

BAKING UP A TAKING: WHY THERE IS NO CATEGORICAL EXCEPTION TO THE FIFTH AMENDMENT TAKINGS CLAUSE FOR THE POLICE POWER

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INTRODUCTION

Justice Robert Jackson famously described the U.S. Constitution’s Bill of Rights as filled with “majestic generalities” that the Court should interpret to protect individual liberty from an infringing government.¹ One of those majestic generalities is found in the Fifth Amendment—that if the government takes private property, it must pay just compensation.² From the start of our republic, the Framers established a limit on the government’s inherent eminent domain power. The Fifth Amendment 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.”³ This is known as the *Armstrong* principle.

Similarly, another concept engrained in the Constitution is the idea of a state’s police power. Based on the Constitution’s Tenth Amendment, a state’s police power is generally agreed to mean a state’s authority to provide for public health, welfare, and safety.⁴ This broad concept encompasses matters ranging from health regulations to administrative searches; that said, this Note focuses heavily on the police power when it comes to law enforcement.

Although both concepts have strong roots in our nation’s Constitution, no consensus exists on how these concepts intersect. For instance, the Tenth Circuit in *Lech v. Jackson* stated that actions taken under the police power are categorically excluded from the Fifth Amendment Takings Clause.⁵ On

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¹W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943).

²U.S. CONST. amend. V.

³*Armstrong v. United States*, 364 U.S. 40, 49 (1960).

⁴*Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991).

⁵791 F. App’x 711, 719 (10th Cir. 2019).

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the other hand, in *Baker v. City of McKinney*, the Sherman Division of the Eastern District of Texas concluded that no categorical exception exists for police powers regarding the Fifth Amendment.⁶

While this distinction may seem a mere exercise of academia, the answer to this question has significant real-world consequences. For instance, what if the police destroy an innocent homeowner's home in pursuit of a fugitive? It is undisputed that the police can enter a home to pursue a fugitive. But in pursuing that fugitive, can the police intentionally destroy the property without the homeowner having any constitutional relief? If the answer is yes, we land in the *Lech* world where an innocent party's destroyed home and all of the costs fall squarely on the innocent homeowner's shoulders. If the answer is no, we land in the *Baker* world, where that same innocent homeowner has recourse through the Takings Clause.⁷ With the increase in police militarization that allows such destruction to occur more often, it is now more important than ever to answer this question.

This Note contributes to academic scholarship on the Fifth Amendment Takings Clause by being the first to discuss police raid damages under the *Cedar Point Nursery* framework and analyze the friction between the *Lech* and *Baker* decisions. Additionally, this Note contains a unique perspective because the Author discussed *Baker* with the lead attorney for the claimant.

Specifically, this Note argues that courts should not recognize a categorical exception for the exercise of police power concerning the Fifth Amendment Takings Clause because such an exception contradicts existing jurisprudence and public policy. Part I discusses the history of the Fifth Amendment Takings Clause, the state's police power, and the ever-growing militarization of our local police departments. Part II analyzes the *Lech* and *Baker* reasoning and concludes which court is more in-line with existing precedent. Part III argues that these police raids fall within the framework recently outlined in *Cedar Point Nursery* because they are, by nature, *per se* takings. Part IV concludes by exploring normative arguments for why the intentional destruction of property through a planned police raid constitutes a Fifth Amendment Taking.

⁶*Baker v. City of McKinney*, 601 F. Supp. 3d 124, 141 (E.D. Tex. 2022), *rev'd*, 84 F.4th 378 (5th Cir. 2023). Please note that references to *Baker* reflect the district court opinion and not the Fifth Circuit's decision.

⁷Through the Takings Clause, the Fifth Amendment requires just compensation when the government effectuates a taking. U.S. CONST. amend. V.

I. HISTORY OF THE TAKINGS CLAUSE AND POLICE POWER

A law professor once told me that before an audience can nod their head in agreement, they must first nod their head in understanding. To do so, here is a brief recap of the history of the Fifth Amendment Takings Clause, state police power, and the rise in police militarization.

A. *History of the Fifth Amendment Takings Clause*

The Fifth Amendment Takings Clause, which applies to the States through the Fourteenth Amendment, provides: “[N]or shall private property be taken for public use, without just compensation.”⁸ In just twelve short words, the framers limited the power of eminent domain by creating a mechanism to prevent the government from forcing individuals to shoulder a burden whose benefits are enjoyed by the public.⁹ As John Adams put it, “[p]roperty must be secured, or liberty cannot exist.”¹⁰

The framers’ original intent has served as a guiding principle for the Supreme Court as its Takings Clause jurisprudence has evolved. The Court’s current dichotomy has two categories: explicit and implicit takings. An explicit taking encompasses instances where the government formally exercises its power of eminent domain to acquire title to private property. In other words, explicit takings are where the government literally takes property from a private citizen.¹¹

On the other side of the dichotomy, we have the Court’s second category of takings: implicit takings. This category encompasses all takings that are not formal exercises of the government’s eminent domain power. The first subcategory of implicit takings is known as appropriative takings, which is where the government physically appropriates private property for its own

⁸ *Id.*

⁹ *Id.*; *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

¹⁰ *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071 (2021) (the “protection of property rights is ‘necessary to preserve freedom’ and ‘empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them.’” (quoting *Murr v. Wisconsin*, 582 U.S. 383, 394 (2017))).

¹¹ A modern example of an explicit taking is *Kelo v. City of New London*, 545 U.S. 469, 484 (2005). In this infamous case, the Court held that the City of New London’s taking of private property to sell for private development qualified as a “public use” within the meaning of the Takings Clause. *Id.* Although *Kelo* remains a controversial decision, it illustrates explicit takings very well: the government seized private property for “public use” and paid Kelo just compensation for the taking of her property with a formal transfer of title. *Id.*

use or a private third party without acquiring title.¹² These are also known as *per se* takings.¹³ The Court has described physical appropriations as the “clearest sort of taking” and uses a simple *per se* rule: “The government must pay for what it takes.”¹⁴

The other subcategory of implicit takings is the regulatory taking. Beginning early in the twentieth century, the Court established that “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”¹⁵ Regulatory takings are subject to *Penn Central* and the balancing of its highly fact-intensive factors.¹⁶ The Court has thus made clear that regulations that go “too far” are also takings under the Fifth Amendment.¹⁷

The Court has also stated that any government action that physically appropriates property is still a *per se* taking even if it arises from a regulation.¹⁸ This means that instead of always applying the ad hoc *Penn Central* factors when a regulation is at issue, the Court’s *per se* rule of “the government must pay for what it takes” applies in certain circumstances.¹⁹

¹²*Cedar Point Nursery*, 141 S. Ct. at 2071; *see* *United States v. Pewee Coal Co.*, 341 U.S. 114, 115–17 (1951) (holding that a coal mine operator’s property that was seized and operated by the U.S. during a temporary period to avert a nationwide strike constituted a taking because the government’s seizure was “as if the Government held full title and ownership” even though there was no formal transfer).

¹³*Cedar Point Nursery*, 141 S. Ct. at 2071.

¹⁴*Id.*

¹⁵*Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

¹⁶The “essentially ad hoc” *Penn Central* factors are: (1) the economic impact of the regulation on the property owner; (2) the extent that the regulation has interfered with reasonable investment-backed expectations; and (3) the character of the governmental action. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

¹⁷*Cedar Point Nursery*, 141 S. Ct. at 2072 (providing examples of government actions that have constituted regulatory takings including zoning ordinances, orders barring the mining of gold, and regulations prohibiting the sale of eagle feathers); for more examples of regulatory takings, *see also* *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992) (“We think . . . that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.”); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 841–42 (1987) (holding that a regulation requiring private homeowners to dedicate a public easement as a condition for renovation was an unconstitutional taking).

¹⁸*Cedar Point Nursery*, 141 S. Ct. at 2072 (citations omitted) (“Our cases have often described use restrictions that go ‘too far’ as ‘regulatory takings.’ But that label can mislead.”).

¹⁹*Id.* at 2071–72 (“Government action that physically appropriates property is no less a physical taking because it arises from a regulation.”).

The focus is not on whether the government's action comes from a regulation. Instead, if the government's actions have led to physically appropriating someone's property, the *per se* rule applies.²⁰ In contrast, if the government's actions restrict a property owner's "bundle of sticks," then the analysis falls within the realm of *Penn Central*'s factors.

