YOU BREAK IT, YOU TAKE IT: AN ARGUMENT FOR THE TAKINGS CLAUSE'S APPLICATION TO LAW ENFORCEMENT PROPERTY DESTRUCTION

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I. INTRODUCTION

When Vicki Baker's Texas home became the scene of a standoff between police officers and an armed fugitive, approximately $50,000 worth of damage was done to her property as police apprehended the criminal.[1] Baker was a completely innocent third party—but she may never receive a dime for the damage done.

On July 25, 2020, Wesley Little was on the run from police with a kidnapped 15-year-old girl.[2] Little successfully evaded police in his "very fast Corvette" earlier that morning, but he soon sought a place to hide out from the authorities.[3] As luck would have it, he knew of a house in McKinney, Texas, owned by Vicki Baker.[4] Baker was a long-time resident of McKinney, though she eventually made plans to move to Montana and sell her home in McKinney.[5] As of 2020, Baker's adult daughter, Deanna Cook, was staying in Baker's Texas home, preparing it for sale.[6] Little had done work on Baker's home at one point, but was fired by Baker due to inappropriate comments he made to Cook.[7] The morning of

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1. Baker v. City of McKinney, 84 F.4th 378, 380–81 (5th Cir. 2023).
2. *Id.* at 380.
3. *Id.*
4. *Id.*
5. *Id.* at 379–80.
6. *Id.* at 380.
7. *Id.*

his getaway from police, Cook saw a Facebook post regarding Little's kidnapping of the teenage girl.[8] Little arrived at the Baker residence with the kidnapped girl, asking Cook to hide his car in the garage.[9] Cook immediately formulated a plan—she allowed Little into the house and falsely claimed that she had to run to the grocery store.[10] Once she left, Cook called Baker, who called the police.[11]

McKinney police arrived at Baker's house shortly thereafter.[12] The police set up a perimeter around the house and began negotiations with Little, who released the girl, but informed them that he had terminal cancer and planned to "shoot it out with the police."[13] In response, the McKinney police "proceeded to use explosive devices, [armored personnel carriers], toxic gas grenades, and a drone to try to resolve the situation."[14] At some point during this confrontation, Little took his own life, and the threat subsided.[15]

The confrontation caused substantial damage to Baker's property. A family dog that was trapped inside during the standoff was left permanently blind and deaf.[16] The gas grenades that were deployed in the house permeated walls and furniture, requiring the services of a "HAZMAT remediation team."[17] Personal belongings within the home were completely destroyed.[18] Electrical fixtures, plumbing, doors, and floors were all decimated—even bricks sustained damage.[19] An antique doll

8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* Cook and Baker went as far as to provide officers with the garage door opener and a door code to enter the house. Baker v. City of McKinney, 601 F. Supp. 3d 124, 128 (E.D. Tex. 2022).
12. *Baker*, 84 F.4th at 380.
13. *Id.*
14. *Id.*; *see also* Nick Sibilla, *After Texas City Refused to Pay for Destroying Her Home, Woman Wins Landmark Fifth Amendment Case*, FORBES (July 11, 2022, 7:40 PM), https://www.forbes.com/sites/nicksibilla/2022/07/11/after-texas-city-refused-to-pay-for-destroying-her-home-woman-wins-nearly-60000/ ("The SWAT team drove a BearCat armored personnel carrier over the fence and through the front door, detonated explosives to forcibly enter the garage, and launched more than 30 tear-gas grenades through the windows, walls, and roof.").
15. *Baker*, 84 F.4th at 380.
16. *Id.*; Sibilla, *supra* note 14.
17. *Baker*, 84 F.4th at 380.
18. *Id.* at 381.
19. *Id.* at 380–81.

collection that Baker's mother gave to her was ruined.[20] "In total, the damage . . . was approximately $50,000."[21]

Baker was denied reimbursement by her homeowners insurance company, and she filed a property damage claim against the City of McKinney, which was also denied.[22] Baker proceeded to file suit against the City of McKinney in federal court, where the court found that the City of McKinney's refusal to compensate Baker violated the Fifth Amendment.[23] Specifically, the court found that the City of McKinney violated the Takings Clause of the Fifth Amendment to the U.S. Constitution by damaging Baker's property for the benefit of the public while not reimbursing her.[24] The City of McKinney then filed a timely appeal to the U.S. Court of Appeals for the Fifth Circuit, which reversed on the basis that the Necessity Exception to the Takings Clause did not require the City of McKinney to reimburse Baker for the damage caused by their police officers.[25] The *Baker* case is a modern representation of the tangled and perplexing grey area in constitutional law known as the Necessity Exception. Just as the lower court in *Baker* reached a different interpretation of the Takings Clause than the appellate court, judges and legal scholars have long struggled with the application and limits of exceptions to the Takings Clause's protections.

Despite the varied interpretations and applications of supposed limits to the Takings Clause, historical context and Supreme Court jurisprudence show that the Necessity Exception should not be used as a loophole to prevent municipalities from reimbursing property owners like Baker. Thanks to *Baker*, the Supreme Court had an opportunity to reject the Necessity Exception once and for all to provide protections for similarly situated property owners moving forward. However, this opportunity was squandered when the Court declined to consider the case.[26]

The Takings Clause of the Fifth Amendment to the U.S. Constitution requires that no person's property shall "be taken for

20. *Id.* at 381.
21. *Id.*
22. *Id.*
23. *Id.* at 381–82.
24. *Id.* at 382.
25. *Id.* at 388.
26. Baker v. City of McKinney, 145 S. Ct. 11, 13 (2024).

public use, without just compensation."[27] The Supreme Court long ago articulated that "[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government [sic] from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[28] Though the plain language of the Takings Clause provides clear instruction for compensation when private property is taken for public use, there has long been a question of whether destruction of property falls under the constitutional definition of a "taking." If it does, the next question is whether destruction out of public necessity is subject to any exception to the constitutional protection.

The government using eminent domain powers to seize private property for the construction of public amenities is likely the most well-known form of "taking" under the Fifth Amendment. However, courts have interpreted the definition of "taking" in a variety of ways. The Supreme Court has articulated that government regulations limiting the use of personal property constitute a taking.[29] Some state supreme courts, including the Supreme Court of New Jersey, have conceded that "the destruction of private property for public use is a taking of it within the meaning of the [C]onstitution."[30] Indeed, the Supreme Court's expression of the purpose of the Takings Clause in *Armstrong v. United States*[31] demonstrates that the true purpose of the protection is to prevent individuals from bearing public burdens, which logically applies to situations like the one Baker faced.[32]

Although "it should be relatively simple to determine that the government takes property by destroying it,"[33] several courts over the years have employed the Necessity Exception to the Takings Clause to limit financial exposure when government actors destroy property out of necessity.[34] This application is especially troublesome in cases like *Baker*, where law enforcement destroys

27. U.S. CONST. amend. V.
28. Armstrong v. United States, 364 U.S. 40, 49 (1960).
29. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).
30. Am. Print Works v. Lawrence, 21 N.J.L. 248, 256 (N.J. 1847).
31. *Armstrong*, 364 U.S. at 49.
32. *Id.*
33. Derek T. Muller, *"As Much Upon Tradition as Upon Principle": A Critique of the Privilege of Necessity Destruction Under the Fifth Amendment*, 82 NOTRE DAME L. REV. 481, 483 (2006).
34. *Id.*

an innocent third-party's property in pursuit of actual criminals. As this Article will explore, the Necessity Exception doctrine was first narrowly recognized by the Supreme Court as a justification for the destruction of property to prevent fires from spreading through towns in the nineteenth century.[35] Despite this narrow purpose, the Necessity Exception has endured as a method for courts to deny compensation under the Takings Clause.

Baker serves as a very recent example of a federal appellate court restricting the Takings Clause improperly. This Article will explore other recent instances, such as *AmeriSource Corp. v. United States*[36] and *Johnson v. Manitowoc County*,[37] where courts have implicitly prioritized law enforcement's unbridled power over personal property rights. Though the courts in *AmeriSource* and *Johnson* did not expressly invoke the Necessity Exception, their rejection of the Takings Clause's command is informative in exploring the tension between providing for the public and protecting personal property.[38] Before exploring modern misapplications of the Takings Clause, however, it is helpful to recount the historical evolution of the constitutional protection.

II. A HISTORY OF THE TAKINGS CLAUSE AND ITS LIMITS

The boundaries of the Takings Clause have evolved over decades as courts have considered a wide array of factual situations that test the limits of private property rights. As Takings Clause jurisprudence has progressed into its modern form, it has been accompanied by a pesky passenger: the Necessity Exception.

