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When Does an Emergency Police Power Constitute an Unconstitutional Taking of Property?

Robert F. Brown
Brown & Hofmeister, L.L.P.
740 East Campbell Road
Suite 800
Richardson, Texas 75081
(214) 747-6130
www.bhlaw.net
e-mail: rbrown@bhlaw.net

I.

THE DOCTRINE OF NECESSITY – AN INTRODUCTION

As will be explored in this paper, there are uses of the government's police powers that take, damage or destroy property that are not compensable under the doctrine of eminent domain. Such uses may be compensable under tort law or other legal theories, but not as an exercise of the power of eminent domain. One category of such non-compensable actions is an exercise of a narrow set of governmental powers sometimes referred to as the "Doctrine of Necessity," which allows the government to damage or destroy property in extraordinary circumstances without the payment of compensation as a taking. The "Doctrine of Necessity" is a defense that can be raised in response to a takings claim for property damage resulting from responses to emergency events such as natural disasters like wildfires and floods, and for police tactics that destroy or damage property to apprehend suspected criminals. *See Steele v. City of Houston*, 603 S.W.2d 786 (Tex. 1980).

While the Doctrine of Necessity is well established in many federal circuits and states, its application in Texas is not yet fully developed. This paper seeks to explore this takings defense and look at questions such as: What are the parameters of this defense? When the state acts pursuant to its police power, rather than the power of eminent domain, can those actions constitute a taking? When does a tort rise to the level to be considered a taking? When does the doctrine apply? What are the public policy implications of a broad reading and, conversely, a narrow reading of the doctrine.

II.

EMINENT DOMAIN AND ITS EXCEPTIONS

The use of eminent domain, and the determination of its proper reach, has been, is, and probably will always be, a controversial subject. Scholars have traced the history of eminent domain as far back as the Bible where "the prophet Samuel informs the people of Israel that the king 'will take your fields, and your vineyards, and your olive yards, even the best of them." Abraham Bell, *Private Takings*, 76 U. Chi. L. Rev. 517, 524 (2009) (quoting 1 *Samuel* 8:14 (King James)). English common law, as set forth in the Magna Carta (adopted in 1215) required that before agents of the King could seize chattels from a "free man," there needed to be a "legal judgment of his peers or by the law of the land," and crown officials had to immediately pay money for these seized chattels. *Id*. at 525 (quoting Magna Carta, chs. 28, 39 (1215), *reprinted in* Sources of Our Liberties: Documentary Origins of Individual Liberties in the United States Constitution and Bill of Rights 11, 16, 17 (Richard L. Perry & John C. Cooper eds., 1959)). Similarly, the U.S. Constitution, through its the Fifth Amendment, requires that the government pay just compensation for a taking. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

A. The Takings Clause – Easy to State.

To properly frame the issue of "if" and "when" the Doctrine of Necessity (and related takings defenses) apply, we should first review, in general terms, the concept of eminent domain and the

obligation to compensate persons who property has been taken.

The "Takings Clause" of the Fifth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides, in pertinent part, that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V; *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071 (2021). "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49. When the government takes property for public use without the owner's consent, it is exercising its power of eminent domain. *See* 1 *Nichols on Eminent Domain* § 1.11 (2022).

Similarly, Article I, Section 17 of the Texas Constitution provides that "[n]o person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person…." Tex. Const. art. I, § 17. Given that the federal Takings Clause is substantially similar, the Texas Supreme Court many times relies upon interpretations of the federal Takings Clause in construing the Texas takings provision and analyzes Texas takings claims under the more familiar federal standards. *See*, *e.g.*, *City of Austin v. Travis County Landfill Co., L.L.C.*, 73 S.W.3d 234, 239 (Tex. 2002) (considering aircraft overflights takings claim, asserted under Texas Constitution, by reference to federal standard established in *United States v. Causby*, 328 U.S. 256 (1946)); *City of Corpus Christi v. Pub. Util. Comm'n of Texas*, 51 S.W.3d 231, 242 (Tex. 2001) (examining federal precedent to decide the framework for determining whether utility charges constitute a taking); *Mayhew v. Town of Sunnyvale,* 964 S.W.2d 922, 932 (Tex. 1998) ("[W]e assume, without deciding, that the state and federal guarantees in respect to land-use constitutional claims are coextensive, and we will analyze the Mayhews' claims under the more familiar federal standards.").

B. The Takings Clause – Hard to Apply.

The U.S. Supreme Court has noted that "[t]he question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty." *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123 (1978). The Texas Supreme Court has also indicated the same difficulty under the Texas Constitution. *See Sheffield Dev. Co., Inc. v. City of Glenn Heights, Texas*, 140 S.W.3d 660, 671 (Tex. 2004) (describing the takings legal battlefield as a "sophistic Miltonian Serbonian Bog," for which "[t]here are small islands in the bog."

