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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

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ABSTRACT

On June 29, 2020, the Supreme Court denied certiorari in *Lech v. Jackson*, a Tenth Circuit inverse condemnation case, which held that governmental entities are categorically exempt from paying just compensation when they destroy private property pursuant to their police powers. This denial of certiorari cements a highly controversial circuit court holding into our takings jurisprudence—the effects of which will be serious and far reaching. This article dissects the Tenth Circuit's opinion in *Lech* and explains how and why this holding should be revisited. If it is not, we risk losing the protection that the Fifth Amendment's Just Compensation Clause provides.

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> [In eminent domain] there is a natural equity which commends it to every one. It in no wise detracts from the power of the public to take whatever may be necessary for its uses; while, on the other hand, it prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.

— Justice David J. Brewer, *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893).

I. INTRODUCTION

The pages of history probably will not remember June 3, 2015, and if they do, it will not be for constitutional reasons.[1] But for Leo Lech, Alfonsia Lech, John Lech, and Anna Mumzhiyan (collectively, the "Lechs"), it is a day that they will never forget. That was the day that the police blew up their house and then refused to pay for it.[2]

Now, this event raises an interesting question. Police forces do not just destroy innocent peoples' homes, and if they did, then they would certainly pay for the damage. So why should we feel bad for the Lechs? But as fate would have it, that was not the case here. On the day in question, John, his girlfriend Anna, and Anna's nine-year old son were tenants in a Greenwood Village, Colorado home owned by John's parents, Leo and Alfonsia.[3] Self-described as the kind of place where people went to get away from "the inexorable advance of urban development,"[4] Greenwood Village (the "City")

1. Markian Hawryluk, *Houston surgeons perform first skull-scalp transplant*, HOUS. CHRON. (June 4, 2015, 10:31 AM), https://www.chron.com/news/health/article/Houston-surgeons-perform-first-skull-scalp-6306721.php#photo-8094965 (revealing that June 3, 2015 was the date that the first skull-scalp transplant was ever completed, a ground-breaking medical event).

2. Bobby Allyn, *Police Owe Nothing To Man Whose Home They Blew Up*, NPR (Oct. 30, 2019, 5:21 PM), https://www.npr.org/2019/10/30/774788611/police-owe-nothing-to-man-whose-home-they-blew-up-appeals-court-says.

3. *Id.*

4. *Greenwood Village is Born*, GREENWOOD VILL., https://greenwoodvillage.com/DocumentCenter/View/375/Historical—Greenwood-Village-Is-Born?bidId= (explaining, ironically, in town's own self-published history how Greenwood Village was incorporated in order to protect itself against unwanted condemnations).

was known to be a "safe" Denver suburb with a visible and responsible police presence.[5] So, it was quite the surprise when Anna came back from a quick trip to the grocery store to find her home surrounded by law enforcement.[6]

The commotion, Anna learned, was the response by the Greenwood Village Police, the neighboring Aurora Police Department, and the Arapahoe County Sheriff's Office (collectively, the "Police") to the Lechs' home alarm system.[7] While she was out, and with her son still in the house, Robert Seacat ("Seacat"), a suspect in a local Walmart shoplifting case, had broken in to the Lechs' home and barricaded himself inside.[8] Luckily, Seacat allowed Anna's son to leave unharmed.[9] But because of several reports that Seacat was armed and potentially dangerous,[10] the Police "deemed the incident a high-risk, barricade situation" and established a perimeter around the Lechs' home to plan his removal.[11]

Over the next nineteen hours, the Police used increasingly aggressive strategies to extract Seacat from the Lechs' home.[12] Specifically, they fired sixty-eight "40mm (cold) chemical munitions" and four "hot gas munitions" into the home,[13] used a BearCat armored vehicle to ram multiple holes into the home,[14] employed

5. *Greenwood Village Crime Survey*, NICHE, https://www.niche.com/places-to-live/greenwood-village-arapahoe-co/crime-safety (last visited Sept. 26, 2020).

6. 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/.

7. Aff. of Probable Cause for Arrest Warrant at 4, Colorado v. Robert Johnson Seacat, 15-CR-1557 (D. Ct. Arapahoe Cty. 2015).

8. Michael Roberts, *SWAT Team House Destruction Case Could Land at U.S. Supreme Court*, WESTWORD (Mar. 12, 2020), https://www.westword.com/content/printView/11662729.

