



## **An Agricultural Law Research Article**

# **Addressing the Shaky Legal Foundations of Florida's Fight Against Citrus Canker**

by

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Originally published in JOURNAL OF LAND USE & ENVIRONMENTAL LAW  
20:2 J. LAND USE & ENVTL. L. 453 (2005)

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# ADDRESSING THE SHAKY LEGAL FOUNDATIONS OF FLORIDA'S FIGHT AGAINST CITRUS CANKER

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## Table of Contents

I.	WHAT IS CITRUS CANKER? . . . . .	454
II.	HOW DOES THE STATE CONTROL CITRUS CANKER? . . . . .	456
III.	THE <i>HAIRE</i> CASE: ARTICULATING THE COMPENSATION REQUIREMENT . . . . .	459
IV.	FROM <i>CORNEAL</i> TO <i>HAIRE</i> : RELIANCE ON PROFESSOR FREUND .	465
V.	PROBLEMS WITH <i>CORNEAL</i> 'S RELIANCE ON FREUND . . . . .	469
VI.	AN ALTERNATIVE TO FREUND AND <i>CORNEAL</i> . . . . .	477
	<i>A. Does the Citrus Canker Law Fall Under the Police Power?</i>	479
	<i>B. Is the Destruction of Citrus Trees Necessary         to Protect Other Property?</i> . . . . .	481
VII.	CONCLUSION . . . . .	487

Backyard (or frontyard) citrus trees are ubiquitous in South Florida. Tom McEwan, a noted sports columnist for the *Tampa Tribune* often conveyed the special relationship that Floridians have with their citrus trees in the introduction to his Sunday column.<sup>1</sup> Since the mid 1990s, the state of Florida has been destroying many of these trees in order to stop the spread of the citrus canker from residential areas to commercial groves.<sup>2</sup> The state believes that citrus canker presents an enormous threat to one of the state's largest industries.<sup>3</sup> Recent hurricanes have exacerbated the

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1. A typical introduction to his column would be:

Over your small glass of chilled grapefruit juice, two eggs fried straight up and broken over a pile of garlic grits, a filet of our own bay water's speckled trout rolled in light flour with creole seasoning, then sautéed in butter and olive oil, sliced tomatoes with mayonnaise dashes, coffee and walkaway bite of mouth-cleansing watermelon, these thoughts:

Tom McEwan, *Bulldogs Leave a Lasting Impression; The Florida-Georgia Rivalry Was a Big Deal When Ray Graves Was the Gators' Coach. It still is*, TAMPA TRIBUNE, October 23, 1998, at Sports Extra 8.

2. See Florida Department of Agriculture and Consumer Services – Division of Plant Industry, *Comprehensive Report on Citrus Canker Eradication Program in Florida Through 22 May 2004* 2, available at <http://www.doacs.state.fl.us/pi/canker/cankerflorida.pdf>. According to the report, the state has destroyed over 3 million citrus trees under its eradication program. However, nearly 80% of the destroyed trees have been in commercial groves.

3. Agriculture is the state's second largest industry. Press Release, Florida Department

problem.<sup>4</sup> The state undertakes this destruction under the authority of the Citrus Canker Law.<sup>5</sup> This destruction of dooryard citrus trees has angered many homeowners who have seen their trees destroyed.<sup>6</sup> As a result, these homeowners have turned to the courts in order to obtain redress.<sup>7</sup>

This paper examines the Citrus Canker Law in light of Florida Supreme Court cases concerning the destruction of citrus trees. First, the paper explains what citrus canker is, why the state believes it presents such an imminent threat to the citrus industry and how the state has reacted through the Citrus Canker Law. Second, the paper examines *Haire v. Florida Department of Consumer Services*.<sup>8</sup> Third, the paper discusses the evolution of the authority upon which the *Haire* decision relied. Fourth, the paper exposes problems with legal authority relied upon by *Haire*. Fifth, the paper presents an alternative approach for examining Florida's Citrus Canker Law, based on United States Supreme Court precedent. Last, this paper suggests that the Florida Supreme Court should revisit *Corneal v. State Plant Board*<sup>9</sup> which *Haire* used as precedent and permit the Florida Department of Agriculture and Consumer Services to destroy non-commercial trees without compensation or upon token payments in order to save the citrus industry from the potential devastation wrought by citrus canker.

## I. WHAT IS CITRUS CANKER?

Citrus canker is a harmful bacterial disease, *Xanthomonas axonopodis pv. Citri*.<sup>10</sup> This disease has no known cure or

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of Agriculture and Consumer Services, Public awareness campaign to show economic value of agriculture, Florida's second-largest industry (Jan. 14 2002), available at <http://www.doacs.state.fl.us/press/2002/01142002.html>.

4. Jamie Manfuso, *Charley's 140 mph winds blow canker across state*, SARASOTA HERALD TRIBUNE, at 1A.

5. See FLA. STAT. § 581.184 (2002).

6. Alexander Christopher of Delray Shores was arrested in 2001 for interfering with state workers preparing to cut down his citrus trees. Kelly Tyko, *Delray Man Arrested Trying to Save His Citrus*, PALM BEACH POST, June 12, 2001, at 1A. Other property owners have been pepper sprayed by law enforcement officials for preventing workers from removing trees. Melissa Harris, *State Set to Destroy Trees in Orange's Canker Zones*, ORLANDO SENTINEL, March 3, 2003 at B1.

7. See, e.g., Fla. Dep't of Agric. & Consumer Servs. v. City of Pompano Beach, 792 So. 2d 539 (Fla. 4th DCA 2001); Fla. Dep't of Agric. & Consumer Servs. v. Haire, 836 So. 2d 1040 (Fla. 4th DCA 2003) [hereinafter *Haire I*] and Haire v. Fla. Dep't of Agric. & Consumer Servs., 870 So. 2d 774 (Fla. 2004) [hereinafter *Haire II*].

8. *Haire II*, 870 So. 2d 774.

9. *Corneal v. State Plant Board*, 95 So. 2d 1 (Fla. 1957).

10. U.S. DEP'T OF AGRIC., CITRUS CANKER ERADICATION PROGRAM, ENVIRONMENTAL ASSESSMENT 1 1999, available at [http://www.aphis.usda.gov/ppq/enviro\\_docs/pdf\\_files/ccea.pdf](http://www.aphis.usda.gov/ppq/enviro_docs/pdf_files/ccea.pdf).

treatment.<sup>11</sup> Citrus canker damages leaves, twigs and fruit.<sup>12</sup> Citrus canker may cause fruit to drop before it is ripe, and the lesions that canker causes on the fruit may make the fruit unmarketable.<sup>13</sup> Further, citrus canker may cause lower juice yields in the fruit. In extreme cases, the citrus canker will weaken the citrus tree to such an extent that another disease or shock will kill the tree.<sup>14</sup> However, citrus canker does not affect humans. Infected fruit is safe to consume.<sup>15</sup>

The spread of citrus canker is caused primarily by wind and wind-driven rain. Human activities such as pruning and picking can spread the disease. Also, birds, insects and mammals may infect new trees with their movements.<sup>16</sup> Citrus canker spreads rapidly through these processes.

The economic costs of citrus canker on the state's growers if the disease were to become endemic are substantial. The citrus industry has about one billion trees<sup>17</sup> that supply about 125,000 jobs<sup>18</sup> and 8.5 to 9 billion dollars to Florida's economy.<sup>19</sup> The disease primarily affects the fresh citrus industry. This part of the citrus industry comprises about one quarter of the total revenue and would cost in the aggregate roughly two billion dollars in losses if the disease should become endemic.<sup>20</sup> A widespread outbreak of the disease could cause a quarantine of the state's citrus, further crippling the industry.<sup>21</sup> The University of Florida Institute of Food and Agricultural Sciences Extension Service conducted a study to determine these costs.<sup>22</sup> The study found that, were citrus canker

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11. Kathryn Brown, *Florida Fights to Stop Citrus Canker*, SCIENCE, June 22, 2001; Mel Melendez and David Fleshler, *Tree Cutting Opposition Intensifies; County Now In Good Shape In Canker Fight*, FT. LAUDERDALE SUN SENTINEL, October 28, 2000, at 1B.

12. *Id.*

13. *Id.*

14. John Torres, *Weather may be slowing spread of Brevard canker*, FLORIDA TODAY, June 10, 2002, at 1.

15. Florida Dep't of Agric. and Consumer Services, *Citrus Canker, the Threat to Florida Agriculture, FAQs*, available at <http://www.doacs.state.fl.us/pi/canker/faqs.htm>.

16. U.S. DEP'T OF AGRIC., CITRUS CANKER ERADICATION PROGRAM, ENVIRONMENTAL ASSESSMENT 1 (1999), [http://www.aphis.usda.gov/ppq/enviro\\_docs/pdf\\_files/ccea.pdf](http://www.aphis.usda.gov/ppq/enviro_docs/pdf_files/ccea.pdf).

17. William Glanz, *Battle on citrus canker bugs Floridians; Residents have no recourse as trees are downed*, WASHINGTON TIMES, December 3, 2000, at C1.

18. Mel Melendez and David Fleshler, *Tree Cutting Opposition Intensifies; County Now In Good Shape In Canker Fight*, FT. LAUDERDALE SUN SENTINEL, October 28, 2000, at 1B.

19. William Glanz, *Battle on citrus canker bugs Floridians; Residents have no recourse as trees are downed*, WASHINGTON TIMES, December 3, 2000, at C1 (Estimates industry value at 8.5 billion); John Torres, *Residents resist tree removal; State undertakes canker program in Palm Bay*, FLORIDA TODAY, March 24, 2002 at 1 (Estimates industry value at 9 billion).

20. Fla. Dep't of Agric. & Consumer Servs. v. City of Pompano Beach, 792 So. 2d 539, 542 (Fla. 4th DCA 2001).

21. *Id.*

22. Ronald P. Muraro, Fritz M. Roka, and Thomas H. Spreen, *Grower Costs of Having*

to become endemic, growers could face new costs ranging from minimums of \$134 to \$233 per acre per year for processed Valencia oranges, to maximums of \$229 to \$250 for seedless grapefruit. These costs would be incurred in order to address the effects of Citrus Canker on the fruit including the lower marketability and lower yield.<sup>23</sup>

Such costs could cause some citrus growers to abandon the industry and place more groves into the path of development. These developments could increase urban sprawl, exacerbate certain traffic conditions and cause additional run-off. Thus, the loss of citrus groves could have widespread, harmful environmental effects.

## II. HOW DOES THE STATE CONTROL CITRUS CANKER?

Owing to these costs and harmful effects, the state and federal government have been fighting the disease aggressively for nearly a century. The disease was first detected in Florida in 1910 and eradicated in 1933.<sup>24</sup> An Asian strain (or A-strain) of the disease was then detected again in 1986 and declared eradicated in 1994.<sup>25</sup> Authorities first detected the current outbreak of the Asian Strain in September 1995 outside of the Miami airport.<sup>26</sup> There are three genotypes of the canker: Miami, Manatee and Wellington.<sup>27</sup> The Wellington Genotype was named after the location in which it was first found; it was detected in 2000 and seems to affect only key lime trees.<sup>28</sup>

The state's goal is to eliminate the disease. Because there is no known cure, this elimination occurs as a result of destroying the trees that host the citrus canker. Tim Gottwald, a scientist with the United States Department of Agriculture was quoted by the *Washington Times* as saying: "Our mission is to eradicate this disease. It's our belief that if we don't eradicate it, it will have a major, adverse affect on the citrus industry, and there is no treatment. We have nothing we can inject into trees like medicine and treat them."<sup>29</sup>

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*Citrus Canker in Florida* (June 2001), available at <http://edis.ifas.ufl.edu/FE286>.

