RECENT CASES

CONSTITUTIONAL LAW — FIFTH AMENDMENT — FIFTH CIRCUIT REJECTS TAKINGS CLAIM UNDER "NECESSITY EXCEPTION." — *Baker v. City of McKinney*, 84 F.4th 378 (5th Cir. 2023), *reh'g denied*, 93 F.4th 251 (5th Cir. 2024).

One's home — invested with so much of their personhood[1] — is perhaps their most important belonging. And like any other kind of private property, the home is protected by the Takings Clause's guarantee that "private property [shall not] be taken for public use, without just compensation."[2] One would thus expect that, where a municipality destroys an innocent person's home, the Clause requires compensation. Apparently not. Recently, in *Baker v. City of McKinney*,[3] the Fifth Circuit held that a historically rooted "necessity exception" prevented Vicki Baker from receiving compensation under the Takings Clause after police destroyed her home in pursuit of a fugitive kidnapper.[4] Applying the exception, the *Baker* court held that no compensation was due because destroying Baker's house was necessary to prevent imminent harm during an emergency.[5] Although the court derived the necessity principle from historical precedents,[6] it did not analogize to those cases when applying the exception.[7] 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.

Baker owned a home in McKinney, Texas.[8] When she decided to move out of state, she prepared to sell her home, and her daughter occupied it in the interim.[9] In July 2020, Wesley Little knocked on Baker's front door with a fifteen-year-old girl he was holding hostage.[10] Baker's daughter allowed them into the home and alerted Baker, who sought police assistance.[11] Upon arrival, officers convinced Little to release the hostage.[12] However, he remained in Baker's attic, armed with several firearms.[13] Attempting to "resolve the situation," police officers used

---

1 *See generally* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).
2 U.S. CONST. amend. V.
3 84 F.4th 378 (5th Cir. 2023), *reh'g denied*, 93 F.4th 251 (5th Cir. 2024).
4 *Id.* at 379, 388.
5 *Id.* at 388.
6 *See id.* at 385–87.
7 *See id.*
8 *Id.* at 379.
9 *Id.* at 379–80.
10 *Id.* Baker's daughter "recognized Little because he 'did some work inside of [the] home more than a year before the incident occurred.'" *Id.* at 380.
11 *Id.* at 380.
12 *See id.*
13 *Id.*

toxic gas grenades, explosives, and multiple armored personnel carriers.[14] The officers eventually found that Little had taken his own life.[15]

In their pursuit of Little, police officers destroyed a large portion of Baker's home. Photo documentation of the incident showed "the toppled fence and battered front door; the broken windows; the damaged roof and landscaping; the blown-out garage door; and the garage ceiling, attic floor, and dry walls all torn through with gas canisters."[16] Baker sought compensation from the City, but it denied her request because police had "immunity while in the course and scope of their job duties."[17]

In March 2021, Baker sued the City.[18] She alleged approximately fifty thousand dollars of damages under the respective takings clauses of the United States and Texas constitutions.[19] Eventually, Baker filed a partial motion for summary judgment.[20] Although she alleged violations of 42 U.S.C. § 1983 and the Fifth Amendment directly, the motion "ask[ed] the Court to determine whether the City is liable under the Fifth Amendment *only*."[21]

The district court granted partial summary judgment for Baker.[22] The court first rejected the City's procedural arguments and then considered both constitutional claims.[23] The City argued that Baker's Fifth Amendment claim should fail because "a legitimate exercise of the City's police power . . . does not constitute a taking under the Fifth Amendment."[24] But the court declined to adopt any such categorical police-power rule.[25] Instead, it conducted a per se takings analysis,[26] finding that the City owed Baker compensation for taking her home "through . . . total destruction."[27] The court thus granted Baker's motion directly under the Fifth Amendment[28] and did not reach her § 1983 claim. It also found compensation due under the Texas Constitution.[29]

---

14 *Id.*

15 *Id.*

16 Baker v. City of McKinney, 601 F. Supp. 3d 124, 128 (E.D. Tex. 2022) (quoting Plaintiff's Motion for Partial Summary Judgment at 4, *Baker*, 601 F. Supp. 3d 124 (No. 21-CV-0176) [hereinafter Plaintiff's Motion]).