9. *See* Flynn, *supra* note 6.

10. Complaint and Information at 10, Colorado v. Seacat, 15-CR-1557 (D. Ct. Arapahoe Cnty. 2015) (Seacat was alleged to have a "handgun" at the time).

11. Lech v. Jackson, 791 F. App'x 711, 713 (10th Cir. 2019) [hereinafter *Lech 2*].

12. *Id.*

13. Phil Hansen & Don Kester, *Greenwood Village Incident Review*, THE NAT'L TACTICAL OFFICER'S ASS'N 8 (2015), https://greenwoodvillage.com/DocumentCenter/View/14272/Incident-Review-3?bidId=.

14. *See* Aff. of Probable Cause for Arrest Warrant, *supra* note 7, at 17; LENCO ARMORED VEHICLES, Bearcat G3, https://www.lencoarmor.com/model/bearcat-g3-police-government (last visited June 16, 2020) (an image of the Bearcat vehicle the Police used on the Lechs' home).

explosives to blow open sightlines through the house's walls,[15] and detonated several chemical agents inside.[16] The end result being "significant damage to all of the upper floor walls, basement back yard doors and front door" as well as damage to every room in the house.[17] Moreover, since remnants of the Police's military extraction were not cleared after their mission was accomplished, the home itself posed a threat to the Lechs' health and safety.[18] For example, after the Lechs were allowed to return to their home to collect personal items, they discovered that "[c]hemical munitions [and] other projectiles were [still] stuck in the walls."[19] And the site had not been cleared of the drug paraphernalia Seacat brought into the home before barricading himself inside.[20] In fact, on more than one occasion, Leo Lech nearly pricked himself with "[a] hypodermic needle containing an unknown dark substance . . . [that] was later found . . . when the Plaintiffs were attempting to recover personal belongings that were not destroyed."[21]

In light of the serious damage that Lechs' home sustained from the Police's extraction methods,[22] it came as no surprise that the house was later pronounced "uninhabitable."[23] Indeed, after all was said and done, the building had more in common with swiss cheese than a home.[24] But what did come as a surprise was the City's position that it had "[no] obligation" to reimburse the Lechs for the

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15. *See* Aff. of Probable Cause for Arrest Warrant, *supra* note 7, at 17; Volusia Sheriff's Office, *VCSO SWAT/EOD Explosive Breach Training: 2/27/19*, YOUTUBE (Mar. 1, 2019), https://www.youtube.com/watch?v=pXkRrcJencA (for a video demonstration of how explosives are used by the Police to breach a residence).

16. *See* Aff. of Probable Cause for Arrest Warrant, *supra* note 7, at 17.

17. *Id.* at 11; Inside Edition, *Town Not Responsible for Damaging Man's Home During Standoff*, YOUTUBE (Nov. 4, 2019), https://www.youtube.com/watch?v=1eoL3LAu4SI (for images of the Lechs' home after the Police employed their extraction protocols).

18. First Amended Complaint, Lech v. Jackson, No. 1:16-cv-01956-PAB-MJW, Doc. 4 at 3 (D. Colo. Aug. 1, 2016) [hereinafter *Lech 1 Complaint*].

19. *Id.* at 3.

20. *Id.* at 4.

21. *Id.* at 3.

22. Hansen & Kester, *supra* note 13, at 2.

23. *Lech 2*, *supra* note 11, at 713.

24. *See* Ryan Grenoble, *Man Whose House Was Blown Up By Cops Not Entitled To Compensation, Court Rules*, HUFF POST (Oct. 31, 2019, 4:48 PM), https://www.huffpost.com/entry/leo-lech-home-compensation-swat_n_5dbb21b6e4b0bb1ea376f1ac (images of the aftermath at the Lech residence).

destruction caused by its police department.[25] As the City saw it, the "Greenwood Village Police Department actions . . . were taken to preserve life, and were at all times conducted in an appropriate manner and in accord with their recognized and lawful police powers."[26] Therefore, the City felt, it could not be held accountable for real or personal property lost during the actions it undertook.[27] Although the City was willing, as a courtesy, to offer "$5,000 to pay the Lechs' insurance deductible and provide for temporary housing,"[28] it "denied any liability for the incident and declined to provide further compensation."[29]

