

Taking Back the Fifth: Why Kansas' Approach to Inverse Condemnation Violates the United States Constitution and Leads to Unnecessary Confusion [*Estate of Kirkpatrick v. Olathe*, 178 P.3d 667 (Kan. Ct. App. 2008)]

Jonathan D. Stokes*

I. INTRODUCTION

Archie Kirkpatrick bought a home in the spring of 1999.¹ Hoping to make the best purchase possible, he inspected it for potential problems.² To his relief, the house was solid, stable, and dry, with sufficient drainage to prevent the excessive accumulation of water.³ The next year the City of Olathe began building a roundabout at a nearby intersection to help reduce traffic congestion.⁴ In order to protect its new project from drainage problems, the City raised the intersection higher than the surrounding property, including Kirkpatrick's home.⁵ Suddenly the home was plagued with water collecting in pools around and under its foundation.⁶ In response to the damage from the flooding, Kirkpatrick was unexpectedly forced to spend \$17,000 in repairs.⁷ The City refused to pay him back.⁸

The Fifth Amendment to the United States Constitution prohibits the government from taking private property for public use without just compensation.⁹ It also provides a private remedy for individuals when the government has taken property without paying for it.¹⁰ This private remedy is a cause of action called inverse condemnation. The State of Kansas placed a similar limitation on governmental takings in Kansas

* B.A. 1998, Louisiana College; J.D. Candidate 2010, Washburn University School of Law. Thanks to Professor Janet Jackson and the *Washburn Law Journal's* Board of Editors for all of their thoughtful comments and assistance. Thanks to my family and friends for patiently tolerating my absences. And thanks to Ian and Lauren for loving me and making me happy.

1. Brief of Appellee at 4, *Estate of Kirkpatrick v. Olathe*, 178 P.3d 667 (Kan. Ct. App. 2008) (No. 06-96229-A).

2. *See id.*

3. *See id.*

4. *Id.* at 5.

5. *See id.* at 6.

6. *See id.*

7. *Estate of Kirkpatrick v. Olathe*, 178 P.3d 667, 669, 671 (Kan. Ct. App. 2008).

8. *See* Brief of Appellee, *supra* note 1, at 6.

9. U.S. CONST. amend. V (stating "nor shall private property be taken for public use, without just compensation").

10. *See* *Prickett v. Belvue Drainage Dist.*, 152 P.2d 870, 874 (Kan. 1944).

statute section 26-513(a).¹¹ Going even further than the United States Constitution, the Kansas statute also prohibits the government from *damaging* private property.¹²

In *Estate of Kirkpatrick v. City of Olathe*,¹³ the City's actions indirectly damaged Kirkpatrick's property.¹⁴ The Kansas Court of Appeals acknowledged that section 26-513(a) provides compensation for damage to property, but explained that Kansas case law dictates that the government need only compensate such damage when the damage was necessary to fulfill its purpose.¹⁵ Because the Court of Appeals found that the property damage was unnecessary, the plaintiff could not seek compensation under the Kansas statute or the Fifth Amendment to the United States Constitution.¹⁶

This Comment concludes that the *Kirkpatrick* court should have recommended that the Kansas Supreme Court overturn its precedent and require compensation for the City's act of damaging the plaintiff's property, for the City's act of taking his property, or both. This Comment also argues that the court misconstrued Kansas statute section 26-513(a) by failing to recognize the relevance of the Kansas Supreme Court's reasoning in two prior decisions. An application of that reasoning to section 26-513(a) would likely render a determination that the statute lacks a private remedy. The failure of Kansas courts to acknowledge explicitly this lack of remedy has perpetuated the "tension" that the *Kirkpatrick* court noted between the statutory language and Kansas case law.¹⁷ Although the Court of Appeals followed Kansas Supreme Court precedent in holding that compensable property damage must be necessary to the government's purpose, this approach is more restrictive than the United States Supreme Court's analysis under the Fifth Amendment. The United States Supreme Court has adopted a disjunctive approach that allows for compensation to private parties when property damage is either necessary to, or a direct result of, the government's activity.¹⁸ By adopting a narrower approach, Kansas courts fail to guarantee basic Fifth Amendment rights and may potentially produce unconstitutional decisions.

11. KAN. STAT. ANN. § 26-513(a) (2000).

12. *Id.*

13. 178 P.3d 667 (Kan. Ct. App. 2008).

14. *Id.* at 670.

15. *Id.* at 672.

16. *Id.*

17. *See id.* at 669, 671.

18. *See Miller v. United States*, 583 F.2d 857, 863-64 (6th Cir. 1978) (describing important factors considered by courts, such as whether flooding was the intended or the contemplated result of the government's activity).

II. CASE DESCRIPTION

Archie Kirkpatrick owned a home and surrounding property in Olathe, Kansas.¹⁹ After prevailing in an eminent domain proceeding, the City of Olathe permanently took approximately 355 square feet of Kirkpatrick's property and temporarily took an additional 426 square feet for a temporary easement to build a roundabout.²⁰ The City started constructing the roundabout in early 2000 and completed it during July of 2001.²¹ Shortly after construction began, the City realized that "potential drainage problems" existed, but believed that the drainage problems would subside after it finished construction.²² Due to the City's work and the subsequent disturbance to the soil, subsurface ground water pooled around and under the foundation of Kirkpatrick's home.²³ Kirkpatrick's daughter discovered water in her father's basement during the weekend of April 15, 2001.²⁴

Apparently, the water had followed the path of least resistance until it collected around Kirkpatrick's foundation.²⁵ Before the government began constructing the roundabout, Kirkpatrick's house was higher than the intersection.²⁶ After the City built the roundabout, however, the house was lower.²⁷ A city employee exacerbated problems during construction by laying the house's water service line on loose gravel.²⁸ Later, another employee noticed "a trickle of water following

19. *Kirkpatrick*, 178 P.3d at 668. Kirkpatrick purchased the property in the spring of 1999. Brief of Appellee, *supra* note 1, at 4. An inspection of Kirkpatrick's property in 1999 revealed no evidence of water damage to the foundation. *Id.*

20. *Kirkpatrick*, 178 P.3d at 668. The City approved the construction of the roundabout by resolution, which it passed on April 4, 2000. Brief of Appellant at 4, *Estate of Kirkpatrick v. Olathe*, 178 P.3d 667 (Kan. Ct. App. 2008) (No. 06-96229-A). In September of 1999, its Land Acquisition Agent attempted to negotiate easements that were necessary for the project with all the affected property owners. *Id.* The agent met with Kirkpatrick on three separate occasions: September 14, 21, and 29. *Id.* Kirkpatrick refused to sign the City's acquisition authorization and would not accept its offer of compensation. *Id.* at 4-5. Through the course of an eminent domain proceeding, the City took the necessary easements from Kirkpatrick. *Id.* at 5. The jury awarded Kirkpatrick \$700, and he did not appeal. *Id.*

In Kansas, eminent domain proceedings—also called "condemnation" proceedings—are limited to the determination of the fair market value of the property the governing authority is taking. *Miller v. Bartle*, 150 P.3d 1282, 1288 (Kan. 2007). The Eminent Domain Procedure Act governs these determinations. *Id.* If the landowner is unhappy with the jury's determination of fair market value, he may appeal that issue. *Id.* Questions regarding the condemning authority's power of eminent domain and the extent of restrictions placed upon that power cannot be litigated in a condemnation proceeding. *Id.* at 1289 (stating that a landowner must raise due process claims separately). The landowner must pursue these constitutional issues in a separate civil action against the government. *See id.* at 1288-89.

21. *Kirkpatrick*, 178 P.3d at 668.

22. *Id.*

23. Brief of Appellee, *supra* note 1, at 6.

24. *Id.* at 5. Three-fourths of an inch of water was on the floor of the basement. *Kirkpatrick*, 178 P.3d at 670.

25. Brief of Appellee, *supra* note 1, at 6.

26. *Kirkpatrick*, 178 P.3d at 670.

27. Brief of Appellee, *supra* note 1, at 6.

28. *Kirkpatrick*, 178 P.3d at 670.

the line.”²⁹ Three separate tests proved this water to be ground water.³⁰

To combat the flooding, Kirkpatrick installed two sump pumps, jacked up his house, and installed piers and steel supports along the back foundation.³¹ In August of 2003, his basement floor cracked.³² To recover for the damage to his basement and his resulting expenses, Kirkpatrick filed a claim against the City in September of 2003 under the Kansas Tort Claims Act.³³ He also alleged a claim for inverse condemnation.³⁴ The district court ruled that the City did not negligently design or build the roundabout.³⁵ When examining his inverse condemnation claim, however, it found that the City partially took Kirkpatrick’s property without justly compensating him for the flood damage.³⁶ Therefore, the district court awarded Kirkpatrick attorney fees under Kansas statute section 58-3502 and found that the City’s damage to his property amounted to \$17,000.³⁷ The City appealed.³⁸

The key issue before the Court of Appeals was whether the City’s construction of the roundabout, causing ground water to flood Kirkpatrick’s basement and inflict damage, constituted a compensable taking under the Fifth Amendment, such as would allow recovery on a claim of inverse condemnation.

III. BACKGROUND

Inverse condemnation is a private cause of action that allows an individual to recover when the government takes his property.³⁹ In order to recover using inverse condemnation, an individual must show that the government has “taken” his property.⁴⁰ The test applied by Kansas courts to determine whether the government took an individual’s property, however, is different than the test applied by the United States Supreme Court.

29. Brief of Appellee, *supra* note 1, at 6.

30. *Kirkpatrick*, 178 P.3d at 670.

31. *Id.* at 669.

32. *Id.*

33. *Id.*; see also KAN. STAT. ANN. § 75-6101 (1997).

34. See *Kirkpatrick*, 178 P.3d at 669. He later amended his complaint to join “the project engineer, the construction contractor, and the project inspector” through third party actions. *Id.* The City moved for summary judgment on both claims, and the district court denied the City’s inverse condemnation motion while not ruling on the negligence motion. *Id.* In September of 2005, Kirkpatrick died and his estate took over his claim as the plaintiff. *Id.*

35. *Id.* In a bench trial, the district court concluded that the City had not deviated from the standard of care required of it and “that no party had negligently deviated from the approved plan.” *Id.* Therefore, Kirkpatrick could not recover for negligence in tort.