A. Suffering Damage for the Commonwealth[39]

Legal scholars have identified the inception of the Necessity Exception in the English common law case of *The Case of the King's Prerogative in Saltpetre*, which was decided by the King's Bench in

35. *See* Bowditch v. Boston, 101 U.S. 16 (1879).
36. 525 F.3d 1149 (Fed Cir. 2008).
37. 635 F.3d 331 (7th Cir. 2011).
38. *AmeriSource Corp.*, 525 F.3d at 1150; *Johnson*, 635 F.3d at 336.
39. "[F]or the commonwealth, a man shall suffer damage." The Case of the King's Prerogative in Saltpetre (1606) 77 Eng. Rep. 1294, 1295; 12 Co. Rep. 12, 13.

the early seventeenth century.[40] This case, from 1606, expounded the King's right to enter property with royal warrants and dig up saltpeter, which was used as a component of gunpowder.[41] The King's men would cause damage to the owner's private property, including "homes, barns, stables, and outhouses" in pursuit of the saltpeter, but the property owner would not be compensated for the saltpeter taken or damage done.[42] This privilege, the court held, was based on the necessity of gunpowder supply for national defense of the common good.[43]

B. Early American History

Before the Bill of Rights—and as a component, the Takings Clause—was ratified, the Supreme Court of Pennsylvania heard the case of *Respublica v. Sparhawk*.[44] The events that led to the suit in *Sparhawk* took place during the American Revolutionary War when American forces anticipated the British invasion of Philadelphia.[45] At the direction of Congress, the Pennsylvania Board of War ordered citizens to abandon the city and collect as much private property as possible to prevent it from falling into the hands of the enemy, who would benefit from the captured supplies.[46] These supplies were transported to the nearby area of Chestnut Hill for safekeeping until they could be returned to their rightful owners.[47] Among these supplies was a large quantity of flour owned by Sparhawk, some of which was lost when it was captured by the British forces.[48] Sparhawk subsequently brought

40. Muller, *supra* note 33, at 488; *see also* Richard F. Boyer, *Municipal Liability for Riot Damage Under Eminent Domain*, 28 WASH. & LEE L. REV. 103, 119 n.99 (1971) ("The origin of the [Necessity Exception] is founded in *The Case of the King's Prerogative in Saltpetre*. . . . [The] case held that an owner of land was not entitled to compensation from the King for saltpetre mined from his property and later used in the manufacture of gunpowder."); Robert H. Thomas, *Lord Coke, the Saltpeter Case, and the Origins of the Just Compensation Requirement*, INVERSECONDEMNATION.COM (Sept. 3, 2019), https://www.inversecondemnation.com/inversecondemnation/2019/09/lord-coke-the-saltpeter-case-and-the-origins-of-the-just-compensation-requirement-.html.

41. Thomas, *supra* note 40.

42. *Id.*

43. *Id.*

44. Respublica v. Sparhawk, 1 U.S. (1 Dall.) 357 (1788).

45. *Id.* at 357. *See generally Virtual Marching Tour of the American Revolutionary War*, USHISTORY.ORG, https://www.ushistory.org/march/phila/britishphila_1.htm (last visited Apr. 15, 2025).

46. *Sparhawk*, 1 U.S. (1 Dall.) at 357–58.

47. *Id.* at 358.

48. *Id.*

suit against the government actors who collected (and lost) his property for the greater good of national defense, asserting that he was due reimbursement.[49] Sparhawk was not reimbursed.[50]

Though the case pertained to wartime actions of the government, the Court in *Sparhawk* reflected on the Great Fire of London of 1666 as a justification for a general rule of necessity justifying takings.[51] Firefighting technology at the time of the Great Fire of London was antiquated in comparison to modern capabilities. With limited means, firefighting techniques of the time included destroying houses in the path of the fire to create a "fire-break" as a last resort.[52] The *Sparhawk* Court reasoned that the mayor of London would have been better equipped to combat the spread of the fire had he not been so concerned with paying for the houses he razed to stop the spread.[53]

The Bill of Rights was ratified shortly after *Sparhawk* was decided, and historical evidence shows that the protection of private property from government interference was important to its framers, especially James Madison. James Madison's "writings and speeches indicate[] that he believed that physical property needed greater protection than other forms of property because its owners were peculiarly vulnerable to majoritarian decisionmaking [sic]."[54] Indeed, the inclusion of the Takings Clause in the Bill of Rights demonstrates how coveted private property rights were to the framers.

As the Supreme Court of the United States heard cases throughout the nineteenth century that concerned the Takings Clause, its plain meaning was reinforced through those decisions. One such decision was *Pumpelly v. Green Bay & Mississippi Canal Co.*,[55] in which a property owner had their land damaged due to

49. *Id.* at 357–58 (explaining that Sparhawk sought reimbursement for the price of 227 barrels of flour plus interest from the time of their taking).

50. *Id.* at 363.

51. *Id.* at 362–63.

52. Ben Johnson, *The Great Fire of London*, HISTORIC UK (July 1, 2020), https://www.historic-uk.com/HistoryUK/HistoryofEngland/The-Great-Fire-of-London/.

53. *Sparhawk*, 1 U.S. (1 Dall.) at 363 ("We find, indeed, a memorable instance of folly recorded in the 3 Vol. of Clarendon's History, where it is mentioned, that the Lord Mayor of London, in 1666, when that city was on fire, would not give directions for, or consent to, the pulling down forty wooden houses, or to the removing the furniture, &c. belonging to the Lawyers of the Temple, then on the Circuit, for fear he should be answerable for a trespass; and in consequence of this conduct half that great city was burnt.").

54. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 847 (1995).

55. 80 U.S. (13 Wall.) 166 (1871).

the construction of a local dam.[56] The *Pumpelly* Court articulated that "under the constitutional provisions it is not necessary that the land should be absolutely taken."[57] The Court went on to interpret the broad application of the Takings Clause in this way:

> It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. *Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors*.[58]

The *Pumpelly* Court made clear that the Takings Clause certainly applies to situations in which property is destroyed for the public benefit.

Eight years after expressing this notion in *Pumpelly*, the Supreme Court heard *Bowditch v. Boston*,[59] another case concerning spreading fires.[60] This time, the Supreme Court considered whether Massachusetts state law and certain ordinances of the City of Boston enabled a property owner to recover after the Boston fire department demolished his home in an attempt to constrain a spreading fire.[61] Notably, the Court did not consider whether the Takings Clause applied to the case, as the Court did not begin applying the clause to state government

56. *Id.* at 175.
57. *Id.* at 179.
58. *Id.* at 177–78 (second emphasis added).
59. 101 U.S. 16 (1879).
60. *Id.* at 16.
61. *Id.* at 16–17.

takings until 1897.[62] The *Bowditch* Court only considered state and city statutes.[63] Referring to *The Case of the King's Prerogative in Saltpetre*, the Court asserted that a right to destroy property in cases of "actual necessity" existed at common law, particularly "to prevent the spreading of a fire."[64] This right, the Court asserted, was founded in natural law, and allowed anyone to destroy property under these circumstances, without owing a dime to the property owner.[65] "The statute of Massachusetts, as far as it goes, gives as a bounty that which could not have been claimed before. How far the statute trenches upon the legal and natural right which every one [sic] possessed prior to its enactment, is a subject we need not consider."[66]

The Supreme Court in *Bowditch* appears to acknowledge that state laws can negate the so-called natural law of necessity. While the Court makes this acknowledgment in terms of state law, it does not comment on the contradiction between the Takings Clause and the "natural law" of necessity.[67] This case appears to be the Supreme Court's earliest acknowledgment of a Necessity Exception. Even though the *Bowditch* Court never mentions the Takings Clause, or even the Federal Constitution, *Bowditch* has been relied upon over time as an endorsement of the modern Necessity Exception.[68]

C. Twentieth Century Takings Clause Cases

In the early twentieth century, the Supreme Court finally addressed potential limitations to the Takings Clause, including the use of police power and the Necessity Exception. *Pennsylvania Coal Co. v. Mahon*[69] examined a state's right to use "police power" to enact statutes that regulated property to the point that such

62. Chicago, B. & Q.R. Co. v. City of Chicago, 166 U.S. 226, 241 (1897) (explaining that a state court that denied compensation for a private property taking ignored a right secured by the Constitution of the United States, thus creating the precedent that the Takings Clause should protect against state government takings).

63. Bowditch v. Boston, 101 U.S. 16, 19–20 (1879).

64. *Id.* at 18.

65. *Id.*

66. *Id.* at 19.

67. *Id.* ("All the questions arising in this case are questions of local law. It is our duty to consider the controversy as if we were a court of the State, and sitting there to apply her jurisprudence.").

68. *See* Baker v. City of McKinney, 84 F.4th 378, 387–88 (5th Cir. 2023).