Literally homeless and lacking the funds necessary to repair the damage done, the Lechs filed suit against the City and the individual officers involved in destroying their home in the District Court for Arapahoe County Colorado to obtain just compensation.[30] In for a penny, in for a pound, the Lechs asserted several claims in their original complaint: "(1) taking without just compensation in violation of the U.S. and Colorado constitutions; (2) denial of plaintiffs' due process rights under the U.S. and Colorado constitutions; (3) trespass; (4) negligence; (5) negligent infliction of emotional distress; and (6) intentional infliction of emotional distress."[31] Although varied, each of these claims revolved around the same themes—the City should not be able to avoid responsibility for destroying the Lechs' home by mere virtue of being a government entity,[32] and the Lechs should not be required to pay out-of-pocket to return their lives back to normal.[33]

On its face, it is difficult not to sympathize with the Lechs' arguments. As they pled in their complaint, the Lechs "suffered economic damages . . . [and] severe emotional damage" resulting from

25. *Greenwood Village Response to U.S. Court of Appeals, 10th Circuit – Leo Lech Case*, GREENWOOD VILL. (Oct. 30, 2019), https://greenwoodvillage.com/DocumentCenter/View/19290/Media-Release—City-Response-to-Leo-Lech-Ruling-Final.

26. *Id.*

27. *Id.*

28. *Id.* Additionally, the City argued, the Lechs were not left with nothing. In fact, the Lechs received "approximately $345,000 following this critical incident, which [they] apparently used to build a much larger and more expensive home." *Id.*

29. Order on Motion for Summary Judgment, Lech v. Jackson, No. 16-cv-01956-PAB-MJW Doc. 115, at 6 (D. Colo. Jan. 8, 2018) [hereinafter *Lech 1 Order*].

30. *See generally Lech 1 Complaint*, *supra* note 18, at 6.

31. *Lech 1 Order*, *supra* note 29, at 7.

32. *Lech 1 Complaint*, *supra* note 18, at 6.

33. *Id.*

the City's actions.[34] The consequences of these damages have been far reaching. The Lechs lost their home, their jobs, their friends, and even their dogs[35]—not to mention a priceless family heirloom.[36] All of which, no party disputes, was done for the public's benefit.[37] So why then, the Lechs' suggested, should they be forced to manage this burden alone with no compensation from the City?[38] And why should they be singled out to carry a civic duty that was greater, and different, than that of their neighbors?

Ironically for the Lechs, "our forefathers long ago envisioned that this . . . may happen."[39] That at some point "an unlucky few would need to sacrifice their property rights for the benefit of all."[40] And their solution was clear: if the government finds itself in the uncomfortable situation of needing to take "private property" for a "public use," it has a duty to provide those unlucky landowners with "just compensation" for the property taken.[41] Indeed, doing so achieves two constitutional promises. First, it guarantees that "some people alone [will not have] to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[42] And second, it ensures "the security of Property, which Alexander Hamilton described to the Philadelphia Convention as one of the great objects of Government."[43] Moreover, and perhaps more importantly, it preserves the "natural equity" between governmental entities and their residents.[44] By providing just compensation in situations like these, the public still gets to take whatever property it may need. While, on the other hand, we ensure that no one

34. *Id.*

35. *Id.* at 4–5 ("The Lech Home was completely uninhabitable . . . ").

36. *Id.* at 5 ("A ring and family heirloom that survived through WWII Italy was never recovered from the Lech Home.").

37. *Lech 2*, *supra* note 11, at 717.

38. *See generally Lech 1 Complaint*, *supra* note 18.

39. Emilio R. Longoria, *The Case for the Rodeo: An Analysis of the Houston Livestock Show and Rodeo's Inverse Condemnation Case Against the City of Houston*, 52 ST. MARY'S L. J. (forthcoming Jan. 2021).

40. *Id.*

41. U.S. CONST. amend. V (". . . nor shall private property be taken for public use, without just compensation."); *see also* TEX. CONST. art. I, § 17 ("No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made.").

