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Avenal v. State: Takings and Damagings in Louisiana

John J. Costonis*

I. INTRODUCTION

Choosing non-constitutional grounds to resolve controversies that pose difficult constitutional issues is a time-honored judicial practice. The judiciary's principal task, after all, is to decide the case before it. Admirable for its prudence, the practice nonetheless delays evolution of doctrine in areas that merit serious judicial attention.

Judicial silence shifts attention from the constitutional issue to the rationale the court employed to avoid it. Does the rationale contain clues suggesting an eventual outcome for the issue? No longer responsible for resolving it on the merits, judges often permit themselves—or are permitted by their colleagues—to speak more expansively in dicta. Is the rationale neutral, or does it instead add or subtract elements that, perhaps unsuspected by their author, cause the original constitutional issue to morph into something different?

These questions leap to the fore in the Louisiana Supreme Court's decision, *Avenal v. State*,¹ a class action involving over two hundred oyster leases, thousands of acres of leased state water bottoms, and more than \$1 billion in damage awards.² *Avenal's* issue, as framed in Louisiana and in companion federal litigation, was whether a state coastal restoration project diminishing the leases' value was a "taking" of the lessees' property under article 1, section 4 of the Louisiana Constitution.³ The project's diversion of fresh water from the Mississippi River over the leased acreage reduced the water's salinity to levels unsustainable for oyster culture.

The Louisiana Supreme Court ruled in favor of the state, but avoided the constitutional issue by validating a clause featured in

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1. *Avenal v. State*, 2003-3521 (La. 2004), 886 So. 2d 1085.

2. See Jeffrey Meitrodt & Aaron Kuriloff, *Shell Games*, Times Picayune (New Orleans), May 4, 2003, at A-18 (National).

3. See La. Const. art. I, § 4(A) ("Every person has the right to acquire, own, control, use, enjoy, protect and dispose of private property. This right is subject to . . . the reasonable exercise of the police power."); La. Const. art. I, § 4(B) ("Property shall not be taken or damaged by the state . . . except for public purposes and with just compensation [T]he owner shall be compensated to the full extent of his loss.").

most of the leases that held the state harmless for losses associated with its project.⁴ This essay's concern, however, is the basis upon which the Court disposed of the balance of the takings claims. It held that because *Avenal's* factual scenario raised not the takings, but the "damagings" issue,⁵ the action was prescribed under Louisiana Revised Statutes 9:5624.⁶

Prescription enabled the Court to sidestep the merits of this inverse condemnation action. It also encouraged Justice Victory, writing for the majority, and Justice Weimer, concurring, to forecast and perhaps reformulate in dicta the likely direction of the Louisiana inverse condemnation doctrine, as well as to profile key parallels and differences between its former version and federal counterpart.⁷

A. *The Takings/Damagings Roadmap*

Part II of this article explores this contribution, which corrects a variety of misconceptions advanced in *Avenal's* appellate court opinions. It constructs a roadmap that outlines the various categories of federal inverse condemnation actions under the Federal Constitution's Fifth Amendment, compares them to Louisiana Constitution, article 1, section 4 actions, and assesses the supposed differences between federal and state law advanced by *Avenal's* appellate court.

The section also probes the likelihood that the Louisiana Supreme Court may indeed have poured new wine into old bottles by excluding from its damagings analysis any consideration of whether Louisiana had expropriated or was itself the owner of the diversion project.⁸

4. *Avenal*, 886 So. 2d at 1099.

5. *Id.* at 1109–10.

6. *Id.* See also La. R.S. 9:5624 (2004). For a further discussion of this statute, see *infra* notes 90–110 and accompanying text.

7. See *infra* notes 60–63, 150 and accompanying text.

8. The reason for this exclusion appears directly linked to the roles played by the federal government and Louisiana in the acquisition of the project site, in the project's construction, and in the project's operation. As stated by the Federal Claims Court, the diversion project "for purposes of this case, was federal in nature." *Avenal v. United States*, 39 Fed. Cl. 778 (Fed Cl. 1995), *aff'd on other grounds*, 100 F.3d 933 (Fed. Cir. 1996). The project was authorized by Congress, which appropriated funds for the project. See Pub. L. No. 89-298, 79 Stat. 1073 (1965); Pub. L. No. 99-591, 100 Stat. 3341 (1986). Louisiana entered into a compact with the federal government in 1987 that obligated the state to maintain and operate the project following completion of construction; to be responsible for twenty-five percent of the project's construction costs; and to indemnify the federal government for damages arising from the construction, operation or maintenance of the project. *Avenal*, 39 Fed. Cl. 778. The state met the last of these requirements by inserting into leases executed in 1985 and later the hold harmless clause that resulted in the denial of most of the claims by the Louisiana Supreme Court. See

The classical paradigm for damagings demands that the injury inflicted on adjacent or nearby private property must be preceded by the government's prior expropriation of the site sponsoring the injury.⁹ If so, the inquiry then shifts to whether the injury at the private site qualifies as a constitutional damaging. If *Avenal* signals the demise of the prior expropriation element, the roadmap will have to be redrawn to recognize the birth of a novel cause of action for constitutional damagings in Louisiana.

B. "Damagings" in Louisiana

Part III targets a variety of conundrums associated with the damagings issue in Louisiana and in other states. Excluding the prior expropriation requirement, these concerns predate *Avenal*. But *Avenal*'s elevation of the damagings issue to front rank in Louisiana's inverse condemnation doctrine and likely modification of the damagings action make clarification or, in some cases, reformulation of a variety of the damagings issue's facets even more imperative. These facets are outlined below.

1. The Prior Expropriation Issue

Leading the list is the prior expropriation requirement that the Louisiana Supreme Court may have modified by categorizing *Avenal* as a damagings dispute. The issue can be posed from two angles. One has already been identified: if a damagings action requires a determination that government must previously have expropriated its own site, does *Avenal*'s exclusion of this element from its damagings analysis birth a novel inverse condemnation cause of action for Louisiana?

The second observes that takings occur in a single step. Whether the step that produces the injury is a regulation, a physical invasion,

Avenal, 886 So. 2d at 1102. The state did not expropriate the project site since the cooperation agreement obligated the federal government to acquire private lands; the state only had to tender state-owned lands free of encumbrances. See e-mail from Andrew Wilson, Counsel in the *Avenal* proceedings for the Louisiana Department of Natural Resources to John Costonis (Feb. 3, 2005) (on file with author). In consequence, title to the project site is held by the federal government. To sum up, Louisiana neither expropriated nor holds title to the project site; it is responsible, however, for operating and maintaining the diversion project. The oyster lessees' challenge, the Louisiana Supreme Court is careful to point out, addresses the "operation" of the project, not its ownership or construction. *Avenal*, 886 So. 2d at 1088, 1095 (emphasis added). In light of these facts, it is clear that *Avenal* deviates significantly from the classical paradigm for damagings actions as that paradigm is fully developed in the text at *infra* notes 35–40.

9. See *infra* notes 35–40 and accompanying text.

or something else, the government's prior behavior is of no import. Illustrative are the *Avenal* opinions in the fourth circuit below¹⁰ and the companion case in the federal courts.¹¹ Having accepted the oyster lessees' characterization of *Avenal* as a takings dispute, these courts had no reason to address how the diversion project site was acquired.

Takings, however, also contrast with damagings by the degree or character of the injury suffered. In fact, the Louisiana Supreme Court stated in *Avenal* itself that a taking requires the government's acquisition of "the right of ownership or one of its recognized dismemberments," while a damaging occurs when the "action of the public authority results in the diminution of the value of the property."¹² The key inquiry under this approach is simply to determine whether the dispute fits into the first or the second of these boxes. This inquiry, which in fact dominated the Louisiana Supreme Court's analysis of *Avenal*'s takings/damagings problem, ignores the manner in which the state acquired the site of its alleged damaging actions. This apparent unbundling of the prior expropriation requirement from the former damagings paradigm conceivably introduces a damagings action that will be analyzed in a manner similar to that employed for partial takings under the federal inverse condemnation doctrine.¹³ Alternatively, it may be termed an instance of "condemnation by nuisance."¹⁴

2. *Inverse Condemnation and Conventional Actions: Exclusive, Overlapping, or Blended?*

The second issue concerns where and how to draw the line between inverse condemnation actions, whether takings or damagings, and conventional actions in tort, nuisance, or property. The problem is not Louisiana's alone. Arvo Van Alstyne, for example, could have been describing the Louisiana picture in his account of the problem in California:

The law of inverse condemnation liability . . . is entangled in a complex web of doctrinal threads. The stark California constitutional mandate that just compensation be paid when private property is taken 'or damaged' for public use has

10. *Avenal v. State*, 01-0843 (La. App. 4th Cir. 2003), 858 So. 2d 697.

11. *Avenal v. United States*, 100 F.3d 933 (Fed. Cir. 1996).

12. *Avenal*, 886 So. 2d at 1105 (quoting *Columbia Gulf Transmission Co. v. Hoyt*, 215 So. 2d 114, 120 (La. 1968)).

13. For a further discussion of the partial takings doctrine, see *infra* notes 22-35 and accompanying text.

14. See *infra* notes 158-161 and accompanying text.

induced courts, for want of more precise guidance, to invoke analogies drawn from the law of torts and property as keys to liability. The decisional law, therefore, contains numerous allusions to concepts of 'nuisance,' 'trespass,' and 'negligence,' as well as to notions of strict liability without fault. Unfortunately, judicial opinions seldom seek to reconcile these divergent approaches. . . . Clarification would . . . be desirable in order to mark the borderline between the presently overlapping, and hence confusing, rules governing governmental tort and inverse condemnation liabilities¹⁵

One facet of the line-drawing issue is whether factual disputes that coincide with the constitutional damagings format may nonetheless be litigated as the conventional actions to which they are often analogized. If a private party rather than the state diverted water over his neighbor's leased oyster beds with the toxic effects recorded in *Avenal*, for example, he might incur liability under Louisiana Civil Code Article 667, which forbids him to "make any work on [his estate] which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him."¹⁶ Could *Avenal*'s oyster lessees have ignored the Louisiana Constitution altogether and framed their claim exclusively as a conventional action under Article 667?

Suppose, further, that arguments exonerating the state are available under the inverse condemnation format, but are excluded from the conventional format and that the state would be liable under the latter but not the former. The query again is whether the private claimant may opt solely for the conventional format.

15. Arvo Van Alstyne, *Inverse Condemnation: Unintended Physical Damage*, 20 *Hastings L.J.* 431, 431–32 (1968–1969).

16. Article 667 is the most frequently cited alternative or complement to article 1, section 4 of the Louisiana Constitution in decisions standing at the interface between conventional and damaging actions. For the leading cases, see *infra* notes 127–145 and accompanying text. The article's selection undoubtedly traces to the similarity of the factual scenarios prescribed in the article and what this essay labels "injurious affection" actions, namely activity by the owner of one site—the government in the case of the injurious affection action—that injuriously affects the holder of a property interest on a nearby site—the private party alleging the damaging in that action. See *infra* note 38 and accompanying text. But article 667's traditional role in this relationship has arguably been modified and perhaps even eliminated by an amendment in 1996 converting from strict liability to negligence actions all proceedings other than those premised on ultra-hazardous activities, which are defined to include only pile driving and blasting with explosives. William Crawford, *Tort Law* §§ 18.18–18.23, in 12 *Louisiana Civil Law Treatise* (2000). Negligent acts, however, are actionable only as torts, not as constitutional damagings in Louisiana. See *infra* notes 97–99 and accompanying text.

These questions are not fanciful, as *Avenal* itself illustrates. Article 1, Section 4 exonerates the state from liability for a taking or damaging if its act is a "reasonable exercise of the police power." Forceful dicta of Justices Victory and Weimer indicate that had the *Avenal* dispute—formatted as a damagings action—been decided on its merits, the state's police power arguments would have prevailed.¹⁷ But the police power rationale is foreign to conventional actions, which measure the jural relations between the state and private parties on the same basis as those between contending private parties alone.

The line-drawing problem reappears in a second guise that, while formally different, raises essentially the same questions as the first. Suppose the dispute *is* styled as a constitutional damagings action. May it nonetheless be resolved on the basis of conventional principles so that the state's obligations will be measured, again, by a yardstick pertaining to private parties?

Should *Avenal*'s oyster lessees, for example, have been able to insist that the state's constitutional damaging liability should be measured by whether or not a private party would be liable under Civil Code article 667 for like behavior? This question is better posed as two separate questions. Will the State avoid liability in the constitutional action if the private actor would not be liable under article 667? Conversely, will the State be liable in the constitutional action if the private actor would be liable under the article?