69. 260 U.S. 393 (1922).

property was diminished in value.[70] Although the phrase "eludes an exact definition,"[71] police power is generally defined as a state's "Tenth Amendment right, subject to due-process and other limitations, to establish and enforce laws protecting the public's health, safety, and general welfare, or to delegate this right to local governments."[72] In *Pennsylvania Coal*, a mining company conveyed surface land above one of their coal operations to a private individual, Mahon.[73] A portion of the deed that memorialized the conveyance specifically stated that Mahon understood the risks associated with the mining operation taking place underneath.[74] Sometime later, the State of Pennsylvania passed a regulation forbidding coal mining that could potentially affect the structural integrity of surface land.[75] Mahon then sued the mining company for violating the statute, which the mining company claimed was an unconstitutional regulation of its property rights.[76] The mining company argued that the regulation was effectively a "taking" of its property rights because the underground land was useless if it could not be used for coal mining.[77]

Addressing the protections of the Takings Clause, the Court cautioned that "[w]hen this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until, at last, private property disappears. But that cannot be accomplished this way under the Constitution of the United States."[78] Seemingly based on this fear that police power, if left unchecked, would engulf private property rights, the Court advised that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[79] Somewhat confusingly, the Court then qualified this general rule by invoking the natural law sentiment from *Bowditch*, stating that "[i]t may be doubted how far exceptional cases, like the blowing up of a house to stop a

70. *Id.* at 414–15.
71. *Police Powers*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/police_powers (last visited Apr. 15, 2025).
72. *Police Power*, BLACK'S LAW DICTIONARY (11th ed. 2019).
73. *Pa. Coal Co.*, 260 U.S. at 412.
74. *Id.*
75. *Id.* at 412–13.
76. *Id.* at 412.
77. *Id.*
78. *Id.* at 415.
79. *Id.*

conflagration, go—and if they go beyond the general rule, whether they do not stand as much upon tradition as upon principle."[80] Once again, the Supreme Court examined a limitation to the Takings Clause in the context of old-fashioned firefighting techniques.

Almost forty years after *Pennsylvania Coal*, the Supreme Court heard a Takings Clause case in which a supplier of shipbuilding materials pursued reimbursement from the government for unpaid materials.[81] The petitioner in *Armstrong v. United States* had provided materials to a contractor that was building personnel boats for the Navy.[82] When the contractor defaulted on its obligations to the government, the government took title to all of the unfinished ships as well as the unused building materials, among which were those that the petitioner had supplied, but not yet been paid for.[83] Under relevant state law at the time, suppliers of shipbuilding materials that had yet to be paid had a lien on such materials until payment was satisfied.[84] The petitioners therefore contended that the government, by taking title to all of the unused materials, made their liens unenforceable, which constituted a taking under the Fifth Amendment.[85]

The Court concluded that the "petitioners must be considered to have had compensable property interests within the meaning of the Fifth Amendment" [86] before the default of the contractor, and that "there was a taking of [the] liens for which just compensation is due under the Fifth Amendment."[87] In its decision, the Court acknowledged a difficulty in distinguishing between government actions that could qualify as a taking versus consequential losses, thus increasing the difficulty in determining if such actions justify compensation.[88] In the conclusion of its holding, however, the Court articulated the core promise of the Takings Clause: "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to

80. *Id.* at 415–16.
81. Armstrong v. United States, 364 U.S. 40 (1960).
82. *Id.* at 41.
83. *Id.*
84. *Id.*
85. *Id.* at 41–42.
86. *Id.* at 46.
87. *Id.* at 48.
88. *Id.*

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."[89]

The *Armstrong* Court examined the difficulty of balancing government interests with the core constitutional protection afforded to private property. In the years since, though the Supreme Court has decided several takings cases, the Court has not provided much more clarity as to where the line is drawn when it comes to nontraditional takings.[90] Because of this lack of clarity, lower courts continued to apply doctrines (like the Necessity Exception) that prevent private property owners from recovering from the government simply because their losses fall outside the traditional scope of "takings."[91] What is clear from these twentieth-century Takings Clause cases, however, is the intent of the Supreme Court to construe the Takings Clause as a broad protection of property rights with limited exceptions.

D. Modern Appellate Court Cases

So far in the twenty-first century, federal appellate courts have often grappled with the bounds of the Takings Clause and the limitations of the Necessity Exception. Armed with little guidance from the Supreme Court, the appellate courts have arrived at differing interpretations of the limitations of the Takings Clause. The decisions in *AmeriSource Corp. v. United States* and *Johnson v. Manitowoc County* are illustrative of this point.

In *AmeriSource*, a wholesale pharmaceutical distributor had its product confiscated (and effectively destroyed) by police for evidentiary use in an investigation into a separate company.[92] AmeriSource Corporation contracted with Norfolk Pharmacy to sell a large quantity of pharmaceuticals for over $150,000.[93]

89. *Id.* at 49.

90. *See* discussion *infra* pt. III.C.

91. *See* discussion *infra* pt. III.C.

92. AmeriSource Corp. v. United States, 525 F.3d 1149, 1150–51 (Fed. Cir. 2008).

93. *Id.* at 1150. The pharmaceuticals included Viagra (an erectile disfunction medication), Propecia (a hair loss medication), and Xenacil (a weight loss medication). *Id. See generally* Patricia Weiser, *Sildenafil (Viagra, Revatio)–Uses, Side Effects, and More*, WEBMD, https://www.webmd.com/drugs/2/drug-7417/viagra-oral/details (last visited Apr. 13, 2025); Nazneen Memon, *Finasteride (Propecia, Proscar)–Uses, Side Effects, and More*, WEBMD, https://www.webmd.com/drugs/2/drug-5471/propecia-oral/details (last visited Apr. 13, 2025); *Xenical–Uses, Side Effects, and More*, WEBMD, https://www.webmd.com/drugs/2/drug-17218/xenical-oral/details (last visited Apr. 13, 2025).

AmeriSource delivered the product to Norfolk, who did not immediately pay for the product, which meant that AmeriSource retained ownership of the drugs until full payment was made.[94] Around the same time that this transaction was being made between the two companies, a federal investigation into Norfolk led to an indictment of the company leadership on charges including "conspiracy, unlawful distribution of prescription pharmaceuticals, operating an unregistered drug facility, and conspiracy to commit money laundering."[95] A large quantity of pharmaceuticals in Norfolk's possession was seized, which included the drugs that AmeriSource had delivered but had not yet been paid for.[96] A trial ensued, followed by appellate hearings, and the government retained the drugs for possible use as evidence.[97] The product never ended up being used in evidence and expired while in the government's possession.[98] AmeriSource attempted on multiple occasions to reclaim their drugs (or their equivalent cost) from the government to no avail.[99]

Responding to AmeriSource's Fifth Amendment Takings claim against the government, the Federal Circuit Court of Appeals stated that the Takings Clause "does not entitle all aggrieved owners to recompense, only those whose property has been 'taken for public use.'"[100] The appellant's argument to the court was that "public use" includes "any government use of private property aimed at promoting the common good, including enforcement of the criminal laws."[101] This argument, the court said, might carry greater weight if the court were to limit its

94. *AmeriSource Corp.*, 525 F.3d at 1150.
95. *Id.* (quoting AmeriSource Corp. v. United States, 75 Fed. Cl. 743, 744 (2007)).
96. *Id.*
97. *Id.* at 1151.
98. *Id.*
99. *Id.* at 1151–52 (citing *AmeriSource Corp.*, 75 Fed. Cl. at 744). In 2000, AmeriSource first brought a Rule 41(e) petition under the Federal Rules of Criminal Procedure, which allows parties a remedy when their property has been seized in connection with a criminal proceeding. *Id.* at 1151 (citing *AmeriSource Corp.*, 75 Fed. Cl. at 744). This initial petition was denied by the Middle District of Alabama. *Id.* (citing *AmeriSource Corp.*, 75 Fed. Cl. at 744–45). AmeriSource then sued Norfolk in the U.S. District Court for the District of West Virginia in 2002, where a default judgement was entered against Norfolk. *Id.* (citing *AmeriSource Corp.*, 75 Fed. Cl. at 746). That judgement remained unsatisfied as of 2008. *Id.* The final attempt by AmeriSource was made in 2004, which was the Fifth Amendment claim in the Court of Federal Claims that is discussed here. *Id.* (citing *AmeriSource Corp.*, 75 Fed. Cl. at 744).
100. *Id.* at 1152 (quoting U.S. CONST. amend. V).
101. *Id.*

interpretation of the text to a literal reading.[102] The court then went on to explain why "seizure of property to enforce criminal laws is a traditional exercise of the police power that does not constitute a 'public use.'"[103]

In formulating its opinion, the Federal Circuit pointed to a past case, *Acadia Technology, Inc. v. United States*,[104] in which U.S. Customs seized computer parts "bearing fabricated trademark stickers."[105] Much like the instant case, the government held on to the computer parts until their value was reduced to scrap, and the owners of the goods were left without reimbursement because the seizure was a "classic example of the government's exercise of the police power."[106] This exercise of police power, the court said, meant that the seizure was not a taking, and likewise, the seizure of AmeriSource's pharmaceuticals was not a taking either.[107] By the court's logic, neither of these goods—computer parts or drugs—that were *literally* taken from property owners in the pursuit of enforcing laws were *actually* taken under the Fifth Amendment because the goods were not taken for public use.[108]

The federal court in *AmeriSource* ignored the Supreme Court's warning from *Pennsylvania Coal* that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[109] The *AmeriSource* court appears to have endorsed a categorical exception to the Takings Clause for the use of police powers in this case, which would later be challenged by

102. *Id.* at 1152–53.

