KATRINA'S HOUSE: THE CONSTITUTIONALITY OF THE FORCED REMOVAL OF CITIZENS FROM THEIR HOMES IN THE WAKE OF NATURAL DISASTERS

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Hurricane Katrina took the United States by storm in the most literal sense. Katrina, the sixth-strongest storm ever to strike the Atlantic basin,[1] grew even more devastating when it breached the levee system that protected the city of New Orleans from nearby bodies of water.[2] Just prior to Katrina's arrival, Mayor Clarence Ray Nagin, Jr., ordered the city's first ever mandatory evacuation.[3] Due to various circumstances, however, thousands of citizens were unable to comply.[4] Amid the ensuing destruction and devastation, Mayor Nagin granted law enforcement officials the power to remove these remaining citizens from their homes forcibly, should they refuse to leave peacefully.[5] This declaration raised more than a few eyebrows and occasioned the inquiry: can they do that?[6]

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1. *E.g.*, Bronwyn Turner, *Mural Records Friendship Born from Hurricane: Lufkin Family Finds Connection with Evacuees*, HOUS. CHRON., Nov. 25, 2005, at B7.

2. For an overview of the path and intensity of Hurricane Katrina, see, for example, Bryn Nelson, *The Fold: Hurricane Katrina, Cause & Effect, Storm Fed by Warm Gulf Waters*, NEWSDAY, Aug. 30, 2005, at A30.

3. *See, e.g.*, John-Thor Dahlberg et al., *Hurricane Rita Rattles Coast*, L.A. TIMES, Sept. 21, 2005, at A1; *see also* City of New Orleans, http://www.cityofno.com/portal.aspx?portal=1&tabid=79 ("Mayor Nagin ordered the first ever mandatory evacuation . . . .").

4. *See, e.g.*, Rick Klein, *Ex-FEMA Chief Spreads the Blame*, BOSTON GLOBE, Sept. 28, 2005, at A1.

5. *See, e.g.*, *Mayor Gets Tough in Clearing Out Survivors*, THE COURIER MAIL (Queensl., Austl.), Sept. 8, 2005, at 11; Kirsten Scharnberg & Mark Silva, *Bush Takes Responsibility: Says Aid Failures Raise Questions About Nation's Preparedness*, CHI. TRIB., Sept. 14, 2005, at C1. In response to this authorization, Police Superintendent Eddie Compass said that he would not commit officers to mandatory evacuation detail until citizens had the opportunity to leave voluntarily, stating, "If I pull my people out to do mandatory evacuations, a lot of people will die." Lieutenant General Russell Honore also stated that federal troops would not participate in

Mayor Nagin articulated health concerns from the flooding and fires as the impetus for the declaration.[7] From the survivors' viewpoint, however, countervailing considerations outweighed these potential health risks. Following Katrina's destruction, looting emerged as a grave concern.[8] With government officials overwhelmed by the clean-up and restoration efforts, some citizens understandably doubted the government's ability to protect what little property remained intact.[9] Others preferred the comfort of their own homes, even in such damaged states, to the uncertainty of surrounding shelters.[10] Still others remained in order to care for their pets that would be left behind in rescue efforts.[11] Whatever the reasons citizens had for staying, the mayor's declaration met with displeasure. Yet, in the face of losing everything, temporary or otherwise, these tragedy-stricken citizens could do nothing but voice displeasure. According to the Robert T. Stafford Disaster Relief and

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forcible evacuations. *At Least 30 Found Dead in Nursing Home*, CNN, Sept. 8, 2005, http://www.cnn.com/2005/US/09/07/katrina.impact/. Various news reports indicated, however, that the National Guard ultimately went door to door, removing citizens from their private homes. Tim Reid, *Body Bags Arrive as Survivors are Forced to Leave*, TIMES (London), Sept. 9, 2005, at 3.

6. Recent skepticism regarding the government's treatment of individual property rights further intensifies this discussion. *See* Kelo v. City of New London, 545 U.S. 469 (2005) (holding that economic development constituted a valid public purpose for seizing private property pursuant to the doctrine of eminent domain).

7. *See, e.g.*, Michael Christie, *Germ Warfare: Now Disease Stalks New Orleans*, ADVERTISER (S. Austl.), Sept. 9, 2005, at 5.

8. Adding insult to injury, several New Orleans police officers allegedly took part in the looting. *See, e.g.*, Kevin Johnson, *New Orleans Area Sees Hope in Restructuring Its Police Forces; Plan Attempts to Preserve and Bolster Regions' Public Safety*, USA TODAY, Jan. 20, 2006, at 3A.

9. *See, e.g.*, Karen Brooks, *Staying Behind to Mind the Enclave After Katrina, Group Keeps Things Humming Along in the Music District*, DALLAS MORNING NEWS, Sept. 25, 2005, at 25A.

10. *See, e.g.*, Angela Shah, *Don't Return Yet, Evacuees Warned Port Arthur Blocks Off Town; Beaumont Says Sewer System a Danger*, DALLAS MORNING NEWS, Sept. 26, 2005, at A14 ("[Sharon Tupper] had sent her daughter away during the evacuation, but she refused to leave. 'This is my home,' Ms. Tupper said, thankful that it survived the storm relatively unscathed. 'My uncle built it from his hands 67 years ago.'").

11. *See, e.g.*, Raja Mishra, *Patrols Focus on the Dead: Some Put Toll in the Hundreds*, BOSTON GLOBE, Sept. 14, 2005, at A18 (describing "a middle-aged man identified only as 'Jimmy,' who had been holed up since the hurricane with his eight dogs, eight cats, and one parrot" and who refused to leave); Jay Romano, *Protecting Pets in a Disaster*, N.Y. TIMES, Sept. 25, 2005, § 11, at 14; Kate Santich, *Pets Not in Disaster Plans; Estimate: 30,000 Animals Homeless*, ORLANDO SUN-SENTINEL, Sept. 29, 2005, at E2; Sheba R. Wheeler, *Louisiana's Holdouts Distress Denver Nurse*, DENV. POST, Sept. 11, 2005, at C6 ("Among the survivors: . . . The woman who refused to leave without her dog.").

Emergency Act of 1988 ("Stafford Act"),[12] which directs the governmental response to natural disasters and states of emergency,[13] not only can the government forcibly evict citizens, it can do so without any repercussions whatsoever under the shield of governmental immunity.

Private property rights stand out as some of the most fundamental and cherished rights in the United States.[14] Indeed, the most central document of this nation's founding explains, "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."[15] The right not only to own property but to exert control over that property is so central to citizenship in this country that any infringement on that right must be carefully and vigorously scrutinized.[16] In light of the significance of the right to property, this Note examines whether the government *should* be able to evict citizens forcibly from their homes in the wake of natural disasters, and ultimately concludes that, as a general rule, the government should not be able to act thus. Private property interests can be protected without retarding the ability of the government to administer relief efforts by amending the Stafford Act to require a court's approval of mandatory evacuation declarations.

Natural disasters vary in form and impact. Some strike without warning, while others can be detected in advance. The scope of this Note will be restricted to forced evictions *following* all natural disasters. Part I addresses the Stafford Act generally, with specific attention paid to governmental immunity surrounding so-called

12. 42 U.S.C. §§ 5121–5206 (2000).

13. *Id.* § 5121.

14. *See* Rebecca M. Kahan, Comment, *Constitutional Stretch, Snap-Back, and Sag: Why* Blaisdell *was a Harsher Blow to Liberty than* Korematsu, 99 NW. U. L. REV. 1279, 1307–11 (2005).

15. U.S. CONST. amend. V. The Declaration of Independence also notes the self-evident nature of "life, liberty, and the pursuit of happiness." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). While property is not explicitly mentioned there, the language mirrors the words of John Locke, and thus "pursuit of happiness" almost certainly is synonymous with property. *See, e.g.*, HENRY S. COMMAGER, JEFFERSON, NATIONALISM, AND THE ENLIGHTENMENT 84, 88–89 (1975); Edward J. Erler, *The Great Fence to Liberty: The Right to Property in the American Founding*, *in* LIBERTY, PROPERTY, AND THE FOUNDATIONS OF THE AMERICAN CONSTITUTION 43, 50 (Ellen Frankel Paul & Howard Dickman eds., 1989).

16. "Liberty is an individual right which provides autonomy. The constitution secures liberty in two ways: first, by itself neither obliging nor forbidding an individual to do a particular thing, and second, by forbidding the State from interfering with the liberty's exercise." Kahan, *supra* note 14, at 1307–08 (footnote omitted).