While the *per se* rule for physical appropriations may seem overly broad, the Court attempted to steady the waters in *Cedar Point Nursery v. Hassid*.²¹ The Court made clear that any physical appropriation by the government constitutes a taking unless the government's actions fall into one of three exceptions.²² The first exception states that trespasses are not takings.²³ The second exception makes clear that many government-authorized physical invasions "consistent with longstanding background restrictions on property rights" are not takings.²⁴ The final exception relates to permissible instances of the government requiring "property owners to cede a right of access as a condition of receiving certain benefits, without causing a taking."²⁵

In summary, the Court's Fifth Amendment Takings Clause jurisprudence has evolved but has always kept the framer's intent as the north star. After *Cedar Point Nursery*, the Court's jurisprudence stands as follows: If there is a formal transfer of title through the government's eminent domain power, an explicit taking has triggered the Fifth Amendment's public use and just compensation requirements. If a regulation restricts a property owner's beloved "bundle of sticks"—particularly the "right to exclude" stick—then an implicit taking may have occurred, depending on a balancing of the *Penn Central* factors for regulatory takings. And if the government physically appropriates private property, the Court's *per se* rule will take effect, and the government must pay just compensation to the property owner.

B. History of the State Police Power

In 1827, Chief Justice John Marshall introduced the term "police power" into American jurisprudence.²⁶ Ever since then, the police power has been a

²⁰ *Id.* at 2072.

²¹ *See id.* at 2074.

²² *Id.* at 2078–79.

²³ *Id.* at 2078.

²⁴ *Id.* at 2079.

²⁵ *Id.*

²⁶ *Brown v. State of Maryland*, 25 U.S. (12 Wheat.) 419, 443 (1827).

staple of our constitutional concept of separation of powers.²⁷ The Supreme Court has broadly defined the concept as the states' "authority to provide for the public health, safety, and morals" of its people.²⁸ State courts have consistently relied on the police power to justify the actions of their state legislatures.²⁹

As society has evolved, threats to the public's health, safety, and welfare have too, which has led to the militarization of state and local police departments.³⁰ Police militarization refers to the way civilian police departments increasingly draw from the tenets of militarism with the use of military equipment.³¹ Police militarization started as a tactic during the infamous "War on Drugs" as an attempt to arm local law enforcement to combat armed gangs and drug dealers.³² And after the 9/11 terrorist attacks, police militarization has grown exponentially to help curtail acts of terror on U.S. soil.³³

²⁷ See generally U.S. CONST. amend. X. The Federal Government does not hold a general police power but may only act where the Constitution enumerates a power. Compare this with the states, who hold the general police power.

²⁸ *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991); see *Berman v. Parker* 348 U.S. 26, 32 (1954) ("Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power . . .").

²⁹ See generally *T-Mobile W. LLC v. City & County of San Francisco*, 438 P.3d 239 (Cal. 2019) ("[I]nherent local police power includes broad authority to determine for purposes of the public health, safety, and welfare, the appropriate uses of land."); *Abdow v. Att'y Gen.*, 11 N.E.3d 574, 582 (Mass. 2014) ("[T]he long-standing principle that the Legislature cannot surrender its broad authority to regulate matters within its core police power, which includes the regulation of gambling and the prerogative to ban forms of gambling that previously had been legal.").

³⁰ See Rashawn Ray, *How 9/11 Helped to Militarize American Law Enforcement*, BROOKINGS (Sept. 9, 2021), <https://www.brookings.edu/blog/how-we-rise/2021/09/09/how-9-11-helped-to-militarize-american-law-enforcement/> ("Federal programs . . . have provided billions of dollars in military equipment to police departments in the U.S. . . . [N]early 65% of the 18,000 law enforcement agencies have received equipment . . . [I]nclud[ing] ammunition, weapons, and tactical armored vehicles.").

³¹ *Militarization of Police*, STAND TOGETHER TRUST (July 17, 2018), <https://standtogethertrust.org/stories/militarization-of-police/> (defining police militarization as the "process whereby civilian police increasingly draw from and pattern themselves around, the tenets of militarism and the military model" and that it occurs when "a civilian police force adopts the equipment, operational tactics, mindsets, or culture of the military").

³² ACLU FOUNDATION, *WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING 2* (2014).

³³ Tonya Mosley & Serena McMahon, *Militarization of Police 'Ramped Up' After 9/11, 'Rise of the Warrior Cop' Author Says*, WBUR (Sept. 9, 2021), <https://www.wbur.org/hereandnow/2021/>

And while curtailing the unfortunate rise in domestic terrorism³⁴ is a legitimate government interest, a few concerns come to mind regarding police militarization. The first concern is that police militarization has blurred the line between the military and the police.³⁵ The military is an adversarial body whose main objective is to fight a foreign entity that conflicts with our interests. Compare that with the traditional function of the police. The police uphold the peace in our communities by enforcing the rule of law. Most notably, the police are not fighting foreign entities—instead, the police engage with fellow Americans. And when our police begin to act with more inherently adversarial militaristic tactics, the focus shifts from keeping the peace to eliminating the enemy.³⁶

A more practical concern of police militarization is the severe consequences of police activity. Tragedies like the loss of innocent lives have increased due to police militarization.³⁷ Another cost of police militarization is the “ordinary collateral damage[s]” that occurs so often that it no longer makes waves in the news cycle.³⁸ These “ordinary collateral damages”

09/09/post-9-11-policing. Today, the police possess “more than 60,000 military grade rifles, 1,500 combat-ready trucks and tanks, 500 unmanned ground vehicles . . . dozens of military aircraft, machine gun parts, bayonets, and even an inert rocket launcher.” Charlotte Lawrence & Cyrus J. O’Brien, *Federal Militarization of Law Enforcement Must End*, ACLU (May 12, 2021), <https://www.aclu.org/news/criminal-law-reform/federal-militarization-of-law-enforcement-must-end>.

³⁴ See Catrina Doxsee et al., *Pushed to Extremes: Domestic Terrorism amid Polarization and Protest*, CTR. FOR STRATEGIC & INT’L STUD. (May 17, 2022), <https://www.csis.org/analysis/pushed-extremes-domestic-terrorism-amid-polarization-and-protest>; Donna St. George, *School shootings rose to highest number in 20 years, federal data says*, WASH. POST: EDUC. (June 28, 2022), <https://www.washingtonpost.com/education/2022/06/28/school-shootings-crime-report/>.

³⁵ Wayne McElrath & Sarah Turberville, *Poisoning our Police: How the Militarization Mindset Threatens Constitutional Rights and Public Safety*, PROJECT ON GOV. OVERSIGHT (June 9, 2020), <https://www.pogo.org/analysis/2020/06/poisoning-our-police-how-the-militarization-mindset-threatens-constitutional-rights-and-public-safety>.

³⁶ Brian Miller, *The Militarization of America’s Police: A Brief History*, FOUND. FOR ECON. EDUC. STORIES (May 24, 2019), <https://fee.org/articles/the-militarization-of-americas-police-a-brief-history/>.

³⁷ Jeff Adachi, *Police Militarization and the War on Citizens*, HUMAN RTS. MAG., Vol. 42, No. 1, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2016-17-vol-42/vol-42-no-1/police-militarization-and-the-war-on-citizens/ (examples such as a child being burned in his crib by a flash-bang grenade, a young mother and her infant son shot by police officers searching for her boyfriend, an elderly man mistakenly shot by police entering the wrong home, and a war veteran being killed when investigating strange noises outside of his home caused by police).

³⁸ *Id.*

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include instances of slaughtered family pets, traumatized children, shattered windows, destroyed family heirlooms, and damaged property just to name a few.³⁹

Police raids are becoming increasingly common,⁴⁰ and when the police are as militarized as they are today, the destruction left in their path turns our neighborhoods into warzones. While these police raids often serve the greater good, that does not mean singular innocent citizens should shoulder the burden of such destruction alone.⁴¹

This Note argues that there is no categorical exception for valid exercises of the police power when it comes to the Fifth Amendment Takings Clause. Such a conclusion is not only consistent with the current Takings Clause framework as outlined by *Cedar Point Nursery* but also adheres to the sentiments of the Framers of the Constitution. This Note will also make a normative argument that such constitutional protection is the best policy.