C. Recent U.S. Supreme Court Reiteration of the Reach, and Non-Reach, of the Takings Clause.

In *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), the Court held that a California law that provided union organizers limited access to agricultural worksites was a *per se* taking based upon the proposition that any governmental grant of physical access, no matter how time-limited or functionally constrained, constitutes a *per se* taking unless one of the Court's articulated exceptions applies. Prior to this decision, the Supreme Court's tests for determining whether a case involved a regulatory or physical taking were somewhat unclear, which resulted in lower courts having to glean

the appropriate takings standard to apply from a vast array of takings jurisprudence. *See* Steven J. Eagle, *The Four-Factor Penn Central Regulatory Takings Test*, 118 Pa. St. L. Rev. 601, 628 (2014) (arguing that discerning between the two "involves subtle determinations of the nature of the property involved").

In addressing the dissent's concern that this holding would "endanger a host of state and federal government activities involving entry onto private property" the Court explained that there are multiple exceptions to the rule that a physical invasion constitutes a *per se* taking. *Id*. at 2078.

First, there are "[i]solated physical invasions, not undertaken pursuant to a granted right of access, [that] are properly assessed as individual torts rather than appropriations of a property right." Id. (*citing* 1 P. Nichols, *The Law of Eminent Domain* § 112, at 311 (1917) ("[A] mere occasional trespass would not constitute a taking.")).

Second, there are physical invasions that are for the purpose of enforcing "longstanding background restrictions on property rights." *Id*. "For example, the government owes a landowner no compensation for requiring him to abate a nuisance on his property, because he never had a right to engage in the nuisance in the first place." *Id*.

Third, "the government may require property owners to cede a right of access as a condition of receiving certain benefits, without causing a taking." *Id*. An example of this is the way in which a restaurant is given a permit to sell food on the condition that the department of health is granted access to inspect the premises at will. Concluding that none of these exceptions applied to the case before it, the Court held "the access regulation amounts to simple appropriation of private property." *Id*.

It is the first (common law torts) and second (limitations inherent in the property) of these exceptions that are implicated in the Doctrine of Necessity.

D. The Intersection of Police Powers and Eminent Domain.

In its the broadest sense, every use of eminent domain is the use of the government's police power. Yet, not every use of the police power is considered the use of eminent domain, and not every use of the police power is compensable. For example, as discussed in *Cedar Point*, no taking will be found where the government is acting to enforce pre-existing background restrictions on property rights:

> These background limitations [ ] encompass traditional common law privileges to access private property. One such privilege allowed individuals to enter property in the event of public or private necessity. *See Restatement (Second) of Torts* § 196 (1964) (entry to avert an imminent public disaster); § 197 (entry to avert serious harm to a person, land, or chattels) [ ]. The common law also recognized a privilege to enter property to effect an arrest or enforce the criminal law under certain circumstances. *Restatement (Second) of Torts* §§ 204-205.

Cedar Point, 141 S. Ct. 2063, 2079 (2021) (internal citation omitted). *See also Thousand Trails, Inc.*

v. Cal. Reclamation Dist. No. 17, 21 Cal. Rptr. 3d 196, 204-05 (Cal. Ct. App. 2004) ("The proper exercise of a public entity's police power is an exception to the just compensation requirement in inverse condemnation cases. This emergency exception arises when damage to private property is inflicted by government under the pressure of public necessity and to avert impending peril. Courts narrowly circumscribe the type of emergency that shields an entity from inverse condemnation liability."). The government's right to regulate private property in this manner is often referred to as its police power. *See* 1 *Nichols on Eminent Domain*, § 1.42 (defining police power as the government's inherent power to "prevent persons under its jurisdiction from conducting themselves or using their property to the detriment of the general welfare").

E. Police Power Limitations.

One court has noted that "[t]he distinction between an exercise of the police power and a constitutional taking has been characterized since *Mugler* [*v. Kansas*, 123 U.S. 623 (1887)] as 'whether the governmental action operates to secure a benefit for or to prevent a harm to the public.'" *Patty v. United States*, 136 Fed. Cl. 211, 214 (Fed. Cl. 2018) (quoting *Morton Thiokol, Inc. v. United States*, 4 Cl. Ct. 625, 630 (Cl. Ct. 1984)). The Tenth Circuit aptly described the differences between the two doctrines, stating "[p]olice power should not be confused with eminent domain, in that the former controls the use of property by the owner for the public good, authorizing its regulation and destruction without compensation, whereas the latter takes property for public use and compensation is given for property taken, damaged or destroyed." *Lamm v. Volpe*, 449 F.2d 1202, 1203 (10th Cir. 1971).