23. *Id.*

24. Florida Department of Agriculture and Consumer Services – Division of Plant Industry, *Comprehensive Report on Citrus Canker Eradication Program in Florida Through 22 May 2004 2*, available at <http://www.doacs.state.fl.us/pi/canker/cankerflorida.pdf>.

25. *Id.*

26. *Id.*

27. John Torres, *Weather may be slowing spread of Brevard canker*, FLORIDA TODAY, June 10, 2002, at 1.

28. Mel Melendez and David Fleshler, *Tree Cutting Opposition Intensifies; County Now In Good Shape In Canker Fight*, FT. LAUDERDALE SUN SENTINEL, October 28, 2000, at 1B.

29. William Glanz, *Battle on citrus canker bugs Floridians; Residents have no recourse as*

Originally, a study based in Argentina determined that the eradication effort should proceed by destroying all citrus trees within a 125-foot radius of an infected tree.<sup>30</sup> However, the state found that this method did not affect new incidences of canker and then commissioned a study by Tim Gowttwald in order to determine the distances that the Asian Strain of the canker would spread.<sup>31</sup> The *Gottwald Study* followed approximately 19,000 trees in four sites in Miami-Dade County by tracking the new infections to the previously infected trees and mapping the spread of the citrus canker. The study was presented at a conference attended by other scientists. This conference reached a consensus that citrus trees should be destroyed in a 1900-foot radius around an infected tree to create an effective buffer zone to arrest the spread of the citrus canker.<sup>32</sup>

The Department of Agriculture and Consumer Services first adopted the 1900-foot zone as an emergency rule<sup>33</sup> following the *Gottwald Study*.<sup>34</sup> Current eradication efforts include quarantines and the destruction of all trees within 1900 feet of an infected tree. Further, in quarantine areas, for two years following the destruction of the infected or exposed tree, citrus trees cannot be planted in the area in which a tree was destroyed.<sup>35</sup> As of May 2004, over 3,075,907 citrus trees, including 650,153 residential citrus trees, had been destroyed in the eradication effort.<sup>36</sup>

Certain attributes of the disease have hampered eradication efforts. First, the citrus canker bacteria populate themselves by oozing out of stem lesions and getting caught in the wind. These stem lesions can survive and produce bacteria for eight to ten years.<sup>37</sup> Second, the symptoms become most visible after the tree has been infected for 100 days making it difficult to find newly infected trees.<sup>38</sup> These characteristics hamper inspectors in their efforts to detect every infected tree.

The Citrus Canker eradication program took a step backwards following the 2004 hurricane season in Florida. That

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*trees are downed*, WASHINGTON TIMES, December 3, 2000, at C1.

30. Fla. Dep't of Agric. & Consumer Servs. v. City of Pompano Beach, 792 So.2d 539, 542 (Fla. 4th DCA 2001).

31. *Id.*

32. *Id.*

33. See 5BER 00-4, 26 Fla. Admin. Weekly 4502 (Sept. 29, 2000).

34. *Pompano Beach*, 792 So. 2d at 543.

35. Florida Department of Agriculture and Consumer Services – Division of Plant Industry, *Comprehensive Report on Citrus Canker Eradication Program in Florida Through 22 May 2004* 2, available at <http://www.doacs.state.fl.us/pi/canker/cankerflorida.pdf>.

36. *Id.*

37. *Pompano Beach*, 792 So. 2d at 541.

38. *Id.*

season saw four major hurricanes cross the state.<sup>39</sup> Because the canker bacteria are spread through wind driven rain, these hurricanes most likely caused increased spread of the disease.<sup>40</sup> Post-hurricane eradication efforts have revealed large areas where citrus trees are exhibiting new infections, and these trees are targeted for destruction.<sup>41</sup>

In 2000, a consortium of South Florida local governments and citizens challenged the 1900-foot zone on its merits, and the circuit court entered an order barring the state from destroying trees.<sup>42</sup> The circuit court's order was overturned on appeal for failure to exhaust administrative remedies.<sup>43</sup> The homeowners and local governments administratively challenged the rule. The administrative law judge ruled that the Department of Agriculture's rules were too vague, so the Department decided to go through the formal rulemaking process to adopt the 1900-foot rule.<sup>44</sup> Subsequently, in 2002, the Florida Legislature enacted the Citrus Canker Law, adopting the 1900-foot radius.<sup>45</sup> Previously, the legislature had not defined a radius, but instead defined exposed trees as "harboring the citrus canker bacteria due to their proximity to infected citrus trees, and which do not yet exhibit visible symptoms of the disease but which will develop symptoms over time, at which point such trees will have infected other citrus trees."<sup>46</sup>

The Citrus Canker Law authorizes the Department, upon discovery of an infected tree, to issue an immediate final order (IFO) to remove all trees within a 1900 feet radius of the infected tree. The IFO provides notice to the property owner that the exposed tree will be destroyed. The affected property owner then has ten days to obtain a stay from the appropriate district court of appeal after delivery of the IFO.<sup>47</sup>

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39. Hurricane Charley crossed the peninsula in August 2004. Hurricane Frances also crossed the peninsula in the first week of September 2004. Hurricane Ivan hit the Western Panhandle region and Hurricane Jeanne followed nearly the same path of Hurricane Frances in the last week of September 2004.

40. Jamie Manfuso, *Charley's 140 mph winds blow canker across state*, SARASOTA HERALD TRIBUNE, at 1A.

41. *Id.*; see also Press Release, Fla. Dep't of Agric. and Consumer Servs., Citrus Canker Found in New Areas (Jan. 28, 2005) (on file with author).

42. *City of Pompano Beach v. Fla. Dep't of Agric. & Consumer Servs.*, No. 00-18394 (08) CACE (Fla. Cir. Ct. Nov. 17, 2000) (Final Judgment on Motion for Injunctive Relief).

43. *Pompano Beach*, 792 So. 2d at 548.

44. Eliot Kleinberg, *Trees Free of Canker Signs Won't be Cut - For Now Reprieve Could Last Several Months*, PALM BEACH POST, August 19, 2001, at 1A.

45. FLA. STAT. § 581.184 (2002). John Torres, *Residents resist tree removal*, FLORIDA TODAY, March 24, 2002, at 1.

46. FLA. STAT. § 581.184(1)(b) (2000).

47. FLA. STAT. § 581.184(2)(a) (2003).

The state provides compensation to homeowners<sup>48</sup> whose trees have been removed.<sup>49</sup> The state uses funds from state and federal sources that must be “specifically appropriated by law.”<sup>50</sup> The compensation is subject to availability of funds.<sup>51</sup> In the 2003-2004 fiscal year the compensation per tree was \$55 per tree and in other years the compensation was set at \$100 per tree.<sup>52</sup> In 2004, the legislature has reduced the compensation again to \$55 per tree.<sup>53</sup> However, if the homeowner is eligible for a Shade Florida Card or Shade Dade Card<sup>54</sup> then the homeowners will not receive compensation for the first destroyed tree in their yard.<sup>55</sup>

### III. THE HAIRE CASE: ARTICULATING THE COMPENSATION REQUIREMENT

Patty and Jack Haire, retirees living in suburban Broward County Florida, have been at the forefront of the citrus canker fight for several years.<sup>56</sup> *Haire v. Florida Department of Agriculture and Consumer Services* was the ultimate case in the second round<sup>57</sup> of attacks on the zone of destruction within the 1900-foot radius surrounding infected citrus trees. In the first round, the Haires and other plaintiffs including the local governments of Broward County and Pompano Beach fought the 1900 foot zone when it was adopted by the Department as an administrative rule.<sup>58</sup> The Haires attacked

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48. The Federal Government provides compensation to commercial growers that have their trees removed and did not receive insurance payments.. Such compensation is for lost production and varies from \$1,989 per acre for Tangelos to \$6,503 for limes. United States Department of Agriculture, *Q's and A's About Citrus Canker Lost Production Payments* (December 2002), available at [http://www.aphis.usda.gov/lpa/pubs/fsheet\\_faq\\_notice/faq\\_phccankrpay.html](http://www.aphis.usda.gov/lpa/pubs/fsheet_faq_notice/faq_phccankrpay.html).

49. FLA. STAT. § 581.1845 (2003).

50. *Id.*

51. *Id.*

52. 52*Id.*

53. FLA. STAT. § 581.1845 (2004).

54. <sup>54</sup> The Shade Dade and Shade Florida Cards are redeemable at Wal-Mart for various garden items other than citrus trees. *Haire II*, 870 So.2d at 780 (quoting Press Release, Liz Compton, Fla. Dep't of Agric. and Consumer Servs., *Crawford Announces Receipt of Shade Florida Funds and Agreement with Retailer* (April 28, 2000), available at <http://doacs.state.fl.us/press/2000/04282000.html>).

55. FLA. STAT. § 581.1845 (2003).

56. Susan Salisbury, *Citrus Canker Consumes Couple's Life, Not Trees (Yet)*, PALM BEACH POST, February 18, 2001, at 1A.

57. The third round of attacks involves attacking the compensation aspect of the Citrus Canker Law in the hopes that the totals will be so exorbitant that the State will no longer be able to run the Citrus Canker Eradication Program because it will not be able to compensate the owners of the trees. See *Patchen v. State Dept. of Agriculture and Consumer Services*, 817 So. 2d 854 (Fla. 3d DCA 2002) (review granted 829 So. 2d 919 (Fla. Oct 09, 2002)).

58. Fla. Dep't of Agric. & Consumer Servs. v. City of Pompano Beach, 792 So. 2d 539 (Fla. 4th DCA 2001).

the 1900-foot radius as enacted by the legislature in the 2002 Citrus Canker Legislation, claiming the provision violated due process, was a taking of their property and permitted unreasonable searches and seizures.<sup>59</sup>

The trial court ruled that the 2002 Citrus Canker Law violated the United States and Florida Constitutions and enjoined the Department from using anything other than individually issued search warrants to search property for citrus canker.<sup>60</sup> The trial court reasoned that the Citrus Canker Law was unconstitutional because it effected a taking and did not offer either substantive or procedural due process.<sup>61</sup> The trial court effectively applied a strict scrutiny review and found that the Due Process Clause was violated because the *Gottwald Study* was not reliable science and could not form the basis for “legislative abrogation of a property owner’s right to the full panoply of protections by our State and Federal constitutions.”<sup>62</sup> The trial court could not find adequate procedural due process in the statute because the statute did not give the homeowner an adequate pre-deprivation hearing; it took away from the judicial branch the ability to decide whether a taking occurred, and if the taking occurred, the appropriate compensation; and only left homeowners with the remedy of inverse condemnation to protect their property.<sup>63</sup> In conclusion, the trial court found that all uninfected citrus trees under commercial, private and public ownership “have a determinable value and cannot be destroyed by the state in the absence of full and fair compensation determined by the appropriate condemnation proceedings.”<sup>64</sup>

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59. *Haire I*, 836 So. 2d at 1045.

60. *Haire v. Fla. Dep’t of Agric. & Consumer Servs.*, 2002 WL 1077187, \*17 (Fla. Cir. Ct. 2002). The trial court concluded:

1)sections 581.184 and 933.07 are unconstitutional because they violate Article I, Section 12 of the Florida Constitution and the Fourth Amendment of the United States Constitution; 2) the scientific principles upon which section 581.184 is founded are unsound and do not provide adequate justification for the legislature to abrogate the rights of property owners; 3) citrus trees that do not patently demonstrate citrus canker pathogens do have a value and cannot be destroyed without providing full and fair compensation to owners as determined in condemnation proceedings; 4) the Department “is temporarily enjoined from entering upon private property anywhere in Florida in the absence of a valid search warrant issued by an authorized judicial officer and executed by one authorized by law to do so”; 5) geographic search warrants cannot be county wide; and 6) search warrants must be executed by duly authorized law enforcement officers.