These questions are considerably more complex than their treatment in Louisiana cases suggests, as Part III will detail. Even if the State would not be liable if a private party would not be liable, the article 667 analysis should only be the first step of a larger constitutional inquiry.¹⁸ Likewise, proof that a private party is liable does not by itself establish state liability. Measuring jural relations between the State and a private party by those between private parties ignores the police power's central role in the former calculus, as noted above. Looking again to *Avenal* to illustrate the question, can the State's liability to the oyster lessees be established simply by showing that the diversion project, if conducted by a private party, violates article 667? Or is a second step necessary: namely, refuting the State's response that its diversion project is a "reasonable exercise of the police power" that overrides the oyster lessees' article 667 property right?¹⁹

17. See *infra* notes 60–63 and accompanying text.

18. See *infra* notes 132–133 and accompanying text.

19. The same police power/private right conflict discussed in text arises under

3. Title 9, Section 5624's Role in Inverse Condemnation Damagings Actions

Louisiana Revised Statutes 9:5624 provides that “[w]hen private property is damaged for public purposes, any and all actions for such damages are prescribed by the prescription of two years, which shall begin to run after the completion and acceptance of the public works.” The statute engages our attention because it has been the focus of more judicial discussion exploring the damagings/conventional action link than the relatively few damagings decisions addressing this topic.

Part III probes two questions relating to the statute. The first is whether the statute bears the exclusive relationship to constitutional damagings that Louisiana Revised Statutes 13:5111 bears to constitutional takings.²⁰ The second assumes a negative response. It asks whether the statute should be amended to limit its coverage solely to article 1, section 4 damagings actions and a second statute adopted that would be reserved solely for conventional actions for public works damages. These actions would treat damagings in parity with takings and separate constitutional from conventional actions.

the Federal Constitution's Fifth Amendment. Instructive for the resolution of *Avenal's* conflict between the state's interest in coastal restoration and the oyster fishermen's enjoyment of their leases is the lucid description of the conflict's jurisprudential structure in the United States Supreme Court's decision, *United States v. Willow River Power Co.*, in which the federal government's navigation servitude was held to supervene a power company's right to the unimpeded flow of waters from its dam:

Rights, property or otherwise, which are absolute against all the world are certainly rare, and water rights are not among them. Whatever rights may be as between equals such as riparian owners, they are not the measure of riparian rights on a navigable stream relative to the function of the Government in improving navigation. *Where these interests conflict they are not to be reconciled as between equals, but the private interest must give way to a superior right, or perhaps it would be more accurate to say that as against the Government such private interest is not a right at all.*

324 U.S. 499, 510, 65 S. Ct. 761, 767 (1945) (emphasis added).

Parallel reasoning, premised explicitly on the United States Supreme Court's decision in *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003, 112 S. Ct. 2886 (1992) leads Justice Victory, in dictum, to the conclusion that “compensation is not owed [to the oyster lessees] because no legally existing rights were being taken under those circumstances.” *Avenal v. State*, 2003-3521 (La. 2004), 886 So. 2d 1085, 1107 n.28.

20. Louisiana Revised Statutes 13:5111 not only establishes a prescriptive period for takings as Louisiana Revised Statutes 9:5624 does for damagings, but addresses a variety of other matters, including attorney fee awards that the latter statute ignores. *Compare* La. R.S. 13:5111 (2004), *with* La. R.S. 9:5624 (2004).

II. TAKINGS AND DAMAGINGS: A ROADMAP FOR LOUISIANA AND FEDERAL INVERSE CONDEMNATION DOCTRINE

A. Federal Takings Formats

Excluding damagings, which are not recognized as such in the federal inverse condemnation doctrine, federal courts utilize a catalog of formats that roughly parallel those employed in Louisiana. Federal takings may derive either from regulations or from public projects and other governmental activity. The former are termed regulatory takings because the restrictions imposed upon private property's use diminish its value. The latter are deemed physical occupations because the project typically entails some type of invasion or occupation of the claimant's land or other property interest.

The regulatory and physical takings formats resolve further into *per se* takings and *ad hoc* takings. A total regulatory taking is a *per se* taking. It occurs when a public regulation that deprives the property of all economic utility cannot be justified as a nuisance-preventing measure or as firmly warranted under "background principles of state property law." Illustrative of this format is *Lucas v. South Carolina Coastal Commission*,²¹ in which the United States Supreme Court invalidated a coastal regulation preventing an owner from building on his two vacant seaside lots.

A partial regulatory taking results when a public restriction severely reduces, but does not eliminate the targeted property's value. Illustrative is *Penn Central Transportation Co. v. City of New York*,²² in which the City's landmarks commission refused to permit construction of a fifty-two story building in the air rights above Grand Central Terminal. Conceding its inability to formulate a bright line test for partial regulatory takings, the United States Supreme Court settled instead for an *ad hoc* approach, addressing such factors as the "character of the governmental action," "the economic impact of the regulation on the claimant and, particularly, the extent to which the governmental action has interfered with distinct investment-backed expectations."²³

The last element proved decisive in the Court's refusal to find a taking. Grand Central Terminal was built in 1902 as a railroad station featuring various ancillary commercial uses, and has not only continued to function in that capacity, but still generates a reasonable return for its owner. Construction of an office tower above the terminal, on the other hand, derived not from these prior investment-

21. 505 U.S. 1003, 112 S. Ct. 2886 (1992).

22. 438 U.S. 104, 98 S. Ct. 2646 (1978).

23. *Id.* at 124, 98 S. Ct. at 2659.

backed expectations, but from the company's desire to cash in on a speculative real estate opportunity unrelated to the Terminal's traditional function.

Physical occupations may either be permanent or temporary. *Loretto v. Manhattan Teleprompter CATV Corp.*²⁴ teaches that permanent physical occupations are per se takings under the Fifth Amendment. The United States Supreme Court declared a statute a taking that authorized cable companies to permanently affix cable boxes to the roofs of Manhattan apartment buildings.²⁵ Non-permanent occupations, like partial regulatory takings, escape categorical resolution and are addressed on a case-by-case basis in decisions that scrutinize the activity's impact on the property owner's right to be free of trespassory incursions.²⁶

B. Louisiana Takings Formats

Louisiana takings law is less well defined than its federal counterpart.²⁷ The richest judicial observations often are expressed only as dicta, as *Avenal* reflects. They are found not only in Louisiana Supreme Court opinions, moreover, but scattered throughout the State's various circuits.

But Louisiana judges are attentive to Federal Fifth Amendment doctrine²⁸ and often treat federal and state takings law issues in tandem.²⁹ Likewise, the federal court's key distinction between

24. 458 U.S. 419, 102 S. Ct. 3164 (1982).

25. *Id.*

26. *See, e.g., Kaiser Aetna v. United States*, 444 U.S. 164, 100 S. Ct. 383 (1979) (deeming a public regulation a taking that denied the claimant-developer the right to exclude the public from boating in his development's private lagoon).

27. Louisiana constitutional jurisprudence, for example, tends to blur the line between takings and substantive due process by invalidating measures deemed takings, rather than by awarding compensation, and by using the takings label for ill-considered measures that fail to accord the injured landowner substantive due process. *See, e.g., Loraine v. City of Baton Rouge*, 57 So. 2d 409 (La. 1952); *Pomeroy v. Town of Westlake*, 357 So. 2d 1299 (La. App. 3d Cir. 1978). Nor does it define with the same precision as the federal courts the distinctions in text between categorical and non-categorical regulatory and physical takings although its approves outcomes that are largely compatible with these labels.

28. An impressive display of the Louisiana Supreme Court's sophisticated grasp of federal takings law appears in footnote twenty-eight of Justice Victory's opinion for the Court in *Avenal*, as complemented by Justice Weimer's concurrence. *See infra* notes 60–63 and accompanying text.

29. *See, e.g., Angelle v. State*, 212 La. 1069, 1080–81, 34 So. 2d 321, 324–25 (La. 1948); *Louisiana Seafood Management Council v. Louisiana Wildlife and Fisheries Comm'n*, 97-1367 (La. 1998), 715 So. 2d 387, 392; *Layne v. City of Mandeville*, 633 So. 2d 608, 611–12 (La. App. 1st Cir. 1993), *writ denied*, 94-0268 (La. 1994), 635 So. 2d 234; *Annison v. Hoover*, 517 So. 2d 420, 423 (La.

regulatory and physical takings is commonplace in Louisiana. Partial regulatory takings will be found in Louisiana when, as stated in the oft-quoted *Annison v. Hoover* decision, "there has been a substantial diminution in value to such an extent that there has been a destruction of a major portion of the property's value."³⁰ It comes as no surprise that destruction of the entirety of a parcel's economic value will amount to a total regulatory taking. Hence, one court's declaration that a "zoning action which deprives an owner of all practical use of his property without expropriation and compensation is unconstitutional."³¹

The physical taking category appears in decisions confirming that physical invasions endowing government with the "right of ownership or one of its recognized dismemberments" are takings.³² Various factual scenarios define these cases: government may acquire a parcel's naked ownership but fail to acquire an outstanding lease,³³ for example, or may encroach with its project upon a portion of the claimant's land.³⁴

But federal and Louisiana law diverge when the "action of the public authority results in the diminution in the value of the property." These actions, *Avenal* instructs, usher us into the realm of Louisiana damagings law for which there is no direct federal equivalent.

C. Louisiana Damagings Law Format

Key to appreciating this distinctive area of inverse condemnation doctrine and the classical damagings paradigm discussed earlier is understanding how the term "damaged" came to join the term "taken"

App. 1st Cir. 1987), *writ denied*, 519 So. 2d 148 (La. 1988); *Standard Materials, Inc. v. City of Slidell*, 96-0684 (La. App. 1st Cir. 1997), 700 So. 2d 975, 983-84.

It is not uncommon for Louisiana courts addressing article 1, section 4 takings or damagings issues to cite federal authority in support of their holdings. For example, a state highway plan that blocked access to the developer's subdivision was deemed a taking in *Rivet v. State*, 93-369 (La. App. 5th Cir.), 635 So. 2d 295, 297, *writ denied*, 94-1606 (La. 1994), 646 So. 2d 397. Offered in support of this holding was the statement in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019, 112 S. Ct. 2886, 2895 (1992), that when state activity causes a landowner "to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."

30. 517 So. 2d 420, 423 (La. App. 1st Cir.), *writ denied*, 519 So. 2d 148 (La. 1988).

31. *Pomeroy v. Town of Westlake*, 357 So. 2d 1299, 1304 (La. App. 3d Cir. 1978).

32. *See, e.g., Columbia Gulf Transmission Co. v. Hoyt*, 252 La. 921, 215 So. 2d 114 (1968).

33. *Huckabay v. Red River Waterway Comm'n*, 27,113 (La. App. 2d Cir. 1995), 663 So. 2d 414; *Naquin v. State*, 604 So. 2d 62 (La. App. 1st Cir. 1992).

34. *See Roy v. Belt*, 2003-1022 (La. App. 3d Cir. 2004), 868 So. 2d 209.

in the Louisiana and many other state constitutions. Projects occurring on expropriated land may diminish private property interests on nearby land as well.³⁵ They may do so physically: flooding of or the deposit of material by a drainage or highway project are illustrative. They may also do so despite the absence of trespassory physical contact by, for example, blocking access to private property by changing the grade of an abutting roadway.

In the pre-damaging clause era, injuries associated with activities occurring on previously expropriated public lands were deemed consequential, and hence non-compensable.³⁶ Indeed, a near-universal principle of nineteenth century federal and state law has been summarized by the leading eminent domain treatise as follows:

[W]hen [government's] devotion of land to the use for which it was taken injuriously affects neighboring land, in a manner that would be actionable at common law if the injury had been committed by a private individual without legislative sanction, but does not substantially oust the owner from the possession or deprive him of all beneficial use thereof, the owner of the injured land is not entitled to compensation under the constitution: *for merely damaging property does not necessarily constitute a taking.*³⁷

Without the damagings language, legislative authorization of projects that injuriously affect neighboring private property vetoed

35. The term "damagings" as used in the text, excludes severance damages, which pertain to the devaluation of property remaining with the claimant caused by the government's expropriation of the balance of its parcel. This article's focus is on injury suffered on non-expropriated private property in consequence of construction or the operation of activities on a nearby government-owned site which the government may have acquired consensually or through the exercise of eminent domain. However, doctrine arising in a severance context that is nonetheless common to Louisiana inverse condemnation law generally is discussed when appropriate to the context. See *infra* note 40, which addresses the three-pronged test announced in *State v. Chambers Investment Co.*, 595 So. 2d 598 (La. 1992). Although portions of the claimant's property had been formally expropriated in *Chambers*, the test nonetheless affords the standard format for judicial analysis of inverse condemnation takings and damagings, and, indeed, served that function in Justice Victory's *Avenal* decision, which, however, found it unnecessary to address all three of *Chambers*'s prongs. See *Avenal v. State*, 2003-3521 (La. 2004), 886 So. 2d 1085, 1104.