103. *Id.* at 1153–55.

104. 458 F.3d 1327 (Fed. Cir. 2006).

105. *AmeriSource Corp.*, 525 F.3d at 1153. Goods bearing fabricated trademark labels can be seized by U.S. Customs under the Tariff Act of 1930, which automatically results in a forfeiture by the owners of the goods. *Id.*

106. *Id.* (quoting *Acadia Tech.*, 458 F.3d at 1332).

107. *Id.* at 1153–54.

108. *Id.* While the petitioner in *Acadia Technology* very well may have been committing a crime, AmeriSource appears to have been ignorant to the crimes being committed by Norfolk that led to the eventual loss of their property. *Id.* at 1156. The Federal Circuit claims that this difference does not matter, though. *Id.* at 1154. The court cited *Bennis v. Michigan*, 516 U.S. 442 (1996), as establishing a general rule that "the inquiry remains focused on the character of the government action, not the culpability or innocence of the property holder." *Id. Bennis* can hardly be relied upon as controlling in the cases that this Article discusses as the Takings Clause claim in *Bennis* is only briefly addressed and narrowly considered in the context of forfeitures. R. Todd Ingram, *The Crime of Property:* Bennis v. Michigan *and the Excessive Fines Clause*, 74 DENV. U. L. REV. 293, 299 (1996).

109. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922); *see* Dave Owen, *The Realities of Takings Litigation*, 47 BYU L. REV. 577, 585 (2022).

the Fifth Circuit Court of Appeals in *Baker*.[110] Despite the outcome, the Federal Circuit in *AmeriSource* acknowledged the inherent unfairness in its ruling: "It is unfair that any one citizen or small group of citizens should have to bear alone the burden of the administration of a justice system that benefits us all."[111] It is indeed a bizarre result that the Federal Circuit reached, conducting logical gymnastics to conclude that the seizure of property in furtherance of law enforcement is somehow not contemplated by the Takings Clause's protection of private property from public use. However, the Federal Circuit has not been the only federal appellate court to reluctantly deny aggrieved property owners a fair result.

The Seventh Circuit Court of Appeals grappled with the Takings Clause and its limits in *Johnson v. Manitowoc County*, which was decided in 2011.[112] Roland Johnson was a landlord who owned a property in Wisconsin, which he rented to a man named Steven Avery.[113] Avery had been serving an eighteen-year sentence for a rape he was sentenced for in the eighties, but was released (with assistance from the Wisconsin Innocence Project) and found a place to stay on Johnson's property in 2003.[114] Avery's troubles with the law, however, were far from over. Johnson's property that was being rented to Avery contained an auto salvage yard, and on October 31, 2005, freelance photographer Teresa Halbach met with Avery to take some photographs for Auto Trader magazine.[115] Halbach disappeared, and Avery (as well as his nephew) was charged with murder, kidnapping, sexual assault, and mutilating a corpse in connection with Halbach's death.[116]

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110. Baker v. City of McKinney, 84 F.4th 378, 384 (5th Cir. 2023) ("[A] city's exercise of its police powers can go too far, and if it does, there has been a taking." (quoting John Corp. v. City of Houston, 214 F.3d 573, 578 (5th Cir. 2000))).

111. *AmeriSource Corp.*, 525 F.3d at 1157.

112. Johnson v. Manitowoc County, 635 F.3d 331, 336 (7th Cir. 2011).

113. *Id.* at 332. The court regarded Roland Johnson as "go[ing] far beyond merely unlucky" for his choice in tenant. *Id.*

114. *Id.*; *Steven Avery*, INNOCENCE PROJECT, https://innocenceproject.org/cases/steven-avery/ (last visited Apr. 13, 2025).

115. *Johnson*, 635 F.3d at 332.

116. *Id.*; Kelli Arseneau, *Steven Avery Is Still Trying to Appeal His Conviction. Here Are the Most Recent Updates.*, POST CRESCENT. (Dec. 10, 2024, 2:13 PM), https://www.postcrescent.com/story/news/crime/2024/04/05/steven-avery-is-still-trying-to-appeal-his-conviction-what-to-know/73021822007. If the details of Avery's conviction sound familiar to some readers, that is because Halbach's murder and Avery's conviction were chronicled in the 2015 Netflix series "Making a Murderer." *Id.*

Manitowoc County police officials conducted a thorough investigation, which included searching the property where Avery lived, which was owned by Johnson.[117] During their search of the property, Manitowoc police took a jackhammer to Johnson's floors, tore off his wall panels, and destroyed his home furnishings in an attempt to obtain evidence.[118] Johnson brought a Takings Clause claim against Manitowoc County after not receiving a satisfactory answer as to reimbursement for the damage.[119] The district court found Johnson's claim unconvincing, citing the city's reasonable use of police power, and granted the County's motion for summary judgment.[120] Johnson appealed to the Seventh Circuit.[121] Citing *AmeriSource*, the *Johnson* court simply called Johnson's Takings Clause claim a "non-starter" and asserted that "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."[122]

Much like the *AmeriSource* court, the *Johnson* court acknowledged in the opinion that it "seems quite unfair to make an innocent, unlucky landlord absorb the costs associated with the execution of a search warrant directed at a criminally-inclined tenant."[123] In this sense, the court was correct. Such an imitation of the Takings Clause is quite unfair.

A complete historical analysis of the Takings Clause necessarily concludes with the most recent high-profile Takings Clause case: *Baker v. City of McKinney*, in which the Fifth Circuit Court of Appeals found the damage done to Vicki Baker's home not compensable.[124] Before *Baker* made it to the appellate level, the federal district court below applied the charge of the Takings Clause in its plain sense and ruled that the City of McKinney's refusal to compensate her constituted a Fifth Amendment

117. *Johnson*, 635 F.3d at 332–33.

118. *Id.* at 333–34 (explaining that officers identified areas in the property's garage where Halbach's blood may have traveled, which required removal of concrete floors).

119. *Id.* at 334.

120. *Id.*

121. *Id.* at 333. Johnson also brought claims that his Fourth Amendment rights were violated, which the Seventh Circuit spends a majority of its decision denying before briefly addressing the Fifth Amendment Takings Clause claim. *See id.* at 333–36.

122. *Id.* at 336 (citing AmeriSource Corp. v. United States, 525 F.3d 1149, 1154 (Fed. Cir. 2008)).

123. *Id.* The court concluded by noting that Johnson had options to seek redress under state law, but not under the U.S. Constitution. *Id.*

124. Baker v. City of McKinney, 84 F.4th 378, 379 (5th Cir. 2023).

violation.[125] The City of McKinney appealed to the Fifth Circuit, which reversed on the basis that the Necessity Exception to the Takings Clause did not require the City of McKinney to reimburse Baker for the damage caused by their police officers.[126] In doing so, the court cited the "history and tradition" that compelled its decision, specifically that of *Sparhawk* and *Bowditch*.[127]

What makes the *Baker* decision unique compared to *AmeriSource* and *Johnson* is the court's clear reluctance to apply the Necessity Exception. The court acknowledged the blatant injustice that Baker endured, pointing to the Supreme Court's sentiments in *Armstrong* about individuals unfairly being forced to bear public burdens.[128] Responding to one of the City of McKinney's arguments for not reimbursing Baker, the court also highlighted an important flaw in the application of the Necessity Exception to police powers. The City of McKinney proposed to the Fifth Circuit "a broad rule: because Baker's property was damaged or destroyed pursuant to 'the exercise of the City's police powers,' there has been no compensable taking under the Fifth Amendment."[129] In proposing this rule, the City of McKinney cited *AmeriSource* and *Johnson* as persuasive.[130]

In addition to asserting that those courts "[did] not rely on history, tradition, or historical precedent,"[131] the court reasoned that "[t]he Supreme Court's entire 'regulatory takings' law is premised on the notion that *a city's exercise of its police powers can go too far, and if it does, there has been a taking*."[132] This sentiment implies that exceptions to the Takings Clause have boundaries of some sort, but those boundaries have yet to be clearly established. Further, despite the acknowledgment of limitations on the Necessity Exception by the court, Baker was denied compensation because the court did not feel that the use of police power, in this case, went too far, especially because Baker claimed it was necessary.[133] This conclusion could imply that if Baker had

125. *See id.* at 381.
126. *Id.* at 388.
127. *Id.* at 385–88.
128. *Id.* at 388 (citing Armstrong v. United States, 364 U.S. 40, 49 (1960)).
129. *Id.* at 383.
130. *Id.* at 383–84 (citing AmeriSource Corp. v. United States, 525 F.3d 1149 (Fed. Cir. 2008); Johnson v. Manitowoc County, 635 F.3d 331 (7th Cir. 2011)). The City also relied on *Lech v. Jackson*, 791 F. App'x 711 (10th Cir. 2019). *Id.*
131. *Id.* at 384.
132. *Id.* at 383.
133. *Id.* at 388.

referred to the use of police force on her home as unnecessary or unreasonable from the inception of her suit, she may have been awarded compensation by the court.