*Id.*

61. *Haire I*, 836 So. 2d at 1046.

62. *Id.*

63. *Id.*

64. *Id.* at 1046-47.

On appeal, the Fourth District Court of Appeal heard consolidated arguments on the issues of whether the statute was constitutional, whether the injunction against the Department against “entering private property without a search warrant” was valid and whether sixty-nine search warrants applied for after the trial court’s ruling were rightfully denied by the trial court.<sup>65</sup> The appellate court acknowledged the use of the police power to protect Florida’s citrus industry<sup>66</sup> and concluded that “because protecting the citrus industry benefits the public welfare, it is within the state’s police power to summarily destroy trees to combat citrus canker.”<sup>67</sup> However, the appellate court gave a caveat that compensation must follow the destruction unless the object of destruction has no value.<sup>68</sup>

Applying the reasonable relationship test, the appellate court upheld the constitutionality of the Citrus Canker Law on substantive due process grounds.<sup>69</sup> The appellate court noted that the legislature does not need to act only on scientific certainty and quoted *Sproles v. Binford*<sup>70</sup> for the proposition that “when the subject lies within the police power of the state, debatable questions as to reasonableness are not for the courts but for the Legislature,

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65. This paper will not discuss the Fourth Amendment and search warrant aspects of the Citrus Canker Law only to note that the plaintiffs have attacked the Citrus Canker Law simultaneously on due process, takings and Fourth Amendment Grounds. *Id.* at 1046.

66. *Id.* at 1047. The court cited: *Johnson v. State*, 99 Fla. 1311, 128 So. 2d 853, 857 (1930) (“The protection of a large industry constituting one of the great sources of the state’s wealth and therefore directly or indirectly affecting the welfare of so great a portion of the population of the state is affected to such an extent by public interest as to be within the police power of the sovereign”); *L. Maxcy Inc. v. Mayo*, 103 Fla. 552, 139 So. 2d 121, 128 (1931) (“[T]he Legislature necessarily has a wide field of police power within which to pass laws to foster, promote, and protect the citrus fruit industry of Florida”); *Coca-Cola Co., Food Division, Polk County v. State*, 406 So. 2d 1079, 1085 (Fla. 1981) (The police power may be used to justify regulations in the citrus industry); *Nordmann v. Fla. Dep’t of Agric.*, 473 So. 2d 278, 280 (Fla. 5th DCA 1985) (Upheld use of police power to destroy citrus trees within 125 feet of infected tree); *Denney v. Conner*, 462 So. 2d 534, 537 (Fla. 1st DCA 1985) (Upheld use of police power to destroy citrus trees within 125 feet of infected tree); and *Corneal v. State Plant Board*, 95 So. 2d 1,4 (Fla. 1957) (“[T]he absolute destruction of property is an extreme exercise of the police power and is justified only within the narrowest limits of actual necessity unless the state chooses to pay compensation”).

67. *Haire I*, 836 So. 2d at 1050.

68. The court did not believe that the exposed or infected homeowner’s trees are necessarily worthless. *Id.* at 1050.

69. *Id.* at 1053. In dicta, the court stated that under the ‘narrowly tailored’ test it would have found that the statute does not violate substantive due process. The court noted that the plaintiffs presented no alternate process or theory for eradication of citrus canker that the state could have adopted in lieu of the 1900 feet zone. As a result, the legislature did not need to delay action until another method could be developed to determine the action that would least infringe on the rights of the plaintiffs. The court concluded that under either standard, the statute would not have violated substantive due process. *Id.*

70. *Sproles v. Biford*, 286 U.S. 374 (1932)

which is entitled to form its own judgment.”<sup>71</sup> Further, the appellate court chided the trial court for subjecting the *Gottwald Study* to adversarial scrutiny when, under the reasonable relationship test, legislative decisions should not be subject to such scrutiny.<sup>72</sup> The appellate court then found that the legislative action was supported by the studies and previous experiences the state had with citrus canker.<sup>73</sup> As a result, the legislature’s action was not arbitrary or capricious, but bore a reasonable relationship to the legislature’s aim of citrus canker eradication.<sup>74</sup>

The appellate court also found that the statute did not violate procedural due process.<sup>75</sup> The plaintiffs argued that the statute violated their procedural due process rights because they were not afforded the opportunity for a pre-deprivation hearing.<sup>76</sup> However, the appellate court noted the “imminent danger” that citrus canker poses and cited the *Nordmann*<sup>77</sup> and *Denney*<sup>78</sup> decisions for the proposition that “the spread of citrus canker is the type of imminent danger which would permit the state to summarily destroy citrus trees.”<sup>79</sup> The court then distinguished property rights from other rights by observing that the postponement of the judicial hearing does not deny someone due process if there is an adequate opportunity in the future for an adequate judicial hearing to determine liability.<sup>80</sup> The court found the only issues that the District Court of Appeal could address in the application for a stay against the IFO by the Department would be the factual issues of whether there is an infected tree and whether that infected tree is within the 1900-foot zone.<sup>81</sup>

The appellate court warned that the issues of whether a taking occurred and what would be the amount of full compensation if a taking occurred cannot be determined by the legislature or the executive branch, but are reserved to the judiciary through inverse condemnation proceedings.<sup>82</sup> The appellate court ruled that the trial court erred by not recognizing that the statute did not prohibit homeowners from bringing inverse condemnation suits.<sup>83</sup> Because

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71. *Haire I*, 836 So. 2d at 1052 (quoting *Sproles*, 286 U.S. at 388).

72. *Id.* (citing *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993)).

73. *Haire I*, 836 So. 2d at 1052.

74. *Id.* at 1053.

75. *Id.*

76. *Id.*

77. *Nordmann v. Fla. Dep’t of Agric.*, 473 So. 2d 278, 280 (Fla. 5th DCA 1985).

78. *Denney v. Conner*, 462 So. 2d 534, 536 (Fla. 1st DCA 1985).

79. *Haire I*, 836 So. 2d at 1053.

80. *Id.* (citing *Phillips v. Comm’r of Internal Revenue*, 283 U.S. 589, 596-7 (1931)).

81. *Haire I*, 836 So. 2d at 1053-4.

82. *Id.* at 1054.

83. *Id.*

inverse condemnation suits were available to homeowners, the statute did not lack procedural due process.<sup>84</sup> Further, the statute only set a floor on the compensation for the trees; the courts are not limited by that floor.<sup>85</sup> In sum, the court found that the inverse condemnation proceedings contemplated by the statute provide procedural due process to the homeowners, and thus the statute did not effect a taking.<sup>86</sup>

The plaintiffs appealed to the Supreme Court of Florida arguing that the statute violated their procedural and substantive due process rights and that the search warrants violated the Fourth Amendment.<sup>87</sup> The supreme court held that the Citrus Canker Law was constitutional.<sup>88</sup> The analysis by the supreme court largely followed the district court of appeals' analysis outlined above.<sup>89</sup> However, the supreme court opened the door wider for the possibility of additional compensation to the plaintiffs.<sup>90</sup>

First, the supreme court addressed substantive due process.<sup>91</sup> The court identified two constitutional provisions in the Florida and United States Constitutions that protect property rights:<sup>92</sup> the Takings<sup>93</sup> and Due Process Clauses.<sup>94</sup> The court distinguished between substantive and procedural due process, finding that “[s]ubstantive due process protects ‘the full panoply of individual rights from unwarranted encroachment by the government.’”<sup>95</sup> Likewise, the court distinguished between the Takings and Due Process Clauses by noting that the Due Process Clauses refer to the Government’s police power, whereas the Takings Clauses refer typically to the Government’s eminent domain powers.<sup>96</sup> According to the court, under the eminent domain powers, the state must make full compensation if it takes property. But that obligation is “qualified” by the police power, which allows the government to

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84. *Id.*

85. *Id.*

86. *Id.* at 1060.

87. *Haire II*, 870 So. 2d at 777.

88. *Id.*

89. Justice Wells concurred in result only and was joined by Justice Bell. Justice Wells stated that the court should have adopted the lower court’s opinion. *Id.* at 790.

90. We agree that this proviso [§ 581.1845(4)] is not a limit on the State’s obligation to pay compensation for the destruction of exposed citrus trees.” *Id.* at 786.

91. *Id.* at 780.

92. *Id.* at 780-81.

93. U.S. CONST. amend. V; FLA. CONST. art. X, § 6.

94. U.S. CONST. amends. V, XIV; FLA. CONST. art. I, § 9.

95. *Id.* at 781 (internal quotes omitted) (*quoting* Dep’t of Law Enforcement v. Real Property, 588 So. 2d 957, 960 (Fla. 1991)).

96. *Id.* at 781.

regulate the use of property, including the power to stop its use in a way that harms the public.<sup>97</sup>

The Florida Supreme Court reviewed the law using the reasonable relationship test, because the law provided compensation for the destruction of the trees.<sup>98</sup> The court found that the protection of the citrus industry fell within the police power of the state, and as a result the eradication of citrus canker fell within the police power.<sup>99</sup> The court noted that it had previously held that “[a]ll . . . *property rights* are held subject to the fair exercise of the [police] power.”<sup>100</sup> The court recognized that it had tempered that power by holding that the destruction of property under the police power can only occur under the “narrowest limits of actual necessity, unless the state chooses to pay compensation.”<sup>101</sup> The court elaborated by noting that if “property is destroyed in order to save property of greater value, a provision for indemnity is a plain dictate of justice and of the principle of equality” requiring that compensation be provided for the destruction.<sup>102</sup>

The plaintiffs argued that *Corneal's* standards of strict scrutiny applied in the instant case because the compensation provided by the department was token compensation and subject to legislative appropriations.<sup>103</sup> The court rebutted this argument by showing previous cases in which the legislature had set a compensation floor that the tree owners could challenge.<sup>104</sup> The court concluded “that under the statutory scheme the State is obligated to provide more than token compensation if the State has destroyed a healthy, albeit exposed tree” and emphasized that healthy but exposed trees may have value.<sup>105</sup> The court held that the statute merely sets a floor of compensation and that the state

97. *Id.* (quoting *Joint Ventures, Inc. v. Dep't of Transportation*, 563 So. 2d 622 (Fla. 1990)).

98. *Id.* at 782.

99. *Id.* at 783.

100. *Id.* (quoting *Golden v. McCarty*, 337 So. 2d 388, 390 (Fla. 1976) (emphasis and alterations supplied by *Haire* court)).

101. *Id.* at 783 (quoting *Corneal v. State Plant Board*, 95 So. 2d 1,4 (Fla. 1957) (quoting ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS*, § 534 (1904))).

102. *Id.* at 783-84 (quoting *Corneal*, 95 So. 2d at 4).

103. *Id.* at 784.

104. *Id.* at 785. See also *State Plant Board v. Smith*, 110 So. 2d 401 (Fla. 1959), *Dep't of Agric. & Consumer Servs. v. Bonanno*, 568 So. 2d 24 (Fla. 1990).

