Dammed if You Do: Should the Government Be Liable for Hurricane Flooding and Other Natural Disasters?

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Abstract

When hurricanes, wildfires, and other natural disasters strike, government officials must make difficult decisions under time pressure and amidst uncertainty over how best to save lives and mitigate the resulting damage to private property. Sometimes landowners who do not second-guess the appropriateness of those decisions made in exigent circumstances nonetheless insist that the government should foot the bill for the resulting destruction. In a 2025 opinion (*Ablan*) and a 2022 decision (*Milton)*, both involving flooding damage resulting from Hurricane Harvey, the Federal Circuit articulated an expansive vision of government liability under the Takings Clause that can be squared with neither Supreme Court authority on the relationship between takings and trespass torts, nor the scope of the government's necessity defense. The Federal Circuit also endorsed two propositions that are out of step with foundational premises in the United States' constitutional order: the notion that the Bill of Rights vindicates positive liberties as well as negative liberties, and the idea that landowners lack constructive notice of prior publicized government actions concerning their property. On remand, the Court of Federal Claims has found the federal government responsible under the Takings Clause for the flooding of upstream homes built inside a floodplain and also liable for downstream flooding that the government initiated in order to prevent much graver harm to both downstream owners and upstream owners. Taken together, *Ablan* and *Milton* represent the worst Takings Clause decisions of the 2000s. This paper explains how these courts went astray, why the defenses of the judges' sudden break with the past do not hold water, how these errors are in tension with longstanding core features of property doctrine, and why these missteps will create perverse incentives for both governments and landowners in various contexts involving foreseeable calamities.

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Introduction

Trolley problems aren't just hypothetical grist for college-level philosophy courses. It turns out they arise in the real world too. In a trolley problem, a subject is presented with a scenario in which a trolley is barreling towards five innocent people who are tied to a track. There is no way to stop the trolley. But the subject can flip a switch that will put the trolley on a different track, where only one defenseless and immobilized person stands in its path. The trolley problem asks whether it is ethical for the individual to flip the switch in those circumstances, and subsequent experimental psychology and philosophical work introduces complications like "What if the one defenseless person is a child, or the subject's spouse?"[1]

Property law sometimes requires government actors to act like the subjects in a trolley problem experiment, making wrenching decisions where someone is necessarily going to wind up harmed. Hurricane Harvey, one of the two most damaging storms in United States history, presented an especially dramatic illustration. The Army Corps of Engineers had invested millions of dollars in preventing flooding from inundating the Houston area, but when Hurricane Harvey hit in 2017, the Corps had to decide how much water to release from two dams when water levels in their reservoirs rose to levels that threatened the dams' structural integrity. There was a margin of uncertainty, but this much was known: Some privately owned land necessarily would flood. If the Corps released more water from the dam, more property downstream would flood. If it released less, more upstream land would flood. Diverting the water during a once in a millennium storm was not an option; there was simply nowhere for the excess water to go. And doing nothing was not an option, because doing nothing could result in a catastrophic dam failure that would inundate downtown Houston and much of the downstream land between the reservoir and the Gulf of Mexico. As it turned out, both the upstream and downstream owners have filed successful takings suits against the government as a result of the Army Corps' actions.

The immediate question before us, and the topic of this article, is whether the Constitution mandates that the federal government compensate the downstream and upstream landowners whose properties were flooded after the Army Corps exercised its judgment about how to best address this particular trolley problem. So its focus will be less on what the government should have done when Harvey hit, and more on whether the actions it took necessarily expose the government, and the ultimately federal taxpayers responsible for paying its bills, for the billions of dollars in property losses that ensued during the terrifying days when Harvey hit Houston.

The Harvey issue arises in various contexts that involve some kind of natural disaster, like hurricane flooding, wildfires, or tsunamis, and some level of government planning to mitigate the threats posed by these events. It comes up very frequently in wartime as well. All along the Gulf and Atlantic coasts, where so many have suffered as a result of hurricanes, and where flooding risk plays such a significant role in affecting the costs and risks of homeownership, this topic is both timely and important.

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[1] See, e.g., April Bleske-Rechek et al., *Evolution and the Trolley Problem: People Save Five Over One Unless the One is Young, Genetically Related, or a Romantic Partner*, 4 J. SOC. EVOLUTIONARY & CULTURAL PSYCHOLOGY 115 (2010); Stijn Bruers & Johan Braeckman, *A Review and Systematization of the Trolley Problem*, 42 PHILOSOPHIA 251 (2014).

In separate December 2025 and June 2022 decisions, the United States Court of Appeals for the Federal Circuit, which in addition to its extensive patent portfolio, is the appeals court that most frequently interprets the Takings Clause,[2] has broadly ruled in favor of plaintiffs whose land was inundated during Harvey. In Ablan v. United States,[3] and Milton v. United States,[4] two opinions written by Judge Cunningham, the Federal Circuit has embraced propositions that are exceedingly difficult to square with Supreme Court precedent, with fundamental aspects of our constitutional order, and with core features of American property law. Unless reversed, *Ablan* and *Milton* will profoundly influence settlements in future takings suits and put federal taxpayers on the hook for substantial financial burdens that otherwise would have been shouldered by insurers and landowners.[5] This article will explain these inconsistencies and evaluate whether the Federal Circuit's sharp break with the past is justified.

The Federal Circuit's re-write of takings law is most prominent in four aspects of its recent decisions. After providing background on Hurricane Harvey and the nine years of litigation that followed in Part I, Part II demonstrates that the court characterized as a potential taking an action that the Supreme Court and other courts have long regarded as a trespass. Part III explains that problems with the court's conclusion that Bowditch v. Boston's[6] venerable necessity defense applies only when the government is taking entirely unforeseeable actions at the last possible moment to respond to natural disasters. This approach creates perverse incentives for the government and will discourage the construction of new disaster-mitigation infrastructure. Part IV shows that the court has implicitly embraced a "positive liberties" conception of the Takings Clause, notwithstanding the foundational principle that the American federal Constitution is one that exclusively protects negative liberties. Part V critiques the court's insistence that extensive government efforts to alert property owners who face hurricane risk will not diminish those owners' distinct, investment-backed expectations if they improve property in ignorance of those warnings. More broadly, these four breaks with the past put the government in the unfamiliar role of insurer of first resort, exacerbate moral hazard problems, and embed hard-to-justify cross subsidies in our constitutional order.

I. Hurricane Harvey and the Ensuing Takings Litigation

Hurricane Harvey began as a tropical storm in the Caribbean and rapidly intensified, making landfall as a Category 4 hurricane between Rockport and Fulton, Texas, on August 25,

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[2] The Tucker Act gives the United States Court of Federal Claims jurisdiction over monetary claims, including takings claims, against the federal government for amounts exceeding $10,000. Decisions by the Court of Federal Claims are appealed to the Federal Circuit. See Gregory C. Sisk, *The Jurisdiction of the Court of Federal Claims and Forum Shopping in Money Claims Against the Federal Government*, 88 IND. L.J. 83, 87-95 (2013).

[3] 162 F.4th 1364 (Fed. Cir. 2025).

[4] 36 F.4th 1154 (Fed. Cir. 2022).

[5] Because the Federal Circuit typically provides the final words on many aspects of takings doctrines, numerous suits going forward will reach settlements that are heavy influenced by the expansive potential government liability reflected in the two recent decisions. For an explanation of these settlement dynamics, see the canonical article on the subject, Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

[6] 101 U.S. 16 (1879).

2017.[7] After battering Texas's Gulf Coast with winds measured at up to 145 miles per hour and a devastating storm surge that reached more than 12 feet above ground level along some parts of the coast, Harvey stalled over southeastern Texas, where it was fed by warm Gulf of Mexico water. The storm repeatedly drew moisture from the Gulf, resulting in a nearly stationary weather system that drenched a wide swath of southeastern Texas for several days.[8]

Between August 26 and August 31, Harvey unleashed nearly 52 inches of rain in parts of the Houston metropolitan area, and more than 60 inches in Nederland, Texas, shattering national rainfall records for a tropical cyclone.[9] Neighborhoods throughout Harris County and surrounding areas were deluged, as bayous and creeks overflowed their banks, streets temporarily turned into rivers, and floodwaters inundated homes and businesses.[10] The scale of flooding was unprecedented—the city's established flood control systems and drainage infrastructure were quickly overwhelmed, leaving many communities trapped or cut off from rescue. Many residents were forced onto rooftops as emergency response teams conducted high-water rescues. The hurricane killed at least 70 people, the majority of whom lived in Houston's Harris County.[11] Fifty-seven of these fatalities resulted from drowning.[12] In addition to the loss of life, the economic costs of Harvey were enormous, with the storm costing an estimated $158.8 billion, displacing more than 30,000 people, and damaging or destroying some 200,000 homes and businesses.[13]

A critical aspect of Harvey's flooding involved the Addicks and Barker reservoirs, which were created by dams built in the 1940s. They were constructed roughly 17 miles west of downtown Houston.[14] When these dams were built, the federal government acquired undeveloped land for the adjacent reservoirs based on the expected maximum rainfall during the dams' respective lifetimes. These figures were estimated using rainfall totals from the previous large storms that had dumped rain on Houston.[15] In the years following the creation of this

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[7] See National Weather Service, Major Hurricane Harvey – August 25-29, 2017, available at https://web.archive.org/web/20251125033916/https://www.weather.gov/crp/hurricane_harvey.

[8] See id.

[9] See Jacob True Furrh & Philip Bedient, *Upstream Addicks-Barker Reservoir Damages During Hurricane Harvey: A Case Study of Urban Hydrology and Policy Failure in Houston, TX*, 59 J. AM. WATER RESOURCES ASS'N 984, 984 (2023).

[10] See National Weather Service, *supra* note 7.

[11] See Sebastiaan N. Jonkman, Maarje Godfroy, Antonia Sebastian, and Bas Kolen, *Brief Communication: Loss of Life Due to Hurricane Harvey*, 18 NATURAL HAZARDS AND EARTH SYSTEM SCI. 1073, 1074 (2018).

[12] See id. at 1075.

[13] See Nat. Env. Satellite, Data, and Info. Serv., Dept. of Commerce, Hurricane Harvey: A Look Back Seven Years Later, Aug. 26, 2024, available at https://web.archive.org/web/20251214122059/https://www.nesdis.noaa.gov/news/hurricane-harvey-look-back-seven-years-later.

[14] See In re Downstream Addicks and Barker (Texas) Flood-Control Reservoirs, 181 Fed. Cl. 225, 235 (Ct. Cl. 2026).

[15] See Furrh & Bedient, *supra* note 9, at 988.

infrastructure, Houston's growth caused many developers to turn undeveloped agricultural land surrounding the reservoirs into residential neighborhoods. These developers and the buyers they sold to were not deterred by the fact that all of this land was listed as being within the Addicks and Barker floodplains, which could flood if an unprecedented storm ever hit Houston. Over the next eight decades, the dams did their jobs, preventing billions of dollars in damages from flooding.[16]

Each reservoir is contained within a public park; the Addicks Reservoir is circumscribed by Congressman Bill Archer Park, and the Barker Reservoir contains George H.W. Bush Park. For much of the year there is little or no standing water in the reservoirs – a visitor would just see parkland. Google Maps satellite imagery shows a large green area, not a blue one. Today there are roughly 20,000 homes inside the flood pool for the Addicks and Barker reservoirs, just outside the parks, and about half of them flooded during Harvey.[17] This residential development, in turn, increased both the risks and costs of any future flooding. It heightened the risks because paving over agricultural land increased peak flows and runoffs resulting from rainfall.[18] It increased the costs by replacing inexpensive unimproved land with valuable improved land. The Addicks and Barker reservoirs each contained a little more than 12,000 acres, but during Harvey at its peak the upstream flooding amounted to 17,000 acres and 15,000 acres respectively; there was far more water than either reservoir could hold.[19]

As their pools swelled with rainwater, the U.S. Army Corps of Engineers was faced with a dire choice: allow the reservoirs' dams to overtop or breach, endangering vast areas downstream and the structural integrity of the dams themselves, or initiate controlled releases that would prompt some flooding downstream but save the dams and reduce the volume of water in the reservoirs. In accordance with its worst-case scenario plans, the Army Corps facilitated water releases to safeguard the structural integrity of the dams and mitigate the loss of life, while sparing downtown Houston and many other downstream areas from flooding.[20] The Army Corps estimated that were the dams to fail, 600,000 lives would be placed at risk and $21 billion in property damage would occur.[21] Flooding occurred both upstream and downstream – upstream because the Army Corps did not release water from the dams quickly enough to stop it, and downstream because the Army Corps released water too quickly to prevent it.

As a result of Harvey, thousands of property owners sued, alleging that the Army Corps had taken their property in violation of the Constitution's Takings Clause. The federal

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[16] See *In re Downstream Addicks*, 181 Fed. Cl. at 233.

[17] See Jim Blackburn, Houston Flooding 3.5 Years After Harvey, Rice Univ. Baker Inst. For Pub. Pol'y Working Paper at 7-8 (March 2021), available at https://web.archive.org/web/20260201014856/https://repository.rice.edu/server/api/core/bitstreams/969ba9f6-8e48-43e4-b037-9edb4b91e79a/content.

[18] See id. at 3; Furrh & Bedient, *supra* note 9, at 985.

[19] See id. at 988.

[20] See *In re Downstream Addicks*, 181 Fed. Cl. at 235 ("Both Dams are classified as high hazard dams due to the probable loss of life and impacts on economic, environmental, and lifeline interests in the event of a failure.") (internal quotation marks omitted).

[21] See id. at 238.

government faced one class action lawsuit from upstream owners (*Ablan*),[22] whose homes within the Addicks and Barker floodplains were flooded, and another from downstream owners (*Milton*),[23] whose property was flooded because the Army Corps had to release some water to preserve the structural integrity of the dams. Plaintiffs' lawyers have asserted, without hyperbole, that the Harvey litigation represents "the largest Fifth Amendment takings case in U.S. history."[24]

The government has not fared well in the Federal Circuit. In the downstream litigation, the appellate court rejected the government and Court of Federal Claims' arguments that the downstream owners had a cognizable property interest in their homes not being flooded, found that Harvey did not qualify as an Act of God, and held that the government's necessity defense could not allow it to prevail on summary judgment, remanding for the Court of Federal Claims to decide whether the government satisfied its burden of proof on necessity.[25] On remand, the chastened Court of Federal Claims ruled against the government pretty much across the board in an April 2026 summary judgment ruling:[26] The downstream flooding that happened during Hurricane Harvey was a physical taking, not a tort; the government could not prevail on its necessity defense; the flooding was not foreseeable for property owners at the time the dams were built but was foreseen by the government prior to Harvey; and the plaintiffs provided adequate evidence of causation to prevail under the Takings Clause.[27] The upstream litigation, decided in December 2025, was an equally emphatic loss for the feds. There the appellate court held that by permitting the upstream properties to flood during Harvey, the federal government had permanently taken a flowage easement for which just compensation was owed. The upstream appellate court also rejected the federal government's necessity defense.[28]

In short, as it stands now, unless the Supreme Court intervenes, the government will definitively lose the benchmark upstream litigation, and have to engage in numerous costly settlements. And unless the Federal Circuit or Supreme Court intervene, there is a good chance the federal government will be responsible for giant payouts in the downstream litigation too. At the same time, the state courts in Texas have hardly been immune to paradoxical rulings. The state's supreme court recently allowed a regulatory takings suit against the City of Houston to proceed towards trial. The plaintiff in that suit, ironically titled *Lake Houston*, is a real estate developer who objects to a post-Harvey regulation that requires new residences to be built at

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[22] Ablan v. United States, 162 F.4th 1364 (Fed. Cir. 2025).

[23] Milton v. United States, 36 F.4th 1154 (Fed. Cir. 2022).

[24] Kiah Collier, *In Win for Harvey Victims, Federal Judge Finds Government Liable for Reservoir Flooding*, TEX. TRIB., Dec. 17, 2019.

[25] *Milton*, 36 F.4th at 1154.

[26] The summary judgment ruling was preceded by a mini-trial on two issues: "1. Was there an emergency that necessitated the United States Army Corps of Engineers opening the Addicks and Barker reservoir gates, or were the gates opened as a matter of ordinary operating procedure; and 2. What would have happened if the gates had remained closed?" See In re Downstream Addicks and Barker (Texas) Flood-Control Reservoirs, 181 Fed. Cl. 225, 242 (2026).

[27] See id. at 248, 249, 252, 263 & 266.

[28] *Ablan*, 162 F.4th at 1378.

least two feet above the 500-year floodplain.[29] That regulation is designed to mitigate the damage that might arise, and the loss of life that could occur, if another large hurricane hits Houston in the years to come. In the process, it's making it more costly for the developer to build his subdivision. So he has sued the city. Where Harvey is concerned, governments are getting hit from all sides. The same court has imposed liability on the government for doing both too much and too little to prevent flooding of the upstream properties. The courts have imposed this liability despite the absence of any determination, or even a credible allegation, that the government acted unreasonably. At the same time, governmental efforts to mitigate the damage that a future hurricane would do to presently undeveloped property also seem poised to trigger regulatory takings liability.

Very little of this "dammed if you do" sequence of events comports with controlling Supreme Court authority, prior Federal Circuit decisions, and common law rules tracing their history to the Founding Era and English common law. Quite simply, the Federal Circuit has made a series of consequential mistakes in perhaps the most economically significant federal takings cases in US history. Even worse, it has created perverse incentives for governments and property owners that could come back to bite society as it prepares for the next catastrophic natural disaster. This article will highlight four areas where *Milton* and *Ablan* have gone astray, beginning with the characterization of Hurricane Harvey's flooding as a taking rather than a trespass.

II. Trespass versus Taking

The most recent landmark Takings Clause case from the Supreme Court is Cedar Point Nursery v. Hassid.[30] That case established a new rule, treating government-authorized permanent but sporadic entries by third parties onto private property as per se takings,[31] with exceptions for entries onto land that is open to the general public,[32] physical invasions that are consistent with background principles of property law,[33] and exactions that fail to satisfy the Supreme Court's "essential nexus" and "rough proportionality" tests.[34] Most important for our purposes, the Supreme Court also explained that one-time entries onto land generally would be analyzed under a trespass framework, rather than a takings framework. The *Cedar Point* Court's discussion of this point is worth quoting in full.

> *First*, our holding does nothing to efface the distinction between trespass and 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. See *Portsmouth*, 260 U.S. at 329–330 ("[W]hile a single act may not be enough, a continuance of them in sufficient number and for a sufficient time

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[29] Commons of Lake Houston v. City of Houston, 711 S.W.3d 666, 674 (Tex. 2025).

[30] 594 U.S. 139 (2021).

[31] See id. at 152.

[32] See id. at 156-157.

[33] See id. at 160.

[34] See id. at 161-162.

may prove [the intent to take property]. Every successive trespass adds to the force of the evidence."); 1 P. Nichols, The Law of Eminent Domain § 112, p. 311 (1917) ("[A] mere occasional trespass would not constitute a taking."). And lower courts have had little trouble applying it. See, e.g., Hendler v. United States, 952 F.2d 1364, 1377 (CA Fed. 1991) (identifying a "truckdriver parking on someone's vacant land to eat lunch" as an example of a mere trespass).