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

43. Kelo v. City of New London, 545 U.S. 469, 496 (2005) (O'Connor, J., dissenting).

44. Monongahela Nav. Co. v. United States, 148 U.S. 312, 325 (1893).

individual is forced to provide something more or different from that taken from the other members of the public.[45]

Unfortunately, the courts did not feel the same way. After removal to federal court,[46] Judge Phillip A. Brimmer of the U.S. District Court of Colorado entered summary judgment in favor of the City and its officers on the Lechs' federal inverse condemnation claim.[47] In coming to his decision, Judge Brimmer "distinguished between the state's eminent-domain authority, which permits the taking of private property for public use, and the state's police power, which allows [it] to regulate private property for the protection of public health, safety, and welfare."[48] "[A]lthough a state may trigger[] the requirement of just compensation by exercising the former," the District Court held, "a state's exercise of the latter does not constitute a taking and is therefore noncompensable."[49] Since the Police were merely enforcing state criminal law when they extracted Seacat from the Lechs' home—and "the state's police power encompasses the enforcement of a state's criminal laws"—the Police's actions did not sound in eminent domain.[50] Accordingly, the District Court dismissed the Lechs' federal inverse condemnation.[51]

45. *Id.*

46. *Lech 1 Order*, *supra* note 29, at 7.

47. *Id.* at 29. After dismissing the Lechs' inverse condemnation claim, the Court also dismissed both the procedural due process claim and substantive due process claim. Having dismissed all of the Lechs' federal claims at that point, the Court denied an exercise supplemental jurisdiction over the Lechs' remaining state law claims; *see also* Agins v. Tiburon, 447 U.S. 255, 258 n.2 (1980) ("Inverse condemnation should be distinguished from eminent domain. Eminent domain refers to a legal proceeding in which a government asserts its authority to condemn property. Inverse condemnation is a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted.") (internal citations omitted). However, a party found culpable of inverse condemnation can be correctly described as having exercised eminent domain.

48. *Lech 2*, *supra* note 11, at 713–14 (internal quotations omitted).

49. *Id.* at 714.

50. *Id.*

51. *Lech 1 Order*, *supra* note 29, at 31–32.

Floored by the Court's reasoning,[52] the Lechs appealed the District Court order as to their inverse condemnation claim.[53] In a relatively short, unanimous opinion authored by Judge Nancy L. Moritz, the Tenth Circuit affirmed the District Court's reasoning.[54] "[D]espite the considerable appeal of [the Lechs' position] as a matter of policy," Judge Moritz wrote, the Lechs "failed to state a claim for compensation under the Fifth Amendment," because "the government's exercise of authority was pursuant to some power other than eminent domain."[55] "[W]hen the state acts to preserve the safety of the public," she reasoned, "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."[56] "The innocence of the property owner does not factor into the determination."[57] "[A]s unfair as it may seem," Judge Moritz wrote, "the Takings Clause simply does not entitle all aggrieved owners to recompense."[58]

Simply put, neither the Constitution nor its historical interpretation support the Tenth Circuit's decision. This article points out just that, in the hopes of dissuading other courts and practitioners from following in *Lech's* footsteps. Contrary to the Tenth Circuit's holding, the Takings Clause was enacted by our forefathers to ensure that families like the Lechs are compensated when their property is haplessly conscripted.[59] The Takings Clause of the

52. *See* CBS Denver, *Greenwood Village Doesn't Owe Leo Lech Anything, Federal Court Ruling Says*, YOUTUBE (Oct. 30, 2019), https://www.youtube.com/ watch?v=l_2yobk4jVQ. Later, in an interview with CBS Denver, Leo Lech would go on to say that this process taught him that he "has no rights." *Id. See also* Amanda Pampuro, *Couple Argues Eminent Domain for Home Destroyed in Police Standoff*, COURTHOUSE NEWS SERV. (Nov. 13, 2018), https://www.courthousenews.com/couple-argues-eminent-domain-for-home-destroyed-in-police-standoff. After the District Court's decision Rachel Maxam, the Lechs' attorney gave an interview where she explained that the decision was "an unseen expansion of police powers in that property can be destroyed in the name of enforcing the law." *Id.*

53. *Lech 2*, *supra* note 11, at 714. "The Lechs also alleged various other claims. But they do not challenge the district court's resolution of those claims on appeal. Accordingly, we discuss the Lechs' remaining claims only to the extent they are relevant to our Takings Clause analysis." *Id.* at 714 n.5.

54. *Id.* at 719.

55. *Id.*

56. *Id.* at 717.