105. *Haire II*, 870 So. 2d at 785. Pending before the court is the question certified in *Patchen v. State Dep't of Agric. and Consumer Servs.*, 817 So. 2d 854, 855-856 (Fla. 3d DCA 2002): “Does the Florida Supreme Court’s decision in *Department of Agriculture & Consumer Services v. Polk*, 568 So. 2d 35 (Fla. 1990), which held that the Department’s destruction of healthy *commercial* citrus nursery stock within 125 feet of trees infected with citrus canker did not compel state reimbursement, also apply to the Department’s destruction of uninfected, health *noncommercial*, *residential* citrus trees within 1900 feet of trees infected with citrus canker?”

has an obligation to provide full and just compensation to homeowners who have their trees destroyed.<sup>106</sup>

Next, the supreme court considered whether the Citrus Canker Law bore a rational relationship to the goal of citrus canker eradication.<sup>107</sup> The plaintiffs argued that the law did not bear a rational relationship because the underlying science was flawed.<sup>108</sup> The court emphasized that under rational basis review, the inquiry into the wisdom of the legislation is inappropriate.<sup>109</sup> The court found that the *Gottwald Study* and the state's experience in fighting citrus canker supported the legislature's choice in enacting the Citrus Canker Law.<sup>110</sup>

The court then addressed the procedural due process issues raised by the plaintiffs. The court distinguished *State Plant Board v. Smith*<sup>111</sup> in which it found a violation of procedural due process when the state summarily destroyed citrus trees to combat the burrowing nematode. The court noted that the burrowing nematode travels about 36 feet per year while the citrus canker is wind borne and can travel at least 1900 feet in one storm.<sup>112</sup> Therefore, because of the urgency and imminence of citrus canker, the court approved of the issuance of an IFO, noting that the only appealable issue is whether the condemned tree is within 1900 feet of an infected tree.<sup>113</sup>

#### IV. FROM CORNEAL TO HAIRE: RELIANCE ON PROFESSOR FREUND

Both the Fourth District Court of Appeal<sup>114</sup> and the Florida Supreme Court<sup>115</sup> recognized that *State Plant Board v. Corneal*<sup>116</sup> was the seminal Florida case for the regulation of the citrus industry under the police power. Each court used the Florida Supreme Court's 1957 *Corneal* decision for the rule that, "where destruction of property is authorized, the police power may be exercised only within the narrowest limits of actual necessity, unless the state chooses to pay compensation."<sup>117</sup> Actually, this idea

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106. *Haire II*, 870 So. 2d at 785-6.

107. *Id.* at 786.

108. *Id.*

109. *Id.* at 787.

110. *Id.*

111. *State Plant Board v. Smith*, 110 So. 2d 401,403 (Fla. 1959).

112. *Haire II*, 870 So. 2d at 787-8.

113. *Id.* at 788.

114. *See Haire I*, 836 So. 2d at 1051.

115. *Haire II*, 870 So. 2d at 784.

116. 95 So. 2d 1 (Fla. 1957).

117. *Haire I*, 836 So. 2d at 1051 (internal quotes omitted) (*quoting Corneal*, 95 So. 2d at 4). *See also Haire II*, 870 So. 2d at 784.

can be traced back to Professor Ernst Freund's treatise *The Police Power: Public Policy and Constitutional Rights*.<sup>118</sup> Indeed, both *Haire* decisions used *Corneal's* quotation from Freund's *Police Power* that, "[w]here property is destroyed in order to save property of a greater value, a provision for indemnity is a plain dictate of justice and of the principle of equality"<sup>119</sup> as a starting point for finding that the legislative scheme represented a floor not a ceiling in terms of compensation to the tree owners for the destruction of their trees.<sup>120</sup>

In *Corneal*, the Supreme Court of Florida had to decide whether the State Plant Board's rule requiring the pulling trees near a tree infected with the burrowing nematode was a "taking of property without compensation."<sup>121</sup> The *Corneal* court rejected a procedural due process challenge.<sup>122</sup> The state's citrus industry faced spreading decline caused by the burrowing nematode.<sup>123</sup> The legislature enacted a law giving the State Plant Board the power to control and eradicate "spreading decline" and the burrowing nematode.<sup>124</sup> By rule, the State Plant Board declared all trees with spreading decline a public nuisance and established a "dangerous zone" around each infested tree of approximately 50 feet.<sup>125</sup> Eventually, the state established a compulsory program of "pull and treat" to burn the trees and other plants in the "dangerous zone."<sup>126</sup> *Corneal* claimed that the compulsory pull and treat rule amounted to a taking.<sup>127</sup>

The supreme court first discussed the limits of police power and relied on Freund's treatise to define those limits.<sup>128</sup> Specifically, the court seemed reluctant to find that the police power encompassed the actual destruction of property. The court referred to Freund for the proposition that "the absolute destruction of property is an extreme exercise of the police power and is justified

118. FREUND, *supra* note 101, § 534.

119. *Id.* §§ 534-35 (quoted at *Haire II*, 870 So. 2d at 783-84 and *Haire I* 836 So. 2d at 1048).

120. *Haire II*, 870 So. 2d at 785-86.

121. *Corneal*, 95 So. 2d at 4.

122. "Some contention is made by the appellants that they were denied due process of law; but in view of the fact that Sec. 581.04 Fla. Stat. 1955, F.S.A. provides for a hearing as to the impact of any of the Board's rules and regulations and of the further fact that the appellants did not request a hearing, this contention cannot be sustained." *Id.*

123. *Id.* at 2. The burrowing nematode is a worm that feeds on the rootstocks of a variety of plants including citrus and avocado trees causing a decrease in fruit production and poor foliage. The nematode moves underground at the rate of 36 feet per year.

124. *Id.* at 3.

125. The size of the zone could vary depending on the plants planted in the zone but was typically no larger than 50 feet. *Id.*

126. *Id.*

127. *Id.* at 4.

128. *Id.*

only within the narrowest limits of actual necessity, unless the state chooses to pay compensation.”<sup>129</sup> The court cited cases in which out of necessity, animals could be destroyed to prevent disease and buildings could be destroyed to arrest the spread of fire.<sup>130</sup> However, the court provided two caveats: (1) in the case of the destruction of animals, the court noted that states usually provided some compensation to the animal’s owner; and (2) in the case of the fire, the court used Freund’s opinion on the justice of compensating owners who had their property destroyed to prevent further conflagration: “[w]here property is destroyed in order to save property of greater value, a provision for indemnity is a plain dictate of justice and of the principle of equality.”<sup>131</sup> The court then added, again using Freund as authority, that destruction of property through statutes “is always accompanied by statutory duty of compensation.”<sup>132</sup>

The *Corneal* court continued by discussing the destruction of fruit trees, noting that many courts have upheld the destruction of infested fruit trees without compensation. The court also cited a Virginia case, *Bowman v. Virginia State Entomologist*,<sup>133</sup> in which the state destroyed trees other than those infected.<sup>134</sup> The court noted that the statute at issue in *Bowman* provided compensation to the owner of the destroyed tree, but that the statute did not require compensation to be provided to the owner of the destroyed tree.<sup>135</sup> Curiously, the court neglected to cite or discuss the United States Supreme Court’s opinion in *Miller v. Schoene*<sup>136</sup> which also addressed the same statute.<sup>137</sup>

The *Corneal* court concluded that the State did not face an emergency because of the slow rate at which the spreading decline

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129. The court cites “Professor Freund, Police Power, Sec. 520, p. 555” for this proposition. *Id.* at 4. This proposition has been cited by other courts in citrus canker cases. See e.g., Dept. of Agric. and Consumer Servs. v. Polk, 568 So.2d 35, 39 (Fla. 1990), *Haire I*, 836 So. 2d at 1048 and *Haire II*, 870 So. 2d at 784.

130. *Corneal*, 95 So. 2d at 4.

131. *Id.*

132. *Id.* (quoting FREUND, *supra* note 101, § 534).

133. *Bowman v. Virginia State Entomologist*, 128 Va. 351, 105 S.E. 141 (1920).

134. *Corneal*, 95 So. 2d at 4-5.

135. The court wrote that *Bowman* “up[held] a statute authorizing the destruction of cedar trees located within one mile of an apple orchard, which provided for, although it did not require, compensation to be paid to the owner.” *Id.* at 5. This reading of the statute at issue in *Bowman* is erroneous because the statute provided compensation for “incidental damages and expenses” such as interruption of farming, dragging the cedars through the farmland, personal supervision et cetera. See *Miller v. State Entomologist*, 146 Va. 175, 193-94 (1926) (dealing with the same statute).

136. 276 U.S. 272 (1928).

137. See text accompanying notes 289 through 311 below.

spreads and the small area of infestation.<sup>138</sup> Further, the court found that there was another method of treating the disease apart from the pull and treat method advocated by the State Plant Board.<sup>139</sup> The court required that the State Plant Board compensate the tree owners for at least, their lost profits for the trees destroyed.<sup>140</sup>

After *Corneal* was decided, the Florida Legislature enacted a law requiring mandatory pull and treat with a maximum compensation set at \$1,000 per acre.<sup>141</sup> The Florida Supreme Court addressed the constitutionality of this law in *State Plant Board v. Smith*.<sup>142</sup> *Smith* was the first case to use *Corneal's* framework to examine the regulation of Florida's citrus trees. The *Smith* court recognized that the police power encompasses the destruction of property, despite the requirement of just compensation, when the property "is a source of public danger,"<sup>143</sup> because the state is not "appropriating it to public use," but instead preventing its use.<sup>144</sup> Yet, in *Smith*, the court found "a provision for 'just compensation' is a clear requisite to the act of destruction" and held that the legislature could enact a law requiring the mandatory destruction of citrus trees however the legislature could not establish a maximum amount of compensation, because that would tread onto

138. *Corneal*, 95 So. 2d at 5.

139. *Id. Contra Miller*, 146 Va. at 191 (no taking despite the fact that the state could have combated cedar rust by removing the cedar balls from the cedar trees at the beginning of each spring).

140. *Corneal*, 95 So. 2d at 6-7. The court added (in language that may be more the result of the Cold War's influence than any legal precedent):

The increasing number of regulatory measures imposed upon its citizens by government at all levels — city, county, state and national — has perhaps accustomed us to restrictions unthought of at the time Professor Freund wrote his work on Police Power cited above. But we hope we never become insensitive to the clear and indefeasible property rights of the people guaranteed by our state and federal organic law, nor forgetful of the principle of universal law that the right to own property is an indispensable attribute of any so-called "free government" and that all other rights become worthless if the government possesses an untrammelled power over the property of its citizens.

*Id.* at 6.

141. *State Plant Board v. Smith*, 110 So. 2d 401, 403 (Fla. 1959).

142. *Id.*

143. "When in the exercise of police power, the State through its agents destroys diseased cattle, unwholesome meats, decayed fruit or fish, infected clothing, obscene books or pictures or buildings in the path of a conflagration, it is clear that the constitutional requirement of 'just compensation' does not compel the State to reimburse the owner whose property is destroyed. Such property is incapable of any lawful use, it is of no value, and it is a source of public danger. A legislative provision for compensation in such cases is a mere bounty that may, of course, be fixed at whatever level the Legislature desires." *Id.* at 406-407.

144. *Id.* at 405. Like *Corneal*, the *Smith* court cites to *Bowman v. Virginia State Entomologist*, 128 Va. 351 (1920) without citing to *Miller v. Schaene*.

the province of the judiciary under the Florida Constitution's separation of powers doctrine.<sup>145</sup> The court also required some compensation to be paid for the destruction of infested trees, that amount to be determined as well by the judiciary.<sup>146</sup>

#### V. PROBLEMS WITH *CORNEAL*'S RELIANCE ON FREUND

The *Corneal* court relied on Freund's treatise as authority for the propositions that "destruction of property is an extreme exercise of the police power and is justified only within the narrowest limits of actual necessity,"<sup>147</sup> and that indemnity for the destruction of property "is a plain dictate of justice."<sup>148</sup> Litigants have subsequently argued that *Corneal* requires courts to apply stricter scrutiny review when the state seeks to destroy citrus trees under the police power.<sup>149</sup> However, Freund's actual analysis presents many problems and exposes weaknesses in *Corneal*'s approach to the destruction issue.