In closing, the *Baker* court said that:

> As a lower court, however, it is not for us to decide that fairness and justice trump historical precedent, particularly Supreme Court precedent, where it has long recognized a necessity exception that excludes those like Baker from the protection of the Fifth Amendment's Takings Clause. Such a decision would be for the Supreme Court alone.[134]

III. ANALYSIS

It's hard not to sympathize with the victims of the Necessity Exception. The outcomes that these innocent property owners faced feel inherently unjust for good reason. The Necessity Exception, especially in the context of police power, has not evolved to conform with the modern ideas of private property ownership.

A. History Does Not Support the Application of the Necessity Exception to Police Power

Proponents of the Necessity Exception to the Takings Clause point to historical precedent,[135] but to say that history supports the application of the Necessity Exception in modern times is misleading. History requires context, and when the Necessity Exception is placed in context, it is antiquated.

1. The Necessity Exception's Context

The Necessity Exception's early application in American caselaw demonstrates the concept's limited and outdated reasoning when applied to modern policing. *Sparhawk*, while used as justification by some courts for the Necessity Exception,[136] addressed wartime decisions, which are not entirely analogous to the type of decisions that law enforcement officers make when

134. *Id.*
135. *Id.*
136. *See id.* at 385–86; Bowditch v. City of Boston, 101 U.S. 16, 18–19 (1879); *see* Respublica v. Sparhawk, 1 U.S. (1. Dall.) 357 (1788).

destroying property out of necessity.[137] While wartime decisions have broad ramifications for national security, a police officer is rarely faced with a decision that affects the security of a nation. Further, the *Sparhawk* decision contemplated several scenarios that illustrate the natural societal preference for individuals to "suffer a private mischief" instead of the public suffering an inconvenience in cases of necessity.[138] Among these scenarios, the *Sparhawk* Court gave special attention to the necessity of razing buildings during the fire of London in 1666.[139] The failure to do so out of concern for individual property rights, according to the Court, was a "memorable instance of folly" that resulted in more damage than necessary.[140] While sprawling city-wide fires may very well have served as an illustration in favor of the Necessity Exception in 1788, the same cannot be said in an era of modern firefighting technology.

While firefighters in the 1600s and 1700s may have necessarily relied upon the destruction of houses to create a fire break, modern firefighting technology enables far more precise and far less destructive responses.[141] Indeed, the same Supreme Court of Pennsylvania that decided *Sparhawk* in 1788 could likely not have conceived of the possibility that fires would one day be extinguished by "light particles and soundwaves."[142] Similarly, the other early architects of the Necessity Exception could likely not have conceived of a 7.96-ton Lenco BearCat (which serves as an acronym for Ballistic Engineered Armored Response Counter Attack Truck) plowing through the front door of Vicki Baker's home in an attempt to apprehend a criminal inside.[143] As society's

137. *Sparhawk*, 1 U.S. (1. Dall.) at 361–62.

138. *Id.* at 362–63. The Court lists "many striking illustrations" of the necessity principle, including the use of a private road when a public road is in disrepair, the pursuit of bothersome animals through private land, and razing houses to prevent the spread of a fire. *Id.*

139. *Id.* at 363.

140. *Id.*

141. Jim Spell, *A Brief History of the Fire Service: From Ancient Equipment to Modern Technology*, FIRERESCUE1 (Aug. 11, 2021, 2:00 PM), https://www.firerescue1.com/fire fighting-history/articles/a-brief-history-of-the-fire-service-from-ancient-equipment-to-modern-technology-uTSiJ1nGr7xUm5fm/ (highlighting the contrast between antiquated methods of firefighting and modern technology, including the modern use of "diesel-driven engines with dual-stage pumps" instead of "steam pumpers drawn by horses" and infrared cameras, vapor barriers, and drones).

142. *Id.*

143. *See* Baker v. City of McKinney, 84 F.4th 378, 380 (5th Cir. 2023); Billy Binion, *This Innocent Woman's House Was Destroyed by a SWAT Team. A Jury Says She's Owed $60,000.*, REASON (June 29, 2022, 5:00 PM), https://reason.com/2022/06/29/this-innocent-

need for necessary intervention by the government in emergency situations has evolved—and as emergency responses, in general, have evolved—the Necessity Exception has remained a stagnant and antiquated excuse for burdening private property owners. History requires context, and when placed in the context of modern policing, limitations to the Takings Clause, like the Necessity Exception, are out of place.

2. Judicial History of the Takings Clause Shows a Lack of Support for the Necessity Exception

Though modern courts cite history and tradition as endorsing the Necessity Exception,[144] early Supreme Court cases demonstrate a preference for the Takings Clause to be construed broadly, as evidenced by the holdings in *Pumpelly*, *Pennsylvania Coal*, and *Armstrong*. The Supreme Court in these fundamental cases hardly endorsed an exception to the Takings Clause. If anything, my impression is that the Supreme Court has repeatedly warned against limiting such constitutional protections.

The Supreme Court in *Pumpelly* explicitly held that a physical "taking" is not necessary to invoke the protections of the Takings Clause, cautioning against the detrimental effects of narrowly construing the Fifth Amendment to its plain text.[145] In deciding *Pennsylvania Coal*, the Supreme Court urged against a categorical exception to the Takings Clause in instances of police power, foreshadowing the "danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[146] Even in *Armstrong*, where the Court acknowledged the difficulty in drawing a line between compensable takings and incidental destruction, the essential charge of the Takings Clause was followed, and the government

womans-house-was-destroyed-by-a-swat-team-a-jury-says-shes-owed-60000/; *Lenco BearCat Armoured Vehicles*, HOMELAND SEC. TECH., https://web.archive.org/web/20240812124201/https://www.homelandsecurity-technology.com/projects/lenco-bearcat-armoured-vehicles-ballistic-us/ (last visited Apr. 9, 2025).

144. *Baker*, 84 F.4th at 385–88 (stating that "history, tradition, and historical precedent reaching back to the [f]ounding supports the existence of a necessity exception to the Takings Clause").

145. Pumpelly v. Green Bay & Miss. Canal Co., 80 U.S. 177–78 (1871); *see* Pa. Coal Co. v. Mahon, 260 U.S. 393, 416 (1922); *see* Armstrong v. United States, 364 U.S. 40, 49–50 (1960).

146. *Pa. Coal Co.*, 260 U.S. at 416.

was prevented from "forcing [individuals] alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[147] Because the Supreme Court seemingly never set clear boundaries for necessity takings, lower courts have struggled to consistently apply the Takings Clause. As a result of this confusion, innocent private property owners continue to be victimized.[148]

B. Restraining the Protections of the Takings Clause is Detrimental to the Communities it was Designed to Protect

Although there appear to be no organized statistics on the number of police interactions that cause property damage to innocent parties, the number of reported incidents in recent years shows that this problem is growing in significance and visibility.[149] While the damage caused in these situations may not appear financially meaningful from the government's perspective, the burden that an individual property owner bears to recoup from such destruction can be crippling.[150] For example, the City of McKinney, Texas passed an $888 million budget for the fiscal year of 2025,[151] while the City of McKinney reported that the median household income of its residents was $113,286 in 2024.[152] An estimated $50,000 in property damage was done to Vicki Baker's

147. *Armstrong*, 364 U.S. at 48–49.

148. To be clear, the goal of this Article is not to propose a standard to be applied by courts when law enforcement damage occurs. Rather, the remainder of the Article is dedicated to examining and alleviating some of the economic concerns associated with compensable necessity takings.

149. *See* cases cited *supra* pt. II.B; *see also* Andrew Wimer, *Innocent Property Owners Deserve Compensation when the Police Cause Destruction*, FORBES (Dec. 3, 2019, 10:22 AM), https://www.forbes.com/sites/instituteforjustice/2019/12/03/innocent-property-owners-deserve-compensation-when-the-police-cause-destruction/; Tony Saavedra, *A Small Business Was Wrecked in Raid by LAPD SWAT Team, but City Won't Pay for Damage*, E. BAY TIMES, https://www.eastbaytimes.com/2023/07/20/north-hollywood-print-shop-wrecked-in-raid-by-lapd-swat-team-but-la-wont-pay-for-damage/amp/ (July 20, 2023, 5:30 AM).

150. Brief of Nat'l Fed'n of Indep. Bus. Small Bus. Legal Ctr., Inc. as Amicus Curiae Supporting Petitioner Vicki Baker at 1–2, Baker v. City of McKinney, 145 S. Ct. 11 (2024) (No. 23-1363).