36. See *id.*

37. *Id.* Kansas statute section 58-3502 provides for additional reimbursement for individuals who are subject to eminent domain actions in projects receiving federal funds. KAN. STAT. ANN. § 58-3502 (2005).

38. *Kirkpatrick*, 178 P.3d at 669.

39. See JULIUS L. SACKMAN, 1 NICHOLS ON EMINENT DOMAIN § G14E.01[1] (rev. 3d ed. 2008).

40. See *id.*

A. History of Eminent Domain

Historically, sovereigns have had the power to take property for public use without the owner's consent.⁴¹ This power is called eminent domain.⁴² "The power of eminent domain is inalienable" from the sovereignty of the state and cannot be "bargained away."⁴³ Furthermore, a state wields sovereign power over the property within its borders, limited only by the United States Constitution as well as the state's own constitution and laws.⁴⁴

The Romans first exercised the power to take property for public use,⁴⁵ but it was not until the Middle Ages that scholars labeled and categorized the practice.⁴⁶ Following the decline of the Roman Empire, early European feudal systems assumed that all land belonged to the sovereign.⁴⁷ As the concept of private ownership emerged, however, governments continued to assert that they had the power of eminent domain but began to place limits on its application.⁴⁸ Although the term "eminent domain" did not appear in the United States until approximately 1827,⁴⁹ the Fifth Amendment, ratified in 1791,⁵⁰ already prohibited the government from taking private property for a public purpose without just compensation.⁵¹ The Supreme Court later applied this prohibition to the states through the Due Process Clause of the Fourteenth

41. *Id.* § 1.12[1].

42. *Id.*

43. *Id.* § 1.141[3]. In other words, one legislature cannot permanently restrict or qualify how later legislatures exercise the power. *Id.* In 2006, however, after public outcry over the Supreme Court case *Kelo v. City of New London*, 545 U.S. 469 (2005), some states attempted to prohibit the right of governments to take homes for the benefit of private development. Avi Salzman, *Only 2 Holdouts Left in Eminent Domain Case*, N.Y. TIMES, June 11, 2006, at 14CN, available at <http://query.nytimes.com/gst/fullpage.html?res=9D04E6D61231F932A25755C0A9609C8B63>.

44. Sackman, *supra* note 39, § 3.02[3]. Sometimes states guarantee broader restrictions on the power of eminent domain than the United States Constitution, which simply provides that the government must justly compensate an individual when it takes his land for public use. *Id.* § 3.04[8]; see U.S. CONST. amend. V.

45. There is some dispute about the exact origin of eminent domain. Harry P. Carroll, *Where to Go After Kelo? Back to the Future!*, 29 W. NEW ENG. L. REV. 75, 82 n.29 (2006) (explaining that some scholars argue that it actually began with King Ahab of the Israelites). At any rate, the exact origin is unknown. *Id.*; Nicholas Devereux, Note, *Wake of the Flood: Examining the Dissipation of Property Rights Through a Model of Post-Katrina New Orleans*, 13 WASH. & LEE J. CIV. RTS. & SOC. JUST. 389, 393 (2007).

46. See Sackman, *supra* note 39, § 1.12[1]. Hugo Grotius first used the term in 1625 in the book *De Jure Belli et Pacis*. Carroll, *supra* note 45, at 82 n.29.

47. Devereux, *supra* note 45, at 393. Technically, eminent domain did not exist, since there was no private property for the sovereign to take. *Id.*

48. See *id.* at 393-94. The English saw eminent domain as two distinct powers. *Id.* at 393. The Crown had the power to take property temporarily as long as it did not take ownership. *Id.* at 393-94. Alternatively, it could take private property permanently, as long as it justly compensated the former owner. *Id.* at 394.

49. Sackman, *supra* note 39, § 1.12[2].

50. Michael Hiatt, Note, *Come Hell or High Water: Reexamining the Takings Clause in a Climate Changed Future*, 18 DUKE ENVTL. L. & POL'Y F. 371, 386 (2008). Because there is sparse historical record of debate surrounding the passage of the Fifth Amendment, it is difficult to ascertain the Framers' intent. Devereux, *supra* note 45, at 394-95.

51. U.S. CONST. amend. V. The American colonies incorporated limiting language in their constitutions prior to the ratification of the Fifth Amendment. Devereux, *supra* note 45, at 394.

Amendment.⁵²

B. Inverse Condemnation in the United States

Inverse condemnation occurs when the government takes private property for public use without invoking its power of eminent domain and without any plans for compensation, and the owner initiates an action to recover his losses.⁵³ By allowing for inverse condemnation, the Fifth Amendment provides a private remedy for individual property owners faced with the threat of eminent domain.⁵⁴ In order to establish a claim for inverse condemnation, an individual must demonstrate that: (1) he has an actual interest in the property;⁵⁵ and (2) there has been a taking by the government.⁵⁶

The United States Supreme Court's treatment of takings cases typically falls into three categories.⁵⁷ One type of taking occurs when

52. *First English Evangelical Lutheran Church v. County of L.A.*, 482 U.S. 304, 310 n.4 (1987); see also U.S. CONST. amend. XIV, § 1.

53. *First English*, 482 U.S. at 314-15; see Sackman, *supra* note 39, § G14E.01[1]. The distinction rests on the entity initiating the action: the property owner or the government. See *Lone Star Indus., Inc. v. Sec'y of Kan. Dep't of Transp.*, 671 P.2d 511, 515 (Kan. 1983). Inverse condemnation is technically not a constitutional or statutory term. It is a popular term for this cause of action. See *City of Keizer v. Lake Labish Water Control Dist.*, 60 P.3d 557, 559 (Or. Ct. App. 2002) (saying that the courts coined the term).

54. *First English*, 482 U.S. at 316 n.9. As early as 1933, the Supreme Court, in *Jacobs v. United States*, 290 U.S. 13 (1933), recognized that the right of a property owner to initiate proceedings against the government for taking his property was grounded in the Constitution. *First English*, 482 U.S. at 315. Perhaps increasing the attractiveness of the remedy against the government, at least one state's supreme court has held that individuals can circumscribe state sovereign immunity by using inverse condemnation. *Manning v. Mining & Minerals Div.*, 144 P.3d 87, 90-92 (N.M. 2006) (reasoning that because the United States Supreme Court has continued to allow takings claims against states, it implicitly has disregarded state sovereign immunity in the takings context), *cert. denied*, 127 S. Ct. 663 (2006). However, there are difficulties in inferring the United States Supreme Court's intent from its official silence on an issue. See Nat Chakeres, Note, *Manning v. Mining and Minerals Division: Sovereign Immunity As a Bar Against Claims for Damages Brought Under the U.S. Constitution*, 37 N.M. L. REV. 573, 583-85 (2007) (suggesting that differences in procedural posture can determine whether sovereign immunity applies, but also explaining that the New Mexico Supreme Court was correct to use the United States Supreme Court's dicta in conjunction with such silence to infer its intent to waive state sovereign immunity for takings claims).

55. Sackman, *supra* note 39, § G14E.02[1]. The United States Supreme Court determines the validity of an individual's property interest by using the states' definitions of property interests. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972) (discussing that property interests stem from "an independent source such as state law"); see Sackman, *supra* note 39, § G14E.02; see also Nicholas G. Grimmer, Comment, *Oops! It Turns Out You Shouldn't Have Built That There: Erroneously Issued Building Permits in Texas*, 44 HOUS. L. REV. 1415, 1441, n.167 (2008) (speculating about whether a landowner has a protectable property interest against improvements built with an invalid permit). Because the *Kirkpatrick* court spent most of its decision discussing whether the damage to Kirkpatrick's property amounted to a taking, it only addressed the issue of property interests peripherally. See *Estate of Kirkpatrick v. Olathe*, 178 P.3d 667, 670-72 (Kan. Ct. App. 2008) (concluding also that the right to quiet enjoyment is not a recognized property right in Kansas). Indeed, the City did not raise the invalidity of Kirkpatrick's property interests as an issue on appeal. See *id.* at 668 (stating only that the City argued that "its actions did not constitute a compensable taking of the Estate's property").

56. See Sackman, *supra* note 39, § G14E.01[1]. The Court has also said that the government must authorize the taking and must compel the property owner to accept the invasion. *Yee v. City of Escondido*, 503 U.S. 519, 527 (1992).

57. See *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538 (2005) (noting that the precedents acknowledge two categories of per se takings, and discussing the balancing required by the third type of taking).

the government regulates property to the extent that it deprives the owner of “all economically beneficial or productive use of land.”⁵⁸ Another type of taking does not deprive the owner of complete right of possession, but it places an undue burden on the owner.⁵⁹ The oldest and most established form of taking occurs, however, when there is a permanent physical invasion of land.⁶⁰ A permanent physical invasion is a per se taking.⁶¹ The United States Supreme Court has stated that when there is a physical occupation, it is a taking “without regard to the public interest it may serve.”⁶²

C. Flooding Damage As a Compensable Taking

Governmentally caused flooding is a physical invasion of property

58. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). The Court considers this type of taking a per se taking. *Lingle*, 544 U.S. at 538. Something is “per se” when it stands alone without further consideration, or it exists as a matter of law. BLACK’S LAW DICTIONARY 1162 (7th ed. 1999). For example, in *First English*, the County of Los Angeles passed an ordinance that prevented the plaintiff from rebuilding its campground after extensive flooding in the area had caused significant property damage. 482 U.S. at 307. The Court noted that if the governmental action denied all use of the property to the landowner, the regulatory taking, whether “temporary” or not, was tantamount to a permanent taking for which the Fifth Amendment clearly demanded just compensation. *Id.* at 318. On remand, the California Court of Appeals found that the ordinance did not actually deny all use of the property, and therefore ruled the County of Los Angeles had not taken the plaintiff’s property. *First English Evangelical Lutheran Church v. County of L.A.*, 258 Cal. Rptr. 893, 905-06 (1989) (finding that the public benefits of the regulation “far exceed[ed] the private costs it impose[d] on the individual property owner”), *cert. denied*, 493 U.S. 1056 (1990).

