LIMITING THE TAKINGS CLAUSE–EVEN WHEN COMPENSATION IS DUE

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Abstract

In Baker v. City of McKinney, the Fifth Circuit Court of Appeals held that a private property owner was not entitled to just compensation under the Fifth Amendment's Takings Clause even though police caused $50,000 worth of damage to her house during a SWAT raid. According to the Court, Ms. Baker was not entitled to just compensation because there was an "objective necessity" for the police action, which ostensibly acts as an exception to the Fifth Amendment's just compensation requirement.
The Fifth Circuit's Baker decision is a disaster. It largely ignores modern Takings Jurisprudence that creates clear distinctions between physical and regulatory takings. It's also manifestly unfair – and forces Baker to "bear public burdens, which in all fairness and justice should be borne by the public as a whole." If the government had destroyed property for a public park, there would be no question that just compensation is due. Baker was also unable to obtain compensation from her homeowners' insurance because of a common boilerplate exception for government actions causing damage.

The US Supreme Court denied Baker's petition for certiorari, but Justices Gorsuch and Sotomayor noted in a statement that "This Court has yet to squarely address whether the government can, pursuant to its police power, require some individuals to bear such a public burden." According to those Justices, whether the "objective necessity" exception to the Takings Clause exists "is an important and complex question that would benefit from further percolation in the lower courts prior to this Court's intervention." In fact, there is no "objective necessity" exception to the Takings Clause's just compensation requirement. The Fifth Circuit badly mangled the law and the policy and set questionable precedent. But Courts should resist the temptation to expand the Takings Clause to provide relief to Baker and others in this wildly uncommon situation. A constitutional remedy should be a last resort. An expansion of the Takings Clause would have adverse effects on valid exercises of police power, including environmental protection measures.

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There is a justice, but we do not always see it. Discreet, smiling, it is there, at one side, a little behind injustice, which makes a big noise.[2]

Hard cases make bad law.[3]

INTRODUCTION

When the government "takes" private property for a public purpose, just compensation is generally due under the Fifth and Fourteenth Amendments.[4] There are some enumerated and judicially created exceptions to this rule, such as when the government takes property by destroying privately-owned structures to further the goals of law enforcement, which protects the

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[2] JULES RENARD, JOURNAL 1887-1910, 251 (Louise Bogan & Elizabeth Roget eds. & trans., 2008).
[3] *See* Sepehr Shahshahani, *Hard Cases Make Bad Law? A Theoretical Investigation*, 51 J. LEGAL STUD. 133, 134 (2022) "[W]here strict application of a generally sound law would present a special hardship to someone, the court is tempted to distort the law to avoid the hardship."
[4] U.S. CONST. amend. V. ("nor shall private property be taken for public use without just compensation."); *see* Chi., B. & Q. R. Co. v. City of Chicago, 166 U.S. 226, 241 (1897) (stating that the Fifth Amendment applies to the states via the Fourteenth Amendment).

community.[5] This exception has been justified by the fact that such a destruction of real property is a public "necessity."[6]

Under a recent Fifth Circuit case, when law enforcement acts under a local jurisdiction's police power to raze private property, it can do so with impunity if there is an "objective necessity" for their actions.[7] But a line of takings cases from the U.S. Supreme Court does not support this conclusion—nor do the historic policy justifications for Fifth Amendment takings.[8]

The denial of just compensation for a law enforcement raid that destroys private property is at odds with the oft-stated policy that one should not be forced to bear burdens that should be borne by society as a whole.[9] It is also at odds with recent Supreme Court cases concerning physical invasion of private property, which has historically been treated differently from regulatory takings. Unfortunately, courts have confused the standards and justifications for providing just compensation when there is a physical invasion versus when a regulation has denied a property owner some use of their land.

Ultimately, local law enforcement should be able to employ their best tactics without fear that an effective strategy would impact their budget. But the costs of law enforcement and police budgets are a societal expenditure.[10] Individual landowners whose property is destroyed by responsibly acting[11] law enforcement should not bear the burden of that loss.

But just because these individual property owners are due compensation should not mean that the Takings Clause should be expanded. An expansion of the Takings Clause can have unintended consequences for otherwise valid government actions like those providing environmental protection. Rather, in the incredibly rare case where an innocent owner's property is damaged by responsibly acting government agents in an emergency criminal situation, justice and fairness dictate that a remedy must exist. And it should—without unnecessarily expanding the Takings Clause. Tort, contract, and insurance

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[5] Pena v. City of Los Angeles, 158 F.4th 1033, 1040 (9th Cir. 2025).

[6] *Id.*

[7] Baker v. City of McKinney, 84 F.4th 378, 388 (5th Cir. 2023).

[8] *See* Armstrong v. United States, 364 U.S. 40, 49 (1960); *see also* First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304, 318–19 (1987) (quoting Armstrong).

[9] *See Armstrong*, 364 U.S. at 49 ("[T]he Fifth Amendment guarantee . . . was designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole"); *see also First English Evangelical Lutheran Church*, 482 U.S. at 318–19 (quoting *Armstrong* in a temporary takings case); Richard A. Epstein, *Levmore on Simple Rules*, 10 TEX. A&M L. REV. 649, 654 (2023) ("[W]hen [the *Armstrong* Principle] is lost sight of, massive expropriation can take place . . . .").

[10] Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 25–27 (1905).

[11] When law enforcement acts negligently, the calculation is different. There may be a remedy under applicable state and federal tort law. *See, e.g.*, Martin v. United States, 605 U.S. 395 (2025) (concerning whether the Federal Tort Claims Act applies to an FBI raid in which a SWAT team went to the wrong house).

law could all provide appropriate remedies that do not alter or conflict with the application of the Constitution.

I. The Problem

The problem—that comprises this article's focus—is when an innocent third party's real property is destroyed by government action in the pursuit of criminal justice. Fairness and justice dictate that those innocent parties should be compensated and made whole. But obtaining relief has been weirdly complicated, and the courts have turned to the Fifth Amendment's Takings Clause to find relief.

A. Baker v. McKinney

In *Baker v. McKinney*[12] and cases like it,[13] a tragic set of facts leads to an innocent property owner paying for the costs of law enforcement through extensive property damage. Ms. Baker sustained more than $50,000 in damages from a police raid that left her house in ruins.[14] The police acted reasonably,[15] and Ms. Baker was not at fault. The police's enforcement successfully apprehended a potentially violent criminal, but at a cost to one private citizen.

Baker owned a home in McKinney, Texas, but was planning to sell it after a recent retirement move to Montana.[16] Her adult daughter, Deanna Cook, was living in the house during the critical period and preparing it for sale.[17] On July 25, 2020, Cook was reviewing social media when she saw a Facebook post in which "Wesley Little was on the run with a 15-year-old female 'runaway.'"[18] Cook remembered Little as a handyman who had done work on their home more than a year before.[19] Little had been fired from that job because of comments that had made Cook uncomfortable.[20]

Earlier that day, McKinney police had observed Little driving a Chevrolet Corvette with the 15-year-old "runaway."[21] Police began pursuit but were

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[12] *Baker*, 84 F.4th 378.
[13] *See, e.g.*, Pena v. City of Los Angeles, No. CV 23-5821-JFW(MAAx), 2024 WL 1600319 (C.D. Cal. Mar. 25, 2024), *aff'd*, 158 F.4th 1033 (9th Cir. 2025).
[14] *Baker,* 84 F.4th at 381.
[15] *See id.* at 380 ("it is undisputed that police acted unimpeachably that day and no party in this case has ever suggested otherwise.").
[16] *Id.*
[17] *Id.* at 378 (Baker's dog was also residing at the home).
[18] *Id.* at 380.
[19] *Id.*
[20] *Id.*
[21] *Id.*

unable to catch Little because "it was a very fast Corvette[.]"[22] After evading police, Little drove to the Baker's house with the 15-year-old girl and knocked on the door.[23] Cook opened the door as Baker was in Montana, and let Little come in to put the car in the garage.[24] Cook told Little she had to run to the supermarket.[25] She subsequently informed Baker, who then called the police.[26]

The local police arrived promptly and "set up [a] perimeter on the home and essentially tr[ied] to secure it. And what we [were] doing [was] for the well-being of not only the 15-year-old girl but the community as a whole."[27] After engaging an armored personnel carrier, Little released the girl, and she exited Baker's house.[28] The girl told police that he had pulled down stairs to get into the attic, that he had several guns, and was high on methamphetamine.[29] Little communicated to police that "he had terminal cancer, wasn't going back to prison, [and] was going to shoot it out with the police."[30]

Police used the armored personnel carrier, toxic gas grenades, and a drone to resolve the situation.[31] The police launched dozens of tear gas grenades in an attempt to get Little out of the home.[32] Little subsequently took his own life after considerable damage was done to Baker's house.[33]

Baker was left with a toppled fence, battered front door, broken windows, damaged roof and landscaping, a blown-out garage door.[34] The attic ceiling, floor, and drywall were all damaged by gas canisters.[35] Baker's dog was rendered blind and deaf by the explosions; toxic gases permeated the house, requiring a HAZMAT remediation team.[36] "Appliances and fabrics were irreparable. Ceiling fans, plumbing, floors (hard surfaces as well as carpet) and bricks needed to be replaced–in addition to the windows, blinds, fence . .

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[22] *Id*. The Corvette was a 2002 convertible. *See* State of Texas v. Little, Wesley Eugene, A 2002 CHEVROLET CORVETTE VEHICLE IDENTIFICATION NUMBER 1G1YY32G825134907, No. 416-00018-2018. (416th Dist. Ct., Collin Cnty., Tex. 2018). Little's Corvette was subject to impoundment, but he was apparently able to keep the car by filing an affidavit of military service. *Id.*
[23] *Baker,* 84 F.4th at 380.
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id*.
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] Baker v. City of McKinney, 608 F. Supp. 3d 457, 460 (E.D. Tex. 2022).
[36] *Id.*

. . Essentially all of the personal property in the house was destroyed, including an antique doll collection left to Baker by her mother."[37]
In sum, there was approximately $50,000 in damage to Baker's home as a direct result of the SWAT raid.[38]

The Baker house after the SWAT raid.[39]

The problem began when Baker—understandably—sought compensation for the considerable damage to her house. There were a number of theories under which she could be compensated, but each was unsuccessful, and Baker was initially left to pay all bills for the police's destruction of her house.[40]

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[37] *Id.*
[38] *Baker,* 84 F.4th at 381. "SWAT" stands for Special Weapons and Tactics. Karan R. Singh, *Treading the Thin Blue Line: Military Special-Operations Trained SWAT Teams and the Constitution*, 9 WM. & MARY BILL RTS. J. 673, 680 (2001). "The majority of SWAT missions are high-risk search or arrest warrant services, hostage situations, or barricaded armed-person incidents." *Id.* at 680–81.
[39] *SWAT Takings and Destruction*, INST. FOR JUST., https://ij.org/issues/private-property/swat-destruction/ [https://perma.cc/U6QJ-5DV4] (last visited Jan. 16, 2026).
[40] *Baker,* 84 F.4th at 381.

Baker's homeowner's insurance refused to cover any damage caused by the SWAT raid.[41] Baker filed a claim against the City of McKinney, and the claim was denied in its entirety.[42]

Baker then filed a lawsuit against the City, alleging that she was owed compensation under, *inter alia*, the Fifth Amendment's Takings Clause.[43] The Federal District Court ruled that she had a cognizable claim.[44] A jury ruled in Baker's favor, and she had three options to pursue her remedy of $59,656 for damage to her home and personal property: Baker could recover under the Fifth Amendment's Takings Clause of the Federal Constitution, under 42 U.S.C. § 1983, or under the Texas Constitution's Takings Clause.[45] Baker chose to apply the federal constitution and the federal law providing for a civil action for deprivation of rights and the attendant damages.[46] This was a fateful decision that ultimately led to an unfortunate legal precedent.

