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Dude, Where's My House: The Interaction Between the Takings Clause, the Police Power, the Militarization of Law Enforcement, and the Innocent Third-Party Property Owner

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**DUDE, WHERE’S MY HOUSE: THE INTERACTION
BETWEEN THE TAKINGS CLAUSE, THE POLICE
POWER, THE MILITARIZATION OF LAW
ENFORCEMENT, AND THE INNOCENT THIRD-
PARTY PROPERTY OWNER**

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“What happened to us should never happen in this country, ever.”

– Leo Lech¹

“I’ve lost everything.”

– Vicki Baker²

“They ripped my entire house down and there was nothing I could do about it or say about it.”

– Andrea Young³

I. INTRODUCTION

On June 22, 2022, for the first time in United States history, a federal jury awarded a property owner damages under the Fifth Amendment's Takings Clause,⁴ which requires the government to pay just compensation when private property is taken for public use.⁵ Before this landmark event, many state and federal courts had denied takings claims made by innocent third-party property owners when law enforcement significantly damaged their property while trying to apprehend a suspect.⁶ These jurisdictions have held that such actions are exempt from the Takings Clause if they are a valid exercise of the police

1. Meagan Flynn, *Police Blew Up an Innocent Man's House in Search of an Armed Shoplifter. Too Bad, Court Rules*, WASH. POST (Oct. 30, 2019), <https://www.washingtonpost.com/nation/2019/10/30/police-blew-up-an-innocent-mans-house-search-an-armed-shoplifter-too-bad-court-rules/>.

2. Billy Binion, *A SWAT Team Destroyed This Innocent Women's House While Chasing a Fugitive. The City Refuses to Pay for Damages*, REASON (Mar. 5, 2021, 3:47 PM), <https://reason.com/2021/03/05/swat-team-destroyed-innocent-womans-house-while-chasing-fugitive-city-refuses-to-pay-fifth-amendment/>.

3. Maria Serrano, *Family Wants Answers After Police Destroy Home During Standoff, But Cops Defend Decision*, WRKC (Nov. 12, 2021), <https://local12.com/news/nation-world/family-wants-answers-after-police-destroy-home-during-standoff-but-cops-defend-decision-michigan-kalamazoo-armed-man-shooting-officer-involved-andrea-young-vernon-coakley>.

4. Jeffrey Redfern & Daryl James, *Texas Police Destroy Home, Then Try to Leave Without Paying*, WASH. EXAM'R (July 2, 2022, 2:12 PM), <https://www.washingtonexaminer.com/opinion/op-eds/texas-police-destroy-home-then-try-to-leave-without-paying>.

5. U.S. CONST. amend. V.

6. See *Lech v. Jackson*, 791 F. App'x 711 (10th Cir. 2019); *AmeriSource Corp. v. United States*, 525 F.3d 1149 (Fed. Cir. 2008); *Bachmann v. United States*, 134 Fed. Cl. 694 (2017); *Johnson v. Manitowoc Cnty.*, 635 F.3d 331 (7th Cir. 2011); *Eggleston v. Pierce Cnty.*, 64 P.3d 618 (Wash. 2003); *Customer Co. v. City of Sacramento*, 895 P.2d 900 (Cal. 1995); *Sullivan v. City of Oklahoma City*, 940 P.2d 220 (Okla. 1997); and *Hamen v. Hamlin Cnty.*, 955 N.W.2d 336 (S.D. 2021) (all holding that the police power is a blanket exception from the Takings Clause). *But see John Corp. v. City of Houston*, 214 F.3d 573 (5th Cir. 2000); *Brewer v. Alaska*, 341 P.3d 1107 (Alaska 2014); *Garrett v. City of Topeka*, 916 P.2d 21 (Kan. 1996); *Wegner v. Milwaukee Mut. Ins. Co.*, 479 N.W.2d 38 (Minn. 1991); *Steele v. City of Houston*, 603 S.W.2d 786 (Tex. 1980); *Soucy v. State*, 506 A.2d 288 (N.H. 1985); and *Kelley v. Story Cnty. Sheriff*, 611 N.W.2d 475 (Iowa 2000) (all holding that the police power is not a blanket exception to the Takings Clause).

power.⁷ This legal doctrine is especially dangerous because traditional American law enforcement has become increasingly militarized over the last forty years.⁸ Three recent examples demonstrate how destructive law enforcement can be while attempting to apprehend a suspect.

In the summer of 2015, a Walmart employee called police to report a fleeing shoplifter, who was later identified as Robert Seacat.⁹ Later in the evening, Seacat broke into the nearby Greenwood Village, Colorado home of John Lech, who lived with his girlfriend and her nine-year-old son.¹⁰ As the local police department arrived, Seacat, who was now the only person in the home, began shooting at the officers.¹¹ A standoff ensued.¹²

During the next several hours the police destroyed John Lech's home.¹³ The police first fired two forty-millimeter rounds of cold-gas munitions into the house.¹⁴ Next, they breached the front and back doors of the house using a BearCat, an Armored Personnel Carrier ("APC").¹⁵ Unable to remove Seacat, the police used the BearCat to remove some of the exterior walls of the home.¹⁶ The police allegedly did this to make the suspect feel exposed and to open holes for the officers to fire into.¹⁷ Officers were specifically instructed to "take as much of the building as needed without making the roof fall in."¹⁸ After a nineteen-hour standoff, Seacat was finally taken into custody.¹⁹ Due to the damage caused by law enforcement, Lech had to demolish his \$580,000 home.²⁰

John Lech, along with his parents Leo and Alfonsia, who had purchased the home for their son, argued in court that the Greenwood Village Police Department had taken their house for public use and that, as such, just compensation was required under the Takings Clause of the Fifth Amendment.²¹ However, the district court held the damage to

7. See, e.g., *Lech v. Jackson*, 791 F. App'x 711, 713–14 (10th Cir. 2019).

8. Peter B. Kraska & Louis K. Cubellis, *Militarizing Mayberry and Beyond: Making Sense of American Paramilitary Policing*, 14 JUST. Q. 607, 609 (1997).

9. *Lech*, 791 F. App'x at 713.

10. *Id.*

11. *Id.* The nine-year-old boy, who was waiting for his mother to return from the store, was the only person home when Seacat entered. The child was watching YouTube videos when he heard the security alarm trip. He walked out of his room and saw Seacat walking up the stairs holding a gun. Seacat reportedly told the boy, "I don't want to hurt anybody. I just want to get away." A few moments later, the boy left the home unharmed. Flynn, *supra* note 1.

12. *Lech*, 791 F. App'x at 713.

13. *Id.*

14. *Id.*

15. *Id.* A "BearCat" is an Armored Personnel Carrier that is typically used in high threat level situations including hostage situations, active shooters, and barricaded gunman. The BearCat is used by military, SWAT, and law enforcement. Kyle Proctor, *Crisp County Receives New BearCat Armored Vehicle*, FOX 31 (Mar. 5, 2021), <https://wfxl.com/news/local/crisp-county-receives-new-bearcat-armored-vehicle>.

16. *Lech*, 791 F. App'x at 713.

17. *Id.*

18. *Id.*

19. *Id.*

20. Billy Binion, *A SWAT Team Blew up this Family's House While Chasing a Shoplifter. The Supreme Court Won't Hear the Case*, REASON (June 29, 2020, 3:50 PM), <https://reason.com/2020/06/29/swat-team-police-leo-lech-supreme-court-5th-amendment/>.

21. *Lech*, 791 F. App'x at 713.

Lech's home did not constitute a taking because attempting to apprehend a criminal suspect and enforcing a state's criminal laws are valid exercises of the police power.²² On appeal, the Tenth Circuit affirmed the judgement, holding that "when the state acts pursuant to its police power, rather than the power of eminent domain, its actions do not constitute a taking for purposes of the Takings Clause."²³

Five years later, a similar situation occurred in McKinney, Texas.²⁴ On July 25, 2020, Wesley Little kidnapped a fifteen-year-old girl.²⁵ Soon after, he and the teen arrived at the home of Vicki Baker—a seventy-six-year-old woman battling stage-three breast cancer—for whom Little had previously done some housework.²⁶ Baker, who was in the process of selling her home, was residing in Montana while her daughter, Deanna Cook, prepared the home for sale.²⁷ Cook, already aware of the kidnapping from news reports, let Little and the teen inside.²⁸ She then immediately left the home and called the McKinney Police Department, who soon arrived on-scene.²⁹ The teen, who was released to police unharmed, relayed that Little had multiple firearms and refused to leave the house alive.³⁰ To ensure the authorities removed Little from the home, Cook provided officers with a back gate code, garage door opener, and house key.³¹ Law enforcement never used these items.³² Instead of using the back gate code, the police drove a BearCat through her fence.³³ Instead of using the garage door opener, police used explosives to breach the garage door.³⁴ Finally, instead of using the house key, the McKinney Police Department drove the BearCat through the front door.³⁵ After causing all of this damage, police entered the home to find Little dead from a self-inflicted gunshot wound.³⁶ In total, Vicki Baker spent approximately \$50,000 to repair a home that she did not damage.³⁷

On March 3, 2021, Vicki Baker filed a lawsuit against the City of McKinney for allegedly violating both the U.S. and Texas Constitutions' Takings Clauses.³⁸ On April 29, 2022, the United States District Court for the Eastern District of Texas partially granted Baker's summary judgement motion and held that the City of McKinney was liable for a taking under the Fifth Amendment.³⁹ On June 22, 2022, a federal jury awarded Baker

22. *Id.* at 713–14.

23. *Id.* at 717; *see also* Rex Realty Co. v. City of Cedar Rapids, 322 F.3d 526, 528 (8th Cir. 2003) (defining eminent domain as "the power of a governmental entity to take private property for a public use without the owner's consent [so long as just compensation has been paid].").

24. Binion, *supra* note 2.

25. Baker v. City of McKinney, 571 F. Supp. 3d 625, 629 (E.D. Tex. 2022).

26. Binion, *supra* note 2.

27. Baker, 571 F. Supp. 3d at 629 n.1.

28. *Id.* at 629

29. *Id.*

30. *Id.*; Binion, *supra* note 2.

31. Baker, 571 F. Supp. 3d at 629; Binion, *supra* note 2.

32. Baker, 571 F. Supp. 3d at 629.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. Baker, 571 F. Supp. 3d at 629; Binion, *supra* note 2 (additionally, the explosions left Deanna Cook's dog deaf and blind).

38. Baker, 571 F. Supp. 3d at 629.

39. *Id.* at 638.

\$59,656.59 in damages.⁴⁰ While Baker has currently received just compensation, it is unclear how the Fifth Circuit Court of Appeals will rule on the merits of this case on a potential appeal.