Freund was not the only academic to examine the scope of the police power at the turn of the last century. Professor For example, W.P. Prentice found the origins of the police power in the law of necessity.<sup>150</sup> According to a recent article, the term "police power" first appeared in the 1820s.<sup>151</sup> It was used to describe the residual powers of the states.<sup>152</sup> Throughout the nineteenth century the term came into greater use as more regulations were enacted and challenged.<sup>153</sup> As the term was used more, its boundaries and limits came into greater focus, and at the turn of the twentieth century the term became the object of some treatise writers in their efforts to place cases into various legal categories.<sup>154</sup>

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145. *Id.* at 408.

146. *Id.* at 409.

147. *Corneal*, 95 So. 2d at 4 (citing Freund).

148. *Id.* (quoting Freund).

149. See e.g. *Haire II*, 870 So. 2d at 782 ("The petitioners assert that because the Citrus Canker Law infringes on fundamental property rights it can be upheld under this Court's decision in *Corneal* . . . , only if the threat is imminently dangerous and the 1900 foot destruction radius is 'justified only within the narrowest limits of actual necessity.' This standard is similar to the 'strict scrutiny' standard of review").

150. See W.P. PRENTICE, *THE POLICE POWERS ARISING UNDER THE LAW OF OVERRULING NECESSITY* 4 (1894).

151. D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 *MIAMI L.REV.* 471, 476 (2004); see *Brown v. Maryland*, 25 U.S. 419, 443 (1827) ("The power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains, and ought to remain, with the States").

152. D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 *MIAMI L.REV.* 471, 476 (2004).

153. See *id.* at 476-78.

154. See, e.g., PRENTICE *supra*, note 150; FREUND, *supra* note 101.

In his 1904 work, *The Police Power*, Freund described the police power as “the power of promoting the public welfare by restraining and regulating the use of liberty and property.”<sup>155</sup> One has commentator argued that, although Freund provided an expansive definition of the police power, in reality he envisioned a much narrower conception.<sup>156</sup> Although Freund claimed that he based the treatise on existing case law, he actually based his definitions on political theory not found in reported precedent.<sup>157</sup> This critical reading of Professor Freund comports with a detailed analysis of the sections of the treatise in which Freund discussed the intersection of the police power and the law of necessity.

Freund divided his presentation into categories that encompass a few cases with similar fact patterns. In the categories, he typically discussed one or two seminal cases or statutes and extracted and theorized from them to reach general principles. He usually accompanied these general principles with a string citation to cases that ostensibly supported the proposition he expounded.<sup>158</sup>

Freund discussed the government’s use of the police power under a variety of circumstances. He believed that nuisances could be destroyed, especially if they were imminently dangerous.<sup>159</sup> He understood that the government’s power to destroy was tied to the protection of public health, safety and morals from such harmful uses.<sup>160</sup> He also recognized that the police power in some circumstances included the power to destroy. “But [the police power] may also be resorted to for the protection of property, and is applied to trees or animals where destructive vermin or contagious diseases threaten the ruin to other property of the like character.”<sup>161</sup>

Freund also discussed the summary abatement of nuisances.<sup>162</sup> He addressed some of the constitutional issues raised by the destruction of property.<sup>163</sup> He believed that the destruction of property was justified only within narrow limits and, in language partly quoted by *Corneal*<sup>164</sup> and *Haire*<sup>165</sup> wrote:

155. *Id.* at § 3.

156. D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 *MIAMI L. REV.* 471, 492 (2004).

157. *Id.*

158. *See, e.g.*, FREUND, *supra* note 101, §§ 521, 522, 534.

159. *Id.*, § 520.

160. *Id.*

161. *Id.*

162. *Id.* § 521.

163. *Id.*

164. *Corneal v. State Plant Board*, 95 So. 2d 1, 4 (Fla. 1957).

165. *Haire II*, 870 So. 2d 774, 783 (Fla. 2004).

In enacting regulative measures the law need not restrict itself to conditions actually harmful, but may require precautions within the whole range of possible danger: *while the taking or destruction of property, being an extreme measure, is justified only within the narrowest limits of actual necessity, – unless the state chooses to pay compensation.*<sup>166</sup>

Professor Freund cited *Van Wormer v. Albany*,<sup>167</sup> *Salem v. Eastern Railroad Company*,<sup>168</sup> *Shipman v. State Livestock Sanitary Commission*,<sup>169</sup> *Lowe v. Conroy*<sup>170</sup> and *Waye v. Thompson*<sup>171</sup> for this proposition.<sup>172</sup> However, in fact, none of these cases directly held that destruction is justified only in the narrowest limits of necessity unless the state pays compensation. Further, most of the cited cases do not address the issue of compensation at all.

In *Van Wormer v. Albany*,<sup>173</sup> the city's board of health found the plaintiff's barns and sheds to be a nuisance owing to a cholera outbreak in 1832. The city had the barns destroyed without providing written notice to the plaintiff.<sup>174</sup> The plaintiff brought a trespass action against the city.<sup>175</sup> The Supreme Court of Judicature of New York found that the legislature of New York had authorized the abatement of nuisances by Boards of Health in times of "pestilential disease" and empowered the city to "all such other regulations as they shall think necessary and proper for the preservation of the public health."<sup>176</sup> Although the court recognized that a nuisance action normally would be required to condemn the buildings, the court found, "If the civil authorities were obliged to wait the slow progress of a public prosecution, the evil arising from nuisances would seldom be avoided."<sup>177</sup> The court did not find the proceedings by the Board of Health to be defective.<sup>178</sup> *Van Wormer* did not involve compensation.<sup>179</sup>

166. FREUND, *supra* note 101, § 521 (emphasis added).

167. *Van Wormer v. Albany*, 15 Wend. 262 (N.Y. 1836).

168. *Salem v. E. R.R. Co.*, 98 Mass. 431 (1868).

169. *Shipman v. State Livestock Sanitary Comm'n*, 115 Mich. 488 (1898).

170. *Lowe v. Conroy*, 97 N.W. 942 (Wis. 1904).

171. *Waye v. Thompson*, 15 Q.B.D. 342 (Q.B. Div'1 Ct. 1885).

172. FREUND, *supra* note 101, § 521.

173. *Van Wormer v. Albany*, 15 Wend. 262 (N.Y. Sup. Ct. 1836).

174. *Id.* at 262.

175. *Id.*

176. *Id.* at 264.

177. *Id.*

178. *Id.* at 265.

179. *See id.*

The Supreme Judicial Court of Massachusetts, in *City of Salem v. Eastern Railroad Company*,<sup>180</sup> found that the city could bring suit to recover from the nuisance owner the expenses of destroying the nuisance.<sup>181</sup> This case *nearly* stands for the opposite of Freund's statement that destruction requires compensation because in *Salem* the city sought to recover its expenses for the destruction from the person Freund believed ought to be receiving compensation.<sup>182</sup> In *Salem*, the railroad originally built a bridge on piles that allowed the free flow of water.<sup>183</sup> Subsequently, the railroad filled in dirt underneath the piles and allowed the water to back up behind the railroad tracks.<sup>184</sup> As a result, a nuisance formed because the water did not drain.<sup>185</sup> The city provided notice for the railroad to remove the nuisance and to allow the water to flow again.<sup>186</sup> The railroad ignored the notice, and the city undertook the work.<sup>187</sup> Upon completion of the work, the city sued the railroad for the sum expended to effect drainage of the pond past the railroad.<sup>188</sup> At issue in the appeal was whether a trial should be held to determine that the railroad's dam actually was a nuisance or whether the board of health's determination that a nuisance was present sufficed.<sup>189</sup> The court held that a trial should be held to determine whether the railroad was liable to the city for the costs of building a canal under the railroad; however, the findings of the board of health that a nuisance existed would be *prima facie* evidence that one did exist.<sup>190</sup> As noted above, the only discussion of compensation involved the statute providing the city with the power to abate nuisances and then charge the owners of the nuisances the costs associated with abatement.<sup>191</sup> There was no issue regarding the payment of compensation by the city to the railroad.<sup>192</sup> The court described the limits on when notice must be

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180. *Salem v. E. R.R. Co.*, 98 Mass. 431 (1868).

181. *Id.* at 452.

182. *See id.* at 445.

183. *Id.* at 432.

184. *Id.*

185. *Id.*

186. *Id.* at 432-33.

187. *Id.* at 433.

188. *Id.*

189. *Id.* at 451-52.

190. *Id.* at 452.

191. *Id.* at 445 ("By express terms of §10, [recovery of expenses of removal] may be claimed of any 'other person who caused or permitted' the nuisance" and the owner).

192. *Id.*

provided under the police power<sup>193</sup> tying the police power to the idea of necessity.<sup>194</sup>

*Shipman v. State Live-Stock Commission*<sup>195</sup> involved diseased cows.<sup>196</sup> A Michigan statute provided for the destruction by the commission of cows diagnosed with tuberculosis.<sup>197</sup> The commission destroyed the plaintiff's cows and offered \$1 per head.<sup>198</sup> The court rejected a mandamus appeal in which the plaintiff asked for a determination that the value was more than \$1 per head, because the court held that the commission was the only body that could determine whether a cow was diseased and, if so, the value of the diseased cow.<sup>199</sup> The only appeal left to the plaintiff was to the governor.<sup>200</sup> The court observed that the state would not be liable if the commission wrongfully condemned cattle, but that an action might lie against the commission members.<sup>201</sup> The court noted that the statute at question did not provide for the destruction of sound cattle exposed to disease<sup>202</sup> and so this case did not address the provision of the statute that allows for the destruction of sound

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193. *Id.* at 443. The court wrote:

But, although such general regulations may seriously interfere with the enjoyment of private property, and disturb the exercise of valuable private rights, no previous notice to parties so to be affected by them is necessary to their validity. They belong to that class of police regulations to which all individual rights of property are held subject, whether established directly by enactments of the legislative power, or by its authority through boards of local administration. The authority of the board of health in respect to particular nuisances stands upon similar ground. Their action is intended to be prompt and summary. They are clothed with extraordinary powers for the protection of the community from noxious influences affecting life and health, and it is important that their proceedings should be embarrassed and delayed as little as possible by the necessary observance of formalities. Although notice and opportunity to be heard upon matters affecting private interests ought always to be given when practicable, yet the nature and object of these proceedings are such that it is deemed to be most for the general good that such notice should not be essential to the right of the board of health to act for the public safety. Delay for the purpose of giving notice, involving the necessity either of public notice or of inquiry to ascertain who are the parties whose interests will be affected, and further delay for such hearings as the parties may think necessary for the protection of their interests, might defeat all beneficial results from an attempt to exercise the powers conferred upon boards of health.

*Id.* (citations omitted).

194. *Id.* at 443-44.

195. *Shipman v. State Live-Stock Sanitary Comm'n*, 115 Mich. 488 (1898).

196. *Id.* at 489.

197. *Id.* at 490.

198. *Id.* at 489.

199. *Id.* at 492.

200. *Id.* at 491.

201. *Id.* at 492.

202. *Id.* at 491.

livestock exposed to disease.<sup>203</sup> This case stands for the principle that, when "necessary,"<sup>204</sup> the state can pay minimal or nominal compensation to abate a nuisance.<sup>205</sup>

*Lowe v. Conroy*<sup>206</sup> also concerned livestock.<sup>207</sup> Under a Wisconsin statute, cows infected with anthrax could be destroyed as a nuisance if the city board of health judged it "necessary for the protection of the public health and safety of the inhabitants."<sup>208</sup> The city health officer thought that a steer was infected with anthrax and ordered it destroyed.<sup>209</sup> The jury thought otherwise, finding that the steer was not diseased and holding the health officer liable to the owner for the value of the steer.<sup>210</sup> The Supreme Court of Wisconsin affirmed, finding that the steer did not fall within the ambit of the statute because the jury found it to be uninfected.<sup>211</sup> Again this case does not stand for the proposition that a state must pay compensation unless within the strict limits of necessity for destroying property, because the jury actually found that the health officer condemned a healthy steer and that the statute allowing the health officer to destroy infected cattle did not apply.<sup>212</sup> As a result, the health officer was liable to the owner for his mistake.<sup>213</sup>

*Waye v. Thompson*<sup>214</sup> involved diseased meat.<sup>215</sup> Again the controversy did not hinge on compensation; rather the court saw the dispute as an evidence case.<sup>216</sup> The justices faced the issue of whether the butcher of condemned meat could be subject to prison and fine without presenting evidence.<sup>217</sup> The justices found for the

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203. *Id.* at 492.