The City of McKinney appealed, and the Federal Fifth Circuit Court of Appeals reversed the district court.[47] On appeal, the City had argued for a broad rule in which the "Takings Clause never requires compensation when a government agent destroys property pursuant to its police power."[48] While the Fifth Circuit was unwilling to adopt this broad and sweeping rule, it came up with a new rule that creates unnecessary confusion:

> [T]he Fifth [C]ircuit adopted a narrower rule that it understood to be compelled by history and precedent: the Takings Clause does not require compensation for damaged property when it was "objectively necessary" for officers to damage the property in an active emergency to prevent imminent harm from persons. Because the parties agreed that the McKinney police's actions were "objectively necessary," the Fifth Circuit concluded that Baker was not entitled to compensation.[49]

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[41] *Id.* Most homeowners' insurance policies have boilerplate language that excludes government action, like police raids, from coverage due to "actions of a civil authority functioning in its ordinary governing capacity." Baker v. City of McKinney, 145 S. Ct. at 11–12 (2024) (citing 10A JORDAN R. PLITT ET AL, COUCH ON INSURANCE § 152:22 (3d ed. Supp. 2024)).

[42] *Baker*, 145 S.Ct. at 11–12.

[43] Baker v. City of McKinney, 601 F.Supp.3d 124, 129 (E.D. Tex. 2022).

[44] *Id.* at 144, *rev.'d & remanded*, 84 F.4th 378 (5th Cir. 2023).

[45] *Baker*, Slip op. at 1 (E.D. Tex. June 5, 2025) ("Baker was given three options under which to pursue her judgment: (1) under the Fifth Amendment directly; (2) under § 1983; or (3) under the Texas Constitution.").

[46] *Id.* at *5.

[47] *Id.* (the Fifth Circuit did not address whether there was a taking under the Texas Constitution because she had not elected to seek such a remedy).

[48] Baker v. City of McKinney, 145 S. Ct. at 11 (2024).

[49] *Id.* (citation omitted).

But this narrow rule would lead to unnecessary injustice and was, in fact, flimsily supported by precedent. Further, in denying compensation, the ruling forced Baker to shoulder burdens which, in justice and fairness, should be borne by society as a whole. The Fifth Circuit's decision is deeply flawed, inconsistent, and would lead to absurd results. It creates a narrow carve-out for the government to evade paying for property it has literally and physically taken by force. However, the Baker case, and others like it, need not even be decided under the Fifth Amendment at all. Changes to, or re-examining, existing insurance and tort law would provide relief without the need to expand the reach of the Fifth Amendment's Takings Clause.

Fortunately, Baker was subsequently able to obtain relief under the Texas Constitution. Baker filed a "Reelection of Remedy,"[50] through which she seeks to pursue judgment on her claim under the Texas Constitution, which states: "No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person."[51]

Baker successfully petitioned the Federal District Court to "reenter judgment pursuant to Article I, Section 17 of the Texas constitution, including pre- and post-judgment interests and costs."[52] The Federal District Court allowed Baker to re-characterize her relief under the Texas Constitution, as the jury had already found that she was entitled to relief. According to the Court, "[w]hen a plaintiff prevails on both federal and Texas state law causes of action for the same injury, federal courts apply Texas' one satisfaction rule . . . " and that a plaintiff can change their election if the right to recover is reversed on appeal.[53] So, if Baker had just elected a remedy under state law in the first place, we never would have to deal with the Fifth Circuit's curious ruling.

B. Other Recent Cases Where an Innocent Third Party's Property was Destroyed by Police

The *Baker* case, while unusual, is not a singular incident. For example, in *Pena v. City of Los Angeles*,[54] the Federal District Court for the Southern District of California found there was no Fifth Amendment taking when a

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[50] *Baker*, Slip op. at 1 (E.D. Tex. June 5, 2025).
[51] TEX. CONST. art. 1, § 17.
[52] *Baker*, Slip op. at 4 (E.D. Tex. June 5, 2025).
[53] *Id.* (citing Malvino v. Delluniversita, 840 F.3d 223, 233 (5th Cir. 2016); Texas Advanced Optoelectronic Sols., Inc. v. Renesas Elecs. Am. Inc., No. 4:08-CV-00451, 2020 WL 1495230, at *8 (E.D. Tex. Mar. 27, 2020)).
[54] Pena v. City of Los Angeles, No. CV 23-5821-JFW(MAAx), 2024 WL 1600319 (C.D. Cal. Mar. 25, 2024), *aff'd*, 158 F.4th 1033 (9th Cir. 2025).

SWAT team caused extensive damage to the plaintiff's shop while they were apprehending a fugitive who had barricaded himself inside, including the police's use of chemical munitions.[55] The damage to the shop was not covered by the plaintiff's insurance.[56]

> The deployment of the chemical munitions caused damage to the walls, doors, roof, and windows of Plaintiff's shop. In addition, the tear gas and pepper spray permeated the entire shop, which . . . caused additional damage to his shop, his printing equipment, and his inventory, and rendered his shop uninhabitable until Plaintiff had it cleaned by a hazardous materials team.[57]

The plaintiff was unable to pay for repairs to his facility and was forced to operate out of his garage with a borrowed printer.[58]

Like *Baker*, all parties to the *Pena* case conceded that the police action was reasonable and was conducted in the public interest.[59] After being denied all claims filed with the LAPD and US Marshall, Pena filed a claim for the taking of private property without just compensation in violation of the Fifth Amendment and 42 U.S.C. § 1983.

According to the court, the police action constituted a valid exercise of police power and was therefore exempt from the Fifth Amendment's requirement to pay just compensation.[60] The court concedes this is an unfair conclusion.[61]

The *Pena* court cites to *Baker*, but seems to draw a line based on the type of government action: "Indeed, it is well settled that a state's seizing and retaining property as part of a criminal investigation is not a 'taking' for a 'public purpose' under the Fifth Amendment and thus does not give rise to a claim for just compensation."[62] This is a ridiculous conclusion. The property

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[55] *Id.* at *1–2.
[56] *Id.* at *2.
[57] *Id.*
[58] *Id.*
[59] *Id.* "Despite the damage, Plaintiff conceded that the LAPD SWAT team acted reasonably in attempting to apprehend the fugitive and "that the public good required the destruction of his shop.""
[60] *Id.* at *4.
[61] *Id.*
[62] *Id.* (citing Ostipow v. Federspiel, 824 Fed.App'x 336 (6th Cir. 2020)). The case was not selected for publication in West's Federal Reporter, although "The court permits citation of any unpublished opinion, order, judgment, or other written disposition." 6 CIR. R. 32.1; *see also* FED. R. APP. P. 32.1. ("[I]t is 'schizophrenic' to allow citation of unpublished opinions, while simultaneously not releasing those opinions for distribution into the Federal Appendix or online. Even more schizophrenic is a rule that affords full precedential value to older, harder to find unpublished opinions, while treating new, easier to

"taken" in cases cited by Pena were evidence of a crime, not the property of an innocent party. But property that is "seized" as the result of a criminal investigation is wildly different from property destroyed as a result of a criminal who has barricaded himself in a third party's home. There is a compelling—and different—justification for the police to seize evidence of a crime rather than to destroy property of a third party in pursuit of a criminal. The case relied upon by the *Pena* court, *Ostipow v. Federspiel*,[63] literally involved items connected to drug manufacturing[64] and the Plaintiff in that case ultimately obtained a favorable judgment.[65] It's hardly precedent for cases in which an innocent third party seeks compensation for justifiable police action for damage to a structure unrelated to the underlying crime.
Ostipow involved the seizure of assets obtained after the police raided a marijuana growing operation that a man was running on his parents' property.[66] The illegal operation was situated in a farmhouse where the son lived "down the street" from the Ostipow parents' house.[67] The local county sheriff's office executed a legal warrant for the property. After discovering "over 200 marijuana plants and fifteen pounds of processed marijuana, as well as narcotics, drug paraphernalia, and equipment used to grow marijuana," those items were seized.[68] Officers also seized the farmhouse property itself, along with its contents, three sheds, a 1965 Chevrolet Nova, and guns.[69]

The son pleaded guilty to growing marijuana.[70] The county prosecutor then initiated civil forfeiture proceedings against the real and personal property seized, and the case bounced up to the Michigan Court of Appeals twice and three times to the Sixth Circuit.[71] Ultimately, the Court of Appeals found no Fifth Amendment Takings, nor a violation of either substantive or procedural due process, and no violation of the Excessive Fines Clause.[72]

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find unpublished opinions as persuasive.") Andrew T. Solomon, *Making Unpublished Opinions Precedential: A Recipe for Ethical Problems and Legal Malpractice?* 26 MISS. C. L. REV. 185, 202 (2007). "In a startling action that drains the meaning from the term "unpublished" opinion, the West Group in September 2001 launched its *Federal Appendix*. This is a new case-reporter series in West's National Reporter System that consists entirely of "unpublished" opinions from the federal circuit courts (except, currently, the Fifth and Eleventh Circuits)." Stephen R. Barnett*, From Anastasoff to Hart to West's Federal Appendix: The Ground Shifts Under No-Citation Rules*, 4 J. App. Prac. & Process 1, 2 (2002).

[63] *Ostipow*, 824 F.App'x 336 (another unpublished case).
[64] *Id.* at 338.
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.* at 338–39.
[72] *Id.* at 338.

In another similar example, *Lech v. Jackson*, a SWAT team destroyed an innocent individual's property.[73] Greenwood Village police had been dispatched to a local Walmart to investigate a shoplifting allegation.[74] An officer confronted a suspect, Robert Seacat, who quickly fled the scene in an automobile.[75] The suspect then abandoned the vehicle and crossed an interstate on foot. The suspect was reportedly armed with "a black semi-automatic pistol."[76] A police chase ensued. A burglar alarm subsequently went off at the Lech home, which backed up to Interstate 25 in Greenwood Village, Colorado.[77] Police officers parked outside the house, and a bullet was fired from within, striking a police car's hood.[78]

The situation was described as "high risk" and a barricade situation.[79] After the initial shots were fired from the Lech house, police set up a command post, shut off gas and water to the house, and negotiated with Seacat to surrender.[80] Seacat did not surrender.[81] This went on for several hours before the police fired "two 40mm rounds of cold gas munitions through a window for the purpose of getting Seacat out of the residence."[82] This was unsuccessful. Throughout the next several hours, police breached the front and rear doors of the house using a BearCat armored vehicle; deployed additional gas munitions (multiple times), explosive ordnance disposal charges, and additional use of the BearCat to open up holes in the back of the home.[83] The commander instructed the officers to "take as much of the building as needed without making the roof fall in."[84]

After this destruction to the house, a tactical team was sent into the house, and Seacat was taken into custody. The whole ordeal took approximately 19 hours.[85] The house was uninhabitable and was ultimately demolished and replaced.[86]