17 *Id.* at 129 (quoting Plaintiff's Motion, *supra* note 16, at 2 Exhibit C).

18 *Baker*, 84 F.4th at 381.

19 *Baker*, 601 F. Supp. 3d at 128–29.

20 *See Baker*, 84 F.4th at 381.

21 *Baker*, 601 F. Supp. 3d at 145 (citing Plaintiff's Motion, *supra* note 16, at 4).

22 *Id.* at 128.

23 *See id.* at 130–32, 146.

24 *Id.* at 132 (quoting Defendant City of McKinney's Response to Plaintiff's Motion for Partial Summary Judgment at 8, *Baker*, 601 F. Supp. 3d 124 (No. 21-CV-0176) [hereinafter Defendant's Response]).

25 *Id.* at 141 (citing Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)).

26 *Id.* (citing Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021)).

27 *Id.* at 144.

28 *Id.* at 145. The court relied upon the Takings Clause's "self-executing character." *Id.* (quoting First Eng. Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 315 (1987)).

29 *Baker*, 601 F. Supp. 3d at 147.

The Fifth Circuit reversed the district court's grant of summary judgment and remanded.[30] Writing for the panel, Judge Higginson[31] held that Baker was not entitled to compensation because the City's destruction of her house was necessary to address an emergency.[32] Thus, the Fifth Circuit recognized a formal "necessity exception" to the Takings Clause.[33] The court derived the exception from history and precedents, the ascendant sources of Takings Clause jurisprudence.[34]

Before beginning its necessity analysis, the panel declined to adopt the categorical rules proposed by the City and by Baker. First, the City argued that "because Baker's property was damaged or destroyed pursuant to 'the exercise of the City's police powers,' there ha[d] been no compensable taking under the Fifth Amendment."[35] The court found this rule overbroad in light of Takings Clause precedents, takings inquiries' fact-specific nature, and the Supreme Court's "history and precedents" approach to takings law.[36] It thus concluded that a categorical police-power rule could "[]not decide this case."[37]

Next, it rejected Baker's call to follow the principle from *Pumpelly v. Green Bay Co.*[38] that "where real estate is actually invaded . . . so as to effectually destroy or impair its usefulness, it is a taking."[39] The court distinguished *Pumpelly* because it involved a taking by legislation, so its facts were "facially distinct."[40] To prevail, Baker had to have shown a "historical or contemporary authority that involves facts closer to those at bar and where the petitioner succeeded under the Takings Clause."[41]

Moving on to recognizing the "necessity exception,"[42] the court first cited legal scholarship demonstrating that such an exception had "existed in Takings Clause jurisprudence since the Founding."[43] It then discussed several historical guideposts for the exception's application.[44]

---

30 *Baker*, 84 F.4th at 389.

31 Judge Higginson was joined by Judges Smith and Willett.

32 *Baker*, 84 F.4th at 388.

33 *See id.*

34 *See id.* at 383, 385 (citing, inter alia, Tyler v. Hennepin County, 143 S. Ct. 1369, 1372 (2023)).

35 *Id.* at 383.

36 *Id.* at 383–84.

37 *Id.* at 383.

38 80 U.S. (13 Wall.) 166 (1871).

39 *Baker*, 84 F.4th at 384 (quoting *Pumpelly*, 80 U.S. (13 Wall.) at 181).

40 *Id.* at 384–85.

41 *Id.* at 385.

42 *Id.* at 388.

43 *Id.* at 385 & n.3 (citing William J. Novak, *Common Regulation: Legal Origins of State Power in America*, 45 HASTINGS L.J. 1061, 1092 (1994); Shelley Ross Saxer, *Necessity Exceptions to Takings*, 44 U. HAW. L. REV. 60, 67 (2022); Brian Angelo Lee, *Emergency Takings*, 114 MICH. L. REV. 391, 391, 393 (2015); Susan S. Kuo, *Disaster Tradeoffs: The Doubtful Case for Public Necessity*, 54 B.C. L. REV. 127, 127 (2013); Derek T. Muller, Note, *"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, 483–85 (2006); Note, *Necessity Takings in the Era of Climate Change*, 136 HARV. L. REV. 952, 953 (2023)).