57. *Id.* at 719.

58. *Id.* at 717.

59. Richard Epstein & Eduardo Peñalver, *The Fifth Amendment Takings Clause*, NAT'L CONST. CTR., https://constitutioncenter.org/interacinte-

Constitution does not require the Lechs to shoulder any other "unfair" result.[60] Indeed, by saying as much, the Tenth Circuit seriously jeopardizes the constitutional right to just compensation. As of the publication of this article, in fact, at least six courts have already cited the Tenth Circuit's opinion in their denial of inverse condemnation claims made after property was destroyed pursuant to a governmental entity's use of its police powers.[61] Who knows how many more will do the same in the coming months and years in light of the Supreme Court's decision to deny certiorari in this case.[62]

Hardly trivial, the fallout from this decision could have serious consequences. Not just because any one could be in the Lechs' shoes, but because such a decision erodes the constitutional protections for property on which our society depends. As the Supreme Court noted in *Horne v. Department of Agriculture*, the Takings Clause was created in "response to the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practiced during the revolutionary war, without any compensation whatever."[63] Because, even to early Americans, the thought that the government may be able to commandeer property without just compensation caused so much fear and concern.[64] For the Tenth Circuit to suggest that a government

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constitution/interpretation/amendmeam-v/clauses/634 (last visited Sept. 20, 2020) (a primer on the Fifth Amendment).

60. *Lech 2*, *supra* note 11, at 717.

61. *See* Emesowum v. Arlington Cty., Civil Action No. 1:20-cv-113, 2020 U.S. Dist. LEXIS 99701, n. 9 (E. D. Va. June 5, 2020) (citing *Lech 2*, *supra* note 11, for the proposition that "damage to private property in the course of law enforcement's exercise of its police power, [cannot] amount to a government taking under the Fifth Amendment."); *see also* Yawn v. Dorchester Cty., 446 F. Supp. 3d 41, 45–46 (D.S.C. 2020) (same); *see also* Britton v. Keller, Case No. 1:19-cv-01113 KWR/JHR, 2020 U.S. Dist. LEXIS 68413, at *7–8 (D. New. Mex. Apr. 16, 2020) (same); Almond v. Randolph Cty., Case No. 3:19-cv-175-RAH, 2020 U.S. Dist. LEXIS 99539, at *28–30 (Md. D. Al. June 8, 2020) (same); Ostipow v. Federspiel, No. 18-2448, 2020 U.S. App. LEXIS 26242, at *11 (6th Cir. Aug. 18, 2020) (same); TJM 64, Inc. v. Harris, No. 2:20-cv-02498-JPM-tmp, 2020 U.S. Dist. LEXIS 134037 (W.D. Tenn. July 29, 2020) (same).

62. Lech v. Jackson, No. 19-1123, 2020 U.S. LEXIS 3417, 2020 WL 3492667, at *1 (June 29, 2020) ("Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit denied.").

63. Horne v. Dep't of Agric., 576 U.S. 351, 359 (2015) (internal citation omitted).

64. *Id.* ("[E]arly Americans bridled at appropriations of their personal property during the Revolutionary War, at the hands of both sides. John Jay, for example, complained to the New York Legislature about military impressment by the Continental Army of Horses, Teems, and Carriages, and voiced his fear that such action by the little Officers of the Quartermasters Department might extend to Blankets, Shoes, and many other articles.") (internal citations omitted).

is categorically exempted from the Just Compensation Clause when it acts pursuant to its police powers could not be further from the truth. The Supreme Court has long allowed for the recovery of just compensation when property has been impaired pursuant to a governmental entity's use of its police powers.[65] And not affirming this now impermissibly allows a citizen to "bear" more than "his [fair] quota of [a] loss."[66]

What is more terrifying: the fact that the government would have to pay a just amount for the property it destroys pursuant to its police powers, or that it would be exempt from paying a dime, regardless of the motivations behind its actions? To what degree can we really trust our officers not to abuse a blanket exemption from paying just compensation? And who is in the best position to foot the bill for the kind of damage the Lechs experienced? These are all questions this article will attempt to answer.