Finally, on November 8, 2021 in Kalamazoo, Michigan, Alex Rawls entered the unlocked home of Andrea Young and asked for restroom access and a change of clothes.⁴¹ Rawls was wanted by police after shooting a woman five times the week before.⁴² Young, who was living in the rented home with her five children, was able to alert authorities and safely escape.⁴³ Unfortunately, the home would be completely leveled hours later.⁴⁴ Similar to John Lech's story, when Kalamazoo Police arrived, Rawls shot at them, and a sixteen-hour standoff began.⁴⁵ Officers shot fifty rounds of tear gas into the home to get Rawls to leave, but this was unsuccessful.⁴⁶ Unable to reach Rawls, as he was shooting at officers from the second floor, the police decided to tear down the walls, windows, and doors of the home, causing it to collapse.⁴⁷ Rawls committed suicide at the end of the standoff.⁴⁸ Young's home was completely demolished after the incident, and the family lost all of their personal belongings.⁴⁹ However, unlike Greenwood Village, Colorado, and McKinney, Texas, the City of Kalamazoo compensated the injured property owners without litigation.⁵⁰ The City paid the Youngs over \$33,000 to replace their personal belongings and paid the homeowner \$117,000, the fair market value of the home.⁵¹ Andrea Young and the homeowner were justly compensated, but why are other property owners, like John Lech, forced to bear the financial burden of law enforcement destroying their property when basic notions of justice and fairness dictate that this cost should not fall on them alone?⁵²

This Comment will explore the past, present, and future of the relationship between the Takings Clause and the police power. Part II familiarizes readers with the Takings Clause, the police power, and where these doctrines overlap. In doing so, the reader will see that, through the expansion of the public use clause, the line between public use and police power has been blurred. This further illustrates why the semantic difference between the police power and the power of eminent domain should not be determinative in

40. Redfern & James, *supra* note 4.

41. Serrano, *supra* note 3.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. Serrano, *supra* note 3.

47. Leona Larson, *KDPS Chief Defends Police Tactic That Demolished Home*, WMUK (Nov. 12, 2021, 8:34 AM), <https://www.wmuk.org/wmuk-news/2021-11-12/kdps-chief-defends-police-tactic-that-demolished-home> (This tactic is called "porting," and is typically used to easily locate a suspect without putting law enforcement in danger).

48. Serrano, *supra* note 3.

49. *Id.*

50. Rachel Van Gilder, *Kalamazoo to Pay Around \$180K After House Demolished in Standoff*, WOOD TV (Mar. 4, 2022, 4:55 PM), <https://www.woodtv.com/news/kalamazoo-county/kalamazoo-to-pay-around-180k-after-house-demolished-in-standoff/>.

51. *Id.*

52. *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (the Takings Clause is "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.").

situations where law enforcement significantly damages the property of an innocent third-party. Part III surveys the rise of America's militaristic police force. Part IV examines caselaw in this area to show the reader that courts inconsistently decide whether the police power completely shields government actors. Part V proposes a full rejection of the police power's blanket exemption from the Takings Clause, and the adoption of a factor test inspired by prominent regulatory takings decisions.

II. TAKINGS CLAUSE JURISPRUDENCE IS A DOCTRINAL MESS

The Supreme Court's interpretation of the Takings Clause has changed dramatically since the Fifth Amendment's ratification.⁵³ As the Supreme Court has expanded the Takings Clause's breadth, it has often been placed in tension against the states' police powers.⁵⁴ This has been especially true since the mid-twentieth century when courts began conflating the police power's scope by making it immune to takings claims.⁵⁵ Section A examines the original formulation of the Takings Clause and its expansion over time. Section B provides an introduction to the police powers and illustrates the broad regulatory power the state retains. Section C demonstrates how these doctrines have intersected in modern American jurisprudence.

A. While Originally Interpreted Narrowly, Courts Now Interpret the Takings Clause Broadly

The Fifth Amendment states that:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; *nor shall private property be taken for public use, without just compensation.*⁵⁶

Over 200 constitutional amendments were proposed at the state ratifying conventions, but none of these amendments suggested a takings clause.⁵⁷ Instead, James Madison "unilaterally" included it among the nineteen amendments he proposed in 1789.⁵⁸ Madison's original draft of the Takings Clause read: "No person shall be . . . obliged to relinquish his property for public use, without just compensation."⁵⁹ There is no recorded congressional debate over the Takings Clause, but scholars and commentators suggest that the wording was changed to "highlight the physical action by the government" by shifting the

53. *See infra* Part II.A.

54. *See infra* Parts II.B. and II.C.

55. *See infra* Part II.C.

56. U.S. CONST. amend. V (emphasis added).

57. WILLIAM MICHAEL TREANOR, *THE ORIGINAL UNDERSTANDING OF THE TAKINGS CLAUSE* 4 (1998).

58. *Id.*

59. *Id.* at 4.

focus off of the individual's "relinquish[ing]" of their property and putting it "on the government's taking."⁶⁰ Madison sought to address two specific problems by drafting the Takings Clause.⁶¹ First, during the revolutionary period, the United States seized over \$20 million of loyalists' real property—ten percent of the value of all real property in the country.⁶² Second, Madison was a slaveowner from Virginia, and he was concerned that Congress would pass legislation that emancipated slaves without compensating their owners.⁶³

Early case law interpreted the Takings Clause very narrowly, as the Supreme Court held that an individual's property must be literally physically seized—"a direct appropriation"—for the individual to be compensated.⁶⁴ The Court's original interpretation allowed for statutes and regulations to limit property use and completely devalue property altogether.⁶⁵ This changed in *Pennsylvania Coal Co. v. Mahon*.⁶⁶ In 1878, the Pennsylvania Coal Company conveyed the surface rights of parcels of land to various property owners, but the company retained the right to mine the properties.⁶⁷ In 1921, the Pennsylvania State Legislature passed the Kohler Act, which prevented the mining of coal in a way that could negatively affect the structural integrity of land.⁶⁸ Property owners subsequently sued the coal company, arguing that the Kohler Act destroyed its right to mine the land.⁶⁹ In an opinion written by Justice Holmes, the Court said the Kohler Act was not a legitimate exercise of the State's police power, and that the interference from the Pennsylvania Legislature was a taking.⁷⁰ In reaching its decision, the Court noted that "property may be regulated to a certain extent, [but] if [the] regulation goes too far it will be recognized as a taking."⁷¹ In other words, the police power is not an unlimited, unfettered power. The Court further held that one way to measure such limits is the diminution of property.⁷² If property diminution is great, it must be justly compensated to be sustained.⁷³ Here, the Kohler Act prevented the Pennsylvania Coal Company from mining and making a profit from the coal under Mahon's property even though it had a contractual right to do so.⁷⁴ Therefore, the Court held that the Kohler Act was a taking and that just compensation was

60. *Id.* at 5.

61. *Id.* at 7.

62. TREANOR, *supra* note 57, at 7.

63. *Id.*

64. *Id.* at 11; *Legal Tender Cases*, 79 U.S. 457, 551 (1871).

[The Takings Clause] has always been understood as referring only to a direct appropriation . . . [i]t has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a draft, or a war may inevitably bring upon individuals' great losses; may, indeed, render valuable property almost valueless . . . [b]ut whoever supposed that, because of this, a tariff could not be changed, or a non-intercourse act, or an embargo be enacted, or a war be declared?

Id.

65. TREANOR, *supra* note 57, at 11.

66. 260 U.S. 393 (1922).

67. *Id.* at 412.

68. *Id.* at 412–13.

69. *Id.* at 412.

70. *Id.* at 414.

71. *Mahon*, 260 U.S. at 415.

72. *Id.* at 413.

73. *Id.*

74. *Id.* at 414.

required.⁷⁵

Fifty-six years later, in *Penn Central Transportation Co. v. City of New York*,⁷⁶ the Supreme Court laid out three principal factors to be considered in a regulatory Takings Clause analysis.⁷⁷ Under the Landmarks Preservation Law, Grand Central Terminal, one of New York City's most famous buildings, was labeled as a historic landmark.⁷⁸ Grand Central was owned by the Penn Central Transportation Company ("Penn Central").⁷⁹ In an effort to increase its revenue, Penn Central entered into a fifty-year lease with UGP Properties.⁸⁰ Under the agreement, Penn Central would receive millions of dollars and, in return, UGP would get the right to construct a multistory office building above the terminal.⁸¹ In compliance with the Landmarks Preservation Law, Penn Central applied to the Landmarks Preservation Commission for permission to construct the office building.⁸² However, the Commission rejected Penn Central's plans.⁸³ Penn Central then filed suit claiming that the Preservation Law's application equated to a taking without just compensation under the Fifth and Fourteenth Amendments.⁸⁴

In determining that the Landmarks Preservation Law did not violate the Takings Clause, the Court first acknowledged that previous regulatory takings cases lacked any kind of "set formula" for determining when a taking has occurred.⁸⁵ After analyzing caselaw, the Court held that three factors should be considered when determining whether a state regulation constitutes a taking: 1) the economic impact of the regulation on the property owner, 2) "the extent to which regulation interferes with distinct investment backed expectations," and 3) the "character" of the action.⁸⁶ Nonetheless, the Court noted that a land regulation that adversely affects a property owner will most likely be upheld if the regulation was enacted under a state's police powers.⁸⁷

Applying this new standard, the Court explained that the Commission's denial of the construction request did not interfere with the present use of the terminal.⁸⁸ While the

75. *Id.* at 416. Perhaps foreshadowing the Court's difficulty in differentiating between the police power and the Takings Clause, Justice Brandeis argued in his dissent that just compensation is not required when a legislature regulates under its police power. *Mahon*, 260 U.S. at 417 (Brandeis, J., dissenting).

76. 438 U.S. 104 (1978).

77. *Id.* at 124.

78. *Id.*

79. *Id.*

80. *Id.* at 104.

81. *Penn Central*, 438 U.S. at 104.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Penn Central*, 438 U.S. at 123–24.

The question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty . . . [T]his Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.

Id. (citing *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962)).

86. *Id.* at 124. Further discussion of the Penn Central factors is set forth in Steven J. Eagle, *The Four-Factor Penn Central Regulatory Takings Test*, 118 DICKINSON L. REV. 601 (2014).

87. *Penn Central*, 438 U.S. at 125.

88. *Id.* at 136.

Commission prevented the terminal from expanding, it did not prevent the terminal from operating as it had for decades.⁸⁹ Therefore, although the Preservation Law had a negative economic impact on Penn Central, the company could still generate revenue from renting out other portions of the terminal.⁹⁰ For similar reasons, because developing the airspace above the terminal was not an option when Penn Central first began investing in the property, its investment backed expectations were not significantly impaired.⁹¹ Lastly, because the Commission's decision only prevented further development, the character of the action was not very significant.⁹² Taken together, the Court upheld the constitutionality of the Landmarks Preservation Law.⁹³

B. The Police Power Gives State Governments Substantial Power to Enforce Laws

The police power is best characterized as the states' "inherent authority . . . to enact laws and promulgate regulations to protect, preserve, and promote . . . [the] general welfare of the people."⁹⁴ Traditional applications and examples of the police power include "[p]ublic safety, public health, morality, peace and quiet, [and] law and order."⁹⁵ The police power stems from the American ideal of federalism.⁹⁶ In *Federalist No. 45*, James Madison, under the pseudonym Publius, wrote that the powers given by the Constitution to the federal government "are few and defined [while the powers that] remain with State Government are numerous and indefinite."⁹⁷ He went on to say that the former will be "exercised principally . . . [while the latter] will extend to all the objects, which . . . concern the lives, liberty, and property of the people; and . . . [the] prosperity of the State."⁹⁸ The police power derives from the Tenth Amendment, which states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."⁹⁹ Because the Constitution does not mention a federal police power, that power is given to the states.¹⁰⁰

An example of the states' broad police power can be seen in the *Slaughter-House Cases*.¹⁰¹ In March of 1869, the City of New Orleans passed "[a]n act to protect the health of the City of New Orleans, to locate the stock landings and slaughterhouses, and to incorporate the Crescent City Livestock Landing and Slaughterhouse Company."¹⁰² Prior to the Act, slaughterhouses located north of New Orleans would slaughter cattle and throw

89. *Id.*

90. *Id.*

91. *Id.* at 136–37.