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[73] Lech v. Jackson, No. 16-cv-01956-PAB-MJW, 2018 WL 10215862 (D. Colo. Jan. 8, 2018), *aff'd*, 791 F. App'x 711 (10th Cir. 2019).
[74] *Id.* at *1.
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.* at *2. A "barricade situation" is defined as "a standoff created by an armed or potentially armed suspect in any location . . . who is refusing to comply with police demands for surrender." A "high-risk situation" is defined as "[t]he arrest or apprehension of an armed or potentially armed suspect where the likelihood of armed resistance is high."
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.* at *3. "[T]he purpose of opening holes in the side of the Lech home was threefold: (1) to create sightlines into the home for the purpose of enabling officers to locate Seacat; (2) to make Seacat feel more exposed; and (3) to create gun ports so snipers could shoot into the residence from a distance."
[85] *Id.*
[86] *Id.*

The Lech house after the police raid.[87]

The City of Greenwood Village denied any liability for compensation, other than an offer of $5,000 to help with temporary living expenses.[88] Lech sued under both constitutional and tort theories: a taking of private property without just compensation under both the federal and state constitutions; trespass; negligence; negligent infliction of emotional distress; and intentional infliction of emotional distress.[89]

The court denied the Takings Clause compensation arguments under the theory that the house destruction was a product of the city's "police power, which allows states to regulate private property for the protection of public health, safety and welfare;"[90] not an exercise of eminent domain authority, "which permits the taking of private property for public use."[91] In other

[87] Bobby Allyn, *Police Owe Nothing to Man Whose Home They Blew Up, Appeals Court Says*, NPR (Oct. 30, 2019, at 17:21 ET), https://www.npr.org/2019/10/30/774788611/police-owe-nothing-to-man-whose-home-they-blew-up-appeals-court-says [https://perma.cc/V3NG-CRGM].
[88] *Lech,* 2018 WL 10215862, at *3.
[89] *Id.*
[90] *Id.* at *6–7 (citing, *inter alia*, Mugler v. Kansas, 123 U.S. 623, 668–89 (1887); Bowditch v. City of Boston, 101 U.S. 16, 18 (1879) (explaining that "[t]he emergency exception has historically been applied to deny compensation where property is destroyed to avert a public emergency.")).
[91] *Id.*

words, the courts have invited the argument that the government is free to destroy private property as long as it is done under the auspices of regulating public health, safety, and welfare. This is a ridiculous and unwarranted expansion of the exception to the requirement of just compensation for a taking of private property. A public park, a city street, and a transfer station all promote public health and welfare.[92] But no court would seriously argue that compensation was not due if a local jurisdiction acquired private property via eminent domain for such city infrastructure.[93] Lech appealed to the Tenth Circuit Court of Appeals and was similarly denied compensation—also in an unpublished decision.[94]

The Courts in *Baker, Pena*, and *Lech* all denied compensation under the Fifth Amendment's Takings Clause. Each grappled with the equities, but each court left the innocent third party property owner to pay for damages caused by valid (non-negligent) exercises of law enforcement.[95] The courts and petitioners have grappled with a pathway to relief through not only the Fifth Amendment, but tort law, insurance law, and other equitable avenues before expanding the Takings Clause.

II. BACKGROUND: THE *ARMSTRONG* PRINCIPLE

The Fifth Amendment Takings Clause provides: "[N]or shall private property be taken for a public use without just compensation."[96] The purpose of this constitutional provision "was designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole"[97] ("*Armstrong* principle").

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[92] *See* Howard Frumkin, *Healthy Places: Exploring the Evidence*, 93 AM. J. PUB. HEALTH 1451 (2003).

[93] *See, e.g.*, Baker v. City of McKinney, 145 S. Ct. at 12 (2024) ("Had McKinney razed Baker's home to build a public park, Baker undoubtedly would be entitled to compensation.").

[94] Lech v. Jackson, 791 F. App'x 711, 719 (10th Cir. 2019), *cert. denied*, 141 S.Ct. 160 (2020).

[95] *See* Emilio Longoria, Lech's Mess with the Tenth Circuit: Why Governmental Entities are not Exempt from Paying Just Compensation when They Destroy Property Pursuant to Their Police Powers, 11 Wake Forest J. L. & Pol'y 297, 304 (2021) ("Contrary to the Tenth Circuit's holding, the Takings Clause was enacted by our forefathers to ensure that families like the Lechs are compensated when their property is haplessly conscripted.")

[96] U.S. CONST. amend. V.

[97] Armstrong v. United States, 364 U.S. 40, 49 (1960); *see* Pumpelly v. Green Bay & Mississippi Canal Co., 80 U.S. 166, 179 (1871) ("private property may be taken for public uses when public necessity or utility requires, they all lay it down as a clear principle of natural equity that the individual whose property is thus sacrificed must be indemnified."); *see* Jan G. Laitos, *Takings and Causation*, 5 WM. & MARY BILL RTS. J. 359, 362 ("the Court has quoted Armstrong so often in takings cases that some commentators believe that the statement "has taken on the quality of a canonical recitation.""); *see also* Richard A. Epstein, *Levmore on Simple Rules*, 10 TEX. A&M L. REV. 649, 655 (2023) ("There was no reason that a huge fraction of the costs of boats designed to protect the nation as a whole should be borne by a subcontractor whom the United States government decided to stiff. Though the lien on property was a partial interest, it was entitled to as much protection as the whole.") (citation omitted).

The *Armstrong* principle militates in favor of compensation for those innocent third parties who have their property damaged by police action, whether the government was negligent or not. The police action—apprehending criminals who have barricaded themselves inside a third party's property—is a general benefit to society. Yet those whose property has been destroyed are entirely bearing the burden (cost) of police action that has destroyed their homes.

The *Armstrong* principle is frequently cited but almost never strictly followed in the Fifth Amendment takings context.[98] Although the *Armstrong* principle represents a nice aspirational platitude about government action and fairness, it really never applies, particularly in the area of physical appropriations. It is a poor guide to the law in cases like *Baker, Pena,* and *Lech.* Further, *Armstrong* itself is a case that should not have required a Fifth Amendment Takings Clause remedy. *Armstrong* involved a mechanics lien on a boat that was seized by the U.S. government.[99] The government had entered into a contract for the construction of 11 navy personnel boats.[100] Under the applicable contract provision, the Government could terminate the contract upon default and require the contractor to transfer all completed and uncompleted work, together with all materials acquired by the contractor for building the boats.[101]

The plaintiffs had supplied various materials to the contractor for the construction of the boats.[102] The plaintiffs had valid liens on the hulls and materials supplied to the contractor at the time the Government seized the boats and materials under the contract. The plaintiff was not paid for the value of the materials provided, either by the government or the contractor.[103] According to the Supreme Court, the plaintiff had acquired title to the property (or had the ability to) seized by the government, through operation of Maine law on materialmen's liens.[104]

The Federal Court of Claims had reached a different conclusion based on the "premise that laborers and materialmen can acquire no liens on a 'public work'" and since the government would end up owning the boats anyway, the government had "inchoate title,"[105] which is (apparently) immune from liens. But the government takes property subject to its faults and encumbrances, including those created under state law. *Armstrong* is a contract matter and

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[98] *See* Michael Pappas, *The* Armstrong *Revolution*, 76 MD. L. REV. ENDNOTES 35, 43–44 (2016). ("[A]n analysis of all citations to the Armstrong principle in lower federal courts and state courts indicates the same result: that the Armstrong principle is oft-cited but never the ultimate grounds for resolving a case.").
[99] *Armstrong,* 364 U.S. at 50.
[100] *Id.* at 41.
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.* at 44.
[105] *Id.* at 42.

need not have been a Fifth Amendment Takings claim. The liens were validly created under state law, and when the property was contractually transferred over to the government by default, the liens should have been as well.[106] If the government took the property subject to the existing liens, which were valid under Maine law, they should have been compensated for the liens. The liens were not on a government project but were part of property seized by the government.

But the *Armstrong* platitude justifiably stands, and one should still not be responsible for a burden that should be borne by society. It just doesn't have to be the Takings Clause that provides relief. The plaintiffs in Armstrong were entitled to relief under basic equitable principles, as are the petitioners in cases like *Pena, Baker*, and *Lech* (and those similarly situated). Tort law, or even substantive due process, might provide relief for these innocent and aggrieved parties. In the case of *Armstrong*, state lien law could have provided the appropriate relief.

The difficulty in applying the Fifth Amendment in the context of an innocent third party's property destruction at the hands of the police has led to aggravating and vague standards that lack legal justification. Courts have twisted—perhaps justifiably—in an attempt to deny compensation that would result in an expansion of the Takings Clause.

III. THE NECESSITY DEFENSE

One of the primary reasons that courts have denied claims of innocent third parties whose property has been destroyed by the police is the "necessity defense" or "emergency exception," which states that "damage to, or even destruction of, property pursuant to a valid exercise of the police power often requires no compensation under the just compensation clause."[107] The justification for such a defense is the fear that if the state "risks liability for the damage or destruction of property during a public emergency, then the

[106] *Id.* at 45–46.

[107] Lech v. Jackson, No. 16-cv-01956-PAB-MJW, 2018 WL 10215862 at *7 (D. Colo. Jan. 8, 2018), *aff'd*, 791 Fed.App'x 711 (10th Cir. 2019); *see* Baker v. City of McKinney, 84 F.4th 385 (5th Cir. 2023) ("we find that historically oriented legal scholarship has widely converged on the thesis that a 'necessity' or 'emergency' privilege has existed in Takings Clause jurisprudence since the founding.") (citing William J. Novak, *Common Regulation: Legal Origins of State Power in America*, 45 HASTINGS L.J. 1061, 1092 (1994); Susan S. Kuo, *Disaster Tradeoffs: The Doubtful Case for Public Necessity*, 54 B.C. L. REV. 127, 127 (2013) ("When government takes private property for a public purpose, the Fifth Amendment of the U.S. Constitution requires just compensation. Courts, however, have long recognized an exception to takings law for the destruction of private property when necessary to prevent a public disaster."); *see also* United States v. Cent. Eureka Mining Co., 357 U.S. 155 (1958) (denying compensation for a shutdown of a gold mine during World War II).

state may not be so quick to damage or destroy it, and such hesitancy risks catastrophe."[108]

There is slight Supreme Court precedent to suggest that there is a necessity exception to the Takings Clause when the governmental destruction of property is "necessary" and "inevitable."[109] In *Bowditch v. Boston*[110]—relied on by the Fifth Circuit in *Baker*[111]—the Supreme Court held that a property owner was not entitled to compensation under a local ordinance when the local fire department destroyed his building to stop a runaway fire from spreading.[112] The court relied on "natural law" principles "and [found] the right and the justification in the same imperative necessity."[113] *Bowditch* relied on a specific fire law that was enacted in 1873.[114]

During the late 1800s, there was a critical need for a fire protocol in large American cities, and Boston had recently suffered a devastating fire.[115] The 1872 blaze reduced 65 acres of commercial property—almost 1,000 businesses—to ruins.[116] Fire officials resorted to blowing up buildings to keep the fire from spreading to residential areas.[117]

The local Massachusetts law at issue in *Bowditch* concerned fire suppression methods specifically, stating "[i]n cases of fire, any three of certain designated officers 'may direct any house or building to be pulled down or demolished when they may judge the same to be necessary in order to prevent the spreading of the fire.'"[118]

> If such pulling down or demolishing of a house or building is the means of stopping the fire, or if the fire stops before it comes to the same, the owner shall be entitled to recover a reasonable compensation from the city or town; but when such building is that in which the fire first broke

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[108] *Baker*, 84 F.4th at 386 (citing Respublica v. Sparhawk, 1 U.S. 357, 363 (1788) (denying a takings claim for flour that had been moved by the government to a depot and was later lost to the British on the grounds that the rights of necessity are a part of our law)).

[109] Bowditch v. City of Boston, 101 U.S. 18 (1879).

[110] *Id.* at 16.