44 *See id.* at 385.

In *Respublica v. Sparhawk*,[45] the plaintiff's flour barrels were destroyed during the Revolutionary War after being displaced by the military to accommodate troops.[46] The Pennsylvania Supreme Court rejected the plaintiff's claim for compensation, finding that "the rights of necessity, form a part of our law."[47] The court also cited the Seventeenth Congress's denial of compensation for a plantation that was destroyed in the 1814 British invasion of Louisiana,[48] as well as several instances of noncompensation for property demolitions during municipal fires.[49]

Following its historical analysis, the panel held: "[I]n this case, the Takings Clause does not require compensation for Baker[] . . . because, as Baker herself claims, it was objectively necessary for officers to damage or destroy her property in an active emergency to prevent imminent harm to persons."[50] The court did not "determine whether the necessity exception extends further than this."[51] In conclusion, it recognized the exception "wrongs individuals like Baker," but acknowledged that it could not "decide that fairness and justice trump historical precedent."[52]

Baker thereafter petitioned for en banc rehearing, arguing that the panel violated party presentation and due process requirements,[53] "erroneously placed the burden on" Baker to disprove the necessity defense,[54] and should have found the necessity exception to be a defense waived by the City.[55] The Fifth Circuit denied Baker's petition.[56] Judge Elrod and Judge Oldham jointly dissented.[57]

Assuming there is some sort of necessity exception deeply rooted in takings jurisprudence, the *Baker* court erred by neglecting to apply it to *Baker*'s unique facts through analogy. To apply the exception, the *Baker*

---

[45] 1 U.S. (1 Dall.) 357 (Pa. 1788).

[46] *Id.* at 358.

[47] *Baker*, 84 F.4th at 385 (quoting *Sparhawk*, 1 U.S. (1 Dall.) at 362).

[48] *See id.* at 386 (citing S. DOC. NO. 587, at 835 (1st Sess. 1822) [hereinafter S. DOC. NO. 587], https://memory.loc.gov/cgi-bin/ampage?collId=llsp&fileName=036/llsp036.db&Page=835 [https://perma.cc/3AG4-33N5]).

[49] *See id.* at 386–88 (citing, inter alia, Field v. City of Des Moines, 39 Iowa 575, 577–78 (1874); McDonald v. City of Red Wing, 13 Minn. 38, 40 (1868)).

[50] *Id.* at 388.

[51] *Id.*

[52] *Id.*

[53] Appellee's Petition for Panel Rehearing at 3, Baker v. City of McKinney, 93 F.4th 251 (5th Cir. 2024) (per curiam) (No. 22-40644).

[54] *See id.* at 5.

[55] *See id.* at 13.

[56] *Baker*, 93 F.4th at 251.

[57] *Id.* (Elrod & Oldham, JJ., dissenting from denial of rehearing en banc). Judges Elrod and Oldham advanced three arguments in dissent. First, the necessity exception may not have applied to the Takings Clause because its historical foundations were in the common law of tort. *See id.* at 254–55. Second, the exception contravened the Takings Clause's broad purpose and text. *See id.* at 256. Third, "even assuming the panel's principal citations help to establish the scope of the Takings Clause, they would not necessarily establish the broad law enforcement necessity exception the panel read into them." *Id.* at 257. Specifically, the panel elided the precedential requirement of inevitability. *See id.* at 257–58. Unlike in precedential emergencies, "McKinney police . . . did not merely hasten a loss that would have inevitably befallen Baker." *Id.* at 258.