The argument is that while the government must pay for property taken by eminent domain, it has no such obligation when acting pursuant to its police power for the public good. As the Supreme Court has explained, "'all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community,' and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it." *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491-92 (1987) (*quoting Mugler*, 123 U.S. at 664). The Supreme Court has acknowledged, however, that attempts to define the reach or outer limits of the police power is "fruitless, for each case must turn on its own facts." *Berman v. Parker*, 348 U.S. 26, 32 (1954). "Public safety, public health, morality, peace and quiet, law and order — these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it." *Id.*

As far back as 1906, however, the U.S. Supreme Court recognized that the police power is not absolute:

> Private property cannot be taken without compensation for public use under a police regulation relating strictly to the public health, the public morals or the public safety, any more than under a police regulation having no relation to such matters, but only to the general welfare.... The constitutional requirement of due process of law, which embraces compensation for private property taken for public use, applies in every case of the exertion of governmental power. If in the execution of any power, no

> matter what it is, the Government, Federal or state, finds it necessary to take private property for public use, it must obey the constitutional injunction to make or secure just compensation to the owner. If the means employed have no real, substantial relation to public objects which government may legally accomplish; if they are arbitrary and unreasonable, beyond the necessities of the case, the judiciary will disregard mere forms and interfere for the protection of rights injuriously affected by such illegal action.... If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no taking of property for the public use, and a right to compensation, on account of such injury, does not attach under the Constitution.... There are, unquestionably, limitations upon the exercise of the police power which cannot, under any circumstances, be ignored. But the clause prohibiting the taking of private property without compensation "is not intended as a limitation of the exercise of those police powers which are necessary to the tranquility of every well-ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments.

Chi., B. & Q. R. Co. v. Illinois, 200 U.S. 561, 592-94 (1906) (internal citations omitted); *See also Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) ("As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone.").

The author's review of the various cases that have addressed the issue reveals that determining whether a particular government action constitutes a compensable "taking" or a non-compensable exercise of police powers is therefore highly dependent on the facts and circumstances of each case.

III.

ORIGINS OF THE DOCTRINE OF NECESSITY

There are a number of scholarly publications that address the Doctrine of Necessity and its origins. *See, e.g.*, Shelley Ross Saxer, *Necessity Exceptions to Takings*, 44 No. 8 Zoning and Planning Law Reports, 2021; Shelley Ross Saxer, *Paying for Disasters*, 68 U. Kan. Rev. 413 (2020); Jeffrey D. Jackson, *Tiered Scrutiny in a Pandemic*, 12 ConLawNOW 39 (2020); Robin Kundis Craig, *Drought and Public Necessity: Can a Common-Law "Stick" Increase Flexibility in Western Water Law*, 6 Tex. A&M L. Rev. 77 (2018); Brian Angelo Lee, *Emergency Takings*, 114 Mich. L. Rev. 391 (2015); 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 (2006). This paper is not one of them.

What the author has gleaned from those publications regarding the Doctrine of Necessity is as follows:

- It is a common law doctrine, generally considered inherent in all property rights, that allows governments facing emergencies to rearrange and destroy those property rights.

- It stems from English common law in response to the Great Fire of London in 1666, where the Mayor of London could have ordered a row of houses torn down to form a firebreak, but did not do so for fear of personal liability for ordering the destruction of the homes.

- While ordinary exercises of the police power are subject to the workings of the Takings Clause, the public necessity doctrine recognizes, in times of true emergency, that private rights yield to public needs, with no need for the acting government to pay.

- The public policy behind the doctrine is to encourage the government to act and not be frozen by fear like the Mayor of London.

- Private property is destroyed for the public good such as general public necessity, military necessity, and law enforcement necessity.

- Reasonable reactions to public health emergencies, including imminent harm to human health and to livestock and agricultural resources and, of course, most recently the COVID-19 pandemic, are covered by the doctrine.

- While not an exclusive list, there are three well-established situations that do not require compensation for the taking or destruction of property: (1) actions during actual warfare; (2) actions to prevent an imminent public catastrophe; and (3) actions to abate a public nuisance.

- The public policy supporting the Doctrine of Necessity is that there are situations in which the state must take steps necessary to quell an emergency, and it must be able to act with speed and confidence, unhampered by fear of liability. A state of emergency imposes severe time constraints, forcing decisions to be made quickly and often without sufficient time to carefully analyze all potential repercussions. As a policy matter, it shares certain attributes with qualified immunity for individuals who are sued for their emergency responses.

IV.

WHAT IS THE DOCTRINE OF NECESSITY?

The "doctrine of necessity" is a defense that can be raised in response to a takings claim for property damage resulting from responses to emergency events such as natural disasters like wildfires and floods, and for police tactics that destroy or damage property to apprehend suspected criminals. *See* Shelley Ross Saxer, *Paying for Disasters*, 68 U. Kan. L. Rev. 413, 451-54 (2019). There are several approaches to the application of the necessity doctrine as a defense to claims for just compensation based on government interference with private property rights. Once category is when private property is destroyed for the public good. This doctrine includes three distinct types of

necessity: "general public necessity, military necessity, and law enforcement necessity." *See* 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, 484 (2006).

Another application of the doctrine of necessity is when the government acts to confront public health emergencies, including imminent harm to human health and to livestock and agricultural resources and, of course, most recently the COVID-19 pandemic. *See Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905); Jeffrey D. Jackson, *Tiered Scrutiny in a Pandemic*, 12 ConLawNOW 39, 40-41 (2020) (citing *In re Abbott*, 954 F.3d 772, 789 (5th Cir. 2020) (relying on *Jacobson* to uphold "a temporary postponement of all non-essential medical procedures, including abortion")).

