

CHALLENGING EQUALITY: PROPERTY LOSS, GOVERNMENT FAULT, AND THE GLOBAL WARMING CATASTROPHE

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ABSTRACT—One of the bedrock principles of American property law is that all property owners and all property are protected equally. We do not believe—when it comes to compensation for loss—that poor owners are compensated rigidly and rich owners are not, or that property in private homes is protected rigidly and property in commercial or industrial structures is not. When it comes to compensation due to public or private fault, we believe in absolute equality. Equal treatment of property is at the heart of the liberal state and is the promise of American property law.

This Essay challenges that bedrock idea. The ultimate inadequacy of finite resources limits government decisions about their distribution, including compensation of private owners for their loss under takings law and other theories. In fact, the idea that public payment for private loss is “resource neutral,” particularly in the context of government fault-based claims, has always been a mythical one. When it comes to legal protection and rights to public compensation, ideas of equal protection for all kinds of property loss are neither currently implemented by American law, nor should they be. When loss occurs, and the adequacy of public resources fails, all property is not equal. It is not equal in origin, societal value, or deserved compensation. If there has been plausible deniability of this truth in the past, it will be shattered by the looming demands of global-warming catastrophe.

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INTRODUCTION

In a very recent book, Professor Hanoch Dagan makes the claim that the legitimacy of the institution of private property is premised on the idea that ownership of property furthers human autonomy.¹ This autonomy-based theory, he explains, is “firmly grounded in liberalism’s most fundamental commitments.”²

Dagan proceeds to explain how this grounding leads to some surprising conclusions, such as a commitment to eliminate “interpersonal domination” and an entitlement of each person “to own *some* autonomy enhancing property.”³ It is the nature of property—not some external value—that is the source of coercive redistributive measures.⁴

These ideas are beyond the usual vision of mainstream liberal traditions of property. However, the idea that property-grounding values such as human autonomy, self-determination, or human flourishing require some kind of redistribution of property is certainly not entirely unknown among those who claim to be writing in the liberal tradition.⁵

It is Dagan’s next claim that is the radical one. “Certain types of property,” he writes, “contribute to [autonomous] self-determination only indirectly, and a liberal property law needs to structure these types to prevent them from involving [too much] private authority.”⁶ For instance, “the private authority attached to commercial property types—notably to

¹ HANOCH DAGAN, *A LIBERAL THEORY OF PROPERTY* 1–4, 35–46 (2021).

² *Id.* at xiii.

³ *Id.* at 4, 42.

⁴ *Id.* at 68–72, 114.

⁵ See PETER M. GERHART, *PROPERTY LAW AND SOCIAL MORALITY* 6 (2014) (discussing human autonomy and self-determination); GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, *AN INTRODUCTION TO PROPERTY THEORY* 89–90 (2012) (discussing human flourishing); Gregory S. Alexander, *Ownership and Obligation: The Human Flourishing Theory of Property*, 43 H.K. L.J. 451, 453 (2013) (discussing human flourishing).

⁶ DAGAN, *supra* note 1, at 5.

ownership of means of production—must be narrowly circumscribed.”⁷ Property law must be particularly vigilant in limiting the claims to property protection by such owners.

With that assertion, we have stepped over an invisible line. One of the bedrock principles of American law is that all property owners and all property are protected equally. This is particularly true when it comes to predation by government or private others. Consider, for instance, the Fifth Amendment: “nor shall private property be taken for public use, without just compensation.”⁸ Not “some private property”; not “private property of particular types”; but *all* private property.

We do not believe—when it comes to compensation for loss—that poor owners are compensated rigidly, and rich owners are not, or that property in private homes is protected rigidly, and property in commercial or industrial structures is not. When it comes to compensation due to public or private fault, we believe in absolute equality. Property is property is property. Equal treatment of property is at the heart of the liberal state and is the promise of American property law.

In this Essay, I will challenge that bedrock idea. The ultimate inadequacy of external, physical, and finite resources limits government decisions about their distribution, including compensation of private owners for their loss. As I discuss below, this is illustrated most sharply in cases of physical catastrophe, but it in fact governs all resource decisions that government makes.

The idea that public payment for private loss is “resource neutral,” particularly in the context of government fault-based claims, has always been a mythical one. When it comes to legal protection and rights to public compensation, ideas of equal protection for all kinds of property loss are neither currently implemented by American law, nor should they be. When loss occurs, all property is not equal. It is not equal in origin, societal value, or deserved compensation.

I. THE IMPENDING CATASTROPHE

Due to global warming and climate change, humans on Earth are facing the prospect of impending catastrophe. Although there might be disagreement as to when, where, and what form the destruction will take,

⁷ *Id.*

⁸ U.S. CONST. amend. V.

there is virtually no denial that it will happen in the coming decades.⁹ Indeed, it has already begun.

Right now, in the South Pacific, the island nations of Tuvalu, Kiribati, the Maldives, and the Marshall Islands are threatened by rising oceans. Scientific predictions assert that some or all of Tuvalu will be uninhabitable in the next several decades.¹⁰ In Europe, U.K. authorities have already begun the process of designating villages to be abandoned to the sea.¹¹ It is estimated that by the year 2050, “sea-level rise will push average annual coastal floods higher than the land now home to 300 million people” around the world; “[h]igh tides could permanently rise above land occupied by over 150 million people.”¹²

In the United States, predicted economic losses from climate change and global warming are staggering. The National Oceanic and Atmospheric Administration predicts that within coming decades, “up to \$106 billion worth of coastal property will likely be below sea level.”¹³ As an example, by the year 2060, it is estimated that 40.4% of the Florida Upper Keys, 58.5% of Miami Beach, and 62.6% of Key West will be inundated, with property losses in those communities alone estimated at \$26.3 billion dollars.¹⁴

⁹ See United Nations, *IPCC Report: “Code Red” for Human Driven Global Warming, Warns UN Chief* (Aug. 9, 2021), <http://news.un.org/en/story/2021/08/1097362> [<https://perma.cc/YD4D-WSXY>] (stating that human-induced climate change has already led to “irreversible” changes to the Earth’s climate system).