151. *McKinney Council Passes FY2025 Budget*, MCKINNEY TEX., https://web.archive.org/web/20240908152002/https://www.mckinneytexas.org/CivicAlerts.aspx?AID=5852 (last visited Apr. 9, 2025). Ironically, part of the city's budget provides for capital improvements and the creation of ten new jobs in the Police Department. *Id.*

152. *Demographics, Census & Reports*, MCKINNEY TEX., https://www.mckinneytexas.org/294/Demographics-Census-Reports (last visited Apr. 9, 2025). McKinney households have relatively high incomes compared to the rest of Texas, which has a statewide median household income of $75,780. *Texas*, U.S. CENSUS BUREAU, https://data.census.gov/profile/Texas?g=040XX00US48 (last visited Apr. 9, 2025).

home,[153] or approximately forty-four percent of the median McKinney resident annual income. Meanwhile, this figure amounts to less than .01% of the City of McKinney's 2025 budget.[154] Though these figures represent a small sample size of the American homeowner, they demonstrate that the party responsible for the damage in these cases, the municipality, is far better equipped to pay for the costs incurred.

Lower-income homeowners are in especially precarious situations when it comes to repairing major damage. Thirty percent of American households in the lowest quintile of income spent nothing on home maintenance in 2019, with another twenty percent of homeowners in the same category spending less than five hundred dollars.[155] When lower-income homeowners do make repairs to their homes, on average, they spend 18.3% of their annual income.[156] These figures relate only to home improvement and maintenance projects,[157] which are likely foreseeable for the homeowner. An interaction with police officers resulting in property damage that will not be reimbursed could be catastrophic for these groups of homeowners. To make matters worse, research shows that police officers are more likely to be involved in fatal interactions with suspects in poorer neighborhoods where lower-income homeowners reside.[158] It follows that if these neighborhoods are seeing a higher proportion of violent interactions between police officers and suspects, unlucky innocent property owners in the area are at greater risk of being caught in the middle of the violence and sustaining collateral damage.

Luckily for Vicki Baker, some groups have mobilized to help her cover the costs of repairing her home while the courts resolved the fate of her case. A GoFundMe page was established in 2020 that chronicles the police standoff and the destruction associated

153. Baker v. City of McKinney, 84 F.4th 378, 381 (5th Cir. 2023).

154. *McKinney Council Passes FY2025 Budget*, *supra* note 151.

155. Sophia Wedeen, *Home Repairs and Updates Pose Considerable Burdens for Lower-Income Homeowners*, JOINT CTR. FOR HOUS. STUD. HARV. UNIV. (June 16, 2022), https://www.jchs.harvard.edu/blog/home-repairs-and-updates-pose-considerable-burdens-lower-income-homeowners. The lowest-income homeowners in this study are defined as those with annual incomes below $32,000. *Id.*

156. *Id.*

157. *Id.*

158. Francie Diep, *Police Are Most Likely to Use Deadly Force in Poorer, More Highly Segregated Neighborhoods*, PAC. STANDARD (Jan. 24, 2019), https://psmag.com/news/police-are-most-likely-to-use-deadly-force-in-poorer-more-highly-segregated-neighborhoods/.

with the event.[159] As of April 2025, $9,831 of the $40,000 goal has been raised, and the page organizer (who appears to be one of Vicki Baker's daughters) has claimed that businesses such as The Home Depot and a local roofing company have contributed to repair efforts.[160] According to the Fifth Circuit, Vicki Baker has "maintained that if she should ever receive compensation from the City of McKinney, she would pay back everyone who volunteered to help her."[161] Though her situation can hardly be described as lucky, Baker's losses are primarily limited to her home's value and the possessions within.[162] A similarly situated business owner in California cannot say the same.

Carlos Pena owned NoHo Printing and Graphics in Hollywood, California, for thirty years before he found himself in a similar situation as Vicki Baker.[163] Like Baker, Pena's property was simply unlucky enough to be chosen by a fleeing fugitive as the scene for a standoff with police.[164] The fugitive's escape from authorities led him to Pena's shop, where he assaulted Pena and forced his way inside.[165] Law enforcement deployed chemical munitions, tear gas, and pepper spray into the building in an attempt to apprehend the fugitive, who could not be found after the assault on Pena's business concluded.[166] Aside from enduring an estimated $60,000 worth of damage to his business, Pena had to drain his savings to continue operating his business out of his garage, and claims to have lost nearly eighty percent of his income.[167] Pena's subsequent plight is a familiar one: he was denied reimbursement by his insurance company, and when he brought action against the City of Los Angeles in federal court for a Takings Clause claim, the court found that law enforcement acted reasonably and out of necessity, which barred recovery.[168] In

159. *SWAT Standoff Destroyed Home*, GOFUNDME (July 29, 2020), https://www.gofundme.com/f/2sa54x-retirement-home-destroyed.

160. *Id.*

161. Baker v. City of McKinney, 84 F.4th 378, 381 (5th Cir. 2023).

162. *Id.* at 380–81.

163. *Carlos Pena*, INST. FOR JUST. (July 19, 2023), https://ij.org/client/carlos-pena/.

164. Macy Jenkins & Alexandra Romero, *North Hollywood Print Shop Owner Denied Compensation for 2022 SWAT Standoff Damage*, 4 L.A. (Mar. 27, 2024, 2:45 PM), https://www.nbclosangeles.com/news/local/north-hollywood-print-shop-owner-denied-compensation-for-2022-swat-standoff-damage/3374139.

165. Pena v. City of Los Angeles, No. CV 23-5821-JFW(MAAx), 2024 WL 1600319, at *1 (C.D. Cal. Mar. 25, 2024).

166. *Id.* at *1–2.

167. Jenkins & Romero, *supra* note 164.

168. *Pena*, 2024 WL 1600319 at *2–6.

denying Pena's Motion for Partial Summary Judgment, the court cited *Baker* and other previously referenced cases for support.[169]

Vicki Baker, AmeriSource Corporation, Roland Johnson, and Carlos Pena were not criminal parties. They were victims of an unconstitutional scheme that distorts the intended protections of the Takings Clause. For too long, courts have prioritized law enforcement's ability to haphazardly carry out their duties over private property rights. These exceptions to the Takings Clause have been taken too far. However, the Supreme Court has the opportunity to rein in the absurdity and preserve the constitutional protections that these victims deserve.

C. Inconsistent Interpretations of the Takings Clause Require Clarity from the Supreme Court

Though lower courts recognize that an exercise of police powers can be taken "too far," they have not exactly been provided with sound guidance from the Supreme Court on this point: "In 70-odd years of succeeding 'regulatory takings' jurisprudence, [the Supreme Court] ha[s] generally eschewed any "set formula" for determining how far is too far, preferring to 'engag[e] in . . . essentially ad hoc, factual inquiries.'"[170] Property owners bear the burden of uncertainty because no set formula has been established by the Supreme Court to address the boundaries of the Takings Clause in the context of police power, and federal appellate courts continue to inconsistently approach such cases.

If appellate courts and legal scholars cannot help but comment on the unfairness of Takings Clause case outcomes like *Baker*, *Johnson*, and *AmeriSource*, the Supreme Court needs to draw a line. In fact, the Supreme Court had an opportunity to do just that. Vicki Baker petitioned the Fifth Circuit for a rehearing but was denied by a vote of six in favor to eleven against a rehearing.[171] On June 28, 2024, Vicki Baker filed a Petition for Writ of Certiorari with the Supreme Court, which docketed the case on July 2,

169. *Id.* at *4.

170. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992) (alteration in original) (quoting Penn Central Trans. Co. v. New York City, 438 U.S. 104, 124 (1978)).

171. Baker v. City of McKinney, 93 F.4th 251 (5th Cir. 2024), *reh'g denied*. The dissent of the denial indicated that "none of the panel's citations [to historical evidence] establishes that a municipal government is absolved from the U.S. Constitution's just compensation requirement merely because the government destroyed property out of law enforcement necessity." *Id.* at 253.

2024.[172] Though multiple amici curiae briefs were filed in support of Baker and Justice Sonia Sotomayor acknowledged the need for guidance from the Court,[173] the petition for a writ of certiorari was denied.[174]

IV. PROPOSED SOLUTION

Ultimately, innocent parties should not be forced to "bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[175] The Takings Clause and Supreme Court jurisprudence require reimbursement for those innocent third parties who have their property destroyed due to law enforcement. The destruction of the property, when necessary for law enforcement purposes, plainly benefits the public as a whole. The next time that the Supreme Court is presented with a case like Baker's, it should use the opportunity to clearly denounce the application of the Necessity Exception to Takings Clause cases involving law enforcement. The Court had an opportunity to clearly establish when exercises of police power are taken too far, which would have provided much-needed certainty to private property owners and municipalities alike. Despite the opportunity and the great need, no such clarification was made. If the Court continues to evade this responsibility, unlucky property owners across the country will continue bearing the burden of destructive law enforcement activities. Furthermore, it is reasonable to anticipate that a Supreme Court decision supporting a broad Necessity Exception could lead to more frequent use of destructive tactics by law enforcement departments, who would feel unrestrained by the potential consequences of such actions.

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172. *Case No. 23-1363*, SUP. CT. U.S., https://www.supremecourt.gov/search.aspx?filename=/docket/DocketFiles/html/Public/23-1363.html (last visited Apr. 7, 2025).