Some courts have used a general police power exception to defeat a regulatory takings claim when the action is not the result of the government's intent to use its eminent domain power. *See Muller*, *supra*, at 516 (noting that "[d]efining the police power … has been a confusing body of law that unsuccessfully attempts to compartmentalize the necessity privilege"). These various defensive concepts tend to overlap, however, as there is no universally recognized classification of these exceptions. *See* Robin Kundis Craig, *Drought and Public Necessity: Can a Common-law "Stick" Increase Flexibility in Western Water Law*? 6 Tex. A&M L. Rev. 77, 93-97 (2018) (discussing public necessity in general and quoting *City of Rapid City v. Boland*, 271 N.W.2d 60, 65 (S.D. 1978) for the three exceptions to requiring compensation as "the taking or destruction of property (1) during actual warfare; (2) to prevent an imminent public catastrophe; and (3) to abate a public nuisance").

V.

THE TEXAS SUPREME COURT HAS RECOGNIZED THE "DOCTRINE OF NECESSITY" ONE TIME, AND HAS NEVER MENTIONED IT AGAIN

In 1980, the Texas Supreme Court in *Steele v. City of Houston*, 603 S.W.2d 786, 790 (Tex. 1980), recognized the doctrine and how it might deny compensation to an injured party given that the Court has long recognized that the Texas Constitution provides protection against the damaging of property, but has also recognized certain limitations on such claims:

> It is not every damaging, however, that should be compensated. The Constitution limits compensation to damages "for or applied to public use," and judicial restraints have narrowed that phrase to damages which arise out of or as an incident to some kind of public works. A more significant restraint, however, was the rule that the damaging must not result from negligence.

Steele v. City of Houston, 603 S.W.2d 786, 790 (Tex. 1980) (internal citations omitted).

In *Steele*, the Houston Police Department, while attempting to apprehend escaped convicts who had taken refuge in a house, "discharged incendiary material" into the house and destroyed it

and its contents. *Id*. at 788–89. Steele (the property owner) and the tenants who were living in the home at the time sued the City of Houston asserting that the destruction of the home and their personal property entitled them to compensation under the Texas Constitution's takings clause. *See id*. at 788–89. The Court reversed and remanded a summary judgment rendered in favor of the City, but indicated on remanded that the City could, with a sufficient showing, avoid takings liability under the Doctrine of Necessity.

The Texas Supreme Court recognized that a city may justify its actions to destroy property without the payment of compensation "by proof of a great necessity" as "[u]ncompensated destruction of property has been occasionally justified by reason of war, riot, pestilence or other great public calamity." *Id*. at 792.

Quoting Professor Prosser, the Court noted as follows:

> Where the danger affects the entire community, or so many people that the public interest is involved, that interest serves as a complete justification to the defendant who acts to avert the peril to all. Thus, one who dynamites a house to stop the spread of a conflagration that threatens a town, or shoots a mad dog in the street, or burns clothing infected with smallpox germs, or, in time of war, destroys property which should not be allowed to fall into the hands of the enemy, is not liable to the owner, so long as the emergency is great enough, and he has acted reasonably under the circumstances. The "champion of the public" is not required to pay out of his own pocket for the general salvation.

Id. at 792-93 (citing Prosser, *The Law of Torts* 24 (4th ed. 1971)).

The Court, in further explaining the justification for the doctrine of necessity defense, noted as follows:

> More closely allied to the power of eminent domain is the power of destruction from necessity. In the case of fire, flood, pestilence or other great public calamity, when immediate action is necessary to save human life or to avert an overwhelming destruction of property, any individual may lawfully enter another's land and destroy his property, real or personal, providing he acts with reasonable judgment. Similarly, he may, in self-defense, take the life of another under certain circumstances. The right to destroy life or property for self-preservation differs from eminent domain in that it is an individual right rather than an attribute of sovereignty. When it is exercised by a public officer, he must justify his conduct as an individual whose position makes him a natural leader, rather than as an agent of the government. The right is a natural one and requires no statutory sanction; in fact, it is doubtful if the exercise of the right could be constitutionally prohibited, whereas eminent domain requires specific authority for the legislature to warrant its exercise even by municipal corporations or officers of the state.

> If the individual who enters and destroys private property happens to be a public officer whose duty it is to avert an impending calamity, the rights of the owner of the property to compensation are no greater than in the case of a private individual. The most familiar example of the exercise of this right is seen in case of a fire. The neighbors and fireman freely trespass on the adjoining land, and houses are even blown up to prevent the spread of the conflagration. The danger of flood or the existence of a pestilence may call for equally drastic action. However, the permanent appropriation of private property without the payment of compensation therefor cannot be justified under the power.

Id. at 792, n.2 (citing Nichols, *The Law of Eminent Domain,* 1.43 (rev. 3d ed. 1979)) (emphasis added).

While a *Westlaw* or *Lexis* search will show that *Steele* has been cited over 200 times by Texas appellate courts for general takings principles, none of them (save the recent City of Arlington dam breach case discussed later) mentions *Steele* for the Doctrine of Necessity. In fact, the doctrine has not arisen in any Texas appellate case since 1980 other than the City of Arlington dam breach case discussed below.

VI.

