

You Break It, You Buy It—Unless You Have a Badge? An Argument Against a Categorical Police Powers Exception to Just Compensation

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I. INTRODUCTION

Fifty SWAT officers armed with 40mm rounds, tear gas, flashbang grenades, breaching rams, and accompanied by two armored BearCats swarm a house located in Greenwood Village, Colorado—a sleepy suburb.¹ Over the course of a nineteen-hour standoff,² they proceed to detonate seventy-two explosives, among other aggressive tactics.³ By the end, the house, once valued at over \$580,000, is no longer habitable.⁴ Surely, it is safe to assume that these measures were employed to combat extreme circumstances, right? Wrong. Although the property owner believed his house turned out worse than Osama bin Laden’s compound after the SEAL invasion,⁵ law enforcement’s tactics were employed to detain a Walmart shoplifter, whom the court characterized as

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¹ Jay Stooksberry, *The Cops Were Chasing a Shoplifter. They Ended Up Destroying an Innocent Man’s Home.*, REASON (Dec. 2017), https://reason.com/2017/11/19/the-cops-were-chasing-a-shopli/?itm_source=parsely-api [<https://perma.cc/R8XY-4LHT>] (“50 SWAT officers bombarded Lech’s property with 40 mm rounds, tear gas, flashbang grenades, two armored Bearcats, and breaching rams.”). A “BearCat” is a “Ballistic Engineered Armored Response Counter Attack Truck.” Aaron Cantú, *4 Shocking Examples of Police Militarization in America’s Small Towns*, SALON (Mar. 28, 2014), https://www.salon.com/2014/03/28/4_shocking_examples_of_police_militarization_in_americas_small_towns_partner/ [<https://perma.cc/VY6S-FSFT>].

² *Lech v. Jackson*, 791 F. App’x 711, 713 (10th Cir. 2019), *cert. denied*, 141 S. Ct. 160 (2020).

³ Stooksberry, *supra* note 1 (“A total of ‘68 cold chemical munitions and four hot gas munitions’ were detonated inside the Greenwood Village home.”).

⁴ *Lech*, 791 F. App’x at 713 (“[A]s a result of this 19-hour standoff, the Lechs’ home was rendered uninhabitable.”); Robert Boehlert, *While the Public Takes to the Streets for Police Accountability, the Supreme Court Remains Silent*, SYRACUSE L. REV.: LEGAL PULSE (July 9, 2020), <https://lawreview.syr.edu/while-the-public-takes-to-the-streets-for-police-accountability-the-supreme-court-remains-silent/> [<https://perma.cc/LZ7D-XWVL>].

⁵ Stooksberry, *supra* note 1 (“If you go online and look at the Osama bin Laden compound, I would say that this may look even a little worse.”).

“an armed criminal suspect who was attempting to evade capture,”⁶ who allegedly stole \$50 worth of merchandise.⁷

Leo Lech, the innocent owner of the destroyed home, was forced to bear significant expenses to restore it.⁸ In fact, the only compensation that the City of Greenwood Village offered was \$5,000 to cover Lech’s “temporary rental” expenses.⁹

It was at this point that Lech brought an inverse condemnation suit against the City, under the Fifth Amendment’s Takings Clause, hoping to receive compensation and hold law enforcement responsible for the damage.¹⁰ In an inverse condemnation suit, the plaintiff pursues a remedy in response to the government taking their private property without paying just compensation.¹¹ Under the Takings Clause, the federal and state governments¹² cannot exercise

⁶ *Lech*, 791 F. App’x at 713.

⁷ Boehlert, *supra* note 4. The alleged shoplifter, Robert Seacat, was accused of shoplifting two belts and a shirt from the Greenwood Village Walmart. *Id.* Seacat had four pending drug-related warrants on his record and was alleged to have fired a pistol at officers while being barricaded inside the Lech’s house. Michael Roberts, *Inside Petition Over No-Compensation Ruling in SWAT Home Destruction*, WESTWORD (Nov. 27, 2019), <https://www.westword.com/news/colorado-swat-team-home-destruction-case-update-11556210> [<https://perma.cc/AHV7-CSNL>].

⁸ See Danielle Wallace, *Colorado Homeowner Owed Nothing After Police SWAT Shootout Destroys His House, Federal Court Rules*, FOX NEWS (Oct. 31, 2019), <https://www.foxnews.com/us/colorado-federal-court-rules-police-dept-owes-homeowner-nothing-after-swat-destroys-his-house> [<https://perma.cc/AQ6G-PJY2>] (“Lech’s attorney told the Post that his home insurance company paid him \$345,000 for the damage but that amount did not come close to covering additional costs.”). Although the Lech’s insurance covered some of the expenses, the coverage was based on a “quirk” and is likely limited to the facts of the case. Clark Neily & Jeffrey Redfern, *Is There a “Police Power” Exception to the Fifth Amendment’s Just Compensation Clause?*, FEDERALIST SOC’Y, at 29:32 (Apr. 6, 2020), <https://fedsoc.org/events/is-there-a-police-power-exception-to-the-fifth-amendment-s-just-compensation-clause> [<https://perma.cc/GNH2-RYQ7>]. Others facing comparable problems will likely be denied any insurance recovery. *Id.* at 29:39.

⁹ 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/> [<https://perma.cc/3LQB-2BKY>] (“The city refused to compensate the Lech family for their losses but offered \$5,000 in temporary rental assistance and for the insurance deductible.”).

¹⁰ *Id.*

¹¹ *Eminent Domain vs. Inverse Condemnation: What’s the Difference?*, OWNERS’ COUNS. OF AM. (Mar. 22, 2016), <https://www.ownerscounsel.com/eminent-domain-vs-inverse-condemnation-whats-the-difference/> [<https://perma.cc/NV5U-KP5G>].

¹² The Fifth Amendment’s Takings Clause is made applicable to the States by the Fourteenth Amendment, and even without this protection, many state constitutions have equivalent provisions providing similar protections. *Chicago, Burlington & Quincy R.R. v. City of Chicago*, 166 U.S. 226, 239–41 (1897).

their powers of eminent domain to take “private property . . . for public use” unless they provide “just compensation.”¹³

Ultimately, Lech’s efforts were unsuccessful; the U.S. Court of Appeals for the Tenth Circuit held that the City did not owe Lech anything.¹⁴ The court reached this conclusion by reasoning that the officers acted pursuant to their police powers and not the power of eminent domain.¹⁵ As a result, their actions did not constitute a taking and did not require just compensation.¹⁶

This outcome is not unique—the Tenth Circuit’s decision is just one of the latest decisions adopting a categorical exception from compensation for property damage caused while the state exercises its police powers.¹⁷ In fact, the majority of jurisdictions that have considered this issue have denied compensation as well.¹⁸ In addition to the Tenth Circuit, there are at least six federal courts and twelve states that have concluded that the Fifth Amendment’s provision for just compensation does not apply to property damage inflicted while police officers are performing their duties.¹⁹ Each of these jurisdictions does so by relying on a distinction between actions taken pursuant to police power and eminent domain.²⁰

¹³ U.S. CONST. amend. V. The Fifth Amendment’s Takings Clause provides, in full: “[N]or shall private property be taken for public use, without just compensation.” *Id.*

¹⁴ Flynn, *supra* note 9 (“[A] federal appeals court has decided what else the city owes the Lech family for destroying their house more than four years ago: nothing.”); Lech v. Jackson, 791 F. App’x 711, 719 (10th Cir. 2019).

¹⁵ Lech, 791 F. App’x at 718–19.

¹⁶ *Id.*

¹⁷ Petition for a Writ of Certiorari at 6, 14–19, Lech v. Jackson, 141 S. Ct. 160 (2020) (No. 19-1123), 2020 WL 1289829, at *6, *14–19. For an even more recent court choosing to adopt this approach, see *Hamen v. Hamlin County*, 955 N.W.2d 336, 348 (S.D. 2021) (“[W]e join the courts that have denied a right of compensation by eminent domain when law enforcement damages private property while executing a warrant or pursuing a fleeing felon.”).

¹⁸ Lech v. Jackson, No. 16-CV-01956-PAB-MJW, 2018 WL 10215862, at *7 (D. Colo. Jan. 8, 2018) (“[A] majority of courts that have considered whether the just compensation requirement applies to property damage caused by police officers in the performance of their duties have concluded that it does not.”).

¹⁹ Samuel D. Hodge, Jr., *Will the Government Reimburse an Innocent Property Owner Whose Home Is Damaged During Police Activity?—Don’t Hold Your Breath!*, 48 REAL EST. L.J. 424, 429–45 (2020). The federal jurisdictions that deny recovery include the Federal Court of Claims, the U.S. District Court for the N.D. of California and the following Court of Appeals: Third Circuit, Seventh Circuit, Eighth Circuit, Ninth Circuit, Tenth Circuit, and Federal Circuit. *Id.* at 429–36. Additionally, the following state courts adopt this approach: Alaska, California, Georgia, Florida, Indiana, Michigan, Ohio, Oklahoma, Utah, South Carolina, Washington, and recently, South Dakota. *Id.* at 436–45; *Hamen*, 955 N.W.2d at 348.

²⁰ Hodge, Jr., *supra* note 19, at 429 (“Most cases that have denied recovery seem to employ the same cookie cutter language in support of their holdings.”).

Although courts have largely not articulated a coherent explanation²¹ for why employing such a categorical exception is the proper approach, there are three common reasons presented in favor of the exception. First, proponents argue that the government could not continue to exist if forced to pay for every intrusion that occurs.²² Second, they argue that requiring compensation will negatively impact law enforcement's decision-making abilities during emergencies.²³ Finally, they argue that law enforcement's actions partially benefit the property owner.²⁴

Meanwhile, a minority of five states permits recovery when the police damage the property of an innocent owner under certain circumstances.²⁵ These jurisdictions base their approach on the underlying principle that the Fifth Amendment's Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."²⁶ Even in these minority jurisdictions, recovering for such damage is an uphill battle.²⁷ For example, one

²¹ See Charles E. Cohen, *Takings Analysis of Police Destruction of Innocent Owners' Property in the Course of Law Enforcement: The View from Five State Supreme Courts*, 34 MCGEORGE L. REV. 1, 2 (2002) ("Of the five courts deciding the cases discussed in this article, only the Iowa Supreme Court was able to articulate a coherent explanation for its holding.").

²² See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) (articulating the proposition that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law" to support the ability for government to impose regulations without payment).