36. See Joseph G. Hebert, Comment, *Expropriation—Consequential Damages under the Constitution*, 19 La. L. Rev. 491, 492–93 (1959). For authoritative judicial treatment of the evolution of the state constitutional damaging clause and damaging action, see *McMahon v. St. Louis, Ark. & Texas R.R.*, 41 La. Ann. 827, 6 So. 640 (1889), and *Jarnagin v. Highway Comm'n*, 5 So. 2d 660 (La. App. 2d Cir. 1942).

37. Nichols' *The Law of Eminent Domain* § 6.20 (Julius L. Sackman ed., rev. 3d. ed. 1990) (emphasis added).

claims against the government. Insertion of this language cleared the way for inverse condemnation actions against these so-called "injurious affections" by cancelling this veto.³⁸

Damagings language found its way into the Louisiana Constitution in 1879.³⁹ A review of the State's inverse condemnation doctrine since that time reveals eight elements that have met with judicial approval, although two may prove less robust after *Avenal*.⁴⁰

Perhaps the most distinctive element of the inverse condemnation action is the first: governmental activity causing private injury must be deliberate or occur as a necessary consequence of an activity serving a public purpose. The constitutional language, "damaging of private property except for public purposes," the Louisiana Supreme Court insists, refers "exclusively to the power of eminent domain, i.e., the intentional or purposeful expropriation or appropriation of private property for public use or convenience."⁴¹

Second, the act producing the claimed injury must be legislatively authorized and advance a public purpose.⁴² Damages resulting from negligence do not meet the "public purpose" requirement because negligent acts, according to the courts, do not advance a public purpose even though the project occasioning them may do so.⁴³

38. See *Jarnagin*, 5 So. 2d at 664.

39. See *supra* note 36 and cited authority.

40. *Avenal*, like other inverse condemnation decisions, adverts to the three-pronged test for takings or damagings advanced in *State v. Chambers Inv. Co.*, 595 So. 2d 592 (La. 1992). See *Avenal v. State*, 2003-3521 (La. 2004), 886 So. 2d 1085, 1104. The elements are a constitutionally protected property interest, damage in a constitutional sense, and a public purpose sustaining the challenged activity. Some of the damaging action's elements identified in text can be assimilated to one of these three headings, but others would be drained of meaning if artificially compressed in this manner. Unlike *Avenal* and other damagings cases, moreover, *Chambers* engaged a fact situation featuring the expropriation both of the government's site and of a portion of the claimant's own parcel. *Chambers'* three variables are too limited, moreover, to facilitate evaluation of decades of Louisiana decisions bearing upon the interface between the constitutionally based inverse condemnation damagings action and conventional actions in tort, nuisance and property. These observations are advanced with some regret because reducing the damagings action to *Chambers'* three elements would enormously simplify the present inquiry. It would also definitively resolve the prior expropriation issue, see *supra* notes 10-14, because prior expropriation by the government of its project site plays no part in the *Chambers* formulation.

41. *Angelle v. State*, 212 La. 1069, 1077, 34 So. 2d 321, 323 (La. 1948)

42. See *McMahon v. St. Louis & Ark. & Texas R.R. Co.*, 41 La. Ann. 827, 829-30, 6 So. 640, 641 (La. 1889); *Jarnagin v. State Highway Comm'n*, 5 So. 2d 660, 664 (La. App. 2d Cir. 1942); *Mathis v. City of DeRidder*, 599 So. 2d 378, 391 (La. App. 3d Cir. 1992).

43. See *Estate of Patout v. City of New Iberia*, 98-0961 (La. 1999), 738 So. 2d 544.

Third, the injury to the claimant's property rights is their diminution in value by the public project.⁴⁴ Correlatively, the damagings remedy has traditionally been measured by the monetary value of the diminution, but is being liberalized in response to the 1974 Constitution's provision that the property owner be compensated "to the full extent of his loss."⁴⁵

Fourth, damagings actions are subject to a two-year prescriptive period.⁴⁶

Fifth, damages must be special to the claimant's property rather than general to the community.⁴⁷ How this distinction should be applied in specific instances is a source of continuing controversy. The factual issues are often complex. Enlarging the properties deemed damaged, moreover, correspondingly enlarges the project's public costs. The flooding of a single adjoining parcel by a public drainage construction project exemplifies the simple case. But how should the line be drawn in the case of the many victims of access-blocking highway construction, or, as in *Avenal*, of diversion projects impacting thousands of acres of Louisiana's coastal wetlands? A companion to the special/general distinction is that between remote damages, which are not compensable, and direct damages, which are.⁴⁸ Again, factual complexity and apprehension of unbounded public liability guarantee conflict over how damages should be characterized in particular instances.

Sixth, government will not incur liability for a project or activity challenged as an inverse condemnation taking or damaging if it qualifies under Article 1, Section 4 as a "reasonable exercise of the police power."⁴⁹ The reasonableness measure is the same for takings

44. See *Reymond v. State*, 255 La. 425, 451, 231 So. 2d 375, 384-85 (1970); *Jarnagin*, 5 So. 2d 660, 663 (La. App. 2d Cir. 1942).

45. La. Const. art. 1, § 4(B). See, e.g., *State v. Chambers Inv. Co.*, 595 So. 2d 598, 602 (La. 1992); *Huckabay v. Red River Waterway Comm'n*, 27,113 (La. App. 2d Cir. 1995), 663 So. 2d 414, 424; *Mossy Motors, Inc. v. Sewerage and Water Bd. of City of New Orleans*, 1998-0495 (La. App. 4th Cir. 1999), 753 So. 2d 269, 276.

46. See La. R.S. 9:5624 (2004).

47. See, e.g., *Constance v. State*, 626 So. 2d 1151, 1156 (La. 1993); *Reymond*, 255 La. at 447-48, 231 So. 2d at 383-84.

48. *Reymond*, 255 La. at 450, 231 So. 2d at 384; *McMahon v. St. Louis, Ark. & Texas R.R. Co.*, 41 La. Ann. 827, 831, 6 So. 640, 641-42 (La. 1889).

49. See La. Const. art. 1, § 4(A). In *Avenal*, this limitation received the affirmative attention of Justice Victory and Justice Weimer, both of whom reflected in dicta that the damage suffered by the lessees was non-compensable on police power grounds. See *Avenal v. State*, 2003-3521 (La. 2004), 886 So. 2d 1085, 1107 n.28 (Victory, J., for the majority), 1115 n.8 (Weimer, J., concurring). Their endorsement of the non-compensated use of the police power's to avoid imminent peril or danger is not unique to Louisiana. See, e.g., *House v. Los Angeles County Flood Control Dist.*, 153 P.2d 950 (1944); *Gray v. Reclamation Dist. No. 1500*, 163 P. 1024 (1917); *Van Alstyne*, *supra* note 15, at 442-47.

and for damagings: do fairness or imperative requirements of public welfare demand that the costs associated with the governmental initiative be borne by those immediately impacted by it or, rather, by the community at large?

While firmly rooted in earlier constitutional jurisprudence, the final two elements, I believe, should either be reformulated or abandoned in response both to *Avenal* and to the larger quest for coherence in Louisiana's currently disjointed damagings doctrine. One is the prior condemnation requirement; the second is employment of rules applicable to private parties in conventional actions as a yardstick for government's liability in constitutional damagings actions.

D. Avenal and the Takings/Damagings Issue

Avenal calls to mind an ink blot test that triggers widely different perceptions. Confronted with the same facts in an action against the United States, the Court of Appeals for the Federal Circuit viewed *Avenal* as falling short of a partial regulatory taking because the oyster lessees flunked *Penn Central's* "distinct investment-backed expectation" test.⁵⁰ The fourth circuit majority opinion shadows *Lucas* in finding the equivalent of a total regulatory taking because it believed that the diversion project completely destroyed the oyster leases' economic value.⁵¹ A fourth circuit concurring opinion evokes *Loretto's* permanent physical occupation format by equating the project's flow of fresh water over the leased bottoms with the paving over of private land by a highway.⁵² Blurring the line between constitutional damagings and conventional actions, a fourth circuit dissenter insists instead that *Avenal* is a "delictual" action.⁵³

The last word, of course, goes to the Louisiana Supreme Court: *Avenal* is a damaging case.

May the same set of facts reasonably be portrayed as a taking on the federal plane and as a damaging in Louisiana? Certainly, given the absence of damaging language in the Fifth Amendment and its presence in article 1, section 4. Confronted with the injurious affection format targeted by the damaging language, federal courts have either rejected the takings claim on the ground that the damages were "consequential,"⁵⁴ or liberalized the taking concept so that Louisiana "damagings" become federal "takings." Arguably, the

50. *Avenal v. United States*, 100 F.3d 933, 937 (Fed. Cir. 1996).

51. *Avenal v. State*, 01-0843 (La. App. 4th Cir. 2003), 858 So. 2d 697, 705.

52. *Id.* at 708.

53. *Id.* at 742-43 (Tobias, J., dissenting).

54. *See Batten v. United States*, 306 F.2d 580, 583 (10th Cir. 1962), *cert. denied*, 371 U.S. 955, 83 S. Ct. 506 (1963).

federal court chose the latter course in the companion *Avenal* litigation: it equated the dispute with a partial regulatory taking and resolved it on the *Penn Central*-basis that the oyster lessees lacked a distinct investment-backed expectation in pre-project salinity levels.⁵⁵

In his concurring opinion in *Avenal*, Justice Weimer confirmed my analysis by observing that “what is considered ‘taken’ is a narrower concept in Louisiana when contrasted with federal law. Under federal law, interpretation of the term ‘taken’ is broader.”⁵⁶ This reasoning reflects the damaging category’s broad sweep in Louisiana. The State’s uncompensated acquisition of the right of ownership or its dismemberments—*Avenal*’s description of a taking—is infrequent because the State typically employs its eminent domain power to achieve such drastic interventions. But impairment of neighboring property’s value by the construction or operation of a public project, the case reports reflect, are commonplace. The uncertain line between compensable and non-compensable losses encourages government to avoid payment unless ordered to do so.

Avenal’s use of the formula equating damagings with diminutions in private property’s value should not be extended to regulatory takings, which also reduce property’s value, absent elimination of the prior expropriation requirement and establishment of a new damagings category that is the functional equivalent of a partial taking.⁵⁷ Louisiana courts routinely analyze value-diminishing land use legislation or regulations as regulatory takings, not as traditional damagings.⁵⁸ The State adopted the damagings language, moreover, specifically to address the consequences of public projects, not of public regulation.⁵⁹ Subjecting regulatory takings to the doctrinal confusion surrounding traditional damagings surely should be avoided if there is no need to do so. Finally, the equation will transform virtually every land use dispute into a presumptive damaging because these disputes are invariably triggered by a loss in property values associated with the challenged land use restriction.

Avenal affords dramatic evidence, albeit in dicta, that the police power can check private rights in the face of harsh private loss. Writing for the majority, Justice Victory highlighted *Lucas*’s

55. *Avenal v. United States*, 100 F.3d 933, 937 (Fed. Cir. 1996).

56. *Avenal v. State*, 2003-3521 (La. 2004), 886 So. 2d 1085, 1115 (Weimer, J., concurring).

57. For an exploration of this position, see *infra* notes 154–155 and accompanying text.

58. See, e.g., *Pomeroy v. Town of Westlake*, 357 So. 2d 1299 (La. App. 3d Cir. 1978); *Layne v. City of Mandeville*, 633 So. 2d 608 (La. App. 1st Cir. 1993), writ denied, 635 So. 2d 234 (La. 1994); *Annison v. Hoover*, 517 So. 2d 420 (La. App. 1st Cir. 1987), writ denied, 519 So. 2d 148 (La. 1988); *Standard Materials, Inc. v. City of Slidell*, 96-0684 (La. App. 1st Cir. 1997), 700 So. 2d 975.

59. See *supra* notes 36–40 and accompanying text.

insistence that even total devaluations of private property are not constitutionally objectionable if the State's action is premised on "background principles of nuisance and property law."⁶⁰ He announced two Louisiana background principles that would have barred the damagings claim at the federal and state levels had *Avenal* been decided on the merits. One is the public trust-based doctrine acknowledging the "right of the state to disperse fresh water . . . over saltwater marshes in order to prevent coastal erosion"⁶¹ The second is the State's police power entitlement to forestall the imminent peril that coastal erosion poses for the State.⁶² "Compensation is not owed" when background principles accord the state entitlements against private property rights, Justice Victory asserted, "because no legally existing rights [are] being taken under those circumstances."⁶³

The foregoing paragraphs assist in critiquing the fourth circuit's rejection of *Penn Central*'s applicability to *Avenal*'s facts on the ground that federal and Louisiana takings law are "different." Differences do exist, as we have seen, growing out of the evolution of the damagings cause of action as a unique element of state constitutional law. But the differences cited by the fourth circuit majority neither support its rejection of *Penn Central* nor cast doubt upon the parallels between federal and Louisiana takings law sketched out above.