The United States Supreme Court further stated that the policy behind the Fifth Amendment was to prevent the government from forcing only some people to bear the costs of public burdens. *First English*, 482 U.S. at 318-19. The Court also noted, however, that a court should base its determination of the value of the property on its worth at the time of the taking, and that a landowner cannot charge the government for any preliminary activity that might depreciate its value. *Id.* at 320. Perhaps going even further, some courts have interpreted *First English* to mean that temporary takings should also be recognized as compensable. *See Assocs. of Meadow Lake, Inc. v. City of Edgewater*, 706 So. 2d 50, 52 (Fla. Dist. Ct. App. 1998) (stating that Florida law recognized and compensated temporary takings).

59. *See Lingle*, 544 U.S. at 539. While the Supreme Court considers the other two types per se takings, this type involves a balancing test. *See id.* at 538-39. The balancing test weighs the economic impact of the regulation and the character of the regulation with the extent to which it interferes with the owner’s property rights. *Id.* at 540; *Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

60. *See Lingle*, 544 U.S. at 537 (calling it the “paradigmatic taking”); *see also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

61. *See Loretto*, 458 U.S. at 426; *Lingle*, 544 U.S. at 538. In other words, when a court determines that a permanent, physical invasion exists, it automatically must declare a taking has occurred. In *Loretto*, the State of New York passed a law prohibiting landlords from preventing the installation of cable facilities on their premises. *Id.* at 423. The law also denied them adequate payment for the invasion of their property. *See id.* The company normally gave the landlords a single payment of one dollar. 458 U.S. at 423-24. The New York Court of Appeals had ruled that this was not a taking because the burdens on the landowners were minor in comparison to their aggregate property rights and the public interest achieved. *Id.* at 425. The Supreme Court disregarded the balancing analysis and ruled it a per se taking. *Id.* at 426. It explained that a permanent physical occupation is so serious because it “chops through the bundle” of sticks that constitutes a property owner’s collection of rights, violating the rights of possession, use, and disposition. *Id.* at 435. The Court did note, however, that the extent of the physical occupation could be used as a factor in determining just compensation. *Id.* at 437. Justice Blackmun criticized the Court’s per se rule and its disregard for the balancing of interests that applies in permanent physical takings. *See id.* at 442 (Blackmun, J., dissenting).

62. *Loretto*, 458 U.S. at 426. A permanent physical invasion need not occur to the exclusion of the owner to be compensable. *See id.* at 436-37 (discussing how the invasion prevents the landlord from excluding others from his property).

that courts can treat as a per se taking.⁶³ Because of the fluid nature of flooding, however, a special analysis applies.⁶⁴ In order for the property damage from flooding to be compensable as a taking, the overflow must be: (1) an actual invasion of the landowner's property; (2) permanent; and (3) the direct or intended consequence of the government's action.⁶⁵ An evaluation of these three requirements must reveal that the damage constitutes an appropriation of the plaintiff's property and not merely an injury.⁶⁶ On the other hand, if the flooding merely harms the claimant's property without meeting these requirements, then the damage is consequential.⁶⁷ Consequential damage is not compensable under the Fifth Amendment.⁶⁸

First under this test, the overflow must actually invade the landowner's property.⁶⁹ To "actually" invade a landowner's property by flooding, the government's actions must cause the physical introduction of water onto a plaintiff's land.⁷⁰ For example, the United States Supreme Court found a taking when the federal government's actions raised the water table and saturated one landowner's soil.⁷¹ Similarly, the Court held that raising the water level by one foot along a plaintiff's

63. Stanley A. Millan, *Cracking the Floodwall Code*, 20 TUL. ENVTL. L.J. 169, 175 (2006).

64. See *Loretto*, 458 U.S. at 436 n.12 (stating that a balancing process is required because the government does not absolutely dispossess the owner of his property); see also *Sanguinetti v. United States*, 264 U.S. 146, 149 (1924).

65. *Sanguinetti*, 264 U.S. at 149.

66. See *id.* In older cases, the Supreme Court construed this stipulation to mean that the flooding had to substantially destroy the property. See, e.g., *United States v. Cress*, 243 U.S. 316, 327-28 (1917). More recently, courts have concluded that a landowner can sue the government on a claim for inverse condemnation for securing a flowage easement across property, even if the landowner may still use a large portion of his land. See *United States v. Dickinson*, 331 U.S. 745, 750 (1947); *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1353 (Fed. Cir. 2003); see also Millan, *supra* note 63, at 175. Furthermore, the permanency analysis has subsumed much of the examination involved in determining whether the government has appropriated land. See Millan, *supra* note 63, at 176-77 (describing a continuum of takings from a flowage easement to a taking in fee simple, distinguished in part by the frequency of the flooding and the permanency of the invasion). Therefore, a distinct appropriation analysis is largely redundant and unnecessary. But see *Franklin v. United States*, 101 F.2d 459, 463-64 (6th Cir. 1939) (explaining that application of the general rule of whether a flooding constitutes a taking is difficult because of disagreements over what constitutes invasions and appropriations) (Simons, J., concurring).

67. See *Sanguinetti*, 264 U.S. at 149-50 (discussing that the claimant's damage did not meet these requirements, and stating the most that could be said about the damage was that it was "indirect and consequential"); *Franklin*, 101 F.2d at 463 (stating that because there was no actual invasion, the damage was consequential). Another commentator defined consequential damage as that damage in which the government does not directly encroach on an individual's property but merely impairs its use or accessibility. Pamela B. Stein, Comment, *The Price of Success: Mitigation and Litigation in Airport Growth*, 57 J. AIR L. & COM. 513, 534 (1991).

68. See generally *Franklin*, 101 F.2d at 462-63 (citing and discussing several cases where consequential damage was not compensable under the Fifth Amendment); *W.A. Ross Const. Co. v. Yearley*, 103 F.2d 589, 592 (8th Cir. 1939) (stating that a lack of an actual invasion of land renders any damage to the property consequential, and therefore not compensable); Stein, *supra* note 67, at 534.

69. *Sanguinetti*, 264 U.S. at 149; *W.A. Ross*, 103 F.2d at 592.

70. See *United States v. Kan. City Life Ins. Co.*, 339 U.S. 799, 809 n.8 (1950) (stating "that where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking").

71. See *Kan. City Life Ins. Co.*, 339 U.S. at 802-03, 810.

embankment was an actual invasion.⁷² On the other hand, any effect on an owner's riparian rights in a navigable stream or land underneath the stream does not constitute an actual invasion.⁷³

Second, for property damage to be compensable, the flooding must be permanent.⁷⁴ In certain situations, the Supreme Court has characterized flooding as a permanent invasion, even if intermittent in nature.⁷⁵ Courts only consider intermittent flooding permanent if its recurrence is inevitable.⁷⁶ For example, the raising of a water table coupled with the blocking of drainage constitutes a permanent invasion of the owner's property.⁷⁷ Additionally, "frequent overflows of water" are a permanent invasion, even if they occur only at intervals.⁷⁸ At least one decision by the United States Court of Appeals for the Federal Circuit indicates that storm water run-off, which regularly collects on a neighboring property's downhill land, may rise to the level of a taking.⁷⁹ Two instances of flooding, however, are insufficient to constitute a permanent invasion.⁸⁰ Ultimately, therefore, the question of permanency is highly factual, and courts address it on a case-by-case basis.

Third, to constitute a compensable taking, the damage must be a necessary or a direct result of the government's actions.⁸¹ This part of the takings analysis distinguishes an inverse condemnation action from an action in tort.⁸² Overflow from flooding results directly from the government's actions when it is the "direct, natural, or probable result of an authorized activity."⁸³ By contrast, if a plaintiff's land would flood regardless of the government's activity, the property damage does not constitute a taking.⁸⁴ Moreover, the single fact that the government's

72. *United States v. Wabasha-Nelson Bridge Co.*, 83 F.2d 852, 854, 856 (8th Cir. 1936).

73. *See United States v. Cherokee Nation of Okla.*, 480 U.S. 700, 704 (1987) (ruling that owners' rights are subject to the broad powers of Congress, granted by the Commerce Clause, to control navigable streams). Riparian rights relate to the banks of streams or rivers. *THE MERRIAM-WEBSTER DICTIONARY* 627 (11th ed. 2004).

74. *Sanguinetti*, 264 U.S. at 149. Some commentators, however, argue that the Supreme Court's focus has centered more on the harm to the claimant's property than on the character of the invasion. Eric Pearson, *Some Thoughts on the Role of Substantive Due Process in the Federal Constitutional Law of Property Rights Protection*, 25 PACE ENVTL. L. REV. 1, 19 n.91 (2008).

75. *Kan. City Life Ins. Co.*, 339 U.S. at 809 n.8.

76. *Sanguinetti*, 264 U.S. at 149.

77. *Kan. City Life Ins. Co.*, 339 U.S. at 810. In *Kansas City Life Insurance Co.*, the United States government operated a dam to raise the water level of the Mississippi River artificially. *Id.* at 801. This action raised the water table and virtually ruined the plaintiff's soil. *Id.* at 802-03. Although the land was not actually submerged, the underflowing destroyed its value just as if it had been submerged. *Id.* at 802-03. The Army Engineers actually predicted this would happen to the plaintiff's land and recommended the government condemn it. *Id.* at 802 n.4. Despite this recommendation, the government did not condemn the land. *Id.*

78. *United States v. Cress*, 243 U.S. 316, 327-28 (1917). The Court did not attempt to quantify this statement with an estimate of how often the flooding recurred. *See id.*

79. *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1358 (Fed. Cir. 2003).

80. *Pinkham v. Lewiston Orchards Irrigation Dist.*, 862 F.2d 184, 189 n.5 (9th Cir. 1988).

81. Millan, *supra* note 63, at 176.

82. *See Ridge Line*, 346 F.3d at 1355.