92. *Penn Central*, 438 U.S. at 136–37.

93. *Id.* at 138.

94. LAWRENCE O. GOSTIN, *PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT* 92 (2008).

95. *Berman v. Parker*, 348 U.S. 26, 33 (1954). *See also* GOSTIN, *supra* note 94. (the police power encompasses three principles: "the governmental purpose is to promote the public good; the state authority to act permits the restriction of private interests; and the scope of state powers is pervasive.")

96. GUY F. BURNETT, *THE SAFEGUARD OF LIBERTY AND PROPERTY: THE SUPREME COURT, KELO V. NEW LONDON, AND THE TAKINGS CLAUSE* 111 (2015).

97. *THE FEDERALIST PAPERS*, No. 45 (James Madison).

98. *Id.*

99. U.S. CONST. amend. X.

100. *Id.*

101. 83 U.S. 36 (1872).

102. *Id.* at 59.

their entrails into the Mississippi River.¹⁰³ The river would carry the refuse down to New Orleans and contaminate the City's water supply, causing disease.¹⁰⁴ The Act did many things, but, most importantly, it forbid the slaughtering of animals within the City and centralized and monopolized slaughtering with Crescent City Livestock—a private New Orleans company.¹⁰⁵ Under the Act, other butchers were required to work through Crescent City and only butcher animals on Crescent City's premises.¹⁰⁶ In response, a butchers' association brought suit against New Orleans and Crescent City Livestock under the Thirteenth and Fourteenth Amendments.¹⁰⁷

The Supreme Court, in an opinion written by Justice Miller, held that the Thirteenth and Fourteenth Amendments did not apply to the butchers' association because the Amendments were intended to prevent discrimination against recently-freed slaves.¹⁰⁸ Additionally, the Court held that the Act fell squarely within the police power.¹⁰⁹ The Court stated that the police power depended upon "the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property."¹¹⁰ Accordingly, the Court held that acts regulating the manner and location of slaughtering animals, by their very nature, are "among the most necessary and frequent exercises of this power."¹¹¹

While federal police power cases are few and far between in modern American jurisprudence, there are a few recent examples from state courts that reaffirm the broad nature of the police power. In *T-Mobile West LLC v. City of San Francisco*, the City enacted an ordinance that required a person seeking to place wireless utility poles to first get approved for a permit.¹¹² Due to the growing demand of wireless providers, the San Francisco Board of Supervisors passed the ordinance to protect the beauty of San Francisco and its tourist industry.¹¹³ While the Board recognized that state law allowed telephone corporations to install and maintain telephone lines in public rights of way, the Board also recognized its self-described power to "enact laws that limit the intrusive effect of [telephone] lines and [their related facilities]."¹¹⁴ Specifically, the ordinance designated certain areas for a "heightened aesthetic review," making it harder for lines to be installed.¹¹⁵ For instance, in certain districts, installation only occurred if the protected view was not "significantly impair[ed]."¹¹⁶ In others, installation only occurred if it did not "significantly

103. Jacob G. Hornberger, *The Slaughter-House Cases*, FUTURE FREEDOM FOUND. (Feb. 19, 2013), <https://bit.ly/3RJBMsk>.

104. *Id.*

105. *Slaughter-House Cases*, 83 U.S. at 59–60.

106. *Id.*

107. *Id.* at 58–59.

108. *Id.* at 69–83.

109. *Id.* at 62–63.

110. *Slaughter-House Cases*, 83 U.S. at 62.

111. *Id.* at 63.

112. 6 Cal. 5th 1107, 1113–14 (2019).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

degrade the aesthetic attributes that were the basis for the special designation” of the building or district.¹¹⁷ Subsequently, T-Mobile brought an action alleging that the ordinance violated California law by treating wireless providers differently than other telephone corporations.¹¹⁸ The Court held that the City of San Francisco’s police power “includes broad authority to determine, for purposes of the public health, safety, and welfare, the appropriate uses of land,” and that this power “generally includes the authority to establish aesthetic conditions for land use.”¹¹⁹

C. After the Kelo Decision, it is Difficult to Distinguish Between Public Use and the Police Power

The Takings Clause expanded once again in *Kelo v. New London*,¹²⁰ the most recent and controversial case addressing the Takings Clause and police power issue.¹²¹ In the 1990s, the City of New London, Connecticut was in poor economic condition.¹²² The town’s unemployment rate was double the state average, and its population was the lowest it had been since before the Great Depression.¹²³ In order to revitalize the area, the State authorized the New London Development Corporation (“NLDC”), a private entity, to lead a development plan focused on the Fort Trumbull area of New London.¹²⁴ The development plan, which encompassed seven parcels of land, called for the creation of a conference center, shopping center, marina, riverwalk, various restaurants, eighty private residences, and other commercial uses.¹²⁵ This plan was used to create jobs, generate tax revenue, and wholly revitalize New London.¹²⁶ The plan was approved in early 2000, and the NLDC was authorized to acquire private property from private residences by using the City’s eminent domain power.¹²⁷

In December of 2000, a group of nine property owners in Fort Trumbull brought an action claiming that the taking of their properties violated the public use restriction of the Takings Clause.¹²⁸ After the trial court granted an injunction prohibiting takings of some of the properties, the Supreme Court of Connecticut held that all of the City’s proposed takings were valid.¹²⁹ The United States Supreme Court granted certiorari to address whether a city can use its eminent domain power to take private property for economic development under the Fifth Amendment’s public use requirement.¹³⁰ In a 5–4 decision, the Court upheld the development plan as a valid public use within the meaning of the

117. *T-Mobile*, 6 Cal. 5th at 1114–15.

118. *Id.* at 1115.

119. *Id.* at 1116.

120. 545 U.S. 469 (2005).

121. BURNETT, *supra* note 96, at 2.

122. *Kelo*, 545 U.S. at 473.

123. *Id.*

124. *Id.*

125. *Id.* at 474.

126. *Id.*

127. *Kelo*, 545 U.S. at 475.

128. *Id.*

129. *Id.* at 475–77.

130. *Id.* at 477.

Takings Clause.¹³¹

Writing for the majority, Justice Stevens focused on the meaning of public use and the caselaw surrounding it.¹³² He noted that, in the mid-1800s, public use was narrowly defined as “use by the public.”¹³³ However, this definition “steadily eroded” over time because it was “impractical given the diverse and always evolving needs of society.”¹³⁴ Instead, the majority formally adopted the broader definition of public use, a “public purpose.”¹³⁵

To show that this broader public use definition was already in use, the Court reviewed previous decisions in *Berman v. Parker* and *Midkiff v. Hawaii Housing Authority*.¹³⁶ In 1954, under Chief Justice Warren and the same year the Supreme Court heard *Brown v. Board of Education*,¹³⁷ the Court also heard *Berman v. Parker*—a case that did arguably as much as *Brown* at establishing new interpretations of the Constitution.¹³⁸ In *Berman*, the Court upheld another development plan in a run-down part of Washington, D.C.¹³⁹ Under this plan, part of the area would be condemned and turned into public facilities like public roads and schools, while another part would be sold to private contractors for redevelopment.¹⁴⁰ A store owner brought suit arguing that creating a more attractive community is not a valid public use, but the Court unanimously rejected that notion.¹⁴¹ The Court held:

The concept of the public welfare is broad and inclusive The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation’s Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.¹⁴²

Similarly, in *Hawaii Housing Authority vs. Midkiff*, the Court considered the Hawaii Land Reform Act of 1967, which used the State’s eminent domain power to deliver a lessor’s fee simple title to a lessee in exchange for compensation in an effort to redistribute land more evenly among the general population.¹⁴³ At the time of the case, seventy-two landowners owned 47% percent of the property in Hawaii.¹⁴⁴ This occurred because, in

131. *Id.* at 490.

132. *Kelo*, 545 U.S. at 479–82; BURNETT, *supra* note 96, at 56–57.

133. *Kelo*, 545 U.S. at 479.

134. *Id.*

135. *Id.* at 480.

136. *Id.* at 480–82; *Berman v. Parker*, 348 U.S. 26 (1954); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

137. 347 U.S. 483 (1954).

138. BURNETT, *supra* note 96, at 60.

139. 348 U.S. at 29–31.

140. *Id.*

141. *Id.* at 31–32.

142. *Id.* at 33.

143. 467 U.S. 233 (1984).

144. *Id.* at 232.

the early 1800s, the islands' high chiefs only distributed land to select individuals.¹⁴⁵ Again, the Court unanimously upheld the statute, holding that Hawaii's purpose of eliminating the "social and economic evils of a land oligopoly" was a valid public use.¹⁴⁶

Using the previous decisions in *Berman* and *Midkiff* and the broader public purpose definition, the *Kelo* Court gave great deference to the State of Connecticut and to the City of New London's legislative judgements.¹⁴⁷ The Court noted that the city has "carefully formulated" a plan that will be beneficial to the community by, among other things, creating new jobs and increasing tax revenue.¹⁴⁸ Accordingly, the Court held that the redevelopment plan "unquestionably served a public purpose" and therefore satisfied the public use requirement of the Fifth Amendment.¹⁴⁹ While the *Kelo* decision remains divisive among legal scholars and commentators,¹⁵⁰ the Supreme Court's expansion of the public use clause endorses a private landowner being compensated if their property was taken for some public benefit.¹⁵¹

III. THE MILITARY MODEL OF POLICING IS THE PROMINENT FEATURE OF MODERN AMERICAN LAW ENFORCEMENT OPERATIONS

To properly define "police militarization," a few other terms must also be defined.¹⁵² Militarism is a set of "beliefs, values, and assumptions that stress the use of force and threat of violence" as the most effective way to solve issues.¹⁵³ Militarization is simply the "implementation of the ideology [of] militarism."¹⁵⁴ Thus, police militarization refers to "the process whereby civilian police increasingly draw from, and pattern themselves around, the tenets of militarism and the military model [of policing]."¹⁵⁵ The military model of policing "overemphasi[z]es the crime fighting function of police work and promotes a warlike approach to crime and drug problems" by creating a police versus civilian mentality.¹⁵⁶

A. The Use of Militarized Police has Risen Dramatically in the United States

Beginning in the 1980s, the United States began relying more frequently on the military model of policing.¹⁵⁷ At the forefront of this rise were Police Paramilitary Units

145. *Id.*

146. *Id.* at 241–42.