The fourth circuit first asserted that the Fifth Amendment lacks a "damagings" clause,⁶⁴ and second, that its remedial standard is "just compensation" while article 1, section 4 requires compensation "to the full extent of [the owner's] loss."⁶⁵ These differences certainly exist, but they had no bearing at all on the court's determination that the diversion project is a taking. Whatever might be said about the takings/damagings dichotomy became irrelevant once the court chose to analyze *Avenal* as a taking. If a federal court agreed with the fourth circuit that the police power did not trump the oyster lessees' property rights and that the project totally destroyed these rights, moreover, it too would clearly have deemed the State's project a taking under

60. See *Avenal*, 886 So. 2d at 1107 n.28. The phrase derives from Justice Scalia's majority opinion in *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003, 112 S. Ct. 2886 (1992), in which he uses the phrase "background principles of the State's law of property and nuisance." *Id.* at 1029. But Justice Victory is presenting *Louisiana*, not federal law, in his statements about the public trust and imminent peril doctrines.

61. *Avenal*, 886 So. 2d at 1107 n.28.

62. *Id.*

63. *Id.*

64. *Avenal v. State*, 1999-0127 (La. App. 4th Cir. 2000), 757 So. 2d 1, 8.

65. *Id.* at 11-12.

Lucas v. South Carolina Coastal Commission.⁶⁶ Likewise irrelevant to the taking determination is the difference between the federal and Louisiana compensation standards since this difference does not come into play until *after* the taking analysis is completed.⁶⁷

III. DAMAGINGS ACTIONS: THE QUEST FOR COHERENCE

Louisiana's inverse condemnation jurisprudence is more orderly than appearances suggest. A reasonable framework for understanding damagings can be constructed from the jumble of decisions rendered since the damaging clause's introduction in 1879. But doing so requires clarification, if not reformulation of doctrinal elements questioned in Parts I and II. Reform also demands the judiciary's more disciplined appreciation of the interface between constitutional and conventional causes action and a more consistent and articulate superintendence of this appreciation by the state's highest court. Helpful as well would be a new statute extending the same support to damagings that Louisiana Revised Statutes 13:1511 affords to takings. *Avenal's* greatest legacy, perhaps, will be the stimulus it provides for the completion of these and related tasks that outstrip Part III's modest goal of highlighting some of the issues that demand the most immediate attention.

Even this lesser effort, however, faces a variety of impediments. One is that Louisiana opinions typically treat takings and damagings as twin components of the overall inverse condemnation format.⁶⁸ Justice Weimer confirms as much in his observation that "in Louisiana, taking and damage claims are treated the same for most purposes, and it is seldom necessary to delineate between taking and

66. 505 U.S. 1003, 112 S. Ct. 2886 (1992).

67. Writing for the majority in the fourth circuit opinion, Judge J. McKay also rejected *Penn Central's* reasoning on the basis of the holding of the Louisiana Supreme Court in *Vermillion Development Corp. v. State*, 7 So. 2d 167 (La. 1971), that knowledge of an expropriation does not bar a claim for compensation in the absence of bad faith. *Avenal*, 757 So. 2d at 12. Dissenting, Judge M. Walzer correctly stated both that Louisiana decisions, including many of those cited at *supra* note 29, are compatible with federal takings jurisprudence, and that *Vermillion* is inapposite because it addressed the question of the claimant's entitlement to compensation in a formal eminent domain proceeding, not the question of whether a taking has been established in an inverse condemnation action. *Id.* at 14-15

68. See, e.g., *Angelle v. State*, 34 So. 321, 326 (La. 1948); *Reymond v. State*, 255 La. 425, 446-47, 231 So. 2d 375, 383 (La. 1970); *State v. Chambers Inv. Co.*, 595 So. 2d 598, 602 (La. 1992); *Constance v. State*, 626 So. 2d 1151, 1155 (La. 1993); *Mossy Motors, Inc. v. Sewerage and Water Bd. of City of New Orleans*, 1998-0495 (La. App. 4th Cir. 1999), 753 So. 2d 269, 275-76.

damaging."⁶⁹ In consequence, an evaluation of damagings doctrine often must reference opinions in which takings were alleged. Care is required to insure that what was said about the inverse condemnation action in a takings context applies with equal force to damagings.⁷⁰

A second problem is that Louisiana decisions treading in the ambiguous space dividing inverse condemnation from conventional actions focus on results, not on careful scrutiny of how the results were reached. They stress issues of damage, remedies and prescription. They usually ignore the intrinsic character of the inverse condemnation action itself, often even ignoring whether a dispute's facts qualify it as an inverse condemnation or a conventional action. Relating the reasoning of particular decisions to one another or to a coherent, larger framework has not been a priority.⁷¹

Interestingly enough, it did not begin this way. On the contrary, the Louisiana Supreme Court commenced with and sustained a brilliantly conceived damagings doctrine⁷² that compares favorably with that of any other state in my judgment. Its legacy seems to have survived meandering lower court opinions and some anomalous utterances of its own along the way leaving the legacy intact but losing altitude. Louisiana damagings doctrine and inverse condemnation law generally would improve dramatically, I believe, if the Court reaffirmed this admirable legacy, revisiting problem areas and filling in analytic voids highlighted in this Part.

The focus on results at the expense of articulate analysis explains why various opinions blur conventional and constitutional principles

69. *Avenal v. State*, 2003-3521 (La. 2004), 886 So. 2d 1085, 1113.

70. In most instances, as Justice Weimer suggests, the issue does not arise because the category "inverse condemnation" includes both takings and damagings, and the judicial doctrines or comments featured in text apply to the overall category. Illustrative is *Angelle v. State*, 212 La. 1069, 34 So. 2d 321 (La. 1948), which, although addressed to a takings claim, explicitly references the damaging sub-category and, on the basis of the inverse condemnation doctrine that it establishes, overrules an earlier damagings case. See *infra* notes 74-82 and accompanying text. Other decisions must be parsed more carefully. See the discussion of *State v. Chambers Inv. Co.*, 595 So. 2d 598 (La. 1992), *supra* note 40.

71. Commenting on the imbalance between conceptual coherence and result-oriented pragmatism, Melvin Dakin and Michael Klein observe:

In Louisiana, . . . the courts appear to reach results on a far less theoretical plane [A]s a general proposition, it is probably less useful for a practitioner to attempt to master either a conceptual framework or its language than to operate on the not inaccurate presumption that the Louisiana courts operate on a more pragmatic plane. . . . Accordingly, this chapter has been organized in an effort to reflect this working judicial perspective rather than any abstract theory of intrinsically consistent dogma relating to cognizable damage claims.

Melvin Dakin & Michael Klein, *Eminent Domain in Louisiana* 62 (1970).

72. See *infra* notes 74-82 and accompanying text.

and formats. It also explains why the following paragraphs often advert to judicial comments arising in response to Louisiana Revised Statutes 9:5624 rather than to Louisiana Constitution article 1, section 4. Result-oriented decisions link more immediately to the former than to the latter, as confirmed by the striking number of public works-related damages cases that are resolved by gaming various prescription statutes, rather than by well-considered decisions on the merits. Although admirably more thoughtful in content and dicta than these cases, *Avenal* itself is of this genre.

Finally, the doctrinal issues selected for discussion date back to the late-nineteenth century. Judicial and legislative attitudes can be expected to shift over such lengthy periods, as can the circumstances that account for the issues' original formulation. I have already referenced evidence of movement away from judicial policing of the divide between constitutional damagings and conventional actions, a movement that has gained greater ground in the appellate courts than in the State's highest court. Whether *Avenal* will encourage further movement or, given the enormity of the stakes involved in the dispute, will induce greater respect for the Court's own special legacy is one of the case's great questions for the future.

A. Constitutional Damagings

A useful preamble to the discussion that follows may be my statement of the constitutional damagings action's character, as developed in Parts I and II of this essay. *A constitutional damaging of private property rights occurs when, in pursuit of a public purpose, the state deliberately engages in a legislatively authorized project causing damages that are either a direct and purposeful result or a necessary consequence of the public purpose.*

Depending upon how *Avenal* is understood, the entity must either acquire its project property through a formal act of eminent domain, or simply possess this power, which remains dormant because the site's transfer occurs on some other basis. The damaging action derives from a constitutionally self-executing provision designed to compel entities possessing the power of eminent domain to provide the compensation that should have been granted through prior formal expropriation proceedings.⁷³ Its purpose is to insure that the costs of public projects are not improperly borne by those damaged by the activities. The claimants' immunity to economic loss is qualified, however, by subordination of their property rights to reasonable exercises of the police power. At issue in every inverse

73. See, e.g., *Chambers*, 595 So. 2d at 602; *Reymond v. State*, 255 La. 425, 446-47, 231 So. 2d 375, 383 (La. 1970).

condemnation action—taking or damaging—is the necessity of balancing private loss as reflected in the diminution of the value of the claimant's property against public welfare, as reflected by the State's police power needs.

1. Article 1, Section 4 Damagings: A Distinctive Cause of Action

The distinctive character of inverse condemnation actions resonates through a number of Louisiana opinions, which afford the core doctrinal position referenced immediately above. The most prominent is *Angelle v. State*,⁷⁴ which dealt with an alleged taking but authoritatively addressed both takings and damagings as eminent domain-based actions. *Angelle* has proven influential not only in subsequent damaging cases, but in the interpretation of Louisiana Revised Statutes 9:5624.

Angelle arose from a sweet potato disinfection program administered by the State's agriculture department to eradicate sweet potato weevils. The plaintiff's produce was destroyed at a railroad terminal where the state agents who conducted the spraying negligently caused a fire. The plaintiff sought to avoid a sovereign immunity bar to a tort action by characterizing the crop's loss as an unconstitutional taking of his property.⁷⁵

The Louisiana Supreme Court denied the claimant the option of characterizing as a tort an event that conformed to the inverse condemnation format, thereby erecting a firm barrier between tortious acts and constitutional takings or damagings. Torts, the Court stated, are "as far removed from a deliberate appropriation as anything could be: forsooth, a wholly unintentional destruction which served no public purpose whatever."⁷⁶ The "taking or damaging of the private property," according to the Court, must be "intentional or occur[] as a necessary consequence of the public undertaking. . . . In such matters, the damage is on a parity with the intentional taking or damaging under the power of eminent domain."⁷⁷

74. 212 La. 1069, 34 So. 2d 321. *Angelle's* application to the damagings as well as takings inverse condemnation category is apparent not only in its express reference to both categories, but to its explicit disagreement with dicta in *DeMoss v. Police Jury of Bossier Parish*, 167 La. 83, 118 So. 700 (1928), in which a claimed constitutional damaging of property associated with the parish's construction of a road was found despite the parish's negligence. *Angelle*, 212 La. at 1076-77, 1086-87, 34 So. 2d at 323, 326-27.

75. *Id.* at 1069, 34 So. 2d at 323.

76. *Id.* at 1077, 34 So. 2d at 323.

77. *Id.* at 1085, 34 So. 2d at 326.

The Louisiana Court relied directly on United States Supreme Court decisions distinguishing between inverse condemnation and tort actions as a basis for establishing jurisdiction of the United States Claims Court, which is authorized by the federal Tucker Act to hear the former but not the latter.⁷⁸ Summarizing federal precedents, the *Angelle* Court stated that “no claims are sustainable against the United States unless there is an intentional taking of the private property—that is, a taking for a public purpose unrelated to a tortious destruction or damaging by an agent of the government.”⁷⁹ This rule, *Angelle* pronounced, “applies with equal force to suits against the State.”⁸⁰

Subsequent decisions sustain both this sharp division between inverse condemnation and conventional actions and the former’s preemption of the latter. Illustrative is *Reymond v. State*.⁸¹ The *Reymond* plaintiff successfully invoked Civil Code article 667 in the courts below to obtain recovery for structural damage to her house caused by the construction of an adjacent highway. But the Louisiana Supreme Court rejected the article’s applicability because, it stated, “the damage complained of . . . arose out of and in connection with a public body’s exercise of eminent domain, and the recovery . . . is provided in special constitutional and statutory provisions for the exercise of the right of eminent domain.”⁸²

*Gray v. State*⁸³ is another Louisiana Supreme Court decision that refuses to blur the boundary between constitutional and conventional actions on the basis of misconceived analogies. When the State expropriated land for a highway, it also acquired a temporary servitude for a borrowing pit on adjacent private property. Subsequently, it chose an alternative pit location and removed fill from that location for the project. Unwittingly, it failed to comply with norms governing rescission of the first servitude or acquisition of the second.⁸⁴

The claimants desired to recover the excavated fill’s value, but could do so only by suing in tort because the inverse condemnation

78. 28 U.S.C. § 1491(a)(1) (2004).

79. *Angelle*, 212 La. at 1081, 34 So. 2d at 325.

80. *Id.* The Louisiana rule that an inverse condemnation action differs from a tort action because the damages associated with the former must be a deliberate or necessary consequence of governmental activities that serve a legislatively authorized public purpose closely tracks the federal rule. *See, e.g.*, *Sanguinetti v. United States*, 264 U.S. 146, 44 S. Ct. 264 (1924); *Myers v. United States*, 323 F.2d 580 (9th Cir. 1963); *Moden v. United States*, 60 Fed. Cl. 275 (2004); *Berenholz v. United States*, 1 Cl. Ct. 620 (1982).