²³ See Ilya Somin, *South Dakota Supreme Court Rules Property Owners Not Entitled to Compensation for Severe Damage to Their Home Inflicted by Police During a Law Enforcement Operation*, VOLOKH CONSPIRACY (Feb. 19, 2021), <https://reason.com/volokh/2021/02/19/south-dakota-supreme-court-rules-property-owners-not-entitled-to-compensation-for-severe-damage-to-their-home-inflicted-by-police-during-a-law-enforcement-operation/> [<https://perma.cc/K3GB-FW53>] [hereinafter Somin, *South*] (responding to such an argument).

²⁴ Cohen, *supra* note 21, at 2 ("Because the decisions to take the plaintiffs' property were not the result of collective deliberation . . . and because the police officers' actions were at least partly intended to benefit the plaintiffs, the policy considerations weigh against compensation.").

²⁵ See *Hamen v. Hamlin County*, 955 N.W.2d 336, 347 (S.D. 2021). But bear in mind that parties have substantially disagreed as to which precedent governs this issue. Thus, different sources provide alternative perspectives as to which jurisdictions fall under each category. Compare *id.* (naming Iowa, Alaska, New Hampshire, Minnesota, and Texas as jurisdictions that permit recovery), with *Petition for a Writ of Certiorari*, *supra* note 17, at 19–23 (naming Alaska, Kansas, New Hampshire, and Wisconsin as those jurisdictions that permit recovery).

²⁶ See, e.g., *Steele v. City of Houston*, 603 S.W.2d 786, 789 (Tex. 1980) (citing *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

²⁷ See, e.g., *id.* at 791–92; see also Andrew Wimer, *Innocent Property Owners Deserve Compensation when the Police Cause Destruction*, FORBES (Dec. 3, 2019), <https://www.forbes.com/sites/instituteofjustice/2019/12/03/innocent-property-owners-deserve->

jurisdiction employs a balancing test,²⁸ while another requires that a plaintiff prove that law enforcement intentionally caused the destruction for “public use.”²⁹

The current controlling approach in cases where law enforcement destroys an innocent third party’s property while apprehending a criminal relies on the categorical police power exception embraced in *Lech*.³⁰ This makes the determinative question, simply, “Does the action ‘*protect the public’s health, safety, and welfare*’ or was it taken ‘*for public use*’?”³¹ Under this approach, a landowner is precluded from receiving compensation, regardless of their innocence and the extent of damage that is inflicted on their property.³² The Supreme Court has recently solidified the validity of this approach by declining to revisit the Tenth Circuit’s decision.³³

But the Supreme Court’s denial of certiorari should not, by any means, lay this issue to rest. Now, as much as ever, the Tenth Circuit’s holding has the potential to have widespread—startling—effects. The Tenth Circuit’s holding reinforces the notion that law enforcement may act without being held accountable. In the wake of the George Floyd murder, many people, including

compensation-when-the-police-cause-destruction/?fbclid=IwAR3PcbMYxlSrX6b8RCxy09Niu1XjYt7IRPxM4Gbs33Rg8Sn6mguapIV7ISg&sh=503ffed55030 [https://perma.cc/LSZ4-VNGG] (“It is an uphill climb [to receive recovery] even in states like Colorado, where the constitution specifically says that government should pay when property is damaged.”).

²⁸ See *Kelley v. Story Cnty. Sheriff*, 611 N.W.2d 475, 480 (Iowa 2000) (“[The applicable balancing test] asks whether the collective benefits of the regulatory action outweigh the restraint imposed upon the property owner.”).

²⁹ See *Steele*, 603 S.W.2d at 792 (“[Plaintiffs] must also prove that the destruction was done ‘for or applied to public use.’” (quoting *Davis v. City of Lubbock*, 326 S.W.2d 699, 702 (Tex. 1959))).

³⁰ *Lech v. Jackson*, 791 F. App’x 711, 719 (10th Cir. 2019), *cert. denied*, 141 S. Ct. 160 (2020); see also 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 Powers*, 11 WAKE FOREST J.L. & POL’Y 297, 322 (2021) (“[A]fter the Tenth Circuit’s opinion, district courts will not have much discretion to operationalize any other kind of rule. Future courts will necessarily be limited from applying any sort of ad hoc factual inquiry to police power takings cases as a consequence of the Tenth Circuit’s opinion. Their job will be fairly perfunctory: did the government act pursuant to its police powers?”).

³¹ See Ilya Somin, *Federal Court Rules There Is No Taking if the Police Destroy an Innocent Person’s House During a Law Enforcement Operation*, VOLOKH CONSPIRACY (Oct. 31, 2019), <https://reason.com/volokh/2019/10/31/federal-court-rules-there-is-no-taking-if-the-police-destroy-an-innocent-persons-house-during-a-law-enforcement-operation/> [https://perma.cc/J67D-ZNSP] [hereinafter Somin, *Federal*].

³² See *id.* (“[T]he Tenth Circuit ruled that the Takings Clause of the Fifth Amendment does not require the government to compensate an innocent man for the destruction of his house during a police operation.”).

³³ *Lech v. Jackson*, 791 F. App’x 711, 719 (10th Cir. 2019), *cert. denied*, 141 S. Ct. 160 (2020).

numerous celebrities,³⁴ have taken a clear stance against this position regarding issues of police brutality.³⁵ In this instance, the majority approach reinforces this notion of action without accountability in the context of police militarization, which has become an increasingly problematic issue.³⁶ By allowing law enforcement to implement these tactics without facing ramifications, they lack an incentive to discontinue their use.³⁷ Any stop to these tactics will likely require the courts to reevaluate the principles of *Lech*.

This Note proposes that courts should reject the categorical police power exception to just compensation. It does so by relying on two distinct arguments. First, in Part II, the Note argues that the categorical police powers exception, when combined with the Supreme Court’s “public use” precedent, undermines just compensation. Second, in Part III, the Note argues that this exception ignores the increasing militarization of law enforcement and the impact this evolution has on property rights. Additionally, this Note, in Part IV, suggests some approaches that courts should instead use in this context—setting out two options for courts to embrace.

II. A CATEGORICAL POLICE POWERS EXCEPTION UNDERMINES JUST COMPENSATION

Courts should reject the categorical police powers exception because that approach, when combined with the Supreme Court’s “public use” precedent, undermines just compensation. The phrase “public use” comes directly from the Fifth Amendment.³⁸ Functionally, it acts as a condition for the state to use its power of eminent domain to take private property.³⁹ Typically, the issue of whether a governmental action supports a public use arises in direct

³⁴ See Rania Aniftos, *Nicki Minaj, Cardi B, Taylor Swift, Beyonce, Ariana Grande & More Speak Out After George Floyd Death*, BILLBOARD (June 2, 2020), <https://www.billboard.com/articles/news/9390793/snoop-dogg-justin-bieber-ariana-grande-george-floyd-death> [<https://perma.cc/4J52-7K94>].

³⁵ See Rashawn Ray, *How Can We Enhance Police Accountability in the United States?*, BROOKINGS (Aug. 25, 2020), <https://www.brookings.edu/policy2020/votervital/how-can-we-enhance-police-accountability-in-the-united-states/> [<https://perma.cc/68DK-S6EE>].

³⁶ See *Police Militarization*, ACLU, <https://www.aclu.org/issues/criminal-law-reform/reforming-police/police-militarization> [<https://perma.cc/6XTV-3C67>]. Although the *Lech* case seems to present extraordinary facts, the destruction in their case is not an isolated occurrence. See, e.g., *Bachmann v. United States*, 134 Fed. Cl. 694, 694–95 (2017) (possessing extremely similar facts to those in *Lech*).

³⁷ See Petition for a Writ of Certiorari, *supra* note 17, at 23 (“If the police power is categorically exempt from the Just Compensation Clause, then government has virtually unlimited latitude to destroy private property.”).

³⁸ See U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

³⁹ See *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 231–32 (2003) (“[T]he text of the Fifth Amendment imposes two conditions on the exercise of such authority: the taking must be for a ‘public use’ and ‘just compensation’ must be paid to the owner.” (citing U.S. CONST. amend. V)).

condemnation suits.⁴⁰ In a direct condemnation suit, the government uses formal eminent domain procedures to take a property and is willing to provide just compensation, but a landowner challenges the government's authority to do so.⁴¹ In these cases, the Supreme Court has defined public use expansively.⁴² However, embracing a categorical police powers exception requires a different meaning of public use—one that limits its scope.⁴³ The combination of this narrow scope approach with the Court's public use precedent enables the government to avoid having to provide just compensation in nearly every takings claim. Thus, this Part argues that courts must abandon the categorical police powers exception.

A. *The Court's Holding in Lech Defines the Scope of Public Use Narrowly*

The court's holding in *Lech* can be separated into two parts. First, the court, affirming the district court's approach, 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."⁴⁴ This holding creates the categorical police powers exception. It does so by allowing the determination that an action is taken pursuant to one's police powers to be dispositive in the context of cases involving the direct physical appropriation or the invasion of private property.⁴⁵ Second, the court held that when law enforcement causes damage in the course of arresting a fugitive, it uses its police power.⁴⁶ This holding confirmed that law enforcement's actions fell within the scope of their police power and, in

⁴⁰ Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 *ECOLOGY L.Q.* 307, 326 (2007) [hereinafter Meltz, *Takings*]. Interestingly enough, this issue arises in *Lech*—an inverse condemnation claim. See *Lech v. Jackson*, No. 16-CV-01956-PAB-MJW, 2018 WL 10215862, at *4–5 (D. Colo. Jan. 8, 2018).

⁴¹ See *Eminent Domain vs. Inverse Condemnation: What's the Difference?*, OWNERS' COUNS. OF AM. (Mar. 22, 2016), <https://www.ownerscounsel.com/eminent-domain-vs-inverse-condemnation-whats-the-difference/> [<https://perma.cc/NV5U-KP5G>]. A landowner may choose to challenge a direct condemnation for numerous reasons, including sentimental connection to the property, having made extensive improvements, or even unhappiness with the price of just compensation being offered. See *Kelo v. City of New London*, 545 U.S. 469, 475 (2005) (noting how petitioners, some of which grew up and lived in the house for their entire life, made extensive improvements to the property and prized its water view).

⁴² See *infra* Part II.B.

⁴³ See *infra* Part II.A.

⁴⁴ *Lech v. Jackson*, 791 F. App'x 711, 717 (10th Cir. 2019).