[111] *Baker*, 84 F.4th at 387.

[112] *Bowditch*, 101 U.S. at 16–17, 22 ("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 such destroyer and no remedy for the owner."). *Id.* at 18.

[113] *Id.* at 19 (citing Respublica, 1 U.S. at 362).

[114] *Id.*

[115] *Great Fire Devastates Boston*, MASS MOMENTS (Nov. 9, 1872), https://www.massmoments.org/moment-details/great-fire-devastates-boston.html [https://perma.cc/8KPP-TELM].

[116] *Id.*

[117] *Id.*

[118] MASS. GEN. STAT., c. 24, § 4 (repealed).

> out, the owner shall receive no compensation.[119]

In other words, if a property owner's house is destroyed by firefighters, the owner will receive compensation from the city of Boston unless they started the fire themselves. But first, there must be an agreement of three fire officials that destroying the building is necessary.[120] There was no such agreement under *Bowditch*, and the petitioner was accordingly denied compensation.[121] The determination in Bowditch concerned not whether the destruction of a building was a "necessity" but whether three designated officers made such an order.[122]

This is not a Fifth Amendment Takings Clause case; it is the construction and application of a Boston City ordinance. Unfortunately, some ill-conceived subsequent cases have extended Bowditch to the Takings Clause context.[123] This construction of a 19th century local ordinance has gained a lot of unwarranted constitutional attention. In *Lucas v. South Carolina Coastal Council*, for example, the U.S. Supreme Court relied on *Bowditch* in creating an exception to the Fifth Amendment's compensation requirement when there is a regulatory taking that denies the property owner of all economically viable use of the property:

> The [principle]. . . that we have in mind is litigation absolving the State (or private parties) of liability for the destruction of 'real and personal property, in cases of actual necessity, to prevent the spreading of a fire' or to forestall other grave threats to the lives and property of others.[124]

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[119] *Id.* § 5. *But see* Raymond R. Coletta, *Reciprocity of Advantage and Regulatory Takings: Toward a New Theory of Takings Jurisprudence*, 40 AM. U. L. REV. 297, 320 (1990) (suggesting that there is a "reciprocity of advantage" because both the property owner and society are benefitted by the government's destruction of private property).

[120] *See* MASS. GEN. STAT., c. 24, § 5 (repealed); Bowditch v. City of Boston, 101 U.S. 20 (1879).

[121] *Bowditch*, 101 U.S. at 18.

[122] *Id.* at 20–21.

[123] *See, e.g.*, Allard v. United States, 173 Fed.Cl.207, 210 (2024) (citing, *inter alia*, *Bowditch*, 101 U.S. at 18) (stating "Ironically, intentionally setting fire on a private individual's property, if done as an exercise of the police power, has been held not to be a taking and instead is viewed as a non-compensable exercise of the police power."). This statement of the law is nonsense. It takes the construction of a local ordinance as a constitutional analysis. Intentionally setting fire to a private residence should be compensable, although it may also be a valid exercise of police power. *Cf.* Susan S. Kuo, *Disaster Tradeoffs: The Doubtful Case for Public Necessity*, 54 B.C. L. REV. 127, 133 (2013) (citing *Armstrong*, 364 U.S. at 49) (stating "For reasons not clearly explained, and apparently contrary to the spirit of the Takings Clause, those unfortunate enough to lose their property to a disaster response must bear the loss alone.").

[124] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 n. 16 (1992) (citing *Bowditch*, 101 U.S. at 18–19; U.S. v. Pacific R.R., 120 U.S. 227, 238–40 (1887) (concering destruction to property during the Civil War,

In *United States v. Caltex*,[125] cited by the concurrence to the denial of certiorari in *Baker*,[126] the Supreme Court "held that the Takings Clause did not require the Government to pay just compensation for its destruction of oil companies' [Philippine-based] terminal facilities amid a military invasion."[127] The government denied the claim because

> [t]he terse language of the Fifth Amendment is no comprehensive promise that the United States will make whole all who suffer from every ravage and burden of war. This Court has long recognized that in wartime many losses must be attributed solely to the fortunes of war, and not to the sovereign. No rigid rules can be laid down to distinguish compensable losses from non compensable losses. Each case must be judged on its own facts.[128]

Caltex was, therefore, a case about war and destruction of property by combatants, not about a single case of an innocent party's property destruction by local law enforcement.

In *Baker*, both parties conceded that the damage to her home from the SWAT raid was "necessary."[129] But the distinction may be that the destruction of Baker's house was not "inevitable." In both *Bowditch* and *Caltex*, the property destruction was inevitable—in *Bowditch*, the property owner's house was going to be destroyed by fire anyway—and in *Caltex*, destruction was inevitable due to the advancing Japanese army. [130] "Inevitable" is not the same as "necessary." This was not lost on Justice Sotomayor, who stated

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holding that the United States are not responsible for the destruction of private property by their military operations during the late Civil War, nor are private parties chargeable for works constructed on their property by the United States to facilitate such operations); *see* Daniel R. Hansen, *Environmental Regulation and Just Compensation: The National Priorities List as a Taking*, 2 N.Y.U. ENV'T L. J. 1, 30 (1993).

[125] United States v. Caltex, 344 U.S. 149 (1952).

[126] Baker v. City of McKinney, 145 S. Ct. at 13 (2024) (Sotomayor, J., concurring).

[127] *Id.* at 13 (citing *Caltex*, 344 U.S. at 155).

[128] *Caltex,* 344 U.S. at 155–56.

[129] Baker v. City of McKinney, 84 F.4th at 380 (2023) (stating "In light of the way Baker has argued this case we do not ourselves evaluate whether the damage to her home was 'necessary'; we grant the parties' shared contention that it was.").

[130] Bowditch v. City of Boston, 101 U.S. 16 (1879); *see also Caltex*, 344 U.S. at 154 ("[I]n times of imminent peril – such as when fire threatened a whole community – the sovereign could, with immunity, destroy the property of a few that the property of many and the lives of many more could be saved.").

"[w]hether the inevitable-destruction cases should extend to this distinct context remains an open question."[131]

Justice Sotomayor also notes a split in the circuits on this issue: "Unlike the Fifth Circuit [in Baker], the Seventh Circuit and Federal Circuit have held that 'the Takings Clause does not apply when property is retained or damaged as the result of the government's exercise of this authority pursuant to some power other than the power of eminent domain.'"[132] The Fourth Circuit has held "[t]hat Government actions taken pursuant to the police power are not per se exempt from the Takings Clause."[133]

Although the property destructions in *Baker*, *Lech*, and *Pena* were arguably necessary to protect public safety, they were not "inevitable" in the sense of an oncoming fire that is destroying neighboring buildings or in the sense of an advancing foreign army. Several of the historic (ancient) cases involve wartime acts that are really not analogous to contemporary situations.[134]

The law desperately needs clarification on this point of "necessity" and "inevitability"—or whether the inquiry is even relevant.[135] One of the biggest issues here is that courts conflate takings that are: (1) physical invasions of private property by the government; (2) regulatory takings for when a government regulation "goes too far" and just compensation is due, usually via an inverse condemnation action; and (3) takings accomplished through the exercise of eminent domain authority. "Necessity" and "inevitability" have different connotations when the government physically enters property versus when the government regulates property in a manner that renders the property unusable.

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[131] Baker v. City of McKinney, 145 S. Ct. at 13 (2024) (Sotomayor, J., concurring).

[132] *Id.* (citing Johnson v. Manitowoc County, 635 F.3d 331, 336 (7th Cir. 2011); AmeriSource Corp. v. U.S., 525 F.3d 1149, 1154 (Fed. Cir. 2008)).

[133] *Baker*, 145 S. Ct. at 13 (citing Yawn v. Dorchester Cnty., 1 F.4th 191, 195 (4th Cir. 2021)); *see* Lech v. Jackson, 791 F. App'x at 715 (10 Cir. 2019) (observing that "at least three of our sibling circuits and the Court of Federal Claims have expressly relied on the distinction between the state's police power and the power of eminent domain in cases involving the government's direct physical interference with private property.").

[134] *See, e.g.*, Catherine R. Connors, *Back to the Future: The "Nuisance Exception" to the Just Compensation Clause*, 19 CAP. U.L. REV. 139, 182 n. 228 (1990) ("Another historical source for a narrowly defined nuisance exception can be found in a distinct line of cases which permit certain takings to remain uncompensated in times of emergency, such as in times of war.").

[135] *See Recent Cases*, 137 HARV. L. REV. 2408, 2411 (2024) ("Applying the [necessity] exception, the Baker court held that no compensation was due because destroying Baker's house was necessary to prevent imminent harm during an emergency. Although the court derived the necessity principle from historical precedents, it did not analogize to those cases when applying the exception. Because of the court's inattention to what kinds of emergencies have historically triggered the exception, the court may have misapplied the exception to a case involving neither the "emergency" nor the "necessity" required."); Kellen Zale, *The Government's Right to Destroy*, 47 ARIZ. ST. L.J. 269, 270–71, 271 n.9 (2015).

IV. PHYSICAL INVASIONS ARE CATEGORICALLY DIFFERENT

Physical invasions of property—in which the government physically occupies property—are different from regulatory takings, in which a government regulation prevents a landowner from using their property.[136] A "'classic taking' [is one] in which the government directly appropriates private property for its own use."[137] Usually, a physical invasion of property is an automatic, or per se taking in which compensation is immediately due. In contrast, a regulatory taking is when a government regulation "goes too far[.]"[138] These two types of takings are markedly different from each other. In a regulatory takings context, laws that do not involve physical occupation of the property may be compensable depending on a three-part ad-hoc balancing test including: (1) the economic impact of the offending regulation on the claimant; (2) the extent to which the regulation has interfered with reasonable investment backed expectations; and (3) the character of the government action (*Penn Central* test).[139] Under the *Penn Central* test, courts will weigh the three factors to determine if a regulation "goes too far"[140] and should result in compensation to the property owner.

The legal standards for the two types of takings are different, and the types of harm are wildly divergent. The legal standard for government physically invading property is an easier lift than proving that an offending regulation has "gone too far" and causes a taking under the applicable balancing test.[141] *Baker, Lech*, *and Pena*–and cases like them–constitute physical invasions of property. They all involve the government entering private property and destroying that property. The question in each of those cases is whether that entry and destruction is compensable under the Fifth Amendment. The distinction between physical and regulatory takings—and the policies behind

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[136] *Accord* David A. Dana, "*Background Principles" in the Law of Takings*, 73 AM. U. L. REV. 1789, 1802 (2024) ("But, in truth, almost all regulation involves some physical aspect. Regulations routinely require an owner to do or permit something physical on their land, and/or require the owner to do something physical when there is a regulatory violation.").

[137] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 324 (2002) (quoting E. Enters. v. Apfel, 524 U.S. 498, 522 (1998)).

[138] *Id.* at 326 (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 412 (1922)).

[139] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978); Kaiser Aetna v. United States, 444 U.S. 164, 174 (1979).

[140] *Pa. Coal Co.,* 260 U.S. at 415 ("The general rule at least is that while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking.").

[141] *See Tahoe-Sierra*, 535 U.S. at 323 ("Th[e] longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa.") (citation omitted); *Contra* Andrea L. Peterson, *The False Dichotomy Between Physical and Regulatory Takings Analysis: A Critique of Tahoe Sierra's Distinction between Physical and Regulatory Takings*, 34 ECOLOGY L.Q. 381 (2007) (arguing that the different treatment of physical invasion cases and non-physical invasion cases is analytically unsound).

each—has been badly mangled and convoluted by the courts.[142] It's caused jurisdiction splits and has led to erroneous law.