81. 255 La. 425, 231 So. 2d 375 (La. 1970).

82. *Id.* at 446, 231 So. 2d at 383.

83. 250 La. 1045, 202 So. 2d 24 (1967).

84. *Id.*

remedy was then limited by the value of the real property's depreciation, which in this case was considerably less than the fill's value.⁸⁵ They succeeded by persuading the lower court to portray the state's action as a "trespass in legal bad faith for which the [state] must respond in tort."⁸⁶

The supreme court reversed, rejecting the plaintiffs' "extravagant demands for redress in tort" as "patently erroneous."⁸⁷

[I]t makes no difference in determining the amount to be awarded that the property was appropriated and not formally expropriated. Albeit in appropriation cases the condemning authority does not obey the mandate of the law that the compensation be paid before the taking, the non-compliance of this condition precedent to the condemnation does not subject the appropriator to a penalty, for when the owner recovers just compensation he recovers all the law gives him.⁸⁸

These opinions refuse to allow inverse condemnation actions to be resolved under conventional rules or to be pursued as conventional actions—the torts of negligence (*Angelle*) or strict liability (*Reymond*) or of conversion and trespass (*Gray*). They recognize that substituting a conventional for a constitutional action on the basis of these analogies is to confuse superficial likeness with fundamental difference. Private persons who commit torts, create nuisances, or violate the immovable property rights of others do not engage in legislatively authorized behavior, do not seek to achieve nor are empowered to implement public purposes, do not possess or exercise the power to compel transfer of private property rights, and most certainly cannot invoke the sovereign police power as a basis for sheltering their damage-producing activity.⁸⁹

2. Title 9, Section 5264: An Exclusive Companion to Article 1, Section 4 Damagings?

A question parallel to that posed above under article 1, section 4 pertains to the coverage of Louisiana Revised Statutes, 9:5624. Does this statute prescribe constitutional damagings actions only, or does it cover conventional actions as well? Despite apparent authority to

85. *Id.* at 1056–57, 1059, 202 So. 2d at 28, 29.

86. *Id.* at 1060, 202 So. 2d at 29.

87. *Id.* at 1058, 202 So. 2d at 28.

88. *Id.* at 1061, 202 So. 2d at 30.

89. For a more recent decision that clearly sets forth the distinctions advanced in text between constitutional inverse condemnation and conventional tort, see *Mathis v. City of DeRidder*, 599 So. 2d 378 (La. App. 3d Cir. 1992).

the contrary,⁹⁰ the statute could be construed to pertain to constitutional damaging actions exclusively, just as Louisiana Revised Statutes 13:1511 pertains only to constitutional takings.

Supporting this construction are parallels in the wording of the statute and article 1, section 4; judicial application of *Angelle's* "necessary consequence" requirement to actions prescribed by the statute; and a construction of the statute's phrase "public works" that expressly aligns the statute with the "injurious affection" category targeted by the damagings clause. My purpose in addressing these factors is not to quarrel with cases construing the statute's coverage to pertain both to constitutional damagings and to conventional causes of action. It is too late in the day for that debate. Rather, the discussion demonstrates how easily blurred the line between the two has become, and why it would be desirable to substitute two statutes for this single statute, devoting one exclusively to damagings and the other to conventional actions.

Adopted two years after *Angelle* and subsequently revised, the statute provides, "When private property is damaged for public purposes any and all actions for such damages are prescribed by the prescription of two years, which shall begin to run after the completion and acceptance of the public works."⁹¹

Article 1, section 4 states that "*property shall not be . . . damaged by the state . . . except for public purposes.*"⁹² The statute advances a two-year prescriptive period for "*property*" that is "*damaged for public purposes*" by "*public works*", whose completion and acceptance commence the running of the prescriptive period.⁹³ The parallelism of the language is undeniable: article 1, section 4 speaks to "*property*" "*damaged by the state*" for "*public purposes*"; the statute references "*property*" "*damaged*" for "*public purposes.*"⁹⁴ If the question of parallel meanings of the two provisions turns on their

90. See, e.g., *Lyman v. Town of Sunset*, 500 So. 2d 390 (La. 1987) (action for damages to an immovable resulting from municipal landfill); *Small v. Avoyelles Parish Police Jury*, 589 So. 2d 1132 (La. App. 3d Cir. 1991) (suit for property damage and personal injuries resulting from sewage back-up); *LeBlanc v. City of Lafayette*, 558 So. 2d 259 (La. App. 3d Cir. 1990) (suit for damages resulting from proximity of municipal landfill); *Boudreaux v. Terrebonne Parish*, 422 So. 2d 1209 (La. App. 1st Cir. 1982) (suit for damages in tort alleging trespass). Disputes in which government acquired its site consensually rather than through eminent domain have traditionally not been included in the constitutional damaging category and hence were actionable on a conventional basis. See *infra* notes 104–107 and accompanying text. For a listing of such cases deemed subject to coverage under La. R.S. 9:5624, see *infra* note 106.

91. La. R.S. 9:5624 (1991).

92. La. Const. art. 1, § 4.

93. La. R.S. 9:5624 (1991).

94. Compare La. Const. art. 1, § 4, with La. R.S. 9:5624 (1991).

use of parallel language, arguing as an original matter that the statute is not exclusively linked to constitutional damagings is a challenge indeed.

The Louisiana Supreme Court's opinion, *Estate of Patout v. City of New Iberia*,⁹⁵ appears to reinforce the exclusivity of the linkage by holding that, like the damages associated with an article 1, section 4 action, those associated with actions prescribed by the statute must be a "necessary consequence" of the government's pursuit of a public purpose. *Patout* was brought as a trespass action to recover damages from a city that negligently dumped refuse on the claimants' lands while operating an adjacent landfill. In a familiar scenario the suit turned into a battle over which of three prescriptive periods governed the action: the general delictual prescriptive period of one year found in Louisiana Civil Code article 3492, the two-year period for damagings under Louisiana Revised Statutes 9:5624, or the three-year period for takings under Louisiana Revised Statutes 13:5111.⁹⁶

The Court opted for the delictual prescription statute.⁹⁷ It engrafted on the two other statutes the article 1, section 4 requirement, earlier announced in *Angelle*, that the damage suffered must be a "necessary consequence" of achieving the public purpose.⁹⁸ Consistent with *Angelle*, it held that damages resulting from the city's negligence fail this test.⁹⁹

Louisiana Revised Statutes 9:5624's additional reference to "public works" arguably strengthens the case that it covers only damagings actions. The damaging clause was added to state constitutions to compensate for public works' damages that, absent the clause, would not have been compensable.¹⁰⁰ The "public works" language, therefore, would seem to target the "injurious affection" format that the article 1, section 4 damaging action was designed to compensate.

It is useful to pause at this point to consider the role that the "necessary consequence" element could have played, and with requisite judicial and legislative clarification, still can play as the bedrock of a clear, principled, and coherent rationale dividing

95. 1998-0961 (La. 1999), 738 So. 2d 544.

96. *Id.* at 548-49. See also La. Civ. Code art. 3492; La. R.S. 9:5624, 13:5111 (1991).

97. *Patout*, 738 So. 2d at 555.

98. *Id.* at 552-53, 555.

99. *Id.* at 554 (La. R.S. 9:5624), 555 (La. R.S. 13:511).

100. See *supra* notes 36-40 and accompanying text. An author writing within the decade in which Louisiana Revised Statutes 9:5624 was enacted concurs with the position advanced in the text by his assertion that "... R.S. 9:5624 squarely contemplate[s] consequential damages . . .," a term he defined in a manner that coincides with this essay's term "injurious affection." See Hebert, *supra* note 36, at 502.

constitutional damagings from conventional actions. This is precisely the element's role in federal law today, as it has been essentially since the time the damagings clause was adopted in Louisiana. *Angelle* explicitly borrowed the element from federal law, enshrining it in Louisiana inverse condemnation law for precisely the same purpose. Although written almost a half-century later, *Patout* brings *Angelle* squarely into the present by what appears to be the brilliant *tour de force* of linking through the "necessary consequence" element the federal rule, the article 1, section 4 rule as announced in *Angelle*, and the scope of Louisiana Revised Statutes 9:5624's coverage.

Alas, Louisiana damagings law never quite achieved this take-off, and indeed seems to have stalled on the runway of *Patout* itself with the Court's footnoted declaration that "[w]e decline to address the question of whether negligence on the part of a public entity or its agents will always preclude the application of R.S. 9:5624 as some lower courts have held."¹⁰¹ With this statement the Court not only cast doubt on the organic linkages to federal and article 1, section 4 law that are robustly supported by the "necessary consequence" element, but called into question even the durability of the statute's negligence exception. It did so without explanation or discussion, as so often occurs at the critical points in the evolution or devolution of Louisiana damagings law.

As matters stand today, the case reports feature a variety of opinions extending the statute's coverage to actions to proceedings they treat as conventional actions. Why so? The answer is not clear, in part because, again, the issue is simply ignored in a number of the opinions applying its coverage to these actions.¹⁰² Their muteness calls to mind the Dakin and Klein observation that the search for an "abstract theory of intrinsically consistent dogma relating to cognizable damage claims" in Louisiana doctrine is misguided because the "Louisiana courts operate on a more pragmatic plane."¹⁰³ Pragmatism unfortunately is not enough. *Avenal* brings home, as few cases can, the stakes in massive public and private costs and in risks to public safety and health that need to be managed by a principled, coherent legal structure governing constitutional damagings law. The quest for coherence ought not to be viewed as a pursuit of theory for theory's sake, but as a call for rational management of the recurrent tension between community welfare and private loss.

Another possible explanation for the statute's coverage of constitutional and conventional actions is suggested by *Chaney v.*

101. *Patout*, 738 So. 2d at 553 n.8.

102. See *supra* note 90.

103. Dakin & Klein, *supra* note 71, at 62.

Travelers Insurance Co.,¹⁰⁴ a Louisiana Supreme Court opinion that appears to have denied constitutional damages status to disputes flunking the prior expropriation requirement.¹⁰⁵ *Chaney* arguably could explain a number of prescription opinions¹⁰⁶ that would otherwise seem aberrant in treating inverse condemnation disputes as conventional actions.¹⁰⁷

A third possibility may well be sovereign immunity's fall from grace in Louisiana. During an earlier era, litigants struggled to shoehorn their claims into the constitutional damages box to avoid the sovereign immunity bar. With the latter's erosion, the courts may feel less compelled to police the line between tort and inverse condemnation as rigorously as late-nineteenth century judges did in *McMahon v. St. Louis, Ark. & Texas R.R. Co.*,¹⁰⁸ or mid-twentieth century judges, in *Angelle v. State*.¹⁰⁹

Whatever the source of the problem, legislative clarification would seem called for in this uncertain area. Louisiana Revised Statutes 9:5624 should be amended to serve the same purposes in relation to constitutional damages that title 13, section 1511 serves for constitutional takings. If the prior condemnation requirement remains vital in the post-*Avenal* era, the requirement should be specifically incorporated into the amended statute so that the only "public works" covered by it are those conducted on premises formally expropriated by the State.

Conventional actions against the State that are currently covered by Louisiana Revised Statutes 9:5624 should receive coverage under a newly drafted prescription statute,¹¹⁰ or be remitted for

104. 259 La. 1, 249 So. 2d 181 (La. 1971).

105. This requirement is discussed in the text accompanying *supra* notes 10-14.

106. See, e.g., *Florsheim v. State*, 201 So. 2d 155 (La. App. 2d Cir. 1967) (damage to claimant's buildings and parking lot caused by highway construction; claimant sold land for highway right of way and granted state a servitude for construction purposes); *Wilson v. City of Baton Rouge*, 683 So. 2d 382 (La. App. 1st Cir. 1997) (erosion of claimant's land by municipal canal project; claimant's predecessor in title sold canal right of way to city); *Oswalt v. Irby Constr. Co.*, 424 So. 2d 348 (La. App. 2d Cir. 1982) (destruction of claimant's irrigation levees by construction of pipeline; pipeline right of way granted by claimant).

107. An earlier appellate court opinion, *Miller v. Colonial Pipeline Co.*, 173 So. 2d 840 (La. App. 3d Cir. 1965), contests this position. The court probed whether Louisiana Revised Statutes 9:5624 pertained to a dispute in which a pipeline company obtained its right of way by grant. The court replied in the affirmative, stating that "[p]rivate property may be damaged for public purposes in the course of work done under a conventional agreement as well as work done pursuant to an expropriation or appropriation. The crucial test is whether it was for a public purpose." *Id.* at 844.

108. 41 La. Ann. 827, 6 So. 640 (La. 1889).

109. 212 La. 1069, 34 So. 2d 321 (La. 1948).