⁴⁵ See *id.* ("[W]e further hold that this distinction remains dispositive in cases that, like this one, involve the direct physical appropriation or invasion of private property.")

⁴⁶ *Id.* at 718.

combination with their first holding, relieved the city from being subject to the Takings Clause’s just compensation provision.⁴⁷

At first glance, these holdings seem logical; when law enforcement engages in action that is not subject to the Takings Clause, they should not be subject to its just compensation requirement. However, upon further inspection of the court’s reasoning behind its second holding, it becomes apparent that a categorical police power exception results in the court embracing a narrow scope of “public use” that is inconsistent with Supreme Court precedent on the issue.

In *Lech*, the court’s reasoning behind its second holding considers only one side of the equation—it focused solely on the scope of the state’s police power. The court began by defining the police power to encompass “the authority to provide for the public health, safety, and morals.”⁴⁸ It later reduced this definition to an action that “control[s] the use of property . . . for the public good” and contrasted such actions with the definition of the power of eminent domain which “takes property for public use.”⁴⁹ Thus, the court framed the determinative question as: Are law enforcement’s actions for “the public good” or for “public use?”⁵⁰ Yet, it did not spend any time considering whether law enforcement’s actions fell within the scope of public use.⁵¹ Instead, it relied on the principle from *Bachmann v. United States* that the actions in question were “perhaps the most traditional function of the police power”⁵²—placing them in the public good category—and concluded its substantive inquiry of the determinative question.⁵³ Therefore, the court’s opinion, by ending its inquiry upon finding that the actions were taken pursuant to the state’s police powers, impliedly asserted that the categories are mutually exclusive.

⁴⁷ *See id.* at 719 (“Because (1) the defendants’ law-enforcement actions fell within the scope of the police power and (2) actions taken pursuant to the police power do not constitute takings, the defendants are entitled to summary judgment on the Lechs’ Takings Clause claims.”).

⁴⁸ *Id.* at 718 (quoting *Dodger’s Bar & Grill, Inc. v. Johnson Cnty. Bd. of Cnty. Comm’rs*, 32 F.3d 1436, 1441 (10th Cir. 1994)); *see also id.* at 718 (“[W]e have described the police power in contrast to the power of eminent domain: ‘the former controls the use of property by the owner for the public good,’ while the latter ‘takes property for public use.’” (quoting *Lamm v. Volpe*, 449 F.2d 1202, 1203 (10th Cir. 1971))).

⁴⁹ *Id.* (emphasis added).

⁵⁰ *See Lech*, 791 F. App’x at 718 (“The parties have not pointed us to any Tenth Circuit authority that affirmatively resolves whether the defendants’ conduct here damaged the Lechs’ home for the public good or for public use.”).

⁵¹ *See id.* at 718–19 (lacking any substantive law defining the practical scope of public use and any analysis as to how these actions are outside its purview).

⁵² *Id.* at 718 (“[T]he Marshals Service damaged plaintiffs’ property while ‘us[ing] perhaps the most traditional function of the police power: entering property to effectuate an arrest or a seizure.’” (citing *Bachmann v. United States*, 134 Fed. Cl. 694, 697 (2017))).

⁵³ *See id.* at 718–19 (transitioning its opinion to focus on rebutting the Lechs’ contentions that this will create an “unprecedented expansion” of police power, that such principles cannot be applied to an innocent landowner and that this case will signal to police that they may “act with impunity to destroy property”).

An assertion that the categories are mutually exclusive, effectively, sets the outer limits of public use somewhere before public good. Otherwise, if the court believed there was an overlap, it would have had to explain why the actions qualified under one category rather than the other. As will be demonstrated below, this approach is inconsistent with the boundaries set by the Supreme Court.⁵⁴

B. *The Supreme Court Defines the Scope of Public Use Expansively*

The Supreme Court has taken a much different approach in defining the boundaries of public use; it has adopted a definition that is homogenous with that of police power.⁵⁵ Upon inspection of the Supreme Court's interpretation of public use, as set forth in its direct condemnation cases, it is apparent that the Court defines the phrase expansively.⁵⁶ In fact, circuit courts have understood the public use requirement to be a remarkably light burden to overcome.⁵⁷

Perhaps the most extreme understanding of "public use" was posited in *Kelo v. City of New London*. In *Kelo*, the city planned to take the plaintiffs' property and then redistribute it to a private pharmaceutical company.⁵⁸ It claimed that doing so was part of an economic development plan that would revitalize the "economically distressed city."⁵⁹ The plaintiffs argued that such a transfer of private property to another private entity (a corporation) ran afoul of the Fifth Amendment's public use requirement because the public would not actually receive possession of the property.⁶⁰ Notwithstanding such an argument, the Court's majority opinion held that the city's actions fell within the scope of public use because the plan was designed to serve a "public purpose."⁶¹ In that case, the Court equated public use with its "broader and more natural

⁵⁴ See discussion *infra* Part II.B.

⁵⁵ See Somin, *Federal*, *supra* note 31 ("The distinction between 'police power' and 'eminent domain'—with only the latter leading to a taking—is a false dichotomy. In many situations, courts have ruled that a taking has occurred even if the government did not try to use eminent domain.").

⁵⁶ Meltz, *Takings*, *supra* note 40, at 326–27 ("A series of Supreme Court decisions since 1954, arising from direct condemnations, has solidified this expansive interpretation.").

⁵⁷ *Daniels v. Area Plan Comm'n of Allen Cnty.*, 306 F.3d 445, 460 (7th Cir. 2002) ("Even though the Supreme Court has required the existence of a public use to justify a taking, the burden on the state is remarkably light.").

⁵⁸ *Kelo v. City of New London*, 545 U.S. 469, 474–75 (2005) ("The NLDC intended the development plan to capitalize on the arrival of the Pfizer facility and the new commerce it was expected to attract.").

⁵⁹ *Id.* at 472 ("[T]he city of New London approved a development plan that . . . was 'projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city.'" (quoting *Kelo v. City of New London*, 843 A.2d 500, 507 (Conn. 2004))).

⁶⁰ See *id.* at 475 ("[The petitioners] claimed, among other things, that the taking of their properties would violate the 'public use' restriction in the Fifth Amendment.").

⁶¹ *Id.* at 484 ("Because [the development] plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.").

interpretation . . . as ‘public purpose,’”⁶² a concept that is defined broadly and one that provides deference to legislative judgments.⁶³ This interpretation provides state governments with the ability to directly condemn properties under their power of eminent domain, so long as it will afford any appreciable benefits to the community’s welfare—a concept within the purview of a state’s police powers.⁶⁴

Kelo’s holding caught many off guard, resulting in widespread public disapproval and eminent domain reform among state legislatures.⁶⁵ But the holding should not have generated such a huge shock. The Supreme Court, over two decades earlier in *Hawaii Housing Authority v. Midkiff*, made explicit that “[t]he ‘public use’ requirement is . . . coterminous with the scope of a sovereign’s police powers.”⁶⁶ This holding effectively meant that “whatever the state may legitimately achieve through its power to regulate property under the police power, it may instead choose to do through the power to take property through eminent domain.”⁶⁷ Even this holding was not novel; *Hawaii Housing* relied on principles derived in *Berman v. Parker*.⁶⁸ In *Berman*, the Supreme Court noted that to assess whether an act serves a public purpose, it deals with “what traditionally has been known as the police power,” and once such act is within that authority, the state can determine the means by which it attains those ends (e.g., its power of eminent domain).⁶⁹

Thus, the Supreme Court has made clear, since 1954, that the phrase “public use” is to be interpreted expansively and in a manner that is coterminous with a state’s police power.⁷⁰ This interpretation allows the government to take properties in a wide variety of circumstances.⁷¹

⁶² *Id.* at 480.

⁶³ *Id.* (“Without exception, our cases have defined [public purpose] broadly, reflecting our longstanding policy of deference to legislative judgments in this field.” (citing *Berman v. Parker*, 348 U.S. 26, 33 (1954))).

⁶⁴ *Kelo*, 545 U.S. at 481, 483–85 (concluding, based on precedent, that the concept of public welfare is within public purpose and that appreciable benefits to the community serves such a purpose).

⁶⁵ See Ilya Somin, *The Political and Judicial Reaction to Kelo*, WASH. POST (June 4, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/04/the-political-and-judicial-reaction-to-kelo/> [<https://perma.cc/2XDJ-SRUH>].

⁶⁶ *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 240 (1984).

⁶⁷ JOSEPH WILLIAM SINGER, BETHANY R. BERGER, NESTOR M. DAVIDSON & EDUARDO MOISÉS PEÑALVER, *PROPERTY LAW: RULES, POLICIES, AND PRACTICES* 1503 (Rachel E. Barkow et al. eds., 7th ed. 2017).

⁶⁸ See *Haw. Hous.*, 467 U.S. at 239 (“The starting point for our analysis of the Act’s constitutionality is the Court’s decision in *Berman*.”).

⁶⁹ *Berman v. Parker*, 348 U.S. 26, 32–33 (1954).

⁷⁰ See *id.*

⁷¹ See *supra* notes 58–64 and accompanying text.

C. Lech's Approach and the Supreme Court's Approach Cannot Co-Exist

In addition to the confusion that may come along with inconsistent definitions for public use,⁷² there is an even larger issue that is at stake. When the implications of both a narrow and broad definition of public use are combined, the ramifications have the potential to undermine takings law altogether.⁷³ Consider the following scenario: A state decides that it would like to directly condemn a piece of private property. Given the Supreme Court's expansive definition of public use, the state can directly condemn the property so long as they cite to a purpose that falls within its police powers, as such powers are coterminous with public use.⁷⁴ This will allow the state to satisfy the Fifth Amendment's public use requirement. Nevertheless, in the same case, the state can also claim that they are immunized from takings liability, as under the categorical police powers exception, it is not required to provide just compensation.⁷⁵ Thus, the private landowner is left with a scenario where it both loses its property and receives nothing in return, given the conflicting definitions of "public use."

If the state can have its cake, by taking property using the Supreme Court's broad interpretation of "public use," and eat it too, by simultaneously limiting the interpretation of "public use" per the categorical police powers exception to be immunized from liability, then what crumbs remain of private property protection? There are none. These inconsistent approaches allow the state to wholly dismiss the protections afforded by the Fifth Amendment and undermine its provision of just compensation. Therefore, to prevent this issue from ensuing, courts must reject the categorical police powers exception altogether.