"discretionary functions." In particular, this Part examines the potential for citizens to pierce the immunity shield when constitutional rights are involved. Part II addresses the competing governmental and individual interests present in the wake of natural disasters and emergencies. Obviously, the government's interest in maintaining order and preventing disease and death stands prominent. Private landowners, however, have a constitutionally granted right to the use and enjoyment of their property. Restrictions on this right cannot be made lightly. Part III addresses potential defenses for the forcible removal of citizens from their homes following natural disasters in order to illuminate possible solutions. For example, can the forcible removal of citizens under such grave circumstances fall under "takings" jurisprudence, or is it more appropriate to frame the situation through a public necessity lens? The implications of each potential classification will be examined briefly. Part IV concludes the Note by arguing for the restriction of governmental immunity in instances of natural disasters and emergencies. An extreme deprivation of property, even in dire circumstances, warrants some protection from arbitrary or abusive implementation. As such, the Stafford Act should be amended to include various safeguards aimed at protecting private landowners from being trampled by an entirely different sort of storm.[17]

I. THE STAFFORD ACT, GOVERNMENTAL IMMUNITY, AND DISCRETIONARY FUNCTIONS

A. *The Stafford Act*

The Constitution itself does not mention times of national crises.[18] Subsequent legislative activity, however, provides a fairly comprehensive discussion of such times. Previously known as the Disaster Relief Act of 1974, the Stafford Act represents "the intent of the Congress . . . to provide an orderly and continuing means of assistance by the Federal Government to State and local governments in carrying out their responsibilities to alleviate the suffering and

17. Some journalists questioned the government's decision not to evict citizens forcibly prior to Katrina's arrival. *See, e.g.*, Douglas Bell, *How the Poor Can Free Themselves: A Modest Proposal for the State-Dependant*, TORONTO STAR, Sept. 18, 2005, at D9.

18. Kahan, *supra* note 14, at 1286.

damage which result from such disasters."[19] The Act contains multiple methods to catalyze disaster relief.[20] Perhaps the most common of these, and the one involved in the Katrina inquiry, is the presidential declaration of a major disaster, which requires the governor of a state to determine first that a particular situation consists of such severity and magnitude as to render the local government insufficient to remedy it. After making this finding, the governor may request assistance from the federal government via the president.[21]

The provisions of the Stafford Act number too many to recount here. Suffice it to say, the Act outlines the procedures for declaring emergencies, the interplay between federal and local governments, and the general rights of the government in such emergencies.[22] Most relevant to this Note, the Act exempts government officials from liability in their performance of discretionary duties:

> The Federal Government shall not be liable for any claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Federal government in carrying out the provisions of this chapter.[23]

Quite explicitly, the Stafford Act grants immunity to federal agents. In the case of Katrina, however, the order authorizing forced removal came from the mayor—a state agent. While the interplay between state and federal government in disaster relief situations can be

19. 42 U.S.C. § 5121(b) (2000).

20. The four triggers are 1) Presidential declaration of a major disaster (discussed above), 2) Presidential declaration of an emergency, 3) the ability for the President to utilize U.S. Department of Defense resources prior to a formal declaration, and 4) the ability of the President to make a major disaster or emergency declaration without a request from a governor when the affected area is one under the responsibility and authority of the law. *Id.* §§ 5122(1), 5122(2), 5193. *See also* Steve Hughes, *The Next New Madrid Earthquake*, 61 J. MO. BAR 186, 187 (2005).

21. 42 U.S.C. § 5170. For a more detailed discussion on the composition and provisions of the Stafford Act, see generally Hughes, *supra* note 20.

22. 42 U.S.C. § 5121. In addition to the Stafford Act, the vast majority of states have adopted statutes authorizing government response to emergencies and disasters. Howard D. Swanson, *The Delicate Art of Practicing Municipal Law Under Conditions of Hell and High Water*, 76 N.D. L. REV. 489, 490 (2000).

23. 42 U.S.C. § 5148.

onerous, this Note simplifies the problem by arguing that the Stafford Act should be amended to encompass state officials.[24]

For the purpose of this Note, it is also worth mentioning that the Federal Emergency Management Agency ("FEMA")[25] constitutes the major vehicle to facilitate relief under the Stafford Act. As a result of this distinction, FEMA frequently emerges as a post-natural disaster party to lawsuits.[26] The Stafford Act equips FEMA with, among other powers, the authorization to provide temporary housing assistance[27] and to remove disaster debris from both public and private spaces.[28]

The relevance of the Stafford Act, then, stands quite evident as it relates to the present inquiry. As will be demonstrated herein, the Act's immunity clause, coupled with a lack of specificity regarding evacuation procedures, renders citizens helpless to defend themselves from forcible eviction from their homes.

B. *Governmental Immunity and Discretionary Functions*[29]

Having garnered a very basic understanding of the Stafford Act and its relevance to inquiries of the same present genre, this Note now turns to the impact of the Act's immunity clause. The concept of governmental immunity extends back to the feudal era in which the king could do no wrong.[30] Justice Holmes explained the concept of sovereign immunity as a practical conclusion drawn from the reality that the sovereign creates the law: "A sovereign is exempt from suit,

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24. Already, the Stafford Act contemplates regulation of state and local officials. For example, the Act "encourag[es] the development of comprehensive disaster preparedness and assistance plans, programs, capabilities, and organizations by the *States* and by *local governments*." *Id.* § 5121(b)(2) (emphasis added). Perhaps more poignant, the Act authorizes the Federal Coordinating Officer to "coordinate the administration of relief, including activities of the *State* and *local governments*." *Id.* § 5143(b)(3) (emphasis added).

25. In 1979, President Carter consolidated approximately thirty disaster agencies, resulting in the creation of FEMA. Hughes, *supra* note 20, at 188.

26. FEMA also receives much criticism for its response to disasters. As an unfortunate subplot to the Katrina story, FEMA's director, Mike Brown, resigned amid intense criticism and revelations of apathetic correspondences regarding the clean-up efforts. *See, e.g.*, Edward Epstein, *The Blame Game: Ex-FEMA Chief Angrily Defends Himself, but Legislators Castigate Him*, S.F. CHRON., Sept. 28, 2005, at A1.

27. 42 U.S.C. § 5174(a).

28. 42 U.S.C. § 5173(a).

29. For a brief overview, see Frank L. Branson, *Personal Torts*, 50 SMU L. REV. 1409, 1422–24 (1997).

30. VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ'S TORTS: CASES AND MATERIALS 640–41 (11th ed. 2005).

not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."[31] The policy rationale behind governmental immunity is compelling.[32] Certainly it would be undesirable to have the judiciary second-guessing governmental authorities' decisions, which are often made under duress and in response to pressure-filled situations. Yet, simultaneously, governmental agents cannot have unchecked authority to carry out their duties. Despite the abrogation of other common law immunities, governmental immunity remains intact, albeit slightly restricted.[33]

Typically, as with the Stafford Act, governmental immunity applies only in cases involving discretionary acts.[34] As understood by the Supreme Court, two criteria must be met in order to deem an act discretionary. First, discretionary acts must "involve[] an element of judgment or choice."[35] Consequently, no discretionary function exception will be found when the act is mandated by statute.[36] Second, it stands imperative that the "judgment is of the kind that the discretionary function exception was designed to shield."[37] Since the exception was designed to prevent judicial scrutiny of administrative decisions, the exception can be said to protect only judgments and choices rooted in the interest of public policy.[38]

Examples of discretionary functions as they pertain to the Stafford Act abound. When suit was brought against the State of Washington and its Governor for declaring a volcanic emergency prematurely, for

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31. Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907).

32. Regardless, some scholars argue for the abolition of immunity. *See, e.g.*, Mark R. Brown, *Weathering Constitutional Change*, 2000 U. ILL. L. REV. 1091, 1094 (2000).

> Contrary to conventional wisdom, I argue that immunities *contradict* or *ignore* the twin principles of fairness and reliance. Because principled judicial decision making is disrupted in either case, the end result is a disjointed constitutional composite whose pieces bear little semblance to one another or to the picture as a whole. Immunities not only fail as constitutional catalysts, but also fail as support for society's settled expectations.

Id. (footnote omitted).

33. RESTATEMENT (SECOND) OF TORTS ch. 45A, introductory note (1979).

34. SCHWARTZ ET AL., *supra* note 30, at 646.

35. Berkovitz v. United States, 486 U.S. 531, 536 (1988).

36. *Id.*

37. Dureiko v. United States, 209 F.3d 1345, 1351 (Fed. Cir. 2000).

38. *Berkovitz*, 486 U.S. at 536–37.

including a particular town in the "red zone" that should not have been so included, and for failing to correct the "red zone" designation in a timely fashion, the Supreme Court of Washington determined the actions in question to be discretionary.[39] On the other end of the spectrum, in *Dureiko v. United States*,[40] FEMA contracted for the clean-up of a mobile home park with the park's trustee, Dureiko. In exchange for the clean-up services, Dureiko leased sites to FEMA for use as temporary housing. Wary of government contractors, Dureiko demanded five specific assurances regarding the project.[41] FEMA so promised but ultimately failed to comply in full, resulting in the suit. The court decided that this alleged breach of contract was not a discretionary function. Although many other examples can be provided, [42] these two cases provide a basic framework for understanding the designation of acts as discretionary or otherwise.