Not only have the courts been quick to resort to a constitutional remedy (or to deny one) in the case of an innocent third party whose property has been destroyed by the government, but they have also misstated the law and created dubious precedent in doing so. Future courts should resist the temptation to expand the Takings Clause when other equitable and tort remedies are available.

A. Permanent Physical Invasions: Loretto

Loretto v. Telemprompter Manhattan CATV Corp.[143] is the seminal case illustrating how physical invasions of property are entirely different from regulations that limit a property's use.[144]

In *Loretto*, a landlord challenged a New York City law that allowed cable television companies to install equipment on private property.[145] The equipment at issue consisted of a two-by-four-inch cable box and a thirty-foot half-inch wide cable.[146] Although the impact to the petitioner was demonstrably small (and arguably conferred a benefit through providing cable TV service to petitioner's tenants), the U.S. Supreme Court found that the law constituted a Fifth Amendment Taking and compensation was due to the petitioner—even if the damages are nominal.[147]

A physical invasion–no matter how nominal–was considered by the court to be an automatic per se taking.[148] It is such an egregious act that there was

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[142] *See* Andrew S. Gold, *The Diminishing Equivalence between Regulatory Takings and Physical Takings,* 107 DICK. L. REV. 571, 580–81 (2003).

[143] Loretto v. Telemprompter Manhatttan CATV Corp., 458 U.S. 419, 430 (1982).

[144] *See* Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 ECOLOGY L. Q. 307, 360–61 (2007):

> If the government-caused physical invasion amounts to a "permanent physical occupation," the rule is categorical: permanent physical occupations of property are per se takings. This is often called the "Loretto rule," after the Supreme Court decision in Loretto v. Teleprompter Manhattan CATV Corp. that made it explicit. Classic examples of permanent physical occupations are continuous or recurring flooding caused by a government dam, regular and low overflights by government airplanes, and government installation of relatively permanent structures such as concrete-anchored fencing or groundwater monitoring wells.

(citations omitted).

[145] *Loretto,* 458 U.S. at 419.

[146] *Id.* at 421–22.

[147] *Id.* at 434–35; *see* Sarah Erb, Note, *Independent Agencies: A Constitutional Violation with a Negligible Remedy*, 75 BAYLOR L. REV. 518, 539 (2023) ("When a plaintiff has not suffered actual damages or imminent future injury to support an injunction, nominal relief can vindicate the plaintiff's legal injury.").

[148] *See* Horne v. Dep't of Agriculture, 576 U.S. 350, 358 (2015) ("There is no dispute that the 'classic taking [is one] in which the government directly appropriates private property for its own use.' Nor is there any dispute that, in the case of real property, such an appropriation is a *per se* taking that requires just compensation.") (citation omitted).

no weighing of factors under *Penn Central's* three-part test to determine if a regulation constituted a taking. A physical invasion is of "an unusually serious character" that "effectively destroys" several rights in the proverbial bundle of sticks that includes the right to use, possess, and dispose of property.[149] According to the court, when there is a permanent physical occupation of private property by the government, there is "a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."[150]

Notably, the *Loretto* Court found that the law requiring New York landlords to allow the installation of cable equipment from a private company was within the city's police power.[151] The city was free to require those boxes, but just compensation had to be paid (however nominal).[152] So there is no practical police power exception to the Takings Clause. Both can coexist in this manner: the government can take property under the Fifth Amendment—under its police power—as long as just compensation is paid.

B. Temporary Physical Invasions: Cedar Point

The U.S. Supreme Court later expanded (and confused) Fifth Amendment Takings law by holding that temporary (as well as permanent) physical invasions are compensable in *Cedar Point Nursery v. Hassid*.[153]

Cedar Point involved a California law that allowed union organizers to enter private property (usually farmland), subject to time limits and other restrictions.[154] Private property owners could not interfere with a union's "right of access" or risk being liable for an unfair labor practice.[155]
When union organizers entered a private strawberry farm in Dorris, California, under the law, the farm owners brought a Fifth Amendment Takings case against the State of California, seeking both declaratory and injunctive relief under 42 U.S.C. § 1983.[156] The U.S. Supreme Court ultimately found a taking, expanding the *Loretto* decision to include state regulations that authorize temporary physical invasions, allowing unions to "use" private property.[157]

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[149] *Loretto*, 458 U.S. at 433, 435.
[150] *Id.* at 434–35.
[151] *Id.* at 425 (stating that the statute was "within the State's police power").
[152] *Id.* at 425–26.
[153] Cedar Point Nursery v. Hassid, 594 U.S. 139, 153 (2021); *see* Timothy M. Harris, *What's Your Damage?! The Supreme Court Has Wrecked Temporary Takings Jurisprudence*, 78 U. MIA. L. REV. 121, 121 (2023).
[154] *Cedar Point*, 594 U.S. at 144 (quoting CAL. CODE REGS. Tit. 8, § 20900(e) (2023)) (The law allowed "the right of access by union organizers to the premises of an agricultural employer for the purpose of meeting and talking with employees and soliciting their support.").
[155] *Id.* at 143–44.
[156] *Id.* at 145.
[157] *Id.* at 151–56.

According to the Court: "The access regulation appropriates a right to invade growers' private property and therefore constitutes a per se physical taking."[158] In other words, there was no weighing of interests to determine whether the government was regulating for public health or whether the government action interfered with the petitioner's reasonable investment backed expectations. A physical invasion is automatically a Fifth Amendment Taking without regard to the parties' interests.

The situation in *Baker, Pena*, and *Lech* is somewhat analogous to a temporary physical invasion under *Cedar Point*—although the physical entry at issue in *Cedar Point* could happen at regular intervals and with notice.[159] Also in *Cedar Point*, it was (presumably) the access regulation itself that constituted a physical taking.[160] In *Baker*, the Fifth Circuit cites favorably to *Pumpelly v. Green Bay & Mississippi Canal Co*. for the analogous proposition that "where real estate is actually invaded . . . so as to destroy or impair its usefulness, is a taking within the meaning of the Constitution."[161] But *Baker* inexplicably fails to cite either *Loretto* or *Cedar Point*, while dismissing *Pumpelly* as both factually distinct and too old.[162]

V. THE IRRELEVANT DISTINCTION BETWEEN TAKINGS AND POLICE POWER

In concurrence to the denial of certiorari in *Baker v. McKinney*, Justice Sotomayor states, "[t]his Court has yet to squarely address whether the government can, pursuant to its police power, require some individuals to bear such a public burden [under the Armstrong principle]."[163]

The Baker Court awkwardly conflates exercises of police power with regulatory takings in reaching the conclusion that "the mere fact that Baker's property has been damaged or destroyed pursuant to the city's police power cannot decide this case."[164] In other words, the *Baker* Court relied on regulatory takings policy to decide a physical taking case.[165] The two types

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[158] *Id.* at 149.

[159] *Id.* at 139 (stating that the California regulation allows labor organizations to "take access" to an agricultural employer's property up to three hours per day, 120 days per year, with adequate notice).

[160] *Id.* ("*Held*: California's access regulation constitutes a *per se* physical taking.").

[161] Baker v. City of McKinney, 84 F.4th at 384 (2023) (quoting Pumpelly v. Green Bay & Mississippi Canal Co., 80 U.S. 166 (1871).

[162] *Baker*, 84 F.4th at 385 ("What Baker needs, in other words, is historical or contemporary authority that involves facts closer to those at bar and where the petitioner succeeded under the Takings Clause."). *Pumpelly* involved a public dam that caused flooding on the petitioners' property. *Id.* at 384 (citing Pumpelly v. Green Bay & Mississippi Canal Co., 80 U.S. 166, 177–79 (1871).

[163] Baker v. City of McKinney, 145 S. Ct. at 12 (2024).

[164] *Baker*, 84 F.4th at 383 (citing John Corp. v. City of Houston, 214 F.3d 573, 578 (5th Cir. 2000)).

[165] *Baker* even cites to *Loretto*, but again applies regulatory taking law: "[In *Loretto,*] the court noted that a given regulation might be 'within the states police power . . . It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid.'" *Baker*, 84 F.4th at 386 (citing Loretto v. Telemprompter Manhatttan CATV Corp., 458 U.S. 425 (1982)); *see id.* at 387 ("The general rule at least is that while property may be regulated to a certain extent, if regulation

of takings are categorically different, and under current law, the analysis—and factors taken into consideration under *Penn Central*—are different.

In drawing a distinction between police power and Takings Clause authority, *Lech* points to, *inter alia, Mugler v. Kansas*:[166] "when the state acts to preserve the safety of the public, the state is not, and consistent[ ] with the existence and safety of organized society, cannot be burdened with the condition that the state must compensate [affected property owners] for pecuniary losses they may sustain in the process."[167] But *Mugler* was a regulatory takings case, not a physical invasion. *Mugler* involved a temperance-era state law (and amendment to the state constitution) that shut down Mugler's brewery in Salina, Kansas.[168] All liquor sales in the state—not just Mugler's—were declared a "common nuisance."[169] The change to the law, which prohibited the use of Mugler's property as a brewery, prompted Mr. Mugler to bring a Fifth Amendment Takings claim.[170]

Under *Mugler*, "a prohibition upon the use of property for purposes that are declared, by valid legislation to be injurious to the health, morals or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit."[171] In other words, a regulation that prohibits property uses that injure the health, morals, or safety of a community is deemed to be exempt from the Fifth Amendment's just compensation requirement because no apparent "taking" has occurred.

In the unpublished decision from the Court of Appeals, the *Lech* Court recognizes the argument that regulatory and physical takings are categorically different.[172] The *Lech* petitioners had argued that any physical appropriation of private property by the government—whether committed pursuant to a power of eminent domain or the police power—gives rise to a per se taking and thus requires compensation under the Takings Clause.[173]

But the *Lech* Court dismisses this argument because it finds that three circuits had recognized the distinction between the state's police power and

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goes too far it will be recognized as a taking.") (citing Pa. Coal Co. v. Mohan, 260 U.S. 393, 415–16 (1922)); *see also Baker*, 84 F.4th at 383 (*Baker* also states that a city's exercise of police powers can go too far, and if it does, there has been a taking (citing *John Corp.*, 214 F.3d at 578)).

[166] Lech v. Jackson, 791 F. App'x 717 (10th Cir. 2019) (quoting Mugler v. Kansas, 123 U.S. 623, 669 (1887)); *see* Dandee Cabanay, Note, *Baking up a Taking: Why there Is No Categorical Exemption to the Fifth Amendment Takings Clause for the Police Power,* 75 BAYLOR L. REV. 778, 791 (2023) ("Thus, because *Mugle*'s distinction between the eminent domain power and the state's police power was made solely in the regulatory taking context, extending such a distinction to physical appropriations of property would be inappropriate.").

[167] *Lech,* 791 F. App'x at 717; *see Baker*, 84 F.4th at 386.

[168] *Mugler,* 123 U.S. at 623.

[169] *Id.* at 671.

[170] *Id.*at 653 (Mr. Mugler claimed "most earnestly and confidently, that his right to operate a brewery as vested in him by the laws of Kansas, cannot be taken away by the State without just compensation.").

[171] *Id.* at 668–69.

[172] *Lech,* 791 F. App'x at 714–15.