III. THE RISE IN POLICE MILITARIZATION WARRANTS A NEW STANDARD

Even if courts are unwilling to accept the refutation outlined in Part II, this Part offers them an alternative reason to abandon their categorical exception approach in police destruction takings claims. In Part III.A, this Note observes that the Supreme Court has previously expressed a willingness to change its

⁷² See *supra* Parts II.A, II.B. For a possible explanation regarding why the court injected an approach inconsistent with other takings precedent, see generally Longoria, *supra* note 30 (asserting that the *Lech* court's interpretation of *Mugler*, *Bennis*, and *Miller* in this context was misplaced and ultimately supports the opposite conclusion).

⁷³ J.P. Burleigh, *Just Compensation and the Police Power*, U. CIN. L. REV. (Apr. 8, 2020), <https://uclawreview.org/2020/04/08/just-compensation-and-the-police-power/> [<https://perma.cc/M8EJ-EFT5>] ("If 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.").

⁷⁴ See *supra* notes 66–69 and accompanying text.

⁷⁵ See *Lech v. Jackson*, 791 F. App'x 711, 717 (10th Cir. 2019) ("[W]hen 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.").

takings standards in the regulatory takings context. In Part III.B, this Note argues that courts should be willing to change their standard in this context as well because the increased militarization of law enforcement poses risks similar to those that caused the change in the governmental regulations context.

A. *The Court Has Shown a Willingness to Change Its Takings Approach*

Although the Supreme Court’s current body of law for assessing whether a taking has occurred is relatively straightforward,⁷⁶ these standards developed over time.⁷⁷ The most dramatic development took place when the Court faced claims stemming from the government’s direct exercise of their police powers—in the regulatory takings context.⁷⁸ In fact, in this context, the change likely could not have been more drastic. Claims for regulatory takings typically arise when homeowners claim that a governmental regulation has impaired either the value or usefulness of their property.⁷⁹ Early takings cases rejected the possibility of a regulation amounting to a taking,⁸⁰ but by 1992, a subsection of regulations was categorically deemed to amount to a taking.⁸¹ Thus, the Supreme Court, in just over 100 years, found themselves on different ends of the spectrum. On one end, it categorically denied any possibility of compensation, while on the other, it categorically held that compensation was due.⁸²

The Court’s early approach, denying the possibility of any compensation, was based on its belief that they should apply the word “taking” in its literal sense.⁸³ The takings analysis for regulations was resolved simply by considering whether the regulation was a legitimate exercise of the government’s police

⁷⁶ See *infra* Parts IV.A.1–.A.3. But see ROBERT MELTZ, CONG. RSCH. SERV., THE CONSTITUTIONAL LAW OF PROPERTY RIGHTS “TAKINGS”: AN INTRODUCTION 1 (Jan. 2008), https://www.everycrsreport.com/files/20080115_RS20741_ac806c5e620a8dcbc0db98be68618fba8d30fedf.pdf [<https://perma.cc/G8Y2-Z96R>] [hereinafter MELTZ, CONSTITUTIONAL].

⁷⁷ See Cohen, *supra* note 21, at 10–22.

⁷⁸ See Meltz, *Takings*, *supra* note 40, at 328 (explaining how prior to the “regulatory taking” only two types of government action triggered the Takings Clause).

⁷⁹ *Regulatory Taking*, OWNERS’ COUNS. OF AM., <https://www.ownerscounsel.com/what-we-do/regulatory-takings/> [<https://perma.cc/BUW4-WK6B>].

⁸⁰ John M. Groen & Richard M. Stephens, *Takings Law, Lucas, and the Growth Management Act*, 16 U. PUGET SOUND L. REV. 1259, 1265 (1993) (“[A] police power restriction on the mere use of land was not a taking.”).

⁸¹ See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992) (“The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land.”).

⁸² Compare *Mugler v. Kansas*, 123 U.S. 623, 668–69 (1887) (categorically denying compensation regarding a plaintiff’s claim based on a government’s ban on the manufacture of liquor), with *Lucas*, 505 U.S. at 1015 (stating that a regulation categorically amounts to a taking if it denies a property owner all economically beneficial or productive use of land).

⁸³ Groen & Stephens, *supra* note 80, at 1265. The Court was not alone in suggesting that the correct interpretation was to apply the word literally—early constitutional theorists supported this interpretation as well. See *Lucas*, 505 U.S. at 1028 n.15.

power.⁸⁴ If so, then such regulation *did not* qualify as a literal “taking” and property owners were denied compensation, even if the regulation resulted in significant property damage.⁸⁵ Therefore, at that time, only two types of government actions triggered a duty to compensate: (1) a “direct appropriation of property,” and (2) the “functional equivalent of a practical ouster [of the owner’s possession].”⁸⁶

However, by 1922, in *Pennsylvania Coal Co. v Mahon*, the Court began to evolve⁸⁷ its takings principles to include a more dynamic analysis for regulatory takings.⁸⁸ In *Mahon*, Justice Holmes laid the foundation of a “regulatory taking” by purporting the general rule that “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”⁸⁹ He set forth this new rule based on his understanding of two practical implications of the government’s regulations. First, Holmes recognized that the government’s regulations enabled them to impermissibly “improve the public condition . . . by a shorter cut than the constitutional way” of providing just compensation.⁹⁰ To combat this, Holmes reasoned that there must be a limit on non-compensable land-use regulations.⁹¹ Otherwise, the government could qualify the Fifth Amendment’s protection of private property using its police power “more and more until at last private property disappears.”⁹² Second, Holmes recognized that the impact of governmental regulations can, in some instances, be so severe

⁸⁴ See *Mugler*, 123 U.S. at 668–69 (analyzing whether a taking occurred by assessing whether the government exercised their police power).

⁸⁵ Groen & Stephens, *supra* note 80, at 1265 (“The Takings Clause was not immediately applied to land use regulations adopted under the police power Even when government actions resulted in significant damage to private property, the state court decisions often denied compensation.”).

⁸⁶ *Lucas*, 505 U.S. at 1014.

⁸⁷ *Mahon* was not the first time that the Court alluded to expanding its interpretation to include somewhat abstract takings concepts. In *Pumpelly v. Green Bay Co.*, the Supreme Court observed that interpreting “taken” in its narrowest sense “pervert[s] the constitutional provision into a restriction upon the rights of the citizen.” *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 177–78 (1872). Similarly, one commentator, Theodore Sedgwick, believed that justice required “taking” to be given a broader construction in as early as 1857. Groen & Stephens, *supra* note 80, at 1265–66.

⁸⁸ Groen & Stephens, *supra* note 80, at 1272–73 (“*Pennsylvania Coal* represents a dramatic advance in takings law from the narrow rule applied in *Mugler*.”).

⁸⁹ *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

⁹⁰ See *id.* at 416 (“We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.”).

⁹¹ See *id.* (“[T]his is a question of degree—and therefore cannot be disposed of by general propositions. But we regard this as going beyond any of the cases decided by this Court.”).

⁹² *Id.* at 415 (“[T]he natural tendency of human nature is to extend the qualification more and more until at last private property disappears.”).

that its effect is equal to that of a direct appropriation or ouster—actions that were traditionally accepted as triggering a duty to compensate.⁹³

Since *Mahon*, the Court has not taken any steps to repudiate Justice Holmes’s majority opinion. Instead, they have actively tried to set out a “coherent” body of law to conform their approach to account for the government’s expansive use of its regulatory power.⁹⁴ The Court has done so, most notably, in *Penn Central Transportation Co. v. City of New York* and *Lucas v. South Carolina Coastal Council*.⁹⁵ Thus, *Mahon* and its progeny seem to suggest that the Court is willing to adapt its taking analysis, even in the face of precedent categorically holding otherwise, to provide protection if (1) the government’s actions are being used to avoid providing just compensation, and (2) the action’s effects are tantamount to a direct appropriation or ouster.

B. *The Increased Militarization of Law Enforcement Warrants a Similar Change*

Courts again face takings claims stemming from the state’s exercise of its police powers. Except this time, a plaintiff’s claim now relies on law enforcement’s actions instead of the effects of governmental regulations.⁹⁶ Many of these claims have arisen given the changes in law enforcement tactics in coordination with police force militarization.⁹⁷ And because law enforcement has increased its use of military tactics by more than 1,400% since the 1980s, landowners will likely continue to face similar issues and bring similar claims.⁹⁸

⁹³ *Id.* at 414–15 (“To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it.”); see *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005) (“Beginning with *Mahon*, however, the Court recognized that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster.”).

⁹⁴ Meltz, *Takings*, *supra* note 40, at 328 (“Beginning in the late 1970s with the seminal *Penn Central Transportation Co. v. New York City* decision, the Court initiated an effort, continuing today, to articulate a coherent body of rules or guidelines for determining which government regulations require compensation under the Takings Clause and which do not.”).

⁹⁵ See generally *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992). Both of these cases and their standards are discussed in greater detail in Parts IV.A.1 and A.2.

⁹⁶ See *infra* notes 97–98 and accompanying text.

⁹⁷ See, e.g., *Lawmaster v. Ward*, 125 F.3d 1341, 1345–46 (10th Cir. 1997) (describing a plaintiff that raised a Takings Clause violation in response to Federal Agents physically damaging his property, forcibly opening both the front and back doors of his home, and tearing out the door jambs); *Lech v. Jackson*, 791 F. App’x 711, 712 (10th Cir. 2019) (describing a plaintiff that raised a Taking Clause violation in response to local law enforcement destroying their home while attempting to apprehend a criminal).

⁹⁸ *Militarization of Police*, CHARLES KOCH INST. (July 17, 2018), <https://www.charleskochinstitute.org/issue-areas/criminal-justice-policing-reform/militarization-of-police/> [https://perma.cc/N74Q-2ETX] (“One study found that use of paramilitary-style teams by law enforcement increased by more than 1,400 percent since 1980.”).