Although the Stafford Act explicitly references evacuations, it remains silent with respect to declarations permitting the forcible removal of citizens. Consequently, the decision to empower relief forces in such a way satisfies the first prong of the discretionary-exception test. Furthermore, a decision to remove citizens from their homes following natural disasters so as to facilitate clean-up efforts and guard against the spread of disease certainly rests on public policy considerations.[43] Thus, authorizing forcible removal almost certainly falls under the discretionary category, thereby triggering

39. Cougar Bus. Owners Ass'n v. State, 647 P.2d 481 (Wash. 1982).

40. 209 F.3d 1345.

41. As outlined in the opinion:

> [Dureiko] demanded FEMA's assurances that the FEMA cleanup contractor would: (1) use rubber-tired equipment as opposed to caterpillar track equipment; (2) preserve the infrastructure of the Park, including utilities, pads, and driveways; (3) hand-pick or hand-rake the debris around utilities, pads, and driveways; (4) restore the property to its pre-hurricane condition or better; and (5) repair or replace utilities pursuant to the Dade County Code.

Dureiko, 209 F.3d at 1348.

42. *E.g.*, City of San Bruno v. FEMA, 181 F. Supp. 2d 1010, 1011–12, 1016 (N.D. Cal. 2001) (holding that FEMA's declaration that a city's hillside project was not eligible for disaster relief funds constituted a discretionary function); Cal.-Nev. Methodist Homes, Inc. v. FEMA, 152 F. Supp. 2d 1202, 1204–08 (N.D. Cal. 2001) (holding that FEMA's failure to construe state law properly and grant relief funds to a retirement community owner constituted a discretionary function).

43. The Stafford Act empowers the government to provide for the "provision of health and safety measures" and the "management, control, and reduction of immediate threats to public health and safety." 42 U.S.C. § 5170(a) (2000).

governmental immunity. An inherent danger exists in the classification of acts as discretionary and the correlating immunity afforded the governmental officials involved. The resulting shield is a broad one, encompassing many situations and actions. Against this shield, citizens do not seem to have recourse against their government for a plethora of wrongs that they might have incurred as a result of an erroneous discretionary act. Such a situation flies in the face of liberty. The next logical inquiry, then, centers on whether citizens have any avenue to circumvent governmental immunity so as to ensure the protection of their private property rights.

C. *Piercing the Immunity Shield*

It seems, then, that citizens lack recourse to any remedy against the government when it performs so-called discretionary acts, and subsequently, the balance of this discussion is purely academic. In certain situations, however, the courts have found that citizens may pierce the immunity shield. In *Arcoren v. Peters*,[44] the court acknowledged this possibility: "it has been settled that, under some circumstances . . . a person whose clearly established constitutional rights are violated by federal officials may sue them directly even though no legislation by Congress exists specifically authorizing such a remedy."[45] This so-called *Bivens* remedy[46] cannot sound in mere tort unassociated with the Constitution, but rather, must center on the disregard of constitutional rights.[47] Although the *Bivens* remedy typically involves the liability of individuals acting under the color of government, it bears particular relevance to the forced removal following Katrina and other situations in which governmental directives implicate potential violations of constitutional rights. Despite the fact that the *Bivens* remedy has received some criticism

44. 811 F.2d 392 (8th Cir. 1987).

45. *Id.* at 393.

46. The remedy was first articulated in the decision *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 389 (1971) (holding that a violation of the Fourth Amendment by a federal agent acting under color of law but unconstitutionally gives rise to a cause of action for damages).

47. *Arcoren*, 811 F.2d at 393–94.

from legal scholars, the rationale underlying the action warrants serious consideration.[48]

In the case from which the remedy derives its name, the petitioner was arrested by federal agents who entered his home without a warrant or probable cause, "manacled" the petitioner in front of his family, and later subjected him to a "visual strip search."[49] In holding the respondents liable for their conduct, however, the Court declined the opportunity to address the respondent's appeal to governmental immunity. After *Bivens*, a number of cases came before the Supreme Court,[50] appealing to this newly determined constitutional remedy. In *Davis v. Passman*,[51] the Supreme Court allowed the petitioner, a Congressional Staff Member, to recover damages for sex discrimination by a former Congressman. Shortly thereafter, in *Carlson v. Green*,[52] the Court opined that a cause of action exists for violations of one's right to be free from cruel and unusual punishment where the decedent petitioner died at the hands of federal prison guards. The Court further noted that the Federal Tort Claims Act[53] was not a sufficient mechanism to protect constitutional rights.[54] The Court later held that citizens enlisted in military service lacked the ability to recover damages from constitutional infringement inflicted

48. *See generally* William P. Kratzke, *Some Recommendations Concerning Tort Liability of Government and Its Employees for Torts and Constitutional Torts*, 9 ADMIN. L.J. AM. U. 1105 (1996).

49. *Bivens*, 403 U.S. at 389.

50. Kratzke, *supra* note 48, at 1129–49 (addressing the ensuing cases in slightly more depth than treated here and providing additional examples).

51. 442 U.S. 228, 230 (1979).

52. 446 U.S. 14, 16–17 (1980).

53. The Federal Tort Claims Act states that the federal district courts:

> [S]hall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1) (1996). The Act continues:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

Id. § 2674.

54. *Carlson*, 446 U.S. at 23.

by their superiors.[55] Although these cases provide only a snapshot of those appealing to the *Bivens* remedy, they demonstrate the breadth of trampled constitutional rights that can trigger the remedy. The constitutional rights affected by the forced removal following Katrina are not only established in the Preamble itself, but also in the Fourth Amendment.[56] As will be shown, however, courts are hesitant to classify the type of activity presently in question as a constitutional problem.[57]

The *Arcoren* case provides parallels to the forced removal occurring in the wake of Katrina. There, governmental officials were informed by third parties that the petitioner neglected and abandoned cattle in which the Farmers Home Association had a security interest. Subsequently, the officials seized the cattle and later sold them. The court held that the petitioner articulated a clear prima facie case of unconstitutional property deprivation because the deprivation lacked hearing or notice.[58] In the opinion, the court discussed the notion of "qualified immunity."[59] As previously delineated, "[u]nder the standard of qualified immunity . . . the Attorney General will be entitled to immunity so long as his actions do not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'"[60] In interpreting qualified immunity, the *Arcoren* court concluded that its inquiry regarding the seized cattle must answer "whether in 1980, when Arcoren's cattle were seized and sold without notice or hearing, there existed a clearly established due process right entitling him to notice or hearing."[61] In the Katrina context, the deprivation lacks the permanence of *Arcoren*, but it is a deprivation nonetheless and raises similar due process issues.[62] If the Stafford Act were to be remedied to include only qualified immunity, citizens would have protection against intrusion in the form of forcible evictions.

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55. Chappell v. Wallace, 462 U.S. 296, 297, 304 (1983).

56. U.S. CONST. amend. IV.

57. *See infra* Part III (discussing the fact that forcible evacuations do not fall under any existing area of law).

58. Arcoren v. Peters, 811 F.2d 392, 394, 400 (8th Cir. 1987).

59. *Id.* at 395.

60. Mitchell v. Forsyth, 472 U.S. 511, 524 (1985) (quoting Harlow v. Fitzgerald, 457 U.S. 731, 818 (1982)).

61. *Arcoren*, 811 F.2d at 396.

62. *See infra* Part I.D.

Cases and actions invoking a *Bivens*-type remedy do not preclude a defense. Defendants can defeat such actions by demonstrating 1) "special factors counseling hesitation in the absence of affirmative action by Congress"[63] or 2) that Congress has provided an alternative remedy that it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as "equally effective."[64] In the instant case, however, if a valid *Bivens*-type remedy indeed exists, the government will have a difficult time establishing either of these defenses. Although *Bivens*-type actions remain rare,[65] the guiding principle bears great relevance for situations in which the government forcibly removes citizens from their homes.[66]

D. *Due Process Violations*

Recourse to *Bivens* remedies only exists against federal agents.[67] Congress, however, has enacted a method for similar recourse against state and local officials through the Civil Rights Act of 1871.[68] Subtitled "Civil action for deprivation of rights," the provision outlines the grounds on which state and local officials may incur liability:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief

63. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971).