173. *Id.* Authors of the briefs include legal history scholars, law professors who are experts on constitutional property rights, and public interest lawyers. *See* Brief of Professors James W. Ely, Jr., Shelley Ross Saxer, and David L. Callies as Amici Curiae in Support of Petitioner at 1–2, Vicki Baker v. City of McKinney, 145 S. Ct. 11 (2024) (No. 23-1363); Brief of Professors Julia D. Mahoney and Ilya Somin and the Cato Institute as Amici Curiae Supporting Petitioner at 1, *Baker*, 145 S. Ct. 11 (No. 23-1363); Brief of National Federation of Independent Business Small Business Legal Center, Inc. as Amicus Curiae Supporting Petitioner Vicki Baker at 1–2, *Baker*, 145 S. Ct. 11 (No. 23-1363); Brief Amicus Curiae of Pacific Legal Foundation in Support of Petitioner at 1, *Baker*, 145 S. Ct. 11 (No. 23-1363).

174. *Baker*, 145 S. Ct. 11.

175. Armstrong v. United States, 364 U.S. 40, 49 (1960).

A. Who Will Pay?

From a public policy perspective, it may seem that extending the bounds of the Takings Clause to protect property owners like Vicki Baker would be cost-prohibitive. Municipalities like the City of McKinney would need to account for the costs of reimbursing property owners in their budgets. For some municipalities with limited means, making space in a budget for destructive policing may be unrealistic. Another argument in favor of the Necessity Exception is that law enforcement would be less effective if they had to worry about how much property damage they were causing in the course of their official duties.[176] Some law enforcement departments may penalize officers who inadvertently or necessarily cause property damage in the course of their jobs, even if those officers did an otherwise good job. These are valid concerns, and when placed in the context of widespread calls for more accountability from law enforcement,[177] one can imagine why law enforcement agencies and municipalities would not be keen on earmarking funds for "fixing" the issues that their officers caused.

Police officers have the difficult job of facing split-second judgment calls.[178] When a police officer uses poor judgment and causes harm to a citizen that they are sworn to protect, there are consequences. After Minneapolis Police Officer Derek Chauvin unlawfully killed George Floyd, Floyd's family obtained a $27 million settlement from the city, one of the largest police liability settlements on record.[179] While the loss of human life cannot be compared to the loss of property, and the murder of George Floyd was likely indefensible in court, the settlement payment is a

176. "[S]ome argue that the privilege [of necessity] ensures that swift action will be taken in times of necessity. If individuals are concerned with liability, 'they may not act with the requisite dispatch to avert a larger disaster.'" Muller, *supra* note 33, at 523 (quoting DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 120 (2002)).

177. *See* Carol A. Archbold, *Police Accountability in the USA: Gaining Traction or Spinning Wheels?*, 15 POLICING 1665, 1666 (2021) (explaining that a majority of the 100 most populated cities in the United States employs civilian review boards for police conduct).

178. Graham v. Connor, 490 U.S. 386, 396–97 (1989). Though it is outside the scope of this Article, the Supreme Court has enunciated standards for judging reasonableness when it comes to law enforcement's use of force under the Fourth Amendment. *Id.* Could this standard of reasonableness under the Fourth Amendment also be applicable to Fifth Amendment Takings Clause cases? That is for the Supreme Court to decide.

179. John Rappaport, *The Future of Police Liability*, HILL (Mar. 28, 2021, 10:30 AM), https://thehill.com/opinion/criminal-justice/545261-the-future-of-police-liability/.

glaring example of the financial liability that municipalities face simply for operating a police department.

Over time, as stories of police brutality have garnered more and more attention, it is a logical conclusion that juries have become increasingly willing to award damages to parties victimized by law enforcement's mistakes.[180] Indeed, Vicki Baker was awarded damages by a jury before the Fifth Circuit reversed based on the Necessity Exception.[181] The costs of reimbursing victims of police misconduct are not unexpected, nor are they unaccounted for by local governments. Some municipalities carve out portions of their budget specifically for settlement and litigation costs related to police conduct, including the City of New York, which set aside $733 million in 2020 for this purpose.[182] Not every city is as large as New York, though, which means that not every city has the income to earmark funds specifically for law enforcement liability costs. Where then, can such local governments turn for help? One possible source of assistance could be the Federal Legislature.

1. Federal Assistance

If cities and municipalities are going to be directed by the federal judiciary to reimburse victimized property owners like Vicki Baker (as this Article urges), then perhaps the federal government is in the perfect position to assist smaller cities and municipalities cover the cost of property damaged by their police officers. This would not be the first time that federal funds have been dispersed to local law enforcement agencies to improve public welfare. In 2015, the Department of Justice ("DOJ") made $20 million available in grants to police agencies seeking to purchase body cameras for increased accountability and provided another $12 million the next year for accountability consulting services.[183] The DOJ even maintains a webpage listing financial resources "to support law enforcement and public safety activities in state, local, and tribal jurisdictions [and] to assist victims of crime."[184] This demonstrates the federal government's willingness to financially

180. *Id.*
181. Baker v. City of McKinney, 84 F.4th 378, 382 (5th Cir. 2023).
182. Archbold, *supra* note 177, at 1672.
183. *Id.* at 1673.
184. *Grants*, U.S. DEP'T JUST., https://www.justice.gov/grants (last visited Apr. 7, 2025).

support local governments in their efforts to effectively and fairly ensure public safety, and could be extended to prevent property owners from footing the bill when law enforcement efforts turn destructive.

In addition to offering financial assistance to municipalities for improving law enforcement effectiveness, the federal government has a history of intervening to assist the general public (both municipalities and individuals) when other forms of harm occur. Two prime examples are the Federal Emergency Management Agency ("FEMA") flood insurance programs and the Terrorism Risk Insurance Act of 2002 ("TRIA").

FEMA was created by executive order in 1979 by President Jimmy Carter.[185] FEMA states that the agency's mission is to "[help] people before, during and after disasters[,]"[186] which is partially accomplished through disaster assistance programs.[187] One way FEMA assists individuals after a flood damages their home, for example, is by helping pay for expenses that insurance does not cover.[188] For example: if FEMA can verify that a homeowner experiences an $8,000 loss, but the relevant insurance policy only covers $2,000, FEMA will award $6,000 to cover the remainder.[189] This program exemplifies the federal government's willingness to share losses with the general public in a manner that does not burden local municipalities. While natural disasters cannot be characterized as intentional acts of the type that this Article examines, the establishment of TRIA is worth examining as a federal aid program that does concern intentional and destructive acts.

Despite well-documented incidents of terrorist attacks in the 1990s, insurance companies did not consider the damage from such attacks to be a risk worth considering when creating policies.[190] The damage caused by the rare incidents of terrorism that had occurred before September 11, 2001, was covered by most standard

185. *History of FEMA*, FEMA, https://www.fema.gov/about/history (Jan. 4, 2021).

186. *About Us*, FEMA, https://www.fema.gov/about (Jan. 22, 2025).

187. *How FEMA Works*, FEMA, https://www.fema.gov/about/how-fema-works (Jan. 23, 2024).

188. FEMA, FEMA QUICK REFERENCE GUIDE: HELP FOR SURVIVORS WITH INSURANCE 1 (2024), https://www.fema.gov/sites/default/files/documents/fema_ia-quick-reference_insurance.pdf.

189. *Id.* at 2.

190. *Terrorism Risk Insurance Act (TRIA)*, NAIC, https://content.naic.org/cipr-topics/terrorism-risk-insurance-act-tria (Oct. 25, 2023).

policies and paid out as an "unnamed peril."[191] No terrorist attack in U.S. history compared to the loss of life and money caused by the September 11, 2001 attacks; such intentional destruction was simply unprecedented.[192] The effect of "one of the largest single insured loss events in history" on the insurance market was extreme, which prompted many insurance companies to specifically exclude losses due to terrorism from their policies; or charge very high premiums if they did cover such loss.[193] In response, Congress passed TRIA in 2002 to "share monetary losses with insurers . . . due to a terrorist attack."[194] The program was initially a temporary one, but has since been renewed four times.[195]

Whether the federal government provides financial support to victims directly or to their insurers, it is clear that an important public policy is acknowledged: when critical insurance coverage falls short, the government must intervene. Funding reimbursement to innocent property owners, like the ones described in this Article, may require the federal government and insurers to combine efforts. To further conceptualize this solution, an examination of the basic principles of insurance is necessary.

2. The Insurance Solution

To manage the financial burden of police officer liability, a vast majority of municipalities in the United States carry liability insurance for police misconduct.[196] This coverage could theoretically be extended to include situations of law enforcement property destruction. Insurance can be purchased for a plethora of items and events. Celebrities and athletes have insured their body

191. *Id.*

192. *Id.*; *see also* Jason Bram et al., *Measuring the Effects of the September 11 Attack on New York City*, ECON. POL'Y REV., Nov. 2002, at 5, 5 (explaining that in addition to the nearly 3,000 lives lost in New York City alone, the total cost of the attack on the World Trade Center is estimated to be between $33 billion and $36 billion as of 2002).

193. *Terrorism Risk Insurance Act (TRIA)*, *supra* note 190 (citing *Background on: Terrorism Risk and Insurance*, INS. INFO. INST. (Apr. 18, 2024), https://www.iii.org/article/background-on-terrorism-risk-and-insurance).