The distinction between trespass and takings accounts for our treatment of temporary government-induced flooding in Arkansas Game and Fish Commission v. United States, 568 U.S. 23 (2012). There we held, "simply and only," that such flooding "gains no automatic exemption from Takings Clause inspection." Id., at 38. Because this type of flooding can present complex questions of causation, we instructed lower courts evaluating takings claims based on temporary flooding to consider a range of factors including the duration of the invasion, the degree to which it was intended or foreseeable, and the character of the land at issue. Id., at 38–39. Applying those factors on remand, the Federal Circuit concluded that the government had effected a taking in the form of a temporary flowage easement. Arkansas Game and Fish Comm'n v. United States, 736 F.3d 1364, 1372 (2013). Our approach in *Arkansas Game and Fish Commission* reflects nothing more than an application of the traditional trespass-versus-takings distinction to the unique considerations that accompany temporary flooding.

Notice what the Court is doing here. A single entry onto land generally won't amount to a taking, and this is true in cases involving flooding as well, such as *Arkansas Game and Fish*. True enough, that case was found to constitute a taking on remand to the Federal Circuit. But the Arkansas case emphasized that "isolated invasions, such as one or two floodings or sprayings, did not make a taking."[35] By contrast, seven consecutive years of intentional government flooding between April and October, during the plaintiffs' tree growing season, did constitute a taking.[36]

In light of *Cedar Point* and numerous lower court precedents,[37] it was not surprising that the government's defense in the Hurricane Harvey cases included the argument that the flooding that ensued was, at most, a trespass, not a taking.[38] The Federal Circuit had embraced that very argument in a 2023 flooding case:

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[35] Arkansas Game & Fish Comm. v. United States, 736 F.3d 1364, 1370 (Fed. Cir. 2013) (quoting Eyherabide v. United States, 345 F.2d 565, 569 (Ct. Cl. 1965)).

[36] See id. at 1367-1368, 1375.

[37] See, e.g., St. Bernard Par. Govt. v. United States, 887 F.3d 1354, 1363-68 (Fed. Cir. 2018); see also Orr v. United States, 166 Fed. Cl. 1, 66 (Ct. Cl. 2023) (no flowage easement required when flooding was a once in a 1,000 year storm event, and the government did not reserve the right to flood the property in the future); Devonwood-Loch Lomond Lake Ass'n, Inc. v. City of Fayetteville, 908 S.E.2d 66, 70 (N.C. App. 2024) ("In the flooding context, "the theory that the government failed to maintain or modify a government-constructed project may state a tort claim, [but] it does not state a takings claim.... Thus, for example, a government's negligence or failure to maintain sewage or drainage systems resulting in flooding does not create a federal takings claim....").

[38] Ablan v. United States, 162 F.4th 1364, 1377 (Fed. Cir. 2025).

> Indeed, while not rigid, the trespass-versus-taking inquiry focuses on whether government actions are "isolated physical invasions, not undertaken pursuant to a granted right of access, which are property assessed as individual torts rather than appropriations of a property right." *Cedar Point*, 141 S. Ct. at 2078. For example, up to three flooding events 'by themselves' do not qualify as (even a temporary) taking. National ByProd., Inc. v. United States, 405 F.2d 1256, 1273 (Ct. Cl. 1969) (collecting cases); see *Ridge Line*, 346 F.3d at 1357 ("Isolated invasions, such as one or two floodings . . . do not make a taking . . . but repeated invasions of the same type have often been held to result in an involuntary servitude.").[39]

And in the aftermath of Hurricane Katrina, plaintiffs whose land was flooded saw the Fifth Circuit treat their claims as trespasses, not takings. They lost.[40] Holding that a one-time incursion cannot be a taking is a workable bright-line rule, so it's no wonder that the Court began with this example in *Cedar Point* as it attempted to explain the takings versus trespass distinction.

Under a trespass test, the Harvey flooding plaintiffs would be very likely to lose, just as the Katrina flooding plaintiffs did. The primary reason why is an immunity built into the Federal Tort Claims Act, the statute enabling individuals to sue the federal government for trespass. The Harvey plaintiffs might well establish the elements of a trespass. The Army Corps knew that its actions would cause flooding at the time the water was released, and there was an unauthorized, unprivileged physical invasion of the property for which the government lacked flowage easements.[41] Establishing trespass causation, in turn, would require the plaintiffs to show that their land wouldn't have flooded if the dams and other flood control infrastructure had never been built.[42] This would be more difficult. But even assuming that the plaintiffs could show causation, hurricane and other flooding precedents demonstrate that the government almost certainly would prevail in a Federal Torts Claims Act suit under the discretionary function immunity that arises when government officials exercise their judgment and discretion to address a policy matter.[43]

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[39] Ideker Farms, Inc. v. United States, 71 F. 4th 964 (Fed. Cir. 2023).

[40] In re Katrina Canal Breaches Litigation, 696 F.3d 436, 448-452 (5th Cir. 2012).

[41] See, e.g., United States v. Imperial Irrigation Dist., 799 F. Supp. 1052, 1059 (S.D. Cal. 1992); 325 Goodrich Ave., LLC v. Southwest Water Co., 891 F. Supp.2d 1364, 1372 (M.D. Ga. 2012); Texas Woman's University v. The Methodist Hosp., 221 S.W.3d 267, 286 (Tex. Ct. App. 2006); Warwick Towers Council of Co-owners ex rel. St. Paul Fire & Marine Ins. Co. v. Park Warwick, L.P., 298 S.W.3d 436, 447-448 (Tex. Ct. App. 2009); 2 RESTATEMENT (FOURTH) OF PROPERTY DIV. 1 § 1.1 (Tentative Draft No. 2, 2021).

[42] See St. Bernard Parish Govt. v. United States, 887 F.3d 1354, 1362-1364 (Fed. Cir. 2018); Big Oak Farms, Inc. v. United States, 131 Fed. Cl. 45, 54 (Ct. Cl. 2017); Orr v. United States, 166 Fed. Cl. 1, 61-64 (Ct. Cl. 2023); Hampton v. Metropolitan Water Reclam. Dist. of Greater Chicago, 262 N.E.3d 694, 714-715 (Ill. App. 2025); San Jacinto River Auth. v. Gonzalez, 657 S.W.3d 713, 725-726 (Tex. Ct. App. 2022). Establishing liability under the Takings Clause also requires the plaintiff to demonstrate causation. See *infra* text accompanying note 169.

[43] See In re Katrina Canal Breaches Litigation, 696 F.3d 436, 448-452 (5th Cir. 2012); A.O. Smith Corp. v. United States, 774 F.3d 359, 364-369 (6th Cir. 2014).

The federal Flood Control Act of 1928 also makes it clear that Congress sought to immunize the federal government against statutory liability in cases involving flood control infrastructure.[44] As the Supreme Court has explained, the Flood Control Act's immunity provision "outlines immunity in sweeping terms: 'No liability of *any* kind shall attach to or rest upon the United States for *any* damage from or by floods or flood waters at *any* place.' It is difficult to imagine broader language."[45] Both the statute's unambiguous language, and the legislative history make it clear that Congress did not want to open up the federal government to future liability that could occur if flood control infrastructure failed to stop all flooding of private property.[46] Based on this assumption that it would not be liable if things went wrong, Congress dramatically expanded the scope of the nation's flood control projects. Still, there were some limits on the scope of the statutory immunity. As the Court explained in a later case, the fact that flood control was one of the reasons why a water-related project was built was inadequate to trigger this immunity, but when a plaintiff was damaged by water released during a flood or for the purpose of mitigating the effects of a flood, the plaintiff could not recover under the Federal Torts Claims Act.[47]

So if the one-time temporary flooding from Katrina was a trespass, and such trespasses could not give rise to governmental liability, what made the Federal Circuit think that the one-time temporary flooding from Harvey was a taking? The explanation is discomfiting. The Federal Circuit concluded that the Harvey flooding was "permanently recurring" such that, even if the Harvey flooding was just temporary, it was still a taking.[48] The core of the court's holding was the idea that the government reserved the right to flood the plaintiffs' property again.[49] But here's what's wild about that finding in the upstream flooding case: The Court of Federal Claims in the downstream flooding case had found that Hurricane Harvey was a once-in-2,000 years to once-in-5,000 years event.[50] As the lower court initially noted, this meant "the last such event occurred during the life of Jesus!"[51] And the Federal Circuit had never disturbed this factual

[44] See 33 U.S.C. § 702(c).

[45] United States v. James, 478 U.S. 597 (1986). *James* held that in light of this immunity provision, the federal government was not liable for concededly negligent management of a flood control facility that resulted in the fatal drowning of a plaintiff.

[46] See id. at 606-607. See also id. at 612 ("[T]here are numerous passages in the legislative history that emphasize the intention of Congress to protect the Federal Government from *any* damages liability that might arise out of flood control.").

[47] See Central Green Co. v. United States, 531 U.S. 425, 434 (2001).

[48] Ablan v. United States, 162 F.4th 1364, 1375 (Fed. Cir. 2025).

[49] Id. at 1376.

[50] In re Downstream Addicks, 147 Fed. Cl. 566, 572 (Ct. Cl. 2020). Indeed, in some parts of Houston, "the 3-day rainfall during Harvey has been estimated to have exceeded a 9,000 year event." Jonkman et. al, *supra* note 11, at 1073. In his academic writing, the plaintiffs' primary expert witness described Harvey's flooding as a 100-year flood. See Furrh & Bedient, *supra* note 9, at 993. Disturbingly, Bedient's conflict-of-interest disclosure in that research article does not mention his role as a paid expert witness for the plaintiffs in the Upstream Flooding litigation. See id. at 997; In re Upstream Addicks, 146 ed. Cl. at 244.

[51] *In re Downstream Addicks*, 147 Fed. Cl. at 570.

finding. That's for good reason: The Court of Federal Claims had it right. Independent analyses confirm that Hurricane Harvey was "the rainiest Atlantic Hurricane every measured,"[52] "caused the largest tropic rainfall in the history of the US,"[53] and produced "the highest rainfall amount in a single storm for any place in the continental United States."[54] Placing the rainfall in a local context, at "Houston's Hobby airport, the three-day rainfall from August 26-28 was greater than the previous record for wettest *65-day* period. Three of the airport's 5 wettest days since 1930 happened during Harvey," and Houston received more than twice as much rainfall in August 2017 as during its previous wettest month in recorded history.[55]

So yes, the plaintiffs might see their lands flooded again but, assuming the Court of Federal Claims's factual findings were correct, the landowners could not expect that to happen for another couple of millennia. To be sure, there are sequoias that can expect to live for that long. But such a timespan does not meet any human's definition of a recurring invasion, save perhaps the humans on the Federal Circuit. In economic terms, the discounted present value of preventing flooding that would otherwise occur 2,000 years in the future is zero.[56] It's of course possible that Harvey-level flooding might become more frequent because of climate change, but that prospect just isn't consistent with the court's factual findings.[57]

The Court of Federal Claims in the upstream case circumvented the "one flood isn't a taking" rule by emphasizing that the government expressly reserved the right to flood the land in the future.[58] Judge Lettow wrote, "Even if a single event of this nature were insufficient to rise to a taking, the sheer frequency of significant storms in the region both before and since construction of the dams – the Hearne storm, the Taylor storm, the 1929 and 1935 storms, Tropical Storm Claudette in 1979, the 1992 series of storms, Tropical Storm Allison in 2001, and the Tax Day Storm – suggests that this was more than an isolated event, and that it is likely to

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[52] Robinson Meyer, *Hurricane Harvey is the Rainiest Atlantic Hurricane Ever Measured*, THE ATLANTIC, Aug, 29, 2017.

[53] Arnoldo Valle-Levinson, Maitane Olabarrieta & Lorraine Heilman, *Compound Flooding in Houston-Galveston Bay During Hurricane Harvey*, 747 SCI. OF TOTAL ENV. 141272, at 2, Dec. 2020. The Court of Federal Claims did not dispute this. See *In re Upstream Addicks*, 146 Fed. Cl. at 240 (describing Harvey as "the largest storm in the recorded history of the United States.").

[54] Id. See *In re Upstream Addicks*, 146 Fed. Cl. at 261.

[55] Id.

[56] On remand in the downstream case, the Court of Federal Claims embraced a different argument. On cross examination, one of the government's experts conceded that a series of moderate storms arriving back-to-back-to-back might theoretically force the Army Corps to release water downstream at levels similar to what happened in Harvey. See In re Downstream Addicks and Barker (Texas) Flood-Control Reservoirs, 181 Fed. Cl. 225, 255 (2026). It does not appear that the record contains any evidence that this confluence of multiple moderate storms in a short period of time producing a devastating cumulative effect has ever happened in the area's recorded history. Recall that Harvey alone smashed Houston's records for the area's wettest month on record. *See supra* text accompanying note 55.

[57] For further discussion of this point see *infra* text accompanying note 198.

[58] See In re Upstream Addicks and Barker (Texas) Flood-Control Reservoirs, 146 Fed. Cl. 219, 250 (Ct. Cl. 2019).

recur."[59] The judge also quoted the plaintiffs' expert, who (perplexingly) insisted that Harvey did not produce unprecedented rainfall in the region and that at some point in the future another storm like Harvey would hit Houston.[60] Again, maybe in the *very* distant future, but an independent analyses of the Harvey rainfall indicated that the odds of somewhere in the United States receiving as much precipitation as Houston received are 1 in a thousand during a single year, and another analysis found that the odds of an area receiving as much rain in a five-day period as Houston received during Harvey are between 4 in 100,000 and 2 in one million.[61]

Contrary to Judge Lettow's conclusions, the evidence in the upstream case did not indicate that the storms his opinion mentioned, all of which were obviously much less severe than Harvey, had caused the flooding of upstream homes. Rather, his opinion noted that as of 2009, the upstream reservoirs had never produced flooding onto private property.[62] The 2016 Tax Day Storm did cause flood pools to exceed the government-owned reservoirs in a few areas, but did not inundate any upstream structures in the Houston reservoir area.[63] And it was only during the flooding caused by Harvey that many upstream owners learned for the first time that their homes were built within federal flood control reservoirs.[64] The judge found that the Harvey flooding was "more severe than any prior flooding" even though they were built "in a geographical area that is generally susceptible to large storms and potential flooding."[65]

On remand in the downstream case, the Court of Federal Claims recharacterized the nature of the government's flooding in a different way. It said Hurricane Harvey was not actually a one-time event, and therefore not a trespass. Rather it was an event that prompted the government to release water gradually from the reservoirs over the course of two weeks in the storm's immediate aftermath.[66] The amount of water released each day was determined by the amount of rainfall received and the resulting risk that the dam would fail. In essence, the Court of Federal Claims engaged in a variant of the temporal conceptual severance explicitly condemned by the Supreme Court in Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency,[67] treating the release of water from a single hurricane that dumped water on

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[59] See id. at 251.

[60] See id.

[61] See Tom Di Libreto, Reviewing Hurricane Harvey's Catastrophic Rain and Flooding, NOAA Climate.gov, Sep. 18, 2017, available at https://web.archive.org/web/20251117175030/https://www.climate.gov/news-features/event-tracker/reviewing-hurricane-harveys-catastrophic-rain-and-flooding.

[62] See *In re Upstream Addicks*, 146 Fed. Cl. at 261.

[63] See id.

[64] See Collier, *supra* note 24.

[65] See *In re Upstream Addicks*, 146 Fed. Cl. at 240.

[66] See In re Downstream Addicks and Barker (Texas) Flood-Control Reservoirs, 181 Fed. Cl. 225, 248 (2026) ("Defendant's only cognizable rebuttal arises from its belief that Harvey's singular occurrence turns plaintiffs' claims into a tort. But the alleged taking arose from defendant's decision to flood plaintiffs' properties through induced surcharges, not the storm itself.").

[67] 535 U.S. 302, 331 (2002). In *Tahoe-Sierra*, the Supreme Court rejected an effort to treat a 32-month moratorium on the development of land held in fee simple as a total taking of a hypothetical 32-month

Houston for consecutive days as a series of discrete water release events that gave rise to takings liability.

The Court of Federal Claims' analysis produces perverse incentives for the government. If the government released large quantities of water all at once, the effects would resemble a dam failure, resulting in catastrophic loss of life and property. But because that irresponsible release would be a one-time trespass event, the government would escape liability. On the other hand, if the government responsibly releases water over the span of days, both to mitigate the threats to life and property downstream, and to ensure it releases no more water than necessary in the face of unknown future rainfall, then the government exposes itself to enormous financial liability under the Takings Clause. A competent and responsible government (the Army Corps in Houston) is transformed into a private insurer, but an incompetent or irresponsible government would have walked away scot-free.

One final point is worth making here. If the government is just taking a flowage easement that will be exercised once in a century or millennium, the fair market value of that easement should be close to zero. A flowage easement is not necessarily a binary entitlement. The value of an easement that allows the government to flood land annually should be much closer to the fair market value of a fee simple than the compensation due for an easement to flood land just once a century or once a millennium.[68] If the frequency of flooding subsequently increases, say because of climate change, then the remedy for the plaintiffs is to go back to court to seek additional compensation.[69] But precisely because it is rational to assume that Hurricane-Harvey-level-flooding will not recur in their lifetimes or their children's lifetimes, a rational purchaser of real estate in a part of Houston that flooded only during Harvey and no other storms would likely accept a paltry amount for a once-in-generations flowage easement. After *Ablan* and *Milton*, the government might still owe landowners for damage to structures and other improvements, and this aspect of the judgment could amount to billions of dollars. But the compensation due for the flowage easements themselves should be small.

In short, the Court of Federal Claims treated the once-in-two-millennia flooding as something that would recur and force the government to flood the plaintiffs' property once again. And the Court penalized the Army Corps for engaging in a prudent gradual release of accumulated storm water over the course of days rather than a one-time release that would have resulted in catastrophic downstream flooding. On these bases, and on the basis of expert testimony that flew in the face of the scientific consensus, the court converted a rather unambiguous trespass into a taking, and the Federal Circuit failed to appreciate these fundamental errors in the application of well-established black-letter law. And even if the Federal Circuit has it right, because repeated cataclysmic flooding in the next century is so unlikely a

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leasehold interest. For further discussion of conceptual severance in the Takings Clause, see GREGORY S. ALEXANDER, LIOR JACOB STRAHILEVITZ & DAVID N. SCHLEICHER, DUKEMINIER & KRIER'S PROPERTY 946-947, 988-989, 997 (11th ed. 2026).

[68] See U.S. v. 2,648.31 Acres of Land, 218 F.2d 518, 522 (4th Cir. 1955).

[69] See id. ("If in the future . . . a greater servitude should be placed upon these lands by changes in the dam, we have no doubt that the owners will be entitled to additional compensation if the value of the lands is adversely affected thereby.").

proper award of just compensation on remand should include small valuations for the relevant flowage easements.