204. *See e.g., id.* at 490 ("Section 7 [of the Michigan Live-Stock Sanitary Act] provides . . . for their [animals] destruction whenever in the opinion of the commission, it shall become necessary to prevent the further spread of the infectious or contagious disease").

205. *See id.* at 489 (State offered \$1 per head).

206. *Lowe v. Conroy*, 97 N.W. 942 (Wisc. 1904).

207. *Id.*

208. *Id.* at 943.

209. *Id.* at 942.

210. *Id.* at 942.

211. *Id.* at 946.

212. *Id.*

213. The facts recited in the opinion indicate that most likely the steer was infected by anthrax because anthrax bacilli were observed in a specimen of blood taken from the site that the steer was flayed. *Id.* at 942. However, the jury was the ultimate finder of fact, and it determined the cow was not infected.

214. *Waye v. Thompson*, 15 Q.B.D. 342 (Q.B. Div'l Ct. 1885).

215. *Id.* at 343.

216. *Id.* at 344 ("The question upon which this case was stated for the opinion of the Court was whether the justices should have permitted evidence to be given by the respondent as to the state and condition of the said meat at the time it was ordered to be destroyed by the said Thomas Barlow Mafsicks").

217. *Id.* at 346.

defendant and held that he could put on evidence that the meat was fit for human consumption.<sup>218</sup>

The above cases do not stand for the proposition for which Freund cited them, that is, that the destruction of property under the police power is justified only in the narrowest limits of necessity. The cases instead illustrate a wide variety of circumstances in which property can be destroyed under the police power with no or nominal compensation to the property owner.<sup>219</sup> It appears that Freund was commenting on what he thought the law *should* be not what it *was*.

Unfortunately, this is not an isolated incident.<sup>220</sup> In section 534, "Destruction of Property to Check the Spread of Fire," Freund also found that property could be destroyed to avoid calamities such as fire or invasion.<sup>221</sup>

Freund divided the power to destroy property to prevent the spread of fire into two categories according to the identity of the defendant.<sup>222</sup> First, he noted that no liability would attach to cities or governments unless they consent to be liable.<sup>223</sup> Second, he noted that government officials that ordered the destruction could be liable, but were usually excused by necessity.<sup>224</sup> However, contrary to the existing case law, he felt that justice dictated that the community actually pay for damages sustained by the owner of the destroyed property.<sup>225</sup> He saw this lack of liability as a defect in the common law.<sup>226</sup> This led him to the conclusion that "[w]here property is destroyed in order to save other property of greater value, a provision for indemnity is a plain dictate of justice and of the principle of equality."<sup>227</sup> Unfortunately, Freund had no case law to sustain this ideal.<sup>228</sup> Nor did Freund make an argument that the

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218. *Id.* at 346-47.

219. See *Salem v. E. R.R. Co.*, 98 Mass. 431 (1868) (destruction of a waterway obstruction), *Shipman v. State Livestock Sanitary Comm'n*, 115 Mich. 488 (1898) (nominal compensation for the destruction of cattle), *Van Wormer v. Albany*, 15 Wend. 262 (N.Y. 1836) (destruction of a barn), *Lowe v. Conroy*, 97 N.W. 942 (Wis. 1904) (jury found cattle uninfected and therefore they did not fall under the statute), *Waye v. Thompson*, 15 Q.B.D. 342 (Q.B. Div'l Ct. 1885) (destruction of diseased meat).

220. See *e.g.*, FREUND, *supra* note 101, § 534.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

Constitution required such compensation.<sup>229</sup> Instead, without apparent foundation, he wrote of the "plain dictates of justice."<sup>230</sup>

Later, Freund limited the scope of justice by remarking: "Of course there can be no constitutional or moral duty of compensation where the property destroyed could not have been saved in any event."<sup>231</sup> Unfortunately, later courts have not looked at Professor Freund's chapter holistically.<sup>232</sup> For example, the *Corneal* court cited bold statements, taken out of context, as justification for new rules of law.<sup>233</sup> Later courts, without making sufficient inquiries into the origins of *Corneal's* "doctrine," followed the same path.<sup>234</sup> The *Corneal* court used Freund's police power treatise as the basis for its decision to force the state Plant Board to compensate the owners of the uninfected trees pulled under the compulsory pull and treat program.<sup>235</sup> However, the *Corneal* court misapplied Freund's treatise by misinterpreting sections and quoting them out of context. First, the *Corneal* Court cited section 520 of the treatise for the proposition that "the absolute destruction of property is an extreme exercise of the police power and is justified only within the narrowest limits of actual necessity, unless the state chooses to pay compensation."<sup>236</sup> In actuality, section 520 says:

Where the condition of a thing is such that it is imminently dangerous to the safety, or offensive to the morals, of the community, and is incapable of being put to any lawful use by the owner, it may be treated as a nuisance per se. Actual physical destruction is in such cases not only legitimate, but sometimes the only legitimate course to be pursued. . . . It [destructive police power] may also be resorted to for the protection of property and is applied to trees or animals where destructive vermin or contagious diseases threaten the ruin of other property of the like character.<sup>237</sup>

Section 520 actually contemplates the destruction of trees and animals "where destructive vermin or contagious diseases threaten

229. *Id.*

230. *Id.*

231. *Id.*

232. See e.g. *Corneal v. State Plant Board*, 95 So. 2d 1,4 (Fla. 1959).

233. See *id.*

234. See *Haire I*, 836 So. 2d at 1048, *Haire II* 870 So. 2d at 782.

235. *Corneal*, 95 So. 2d at 6-7.

236. *Id.* at 4.

237. FREUND, *supra* note 101, § 520.

the ruin of other property of like character.”<sup>238</sup> Nowhere does the section discuss compensation or the “narrowest limits of actual necessity.”

The next section, section 521, did discuss the narrow limits of actual necessity.<sup>239</sup> But as shown above, Freund’s authority for the statement that compensation is required unless within those limits is weak at best. Only six reported cases (and only one non-Florida case dating from 1912) have used Professor Freund’s requirement of compensation unless within the narrowest limits of actual necessity.<sup>240</sup>

Additionally, the *Corneal* court took liberties with section 534 of Freund’s *Police Power*.<sup>241</sup> Without illuminating the context, the *Corneal* court quoted Freund for the idea that, “where property is destroyed in order to save property of greater value, a provision for indemnity is a plain dictate of justice and of the principle of equality.”<sup>242</sup> However, section 534 addresses the context of using the principle of necessity to pull down a building to serve as a firebreak for conflagration and not in an agricultural context.<sup>243</sup> Also, section 535 contains the caveat that no compensation should be required if the property would be destroyed anyway.<sup>244</sup> Unfortunately, these errors and misreadings have persevered in Florida jurisprudence, because *Corneal* is used as the benchmark for evaluating regulations of the citrus industry in Florida.<sup>245</sup>

## VI. AN ALTERNATIVE TO FREUND AND CORNEAL

A different line of cases from the United States Supreme Court presents an alternative framework from which to analyze the Citrus Canker Law. When using the police power the state does not have to pay compensation because the police power, is rooted in the law of necessity. However, when using the power of eminent domain, compensation is required because it is a taking of property

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238. *Id.*

239. *Id.* § 521.

240. A WestLaw search identified six cases that have used the language “narrowest limits of actual necessity.” *Haire I*, 870 So. 2d at 782, Department of Agriculture & Consumer Services v. Polk, 568 So. 2d 35, 39 (Fla. 1990), *Zabel v. Pinellas County Water & Navigation Control Authority*, 171 So. 2d 376, 380 (Fla. 1965), *Corneal v. State Plant Board*, 95 So. 2d 1, 4 (Fla. 1957), *Haire II*, 836 So. 2d at 1048 and *Vreeland v. Erie R. Co.*, 83 A. 384 (N.J. Ch. 1912) (destruction of forest to create firebreak).

241. *Corneal*, 95 So. 2d at 4.

242. *Id.* (quoting FREUND, *supra* note 101, § 534).

243. FREUND, *supra* note 101, § 534.

244. “Of course there can be no constitutional or moral duty of compensation, where the property destroyed could not have been saved in any event.” *Id.* § 535.

245. *Haire II*, 836 So. 2d at 1048.

for the greater good. Earlier cases made this distinction; however Freund muddled these concepts when he wrote, "where destruction of property is authorized, the police power may be exercised only within the narrowest limits of actual necessity, unless the state chooses to pay compensation."<sup>246</sup> As shown above, Freund had limited authority for that statement and sought to comment on what he thought the law should be. Because the *Corneal* court relied on Freund,<sup>247</sup> the justices also missed the distinction between eminent domain and the police power and brought eminent domain concepts of compensation into the police power equation.<sup>248</sup>

It must be added that, a quarter century after Freund finished his treatise, Justice Holmes, in *Pennsylvania Coal Co. v. Mahon*<sup>249</sup> did tie together eminent domain and the police power through his famous statement that "if a regulation goes too far it will be recognized as a taking,"<sup>250</sup> thus creating some overlap between the doctrines. Although such overlap arguably exists, only six years later the Supreme Court rejected the notion that compensation would be required or due process would be violated by a statute that required the destruction of trees that carried but were unaffected by a disease enacted in Virginia.<sup>251</sup>

The Florida Supreme Court should take a step back from *Corneal* and reexamine United States Supreme Court precedent under the following rubric. First, the court should ask whether the law is within the state's police power.<sup>252</sup> Second, the court should ask whether the destruction required by the law is necessary.<sup>253</sup> Factors that may influence the necessity of destruction of property include: time frame (that is, how fast the danger is spreading), degree of danger (that is, the potential damage of doing nothing), value (is the legislature choosing to protect more valuable property to the detriment of less valuable property) and contagiousness. The following cases help illustrate the operation of this framework. If the destruction is within the police power and is necessary in order

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246. FREUND, *supra* note 101, § 534.

247. *Corneal*, 95 So. 2d at 4.

248. *See id.*

249. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

250. *Id.* at 415.

251. *See Miller v. Schoene*, 276 U.S. 272, 279-80 (1928) [hereinafter *Miller*]. Even Freund recognized the destruction of trees to abate noxious pests was within the scope of the police powers on the page previous to the one quoted by *Corneal* and *Haire*. FREUND, *supra* note 101, § 520 ("But it [physical destruction] may also be resorted to for the protection of property and is applied to trees or animals where destructive vermin or contagious diseases threaten the ruin to other property of the like character.")

252. *See e.g. Sligh v. Kirkwood*, 237 U.S. 52 (1915).

253. *See e.g. Miller*, 276 U.S. at 279-80.

to protect other property, then the state should not be required to pay any compensation.