II. LECH'S FAULTY PREMISE

In coming to its holding that governmental entities are categorically exempt from paying just compensation when they destroy private property pursuant to their police powers, the Tenth Circuit cited several Supreme Court cases, which actually support the opposite conclusion.[67] An avoidable mistake, the Tenth Circuit's misstep could have been prevented had it adhered to Justice Ginsburg's first rule of interpreting case law, "*Read on.*"[68] Considering the faulty premise on which the Tenth Circuit relied, any meaningful discussion about how, and why, the Tenth Circuit came to the wrong result in the Lech's dispute must start with re-contextualizing these foundational cases.[69]

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65. *See, e.g.*, United States v. Causby, 328 U.S. 256, 261-68 (1946) (finding that the Federal Government took an aerial easement from a nearby chicken farm in its use of an army airfield base, regardless of the fact that the Federal Government had the right to operate said base pursuant to its police powers).

66. *Id.*

67. *See* Mugler v. Kansas, 123 U.S. 623, 668–69 (1887); *see also* Bennis v. Michigan, 516 U.S. 442, 443–44 (1996); *see also* Miller v. Schoene, 276 U.S. 272, 277 (1928).

68. Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 36 (2012) (emphasis added); Loc. Union 1261, Dist. 22, United Mine Workers v. Fed. Mine Safety & Health Review Comm'n, 917 F.2d 42, 45 (D.C. Cir. 1990) ("If the first rule of statutory construction is Read, the second rule is Read On!") (internal quotations omitted) (Ginsburg, J.).

69. For editorial reasons, this article has limited its review of the case law cited in the *Lech* opinion to the Supreme Court cases cited. However, the *Lech* Court did cite several circuit court opinions as well.

A. *Mugler v. Kansas*

The Tenth Circuit's opinion begins by citing *Mugler v. Kansas*, a nineteenth-century Supreme Court case, which confronted whether the State of Kansas effected a taking by passing prohibition regulations that prohibited a brewery from continuing its operations.[70] That case, the Tenth Circuit argued, was the first time the Supreme Court acknowledged a "hard line between those actions the government performs pursuant to its power of eminent domain and those it performs pursuant to its police power . . . in the context of regulatory takings."[71] Since such a distinction exists in regulatory takings, the Tenth Circuit reasoned, the same must be true for physical takings cases.[72] Thus, the Tenth Circuit extended the Supreme Court's purported holding in *Mugler* to physical takings cases, rather than treating them differently than their regulatory counterparts.[73] This formed the flawed basis of the Tenth Circuit's holding that governmental entities are categorically exempt from paying just compensation when they physically destroy private property pursuant to their police powers, as opposed to their powers of eminent domain.[74]

First, and perhaps most importantly, the Tenth Circuit fundamentally misunderstood the *Mugler* holding. *Mugler* did not recognize a compensable distinction between "those actions the government performs pursuant to its power of eminent domain and those it performs pursuant to its police power . . . in the context of regulatory takings."[75] Rather, it denied a regulatory takings claim by comparing it against a more intrusive example of governmental interference with private property rights—a physical intrusion made pursuant to a state's use of its police powers.[76] This is wholly

70. *Mugler*, 123 U.S. at 653–54 (this case was also combined with a related challenge to Kansas' criminal statutes, which prohibited the sale and manufacturing of liquor; however, the discussion about that aspect of the case is not relevant to this article).

71. *Lech 2*, *supra* note 11, at 715 (quoting *Mugler*, 123 U.S. at 668–69).

72. *Id.* (under eminent domain "property may not be taken for public use without compensation," however, states are not "burdened with the condition that [they] must compensate [affected] individual owners for pecuniary losses they may sustain" due to the use of their police powers).

73. *Id.*

74. *Id.* at 719.

75. *Id.* at 715.

76. *See, e.g.*, *Mugler*, 123 U.S. at 667–68 (comparing the Petitioner's regulatory takings case against the *Pumpelly v. Green Bay Co.* case, which involved a direct physical intrusion to

different from suggesting, as the Tenth Circuit did, that *Mugler* categorically prohibited just compensation for regulatory takings claims that arise out of a state's use of its police powers.[77] As a result, *Mugler* cannot rightly be described as supporting the proposition ascribed to it by the Tenth Circuit that regulatory takings claims arising out of a state's use of its police powers are not compensable, while regulatory takings claims arising out of eminent domain are compensable.