¹⁰ See, e.g., Rhoda Kwan, *Island Nation at Risk of Extinction from Rising Seas Laments Watered-Down Climate Pact*, NBC NEWS (Nov. 15, 2021), <https://www.nbcnews.com/news/world/tuvalu-laments-watered-cop26-climate-pact-rcna5575> [<https://perma.cc/36L8-U3HR>] (describing the impact of climate change on Tuvalu); Mike Ives, *A Remote Pacific Nation, Threatened by Rising Seas*, N.Y. TIMES (July 2, 2016), <https://www.nytimes.com/2016/07/03/world/asia/climate-change-kiribati.html> [<https://perma.cc/6KTT-5DGQ>] (describing the impact of climate change on Kiribati); WORLD BANK, *ACTING ON CLIMATE CHANGE & DISASTER RISK FOR THE PACIFIC 3* (2013), <https://www.worldbank.org/content/dam/Worldbank/document/EAP/Pacific%20Islands/climate-change-pacific.pdf> [<https://perma.cc/G8RT-8T56>] (describing the impact of climate change on Pacific island nations); *Tuvalu About to Disappear into the Ocean*, REUTERS (Sept. 13, 2007), <https://www.reuters.com/article/environment-tuvalu-dc/tuvalu-about-to-disappear-into-the-ocean-idUKSEO11194920070913> [<https://perma.cc/SC4T-6GKN>] (describing the possibility of Tuvalu becoming submerged by rising sea levels in the next thirty to fifty years).

¹¹ See Sylvia Hui, *Frustration, Defiance in Welsh Village to Be Abandoned to the Sea*, L.A. TIMES (Nov. 12, 2021), <http://latimes.com/world-nation/story/2021-11-12/frustration-defiance-in-welsh-village-to-be-abandoned-to-the-sea> [<https://perma.cc/CEC5-TMKV>].

¹² Jim Dobson, *Shocking New Maps Show How Sea Level Will Destroy Coastal Cities by 2050*, FORBES (Oct. 30, 2019), [forbes.com/sites/jimdobson/2019/10/30/shocking-new-maps-show-how-sea-level-rise-will-destroy-coastal-cities-by-2050/?sh=248b491456e8](https://www.forbes.com/sites/jimdobson/2019/10/30/shocking-new-maps-show-how-sea-level-rise-will-destroy-coastal-cities-by-2050/?sh=248b491456e8) [<https://perma.cc/Q8HZ-TSPW>].

¹³ See *Climate Change Predictions*, NOAA OFF. FOR COASTAL MGMT. (July 1, 2022), coast.noaa.gov/states/fast-facts/climate-change.html [<https://perma.cc/H7WZ-7BVF>].

¹⁴ Michael B. Sauter & Thomas C. Frohlich, *Climate Change: These American Cities Will Soon Be Under Water*, USA TODAY (June 18, 2019), [usatoday.com/story/money/2019/06/18/climate-change/american/cities-that-will-soon-be-under-water/39533119/](https://www.usatoday.com/story/money/2019/06/18/climate-change/american/cities-that-will-soon-be-under-water/39533119/) [<https://perma.cc/SCE7-FZP2>].

Including potential changes in hurricane activity, annual losses from storms are expected to grow by \$7.3 billion per year, to a total of \$35 billion per year by the year 2029.¹⁵ Drought, extreme heat, and destructive infernos are already devastating the western United States. In California, 1.6 million acres burned in 2018, more than the previous record; in 2020, 4.2 million acres burned.¹⁶

How will American law and policy deal with these situations? As personal and property losses mount in the United States, and become—by fiscal definition—beyond the capacity of the public to make whole, the question becomes: how will critically scarce public resources and energy be distributed? Who will be “made whole”? How will we—as a matter of law and public policy—choose those who are entitled to recover?

The reality of finite and therefore inadequate resources, and who should receive them, is involved in all collective resource decisions. Every decision involving government taxation, spending, or other exercises of coercive state power unavoidably involves these issues, and we as a society are very aware of the conflicting considerations involved in these choices. Will trillions of dollars be spent on dairy subsidies or construction projects? We accept, without question, the unavoidability of such difficult questions.

Cases of catastrophic loss are different. As a legal and societal matter, we have an almost unvarying and automatic response. If the property of citizens is destroyed by catastrophe, all of those affected must—as a matter of the social compact and the principle of equality—receive adequate and complete compensation. This is true whether the loss occurred as the result of natural forces or government fault. We do not believe—when it comes to compensation for loss—that society should choose among recipients, rescuing some but not others. Property loss is property loss, no matter who incurs it and no matter the kind of property involved. It is a matter of long-established principles of equality, the demands of human connection, and (in some cases) constitutional guarantee.

Those are our strong and uncompromising beliefs. However, questions remain. To what extent *do* our actions actually comport with those beliefs? Furthermore, to what extent *should* they do so?

¹⁵ See RISKY BUSINESS PROJECT, *RISKY BUSINESS: THE ECONOMIC RISKS OF CLIMATE CHANGE IN THE UNITED STATES* 3 (2014), https://riskybusiness.org/site/assets/uploads/2015/09/RiskyBusiness_Report_WEB_09_08_14.pdf [https://perma.cc/JN3N-A525].

¹⁶ Gabriel Canon, *Heat, Drought, and Fire: How Climate Dangers Combine for a Catastrophic ‘Perfect Storm,’* GUARDIAN (Aug. 10, 2021), [theguardian.com/us-news/2021/aug/10/heat-drought-and-fire-how-climate-dangers-combine-for-a-catastrophic-perfect-storm](https://www.theguardian.com/us-news/2021/aug/10/heat-drought-and-fire-how-climate-dangers-combine-for-a-catastrophic-perfect-storm) [https://perma.cc/PP9F-FZ4L].

II. THE MYTHS EXPOSED

When it comes to compensatory programs for individuals who have suffered catastrophic loss, two approaches currently predominate in American life and law. The first is the “insurance solution,” and the second is direct payments through government disaster relief.

Before evaluating these approaches, it is useful to keep in mind that, despite our conviction that all victims of catastrophic loss deserve to be made whole, awarding compensation for catastrophic loss is always a potentially tragic choice. It requires the government to allocate “tragic goods,” or goods critical to human life, when there are not enough for all who want them. All choices by government involving tragic goods involve two steps: a “first-order” decision, as to *how much* of the tragic good will be manufactured or otherwise produced (through financial incentives, direct taxpayer funding, or public policy modifications); and a “second-order” decision, as to *who will receive* the tragic goods available.¹⁷ Decisions involving catastrophic loss will, at some point, invoke these questions. If catastrophic loss is too severe, American society will first have to decide how much in the way of resources will be devoted to compensating victims, and then be forced to determine who the recipients will be.

A. *The Insurance Solution*

Generally, both private and public insurance are available for reimbursement for catastrophic loss. Private insurance can take the form of insurance for perils such as floods, fires, wind damage, hail, and crop loss.¹⁸ In the case of flood-prone areas, subsidized government insurance may be the only economically feasible option for property owners.¹⁹

Effectively, under this “insurance solution” approach, individual property owners are tasked with the obligation to protect themselves. This

¹⁷ For a seminal discussion of these issues, see GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES: THE CONFLICTS SOCIETY CONFRONTS IN THE ALLOCATION OF TRAGICALLY SCARCE RESOURCES 19–20 (1978).