III. **Necessity Defenses**

Ever since the nineteenth century, the Supreme Court has consistently reaffirmed the idea that when the government destroys property in order to deal with an emergency, it need not compensate the owners for the resulting damage. The necessity defense essentially embeds in our legal system the utilitarian impulse to protect the bystander who decides to flip the switch when confronted with a trolley problem. The landmark case establishing this proposition as a matter of takings law is Bowditch v. City of Boston, decided by the Court in 1879. The *Bowditch* court rejected an appeal by a building owner whose structure was blown up, apparently by Boston's Postmaster, in order to prevent a fire from spreading to other parts of the city.[70] In affirming the trial court's directed verdict in the government's favor, the Supreme Court emphasized the long common-law and natural law tradition of permitting the destruction of property when necessary to prevent a grave harm. As the Court put it:

> At the common law every one had the right to destroy real and personal property, in cases of actual necessity, to prevent the spreading of a fire, and there was no responsibility on the part of such destroyer, and no remedy for the owner. . . . There are many other cases besides that of fire, -- some of them involving the destruction of life itself, -- where the same rule is applied. "The rights of necessity are a part of the law." Respublica v. Sparhawk, 1 Dall. 357, 362. See also Mouse's Case, 12 Rep. 63; 15 Vin., tit. Necessity, sect. 8; 4. T.R. 794; 1 Zab. (N.J.) 248; 3 id. 591; 25 Wend. (N.Y.) 173; 2 Den. (N.Y.) 461. In these cases the common law adopts the principle of the natural law, and finds the right and the justification in the same imperative necessity. Burlem. 145, sect. 6; id. 159, c. 5, sects. 24-29; Puffendorf, B. 2, c.6.[71]

The first case cited by the *Bowditch* Court was *Sparhawk*, a landmark 1788 Pennsylvania Supreme Court opinion involving 227 barrels of flour belonging to Sparhawk during the Revolutionary War. With British troops advancing on Philadelphia, Congress directed the Pennsylvania Board of War to order the removal of all articles that would be valuable to the Redcoats' war efforts if they fell into enemy hands. Sparhawk's flour was removed to Chesnut Hill for safekeeping pursuant to this order. Unfortunately, the British troops wound up seizing Chesnut Hill's depot in any event, so Sparhawk's flour was confiscated by the Crown.[72] Sparhawk sued the American government and lost. The court stated that what would ordinarily be a trespass by the government would be excused in cases of necessity. As the court explained:

> Of this principle, there are many striking illustrations. If a road be out of repair, a passenger may lawfully go through a private enclosure 2 Black. Com. 36. So, if a man is assaulted, he may fly through another's close. 5 Bac. Abr. 173. In time of war, bulwarks may be built on private ground. Dyer. 8. Brook. trespass. 213. 5 Bac. Abr. 175. and the reason assigned is particularly applicable to the present

[70] 101 U.S. 16, 22 (1879).

[71] Id. at 18-19.

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

case, because it is for the public safety. 20 Vin. Abr. (trespass) B. a. sec. 4. fo. 476. Thus, also, every man may, of common right, justify the going of his servants, or horses, upon the banks of navigable rivers, for towing barges, &c. to whomsoever the right of the soil belongs. 1 Ld. Raym. 725. The pursuit of Foxes through another's ground is allowed, because the destruction of such animals is for the public good, 2 Buls. 62. Cro. I. 321. And, as the safety of the people is a law above all others, it is lawful to part affrayers in the house of another man. Keyl. 46. 5 Bac. Abr. 177. 20 Vin. Abr. fo. 407. sec. 14. Houses may be razed to prevent the spreading of fire, because for the public good. Dyer. 36. Rud. L. and E. 312. See Puff. lib. 2. c. 6. sec. 8. Hutch. Mqr. Philos. lib. 2. c. 16. 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.

> We are clearly of opinion, that Congress might lawfully direct the removal of any articles that were necessary to the maintenance of the Continental army, or useful to the enemy, and in danger of falling into their hands; for they were vested with the powers of peace and war, to which this was a natural and necessary incident: And, having done it lawfully, there is nothing in the circumstances of the case, which, we think, entitles the Appellant to a compensation for the consequent loss.[73]

There is a lot to unpack in this important passage from *Sparhawk*, so let's work through several key points.

First, the court's reference to the Great London Fire of 1666 is illuminating. The calamitous fire that burned most of London's city center likely could have been stopped in its infancy, but hesitation by London's mayor doomed the fire control efforts. When first alerted to the fire in the middle of the night, London's Lord Mayor, Thomas Bloodworth, saw it from a distance and scoffed, "Pish! A woman might piss it out."[74] Soon after, the Lord Mayor began to recognize his mistake, especially after being ordered by King Charles II to start preemptively demolishing buildings that were in the fire's path to prevent a widespread conflagration.[75] Even after receiving his sovereign's instructions, Bloodworth hesitated. As Christoph Heyl puts it:

> Having underestimated the formidable danger posed by the fire from the very beginning, he did not manage to come up with anything resembling a coherent and practical strategy during the early phase of the conflagration. For Bloodworth, the protection of both liberty and property must have been a key concern. He

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[73] Id. at 363.

[74] The cringeworthy quote appears in Christoph Heyl, *A Miserable Sight: The Great Fire of London* (1666), in FIASKO-SCHEITERN IN DER FRUHEN NEUZEIT 111 (Stefan Brakensiek & Claudia Claridge eds. 2015).

[75] See id. at 113.

> found himself in a dilemma; the only way to save houses was to destroy other houses.[76]

Bloodworth's Hamletesque "folly" turned into a morality tale in the minds of seventeenth-century Londoners, eighteenth-century Americans, and the *Sparhawk* court.[77] When faced with disasters, bold, immediate, and proactive leadership was required. Governmental hesitation to impose real costs on the few risked calamity for all. For the Founding generation, who had lived through and often fought in the American Revolutionary War, Pennsylvania's actions would have been highly salient in their understanding of the new government's powers.[78]

Second, the timing of the *Sparhawk* decision is worth underscoring, as the case was decided during the process of ratifying the Constitution,[79] and almost exactly one year before the Bill of Rights, which includes the Fifth Amendment's Takings Clause, was submitted to the states for ratification. To an originalist, this 1788 pronouncement by the Pennsylvania Supreme Court is as clear an indication as one will find of the background legal rules that would have informed the Framers' understanding of the Takings Clause's scope.[80] In defining the scope of

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[76] Id. at 116.

[77] *Sparhawk*, 1 U.S. at 363; see generally Andrea McKenzie, *Fire, Fake News and the Standing Army: Arson and Moral Panics During the Popish Plot, 1678-81*, in CULTURAL HISTORIES OF LAW, MEDIA AND EMOTION 19, 22 (2022) ("[T]he principal method of stopping a fire was blowing up houses in its path with gunpower. During the Great Fire of London in 1666, the then mayor Thomas Bloodworth famously quailed at taking such drastic measures, fearing the wrath of the residents whose homes would be destroyed, ultimately necessitating the direct intervention of Charles II and the Duke of York. Years later, one London citizen still grumbled at the mayor, blaming him for the 'great estate that he lost by the fier.'"). Some scholars have argued that Bloodworth became a scapegoat for poor weather and bad luck. See, e.g., 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, 489-491 (2006).

[78] Frederick R. Black, *The American Revolution as "Yardstick" in the Debates on the Constitution, 1787-1788*, 117 PROCEEDINGS OF THE AM. PHIL. SOC'Y 162, 174-175 (1973) (describing how the success of the continental army shaped early Americans' understanding of the Constitution); id. at 184 ("All Americans accepted and approved of the Revolution. Furthermore, for most individuals the Revolution had been the most dramatic public incident in their lives. . . . Members of all classes, professions, religious groups, and age categories had some firsthand acquaintance with the Revolution and the war.").

[79] When the decision was handed down eleven of the thirteen colonies had ratified the Constitution. North Carolina ratified two months after *Sparhawk,* and Rhode Island ratified it about half a year after that.

[80] The Northwestern University Law Review recently published a student note that asserts otherwise. See Tony Smith, Note, *Take in Case of Emergency: Reconciling Necessity Takings with the Original Meaning of the Takings Clause*, 120 Nw. U. L. Rev. 465, 483 (2025). The Note ignores the Great London Fire of 1666, inexplicably calls *Sparhawk* an "outlier" case while pointing to no Founding-era American cases that rejected the necessity defense, unpersuasively treats as irrelevant various private necessity cases on which *Sparhawk* relied, and hand-waives about both liquidation and all the cases that do not go in the author's apparently preferred direction. For discussions about the problematic nature of these kinds of analytical moves, see generally Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Madisonian Liquidation, and the Originalism Debate*, 106 VA. L. REV. 1 (2020) (exploring the relationship between liquidation and historical gloss for originalism); William Baude, *Is Originalism Our Law?*, 115 COLUM.

the Takings Clause, the Supreme Court generally looks to the history of the Founding era and the period that followed.[81]

Third, *Sparhawk* makes clear that the necessity exception was not limited to fighting fires and redcoats at the time of the nation's founding. Rather, it encompassed far more mundane acts, like entering onto private property when a road had washed out. The necessity exception even extended, we learn, to trespassing on another's land for the purpose of killing foxes, who of course loom large in the annals of property law.[82] *Bowditch* also cited to *Mouse's Case*, a landmark 1608 English decision, which held that when a storm threatened a boat carrying 47 passengers, a passenger who threw cargo overboard to prevent the boat from sinking was not liable to the owner of the cargo.[83] The other primary cases relied on by the *Bowditch* Court, involved familiar facts of destroying buildings to prevent the spread of fires.[84] As Senator Verplanck, sitting on New York's highest court, put it in 1840, "[t]he necessity of the case compels the destruction of some property in order to save more; those who commit this act of salutary and well intentioned violence are exempted from responsibility, upon every ground of justice and of positive law."[85] As a review of these varied facts suggests, "necessity" is in some respects an unhelpful term. Killing a single fox is of course not absolutely necessary, and someone who encounters a damaged road can usually double back to the last intersection and pick a different route instead of crossing private property. But those actions were still privileged in the same way that more obviously critical actions by soldiers and firefighters were. The common theme at America's founding seemed to have more to do with the existence of a public-spirited limitation on property rights rather than time being of the essence. During the era of *Sparhawk*, and continuing through to the *Bowditch* era, then, the government's necessity defense was not a narrow rule applicable only to fires or wartime property destruction, but a broader rule permitting the government to avoid takings liability whenever it dealt with a threat that required

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L. REV. 2349, 2358 (2015) (describing the relevance of founding era interpretive methods and background rules for originalists). Smith's main argument seems to be that the text of the Fifth Amendment itself lacks an explicit necessity exception. See id. at 476-480. We knew that already. The interesting questions for originalists are what the framers meant by the word "taken," and how common law precedents, background principles, and natural law would have informed that era's interpretation of the Takings Clause's text. A more plausible, non-originalist claim is advanced in Brian Angelo Lee, *Emergency Takings*, 114 MICH. L. REV. 391 (2015). Lee correctly points out that after *Sparhawk* and *Bowditch*, not every necessity judicial decision has gone the government's way, though the government has generally prevailed when paying compensation for widespread destruction could impose very large fiscal costs on the government, as in the Civil War and World War II. See id. at 449-453. Lee presents a normative case for paying partial compensation in necessity cases. See id. at 453.

[81] See Pung v. Isabella County, 609 U.S. ___, 146 S. Ct. 1964, 1968-1970 (U.S. 2026).

[82] See Pierson v. Post, 3 Cai. R. 175, 2 Am. Dec. 264 (N.Y. 1805).

[83] Mouse's Case, 77 Eng. Rep. 1341, 12 Co. Rep. 63 (K.B. 1609).

[84] See Stone v. The Mayor, 25 Wend. 157 (N.Y. 1840).

[85] Id. at 177. The court, by a vote of fifteen to three, affirmed the government's trial court victory. See id. at 186.

it to sacrifice some peoples' property interests in order to save others' property, promote national defense, or serve some less vital purpose.[86]

This broad conception of the necessity defense was one that the Founding generation embraced, in cases like *Sparhawk*, and it was one that the modern Supreme Court has reaffirmed, most famously in Justice Scalia's landmark majority opinion, Lucas v. South Carolina Coastal Council.[87] There, Justice Scalia wrote that the government generally would be liable whenever it deprived a landowner of all economically beneficial and productive uses of land, with the exception of instances where the government was acting to abate a nuisance, or where it was acting out of necessity. As he wrote, for the Court, the government would not be liable under the Takings Clause for wiping out an owner's real or personal property where it acted "in cases of actual necessity, to prevent the spreading of a fire, or to forestall other grave threats to the lives and property of others."[88] The Court cited *Bowditch* and United States v. Pacific Railroad Co.[89] for this proposition. Other twentieth-century caselaw re-affirmed the same proposition. As the Supreme Court put it in United States v. Caltex (Philippines), Inc.,[90] "the common law had long 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 that the property of many and the lives of many more could be saved."[91] The *Caltex* Court thus denied compensation to the owners of an oil company terminal that was destroyed by the retreating US military to prevent it from falling into Japanese hands.[92]

The broad conception of necessity was echoed by both the majority and Justice Kavanaugh's concurring opinion as recently as 2021, in *Cedar Point*. Recall that *Cedar Point Nursery* involved a longstanding California regulation that required owners of farmland to permit union organizers to enter private property to facilitate unionization campaigns for up to three hours per day and up to 120 days in a year.[93] In explaining that the government was usually liable when it authorized third parties or its own agents to invade private property, the *Cedar Point* majority was careful to note that the government would not be liable under the Takings Clause in cases of necessity. As the Court noted:

> many government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights. . . . These background limitations also encompass traditional common law privileges to access private property. One such privilege allowed individuals to enter private property in the event of public or private necessity. See Restatement

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[86] For further elaboration, see *infra* text accompanying note 102.

[87] 505 U.S. 1003 (1992).

[88] Id. at 1029 n. 16.

[89] 120 U.S. 227 (1887).

[90] 344 U.S. 149 (1952).

[91] Id. at 154.

[92] See id. at 156.

[93] See Cedar Point Nursery v. Hassid, 594 U.S. 139, 143 (2021).

(Second) of Torts § 196 (1964) (entry to avert an imminent public disaster); § 197 (entry to avert serious harm to a person, land, or chattels).[94]

Section 196 of the Restatement, in turn, provides that "one is privileged to enter land in the possession of another if it is, or if the actor reasonably believes it to be, necessary for the purpose of averting an imminent public disaster," and the commentary emphasizes that someone entering private property "to prevent *or mitigate* the effects of an impending public disaster such as a conflagration, flood, earthquake, or pestilence" is privileged to do so.[95] Section 196's Reporter's Notes, in turn, cite favorably to *Sparhawk*'s reasoning.[96] Section 197 contains similarly defendant-protective provisions.[97]

In deciding that the California regulation amounted to a physical taking of Cedar Point's property, the majority had to explain why that result was consistent with NLRB v. Babcock & Wilcox Co., a 1956 precedent.[98] *Babcock & Wilcox* involved a similar conflict between labor rights and private property. The National Labor Relations Board argued that the National Labor Relations Act gave union organizers the right to enter private property to communicate with workers. The Supreme Court construed the statute so as to provide for such access only in cases where speaking to workers on company property was necessary, which in that case was limited to situations "when the employees live on company property and union organizers have no other reasonable means of communicating with the employees."[99] The *Cedar Point* majority rationalized *Babcock & Wilson* as a precedent sensibly protecting private property rights "at least outside the unusual circumstance where their employees were otherwise 'beyond the reach of reasonable union efforts to communicate with them.'"[100] Justice Kavanaugh wrote separately to emphasize that both *Cedar Point* and *Babcock & Wilcox* were correctly decided. Kavanaugh explained, "*Babcock* recognized that employers have a basic Fifth Amendment right to exclude from their private property, subject to a 'necessity' exception similar to that noted by the Court today."[101] Sometimes, then, a union organizer advocating for collective bargaining could successfully invoke the necessity defense. In short, Justice Kavanaugh's conception of the necessity defense in takings cases echoes earlier cases in American history, such as those of the

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[94] Id. at 160-161.

[95] RESTATEMENT (SECOND) OF TORTS § 196 & cmt. a (1964) (emphasis added).

[96] Id. cmt. d, Reporter's Notes ("A striking illustration of the unwisdom of restricting this privilege within too narrow limits is noted in the opinion of M'Kean, C.J., in Respublica v. Sparhawk [referencing the Great London Fire]").

[97] See RESTATEMENT (SECOND) OF TORTS § 197 cmt. f ("Where the actor enters for the protection of the possessor of the land or a third person or the property of either of them, it is sufficient to the existence of the privilege that the actor's conduct is necessary or reasonably believed by him to be necessary for accomplishing the purpose of his entry and that the measures taken by him are reasonable in the light of all the circumstances.").

[98] 351 U.S. 105 (1956).

[99] *Cedar Point*, 594 U.S. 139, 163 (Kavanaugh, J., concurring).

[100] Id. at 594 U.S. 157 (majority op.) (citing *Babcock & Wilcox*, 51 U.S. at 113).

[101] Id.

hunter pursuing the fox or the motorist confronting a damaged roadway,[102] where it is challenging to point to grave and imminent public harm if the defendant fails to act.

Contemporary Texas state law understands the necessity defense in the same way that the older common law authorities and the Restatement do,[103] though with more emphasis on the imminence of the threat confronted by a defendant. This convergence matters because state law typically determines the contours of property for federal takings claims.[104] Of special interest is the recent Texas Court of Appeals decision in San Jacinto River Authority v. Ross, another Hurricane Harvey case.[105] Under Texas law, "an action taken out of a reasonable good faith belief that the action is necessary to prevent a grave and immediate threat to life or property" does not give rise to takings liability.[106] The court concluded "that Harvey presented a grave and immediate threat to life or property."[107] The court went on to hold that Texas law's definition of necessity did not require strict necessity, but merely that the state's action was "appropriate and well adapted to fulfilling an objective" or "needed for some purpose."[108] Under that standard, the state government's decision to release water from its reservoirs to protect the integrity of a dam easily qualified as necessary under state law.[109]

Pre-Harvey Federal Circuit precedent said largely the same thing. While the government could not prevail on the necessity test just because it was engaged in fighting any kind of blaze,[110] the circuit court in *TrinCo* stated that the government should prevail in cases of "actual emergency, imminent danger, and the actual necessity of the Government action."[111] As examples of such emergencies, the court offered "a fire burning in a populated city, as in *Bowditch*, or an invading enemy army, as in *Caltex*."[112] On remand, the Court of Federal Claims explained that "a governmental response to an actual emergency and imminent danger is actually

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[102] *See supra* text accompanying note 86.

[103] See, e.g., San Jacinto River Auth. v. Gonzalez, 657 S.W.3d 713 (Tex. Ct. App. 2022) (finding that the plaintiffs lost on causation because they could not show that their property wouldn't have flooded if the government's flood-control infrastructure had never been built); San Jacinto River Auth. v. Ross, __ S.W.3d ___, 2025 WL 2934051 (Tex. Ct. App. Oct. 16, 2025) (finding no taking in light of the government's necessity defense because the release of reservoir water downstream during Harvey was necessary to avoid the risk of dam failure)

[104] See, e.g., Phillips v. Washington Legal Found., 524 U.S. 156, 164 (1998).

[105] San Jacinto River Auth. v. Ross, __ S.W.3d ___, 2025 WL 2934051 (Tex. Ct. App. Oct. 16, 2025).

[106] Id. at *3.

[107] Id. at *10.

[108] Id. at *15.

[109] See id.

[110] See TrinCo Inv. v. U.S., 722 F.3d 1375, 1378 (Fed. Cir. 2013) (Extending "the doctrine of necessity to automatically absolve the Government's action in any case involving fire control stretches the doctrine too far.").

[111] Id. at 1379.