64. *Id.* at 397.

65. Recoveries from both settlements and litigated judgments "continue to be extremely rare" in *Bivens*-type cases. Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under* Bivens, 88 GEO. L.J. 65, 66 (1999).

66. The existence of *Bivens*-type remedies also demonstrates a general distaste for governmental immunity. Especially when constitutional rights are at issue, citizens must have some avenue of recourse.

67. Klint A. Cowan, *International Responsibility for Human Rights Violations by American Indian Tribes*, 9 YALE HUM. RTS. & DEV. L.J. 1, 28 (2006).

68. 42 U.S.C. § 1983 (2000).

> shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.[69]

The above provision indicates a general trend against immunity as an all-inclusive rule, especially in cases involving fundamental rights and liberties.[70] The Stafford Act, however, lags behind the times, maintaining immunity as a general rule in discretionary acts.

Both *Bivens*-type remedies and civil deprivation of rights actions relate well to current Fourth Amendment jurisprudence. That amendment maintains "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ."[71] Under the jurisprudence of the Court in *Soldal v. Cook County*,[72] "Fourth Amendment rights are implicated purely by interfering with an individual's possessory interest in property."[73] When coupled with the Civil Rights Act, it becomes quite clear that Congress intends to protect constitutional rights from infringement by the states.[74] In examining whether a federal violation of an individual's constitutional rights has occurred, a court must employ an objective reasonableness standard.[75]

In order to recover under section 1983, the following three elements must be established: 1) a deprivation of a constitutional right, 2) by virtue of state action, and 3) made under color of law.[76] Black's Law Dictionary defines an action under "color of law" as usually implying a "misuse of power made possible because the wrongdoer is clothed with authority of the state."[77] Given these requirements, the discussion almost always entails procedural due process, which guarantees citizens the right to be heard before their

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69. *Id.*

70. For further discussion, see *infra* Part I.D (discussing § 1983 claims).

71. U.S. CONST. amend. IV.

72. 506 U.S. 56, 62–63 (1992).

73. C.E. Willoughby, Casenote, Soldal v. Cook County*: The Constitutional Tort of "Moving" a Mobile Home*, 19 S. ILL. U. L.J. 419 (1995).

74. 1 SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 1:1 (4th ed. 2005).

75. *Soldal*, 506 U.S. at 71.

76. NAHMOD, *supra* note 74, § 2:1.

77. BLACK'S LAW DICTIONARY 282 (8th ed. 2004).

rights are deprived.[78] More simply, the government cannot arbitrarily intrude upon private rights. Instead, "[p]arties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified."[79] Deprivation of this procedural due process can be actionable only if no adequate state law remedies exist;[80] no such adequate state remedies exist for forcibly removed citizens. Thus, it appears that these citizens have recourse to a section 1983 claim. While pre-deprivation hearings are generally the norm, they cannot always be offered.[81] Since this Note pertains to post-disaster evacuations, it will resist the significant digression of considering cases in which disasters were readily ascertainable prior to their impact.[82]

Forcible removal of citizens may also implicate substantive due process, which protects citizens "from particular government acts without regard to, or limitation by, existing procedural safeguards, thereby guaranteeing certain fundamental rights."[83] Freedom from an unreasonable search or seizure is one such right protected by substantive due process.[84] Accordingly, Fourth Amendment rights are violated when "there is a seizure [that] is outside of the Fourth Amendment's parameters of objective reasonableness."[85] Traditionally, the courts treat such deprivations of property as failures of due process, not as deprivations of Fourth Amendment constitutional rights.[86] In *Soldal v. Cook County*,[87] the plaintiff's

78. Fuentes v. Shevin, 407 U.S. 67, 80 (1972).

79. Baldwin v. Hale, 68 U.S. (1 Wall.) 223, 233 (1863).

80. Willoughby, *supra* note 73, at 423.

81. Parratt v. Taylor, 451 U.S. 527, 540–41 (1981).

82. Certainly, some natural disasters, if not the majority, strike without warning, thereby precluding any ability to inform citizens of a potential forced removal. Advances in technology, however, enable significant notice for hurricanes like Katrina, thus creating the possibility of some pre-deprivation procedure. In this sense, then, hurricanes provide a unique opportunity.

83. Willoughby, *supra* note 73, at 424.

84. *Id.*

85. *Id.* at 427–28.

86. *See, e.g.*, Zinermon v. Burch, 494 U.S. 113 (1990); *Parratt*, 451 U.S. 527; Baker v. McCollan, 443 U.S. 137 (1979); Fuentes v. Shevin, 407 U.S. 67 (1972). *See also* Soldal v. County of Cook, 942 F.2d 1073, 1080 (7th Cir. 1991), *rev'd*, 506 U.S. 56 (1992) ("If the gist of the challenged conduct is a repossession or eviction conventionally challenged under the due process clause as a deprivation, recharacterization as a Fourth Amendment seizure is barred. The suggestion that . . . all property disputes should so far as possible be stuffed into the Fourth Amendment [is] bizarre.") (citing Graham v. Connor, 490 U.S. 386 (1989)).

87. 506 U.S. 56.

mobile home was forcibly evicted for alleged failure to pay rent.[88] Although the eviction was enforced by private individuals, police presence ensured that Mr. Soldal could not use reasonable force to resist the unlawful deprivation.[89] The Supreme Court found this to be a seizure, noting that "the Fourth Amendment protects other interests in addition to privacy interests, such as possessory interests."[90] The Court went on to define a seizure as taking place when "there is some meaningful interference with an individual's possessory interests in that property."[91]

Given that understanding, the forcible removal of victims of natural disasters seemingly constitutes seizures. Applying the requisite standard of reasonableness, it must be asked whether the actions were, in fact, reasonable. Given the nature of the situation, it is evident that they were not. The affected citizens were not guilty of any crime. Additionally, their property was in no way necessary for the government to carry out its duties. Instead, these hurricane victims were further victimized by their government, which removed them from their homes based on the suspicion that they might contract some disease. Without a more compelling interest, the government's actions were unreasonable.

In the absence of a case directly on point, it is not clear how the courts would rule regarding such forcible evictions. More specifically, it is not clear whether such evictions would be considered due process deprivations or constitutional questions. Regardless, citizens will probably be without any other remedy on account of governmental immunity. In any event, this analysis provides at least a glimmer of hope and the foundation for an amendment to the Stafford Act. Since property stands out as one of the most critical rights established by the Constitution,[92] the remainder of this Note engages in an inquiry similar to that of the *Arcoren* court—namely, whether, at the time of forcible eviction, the affected citizens enjoyed a clearly established right that was summarily rejected by the government. As will be shown, the affected citizens did in fact

88. *Id.* at 58 (stating that the eviction was authorized by the Illinois Forcible Entry and Detainer Act, 735 ILL. COMP. STAT. 5/9-101 (2003)).

89. *Soldal*, 506 U.S. at 60–61, n.6.

90. Willoughby, *supra* note 73, at 437 (citing *Sodal*, 506 U.S. at 62).

91. *Soldal*, 506 U.S. at 61 (quoting United States v. Jacobsen, 466 U.S. 109, 113 (1984)).

92. TERRY L. ANDERSON & LAURA E. HUGGINS, PROPERTY RIGHTS: A PRACTICAL GUIDE TO FREEDOM AND PROSPERITY 69 (2003).

possess such rights, and consequently the government, be it local, state, or federal, should not be immune from disregarding them.

II. COMPETING INTERESTS

Like many other issues within the law, the constitutionality of the forced removal of citizens in the wake of Katrina involves a delicate balancing of competing interests. Stated simply, the propriety of forced evacuations should balance the governmental interests in such evacuations against the individual rights to private property and ownership. In this sense, then, the individual interests will be constant while the governmental interests will vary, dependent on the nature and magnitude of the natural disaster in question. The mandate to remove citizens, by force if necessary, stems from the belief that the government's interest in protecting its citizens (even from themselves) outweighs individual property rights. This Note argues the contrary. More specifically, individual property rights are so critical that they should outweigh almost any number of interests balanced against them.[93]

A. *Governmental Interests*[94]

Some may reduce the present discussion to the simple question of whether the government has an absolute duty to protect its citizens, even from themselves. The government does in fact play such a role, and existing laws support that role.[95] Seat belt laws, for example, exist in many states for the purpose of protecting citizens from injury and death in automobile accidents.[96] The illegality of drugs also provides

93. "[The] right to recovery is critical when it comes to catastrophic property losses that occur in the wake of both man-made and natural disasters." Richard B. Allyn & Margo S. Brownwell, *Getting Something Back: Subrogating After the Catastrophe*, 32 BRIEF 44, 44 (2003).