110. At least two drafting issues attend the second statute. The first concerns the

coverage under one of the existing prescription statutes for conventional actions.

B. Chaney v. Travelers Insurance Company: Must Government Expropriate Its Own Site?

Earlier discussion details the nineteenth-century origin of the prior expropriation requirement as a component of injurious affection actions.¹¹¹ The requirement's survival into the second half of the twentieth century was apparently confirmed in the Louisiana Supreme Court's 1971 decision, *Chaney v. Travelers Insurance Company*.¹¹² In *Chaney*, a municipal contractor utilized the city's *existing right of way* to enlarge a canal. Vibrations from heavy equipment employed to install two large pipes damaged the plaintiff's adjacent dwelling. The Court found the city liable under Louisiana Civil Code article 667 rather than under article 1, section 4.¹¹³

The Court emphasized that the city already possessed the right of way on which its contractor worked, rather than expropriated it as an integral component of the canal improvement project. The project, the Court states, was not "the direct result of expropriation proceedings . . . nor was the damage . . . incidental to an expropriation proceeding . . ." ¹¹⁴ Quoting the damagings clause, it then advanced the expected observation that "since [the damage] has not been compensated as the Constitution directs, [it] must be recovered by resort to other principles of our law allowing recovery in such

length of the statute's prescriptive period. La. R.S. 9:5624's two-year period is not subject to extension by the continuing tort doctrine. *See Nuckolls v. State*, 337 So. 2d 313 (La. App. 2d Cir. 1976). That doctrine is applicable to Louisiana Civil Code article 3492, the one-year prescription statute for general delictual actions, however. The second concerns identification of the types of public actions that merit status as conventional actions. If the prior expropriation requirement survives *Avenal*, one action to be covered will be that arising from disputes in which government does not obtain its site through formal condemnation. But identifying other types of conventional actions is more problematic. The Legislature should give a great deal more attention than was possible in an essay of this limited scope to a systematic inventory and classification of all actions—excluding constitutional damagings actions—arising in consequence of public works that merit treatment as conventional actions. If there are too few to merit their coverage other than in existing prescription statutes, there may be no need for a second statute. Otherwise, the Legislature should draft its listing in a manner designed insofar as possible to avoid confusion with the constitutional damagings actions covered by amended La. R.S. 9:5624.

111. *See supra* notes 36–40 and accompanying text.

112. 259 La. 1, 249 So. 2d 181 (1971).

113. *Id.* at 16–17, 249 So. 2d at 186.

114. *Id.* at 9, 249 So. 2d at 184.

instances.”¹¹⁵ Rather than selecting the inverse condemnation damaging proceeding as the appropriate vehicle, however, it treated the matter as a delictual proceeding under Civil Code article 667.¹¹⁶ It offered no explanation for its choice beyond what might be gleaned from its earlier reference to the absence of an expropriation proceeding.

If the Court’s assertion that the damage was “not compensated as the Constitution directs” means simply that the city failed to expropriate the claimant’s property, why isn’t the usual inverse condemnation action a clear principle of law “allowing recovery in such instances”?¹¹⁷ Again, the answer is not clear. It may perhaps lie in the Court’s evident concern about the city’s acquisition of its project site consensually rather than through eminent domain.

If so, its position is vulnerable to severe criticism, particularly following *Avenal*. The focus of the constitutional damages action is the injury suffered by the private party on *its* site. Justice Victory’s opinion for the *Avenal* Court illustrates the point perfectly by, on the one hand, ignoring how the diversion project site was obtained while, on the other, devoting its full attention to the precise nature of the oyster lessees’ injury.

Likewise opposing *Chaney*’s apparent reasoning is the response that liability should not turn on government’s exercise of its eminent domain power, but on its capacity to employ that power should the need arise.¹¹⁸ Take *Chaney* as an example. If the City had not already possessed a right of way for use by its contractor, it most certainly could have obtained it through expropriation. The fact that it did not have to do so would seem a slender basis for proceeding under article 667 rather than under article 1, section 4.

Avenal’s apparent exclusion of the prior expropriation element warrants unbundling the constitutional damaging action from its

115. *Id.*

116. *Id.* at 16–17, 249 So. 2d at 186.

117. This was the Louisiana Supreme Court’s choice sixteen years earlier in *Buras Ice Factory v. Department of Highways*, 235 La. 158, 103 So. 2d 74 (1958), in which the Court evaluated under the inverse condemnation damages format a scenario in which the State acquired its property interest by grant, rather than by expropriation. See *infra* notes 127–132.

118. The argument, as phrased by one commentator, proceeds as follows:
[I]t should not . . . be . . . necessary . . . that there be an actual exercise of the power of eminent domain. It is the possession of the power of eminent domain that has placed the taker-actor in a position to injure the landowner. Thus even though there is no exercise of that power either on the injured landowner or the adjacent landowners, recovery should lie if market value is depreciated by the construction or operation of the improvement concerned.

Hebert, *supra* note 36, at 503 n.65.

original source in government's expropriation of the offending site. But—and this is a huge but—unbundling will birth a novel inverse condemnation damagings action for Louisiana. Discussion of this dramatic possibility is reserved for the article's conclusion.

C. Resolving Constitutional Damagings Disputes by Conventional Principles

Courts flout *Angelle's* signature treatment of inverse condemnation actions as distinct from conventional actions when they resolve the former by conventional rather than constitutional principles. Flouting may take the form either of ignoring that the case presents an inverse condemnation claim, or of by acknowledging the character of the claim but resolving it on the basis of conventional principles. The following discussion tracks these two patterns.

1. Treating Damagings Actions as Conventional Actions

Opinions least respectful of the *Angelle* paradigm are those that, without explanation, flatly ignore the damagings clause by converting damagings actions into conventional actions. Illustrative of this conversion are *Nuckolls v. Louisiana State Highway Department*¹¹⁹ and *Eubanks v. Bayou D'Arbonne Lake Watershed District*.¹²⁰ In *Nuckolls*, a state highway project flooded the claimant's adjoining land, a classic instance of the constitutional damaging format. The suit was brought, however, as a conventional action for "unauthorized alteration of the natural drain of rain waters causing the overflow onto [the plaintiff's] property."¹²¹ It failed, but not on the *Angelle* principle that an inverse condemnation action affords the exclusive route for the dispute. Rather, the Court ruled that the suit was prescribed under Louisiana Revised Statutes 9:5624.¹²²

In *Eubanks*, subdivision homeowners premised an action for damages on a "failure to warn theory"¹²³ against a water district under a similarly classic inverse condemnation scenario—flooding of private property by a public project that dammed a bayou and directed overflows through a spillway in the vicinity of the claimants' homes. As in *Nuckolls*, the court invoked the prescription statute to deny liability while ignoring the underlying constitutional damaging

119. 337 So. 2d 313 (La. App. 2d Cir. 1976).

120. 32,334 (La. App. 2d Cir. 1999), 742 So. 2d 113.

121. *Nuckolls*, 337 So. 2d at 314.

122. *Id.* at 315.

123. *Eubanks*, 742 So. 2d at 117.

issue.¹²⁴ No explanation for electing not to present and resolve the dispute as an inverse condemnation action was offered.

2. *Resolving Damaging Actions Under Conventional Principles*

This essay's Introduction identified two questions that arise when courts make reference to conventional principles, such as Louisiana Civil Code article 667, in resolving disputes they concede to be inverse condemnation damaging actions.¹²⁵ The first is whether government will not be liable if a private party behaving similarly would not be liable. The second question is whether the government will be liable if the private party would be liable.

The answer to the first question is clearly yes. The answer to the second is not clear. A number of cases suggest the answer is also yes.¹²⁶ But these are cases in which the issue of the State's liability on constitutional grounds is not in issue. Suppose that issue was raised, and the state was exonerated on a constitutional ground. Would the state nevertheless remain liable on conventional grounds?

a. Buras, Chambers, and Constance: Reasoning by Analogy or by Sound Constitutional Analysis?

Buras Ice Factory v. Department of Highways,¹²⁷ *Department of Transportation v. Chambers Investment Co.*,¹²⁸ and *Constance v. State*¹²⁹ address the impact of Louisiana Civil Code article 667 on inverse condemnation claims, and all determine that the challenged action or project would not have violated the claimant's article 667 rights if engaged in by a private actor rather than by the state. These opinions leave no doubt that the state will not be liable in an inverse condemnation action if a private individual will not be liable under article 667. With the possible exception of *Constance*, however, they do not tell us why.

Nor does their reasoning definitively answer the question whether the State will be liable if the private party would have been liable

124. *Id.* at 118. If either *Avenal* or *Chambers*, both of which ignore the prior expropriation element, more accurately state Louisiana damagings law than *Chaney*, the cases cited at *supra* note 106 also need to be added to the category of decisions that convert constitutional damagings actions into conventional actions.

125. See *supra* notes 15–19 and accompanying text.

126. See, e.g., *Mossy Motors, Inc. v. Sewerage and Water Bd. of City of New Orleans*, 1998-0495 (La. App. 4th Cir. 1999), 753 So. 2d 269, 275, 278, 281–82; *Kendall v. State*, 168 So. 2d 840, 842–44 (La. App. 2d Cir. 1964).

127. 235 La. 158, 103 So. 2d 74 (La. 1958).

128. 595 So. 2d 598 (La. 1992).

129. 626 So. 2d 1151 (La. 1993).

under that article. Other cases answer this question affirmatively.¹³⁰ But they do not tell us how this liability, which is either premised on an analogy to or is a direct application of conventional principles, would fare against a determination in the same case that a police power defense exonerated the State of constitutional liability.

In *Buras*, a landowner who sold ice to professional fishermen from his ice factory located at the end of a canal brought an article 1, section 4 damaging action against the State.¹³¹ Having been granted a right of way by the canal's owner, the State built a roadway across the canal that severely diminished the value of the claimant's property by blocking the fishermen's access to the factory. Ruling against the claimant, the Court stated that the constitutional damaging provision "applies only in cases . . . where the public improvement . . . would give rise to an action for damages under Articles 2315 or 667 of the Civil Code had it been done by an individual or private corporation."¹³²

Does the Court's use of the term "applies" signify that the Civil Code articles govern the inverse condemnation action's outcome, and that liability under article 667 by itself warrants liability under Article 1, Section 4? Or does it mean something very different and entirely respectful of the portrayal of the inverse condemnation action in *Angelle*, *Reymond*, and *Gray*: namely, that establishing that a private actor would be liable under the articles suffices only to confirm that the injured claimant possesses a constitutionally cognizable property right against another private party, while leaving to a succeeding inquiry whether this right will overcome or be subordinated to the State's police power exercise or to other original elements of the inverse condemnation action. *Buras* never asks this question, and, therefore, does not answer it.

A similar scenario is repeated in *Chambers*, an opinion which makes clear that, absent a property right, the claimant lacks one of the three essentials necessary to prevail in an inverse condemnation action.¹³³ The other two are that the claimant suffer damage in a constitutional sense and that the State project serve a public purpose.¹³⁴ At issue in *Chambers* was whether the claimant suffered an article 1, section 4 damaging because construction of a highway on land expropriated from the middle of the claimant's tract occasioned financial loss associated with a multi-year delay in the claimant's development and marketing of a real estate development on its retained land. An owner's right to develop his property and the

130. See *supra* note 126 and cited cases.

131. *Buras*, 235 La. 158, 103 So. 2d 74.

132. *Id.* at 179, 103 So. 2d at 82.

133. *State v. Chambers Inv. Co.*, 595 So. 2d 598, 603 (La. 1992).

134. *Id.*

State's provision of roadway infrastructure satisfied the property interest and public purpose requirements, respectively.¹³⁵

Turning to the "damaging in a constitutional sense" element, Justice Dennis, the opinion's author, stated that

in order to decide whether the State caused any damage to the claimant's right of ownership, we must determine whether the State's construction activities resulted in inconveniences that must be tolerated by the claimant under Article 668 or, rather, resulted in more serious inconveniences or interference that may be suppressed under Article 667.¹³⁶

He added that "as long as the activities on the State's land do not exceed the level of causing the claimant 'some inconvenience,' there can be no taking or damaging of the claimant's property right."¹³⁷ These statements likewise do not reach the issues left open in *Buras*.

Constance entailed a damagings claim premised on a partial blockage of access to the claimant's commercial property. Chief Justice Calogero's majority opinion combines elements of *Reymond* and *Chambers* in ruling against the damagings claim. The claimant failed to satisfy either *Reymond*'s requirement that there be special damage peculiar to the property,¹³⁸ or Civil Code article 667's standard that, to overcome qualifications established in Civil Code article 668, it suffer some type of excessive or abusive conduct.¹³⁹

But this majority opinion and Justice Dennis's concurrence come much closer to resolving the questions posed above than the two previous decisions. The *Constance* opinions strongly suggest, first, that the police power supervenes conventional liability, and, second, that a finding of article 667 liability does not establish inverse condemnation liability but either is irrelevant to or is merely a preliminary component of that inquiry as it has been shaped by *Angelle*, *Reymond*, and *Gray*.