Although such a prohibition against compensation for regulatory takings claims arising out of a state's use of its police powers may have existed at one point, that is no longer the case. As Justice Scalia explained in *Lucas v. S.C. Coastal Counsel*, at the time *Mugler* was decided, "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."[78] However, the Supreme Court has long since abandoned this narrow idea of what qualifies as a compensable taking.[79] Indeed, it was Justice Holmes in *Pennsylvania Coal Company v. Mahon* who first recognized that a landowner could be compensated for a regulatory takings claim that arose out of a state's use of its police power.[80] "[I]f the protection against physical appropriations of private property was to be meaningfully enforced," Holmes realized, "the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits"[81]—namely the Fifth Amendment. If it were not, "the uses of private property were subject to unbridled, uncompensated qualification under the police power, the natural tendency of human nature would be to extend the qualification more and more until at

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build a dam, and ultimately denying the Petitioner's case because it did not implicate as severe an intrusion with private property rights as *Pumpelly*).

77. *See Lech 2*, *supra* note 11, at 715.

78. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 (1992).

79. *See, e.g.*, Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) ("The general rule at least is, that while property may be regulated" pursuant to a state's police powers "to a certain extent, if regulation goes too far it will be recognized as a taking."); *see also* Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 325–327 (2002) (holding that the Court has a duty to compensate landowners for police power regulations that go "too far" in restricting a landowner's use of the property, "generally eschew[ing] any set formula" to determine what "too far" means).

80. *Lucas*, 505 U.S. at 1014 (internal citation omitted).

81. *Id.*

last private property disappeared."[82] Thus, neither the Supreme Court nor *Mugler* have ever suggested that there is a compensable distinction between eminent domain claims and police powers claims in the regulatory context.

Even accepting, *arguendo*, that such a distinction between a state's eminent domain powers and police powers exists in the regulatory context, the Tenth Circuit incorrectly proposed that the same should hold true for physical takings like the Lechs' case.[83] Indeed, nothing could be further from the truth. As the Supreme Court explained in *Tahoe-Sierra Pres. Council v. Tahoe Regional Planning Agency*,

> [the] longstanding distinction[s] between [physical] acquisitions of property for public use, on the one hand, and [police power] regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a regulatory taking, and vice versa.[84]

That is because "[l]and-use regulations are ubiquitous and most of them impact property values in some tangential way—often in completely unanticipated ways."[85] Whereas, "[b]y contrast, physical appropriations are relatively rare, easily identified, and usually represent a greater affront to individual property rights."[86]

The inapplicability of the *Mugler* holding to the Lech's physical takings case is further confirmed by a review of the Supreme Court cases cited in the opinion. In deciding *Mugler*, for example, the Supreme Court cited its opinion in *Pumpelly v. Green Bay Co.* with approval.[87] There, the Supreme Court had to decide whether a government's unintentional flooding of private land to build a dam effected a taking.[88] Although the petitioner's land was physically inundated with water, the Government argued that there was no taking within the Constitution's meaning because the resulting damage was merely consequence of necessary improvements to

82. *Id.* (internal citations omitted).

83. *Lech 2*, *supra* note 11, at 715.

84. *Tahoe-Sierra Pres. Council*, 535 U.S. at 323 (internal quotations omitted).

85. *Id.* at 324.

86. *Id.*

87. Mugler v. Kansas, 123 U.S. 623, 667–68 (1887).

88. *Id.*; *see also* Pumpelly v. Green Bay Co., 80 U.S. 166, 177 (1871).

local waterway infrastructure, which the "government had a right to" carry out pursuant to its police powers.[89] In deciding in favor of the landowner, the *Pumpelly* Court explained why, contrary to the Government's arguments, even unintentional physical appropriations that resulted from a state's proper use of its police powers still effected a taking:

> It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provisions into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.[90]

Sidestepped by the Tenth Circuit entirely, the *Mugler* Court cited *Pumpelly* precisely because it believed that regulatory takings and physical takings should be treated differently.[91] As the *Mugler* court explained, there is a staunch difference between governmental acts that result in the "physical invasion of the real estate of the private owner, and a practical ouster of his possession," and those that merely prohibit a "use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community" while not "directly encroaching upon

89. *Mugler*, 123 U.S. at 667; *see also Lech 2*, *supra* note 11, at 714 (police powers are the state's general ability "to regulate private property for the protection of public health, safety, and welfare.").