83. *Id.*

84. *Sanguinetti v. United States*, 264 U.S. 146, 150 (1924). In *Sanguinetti*, the United States

action may lead to the “probab[ility] [of] some increased flooding” is insufficient to establish that the government’s action was the direct cause of the damage to the plaintiff’s property; therefore, the damage was only indirect and consequential.⁸⁵ On the other hand, if the floodwater along the embankment of a road does not touch the surface of the road, but could potentially damage the surface by saturation, it may be a taking.⁸⁶

Federal courts apply a necessity requirement as an alternative to the direct result requirement, allowing compensation in either situation.⁸⁷ A consequence is “necessary” when it is within the intended purpose of the government, whereas a consequence is “direct” when it is foreseeable to the government.⁸⁸ In *Sanguinetti v. United States*,⁸⁹ the Supreme Court applied these requirements. After stating the general rule, that the overflow must be the direct result of the government’s activities, the Court reasoned that the overflow was not the direct *or* the necessary consequence of the government’s activity.⁹⁰ Without further clarification, the Court implied that it could apply the “direct result” analysis and the “necessity” analysis disjunctively.⁹¹ The Court has con-

constructed a canal to relieve flooding in an area including the plaintiff’s land. *Id.* at 146-47. The canal’s capacity could not accommodate the floodwaters, and they overflowed onto the plaintiff’s land, resulting in damage. *Id.* at 147.

85. *Id.* at 150. Some argue that *Sanguinetti* narrows the application of decisions such as *Cress* and that such rulings are merely qualifications of the general rule that flood damage is usually consequential. *See Franklin v. United States*, 101 F.2d 459, 462 (6th Cir. 1939). *But see id.* at 467 (Hamilton, J., dissenting) (explaining that the inverse was actually true and that the cases denying a taking had special factual circumstances). Still other courts have argued that the majority decision in *Sanguinetti* was merely a clarification of the general rule and not a departure from it. *See Jacobs v. United States*, 45 F.2d 34, 38-39 (5th Cir. 1930).

86. *See United States v. Wabasha-Nelson Bridge Co.*, 83 F.2d 852, 854 (8th Cir. 1936). In *Wabasha-Nelson Bridge Co.*, the court found that the flooding caused by construction of a dam did amount to a taking of a plaintiff’s road. *Id.* at 854, 856. The government constructed a dam to maintain a nine-foot navigation channel for the Mississippi River. *Id.* at 853-54. In doing so, it caused water upstream from the dam to stack and deepen. *See id.* at 853. This raised the water level along the embankment supporting the plaintiff’s roadway about one foot. *Id.* at 854. The court did not clarify how the water level would affect the surface. It simply stated, “It cannot be said that a small portion of an embankment supporting a roadway may be saturated with water and not, in some degree, affect the surface” *Id.* Moreover, because the road was the only connection between a bridge and a public highway, destruction of any part would render the entire road useless. *Id.*

87. *See Millan*, *supra* note 63, at 176 (stating that “the government must intend to invade a protected interest, or the asserted invasion is the direct, natural, or probable result of an authorized activity”).

88. *See Sanguinetti*, 264 U.S. at 149-50 (stating that the overflow was not the direct or necessary result, “nor [was] it was within the contemplation of or reasonably to be anticipated by the government”); *John Horstmann Co. v. United States*, 257 U.S. 138, 146 (1921) (stating that damage is consequential if it is neither within the foresight or the purpose of the government when it began construction).

89. 264 U.S. 146 (1924).

90. *Sanguinetti*, 264 U.S. at 149-50. This alternative was repeated in *Jacobs v. United States*, 45 F.2d 34, 38 (5th Cir. 1930).

91. *See Sanguinetti*, 264 U.S. at 149-50. The Court has applied the “necessity” requirement in other types of condemnation cases. In *United States v. Grizzard*, 219 U.S. 180 (1911), it ruled that the government must compensate the landowner for incidental damage to her land, resulting from activity on a portion of her land it had already condemned. *Id.* at 183. A taking that only removes a portion of a landowner’s property is a “partial taking.” Sackman, *supra* note 39, § 14.01[1]. A decision by the United States Court of Appeals for the Fifth Circuit later clarified, however, that the government must be reasonably able to foresee the subsequent damage as a necessary result of its work. *First Nat’l Bank of Brunswick v. United States*, 350 F.2d 606, 608 (5th Cir. 1965). Furthermore, the

cluded similarly in other decisions.⁹² The United States Court of Appeals for the Sixth Circuit stated that whether the government intended the flooding is an important consideration.⁹³ Despite this fact, however, it analyzed the flooding and subsequent damage to the plaintiffs' property solely on the basis of whether they were the direct results of the government's actions.⁹⁴

A synthesis of federal case law shows that, while many courts cite the direct result requirement as the rule, some courts have also incorporated a necessity analysis as an alternative. In the United States Supreme Court's takings analysis, then, compensable flooding damage can be either the direct result *or* the necessary result of the government's activity.

D. Inverse Condemnation in Kansas

Some courts have argued that the Kansas Constitution reinforces the Fifth Amendment's prohibition against governmental takings without just compensation.⁹⁵ The Kansas Supreme Court first recognized the right of a private individual to claim inverse condemnation against the government for an intentional but uncompensated taking in *Prickett v. Belvue Drainage District*.⁹⁶ In *Prickett*, the defendant widened and deepened a drainage ditch adjacent to the plaintiff's land to enable the ditch to carry larger volumes of water.⁹⁷ The greater volume of water eroded the banks on both sides and carried away at least five acres of "heavy rich top soil" from the plaintiff's land.⁹⁸ Although the defendant had not contemplated the taking of the plaintiff's soil by erosion in its original plans, it later discovered this would occur and continued with the project anyway.⁹⁹ The Kansas Supreme Court ruled that the plaintiff had a cause of action to recover damages for the taking of his property.¹⁰⁰ As part of its recitation of the governing law, the court noted a statute that gave the power of eminent domain to drainage districts and

government is not responsible for this type of damage if it occurs "after the date of taking." *Id.* (explaining that though this damage independently may constitute a taking, there are other remedies available).

92. *See, e.g., John Horstmann Co.*, 257 U.S. at 146 (using the terms "foresight" and "purpose" to a similar effect).

93. *Miller v. United States*, 583 F.2d 857, 863-64 (6th Cir. 1978).

94. *See id.* at 864. It found this to be a question of fact that the trial court must resolve, and therefore remanded the case for reconsideration. *Id.* at 864-65.

95. *See Isely v. City of Wichita*, 174 P.3d 919, 921-22 (Kan. Ct. App. 2008) (comparing the Kansas constitutional provision to the Fifth Amendment). Technically, though, the Kansas Constitution's language only mentions corporations. *See* KAN. CONST. art. XII, § 4.

96. *See Prickett v. Belvue Drainage Dist.*, 152 P.2d 870, 874 (Kan. 1944) (noting that to bar the plaintiff from recovery would lead to an unjust result).

97. *Id.* at 871.

98. *Id.* at 872.

99. *Id.* at 873-74. A statute, which provided for the compensation of property owners for the taking of their property, granted the drainage district eminent domain authority. *Id.*

100. *Id.* at 874.

prohibited uncompensated governmental takings.¹⁰¹ It further explained that the United States Constitution “buttressed” the plaintiff’s right of recovery.¹⁰² In *Sester v. Belvue Drainage District*,¹⁰³ while interpreting the same statute, the Kansas Supreme Court refused to allow recovery for damage that it did not deem sufficient to constitute a taking, despite the statute’s language providing for compensation for damage.¹⁰⁴ In other words, a synthesis of these two decisions suggests that although the statute limited the defendant’s right to take the plaintiff’s property, the Fifth Amendment provided the plaintiff with an actual remedy when the government did not compensate him.¹⁰⁵ The court’s use of the Fifth Amendment to buttress the statute’s prohibition against takings implies that the statute alone was inadequate to give the plaintiff a private remedy against the government.

The court further modified its inverse condemnation law in *Sester* by distinguishing the facts of its own case from those of *Prickett*.¹⁰⁶ It explained that the *Prickett* defendant had intentionally eroded the plaintiff’s property, but in *Sester*, the defendant had not contemplated erosion occurring.¹⁰⁷ The court explained:

There is a great difference between intentional taking of land in the exercise of governmental power and injury resulting to land as a consequence therefrom. A consequential injury is not a taking of private property for public use within the meaning of the Fifth Amendment.¹⁰⁸

The right to sue the government, the court added, “does not extend to cases where land is not actually taken.”¹⁰⁹ The *Sester* court held that in order for a claim of inverse condemnation to survive, the plaintiff must show that the government *intentionally* took possession or control of his property.¹¹⁰

In 1963, the Kansas Legislature first codified a general prohibition against governmental taking without compensation when it created the Eminent Domain Procedure Act (EDPA).¹¹¹ The statute prohibited the

101. *Id.* at 874. The Kansas Supreme Court heard *Prickett* in 1944 before the Legislature enacted the Eminent Domain Procedure Act. *See id.* at 870; KAN. STAT. ANN. § 26-501. The particular statute in that case dealt specifically with a drainage district charged with managing the flow of water. *Prickett*, 152 P.2d at 873-74.

102. *Prickett*, 152 P.2d at 874.

103. 173 P.2d 619 (Kan. 1946).

104. *Id.* at 622. The plaintiff sought recovery for damage to his property from the same drainage district as in *Prickett*. *Id.* at 620.

105. The United States Supreme Court has also asserted that the Fifth Amendment provides a private remedy for compensation when there is a taking. *First English Evangelical Lutheran Church v. County of L.A.*, 482 U.S. 304, 316 n.9 (1987).

106. *Sester*, 173 P.2d at 621.

107. *Id.*

108. *Id.* at 622.

109. *Id.*

110. *See id.* (stating that “constitutional guarantees” do not extend to cases where there has not been a taking or an appropriation of an individual’s property).

111. *See* KAN. STAT. ANN. § 26-513(a) (2000); *see also* *Richert v. Bd. of Educ. of the City of Newton*, 280 P.2d 596, 599 (Kan. 1955) (stating that Kansas had no statutory or constitutional provi-

taking *or damaging* of private property for public use without compensation.¹¹² It also provided for the computation of damages upon a “partial taking.”¹¹³ Although the *Sester* court held that the government must take possession or control of the property for a claim of inverse condemnation to succeed, the statute’s language broadened the scope of the claim to include relief for damage to property.¹¹⁴ Despite the Kansas Supreme Court’s review of several inverse condemnation cases, it has not discussed or interpreted the “or damaged” alternative provided in the statute.¹¹⁵ Instead, the Kansas Supreme Court created the general rule that a “taking” is defined as:

[T]he acquiring of possession as well as the right of possession and control of tangible property to the exclusion of the former owner, with such title in fee or easement as the statute under which the proceeding is had provides.¹¹⁶

While initially requiring the exclusion of the former owner, the court began to carve out a few exceptions to this general rule.¹¹⁷ For example, the government cannot take a property owner’s right to maintain lateral support to his natural soil “without acquisition and payment, the same as any other right or interest in real property.”¹¹⁸ Similarly, a city cannot require a landowner to reserve indefinitely his property from development in the uncertain event the city should choose to take it for public use.¹¹⁹ An important qualification to that exception, however, is that the governmental entity must actually place a legal restriction on the property.¹²⁰ A city’s announcement that it is taking property with-

sions prohibiting a condemnor from taking or damaging property without compensation).