147. *Kelo*, 545 U.S. at 483–84.

148. *Id.*

149. *Id.* at 484.

150. See generally Ilya Somin, *The 15th Anniversary of Kelo v. City of New London*, REASON (June 23, 2020, 10:30 AM), <https://bit.ly/3KYVM85>.

151. Ilya Somin, *Debating the Original Meaning of "Public Use"*, WASH. POST (Feb. 27, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/27/debating-the-original-meaning-of-public-use/>.

152. Peter B. Kraska, *Militarization and Policing—Its Relevance to 21st Century Police*, 1 POLICING 501, 503.

153. *Id.*

154. *Id.*

155. *Id.*

156. Kraska & Cubellis, *supra* note 8, at 610.

157. Kraska, *supra* note 152, at 506.

(“PPU”), most commonly known as Special Weapons and Tactics (“SWAT”) Teams.¹⁵⁸ At the time, traditional police differed from SWAT Teams and other PPU in two distinct ways. First, PPU “train[ed] and function[ed]” as a military team with a “military command structure.”¹⁵⁹ Second, PPU had the option to use force at their discretion, unlike traditional police officers, who typically had to use force as a last resort.¹⁶⁰ There were also two lesser factors that helped differentiate PPU from traditional police: uniform and weapons.¹⁶¹ PPU generally dressed themselves in “black or urban camouflage Battle Dress Uniforms (“BDU”), lace-up combat boots, full-body armor, Kevlar helmets, and ninja-style hoods.”¹⁶² Similarly, their weapons included “submachine guns, tactical shot-guns, sniper rifles, percussion grenades . . . tear and pepper gas, surveillance equipment, and fortified personnel carriers.”¹⁶³

At the end of the twentieth century, roughly 89% of U.S. police departments that served a population of at least 50,000 had a PPU—double the amount that existed in the mid-1980s.¹⁶⁴ Similarly, as of 2007, about 80% of police departments serving a population between 25,000 and 50,000 had a PPU, compared to only 20% in the mid-1980s.¹⁶⁵ These units have also been deployed at exponentially higher rates. Between 1980 and 2000, the total number of PPU deployments increased by more than 1,400%.¹⁶⁶ Experts estimate there were 45,000 PPU deployments in 2007, whereas, in the 1980s, there were only about 3,000.¹⁶⁷ Moreover, instead of hostage or terrorist situations, more than 80% of these deployments were used for entry into private residences to search for the illegal use of guns, drugs, and money.¹⁶⁸

B. The War on Drugs Significantly Contributed to the Militarization of the American Police Force

While there are many different factors that contributed to the rise of a militarized police force, they are all inextricably linked to the War on Drugs. The War on Drugs was a multifaceted government offensive that involved curtailing the “use, distribution, and cultivation of drugs.”¹⁶⁹ The belief that the U.S. was plagued by rampant drug use was extraordinarily common in 1960s America.¹⁷⁰ In response, President Nixon declared in a 1971 press conference that “America’s public enemy number one in the United States is

158. *Id.* at 502.

159. Kraska & Cubellis, *supra* note 8, at 610.

160. *Id.*

161. *Id.*

162. *Id.* at 610–11.

163. *Id.*

164. Kraska, *supra* note 152, at 506.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 6–7. After a SWAT raid on the wrong residence, the State of Maryland was required to report every SWAT Team deployment from 2010 to 2014. Maryland conducted 8,200 raids from 2010 to 2014. Of these 8,200 raids, 92% were used to execute search or arrest warrants. Less than 5% of these raids dealt with an armed suspect. Johnathon Mummolo, *Militarization Fails to Enhance Police Safety or Reduce Crime but may Harm Police Reputation*, 115 PROC. NAT’L ACAD. SCI. 9181 (2018).

169. GINA ROBERTIELLO, *THE USE AND ABUSE OF POLICE POWER IN AMERICA* 184–85 (2017).

170. *Id.* at 184.

drug abuse. In order to fight and defeat this enemy, it is necessary to wage a new, all-out offensive.”¹⁷¹ Although over fifty years have passed since Nixon’s speech, Americans are still feeling the effects of this offensive today due to the policy decisions surrounding the War on Drugs.¹⁷² Specifically, such policy decisions include the erosion of the Posse Comitatus Act and the creation of the 1033 Program, which have both significantly attributed to the militarization of the American police force.¹⁷³ Furthermore, while not directly tied to the War on Drugs, the formation of the Department of Homeland Security has further caused traditional police departments to become more militarized in the name of stopping terrorist threats.¹⁷⁴

i. The Military Cooperation with Law Enforcement Act Eroded the Posse Comitatus Act and Increased Interaction Between American Police and the American Military

The Posse Comitatus Act (“PCA”), passed in 1878, kept the military and law enforcement separate for decades by preventing military forces from acting as traditional police.¹⁷⁵ Today, the one sentence act simply reads:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.¹⁷⁶

Because of the explicit references to the Army and the Air Force, the latter of which was added to the Act in 1956, there have been some questions as to whether the PCA applies to the other military branches.¹⁷⁷ While courts have not extended the PCA beyond the named branches, military regulations require that the Navy and Marine Corps comply with the PCA.¹⁷⁸ However, neither the PCA nor military regulations forcing compliance with the PCA extend to the Coast Guard.¹⁷⁹ Similarly, the PCA does not apply to the National Guard when it is in state service.¹⁸⁰

Congress enacted the PCA as a response to the Reconstruction Era, when the military was used to protect freed slaves.¹⁸¹ In the tightly-contested 1876 presidential election,

171. Richard Nixon, *Remarks About an Intensified Program for Drug Abuse Prevention and Control*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/remarks-about-intensified-program-for-drug-abuse-prevention-and-control>.

172. ROBERTIELLO, *supra* note 169, at 185; *see also* RADLEY BALKO, *RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA’S POLICE FORCES* 203–04 (2013).

173. Kraska, *supra* note 152, at 502.

174. Radley Balko, *A Decade After 9/11, Police Departments Are Increasingly Militarized*, HUFFINGTON POST (Nov. 12, 2011, 8:12 AM), https://www.huffpost.com/entry/police-militarization-9-11-september-11_n_955508.

175. Scott Tighe & William Brown, *The Militarization of Law Enforcement: Bypassing the Posse Comitatus Act*, 12 JUST. POL’Y J. 2, 10 (2015).

176. 18 U.S.C. § 1385. In Latin, posse comitatus translates to “power of the country.” *United States v. Harley*, 796 F.2d 112, 115 n.3 (5th Cir. 1986).

177. Sean J. Kealy, *Reexamining the Posse Comitatus Act: Toward a Right to Civil Law Enforcement*, 21 YALE L. & POL’Y REV. 383, 397 (2003).

178. *Id.*

179. *Id.*

180. *Id.*

181. Tighe & Brown, *supra* note 175, at 10.

Republican candidate Rutherford B. Hayes promised to remove federal troops from the South and end Reconstruction in order to secure electoral college votes from Florida, Louisiana, and South Carolina.¹⁸² Two years later, President Hayes made good on his promise and signed the PCA into law, ensuring the rampant spread of Jim Crow laws in the South.¹⁸³

In 1981, to help prosecute the War on Drugs, President Reagan signed the Military Cooperation with Law Enforcement Act (“MCLEA”).¹⁸⁴ In essence, the MCLEA eroded the PCA by allowing the U.S. military to be more involved in the War on Drugs by giving police at the local, state, and federal levels access to military intelligence and research.¹⁸⁵ The Act also authorized the military to train traditional police on how to use military equipment.¹⁸⁶ Basically, the MCLEA allowed the military to be involved in every aspect of the drug war, except for searches and seizures.¹⁸⁷ As the 1980s continued, the military’s role in the War on Drugs became more active.¹⁸⁸ By 1984, the military had provided \$100 million in drug trafficking prevention to local law enforcement agencies.¹⁸⁹ In 1986, President Reagan signed National Security Decision Directive 221,¹⁹⁰ which gave the Secretary of Defense the power to “develop and implement any necessary modifications to applicable statutes, regulations, procedures, and guidelines to enable United States military forces to support counter-narcotics efforts more actively, consistent with the maintenance of force readiness and training.”¹⁹¹ The next year, Congress ordered the Secretary of Defense to notify local law enforcement agencies about the availability military grade equipment.¹⁹² In 1988, congress updated the MCLEA by authorizing the Department of Defense to perform aerial and maritime surveillance missions to further combat drug trafficking.¹⁹³ By the end of the 1980s, the Department of Defense became the lead agency for detecting and monitoring drugs in the United States.¹⁹⁴

ii. The 1033 Program and the War on Terrorism Allowed Traditional Police to Acquire Military-Grade Equipment from the Federal Government

The 1033 Program further contributed to the militarization of local police forces. In

182. *Id.*

183. *Id.*

184. 10 U.S.C. §§ 271–284.

185. 10 U.S.C. § 271; *see also* BALKO, *supra* note 172, at 145.

186. 10 U.S.C. § 273.

187. 10 U.S.C. § 275.

188. Kealy, *supra* note 177, at 412.

189. *Id.*

190. Mark P. Nevitt, *Unintended Consequences: The Posse Comitatus Act in the Modern Era*, 36 CARDOZO L. REV. 119, 143 (2014).

191. *Id.* (quoting NATIONAL SECURITY DECISION DIRECTIVE NO. 221 (Apr. 8, 1986)).

192. Nevitt, *supra* note 190, at 154.

193. *Id.*

194. *Id.*

1994, the Pentagon began donating surplus military equipment to traditional police departments.¹⁹⁵ Three years later, the Department of Defense, through the National Defense Authorization Act,¹⁹⁶ established the 1033 Program to streamline the process even further.¹⁹⁷ The 1033 Program “granted law enforcement agencies permanent authority to acquire property for law enforcement purposes ‘associated with counter drug and counter terrorism activities.’”¹⁹⁸ Items received through the 1033 Program included everything from night vision goggles to helicopters.¹⁹⁹ A 2013 study found that 80% of counties in the United States had received military equipment from the Department of Defense through the 1033 Program.²⁰⁰ Additionally, \$7.4 billion of military equipment has been given to police departments since the program’s inception.²⁰¹

The militarization of police continued in the early 2000s in response to the September 11th terrorist attacks.²⁰² The federal government’s response to terrorism, through the newly founded Department of Homeland Security (“DHS”), provided another opportunity for traditional police forces to continue to stockpile military weapons, regardless of the town size or potential threat of a terrorist attack.²⁰³ Following September 11th, larger areas like Washington, D.C. swapped out their traditional police uniforms for military styled BDUs, which critics argue changed both the way police are viewed and how they view themselves.²⁰⁴ Similarly, in places like Indianapolis and Chicago, police departments began obtaining military grade machine guns “in the name of fighting terror.”²⁰⁵ Police departments serving smaller areas also started acquiring military grade weapons. For instance, Jasper, Florida—a town of 2,000 people—gave each of the town’s seven police officers a military grade M-16 machine gun.²⁰⁶ In West Springfield, Massachusetts, police officers acquired two military issue M-79 grenade launchers.²⁰⁷

Since September 11th, DHS has given billions of dollars in grants to municipalities across the country to combat terrorist threats, but again, in many cases, the cities and counties awarded these grants are unlikely terrorist targets.²⁰⁸ These counties and cities include Winnebago County, Wisconsin; Longview, Texas; Tuscaloosa County, Alabama; Canyon County, Idaho; Santa Fe, New Mexico; Adrian, Michigan; Chattanooga, Tennessee; and

195. Balko, *supra* note 174 (“In the first three years after the 1994 law alone, the Pentagon distributed 3,800 M-16s, 2,185 M-14s, 73 grenade launchers, and 112 armored personnel carriers to civilian police agencies across America. Domestic police agencies also got bayonets, tanks, helicopters and even airplanes.”).