Scholars define “police militarization” as the “process whereby civilian police increasingly draw from and pattern themselves around[] the tenets of militarism and the military model.”⁹⁹ The process began in the United States as a means to support the War on Drugs,¹⁰⁰ but as the country’s fears of crime and terrorism supplemented the War on Drugs, the militarization expanded even further.¹⁰¹

Today, many people “mistake [their police] officers for soldiers.”¹⁰² This mistaken recognition has occurred primarily due to two similarities that now exist between local law enforcement and the military. The first similarity is between each force’s equipment.¹⁰³ In this context, local law enforcement has been given access, through the Department of Defense’s 1033 program, to over \$6 billion worth of military-grade vehicles, gear, and weapons.¹⁰⁴ The second similarity is each force’s use of military tactics.¹⁰⁵ In this context, local law enforcement is increasingly employing military-style tactics¹⁰⁶—the use of which has not only been reckless¹⁰⁷ but has had devastating results.¹⁰⁸

Consider, for example, the destruction that occurred in two recent exercises of military tactics by law enforcement. First, in *Lech*, the raid’s commanding officer authorized his team to “take as much of the building as needed, without making the roof fall.”¹⁰⁹ Or, even more severe, consider the story of Breonna

⁹⁹ *Id.*

¹⁰⁰ Mallory Meads, *The War Against Ourselves: Heien v. North Carolina, the War on Drugs, and Police Militarization*, 70 U. MIAMI L. REV. 615, 617–18 (2016) (“[T]his expansion in favor of police practices . . . [is] often in the name of the government’s domestic ‘War on Drugs.’”).

¹⁰¹ See Cantú, *supra* note 1 (“Fear of drugs, crime and terrorism have been used to justify the expansion of SWAT programs and the acquisition of military grade weaponry and vehicles in America’s smaller towns.”).

¹⁰² *Police Militarization*, *supra* note 36. See generally Alex Horton, *‘It’s Not Good for Our Democracy’: Calls Grow for Federal Officers to Shed Camouflage*, WASH. POST (July 22, 2020), <https://www.washingtonpost.com/national-security/2020/07/22/cbp-military-camouflage-uniforms/> [<https://perma.cc/E83K-WL9R>].

¹⁰³ See *Police Militarization*, *supra* note 36.

¹⁰⁴ *Militarization of Police*, *supra* note 98. The 1033 program enables local law enforcement agencies to acquire military equipment without any oversight by state lawmakers or local city officials, as the equipment is purchased using federal tax dollars. *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ See *supra* text accompanying note 98.

¹⁰⁷ See ACLU, WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING 22 (June 2014), https://www.aclu.org/sites/default/files/field_document/jus14-warcomeshome-text-rel1.pdf [<https://perma.cc/3Q3T-VGKG>] (“[R]etired police officer Bill Donnelly stated . . . ‘One tends to throw caution to the wind when wearing “commandochic” regalia, a bulletproof vest with the word “POLICE” emblazoned on both sides, and when one is armed with high tech weaponry.’”).

¹⁰⁸ See *id.* at 39.

¹⁰⁹ Stooksberry, *supra* note 1. The sheer amount of damage can be demonstrated by the fact that Lech’s insurer paid him \$345,000 for the damage and this was not enough to cover the total costs related to the damage inflicted. Wallace, *supra* note 8.

Taylor, a 26-year-old African-American medical worker, who was shot by police during a no-knock raid.¹¹⁰

Notwithstanding these devastating results, the majority approach for claims stemming from police destruction addresses the issue by embracing a similar approach to that of their early ancestors who applied the word “taking” literally.¹¹¹ Under the current analysis, the court merely considers whether law enforcement’s actions were a legitimate exercise of the government’s police power, not providing any weight to the extent of damage or the property owner’s innocence.¹¹²

But, for the same reasons that Justice Holmes purported in the regulatory takings context, courts should alter their approach in this context as well. In *Mahon*, Justice Holmes set forth two reasons for allowing a regulation—which relies on the state’s police powers—to possibly amount to a taking.¹¹³ He recognized that (1) the government may use such actions as a “shorter cut” to improve public conditions without providing just compensation, and (2) the action’s effects may be equal to those in a direct appropriation or ouster.¹¹⁴ In the police-destruction takings claim context, the same risks exist.

First, the government is circumventing providing just compensation using a “shorter cut.” Here, they do so by using their police powers to claim a privilege from reimbursing landowners for the property damage they cause in the process of apprehending a criminal. In fact, courts have even gone so far as to concede the inherent unfairness created by such a privilege.¹¹⁵ For example, the *Lech* court stated that “[a]s unfair as it may seem,” the Takings Clause simply “does not entitle all aggrieved owners to recompense.”¹¹⁶ Therefore, the same risk of the government being able to use their police powers to qualify the Fifth

¹¹⁰ David Sklansky, *Stanford’s David Sklansky on the Breonna Taylor Case, No-Knock Warrants, and Reform*, STANFORD L. SCH. (Sept. 28, 2020), <https://law.stanford.edu/2020/09/28/stanfords-david-sklansky-on-the-breonna-taylor-case-no-knock-warrants-and-reform/> [<https://perma.cc/7BST-UPTA>] (“Breonna Taylor, a 26-year-old Black medical worker in Louisville, Kentucky, was shot to death by police The police had a no-knock warrant and entered with a battering ram to search for evidence of drug dealing; none was found.”).

¹¹¹ *Compare* *Mugler v. Kansas*, 123 U.S. 623, 669 (1887) (analyzing whether a taking occurred by assessing whether the government exercised their police power), *with* *Lech v. Jackson*, 791 F. App’x 711, 715–19 (10th Cir. 2019) (reasoning, while adopting the majority approach, that because law enforcement’s actions fell within the scope of police power that they did not constitute a taking).

¹¹² *See* *Lech*, 791 F. App’x at 718–19 (analyzing the legal issue considering that the action’s limits were subject only to Due Process Clause and “reject[ing] the . . . assertion that the police power does not encompass the state’s ability to seize property from an *innocent* owner”).

¹¹³ *See* *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 414–16 (1922).

¹¹⁴ *See id.* at 415–16.

¹¹⁵ *See, e.g., Lech*, 791 F. App’x at 717.

¹¹⁶ *Id.* (quoting *AmeriSource Corp. v. United States*, 525 F.3d 1149, 1152, 1154 (Fed. Cir. 2008)).

Amendment's protections "until . . . private property disappears"¹¹⁷ exists here too.

Second, the militarization of police has effectively made numerous police actions tantamount to a direct appropriation or ouster. Although the Supreme Court has not set clear standards for the "functional equivalent" of an appropriation or ouster,¹¹⁸ it should be inclined to find that such a violation occurs here. At bottom, a direct appropriation affects a property owner's "bundle of rights," namely, their rights to exclude, possess, use, and dispossess.¹¹⁹ In this context, even what is likely one of the least intrusive actions¹²⁰ among the available tactics of militarized police forces—a no-knock raid—extinguishes these rights. Such raids have been described by legal commentators as "touch[ing] on a very basic sense [of] private property" and as abusing the sanctity that is one's "castle."¹²¹ The intrusion on one's basic sense of private property occurs because such actions destroy a property owner's right to exclude—the most sacred strand in an owner's bundle of property rights—when officers forcibly enter one's home.¹²² And because such raids occur so often,¹²³ courts should be cautious before allowing such actions to continue without accountability.

The extinguishment of such rights becomes even more apparent in cases like *Lech*. In *Lech*, nearly all rights of ownership were destroyed as the property

¹¹⁷ *Mahon*, 260 U.S. at 415.

¹¹⁸ See Meltz, *Takings*, *supra* note 40, at 334 (suggesting that the regulatory takings inquiry asks whether the restriction is the functional equivalent of such but only offering the insight that "[i]t is difficult to argue that small to moderate economic impacts are the functional equivalents of appropriations or ousters").

¹¹⁹ Michael B. Kent, Jr., *Construing the Canon: An Exegesis of Regulatory Takings Jurisprudence After Lingle v. Chevron*, 16 N.Y.U. ENV'T L.J. 63, 89 (2008) ("Like a direct appropriation, such regulatory action affects the entire 'bundle of rights' acquired by the property owner. Among the most important rights in the 'bundle' are the rights of exclusion, possession, use, and disposition.").

¹²⁰ This reference to no-knock raids as the "least intrusive" is comparing such actions relative to intrusions such as those with a BearCat and is in no way intended to downplay the devastating effects that may occur in such raids.

¹²¹ Carey L. Biron, 'Your Home Is Your Castle'—Unless Police Mount a 'No-Knock' Raid, REUTERS (June 18, 2020), <https://www.reuters.com/article/us-usa-race-noknock-trfn/your-home-is-your-castle-unless-police-mount-a-no-knock-raid-idUSKBN23P39D> [<https://perma.cc/HMU4-UZFJ>]. The title of this article, alone, seems to suggest that these tactics are the functional equivalent of an ouster; in such actions the property owner is stripped of their ownership of their castle.

¹²² See Kent, Jr., *supra* note 119, at 89; Tyler Broker, *No-Knock Raids Are an Unnecessary Evil*, ABOVE THE L. (May 26, 2020), <https://abovethelaw.com/2020/05/no-knock-raids-are-an-unnecessary-evil/> [<https://perma.cc/WUA8-ZZMC>] ("For anyone who might not be aware, no-knock raids are a practice of forcible entry by police, without prior notification, into a place of residence.").

¹²³ Biron, *supra* note 121 (estimating that police carry out over 20,000 no-knock raids per year).

was deemed uninhabitable.¹²⁴ Stated differently, Leo Lech, the property owner, was effectively deprived of all enjoyment of his property after the police's actions, as the damage was so severe that his house was rendered unsuitable for its desired purpose.¹²⁵ If property owners are deprived of their basic rights of ownership, in both the least intrusive and most severe police actions, then courts have ample support to recognize that law enforcement's militarized actions pose a functional risk of direct appropriation.

If courts stand idly by and allow the government to invoke a police power exception for law enforcement's destructive actions, they would be upholding an approach similar to that of the Supreme Court's in the regulatory takings era that precluded recovery.¹²⁶ However, because there is ample evidence to suggest that the dynamics of police's militarized actions warrant a change of approach, courts should avoid this outcome.

IV. COURTS SHOULD EMPLOY A TEST THAT CONSIDERS NUMEROUS FACTORS

Once a court accepts either of the refutations to the current categorical approach provided in Parts II or III, the question that arises is “what analysis should we use when a plaintiff brings a claim after their property has been destroyed by law enforcement?” This Part provides two possible solutions—one that accounts for flexibility and another that seeks to maintain coherence in the Supreme Court's takings jurisprudence. Part IV.A argues that the proper analysis should, minimally, consider the severity of the burden on the landowner because the Takings Clause's purpose warrants such consideration. Meanwhile, Part IV.B argues that courts should, ideally, not muddle takings jurisprudence any further and embrace their physical takings framework because police destruction claims fit neatly within the *Penn Central* test's scope.