112. § 26-513(a).

113. § 26-513(c).

114. *Compare Sester v. Belvue Drainage Dist.*, 173 P.2d 619, 622 (Kan. 1946), with KAN. STAT. ANN. § 26-513(a).

115. *See generally Sanders v. State Highway Comm’n*, 508 P.2d 981 (Kan. 1973) (neglecting to discuss the statute at all); *Lone Star Indus., Inc. v. Sec’y of Kan. Dep’t of Transp.*, 671 P.2d 511, 515-16 (Kan. 1983) (mentioning the statute and then proceeding to a discussion of a taking without acknowledging the “or damaged” language). It is difficult to ascertain what the Legislature intended when it passed the Eminent Domain Procedure Act. No minutes are available from the Senate Judiciary Committee of 1963, which was responsible for drafting and considering the Act. The House Judiciary Committee minutes reveal only that the bill (SB 184) passed unanimously with two undisclosed amendments but with no discussion. *Eminent Domain Procedure Act of 1963: Hearing on S. 184 Before the H. Judiciary Committee*, Session 2 (Kan. 1963).

116. *Ventures in Prop. I v. City of Wichita*, 594 P.2d 671, 678 (Kan. 1979).

117. *See Sanders*, 508 P.2d at 990 (finding a taking through the taking of an owner’s right to lateral support of his land).

118. *Sanders*, 508 P.2d at 989-90. In *Sanders*, the defendant was performing excavation work on a highway adjacent to the plaintiff’s property, and because of the steep incline, “the soil had crumbled and slid way onto the right-of-way leaving a large hole or crevice . . .” *Id.* at 983-84. Under the common law, the right to have one’s land remain in its natural condition with the support of the neighbor’s soil was a recognized property right, called lateral support. *Id.* at 987. The court recognized this property right and held that the landowner suffers legal damage when no buildings are added and the earth is disrupted to the point that it “slides or falls.” *Id.* at 987.

119. *Ventures in Prop. I*, 594 P.2d at 683. Restricting its decision to the factual situation presented, the court found that the city had taken the plaintiff’s property even though it had not taken possession to the exclusion of the owner. *See id.*

120. *Lone Star Indus., Inc. v. Kan. Dep’t of Transp.*, 671 P.2d 511, 518 (Kan. 1983).

out such a restriction is insufficient to constitute a taking.¹²¹

Kansas courts have been hesitant to find that mere damage to an individual's property is a taking.¹²² In *Deisher v. Kansas Department of Transportation*,¹²³ the Kansas Supreme Court held that the loss of water in the plaintiff's well, indirectly due to blasting by the defendant, was not necessary to the completion of the defendant's project.¹²⁴ The *Deisher* court analogized the facts of the case to an unrelated negligence action, creating a necessity requirement for cases of inverse condemnation without providing direct authority for doing so.¹²⁵ It concluded that the plaintiff's claim "lay in tort, not in inverse condemnation."¹²⁶ Several years later, in *Kau Kau Take Home No. 1 v. City of Wichita*,¹²⁷ the Kansas Supreme Court incorporated its reasoning from *Deisher* and affirmed the "necessity" requirement.¹²⁸ In discussing the necessity requirement found in *Deisher*, the *Kau Kau* court explained that the damage to the *Deisher* plaintiffs' well was not necessary to complete the government's project "because the State did not need to use [the] Deishers' water or to divert their water to complete the road construction project."¹²⁹ In evaluating the claim by the plaintiff before it, the court was unfortunately even less clear in its analysis.¹³⁰ It simply stated that "[t]he alleged damage to the Appellant's property caused by the contractors driving over the property was not necessary to the completion of the City's project. The alleged damage was caused by the contractor's negligence."¹³¹ What the court meant by "necessary" is unclear. Its emphasis on the accidental nature of the damage (i.e. the loss of well water due to nearby blasting or ruts left by vehicles driving over property) in the above two cases, however, implies that "necessary" means "intentional." Such an interpretation would be consistent with the rul-

121. *Id.*

122. *See, e.g.*, *Kau Kau Take Home No. 1 v. City of Wichita*, 135 P.3d 1221, 1226 (Kan. 2006).

123. 958 P.2d 656 (Kan. 1998).

124. *Id.* at 658, 664-65.

125. *Id.* at 664-65. The court explained, "*Olson [v. State Highway Commission*, 679 P.2d 167 (Kan. 1984)] is analogous to this case. There, as here, property was damaged by a contractor while doing work for the State. The damages were not a necessary consequence of a taking. Instead, they resulted from the negligence of the State or one acting on behalf of the State." *Deisher*, 958 P.2d at 664. The statute contains the word "necessity," although the court did not explicitly link the statute to this term in its analysis. *See id.* at 662-63. The statute states, "*Necessity*. Private property shall not be taken or damaged for public use . . ." KAN. STAT. ANN. § 26-513(a) (2000). No authority, however, directly links "*Necessity*" to the word "taking." Moreover, there is nothing in the structure of the sentence or the surrounding language exhibiting a legislative intent to link "taken or damaged" to "*Necessity*." *See* § 26-513(a). In fact, a court could more reasonably infer that the Legislature was emphasizing the importance of compensation to individuals who have suffered property loss at the hands of the government.

126. *Deisher*, 958 P.2d at 665.

127. 135 P.3d 1221 (Kan. 2006).

128. *Id.* at 1226.

129. *Id.*

130. *See id.*

131. *Id.*

ing in *Sester*.¹³²

Whatever the precise meaning of “necessary,” Kansas case law now reflects the requirement that damage to a plaintiff’s property must be necessary to the completion of the governing authority’s project before it may be considered a compensable taking.¹³³

E. Other Jurisdictions

Although all states have constitutional or statutory prohibitions against taking private property without just compensation, many have an additional prohibition against damaging private property.¹³⁴ Not all states, however, have concluded that a taking must be permanent.¹³⁵ Nor do they necessarily conclude that a taking must occur to the exclusion of the former owner.¹³⁶

Even more notably, not all state courts have used the necessity requirement as the exclusive test to determine whether damage to property constitutes a taking.¹³⁷ For example, the Colorado Supreme Court stated that the threshold issue for an inverse condemnation claim was whether damage caused by leakage was a “direct, natural or probable result of locating and operating a water storage tank where the tanks are located”¹³⁸ It further explained that the damage must be a “reasonably foreseeable consequence” of the government’s actions.¹³⁹ This requirement is similar to the one used by the United States Supreme Court.¹⁴⁰ Other courts, however, have used the necessity requirement.¹⁴¹ The Oklahoma Supreme Court concluded that flooding was

132. See *Sester v. Belvue Drainage Dist.*, 173 P.2d 619, 622 (Kan. 1946).

133. *Estate of Kirkpatrick v. Olathe*, 178 P.3d 667, 672 (Kan. Ct. App. 2008).

134. 11A EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 32.80 (3d ed. 2000).

135. *Waid v. State ex rel. Dep’t of Transp.*, 996 P.2d 18, 23 (Wyo. 2000).

136. See *City of Keizer v. Lake Labish Water Control Dist.*, 60 P.3d 557, 566-67 (Or. Ct. App. 2002) (stating that flood damage that substantially interferes with a landowner’s property rights can be sufficient for a claim of inverse condemnation).

137. See *Trinity Broad. of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 921 (Colo. 1993) (finding that ground water flooding can constitute a taking); see also *Paterno v. State*, 6 Cal. Rptr. 3d 854, 866 (Cal. Ct. App. 2003) (stating “[t]he public should pay the costs inherent in public works, including damages, foreseeable or not”); *Phillips v. King County*, 968 P.2d 871, 881 (Wash. 1998) (requiring that the governmental activity be the “direct or proximate cause of the landowner’s loss”). Some jurisdictions use “necessity” language, however, when trying to determine if they should factor incidental damage into the total compensation for an established taking. See *Albahary v. City of Bristol*, 886 A.2d 802, 809 (Conn. 2005) (requiring that the damage be the “necessary, natural, and proximate result” of the taking).

138. *Trinity Broad.*, 848 P.2d at 921. In *Trinity Broadcasting*, the plaintiff claimed that the City had inversely condemned its property by storing large amounts of water in tanks, which leaked and saturated the surrounding soil. *Id.* at 919. This leakage caused the foundation in the plaintiff’s building to crack. *Id.*

139. *Id.* at 921. Ultimately, it concluded that inadvertent leaking of the water tanks was not a deliberate goal of the City, and therefore did not constitute a taking. *Id.* at 922.

140. Compare *id.* at 921, with *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1355 (Fed. Cir. 2003).

141. See *Morain v. City of Norman*, 863 P.2d 1246, 1249 (Okla. 1993); see also *Colombari v. Port Auth. of Allegheny County*, 951 A.2d 409, 413 (Pa. Commw. Ct. 2008) (requiring that the damage be the “immediate, necessary, and unavoidable consequences of the exercise of the condemnor’s emi-

not a necessary part of the public work by the City, and therefore, did not support a claim for inverse condemnation.¹⁴²

A comparison of multi-jurisdictional case law reveals that Kansas' exclusive necessity requirement for compensable damage differs not only with the United States Supreme Court's interpretation of a taking but with other state courts' interpretations as well.