94. Although clever, the argument that homes submerged or partially submerged by tidal waters become government property does not withstand even mild scrutiny. *See, e.g.*, Eugene A. Pinover & Maureen Sladek, *Historic Rains of '93 Bring Downpour of Title Woes*, N.Y.L.J., Aug. 30, 1993, at S1.

95. Kahan, *supra* note 14, at 1310.

96. *See generally* Robert F. Cochran, Jr., *New Seat Belt Defense Issues: The Impact of Air Bags and Mandatory Seat Belt Use Statutes on the Seat Belt Defense, and the Basis of Damage Reduction Under the Seat Belt Defense*, 73 MINN. L. REV. 1369 (1989). Cochran states, "Mandatory use statutes run counter to a strong tradition against protecting citizens from themselves. Such statutes may be justified because they impose a minimal burden on citizens and can lead to a substantial saving of life." *Id.* at 1401 (footnote omitted).

an example of a regulation intended to protect citizens from themselves.[97] Newer laws focused on restricting smoking areas also fall under this category.[98] Governmental paternalism has extended even to credit cards by requiring warnings regarding making merely the minimum payments so as to protect citizens from racking up large debts.[99] Certainly, an abundance of paternalistic laws exists; they are nothing new to society.[100] Generally speaking, these restrictions and regulations apply more commonly to personal privileges (e.g., driving a car, smoking, and using credit cards) than rights.[101] In other words, individuals do not enjoy a constitutionally granted "right" to drive, smoke, etc. The Constitution, however, does protect private property.[102] In this way, then, the current discussion differs from existing paternalistic laws. Given this distinction between privileges and rights, it is little wonder that most citizens (save the smoker and the transplanted hippie) do not strenuously object to the restrictions of mere privileges. Nevertheless, constitutionally granted rights are viewed with a much more protective eye.[103] Thus, it stands to reason that infringements on these rights must be justified by even more compelling governmental interests than infringements associated with mere privileges.[104]

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97. *See, e.g.*, Tally M. Wiener, Note, *Drug Policy Priorities in the Wake of the June 1998 Drug Summit*, 25 BROOK. J. INT'L L. 759, 759 (1999).

98. *See, e.g.*, Nicholas A. Danella, Note, *Smoked Out: Bars, Restaurants, and Restrictive Antismoking Laws as Regulatory Takings*, 81 NOTRE DAME L. REV. 1095, 1095 (2006).

99. Credit Card Minimum Payment Warning Act, S. 2475, 108th Cong. (2004).

100. *See generally*, David L. Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519 (1988) (discussing the use of paternalism in general as a justification for law in a society that values self-determination). For a more detailed discussion of paternalistic laws, see Eric Tennen, *Is the Constitution in Harm's Way? Substantive Due Process and Criminal Law*, 8 BOALT J. CRIM. L. 3 (2004).

101. A "right" is defined as "[s]omething that is due to a person by just claim, legal guarantee, or moral principle (the right of liberty)." *Id.* at 1347.

102. U.S. CONST. amend. V.

103. *See, e.g.*, John Eidsmoe, *The Article III Exceptions Clause: Any Exceptions to the Power of Congress to Make Exceptions?*, 19 REG. U. L. REV. 95, 130 (stating that when proposals "violate citizens' constitutional rights or even unintentionally burden the exercise of such rights, they warrant strict scrutiny").

104. *See, e.g.*, Madeline Morris, *The Structure of Entitlements*, 78 CORNELL L. REV. 822, 832 (1993) (discussing W.N. Hohfeld's attempt to classify privileges versus rights and stating that the essential difference "turns on whether the other party holds a privilege. If the other party has a privilege, then I possess only a privilege. If the other party has no privilege but, rather, a duty, then what I have is a right.").

The folly of the past illuminates the dangers inherent in the deprivation of constitutionally granted rights. Looking back, one can scarcely fathom how black Americans were denied basic human rights for so very long.[105] Similarly appalling is that women were denied the right to participate in the democratic system until 1920.[106] The internment of Japanese-American citizens during the Second World War likewise shocks the conscience.[107] Unlike the first two examples, the internment camps were founded on more than base discrimination. The governmental interest surrounding the detainment of Japanese citizens was the belief that doing so would ensure national security—a compelling interest in and of itself.[108] When matched against the temporary but nonetheless appalling deprivation of the basic rights of Japanese-Americans, however, that governmental interest should not have prevailed.[109]

As articulated, the impetus behind mandatory evacuations from New Orleans and surrounding communities hinged on the government's desire to keep citizens safe from disease, to facilitate clean-up efforts, and to maintain order.[110] Presumably, the protection of lives or the prevention of death also figured into the decision. In and of themselves, these goals hardly generate any controversy.[111] In fact, such reasons might serve to override personal *privileges*. When placed in opposition to constitutional *rights*, however, they are meager at best and do not rise to the requisite level of "compelling." A cursory comparison between these interests and those present in the *Korematsu* case illuminates this conclusion.[112] While the

105. Plessy v. Ferguson, 163 U.S. 537, 550–51 (1896) (upholding a statute providing for separate railway transportation for whites and blacks), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954); Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (concluding that a slave of African descent was not a citizen of the United States), *superseded by* U.S. CONST. amend. XIV.

106. U.S. CONST. amend. XIX.

107. Korematsu v. United States, 323 U.S. 214, 216, 219–20 (1944) (upholding an exclusion order that violated the rights of citizens based on natural origin). Justice Murphy dissented, arguing that internment was "one of the most sweeping and complete deprivations of constitutional rights in the history of the nation." *Id.* at 235 (Murphy, J., dissenting).

108. *See* Sarah A. Whalin, Note, *National Security Versus Due Process:* Korematsu *Raises Its Ugly Head Sixty Years Later in* Hamdi *and* Padilla, 22 GA. ST. U. L. REV. 711, 715 (2006).

109. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 215 (1995).

110. *See supra* notes 1–13 and accompanying text.

111. Indisputably, the government must play a role in the wake of natural disasters. While it may be tempting to suggest that this role involves a temporary "stretch" of the Constitution, the result can be very detrimental in the long run. *See* Kahan, *supra* note 14.

112. 323 U.S. 214 (1944).

deprivation of liberties in *Korematsu* was more extreme than the deprivation in the present inquiry, the governmental interest was far more compelling. If issues of national security are not sufficient to evict citizens from their homes, certainly the potential for disease and the desire for orderly clean-up cannot suffice.

B. *Individual Interests*

Citizens' private property rights are core rights upon which the United States was founded to protect.[113] The founding documents of the United States, however, did not establish these rights: "Rather, as those who cherish liberty have always understood, property is a natural right of free persons. When individuals freely bargain to coordinate the use or sale of their property rights, they assert their human dignity and enhance their mutual welfare."[114] A brief examination of private property rights will prove sufficient to demonstrate the weight of the right to property ownership and control.[115] This fundamental right is well summarized by the following mock letter: "[Private property] is property to which the following label can be attached: To the world: Keep off X unless you have my permission, which I may grant or withhold. Signed: Private citizen. Endorsed: The state."[116]

From the very beginning of this country, private property has been revered.[117] The Founding Fathers considered the right to property paramount, even aligning it with liberty and the right to life.[118] Shortly after the establishment of the Constitution, Supreme Court Justice William Patterson observed that private property is essential to personhood:

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113. *See supra* note 14 and accompanying text.

114. Steven J. Eagle, *The Development of Property Rights in America and the Property Rights Movement*, 1 GEO. J.L. & PUB. POL'Y 77, 78 (2002).

115. *See generally* ANDERSON & HUGGINS, *supra* note 92; J. W. HARRIS, PROPERTY AND JUSTICE 182–91 (1996); RICHARD PIPES, PROPERTY AND FREEDOM xi–xiv (2000).

116. Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 374 (1955).

117. *See, e.g.*, Eagle, *supra* note 114, at 79; Saul Levmore, *Property's Uneasy Path and Expanding Future*, 70 U. CHI. L. REV. 181, 181 (2003); Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 404–05 (2003).

118. "Property is surely a right of mankind as real as liberty." HENRY HYDE, FORFEITING OUR PROPERTY RIGHTS: IS *YOUR* PROPERTY SAFE FROM SEIZURE? 20 (1995) (quoting John Adams's argument in the defense of John Hancock when Hancock's schooner *Liberty* was confiscated by the British Crown).