THAT DAM CASE

The Fort Worth Court of Appeals addressed the Doctrine of Necessity, albeit in passing, in *Prestonwood Estates West Homeowners Association, et al. v. City of Arlington*, No. 02-21-00362-CV, 2022 WL 3097374 (Tex.App.-Fort Worth Aug. 4, 2022, no pet.) (mem. op. not designated for publication). Because the case was a review of the granting of a plea to the jurisdiction on the pleadings, the court assumed, for purposes of its review, that all facts as alleged were true. The case involved the City of Arlington's intentional breach of the Prestonwood Lake Dam and the alleged resulting damage to residential lots along Prestonwood Lake, which are upstream from the dam. The Prestonwood Estates West Homeowners Association ("**HOA**") and homeowners belonging to the HOA (collectively, the "**Homeowners**") sued the City for inverse condemnation and under the Texas Tort Claims Act. The Tort Claim Act claims were later dropped by the Homeowners. *Id*. at *1.

The HOA comprises lots that abut a creek and Prestonwood Lake, which was created when the Prestonwood Lake Dam was installed between 1979 and 1982. The HOA was responsible for maintaining the dam. In the fall of 2018, the dam began to fail and Tarrant County was experiencing severe weather and flooding. In late October 2018, the City hired an engineering firm to conduct a breach analysis on the dam to determine the likelihood of the dam's failure and to evaluate any downstream impacts in the event of a breach. The engineering report described the dam's damaged condition and concluded that "the dam will likely fail if no remedial actions are taken immediately." *Id*.

The engineering report indicated that potential risks of dam failure included channel widening that would "likely occur" and "could potentially impact nearby structures"; erosion that would threaten an upstream street and culverts; a release of sediment that could potentially impact ecological habitats and City culverts; and possible additional downstream erosion that could threaten private property, public infrastructure, and the downstream channel. *Id*. at *2. Given the dam's condition and the likely possibility of a dam breach, the engineering report further recommended notifying the TCEQ of the dam's condition; alerting City crews to the possible breach and breach flows at a nearby street; inspecting city culverts at a nearby street to ensure that they were unclogged and able to convey large flows; notifying a nearby wastewater treatment plant's operators; checking the conveyance capacity of culverts on the wastewater treatment plant's property; and notifying emergency responders in "the general vicinity and downstream area." *Id*.

On November 1, 2018 - two days after the City's mayor received the engineering report - Arlington's mayor declared a state of disaster for the City and implemented the City's Emergency Operational Plan because (1) the severe weather and flooding that had started on September 10, 2018, had caused and might continue to cause widespread and severe property damage in Tarrant County; (2) the Texas Governor had declared a state of disaster for Tarrant County; (3) due to the rain occurring within the City over several weeks and still occurring the week of November 1, 2018, the imminent possibility existed that City residents and the City itself would suffer severe injury and property damage due to the possibility of a dam breach on Prestonwood Lake; and (4) the mayor had "determined that extraordinary measures must be taken to alleviate the potential suffering of people and to protect or rehabilitate property." *Id*. as *2-3.

That same day, City crews performed a controlled breach of the dam, which drained Prestonwood Lake, which resulted in the Homeowners no longer having property that abutted a lake, but which now abutted a dry creek bed. The Homeowners asserted that the dam breach caused substantial erosion throughout the waterway's length and that nearly every lot along Prestonwood Lake suffered substantial erosion, which caused retaining walls to crumble and fall into the almost-dry creek bed. They further claimed that some of the Homeowners faced the potential of losing the structural integrity of their homes and that "[o]ne lot is mere feet away from losing its underground pool due to the erosion." The Homeowners estimated that the City's actions caused about $2,000,000 in damages. The Homeowners sued for a taking, and Arlington filed a plea to the jurisdiction. *Id*. at *3.

Amongst the grounds upon which the trial court granted the City's plea to the jurisdiction was the "Doctrine of Necessity." The appellate court framed the issue as follows:

> According to the City, the necessity doctrine insulates the City from takings liability here. The Homeowners counter that there is no emergency exception to the takings clause and that the trial court thus erred to the extent that it granted the City's jurisdictional plea based on the mayor's exercising his emergency powers and his issuing the emergency order. The City disagrees and asserts that the threshold question here is whether the City's performing a controlled breach of the dam in response to the mayor's emergency declaration was a use of the City's eminent-domain power—which is compensable under the Texas Constitution—or "an

> exercise of a narrow set of governmental powers sometimes referred to as the 'doctrine of necessity,' which allows the government to damage or destroy property in extraordinary circumstances without paying compensation." The City additionally argues that the mayor's ordering the controlled breach was an exercise of his emergency police powers authorized by the Texas Disaster Act of 1975, not the City's use of its eminent-domain power. *See generally* Tex. Gov't Code Ann. §§ 418.001, .002, .101–.1102. Thus, the City contends, its "actions were undertaken under the doctrine of necessity in order to prevent the damage likely to occur due to the imminent uncontrolled rupturing of the dam," and therefore, "the takings clause is simply not applicable in this situation."

Id. at *4.