IV. COURT'S DECISION

Estate of Kirkpatrick v. City of Olathe is significant because it highlights the disparity between the United States Supreme Court's takings analysis and the Kansas Supreme Court's takings analysis. In particular, the seeming injustice of the Court of Appeals' decision may have been prevented by the application of the United States Supreme Court's alternative taking requirements. Ultimately, the Court of Appeals' decision turned exclusively on the necessity requirement found in Kansas case law.¹⁴³

Kirkpatrick argued that the City's work, which caused damage to his property even though the City did not compensate him for it, constituted a taking within the meaning of the Fifth Amendment.¹⁴⁴ He further argued that the damage to his property violated Kansas statute section 26-513.¹⁴⁵ Kirkpatrick asserted that section 26-513 did not require a taking "in fee [simple]," but contemplated compensation for a partial taking as well.¹⁴⁶ Thus, he concluded, although the taking must be necessary for a public use, the taking does not have to be intentional.¹⁴⁷

The City of Olathe argued that the flood damage to Kirkpatrick's basement did not constitute a taking as defined by the Kansas Supreme Court.¹⁴⁸ Specifically, the City asserted that its actions did not satisfy the possession and exclusivity requirements of a taking because the City did not acquire possession of the plaintiff's property, and the damage

ment domain power"); *Pigs Gun Club, Inc. v. Sanpete County*, 42 P.3d 379, 386 (Utah 2002) (holding that the damage must be the "direct and necessary consequence"). The takings provision in Oklahoma's constitution is also similar to Kansas' takings statute. Compare KAN. STAT. ANN. § 26-513(a) (2006), with OKLA. CONST. art. II, § 24 ("Private property shall not be taken or damaged for public use without just compensation.").

142. *Morain*, 863 P.2d at 1249. In *Morain*, a private landowner sued the city for improvements to the drainage system of his subdivision, which caused increased flooding to his property during periods of excessive rainfall. *Id.* at 1248.

143. *Estate of Kirkpatrick v. Olathe*, 178 P.3d 667, 672 (Kan. Ct. App. 2008). This is true at least as far as denying compensation for the flood damage to Kirkpatrick's home. See *id.* The Court of Appeals also noted that Kirkpatrick had not provided authorities to support his claim that the City took his right to quiet enjoyment of his property. *Id.* It said that such a right is not a recognized property right. *Id.* This holding is not unconstitutional. The United States Supreme Court has made it clear that states can determine which property rights will be recognized. See *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972).

144. See Brief of Appellee, *supra* note 1, at 9-11.

145. *Id.*

146. *Id.* at 11.

147. *Id.*

148. Brief of Appellant, *supra* note 20, at 20-22.

that resulted was not permanent but intermittent.¹⁴⁹ Additionally, the City reasoned that it had no duty to provide for drainage of surface waters, and it was free from liability if the damage that resulted was no worse than what would have occurred before its work.¹⁵⁰ The City ultimately reasoned that the plaintiff's claims sounded in tort rather than inverse condemnation.¹⁵¹

The Court of Appeals reversed the trial court's decision when it found that the damage to Kirkpatrick's property did not constitute a compensable taking under Kansas law.¹⁵² It noted the extremely unsettled nature of inverse condemnation in Kansas.¹⁵³ Moreover, it said that the "fundamental tension" arose from the fact that the statute's language seemed to provide compensation for damage, but the case law required that the City take possession to the exclusion of the property owner before allowing compensation.¹⁵⁴

The court began its discussion of the case law with the proposition that the government must actually take the land before a party may claim inverse condemnation.¹⁵⁵ Next, it suggested that the Kansas Supreme Court may have "muddled" the property damage concept from tort law with the takings analysis from inverse condemnation in *Sanders v. State Highway Commission*.¹⁵⁶ It further noted that the Kansas Supreme Court seemed to relax the general rule when it recognized a taking in cases of lateral support and access.¹⁵⁷ Finally, the court explained that in *Kau Kau*, the Kansas Supreme Court attempted to make a clearer distinction between a claim in tort and a claim in inverse condemnation.¹⁵⁸ The *Kau Kau* court held that the government generally must acquire the property to the exclusion of the former owner, and proof of mere property damage would not be sufficient to support an inverse condemnation claim unless the damage was necessary to the completion of the government's purpose.¹⁵⁹

In evaluating Kirkpatrick's claim, the court concluded that the City

149. *Id.*

150. *Id.* at 22-23.

151. *Id.* at 25. The City also argued that a claim of negligence should fail because it was barred by the Kansas Tort Claims Act and the statute of limitations for negligence claims. *Id.* Furthermore, the trial court found no evidence of negligence. *Id.*

152. *Estate of Kirkpatrick v. Olathe*, 178 P.3d 667, 668 (Kan. Ct. App. 2008). It declined to discuss the trial court's negligence decision because it was not raised on appeal. *Id.* at 672. Furthermore, it determined that because the trial court's conclusion concerning inverse condemnation was reversed, the decision regarding attorney fees must also be reversed. *Id.*

153. *Id.* at 671.

154. *Id.*

155. *Id.*; see also *Sester v. Belvue Drainage Dist.*, 173 P.2d 619, 622 (Kan. 1946).

156. *Kirkpatrick*, 178 P.3d at 671; see also *Sanders v. State Highway Comm'n*, 508 P.2d 981 (Kan. 1973).

157. *Kirkpatrick*, 178 P.3d at 671; see also *Ventures in Property I v. City of Wichita*, 594 P.2d 671, 678-79 (Kan. 1979).

158. *Kirkpatrick*, 178 P.3d at 672; see also *Kau Kau Take Home No. 1 v. City of Wichita*, 135 P.3d 1221, 1226 (Kan. 2006).

159. *Kirkpatrick*, 178 P.3d at 672; *Kau Kau*, 135 P.3d at 1226.

did not take any property right from Kirkpatrick, and the flooding that occurred in his basement from the run-off ground water was not necessary to the completion of the roundabout.¹⁶⁰ Therefore, the damage to his property did not constitute a taking.¹⁶¹

V. COMMENTARY

In denying Kirkpatrick compensation, the Court of Appeals ignored the plain language of section 26-513(a). Having mischaracterized the relationship between section 26-513(a) and the Fifth Amendment, the court failed to acknowledge the reason the Kansas Supreme Court always requires a takings analysis. Most importantly, however, the Court of Appeals rendered a potentially unconstitutional decision when it followed Kansas' more restrictive necessity requirement and disregarded the alternatives provided by the United States Supreme Court.

A. *Kan. Stat. Ann. 26-513(a)*

The tension between the statutory language of Kansas statute section 26-513(a) and Kansas case law on inverse condemnation has created confusion over what constitutes a taking.¹⁶² On one hand, the statute contemplates compensation for a taking *or* damage.¹⁶³ On the other hand, Kansas case law always requires the court to apply a takings analysis.¹⁶⁴

1. The Damage Alternative

The Court of Appeals violated the plain language of section 26-513(a) when it ignored the “damage” alternative. The fundamental rule of statutory construction is that the intent of the legislature governs if the court can ascertain it.¹⁶⁵ Moreover, if the language of the statute is plain and unambiguous, the court should use the express language of the statute to determine the legislature’s intent.¹⁶⁶ The plain language of section 26-513(a) states, “Private property shall not be taken or damaged for public use without just compensation.”¹⁶⁷ The use of the disjunctive “or” in the statute’s language creates alternatives, either of which may be sufficient to trigger the statute’s application.¹⁶⁸ By using

160. *Kirkpatrick*, 178 P.3d at 672.

161. *Id.*

162. *Id.* at 671. The court admitted, “Frankly, our attempt to synthesize Kansas law on inverse condemnation has not been easy.” *Id.*

163. KAN. STAT. ANN. § 26-513(a) (2006).

164. *Kirkpatrick*, 178 P.3d at 670.

165. *State v. Snow*, 144 P.3d 729, 742 (Kan. 2006).

166. *Id.*

167. § 26-513(a).

168. *See Lopez v. Unified Gov’t of Wyandotte County*, 89 P.3d 588, 590 (Kan. 2004) (interpret-

“or” in section 26-513(a), the Legislature was expressing its intent to require the government to compensate property owners for either damaging or taking their property.

When the Court of Appeals dropped the phrase “or damaged” from its analysis of Kirkpatrick’s claim, it nullified this statutory language. Courts must not read statutes to exclude language that is expressly included.¹⁶⁹ The Court of Appeals chose to focus solely on one alternative in the statute. It incorrectly stated that under the statute a taking *included damage* to property.¹⁷⁰ In actuality, the statute calls for compensation for a taking *or damage*, treating the two as alternatives.¹⁷¹ In framing the requirements for compensation in this way, the court excluded the second alternative and rendered the statute’s language useless.¹⁷² Therefore, although the Legislature expressed its intent to compensate individuals for governmentally caused damage to their property, the Court of Appeals’ interpretation of the statute ignored this intent and imposed a foreign meaning on the statute.

2. “Tension” in the Law

Even if the *Kirkpatrick* court correctly followed Kansas precedent in ignoring the disjunctive language of 26-513(a), it mischaracterized the relationship of the authorities in Kansas inverse condemnation law. Following the Kansas Supreme Court’s lead, the Court of Appeals began its analysis by citing the Fifth Amendment’s prohibition against uncompensated governmental takings.¹⁷³ It then cited the Kansas statute as a codification of the Fifth Amendment.¹⁷⁴ The court set out the elements of inverse condemnation required by Kansas case law without explaining if or how the statute modified that law.¹⁷⁵ The *Kirkpatrick* court noted,

ing KAN. STAT. ANN. § 75-6104(1)).

169. *State v. McElroy*, 130 P.3d 100, 105 (Kan. 2006).

170. *Estate of Kirkpatrick v. Olathe*, 178 P.3d 667, 671 (Kan. Ct. App. 2008).

171. *See* § 26-513(a).

172. Some might argue that the statute does not express intent to provide individuals with a private remedy against the government. *See infra* Part V.A.2. The Fifth Amendment provides a private remedy only for a taking and not for consequential damage, and therefore, individuals can only obtain a private remedy against the government for consequential damage to their property if their state statute or constitution expressly provides one. *Infra* Part V.A.2. Otherwise, the argument goes, individuals may not use the statute to sue for property damage that does not rise to a taking. *See Goodman v. State Dep’t of Transp.*, 113 P.3d 822, 825 (Kan. Ct. App. 2005) (ruling that a statute must express intent to create a private remedy).

If this were true, however, it is unclear why the Kansas Legislature included the “or damaged” language at all. If it only intended for the government to compensate for takings—including damage that constitutes a taking—it could have excluded the damage language altogether with the knowledge that a takings analysis would necessarily cover everything the Fifth Amendment covers. *See Infra* Part V.B. If the Legislature’s intent, however, was to cover *all* damage the government causes for public use, and thereby expand on the Fifth Amendment’s protections, it would include additional language providing an alternative for damage to property.