> Men have a sense of property: Property is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects, that induced them to unite in society. No man would become a member of a community, in which he could not enjoy the fruits of his honest labour and industry. The preservation of property then is a primary object of the social compact . . . .[119]

As previously alluded to, other thinkers believe that the right to property is so innate that it predates man-made laws.[120] This natural law understanding of property rights explains why citizens intuitively and uncomfortably pause at deprivations of these rights. But the recent decision in *Kelo v. City of New London*[121] provides a disheartening barometer as to the present state of private property rights in the United States.[122] In that decision, the Court expanded the already heavily criticized "takings" jurisprudence by permitting the condemnation of nine personal residences so that a development, including restaurants and hotels, could be erected in their place. In doing so, the Court included "economic development" under the broad "public use" requirement.[123] Citizens understandably question the strength of their property rights when the government has the ability to seize it for an economic revitalization plan.[124] In response, some states promptly proposed legislation restricting the ability of local or state governments to condemn property for economic expansion.[125] Takings cases generate much skepticism because of

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119. Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 310 (1795).

120. "Life, liberty, and property do not exist because men have made laws. On the contrary, it was the fact that life, liberty, and property existed beforehand that caused men to make laws in the first place." FREDERIC BASTIAT, THE LAW 6 (Dean Russell trans., The Found. For Econ. Educ. 1950) (1850).

121. 545 U.S. 469 (2005).

122. This universality of the dislike for governmental takings is clearly evidenced by the agreement between both Democrats and Republicans that *Kelo* is a suspicious ruling. Christine Dempsey, *Parties Agree on Eminent Domain: Republicans, Democrats Say Town's Ability to Seize Property Should Be Limited*, HARTFORD COURANT, Sept. 28, 2005, at B3.

123. *Kelo*, 545 U.S. at 476.

124. As Steven Eagle notes, "it is the right of use [of property] that has been most under attack in America during this century." Eagle, *supra* note 114, at 91.

125. The Michigan legislature, for example, passed a constitutional amendment by overwhelming margins, restricting the power of the local government to seize private property for public use. S.J. Res. E, 93d Leg., Reg. Sess. (Mich. 2005). This amendment was approved by Michigan voters and became effective in 2006. MICH. CONST. art X, § 2.

their infringement on the fundamental right to property.[126] Even those cases, however, include compensation for the property deprivation.[127] Forcibly evicted citizens often have nowhere to go and receive no compensation apart from the disaster relief program, which relief they obtain whether or not they leave their homes.[128] Yet, forcible eviction appears to be another symptom of the disease manifest in society in the form of rapidly eroding property rights. The government's ability to oust citizens from their homes to build shopping malls and business districts and, now, to remove citizens from private residences when it believes it should, begs the question of whether private property rights are merely illusory. This trend must be reversed.

Citizens affected by Katrina have individual interests that extend beyond mere home ownership.[129] While removal in and of itself strikes citizens as a particularly egregious and dangerous prospect, that concern is elevated when other exacerbating circumstances are present. Looting, for example, was rampant following Hurricane Katrina.[130] Citizens already faced with the destruction of their personal property stood to be more devastated by the absolute loss of cherished possessions to theft. Also, remaining in their homes allowed citizens to begin the tedious process of restoring their residences to livable states. This task grows more and more challenging the longer the stagnant water remains in contact with belongings. Thus, forcibly evicted citizens face the prospect of returning to their residences with absolutely nothing salvageable. Regardless of the possibility of contracting some disease, any given citizen may determine that the risk is worthwhile. Some might argue that it is precisely this sort of decision that gives rise to the policy reason for forcible removal: the government pays for disease care through health care; thus, forcibly evicting citizens serves as a preemptive check against such expenditures. This argument might be facially appealing, but it bears no fruit. Such reasoning places the government's interests above the citizens' interests and patently

126. Eagle, *supra* note 114, at 91.

127. U.S. CONST. amend. V.

128. For an analysis of forcible eviction as compared to takings jurisprudence, see *infra* Part III.

129. Eagle, *supra* note 114, at 90.

130. *See supra* note 8 and accompanying text; *see also* Jim Dwyer & Christopher Drew, *Fear Exceeded Crime's Reality in New Orleans*, N.Y. TIMES, Sept. 29, 2005, at A1.

contradicts the very foundation of this country. After all, "[p]rivate property is . . . the vehicle by which individual freedom and the enrichment of society are joined in a virtuous circle to enhance the welfare of all."[131]

The foregoing demonstrates the presence of competing issues surrounding the discussion of the government's right to evict citizens forcibly from their homes in the wake of natural disasters. Returning to the fundamental question (akin to the one present in *Arcoren*[132]), this Note now inquires whether the government's interest in protecting citizens from potential disease outweighs individual property rights. Given the history of the nation and the reverence accorded to private property, the question must be answered in the negative.[133]

III. POTENTIAL GOVERNMENTAL DEFENSES AND CLASSIFICATIONS

A very real tension exists between the governmental power supplied by the Stafford Act to remove citizens forcibly from their homes, and the property rights of those citizens.[134] The Stafford Act's grant of governmental immunity for discretionary functions further complicates this tension.[135] In this sense, the fight is a rather unfair one as the government escapes liability either way, absent a rare and improbable finding of a *Bivens*-type remedy. In a country of freedom and liberty, this result is plainly unacceptable. In pursuing a potential solution, it is beneficial to discuss whether such a situation falls under any other existing jurisprudence or explanation. Should it prove to fall under an existing area of the law, then a solution to the problem may very well rise to the surface and a remedy be provided, notwithstanding the immunity roadblock. Unfortunately, however, as the following discussion demonstrates, forcible eviction does not fall neatly into an already existing area of the law. The following thus contemplates the potential governmental defenses of eminent

131. Eagle, *supra* note 114, at 79.

132. 811 F.2d 392, 394, 400 (8th Cir. 1987).

133. *See generally*, JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (2d ed. 1998).

134. *See supra* Parts I–II.

135. *See supra* Part I.

domain, public necessity, and arguments in favor of the common good, ultimately rejecting each in turn.[136]

A. *Takings Jurisprudence*

Society has recently become very acquainted with the notion of governmental takings or the exercise of eminent domain.[137] The power of the government to take property stems directly from the Fifth Amendment: "[N]or shall private property be taken for public use, without just compensation."[138] Defining a "taking" can prove a difficult task for the courts, which have failed to create an adequate test for determining whether a taking has occurred.[139] The two critical elements involved in takings cases are 1) public use and 2) just compensation.[140] Each of these elements will be discussed in turn.

The phrase "public use" is open to legal interpretation. On the one hand, it could mean that "the use of the taken property must somehow inure to the public as a whole, and not merely to some individual members of the public."[141] A more common approach, however, gives "the legislature virtual carte blanche to define a public use."[142] As a result of this very broad grant of power, public use has been satisfied in a wide variety of cases. For example, in *Hawaii*

136. A veritably timeless defense known as the "Act of God" defense has been defined as "appl[ying] only to events in nature so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them." Bradford v. Stanley, 355 So. 2d 328, 330 (Ala. 1978). Typically, this defense arises in cases involving flooding, blizzards, lightning strikes, and earthquakes. Allyn, *supra* note 93, at 50. Since modern technology provides for reasonable notice of hurricanes, this defense will not be discussed herein.

137. Kelo v. City of New London, 545 U.S. 469 (2005).

138. U.S. CONST. amend. V.

139. Saul Jay Singer, *Flooding the Fifth Amendment: The National Flood Insurance Program and the "Takings" Clause*, 17 B.C. ENVTL. AFF. L. REV. 323, 339 (1990) (discussing possible theories for determining the existence of a taking). Of particular relevance, Singer notes that "[t]he government has regularly relied on the nuisance abatement theory to uphold health and safety regulations." *Id.* at 341. Singer continues, "[t]he theory most generally relied on in the majority of takings opinions is the 'diminution of value' theory, which . . . focuses on the extent of destruction of the individual's economic interest in the land. . . . Diminution of value may be a taking." *Id.* at 343.

140. *See* U.S. CONST. amend. V.

141. SHELDON F. KURTZ & HERBERT HOVENKAMP, CASES AND MATERIALS ON AMERICAN PROPERTY LAW 796 (4th ed. 2003).

142. *Id.*

Housing Authority v. Midkiff,[143] the Court upheld the right of the State of Hawaii to take "with just compensation, title in real property from lessors and transfer[] it to lessees in order to reduce the concentration of ownership of fees simple in the State."[144] In *Loretto v. Teleprompter Manhattan CATV Corp.*,[145] the Court determined that "minor but permanent physical occupation" in the form of cable television installation constituted a taking.[146]

It is conceivable that Mayor Nagin's cited reasons for the forcible removal of New Orleans citizens would satisfy public use.[147] More specifically, the facilitation of clean-up efforts seems to inure to the public as a whole, and could therefore be considered public use. In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,[148] the county passed an ordinance in response to increased flood risks stemming from a forest fire. The ordinance prohibited "reconstruct[ing] . . . any building . . . any portion of which is . . . located within the outer boundary lines of the interim flood protection area."[149] The rationale for the ordinance hinged on the "immediate preservation of the public health and safety."[150] In that case, the Court found preservation of human life to be a valid public use and accordingly ruled that a taking warranting just compensation occurred.[151] Likewise, in this instance, citizens are not deprived of all use of their property permanently, only temporarily. *First English Evangelical*, however, involved a state regulation, rather than discretionary acts of governmental agents. As such, its applicability to situations involving forced removal is tenuous at best. In typical cases of eminent domain, property is taken permanently, and thus it

143. 467 U.S. 229 (1984).