194. *Id.*

195. *Id.*

196. Rappaport, *supra* note 179. These policies would not cover the type of damage caused by McKinney police officers as their destructive tactics were deemed necessary by the court. The typical law enforcement liability insurance that cities and municipalities presently hold cover misconduct and wrongful acts. *See Law Enforcement Liability Insurance*, TRAVELERS INDEM. CO., https://www.travelers.com/business-insurance/general-liability/law-enforcement (last visited Apr. 7, 2025).

parts for millions of dollars.[197] International travelers can insure against kidnappings, where policies will "reimburse you for expenses associated with the incident and will pay the ransom."[198] You can even purchase an insurance policy to cover star players on your fantasy football team, should they get injured during the season and jeopardize your chances of earning back your entry fee.[199] Indeed, insurance policies can be crafted to cover just about anything. After all, the core premise of insurance is simple and flexible: the spreading of risk among several parties to help prevent a single party from bearing the full burden of a loss.[200] This premise is quite analogous to the core premise of the Takings Clause: spreading the cost of the public welfare to prevent individuals from bearing burdens "which, in all fairness and justice, should be borne by the public as a whole."[201]

The burden of carrying insurance to compensate for necessary law enforcement destruction should logically fall on the municipalities that might employ officers causing destruction. This comports with the disbursement of risk that the Takings Clause requires. Requiring property owners to obtain such coverage would subvert the purpose of the Takings Clause, as it would still be the duty of the individual property owner to obtain, and pay for, insurance that covers intentional acts of destruction carried out by law enforcement. In other words, the burden would be placed on the individual. Further, as Vicki Baker discovered,

197. Anna Shpak, *Insured for Millions: The Funny and Fascinating World of Body Part Insurance*, ELEMENT RISK MGMT. (Apr. 19, 2023), https://elementrisk.com/blog/insured-for-millions-the-funny-and-fascinating-world-of-body-part-insurance/; Luke Graham, *10 Expensively Insured Body Parts*, CNBC (Sep. 9, 2016, 6:34 AM) https://www.cnbc.com/2016/09/09/10-expensively-insured-body-parts.html.

198. Sabah Karimi, *30 Most Outrageous Things You Can Insure*, YAHOO! FIN., https://finance.yahoo.com/news/30-craziest-things-insure-003042737.html? (Dec. 12, 2018).

199. Jamie Shooks, *Fantasy Sports Insurance: Is It an Insurable Risk?*, MILLIMAN (Oct. 1, 2020), https://www.milliman.com/en/insight/fantasy-sports-insurance-is-it-an-insurable-risk.

200. The mechanics of insurance are relatively simple: insurers collect a payment (a "premium") from policyholders and then disburse payments to a policy holder upon the occurrence of a loss or some other triggering event. For auto insurance, the triggering event would typically be an accident. Premiums are calculated based on the likelihood of the triggering event occurring. Therefore, a driver with a history of speeding and reckless driving should expect to pay a higher-than-average premium, because it is more likely that the insurance company will need to issue a payment to them in the future. Conversely, a golf course purchasing insurance for a hole-in-one tournament would pay a relatively low premium, because it is unlikely that a golfer will actually sink a hole-in-one during the tournament. *See generally How Insurance Works*, LLOYDS, https://www.lloyds.com/about-lloyds/our-market/how-insurance-works (last visited Apr. 7, 2025).

201. Armstrong v. United States, 364 U.S. 40, 49 (1960).

few (if any) homeowners' insurance policies cover such acts.[202] This conundrum creates a catch-22 for similarly situated property owners: courts are adamant that the police who intentionally caused the destruction need not pay for it, and the insurance policies that are supposed to protect the lost property exclude intentional damage caused by law enforcement.

After all, insurance policy exclusions like the one that Vicki Baker fell victim to are not rare. Conventional insurance law doctrine provides that liability insurance is intended to cover only "fortuitous or accidental losses" because insurance exists to mitigate the risk of such losses, not to act as a license for wrongdoers to cause damage without consequence.[203] This principle supposes that if insurance policies commonly covered intentional torts, wrongdoers would benefit "by allowing insurance to cover their liabilities for such misconduct."[204] This concern is logical for financial reasons, too. If property owners were simply paid by their insurance companies every single time damage occurred to their possessions—whether the damage was accidental or not—premiums would be astronomical.[205] Requiring municipalities to obtain a form of insurance that covers intentional but necessary damage caused by law enforcement ("Necessity Destruction Coverage") paints a more promising picture, though.

Aside from the moral justification that parties who cause damage should pay for it, forms of insurance coverage already exist that resemble Necessity Destruction Coverage, albeit for non-governmental parties.[206] These policies include coverage for shareholder fraud, discrimination in employment practices, and

202. Baker v. City of McKinney, 93 F.4th 251, 381 (5th Cir. 2024).

203. Christopher C. French, *Insuring Intentional Torts*, 83 OHIO ST. L.J. 1069, 1071 (2022).

204. *Id.* While this mention of intentional torts merely serves to illustrate the restrictive principles of insurance law, it should be noted that the doctrine of sovereign immunity generally protects municipalities from tort liability. For a more in-depth discussion of sovereign immunity as it relates to the Takings Clause, see Saul Levmore, *Takings Torts, and Special Interests*, 77 VA. L. REV. 1333, 1349–52 (1991).

205. Indeed, if homeowners' insurance markets need legislative intervention to keep rates affordable in a state like Florida due to the high frequency of natural disasters, one can imagine how difficult it would be to maintain affordable rates when intentional damage is suddenly covered by policies. *See* Shannon Martin & Jessa Claeys, *Can Lawmakers Save the Collapsing Florida Home Insurance Market?*, BANKRATE (Sept. 19, 2023), https://www.bankrate.com/insurance/homeowners-insurance/florida-homeowners-insurance-crisis/.

206. French, *supra* note 203, at 1084–90.

sexual misconduct.[207] What do these policies have in common? They cover liability incurred for the intentional acts of employees.[208] Surely an employee does not accidentally commit shareholder fraud: the very premise of fraud is intentional misrepresentation.[209] If "well-known global insurance companies"[210] are willing to offer such policies to employers that cover intentional and malevolent acts, there could be a market for Necessity Destruction Coverage, which would also cover intentional acts. The types of acts covered by Necessity Destruction Coverage, however, would be necessary for the public wellbeing, and would be carried out by law enforcement officers who are (ideally) trained to limit the destruction caused where possible.

If municipalities were provided with the option to extend their existing law enforcement liability insurance to include Necessity Destruction Coverage, they would be better equipped to reimburse property owners like Vicki Baker should the Supreme Court ever choose to require it. Operating law enforcement departments with Necessity Destruction Coverage would ideally strike a happy medium: law enforcement personnel would be disincentivized from liberal use of destructive tactics, but not to the point that they perform their jobs ineffectively. Rates would likely be higher for police departments that frequently employ destructive means, and those departments would be held accountable by their governing municipalities and local taxpayers.

In summary, the financial solutions proposed in this Part—federal assistance, new forms of insurance, or a mixture of both—are incidental to the true problem explored by this Article. It will not matter how a property owner's loss is paid for until the Supreme Court reinforces the purpose of the Takings Clause.

V. CONCLUSION

While insurance policies crafted to reimburse innocent property owners are practically possible, the affordability of

207. *Id.*
208. *Id.*
209. *Fraud*, BLACK'S LAW DICTIONARY (12th ed. 2024) (defining fraud as "[a] knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment").
210. French, *supra* note 203, at 1088.

premiums and availability of coverage pose a significant hurdle. The number of insurance companies willing to offer law enforcement liability insurance has decreased recently, possibly due to the increase in instances of misconduct relating to civilian deaths.[211] Less competition in the sector means the insurance companies still offering coverage can dictate more of the terms of their policies, including premium payments.[212] If the Supreme Court broadens law enforcement liability by ruling in favor of a future victimized property owner, the already limited insurance sector that caters to police departments may find additional claims hard to stomach. And if those remaining insurers do decide to offer policies that cover Takings Clause claims, it is hard to imagine that premiums will be affordable without some form of subsidy. Federal subsidies could very well be the key to making such insurance affordable.

Regardless of how innocent property owners like Baker are reimbursed, this much is clear: the Supreme Court must uphold the original meaning of the Takings Clause and an obligation to follow the age-old precedent that reinforced that meaning. Lower courts around the country must be reminded of this to prevent further injustice. The Takings Clause demands just compensation for innocent property owners who are victimized by destructive law enforcement tactics. These parties have undoubtedly had their property "taken" within the meaning of the Fifth Amendment for the benefit of the public, which means that just compensation is owed. Any other conclusion perverts the protections that are owed to personal property rights by the Constitution.

211. Judy Greenwald, *Insurers Back Away from Police Liability*, BUS. INS. (June 1, 2023), https://www.businessinsurance.com/insurers-back-away-from-police-liability/.

212. *Id.*