196. National Defense Authorization Act of 1997, Pub. L. No. 104-201, 110 Stat. 2422.

197. DRUG POLICY ALLIANCE, *THE 1033 PROGRAM, POLICE MILITARIZATION, AND THE WAR ON DRUGS 2* (2021).

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. Balko, *supra* note 174.

203. *Id.*

204. *Id.* See also Mummolo, *supra* note 168.

205. Balko, *supra* note 174; 26 U.S.C. § 5845(b) (the National Firearms Act defines a machine gun as “any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot without manual reloading, by a single function of the trigger.”).

206. Balko, *supra* note 174.

207. *Id.* (additionally, at a local college in Massachusetts, school police officers received M-16 machine guns).

208. *Id.*

Germantown, Tennessee.²⁰⁹ These grants are used predominantly to purchase Lenco Bear-Cats, which cost between \$200,000 and \$300,000.²¹⁰ The BearCat has become a “status symbol” among police departments.²¹¹ When a BearCat is purchased, police often put out press releases.²¹² It is also very common for police to take pictures with these vehicles and post them to social media and for these vehicles to be flaunted during parades and county fairs.²¹³ Although police may try to use the BearCat as an effective public relations tool, critics argue that it may make the citizenry feel intimidated instead of safe.²¹⁴

IV. COURTS INCONSISTENTLY DECIDE CASES INVOLVING THE TAKINGS CLAUSE AND THE POLICE POWER

At both the federal and state level, there is a jurisdictional split regarding the relationship between the Takings Clause and the police power. Some courts, like *Lech*, hold that compensation is not required if a state acts pursuant to its police power.²¹⁵ Other courts, like *Baker*, reject this blanket rule.²¹⁶ Interestingly enough, the Supreme Court answered this question 150 years ago in *Pumpelly v. Green Bay & Mississippi Canal Co.*²¹⁷

A. Historically, the Supreme Court has Recognized the Right to be Compensated Under the Takings Clause When the State Destroys Private Property

In *Pumpelly*, decided twenty-six years before the Takings Clause was made applicable to the states through the Fourteenth Amendment,²¹⁸ a private land-owner sought compensation under Wisconsin’s Takings Clause after a state-authorized dam flooded his

209. *Id.* (“When the Memphis suburb of Germantown, Tennessee—which claims to be one of the safest cities in the country—got its APC in 2006, its Sheriff told the local paper that the acquisition would put the town at the ‘forefront’ of homeland security preparedness.”).

210. *Id.*

211. Balko, *supra* note 174.

212. *Id.*

213. See Jennifer Smith Richards & Stacy St. Clair, *Assault rifles and armored trucks: Illinois police agencies have obtained \$4.7 million in military gear since Trump lifted Obama’s restrictions on a federal surplus program*, CHI. TRIB. (Aug. 19, 2020, 5:00 AM), <https://bit.ly/3qtSsZ7>.

214. *Id.*; see also Mummolo, *supra* note 168.

215. *Lech v. Jackson*, 791 F. App’x 711 (10th Cir. 2019); see also *AmeriSource Corp. v. United States*, 525 F.3d 1149 (Fed. Cir. 2008); *Bachmann v. United States*, 134 Fed. Cl. 694 (2017); *Johnson v. Manitowoc Cnty.*, 635 F.3d 331 (7th Cir. 2011); *Eggleston v. Pierce Cnty.*, 64 P.3d 618 (Wash. 2003); *Customer Co. v. City of Sacramento*, 895 P.2d 900 (Cal. 1995); *Sullivant v. City of Oklahoma City*, 940 P.2d 220 (Okla. 1997); and *Hamen v. Hamlin Cnty.*, 955 N.W.2d 336 (S.D. 2021) (all holding that the police power is a blanket exception from the Takings Clause).

216. See *John Corp. v. City of Houston*, 214 F.3d 573 (5th Cir. 2000); *Brewer v. Alaska*, 341 P.3d 1107 (Alaska 2014); *Garrett v. City of Topeka*, 916 P.2d 21 (Kan. 1996); *Wegner v. Milwaukee Mut. Ins. Co.*, 479 N.W.2d 38 (Minn. 1991); *Steele v. City of Houston*, 603 S.W.2d 786 (Tex. 1980); *Soucy v. State*, 506 A.2d 288 (N.H. 1985); and *Kelley v. Story Cnty. Sheriff*, 611 N.W.2d 475 (Iowa 2000) (all holding that the police power is not a blanket exception to the Takings Clause).

217. 80 U.S. 166 (1871).

218. *Chicago, Burlington, & Quincy R.R. v. City of Chicago*, 166 U.S. 226 (1897).

property.²¹⁹ The dam, which was erected by the canal company, caused the lake to “violent[ly] overflow” onto Pumpelly’s land, damaging his 640 acres.²²⁰ The overflow uprooted Pumpelly’s trees and grass, washed away his hay, filled up his ditches and drains, and “saturated” his property.²²¹ The canal company argued that it was not liable for Pumpelly’s damage because a Wisconsin statute allowed it to build a dam under specific guidelines, regardless of what effect the dam would have on the surrounding area.²²²

As Wisconsin’s Constitution essentially mirrored the Fifth Amendment’s Takings Clause, the only question for the Supreme Court, led by Justice Miller, to decide was whether the damage to Pumpelly’s property was protected under the U.S. Constitution.²²³ Because the canal company erected a dam that caused the lake to overflow and because the overflow caused “almost complete destruction” of the value of Pumpelly’s land, the damage Pumpelly sustained was protected under the Takings Clause.²²⁴ The Court stated that:

It would be a very curious and unsatisfactory result, if . . . it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.²²⁵

Despite this, the Court recognized that there was a plethora of lower court decisions giving no redress when injury to private property occurred from the “improvement of roads, streets, rivers, and other highways, for the public good.”²²⁶ While the Court noted that this is a sound principle in many instances, it also noted that, in others, these decisions went “to the uttermost limit of sound judicial construction in favor of this principle, and, in some cases, beyond it.”²²⁷ As such, to reconcile this case from the state court decisions,

219. *Pumpelly*, 80 U.S. at 168. The Wisconsin Constitution provides that “the property of no person shall be taken for public use without just compensation therefor.” WIS. CONST. art. 1, § 13.

220. *Pumpelly*, 80 U.S. at 168.

221. *Id.*

222. *Id.* at 171.

223. *Pumpelly*, 80 U.S. at 176–77.

This [case] requires a construction of the Constitution of Wisconsin; for though the Constitution of the United States provides that private property shall not be taken for public use without just compensation, it is well settled that this is a limitation on the power of the Federal government, and not on the States. The Constitution of Wisconsin, however, has a provision almost identical in language, viz.: that ‘the property of no person shall be taken for public use without just compensation therefor.’ Indeed this limitation on the exercise of the right of eminent domain is so essentially a part of American constitutional law that it is believed that no State is now without it, and the only question that we are to consider is whether the injury to plaintiff’s property, as set forth in his declaration, is within its protection.

Id.

224. *Id.* at 177.

225. *Id.* at 177–78.

226. *Id.* at 180–81.

227. *Pumpelly*, 80 U.S. at 181.

the Court held that “where real estate is actually [physically] invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution.”²²⁸

B. Today, Federal Circuits are Split in Determining Whether the Police Power is a Blanket Exception to the Takings Clause

Among the federal courts, some circuits hold that the police power is a blanket exception to the Takings Clause, while other circuits do not.²²⁹ In *Lech v. Jackson*, discussed in Part I, Lech appealed to the Tenth Circuit Court of Appeals on two grounds.²³⁰ First, Lech argued that the district court erred in ruling that when law enforcement acts pursuant to the state’s police power, its actions cannot constitute a Fifth Amendment Takings claim.²³¹ Second, Lech argued that even if the police power is a blanket exception to the Takings Clause, the district court erred by holding that the conduct of the Greenwood Village Police Department fell within the scope of the police powers merely because law enforcement damaged the home while “enforcing the law.”²³² The Tenth Circuit quickly dispelled both arguments.²³³

Regarding the first issue, the court relied heavily on how sister jurisdictions view the relationship between the police power and the power of eminent domain—the vehicle through which a government takes private property for public use with just compensation.²³⁴ Indeed, the court noted that the Third Circuit, Seventh Circuit, Federal Circuit, and Federal Court of Claims all rely on the distinction between the two powers in instances where law enforcement seizes or destroys property and hold that no taking occurs when law enforcement acts pursuant to the police power.²³⁵ Additionally, the court briefly touched on two Supreme Court cases, *Mugler v. Kansas*²³⁶ and *Bennis v. Michigan*²³⁷ to support the notion that valid exercises of the police power are completely exempt from Fifth Amendment Takings actions.²³⁸

In *Mugler*, the owners of two breweries brought a takings claim against the State of Kansas for enacting a prohibition regulation.²³⁹ The Court, thirty-five years away from recognizing regulatory takings in *Mahon*,²⁴⁰ sided with the state.²⁴¹ The Tenth Circuit accepted the view that *Mugler* was the first case that distinguished between the power of eminent domain, which requires just compensation, and the police powers, which are not

228. *Id.* at 181.

229. See cases cited *supra* note 6.

230. *Lech v. Jackson*, 791 F. App’x 711, 714–15 (10th Cir. 2019).

231. *Id.*

232. *Id.* at 715.

233. *Id.* at 711.

234. *Id.* at 715–17.

235. *Lech*, 791 F. App’x at 715–17. See also cases cited *supra* note 6.

236. 123 U.S. 623 (1887).

237. 516 U.S. 442 (1996).

238. *Lech*, 791 F. App’x at 715–16.

239. *Mugler*, 123 U.S. at 657.

240. 260 U.S. 393, 415 (1922).

241. *Mugler*, 123 U.S. at 675.