144. *Id.* at 231–32.

145. 458 U.S. 419 (1982).

146. *Id.* at 421; *see also* Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 832 (1987); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); Pa. Coal Co. v. Mahon, 260 U.S. 393, 414–15 (1922).

147. *See* Christie, *supra* note 7.

148. 482 U.S. 304 (1987).

149. *Id.* at 307.

150. *Id.*

151. *Id.*

is unlikely that mandatory evacuations will ever be viewed by the courts as takings.[152]

Assuming that temporary deprivations of property can be considered "takings" under the Fifth Amendment, a grave policy dilemma emerges. Legitimate takings require just compensation.[153] The government would have to pay each and every citizen some reimbursement to satisfy the period of deprivation. Moreover, if just compensation applied only to citizens forcibly removed from their homes, treating such evacuations as takings would inevitably lead to more citizens remaining in cities ravaged by natural disasters, thereby complicating the problem even further.

Although tempting to do so, mandatory forcible evacuations cannot, and should not, be considered under the state's power of eminent domain or inverse condemnation. The "takings" at issue are only temporary and thus not fully in line with the weight of takings jurisprudence. Even if some exception could be carved out to include them,[154] a policy nightmare would ensue when governmental officials face the task of assessing compensation for each displaced citizen.

B. *Public Necessity*[155]

Having established the undesirability of applying takings jurisprudence to forcible evacuations, this Note now considers the relevance of the defense of necessity to the forced removal of citizens from their homes following Katrina. The necessity doctrine essentially eliminates liability for a person who destroys or takes

152. Generally, the paramount consideration regarding takings and governmental regulations centers on the extent to which the owner is deprived of economically beneficial uses. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992).

153. For a case discussing just compensation methods, see J.J. Newberry Co. v. City of East Chicago, 441 N.E.2d 39 (Ind. Ct. App. 1982).

154. For example, takings may occur in the absence of a formalized procedure on the part of the government. The concept of "inverse condemnation" refers to "a cause of action against a government defendant in which a landowner may recover just compensation for a 'taking' of his property under the Fifth Amendment, even though formal condemnation proceedings . . . have not been instituted." San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 638 n.2 (1981); *accord* Agins v. City of Tiburon, 447 U.S. 255, 258 n.2 (1980); United States v. Clarke, 445 U.S. 253, 257 (1980).

155. "Liberalism attempts to resolve the inherent conflict by creating a sharp line between the government of peace and that of crisis; the former adhering to tenets of separation of power and individual liberty, the latter ruled only by necessity." Kahan, *supra* note 14, at 1287.

another's property in order to protect the greater public.[156] Necessity operates as an affirmative defense whereby the defendant must demonstrate that liability should not attach to otherwise tortious conduct because the conduct was necessary to protect the greater public.[157]

In the present case, the argument could proceed in either of the following fashions. First, the potential for the spreading of disease exists. Therefore, it is necessary to remove citizens forcibly to protect everyone from disease. In the alternative, the city has been damaged; sweeping clean-up efforts are necessary, and these clean-up efforts will be hindered by the presence of citizens. Therefore, it is necessary to remove citizens in order to facilitate the restoration of order. If either of these models bears weight under the public necessity defense, the private citizens have no recourse to their evictions, regardless of the previously discussed governmental immunity. Thus, if a necessity defense could be established, it would be most undesirable from the vantage point of property rights advocates.

Historically, the defense of public necessity has not been applied to situations akin to the present one.[158] More frequently, cases of public necessity entail the destruction of another's property to prevent further destruction to more property or to save lives.[159] However, "the safety of human lives belongs to a different scale of values from the safety of property. The two are beyond comparison and the necessity for saving life has at all times been considered a proper ground for inflicting necessary damage on another's property."[160] Thus, if it can be argued that the mandate for forcible removal constitutes an effort to save lives from disease, the damage inflicted (dispossession of another's property) might well fall under

156. *See* RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 57–60 (5th ed. 1990) (discussing the public necessity defense); *see also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 24, at 146–47 (W. Page Keeton ed., 5th ed. 1984) (discussing the public necessity defense).

157. *See, e.g.*, Kathy Seward Northern, *Battery and Beyond: A Tort Law Response to Environmental Racism*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 485, 596 (1997).

158. *See, e.g.*, George C. Christie, *The Defense of Necessity Considered from the Legal and Moral Points of View*, 48 DUKE L.J. 975 (1999) (noting many cases in which the defense of public necessity has been applied, but not noting any dealing with forcible eviction for health reasons).

159. *See, e.g.*, Surocco v. Geary, 3 Cal. 69, 70, 74 (1853) (holding that a citizen was immune from liability when he blew up another's home to prevent the spread of a fire).

160. Southport Corp. v. Esso Petroleum Co., 2 All E.R. 1204, 1209–10 (Q.B.D. 1953); *see also* Vincent v. Lake Erie Transp. Co., 124 N.W. 221 (Minn. 1910).

public necessity.[161] Indeed, the Second Restatement of Torts extends the privilege to the taking of property, even if the possessor objects.[162] It is of particular relevance, then, that "public authorities also have a privilege to destroy property in order to save life or to deal with public emergencies, and are under no common law duty to pay compensation to the owner of the property when they exercise the privilege."[163] Yet the citizens remaining after natural disasters have full disclosure of their situations. These citizens have survived an initial onslaught and know that their situations are dire. They are making autonomous choices to stay with their belongings. It does not appear that such situations of potential disease fit neatly into the public necessity defense.

Furthermore, application of public necessity is a bit tenuous since it normally involves property destruction, whereas the present inquiry involves deprivation of property.[164] In short, application of the public necessity defense would seemingly extend the reach of that defense beyond its intended scope.[165] Such an extension would be detrimental to individual property rights since the government would be able to excuse its actions for seemingly anything.

C. *Government Acting for the Common Good*

When no legal jurisprudence can be found to defend or justify particular actions, it is quite common to appeal to public policy considerations. Thus, if no law exists to legitimize governmental action, the government can often continue to act because doing so is in the best interests of its citizenry. Throughout history, philosophers have debated the role of the government as it relates to a society.[166] A recurring theme in this debate centers on the notion of the "common

161. "Thus, judicial affirmation of the exercise of crisis powers is critical, because the approving mark of the Court defines them as constitutional." Kahan, *supra* note 14, at 1290.

162. RESTATEMENT (SECOND) OF TORTS § 263 (1965).

163. Christie, *supra* note 158, at 995.

164. While public necessity occasionally involves "takings," those situations generally differ from the type of "takings" in the present inquiry. *See id.* at 1003–07.

165. As Kahan notes, "The Crisis Hypothesis of constitutional change posits that 'necessary' expansions of power to deal with crises beget permanent expansions in government power." Kahan, *supra* note 14, at 1290–91.

166. *Id.* at 1282–83.

good."[167] Although such discussion is necessarily philosophical, perhaps the government can be absolved of liability if its actions are deemed to further the common good.[168] For if, in fact, forcibly removing citizens from their homes is done in pursuit of the common good, it would be quite detrimental to the government's role to have citizens challenging the action in lawsuits and otherwise. After all, if the government is charged with the duty of ensuring the common good, it should be liable only if its actions are shown not to be, in fact, in accordance with the common good.

The common good is referenced often but less frequently defined. For Aristotle, the common good was simply the proper aim of the state.[169] More specifically, he viewed the common good as the happiness of the members of the state. Accordingly, the state should make decisions based on whether a particular course of action would be in the best interest of the state as a whole.[170] In this Aristotelian understanding, the role of the government is to foster virtues in its citizens, for happiness is attained through practicing the virtues.[171] By contrast, utilitarian philosophy generally understands the common good as "the greatest happiness of the greatest number."[172] One could compose a book examining the nuances present in different philosophers' conceptions of the common good and the role and purpose of government. To spare such a significant detour, this Note accepts a very basic conception of the common good as the aggregate

167. Some notable modern thinkers dismiss the possibility of the common good. For example, Alasdair MacIntyre believes that although the common good might be discernable through primary principles, society has been fractured into an "emotivist culture" whereby it is impossible for persons to agree on even basic moral principles. As such, the "common good" is essentially unattainable. ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 6–22 (2d ed. Univ. of Notre Dame Press 1984); *see also* ALASDAIR MACINTYRE, DEPENDENT RATIONAL ANIMALS: WHY HUMAN BEINGS NEED THE VIRTUES 99–118 (1999).