[173] *Id.*

the power of eminent domain in cases involving "the government's direct physical interference with private property."[174] However, the cases the court relies on to distinguish cases in which an innocent third party's property is damaged by the police involve either taking evidence in the form of personal property that constitutes the spoils of crime,[175] which is entirely different, or flat-out misstate the law. For instance, the *Lech* Court cites *Bachman v. United States* for the proposition that "when private property is damaged incident to the exercise of the police power, such damage—even when physical in nature—is not a taking for the public use 'because the property has not been altered or turned over for public benefit.'"[176] This is a ridiculous statement of the law. No test, whether under physical or regulatory takings, has limited takings depending on whether the property taken has been "altered or turned over for the public benefit."[177]

The *Lech* Court acknowledges that "the Supreme Court has never expressly invoked this distinction in a case alleging a physical taking," but "it has implicitly indicated the distinction applies in this context."[178] This is an amazing distortion of the law that would allow agencies to occupy private property as long as it was not "altered" or turned over to public benefit. *Lech* cites to *Nat'l Bd. of Young Men's Christian Assn's v. United States*[179] for this proposition—a case involving riots in Panama in which United States troops occupied buildings owned by third parties.[180] The United States government did not cause the damage to the Panamanian buildings. The court understandably denied the Fifth Amendment Takings claim, including any compensation, for buildings owned by foreign nationals in a foreign country for damages done by foreign rioters.[181] It is not a physical taking.

But there is no reason that police power and Fifth Amendment Takings have to be mutually exclusive. Some valid exercises of police power require

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[174] *Id.* at 715.
[175] *See infra* notes 191–95 and accompanying text. The *Lech* court cites to AmeriSource Corp. v. U.S., 525 F.3d 1150 (Fed. Cir. 2008) (a case about seizure of pharmaceuticals for individuals charged with "conspiracy, unlawful distribution of prescription pharmaceuticals, operating an unregistered drug facility, and conspiracy to commit money laundering."); *see* Zitter v. Petruccelli, 744 F. App'x 90, 93 (3d Cir. 2018) (holding that there was no taking when the government seized oysters and oyster-growing equipment when plaintiff harvested shellfish in prohibited waters); *see also* Ostipow v. Federspiel, 824 Fed.App'x 336, 338 (6th Cir. 2020) (property seized as part of a civil asset forfeiture after the petitioners' son pleaded guilty to drug crimes).
[176] *Lech*, 791 F. App'x at 716 (citing Nat'l Bd. of Young Men's Christian Ass'ns v. United States, 395 U.S. 85, 92–93 (1969) (concerning the denial of compensation for damage done by rioters to buildings occupied by United States troops).
[177] *See, e.g.*, Cedar Point Nursery v. Hassid, 594 U.S. 139 (2021) (where a taking was found when a California law allowed union organizers to enter private property).
[178] *Lech,* 791 F. App'x at 716.
[179] *Nat'l Bd. of Young Men's Christian Assn's,* 395 U.S. at 85.
[180] *Id.* at 86.
[181] *Id.*

compensation.[182] Some don't.[183] The government is free to take private property for a public use under the express language of the Fifth Amendment Takings Clause—they just have to pay "just compensation" when doing so.[184] Courts have bewildered the takings analysis unnecessarily in this regard. In *Steele v. City of Houston*,[185] for example, the Texas Supreme Court specifically declined to differentiate between an exercise of police power and eminent domain and found the distinction useless "in determining when private citizens affected by government actions must be compensated."[186] The federal circuit courts have flailed in *Baker, Lech*, and *Pena*—they have crossed indiscriminately between governmental physical invasions and regulatory takings, applying the policies and tests of one to another while conflating the necessity defense across all takings, and have created a confusing morass of decisions.

The solution should be simple. The "necessity defense" applies to regulations that affect society generally, such as the case in *Mugler* where temperance laws shut down all breweries[187] or during the COVID-19 pandemic when the government shut down businesses to prevent the spread of disease.[188] This reasoning is in line with the *Lucas* exception to regulatory takings and the oft-cited admonition from Justice Oliver Wendell Holmes that government could "hardly go on" if it had to pay for every diminution in value of property occasioned by a regulation.[189]

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[182] U.S. CONST. amend. V.
[183] *Id.*
[184] *Id.*
[185] Steele v. City of Houston, 603 S.W.2d 786, 789 (Tex. 1980) (citations omitted). *Cf.* Wegner v. Milwaukee Mut. Ins. Co., 479 N.W.2d 38, 42 (Minn. 1991) (rejecting the difference between the state's power of eminent domain and the police power because it would be unjust for an innocent property owner to bear the entire loss caused by government action benefiting the public as a whole.); *see also* Christopher D. Supino, *The Police Power and "Public Use": Balancing the Public Interest Against Private Rights Through Principled Constitutional Distinctions*, 110 W. VA. L. REV. 711, 713 (2008) (arguing that "the Supreme Court's inability to articulate principled boundaries between these two concepts [of police power and the public use clause] has deprived courts of the intellectual framework necessary for precise analysis of the conflicting principles and interests involved in takings jurisprudence, leaving courts and legislatures without a meaningful limiting principle for government takings. This results in haphazard and poorly justified court holdings, ad hoc judicial review and, ultimately, diminished property rights for private citizens.").
[186] *Steele,* 603 S.W.2d at 789.
[187] *See* Mugler v. Kansas, 123 U.S. 623 (1887).
[188] *See generally* Timothy M. Harris, *The Coronavirus Pandemic Shutdown and Distributive Justice: Why Courts Should Refocus the Fifth Amendment Takings Analysis*, 54 LOY. L.A. L. REV. 455, 475 (2021) (discussing the implementation to emergency measures that infringe on constitutional rights as long as necessary) (citing Luke's Catering Service, LLC v. Cuomo, 485 F.Supp.3d 369 (W.D. NY 2020)).
[189] Pa. Coal Co., Mahon, 260 U.S. 393, 413 (1922) ("Government hardly could go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously, the implied limitation must have its limits, or the contract and due process clauses are gone.").

Where, however, a government SWAT team destroys the house of an innocent third party, the sweeping "necessity defense" should not apply in the same manner as in a regulation that applies to society generally.[190] *Lech*, *Pena*, and *Baker* are rare cases where there was a discrete non-negligent physical invasion of a single property owner's home.

The courts also conflate cases where (1) petitioners are charged with a crime, and/or (2) the police are demonstrably negligent. In *Lech, Pena*, and *Baker*, and cases like them, an innocent third party's property is damaged through no fault of their own. These are difficult cases in which the property owners have been denied compensation even though the interests in fairness, equity, and the *Armstrong* principle—dictate that they should be compensated.

The *Pena* Court, for example, states that "claims based on damages caused by the government's exercise of police power in the course of enforcing criminal laws does not provide a basis for a taking claim under the Fifth Amendment."[191] The *Pena* Court cites several cases, many of which involve the spoils of criminal activity.

For example, *Lech* cites to *Johnson v. Manitowac County*,[192] in which police jackhammered and damaged a home in search of evidence for a murder. The court, in dismissing the Fifth Amendment complaint with a paucity of analysis, stated: "the Takings Clause does not apply when property is retained or damaged as the result of the government's exercise of its authority pursuant to some power other than the power of eminent domain."[193] This is a crazily sweeping misstatement of the law—many takings cases do not involve the direct power of eminent domain. These cases do not involve matters where the government is "exercising" eminent domain power; rather, they involve the government exercising its police power in a manner that takes (or destroys) private property. It is also an easily distinguishable factual scenario.

Other cases cited by *Pena* are equally unconvincing. In *Acadia Tech. Inc. v. United States*, the government seized cooling fans that contained allegedly counterfeit trademarks—the parties reached a stipulated settlement, and the plaintiffs found the fans useless after an "unreasonable delay"[194]. In

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[190] The general applicability distinction may also make sense in the context of a physical taking where, as in wartime, buildings are destroyed due to (for example) an inevitably advancing enemy. *Cedar Point* tacitly acknowledges this as a possibility. Cedar Point Nursery v. Hassid, 594 U.S. 139, 160–61 (2021) (stating that government authorized physical takings may not be compensable if they are consistent with longstanding background restrictions on property rights, including entry in case of emergency, criminal law enforcement, and to avert harm to persons or chattels).

[191] Pena v. City of Los Angeles, No. CV 23-5821-JFW(MAAx), 2024 WL 1600319 at *5 (C.D. Cal. Mar. 25, 2024).

[192] Johnson v. Manitowoc Cnty., 635 F.3d 331, 333 (7th Cir. 2011).

[193] *Id.* at 336.

[194] Acadia Tech., Inc. v. United States, 458 F.3d 1327, 1329 (Fed. Cir. 2006).

AmeriSource Corp. v. United States, the court found no taking for pharmaceuticals seized "'in connection with [a criminal] investigation' because 'the government seized the pharmaceuticals in order to enforce criminal laws.'"[195]

The innocent property owners' status as an innocent third party was critical in *Wegner v. Milwaukee Mut. Ins. Co.*,[196] in which the Minnesota Supreme Court held "where an innocent third party's property is damaged by the police in the course of apprehending a suspect, that property is damaged within the meaning of the [Minnesota] constitution." Wegner involved facts similar to *Baker, Lech*, and *Pena*—the police destruction of an innocent third party's house in an attempt to apprehend a criminal.[197]

Baker, Lech, and *Pena* also involve the destruction of an innocent third party's property in an endeavor to curb criminal behavior in a manner benefiting society. None of the petitioners was criminally liable, and in each case, the property destroyed was unrelated to the crime. Yet in each case, the court looked at and analogized cases in which the seized property involved the spoils of crime. The distinction between the two is sharp. There is a greater societal and police need for evidence related to a crime. There is no suggestion that the property destroyed in *Baker*, for example, was necessary evidence for subsequent criminal prosecution.

Cases in which the police are demonstrably negligent—raiding the wrong house, for example—are an easier matter under the applicable tort law.[198] Although courts have historically balked, the recent trend is toward finding liability—for example, *in Martin v. United States*,[199] the FBI raided the wrong house in Atlanta due to an address mix-up.[200] The FBI breached a home's front door and detonated a flash-bang grenade, terrorizing the innocent residents who hid in a closet.[201] An agent had used his personal GPS device to navigate to the wrong house, ignoring street signs and house numbers along the way.[202] The petitioner sought damages for negligence and intentional tort under the Federal Tort Claims Act (FTCA).[203] The District Court and the

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[195] Lech v. Jackson, 791 F. App'x 711, 715 (10th Cir. 2019) (citing *AmeriSource Corp.*, 525 F.3d at 1153–54).
[196] Wegner v. Milwaukee Mut. Ins. Co., 479 N.W.2d 38, 41–42 (Minn. 1991).
[197] *See id.*
[198] *See* Pena v. City of Los Angeles, No. CV 23-5821-JFW(MAAx), 2024 WL 1600319 at *5 (C.D. Cal. Mar. 25, 2024) ("some courts have found that plaintiffs may have viable claims under the Fourth Amendment if the exercise of police power is unreasonable or out of proportion to the suspected crimes.").
[199] Martin v. United States, 605 U.S. at 395 (2025).
[200] *Id.* at 399.
[201] *Id.*
[202] *Id.* at 399–400.
[203] *Id.* at 400.