A. *The Proper Approach Should, Minimally, Consider the Severity of the Burden*

Although the basis for every taking claim relies on the same language—the text of the Fifth Amendment—the Supreme Court has developed different analytical frameworks to assess the central substantive question of “is there a taking on the facts presented?”¹²⁷ Which framework the Supreme Court

¹²⁴ *Lech v. Jackson*, 791 F. App'x 711, 713 (10th Cir. 2019) (“[A]s a result of [the] 19-hour standoff, the [Lechs'] home was rendered uninhabitable.”).

¹²⁵ *See id.* at 712–13.

¹²⁶ *See generally* *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922).

¹²⁷ Meltz, *Takings*, *supra* note 40, at 312. This is not to suggest that this question is the plaintiff's only hurdle. There are many other procedural and jurisdictional hurdles that they also face (e.g., the statute of limitations and ripeness prerequisites), but these issues are beyond the scope of this Note.

employs depends on the type of takings claim that a plaintiff presents.¹²⁸ Currently, the Court recognizes three types of takings claims: a claim for (1) a physical taking, (2) a regulatory taking, and (3) an exaction taking.¹²⁹ Even though the Court's takings jurisprudence among the different types "cannot [clearly] be characterized as unified," there is one "common touchstone": each of the main frameworks considers the severity of the burden that the government imposes on a property owner and their rights.¹³⁰ Therefore, this Part argues that the proper standard in this context should consider the burden on the property owner too.

1. *The Physical Takings' Frameworks Consider the Severity of the Burden*

The first category that embraces tests that consider the severity of the burden is physical takings.¹³¹ The Supreme Court has set forth two main frameworks to assess whether a physical taking has occurred. In a physical takings claim, a plaintiff asserts that the government has taken property by causing, or authorizing another, to physically occupy or invade their property.¹³² Under the Court's first framework, the *Loretto* rule, it considers whether such invasion amounts to a "permanent physical occupation."¹³³ If the intrusion reaches such an extreme, then the Court categorically concludes that a taking has occurred.¹³⁴ However, if the intrusion is only "temporary," then the Court employs the *Penn Central* balancing test.¹³⁵ Under the *Penn Central* balancing test, the Court examines the government's action using three factors: (1) its economic impact

¹²⁸ The Court is very careful in applying the appropriate test to the corresponding type of claim. They have even gone so far as to assert that it is "inappropriate" to treat cases involving, for example, a physical taking as controlling precedent in a regulatory taking claim. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 323 (2002).

¹²⁹ See MELTZ, CONSTITUTIONAL, *supra* note 76, at 2–5.

¹³⁰ *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005). In *Lingle*, Justice O'Connor's opinion included the aforementioned statements while discussing her understanding of the analytical framework for regulatory takings. *Id.* This Note argues that the same principle is true among all types of takings claims—whether physical, regulatory, or exaction.

¹³¹ This Note begins with discussing physical takings claims because they have been referred to as the "paradigmatic" type of taking that requires just compensation. See *id.* at 537.

¹³² MELTZ, CONSTITUTIONAL, *supra* note 76, at 4.

¹³³ See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

¹³⁴ *Id.*

¹³⁵ *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1347 (Fed. Cir. 2002) ("[W]hile the *Riverside Bayview* Court refused to address whether a 'temporary regulatory taking' would be compensable, the Court recently held that no per se rule applies to temporary moratoria and that whether they are takings must be analyzed under *Penn Central*.").

on the property owner, (2) the degree to which it interferes with a property owner's reasonable investment-backed expectations, and (3) its character.¹³⁶

Whether the Court applies the *Loretto* rule or the *Penn Central* balancing test, its primary focus in each is the severity of the burden on the property owner. Regarding the *Loretto* rule, the Court's focus on the severity of the burden becomes apparent in its reasoning for creating the categorical rule. As explained in *Loretto*, the Court adopted this per se rule primarily based on its understanding of the severe burden that property owners suffer—permanent physical invasions egregiously violate all of an owner's property rights.¹³⁷ In fact, the Court's only consideration in the *Loretto* rule is the burden on the property owner;¹³⁸ under this framework, the Court concludes that a taking has occurred without regard to the public interests that the invasion may serve.¹³⁹ And regarding the *Penn Central* balancing test, this framework primarily focuses on the severity of the burden as its inquiry turns, in large part, on the economic impact and interference with investment suffered by a property owner.¹⁴⁰ Thus, under both frameworks, the Court considers the severity of the burden.

2. *The Regulatory Takings' Frameworks Consider the Severity of the Burden*

Similar to the Court's approach for assessing physical takings, it has set forth two main frameworks to determine whether a regulatory taking has occurred—both of which consider the severity of the burden. For this taking, the primary question is whether the regulation in question has gone “too far.”¹⁴¹ Under the Court's first “total taking” framework, a government's regulation has gone too far if it denies *all* economically beneficial or productive use of a

¹³⁶ Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978). The Court has not shed much light on the content of these factors and how they are to be balanced. Meltz, *Takings*, *supra* note 40, at 333. Instead, they have referred to it as an “essentially ad hoc, factual inquir[y].” *Id.* at 330.

¹³⁷ 458 U.S. at 435; MELTZ, CONSTITUTIONAL, *supra* note 76, at 4. More specifically, the Court has explicitly noted that permanent physical invasions destroy a property owner's right to exclude, a right which has traditionally been considered one of the most sacred strands in an owner's bundle of property rights. *Loretto*, 458 U.S. at 435.

¹³⁸ *See Loretto*, 458 U.S. at 435–36.

¹³⁹ *See id.* at 426.

¹⁴⁰ *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 528–29, 540 (2005) (“[T]he *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests.”).

¹⁴¹ Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (“The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”).

property owner's land.¹⁴² There are a few notable exceptions to this categorical rule, namely, if the restriction “duplicates what could have been achieved under ‘background principles’” of the law of property and nuisance or if the restriction is prospectively temporary.¹⁴³ However, when the government's interference falls short of completely denying all economically beneficial or productive use, the Court then employs its second framework, its “partial takings” framework, which involves the *Penn Central* balancing test mentioned in the physical takings context.¹⁴⁴

Both the total taking and partial taking frameworks consider the severity of the burden on the landowner. In the total takings context, the framework considers the severity of the burden because “the complete elimination of a property's value”—a factor that solely considers the impact suffered by a landowner—“is the determinative factor.”¹⁴⁵ Even the Court's exceptions to its total taking framework consider the burden on a landowner. The background principles exception exists plainly because a landowner cannot suffer a burden when the government “eliminates” a right they never possessed.¹⁴⁶ Meanwhile, the prospectively temporary exception recognizes that such restrictions pose a “lesser risk” of landowners bearing a “special burden.”¹⁴⁷ And for the same reasons stated in Part IV.A.1, the regulatory takings' partial taking *Penn Central* test also focuses on the severity of the burden.¹⁴⁸ Therefore, each of the regulatory takings frameworks also focuses on the severity of the burden.

¹⁴² *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992) (“The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land.”). This is commonly referred to as a *per se* “total taking.” Meltz, *Takings*, *supra* note 40, at 329.

¹⁴³ Meltz, *Takings*, *supra* note 40, at 329.

¹⁴⁴ See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). This is commonly referred to as a “partial taking” claim. MELTZ, CONSTITUTIONAL, *supra* note 76, at 2–3. Practically, plaintiffs typically seek to convince a court, first, that they have suffered a total taking (to qualify under the *per se* taking rule) and only argue that a partial taking has occurred as a backup. *Id.*

¹⁴⁵ *Lingle*, 544 U.S. at 539. The Court in *Lucas* reasoned that this factor was determinative because they equated such deprivation with that suffered in physical appropriations. *Lucas*, 505 U.S. at 1017 (“We have never set forth the justification for this rule. Perhaps it is simply, as Justice Brennan suggested, that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation.”).

¹⁴⁶ Meltz, *Takings*, *supra* note 40, at 329 (“Plainly, there can be no taking when a government restriction eliminates a right the landowner never had.”).

¹⁴⁷ *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 341 (2002) (“Moreover, with a temporary ban on development there is a lesser risk that individual landowners will be ‘singled out’ to bear a special burden that should be shared by the public as a whole.”).

¹⁴⁸ See Meltz, *Takings*, *supra* note 40, at 329.

3. *The Exaction Takings' Framework Considers the Severity of the Burden*

Finally, for the last recognized takings category, exaction takings, the Supreme Court has set forth one framework, often referred to as “heightened scrutiny,” which also considers the severity of the burden.¹⁴⁹ In an exaction takings claim, a plaintiff objects to an exaction that a land regulatory agency demands as a condition to approving their proposed development.¹⁵⁰ Under heightened scrutiny, the Court considers two criteria to determine whether an exaction amounts to a taking.¹⁵¹ First, there is the “essential nexus” criterion.¹⁵² This criterion requires that the exaction condition be substantially related to the underlying purpose behind the development restriction.¹⁵³ Second, there is the “rough proportionality” criterion.¹⁵⁴ In the exaction takings context, it is under this second criterion that the Court focuses on the severity of the burden. The rough proportionality criterion does so by considering whether the burden imposed on the landowner by the exaction has “rough proportionality” to the impact that development would have on the community.¹⁵⁵ Thus, the framework in the exaction context explicitly places determinative weight on the severity of the landowner’s burden.

4. *Because the Court Lacks a Principled Reason to Avoid Supporting the Takings Clause’s Purpose, It Should Consider the Severity of the Burden Here Too*

In each of the three types of recognized takings claims, the Court’s primary focus is to assess the severity of the burden on the landowner.¹⁵⁶ This is true whether the Court applies a *per se* rule, a balancing test, a criterion-based test,

¹⁴⁹ *Id.* at 367.

¹⁵⁰ MELTZ, CONSTITUTIONAL, *supra* note 76, at 4. Typically, these exactions are demanded as one way for the government to get developers to pay for consequential costs of development. *See id.* Common exaction conditions are dedications of a portion of the developed land or “in lieu fees” which take the place of such dedication. Meltz, *Takings*, *supra* note 40, at 366.

¹⁵¹ MELTZ, CONSTITUTIONAL, *supra* note 76, at 4. Under this framework, the criterion is disjunctive. Meltz, *Takings*, *supra* note 40, at 367. Thus, if either one of the two criterion are unmet, then the Court will deem there to have been a taking. *Id.*

¹⁵² *See* Nollan v. Cal. Coastal Comm’n, 483 U.S. 825, 837 (1987).

¹⁵³ *Id.* (“[T]he lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was.”).