II. A GROWING SPLIT: *BAKER* AND *LECH*

A split is growing among jurisdictions on whether property damage caused pursuant to the state police power is categorically excluded from the Fifth Amendment Takings Clause. Some jurisdictions say yes, a categorical exception exists for “takings” resulting from other valid exercises of governmental power—such as the police power—relieve the government of its constitutional burden of public use and just compensation.⁴² Other jurisdictions say no, arguing that no categorical exception exists for exercises of the police power and that it can co-exist with the Takings Clause.⁴³

The Tenth Circuit has taken the first approach—valid exercises of the police power are categorically exempt from the Fifth Amendment Takings Clause.⁴⁴ In *Lech v. Jackson*, the Greenwood Village Police Department (GVPD) raided Lech’s home in pursuit of a fugitive who had commandeered

³⁹ *Id.*

⁴⁰ Bonnie Kristian, *The troubling rise of SWAT teams*, THE WEEK (January 19, 2015), <https://theweek.com/articles/531458/troubling-rise-swat-teams> (Stating that SWAT team use, “has spiked from around 3,000 strikes per year in 1980 to as many as 80,000 raids a year” by 2015).

⁴¹ *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

⁴² *See Lech v. Jackson*, 791 F. App’x 711, 712 (10th Cir. 2019).

⁴³ *Baker v. City of McKinney*, 84 F.4th 378, 383 (5th Cir. 2023) (*Baker II*); *Baker v. City of McKinney*, 601 F. Supp. 3d 124, 141 (E.D. Tex. 2022), *rev’d*, 84 F.4th 378 (5th Cir. 2023).

⁴⁴ *Lech*, 791 F. App’x at 717.

their home.⁴⁵ After a standoff with no progress, the police began to take action by using a “BearCat⁴⁶ armored vehicle and explosives” to destroy the front and rear doors to create entry and exit points for the GVPD tactical team.⁴⁷ Unsuccessful, GVPD decided to deploy more aggressive tactics, including instructions to “take as much of the building as needed without making the roof fall in.”⁴⁸

Lech Damage Picture One⁴⁹



⁴⁵ *Id.* at 713.

⁴⁶ BearCats are military-grade vehicles designed to withstand attacks from small arms, explosives, and IED threats. BearCats can also breach buildings by attaching a battering ram to the front. See *Lenco Armored Vehicles*, POLICE 1, <https://www.police1.com/company-directory/lenco-armored-vehicles/> (last visited Sep. 17, 2023).

⁴⁷ Appellant’s Opening Brief at 3, *Lech*, 791 F. App’x at 713 (No. 18-1051).

⁴⁸ *Id.*

⁴⁹ Bobby Allyn, *Police Owe Nothing To Man Whose Home They Blew Up, Appeals Court Says*, NPR (Oct. 30, 2019), <https://www.npr.org/2019/10/30/774788611/police-owe-nothing-to-man-whose-home-they-blew-up-appeals-court-says> (Credit for the image is given to Kathryn Scott Osler/Denver Post via Getty Images.).

Lech Damage Picture Two⁵⁰

The results of GVPD's planned police raid left the Lech home uninhabitable.⁵¹ The Lechs had no choice but to demolish and rebuild.⁵² The City offered the Lechs \$5,000 to cover the costs of her temporary living expenses "as a 'gesture of good faith.'"⁵³ The City, and its insurance provider, denied the claims, arguing that their actions were valid exercises of the police power pursuant to the public good, which categorically exempted them from the Fifth Amendment Takings Clause.⁵⁴ The Tenth Circuit agreed with the City.⁵⁵ The court concluded that because the police raid was a valid exercise of the state's police power and not an exercise of the eminent domain power, the Fifth Amendment Takings Clause was inapplicable to Lech's destroyed home.⁵⁶

On the other hand, the Eastern District of Texas, Sherman Division took the second approach in *Baker v. City of McKinney*, a case with a very similar

⁵⁰ *Lech v. City of Greenwood Village*, INSTITUTE FOR JUSTICE, <https://ij.org/case/lech-v-city-of-greenwood/>.

⁵¹ Appellant's Opening Brief at 3-4, *Lech*, 791 F. App'x at 713 (No. 18-1051) ("The Lech Home was declared 'unsafe to occupy' by the City's Building Inspector due to structural integrity issues.").

⁵² *Id.* at 4.

⁵³ *Id.*

⁵⁴ *Lech*, 791 F. App'x at 714.

⁵⁵ *Id.* at 717.

⁵⁶ *Id.*

fact pattern.⁵⁷ In *Baker*, the City of McKinney Police Department (MPD) raided Baker's home in pursuit of a fugitive.⁵⁸ The fugitive had commandeered the Baker home.⁵⁹ After hours of unsuccessful negotiations, MPD decided to forcefully enter the home by breaking down the front door, garage door, and running over the backyard fence with a BearCat.⁶⁰

Baker Damage Photo⁶¹



At the end of the raid, the Baker house suffered severe property damage. The official police report described the damages with photos, including a “toppled fence and battered front door; the broken windows; the damaged roof and landscaping; the blown-out garage door; and the garage ceiling, attic floor, and dry walls all torn through with gas canisters.”⁶² The police report stated that much of the damage done by the planned police raid could not be properly appreciated through photographs.⁶³

⁵⁷ See 601 F. Supp. 3d 124, 147 (E.D. Tex. 2022), *rev'd*, 84 F.4th 378 (5th Cir. 2023).

⁵⁸ *Id.* at 128.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *After a SWAT team destroyed Vicki Baker's Texas home, it refused to pay for the damage. Now she is fighting back.*, INSTITUTE FOR JUSTICE, <https://ij.org/case/texas-swat-destruction/> (last visited Nov. 19, 2023).

⁶² *Baker*, 601 F. Supp. 3d at 128.

⁶³ *Id.* at 128–29 (“The explosions left [] Baker’s dog permanently blind and deaf. The toxic gas that permeated the [H]ouse required the services of a HAZMAT remediation team. Appliances and fabrics were irreparable. Ceiling fans, plumbing, floors (hard surfaces as well as carpet), and bricks

Baker's insurance provider denied her policy claim because a government entity caused the damages.⁶⁴ So Baker filed a claim for property damage with the City of McKinney, but the City denied her request claiming sovereign immunity.⁶⁵ Baker then sued the City, where the court granted her Motion for Summary Judgment, establishing that the City was liable as a matter of law under the Fifth Amendment Takings Clause for physically appropriating her property.⁶⁶

On appeal, the Fifth Circuit reversed and remanded the *Baker* court's decision, finding that the Takings Clause does not require compensation for Baker's damaged or destroyed property.⁶⁷ The Fifth Circuit based its holding on its interpretation of the common law necessity exception to the Takings Clause,⁶⁸ as it determined that it was "objectively necessary" for officers to damage or destroy Baker's property.⁶⁹ That said, the Fifth Circuit expressly declined to adopt the City's broad rule that actions taken pursuant to the police powers are categorically exempt from the Takings Clause.⁷⁰ Thus, there is still a circuit split⁷¹ for whether actions taken pursuant to police powers are categorically exempt from the Fifth Amendment Takings Clause, even with the Fifth Circuit reversing the *Baker* court's decision.

In this section, this Note will analyze the reasoning discussed in both *Lech* and *Baker* and determine which court's analysis best reflects existing

needed replacing—in addition to the windows, blinds, fence, front door, and garage door. Essentially all of the personal property in the [H]ouse was destroyed, including an antique doll collection left to [] Baker by her mother. In total, the damage . . . was approximately \$50,000.”)

⁶⁴*Id.* at 129.

⁶⁵*Id.* (“The City replied in a letter that it was denying the claim in its entirety because ‘the officers have immunity while in the course and scope of their job duties.’”).

⁶⁶*Id.* at 147; *Baker v. City of McKinney*, 624 F. Supp. 3d 653, 657–58 (E.D. Tex. 2022), *vacated*, 84 F.4th 378 (the ensuing trial resulting in Baker being awarded \$59,656.59 in just compensation for the cost of repairs for the home and loss in market value to her personal property).

⁶⁷*Baker v. City of McKinney*, 84 F.4th 378, 389 (5th Cir. 2023) (*Baker II*).

⁶⁸This will be discussed further in Part III.B.