*A. Does the Citrus Canker Law Fall Under the Police Power?*

The Citrus Canker Law falls within the ambit of the state's police power to regulate the citrus industry, as recognized by the Supreme Court in *Sligh v. Kirkwood*<sup>254</sup> and the Florida Supreme Court in *Maxcy v. Mayo*.<sup>255</sup> In *Sligh v. Kirkwood*, the plaintiff attacked a statute making it a crime to sell immature or unfit citrus fruit as unconstitutional under the Commerce Clause of the Constitution.<sup>256</sup> Justice Day, writing for the Court, addressed whether Florida had the authority under the police power to create a crime for delivering citrus fruit that was immature and unfit for consumption.<sup>257</sup> The court answered in the affirmative.<sup>258</sup> In so answering, the court first undertook to define the extent of the police power.<sup>259</sup> The court noted the difficulty in making such a definition and adopted the definition of *Eubank v. Richmond*:<sup>260</sup>

Whether it is a valid exercise of the police power is a question in the case, and that power we have defined, as far as it is capable of being defined by general words, a number of times. It is not susceptible of circumstantial precision. It extends, we have said, not only to regulations which promote the public health, morals, and safety, but to those which promote public convenience or the general prosperity. . . . And further, "It is the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government."<sup>261</sup>

The Court found that the existence of indirect effects on interstate commerce does not negate the state's right to exercise its police power unless Congress has preempted the area.<sup>262</sup> The Court then asked whether the Florida citrus law bore a "reasonable relation to a legitimate purpose to be accomplished by its enactments".<sup>263</sup> The court found a reasonable relationship, because the importance of the citrus industry to the state was unquestioned, and such a law protected the reputation of the industry in foreign

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254. *Sligh*, 237 U.S. at 61-62.

255. *Maxcy v. Mayo*, 103 Fla. 552, 569 (1932).

256. *Sligh*, 237 U.S. at 57.

257. *Id.*

258. *Id.* at 62.

259. *Id.* at 58-59.

260. *Eubank v. Richmond*, 226 U.S. 137, 142 (1912).

261. *Sligh*, 237 U.S. at 59 (quoting *Eubank*, 226 U.S. at 142).

262. *Id.* at 61.

263. *Id.*

markets.<sup>264</sup> As a result, the Court found that the law passed constitutional muster.<sup>265</sup>

Seventeen years later, in *Maxcy v. Mayo*, the Florida Supreme Court used *Sligh's* posture on the police power to justify additional regulation of the citrus industry.<sup>266</sup> It had become common to spray citrus trees with arsenic to kill pests.<sup>267</sup> However, overuse of such spraying detrimentally affected the fruit of the tree.<sup>268</sup> The state banned the spraying and made it a criminal offense.<sup>269</sup> Some growers objected and sued.<sup>270</sup> The court discussed the expansion perimeters of the police power.<sup>271</sup> First the court found that the legislature has the police power to regulate the citrus industry:

This Court takes judicial notice of the fact that the citrus industry of Florida is one of its greatest assets. Its promotion and protection is of the greatest value of the state and its advancement redounds greatly to the general welfare of the commonwealth. For this reason the Legislature necessarily has a wide field of police power within which to pass laws to foster, promote and protect the citrus fruit industry of Florida from injurious practices which may tend to injure or destroy either the reputation or value of Florida citrus products in the world's markets.<sup>272</sup>

The court then emphasized that the state, when faced with a choice of one type of property over another, can decide on the destruction of one when necessity requires that destruction in order to save the other.<sup>273</sup> The court noted: "Preferment of the public interest even to the extent of actually destroying property interests of the individual, has always been one of the distinguishing characteristics of every exercise of the police power which affects property."<sup>274</sup> The court also emphasized the developing nature of the police power. "But it must also be remembered that the police power of the state is not static. The Courts are in duty bound to recognize its expansion in proper cases to meet conditions which necessarily change as business progresses and civilization

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264. *Id.* at 61-62. "We may take judicial notice of the fact that the raising of citrus fruits is one of the great industries of the State of Florida." *Id.* at 61.

265. *Id.* at 62.

266. *Maxcy, Inc. v. Mayo*, 139 So. 121 (1932).

267. *Id.* at 127-28.

268. *Id.* at 127.

269. *Id.* at 126-27.

270. *Id.* at 127.

271. *Id.* at 130-31.

272. *Id.* at 128.

273. *Id.* at 130-131.

274. *Id.*

advances.”<sup>275</sup> The court then cited *Miller v. Shoene*<sup>276</sup> and *Euclid v. Ambler Realty*<sup>277</sup> as examples of the advancement of the police power.<sup>278</sup> With regard to the case before it, the Court noted that the police power extends even to ban acts that may be innocent if “evil largely grows” out of the practice.<sup>279</sup> Because of this reasoning, the court found that banning arsenic spraying would be a valid exercise of the police power.<sup>280</sup>

Under *Sligh* and *Maxcy*, the regulation of citrus and therefore the citrus canker law falls under the police power of the state. The next step would be to ask whether the action contemplated by the law is necessary. A series of Virginia cases culminating in a United States Supreme Court case help define this issue. The Florida Supreme Court in *Maxcy* cited to this Supreme Court case,<sup>281</sup> *Miller v. Shoene*,<sup>282</sup> holding that a Virginia statute requiring the destruction of a class of trees within two miles<sup>283</sup> of an apple orchard was constitutional.<sup>284</sup>

### B. *Is the Destruction of Citrus Trees Necessary to Protect Other Property?*

Under *Miller v. Schoene*, the Supreme Court acknowledged that choosing one class of property over another is within the realm of the police power and does not violate due process.<sup>285</sup> Further, *Miller* upheld a Virginia statute that did not provide for compensation for “the value of the standing cedars or the decrease in the market value of the realty caused by their destruction” but

275. *Id.* at 131.

276. *Miller v. Schoene*, 276 U.S. 272 (1928).

277. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (upheld constitutionality of zoning).

278. *Maxcy*, 139 So. at 131.

279. *Id.*

280. *Id.*

281. *Id.* 130-31.

282. 276 U.S. 272 (1928).

283. The act actually is unclear. In the opening section it declares cedar trees to be a nuisance in a one mile radius, but in the next section it refers to a two mile radius. VA. CODE §§ 885, 886 (1919). Even the Virginia court found it to be puzzling.

Why one mile should have been inserted in the first section of the act (Code, section 885) and *two miles* in the second section (Code, section 886) is a mere matter of conjecture, . . . it may be observed, however, in passing that the first section (Code, section 885) appears to be a mere declaration of public policy, declaring the infected cedars within one mile to be per se a public nuisance, and might have been omitted, without impairing the completeness and efficiency of the residue of the act.

*Miller v. State Entomologist [State Entomologist]*, 146 Va. 175, 187-88, 135 S.E. 813, 817 (1926).

284. *Miller*, 276 U.S. at 272.

285. *Id.* at 279-80.

that allowed the property owner to recover only the expenses of removing the trees.<sup>286</sup> Under this line of cases, the Citrus Canker Law would be constitutional when attacked on due process grounds as a valid exercise of the police power,<sup>287</sup> because the Citrus Canker Law merely makes a public policy choice of preferring one more valuable property over another less valuable property.<sup>288</sup>

Virginia enacted its Cedar Rust Law in order to combat the spread of cedar rust.<sup>289</sup> Cedar rust is a fungus that uses two species of trees to survive.<sup>290</sup> It travels from cedar tree balls to apple trees through wind driven spores.<sup>291</sup> Once, on the apple tree, it causes retarded development of fruit and defoliation.<sup>292</sup> The defoliation eventually kills the cedar tree.<sup>293</sup> The statute declared all red cedar trees within one mile of an apple orchard to be a nuisance.<sup>294</sup> It also provided a mechanism where the State Entomologist could condemn cedar trees and force property owners to remove the trees.<sup>295</sup> Under certain circumstances, the state might compensate the cedar tree owner but only for the costs of destroying the cedar trees.<sup>296</sup> No other compensation mechanism was provided.<sup>297</sup>

The statute's constitutionality was challenged on at least four occasions — *Bowman v. Virginia State Entomologist*,<sup>298</sup> *Miller*

286. *Id.* at 277.

287. *See Sligh*, 237 U.S. at 57-68.

288. This can be seen when one considers that because, all citrus trees exposed to citrus canker will be infected by the disease, eventually the disease will become endemic. The state is choosing at this point to destroy the infected trees and those trees exposed to infection (which under the above logic will be infected) in order to preserve the more valuable unexposed and uninfected trees.

289. *State Entomologist*, 146 Va. at 178 (quoting VA. CODE § 885).

290. *Kelleher v. Schoene*, 14 Fed. 2d 341, 347 (W.D. Va. 1926); *Bowman v. Virginia State Entomologist*, 128 Va. 351, 369-70 (1920) [hereinafter *Bowman*].

291. *Kelleher*, 14 Fed. at 347.

292. *Id.*

293. *Id.*

294. VA. CODE § 885 (1919).

295. *Id.* § 886.

296. *See e.g.*, *Miller v. Schoene*, 276 U.S. 272, 277 (1928).

297. *See id.*

298. 128 Va. 351, 105 S.E. 141 (1920). In the first challenge, *Bowman v. Virginia State Entomologist*, the Supreme Court of Virginia found the statute to be constitutional. The court first found that the legislature had the power to enlarge the definitions of nuisance available at common law. *Id.* at 361. The court found that the legislature had the power to enact statutes for the public welfare. Public welfare, according to the court, is "concerned not only with the safety, health and morals of the people; but also, under certain circumstances, as is universally admitted in the protection property." *Id.* at 362. The court distinguished the destruction of property because it is a nuisance and eminent domain the use of a nuisance cannot consistent with the principle of *sic utere tuo ut alienum non laedas*. (Use your own property so not to damage others.) The court recited a litany of cases that allowed for the destruction of infected trees or weeds and even trees infected with canker. The court then reached the Cedar Rust statute and applied a rational basis test to it. *Id.* at 368. The court

*v. State Entomologist*,<sup>299</sup> *Kelleher v. Schoene*<sup>300</sup> and *Miller v. Schoene*<sup>301</sup> — and on each occasion was upheld as a valid exercise of the state’s police power.<sup>302</sup> In the Supreme Court, Justice Stone writing for an unanimous court found the Cedar Rust Law to be constitutional.<sup>303</sup> He reasoned that the cedar rust presented the legislature with a dilemma: either it could preserve one type of property or another.<sup>304</sup> Justice Stone called it a “necessity of making a choice.”<sup>305</sup> Under these circumstances, a state can choose the destruction of one class of property to preserve another class of property that the legislature deems to be more valuable to the public under the police power.<sup>306</sup> As Justice Stone put it, “where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property.”<sup>307</sup> As a result, the state did not deny due process, because a choice had to be made

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held that “the character of the regulations provided for in the statute is not arbitrary or unreasonable, that the statute is really designed to accomplish a legitimate public purpose, that the means have employed have a real, substantial relation to the public object in view, and that they do not impose an unusual or unnecessary restriction upon the lawful use of private property.” *Id.* at 371.

299. 146 Va. 175, 135 S.E. 813 (1926) [hereinafter *State Entomologist*]. Six years to the day later, the Supreme Court of Appeals of Virginia, again passed judgment on the constitutional validity of the Cedar Rust statute. Again, the court found the statute to be constitutional and upheld *Bowman*. *Id.* at 180. In that case however, the court enlarged on some of its reasoning in *Bowman*. For instance, the court noted that infection by cedar rust of the cedar tree was not a prerequisite to destruction. “It is not necessary to wait for absolute infection before the cedars may be destroyed.” *Id.* at 190. More interestingly, however, the court noted that the removal of the cedar balls from the tree could remedy and stop the spread of cedar rust. However, this fact did not sway the court from finding that the destruction of the cedar trees was a valid statutory choice and justified under the circumstances. Most importantly, the court clarified the compensation provisions of the statute by interpreting the statute to force the local governments through the apple orchard owners to compensate the cedar tree owners for the time and expense of cutting down the cedar trees but not for the scenic value. *Id.* at 195.

300. 14 Fed. 2d 341 (W.D. Va. 1926).