173. *Kirkpatrick*, 178 P.3d at 669; *see, e.g., Lone Star Indus., Inc. v. Sec’y of Kan. Dep’t of Transp.*, 671 P.2d 511, 514 (Kan. 1983).

174. *Kirkpatrick*, 178 P.3d at 669; *see, e.g., Lone Star*, 671 P.2d at 515.

175. *See Kirkpatrick*, 178 P.3d at 669-70. The opinion in the *Kirkpatrick* case used a typical cita-

however, that a “fundamental tension” existed between the statute’s language and the case law.¹⁷⁶ The court recognized the difficulty of synthesizing the two.¹⁷⁷

Kansas statute section 26-513(a) is not a mere “codification” of the Fifth Amendment. Although the Fifth Amendment provides minimal constitutional guarantees, a state is free to place greater restrictions on its power of eminent domain.¹⁷⁸ Therefore, while the Fifth Amendment only protects against governmental *takings*, the State of Kansas is free to broaden that protection to include damage as well.¹⁷⁹ Section 26-513(a) appears to do just that.¹⁸⁰ Notwithstanding the statute’s obvious construction, the Kansas Supreme Court has repeatedly conducted a takings analysis, even in situations clearly falling under the damage alternative.¹⁸¹

It is unclear whether the Eminent Domain Procedure Act provides a private remedy to individuals.¹⁸² The statute prohibits taking or damaging private property, but it does not explain how a private individual may seek compensation under this provision.¹⁸³ Kansas case law provides that a statute must display an intent to create a private remedy as well as a private right.¹⁸⁴ Without a private remedy, an individual can-

tion of the relevant law. The court stated:

The Fifth Amendment to the United States Constitution prohibits government from taking private property for public use without paying the owner just compensation. The Fifth Amendment prohibition applies to the states through the Due Process Clause of the Fourteenth Amendment . . . Kansas has codified this prohibition in K.S.A. 26-513(a) . . . An inverse condemnation action is initiated by an owner of private property to recover compensation from a governmental entity that has taken . . . To establish a claim for inverse condemnation, a party must establish an interest in the real property and a taking.

Id. at 669-70; *see also Lone Star*, 671 P.2d at 515.

176. *Kirkpatrick*, 178 P.3d at 671.

177. *Id.*

178. *See Sackman*, *supra* note 39, § 3.04[8]; *see also* U.S. CONST. amend. V. By analogy, federal courts have ruled that First Amendment rights are a minimum standard of protection and that states are always free to “increase . . . protection.” *See Konikoff v. Prudential Ins. Co.*, 234 F.3d 92, 105 (2d Cir. 2000).

179. *See Sackman*, *supra* note 39, at § 3.04[8].

180. *Supra* Part V.1.

181. *See, e.g., Deisher v. Kan. Dep’t of Transp.*, 958 P.2d 656, 664-65 (Kan. 1998).

182. *See KAN. STAT. ANN.* § 26-513(a) (2000). Perhaps contributing further to this uncertainty, in eminent domain proceedings involving disputes over the determination of fair market value, the Kansas Supreme Court has said that the statute controls the remedy for a taking. *See Butler County Rural Water Dist. v. Yates*, 64 P.3d 357, 360 (Kan. 2003) (denying the landowners’ claims that the fair market value determination was in error).

183. § 26-513(a). Given the *Butler* rule, establishing that the statute controls the remedy for takings in fair market value determinations, it is unclear whether section 26-513(a) also controls plaintiffs’ remedies in inverse condemnation actions. *See Butler*, 64 P.3d at 360-62 (assessing the fair market value determination in an eminent domain proceeding). The Kansas Supreme Court ruled, however, that an eminent domain proceeding is distinctly separate from a civil proceeding involving a landowner’s constitutional claims. *Miller v. Bartle*, 150 P.3d 1282, 1288-89 (Kan. 2007). Constitutional claims alleged in separate civil cases have been governed primarily by the Fifth and Fourteenth Amendments. *See id.*

184. *See Goodman v. State Dep’t of Transp.*, 113 P.3d 822, 825 (Kan. Ct. App. 2005) (discussing a federal statute). It is uncertain, however, how clearly the legislature should state its intent to create a private remedy. For example, the Kansas Court of Appeals interpreted a statute regulating common carriers to provide a private remedy because it outlined the manner in which the carriers should compensate individuals that suffered because of their violations. *See Dietz v. Atchison, Topeka &*

not employ section 26-513(a) to present a claim against the government.

Although no court has explicitly ruled that section 26-513(a) does *not* provide a private remedy, the Kansas Supreme Court laid the foundation for such a ruling in *Prickett v. Belvue Drainage District* and *Sester v. Belvue Drainage District*. Both cases involved an eminent domain statute with language similar to section 26-513(a).¹⁸⁵ In both *Prickett* and *Sester*, the court's treatment of the statute suggested that while the statute limited the defendant's right to take or damage the plaintiff's property without compensation, it did not provide the plaintiff with a private remedy with which to sue the government.¹⁸⁶ That remedy came from the Fifth Amendment.¹⁸⁷ Even though no court has specifically applied the *Prickett/Sester* reasoning to the EDPA, which contains language similar to the statute found in those cases, the *Prickett/Sester* reasoning would likely apply.¹⁸⁸ Consequently, despite the language in section 26-513(a) prohibiting governmental taking or damage, individuals can only sue the government for inverse condemnation using the Fifth Amendment to the United States Constitution.

The true reason, then, that courts must continue to apply the takings analysis is because the Fifth Amendment is the only source that provides a private remedy for a governmental taking. The Fifth Amendment, however, does not apply to consequential damage.¹⁸⁹ In *Sester v. Belvue Drainage District*, the court distinguished the plaintiff's case from the case in *Prickett*, wherein the plaintiff sued the district for taking his property.¹⁹⁰ The plaintiff's loss in *Sester*, however, did not constitute a taking, but only involved damage to the property.¹⁹¹ The court further explained that while the Fifth Amendment provided a private remedy for taking of property, it did not extend that remedy to mere damage to property, even though the statute allowed for compensation in the case of property damage.¹⁹² The *Sester* interpretation presumably applies to The Eminent Domain Procedure Act of 1963.

Treating section 26-513(a) as a mere codification of the Fifth Amendment masks the true nature of the relationship between the stat-

Santa Fe Ry. Co., 823 P.2d 810, 814-15 (Kan. Ct. App. 1991). Similarly, the Eminent Domain Procedure Act outlines the process a governing body must go through to insure adequate compensation for the property it condemns. See *generally* § 26-501 (explaining the process of an eminent domain proceeding and the manner in which a court should determine compensation). A plaintiff could reasonably argue, then, that by providing a mechanism for compensation of private property owners, the legislature expressed its intent to create a private cause of action. Until the Kansas Supreme Court addresses this issue, the question remains unsettled.

185. Compare *Prickett v. Belvue Drainage Dist.*, 152 P.2d 870, 874 (Kan. 1944) (stating, "the statute contemplate[s] compensation for property taken or damaged . . ."), with § 26-513(a).

186. See *Prickett*, 152 P.2d at 874; *Sester*, 173 P.2d at 622.

187. See *Prickett*, 152 P.2d at 874; *Sester*, 173 P.2d at 622.

188. Compare *Prickett*, 152 P.2d at 874, with § 26-513(a).

189. See *Sester*, 173 P.2d at 622.

190. *Id.* at 621-22.

191. *Id.*

192. See *id.* at 622.

ute and the Amendment, leads to confusion, and sets bad precedent. A proper citation of authorities should list the statute as an independent source for the limitation on the government's right of eminent domain, and should list the Fifth Amendment as the only means of establishing a private remedy. Such a citation would reveal the true reason that a takings analysis is still required.¹⁹³

Under current case precedent, the damage alternative of Kansas statute section 26-513(a) is of limited use to property owners in Kansas. Until the Kansas Supreme Court gives full legitimacy to the apparent intentions of the Kansas Legislature, the statute will continue to be of limited use.

B. Kansas' Interpretation of the Takings Clause

By recognizing the Fifth Amendment as the exclusive vehicle by which a person may claim inverse condemnation, a private remedy, the Kansas Supreme Court has based this claim solely on the United States Constitution and precluded section 26-513(a) from providing private relief. Moreover, its interpretation of a taking is narrower than the United States Supreme Court's interpretation, and therefore, the Kansas Supreme Court may fail to meet the minimum constitutional guarantees provided to individuals by the Fifth Amendment and related United States Supreme Court jurisprudence.¹⁹⁴ The Kansas Supreme Court ruled that for property damage to constitute a taking, it must be necessary to the completion of the government's purpose.¹⁹⁵ The court, however, did not cite any direct precedent for this rule. In *Deisher*, it only compared the facts of the case to a previous court decision involving negligence.¹⁹⁶ It explained that the action in the previous case had been *unnecessary* to the government's purpose, just as the action in *Deisher* was unnecessary. The court, therefore, concluded that because the action in the *Deisher* case was unnecessary, it constituted negligence.¹⁹⁷ It later used this reasoning to establish the necessity requirement, which it used to determine whether property damage constituted a taking.¹⁹⁸

193. Kansas is not alone in always requiring a takings analysis. See Tanya D. Marsh & Robert G. Solloway, *Recent Developments in Indiana Real Property Law*, 40 IND. L. REV. 1067, 1092 (2007) (discussing an Indiana Court of Appeals case holding that a piece of the real estate or a substantial right attached to it must be taken to be compensated); see also Beck v. City of Evansville, 842 N.E.2d 856, 863-64 (Ind. Ct. App. 2006).

194. See *First English Evangelical Lutheran Church v. County of L.A.*, 482 U.S. 304, 310-11 (1987) (holding that California courts decided "the compensation question inconsistently with the requirements of the Fifth Amendment"); see also Sackman, *supra* note 39, at § 3.02[1] (stating that the power of the states to use eminent domain is limited by the textual provisions of the Constitution).

195. *Estate of Kirkpatrick v. Olathe*, 178 P.3d 667, 672 (Kan. Ct. App. 2008).