⁶⁹*Baker II*, 84 F.4th at 379.

⁷⁰*Id.* at 383 (“The City invites our court to adopt a broad rule: because Baker’s property was damaged or destroyed pursuant to ‘the exercise of the City’s police powers,’ there has been no compensable taking under the Fifth Amendment. We decline.”).

⁷¹*Id.* at 383–84. It should also be noted that the Tenth Circuit’s decision in *Lech* was an unpublished decision and therefore not necessarily binding in every Tenth Circuit case—it does, however, reflect the current sentiment of the Tenth Circuit. *See id.* The case was also denied certiorari by the Supreme Court in 2020. *Lech v. Jackson*, 141 S. Ct. 160 (2020).

precedent with regards to the intersection of the police power and Fifth Amendment Takings Clause.

A. The Difference Between Physical Appropriations and Regulatory Takings

As discussed in Part I.A, physical appropriations and regulatory takings are different types of implicit takings.⁷² The *Baker* court found that the Tenth Circuit in *Lech* improperly conflated physical appropriations and regulatory takings as one and the same.⁷³ The Tenth Circuit cited *Mugler v. Kansas* to support its decision to distinguish between the state's power of eminent domain and the state's police power.⁷⁴

Mugler involved a regulatory scheme under the state's police power that prohibited the sale of liquor except for in some cases.⁷⁵ In deciding that there was no taking, the Supreme Court noted that an action taken pursuant to the state's police powers does not require the state to compensate aggrieved property owners—that only the eminent domain power is subject to the Fifth Amendment's restrictions.⁷⁶ The Tenth Circuit relies on this reasoning to reject *Lech*'s argument that the physical appropriation of property by the government is a *per se* taking.⁷⁷ The *Baker* court called this extension inappropriate because it claimed the Supreme Court has never made such a distinction.

As the *Baker* court correctly observes, *Mugler* involved an alleged regulatory taking. That said, at the time of *Mugler*'s decision,⁷⁸ a regulatory

⁷² See *supra* Part I.A.

⁷³ *Baker*, 601 F. Supp. 3d at 136.

⁷⁴ *Lech v. Jackson*, 791 F. App'x 711, 715 (10th Cir. 2019) (using *Mugler* to distinguish “between ‘the state’s power of eminent domain’—under which ‘property may not be taken for use without compensation’—and state’s ‘police powers’—which are not ‘burdened with the condition that the state must compensate [affected] individual owners for pecuniary losses they may sustain’”).

⁷⁵ 123 U.S. 623, 657 (1887).

⁷⁶ *Id.* at 669.

⁷⁷ *Lech*, 791 F. App'x at 715.

⁷⁸ Even today under *Penn Central*'s regulatory taking factors, *Mugler* would not constitute a taking because of the economic impact of the regulation and the character of the government action. Compare *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) with *Mugler*, 123 U.S. at 671.

takings claim did not exist yet.⁷⁹ In fact, *Mugler*'s reasoning supports treating physical appropriations and regulatory takings differently. On its face, a physical appropriation is a greater infringement on a property owner's "bundle of sticks" due to the inherently physical nature when compared to regulatory takings.⁸⁰ And such a distinction accurately reflects the Supreme Court's interpretation of the Takings Clause.⁸¹

Thus, because *Mugler*'s distinction between the eminent domain power and the state's police power was made solely in the regulatory taking context, extending such a distinction to physical appropriations of property would be inappropriate.

B. There is no Implicit Distinction Between Eminent Domain Cases and Police Power Cases When It Comes to Physical Takings.

The Tenth Circuit relied on the Supreme Court's decision in *Bennis v. Michigan* to justify its conclusion that there is an implicit distinction between eminent domain power and police power in this context.⁸² The Tenth Circuit argued that this implicit distinction established that actions pursuant to the police power are categorically excluded from the Fifth Amendment Takings Clause.⁸³

In *Bennis*, the Supreme Court stated that the "government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain."⁸⁴ *Bennis* involved the forfeiture of a car on public-nuisance grounds.⁸⁵ The car was co-owned by both Mr. Bennis and Mrs. Bennis.⁸⁶ Because she had an equal property interest in the now-seized car,

⁷⁹ *Baker v. City of McKinney*, 601 F. Supp. 3d 124, 136 (E.D. Tex. 2022), *rev'd*, 84 F.4th 378 (5th Cir. 2023) ("Prior to Justice Holmes's exposition in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), it was generally thought that the Takings Clause reached only a direct appropriation of property . . . or the functional equivalent of a practical ouster of the owner's possession." (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992))).

⁸⁰ *Id.*

⁸¹ *See Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071–72 (2021).

⁸² *Lech*, 791 F. App'x at 716 ("Further, although the Supreme Court has never expressly invoked this distinction in a case alleging a physical taking, it has implicitly indicated the distinction applies in this context.").

⁸³ *Id.* at 717.

⁸⁴ 516 U.S. 442, 452 (1996).

⁸⁵ *Id.* at 443.

⁸⁶ *Id.*

Mrs. Bennis argued that the forfeiture was an unconstitutional taking as applied to her.⁸⁷ The *Bennis* court rejected Mrs. Bennis's Takings claim.⁸⁸ The *Bennis* court concluded that because the seizure of the car happened during a criminal proceeding, the government already had lawful possession and did not need the power of eminent domain to seize the car.⁸⁹

The *Baker* court argued that the Tenth Circuit improperly relied on *Bennis* to establish that there is an implicit distinction for physical takings between eminent domain cases and police power cases.⁹⁰ The *Baker* court started by pointing out that the *Bennis* opinion discussed the Fifth Amendment for three sentences and is non-binding dicta.⁹¹ Additionally, the *Baker* court explained that the Supreme Court affirmed cases of forfeiture without compensation for four specific principles drawn out of earlier cases, which the Tenth Circuit did not consider.⁹² Those principles justified the uncompensated forfeiture in those cases to serve specific policy goals.⁹³ The *Baker* court criticized the Tenth Circuit for creating its categorical exclusion without accounting for the context of the *Bennis* opinion.⁹⁴

⁸⁷ See *id.* at 445, 452.

⁸⁸ *Id.* at 453.

⁸⁹ *Id.* at 452.

⁹⁰ *Baker v. City of McKinney*, 601 F. Supp. 3d 124, 137 (E.D. Tex. 2022), *rev'd*, 84 F.4th 378 (5th Cir. 2023).

⁹¹ *Id.* (citation omitted) ("In total, the segment of the *Bennis* opinion relating to the Fifth Amendment is three sentences long. Those three sentences are more accurately described as dicta, as they were not central to the holding."). For context, those three sentences are "Petitioner also claims that the forfeiture in this case was a taking of private property for public use in violation of the Takings Clause of the Fifth Amendment, made applicable to the States by the Fourteenth Amendment. But if the forfeiture proceeding here in question did not violate the Fourteenth Amendment, the property in the automobile was transferred by virtue of that proceeding from petitioner to the State. The government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain." *Bennis*, 516 U.S. at 452.

⁹² *Baker*, 601 F. Supp. 3d at 138. (citations omitted) ("One reason was that the forfeited items presented a threat in and of themselves. Second, the forfeited property in each case was entrusted to the criminal perpetrators as part of the criminal enterprise. Third, forfeiting the property achieved 'punitive and remedial' goals. Finally, the property in question was evidence in the subsequent criminal prosecutions.").

⁹³ *Id.*

⁹⁴ *Id.* ("Imposing a brightline rule based on three sentences from an otherwise nuanced and detailed opinion would undermine ample Supreme Court caselaw and lead to inconsistent results. Yet that is what the Tenth Circuit did in *Lech*.").

The *Baker* court is right: the Tenth Circuit's use of *Bennis* does not fully appreciate the nuances of the Court's opinion. *Bennis*'s primary focus was not on the Fifth Amendment, and its brief discussion was ancillary to its primary holding.⁹⁵ To conclude from *Bennis* that there is an implicit distinction between the eminent domain power and the police power would be an improper extension.⁹⁶

C. The Police Power and Eminent Domain Power Can Co-Exist.

The police and eminent domain power can co-exist when examining the interplay between them. The police power finds its roots in the public good, while the public use requirement restricts eminent domain. That said, the public use requirement is rarely an issue when the state acts through its police power—instead, the only relevant question is whether property taken under the police power constitutes a taking under the Fifth Amendment. The Tenth Circuit said no; the Takings Clause is never triggered when a state acts through its police power.