[112] Id. at 1380. These kinds of takings remain quite common in the contemporary era despite advances in fire-control and combat techniques. See Lee, *supra* note 80, at 397-398.

necessary if it is a *reasonable* response under the circumstances."[113] In other words, the government's action needed to be reasonably necessary, with the court rejecting the plaintiffs' argument advocating for "a strict limitation on the necessity defense to those situations where only one possible emergency response is feasible."[114] Critically, "the necessity of the agency's fire-fighting response will be measured at the time of the actual emergency and imminent danger, not in hindsight, and must take into account the information available to the fire-fighters at that time."[115]

The parsimonious version of the necessity defense that the *Ablan* court articulated is one that the common law, natural law, Texas state law, and U.S. Supreme Court precedents re-affirmed over the course of centuries would scarcely recognize. Here is the key paragraph where the Federal Circuit rejected the government's necessity defense in the upstream case.

> The government contends that any taking is excused by a necessity defense. See Appellant's Br. 45–51. We disagree. This is not a case where the government prevented a landowner from activities "akin to public nuisances." Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1022 (1992). Nor is it one where the government's actions were in response to an unforeseeable exigency, such as where urgent action was taken "to prevent the spreading of a fire." See id. at 1029 n.16 (quoting Bowditch v. City of Boston, 101 U.S. 16, 18–19 (1879)). And the government did not build and operate the Addicks and Barker Dams for the benefit of Plaintiffs. Cf. Nat'l Bd. of YMCA v. United States, 395 U.S. 85, 90–93 (1969) (holding that there was no compensation for takings liability when there was a temporary and unplanned occupation of petitioners' buildings by troops who "were acting primarily in defense of petitioners' buildings," rather than the "general defense" of the zone). Instead, the government, as it does in every flooding case, allocated the location of water between private citizens. In doing so, it aided some property owners (downstream residents) and harmed others (upstream residents). "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar [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." Armstrong v. United States, 364 U.S. 40, 49 (1960). Accordingly, we reject the government's necessity defense.[116]

There are several mis-readings of the Supreme Court's caselaw in this passage. First, the necessity defense is not limited to cases where the government is destroying property that a landowner is using in a nuisance-like manner. As *Lucas* made clear, the nuisance defense and the necessity defense are analytically separate.[117] They provide alternative rationales by which the government may defeat a takings suit despite the destruction of an owner's property. Neither

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[113] Trin-Co Inv. Co. v. United States, 130 Fed. Cl. 592, 600 (Ct. Cl. 2017) (emphasis in original).

[114] Id.

[115] Id. at 601.

[116] Ablan v. United States, 162 F.4th 1364, 1378 (Fed. Cir. 2025).

[117] See *supra* text accompanying note 88.

Bowditch's building, nor Sparhawk's flour, nor Caltex's terminal were nuisances. Nuisance deals with the external costs of a land use, and necessity deals with the need for bold government action when it confronts a trolley problem.

Second, there has never before been a limitation on the necessity defense where it only applies to unforeseeable actions. Quite the contrary, it is entirely foreseeable that fires will break out and spread in cities like Boston, and in *Bowditch* the Supreme Court was interpreting a city ordinance that explicitly authorized the city to dynamite buildings in precisely those circumstances.[118] So too with war planning, the entry of foxes onto private land, the arrival of union organizers to meet with workers who both live and work on a rural farm, and the various other necessity cases that are well-established. Indeed, in the Upstream case the Court of Federal Claims had fleshed out the reasoning that the Federal Circuit would affirm in *Ablan*. It said that the necessity defense was limited to situations "unexpectedly arising."[119] In constructing the dams, the Army Corps had contemplated the possibility that water might spill over the limits of the existing reservoirs if an unprecedented storm ever hit Houston. Therefore, to the Court of Federal Claims, "the necessity defense cannot apply here because it cannot be said that 'necessity' existed in this case, when the flooding that occurred was the direct result of calculated planning."[120]

Ablan's language placed the Court of Federal Claims in the downstream case between the rock of the Federal Circuit's instructions and the hard place of virtually every other necessity precedent from American courts. The Court of Federal Claims obligingly followed *Ablan*. In the process, it articulated quite possibly the stingiest and strangest conception of the Takings Clause's necessity defense ever articulated in this country. The Court of Federal Claims concluded that at its highest level during Harvey the Addicks dam pool elevation did not exceed 109.09 feet, less than six feet shy of levels that would create a 14% risk of the Addicks floodways failing.[121] The court did not wrestle with the argument that gradual downstream releases explained why the dam did not reach those critical levels, even though another recent Court of Federal Claims necessity decision ruled in the government's favor on precisely that rationale.[122] The court also dug into the details of the Army Corps' Emergency Action Plan ("EAP"), a planning document prepared in advance of Harvey, while noting that the Corps did not follow the EAP, but instead followed a separate document, the Water Manual, to govern controlled releases from the floodgates.[123] The EAP provides for three "Emergency Levels"

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[118] See *Bowditch*, 101 U.S. at 17, 20-21.

[119] In re Upstream Addicks and Barker (Texas) Flood-Control Reservoirs, 146 Fed. Cl. 219, 264 (Ct. Cl. 2019).

[120] Id.

[121] See In re Downstream Addicks and Barker (Texas) Flood-Control Reservoirs, 181 Fed. Cl. 225, 266 (2026).

[122] See Orr v. United States, 166 Fed. Cl. 1, 75 (Ct. Cl. 2023) ("The steps taken by government officials, however . . . were ultimately the reason that the Olympus Dam did not fail, which was the danger that concerned them. The testimony that the dam was not in danger can also be understood as reflecting that those witnesses understood that it was their own success given that the actions they took preserved the dam, not a lack of a possibility that the dam could fail.").

[123] See *In re Downstream Addicks*, 181 Fed. Cl. at 235-236.

where downstream releases would be required. Emergency Level 1 describes an "Unusual Event or Developing Condition," Emergency Level 2 describes "Expected Flooding from Uncontrolled/Controlled Releases or Potential [D]am Failure Situation," and Emergency Level 3 arises in "an extremely urgent situation where conditions are such that failure is judged to be imminent or in progress."[124] The Army Corps began controlled releases from the dams when conditions at the dam were at Emergency Level 2.[125] As the court saw it, the fact that the releases occurred at Level 2 rather than Level 3 established "that the Dams did not face an imminent danger."[126]

In essence, then, the Court of Federal Claims imposed a novel "intent" test for necessity and imminence. Had the Army Corps waited until the precise moment when the Addicks and Barker reservoirs were on the verge of failing, then the necessity defense would have been appropriate. But because the Army Corps acted a little bit more prudently, gradually releasing water to avoid a grave threat to the dam's integrity that would have placed 600,000 lives in peril,[127] the necessity defense was inapplicable. There are two problems with the Court of Claim's innovation. First, the test it applied has never been the law. It shows up in neither the Restatement nor any of the earlier cases. Second, its new test creates problematic incentives for government officials, precisely the kinds of incentives that the necessity defense was designed to remove.

Just how imminent does an "imminent risk" need to be? In none of the necessity cases referenced above, *Sparhawk*, *Bowditch*, *Pacific Railroad, Ross*, and *Caltex (Philippines)*, is there any indication that the government only destroyed property at the last possible moment. Nor did any court fault them for not having waited a little longer until the government was on the brink of disaster. Quite the contrary. For example, in *Sparhawk*, the plaintiff's flour was removed from the city on April 18, 1777 and transferred to Chestnut Hill. But in the days that followed it turned out that the British were "not approaching so rapidly as was expected," and as ironically the British wound up capturing the Chestnut Hill depot and, with it, Sparhawk's 227 barrels of flour.[128] The court didn't think that timeline mattered at all, embracing the government's necessity defense based on the ex ante danger that the flour might have fallen into the redcoats' hands had it remained in Sparhawk's possession.[129] Other cases, like *Bowditch*, make it clear that the courts are to be deferential to the actions of government decision-makers. If a government official charged with fire control reasonably concludes that blowing up a building is necessary to prevent the spreading of a conflagration, and the government then does so, then the Constitution does not mandate just compensation. Rather, any right that a plaintiff might have to compensation would depend on a statutory scheme.[130] There's no hint of judicial second-

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[124] Id. at 268.

[125] See id.

[126] Id.

[127] See id. at 238, 266.

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

[129] See id. at 363.

[130] See Bowditch v. City of Boston, F. Cas. 1038, 1045 (Cir. Ct. D. Mass. 1876), *aff'd* Bowditch v. Boston, 101 U.S. 16 (1879).

guessing of high-stakes decisions that government officials must make when stuck between a rock and a hard place. Caltex (Philippines) was similar – the retreating U.S. Army in the Philippines demolished the plaintiff's oil depot on December 31, 1941, several days before the Japanese army completed its occupation of the city.[131] In either case, the government could have waited another day or two before demolishing a valuable structure, to make sure that the losses were absolutely necessary. But doing so would have placed additional structures or soldiers' lives at risk, so the government acted proactively and nonetheless prevailed on the necessity defense. Indeed, the Court of Federal Claims' "last possible moment" test in the downstream cases introduces a substantial risk of improper hindsight bias into judicial making,[132] falling for precisely the sort of cognitive bias that the *Trin-Co* court warned of.[133] In short, the standard that emerges throughout the pre-*Milton* and *Ablan* takings caselaw is one of "reasonable necessity," not "strict necessity," and reasonable necessity is also the standard embraced by the Texas courts.[134]

The Court of Federal Claims, by inventing a "last possible moment" gloss on the necessity defense, has thwarted the purpose of a doctrine that developed to eliminate the conundrum faced by the Lord Mayor of London in 1666. All the courts following cases like *Sparhawk* and *Bowditch* embraced the idea that it was vital to everyone's welfare for the government to be proactive in the face of a danger that plausibly threatened everyone in the community.[135] Yet the downstream decision says, essentially, "Not so fast. If you act a day too early, then the government will be on the hook financially, as a constitutional matter." The problem with these incentives, of course, is that it is easier to identify the last possible moment ex post than ex ante.[136] And, as the Army Corps pointed out in the Harvey trial, if government workers miss the last possible moment by minutes, then it may be too late to protect the

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[131] United States v. Caltex (Philippines), 344 U.S. 149, 151 (1952).

[132] On the dangers of hindsight bias in judicial decisionmaking, see State v. Cummings, 305 P.3d 556, 563-565 (Kan. 2013).

[133] See *supra* text accompanying note 115. In its 2023 case, Orr v. United States, the Court of Federal Claims similarly avoided hindsight bias judgments. 166 Fed. Cl. 1, 76 (Ct. Cl. 2023) ("While plaintiffs argue that the Bureau could have waited longer before it began its peak releases . . . plaintiffs' after-the-fact arguments do not overcome the conclusions reached by the government officials at the time . . . to prevent more catastrophic damage and the necessity of the government's actions.").

[134] See *supra* text accompanying notes 106-109.

[135] See also Mitchell v. Harmony, 34 U.S. 115 (1851) ("In deciding upon this necessity, however, the state of the facts, as they appeared to the officer at the time he acted, must govern his decision; for he must necessarily act upon the information of others as well as his own observation. And if, with such information as he had a right to rely upon, there is reasonable ground for believing that the peril is immediate and menacing, or the necessity urgent, he is justified in acting upon it; and the discovery afterwards that it was false or erroneous, will not make him a trespasser.").

[136] Cf. Orr v. United States, 166 Fed. Cl. 1, 76 (Ct. Cl. 2023) ("The Bureau personnel operating Olympus Dam at the time that peak releases were commenced . . . did not have access to the calibrated models of rainfall, runoff, and other storm features of which both parties have made use in after-the-fact analysis. Rather, Bureau personnel operated during an emergency, without the ability to know whether the inflow to Lake Estates would increase or stabilize.").

citizenry.[137] Moreover, acting at the last possible moment presents grave risk – of firefighters, soldiers, dam workers, and national guard members being caught in a blaze, ambush, or flood while awaiting final instructions from their superiors. There is also a substantial danger about analytical and communications breakdowns among government officials during disasters. State capacity is always limited, and those limitations become more pronounced as uncertainty, sleep deprivation, concern for personal safety, and high stakes interfere with optimal decision-making.[138]

Ablan's analysis tying necessity to completely unexpected scenarios is misguided. It discourages governments from doing their homework and running through worst case scenarios when they plan and build infrastructure. And this constrained interpretation guts the necessity defense in those cases when it has most frequently been invoked, such as to deal with climate and conflict-related government actions. Under the Court of Federal Claims' reasoning, governments employing fire control measures presumably could never invoke the necessity defense during fire season. So too with flood control during the rainy season. Because war efforts necessarily involve extensive advanced planning by the military, the classic and venerable cases of wartime destruction of property, like *Caltex*, could never escape takings liability. The possibility that the government would have to retreat from Manila and destroy strategic assets that would be useful to the Japanese military was something that American commanders surely foresaw in war planning.[139] Or, to take a more recent example, government officials in California had done extensive research assessing wildfire risk and implementing fire control strategies in the years preceding the Palisades Fires of January 2025.[140] In October of that year, California's governor signed the California Wildfire Model Act (Senate Bill 429) to create a statewide,

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[137] Perhaps the best illustration of this gobsmacking phenomenon is this quote from Judge Smith's decision in In re Downstream Addicks and Barker (Texas) Flood-Control Reservoirs, 181 Fed. Cl. 225, 265 (2026) ("Colonel Zetterstrom testified that the Corps could not wait to open the floodgates because 'once dam failure is imminent, it's almost impossible to stop that sequence and ultimate failure.' Again, plaintiffs do not question defendant's decision to open the floodgates. But invoking the Induced Surcharges *before* imminent failure prevents a finding that an imminent danger existed.")

[138] See generally id. at 265 ("Colonel Zetterstrom testified that Harvey 'was the most stressful and traumatic experience of my life.' . . . During Harvey, defendant turned the power off at Addicks to prevent potential electrocution. Personnel stayed on site for weeks, with some sleeping on air mattresses or in their cars and one member worked 20 hours a day. Field observers lost their personal vehicles and some had to be rescued by other team members.")

[139] The U.S. military directed the destruction of oil facilities in Manila five days before the destruction occurred. See United States v. Caltex (Philippines), Inc., 344 U.S. 149, 150-151 (1952). Manila was no stranger to scorched earth tactics designed to deprive a military's foes of essential resources, with the practice common as far back as the eighteenth century. See Kristie Patricia Flannery, *Scorched Earth: War and Loss in Manila and Luzon, 1762-1764*, in THE 1762 BRITISH INVASION OF SPANISH-RULED PHILIPPINES: BEYOND IMPERIAL AND NATIONAL IMAGINARIES 184-185 (Maria Cristina Martinez-Juan ed. 2024).

[140] See, e.g., California Wildfire & Forest Resilience Task Force, California's Wildfire & Forest Resilience Action Plan: A Comprehensive Strategy of the Governor's Forest Management Task Force (January 2021), available at https://web.archive.org/web/20260130114821/https://wildfiretaskforce.org/wp-content/uploads/2023/04/californiawildfireandforestresilienceactionplan.pdf.

publicly-accessible model assessing the risks of catastrophic wildfires throughout the state.[141] Under the reasoning of *Ablan*, these useful exercises of modeling eventual wildfire risks may well expose government officials to takings liability if state officials subsequently need to burn some flammable property to prevent devastating fires from spreading out of control.[142] A state government that buried its head in the sand, by contrast, would be far more likely to prevail in court.[143] Perhaps unwittingly, the Federal Circuit has embraced a version of the necessity doctrine that encourages governments *not to plan*. Governments are now incentivized to empower their agents to make ad hoc decisions over matters of life and death, a recipe for grievous mistakes and poor coordination across different units of government.

Third, as cases like *Caltex* make clear, there was no pretense in the Supreme Court's necessity cases that the government was acting to further Caltex's property interests; they were acting to aid the American war effort in the Pacific Theatre, at the expense of Caltex's property rights. The government in the Harvey cases was doing exactly what it does in every necessity case – weighing the rights of the many against the rights of the fewer in an emergency situation where some property owners were inevitably going to be hurt badly.

There is no coherent conceptual distinction between a fire that is spreading out of control, warranting the government's emergency destruction of a private building in the fire's path, and the government's emergency release of water from a dam that is about to fail unless some water is released from its reservoir. Courts have long treated fires and floods the same way with respect to the government's police power and how to characterize a series of government policies in

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[141] See California Department of Insurance, The California Public Wildfire Model, available at https://web.archive.org/web/20251219033001/https://www.insurance.ca.gov/01-consumers/180-climate-change/public-wildfire-model.cfm.

[142] For a related argument, see Harris County Flood Control Dist. v. Kerr, 499 S.W.3d 793, 809-810 (Tex. 2016):

> [T]ake any large city with its contingent of high-rise buildings. A city may know that somewhere, someday, a fire will occur on a floor the city fire trucks cannot reach. Suppose a city has a study in hand recommending larger ladder trucks, but fails to purchase the trucks due to funding problems or other priorities. Under the homeowners' approach, if a fire occurs on a higher floor of a building, and damages adjacent properties, the adjacent property owners have a takings claim if they can show that a larger ladder truck would have contained the fire. It does not matter whether the city's conduct was reasonable given its tax base or funding priorities. In today's case, too, the record shows that funding issues played a role in the County's decisions. All that matters is that the city issued building permits, knowing that somewhere, someday, a fire would likely occur on an upper floor. This knowledge supplies the intent element, and the building permits supply the causation element, regardless of whether an act of nature started the fire. It does not matter whether the building in issue was privately owned, because according to the homeowners private ownership of the property approved for development is no bar to recovery. . . . We decline to extend takings liability vastly beyond the extant jurisprudence, in a manner that makes the government an insurer for all manner of natural disasters and inevitable man-made accidents.

[143] See id. at 810 (noting that imposing liability for failures to prevent flooding "would encourage governments to do nothing to prevent flooding, instead of studying and addressing the problem.").

takings cases, as well as the conflagration rule in particular.[144] If it's a taking to release water from a reservoir in order to prevent the reservoir's dam from overflowing and being destroyed, then it's a taking for firefighters to do a controlled burn that sacrifices some homes in order to safeguard the vast majority, in a situation where the government cannot protect all the homes. Yet to the Federal Circuit, as long as it was foreseeable that the government might encounter that kind of trolley problem, the government is ostensibly liable once it flips the switch.

Having identified two serious doctrinal errors in the Harvey cases, relating to the trespass -takings distinction and the necessity defense, we will now pivot to two systematic errors in which the Harvey courts are embracing governmental liabilities that are incompatible with foundational principles of the legal system: the federal Constitution's rejection of positive liberties, and American property law's principle of constructive notice.

IV. Positive Liberties and Negative Liberties

Generalizing about the United States Constitution is a perilous task, but there are a few generalizations that hold up exceedingly well. In comparative terms, ours is a Constitution that is both very old and very difficult to amend. By international standards, our Constitutional text is also very short. And the American Constitution is a document that establishes negative freedoms, rather than positive freedoms. The distinction, first introduced by Isaiah Berlin,[145] differentiates between the entitlement "to be free of interference by others" and an entitlement to "receive certain kinds of active assistance from others."[146] Writing for the Seventh Circuit, and deviating somewhat from Berlin's concepts, Judge Posner described the federal Constitution as a "charter of negative rather than positive liberties."[147] A quick perusal of the Constitution's text confirms Posner's assessment, as the Bill of Rights is oriented towards restricting the state's ability to suppress private speech, conduct unreasonable searches and seizures, force individuals to incriminate themselves, and so on. Even constitutional rights like the right to counsel, that seem to embed positive liberties, reveal themselves to be more negative upon close examination. There is no constitutional right to counsel before the state initiates criminal proceedings against individuals, but once it does the state can't put people on trial without a lawyer. There are a few important exceptions to this general rule, including the affirmative right to vote or the right to a court date, where the government is compelled to devote resources to facilitating the exercise of rights.[148]

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[144] See, e.g., St. Bernard Parish Govt. v. U.S., 887 F.3d 1354, 1364 (Fed. Cir. 2018); Rose v. States, 123 P.2d 505, 515 (Cal. 1942); Mark Nevit, *The Legal Crisis within the Climate Crisis*, 76 STAN. L. REV. 1051, 1093 (2024).