court must have found both *emergency* and *necessity*.[58] What sorts of emergencies trigger the exception? What constitutes necessity? The court considered neither question before reaching its summary conclusion that Baker's case fell within the exception.[59] Though distinct, these two elements — emergency and necessity — share a common nexus in the underlying event's scope. For one, historical cases applying the exception have typically involved extreme calamities like war and conflagration — emergencies that implicate public welfare far more than the City's pursuit of a trapped kidnapper.[60] And whether *noncompensation* was necessary — a distinct but relevant inquiry from whether destruction was necessary — has historically depended on whether the relevant emergency, based on its scope, posed a sufficiently large fiscal or administrative burden to the government.[61] The *Baker* court, not considering whether the emergency in Baker's case was sufficiently scoped to trigger the exception, erroneously overlooked both key inquiries. Instead, the court relied upon Baker's vague stipulation that it was "necessary" to destroy her house and never explicitly showed that *Baker*'s "emergency" was sufficiently grave to trigger the exception.[62] This course may have been benign if *Baker* was clearly within precedents' scope. However, by filling in its capacious exception[63] without attention to factual dissimilarities between *Baker* and precedents, the court may have ultimately denied Baker compensation she was due.

Under the Takings Clause, "private property [shall not] be taken for public use, without just compensation."[64] The Clause requires compensation when the government effects a taking by, among other things, physically occupying property[65] or completely destroying its economic value.[66] The necessity exception, rooted in the common law,[67] absolves the government "of liability for the destruction of 'real and personal property, in cases of actual necessity, to prevent the spreading of a fire'

---

58 *See Baker*, 84 F.4th at 379.

59 *See id.* at 388 ("[W]e make no attempt to identify the bounds of this exception.").

60 *See, e.g.*, Respublica v. Sparhawk, 1 U.S. (1 Dall.) 357, 358 (Pa. 1788).

61 *See* Lee, *supra* note 43, at 409.

62 *See Baker*, 84 F.4th at 380.

63 *Cf.* Robin Kundis Craig, *Public Trust and Public Necessity Defenses to Takings Liability for Sea Level Rise Responses on the Gulf Coast*, 26 J. LAND USE & ENV'T L. 395, 420 (2011) ("States vary in how they conceive of 'emergency' . . . .").

64 U.S. CONST. amend. V.

65 *E.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421 (1982).

66 *E.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992). *Baker* could fall beyond the Fifth Amendment if governmental *destruction* of property, as opposed to occupation or regulation, is not a taking. After all, the necessity exception is rooted in the common law, not the Takings Clause. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 196 (AM. L. INST. 1965). In any case, whether Baker's deprivation was technically a taking is beyond the scope of this comment, which assumes the Takings Clause's plausible applicability and instead focuses on the scope of the requisite "emergency" to justify the necessity exception's application.

67 *See, e.g.*, The Case of the King's Prerogative in Saltpetre (1606) 77 Eng. Rep. 1294; 12 Co. Rep. 12, 12.

or to forestall other grave threats to the lives and property of others."[68] Two elements must therefore be shown to assert the privilege: necessity and emergency.[69] When reasoning from historical precedents, courts both distill abstract principles[70] and apply those principles through factual analogy.[71] The *Baker* court neglected to do the latter.

Historical precedents (including those underpinning *Baker*) reflect that the necessity exception has traditionally been applied to emergencies involving grave, uncontrolled threats to life and property — most commonly, conflagration or war. For instance, *Sparhawk* — the court's leading Founding-era precedent — arose from the destruction of barrels of flour during the Revolutionary War.[72] And *Sparhawk* itself analogized to the 1666 Great Fire of London.[73] While London was rapidly burning down, the city's mayor refused to slow the fire by demolishing dozens of houses, "for fear he should be answerable for a trespass."[74] Because of this inaction, "half that great city was burnt."[75] *Sparhawk* and the Great Fire are the sorts of paradigmatic calamities that have guided the necessity exception's development.[76] War and conflagration, however, tower over the threat in *Baker*: a single fugitive, cornered in a home, surrounded by police.[77] To be sure, the *Baker* court characterized the ongoing emergency as a "potential shootout in a residential neighborhood with a heavily armed fugitive."[78] Although the situation certainly presented danger, it was not as threatening as the precedent calamities.[79] The court should have at least addressed this discrepancy.