Chief Justice Calogero, for example, opened his analysis with an explicit nod to article 1, section 4's subordination of private property rights to "reasonable statutory restrictions and the reasonable exercise of the police power."¹⁴⁰ Only some lines after this statement does he add that "a landowner's right of ownership is *also* limited by Civil Code articles 667 and 668."¹⁴¹ Finally, he endorsed the primacy of the police power in the context of the traffic diversion context posed

135. *Id.* at 603–05.

136. *Id.* at 604.

137. *Id.* at 605.

138. *Constance v. State*, 626 So. 2d 1151, 1156–57 (La. 1993).

139. *Id.* at 1157.

140. *Id.* at 1155.

141. *Id.* (emphasis added).

by *Constance*: “it has long been recognized that a public body has the right, under its police power, to divert traffic without subjecting itself to liability.”¹⁴²

Justice Dennis went even further in passages that appear to clarify the questions left open in his *Chambers* opinion. Recurring to *Chambers*'s three-pronged analysis, he confirmed that the property interest element was satisfied by the claimant's entitlement to access to his adjacent parcel.¹⁴³ But he found it unnecessary to consider the public purpose element because, he reasoned, the claimant failed to establish the third element—damaging in a constitutional sense. He tested the third element by balancing the impact of the state action on the claimant's conceded property right against the state's police power interest in providing for public transportation needs. His conclusion: “there was no taking or damage in the constitutional sense because, considering both the physical and temporal extent of the interference, the loss suffered was not substantial.”¹⁴⁴ Lest there be any doubt that he was not engaged in a veiled article 667 inquiry, he stated that his police power analysis rendered “irrelevant” the question “whether the state made work on its estate causing actionable inconvenience to the claimants under Civil Code articles 667–669.”¹⁴⁵

It would be inaccurate to conclude that the foregoing views are uniformly reflected in Louisiana constitutional damagings law, particularly at the appellate or trial level. No other opinions aspire—and certainly none achieve—the level of conceptual coherence and clarity reflected in the reasoning of Justices Calogero and Dennis. On the contrary, numerous decisions inject article 667 and other conventional doctrines into constitutional damagings actions to resolve damagings dispute. Strikingly illustrative is an appellate decision, *Kendall v. State Department of Highways*,¹⁴⁶ which sustained a judgment holding the State liable for silting up the claimant's lake by the construction of a nearby highway. Confirming that it “is in agreement with the trial judge's conclusion,”¹⁴⁷ the Court quoted the following excerpt from that judge's “Reasons for Judgment”:

[T]he plaintiff is entitled to recover for that damage, regardless of whether we place her demand upon the basis of Article 667 of the LSA–Civil Code or upon the requirement

142. *Id.* at 1156.

143. *Id.* at 1160.

144. *Id.*

145. *Id.*

146. 168 So. 2d 840 (La. App. 2d Cir. 1964).

147. *Id.* at 843.

of the Constitution that the State pay damages to those whose property it has damaged in carrying on its public work.

We say that it makes no difference which of the two legal provisions we follow as a basis for liability as to the State.¹⁴⁸

Those who may still question why this essay supports *Angelle's* strict separation of constitutional damagings from conventional actions are invited to resolve *Avenal* on the merits using *Kendall's* "it makes no difference" position as their compass. They will quickly find themselves enmeshed in the questions stressed throughout this essay, and will conclude, I suspect, that the root problem lies in framing the inquiry as if the line between the two kinds of actions can be crossed with impunity.

Most of these issues remain dormant in cases where the State would clearly be liable when—*not because*—a private party would be or when the State clearly would not be liable when—*not because*—a private party would not be. The ultimate test of the line-crossing applauded in *Kendall* occurs when a private party would clearly be liable had it performed the State's act, but the police power shelters that same act from imputing liability to government.

Can there be any doubt that the State would *not* be liable, absent some unusual but not unheard-of arrangement in which a special legislative act linked to unique activity provides non-constitutional monetary relief?¹⁴⁹ If this conclusion is correct, the fundamental basis for this essay's conceptual model of the damagings action—which itself merely restates what is explicit or implied in the *Angelle* line of authority—becomes both clear and, I believe, compelling.

This model spurns invoking analogies drawn from conventional actions to decide constitutional damagings disputes. These analogies are not only the principal source of Louisiana's disjointed inverse condemnation doctrine, but advance neither logic nor policy. A misconception is compounded with a *non-sequitur* in the positions, first, that a damagings action will not lie against government for acts that would not render private actors liable, and, second, that government will be liable, therefore, for acts that render the latter

148. *Id.* at 842-43.

149. *DeMoss v. Police Jury of Bossier Parish*, 167 La. 83, 118 So. 700 (1928) illustrates such an arrangement. The claimant's land was damaged through a police jury's negligent road-building activities. The Court granted him compensation on the basis both of the constitutional damaging clause and a special statute requiring that police juries engaged in road building "assess such damages as any person may sustain." *Id.* at 88, 118 So. at 702. The portion of the opinion sustaining compensation on constitutional grounds was overruled in *Angelle v. State*, 212 La. 1069, 34 So. 2d 321 (La. 1948), because negligent damage is not a "necessary consequence" of the public work, but the statutory damage award received the Court's full approval. *Id.*

liable, and its liability will be determined by the same rules that apply to private activity.

The first position slides easily into the misconception that government is not liable for *the same reason that* a private actor is not liable. In fact, government is not liable for a non-conventional *constitutional* reason: namely, that the claimant's lack of a cause of action against another private party establishes that its claim fails the "property interest" requirement of Justice Dennis's three-pronged *Chambers* test. The second position simply does not follow from the first in those instances, as Justices Victory and Weimer describe in *Avenal*, when rights of private parties against other private parties may turn out to be *public* rights in contests against the State, or, what functionally produces the same result, when those private rights are overridden by such imperative public welfare concerns as avoiding impending perils or catastrophes.

Justice Victory's dicta in *Avenal* leave no doubt of his take both on the public/private rights contest and on the police power's scope in the face of imminent community peril. He confidently asserts that the State possesses the right under the public trust doctrine to disperse fresh water over salt marshes.¹⁵⁰ Whatever the oyster lessees' "right" may be as against other private actors, they confuse who as between themselves and the State enjoys the property entitlement when they claim that they have the "right" to be free of such diversions. Nor does he hesitate to elevate the State's interest in protecting its coastal wetlands from imminent loss above the private property rights that this protection clearly destroys.¹⁵¹

Gauging the State's liability with a private yardstick leads to other anomalies. The State engages in all manner of activities that private parties cannot duplicate—multi-parish coastal restoration projects among them. How can a yardstick designed for private liability be sensibly applied in these instances, a prime example of which is *Avenal* itself? The goal that shapes the inverse condemnation action, moreover, is properly allocating public projects' costs by balancing general welfare (police power) needs against the diminution of private property's value. But this calculus is inapposite in conventional actions which are shaped to serve different and much narrower ends. The tort paradigm's duty/risk analysis, for example, is simply not conceived to manage the tension between community welfare and private entitlements.¹⁵² Nor was that paradigm constructed to address

150. *Avenal v. State*, 2003-3521 (La. 2004), 886 So. 2d 1085, 1108 n.28.

151. *Id.*

152. Duty/risk analysis is useful for cautionary purposes, but leads to a dead end when damage is a necessary consequence of an urgent public project and no reasonable measures are available to government to avoid the damage. The analysis is useful in directing government to evaluate the foreseeability of damage and to

activities that, in tandem, are legally authorized, serve valuable, legislatively declared community purposes, and cause injury that is a necessary consequence of their public utility.¹⁵³

IV. CONCLUSION

If the preceding portrayal of *Avenal*'s many facets is sound, *Avenal* may be that rare case in which avoidance of a decision on the merits actually changes the law more profoundly than if the dispute had been addressed head on. In fact, *Avenal* appear to have birthed a novel inverse condemnation action under Article 1, Section 4.

The traditional "injurious affection" action, which requires government's prior condemnation of its site by government, will continue unchanged. But *Avenal* appears to exemplify a constitutional damagings action for Louisiana in which prior condemnation by the State plays no role. Conceptually, this novel action in Louisiana is a variant of the familiar partial takings action

explore alternative modes of prosecuting the project so that damage can be avoided. But the *Avenal* diversion project's damage is completely foreseeable as a necessary consequence of the public purpose being pursued, and reasonable alternatives are not available. Louisiana's coastline cannot be restored absent the diversion of the Mississippi River's waters through the salt marshes, and this diversion necessarily modifies the salinity of the waters over the leased oyster water bottoms. Surely the conclusion cannot be a categorical assertion that the government has no duty to those uniquely burdened by the project because such alternatives do not exist. Equally certain, it cannot be that the government is therefore liable for any and all damage for which its foreseeably harmful project is the proximate cause. Analysis of such conflicts—the resolution of which turns on *fairness* in allocating the costs of public projects and *not* on risk foreseeability and harm avoidance—must be elevated to the constitutional plane and its associated police power/private rights analysis.

153. The question can also be posed whether the same set of facts may be made actionable under both a constitutional damaging and a conventional action format. See, e.g., *Mossy Motors, Inc. v. Sewerage and Water Bd. of City of New Orleans*, 1998-0495 (La. App. 4th Cir. 1999), 753 So. 2d 269 (claimant entitled to proceed with both causes of action and to claim both inverse condemnation and general tort damages); *Ursin v. New Orleans Aviation Bd.*, 506 So. 2d 947 (La. App. 5th Cir.), *rev'd on other grounds*, 515 So. 2d 1087 (La. 1987) (same). The question raises a variety of procedural and remedial issues that exceed this essay's scope. However, the essay's analysis of the subordination of private rights to the police power requires the conclusion that the conventional action must fail if the constitutional damagings action fails. See *supra* notes 17, 60–63, & 140–45 and accompanying text. A similar question may also be posed under Louisiana Revised Statutes 9:5624: does the statute apply only to the inverse condemnation remedy or to both that remedy and to a general damages remedy? *Acadian Heritage Realty, Inc. v. City of Lafayette*, 434 So. 2d 182 (La. App. 3d Cir. 1983), and *LeBlanc v. City of Lafayette*, 558 So. 2d 259 (La. App. 3d Cir. 1990), elect the former, while *Wilson v. City of Baton Rouge*, 96-0015 (La. App. 1st Cir. 1996), 683 So. 2d 382, elects the latter.

in federal constitutional law. Its sole inquiry will be that posed in the latter action: whether or not diminution in value has occurred under circumstances in which fairness or overriding considerations of public policy dictate that the property owner be compensated for its loss.¹⁵⁴

The Federal Circuit Court of Appeals evaluated *Avenal's* dispute on precisely this basis.¹⁵⁵ By disdaining the prior condemnation requirement, the Louisiana Supreme Court appears, in essence, to have adopted this model. But the Court stopped short of applying it, employing Louisiana Revised Statutes 9:5624 instead to prescribe the action.

It is possible to take the analysis a step further if *Avenal's* facts are viewed as presenting a non-trespassory or "non-physical touching" scenario. This view would seem justified by Justice Victory's limitation of the oyster lessees' property interest to the exclusive possession of the leased water bottoms, assigning to the State ownership and control of the waters over those bottoms including management of the waters' salinity.¹⁵⁶ Under this view, the scenario is functionally identical to that in which private property is depreciated by the noise pollution of nearby aircraft or the offensiveness of a nearby sanitary landfill or "dump," as landfills used to be called in less euphemistic days. The Louisiana Supreme Court decisions confirm that non-trespassory damagings are indeed actionable provided that the damages sustained are special to the property of the individual plaintiff or class of plaintiffs rather than scattered throughout the community generally.¹⁵⁷

Modeled as a non-trespassory case, *Avenal* presents itself as an action that Professor William Stoebuck has labeled "condemnation by nuisance."¹⁵⁸ He derived this phrase from his analysis of a variety of federal and state cases¹⁵⁹ in which government was deemed liable

154. It is assumed, of course, that the public project does not totally deprive the private property of any value. If it did, it would constitute a taking under both federal and Louisiana constitutional law. See *supra* notes 21 (U.S. Const. amend. 5) & 31 (La. Const. art. 1, § 4) and accompanying text. Hence, my description of the novel action as a partial taking only.

155. See *supra* note 50 and accompanying text.

156. *Avenal v. State*, 2003-3521 (La. 2004), 886 So. 2d 1085, 1106.

157. See *supra* note 47 and cited cases. "Special damages" may be suffered by a class of persons as well as by a single individual. See *Ursin v. New Orleans Aviation Bd.*, 506 So. 2d 947 (La. App. 5th Cir.), *rev'd on other grounds*, 515 So. 2d 1087 (La. 1987) (inverse condemnation action brought by property owners living in proximity to airport). Cf. *Acadian Heritage Realty, Inc. v. City of Lafayette*, 434 So. 2d 182 (La. App. 3d Cir. 1983) (nuisance action brought by owners of property in proximity to landfill).