168. The Stafford Act does not explicitly reference the common good but does use similar terms, such as "public health and safety." 42 U.S.C. § 5170(a)(3)(D) (2000).

169. ARISTOTLE, NICOMACHEAN ETHICS, Bk. VIII, Ch. 9 (W.D. Ross & J.O. Urmson trans.), *reprinted in* 2 THE COMPLETE WORKS OF ARISTOTLE 1729, 1833 (Jonathan Barnes ed., Princeton Univ. Press 1984) [hereinafter NICOMACHEAN ETHICS].

170. *See* ARISTOTLE, POLITICS, Bk. I, Ch. 1, Bk. III, Ch. 6 (B. Jowett trans.), *reprinted in* 2 THE COMPLETE WORKS OF ARISTOTLE 1986, 1986, 2029–30 (Jonathan Barnes ed., Princeton Univ. Press 1984).

171. *See id.*, Bk. III, Ch. 9, at 2031–33. Aristotle's conception of the common good is best exemplified by his understanding of friendship. NICOMACHEAN ETHICS, *supra* note 169, Bks. VIII–IX, at 1825–52.

172. 1 JEREMY BENTHAM, *A Fragment on Government*, *in* THE WORKS OF JEREMY BENTHAM 221, 227 (photo. reprint 1962) (1843) (emphasis omitted).

well-being of society. Or, perhaps put more simply, the common good is that which is better for the state on the whole. Under this understanding, it might be tempting to aver that the common good is best served by protecting even unwilling citizens against the potential spread of disease and ensuing death.[173] Certainly, this outlook garners initial appeal and some precedent. It is noted, "throughout our nation's history there have been moments—usually very brief moments—when the normal rights of citizens were legitimately suspended for the common good, such as after an earthquake or other natural disaster."[174] Digging a little deeper, however, one must ponder at what cost this intervention comes. Would it not be better for the state to allow citizens to exercise autonomy over their lives and have the government protect the framework that enables them to thrive, namely, the right to life, liberty, and property? In other words, a state less involved in the personal decisions of its citizens would best breed common happiness and therefore the common good.

The common good provides a potential philosophical argument for governmental efforts to protect citizens from themselves. In certain instances, such intervention is warranted.[175] When a

173. Certainly, the government must play a role in disaster mitigation and relief efforts. It may be argued that liability could discourage government action. Christopher City, Note, *Duty and Disaster: Holding Local Governments Liable for Permitting Uses in High-Hazard Areas*, 78 N.C. L. REV. 1535, 1564 (2000).

174. Paul Finkelman, *Limiting Rights in Times of Crisis: Our Civil War Experience—A History Lesson for a Post-9-11 America*, 2 CARDOZO PUB. L. POL'Y & ETHICS J. 25, 26 (2003). Finkelman would seemingly support the decision for forcible evacuations, as he states:

> At some times, and in response to some emergencies, it is clearly reasonable to infringe upon some basic liberties. There may even be times when the military can arrest civilians if they violate orders given by the police or the military. At some times the necessity of limitations on mobility and movement seems obvious. After an earthquake, for instance, the police or the National Guard often seal off streets and roads and prevent even residents from entering the area. If someone enters the quake zone, the military may stop and restrain that person. Officials might allow a resident to return to his or her home in a quake zone, but refuse to allow a non-resident to pass through a barricade. Or those in charge might prevent anyone from entering the danger zone. Similarly, fires, floods, train wrecks, toxic leaks, and the like can close down neighborhoods or even threaten whole cities. Under such circumstances it is not unusual for the National Guard, the police, members of the fire department, or forest service personnel to stop people or arrest them if they disobey orders to leave or avoid restricted areas.

Id. at 27. However, Finkelman's article specifically pertains to habeas corpus and the liberty infringements associated with arrests. *Id.* at 26.

175. Consider potential suicides, the intake of illegal drugs, and reckless and drunk driving as viable instances where the government may intervene.

fundamental right of the citizens of a state is in play, however, the common good is best served by the utmost respect for that right. For, if a government infringes upon such rights as it pleases, the strength of the right itself may erode to the point at which it remains little more than an illusion. It is better to guarantee each citizen that certain rights are fundamentally and absolutely protected, as this will yield a greater good. In sum, even a philosophical discussion of the role of government compels the conclusion that the basic rights of a citizen must be accorded absolute respect.

The government cannot appeal to the traditional defenses of eminent domain, necessity, or the common good. As a result, it will be imperative to determine a solution, for "[w]hen an action judged in the past to be an impermissible exercise of government power—or never even considered at all—is upheld by the Court or ratified by public opinion, it *becomes* constitutional."[176]

IV. THE ARGUMENT FOR AN AMENDMENT TO THE STAFFORD ACT[177]

Decisions made in response to natural disasters are inherently difficult ones since they are typically made under extraordinary pressure and duress.[178] Natural disasters evoke sympathy for all parties involved—those suffering as well as those doing their best to provide critical assistance. Sympathy, however, cannot mask potential constitutional wrongs that occur amid tragedy. Private homeowners are guaranteed the right to possess, use, and control their property. This right was one of the fundamental rights upon which the United States was founded to protect; infringing on that right, even during times of natural disasters and emergencies, threatens the liberty of the American people. As it stands, the Stafford Act provides the government with immunity from liability for discretionary decisions that significantly affect private property owners. While competing governmental and individual interests certainly coexist, governmental

176. Kahan, *supra* note 14, at 1292.

177. "[I]f Congress intended the desired remedy in the disputed statute, it would have said so explicitly." David A. VanDyke, Note, *RCRA Citizen Suits and Restitution: The Eighth Circuit's Full* Cort *Press Strangles Equity's Traditional Remedial Play*, 61 MO. L. REV. 489, 495 (1996).

178. "Emergencies and disasters call for prompt decision making and the exercise of judgment, impacting personal lives, businesses, and property." Swanson, *supra* note 22, at 499.

paternalism should be restricted to individual privileges. Rights, on the other hand, are afforded much greater respect. The very existence of *Bivens*-type remedies[179] for piercing governmental immunity and section 1983 claims[180] for redressing constitutional wrongs demonstrates the reverence that the legislative and judicial branches have for constitutionally granted rights. Unfortunately, forcible evictions fall between the cracks of such remedies and existing jurisprudences. Thus, steps must be taken to ensure the safety and protection of private property. Certainly, it is not the case that evacuation orders should never be decreed. On the contrary, such orders can be very beneficial to citizens who independently determine that it is in their best interest to evacuate. Citizens that elect to remain, however, should not be forcibly evicted from their homes. Autonomy surrounding fundamental rights must be afforded the highest respect.

Thus, the Stafford Act should be amended to include, with specificity, a section on forcible evictions. As a general rule, such evictions should be prohibited—the section of the Act authorizing evacuations should plainly affirm the right of citizens to remain with their property. It is conceivable, however, that a natural disaster will result in such extenuating circumstances that require absolute evacuation of an area. In these rare cases, authorities should be required to obtain a court order authorizing forcible eviction. A proposed amendment follows:

EVACUATIONS

(a) The Federal Coordinating Officer, on independent initiative or by request from the Governor of any State may authorize mandatory evacuations to facilitate order and protect the citizens of that State.
(b) In the event that citizens do not comply with mandatory evacuation orders, no local, State, or federal agent shall authorize or participate in the forcible removal of citizens.
(c) In the event that a disaster warrants absolute evacuation of an affected area, the Governor of the affected State shall obtain an

179. *See supra* Part I.C.
180. *See supra* Part I.D.

emergency court order authorizing such evacuation from a federal judge situated within the affected State.

i. The Governor of the affected State must file a motion for a court order in which the Governor sets forth objectively compelling reasons for forced evacuations.
ii. The affected citizens shall be represented collectively by a court-ordered public interest group.
iii. Any judge who considers ordering such a court order shall grant ultimate priority to the issue and administer a decision immediately.
iv. In making the decision for forced evacuation, the judge shall evaluate the objective need for forced evacuations against the property rights of the citizens.

In this way, citizens would have a neutral official reviewing the necessity of such extreme courses of action. Such approval would necessarily follow the pattern of pre-deprivation hearings.[181] In times of distress following natural disasters, property owners could, at the very least, know that their fundamental rights are being given due respect.

181. See Jack F. Williams, *Process and Prediction: A Return to a Fuzzy Model of Pretrial Detention*, 79 MINN. L. REV. 325 (1994).