196. *Deisher v. Kan. Dep't of Transp.*, 958 P.2d 656, 664-65 (Kan. 1998).

197. *Id.*

198. *Kau Kau Take Home No. 1 v. City of Wichita*, 135 P.3d 1221, 1226 (Kan. 2006).

Although the court has not been clear about the meaning of “necessary,” it is likely that it means “intentional.”¹⁹⁹

The necessity requirement, however, is only one alternative used by the United States Supreme Court. The Court has ruled that “the Takings Clause requires compensation if the government authorizes a compelled physical invasion of property.”²⁰⁰ To determine whether there has been such an invasion in flooding cases, the Court applies a unique analysis that examines: (1) whether the damage is a direct or necessary, i.e. intended, result of the government’s actions; (2) whether there was an actual invasion; and (3) whether the invasion was permanent.²⁰¹ While the United States Supreme Court has occasionally applied a necessity inquiry, it usually does so as an alternative to the “direct result” prong of its takings analysis.²⁰² By requiring the plaintiff to prove that the damages were necessary to the government’s purpose, Kansas courts have only focused on one alternative in the Supreme Court’s analysis.

The *Kirkpatrick* case illustrates the disparity between the two analytical schemes. Using the United States Supreme Court’s approach, the question of necessity is only one alternative in the analysis. The first prong is whether the ground water’s flood damage was a necessary *or* a direct result of the government’s activity. Concluding that the damage was not necessary does not end the analysis. It is possible that the damage was an unintended consequence of the City’s purpose, but a direct result of its activities. To be sure, it is highly improbable that the City *intended* for its work to result in the flooding to Kirkpatrick’s basement. It seems, however, at least more likely that it should have *foreseen* that flooding would occur. Similarly, in *United States v. Dickinson*,²⁰³ the Court found that even though the government only needed the portion of land it intentionally flooded, it was still liable to the landowner for the resulting erosion to his adjacent land.²⁰⁴ As long as the government can predict the damage as a direct result of its activity, even if it did not intend or need the result to achieve its purposes, it can be liable to the plaintiff under inverse condemnation.²⁰⁵

Most likely, Kirkpatrick’s flood damage was the direct, natural, and

199. Compare *id. with* *Sester v. Belvue Drainage Dist.*, 173 P.2d 619, 622 (Kan. 1946).

200. *Yee v. City of Escondido*, 503 U.S. 519, 527 (1992).

201. *Supra* Part III.C.

202. See, e.g., *Sanguinetti v. United States*, 264 U.S. 146, 149-50 (1924); *John Horstmann Co. v. United States*, 257 U.S. 138, 146 (1921); see also *Miller v. United States*, 583 F.2d 857, 863-64 (6th Cir. 1978).

203. 331 U.S. 745 (1947).

204. *United States v. Dickinson*, 331 U.S. 745, 750 (1947). The Court explained, “If the Government cannot take the acreage it wants without also washing away more, that more becomes part of the taking.” *Id.*

205. See *Millan*, *supra* note 63, at 175-76 (stating that flooding must be predictable but does not have to be intended).

probable result of the government's activity. This case is different from cases such as *Sanguinetti*, in which the Court concluded that the land would have flooded regardless.²⁰⁶ In the instant case, the trial court determined that the City knew of a drainage problem during its construction and did nothing about it.²⁰⁷ Furthermore, it concluded that there were no drainage problems before the construction, and then after the construction, there were problems.²⁰⁸ From these facts, one could conclude that the trial court inferred a direct causal link between the City's construction and the flood damage to Kirkpatrick's basement, suggesting that it was a direct and probable result.

Kirkpatrick's dilemma is similar to that of a case from the Federal Circuit Court of Appeals. In *Ridge Line, Inc. v. United States*,²⁰⁹ the government's construction of a postal station caused water run-off to flow downhill and collect on the plaintiff's land.²¹⁰ This drainage increased the storm water run-off from what took place prior to the construction by approximately 70-150%.²¹¹ The court indicated that the project engineers' lack of foresight in predicting and planning for the run-off did not prevent a conclusion that the run-off was the natural consequence of the construction.²¹² Similarly, the City of Olathe should not escape liability simply because it failed to predict that the ground water run-off would damage Kirkpatrick's property. A claim of ignorance has little persuasive value when the City knew about the drainage problems while it was constructing the roundabout, yet chose to do nothing to address them.²¹³ Given this information, then, it is likely that a court, using the United States Supreme Court's analytical approach, would find the damage to be a direct result of the City's work. By stopping the analysis after the necessity inquiry, the Kansas Court of Appeals ignored an alternative that would have allowed Kirkpatrick to recover for his loss.

The other significant question a court must address in a flooding case is whether the flooding was permanent.²¹⁴ To be permanent, the floodwaters must inevitably return intermittently.²¹⁵ Because the trial

206. See *Sanguinetti*, 264 U.S. at 147.

207. Estate of Kirkpatrick v. City of Olathe, 178 P.3d 667, 668 (Kan. Ct. App. 2008).

208. *Id.* at 670.

209. 346 F.3d 1346 (Fed. Cir. 2003).

210. *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1351 (Fed. Cir. 2003).

211. *Id.*

212. See *id.* at 1358.

213. See Estate of Kirkpatrick v. City of Olathe, 178 P.3d 667, 668 (Kan. Ct. App. 2008) (stating that the City knew about potential drainage problems but concluded that they would cease upon completion of its construction).

214. The question of whether the water actually invaded the land was not disputed on appeal. See *id.* at 670-71 (explaining that on appeal the City did not dispute the trial court's findings of fact which included a finding that ground water flowed from where the City had constructed the roundabout onto Kirkpatrick's property). Other jurisdictions also use a permanency analysis. See *Kingsway Cathedral v. Iowa Dep't of Transp.*, 711 N.W.2d 6, 10 (Iowa 2006).

215. *United States v. Kan. City Life Ins. Co.*, 339 U.S. 799, 809-10 & n.8 (1950).

court and the Court of Appeals evaluated Kirkpatrick's claim with a different analytical scheme than that used by the United States Supreme Court, they did not examine the facts relevant to deciding whether the flooding was legally permanent. It did not examine, for example, the frequency of the flooding caused by the run-off ground water. If a plaintiff could establish that (1) the government's activity caused a rise in the level of the water table; (2) the flooding settled in his basement without draining; or (3) flooding occurred at least more than two times, a court might conclude that the flooding was permanent. Without knowing more facts relevant to the issue of permanency, the issue cannot be fully evaluated in this Comment. It is unclear whether a court would consider the flooding in this case to be a permanent physical invasion.

Because of the disparity between the analytical approach of the United States Supreme Court and the Kansas Supreme Court, Kansas courts may render unconstitutional decisions. They have chosen to analyze an inverse condemnation claim using the Fifth Amendment as the source of the individual's remedy.²¹⁶ Because the Fifth Amendment raises United States constitutional issues, the Supreme Court's interpretation should take precedence over a state court's interpretation.²¹⁷ In past cases, when a state court's interpretation of a taking does not meet the minimum requirements guaranteed by the Fifth Amendment, the United States Supreme Court has intervened.²¹⁸ Therefore, to the extent the *Kirkpatrick* court only used the necessity prong and neglected the direct result prong, its decision may have unconstitutionally denied the plaintiff's Fifth Amendment right to just compensation.

It is unclear from the existing facts whether the approach adopted by the United States Supreme Court would lead to a different result. Nevertheless, by using a more restrictive analysis, Kansas courts run the risk of asking the wrong questions and delivering unconstitutional results.

VI. CONCLUSION

Kansas statute section 26-513(a) prohibits state actors from taking or damaging private property without just compensation. The *Kirkpatrick* court ignored the plain language of the statute when it dis-

216. See *Miller v. Bartle*, 150 P.3d 1282, 1288-89 (Kan. 2007) (distinguishing between a condemnation proceeding and a civil action initiated by an individual against the government).

217. See *First English Evangelical Lutheran Church v. County of L.A.*, 482 U.S. 304, 310-11 (1987); see also *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (stating that "the federal judiciary is supreme in the exposition of the law of the Constitution"). At least one other jurisdiction follows the United States Supreme Court's analytical approach in flooding cases. See *Colombari v. Port Auth. of Allegheny County*, 951 A.2d 409, 413 (Pa. Commw. Ct. 2008).

218. See *First English*, 482 U.S. at 310-11.

missed the damage alternative, rendering the language useless. Even if it correctly ignored the damage alternative, however, the *Kirkpatrick* court mischaracterized the relationship between the statute and the Fifth Amendment to the United States Constitution. It did so by neglecting to recognize that section 26-513(a) lacks a private remedy under the prevailing *Prickett/Sester* interpretation of “takings” statutes in Kansas. Without a private remedy, the statute does not provide individuals with a means to sue the government, so they must use the Fifth Amendment as a vehicle to present a claim of inverse condemnation. Moreover, because the Fifth Amendment only protects against takings and does not protect against consequential property damage, any damage to property must amount to a taking under the Fifth Amendment to be compensable. Consequently, the Kansas Supreme Court always requires a takings analysis in inverse condemnation cases. The court has perpetuated the current confusion in Kansas inverse condemnation law by failing to explain the proper relationship between section 26-513(a) and the Fifth Amendment.

Further complicating matters, the Kansas Supreme Court’s interpretation of a taking is narrower than the United States Supreme Court’s interpretation. The Fifth Amendment guarantees minimum constitutional protections against governmental takings of private property. The Fourteenth Amendment applies the Fifth Amendment’s protection to the states, and requires states to meet its minimum guarantees to avoid an unconstitutional result. As part of those guarantees, the United States Supreme Court has ruled that flood damage can constitute a taking if it was (1) the direct *or* (2) the necessary result of the government’s actions. The Kansas Supreme Court applies a more restrictive interpretation, which always requires that the damage be necessary to the government’s purpose. Kansas’ more restrictive approach prevents compensation in situations that would likely be compensable under the United States Supreme Court’s interpretation. By choosing to follow the Kansas Supreme Court’s more restrictive approach, the *Kirkpatrick* court may have failed to guarantee Kirkpatrick’s basic constitutional protection against uncompensated governmental takings. In denying him relief, the Kansas Court of Appeals left the price of public improvement squarely on his shoulders.