158. William B. Stoebuck, *Non Trespassory Takings in Eminent Domain* 158 (1977).

159. Among the principal cases cited are *Richards v. Washington Terminal Co.*,

for the diminution of private property's value by public landfills, airports, and other uses that, while socially beneficial, devalue private property. His conclusion: an "activity by an entity having the power of eminent domain, which activity would constitute a nuisance according to the law of torts, is a taking of property for public use, even though such activity may be authorized by legislation."¹⁶⁰

There is considerable merit in classifying *Avenal* as a partial taking that should be further sub-classified as a condemnation by nuisance. Certainly, every element of the Stoebuck formulation¹⁶¹ is satisfied by my earlier formulation that a constitutional damaging of private property rights occurs when, in pursuit of a public purpose, the State deliberately engages in a legislatively authorized project causing damages that are either a direct and purposeful result or a necessary consequence of the public purpose.¹⁶² His observation that government need only possess, not exercise, the power of eminent domain squares, of course, with the new Louisiana inverse condemnation action. Damage to the oyster leases is undeniable, moreover, and is no less "special" than that suffered by groups of persons located in proximity to airports or landfills, formats that have given rise to special damages in prior Louisiana litigation.¹⁶³

Condemnation by nuisance also describes the framework giving rise to non-trespassory takings more fittingly than the classical damagings paradigm does. It features permanent acquisition of the government's site and permanent location there of a land use that depreciates proximate private property by the use's inherent offensiveness. Classical damagings may reflect these features, of course. But their offense more often results from offsite damage

233 U.S. 546, 34 S. Ct. 654 (1946) (railroad tunnel); *Thornburg v. City of Portland*, 376 P.2d 100 (Or. 1962) (airport); *Aliverti v. City of Walla Walla*, 298 P. 698 (Wash. 1931) (sewage disposal plant).

160. Stoebuck, *supra* note 158, at 158.

161. Professor Stoebuck uses the term "taking" in his formulation. But his discussion recognizes that condemnation by nuisance also comprehends damagings as it properly should since the difference between the two is one of often imperceptible degree and, indeed, because the actual injury in this category is more likely to be a damaging than a taking. *See id.* at 159, 162.

162. The Louisiana Supreme Court has recognized that the damage associated with a landfill may be a "necessary consequence" of a public work pursued for a public purpose under Louisiana Revised Statutes 9:5624. *Lyman v. Town of Sunset*, 500 So. 2d 390, 393 (La. 1987). Strikingly, the "necessary consequence" language derives directly from *Angelle v. State*, 212 La. 1069, 1086, 34 So. 2d 321, 326 (La. 1948), which viewed that element as the *sine qua non* of a constitutional damagings action. *See supra* notes 74-80 and accompanying text. For the view that actions prescribable under Louisiana Revised Statutes 9:5624 should be limited exclusively to constitutional damagings actions, see *supra* notes 90-100 and accompanying text.

163. *See supra* note 157 and cited cases.

associated with the public work's construction—cracked foundations, flooded lands, sewer back-ups, and the like. The property interest obtained by government, moreover, is often transitory, serving as a platform from which government work is carried out. Classical damagings tend, therefore, to focus more intensely on the acts of government or its contractors than on the installation of permanent land uses that are inherently offensive to nearby properties. *Avenal*, of course, fits neatly within the latter category.

Finally, classifying non-trespassory damagings in the manner suggested brings into the play what truly is at stake when a socially desirable land use necessarily damages private property rights: the need to balance the State's police power entitlements against private loss. As the body of this essay insists, constitutionalization of the inverse condemnation action rests ultimately upon the police power element, which has no place in a conventional action. Duty/risk tort analysis, which assumes that the jural relations obtaining between private parties apply as well to government, was not designed to duplicate the police power/private rights analysis.¹⁶⁴ Unsurprisingly, it played no role whatsoever in the constitutional analyses advanced in dicta by Justices Victory and Weimer in *Avenal*.

Endorsement of the condemnation by nuisance action might raise fears of unbounded public liability and of basing a constitutional damagings action on conventional nuisance law. But the fears are not credible. Government is going to be sued one way or the other.¹⁶⁵ The proper question is which format—condemnation by nuisance or conventional nuisance—is likely to produce the fairer and more well reasoned result? The argument has already been advanced that an action whose fulcrum is police power/private loss balancing is clearly more apt than one relying on duty/risk analysis.¹⁶⁶ The second objection, it should be obvious by now, collapses with the understanding that despite the similarities in the factual formats, a constitutional nuisance is qualitatively different than a conventional nuisance because it measures the jural relations between the state and a private party by a police power/private loss yardstick that is no part of a conventional action.

Whether Louisiana's new constitutional damaging action is described as a partial taking or condemnation by nuisance is less important, ultimately, than the impetus its evolution affords for a

164. See *supra* note 152.

165. See, e.g., *Lyman*, 500 So. 2d at 393 (landfill); *Acadian Heritage Realty v. City of Lafayette*, 434 So. 2d 182 (La. App. 3rd Cir. 1983) (landfill); *Ursin v. New Orleans Aviation Bd.*, 506 So. 2d 947 (La. App. 5th Cir. 1987), *rev'd on other grounds*, 515 So. 2d 1087 (La. 1987) (airport); *LeBlanc v. City of Lafayette*, 558 So. 2d 259 (La. App. 3d Cir. 1990) (landfill).

166. See *supra* note 152.

fresh look at the various constitutional and statutory questions posed in this essay. I believe that Louisiana's inverse condemnation doctrine proceeds from a solid conceptual base, as exemplified in *Angelle* and *Reymond*, overall, and in *Patout*'s engrafting of *Angelle*'s "necessary consequence" requirement onto Louisiana Revised Statutes 9:5624. *Angelle* clarifies that this base aligns with federal law, which insists upon a firm boundary between inverse condemnation actions and conventional actions.

In my judgment, Louisiana's best option—and it is a very good one indeed—is to reaffirm in contemporary guise this model, which clarifies why the two types of actions must be sharply distinguished. Alternatives leading down other roads will not lead to a better place than the refurbished *Angelle* option promises.

Reaffirmation of *Angelle* will demand greater consistency and coherence in the resolution of individual disputes. The Louisiana Supreme Court's leadership is essential. As a law giver, it deserves high praise for adopting a model that is better conceived and more durable than those applied elsewhere. As a teacher, it is positioned to define *Angelle*'s conceptual structure even more powerfully than in the past. It can illuminate the organic linkage of the federal inverse condemnation/tort divide, of Louisiana's adoption of the this model in *Angelle*, and of Louisiana Revised Statutes 9:5624, to which *Angelle*'s "necessary consequence" requirement applies with equal force.

It can elevate *Avenal* over *Chaney* by confirming the demise of the prior expropriation requirement. It can make *Patout* whole by confirming that Louisiana Revised Statutes 9:5624 does not cover negligence actions, but is linked exclusively to article 1, section 4.¹⁶⁷ It can cut damagings doctrine free of *Buras*'s albatross that government will be liable only when a private party acting similarly will be liable by confirming that the jural relations between the State and a private actor in a matter of *constitutional* import are not governed by the same principles that obtain between private parties in a civil dispute. It can carry forward the fine work already commenced in *Constance* by stating unequivocally that constitutional inverse condemnation outcomes preempt a conventional action addressing the same matter. Likewise, while conventional results under similar facts may be a useful backdrop for a constitutional damagings determination, the latter must always square with the State's police power entitlements which, if sufficiently compelling in a given case, will override what otherwise would be an entitlement based upon a private right.

167. Perhaps the Legislature will have amended the statute in both respects so that the court will merely be affirming the character of the amendment.

I believe that the Legislature's involvement is imperative as well. Louisiana Revised Statutes 9:5624 seems to have taken on a life of its own. Not only is it now broadly applied to constitutional and conventional applications alike, but it occupies a very ambiguous space alongside Louisiana Constitution article 1, section 4, Louisiana Revised Statutes 13:1511, and a host of other prescriptive statutes including Louisiana Civil Code article 1394.

In fact, Louisiana Revised Statutes 9:5624 is merely a prescriptive statute. It does not create causes of action, but merely states the prescriptive period for causes of action created elsewhere as exemplified by the damagings action itself which is created by article 1, section 4. Yet there is a sense that the statute in a process that is both mute and unanalyzed is almost viewed as being itself the source of a generic cause of actions for damages resulting from public works activities.¹⁶⁸

The easiest way to restrict the statute to damagings actions and to negate the possible interpretation offered immediately above is for the Legislature to amend the statute as proposed in Part IV.¹⁶⁹ The statute would then play the same role for constitutional damagings actions that Louisiana Revised Statutes 13:511 plays for constitutional takings actions. It would address not only prescription, therefore, but also other elements such as the general character of the cause of action, identity of the members of the class of defendants, and availability of attorneys fees for those suing under it.

168. Indeed, one court has held that the statute "creates a cause of action for damages caused by public works . . ." *Elmer v. West Jefferson Levee Dist.*, 01-248 (La. App. 5th Cir. 2001), 803 So. 2d 229, 237, *writ denied*, 2002-1032 (La. 2002), 817 So. 2d 1158. Were the court correct, the statute would provide an independent basis for all actions premised on damages to private property caused by public works, which, in truth, describes how many lower courts in fact employ it. This interpretation, however, is surely incorrect both as a matter of text and of policy. The statute clearly assumes that the causes of action that it prescribes derive from their own independent sources, familiar examples being constitutional damagings actions deriving from article 1, section 4 or delictual actions deriving from pertinent sections of the Louisiana Civil Code. There simply is no specification within the statute that permits an intelligent determination of the nature, elements, or defenses associated with this supposed independent and generic cause of action. Worse still, the statute would render article 1, section 4 and its police power defense irrelevant in disputes such as *Avenal*. The Legislature may choose to provide compensation in the form of damages even for events that do not rise to constitutional takings or damagings. *See supra* note 149. Accordingly, a claimant could ignore article 1, section 4 and avoid its police power defense simply by suing under the statute alone. Is it reasonable to assume that the Louisiana Supreme Court would—or should—countenance this outcome in *Avenal*?

169. *See supra* note 110 and accompanying text.

How the Legislature chooses to deal with non-constitutional actions deriving from public works construction or operation is less easily stated. If the Legislature amends the existing statute so that it applies exclusively to constitutional damagings actions, it may conclude that it has thereby exhausted the class of actions that can arise in consequence of government's construction or operation of a public project for a public purpose.¹⁷⁰ More extensive investigation than is possible here, on the other hand, may disclose a variety of categories of actions that merit treatment as conventional proceedings despite the public character of the work or operations being pursued. If so, the Legislature will want to consider whether these actions are adequately covered by existing prescription statutes or whether a new prescription statute with the former statute's categorical two-year term would be more desirable.

The Legislature should also attend to a topic addressed only in footnote in this essay: namely, whether, on the basis of the same set of facts, litigants may simultaneously pursue separate causes of action and separate remedies under the constitutional damaging and conventional headings.¹⁷¹ Although parallel causes of action would seem to violate the letter, if not the spirit of, the *Angelle-Reymond-Gray* line of authority, the question of their permissibility raises a variety of complex procedural and remedial issues that far exceed this essay's scope. Whatever posture the Legislature chooses to adopt on the issue, however, two positions stressed throughout the essay should be honored. First, if parallel actions are permitted, special care must be taken by the draftspersons to avoid allowing litigants—or judges—to entangle constitutional and conventional principles in the disposition of the actions.¹⁷² Second, resolution of the constitutional damaging action in favor of government will serve as a death sentence for the conventional action claim. To invoke our continuing *Avenal* hypothet for a final time, violation of this requirement would present the perverse result of exonerating the State of the oyster lessees' damagings claim, yet holding the

170. See *supra* notes 90–100 and accompanying text in which the argument is advanced that any action for damages resulting from a public project or works constructed for a public purposes must necessarily be a constitutional damaging action unless the project has been conducted negligently. The one possible exception was damages caused by a public project constructed on a site not acquired through formal expropriation, and this exception would only apply if *Avenal* were not deemed to eliminate *Chaney*'s formal expropriation determination.

171. See *supra* note 153.

172. For an illustration of the utter entanglement of the two orders of decisional principles, see *Mossy Motors, Inc. v. Sewerage and Water Bd. of City of New Orleans*, 1998-0495 (La. App. 4th Cir. 1999), 753 So. 2d 269.

State liable for a conventional claim whose foundation has just been negated by the constitutional result.

The Conclusion's recommendations call for substantial effort by and cooperation between the Louisiana Supreme Court and Legislature. I believe the effort would have been justified even without *Avenal*. With the Court's elevation of the constitutional damagings action to new-found prominence, scope, and, likely, frequency of use, however, failure to undertake the effort will invite difficulties even more predictable and pervasive.