---

[68] *Lucas*, 505 U.S. at 1029 n.16 (quoting Bowditch v. Boston, 101 U.S. 16, 18 (1880)).

[69] *See* Craig, *supra* note 63, at 420–21.

[70] *See, e.g.*, Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2072–74 (2021).

[71] After all, the *Baker* court reasoned that, in order to succeed, Baker needed to show some "historical or contemporary authority that involves *facts closer to those at bar* and where the petitioner succeeded under the Takings Clause." *Baker*, 84 F.4th at 385 (emphasis added).

[72] Respublica v. Sparhawk, 1 U.S. (1 Dall.) 357, 358 (Pa. 1788).

[73] *Id.* at 363.

[74] *Id.*

[75] *Id.*

[76] *Cf.* Craig, *supra* note 63, at 420.

[77] *See also, e.g.*, S. DOC. NO. 587, *supra* note 48, at 835 (denying petition for compensation for property destruction by American military during invasion of Louisiana); United States v. Russell, 80 U.S. (13 Wall.) 623, 628 (1871) (Union army using privately owned steamboats during Civil War); Bowditch v. Boston, 101 U.S. 16, 17–18 (1880) (razing of business premises in response to "great fire . . . in the city of Boston," *id.* at 16); United States v. Pac. R.R., 120 U.S. 227, 229, 239 (1887) (destruction of bridges by Union army during Civil War); McDonald v. City of Red Wing, 13 Minn. 25, 25 (1868) (noting that a "building [was] . . . destroyed to prevent the spreading of a conflagration in the city of Red Wing"); United States v. Caltex (Philippines), Inc., 344 U.S. 149, 151 (1952) (destruction of petroleum facilities in Philippines by United States military during World War II); Field v. City of Des Moines, 39 Iowa 575, 577–78 (1874) (razed house to abate conflagration).

[78] *Baker*, 84 F.4th at 385.

[79] Indeed, state courts have diverged in their treatment of cases factually similar to *Baker*. *Compare* Steele v. City of Houston, 603 S.W.2d 786, 792 (Tex. 1980) (holding "that the innocent third parties are entitled by the Constitution to compensation for their property," but remanding for a trial on cause, *id.*

The requirement of calamity is evident not only in the facts of precedent cases but also in their articulations of the necessity principle. For instance, in one of the most recent statements of the exception, *United States v. Caltex (Philippines), Inc.*[80] recognized that "in times of imminent peril — such as when fire threatened a whole community — the sovereign could, with immunity, destroy the property of a few [so] that the property of many and the lives of many more could be saved."[81]

The factual dissimilarities between historical necessity cases and *Baker* also manifest as logical inconsistencies between the precedents' and the panel's rationales. Start with the rationale underpinning the necessity exception in historical cases. Most of the historical cases cited in *Baker* found the exception to be based upon what might be called a "chilling-effect" rationale: "[I]f public officials 'are concerned that the government — or perhaps they personally — may be held liable for a large compensation award, they may not act with the requisite dispatch to avert a larger disaster.'"[82] This was the import of the *Sparhawk* court's reference to the London Fire of 1666.[83] The rationale, however, has been undercut by the development of sovereign liability for emergency responses. For a while, victims of emergency takings recovered damages by suing the responsible public official himself for trespass (not the government).[84] In fact, "until the late nineteenth century, lawsuits against individual persons were the standard vehicle for claims seeking compensation under state law for property taken through eminent domain."[85] Today, such lawsuits (like *Baker*) are asserted against the government rather than individual officials.[86] The officials' incentives to avoid destroying property is thus diminished and the chilling-effect rationale largely outmoded.[87] But the *Baker* court did not acknowledge this development, further weakening its application of the exception.[88]

---

at 791–92), *and* Wegner v. Milwaukee Mut. Ins. Co., 479 N.W.2d 38, 39, 41–42 (Minn. 1991) (ordering compensation under state takings clause after police destroyed a home to apprehend a fugitive), *with* Customer Co. v. City of Sacramento, 895 P.2d 900, 901 (Cal. 1995) (declining to follow *Wegner* and *Steele*, *id.* at 912–13, and instead finding no taking under the California constitution to begin with, *id.* at 901). To be sure, these differences may be attributable to discrepancies between state constitutions.