[145] See ISAIAH BERLIN, TWO CONCEPTS OF LIBERTY 7 (1958).

[146] See Frank I. Michelman, *Anti-Negativity as Form*, 21 L. & SOC. INQUIRY 83, 85 (1996).

[147] Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983).

[148] See Martha C. Nussbaum, *Forword: Constitutions and Capabilities: "Perception" Against Lofty Formalism*, 121 HARV. L. REV. 4, 21 (2007). Nussbaum points out that Berlin's dichotomy has been widely misunderstood, with positive liberties in his framework representing the ability to take charge of one's life rationally, which Berlin believed would necessitate substantial social engineering by the government. See id. at 21 n. 34.

The landmark Supreme Court case that best exemplifies the U.S. Constitution's status as a covenant of negative liberties is DeShaney v. Winnebago County Dept. of Social Services.[149] In that 1989 case, the Supreme Court held that the government has no constitutional duty to protect a child from unlawful physical abuse by his father. The Court reached this result even though the state had been alerted multiple times to Joshua DeShaney's severe abuse at his father's hands, which ultimately resulted in horrific brain damage that left 4-year old Joshua institutionalized for the rest of his life.[150] The Winnebago County Department of Social Services made numerous visits to Joshua's residence but ultimately failed to remove him from his home despite ample evidence of severe abuse. Explaining why imposing liability on the state under the Due Process Clause was inappropriate, the Chief Justice's majority opinion said the following about that constitutional provision:

> The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.[151]

In other words, *DeShaney* held, the Constitution protects against state abuse of children, but it does not impose affirmative obligations on the government to protect kids against abuse. As of January 2026, the Court's *DeShaney* opinion had been cited more than 20,000 times. To be sure, not every constitution is structured in this way. State constitutions often embed positive liberties such as a basic right to at least a minimally adequate public education or a right to privacy that runs against public and private actors alike. And many foreign constitutions do protect a series of positive liberties in the form of socio-economic rights.[152] But the federal Constitution has always been limited to negative liberties.[153] This is true at a high level of generality, and it is true in the

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[149] 489 U.S. 189 (1989).

[150] See id. at 192-193.

[151] Id. at 195.

[152] See Rosalind Dixon & Julie Suk, *Liberal Constitutionalism and Economic Inequality*, 85 U. CHI. L. REV. 369, 384 (2018) ("While the US Constitution famously does not include any express guarantee of social rights, an overwhelming majority of constitutions worldwide adopt a long list of social rights guarantees: they protect rights to education, work, health, housing, food, water, and social security.").

[153] Narrow exceptions like the state-created danger doctrine largely prove the rule. Under that doctrine, the government may be liable for its prior affirmative acts that created or enhanced a danger that wound up harming the plaintiffs. Plaintiffs must show that "the harm ultimately caused was foreseeable and direct," that "a state actor acted with a degree of culpability that shocks the conscience," that "the plaintiff was a foreseeable victim of the defendant's act," and that "a state actor affirmatively used his or her authority in a way that created a danger to the citizen." See Sanford v. Stiles, 456 F.3d 298, 304-305 (3d Cir. 2006). In Harvey, the plaintiffs have generally conceded that the government acted reasonably during the storm itself, and the government's failure to purchase upstream and downstream flowage easements at an earlier date are omissions rather than affirmative acts. See generally Doe v. Rosa, 795 F.3d 429, 439 (4th Cir. 2015) (A "plaintiff must show that the state actor created or increased the risk of private danger, and did so directly through affirmative acts, not merely through inaction or omission"). Another exception

specific case of flooding necessitated by a massive storm. As the Supreme Court put it in United States v. Sponenbarger, "An undertaking by the Government to reduce the menace from flood damages which were inevitable but for the Government's work does not constitute the Government a taker of all lands not fully and wholly protected. When undertaking to safeguard a large area from existing flood hazards, the Government does not owe compensation under the Fifth Amendment to every landowner which it fails to or cannot protect."[154]

These limitations on the scope of the Takings Clause have been recognized by the Texas Supreme Court as well. In a 2016 case involving flooding in Houston, the state's highest court ruled against plaintiffs who alleged that the county government's flood control efforts were inadequate to prevent flooding on their land.[155] There, the court emphasized that "inaction cannot give rise to a taking" and that the county's approval of development on the plaintiffs' land did not make it liable when the county was unable to prevent flooding during a storm.[156] The court emphasized that takings liability was inappropriate when, inter alia, "the County never desired to cause flooding, but desired only the opposite," the County "undertook significant efforts to prevent flooding, spending tens of millions of dollars over many years," and "the flooding resulted from multiple causes—Acts of God, the activities of other defendants, the alleged failure to complete [a proposed flood control] Plan, and the approval of private development."[157]

It is sometimes the case that private actors can be liable for simultaneously doing too much and doing too little. For example, in a dual liability case, a company might be liable if one product feature is designed to protect consumers against a particular kind of injury but winds up increasing the risks of another (more serious) injury.[158] That said, when courts become aware of this kind of problem, they tend to apply the Restatement's framework, which let companies off the hook if the plaintiff's proposed changes in a product's design would have reduced the odds of the plaintiff's injuries while simultaneously increasing the risks faced by other consumers.[159] As one court put it in litigation over automobile airbags, this "requirement that the alternative design be not only feasible but also safer for the relevant users is vital, for otherwise a plaintiff could

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to the negative liberties limitation arises for people in state custody, see id. at 437, which is obviously inapplicable to the upstream and downstream property owners in Harvey.

[154] 308 U.S. 256, 265 (1939).

[155] Harris County Flood Control Dist. v. Kerr, 499 S.W.3d 793 (Tex. 2016).

[156] See id. at 805.

[157] Id. at 807.

[158] See, e.g., General Motors Corp. v. Burry, 203 S.W.3d 514, 530-533 (Tex. Ct. App. 2006) (imposing liability on GM for a failure to deploy airbags despite evidence that deploying airbags unnecessarily would cause a small number of additional injuries).

[159] See Crespo v. Chrysler Corp., 75 F. Supp.2d 225, 228 (S.D.N.Y. 1999) (citing RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. f, at 23 (1998)); see also Thomas v. Hoffman-LaRoche, Inc., 949 F.2d 806, 816 n. 40 (5th Cir. 1992) (expressing the concern that liability for failure to warn about a low-risk associated with a pharmaceutical "would force drug manufacturers to list, and perhaps contraindicate, every possible risk in order to avoid the possibility of liability. If manufacturers so respond to the possibility of liability, physicians will begin to ignore or discount the warnings provided by drug manufacturers. Permitting a jury to find liability on such a basis would undermine the important role of warnings as a device to communicate vital information to physicians.").

recover simply by showing that a product could feasibly and without loss of utility be designed in such a way as to avoid injury to him alone even though the change would inflict injury on numerous others—an absurd position."[160] Designing a product in a safer manner had to "mean safer to the relevant set of users overall, not just to plaintiff."[161] In short, private sector defendants who impose moderate harms on some consumers in order to avoid imposing larger and otherwise unavoidable costs on different consumers usually are in the clear. Prior to Hurricane Harvey, the federal government also had been exempted from this sort of "damned if you do, damned if you don't" liability. Perhaps the best illustration of this fact is the discretionary function immunity built into the Federal Torts Claims Act.[162] The Texas courts have likewise held that the same discretionary function immunity arose under Texas's Tort Claims Act in negligence and nuisance cases involving abnormal municipal government releases of water from a dam.[163]

Notwithstanding this history and precedent, the Federal Circuit went in a different direction. In Milton v. United States,[164] the Federal Circuit considered the takings claims brought by the downstream residents. Recall that the water was released from the Addicks and Barkers reservoirs, created by dams built by the Army Corps of Engineers in the 1940s "to mitigate against flood damages in the plaintiffs' area."[165] Before Harvey, the government *never* had to release water from the reservoirs, but Harvey, which the Army Corps characterized by a once-every-2,000-to-5,000-year event, overwhelmed the capacity of the Addicks and Barker reservoirs so – consistent with the Army Corps' worst case scenario plan – the floodgates of the dams were opened, and downstream homes experienced temporary flooding and substantial damage to structures, fixtures, and personal property.[166]

At the Court of Federal Claims, the trial court initially made quick work of the plaintiffs' claims. In the trial court's view, "[t]hese were flood waters that no entity could entirely control. The government attempted to mitigate against them, but it could not. . . . So do plaintiffs have the right to be perfectly protected from flooding? The simple answer is no; the right to perfect flood control is not recognized by either Texas property law or federal law."[167] Citing *Sponenbarger*, the court treated Harvey as an Act of God and cited several Texas cases where the courts had found no liability where the government was unable to prevent the flooding of private property resulting from natural disasters.[168] The court also expressed doubt about whether the

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[160] *Crespo*, 75 F. Supp.2d at 228.

[161] Id.

[162] 28 U.S.C. § 2680(a) (immunizing the federal government against any "claim based upon an act or omission of an employee of the Government, exercising due care, in execution of a statute or regulation . . . or based upon the exercise or performance or the failure to exercise or perform a discretionary function . . . whether or not the discretion involved be abused").

[163] See Golden Harvest Co. v. City of Dallas, 942 S.W.2d 682, 685, 687-688 (Tex. App. 1997).

[164] 36 F.4th 1154 (Fed. Cir. 2022)

[165] See In re Downstream Addicks, 147 Fed. Cl. 566, 570 (Ct. Cl. 2020).

[166] See id. at 573.

[167] See id. at 570.

[168] See id at 578-579.

plaintiffs could demonstrate the requisite causation, because the government had not released more water from the reservoir than Harvey was dropping into it. As a result, the plaintiffs' land likely would have flooded even if the dams had never been built.[169]

The Federal Circuit reversed and remanded. It held that the plaintiffs have a cognizable property interest in flowage easements over their property.[170] Although the Court of Federal Claims leaned heavily on *Sponenbarger* for the proposition that downstream landowners had no cognizable property interest in receiving affirmative protection from flooding,[171] the Federal Circuit failed to mention this Supreme Court precedent even once. The court reversed via a distractingly circuitous path, addressing less obviously relevant arguments. First, it rejected the government's police power defense, incorrectly insisting that the police power in Texas is limited to nuisance abatement.[172] Second, it held that whether Harvey was an Act of God spoke to the issue of whether a taking occurred, rather than whether the plaintiffs had a cognizable property interest in not being flooded.[173] Third, the court cryptically brushed aside the government's argument that the owners' property rights were limited by their expectations at the time they acquired their land, an issue we'll consider in more depth in Part V.[174] But it never even began to address the essence of the lower court's finding about why no cognizable property interest existed, which is that the landowners were claiming that the federal government was obliged to protect them completely from flooding. The Federal Circuit remanded for the Court of Federal

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[169] See id. at 580. After reversal and remand, the Court of Federal Claims abandoned this causation test and replaced it with an inquiry into whether the plaintiffs' properties would have flooded had the dams' floodgates stayed closed during Harvey. See In re Downstream Addicks and Barker (Texas) Flood-Control Reservoirs, 181 Fed. Cl. 225, 257 (2026). But this inquiry, puzzlingly, did not contemplate the possibility that if the floodgates had stayed closed the dams would have failed during Harvey, resulting in catastrophic flooding.

[170] *Milton*, 36 F.4th at 1162.

[171] See *In re Downstream Addicks*, 147 Fed. Cl. at 582-583.

[172] See id. at 1161. The Texas Supreme Court cases cited by the Federal Circuit – Severance v. Patterson, 370 S.W.3d 705 (Tex. 2012), and City of Dallas v. Stewart, 361 S.W.3d 562 (Tex. 2012) – do not say that the police power only covers nuisance-prevention cases. Both cases provide that the government need not compensate landowners when the government takes property to abate a nuisance, but the Texas cases make it clear that this is not the only circumstance when the government should prevail. *Severance* says that "[l]imitations on property rights may be by consent of the owner, state condemnation with payment of just compensation**,** appropriate government action under its police power (such as addressing nuisances), sufficient proof of use by persons other than the owner that creates an estoppel-based right to continuing use (easements) or pre-existing limitations in the rights of real property owners that have existed "since time immemorial." 370 S.W.3d at 710. As the language makes clear, nuisance is an *e.g.* for the police power, not an *i.e.* But the inability to sue the government for a failure of perfect flood protection is another key limitation built into ownership, as the Supreme Court made clear in *Sponenbarger.* See *supra* text accompanying note 9. As for *Stewart*, it emphasizes that nuisance prevention is just one type of police power defense, not the only way the government can invoke the police power. See 361 S.W.3d at 575-576 ("Because a nuisance determination is an exercise of the police power, it, *like any other determination regarding the police power,* "is a question of law and not fact" that must be answered based upon a "fact-sensitive test of reasonableness.") (emphasis added).

[173] See *Milton*, 36 F.4th at 1162.

[174] See id. at 1162.

Claims to consider whether the plaintiffs can demonstrate causation and whether the government would prevail on its necessity defense. On remand, the government lost on those issues.[175]

In essence, the Federal Circuit ignored the key impediment to imposing liability in the downstream case, which was that having taken major steps to protect downstream property owners from ordinary flooding, the government did not become liable for failing to protect them against generational flooding. Simply calling an interest in not being flooded because of a hurricane a "flowage easement" does not alter the calculus. Perhaps a cognitive heuristic linked to the trolley problem explained the error. Opening a dams' floodgates to prevent its destruction seems like "flipping a switch," so courts more readily assigned agency to the government. But the presence of a simple machine should not, as a normative matter, change the outcome. If the dam were built with an automatic and irreversible valve that automatically released water when water levels or pressure reached certain levels, the result should be the same.

Though none of this academic literature was cited in the Federal Circuit's opinion, the Federal Circuit's de facto embrace of a positive liberties theory of the Takings Clause is arguably consistent with the views of a distinguished Property scholar, Christopher Serkin. In his article, Passive Takings: The State's Affirmative Duty to Protect Property, Serkin advocates for a radical expansion of the scope of the Takings Clause.[176] To be clear, Serkin's proposal is largely normative rather than descriptive. He concedes that the original meaning of the Takings Clause did not contemplate government liability for failing to protect property from damage,[177] and he notes that efforts to enshrine positive liberty protections under the federal Constitution, such as *DeShaney*, "New Property" welfare claims, and constitutional rights to abortion funding, have generally failed in courts.[178] But he points to occasional cases where the government can be liable for failing to affirmatively protect private property, including from failures to protect incarcerated individuals in the state's care, or some refusals to re-zone.[179] As he puts it, "passive takings liability will therefore attach to property that the government substantially regulates and has consequently rendered especially vulnerable to a change in the world."[180] More precisely, Serkin explains that the government ought to be liable when one of two conditions are met: "The state has effective control over the injury-causing condition," or "the state has rendered the property especially vulnerable to adverse changes in the world."[181] In the abstract, it is difficult to tell when these conditions are satisfied, but Serkin's use of examples are clarifying.

For starters, Serkin makes it clear that under his approach, "[i]f your house burns down, you do not have a passive takings claim because the government could have located a fire house

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[175] See In re Downstream Addicks and Barker (Texas) Flood-Control Reservoirs, 181 Fed. Cl. 225, 272-273 (2026).

[176] Christopher Serkin, *Passive Takings: The State's Affirmative Duty to Protect Property*, 113 MICH. L. REV. 345 (2014).

[177] See id. at 356.

[178] See id. at 356-359, 375-376.

[179] See id. at 376.

[180] Id. at 377-378.

[181] Id. at 378.

closer to your neighborhood."[182] That seems obviously right, and consistent with the analysis above. It's hard to imagine what an alternative regime could even look like. Society addresses the fire threat problem with homeowner's insurance, not compulsory government liability. And, in turn, the insurance market can incentivize people to install smoke detectors, sprinklers, or live in areas less prone to wildfires.

Anticipating an argument that Timothy Mulvaney would develop in a subsequent article,[183] Serkin also argues that if the government bans self-help evictions by landlords and then refuses to carry out a valid eviction order that the landlord has obtained in court, this combination of actions may give rise to a taking.[184] The Eighth Circuit has embraced similar logic in a COVID-19 era eviction moratorium case,[185] though the case law is more mixed nationwide.[186] But in both Serkin's hypothetical and the real-world COVID cases, landlords had a well-established property right that the state was rendering a nullity for a significant period of time by not enforcing it. It's understandable why these would be regarded as the destruction of an existing property right and therefore, plausibly a taking. But these kinds of cases are appropriately characterized as falling within Serkin's category of non-enforcement takings, rather than passive takings.

Serkin provides a few other examples of passive takings where he thinks liability could be appropriate. For example, if the government imposes height limits on properties in coastal areas, preventing the landowners from raising their homes enough to spare them from flooding, Serkin seems a basis for liability.[187] He also argues that the government might be liable under the Takings Clause for either building a seawall (which could hasten beach erosion on adjacent properties) or for not building a seawall (which could leave coastal homes vulnerable to flooding).[188] In such cases, "the difference between the damage to neighboring property with the sea wall in place and the damage with the sea wall removed must rise to the level of a taking."[189] This is a standard that would be hard to meet in regulatory takings cases, but perhaps easier in physical takings cases, provided the plaintiff could show causation. Pulling his rules and examples together, it seems as though the Army Corps did not have effective control over flood waters during Harvey, nor did it make downstream properties more vulnerable. The water had to

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[182] Id. at 378.

[183] See Timothy M. Mulvaney, *Non-Enforcement Takings*, 59 B.C. L. Rev. 145 (2018).

[184] Serkin, *supra* note 176, at 381.

[185] See Heights Apartments, LLC. V. Walz, 30 F.4th 720 (8th Cir. 2022).

[186] See ALEXANDER ET AL., *supra* note 67, at 431 (reviewing the various recent eviction moratorium cases in which the government has prevailed).

[187] See Serkin, *supra* note 176, at 393.

[188] See id. at 596-597.

[189] Id. at 597.

go somewhere, and (unlike with the upstream properties) the construction of the dams and creation of the reservoirs likely made the flooding downstream better overall, not worse.[190]

Assuming, however, that the Army Corps actions during Harvey satisfied one of Serkin's takings tests, it's worth analyzing his argument that, contra existing law, passive takings liability is appropriate. As part of his broader normative argument, Serkin dismisses the readily apparent counterarguments, which are that liability for passive takings creates bad incentives for both landowners and governments.[191] He does so too hastily. The landowner incentives problem with imposing liability for passive takings is moral hazard. More precisely, property owners may take unwise risks if they know that the Takings Clause gives them a free insurance policy in case something bad happens. For example, a landowner might purchase property in a coastal area that is prone to flooding, reasoning that if the government fails to protect the land, and flooding ensures, the government will make the owner whole.[192] Serkin offers two responses, but neither is persuasive.