Yet such a decision flouts the Court's well-established jurisprudence. The Tenth Circuit erred by over-relying on *Mugler*. As discussed, *Mugler* involved what courts now consider a regulatory taking before the concept existed.⁹⁷ But *Mugler* is not the only law of the land. Instead, the law here is split into a dichotomy. *Mugler* is on one side, joined by other regulatory takings cases such as *Penn Central* and *Penn Coal*.⁹⁸ These cases illustrate that when regulations—which are the quintessential acts taken under the police power—go too far, a taking has occurred.⁹⁹

Physical appropriations, however, stand on the other side of the dichotomy. Cases like *Pumpelly* and now *Cedar Point* demonstrate the Court's consistent recognition that physical invasions by the government go too far.¹⁰⁰ And this is where the forest can be missed from the trees: physical

⁹⁵ See *Bennis*, 516 U.S. at 443–44.

⁹⁶ *Id.* at 452–53 (holding that the Michigan court order did not offend the Due Process Clause or the Takings Clause—yet the discussion of the Fifth Amendment Takings Clause was three sentences long and was resolved because the Fourteenth Amendment was not violated).

⁹⁷ See *supra* Part II.A.

⁹⁸ See *Mugler v. Kansas*, 123 U.S. 623, 657 (1887); *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

⁹⁹ See *Mugler*, 123 U.S. at 657; *Pa. Coal Co.*, 260 U.S. at 415; *Penn Cent.*, 438 U.S. at 124.

¹⁰⁰ See *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 182 (1872); *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021).

invasions, no matter which power is used, constitute takings for which just compensation must be paid.¹⁰¹

A regulatory taking occurs when the government's actions—via a regulation or statutory scheme—go too far.¹⁰² A state's ability to regulate and enact laws fall under the police power.¹⁰³ So, properly conceptualized, a regulatory taking inherently occurs when the state's police power goes too far.¹⁰⁴ As discussed, physical appropriations always constitute a government overstep that triggers the Takings Clause. Thus, a physical appropriation, even if taken under the guise of the police power, constitutes a taking that requires just compensation.

The implication of *Lech* is that it allows the government to avoid paying just compensation whenever it plays the police power card.¹⁰⁵ Such a result would swallow the rule in the Takings Clause.¹⁰⁶ Take the issue of damages that result from planned police raids. The individual property owner would argue that such damages constitute a physical appropriation, which means the *per se* rule applies: the government must pay for what it takes. On the other hand, the government would argue that this was a mere exercise of the police power and that under *Lech* there is no requirement for just compensation. This forces courts to answer which is worse: the government paying just compensation for property destroyed under its police powers, or that it would be exempt from ever paying a dime, regardless of the motivations behind its actions?¹⁰⁷ *Lech* categorically excludes actions under the police power from the Takings Clause, even though the Court has found

¹⁰¹ *Cedar Point Nursery*, 141 S. Ct. at 2072 (so long as these physical invasions are not subject to one of the Cedar Point exceptions discussed in Part III).

¹⁰² *Id.*

¹⁰³ See *supra* note 29 and accompanying text.

¹⁰⁴ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982) (holding that a permanent physical occupation of private property due to government action, even when it is a small area, does not greatly affect the owner's economic interests); *Penn Cent.*, 438 U.S. at 124; *Cedar Point Nursery*, 141 S. Ct. at 2072.

¹⁰⁵ See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992) (holding that a taking had occurred even though South Carolina's legislature validly exercised its police power because "[w]hen the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good . . . he has suffered a taking").

¹⁰⁶ J.P. Burleigh, *Just Compensation and the Police Power*, U. CIN. L. REV. BLOG ARTICLES (Apr. 8, 2020), <https://uclawreview.org/2020/04/08/just-compensation-and-the-police-power/>.

¹⁰⁷ Emilio R. Longoria, *Lech's Mess*, 11 WAKE FOREST J.L. & POL'Y 297, 306 (2021).

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takings in *Loretto*, *Penn Coal*, and *Cedar Point*—all of which involve exercises of the police power.¹⁰⁸

In other words, the Court’s current framework implicitly rejects categorizing exercises of the police power as automatically non-compensable under the Fifth Amendment Takings Clause. Existing case law shows a natural interplay between the police power and eminent domain, making any hardline separating the two contrary to existing precedent. Acknowledging this reality avoids the absurd pitfall of allowing the government’s actions to go unchecked by the Takings Clause.

III. CEDAR POINT NURSERY’S FRAMEWORK

In 2021, the Court clarified its Takings Clause jurisprudence in *Cedar Point Nursery v. Hassid*.¹⁰⁹ *Cedar Point Nursery* involved a California regulation enacted by the police power that granted labor organizations a “right to take access” to an agricultural employer’s property to garner support for unionization.¹¹⁰ The regulation required agricultural employers to grant union organizers access to their property for up to three hours per day for 120 days every year.¹¹¹

The question presented was whether an access regulation—a valid exercise of the state’s police power—constituted a *per se* physical taking under the Fifth Amendment Takings Clause.¹¹² *Cedar Point Nursery*, the agricultural employer here, argued that the access regulation was an unconstitutional *per se* taking because it appropriated their private property for an easement without compensation.¹¹³ The Supreme Court concluded that its jurisprudence established that “appropriations of a right to invade are *per se* physical takings, not use restrictions subject to *Penn Central*.”¹¹⁴ Thus, the Court ruled that the access regulation constituted a *per se* taking because it granted labor organizations a right to invade the property.¹¹⁵

¹⁰⁸ See *Loretto*, 485 U.S. at 419; *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 414–16 (1922); *Cedar Point Nursery*, 141 S. Ct. at 2080.

¹⁰⁹ 141 S. Ct. at 2063.

¹¹⁰ *Id.* at 2069.

¹¹¹ *Id.*

¹¹² *Id.* It is worthwhile to note that *Cedar Point Nursery*’s regulation is a classic example of the police power being exercised *outside* of the law enforcement context.

¹¹³ *Id.* at 2070.

¹¹⁴ *Id.* at 2077.

¹¹⁵ *Id.* at 2080. The Court reversed the Ninth Circuit’s judgment and remanded the case for further proceedings—presumably to calculate just compensation for the *per se* taking.

The Court's ruling made clear that *per se* physical takings—otherwise known as physical appropriations of property—are the “clearest sort of taking” under the Fifth Amendment.¹¹⁶ The Court emphasized that *per se* takings include appropriations of an owner's right to exclude, calling this part of the bundle of sticks “‘one of the most treasured’ rights of property ownership.”¹¹⁷ Still, the Court reiterated that any government-authorized physical appropriation of private property is a taking under the Fifth Amendment.¹¹⁸ That said, the Court realized this general rule could make many government actions *per se* takings, so it created three exceptions, each of which will be discussed in more depth later on.¹¹⁹

Police raid damages, such as the ones suffered by the Lech and Baker families, are government-authorized physical appropriations of private property. Thus, these actions are *per se* takings that entitle innocent homeowners to just compensation unless one of the three *Cedar Point Nursery* exceptions apply.

A. *Intentional Police Raid Damages are Per Se Takings.*

The intentional destruction of private property that results from police raids constitutes takings under the Fifth Amendment. By their very nature, police raid damages are physical invasions of private property authorized by the government. This invasion essentially extinguishes the benefits of property ownership by diminishing the value of the bundle of sticks, including the owner's right to exclude stick—which the Court's precedent emphasizes is a key consideration when determining whether there was a government taking.¹²⁰ How so? Because planned police raids result in destruction that restricts the property owner's ability to enjoy her property in

¹¹⁶*Id.* at 2071.

¹¹⁷*Id.* at 2072 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982)).

¹¹⁸*Id.* at 2074 (“The upshot of this line of precedent is that government-authorized invasions of property—whether by plane, boat, cable, or beachcomber—are physical takings requiring just compensation.”).

¹¹⁹*Id.* at 2078 (citation omitted) (“[T]reating the access regulation as a *per se* physical taking will endanger a host of state and federal government activities involving entry onto private property. That fear is unfounded.”).