The *Prestonwood* court acknowledged that the Texas Supreme Court had recognized the doctrine in its 1980 *Steele* decision, and characterized the *Steele* decision as one where the City of Houston could "defend its actions by proof of a great public necessity" since "[u]ncompensated destruction of property has been occasionally justified by reason of war, riot, pestilence[,] or other great public calamity." *Prestonwood* at *5. The Prestonwood court further noted that "[d]estruction has been permitted in instances in which the building is adjacent to a burning building or in the line of fire and destined to destruction anyway." *Id*. However, because the doctrine is a defense to takings liability, the court held that the City could not assert it by way of a plea to the jurisdiction and sent the case back to the trial court to hear proof of the emergency defense by the City. *Id*. at *6. Importantly, the Fort Worth Court of Appeal did not fully embrace the doctrine stating that "[a]t this juncture, we need not determine whether the Texas Supreme Court still recognizes the necessity doctrine as a defense to a takings claim (*Steele* was decided in 1980), the doctrine's contours, or its application to these facts." *Id*. at *8, n.8.

So, other than *Steele* (decided 33 years ago) which discussed, but did not apply, the Doctrine of Necessity, and *Prestonwood* (decided last year) which also discussed, but did not apply, the Doctrine of Necessity, we have no state court guidance as to whether the doctrine is a viable defense to a taking under the Texas Constitution. Perhaps the Prestonwood Dam case, if tried and further appealed, will provide guidance for the State and its political subdivisions as to when the use of a police power, not in the exercise of eminent domain to acquire property for public use, but to further the public good, is a taking.

VII.

BAKER **– AN EXPANSIVE VIEW OF TAKINGS LIKE NO OTHER**

A recent decision from a federal court in Sherman has rejected the (at least up to this point) universal holding that a Fifth Amendment takings claim cannot be used to recover damages caused by reasonable law enforcement activities. That decision, *Baker v. City of McKinney, Texas*, is contained in a number of different trial court orders based on different procedural stages. They can be found at 2022 WL 3704301 (denial of the City's Post-Trial Motion for New Trial); 2022 WL 3704301 (denial of the City's Post-Trial Renewed Motion for Judgment); 2022 WL 2298974

(granting Plaintiff's Motion in Limine); 2022 WL 2068257 (granting Plaintiff's Motion for Partial Summary Judgment); 571 F.Supp.3d 625 (denying the City's Motion to Dismiss). The case is currently on appeal before the 5th Circuit in Appeal No. 22-40644.

Factually, the case involved a home owner seeking recovery under the Fifth Amendment Takings Clause, and the Texas Constitution's Takings Clause, for damages caused by police officers who reasonably responded to an armed hostage standoff in the plaintiff's home. A review of the appellate record shows the following facts:

Plaintiff Vicki Baker ("**Baker**") owned a residential home in the City of McKinney. At the time of the events in question, Baker had moved to Montana; however, Baker's adult daughter, Ms. Deanna Cook ("**Cook**") was living in Baker's house and saw a Facebook post reporting that an acquaintance of Baker's, Mr. Wesley Little ("**Little**"), was on the run with a 15-year-old girl. Cook called Baker to advise her of Little's actions.

Little came to the home with the 15-year-old girl and told Cook that he wanted to enter the home and put his car in the garage. Cook knew Little and let Little into the home and let him park his car in the garage, and she thereafter left the house. Cook and Baker then together called the McKinney police, who met Cook in a retail parking lot. The police then went to the home and surrounded it. The police realized that Little was the same person who had eluded police in a high-speed car chase earlier that day.

The police attempted to negotiate with Little during the standoff. Little refused to leave the house, but released the 15-year-old girl. The girl told the police that Little had multiple weapons and that he stated that he was ready to die and go out shooting. Over the next several hours, the police attempted to coerce Little to leave the house by using tear gas and other forceful methods, without success. The police then used a drone to enter the house, and found Little inside the house, discovering that at some point in time he had taken his own life with a self-inflicted gunshot wound to the head. As a result of the police operations, some damage to the home occurred. Baker repaired the home and then sold it.

Baker's claims arose out of the McKinney police department's response to the armed hostage standoff at Baker's Property. Throughout the pleadings and trial of the case, Baker did not criticize the actions taken by the City's police officers, and consistently asserted that those actions were lawful, proper and reasonable. Baker sought from the City recovery of the damages to her property arising out of this law enforcement event, claiming that the City's denial of her claim for reimbursement violated the takings clauses of the federal and state constitutions.

The City sought dismissal alleging no jurisdiction and failure to state a claim, which the district court denied. The district court then granted a pretrial summary judgment to Baker, finding takings liability against the City. Trial to the jury resulted in a jury verdict on a claim under 42 U.S.C. § 1983. Because no case has held that the Fifth Amendment Takings Clause provides a remedy for property damage caused by police officers who reasonably performed law enforcement tasks, the City has appealed the decision. At issue in the case is, as a matter of first impression in the

Fifth Circuit, whether the Fifth Amendment provides the basis for a takings claim for such law enforcement police power actions?