301. 276 U.S. at 272 (1928). Interestingly, the Counsel for the plaintiffs in error, Randolph Harrison, argued that the cedar rust cases were “in no wise controlled by the decisions . . . in which statutes have been held valid which provided for the destruction . . . of oranges affected by ‘citrus canker’” because the citrus trees so destroyed had no value but these cedar trees were not “injured in the slightest degree as a result of their becoming hosts of the cedar rust” and thus have non *de minimus* value. *Id.* at 273-74.

302. *Miller*, 276 U.S. at 272; *Kelleher*, 14 Fed. 2d at 341; *State Entomologist*, 146 Va. at 175; *Bowman*, 128 Va. at 351.

303. *Id.* at 281.

304. *Id.* at 279.

305. *Id.*

306. *Id.*

307. *Id.* at 279-80.

and the choice was reasonable under the considerations of social policy.<sup>308</sup>

The Supreme Court found the destruction of the cedar trees in favor of the apple orchards to be within the ambit of the police power.<sup>309</sup> The citrus canker issue however does not present the choice between the preservation of two distinct types of property; it is the choice between same property but with different values.<sup>310</sup> Either the state can choose to eradicate the canker and preserve the higher yield trees or it can choose to allow the canker to become endemic and possibly destroy a valuable industry. Like the Cedar Rust Law, necessity justifies action.<sup>311</sup> The courts in Florida should characterize the legislature's action not as a taking but as a legitimate exercise of the police power.

The concept of necessity illustrates the relationship between necessity and the police powers. In *Sligh*, the Court upheld a statute aimed at regulating the value of the citrus industry because of the necessity of the industry to Florida's economy.<sup>312</sup> In *Miller*, the Court found that the state had deemed it necessary to choose the destruction of one type of property in order to save another.<sup>313</sup> A third Supreme Court case, *Bowditch v. Boston*<sup>314</sup> further illustrates the concept of necessity in a graver context. The ability of the state to raze a building to create a firebreak in the case of conflagration has been long recognized in the law.<sup>315</sup> In the case of the *King's Prerogative in Saltpeter*,<sup>316</sup> the court discussed the cases in which destruction was justified by the circumstances, and no liability arose.

And for the commonwealth, a man shall suffer damage; as, for saving of a city of a city or town, a house shall be plucked down if the next be on fire: and the suburbs of a city in time of war for the common safety shall be plucked down; and a thing for the commonwealth every man may do without being liable to an action.<sup>317</sup>

308. *Id.* at 280.

309. *Id.*

310. The two types of property are uninfected trees and infected trees. Uninfected trees are worth more because they have greater yields.

311. See, e.g. *Miller*, 276 U.S. at 279-80.

312. *Sligh v. Kirkwood*, 237 U.S. 52, 62 (1915).

313. *Miller*, 276 U.S. at 279-80.

314. *Bowditch v. Boston*, 101 U.S. 16 (1880).

315. See *Case of the King's Prerogative in Saltpetre*, 12 Coke 12-13 (1606), *Mouse's case*, 77 Eng. Rep. 341 (1608).

316. *Prerogative*, 12 Coke at 13.

317. *Id.*

Necessity arose again in *Mouse's Case*,<sup>318</sup> which allowed goods to be cast over the side of a barge when the barge was in danger of sinking, without assigning liability.<sup>319</sup> The common law recognized necessity as a defense to otherwise tortious conduct.<sup>320</sup>

In *Bowditch v. Boston*,<sup>321</sup> the Supreme Court reaffirmed the common law principles laid down in the above cases.<sup>322</sup> The case involved a fire in Boston during which a building was torn down to serve as a fire break.<sup>323</sup> The owner of the merchandise in the building sued to recover the value of his goods under a Massachusetts statute that provided for recovery if a building is destroyed for the public good, but only under certain circumstances.<sup>324</sup> The owner did not meet those circumstances.<sup>325</sup> As a result, the owner had no statutory cause of action.<sup>326</sup> Likewise, the Supreme Court found no common law cause of action because of the doctrine of necessity.<sup>327</sup> Justice Swayne, speaking for the court summarized the state of the common and natural law regarding necessity:

At the common law every one had the right to destroy real and personal property, in cases of actual necessity, to prevent the spreading of a fire, and there was no responsibility on the part of

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318. *Mouse's case*, 77 Eng. Rep. at 341.

319. *Id.*

320. See e.g., *id.*; *Prerogative*, 12 Coke at 13; *Respublica v. Sparhawk*, 1 U.S. 357, 362 (Pa. 1788) ("If a road be out of repair, a passenger may lawfully go through a private enclosure. So, if a man is assaulted, he may fly through another's close. In times of war, bulwarks may be built on private ground. Thus, also, every man may, of common right, justify the going of his servants, or horses upon the banks of navigable rivers, for towing barges, &c. to whomsoever the right of the soil belongs. The pursuit of Foxes through another's ground is allowed, because the destruction of such animals is for the public good. And, as the safety of the people is a law above all others, it is lawful to part affrayers in the house of another man. Houses may be razed to prevent the spreading of fire, because for the public good.") (internal citations omitted) and *Stone v. New York*, 25 Wend. 157, 174 (N.Y. 1840) (The right to take use or destroy property "is a natural right, arising from the inevitable and pressing necessity when of two immediate evils, one must be chosen and the less is voluntarily inflicted in order to avoid the greater. Under such circumstances, the general and natural law of all civilized nations, recognized and ratified by the express decisions of our own common law, authorizes the destruction of property by any citizen, without his being subject to any right of recovery against him by the owner").

321. *Bowditch v. Boston*, 101 U.S. 16 (1880).

322. *Id.* at 28. The statute that would have provided compensation required the three fire marshals jointly to order the destruction of the building in order for the owner of the building to be eligible for compensation. The Supreme Court found no evidence that three fire marshals ordered the destruction of the building and thus the terms of the statute were not met.

323. *Id.* at 16.

324. *Id.*

325. *Id.* at 21-22.

326. *Id.* at 20-21.

327. *Id.* at 18-19.

such destroyer, and no remedy for the owner. In the case of the Prerogative, 12 Rep. 13, it is said: "For the Commonwealth a man shall suffer damage, as for saving a city or town a house shall be plucked down if the next one be on fire; and a thing for the Commonwealth every man may do without being liable to an action." There are many other cases besides that of fire, — some of them involving the destruction of life itself, — where the same rule is applied. "The rights of necessity are a part of the law."

In these cases the common law adopts the principle of the natural law, and finds the right and the justification in the same imperative necessity.<sup>328</sup>

As a result, the court found no common law action for the owner.<sup>329</sup> Therefore, despite the destruction of the goods by the representatives of the city, the owner had no recourse in the law.<sup>330</sup>

The instant case can be analyzed under the rubric presented by *Sligh, Miller and Bowditch*. First, according to *Sligh*, Florida can enact regulations affecting the citrus industry under its police power.<sup>331</sup> The Citrus Canker Law was enacted by the Florida Legislature to combat citrus canker, a known threat to the citrus industry.<sup>332</sup> Second, according to *Miller*, regulations that protect an industry can go even as far as destroying trees with some value (that otherwise would not be destroyed by the disease that they have the potential to carry) without compensating the owners for their value, in order to protect other trees with greater value.<sup>333</sup> *Miller* was decided six years after *Pennsylvania Coal v. Mahon*,<sup>334</sup> where Justice Holmes declared that "if a regulation goes too far it will be recognized as a taking."<sup>335</sup> Thus, presumably, the Court, if so inclined, could have applied Holmes' dictum and recognized a taking in the destruction of the cedar trees.<sup>336</sup> However, the unanimous court declined to do so.<sup>337</sup> Like the Cedar Rust law, the Citrus Canker law authorizes the destruction of exposed citrus trees in order to protect unexposed citrus trees of potentially greater value.<sup>338</sup> Under *Miller*, such a law would not violate due process,

328. *Id.*

329. *Id.*

330. *Id.* at 22.

331. *Sligh v. Kirkwood*, 237 U.S. 52, 61-62 (1915).

332. FLA. STAT. § 581.184 (2002).

333. *Miller*, 276 U.S. at 279-80.

334. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

335. *Id.* at 415.

336. Indeed, the plaintiffs in error cited *Pennsylvania Coal* and asked the Court to find that the Cedar Rust Law was a taking. *Miller*, 276 U.S. at 274.

337. *Id.* at 281.

338. The unexposed trees have a greater value because they cannot be infected.

because the State of Florida is presented with a choice of either destroying exposed and infected trees or facing endemic citrus canker. Thus, like the state in *Miller*, Florida faces a choice between protecting two types of property.<sup>339</sup> Third, according to *Bowditch*, the state can destroy property when necessary to protect other property of value without providing compensation under the police power.<sup>340</sup> The distinction that Freund overlooks and *Corneal* neglects is that eminent domain compensation is not implicated in the destruction of property under the doctrine of necessity, because the police power derive in part from the notion of necessity.<sup>341</sup> The key distinctions between compensable and non-compensable destruction were explained by *Stone v. New York*.<sup>342</sup> Compensable taking is “when the property of an individual is taken by the authority of the State for the common use or benefit of the public”<sup>343</sup> whereas non-compensable destruction occurs “in cases of imminent peril, when the right of self-defense, of the protection of life or of property, authorizes the sacrifice of other and less valuable property.”<sup>344</sup> The court noted that these distinctions “are often confounded.”<sup>345</sup>

## VII. CONCLUSION

One noted commentator has pointed out that the police power originated in the doctrine of necessity.<sup>346</sup> Reexamining some of those roots can be a surprising and enlightening task in the context of contemporary cases that chip away at the police power. Such a reexamination, in light of Florida’s Citrus Canker Law, leads to an abundance of precedent for the notion that the state can make a choice to destroy a class a property in order to save another class of property, when it is necessary to do so under its police power, without compensating the owner of the destroyed property.<sup>347</sup>

In light of these findings and the new reality of the post-hurricane expansion of citrus canker,<sup>348</sup> this article suggests that Florida need not provide compensation for the destruction of

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339. See *Miller*, 276 U.S. at 279-80.

340. *Bowditch v. Boston*, 101 U.S. 16, 18-19 (1880).

341. W.P. PRENTICE, *THE POLICE POWERS ARISING UNDER THE LAW OF OVERRULING NECESSITY* 4 (1894).

342. *Stone v. New York*, 25 Wend. 157, 174-175 (N.Y. 1840).

343. *Id.* at 173.

344. *Id.* at 174.

345. *Id.* at 173.

346. See W.P. PRENTICE, *THE POLICE POWERS ARISING UNDER THE LAW OF OVERRULING NECESSITY* 4 (1894).

347. See, e.g., *Miller v. Schoene*, 276 U.S. 272, 279-80 (1928).

348. See *infra* notes 39-41.

exposed citrus trees and asks the Florida Supreme Court to reexamine *Corneal* in order to determine: (1) when destruction of property is authorized; (2) whether the police power should be exercised "only within the narrowest limits of actual necessity, unless the state chooses to pay compensation;" and (3) whether, where the "property is destroyed to save property of greater value, a provision for indemnity is a plain dictate of justice and of equality."<sup>349</sup> The Florida Courts' reliance on Freund's treatise was based on sound legal precedent. There is an alternative legal foundation for the Citrus Canker Law that lies founded in the United States Supreme Court decisions in *Sligh*, *Miller* and *Bowditch*. Under this alternate analysis, the Florida courts should uphold the Citrus Canker Law, because the regulation of the citrus industry falls within the police power of the state, and the state is exercising that police power to choose to destroy one class of property to protect a class of a greater value. Moreover, the state would not be required to provide compensation to the citrus tree owners. This line of analysis is preferable because it relies on United States Supreme Court precedent, not on the unsupported representations found in a treatise and gives the state greater freedom to protect Florida's citrus industry from the devastating effects of citrus canker.

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349. *Corneal v. State Plant Board*, 95 So.2d 1, 4 (Fla. 1957).