¹²⁰*Id.* at 2073 (“The right to exclude is ‘one of the most treasured’ rights of property ownership” and that the right is “‘one of the most essential sticks in the bundle of rights that are commonly characterized as property.’” (first quoting *Loretto*, 484 U.S. 419 at 435; and then quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979))).

the same manner as before the government's invasion. The Lech and Baker families could not enjoy their homes in the same way they did just hours before the invasion because the police's raid made their homes uninhabitable.¹²¹ Thus, because of the Court's strong stance on compensating property owners for government actions that restrict the enjoyment of the property through physical appropriation, damages resulting from police raid damages are takings under the Fifth Amendment.

That said, some cases seem to support the proposition that damages resulting from valid exercises of the police power are not takings. One of those cases is *AmeriSource Corp. v. United States*,¹²² which involved the United States seizing pharmaceuticals in connection with a conspiracy investigation.¹²³ AmeriSource contracted with Norfolk Pharmacy to sell various pharmaceutical drugs.¹²⁴ AmeriSource delivered but retained ownership of the drugs because Norfolk never tendered final payment under their agreement.¹²⁵ A few days before Norfolk entered into its agreement with AmeriSource, the pharmacy's principals were indicted on conspiracy charges.¹²⁶ As part of its investigation, the United States seized many pharmaceuticals from Norfolk's warehouse, including AmeriSource's.¹²⁷

AmeriSource did not contest the initial seizure but took issue when the government retained AmeriSource's property—pharmaceutical drugs—past the “use by” date, which made the drugs worthless.¹²⁸ AmeriSource argued that it was entitled to just compensation under the Takings Clause because the government took its pharmaceuticals for the “public use” by enforcing criminal laws.¹²⁹ AmeriSource grounded its argument in the fact that it was an innocent third party who was in no way being punished by the seizure.¹³⁰

¹²¹ See *Baker v. City of McKinney*, 601 F. Supp. 3d 124, 135 (E.D. Tex. 2022), *rev'd*, 84 F.4th 378 (5th Cir. 2023).

¹²² 525 F.3d 1149 (Fed. Cir. 2008).

¹²³ *Id.* at 1150.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 1150–51.

¹²⁹ *Id.* at 1151. It should be noted that the Excessive Fines Clause was not raised by either AmeriSource or the Federal Circuit; all the discussion revolved solely around whether the U.S. Attorney's actions constituted a taking under the Fifth Amendment Takings Clause. See *id.*

¹³⁰ *Id.* at 1155. The Takings Clause would likely not be implicated if AmeriSource was a party to the criminal trial involving Norfolk. A forfeiture in that regard would be meant to punish AmeriSource, and it would be a bizarre position that the government must pay just compensation to

The Federal Circuit rejected this argument and concluded that “[p]roperty seized and retained pursuant to the police power is not taken for a ‘public use’ in the context of the Takings Clause.”¹³¹ The court reasoned that there is a distinction between property properly seized under the police power and takings for public use under the Fifth Amendment.¹³² In short, the Tenth Circuit and the *AmeriSource* court appear to limit the police power to law enforcement rather than the broad regulatory power discussed earlier.¹³³

But applying this conclusion to planned police raid damages fails to appreciate the reality of the situation. The Tenth Circuit and Federal Circuit state that the police’s actions fall under the police power; the same broad-regulatory police power discussed throughout this Note.¹³⁴ This makes sense because both courts are right: the police do derive their power from the broad police power.¹³⁵ And neither provide any basis from distinguishing law enforcement from the police power.¹³⁶ Yet, the Tenth Circuit’s conclusion would mean that *Cedar Point*, *Penn Central*, and all other regulatory takings cases were improperly decided because regulations are made pursuant to a state’s police power.

As discussed in Part II, the Supreme Court’s Takings Clause jurisprudence has not recognized the proposition that actions taken under a valid exercise of the police power are categorically excluded from the Fifth Amendment.¹³⁷ The Federal Circuit cited two cases in its discussion of traditional exercises of the police power not constituting a public use under

someone it is punishing. Here, *AmeriSource* owned property that the government seized because it was in Norfolk’s warehouse. *AmeriSource* is not being punished because, as the government admits, it wanted to introduce the drugs in its case-in-chief against Norfolk’s principals.

¹³¹ *Id.* at 1153.

¹³² *Id.*

¹³³ See *supra* Part II.A. There is no reason to limit the police power in the way the Tenth Circuit and *AmeriSource* court did; in fact, the Court’s jurisprudence rejects such a conclusion. The broad regulatory power includes the state’s ability to police its citizens and enforce its laws. Drawing a narrow line to avoid the Takings Clause’s “public use” requirement also fails to appreciate that the Supreme Court has acknowledged that “public use” and “public good” overlap—in fact, there really is no meaningful difference. See *supra* Part II.C.

¹³⁴ *AmeriSource*, 525 F.3d at 1153; *Lech v. Jackson*, 791 F. App’x 711, 714 (10th Cir. 2019).

¹³⁵ *AmeriSource*, 525 F.3d at 1153; *Lech*, 791 F. App’x at 714.

¹³⁶ See *AmeriSource*, 525 F.3d at 1153; *Lech*, 791 F. App’x at 714.

¹³⁷ See *supra* Part II.

the Fifth Amendment.¹³⁸ Both cases hold that the “government’s *seizure, retention, and damaging of the [seized] property*” is not a taking because “items *properly seized* by the government under its police power are not *seized*” within the meaning of the Fifth Amendment.¹³⁹ Each of the cases cited concern the police seizing property for a criminal proceeding. That is not what is at issue in *Lech* and *Baker*. The government is not merely *seizing* property for a criminal investigation but is instead *destroying* property during raids. The justification that the government has broad latitude to use seized property during criminal proceedings—including its destruction—is not present when it destroys property to arrest someone. The former has the protections of the Due Process Clause.¹⁴⁰ The latter does not.¹⁴¹

When it comes to *Lech* and *Baker*, their homes were destroyed. They were not being punished.¹⁴² They were not doing anything illegal. Thus, the line of cases concluding that property damage under valid actions of the police power does not account for the specific circumstances found in police raid damages. Thus, the Court’s *per se* rule governs police raid damages unless one of its three exceptions applies.¹⁴³

B. The First Exception: Government Trespasses Are Not Takings

Cedar Point Nursery makes clear that “[i]solated physical invasions, not undertaken pursuant to a granted right of access, are properly assessed as individual torts rather than appropriations of a property right.”¹⁴⁴ It is when the government continuously invades private property that elevates the action

¹³⁸*AmeriSource*, 525 F.3d at 1153–54 (citing two primary cases for its discussion: *Acadia Technology, Inc. v. United States*, 458 F.3d 1327, 1329 (Fed. Cir. 2006); *Bennis v. Michigan*, 516 U.S. 442 (1996)).

¹³⁹*Id.* at 1153 (emphasis added) (citing *Acadia*, 458 F.3d at 1332).

¹⁴⁰*Id.* at 1154 (emphasis added) (“As expansive as the police power may be, it is not without limit. The limits, however, are largely imposed by the Due Process Clause.”).

¹⁴¹*See id.*

¹⁴²*Austin v. United States*, 509 U.S. 602, 622 (1993) (holding that forfeiture of real property under a statutory scheme is subject to the Eighth Amendment’s Excessive Fines Clause because it constitutes “payment to a sovereign as punishment for the offense” and not a taking under the Takings Clause).

¹⁴³The third exception laid out by *Cedar Point Nursery* is that requirements by the government that property owners cede a right of access as a condition of receiving specific benefits are not considered takings. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2079 (2021). This exception has to do with government issued permits and bears little relevance here.

¹⁴⁴*Id.* at 2078.

from an isolated physical invasion to a taking under the Fifth Amendment.¹⁴⁵ Thus, the analysis for this exception constitutes a spectrum: does the government's actions fall closer to an isolated trespass or a continual invasion with the intent to take?

On the surface, the intentional destruction of property during a police raid appears to be closer to an isolated trespass rather than a continual invasion by the government. And this argument makes sense. The SWAT team only invades private property once. They only destroy property once. It makes sense that this should be categorized as an isolated trespass.