¹⁵⁴ Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (“We think a term such as ‘rough proportionality’ best encapsulates what we hold to be the requirement of the Fifth Amendment.”).

¹⁵⁵ *Id.* (“[T]he city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”).

¹⁵⁶ *See* discussion *supra* Parts IV.A.1–A.3.

or even the exceptions to its main frameworks.¹⁵⁷ So what does this suggest— Why does each of the frameworks possess this consistency?

The answer is straightforward. In tailoring its frameworks to consider the severity of the burden, the Court attempts to support what it has emphasized as the purpose of the Fifth Amendment’s Takings Clause. The purpose is to “bar [the] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”¹⁵⁸ Thus, the Court focuses on the severity of the burden as a means to decipher who should bear its costs.

Yet, in the law enforcement destruction context, the majority of courts do not provide any weight to the burden on the landowner.¹⁵⁹ Instead, they reason that when preserving the “safety of the public,” a state cannot be burdened with compensating for pecuniary losses sustained in the process.¹⁶⁰ In effect, the majority of courts intentionally ignore the burden on the landowner and categorically prioritizes the state’s treasury and the public’s safety.

Undoubtedly, these are two beneficial ends to serve. However, the majority position too hastily accepts the proposition that the state cannot preserve its treasury and public safety, while simultaneously compensating public burdens. As demonstrated in the regulatory takings context, the state has proven that it can balance such interests.¹⁶¹ In this scheme, the state supports the public’s health, *safety*, and morals by passing different legislation,¹⁶² and they are still required to provide compensation when such regulations go “too far.”¹⁶³ Therefore, the majority of courts’ reasoning for ignoring the severity of the burden, provided in *Lech*, seems to fall apart. Without a principled reason for ignoring the severity of the burden, courts should seek to uphold the Takings

¹⁵⁷ *Id.*

¹⁵⁸ See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005) (first citing *Armstrong v. United States*, 364 U.S. 40, 49 (1960); and then citing *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 325 (1893)).

¹⁵⁹ See *Lech v. Jackson*, 791 F. App’x 711, 718–19 (10th Cir. 2019) (adopting the majority approach and considering only whether the police acted pursuant to their police powers).

¹⁶⁰ *Id.* at 717 (“[W]hen the state acts to preserve the ‘safety of the public,’ the state ‘is not, and, consistent[] with the existence and safety of organized society, cannot be, burdened with the condition that the state must compensate [affected property owners] for pecuniary losses they may sustain’ in the process.” (quoting *Mugler v. Kansas*, 123 U.S. 623, 669 (1887))).

¹⁶¹ See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415–16 (1922) (holding that even though such regulations preserve public safety, among other ends, that the state can be held responsible for the ensuing damage on property).

¹⁶² *Id.* at 417 (Brandeis, J., dissenting) (recognizing that these restrictions are imposed to “protect public health, safety or morals”).

¹⁶³ *Id.* at 415 (majority opinion) (“The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking [and require compensation].”).

Clause’s purpose and consider the severity of the burden on the landowner, minimally, as one factor, just as they do in all other contexts.¹⁶⁴

B. Ideally, the Court Should Assess Police Destruction Claims Using Its Physical Takings Framework

Although courts may be inclined to embrace a separate standard to assess whether law enforcement’s actions amount to a taking (as they did when adopting the categorical police powers exception), the best approach is to analyze the actions using the Supreme Court’s physical takings framework.¹⁶⁵ As explained in Part IV.A.1, courts invoke one of two frameworks, the *Loretto* rule or *Penn Central* test, in the physical takings context to determine whether actions amount to a taking. In the police destruction context, as will be further explained in Part IV.B.1, the Court should opt to use the latter—the *Penn Central* test. This approach is ideal because (1) its application in this context is logical, (2) it results in consistency, (3) it accounts for each of the competing interests at stake, and (4) it creates equitable results.

1. Law Enforcement’s Actions Fit Neatly Within the Purview of the Penn Central Physical Takings Test

Police destruction claims should be assessed using the physical takings tests, first, because law enforcement’s actions in these cases are characteristic of the actions at issue in a physical taking. A claim for a physical taking generally arises when the government, or a party authorized by the government, physically occupies or invades private property.¹⁶⁶ In police destruction claims, law enforcement does just that—officers invade and intrude on a landowner’s property, whether personally or, as in *Lech*, with explosives or other tactics.¹⁶⁷

¹⁶⁴This statement is not meant to suggest that a court *should* create a separate standard for assessing police destruction claims. In fact, this Note argues that they should adopt the standard physical takings framework. See *infra* Part IV.B. This argument is made, instead, to account for the possibility that if a court accepts the argument that these claims cannot be settled by a threshold categorical exception, that it may wish to employ an alternative approach involving other factors.

¹⁶⁵Although some states’ takings clauses may differ in some form from the Fifth Amendment, they are often construed to have the same meaning, even if the state clause includes a provision for “damage” to property. Meltz, *Takings*, *supra* note 40, at 311–12, 312 n.12 (“[S]tate takings clauses are often construed to have the same meaning as their federal counterpart.”). Thus, this suggestion can likely be applied in cases involving both the Fifth Amendment’s and states’ takings clauses.

¹⁶⁶Richard A. Epstein, *Physical and Regulatory Takings: One Distinction Too Many*, 64 STAN. L. REV. ONLINE 99, 101 (2012).

¹⁶⁷See *Lech v. Jackson*, 791 F. App’x 711, 713 (10th Cir. 2019) (recounting law enforcement’s actions and noting that “the officers positioned their vehicles in the driveway,” “fired several rounds of gas munition into the home,” and “sent . . . a tactical

But how courts assess such a claim for a physical taking depends on the extent of the intrusion.

The first framework, the *Loretto* rule, is applied when a physical invasion amounts to a “permanent physical occupation” of the property.¹⁶⁸ Courts have held that the following actions, among others, amount to a permanent physical occupation: (1) “continuous or recurring flooding caused by a government dam”; (2) “regular and low overflights by government airplanes”; and (3) “government installation of relatively permanent structures.”¹⁶⁹ Because of the resulting damage from law enforcement’s destruction, a landowner in this context may argue that their property has suffered a permanent physical occupation.¹⁷⁰ They would support this argument by citing to the fact that, without repairs, the effects of the government’s intrusion would be everlasting¹⁷¹—just as the effects in the aforementioned “classic cases.”¹⁷² However, this argument will likely fail because the Court’s standard for a permanent physical occupation is actor focused; that is, it requires a “continuous” right to intrude and traverse the property.¹⁷³ In police destruction cases, unlike the classic examples of permanent physical occupations, there is not a continuing intrusion by the officers; instead, law enforcement intrudes only on the date that the damage took place.¹⁷⁴ Therefore, police destruction claims do not fit within the scope of “permanent physical occupation” claims.

team [inside Lech’s home]”). One of the courts that embrace the minority view on this topic (that police destruction cases *may* result in a taking) assert that police destruction claims “do not fit neatly within the other categories of takings cases such as the physical invasion or occupation of private property, or the regulation of the use of property.” *See Kelley v. Story Cnty. Sheriff*, 611 N.W.2d 475, 479 (Iowa 2000). However, its reasoning behind this conclusion actually supports the proposition that these claims fit within the physical invasion category by noting that “officers . . . enter[] the property” and cause “physical damage.” *See id.* (“The alleged taking of private property in this case is the physical damage caused to Kelley’s property by the officers when they entered the property to execute the arrest warrant.”).

¹⁶⁸ *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

¹⁶⁹ Meltz, *Takings*, *supra* note 40, at 361 (“Classic examples of permanent physical occupations are continuous or recurring flooding caused by a government dam, regular and low overflights by government airplanes, and government installation of relatively permanent structures.”).

¹⁷⁰ *See id.* at 360–61.

¹⁷¹ *See Brutsche v. City of Kent*, 193 P.3d 110, 121 (Wash. 2008) (“Mr. Brutsche maintains that a permanent physical occupation of his property would have resulted had Mr. Brutsche not paid a carpenter to repair the property.”).

¹⁷² *See, e.g., Loretto*, 458 U.S. at 419; *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028 (1992); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 831–32 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 394 (1994).

¹⁷³ *Nollan*, 483 U.S. at 832 (“We think a ‘permanent physical occupation’ has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed.”).

¹⁷⁴ *See Lech v. Jackson*, 791 F. App’x 711, 716 (10th Cir. 2019).

Meanwhile, the second framework, the *Penn Central* balancing test, is employed if the invasion was only “temporary.”¹⁷⁵ Courts have understood the term “temporary” to logically refer to governmental actions that “involve an occupancy that is transient and relatively inconsequential.”¹⁷⁶ In police destruction cases, officers’ occupancy on landowners’ property likely qualifies as temporary because they are only on the property for a relatively short, transient, and inconsequential time.¹⁷⁷ Thus, law enforcement’s actions in police destruction claims fall directly within the scope of the *Penn Central* test’s purview as a temporary physical taking.

In an analogous police destruction case, involving a store being damaged by police officers in the process of a search, the Third Circuit also considered law enforcement’s actions under the “temporary physical taking” category and applied the *Penn Central* test’s factors.¹⁷⁸ This case provides further support for courts to deem law enforcement’s actions as under *Penn Central*’s temporary physical taking purview.

2. *The Penn Central Test Does Not Muddle Takings Jurisprudence Any Further*

Second, by adopting an approach that is within the existing caselaw, courts avoid adding an additional layer of confusion in an area that is already in a state of “disarray.”¹⁷⁹ A common critique by commentators about Takings Clause jurisprudence is that it is “incoherent,” “mess[y],” “muddled,” “confused,” and “incomprehensible.”¹⁸⁰ Although accepting an approach that is within this

¹⁷⁵ See *Benson v. State*, 710 N.W.2d 131, 152 (S.D. 2006) (“The acts of the hunters result in temporary and intermitted physical invasions rather than a permanent occupation. Therefore, we must analyze the takings claim under the *Penn Central* regulatory analysis.”).

¹⁷⁶ See, e.g., *Hendler v. United States*, 952 F.2d 1364, 1377 (Fed. Cir. 1991) (“If the term ‘temporary’ has any real world reference . . . it logically refers to those governmental activities which involve an occupancy that is transient and relatively inconsequential.”).

¹⁷⁷ See *Hamen v. Hamlin County*, 955 N.W.2d 336, 341–43 (S.D. 2021) (detailing an attempt to apprehend a criminal suspect and the destruction of a mobile-home from 11:30 AM to 6:00 PM); *Lech*, 791 F. App’x at 713 (involving a 19-hour standoff).