¹⁸ See *Spotlight on: Catastrophes - Insurance Issues*, INS. INFO. INST. (Dec. 13, 2021), <https://www.iii.org/article/spotlight-on-catastrophes-insurance-issues> [<https://perma.cc/6AMM-GLYC>].

¹⁹ Most prominently, the federal National Flood Insurance Program (NFIP) provides flood insurance to property owners, renters, and businesses, and is available to anyone living in one of the 23,000 participating NFIP communities. *Flood Insurance*, FEMA (Mar. 9, 2022), <https://www.fema.gov/flood-insurance> [<https://perma.cc/C842-EFYG>]. As of 2016, the NFIP has over five million policyholders in force and has saved policyholders approximately \$3 billion annually in premium payments over private insurance costs. Increased flooding catastrophes have strained the NFIP. As of the same date, the program was some \$24 billion in debt—leading to calls that public responsibility for these losses should be ended. See Ike Brannon & Ari Blask, *The Government's Hidden Housing Subsidy for the Rich*, CATO INST. (Aug. 8, 2017), <https://www.cato.org/commentary/governments-hidden-housing-subsidy-rich> [<https://perma.cc/65HY-9TXF>].

approach involves the implicit judgment that those who think ahead and buy insurance to mitigate their losses are worthy of recovery and are rewarded; scofflaws and others who squander their money, and do not plan ahead, are not.²⁰

Insurance is a very common way in American society to address the question of recovery by individuals for economic loss in many areas of life. We use it in the medical setting, the automobile accident setting, and in the protection of homes and commercial properties. We even use it to protect individuals from liability for negligence, carelessness, professional malfeasance, and more.

How does this approach fare in the case of catastrophic loss? In some ways, it fares well. One of its most desirable features is that it makes individuals and private insurers the “tragic decisionmakers” rather than the public—avoiding the acute public discomfiture that comes with that role. Requiring the public to explicitly decide how much of a tragic good to create (with the implicit acknowledgement that this will entail the deprivation of some), or which individuals shall receive the goods created, can have high societal costs in morale and the knowledge of decisions in contravention of bedrock societal principles.²¹ Calculated decisions that intentionally produce less than needed of a tragic good, or that pick and choose among victims of catastrophic loss, contravene foundational societal commitments to the well-being and equality of all. To avoid the public dismay and outrage that such decisions create, we, as a society, try to make them in a way that draws the least public scrutiny and public outrage.²² Making the availability of compensation a private choice, rather than a public one, deflects these issues. It also has the beauty of automatically limiting the pool of eligible recipients to match the pool of resources (insurance proceeds) available—promising, in theory, that the need for society to make an inadequate first-order decision will vanish. Finally, the insurance solution has been argued to honor the principle of equality: there is equal opportunity for all to buy insurance, and to protect themselves against floods, fire, drought, or other catastrophic loss.²³ If victims of catastrophes fail to protect themselves, it is not because they weren’t afforded the equal opportunity to do so.

²⁰ See CALABRESI & BOBBITT, *supra* note 17, at 63, 72–78 (discussing worthiness judgments in the setting of public policy for tragic resource allocations).

²¹ See *id.* at 20–27.

²² See *id.* at 131–46.

²³ To avoid public exposure of first-order and second-order decisions, the societal allocation can be transformed into one of “absolute worthiness,” with “worthiness . . . defined [so] that, in practice, enough [eligible recipients] will be found wanting . . . that the constraints imposed by the first-order determination will be satisfied.” *Id.* at 73. Society, in this approach, will not be viewed as “actually

Having said all of that, some factual caveats are of course in order. These positive attributes of the insurance solution assume that insurance for the particular risk is available, and that insurance pools are solvent after claims are paid.²⁴ However, even if insolvency threatens, the first-order part of the tragic choice—deciding how much will be distributed—is ameliorated by this strategy. Unavailability of insurance is a lesser indictment of society's values than an obvious and embarrassing shortage of publicly appropriated money. In addition, the problem of inadequate insurance pools to pay claimants will—as a practical matter—be limited. Only those who bought insurance in good faith, and whose insurers are now insolvent, will have any claim to the available (insurance) resources.

Although the insurance solution seems to be a good one that rewards responsible individuals and vindicates principles of equality, upon deeper inspection these pillars crumble. Whether insurance schemes truly satisfy the principle of equality depends on what equality means. If, for instance, equality means *equal protection* from catastrophic loss, these programs falter. Obviously, those without insurance have no protection under these programs at all.²⁵ Indeed, insurance schemes falter even if we attenuate the idea of equality to mean *equal ability to seek protection* from catastrophic loss. What about the victims of catastrophes who were too poor to buy either private or public insurance, or who live outside of the geographic zones that public or private insurance require? What about those whose claims are denied for reasons of inadequate proof or other technical problems in their

allocating.” *Id.* This is particularly effective if the “individuals who are denied the scarce goods could, through their own behavior, [have] put themselves in the favored category.” *Id.*

²⁴ Storms, floods, and heat waves across the globe forced private insurers to pay out an estimated \$42 billion for natural disasters in the first six months of 2021, a ten-year record. See Jasper Jolly, *2021's Extreme Weather Leads to Insurers' Biggest Payout in 10 Years*, GUARDIAN (July 21, 2021), [theguardian.com/business/2021/jul/21/2021s-extreme-weather-leads-to-insurers-biggest-payout-in-10-years](https://perma.cc/CT58-X59A) [https://perma.cc/CT58-X59A]; see also INS. INFO. INST., *supra* note 18 (providing an overview of recent developments affecting insurance policies). Concerns about solvency have led to waves of attempted cancellations and nonrenewals. In the wake of recent catastrophic loss to wildfires in Northern California, California Insurance Commissioner Ricardo Lara ordered a one-year moratorium on nonrenewals and cancellations for more than 325,000 residential policyholders who were affected by devastating Northern California wildfires across twenty-two counties. Press Release, Cal. Dep't of Ins., Commissioner Lara Protects Insurance Coverage for 325,000 Northern California Wildfire Survivors (Sept. 20, 2021), <https://www.insurance.ca.gov/0400-news/0100-press-releases/2021/release095-2021.cfm> [https://perma.cc/T7G8-8TNX]. The Commissioner's order protects those living within the perimeter or adjacent to a declared wildfire disaster, regardless of whether they suffered a loss. “Climate change-fueled wildfires continue to devastate homeowners and communities. My moratorium orders help provide short-term relief as we address the root causes of these ever-intensifying natural disasters,” said Commissioner Lara.” *Id.*

²⁵ Uninsured and underinsured property owners may have access to some mode of recovery under other compensation approaches. However, as will be shown below, those approaches have their own significant shortcomings. See *infra* notes 28–29, 32.

applications, or because their particular losses are not covered by the terms of the insurance policy purchased? All of a sudden, the idea that self-help is available to all—and that equal opportunity meets the requirements of equality—seems less certain or, in many cases, completely mythical.