First, Serkin argues that existing takings doctrine already creates a moral hazard problem.[193] As the literature has long recognized, the Takings Clause may make owners insufficiently attentive to what regulations the government might enact in the future that could reduce their property values. Or owners might improve property that the government is contemplating taking via eminent domain. As a result, owners may invest in improving the property shortly before new restrictions or exercises of eminent domain render those improvements worthless.[194] But the moral hazard associated with failing to anticipate new regulations or the exercise of eminent domain is quite distinct from the moral hazard associated with buying risky real estate that is subject to external risks that the government might not protect against. The former represents a small distortion and the latter represents a massive behavioral distortion.[195] As Mulvaney aptly puts it, "existing regulations are far exceeded by the infinite number of conceivable regulations that are not in existence."[196]

We see evidence of moral hazard in the run-up to Hurricane Harvey in Houston, where the Army Corps bought up a large amount of land at the time the derricks were constructed and advised developers and prospective homeowners that adjacent land not owned by the government was vulnerable to flooding in extreme weather events. Notwithstanding these

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[190] This was true collectively, but not be true individually. That is, the dams almost certainly reduced the severity of flooding for all downstream landowners, but likely made a subset of downstream landowners worse off.

[191] See id. at 387-388.

[192] See id. at 387.

[193] See id.

[194] See, e.g., Lawrence Blume, Daniel L. Rubinfeld & Perry Shapiro, *The Taking of Land: When Should Compensation Be Paid?*, 99 Q.J. ECON. 71 (1984); Steve P. Calandrillo, *Eminent Domain Economics: Should "Just Compensation" Be Abolished, and Would "Takings Insurance" Work Instead?*, 64 OHIO ST. L.J. 451 (2003).

[195] See David Dana, *Incentivizing Municipalities to Adapt to Climate Change: Takings Liability and FEMA Reform as Possible Solutions*, 43 B.C. ENV. AFF. L. REV. 281, 287-293, 300-301 (2016).

[196] Mulvaney, *supra* note 183, at 182 n. 153.

warnings, the plaintiffs or their predecessors in interest bought homes anyway. Then the court bailed them out.[197] To be clear, if it is really the case that Harvey flooding was a once-in-two-millennia event, then compensating owners should not create moral hazard. Rational homebuyers would ignore the possibility of being compensated for an extremely low-probability event. But remember that the Court of Federal Claims determination that the Army Corps actions amounted to an unconstitutional taking (rather than a trespass) depended on its conclusion that water encroachments would be "permanently recurring."[198] If that is the case, and if climate change renders "once in a millennium" flooding far more frequent in fact, then the moral hazard problem looms large. So Harvey's flooding either wasn't likely to recur, in which case it's not a taking, or is likely to recur more regularly, in which case compulsory compensation creates a significant moral hazard problem.

Second, Serkin considers the possibility that imposing takings liability for inaction once the government has begun to regulate land might negatively distort government incentives. More precisely, because passive takings liability under Serkin's framework only arises once the government has some level of involvement with regulating particular land, "this threat of new liability might induce governments to avoid acting in the first place in order to forestall the passive takings claims that could follow."[199] Serkin acknowledges the force of these considerations but brushes them aside because the government already has strong political incentives to regulate and he thinks the fear of passive takings liability will only have a marginal effect. He is likely too sanguine about this risk as well, and the hurricane flooding example illustrates that. According to a 2024 FEMA Report, roughly 40 percent of the American population lives in coastal areas that are vulnerable to storm or tsunami-related flooding.[200] The risks are generally remote, but the magnitudes are enormous. In all these coastal areas, the government already regulates land use – such regulations are ubiquitous – but if the federal government will be liable for failing to do more to prevent a direct hit on any highly populated area, then the government has little economic incentive to try anything. And even studying what investments are appropriate may be used against the government, because the resulting reports show governmental awareness of the threat. With resource constraints confronting governments at every level, it is hard to imagine governments taking any steps to improve disaster resiliency, because any efforts undertaken could prove inadequate when the "big one" finally hits.[201]

What's more, Serkin does not address a related problem with his proposal for passive takings liability, which is that the government is a "they," not an "it." Federal, state, and local governments have different incentives and often are pursuing different policies. Sometimes one layer of government is acting at loggerheads with another layer, for example when the feds try to limit development to protect the environment and the local government tries to promote

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[197] In re Upstream Addicks and Barker (Texas) Flood-Control Reservoirs, 146 Fed. Cl. 219, 237-238, 261-263 (Ct. Cl. 2019).

[198] See *supra* text accompanying notes 48-57.

[199] Serkin, *supra* note 176, at 388.

[200] FEMA, National Preparedness Report 26 (Dec. 2024), available at https://web.archive.org/web/20251230133104/https://www.govinfo.gov/content/pkg/CMR-HS5_100-00193235/pdf/CMR-HS5_100-00193235.pdf.

[201] See *infra* text accompanying note 297.

growth.[202] This is especially true for natural disaster mitigation. A study published in the journal *Nature* concluded that the urbanization of the Houston area made Harvey-level flooding 21 more times likely than it otherwise would have been.[203] The federal government played a limited role in that urbanization, but under the Federal Circuit's decision federal taxpayers are left footing the entirety of the bill.[204]

Conflicting priorities are an inevitable feature of federalism. Spending resources to mitigate severe flooding impacts may be cost-effective for the federal government because prevention is often cheaper than cleanup. But local governments have little political incentive to spend on disaster preparedness.[205] For example, in the years before Harvey federal policy was trying to encourage more stringent building codes at the local level, and local officials were pushing back on this agenda because more demanding codes necessarily increased housing construction costs.[206] Similarly, the federal government was trying to buy out homeowners in the areas most vulnerable to flooding, but localities were opposing these efforts because of concerns that removing homeowners would damage the local tax base and that local governments would strain to cover the costs of maintaining newly acquired park space.[207] As the upstream plaintiffs' primary flooding expert admitted in his subsequent academic work, both climate change and the rapid urbanization of areas surrounding Houston exacerbated the flooding that occurred during Harvey.[208] After Harvey, Congress appropriated nearly half a billion dollars for flood control projects in Harris County, in addition to whatever amounts it will ultimately owe as a result of the takings litigation.[209] In such circumstances, suing the federal government for takings is problematic. One government can mitigate the risks associated with natural disasters, and the other government can thwart those efforts. So how does blame get apportioned, in light of the different resource constraints, political incentives, institutional capacities, and policy domains peculiar to each layer of government? The Federal Circuit ignored the problem.

Responsibility for damage from natural disasters isn't just split between national and state governments. It's split between governments and private property owners too. This dynamic

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[202] See, e.g., Roberton C. Williams III, *Growing State-Federal Conflicts in Environmental Policy: The Role of Market-Based Regulation*, 96 J. PUB. ECON. 1092 (2012).

[203] Wei Zhang, Gabriele Villarini, Gabriel A. Vecchi & James A. Smith, *Urbanization Exacerbated the Rainfall and Flooding Caused by Hurricane Harvey in Houston*, 563 NATURE 384, 388 (Nov. 2018).

[204] Federal liability might be more defensible where the federal government itself is acting alongside state and local governments to encourage the development of flood-prone land. See Joseph William Singer, *After the Flood: Equality & Humanity in Property Regimes*, 52 LOYOLA L. REV. 243, 283-285 (2006) (characterizing the federal government as having encouraged people to build in vulnerable areas in the runup to Hurricane Katrina).

[205] See Stephanie Zarb & Kristin Taylor, *Uneven Local Implementation After Disaster: Policy Conflict and Goal Ambiguity*, 40 REV. POL'Y RES. 63, 66-67 (2022).

[206] See id. at 73.

[207] See id. at 74.

[208] See Furrh & Bedient, *supra* note 9, at 985. The authors are civil engineering professors at Rice University. Bedient was a key expert witness for the plaintiffs.

[209] Blackburn, *supra* note 17, at 18.

underscores the problem with *constitutionalizing* just compensation in instances where both the plaintiffs' actions and the defendants' actions contributed to the harm suffered by the plaintiffs. If landowners do not know ex ante whether they will receive compensation in the event of a natural disaster, because whether owners get compensated depends on the outcomes of an uncertain legislative process, owners will have an incentive to take precautions to mitigate the associated risks, say by buying in a less flood-prone area or building their house on higher ground. But if compensation is certain, then owners will have little incentive to take these prudent measures. The result will be greater social waste. Deciding whether to compensate landowners through the political process, rather than mandating as a matter of constitutional law, promotes these prudent precautions, a point elegantly anticipated in prior scholarship.[210] Flood victims are generally sympathetic, they are geographically concentrated, and they can organize themselves easily. These factors suggest they typically will do well advocating for themselves in the legislative process. But guaranteeing compensation under the Takings Clause forestalls legislative judgments that are context-sensitive to landowners' and governments' respective shares of the blame.

Before turning to the final error made by the *Ablan* and *Milton* courts, let's consider two pragmatic defenses of *Milton*'s embrace of positive liberty protection under the Takings Clause. Perhaps imposing liability on the government makes sense as a risk-spreading strategy where the flood insurance market is fundamentally broken. Alternatively, perhaps constitutionalizing this body of law makes sense in a world where congressional disaster relief funding is no longer being distributed in an even-handed way. We will consider each of these possibilities in turn.

The question of who should ultimately pay for damage from flooding, fires, and other natural disasters is complex and dynamic, with ex ante consequences that are sometimes difficult to evaluate.[211] A sensible approach, embraced by the Restatement (Second) of Torts, is that in instances of public necessity, compensating people whose property was damaged or destroyed because of such necessity is morally desirable but not required as a matter of legal doctrine.[212] This sentiment mirrors the pre-Harvey takings doctrine, when disaster relief had been a popular cause for legislation but not constitutionally compulsory. This flexibility permits governments to craft legislation that is sensitive to the culpability of public and private actors after particular natural disasters while also putting disaster recovery on equal footing with other worthy objectives, like health, education, and public safety, that similarly make demands on finite government resources.

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[210] See Saul Levmore, *Coalitions and Quakes: Disaster Relief and Its Prevention*, 3 U. CHI. L. SCH. ROUNDTABLE 1, 19-23 (1996).

[211] For a thoughtful paper analyzing the tradeoffs among making electric utility ratepayers and shareholders or state taxpayers liable for wildfire damage, see Kiran Chawla, Who Pays for Wildfires? (July 2026 draft, on file with author).

[212] See RESTATEMENT (SECOND) OF TORTS § 196 cmt. h (1965) ("Although the moral obligation to compensate the person whose property has been damaged or destroyed for the public good is obviously very great, and is of the kind which should be recognized by the law, the rules as to governmental immunity from suit have stood in the past as a barrier to any effective legal remedy. After major public disasters compensation often has been paid under special legislation enacted for the purpose, and in several jurisdictions general statutes provide for such compensation.").

Presently, the federal government is deeply involved in flooding-related aspects of the economy. The federal government subsidizes flood insurance for roughly 17% of homeowners while charging the remainder of homeowners roughly the market rate for such insurance.[213] Still, there are substantial cross-subsidies arising from the coarseness of the FEMA flood zones (so high risk properties close to the coast are subsidized by nearby lower-risk, inland property assigned to the same zone).[214] When a major natural disaster hits, the Federal Emergency Management Administration (FEMA) also often steps in with funds and support to help affected governments and displaced people rebuild, though this funding typically only covers a small percentage of repair and reconstruction costs.[215] And FEMA spends significant sums on mitigation before natural disasters hit, with funds mostly distributed to local governments.[216] Regardless of how the Takings Clause is interpreted by the Courts, the federal government therefore already chooses to shoulder part of the burden associated with natural disasters. But making a large portion of flood damage situations into takings cases would prompt the federal government to shoulder nearly all of the costs of this damage, and that shift would eliminate the incentives that risk-based flood insurance premiums currently provide for homeowners to build more hardened homes in lower-risk locales, while also entailing large cross subsidies to the residents three US states (Florida, Texas, and Louisiana, which currently account for roughly 17% of the US population but together encompass 58% of all federal flood insurance program policies).[217] Because homeowners who live right on the coast tend to be much wealthier than inland residents,[218] these cross subsidies would also be highly regressive. Insurance premiums cause insurers and insureds to spread the risk associated with natural disasters, and that in turn alleviates the moral hazard that arises when homeowners only have to deal with the inconvenience of moving and suing but the government otherwise foots the financial bill. In comparison to takings liability that will be borne collectively by all federal taxpayers, insurance markets tend to localize more of the risk to the people who choose to live in areas that are known to be susceptible to natural disasters.[219] Internalizing externalities in this way enhances efficiency while also plausibly furthering progressivity.

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[213] See Carolyn Kousky, *Financing Flood Losses: A Discussion of the National Flood Insurance Program*, 21 RISK MGMT. & INSURANCE REV. 11, 21-23 (2018). Under the federal NFIP (National Flood Insurance Program), 35 percent of all policies are for Florida, 12 percent are for Texas, and another 9 percent are for Louisiana, with California and New Jersey combining for a little more than 10% of the policies. See id. at 17.

[214] See id. at 24-25.

[215] See id. at 18; Grace Natalia Bornok Siahaan, *Disaster Preparedness and Recovery Funding: The Responsibility of FEMA or the States?*, 2 J. ACAD. SCI. 1758, 1761 (2025).

[216] See Jenna Tyler et al., *Is Flood Mitigation Funding Distributed Equitably? Evidence from Coastal States in the Southeastern United States*, 16 J. FLOOD RISK MGMT. 1 (June 2023).

[217] See *supra* note 213.

[218] See Yi Qiang, *Disparities of Population Exposed to Flood Hazards in the United States*, 232 J. ENVTL. MGMT. 295, 303 (2019); see also *infra* text accompanying note 275 (noting that coastal properties in floodplains are more expensive than coastal properties outside floodplains, presumably because they are closer to the water and beach-related amenities).

[219] In a sense, Hurricane Harvey presents a classic "Givings" problem. See Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547 (2001). The beneficiaries of the decisions made by the Army

A different kind of pragmatic defense of constitutionalizing liability for natural disasters would focus on recent changes in the American presidency and its posture towards disaster relief. Traditionally, disaster relief bills in Congress were bipartisan affairs.[220] Statistical studies of pre-Trump Presidents find no significant relationship between disaster relief expenditures and whether the governor of a state where a disaster has occurred is of the same political party as the President,[221] as these partisan considerations were dwarfed in importance by factors such as the per capital flood damage and whether the damage resulted from a hurricane.[222] During the Trump Administration, there is a widespread perception, voiced by Blue State governors (though denied by the Administration), that disaster relief funding allocations have become a reward for states that supported Trump and a punishment for those that did not.[223] And it does appear that Texas and Florida were treated much more favorably by the first Trump Administration than Puerto Rico was after each was hit with a severe hurricane (Harvey, Irma, and Maria, respectively).[224] Even setting aside Trump's apparent playing favorites with MAGA-friendly states, FEMA grants for disaster mitigation and preparedness have long tended to flow towards wealthier, better educated counties, which are more likely to have the kinds of sophisticated local bureaucracies

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Corps to build, maintain, and then operate the dams during Harvey are spread throughout the Houston area, and also include the great many people who live outside the metro area but would have suffered if downtown Houston became completely inundated. In a perfect world, it would be normatively desirable for the people whose property, thanks to the dams, did not flood or whose economic livelihood was enhanced to be charged for these benefits, with the resulting revenue going to those whose homes were flooded during Harvey but would not have been flooded had the dams never been built. Yet there are practical problems with this approach. First, there is not an extant legal mechanism to accomplish this redistribution. Second, the people who benefited in this way overwhelmingly do not realize it. And third, establishing causation is challenging on both ends – it is quite difficult to model accurately the flow of water in a counterfactual world where the Army Corps constructs no flooding infrastructure in Houston.

[220] Naim Kapucu, Montgomery Van Wart, Richard Sylves & Farhod Yuldashev, *U.S. Presidents and their Roles in Emergency Management and Disaster Policy 1950-2009*, 2 RISK, HAZARDS & CRISIS IN PUB. POL'Y 1, 24 (2011) (noting that "several studies have shown that presidents cannot be statistically shown to use their disaster declaration authority in overtly partisan ways").

[221] See Thomas Husted & David Nickerson, *Political Economy of Presidential Disaster Declarations and Federal Disaster Assistance*, 42 PUB. FINANCE REV. 49 tbl. 5 (2014); Richard S. Salkowe & Jayajit Chakraborty, *Federal Disaster Relief in the U.S.: The Role of Political Partisanship and Preference in Presidential Disaster Declarations and Turndowns*, 6 J. HOMELAND SEC. & EMERGENCY MGMT. 13-14 (2009). There is marginally significant evidence (10% confidence interval) that governors of the same political party as the President who are also up for reelection are more likely to obtain disaster declarations, as does having two US Senators from the same party as the President (a highly significant result). See Husted & Nickerson, *supra* at 48 tbl. 4; Salkow & Chakraborty, *supra* at 14 tbl. 3.

[222] See id. at 48-49.

[223] See Thomas Frank, *It's 3 Times Harder for Blue States to Get Disaster Funding Under Trump*, POLITICO, Mar. 23, 2026, available at https://www.politico.com/news/2026/03/23/trump-denies-disaster-aid-for-democratic-led-states-00831199; Natalie Fertig & Gregory Svirnovskiy, *States Are Trying to Keep Disasters Apolitical in the New Trump Era*, POLITICO, Aug. 17, 2025, available at https://www.politico.com/news/2025/08/17/disasters-trump-aid-00512470.

[224] See Charley E. Willison et al., *How Do You Solve a Problem Like Maria? The Politics of Disaster Response in Puerto Rico, Florida and Texas*, 14 WORLD MED. & HEALTH POL'Y 490, 495 (2022).

that can plan for disasters and be competitive in the grant-making process.[225] So perhaps the politics of disaster relief has become broken, and the courts should remove this issue from the legislative domain and resolve it as a matter of constitutional law?

Ultimately, it is not obvious that the Constitution's meaning should change just because a leader with a penchant for score settling has twice secured the Presidency. Even during the first Trump administration, disaster relief in Florida and Texas received bipartisan support in Congress.[226] Moreover, the argument from political influence proves too much. There are lots of areas of the law that the Trump Administration has been credibly accused of politicizing by playing favorites, including funding for infrastructure, higher education, scientific research, the arts, and health funding.[227] But these policy actions do not mean that the federal judiciary, which has become more politicized and partisan during recent decades as well,[228] ought to seize permanent control over vast swaths of federal policy. Disaster relief has long been a set of expenditures subject to congressional and agency control via the ordinary budget process and legislative oversight; even a pragmatic judge should expect to see more evidence of sustained abuse before giving up on the possibility that bipartisan and technocratic policymaking in this domain will be reinvigorated.

Finally, it is hard to identify a workable limiting principle if the Takings Clause becomes recognized as an exception to the *DeShaney* principle. The federal government does things all the time that enhance property values, and it does things all the time that diminish them. Do cattle ranchers in Texas have a takings suit against the federal government for failing to prevent screwworm from infecting their livestock despite spending millions of dollars on the effort?[229] The government could have decided not to slash funding for screwworm containment efforts,[230] just as it could have devoted more money to the acquisition of flowage easements in Houston. In each case the relationship between diminished investment and the harm that ensued was

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[225] See Tyler et al., *supra* note 216, at 8-9.

[226] See Willison et al., *supra* note 224, at 495.