But such a conclusion fails to appreciate precedent. In *Arkansas Game and Fish Commission v. United States*, the Court determined that a key consideration to the takings inquiry "is the degree to which the invasion is intended or is the foreseeable result of authorized government action."¹⁴⁶ While this case was in the context of a temporary flooding, the Court noted that this approach "reflects nothing more than an application of the traditional trespass-versus-takings distinction" already established.¹⁴⁷ When the government's actions are intentional, the act falls closer to a taking. The same is true if the government's actions are foreseeable. If the government's actions are both intentional and foreseeable, then there is a high chance a taking has occurred.

The *Baker* court agreed with this distinction and used it to conclude that the destruction caused by the police raid to the Baker house constituted a taking under the Fifth Amendment.¹⁴⁸ The court characterized its analysis by focusing on the nature of the invasion, stating that the characterization of the government's actions is where the line should be drawn when deciding whether the destruction of property is a compensable taking.¹⁴⁹ The *Baker* court reasoned that if the destruction of the Baker house resulted from the

¹⁴⁵*Id.* ("[W]hile a single act may not be enough, a continuance of them in sufficient number and for a sufficient time may prove [the intent to take property]. Every successive trespass adds to the force of the evidence.").

¹⁴⁶568 U.S. 23, 39 (2012) (citing *John Horstmann Co. v. United States*, 257 U.S. 138, 146 (1921)).

¹⁴⁷*Cedar Point Nursery*, 141 S. Ct. at 2079.

¹⁴⁸*Baker v. City of McKinney*, 601 F. Supp. 3d 124, 141–44 (E.D. Tex. 2022), *rev'd*, 84 F.4th 378 (5th Cir. 2023).

¹⁴⁹*Id.* at 141 ("[D]ifficulty exists in 'trying to draw the line between what destructions of property by lawful governmental actions are compensable 'takings' and what destructions are 'consequential' and therefore not compensable' The issue is the nature of the invasion." (quoting *Armstrong v. United States*, 364 U.S. 40, 48 (1960))).

government's intentional or foreseeable actions, the police's actions constituted at taking.¹⁵⁰

Applying this framework to police raid damages, it is clear that in these cases the police intended to destroy property. In both *Lech* and *Baker*, the police are on the record stating that they intentionally destroyed the homes to end the standoff.¹⁵¹ Additionally, damages during a planned police raid are foreseeable because thanks to police militarization, local law enforcement is equipped with military-grade equipment that can turn a suburban neighborhood into a war zone.

Therefore, the first exception to the *per se* taking rule does not apply to damages caused by a planned police raid. Because the police's actions are intentional and foreseeable, their actions are closer to an invasion with the intent to take instead of a one-time trespass.

C. The Second Exception: Government Actions that are Consistent with Longstanding Background Restrictions on Property Rights Are Not Takings.

The second exception states that government-authorized physical invasions of property that are consistent with "longstanding background restrictions on property rights" are not takings under the Fifth Amendment.¹⁵² These longstanding restrictions also include the traditional common law privileges to access property.¹⁵³ The common law recognized "a privilege to enter property to effect an arrest or enforce the criminal law under certain circumstances."¹⁵⁴ Indeed, it would be ridiculous to argue that a taking has occurred when an officer is engaged in a reasonable search consistent with the Fourth Amendment.¹⁵⁵

¹⁵⁰ *Id.* at 143 ("As such, if the destruction of the House was a direct result of the government's conduct, and the result was intentional or foreseeable, then the Department's conduct amounts to a taking.").

¹⁵¹ *Id.* at 144.

¹⁵² *Cedar Point Nursery*, 141 S. Ct. at 2079 ("[M]any government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights" and that "the government does not take a property interest when it merely asserts a 'pre-existing limitation upon the land owner's title.'" (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028–29 (1992))).

¹⁵³ *Id.*

¹⁵⁴ *Id.* (emphasis added) (citing Restatement (Second) of Torts §§ 204–05 (1965)) (*entry* to land in possession of another for the purposes of making an arrest).

¹⁵⁵ *See id.*

There is an argument that these common law principles extend to police raids as well, since at its most basic level, the police are entering someone's property to effect an arrest. And as long as the police's actions pass Fourth Amendment scrutiny, that specific exercise of police power is valid, no matter what actions transpired, including the total destruction of someone's home. This seems to be a very persuasive argument that allows the state to exercise its police power without having its police constantly worry about effectuating a taking in emergency situations.

And this argument closely tracks the line of reasoning the Fifth Circuit used when it reversed the *Baker* court's decision that the police raid violated the Takings Clause.¹⁵⁶ In reversing, the Fifth Circuit found that active emergency situations relieve the government from justly compensating unfortunate property owners under the Fifth Amendment.¹⁵⁷ The court found a 1788 Pennsylvania Supreme Court case to be directly on point for how the common law necessity exception to the Takings Clause was understood at the time.¹⁵⁸ From *Sparhawk*, the Fifth Circuit directly gleaned what appears to be a guiding rationale for the necessity exception: "the fear that if the state risks liability for the damage or destruction of property during a public emergency, then the state may not be so quick to damage or destroy it, and such hesitancy risks catastrophe."¹⁵⁹ After several other case illustrations, the Fifth Circuit concluded that the Takings Clause does not require compensation for damaged or destroyed property when it was objectively necessary for officers to damage or destroy that property in an active emergency to prevent imminent harm.¹⁶⁰

But this argument does not account for the exact words used by the Court in *Cedar Point*: "a privilege to *enter* property to effect an arrest or enforce the criminal law under certain circumstances."¹⁶¹ The right of *entry* is the longstanding background restriction on property rights that is consistent with our Nation's history and common law—not destruction. The Court consistently uses the right of *entry* and not the right of destruction in *Cedar Point Nursery*.¹⁶² And this distinction makes sense with the general theme of this exception: certain circumstances dictate government invasion of your

¹⁵⁶*Baker v. City of McKinney*, 84 F.4th 378, 388 (5th Cir. 2023) (*Baker II*).

¹⁵⁷*Id.*

¹⁵⁸*Id.* at 385–86 (citing *Respublica v. Sparhawk*, 1 U.S. 357 (Penn. 1788)).

¹⁵⁹*Id.* at 386.

¹⁶⁰*Id.* at 388.

¹⁶¹141 S. Ct. 2063, 2079 (2021) (emphasis added).

¹⁶²*Id.*

property. The classic examples are stopping a public nuisance and effecting an arrest or search.¹⁶³ These classic common law examples only require *entry* and are a one-time infringement on the right to exclude stick. Compare this with the intentional destruction pursuant to a police raid, where the government—admittedly—infringes on your right to exclude stick only once, but rather than returning the stick intact, you are left with a shattered stick with no meaningful use. A blind application of the second exception would call that shattered stick a one-time infringement, when in reality the effects of the government’s infringement are continuously felt after the police drive away.

This distinction appreciates the reality of the situation: the run-of-the-mill effectuations of arrests and searches are mere temporary entrances onto property, while the intentional destruction of property during a police raid has a resounding sense of permanence. The Fifth Amendment Takings Clause as a whole concerns itself with when the government’s actions go too far in interfering with a property owner’s rights of ownership.¹⁶⁴ A one-time invasion consistent with common law principles does not go too far in its restriction of a property owner’s bundle of sticks. But when the police intentionally damage property during a raid, the government’s actions go too far because it diminishes the owner’s bundle of sticks—something that does not happen with the one-time invasions.

The Fifth Circuit would likely disagree with this emphasis on “entry,” considering the court based its holding on the longstanding common law exception of necessity to destroy property in active emergencies.¹⁶⁵ But the common law necessity privilege is distinguishable from modern-day police raids. The necessity privilege is distinguishable here because its roots are based on cases that typically involved destroying one house to prevent a fire from spreading throughout the entire community.¹⁶⁶ Here, we do not have the same sprawling-unpredictable threat an uncontrollable fire poses—instead, we have a criminal surrounded by police with nowhere else to go. So while yes, this is an emergency with lives on the line, the same necessity concerns of preventing the spread of destruction throughout the community do not

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 2072 (“It is whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner’s ability to use his own property.” (citing *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Plan. Agency*, 535 U.S. 302, 321–23 (2002))).

¹⁶⁵ *Baker II*, 84 F.4th at 388.

¹⁶⁶ *See id.* at 385–87.

exist with the same level of force that warrant an exception to the Takings Clause when it comes to police raids like the ones in *Baker* and *Lech*.