80 344 U.S. 149 (1952).

81 *Id.* at 154 (citing, inter alia, *Bowditch*, 101 U.S. at 18–19; Respublica v. Sparhawk, 1 U.S. (1 Dall.) 357 (Pa. 1788); Parham v. Justices of the Inferior Ct. of Decatur Cnty., 9 Ga. 341, 348–49 (1851)); *see also Steele*, 603 S.W.2d at 792 (rooting exception in "war, riot, pestilence or other great public calamity"); Novak, *supra* note 43, at 1092 (noting the same).

82 Lee, *supra* note 43, at 411 (quoting DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 120 (2002)); *see also Baker*, 84 F.4th at 387.

83 *See* Lee, *supra* note 43, at 411; *Sparhawk*, 1 U.S. (1 Dall.) at 363.

84 *See* Lee, *supra* note 43, at 450–51.

85 *Id.* at 450–51; *see also Sparhawk*, 1 U.S. (1 Dall.) at 360.

86 *See* Lee, *supra* note 43, at 412; Baker v. City of McKinney, 93 F.4th 251, 255 (5th Cir. 2024) (Elrod & Oldham, JJ., dissenting from denial of rehearing en banc).

87 *See* Lee, *supra* note 43, at 451.

88 *See id.* ("The holdings in those earlier cases cannot simply be plucked out . . . and dropped into the very different modern context of governmental obligations to pay compensation.").

Beyond the necessity exception's "emergency" element, a given emergency's scope also helps determine whether noncompensation is *necessary*. The idea is both intuitive and evident in the precedents cited in *Baker*. In *Sparhawk*, for instance, the court reasoned that the exception was socially beneficial, for "[w]hat nation could sustain the enormous load of debt which so ruinous a doctrine would create!"[89] Professor Brian Lee calls this "fiscal-noncompensation necessity" and finds it to be one of two ways to show the requisite element of noncompensation necessity called for by emergency takings precedents.[90]

By finding the necessity requirement satisfied through Baker's stipulation,[91] the court confused two independently requisite types of necessity: destruction and noncompensation.[92] The stipulation was directed toward "destruction necessity" because it answered whether the city police's actions were necessary.[93] However, it did not establish noncompensation necessity — that is, the principle that the government, out of necessity, could not compensate Baker, whether for administrative or fiscal reasons.[94] By eliding this distinction, the court erroneously conflated two sorts of necessity and overlooked the link between an emergency's scope and the required showing of necessity.

The Takings Clause, by requiring compensation for government takings of private property, prevents the "[g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[95] The *Baker* court ran afoul of this guarantee by recognizing a vague exception to the Takings Clause and then applying it to Baker's case without attention to the facts of both its key precedents and the case at bar. In doing so, the court elided key dissimilarities between precedent cases and Baker's. Future courts would do well to apply the necessity exception through factual analogy, thereby limiting the risk of erroneously upholding an unfair property deprivation in the name of "necessity."

---

89 *Sparhawk*, 1 U.S. (1 Dall.) at 362.

90 Lee, *supra* note 43, at 409, 450–51; *see also* Note, supra note 43, at 959.

91 *See Baker*, 84 F.4th at 380. The court's reliance on the stipulation is perhaps questionable given the necessity exception was not discussed in the court below or in the parties' appellate briefs. *See* Baker v. City of McKinney, 601 F. Supp. 3d 124, 128 (E.D. Tex. 2022); Plaintiff's Motion, *supra* note 16, at 4; Defendant's Response, *supra* note 24, at 8.

92 *See* Lee, *supra* note 43, at 409.

93 *See Baker*, 84 F.4th at 380.

94 *See* Lee, *supra* note 43, at 409.

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