The insurance solution might seem to acceptably shift the risks of catastrophic loss to individuals, but underneath it is riddled with contradictions of the principles of the basic social compact and equality. We believe as a matter of deep societal conviction that victims of catastrophe should be entitled to recover for their losses, fairly and equally. The insurance solution does not embody those values.

B. Payment Through Direct Governmental Relief

The next-most-common approach to catastrophic loss is provided by disaster programs that afford victims direct relief. Primary among these are disaster relief programs of various kinds run by the federal government. For instance, there are direct monetary grant programs administered by the Federal Emergency Management Agency (FEMA) for those who live in a federally declared disaster area.²⁶ These programs include funds for temporary housing, repair or replacement of an owner-occupied home that serves as the household's primary residence, uninsured or underinsured disaster-caused damage to essential personal property, and other government-approved items.²⁷ Amounts of funds are limited by Congressional appropriations²⁸ and by program terms. For instance, in a recent analysis of FEMA data, typical household grants were found to be \$8,000 or less.²⁹ Small Business Administration (SBA) loans are the single largest source of federal disaster recovery funds available for survivors.³⁰ These are low-interest loans that can be repaid over a long term.

²⁶ Designation of an area of the United States as a federally declared disaster area is initiated by the governor of the affected state, federal district, territory, or tribal government. *How a Disaster Gets Declared*, FEMA (Jan. 4, 2022), [fema.gov/disaster/how-declared](https://perma.cc/S7U3-AXKP) [https://perma.cc/S7U3-AXKP].

²⁷ See *Individuals and Households Program*, FEMA (May 19, 2022), <https://www.fema.gov/assistance/individual/program> [https://perma.cc/GWA3-PQ85].

²⁸ See, e.g., FEMA, NOTICE OF FUNDING OPPORTUNITY FOR FISCAL YEAR 2021 BUILDING RESILIENT INFRASTRUCTURE AND COMMUNITIES GRANTS (2021), <https://www.fema.gov/fact-sheet/notice-funding-opportunity-fiscal-year-2021-building-resilient-infrastructure-and> [https://perma.cc/WTG8-T2LL] (discussing changes to federal appropriations for federal hazard mitigation grants).

²⁹ See Chad Calder, *How Much Money Can You Expect from FEMA? Disaster Grants Sure to Disappoint, Analysis Finds*, ADVOCATE (Aug. 17, 2016), https://www.theadvocate.com/louisiana_flood_2016/article_22c86fe0-64cd-11e6-9bb2-07f95d36ee28.html [https://perma.cc/E3M5-Z67K].

³⁰ Press Release, FEMA, It's Important to Submit an SBA Loan Application (Jan. 20, 2022), <https://www.fema.gov/press-release/20220124/its-important-submit-sba-loan-application> [https://perma.cc/9KTQ-7AP2].

Homeowners can be eligible for loans of up to \$200,000 for primary-residence structural repairs or rebuilding; homeowners and renters can be eligible for up to \$40,000 to replace important personal property; and qualified businesses and private nonprofit organizations can be eligible for an amount up to \$2 million for repair or replacement of real property, machinery, equipment, and other business goods.³¹ Each federal grant and loan program has particular eligibility requirements and bureaucratic application hurdles.³²

Whether these programs honor the principle of compensatory equality depends, again, on what “equality” means. Equality in opportunity exists, in the sense that federal disaster grant and loan programs generally have clear, publicly available eligibility criteria, and promise that anyone who meets those criteria will receive compensation. If, however, the “equal treatment” of disaster victims means equality in substantive outcomes, many failures are immediately apparent. To successfully compete for these funds, an individual must have the relative stability and security needed to navigate bureaucratic hurdles, and the skills and time necessary to pursue them. Will a poor person who lived in a destroyed shack and is now struggling to survive have the personal resources, expertise, and persistence to pursue complicated government application procedures? Will such a person have the documentation, ownership interests, and other indications of stability and “productivity” that these programs reward? What if the individual is not a residential-property owner or business owner (the primary focus of larger loan programs) at all? In addition, as described above, actual awards under grant programs have been vanishingly small; a grant of \$8,000 to a household devastated by a flood or wildfire is hardly enough to build life anew. More money is often available through loans, but loan programs are of use only to those who have the ultimate ability to repay. If the goal is the equal protection of all from catastrophic loss, these programs are patently inadequate.³³

³¹ See *Disaster Assistance*, U.S. SMALL BUS. ADMIN., sba.gov/funding-programs/disaster-assistance [<https://perma.cc/U4M6-YY3V>]; *SBA Loans for Disaster Recovery*, FEMA (May 25, 2021), fema.gov/fact-sheet/sba-loans-disaster-recovery [<https://perma.cc/T7HB-EXHX>].

³² See *Individuals and Households Program*, *supra* note 27; U.S. SMALL BUS. ADMIN., *supra* note 31 (SBA loan programs).

³³ For instance, in November of 2020, the National Advisory Council of FEMA—a federal panel established after Hurricane Katrina—published findings that low-income survivors were less likely than more affluent survivors to receive federal emergency assistance after national disasters. The report found that the agency was twice as likely to deny money for repair or replacement of homes in low-income areas, owners of homes in low-income areas were twice as likely to be denied rental aid, and low-income renters were more likely to be denied aid for destroyed personal property. See Rebecca Hersher & Ryan Kellman, *Why FEMA Aid Is Unavailable to Many Who Need It the Most*, NPR (June 29, 2021),

In addition, there is the undeniable prominence of the first-order decision under these programs, with all of the discomfiture that involves. These problems require a highly scrutinized first-order decision by Congress that determines how much money to appropriate to pay claims. Even though the amounts of individual assistance grants are shockingly small, demands for payment under grant programs can quickly become unsustainable. In a December 7, 2021 report, FEMA states that it has spent more than \$68,242,000,000 on natural disasters since August 1, 2017.³⁴ As the catastrophes from global warming increase, there will be increasing political panic and rancor over mounting costs, on one hand, and exposure of the fact that the public help available is inadequate for millions of victims, on the other. Complex eligibility criteria and bureaucratic application requirements,³⁵ ostensibly utilized to target relief to worthy individuals, can be used to limit the number of approvable applications received. But at some point, appropriations are bound to be overwhelmed. The societal promise that everyone who is harmed will be taken care of by government programs will become quite obviously a myth as conditions worsen.