“burdened with the condition that the state must compensate [an injured property owner].”²⁴² Additionally, the Tenth Circuit noted that while the Supreme Court never expressly applied the *Mugler* rule in a physical takings context, it “implicitly” applied it in *Bennis*.²⁴³ In *Bennis*, a Michigan state court ordered that a vehicle shared by a husband and wife be forfeited on public nuisance grounds after the husband was caught having sex with a prostitute in the car while it was parked on a Detroit street.²⁴⁴ The wife argued that, as applied to her, the forfeiture was a taking, but the Court disagreed and very briefly explained that “[t]he government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain.”²⁴⁵

Regarding the second issue, the court held that the actions of law enforcement were a valid exercise of the police power.²⁴⁶ The Tenth Circuit cited decisions in *AmeriSource Corp. v. United States* and *Bachmann v. United States*, two non-binding decisions.²⁴⁷ In *Amerisource*, the Federal Circuit held that “[t]he government's seizure of property to enforce criminal laws is a traditional exercise of the police power that does not constitute a public use.”²⁴⁸ In *Bachmann*, U.S. Marshalls used guns, smoke bombs, tear gas, battering rams, and a robot to gain entry into a property that became a hideout for a fugitive.²⁴⁹ Similarly, the Federal Claims Court in *Bachmann* held that entering one’s property to make an arrest or a seizure is “perhaps the most traditional function of the police power.”²⁵⁰ Adopting a similar rationale, the court in *Lech* held that “when the state acts pursuant to its police power, rather than the power of eminent domain, its actions do not constitute a taking for purposes of the Takings Clause.”²⁵¹

As another example, in *Johnson v. Manitowoc County*,²⁵² the Plaintiff, Roland Johnson, sued the county police department after it damaged his rental property while executing a search warrant.²⁵³ Johnson rented out his trailer to Steven Avery, who previously served eighteen years in prison after being convicted of rape, but was released after DNA testing showed he most likely was not the perpetrator.²⁵⁴ Two years later, a woman went missing

242. *Id.* at 669.

243. *Lech*, 791 F. App’x at 716.

244. *Bennis v. Michigan*, 516 U.S. 442, 443 (1996).

245. *Id.* at 452.

246. *Lech*, 791 F. App’x at 719.

247. *Id.* at 715–16 (citing *AmeriSource Corp. v. United States*, 525 F.3d 1149, 1150, 1153–54 (Fed. Cir. 2008); *Bachmann v. United States*, 134 Fed. Cl. 694, 696 (2017)).

248. 525 F.3d at 1153.

249. 134 Fed. Cl. at 695.

250. *Id.* at 697. Interestingly, the *Bachmann* court noted that the only way to compensate the Bachmanns would be to create a test analogous to the Penn Central regulatory takings test. However, because a test like this would require a “highly fact-intensive analysis, considering the lawfulness or reasonableness of the police action, the temporal nature of the action, whether personalty or realty were involved, and the economic impact on the property,” the court declined to engage in such a test without word from the Supreme Court and because it would allow courts to question the conduct of police. *Id.* at 698.

251. 791 F. App’x at 717. For a more in-depth critique of the *Lech* decision see Emilio R. Longoria, *Lech’s Mess with the Tenth Circuit: Why Governmental Entities Are Not Exempt from Paying Just Compensation When They Destroy Property Pursuant to Their Police Power*, 11 WAKE FOREST J. L. & POL’Y 297 (2021).

252. 635 F.3d 331 (7th Cir. 2011).

253. *Id.* at 333.

254. *Id.* If the name Steven Avery sounds familiar, it is because his exploits were later memorialized in the

after meeting Avery at the property.²⁵⁵ An investigation by the Manitowoc County authorities led to Avery being arrested and convicted for murder.²⁵⁶

Roland Johnson brought a subsequent claim against the Wisconsin counties of Manitowoc and Calumet stemming from the murder investigation.²⁵⁷ During the investigation, through the execution of search warrants, authorities damaged Johnson's trailer and seized some of his property.²⁵⁸ For instance, in order to see if blood seeped through cracks in the concrete floor, authorities jackhammered a portion of the garage floor.²⁵⁹ Although only a small portion of the floor was jackhammered, the damage was significant enough that the entire floor had to be replaced.²⁶⁰ Authorities also damaged the main door of the trailer and removed multiple sections of paneling from the bedroom, half of the carpet in the bedroom and hallway, and small swatches from a couch.²⁶¹ Johnson argued that his trailer was uninhabitable due to the damage and his financial inability to make repairs, and that he was entitled to compensation under the Fifth Amendment.²⁶² The Seventh Circuit Court of Appeals dismissed the claim.²⁶³ While the court noted that it was unfair to make "innocent, unlucky landlords absorb the costs associated with the execution of a search warrant directed at a criminally-inclined tenant,"²⁶⁴ the court held "the Takings Clause does not apply when property is retained or damaged as the result of the government's exercise of its authority pursuant to some power other than the power of eminent domain. Here, the actions were taken under the state's police power. The Takings Claim is a non-starter."²⁶⁵ Instead, the court suggested that Johnson seek redress from the State of Wisconsin, which has procedures to recover property and compensation for these costs.²⁶⁶ While redress was available, the court noted that it was not available through a Fifth Amendment claim.²⁶⁷

Conversely, in at least one federal court, as the *Baker* case illustrates, there is a refusal to adopt a per se rule that when private property is destroyed under a state's police powers, it cannot constitute a Fifth Amendment Taking.²⁶⁸ In Vicki Baker's case, the United States District Court for the Eastern District of Texas partially granted Baker's summary judgement motion and held that the City of McKinney was liable for a taking under the Fifth Amendment.²⁶⁹ Given the similarities between John Lech's and Vicki Baker's cases, the court examined the *Lech* opinion thoroughly; however, in the end, the Eastern District of Texas was not persuaded to follow the Tenth Circuit Court of Appeal's

popular documentary series "Making a Murder," available on Netflix. MAKING A MURDER (Netflix 2015).

255. *Johnson*, 635 F.3d at 333.

256. *Id.*

257. *Id.* at 332–33.

258. *Id.* at 333–34.

259. *Id.* at 333.

260. *Johnson*, 635 F.3d at 333.

261. *Id.* at 333–34.

262. *Id.* at 334.

263. *Id.* at 336.

264. *Id.*

265. *Johnson*, 635 F.3d at 336 (citing *AmeriSource Corp. v. United States*, 525 F.3d 1149, 1154 (Fed. Cir. 2008)).

266. *Id.*

267. *Id.*

268. *Baker v. City of McKinney*, No. 4:21-CV-00176, 2022 WL 2068257, at *17 (E.D. Tex. Apr. 29, 2022).

269. *Id.*

decision in *Lech* for many reasons.²⁷⁰

First, the court made clear that it was not bound by an opinion from a different jurisdiction.²⁷¹ Next, and more significantly, the *Baker* court found that most of the *Lech* opinion was based on flawed legal arguments.²⁷² The *Baker* court disagreed with the *Lech* court that in the context of the police power there is no difference between a physical or regulatory taking.²⁷³ Specifically, the court believed that the *Lech* decision conflated the Supreme Court's decision in *Mugler*.²⁷⁴ As discussed above, the *Lech* court argued that *Mugler* was the first time the Supreme Court recognized a "hard line between those actions the government performs pursuant to its power of eminent domain and those it performs pursuant to its police power . . . in the context of regulatory takings."²⁷⁵ However, this could clearly not be the case because at the time *Mugler* was decided, a regulatory takings claim did not exist.²⁷⁶ Instead of creating such a hard line, *Mugler* simply denied a regulatory takings claim thirty-five years before regulatory takings were recognized by the Supreme Court.²⁷⁷ Nonetheless, the Tenth Circuit took this faulty premise and expanded it to physical takings cases as well, which led to the per se rule that when a government acts pursuant to its police power, it is exempt from paying just compensation under the Takings Clause.²⁷⁸

The *Baker* court also took issue with the Tenth Circuit's use of *Bennis v. Michigan*.²⁷⁹ The Tenth Circuit briefly cited to *Bennis* to show that the Supreme Court may have recognized the difference between the police power and the power of eminent domain in situations involving the government's direct physical interference with private property.²⁸⁰ However, again, the *Baker* court was unpersuaded and believed the Tenth Circuit once again mischaracterized the law.²⁸¹ What the Tenth Circuit called "implicitly" asserting a distinction between the power police power and the power of eminent domain is what the Eastern District of Texas called "cherry-picke[d] dicta" that had little to do with the holding in *Bennis*.²⁸² As the *Baker* court explained, in all of *Bennis*, only three sentences relate to the Fifth Amendment.²⁸³ Instead of a Fifth Amendment Takings Clause case, *Bennis*

270. *Id.* at *7–12.

271. *Id.* at *8.

272. *Id.*

273. *Baker*, 2022 WL 2068257, at *8.

274. *Id.*

275. *Id.* (quoting *Mugler v. Kansas*, 123 U.S. 623, 668–69 (1887)).

276. *Id.*

277. *Id.*

278. *Baker*, 2022 WL 2068257, at *10.

279. *Id.*

280. *Lech v. Jackson*, 791 F. App'x 711, 716 (10th Cir. 2019).

281. *Baker*, 2022 WL 2068257, at *9.

282. *Id.* at *9, *18.

283. *Id.* at *9; *Bennis v. Michigan*, 516 U.S. 442, 452 (1996).

Petitioner also claims that the forfeiture in this case was a taking of private property for public use in violation of the Takings Clause of the Fifth Amendment, made applicable to the States by the Fourteenth Amendment. But if the forfeiture proceeding here in question did not violate the Fourteenth Amendment, the property in the automobile was transferred by virtue of that proceeding from petitioner to the State. The government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain.

was a forfeiture case that explored when uncompensated forfeitures were “justified to serve certain policy goals, like the security of property, criminal deterrence, and punishment.”²⁸⁴ As the Eastern District of Texas pointed out, piecemealing a “brightline rule” from a few lines in an intricate legal opinion drastically undermines caselaw, yet that is exactly what the Tenth Circuit did with *Bennis*.²⁸⁵

Lastly, the *Baker* court disagreed with how the Tenth Circuit’s narrow holding failed to consider whether certain actions taken pursuant to the police power can fall within the broader definition of a public use that the Supreme Court articulated in *Kelo*.²⁸⁶ Under this expansive definition of public use, a public purpose, what is for the public good, and what is a public use are not mutually exclusive.²⁸⁷ Otherwise, “[i]f [the] government was exempt from paying just compensation every time it exercised the police power, there would never be just compensation; the exception would swallow the rule.”²⁸⁸ As such, the *Baker* court refused to hold that the destruction of private property pursuant to the police power is categorically non-compensable under the Takings Clause.²⁸⁹

Rejecting the categorical exemption rule that other jurisdictions have adopted, the *Baker* court then determined if there was a Takings Clause violation.²⁹⁰ In order to prove such a violation, the plaintiff must prove that the government had taken property and then denied the owner just compensation.²⁹¹ To prove the first prong, the damage cannot be merely incidental to the government’s actions, and the damage has to be the foreseeable result of the actions.²⁹² Applying these rules, the court noted that the McKinney Police Department surrounded the house; destroyed windows, doors, and fences; exploded dozens of tear gas cannisters inside the house; and even drew up plans detailing their offensive.²⁹³ As such, this damage was clearly not incidental and very foreseeable.²⁹⁴ Therefore, the first prong of the test was easily met.²⁹⁵ Likewise, the city refused to provide Baker any compensation, much less just compensation; therefore, the second prong of the test was met.²⁹⁶ Consequently, as a matter of law, the United States District Court for the Eastern District of Texas found the City of McKinney, Texas liable under the Fifth Amendment’s Takings Clause.²⁹⁷

Id.