Eleventh Circuit Court of Appeals denied the claims under a novel "restrictive and defendant-friendly" exception to the FTCA. [204]

The FTCA is a waiver of sovereign immunity, allowing those injured by federal employees to sue the United States for damages.[205] The U.S. Supreme Court vacated the Eleventh Circuit's holding and remanded for further proceedings based on its view of the exceptions to the FTCA.[206] The FTCA, of course, only applies to federal actions, and the cases at issue here—*Baker, Pena*, and *Lech*—each involved non-federal local police action. But the policies apply to both, and the FTCA's liability rule expressly incorporates state law.[207] Moreover, "Congress has entered the field and expressly bound the federal government to accept liability under state tort law on the same terms as a 'private individual.'"[208]

VI. THE CONSTITUTIONAL AVOIDANCE DOCTRINE

The courts have demonstrably stumbled over Fifth Amendment Takings law, creating confusing and inconsistent rules in a nebulous and challenging constitutional doctrine. Courts have blurred the necessity defense and inevitability and applied policies behind regulatory takings to physical invasions. But many, if not all, of these cases could be decided without turning to the United States Constitution, which frequently results in an expanding application of the Fifth Amendment.

Courts are quick to apply the Takings Clause when there are other means of redress for aggrieved parties that should, in fairness, receive compensation when they are damaged by government action through no fault of their own. Under the Constitutional Avoidance Doctrine, for example, courts will only interpret the Constitution when it is "absolutely necessary."[209] In *Ashwander v. Tennessee Valley Authority*,[210] Justice Brandeis identified seven rules comprising the Constitutional Avoidance Doctrine: (1) The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary,

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[204] *Id.* at 402.
[205] *Id.* at 395.
[206] *Id.* at 415.
[207] *Id.* at 410.
[208] *Id.* at 412.
[209] *See* Burton v. United States, 196 U.S. 283, 295 (1905) ("It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case."); Eric S. Fish, *Constitutional Avoidance as Interpretation and as Remedy*, 114 MICH. L. REV. 1275, 1278–79 (2016) (arguing for avoidance of constitutional issues as a constitutional remedy); Anita S. Krishnakumar, *Passive Avoidance,* 71 STAN. L. REV. 513, 513 (2019) ("the Roberts Court's aggressive use of the avoidance canon may itself have contributed to the Court's shift away from invoking the canon in recent Term—that is, the Court may have ratcheted down its use of the canon in response to commentators' attacks against its reliance on avoidance in its early Terms.").
[210] Ashwander v. Tenn. Valley Auth., 297 U.S. 288 (1936).

proceeding;[211] (2) The Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it"[212] (Ripeness); (3) The Court will not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."[213] (Judicial Minimalism); (4)

> The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter[214]

(Last Resort Rule); (5) "The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation"[215] (Standing); (6) "The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits"[216] (Estoppel); and (7) 'When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."[217] Rules (1), (2), (5), and (6) generally inform a court whether a case is justiciable, and Rules (3), (4), and (7) inform how a court should address constitutional questions in cases before it.[218]

Rule (4) is of particular moment in cases like *Baker, Lech*, and *Pena*. Under each, the court found no relief under the U.S. Constitution, and either

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[211] *Id.* at 346 (Brandeis, J., concurring) (citing Chicago & Grand Trunk Ry. Co. v. Wellman, 143 U.S. 339, 345 (1892)).
[212] *Id.* (citing Liverpool v. Emigration Comm'rs, 113 U.S. 33, 39 (1885); Abrams v. Van Schaick, 293 U.S. 188 (1934); Wilshire Oil Co. v. United States, 295 U.S. 100 (1935)).
[213] *Id.* at 347 (citing City of Hammond v. Schappi Bus Line, 275 U.S. 164, 169–72 (1927)).
[214] *Id.* (citing Siler v. Louisville & Nashville R.R. Co., 213 U.S. 175, 191 (1909); Light v. United States, 220 U.S. 523, 538 (1911)).
[215] *Id.* (citing Tyler v. Judges of Ct. of Registration, 179 U.S. 405 (1900); Hendrick v. State of Maryland, 235 U.S. 610, 621 (1915)).
[216] *Id.* at 348 (citing Great Falls Mfg. Co. v. Garland, 124 U.S. 581 (1888); Wall v. Parrot Silver & Copper Co., 244 U.S. 407, 411–12 (1917); St. Louis Malleable Casting Co. v. Prendergast Constr. Co., 260 U.S. 469 (1923)).
[217] *Id.* (citing Crowell v. Benson, 285 U.S. 22, 62 (1932)).
[218] JEANNE DENNIS, CONG. RSCH. SERV., LSB10722, THE CONSTITUTIONAL AVOIDANCE DOCTRINE: THE CONSTITUTIONAL-DOUBT CANON (PART 3 OF 3) (2022).

ignored or gave short shrift to state law claims.[219] Deciding these cases under the Constitution should not be "strictly necessary"–if there is otherwise an adequate remedy, and there should be an adequate remedy through tort law or insurance law. Barring remedies under either of those, parties should be allowed compensation under the collateral source rule, a tort concept that has little applicability to Fifth Amendment Takings law.

Ms. Baker, for example, had sought non-constitutional remedies before turning to her Fifth Amendment Takings claim.[220]

VII. INSURANCE SHOULD COVER THIS

Ms. Baker had applied for compensation for SWAT-caused damages through her applicable home insurance policy. "Baker filed a claim for property damage with the City, but the City replied in a letter that it was denying the claim in its entirety because 'there is no liability on the part of the City or any of its employees.'"[221] Baker's insurance "would not cover any damage caused by the City's police, including the structural damage."[222] The denial of insurance coverage should be legally suspect, at least for public policy reasons.

Denial of Baker's insurance claim was based on standard insurance language excepting government action from recovery. The house destruction in Baker was considered an "action of a civil authority functioning in its ordinary governing capacity."[223] The justification for the denial of claims brought due to government action is that "this kind of loss is unpredictable."[224] But the losses at issue here, where an innocent third party's home is destroyed by a non-negligent SWAT team, have not been tested. The destruction by a government agency is no more predictable than a fire caused by a lightning strike that destroys a home.

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[219] *See* M. Akram Faizer, *The Privileges or Immunities Clause: A Potential Cure for the Trump Phenomenon*, 121 PENN. ST. L. REV. 61, 71–72 (2016) ("The most important of [the *Ashwander* rules] is that the Court should abjure from adjudicating the constitutionality of an issue unless it is an absolutely necessary matter of last resort. This is to minimize the footprint of the appointed federal judiciary and allow for the Framers' laboratories of democracy to flourish.") (citations omitted).

[220] Baker v. City of McKinney, 84 F.4th 381 (2023)

[221] *Id.*

[222] *Id. See also* Baker v. City of McKinney, 145 S. Ct. at 12 n* (2024) ("Homeowners' insurance policies generally do not provide coverage for damage caused by the government" (citing JORDAN R. PLITT ET AL., 10A COUCH ON INSURANCE § 152:22 (3d ed. Supp. 2024) (explaining that "losses [that] occur because of the actions of a civil authority functioning in its ordinary governing capacity" are "typically excluded from most property insurance policies"))).

[223] PLITT ET AL., *supra* note 221, at § 152:22.

[224] *Id.*

Insurance clauses may be stricken down if they are void for public policy.[225] Here, the unusual situation of rare government action that destroys a house should be covered, and the insurance company may subrogate the loss by seeking damages from the City or even the criminal who chose to enter the house. Insurance clauses may also be stricken down if they are ambiguous. For example, one would expect that in the unusual occurrence of a SWAT team destroying one's home, there would be insurance coverage. When an insurance clause is ambiguous (as the government exclusion clause arguably is), ambiguity "is determined from the viewpoint of a consumer with average intelligence but untrained in the law or insurance."[226]

VIII. THE COLLATERAL SOURCE RULE

Another issue that was raised during Baker's litigation was the collateral source rule. Baker conceded during deposition that she paid for repairs out of pocket, but "many of the repairs were either covered by charitable or private donations," or insurance.[227]

The collateral source rule is a tort concept not usually applied to Fifth Amendment Takings. The collateral source rule provides:

> [T]he fact that an injured person receives from a collateral source payments which may have some tendency to mitigate the consequences of the injury which he otherwise would have suffered may not be taken into consideration in assessing the damages or other recovery to which the claimant may be entitled.[228]

Accordingly, Ms. Baker sought to have any evidence of external payments for her damages—like charitable payments, private donations, or insurance—

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[225] *See, e.g.*, Neustadt v. Colafranceschi, 469 P.3d 1, 8 (Idaho 2020) ("'[T]he courts will not hesitate to declare void as against public policy contractual provisions which clearly tend to the injury of the public in some way'" (quoting 17A C.J.S. *Contracts* § 218 (2010)). "'The usual test applied by courts in determining whether a contract offends public policy is antagonistic to the public interest is whether the contract has a *tendency* toward such an evil.'" (quoting Stearns v. Williams, 240 P.2d 833, 837 (1952))).

[226] *See* U.S. Specialty Ins. Co. v. Estate of Ward, 444 P.3d 381, 383–84 (Mont. 2019) (citation omitted).

[227] Baker v. City of McKinney, 608 F. Supp. 3d 457, 460 (E.D. Tex. 2022).

[228] *Id.* at 462 (citing Traders & Gen. Ins. Co. v. Reed, 376 S. W. 2d 591, 593 (Tex. Civ. App 1964; *see also* San Joaquin Valley Ins. Auth. v. Gallagher Benefit Servs., 437 F. Supp. 3d 761, 763 (E.D. Cal. 2020) (citing Helfend v. S. Cal. Rapid Transit Dist., 2 Cal. 3d 1 (1970) (holding that the collateral source rule applies to "tort cases in which the plaintiff has been compensated by an independent source—such as insurance, pension, continued wages, or disability payments—for which he had actually or constructively . . . paid or in cases in which the collateral source rule would be recompensated from the tort recovery through subrogation, refund of benefits, or some other arrangement").

excluded from trial under the collateral source rule.[229] The City of McKinney objected,[230] arguing that Baker had been partially compensated from these sources and her just compensation must be reduced accordingly. [231]

This was an issue of first impression. "Put differently, no court has discussed how just compensation should be determined in a takings case, arising out of law enforcement activities, where the plaintiff receives monetary funds from collateral third parties to repair property damages caused by the taking."[232]

If the collateral source rule does not apply to takings cases, the government entity causing the harm stands to get a windfall. If, as in the case of *Baker*,[233] a GoFundMe account yields monies, the purpose of that account is not to raise funds for the government's intrusion, and to do so would thwart the donor's intent. If insurance pays for the damage, as it should, the analysis is mostly the same—the government is still on the hook to pay just compensation, but it is the insurance company that should be reimbursed via the collateral source rule.[234] Otherwise, the government, which has a constitutional obligation to pay just compensation, gets a benefit from those property owners who have insurance coverage and must pay for those who do not.
Furthermore, if the property owner is compensated under tort law, the usual collateral source rule applies as it would for any particular tort.[235] Insurance companies may be compensated to the extent available under the applicable state law, although Ms. Baker's insurance did not cover all her losses, including any structural damage.[236] Baker should be made whole, and courts need not expand the Takings Clause.

IX. SOVEREIGN IMMUNITY

Sovereign immunity arguably creates a barrier to compensation for aggrieved individuals. At the federal level, the Federal Tort Claims Act covers SWAT home invasions under a recent U.S. Supreme Court Case.[237]

The federal, state, and tribal governments all have some modicum of sovereign immunity or the right to be free from lawsuits unless expressly

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[229] *Baker*, 608 F. Supp. 3d at 460.
[230] *Id.* at 460–61.
[231] *SWAT Standoff destroyed home*, GOFUNDME https://www.gofundme.com/f/2sa54x-retirement-home-destroyed [https://perma.cc/QP7S-BQ32] (last visisted Jan. 26, 2026). Ms. Baker had also received funding through a GoFundMe page in the amount of $9,831.
[232] *Baker*, 608 F. Supp. 3d at 462.
[233] *Id.* at 466.
[234] *Id.* at 463.
[235] *Id.*
[236] *Id.* at 460 (insurance paid for some of Ms Baker's losses).
[237] Martin v. United States, 605 U.S. 395, 409–10 (2025).

authorized by law.[238] The cases at issue here—*Baker, Lech*, and *Pena* all involved local jurisdictions. Moreover, at the city or municipal level, generally only "governmental functions" are covered by sovereign immunity, as opposed to "proprietary functions."[239] Law enforcement is almost certainly a "governmental function." But in many jurisdictions, "finding a municipality liable for torts is the exception to the general rule of sovereign immunity."[240] And in others, there must be a statutory waiver of tort liability by municipalities.[241] Sovereign immunity may, therefore, be waived, but jurisdictions vary wildly.[242] Jurisdictions, including the federal government, may also pass legislation or waive their sovereign immunity.