¹⁷⁸ See *Jones v. Phila. Police Dep’t*, 57 F. App’x 939, 941–42 (3d Cir. 2003) (“This case involves only a temporary physical invasion of private property by the government. . . . Temporary invasions are subject to a ‘complex balancing process to determine whether they are a taking.’”).

¹⁷⁹ Andrea L. Peterson, *The Taking Clause: In Search of Underlying Principles Part I—A Critique of Current Takings Clause Doctrine*, 77 CALIF. L. REV. 1299, 1303–04 (1989) (“[T]he Court’s takings doctrine is in far worse shape than has generally been recognized . . . it is difficult to imagine a body of case law in greater doctrinal and conceptual disarray.”).

¹⁸⁰ See Stephen Durden, *Unprincipled Principles: The Takings Clause Exemplar*, 3 ALA. C.R. & C.L.L. REV. 25, 27–28 (2013) (noting how commentators disagree with the Supreme Court’s characterization of takings jurisprudence as logical and have instead referred to Takings Clause jurisprudence as “‘incoherent’ and a ‘mess,’ a

scheme may not resolve the existing incoherence, it does maintain consistency and avoid further muddling.

3. *The Penn Central Test Sufficiently Accounts for Each of the Competing Interests*

Another reason for courts to adopt the *Penn Central* balancing test is because its factors sufficiently account for the competing interests in police destruction cases. In police destruction cases, there are, principally, two competing interests. First, the landowner's interest is at stake because their property rights are injured.¹⁸¹ Second, the government's interest is also at stake given that it is the party that would likely be held accountable for the damage and is also responsible for ensuring that their law enforcement protects its citizens.¹⁸² Under the *Penn Central* balancing test, the Court has identified three factors that influence its determination of whether there is a taking on the facts of the case.¹⁸³

The first two factors of the *Penn Central* test protect the landowner's interest. These factors are (1) "[t]he economic impact . . . on the claimant" and (2) "the extent to which [the action] has interfered with distinct investment-backed expectations."¹⁸⁴ Both of these factors are focused on the severity of the burden to ensure that the government does not force the landowner to bear public burdens that should be borne by the public—the purpose of the Takings Clause.¹⁸⁵ Practically, this sets an upward limit for when the destruction caused by law enforcement has gone too far; in such circumstances, the landowner is entitled to compensation.¹⁸⁶

Meanwhile, the *Penn Central* test's third factor, "the character of the governmental action,"¹⁸⁷ protects the government's interest. This factor offers the opportunity for the government to make it less likely that a court will find that a taking occurred, depending on the circumstances surrounding the

'muddle' . . . 'confused,' ['incomprehensible,' 'standardless,' and 'unprincipled']). The description of the Court's jurisprudence in this manner is likely a result of the Court's use of "essentially ad hoc, factual inquiries" to assess takings claims. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (characterizing the Court as engaging in "essentially ad hoc, factual inquiries" to assess takings claims).

¹⁸¹ *See Somin, South, supra* note 23.

¹⁸² The government's interest in ensuring that its law enforcement protects its citizens arises in these cases because some argue that allowing liability "would make police unduly hesitant to enforce the law." *See id.*

¹⁸³ Meltz, *Takings, supra* note 40, at 371–72 ("Generally, there are three factors of 'particular significance' [under the *Penn Central* test].").

¹⁸⁴ *Penn Cent.*, 438 U.S. 104, 124 (1978).

¹⁸⁵ *See supra* notes 130, 147 and accompanying text.

¹⁸⁶ *See Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

¹⁸⁷ *Penn Cent.*, 438 U.S. at 124.

intrusion.¹⁸⁸ This factor is particularly likely to mitigate the chances of a court finding that a taking occurred in police destruction cases because law enforcement's actions are meant to "promote the common good."¹⁸⁹ Having said that, if courts are still concerned that this factor does not provide enough consideration of the government's good faith in these circumstances, they can require that this factor, in police destruction cases, be provided more weight than the other two. Or, alternatively, courts can provide more weight to the government's action based on the severity of the alleged offense that it was working to apprehend. Under this approach, if law enforcement apprehended a more dangerous offender, the action's character would act as a larger mitigating factor. This leeway is within the discretion of the courts, under the *Penn Central* test, because the Supreme Court has not set strict guidelines regarding how the factors are to be balanced.¹⁹⁰

Injecting the *Penn Central* test into police destruction cases will not result in changes to how law enforcement apprehends criminals. An argument claiming otherwise¹⁹¹ possesses two faults. First, it misconstrues the immediacy of such situations. Often, there is not a "need for rapid decision-making" in situations where officers damage or destroy private property.¹⁹² Instead, operations involving military-style tactics are likely going to be carefully planned in advance.¹⁹³ This was almost certainly the case in *Lech*, where SWAT's actions only became destructive after other, non-violent tactics were unsuccessful.¹⁹⁴ Second, such an argument wrongly assumes that officers are unable to apply a balancing test. In fact, officers have been tasked with applying similar tests in other circumstances, such as those involving warrantless searches.¹⁹⁵ And officers will likely not shy away from making these decisions because they "are unlikely to have to pay for the damage out of their own

¹⁸⁸ *Id.* ("A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." (citation omitted)).

¹⁸⁹ *See id.* (implying that interferences that promote the public good at large are less likely to amount to a taking).

¹⁹⁰ Meltz, *Takings*, *supra* note 40, at 333 ("Notwithstanding the Court's recent reinvigoration of the *Penn Central* test, it has shed little light on . . . how to balance [the factors].").

¹⁹¹ *See supra* note 167.

¹⁹² Somin, *Federal*, *supra* note 31 ("[T]he need for rapid decision-making is by no means a universal trait of police actions that damage or destroy private property.").

¹⁹³ *Id.*

¹⁹⁴ *See Lech v. Jackson*, 791 F. App'x 711, 713 (10th Cir. 2019) (describing how officers began by barricading the driveway and spent five hours trying to negotiate with Seacat before they employed increasingly aggressive tactics).

¹⁹⁵ *See Rob Usry, Police Better Have a Good Reason to Go Through Your Stuff Without a Warrant*, HOLLAND & USRY, P.A., <https://www.bhollandlawfirm.com/library/when-can-police-search-without-a-warrant-.cfm> [<https://perma.cc/8H46-2DU9>] ("Before I list the exceptions, understand this: . . . [t]he law here is really complicated. What is allowed depends on the facts of each case.").

salaries”—instead, the compensation will be provided by the city.¹⁹⁶ Additionally, if the government is still concerned with how officers may respond, superiors can consider those issues in advance and formulate general guidelines for officers to use.¹⁹⁷

4. *The Penn Central Test Will Create Equitable Holdings for Police Destruction Claims*

Not only does the *Penn Central* test provide a court with factors that are sufficient to account for each of the competing interests, but the practical application of those factors also reaches equitable results. Consider, for example, the *Penn Central* test as applied to facts similar to those presented in *Lech*: Law enforcement caused hundreds of thousands of dollars' worth of damage to a house in the process of apprehending an allegedly armed shoplifter with four pending warrants. Even assuming that a court adopts one of the hybrid approaches to favor the character of the government's action, it would still likely conclude that law enforcement's actions amount to a taking. In this hypothetical, the extent of destruction places both the “economic impact” and “interference with investment-backed expectations” in a position that is vastly disproportionate to the good promoted in apprehending the wrongdoer in question.

There will, undoubtedly, be police destruction claims where the *Penn Central* analysis is not so clear cut. For example, consider the following facts: In attempting to apprehend an individual that law enforcement believes operates a methamphetamine lab, officers breach a number of doors on a landowner's property, causing approximately \$5,000 worth of damage.¹⁹⁸ In this hypothetical, the weight of the economic impact, the interference with investment-backed expectations, and the character of the government's action seem to be on relatively equal footing. Given the inherent ambiguity in weighing the economic damage inflicted on a landowner against the good promoted by the government's act, it is not unlikely that some judges may struggle to balance these competing interests.

However, it is precisely this discretion that enables courts to perform a fact-specific inquiry that prevents smaller intrusions from being deemed a taking.¹⁹⁹

¹⁹⁶ Somin, *South*, *supra* note 23.

¹⁹⁷ Somin, *Federal*, *supra* note 31 (“[L]ine officers do not have to weigh takings issues on the spot. Such matters could be considered in advance by their superiors in formulating general tactical guidelines for their subordinates.”).

¹⁹⁸ These facts were inspired, with some adaptations, from those in *Brutsche v. City of Kent*. See 193 P.3d 110, 113–14 (Wash. 2008) (involving a takings claim where law enforcement used a battering ram to enter a property while executing a search warrant for a suspected methamphetamine lab).

¹⁹⁹ Drawing conclusions based on prior cases employing the *Penn Central* test, it is even safe to assume that much more than only “smaller intrusions” will not result in a taking. See

In fact, this mechanism combats the issue raised by the Supreme Court in *Pennsylvania Coal Co. v. Mahon* that “[g]overnment hardly could go on” if every intrusion required compensation.²⁰⁰ And because the *Penn Central* test was set forth in 1978, courts can rely on over forty years of precedent to guide their analysis.²⁰¹ Therefore, the *Penn Central* test sets forth an effective mechanism in assessing whether a taking has occurred—protecting the government but also ensuring that landowners are not stripped of their property rights without compensation.

V. CONCLUSION

Landowners’ property rights are in danger. As police forces across the country become more militarized, more destruction to individual’s homes is bound to occur. But, so long as the categorical police powers exception exists, there is nothing landowners can do besides prep their bank accounts to cover the costs of damage inflicted by their respective cities.

Courts’ continued adoption of the categorical police powers exception is not the proper way to assess police destruction claims. Such an approach undermines the concept of just compensation by simultaneously permitting a state to perform a taking under “public use” and then deny any taking liability. Additionally, this exception ignores the increased militarization of law enforcement which poses the same risks as regulatory takings. Courts should instead embrace an approach that considers the severity of the burden on the landowner, or, ideally, adopt the *Penn Central* balancing test. It is only under these approaches that courts will be able to hold law enforcement accountable for their actions and restore landowners’ property rights provided by the Fifth Amendment.

Meltz, *Takings*, *supra* note 40, at 333 (“The *Penn Central* test has rarely been invoked successfully in the Supreme Court.”).

²⁰⁰ 260 U.S. 393, 413 (1922) (“Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”).

²⁰¹ See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).