284. *Baker*, 2022 WL 2068257, at *10.

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.* at *11 (quoting J.P. Burleigh, *Just Compensation and the Police Power*, U. CIN. L. REV.: BLOG ARTICLES (Apr. 8, 2020), <https://uclawreview.org/2020/04/08/just-compensation-and-the-police-power/>).

289. *Baker*, 2022 WL 2068257, at *12.

290. *Id.*

291. *Id.*

292. *Id.* at *12–13.

293. *Id.* at *14.

294. *Baker*, 2022 WL 2068257, at *14.

295. *Id.* at *15.

296. *Id.*

297. *Id.* at *17. The court also found that the city was liable under the Texas Constitution’s Takings Clause, which will be discussed *infra* Part IV.C.

C. Likewise, State Courts are Split in Determining Whether the Police Power is a Blanket Exception to the Takings Clause

There is a similar jurisdictional split in state courts.²⁹⁸ In *Eggleston v. Pierce County*,²⁹⁹ local police left the Plaintiff's home structurally uninhabitable when it removed two walls for evidentiary purposes.³⁰⁰ In this case, Linda Eggleston lived in a two-bedroom home with her son, Brian Eggleston—who local authorities believed was selling drugs.³⁰¹ When deputies entered the home after securing a warrant, a fight between Brian and the officers ensued, and an officer was killed in the struggle.³⁰² After the incident, Linda Eggleston began staying with her mother.³⁰³ Seven months later, the trial court authorized police to take evidence relating to the officer's murder.³⁰⁴ Additionally, the trial judge issued an order requiring the crime scene to be preserved in its entirety.³⁰⁵ Officers removed two walls from the home as evidence, one of which was load-bearing.³⁰⁶ As such, the home was left uninhabitable.³⁰⁷ Eggleston, whose only income was the \$500 per month she received in social security benefits, filed a state takings claim.³⁰⁸

The Washington Constitution provides that “[n]o private property shall be taken or damaged for public or private use without just compensation having been first made”³⁰⁹ In reaching its decision that compensation was not required, the Washington Supreme Court noted the difference between eminent domain and police power.³¹⁰ It explained that “[e]minent domain takes private property for a public use, while the police power regulates [private property] for its use and enjoyment . . . it is not a taking or damaging for the public use, but to conserve the safety, morals, health and general welfare of the public.”³¹¹ The court further explained that “the gathering and preserving of evidence is a police power function,” and that no other jurisdiction holds that this is a taking.³¹² Interestingly, the court did acknowledge a jurisdictional split on the issue of whether the destruction of property by police activity other than collecting evidence is a compensable taking.³¹³ However, the court refused to weigh in on the issue as it already answered the question in *Eggleston*.³¹⁴

298. See cases cited *supra* note 6.

299. 64 P.3d 618 (Wash. 2003).

300. *Id.* at 622.

301. *Id.* at 620.

302. *Id.*

303. *Id.* at 621.

304. *Eggleston*, 64 P.3d at 621.

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.* at 622–23.

309. WASH. CONST. art. I, § 16.

310. *Eggleston*, 64 P.3d at 623.

311. *Id.* (quoting *Conger v. Pierce Cnty.*, 198 P. 377 (Wash. 1921)).

312. *Id.* at 623–24.

313. *Id.* at 626–27.

314. *Id.* at 627.

Conversely, other state jurisdictions hold that the police power is not a blanket exception to the Takings Clause. Specifically, two states, Texas and Minnesota, have applied this rule to instances where law enforcement destroys the property of an innocent third-party while trying to apprehend a dangerous suspect. In *Wegner v. Milwaukee Mutual Insurance Co.*,³¹⁵ Minneapolis police were staking out an address in hopes of capturing two suspected drug dealers.³¹⁶ The suspects arrived, spotted the police, and a high-speed chase ensued.³¹⁷ Eventually, the suspects split up on foot.³¹⁸ One of them entered and hid in the home of Harriet Wegner.³¹⁹ Wegner's adult granddaughter, who was living at the home, notified police.³²⁰

In response, the Minneapolis Police Department deployed its Emergency Response Unit (ERU) to the scene.³²¹ After three hours of attempting to communicate with the suspect, the police launched twenty-five rounds of tear gas and three flash grenades into the home to disorient him.³²² The Minneapolis Police Department then apprehended him while he was trying to escape from a basement window.³²³ The tear gas and flash grenades caused significant damage to Wegner's home.³²⁴ Every window in the home was broken, a pink film from the tear gas coated the home's interior, and multiple walls were damaged.³²⁵ Wegner alleged \$71,000 in damages, but her insurance company only covered roughly \$28,000 in emergency repairs.³²⁶ Asserting that law enforcement's actions constituted a compensable taking, Wegner brought a claim against the city to recover the remaining costs.³²⁷

The Minnesota Constitution states that "[p]rivate property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured."³²⁸ The Minnesota Supreme Court noted that recovery rested on whether a legitimate exercise of the city's police power could constitute a taking.³²⁹ To meet this burden, the property had to be damaged for a public use, a standard the court historically "construed broadly."³³⁰ Since this was a case of first impression, the court relied mostly on the "well-reasoned" decision in *Steele v. City of Houston*.³³¹ In this case, a group of escaped

315. 479 N.W.2d 38 (Minn. 1991).

316. *Id.* at 39.

317. *Id.*

318. *Id.*

319. *Id.*

320. *Wegner*, 479 N.W.2d at 39.

321. *Id.* ("The ERU, commonly thought of as a 'SWAT' team, consists of personnel specially trained to deal with barricaded suspects, hostage-taking, or similar high-risk situations. Throughout the standoff, the police used a bullhorn and telephone in an attempt to communicate with the suspect.")

322. *Id.*

323. *Id.*

324. *Id.*

325. *Wegner*, 479 N.W.2d at 39.

326. *Id.*

327. *Id.*

328. MINN. CONST. art. I, § 13.

329. *Wegner*, 479 N.W.2d at 40.

330. *Id.*

331. *Id.*; 603 S.W.2d 786 (Tex. 1980).

prisoners barricaded themselves in a random home.³³² To expel the fugitives, the Houston Police Department lit the house on fire.³³³ Even after the fire department arrived, the police allowed the housefire to continue to ensure the escaped prisoners had been forced out.³³⁴ Unsurprisingly, the homeowners argued that the intentional destruction of their home and personal property entitled them to compensation under the Texas Constitution's Takings Clause.³³⁵

In *Steele*, the Texas Supreme Court found a right to compensation when an innocent third party has their property damaged by law enforcement.³³⁶ To do so, the court firmly rejected the police power's blanket exemption rule,³³⁷ and broadly defined public use to include any "real or supposed public emergency to apprehend armed and dangerous men who had taken refuge in the house."³³⁸ Lastly, the *Steele* court noted that the Texas Constitution's Takings Clause,³³⁹ which, as the *Wegner* court pointed out,³⁴⁰ is nearly identical to the Minnesota Constitution's Takings Clause, plainly authorized compensation in these scenarios, even if a police department correctly ordered a home's destruction.³⁴¹ Finding that the homeowner could receive compensation in these scenarios, the Texas Supreme Court remanded the case so the homeowner could prove that his property was destroyed for a public use.³⁴² However, in *Wegner*, the Minnesota Supreme Court found that remanding the case on the specific issue of whether the police intentionally damaged *Wegner's* house for public use would not be necessary.³⁴³ Instead, the court held that the "damage inflicted by the police in the course of capturing a dangerous suspect was for a public use within the meaning of the [Minnesota] [C]onstitution."³⁴⁴ Thus, the court required the City of Minneapolis to pay just compensation to *Wegner*.³⁴⁵

332. *Steele*, 603 S.W.2d at 789.

333. *Id.*

334. *Id.*

335. *Id.* at 788.

336. *Id.* at 793.

337. *Steele*, 603 S.W.2d at 789 ("[T]his court has moved beyond the earlier notion that the government's duty to pay for taking property rights is excused by labeling the taking as an exercise of police powers.").

338. *Id.* at 792.

339. TEX. CONST. art. I, § 17.

No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person, and . . . when a person's property is taken . . . except for the use of the State, compensation . . . shall be first made, or secured by a deposit of money . . .

Id.

340. *Wegner v. Milwaukee Mut. Ins. Co.*, 479 N.W.2d 38, 41 (Minn. 1991).

341. *Steele*, 603 S.W.2d at 793 ("We do not hold that the police officers wrongfully ordered the destruction of the dwelling; we hold that the innocent third parties are entitled by the Constitution to compensation for their property.").

342. *Id.*

343. *Wegner*, 479 N.W.2d at 41.

344. *Id.*

345. *Id.* at 42.

We believe the better rule, in situations where an innocent third party's property is taken, damaged or destroyed by the police in the course of apprehending a suspect, is for the municipality to compensate the innocent party for the resulting damages. The policy considerations in this case center around the basic notions of fairness and justice. At its most basic level, the issue is whether it is fair to allocate the entire risk of loss to an innocent homeowner for the good of the public. We do not believe the

Similarly, although not dealing with law enforcement's destruction of private property while trying to capture a suspect, other state courts have found that the police power is not a blanket exemption from a potential takings claim. In *Brewer v. Alaska*,³⁴⁶ state-directed fire departments damaged the Plaintiffs' property while setting a backfire to prevent the spread of an approaching wildfire that would eventually engulf 600,000 acres.³⁴⁷ The Plaintiffs were a group of landowners who owned various subdivisions.³⁴⁸ As the fire approached the subdivisions, firefighters entered the various properties and set fire to surrounding vegetation.³⁴⁹ These fires were then "pushed out" to meet the oncoming wildfires.³⁵⁰ This process, called burnouts or backfires, is used to deprive oncoming fires of fuel.³⁵¹ The landowners subsequently brought a takings claims under Article 1, Section 18 of the Alaska Constitution, which reads "[p]rivate property shall not be taken or damaged for public use without just compensation."³⁵² The landowners argued that the state did not try to minimize the burnout's damage, the landowners' property was not under immediate threat of fire damage, and the state chose to use their property instead of nearby state-owned lands.³⁵³

The Supreme Court of Alaska determined that for the landowners to be entitled to compensation, they must show that their property was damaged by the state and done so for a public use.³⁵⁴ Alaska law explicitly authorizes the state to enter private property for the purposes of "preventing, suppressing, or controlling" a wildfire.³⁵⁵ The court noted that, implicit in this statute is language portraying that fighting wildfires benefits the public, regardless of whether the individual landowners are the only ones to benefit directly.³⁵⁶ Therefore, the court held that "[b]ecause the burnouts were set in the exercise of the State's police powers, the damage [the fire department] caused was for a public use for purposes of the Takings Clause."³⁵⁷

Lastly, in *Garrett v. City of Topeka*,³⁵⁸ the Plaintiff owned a tract of land with a single-family home on it.³⁵⁹ The City of Topeka enacted a series of city traffic resolutions that affected Garrett's property.³⁶⁰ The resolutions were enacted to "safeguard public

imposition of such a burden on the innocent citizens of this state would square with the underlying principles of our system of justice. Therefore, the City must reimburse Wegner for the losses sustained.