X. STRICT LIABILITY FOR ABNORMALLY DANGEROUS ACTIVITIES?

Assuming that a petitioner is in a jurisdiction where sovereign immunity can be overcome, there are instances in which intent or negligence are not necessary to prove a tort cause of action. In cases of inherently dangerous activities, like the use of explosives in a populated area, a plaintiff need not prove negligence to obtain judgment.[243]
According to the Restatement (Second) of Torts:

> (1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another

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[238] The principle of sovereign immunity in American law was a product of the English common law maxim: *rex non potest peccare* ("the king can do no wrong."). *See* Charles D. Wallace, *When (and Why) the Levee Breaks: A Suggested Causation Framework for Takings Claims that Arise from Government-induced Flooding*, 61 WM. & MARY L. REV. 603, 633–34 (2019) ("Due to substantial tort immunity to the federal government, litigants have little chance at succeeding on any tort claim against the federal government. However, under the Tucker Act, the federal government is not immune from takings claims."). *See generally* Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 801 (2007) (stating, *inter alia*, that the sovereign immunity doctrine holds that the federal government is immune from damages liability unless it expressly provides consent).

[239] *See, e.g.*, Richardson v. City of St. Louis, 293 S.W.3d 133, 136–37 (Mo. Ct. App. 2009); *see also* CSX Transp., Inc. v. City of Garden City, 588 S.E.2d 688, 690 (2003) (city's sovereign immunity was waived to the extent of insurance liability coverage).

[240] Gregg v. City of Kansas City, 272 S.W.3d 353, 359–60 (Mo. Ct. App. 2008); s*ee also* Parker v. Town of Erwin, 776 S.E.2d 710, 723 (N.C. 2015) ("[A] town may waive sovereign immunity through the purchase of liability insurance.").

[241] *See* 63 C.J.S. *Municipal Corporations* § 874 (2025).

[242] *See id.; see also* Daniel J. Kenny, Note, *Dangers, Duties, and Deterrence: A Critique of State Sovereign Immunity Statutes*, 99 N.Y.U. L. REV. 1097, 1098 (2024) ("[B]efore courts can consider the merits of their claims, plaintiffs must untangle a complex web of restrictions imposed by state sovereign immunity statutes. In some states, they must ascertain whether and to what extent the government actors they are suing are covered by liability insurance. The result of this system is that there is effectively one law for government tortfeasors and another for private defendants.").

[243] *See* RESTATEMENT (SECOND) OF TORTS § 519 (A. L. I. 1977).

> resulting from the activity, although he has exercised the utmost care to prevent the harm.
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> (2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.[244]

Blasting, for example, in an urban area, can be enough to create strict liability and require compensation. In *Colton v. Onderdonk*, the California Supreme Court found that a neighbor who was blasting rock was liable for damage to the plaintiff's house.[245]

> The defendant seems, by his contention, to claim that he had a right to blast rocks with gunpowder on his own lot, in San Francisco, even if he had shaken Mrs. Colton's house to ruins, provided he used care and skill in so doing, and although he ought to have known that by such act, which was intrinsically dangerous, the damage would be a necessary, probable, or natural consequence. But in this he is mistaken.[246]

The court found him strictly liable for damage caused to his neighbor's house due to the inherent danger of the activity.[247] There was no negligence. Cases like *Baker* arguably present an analogous situation to inherently dangerous activities in which strict liability applies. Home destruction through explosive devices to ferret out a criminal in a third party's property should result in compensation for damages regardless of the police's negligence.

But police should be able to destroy property if their actions are in the interests of society. The application of strict liability in this context should

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[244] *Id.*
[245] Colton v. Onderdonk, 69 Cal. 155, 158–59 (1886).
[246] *Id.* at 159; In N. Transp. Co. v. City of Chic., the Court stated:

> every land-owner has a right to have his land preserved unbroken, and that an adjoining owner excavating on his own land is subject to this restriction, that he must not remove the earth so near to the land of his neighbor that his neighbor's soil will crumble away under its own weight and fall upon his land.

99 U.S. 635 (1878); *see also* Cath. Welfare Guild, Inc. v. Brodney Corp., 208 A.2d 301 (Del. Super. Ct. 1964); Cent. Expl. Co. v. Gray, 70 So.2d 33 (Miss. 1954); Britton v. Harrison Const. Co., 87 F. Supp. 405 (S.D.W. Va. 1948); Brown v. L.S. Lunder Const. Co., 2 N.W.2d 859 (Wis. 1942).
[247] *See Colton*, 69 Cal. at 159–60.

only be to third parties who are impacted by police action that is "inherently dangerous." If the police are negligent, for example, strict liability need not apply.

XI. TRESPASS?

The property owners in *Baker*, *Lech*, and *Pena* might arguably be able to pursue a claim in trespass, but that's unlikely to succeed in the strict facts of those cases under the necessity exception.[248]

The right to exclude others overlaps both takings and trespass law.[249] According to the Restatement (Second) of Torts, trespass is an intentional physical entry (or causing entry) onto land in another's possession, or remaining there, or failing to remove something from it. [250] The intent required is to enter the land, not necessarily to invade another's rights; a mistaken but non-negligent entry can still be trespass.[251] A SWAT team's entry onto private property to apprehend a criminal—and damaging the premises—is a trespass under this simple definition.

But that's only half of the story. A public necessity—such as when police enter that private property to apprehend a criminal who is a potential danger to the public—protects the community or public interest (e.g., a fire chief demolishing a building to stop a fire) and generally provides a complete defense against liability, even for damages, as it serves the greater good.[252] In this regard, the necessity defense operates in the same manner in both trespass and Fifth Amendment Takings. In both cases, innocent property owners are left to pay for the damage themselves. This is a problem—and an injustice.

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[248] *See, e.g.*, Jones v. City of Tulsa, 857 P.2d 814, 815–16 (Okla. Crim. App. 1993) ("In general, the defense of necessity is allowed when a defendant is faced with the burden of committing a lesser harm to prevent the occurrence of a different and somewhat greater harm. The harm being prevented needs to be *significant* and *immediate*."). *Jones* involved criminal trespass.

[249] *See* Aberdeen Apartments v. Cary Campbell Realty All., Inc., 820 N.E.2d 158, 164–65 (Ind. Ct. App. 2005) ("[T]respass actions are possessory actions and . . . the right interfered with is the plaintiff's right to the exclusive possession of a chattel or land." (citations omitted)).

[250] RESTATEMENT (SECOND) OF TORTS, § 158 (A. L. I. 1977).

[251] *Id.*

[252] RESTATEMENT (SECOND) OF TORTS § 196 (A. L. I. 1977). Contrast private necessity, in which damages are still available, even though the trespass itself might be excused; *Id.* § 197; *see* also Struve v. Droge, 10 Abb. N. Cas. 142, 145 (N.Y. 1881):

> [I]n a case of public necessity, to prevent the spreading of a fire, any individual may demolish a building, without being responsible in trespass or otherwise. If, however, such public necessity does not exist, and, in point of fact, there is no need of the destruction, the person who commits the act is responsible in damages.

XII. WHY IS THIS A PROBLEM?

The problem is two-fold: (1) the complicated factual scenario in which an innocent third party's property is destroyed by a SWAT team seems to demand compensation under the *Armstrong* principle and basic issues of fairness and equity, but courts have generally denied relief and created confusing precedents in doing so;[253] and (2) Justice Sotomayor's opinion in the *Baker* denial of certiorari, joined by Justice Gorsuch, indicates that this issue will come before the Court in the foreseeable future and there is a risk of another confusing expansion of Fifth Amendment Takings law.[254]

Expansion of the Takings Clause has the potential to create new barriers to otherwise valid exercises of police power, including environmental regulations. The necessity defense, for example, may include sweeping environmental protection. If the government fears it will have to pay each property owner for new and generally applicable health and safety regulations that also benefit the environment, such regulations will be stifled. There is a place for the necessity defense as a means of curbing government liability when there is a sweeping government action that impacts a wide swath of the population, such as regulations enacted during a pandemic.

Cases like *Baker, Lech,* and *Pena* are rare and should not be used to justify an expansion of the Takings Clause through application of easily distinguishable cases.

XIII. THE SOLUTION

The solution to remedy the ill-conceived precedent in these difficult factual cases is a clear state remedy for the peculiar situation presented in *Baker, Pena*, and *Lech*. That remedy may be in tort, insurance law, or state and local statutes. It need not rise to the level of a constitutional claim.

Even if these cases give rise to a constitutional claim, there should be limits. Situations where a SWAT team destroys an innocent third party's property are rare and should not be used to expand and further confuse existing law. The necessity defense has been used to deny claims of innocent third party property owners,[255] but the necessity defense is better suited to sweeping regulations that generally affect society—like when the government enacts emergency regulations to curb the spread of disease in a pandemic.

Justice Sotomayor's concurrence to the denial of certiorari in *Baker* indicates an interest in hearing a similarly situated case to determine, *inter*

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[253] Baker v. City of McKinney, 145 S. Ct. at 12–13 (2024) (Sotomayor, J., concurring).
[254] *Id.*
[255] *Id.*

alia, the relevance of inevitability and likelihood in a necessity defense to a Takings claim.[256] But that distinction should be irrelevant in these cases. Courts should not take the bait and turn every offending government action into a constitutional question—although clarity is desperately needed in the applicability of the necessity defense—and those lines should be drawn on (1) whether a taking is physical or regulatory; (2) whether the property owner is innocent; (3) whether the taken property is evidence or the spoils of a crime; and (4) whether the offending action and property destruction is singular and not community-wide. In cases like *Baker*, *Pena,* and *Lech*, where an innocent property owner suffers damages that only apply to them (or the immediate area), and involve a physical invasion of property, there should be compensation, and the government should not escape liability via the necessity defense.

XIV. CONCLUSION

This issue of whether just compensation is due for an innocent third party homeowner whose property was destroyed by a SWAT team, under the Fifth Amendment's Takings Clause, is going to work its way through the courts again. *Baker, Pena,* and *Lech* have left property owners and local government in a quandary. The law is confusing, and the Federal Courts of Appeals are split. The policies behind regulatory takings with physical invasions are categorically different.

Fairness, equity, and even the *Armstrong* principle, militate in favor of compensation for these innocent property owners. There should be, and is, a remedy under tort law or the applicable insurance policy. Failure to compensate the property-owning victim for government-induced harm is an injustice, which the courts have acknowledged. But the remedy does not require a new and expanded constitutional doctrine.

Expanding the Takings Clause—even by limiting the applicability of the necessity defense—may have unintended and far-reaching consequences. For example, the policies behind the necessity defense are sound when applied to sweeping proclamations to avoid the spread of disease, protect the environment, and (historically) to curb alcohol consumption.

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[256] *Id.*