C. Theories of Government Fault

As a result of frustrations with both insurance and direct governmental-relief approaches, government fault-based theories of recovery in cases of global-warming catastrophe have emerged with strong appeal. Government, it is argued, should not be treated as a bystander in all of this; it is, indeed, often deeply at fault. Government, it is argued, has failed to protect citizens against clearly impending catastrophe; it has, in some cases, actually heightened individuals' risks by forbidding self-help measures, such as the building of sea walls.³⁶ In the most expansive understandings of fault, broad policies pursued by government in energy, transportation, and other critical areas are argued to have worsened the risk of catastrophe and the inevitable losses that citizens will suffer.

npr.org/2021/06/29/1004347023/ [https://perma.cc/4LEK-VW25]. Structural reasons believed to explain these findings, advanced by the report's authors and other researchers, include the facts that poor residents are less likely to have paperwork proving ownership and value of personal property; inspectors often operate with implicit bias against the value or repair of low-income (less valuable) homes; and poor people often do not have the formal rental (lease) agreements, or formal land title, required for recovery under FEMA programs. *See id.*

³⁴ *See* FEMA, U.S. DEP'T OF HOMELAND SEC., DISASTER RELIEF FUND: MONTHLY REPORT app. C (Dec. 7, 2021), [fema.gov/sites/default/files/documents/fema_signed-drf-congressional-report-month-ended-nov-2021.pdf](https://perma.cc/G6DR-8Q5V) [https://perma.cc/G6DR-8Q5V].

³⁵ *See supra* note 27.

³⁶ *See infra* note 43 and accompanying text.

Theories of government fault, which have been aggressively advocated by academics and pursued by lawyers in litigation, are usually grounded in the Fifth Amendment Takings Clause of the U.S. Constitution.³⁷ This approach is particularly appealing because of its immediate invocation of the bedrock idea of protection in American property law, described above. If it is a case of government fault—e.g., a *taking* of private property by government—the promise is clear. Compensation *will be owed*, as a moral and constitutional duty. It will not matter if these citizens had no insurance, or do not qualify for FEMA funds. Guaranteed and equal remedies—that is, equality in substantive outcomes—will be achieved.

As a threshold matter, the application of takings law to situations of catastrophic loss is somewhat awkward. Previously, takings claims have been asserted when private individuals have lost property as the result of particular government action—such as the confiscation of title or excessive regulation—which involved changes in legal rights.³⁸ Claims of government takings of property in cases involving catastrophic loss from climate-change-related disasters are premised on a different theory.³⁹ In this case, the fault of government is not grounded in the direct taking of title or the imposition of regulations that unreasonably impair value; rather, government fault is grounded in more (arguably) indirect claims. These include that government choices made the claimant more vulnerable to the disaster,⁴⁰ or that government decided in dealing with impending catastrophe that the land of

³⁷ See *supra* note 8 and accompanying text.

³⁸ See, e.g., Laura S. Underkuffler, *Property and Change: The Constitutional Conundrum*, 91 TEX. L. REV. 2015, 2015–18 (2013) (discussing the traditional role of the Takings Clause in navigating tensions between existing property rights and their impairment by government in American law).

³⁹ See, e.g., Gary Dreyzin, Note, *The Next Wave of Climate Change Litigation: Comparing Constitutional Inverse Condemnation Claims in the United States, South Africa, and Japan*, 31 GEO. ENV'T L. REV. 183, 189–91 (2018); UNITED NATIONS ENV'T PROGRAMME, THE STATUS OF CLIMATE CHANGE LITIGATION—A GLOBAL REVIEW 10 (2017) (noting that the United States has hosted about three times as much climate change litigation as all other countries combined).

⁴⁰ See Christopher Serkin, *Passive Takings: The State's Affirmative Duty to Protect Property*, 113 MICH. L. REV. 345, 378–82, 384 (2014) (“The other doctrinal hook for passive takings liability exists when the government has made a piece of property more vulnerable to subsequent changes in the world. In the quintessential case, this occurs when the government disables self-help. By removing property owners’ ability to protect themselves, the government incurs a special obligation to provide protection, and its failure to do so can trigger passive takings liability.”); see also Jeremy Patashnik, Note, *The Trolley Problem of Climate Change: Should Governments Face Takings Liability if Adaptive Strategies Cause Property Damage?*, 119 COLUM. L. REV. 1273, 1290–91 (2019) (describing a type of takings claim that may be brought against the government for implementing a law that predictably led to a loss in property value).

others would be saved and the land of the claimant sacrificed.⁴¹ In the most expansive accounts of this theory, government liability can be rooted in a failure to act, such as when government knew of an impending threat to property and did nothing.⁴² In summary, in the global-warming catastrophic context, government takings liability is still “fault-based,” but that term is subject to extended meanings.

Many commentators have questioned whether government liability should include catastrophic situations, as a matter of doctrinal takings law.⁴³ However, if one is concerned about the arbitrary exclusion of particular

⁴¹ As a result of Hurricane Harvey’s assault on the Texas Gulf Coast in 2017,

flooding led to one of the worst climate-related disasters in U.S. history; . . . recovery costs [were estimated at] 180 billion dollars. . . . [N]ear the end of the natural disaster’s most severe effects, the U.S. Army Corps of Engineers . . . decided to make several controlled releases from two government-owned reservoirs. . . . As a result, water flooded thousands of homes and businesses that otherwise would have survived the hurricane with minimal damage. . . .

Affected property owners brought lawsuits in federal courts, alleging an unconstitutional taking of private land and demanding compensation.

Dreyzin, *supra* note 39, at 184–85. The core of the lawsuits was that the government chose some property for preservation and some for destruction. Potential damages for victims were estimated at \$10 billion. *See id.* at 85; *see also* John Echeverria, *The Flood of Takings Cases After Hurricane Harvey*, TAKINGS LITIG. (Oct. 23, 2017), <https://takingslitigation.com/2017/10/23/the-flood-of-takings-cases-after-hurricane-harvey/> [<https://perma.cc/R7PM-VCLH>]; Shannon Sims, *The U.S. Flooded One of Houston’s Richest Neighborhoods to Save Everyone Else*, BLOOMBERG BUSINESSWEEK (Nov. 16, 2017, 4:00 AM), <https://www.bloomberg.com/news/features/2017-11-16/the-u-s-flooded-one-of-houston-s-richest-neighborhoods-to-save-everyone-else> [<https://perma.cc/7ZMW-G8Y2>]. For academic discussion of this theory, *see* Serkin, *supra* note 40, at 378–79, 384; and Sophie Stocks, Note, *No Firm Ground: Fifth Amendment Takings and Sea-Level Rise*, 70 HASTINGS L.J. 621, 626–27 (2019).