[227] See, e.g., Chandler Rankin, *Challenging Politically Discriminatory Funding Cuts*, Blog Essay, HARV. L. REV. Feb. 1, 2026, available at https://harvardlawreview.org/blog/2026/02/challenging-politically-discriminatory-funding-cuts/; Natasha Bertrand & Haley Britzky, *Pentagon May Bar Tuition Aid for Top Universities in Hegseth's Crackdown on 'Biased' Schools*, CNN.COM, Feb. 13, 2026, available at https://www.cnn.com/2026/02/13/politics/us-military-top-universities-tuition-assistance; Meryl Kornfield & Hannah Natanson, *Trump Administration Admits to Targeting Blue States for Energy Grant Cuts*, WASH. POST. (Dec. 17, 2025).

[228] See Richard L. Hasen, *Polarization and the Judiciary*, 22 ANNU. REV. POL. SCI. 261, 263-265 (2019).

[229] See Cassandra Garrison, Heather Schlitz & Tom Plansek, *Ames USDA Lab Confirms Screwworm Detected in Texas*, DES MOINES REG., Jun 6, 2006, at C1.

[230] See Isaac Arnsdorf & Lena H. Sun, *Screwworm Outbreak Gains a U.S. Foothold: Spread of Flesh-Eating Maggot Fuels Scrutiny of Trump Administration*, WASH. POST, June 20, 2026, at A1. ("USDA's Animal and Plant Health Inspection Service (APHIS), whose responsibilities include screwworm detection and treatment, lost nearly 2,000 employees last year, more than 20 percent of its workforce, as the Trump administration downsized the federal government. . . The Trump Administration's dismantling of the U.S. Agency for International Development also cut about $382 million from the United Nations Food and Agriculture Organization, including the Global Health Security Program targeting diseases and pests such as New World screwworm.").

foreseeable. By the same token, surely the federal Highway Safety Traffic Administration could do more to enhance safety on the nation's freeways,[231] and the decision to devote resources to other projects is the but-for cause of various foreseeable traffic accidents. Is every such fender bender that results in property damage now a Takings case? We can go larger still. Surely there are things the federal government could have done ex ante to prevent COVID from becoming a pandemic in the United States. So does that mean that the owners of the businesses that closed, the employees who were laid off, and the hotels that saw cancelled reservations have takings suits against the government?[232] Under discretionary function immunity,[233] the answers to those questions have long been a resounding "no," but the downstream case could undermine decades of doctrinal stability.

A positive liberties theory of the Takings Clause would hit state and local governments hard too. Local governments make decisions regularly about where to place fire stations, and as distance to the nearest fire station increases, so does the foreseeable risk of death and destruction from an unintentional fire.[234] Decisions about designing the street grid can also have major impacts on fire fighters' ability to contain blazes in residential areas. Local governments may approve street grids that involve narrow, winding streets, which "may prevent fire trucks from reaching their destination or may limit landowner escape routes."[235] Funding shortfalls in California due to Proposition 13 caused major cutbacks in fire response and mitigation in the run up to the Oakland Hills fires of 1991, which resulted in billions of dollars of damage to private property.[236] Homes that were wiped out by the 1991 were, with government approval, rebuilt larger and closer to neighboring structures, increasing the probability of a future conflagration.[237] A similar story played out in Paradise, California, before the deadly 2018 Camp Fires that

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[231] See e.g., U.S. Department of Transportation, U.S. Department of Transportation Announces $1.25 Billion in Direct, Accessible Grants for Local Communities to Improve Roadway Safety, Feb. 21, 2024, available at https://www.transportation.gov/briefing-room/us-department-transportation-announces-125-billion-direct-accessible-grants-local.

[232] This is an entirely separate theory from the ones pressed by plaintiffs around the country arguing that mandatory business closures or eviction moratoria during 2020 were unconstitutional takings. See, e.g., Darby Develop. Co. v. United States, 112 F.4th 1017, 1036 (Fed. Cir. 2024); Culinary Studios, Inc. v. Newsom, 517 F. Supp.3d 1042 (E.D. Cal. 2021); Friends of Danny DeVito v. Wolf, 227 A.3d 872 (Pa. 2020). After all, the available economic evidence from developed countries suggests that it was COVID itself, not the government-ordered lockdowns, that accounted for the lion's share of the economic damage from the pandemic. See Adam Sheridan et al., *Social Distancing Laws Cause Only Small Losses of Economic Activity During the COVID-19 Pandemic in Scandinavia*, 117 PNAS 20468 (2020).

[233] See supra text accompanying notes 162-163.

[234] See Soojin Min, Dohyeong Kim & Chang Kil Lee, *Association Between Spatial Accessibility to Fire Protection Services and Unintentional Injuries or Deaths: A Cross-Sectional Study in Dallas, Texas*, 9:5 BMJ OPEN e023780 (2019), available at https://bmjopen.bmj.com/content/9/5/e023780.abstract.

[235] See Alan J. Long, Dale D. Wade & Frank C. Beall, *Managing for Fire in the Interface: Challenges and Opportunities,* in FORESTS AT THE WILDLAND-URBAN INTERFACE: CONSERVATION AND MANAGEMENT 201, 205 (2004), available at https://research.fs.usda.gov/download/treesearch/21259.pdf.

[236] Gregory L. Simon, *Vulnerability-in-Production: A Spatial History of Nature, Affluence, and Fire in Oakland, California*, 104 ANNALS ASS'N AMERICAN GEOGRAPHERS 1199, 1210-1211(2014).

[237] See id. at 1214.

claimed 86 lives and nearly 14,000 homes. Local officials knew that roads were too narrow, too winding, and too few in number to evacuate everyone from the town if a major fire hit, but they authorized continued development anyway and spent too little on road widening and construction.[238] In one instance, town officials even narrowed a critical road as a traffic calming measure to deal with eight injuries suffered by pedestrians who had been struck by cars.[239] Similar divestment in fire-control infrastructure and greenlighting of development in sensitive areas helped make the 2025 Palisades Fire in Los Angeles catastrophic.[240]

Essentially, every argument that the *Milton* court made for imposing liability on the government for its failure to protect some downstream owners from the known risk of hurricane-related flooding and for failing to acquire flowage easements before Harvey is equally applicable to a host of costly disasters, be they fires, plagues of invasive insects, car crashes, pandemics, and tsunamis. The government is always in a position to invest more in prevention, but it faces tradeoffs when it does so. And in every case private actors took countless actions that also contributed to the economic harm that ultimately resulted – by developing and building homes in sensitive areas, driving large vehicles at high speeds, raising livestock in areas close to infested locales, making decisions about indoor ventilation and the ratio of indoor to outdoor dining seats, choosing to purchase that property with a lovely beach view. Absent a way to turn *Milton* into a one-off, the vision of the Takings Clause it embraces turns the government into an all-purpose insurer.[241] In effect, it constitutionally embeds persistent cross-subsidies from property owners in low-risk areas to those in higher-risk ones. It is hard to develop a persuasive normative account of why the Constitution should do this, rather than letting democratically accountable actors make these decisions about cross-subsidies and risk-spreading.

In short, before the Federal Circuit decided *Milton*, the Constitution, including the Takings Clause, was a document protecting negative liberties rather than positive liberties. Perhaps without realizing it, the Federal Circuit has undermined that foundational feature of our constitutional system. But those foundational premises are there for good reason, and the arguments for constitutionalizing FEMA policy choices and the federal insurance program do not hold water. If anything, the Hurricane Harvey cases show just how expensive and ultimately unworkable a program of passive takings liability would become.

V. Investment Backed Expectations and Constructive Notice

In its 2012 *Arkansas Game & Fish* decision, the Supreme Court identified the continuing relevance of reasonable investment-backed expectations when deciding whether the government's involvement in contributing to the flooding of plaintiffs' land amounted to an

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[238] See Paige St. John, Joseph Serna & Rong-Gong Lin II, *Here's How Paradise Ignored Warnings and Became a Deathtrap*, L.A. TIMES, Dec. 30, 2018.

[239] See id.

[240] See Vytenis Babrauskas, *The Palisades Fire of Los Angeles: Lessons to Be Learned*, 8 FIRE 303 (2025), available at https://www.mdpi.com/2571-6255/8/8/303 (noting that Los Angeles had 320 fire engines in 1961 and only 83 in 2025, and that there were severe problems with accessing water supplies in burning areas).

[241] See *supra* note 142.

unconstitutional taking.[242] As the Court noted, these considerations in the flooding context included whether the plaintiffs' land "lies in a floodplain below a dam" and had "experienced flooding in the past."[243] If so, then the plaintiffs' takings arguments would be weakened. The analysis is straightforward, as the law does not want to reward people who gambled and lost on a risky bet about whether flood-prone land they had invested in improving eventually would be submerged.

It is therefore surprising that in *Milton*, the downstream case, the Federal Circuit viewed it as irrelevant that the plaintiffs had all purchased their properties after it was designated as being within a floodplain.[244] And in *Ablan*, the upstream case, the Federal Circuit held that the plaintiffs, all of whom built in a floodplain, nonetheless had the kind of reasonable investment-backed expectations that strengthened their takings case.[245] In so doing, *Ablan* embraced the reasoning of the Court of Federal Claims, below, summarized here:

> While the government argues that Plaintiffs should have known that their land was susceptible to flooding, the Court of Federal Claims justifiably relied on: (1) the undisputed fact "that plaintiffs did not know their properties were located within the reservoirs and subject to attendant government-induced flooding," (2) that "average homeowner[s] do[ ] not generally know" how to "read and understand" government maps that indicated the Plaintiffs' properties were within the dams' reservoirs, (3) that "it would take an uncommonly attentive eye to notice" the "miniscule details" in "subdivision plats, which indicate that land was subject to controlled inundation," (4) that "there is no evidence that [public] meetings [conducted by the Corps and local governments] were heavily attended or particularly well publicized," and (5) that a regular flow of people moving in and out of the community meant that many new residents would not know of the risk of flooding. The Court of Federal Claims' weighing of this evidence and finding that reasonable investment-backed expectations weigh in favor of Plaintiffs were not clearly erroneous.[246]

We can set to one side for now the question of whether "clear error" is the right standard of review for general statements about investment-backed expectations.

Because the Federal Circuit's discussion of the investment-backed expectations arguments are limited to the paragraph excerpted above, the court necessarily glosses over a great deal of context. So let's dig into the Court of Federal Claims' upstream trial court decision to understand the evidence that the trial court and appellate court deemed insufficient to put the landowners on notice. First and foremost, the Court of Federal Claims noted that the Army Corps of Engineers had organized "dozens and dozens of public presentations in the greater Houston

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[242] Arkansas Game & Fish Comm'n, 568 U.S. 23, 39 (2012).

[243] Id. Other considerations are the duration of the flooding, "the degree to which the invasion is intended or . . . the foreseeable result of authorized government action," the character of the land at issue, and the severity of the interference. Those latter two factors likely cut in favor of the landowners.

[244] Milton v. United States, 36 F.4th 1154, 1162 (Fed. Cir. 2022).

[245] Ablan v. United States, 162 F.4th 1364, 1378 (Fed. Cir. 2025).

[246] Id.

area" about the flooding risk that upstream property owners faced in the event of a large-scale hurricane hitting Houston.[247] At these meetings, which occurred over the course of decades prior to Harvey,[248] the Army Corps showed attendees visuals illustrating what areas would be flooded if "the big one" ever hit Houston.[249] As it became clear that people were building homes and businesses in the upstream grazing lands and rice fields that would be most vulnerable to flooding from the Addicks and Barker Flood-Control Reservoirs, the county government and FEMA publicized flood maps and issued various public reports about the risks.[250] Second, the Army Corps did outreach to real estate developers who were building in the flooding-vulnerable upstream areas to underscore the associated risks.[251] Third, as the government noted, homeowners in the upstream area purchased flood insurance at a rate much higher than the national average.[252]

The Court of Federal Claims brushed aside each of these arguments, concluding that they were inadequate to meet the government's burden of showing "that plaintiffs should reasonably have known of the risk."[253] With respect to the dozens and dozens of meetings, "[t]he mere fact that meetings occurred does not mean they were effective at communicating the risk such that the public should have known about government-induced flooding; there is no evidence that these meetings were heavily attended or particularly well publicized in the community."[254] The court emphasized that in a fast-growing area like Houston, newcomers might not learn of the hurricane risk that had been disclosed at meetings that occurred prior to their arrival in the city "without an especially aggressive public campaign."[255] It also emphasized that each of the plaintiffs in the case insisted that they didn't personally know about the flooding risk before the hurricane, which the court deemed "telling with respect to the effectiveness of these meetings" and which indicated in the court's mind "that it is quite reasonable to conclude that the average person in the community was likely unaware of the risk."[256] On remand in the 2026 downstream case, the Court of Federal Claims adopted reasoning similar to its upstream counterpart.[257]

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[247] In re Upstream Addicks and Barker (Texas) Flood-Control Reservoirs, 146 Fed. Cl. 219, 237 (Ct. Cl. 2019).

[248] See id. at 262.

[249] See id. at 238.

[250] See id. at 237-238.

[251] See id. at 262.

[252] See id.

[253] Id.

[254] Id. at 263.

[255] Id.

[256] Id.

[257] See In re Downstream Addicks and Barker (Texas) Flood-Control Reservoirs, 181 Fed. Cl. 225, 252 (2026) ("As to whether defendant interfered with plaintiffs' reasonable investment-backed expectations, the court need not reinvent the wheel.").

The trial court's analysis is a borderline-hilarious illustration of the classic analytical fallacy of selecting on the basis of the dependent variable.[258] Assume for the sake of argument that each plaintiff testified honestly that they didn't know about the risks of flooding. The people who knew about the flooding risk are the ones who presumably bought in less flood-prone areas, and the people in flood-prone areas who didn't sue the government presumably are the ones who understood the risks at the time of their purchase. So the fact that the plaintiffs claim not to have known about the flooding risks tells us little about whether the average person who considered living in the Houston area was aware of what flood maps, insurers, mortgage lenders, the Army Corps, and (at times) county government officials had been trying to tell them for decades. It's astonishing that the Federal Circuit affirmed the lower court's "reasoning" without further commentary.

The upstream court's other reasons for finding that the homeowners had reasonable investment-backed expectations despite having purchased homes in an area prone to hurricane flooding weren't as ludicrous. The Court of Federal Claims found that while maps revealed flooding risks associated with particular elevations, the typical homeowner wouldn't necessarily know the elevation of their own home, nor understand that the flooding risk on government maps stemmed in part from their being located in an area that the government would not be able to protect in order to prevent downtown Houston's flooding.[259] Similarly, though the Corps did communicate to real estate developers about the flooding risk, there was no guarantee that developers would pass this information along to homeowners.[260] Indeed, those developers may have had perverse economic incentives to acquire land in the floodplain (presumably at a lower cost because of flooding risk), develop and flip those properties to naïve purchasers, and then leave those homeowners holding the bag when the anticipated eventual flooding finally materialized. The question before the court in *Ablan* is whether the government, which warned the developers, is the party that should compensate the unfortunate homeowners in that situation. It should also be noted that this part of the *Ablan* court's analysis is arguably consistent with dicta from the Texas Supreme Court, though other portions of *Ablan* are irreconcilable with that same decision.[261]

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[258] See generally James J. Heckman, *Sample Selection Bias as a Specification Error*, 47 ECONOMETRICA 153 (1979). For example, an inept medical researcher might observe that all the patients who recovered from a disease took ibuprofen to deal with pain and then incorrectly infer that ibuprofen cures the disease. But it turns out that many people who did not recover from the disease also took ibuprofen. Limiting the sample to patients who recovered therefore provides a skewed impression of what might have caused their recovery. The Court of Federal Claims judge made a similar mistake in the upstream case, and the Federal Circuit failed to notice.

[259] In re Upstream Addicks and Barker (Texas) Flood-Control Reservoirs, 146 Fed. Cl. 219, 261 (Ct. Cl. 2019).

[260] See id. at 262.

[261] See Harris County Flood Control Dist. v. Kerr, 499 S.W.3d 793, 807 (Tex. 2016) ("This is not a case where the government made a conscious decision to subject particular properties to inundation so that other properties would be spared, as happens when a government builds a flood-control dam knowing that certain properties will be flooded by the resulting reservoir. In such cases of course the government must compensate the owners who lose their land to the reservoir."). It is unclear whether, in this passage, the

One of the problems the government faced in the upstream case is the difficulty of establishing that the plaintiffs indeed gambled on not being left holding the bag when a known risk materialized, versus being more naïve actors who merely didn't do enough homework at the time they purchased their homes. The only evidence available in *Ablan* was the homeowners' own declarations, and it's hardly surprising that they all testified in a self-serving way. Perhaps some of them perjured themselves and some of them didn't, but it was going to be very hard for the government to prove the former. When that kind of problem of proof emerges in court, it is often helpful to look at what we know about how real estate markets deal with flooding risk in general and hurricane-related flooding risks in particular. The picture that emerges in the economics literature is nuanced.

For starters, as applied to contemporary land purchasers, the idea that homeowners are generally unaware of flooding risks revealed on flooding maps is increasingly untenable. Today if prospective purchasers in the United States look at real estate listings on widely used websites like Redfin or Realtor.com, they will see a flooding risk score produced by a company called First Street for each property. Zillow previously included such information as well,[262] but then removed it under pressure from California's Multiple Listing Service.[263] The websites will remove flooding information if the seller requests it,[264] though the seller opting out in this way may constitute improper concealment of a material risk, and coming across a rare listing with no flood disclosures might put a reasonable prospective purchaser on notice that they should do further due diligence. These flooding scores appear to have significant effects on sale prices, with buyers avoiding otherwise appealing homes that are exposed to substantial risk.[265] That said, while site-specific flooding risk information is freely available now, it was not as readily available when many of the plaintiffs in the Hurricane Harvey cases purchased or improved their property. So what today should be an easy issue was more difficult retrospectively.

At the time of Hurricane Harvey, the most common pathways for prospective homeowners to learn about the flooding risk associated with a piece of land they were contemplating purchasing were through trusted third parties. As the *Ablan* court suspected, relatively few homeowners learned information about their prospective homes' flooding risk for the first time through a government website or a FEMA map. Rather, it's much more common

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Kerr court is contemplating permanent flooding or flooding from a once-in-a-millennium storm like Harvey.

[262] See Jean Eaglesham & Nicole Friedman, *The Climate-Disaster Scores that Could Make or Break Your Homes Sale*, WALL ST. J., Jan 18, 2026.

[263] See Claire Barber, Zillow *Removed Climate Risk Scores. This Climate Expert is Restoring Them*, ARS TECHNICA, Jan. 21, 2026, available at https://web.archive.org/web/20260121175736/https://arstechnica.com/science/2026/01/zillow-removed-climate-risk-scores-this-climate-expert-is-restoring-them/?utm_source=bsky&utm_medium=social

[264] See id.

[265] See Eaglesham & Friedman, *supra* note 262. Experimental evidence suggests that the manner in which flooding risk information is presented to consumers and the quantity of such information is important. See Avidesh Seenath, Scott Mark Romeo Mahadeo & Matthew Blackett, *Decision-Making Under Flood Predictions: A Risk Perception Study of Coastal Real Estate*, 45 RISK ANALYSIS 1899, 1204 (2025). The study provides an especially helpful natural experiment because of a government decision to prohibit the use of information from the new maps in private insurance premium pricing. See id. at 1199.

for homeowners to learn that their properties face flooding risk through either their mortgage lender or their realtor.[266] By ignoring these dynamics, the *Ablan* decision disregards the critical avenues for relevant information to flow.