The court's holding in *Baker* is contrary to every reported decision on this subject of which the author is aware. The United States Supreme Court has found that "[i]solated physical invasions, not undertaken pursuant to a granted right of access, are properly assessed as individual torts rather than appropriations of a property right." *Cedar Point,* 141 S.Ct. at 2078). The Court in *Cedar Point* reiterated that the common law authorizes law enforcement to enter private property to avert public or private harm, arrest a suspect, or enforce criminal law without compensation. *Id.* at 2079 (citing Restatement (Second) of Torts §§ 196-197 and 204-205 (1964)). The Supreme Court further reiterated the long-standing rule:

> Because a property owner traditionally had no right to exclude an official engaged in a reasonable search, see, *e.g.*, *Sandford v. Nichols*, 13 Mass. 286, 288 (1816), government searches that are consistent with the Fourth Amendment and state law cannot be said to take any property right from landowners.

Id. (citing *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 538 (1967)). Thus, notwithstanding the decision in *Baker*, the Fifth Amendment should not apply to property damage caused by law enforcement when reasonably performing law enforcement tasks.

The Supreme Court and other circuits have consistently applied these principles in cases involving property damage caused by intentional law enforcement activity. *See, e.g., Nat'l Bd. of Young Men's Christian Assn's v. U.S.,* 395 U.S. 85, 92 (1969) (government not liable to property owners "every time policemen break down the doors of buildings to foil burglars thought to be inside."); *Lech v. Jackson,* 791 Fed. Appx. 711, 713-716 (10th Cir. 2019) (city not liable for law enforcement breaching front door, punching holes in walls, and firing tear gas into property when apprehending armed suspect); *Bachmann v. United States,* 134 Fed.Cl. 694, 697 (Fed.Cl. 2017) (government not liable for law enforcement firing weapons, smoke bombs, and tear gas into property when apprehending fugitive); *Johnson v. Manitowoc Cnty,* 635 F.3d 331, 332-33, 336 (7th Cir. 2011) (county not liable for law enforcement damage to wall paneling, furniture, and garage floor when executing search warrant).

The court in *Baker* either ignored, or discarded, the U.S. Supreme's recent discussion in *Cedar Point* wherein the Court explained that isolated physical invasions are torts, not takings:

> Isolated physical invasions, not undertaken pursuant to a granted right of access, are properly assessed as individual torts rather than appropriations of a property right. This basic distinction is firmly grounded in our precedent.

Id. at 2078. That Court also confirmed that traditional common law principles allow the government to enter property to avert a disaster, prevent serious harm to person or property, to arrest a suspect, or enforce criminal law. *Id.* at 2079. The *Baker* court held otherwise.

One particularly persuasive case that has collected and reviewed many decisions and analyzed similar law enforcement facts, and which has been cited in subsequent cases, is the Tenth Circuit's unreported decision in *Lech v. Jackson,* 791 Fed.Appx. 711, 713-714 (10th Cir. 2019). In that case, the Lechs alleged a takings claim against the City of Greenwood, Colorado, and numerous police officers, for damages resulting from a police response to an armed burglar inside the Lechs' home. *Lech,* 791 Fed.Appx. at 713-14. The court of appeals, noting the issue was a matter of first impression, held that "when the state acts pursuant to its police power, rather than the power of eminent domain, its actions do not constitute a taking for purposes of the Takings Clause . . . [a]nd we further hold that this distinction remains dispositive." *Lech,* 791 Fed.Appx. at 717. Further, the court explained that the police response was "perhaps the most traditional function of the police power, entering property to effectuate an arrest[.]" *Id.* at 718 (citing *Bachmann,* 134 Fed.Cl. at 697).

In *Lech,* the court of appeals discussed decisions from numerous other courts who held that a legitimate exercise of the police power does not constitute a taking under the Fifth Amendment:

> [C]ontrary to the Lechs' position, at least three of our sibling circuits and the Court of Federal Claims have expressly relied upon the distinction between the state's police power and the power of eminent domain in cases involving the government's direct physical interference with private property. For instance, in *AmeriSource Corp. v. United States*, the Federal Circuit held that no taking occurred where the government physically seized (and ultimately "rendered worthless") the plaintiff's pharmaceuticals "in connection with [a criminal] investigation" because "the government seized the pharmaceuticals in order to enforce criminal laws"—an action the Federal Circuit said fell well "within the bounds of the police power." 525 F.3d 1149, 1150, 1153–54 (Fed. Cir. 2008) (citing *Bennis v. Michigan*, 516 U.S. 442, 443–44, 452–53, 116 S.Ct. 994, 134 L.Ed.2d 68 (1996)); *see also, e.g.*, *Zitter v. Petruccelli*, 744 F. App'x 90, 93, 96 (3d Cir. 2018) (unpublished) (relying on distinction between power of eminent domain and police power to hold that no taking occurred where officials physically seized plaintiff's oysters and oyster-farming equipment (citing *Bennis*, 516 U.S. at 452, 116 S.Ct. 994)); *Johnson v. Manitowoc Cty.*, 635 F.3d 331, 333–34, 336 (7th Cir. 2011) (relying on distinction between power of eminent domain and police power to hold that no taking occurred where authorities physically damaged plaintiff's home (citing *Bennis*, 516 U.S. at 452, 116 S.Ct. 994)); *Bachmann v. United States*, 134 Fed. Cl. 694, 696 (Fed. Cl. 2017) (holding that "[w]hen private property is damaged incident to the exercise of the police power, such damage"—even when physical in nature—"is not a taking for the public use, because the property has not been altered or turned over for public benefit" (citing *Nat'l Bd. of Young Men's Christian Assn's v. United States*, 395 U.S. 85, 92–93, 89 S.Ct. 1511, 23 L.Ed.2d 117 (1969))).