⁴² *See, e.g.,* Juliana v. United States, 217 F. Supp. 3d 1224, 1250–51 (D. Or. 2016), *rev’d on other grounds*, 947 F.3d 1159 (9th Cir. 2020); Joseph Rosenberg, *Condemn (the) Nation: Holding the United States Accountable Through Inverse Condemnation Claims for Its Role in Bringing About—and Then Failing to Mitigate and Adapt to Certain Effects of—Climate Change*, 26 BUFF. ENV’T L.J. 85, 91–93, 100–33 (2018–2019).

⁴³ The most intractable objection is rooted in the undeniable fact that in cases of environmental catastrophe, the interests and fates of thousands of shoreline and inland owners are inextricably interconnected. Prohibited measures such as armoring, building sea walls, or other self-help actions might later save some owners, but will cause erosion and inundation of the land of others. *See, e.g.,* J. Peter Byrne, *Rising Seas and Common Law Baselines: A Comment on Regulatory Takings Discourse Concerning Climate Change*, 11 VT. J. ENV’T L. 625, 633 (2010) (stating that, in dealing with climate change and sea-level rise, “[t]he state has important, if sometimes conflicting, interests in protecting wetlands, sand dunes, habitat, storm buffers, and economic infrastructure”); Michael Allan Wolf, *Strategies for Making Sea-Level Rise Adaptation Tools “Takings-Proof,”* 28 J. LAND USE 157, 191 (2013) (“The negative environmental externalities attributable to sea walls, bulkheads, revetments, dikes, and the like are serious and diverse, not just to adjoining properties but to the coastal ecology as a whole.”); *see also* A. Dan Tarlock, *Takings, Water Rights, and Climate Change*, 36 VT. L. REV. 731, 738 (2012) (discussing the risks associated with ownership and how climate change introduces new risks); J. Scott Pippin & Mandi Moroz, *But Flooding Is Different: Takings Liability for Flooding in the Era of Climate Change*, 50 ENV’T L. REP. 10920, 10922–23 (2020) (noting that urbanization leads to increased flood risks for a larger population).

victims of catastrophe from compensation under existing schemes, such as insurance and existing government grant programs, fault-based theories such as these have great appeal. The foundational promise of compensatory justice, imposed by takings law,⁴⁴ is one of the strongest arguments for its use in the catastrophic context. By its very nature, takings doctrine and its guarantee of compensation in the face of government wrongdoing exhibits greater fidelity to the promise of equal protection of property than any other existing scheme. Anyone who can prove government fault in the destruction of their property—regardless of personal identity, the nature of that property, decisions to insure or not insure, or other factors—will be entitled to recovery. Equality of all comers is a deep value in takings law, and in all theories rooted in fault, and it will be enforced, as a matter of law, in every fault-based case.

At this point, however, we stumble upon a difficult problem. What if it is impossible, as a matter of economic fact, to fully compensate all who have lost? When we are talking about catastrophic destruction of this magnitude, it is virtually assured that claims will outstrip resources.⁴⁵ Yet theories of fault, such as takings theories, deny that this problem exists.

In truth, the case of catastrophic loss merely illuminates a vulnerability that has always existed in American takings law and other fault-based theories. American takings law, as established by the U.S. Supreme Court, has (almost without exception) followed this lock-step analysis:

- (1) With what property did owner “x” begin?
- (2) What property does owner “x” have now?
- (3) Should owner “x” be compensated for this loss? The answer would be “yes” unless the loss is trivial; there are other benefits that owner “x” has received from the challenged action; or government has acted to protect limited interests in (physical) human health and safety.⁴⁶

This is the explicitly articulated structure in many cases decided by the Supreme Court’s conservative wing.⁴⁷ It has also been the generally

⁴⁴ See Laura S. Underkuffler, *Tahoe’s Requiem: The Death of the Scalian View of Property and Justice*, 21 CONST. COMMENT. 727, 749–50 (2004).

⁴⁵ See, e.g., Dreyzin, *supra* note 39, at 186 (“If successful, takings claims can result in insurmountable debt and deter government from responding to dangerous climate change effects to protect its citizens.”).

⁴⁶ See Underkuffler, *supra* note 44, at 731.

⁴⁷ See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1008–10, 1027 (1992). Consideration of other “justice” issues—such as competing public interests—has been expressly resisted by conservative members of the Court. See, e.g., *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Plan. Agency*, 535 U.S. 302, 349 (2002) (Rehnquist, J., dissenting, joined by Scalia, J., and Thomas, J.) (arguing that in a takings case, the question of compensation owed must be viewed, exclusively, from the complaining owners’ standpoint”).

assumed, if not articulated, model used by other justices.⁴⁸ There is often boilerplate language in takings cases about assessing “fair” burdens, “equitable” results, and so on, but there is rarely any overt challenge to the limited logical lockstep analysis above.⁴⁹ There will be discussions about whether constitutionally cognizable property is at issue (i.e. whether there are justified expectations, rights under state law, and so on at stake);⁵⁰ whether the facts indicate that the property as defined was “taken” (sufficiently impaired) by government;⁵¹ and whether the owner has, under some theory, already received (implicit) compensation.⁵² However, if “property” was “taken,” and if the owner has received no compensation to date, the idea that the owner might be awarded less than the full amount of that loss—on the ground of limited resources, failure to follow bureaucratic procedures, or the disfavored nature of the claimant’s property—is never entertained. With rare exception, the overarching guarantee of American takings law is an assumption of *compensatory* justice.

When we think about it, the traditional takings formula just described has one outstanding characteristic. It completely denies that the first-order decision—how much we, as a society, will devote to paying claimed losses—exists. Takings law does not come with an asterisk that compensation will be paid if government can afford it. Compensation that is owed will be paid, period. There is no included contingency. A certain mythology—that government will always pay proven claims—has been overtly asserted or assumed in all of the Supreme Court’s cases.

That does not mean, of course, that the specter of inadequate resources has never been faced. Rather, it has been avoided through judicial manipulation of the stated guarantee itself: that government will pay all *proven* claims. Whenever the reality of inadequate government resources has loomed, the courts have responded by interpreting doctrinal elements to limit the instances in which claims have been proven. When, for instance, a case threatened to require the payment of compensation to millions of owners of

⁴⁸ See, e.g., *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 706 (1999); cf. *Tahoe-Sierra Pres.*, 535 U.S. at 326, 334–42 (rejecting a per se compensatory rule in favor of a “careful examination and weighing of all relevant considerations,” including public interests).

⁴⁹ See, e.g., *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (“The [Takings Clause] is designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”).

⁵⁰ See, e.g., *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 496–99 (1987); *Andrus v. Allard*, 444 U.S. 51, 65–66 (1979).