Thus, the second exception does not apply to instances of planned police raid damages. Because the Court's language does not support including destruction as a traditional common law principle, and because the justification behind allowing these principles is not present with the intentional destruction of property, the *per se* rule for takings applies unless the third exception is triggered.

IV. NORMATIVE ARGUMENTS

This Note has paved a legal pathway for rejecting a categorical exception for intentional police raid damages from the Takings Clause.¹⁶⁷ But an argument must stand on two legs: a legal pathway forward and a basis in good public policy. This section first explains how the Court's longstanding *Armstrong* Principle supports finding a taking in these scenarios, and then looks at the reality of what homeowners face after these raids take place.

A. *The Armstrong Principle*

Fortunately, the Supreme Court has explained that the public policy driving the Fifth Amendment's Takings Clause revolves around fairness and justice. The Takings Clause bars the government from "forcing some people alone to bear public burdens [that] should be borne by the public as a whole."¹⁶⁸ This policy reflects the realities of our republic: actions for the public good come with a cost.

Of course, there are many examples of government actions coming at a cost. For government funding, income taxes are levied against all earners rather than one specific subset of workers, so no one group of people shoulders the cost of *our* government alone. For local public education, funds are collected from the property taxes of surrounding areas—even if the

¹⁶⁷While this Note has focused solely on the Takings Clause and *Cedar Point Nursery* framework, another possible avenue for homeowners like *Lech* and *Baker* to recover are Damagings Clauses found in twenty-seven state constitutions. These clauses prohibit the "damaging" or "injuring" of property for public use without just compensation. Maureen E. Brady, *The Damagings Clauses*, 104 VA L.R. 341, 344 (2018). There is no Damaging Clause in the federal constitution, which is why this Note does not discuss them in depth. For a further discussion on Damagings Clauses, please see Maureen E. Brady's *The Damagings Clauses*.

¹⁶⁸*Armstrong v. United States*, 364 U.S. 40, 49 (1960).

property owner does not have any children in public school.¹⁶⁹ And of course, the Social Security system is built on workers paying taxes into the program so benefits can be made to various classes of our society.¹⁷⁰

All these examples exemplify one governing principle: that to realize the government described in our Constitution's Preamble¹⁷¹, the necessary costs should be spread among we the people, rather than you the individual person. It would be bad public policy for income taxes to be levied only against one subset of workers. It would be bad public policy for the costs of educating our nation's future to be shouldered by parents alone when our democracy benefits from an educated society. We have even decided that it is bad public policy to leave the retired, disabled, and widowed without a source of income.¹⁷² Our public policy stands for the notion that individuals do not bear the costs of the government's actions alone. That same public policy drives the Takings Clause. So why should the intentional acts of police destruction be any different?

Additionally, the damages resulting from intentional police raids fall closer to explicit takings—which have always been understood to be takings—than the regulatory takings found in *Cedar Point Nursery*. Explicit takings are often random from the perspective of the homeowner, as the homeowner is not making an active choice to open herself up to government regulation. However, in *Cedar Point Nursery*, the nursery chose to employ migrant workers, which inherently subjected them to regulations.¹⁷³ Damages from intentional police raids are random in the same sense that homeowners are not making an active choice to open themselves up to the government's actions; in fact, in both *Lech* and *Baker*, their homes were commandeered by a fugitive.

¹⁶⁹Daphne Kenyon et al., *Public Schools and the Property Tax: A Comparison of Education Funding Models in Three U.S. States*, LINCOLN INST. OF LAND POL'Y (Apr. 12, 2022), <https://www.lincolninst.edu/publications/articles/2022-04-public-schools-property-tax-comparison-education-models> (stating that “[p]roperty taxation and school funding are closely linked” because half of public education revenue comes from local government sources, and of that local revenue “about 36 percent came from property taxes”).

¹⁷⁰SOC. SEC. ADMIN., PUB. NO. 05-10024, UNDERSTANDING THE BENEFITS 1–3 (Jan. 2023) (explaining how the current Social Security system works and who receives benefits).

¹⁷¹U.S. CONST. pmb. (stating that the Constitution was established to “form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty”).

¹⁷²SOC. SEC. ADMIN., PUB. NO. 05-10024, UNDERSTANDING THE BENEFITS 1–3 (Jan. 2023) (explaining how the current Social Security system works and who receives benefits).

¹⁷³141 S. Ct. 2063, 2069 (2021).

This distinction shows that these police raid damages embody the heart of the Takings Clause. The *Armstrong* Principle explains that the Takings Clause stands for the notion that it would be unfair for the costs of actions taken in the name of public use to be shouldered by a few unlucky individuals. With police raid damages, we have officers physically appropriating property through destruction to benefit the public. If anything, physical appropriations are closer to the core of the Takings Clause than the repeatedly recognized implicit takings found in *Cedar Point Nursery*. Thus, the only fair and just interpretation of the Takings Clause that reflects the *Armstrong* Principle is to fairly compensate the unlucky property owners who fall victim to these kinds of police raid damages.

B. Insurance Woes

Property owners who are dealt the unlucky hand of intentionally destroyed property via the police power find no recourse through their insurance policies. Both the Baker and Lech families were denied recovery under their homeowner's insurance policies.¹⁷⁴ Unfortunately for property owners like Baker and Lech, policy exclusions for government actions are typical in homeowner's insurance policies.¹⁷⁵ This reality leaves homeowners high-and-dry, scrambling to cover the costs of repairing damages caused by military-grade weaponry for actions meant to serve the public good. This is yet another reason why the *Armstrong* principle should apply in these cases—it is often the property owner's only hope at avoiding life-altering financial catastrophe.

One may argue, however, that shouldering these costs among everyone would lead to a noticeable increase in property taxes. This is a fair point. Especially considering the frequency, expecting the government to pay out these rare claims would require them to carry policies with high premiums. If the government has to pay high premiums, these costs would be passed

¹⁷⁴See *supra* notes 54 and 61 along with accompanying text; *Lech v. Jackson*, 791 F. App'x 711, 713 (10th Cir. 2019).

¹⁷⁵E.g., Pat Howard, *What Does Homeowners Insurance NOT Cover? 13 Common Policy Exclusions*, POLICYGENIUS (Jan. 31, 2023), <https://www.policygenius.com/homeowners-insurance/home-insurance-exclusions/> (“If a governmental or public authority damages or destroys your house or your belongings, homeowners insurance will not pay to replace it.”); Doug Sibor, *10 Kinds of Damage Home Insurance Won't Cover*, NERDWALLET (Aug. 5, 2022), <https://www.nerdwallet.com/article/insurance/home-insurance-exclusions> (“If the government . . . condemns your home and takes over the land, your policy won't cover the cost to repair or replace your property.”).

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down to taxpayers. In short, the increased taxes may not be worth it, making it bad public policy.

There is no denying that holding the government accountable for the intentional destruction of property under the police power would lead to an increase in taxes. But that alone does not justify dismissing the Takings Clause's protection. The increase in taxes would be necessary to account for the increasing police militarization running rampant throughout the country. The reality is that access to military-grade weapons has turned exercises of search and seizure into military-like operations, with warzone damages left behind. Leaving these unlucky homeowners without recourse through the Takings Clause is bad public policy and is inconsistent with the Framers' Intent expressed through the *Armstrong* principle. To conclude otherwise not only flouts the Framers' intent and existing jurisprudence, but also creates an untenable public policy that deviates from similar existing situations.

CONCLUSION

The Founding Fathers made clear that the original intent of the Takings Clause was to secure individual liberty by protecting individual property rights.¹⁷⁶ The core policy of the Takings Clause is that it is fundamentally unjust to burden an unlucky individual, whose property has been taken in the name of the public's use, with the sole responsibility of bearing the financial consequences.

Intentional police raid damages are *per se* takings because the intentional destruction of property is a physical appropriation since it severely affects an owner's bundle of sticks. None of *Cedar Point Nursery's* exceptions apply in these cases, further amplifying that these raids constitute takings under existing jurisprudence. By shouldering these damages, we ensure that the costs taken for the public's use are distributed equitably, alleviating the disproportionate burden on one individual.

In summary, to avoid forcing the unlucky and faultless from bearing the public's burdens alone, there is only one correct conclusion: allowing recourse for police raid damages under the Fifth Amendment's Takings Clause.

¹⁷⁶*Cedar Point Nursery*, 141 S. Ct. at 2071.