Lech, 791 Fed.Appx. at 715-716.

Other federal decisions have found that no Fifth Amendment Takings claim exists under similar circumstances. *See, e.g.*, *Bennis*, 516 U.S. at 452 (cited in *Lech*) ("The government may not

be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain."); *Nat'l Bd. of Young Men's Christian Assn's*, 395 U.S. at 92 (mentioned in *Lech*) (governmental bodies are not "liable under the Just Compensation Clause to property owners every time policemen break down the doors of buildings to foil burglars thought to be inside."); *Johnson v. Manitowoc Cty.*, 635 F.3d 331, 336 (7th Cir. 2011) (the Fifth Amendment's Takings Clause did not apply to officer's destruction of plaintiff's property during a search: "Here, the actions were taken under the state's police power. The Takings Clause claim is a non-starter.").

Additionally, federal courts who have addressed whether a Fifth Amendment takings claim is available when the government is exercising its police power, rather than its eminent domain power, have found there to be no takings claim available. *See, e.g., Bachmann,* 134 Fed.Cl. at 697-98 (cited in *Lech*) (detailed analysis of cases); *McKenna v. Portman*, 538 Fed.App'x. 221, 224 (3d Cir. 2019) (property seized pursuant to the criminal laws is not a taking); *Scott v. Jackson County*, 297 Fed.App'x 623, 625-26 (9th Cir. 2008) (Fifth Amendment does not apply to law enforcement actions); *Acadia Tech., Inc. v. United States*, 458 F.3d 1327, 1331-32 (Fed. Cir. 2006) (property seized as part of a criminal investigation is not a taking); *Lawmaster v. Ward*, 125 F.3d 1341, 1351 (10th Cir. 1997) (same); *Young v. County of Hawaii*, 947 F.Supp.2d 1087, 1103 (D.Hawai'i 2013) (Fifth Amendment Takings Clause does not apply when the taking is for law enforcement purposes, citing *Scott*); *Carrasco v. City of Udall, Kansas*, 2022 WL 522959, at **3-4 (D. Ka., No. 20-1322-EFM, Feb. 22, 2022) (unreported) (same, citing *Lech*); *Harris v. Warden*, 2020 WL 7129339, at *3 (D. Md., No. CCB-20-1500, Dec. 4, 2020) (unreported) (action by law enforcement not a taking under Fifth Amendment); *Britton v. Keller*, 2020 WL 1889017, at **3-4 (D. N. Mex., No. 1:19-cv-01113-KWR/JHR, Apr. 16, 2020) (unreported) (same, citing *Lech*); *Freeman v. Indiana*, 2019 WL 357051, at **12-13 (N.D. Ind., No. 1:17-CV-317-TLS, Jan. 29, 2019) (unreported) (same, citing *Bennis*, *Lech*, etc.); *Cybernet, LLC v. David*, 2018 WL 5779511, at *16 (E.D.N.C., No. 7:16-CV-16-RJ, Nov. 2, 2018) (unreported) (same).

Based on the great weight of the cases cited above, *Baker* should be reversed.

VIII.

POLICY ISSUES

The implications of *Baker*, and an expansive reading of takings protections, are clear. If every governmental act that takes, damages, or destroys property results in a compensable taking, sovereign immunity is rendered meaningless. Legislative policy decisions that provide limited waivers of immunity and caps on damages are rendered a nullity because takings liability has no monetary limits and no immunity applies to takings claims.

As applied to law enforcement by *Baker*, the slippery slope created leads to takings liability for firefighters and first responders. And to find that drugs, weapons, and other contraband seized from criminals must be now paid for. And to find that a police officer who smashes a car window to remove an endangered child from a dangerously hot car has now subjected his employer to takings liability. The Doctrine of Necessity is needed in situations other than law enforcement as well.

Otherwise, government actors might hesitate to take actions needed to protect the public such as destroying a house to stop the spread of a fire that threatens a town; or shooting a mad dog in the street; or burning clothing infected with smallpox germs; or in time of war, destroying property which should not be allowed to fall into the hands of the enemy.

If the Doctrine of Necessity is not recognized (as the Fort Worth Court of Appeals seems to suggest and the federal court in Sherman has clearly stated), a chilling effect could be created on those responding to emergency situations. It happened to the Mayor of London in 1666 and London burned. Hopefully, our courts will give heed to this important doctrine to allow those who are charged with dealing with emergency situations the protection to do so, within reason, without fear of unbridled and uncapped takings liability.