⁵¹ See, e.g., *Palazzolo v. Rhode Island*, 533 U.S. 606, 630–32 (2001); *Keystone Bituminous*, 480 U.S. at 495–502; *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 135–38 (1978).

⁵² See, e.g., *Keystone Bituminous*, 480 U.S. at 491; *Agins v. City of Tiburon*, 447 U.S. 255, 262 (1980).

restricted wetlands (*Palazzolo*), or to millions of owners of restricted ocean-front land (*Lucas v. South Carolina Coastal Council*), the Court invoked time-honored doctrinal strategies to limit claims without altering takings law's theoretically universally available compensatory guarantee. In *Palazzolo*, the Court included usable, nonregulated land within the physical boundaries of the affected "property," reducing the regulations' "impact" on the "parcel" and resulting in the conclusion that no taking had occurred.⁵³ In *Lucas*, the Court narrowed its focus to the most extreme cases: those that involve the deprivation of all value in the claimant's land—a category that could afford Lucas a remedy, but (prospectively) few other landowners.⁵⁴

By denying that the question of inadequate resources (the first-order decision) exists, the Court has also avoided the next (second-order) decision—that is, *who* should get what resources are available. If there is no acknowledgment of the problem of bankrupting takings claims, there is no need to articulate criteria as to who, among contending parties, should get the tragic goods. This serves to reinforce the mythical promise: if an individual or entity has been victimized by government, compensation (as a matter of compelled equity) will follow.

In short, the idea that outcomes in takings cases are driven by resource-neutral guarantees has always, necessarily, been a myth. Until now, the Court has been able to maintain this myth because of the kinds of cases adjudicated: those involving particularized, factually limited circumstances, or those involving complicated courses of government action that do not generate general rules that require the compensation of thousands of others. In those rare instances in which the kind of claim involved was potentially shared by thousands or millions of others, the case was carefully doctrinally limited, or the claim was denied.

The idea of universal compensation for losses of private property that fall within the spirit of the constitutional mandate or other theories of fault has never been possible; instead, it is a veneer that has been maintained over a decision-making process that cannot be reduced to such simple terms. To date, we have hidden the unequal and inequitable choices that we have made in takings law under a whitewash that they do not exist. In cases of catastrophic loss—where claimed "innocent loss" will be undeniable and will desperately affect millions—this strategy of denial and obfuscation will finally fail. If the doctrinal facade that takings law delivers a resource-neutral guarantee to all who are harmed by government action was cracked before,

⁵³ See 533 U.S. at 631–32.

⁵⁴ See 505 U.S. 1003, 1015–19 (1992).

it will be shattered by the coming exigencies of climate-change-related, catastrophic loss.

* * *

Cases of catastrophic loss force us to rethink the compensatory premise under which we operate. How much in the way of public resources should we dedicate to these cases? On what basis should allocative decisions be made? Should allocative decisions be driven by the idea of “first come, first served,” a kind of artificial equality of all comers and all claims? Or should we double down in the use of the sorting criteria that insurance schemes and federal grant programs currently impose?

In what follows, I will suggest a different approach. The idea in American culture and law that “property is property” when it comes to legal protection and rights to compensation must be jettisoned. When loss occurs, all property is not equal. It is not equal in origin, societal value, or deserved compensation.

III. FLOATING CASKETS

Louisiana is a state that is in the bullseye of climate change and global-warming destruction. During the years 1980–2021, Louisiana experienced catastrophic losses of more than \$200 billion from weather and other climate-related disasters.⁵⁵

In a recent news report, the devastation suffered by the people of the all-Black town of Ironton, Louisiana was vividly described. This community sits on the west bank of the Mississippi River about twenty-five miles southeast of New Orleans.⁵⁶ As the result of Hurricane Ida in August 2021, the town suffered catastrophic loss. “[P]owerful flood waters . . . knocked homes off their foundations, swamped buildings with several feet of water and swept caskets out of their tombs, scattering them around the community.”⁵⁷ Houses that were elevated suffered severe storm damage, and those that were not elevated were decimated. Caskets and their vaults from above-ground tombs, weighing tons, were swept from the graveyard and scattered at angles and upside down on private yards, public lands, and streets. Haywood Johnson, the pastor of St. Paul Missionary Baptist Church

⁵⁵ Adam B. Smith, *2021 U.S. Billion-Dollar Weather and Climate Disasters in Historical Context*, NAT’L OCEANIC & ATMOSPHERIC ADMIN. (Jan. 24, 2022), <https://www.climate.gov/news-features/blogs/beyond-data/2021-us-billion-dollar-weather-and-climate-disasters-historical> [https://perma.cc/QQ4X-64LE].

⁵⁶ David Williams, *Caskets Are Still Scattered Around a Louisiana Community as Residents Struggle to Recover from Hurricane Ida*, CNN (Sept. 25, 2021, 5:09 AM), <https://www.cnn.com/2021/09/25/us/ida-ironton-caskets-trnd/index.html> [https://perma.cc/GV4G-SR8U].

⁵⁷ *Id.*

in Ironton, stated that residents were “shocked by the . . . destruction,” but they were “even more so overwhelmed by their loved ones floating and ending up landing in the streets and people’s yards and on the side of the levee and out in the field . . . [it was] just, just overwhelming.”⁵⁸ Johnson said that he was “still looking for the caskets of his mother, his uncle, and his sister.”⁵⁹

Members of the state emergency response agency and its contractors assessed the devastation and viewed the caskets strewn among the hurricane debris. Many of the caskets and their vaults weighed tons, which state officials observed would require the use of heavy equipment to move. How that would be done, however, was far from apparent. “Knee-deep muck” made the use of such equipment extraordinarily difficult.⁶⁰

The town of Ironton was known to be between zero and three feet below sea level, according to the Army Corps of Engineers. “[T]he levees near Ironton and other communities in the area were not built by the federal government and [were] basically mounds of dirt.”⁶¹ As a result, they provided little or no protection from the storm surge that accompanied the hurricane.

When we hear this story, the sense of undeniable heartbreak and human loss is palpable. There is little that we can imagine that would be worse than having one’s loved ones swept from what were supposed to be their inviolable, eternal resting places and tossed like discarded cars and building parts onto private yards and the public street. Our reaction is immediate. These tombs must be returned to where they were buried, and the public should pay whatever it takes to rectify this wrong. The gravity and humane indignity of this—were it to happen to anyone—should move these victims of catastrophe to the front of the line for assistance and entitle them to whatever resources they require. Basic elements of humanity demand that the larger community step forward to immediately rectify such loss.