There are broader questions to explore about how efficiently real estate markets account for flooding risk connected to hurricanes and other natural disasters. The literature on this topic is rather vast, though much of it struggles with endogeneity challenges. For example, homeowners in flood zones must typically obtain flood insurance in order to obtain a mortgage, and this insurance itself is costly.[267] A study of single family homes in Miami-Dade County finds that moving from outside a FEMA 100-year flood zone to inside such a zone was associated with a roughly $4,200 decline in property values for the typical home, and properties that moved from inside such a zone to outside saw a similar increase in values, though changes in insurance premiums may explain some of this price movement.[268] One well-designed differences-in-differences study looked at a 2011 change in government policy to make detailed flooding risk maps available to the public in Ireland, a policy change that did not affect the insurance market. These disclosures produced an immediate 4% reduction on the price of real estate in flood-prone areas, and a nearly 5% reduction in coastal areas prone to flooding.[269] A different study of the New Orleans market just before Hurricane Katrina found that lower home elevation was associated with lower real estate prices – each additional foot below sea level corresponded to a 0.9% decrease in real estate values, and after Katrina this discount grew to 4.5% per foot.[270] Another study of three inland counties in the United States that experienced major fluvial flooding events found that properties in the 100-year and 500-year floodplains sold for

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[266] See Carolyn Kousky & Noelwah R. Netusil, *Flood Insurance Literacy and Flood Risk Knowledge: Evidence from Portland, Oregon*, 26 RISK MGMT. & INSUR. REV. 175, 195 fig. 7 (2023). Of course, there are still large numbers of home purchasers who do not learn about flooding risk until after they have purchased a home. See Okmyung Bin & Craig E. Landry, *Changes in Implicit Flood Risk Premiums: Empirical Evidence from the Housing Market*, J. ENVTL. ECON. & MGMT. 361, 375 (2013) ("The lack of a persistent [price] effect suggests that homebuyers . . . are unaware or misinformed about flood risks and attendant insurance requirements when bidding on properties.").

[267] See Justin Contat, Carrie Hopkins, Luis Mejia & Matthew Suandi, *When Climate Meets Real Estate: A Survey of the Literature*, 52 REAL ESTATE ECON. 618, 624 (2024). There is some evidence of underenforcement of these requirements, meaning that roughly a quarter to one half of homeowners who are required to have flood insurance do not actually satisfy this requirement. See Wanyun Shao et al., *Understanding the Effects of Past Flood Events and Perceived and Estimated Flood Risks on Individuals' Voluntary Flood Insurance Purchase Behavior*, 108 WATER RESEARCH 391, 392 (2017); Erwann O. Michel-Kerjan & Carolyn Kousky, *Come Rain or Shine: Evidence on Flood Insurance Purchases in Florida*, 77 J. RISK & INSUR. 369, 370 (2010). One study finds that by far the most common reason for homeowners to purchase flood insurance was that their mortgage lender requires it. See Kousky & Netusil, *supra* note 266, at 193 fig. 4.

[268] See Evelyn G. Shu et al., *The Economic Impact of Flood Zone Designations on Residential Property Valuation in Miami-Dade County*, 15 J. RISK & FIN. MGMT. 434, at 11 (2022).

[269] See Tom Gillespie, Ronan C. Lyons, and Thomas K.J. McDermott, *Estimating the Flood Risk Discount: Evidence from a One-Off National Information Shock*, 88 ENVTL. & RESOURCE ECON. 1195 (2025).

[270] See Russell McKenzie & John Levendis, *Flood Hazards and Urban Housing Markets: The Effects of Katrina on New Orleans*, 40 J. REAL ESTATE FINANCE ECON. 62, 74 (2008).

substantially less than properties outside those floodplains in the years preceding the floods.[271] But a study of North Carolina's real estate market before and after two hurricanes in the 1990s found no pre-hurricane price discounts, and price discounts for property in floodplains diminished over time, with no discernible discount six years after the second hurricane.[272] So at least some evidence from well-designed pricing studies points against the markets efficiently and fully accounting for risks.

Comprehensive reviews of the literature suggest that properties that were damaged in hurricanes see substantial price decreases over the next several years, even after accounting for repair costs.[273] While widely understood flooding risks are priced into existing home values, unexpected flooding cause the largest changes in purchasers' behavior and therefore lead to the sharpest decline in real estate prices.[274] Other meta-analyses suggest that whereas inland properties in a 100-year floodplain are discounted by an average of roughly 4.6%, coastal properties in floodplains fetch a price premium of 14.8%, probably because of the correlation between flood plain location and proximity to the beach.[275] This meta-analysis also finds that the price effects are much more pronounced after flooding, with a 2.9% discount for inland properties prior to a flood versus a 6.9% discount in the immediate aftermath in a 100-year floodplain, and a 0.3% price premium in a 500-year floodplain before flooding versus a 5.2% discount after flooding.[276]

Timing is important too. Even though home-buying is the largest purchase many Americans will ever make, the majority of buyers do not learn about a property's flood risk or the associated costs of flood insurance until after they have made an offer on a home.[277] A study of Oregon homeowners found that more than 60% of respondents residing in a 100-year floodplain area "did not think about flood risk at all when deciding to purchase their home," and 62% of respondents described their current home's flood risk as below average for their neighborhood; just 5% thought their home faced above average flooding risk in the context of their neighborhood.[278] So optimistic bias is a complicating favor in real estate markets.[279]

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[271] See Ryan G. Miller & Nicholas Pinter, *Flood Risk and Residential Real-Estate Prices: Evidence form Three US Counties*, 15 J. FLOOD RISK MGMT. e12774, at 1, 11 (2021).

[272] See Bin & Landry, *supra* note 266, at 375. This result is especially surprising because it suggests that the higher insurance premiums associated with being in a 100-year floodplain and having to obtain insurance in order to get a mortgage are not capitalized into housing prices. See id.

[273] See Contat et al., *supra* note 267, at 626.

[274] Id. at 628.

[275] See Allan Beltrán, David Maddison & Robert J. R. Elliott, *Is Flood Risk Capitalised into Property Values*, 146 ECOLOGICAL ECON. 668, 673, 676-679 (2018).

[276] See id. at 673.

[277] See Kousky & Netusil, *supra* note 266, at 176 ("We find that only 16% of those in our 100-year floodplain sample report having learned of the flood risk and the cost of flood insurance before making an offer on their property.").

[278] See id. at 186 & 187 tbl. 2.

[279] See Diego Salzman & Remco C.J. Zwinkels, *Behavioral Real Estate*, 25 J. REAL ESTATE LIT. 77, 84 (2017).

The effects of hurricanes on commercial real estate are similar, with one comprehensive study of thirty years of property transactions showing that it took roughly five years after a hurricane for property values to return to their inflation-adjusted pre-hurricane levels.[280] In the two years after a hurricane, property not impacted by the disaster increased 26% more than commercial property that was affected.[281] This short-term effect, followed by a rebound to baseline values, is in tension with the way the Court of Federal Claims in the upstream flooding case, understood the real estate market. Judge Lettow concluded that the upstream properties that had been flooded would see "a decline in property value of at least 20 to 30 percent."[282] None of the serious academic studies show a long-term or persistent effect anywhere near that 20-30 percent figure, and most of them don't even show short-term effects with that magnitude. In light of the relevant scholarly literature, Lettow's factual finding was essentially *absurd*.

Pulling together this vast literature on real estate and insurance markets, the following conclusions seem inevitable. First, the weight of the evidence indicates that flooding risk is reflected in real estate values, insurance premiums, and insurance purchases, substantially aided by the roles of mortgage insurers and realtors. But there's a clearer consensus about post-flooding price discounts than pre-flooding discounts, and those post-flood discounts tend to dissipate after five years or so. Second, flooding risk is probably not as salient as it ought to be for home buyers. At least prior to the availability of flood risk assessments on sites like Redfin and Realtor.com, purchasers often learned about flooding risk after they decided upon a house and agreed upon an initial purchase price. Third, decisions about purchasing and insurance probably reflect optimistic bias on the part of homeowners and homebuyers, who engage in motivated reasoning in order to minimize the frightening risks associated with flooding. The Takings Clause question therefore presents the issue of whether the government should be liable in those instances where risk information was readily available but then was minimized, never sought, or ignored by property owners.

By essentially giving home purchasers a free pass on due diligence to determine flooding risk and rendering owners who did less investigation more likely to prevail, the Federal Circuit created a kind of incongruity with property doctrine more generally. A foundational feature of property law is to put landowners on notice of information they either did know or should have known. This concept arises in several areas of property law, including record and inquiry notice,[283] adverse possession,[284] reciprocal negative easements and equitable servitudes,[285] and

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[280] See Jeffrey D. Fisher & Sara R. Rutledge, *The Impact of Hurricanes on the Value of Commercial Real Estate*, 56 BUS. ECON. 135-136 (2021).

[281] See id. at 134.

[282] See in re Upstream Addicks and Barker (Texas) Flood-Control Reservoirs, 146 Fed. Cl. 219, 252 (Ct. Cl. 2019).

[283] See *infra* text accompanying notes 287-288.

[284] See, e.g., Sellers v. Claudson, 550 P.3d 559 (Wy. 2024) (trespasser's use of land was open and notorious, providing landowner with constructive notice for purposes of adverse possession).

[285] See, e.g., Sanborn v. McLean, 206 N.W. 496 (Mich. 1925) (common plan and uniformity in residential neighborhood put owner on notice that commercial uses of residential property were not permitted, creating a duty to search adjacent parcels' chain of title to discover reciprocal negative easement therein).

common interest communities.[286] In each of these pockets of property doctrine, the law's focus is not on what a particular party did know, but what they should have known, and the absence of actual knowledge becomes irrelevant if constructive knowledge was present. Let's march through a few prominent examples to underscore that the idea of constructive knowledge is a common thread throughout any Property course.

Take the ideas of record notice and inquiry notice. Record notice is notice of adverse property interests whose existence is revealed in properly recorded instruments in the chain of title.[287] Inquiry notice provides that someone who acquires an interest in property takes that interest subject to a duty to inquire about the possible existence of an adverse interest based on facts that would cause a reasonable person to make such an inquiry.[288] In both instances, the buyer of property who wishes to obtain clear title to land must exercise due diligence, examining title records (in the case of record notice) or doing further investigations to learn about someone's unrecorded occupancy of property or an unrecorded lease (in the case of inquiry notice).

These core conceptual frameworks of constructive notice have manifested in the Federal Circuit's own pre-*Ablan* and pre-*Milton* Takings Clause case law too. For example, in a series of cases involving government actions that authorized physical intrusions onto land by third parties, the Federal Circuit has insisted that the statute of limitations to sue for a violation of the Takings Clause began on the date that Congress or an agency authorized the intrusions, not on the later date when the physical intrusions actually occurred. So the court held in Fallini v. United States,[289] Goodrich v. United States,[290] Navajo Nation v. United States,[291] and Campbell v. United States.[292] As this line of authority emphasizes, a cause of action arises at the time the final decision of a government actor is made, not when the impact of that decision is felt by the landowner.[293] Thus a great many otherwise meritorious takings suits failed on statute of limitations grounds.[294] These Federal Circuit cases indicate that core Property ideas of constructive notice are well established in takings law as well.

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[286] See, e.g., Nahrstedt v. Lakeside Village Condominium Ass'n, Inc., 878 P.2d 1275 (Cal. 1994) (condominium purchaser had duty to examine condo associations' CC&Rs, which prohibited all residents from keeping cats and dogs in the development, and was bound by such restrictions even though she lacked actual knowledge of them when she purchased the unit).

[287] See ALEXANDER ET AL., *supra* note 186, at 585.

[288] See id.

[289] 56 F.3d 1378, 1380-1382 (Fed. Cir. 1995).

[290] 434 F.3d 1329, 1331-1333 (Fed. Cir. 2006).

[291] 631 F.3d 1268, 1275 (Fed. Cir. 2011).

[292] 932 F.3d 1331, 1338 (Fed. Cir. 2019).

[293] See id.

[294] For further discussion see Rebecca Hansen & Lior Jacob Strahilevitz, *Toward Principled Background Principles in Takings Law*, 10 TEX. A & M L. REV. 427 (2023).

This constructive notice idea has been endorsed by the Supreme Court too, in *Chippewa Indians v. United States*,[295] which involved a statute that simultaneously created a national forest on what had previously been government lands held in trust for a tribe and permitted the logging of timber on that land. The Court held that the date of the taking was the day the statute was enacted, not the subsequent date when the government sold the lumber and it became apparent that the government's appraisal of that lumber used to compensate the tribe was too low.[296]

To be sure, the claim here is not that the Federal Circuit's recent decisions on investment-backed expectations contradicts its recent decisions on cause of action accrual. It's that there's significant conceptual tension between the lines of precedent. The statute of limitations decisions from the Federal Circuit and Supreme Court both contemplate property owners who don't exercise due diligence to follow statutory, regulatory, and administrative developments that may endanger their property rights. If those owners don't act promptly, they forever lose the right to sue. Yet *Ablan* excuses property owners for ignoring government-issued flood maps, federal and county government meetings designed to alert owners to risks, and information they may glean from the real-estate market. It's incongruous.

Going forward, courts perhaps will be sympathetic to the idea that flooding risk information is much more readily available now, through sites like Realtor.com or Zillow.com, than it was in 2017. So changed factual circumstances may permit the Federal Circuit to distinguish *Ablan*'s reasoning. But there is real risk that the court will fail to revisit its analysis of investment-backed expectations. For the federal government it probably would be cost-effective to mail a letter to the address of each home or business that is similarly situated to the Harvey plaintiffs: landowners whose property lies within a 100-year or 500-year floodplain but for whose property the government does not already possess a flowage easement. The costs of identifying all such properties and mailing these notices annually is not trivial, but if *Milton* and *Ablan* foreshadow the Federal Circuit's new approach, then such mailings alerting owners to the risks of flooding would likely prove a cost-effective way of reducing taxpayers' future liability for takings suits.

VI. Conclusion

The two sets of plaintiffs in the Harvey cases present conflicting claims. According to the upstream property owners, the federal government owes them money because it did not release enough water from the Barker and Addicks reservoirs downstream. According to the downstream property owners, the federal government owes them money because it released too much water from those same reservoirs. Without commenting on the tension between these claims, the Federal Circuit handed both sets of plaintiffs resounding victories. As a result of Harvey, the Army Corps faced a "damned if you do, damned if you don't" dilemma. The Texas Supreme Court says imposing liability on the government under the Takings Clause is inappropriate in those circumstances, but the Federal Circuit disregarded the applicable state's property law.[297]

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[295] Chippewa Indians v. United States, 305 U.S. 479 (1939).

[296] *Id.* at 481–83.

[297] Harris County Flood Control Dist. v. Kerr, at 810 ("[T]he homeowners' theory of takings would place governments in a unending dilemma of requiring extreme flood-control measures and facing a regulatory takings claim from the owners directly subjected to such measures, or requiring less extensive measures and facing a takings claim when downstream property owners experience flooding. In the words of

Taken together, the court's decisions in *Milton* and *Ablan* are the worst takings decisions the federal courts have made in the 2000s. They are also likely to prove the costliest, both in terms of the out-of-pocket government payouts and social costs brought about by perverse incentives for both property owners and governments. The Federal Circuit's *Milton* case is especially worrisome because of its embrace of a positive liberties theory of liability that is out of step with nearly all of federal takings law and constitutional law more generally, and *Ablan*'s gutting of the necessity defense is similarly perplexing. The Federal Circuit has simultaneously rendered incoherent the law's longstanding distinction between takings and torts by mischaracterizing a single storm as a series of floodings, while simultaneously embedding positive liberty protections into the federal Constitution where they were previously absent. These Federal Circuit decisions are quite difficult to square with at least six Supreme Court decisions: *Bowditch*, *Sponenbarger*, *Caltex (Philippines)*, *DeShaney*, *Lucas*, and *Cedar Point Nursery*. Along the way, the Federal Circuit has also excused property purchasers who buried their heads in the sand about a flooding risk that the federal government was trying to publicize, encouraged landowners to take on excessive risks, created perverse incentives for governments to avoid planning for disasters and assessing the risks associated with worst case scenarios, and upset the market for flood insurance in ways that will make sensible planning and risk sharing much more difficult going forward.

The incentives created by *Milton* and *Ablan* are largely perverse. Governments should release water all at once instead of gradually over the course of days. Governments should empower officials to make ad hoc decisions instead of sticking with a well-researched playbook that addresses natural disaster contingencies. These officials should then wait until the last possible moment before releasing water from a stressed dam, lest a judge second-guess the necessity of the government's decision. Property purchasers should have little incentive to evaluate flooding and fire risks, and compensation should be constitutionally mandated for the most risk-seeking and least diligent purchasers of property, to be necessarily cross-subsidized by their better-informed and more risk-averse counterparts. And if all this becomes too costly over the long run, the government will get out of the business of promoting natural disaster resiliency altogether. On July 23, 2026, the Army Corps of Engineers announced that, in response to *Milton* and *Ablan*. it was recommending scrapping a flood control project in Jefferson City, Missouri, whose construction would have been endorsed had it not been for the changes in doctrine and project costs prompted by the two recent decisions.[298] That sound you just heard is the other shoe

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amicus curiae City of San Antonio, flood-control decisions will be reduced to 'picking your plaintiff rather than responsible flood control management.'")

[298] See email from Missouri Department of Natural Resources, re: Lower Missouri River Studies – Jefferson City Study Update, July 23, 2026 (on file with author) ("Recent federal court decisions relating to takings analysis and determinations for federal projects have significantly increased the scope of what is considered induced flooding under federal law to include not only newly flooded lands or an increase in the flood footprint but also increased flooding depth on land that would already be flooded during a flood event. This has significantly increased the amount of land area requiring flood mitigation for a federal project to move forward with federal funding. This feasibility study is one of the first projects in the nation to be impacted by this new process and it has resulted in a determination that an estimated 26,000 acres of land on 1,700 parcels spread across four counties will experience induced flooding, despite little to no changes to flood footprint beyond the local project area. Due to the lack of an identified non-federal sponsor (NFS) capable of fully executing all NFS-required actions for project implementation, the

dropping. Because all these incentives would arise as a matter of constitutional law, there would be little that society can do to ameliorate these misalignments, short of hoping that the judges ultimately come to see the error of their ways.

While it's understandable that the Federal Circuit was sympathetic to Houston's tens of thousands of flood victims, many of whom were uninsured, the court has handed down a couple of decisions that are hard to defend as a matter of *stare decisis*, original public meaning, and as a pragmatic matter. There are many situations where governments confront a trolley problem not of their own making. They did not build the trolley, and they are not responsible for sending it careening down the tracks. Governments simply made sensible decisions about how to minimize the damage, resulting in unavoidable harm. When it comes to natural disasters like hurricanes, tsunamis, and wildfires, the federal courts should reconsider the doctrinal revolution that *Milton* and *Ablan* portend. Questions about how best to address the severe costs of these storms and other natural disasters should remain with the government entities that have long resolved them: Congress and FEMA.

USACE is recommending a No Action Alternative despite identification of a federal interest plan that, prior to these court decisions, would have been recommended.").