Id.

346. 341 P.3d 1107 (Alaska 2014).

347. *Id.* at 1109.

348. *Id.*

349. *Id.* at 1110.

350. *Id.*

351. *Brewer*, 341 P.3d at 1110.

352. ALASKA CONST. art. 1, § 18.

353. *Brewer*, 341 P.3d at 1110.

354. *Id.* at 1111.

355. *Id.* at 1112.

356. *Id.*

357. *Id.*

358. 916 P.2d 21 (Kan. 1996).

359. *Id.* at 26.

360. *Id.* at 26–27.

health, safety, and welfare in anticipation of commercial development and to place reasonable controls on traffic flow.”³⁶¹ These resolutions called for the creation of streets, one of which cut through Garrett’s tract of land.³⁶² Garrett deeded 8,663 square feet of her land to the City of Topeka for \$61,800.³⁶³ However, Garrett later brought an inverse condemnation action, alleging that a taking occurred because the city failed to complete the road construction prescribed in the ordinance.³⁶⁴

The Kansas Supreme Court held that where there is an actual taking of property under the police power, compensation is required and that a “case-by-case approach is used in determining whether the facts and circumstances of a case show” that there is a taking.³⁶⁵ The factors that courts use in this balancing test include, but are not limited to, “loss of value of land or sales; restrictions on access; and the distance and circuity of travel that is now required for ingress and egress.”³⁶⁶ The court determined that Garrett’s economic loss was so substantial it constituted a taking.³⁶⁷

To summarize, some courts hold that the police power is an exception to the Takings Clause, while other courts hold that there is no such exception.³⁶⁸ The jurisdictions that hold that there is no exception inconsistently examine a variety of facts and circumstances to determine whether traditional exercise of the police power requires compensation.³⁶⁹ This jurisdictional split is dangerous for today’s property owner. As traditional law enforcement has become militarized, the possibility that a property owner’s home can be destroyed increases, as happened to John Lech, Vicki Baker, and Andrea Young.³⁷⁰ When a court holds that the police power is fully exempt from the Takings Clause, it leaves the individual property owner without a remedy. As a dissenting judge in *Eggleston* stated, the police power cannot be used as “some sort of mystical excuse to cart away part of a person’s house without paying for it.”³⁷¹

V. THE SUPREME COURT SHOULD ADOPT A STANDARDIZED APPROACH TO POLICE POWER AND TAKINGS CLAUSE ISSUES

Given the militarization of the American police force, it is paramount that the Supreme Court analyze the intersection between the Takings Clause and the police power as applied to instances where law enforcement significantly damages the home of an innocent third party. At the crux of this issue is the relationship between one’s private property and the idea of life over property. On one side of the spectrum, American respect for private property predates the American Revolution.³⁷² On the other side of the spectrum is the

361. *Id.* at 26.

362. *Id.* at 27.

363. *Garrett*, 916 P.2d at 27.

364. *Id.*

365. *Id.* at 31.

366. *Id.* at 32.

367. *Id.* at 36.

368. *See* cases cited *supra* note 6.

369. *See* cases cited *supra* note 216.

370. *See supra* Parts I, III.

371. *Eggleston v. Pierce Cnty.*, 64 P.3d 618, 629 (Wash. 2003) (Sanders, J., dissenting).

372. William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765–1769*, 1765, UNIV. CHI. PRESS, <https://press-pubs.uchicago.edu/founders/documents/v1ch16s5.html> (last visited

very uncontroversial idea of life over property. After Andrea Young's home was destroyed, Kalamazoo Department of Public Safety Chief Vernon Coakley stated that "the top priority of law enforcement is to keep the community safe . . . [and the] second priority is the safety of . . . all officers While this unfortunate damage was caused to this home, we prioritize lives before property."³⁷³

Neutralizing dangerous criminals that could potentially take another's life is beneficial for society, but does that mean one unlucky property owner must bear the cost for all of the public? The obvious answer to this question is no. As Justice Black plainly stated in *Armstrong v. United States*,³⁷⁴ the Takings Clause is "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."³⁷⁵ Further, considering the *Kelo* court's broad definition of public use, it follows logically that destroying a home in order to apprehend a dangerous suspect is a public benefit and should therefore be considered a public use.³⁷⁶ In fact, a few state supreme courts have already adopted such a view.³⁷⁷

In 1871, the Supreme Court declared it an "unsatisfactory result" when the government inflicts "irreparable and permanent" injury on an individual by destroying private property without providing compensation.³⁷⁸ However, today's courts have diverted from this standard. Instead, like in the case of John Lech, some courts allow a private property owner to go uncompensated if their home was damaged under the state's broad police power.³⁷⁹ Perhaps the lower court jurisdictional split on how to handle these issues stems from the Supreme Court's own difficulty in clarifying the police power's boundaries and what constitutes a public use.³⁸⁰ Nevertheless, the Court can remedy this by revisiting its decision in *Pumpelly* and holding that the police power is not a blanket exception to the Takings Clause.

Additionally, the Supreme Court should revisit its decisions in prominent regulatory takings cases and consider a standardized approach to instances where law enforcement destroys the private property of another. The Supreme Court made clear in *Mahon* that the police power is not an unlimited, unfettered power.³⁸¹ Such a test could be modeled after

Sept. 14, 2022) (In 1765, Sir William Blackstone famously wrote: "So great, moreover, is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community."). Additionally, another Fifth Amendment clause, the Due Process Clause, ensures that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. V.

373. Larson, *supra* note 47.

374. 364 U.S. 40 (1960).

375. *Id.* at 49; *see also* Judge Amos Mazzant's comment that, "[i]t cannot be the case that public good could be done at the cost of the individual." Baker v. City of McKinney, No. 4:21-CV-00176, 2022 WL 2068257, at *12 (E.D. Tex. Apr. 29, 2022).

376. *Kelo* v. New London, 545 U.S. 469, 480 (2005).

377. *Brewer v. Alaska*, 341 P.3d 1107 (Alaska 2014); *Wegner v. Milwaukee Mut. Ins. Co.*, 479 N.W.2d 38 (Minn. 1991); *Steele v. City of Houston*, 603 S.W.2d 786 (Tex. 1980).

378. *Pumpelly v. Green Bay & Miss. Canal Co.*, 80 U.S. 166, 177–78 (1871).

379. *Lech v. Jackson*, 791 F. App'x 711 (10th Cir. 2019); *Baker v. City of McKinney*, No. 4:21-CV-00176, 2022 WL 2068257 (E.D. Tex. Apr. 29, 2022).

380. *Kelo*, 545 U.S. at 479.

381. "[P]roperty may be regulated to a certain extent, [but] if [the] regulation goes too far it will be recognized as a taking." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

the approaches in *Penn Central Transportation Co. v. City of New York*, where the Supreme Court examined three specific factors to determine whether a regulation constituted a taking of private property for public use that required just compensation,³⁸² and *Garrett v. City of Topeka*, where the Kansas Supreme Court applied a similar test.³⁸³ Factors to be considered in this approach should include 1) loss of value to the home, 2) how much damage the home received, 3) the habitability of the home, and 4) the character of law enforcement's action, the last of which would allow courts to consider all potentially relevant information.³⁸⁴

It is important to note that this formula would only remedy injured property owners that suffer significant damage. If police use a battering ram to bust down a door or remove an interior wall for evidence that does not compromise the home's structural integrity, then the property owner would most likely go uncompensated. However, if law enforcement uses APCs, explosives, and other military equipment to remove a suspect, then the homeowner would likely be compensated. To ensure a remedy for the innocent property owner who suffered significant damage from law enforcement, the Supreme Court should 1) unequivocally declare that the police power is not a full exemption from a potential Takings Clause claim, and 2) develop a factor test that could be applied to find a taking in the most egregious instances.

Naturally, if judges start deciding that property owners are required to be compensated when law enforcement destroys their property, there may be a fear from the courts and the public that law enforcement will value property more than life and refrain from instituting potentially lifesaving measures out of fear of litigation or admonishment. However, the most effective remedy for these situations is the Supreme Court rejecting the purely semantic difference between whether a government action stems from its police power or its eminent domain power. A decision by the Supreme Court would also potentially encourage legislatures to pass statutes requiring just compensation when private property is destroyed—a popular recommendation that other Takings Clause articles have called for.³⁸⁵ While some jurisdictions already have programs like this in place, the Supreme Court's revisit of this issue could further force the hand of municipal and state governments by making these safety net statutes and programs mandatory.³⁸⁶

Similarly, a decision by the Supreme Court could solve the catch-22 between takings actions and inverse condemnations actions.³⁸⁷ In jurisdictions that currently hold that the police power is a blanket exception to the Takings Clause, the injured property owner can bring an inverse condemnation action—a tort—instead of claiming a Fifth Amendment

382. 438 U.S. 104, 124 (1978).

383. 916 P.2d 21, 32 (Kan. 1996).

384. Creating such a test would not be new for the modern Court. Only a decade ago, the Supreme Court created and applied a multi-factor test in the context of government-induced flooding to determine whether such flooding is a taking. *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 38–40 (2012).

385. See C. Wayne Owen Jr., *Everyone Benefits, Everyone Pays: Does the Fifth Amendment Mandate Compensation When Property is Damaged During the Course of Police Activities*, 9 WM. & MARY BILL RTS. J. 277 (2000); see also William Michael Treanor, *The Armstrong Principle, the Narratives of Takings, and Compensation Statutes*, 38 WM. & MARY L. REV. 1151 (1997).

386. Owen Jr., *supra* note 385, at 295.

387. *Id.* at 278.

Takings violation.³⁸⁸ However, given the immense protection law enforcement receives due to qualified immunity, the injured property owner regularly does not recover any damages.³⁸⁹ Therefore, in these jurisdictions, because of qualified immunity and the broad police power, the injured property owner receives no remedy.

VI. CONCLUSION

Basic notions of justice and fairness dictate that an innocent third-party landowner should be compensated when law enforcement significantly damages their property—regardless of whether the government was acting pursuant to its police power or its eminent domain power. Law enforcement, through the plethora of military equipment received through the War on Drugs, the 1033 program, and the War on Terrorism, can cause thousands of dollars' worth of damage in an instant.³⁹⁰ While police have a civic duty to protect the public, that does not mean the individual property owner alone should bear the damages stemming from this duty. Although the police power is broad, it is not unlimited.³⁹¹ To remedy this, the Supreme Court should look to its regulatory takings caselaw and adopt a factor test to ensure the injured property owner receives just compensation.³⁹²

-Tristan Reagan*

388. *Id.*

389. *Id.*

390. *See supra* Parts I, III.

391. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

392. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 124 (1978).

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