Should this kind of property destruction—the destruction of tombs and the displacement of the dead—be seen as simply on par with destruction of a local Target store, a wealthy home, or a parking lot? If we look at this through a traditional compensatory lens, in which the core of the cause of action is rooted in the fault of the government defendant, all catastrophic claims are of equal status and presumptively deserve equal compensation. If all are proven, all deserve to be paid in full. There is no authority for paying in full the claims that we like and discounting those that we don’t. Yet in the

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *See id.*

⁶¹ *Id.*

case of the catastrophe in Ironton, we rebel at the conclusion that all property losses are of equal human cost.

There are, in addition, other objections to circumstance-blind application of compensatory remedies in this case and others. If we reflect, we realize that there are facts in addition to the nature of the loss that drive the conviction that there must be public indemnity in Ironton's case. Ironton is a poor community. There are more than hints in this story that the failure of the federal government to provide this community the kind of levee protection afforded elsewhere was influenced by historic poverty and racial discrimination. Would our conviction that the public—the broader community—must do what it takes to rectify this situation be the same if the victims were wealthy individuals whose relatives had been buried in a cemetery for leading citizens and industry titans? We would feel the same horror for the catastrophe in that case. But a conviction that the “property losses” would be equally entitled to public compensation (as opposed to private rectification) would not necessarily follow.

The case of Ironton, and others involving similar circumstances, indicts the idea that the myth of equal compensatory payment should be maintained as traditionally commanded by takings law or other fault-based remedies. Whenever resource limitations loom, “equality” in cases of public indemnification for private loss requires more than a commitment to simple payment for proven cases of economic loss that have some causal connection to government conduct. A more sophisticated understanding of “equality” is demanded, under all of the facts and circumstances of the case.

The following is a preliminary list of principles and facts that must be considered when establishing true notions of equality in the allocation of tragically scarce public resources. All attempt to capture, albeit imperfectly, what we intuitively believe to be human loss that demands collective response and the identity of those human beings who have the moral authority to assert it:

- (1) *Identification of property most critical to human life.* Loss of property most critical to human life must be prioritized. This would include loss of primary shelter, clothing, and other property necessary for physical survival; loss that invokes severe and unique psychological distress (such as disinterment of the dead); and other property loss that threatens human physical or psychological survival.
- (2) *Prioritization of property loss of those without other economic means.* When tragic choices involve scarce public resources, outcome equality

must have some role (as it does in many other contexts).⁶² Public compensation must be correlated with need.

- (3) *Recognition of historical denial of public support, due to factors such as economic or racial discrimination.* For instance, in the catastrophe context, denial of the protection of public infrastructure, by reason of historical economic or racial discrimination against particular communities, must be considered in any undertaking of “equal treatment” of victims under the circumstances.
- (4) *Consideration of benefits received from government policies now claimed to be at fault.* Direct and substantial financial benefits received by victims from the very government policies that are now claimed to have caused their losses—for instance, losses now claimed to be caused by global warming by the petroleum refining industry—should be acknowledged in determining entitlements to compensation.
- (5) *Consideration of the extent to which claimed losses in value were, themselves, the products of public subsidization and expenditure.* Separation of increases in property value that results from prior public subsidization and expenditure, rather than other factors, is notoriously difficult. However, to avoid the phenomenon that the public is “taxed twice,” it should be considered in extreme cases.⁶³
- (6) *Comprehensive consideration of the losses of all victims of a catastrophe, not only those with the resources, expertise, or luck to bring or join fault-based lawsuits.* The practice of indemnifying those who are parties to private fault-based lawsuits—an approach demanded by responding to takings claims—privileges the financially well-heeled, well-connected, or lucky. Where limited public resources are at stake, “equal opportunity” requires that this approach be abandoned.

⁶² Other examples include federal income tax credits and deductions qualification thresholds, federal government subsidies in educational assistance, federal farm and commodities subsidies, and others.

⁶³ Consider, for instance, the recent case of *Horne v. Department of Agriculture*, which involved a federal agricultural program in which farmers were required to keep a portion of their raisin crops off the market in order to support raisin prices. 576 U.S. 350, 355 (2015). A farmer sued, claiming that the raisins that were removed from the market were “taken” by the government without compensation. *Id.* at 2425. The Court agreed, ignoring the benefits over the years that the farmer had received from the price supports generated by the program for the remainder of his raisin crops. *See id.* at 2434–36 (Breyer, J., concurring in part and dissenting in part). For academic discussions of “givings” theories, see Daniel D. Barnhizer, *Givings Recapture: Funding Public Acquisition of Private Property Interests on the Coasts*, 27 HARV. ENV’T L. REV. 295, 297 (2003); Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547, 590–608 (2001) (discussing public subsidies that enhance value of property “taken” by government); and compare S. AFR. CONST. ch. 2, § 25(3) (1996) (stating that compensation for property taken by government must include consideration of the extent of direct state investment and subsidy as it affects the value of the property).

Universal compensation for losses of private property that fall within the spirit of the takings mandate or other theories of fault has never been possible; it is impossible to reduce such complicated societal decisions to such simple terms. Takings law and other theories of fault have, to date, hidden the unequal values and choices that we have necessarily made under the pretext that they do not exist. In cases of catastrophic loss, where claimed “innocent loss” is undeniable and desperately affects millions, we will finally be forced to deal with deeper questions anchored in the meanings of equality and desert. Is equality served by treating the poor and the rich equally? Is it served by equal treatment of those who have been the recipients of public subsidies, largesse, and protection in the past and those who have been ignored? Is it served by equal treatment of ordinary individuals and commercial or industrial behemoths that claim equal victimization by government? Who our society actually is lies in the answers to these questions.

CONCLUSION

Equality is, in many ways, the most important animating principle in American society. It is a term that we use loosely and ubiquitously in our culture and law. Its meaning might seem to be obvious, but it rarely is. For instance, we all believe (at some level) in equality in democratic governance. By that we mean that all citizens are equal before the law. Yet, upon closer examination, that idea of equality proves to be inadequate. Equality in this context could mean equal opportunity to make one’s case at crucial times and places; equal voice, in the sense of the ability to be heard or the ability to influence; or equal outcomes, in the sense of equal benefit from official policies.

What is missing from this idea of equality is an underlying understanding of what democratic or representative government *substantively* guarantees. Whether we view unequal opportunity, voice, or outcomes as legitimate or illegitimate will depend upon what the democratic guarantee really is. The simple notion of equality does not answer such questions.

When it comes to equality and the protection of property, we stumble upon the same issues. “Equality” in cases of public indemnification for private loss must mean more than simple platitudes of “equal property protection” without regard to existing realities. When, as in cases of catastrophic loss, resources are insufficient, as they inevitably will be, we will be forced to make difficult *and articulated* choices on the basis of what the underlying, substantive idea of equality in our society demands. We will be required to abandon the mythology that “all property is protected

equally.” Indeed, as in many cases in life and in law, *inequality* will be the only way to achieve equality.