90. *Pumpelly*, 80 U.S. at 177.

91. *Mugler*, 123 U.S. at 667–68.

private property."[92] Namely, the directness and degree with which one's right to quietly enjoy property is interfered.

Governmental entites, the *Mugler* court continued, have broad authority to prohibit "such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public."[93] And when they do so, they should not be "burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community."[94] However, this "is very different from taking property for public use, or from depriving a person of his property without due process of law."[95] In that circumstance, just compensation must be provided.[96]

This makes sense. In the regulatory context, enactment of a rule or regulation by a state pursuant to its police powers is likely to have "tangential," "unanticipated," and unquantifiable effects on the private use of property.[97] It is no surprise therefore that courts are wary of compensating landowners for such diminished uses and that they have installed a measured ad hoc inquiry to determine when doing so is appropriate.[98] Moreover, these unquantifiable effects can often be justified by pointing to marginal returns to the public fisc or the abatement of a nuisance.[99] However, that is not the case in the context of physical takings. Like in *Pumpelly*, physical invasions of property made pursuant to a state's police powers are "relatively rare, easily identified, and usually represent a greater affront to individual property rights,"[100] in large part because such invasions often result in "unoffending property [being] taken away from an innocent owner" with few easily identifiable benefits in

92. *Id.* at 668–69.

93. *Id.* at 669.

94. *Id.*

95. *Id.*

96. *See id.*

97. Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 324 (2002).

98. *Id.*; *see also* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (for the Supreme Court factors that must be analyzed to determine whether a regulation created pursuant to a state's police powers effects a taking: (1) "[t]he economic impact of the regulation on the claimant," (2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) "the character of the governmental action.").

99. *Mugler*, 123 U.S. at 669.

100. *Tahoe-Sierra Pres. Council*, 535 U.S. at 324.

return.[101] For that reason, they represent a greater affront to "the security of Property," which Alexander Hamilton described "as one of the great objects of Government."[102] For the Tenth Circuit to hold otherwise in the *Lech* opinion allows states to "pervert the constitutional provisions" meant to protect citizens from government tyranny, into mechanisms that justify "the invasion of private right under the pretext of the public good."[103]

B. Bennis v. Michigan

Regardless of the adverse precedent in *Mugler*, the Tenth Circuit relied on two different Supreme Court cases[104] for the proposition that "although the Supreme Court has never expressly invoked [a] distinction" between eminent domain cases and police powers cases, it has "implicitly indicated [that such a] distinction applies in [the] context" of "physical taking[s]."[105] However, like with *Mugler*, the Tenth Circuit mischaracterized these Supreme Court holdings. Hardly trivial, this misstep contributed to the Tenth Circuit's flawed opinion in the Lechs' case. Therefore, these cases must also be re-contextualized in order to unwind the Tenth Circuit's opinion. Since the Tenth Circuit discussed *Bennis v. Michigan* first, [106] this article will also discuss the Tenth Circuit's interpretation of that case first as well.

In *Bennis*, the Supreme Court was charged with deciding whether the State of Michigan effected a taking when it forfeited an automobile that was used in the course of committing a crime without first providing an offset for an interest held by an innocent joint owner.[107] By doing this, the petitioner argued, the State of Michigan deprived her of "her interest in the forfeited car without due

101. *Mugler*, 123 U.S. at 669.

102. Kelo v. City of New London, 545 U.S. 469, 496 (2005) (O'Connor, J., dissenting).

103. Pumpelly v. Green Bay Co., 80 U.S. 166, 178 (1872).

104. Bennis v. Michigan, 516 U.S. 442, 443–44 (1996); Miller v. Schoene, 276 U.S. 272, 277 (1928).

105. *Lech 2*, *supra* note 11, at 716. The Tenth Circuit also relied on three Circuit Court opinions (AmeriSource Corp. v. United States, 525 F.3d 1149, 1150, 1153–54 (Fed. Cir. 2008); Zitter v. Petruccelli, 744 F. App'x 90, 93, 96 (3d Cir. 2018); Johnson v. Manitowoc Cty., 635 F.3d 331, 333–34, 336 (7th Cir. 2011)) and one Federal Court of Claims opinion (*See* Bachmann v. United States, 134 Fed. Cl. 694, 696 (Fed. Cl. 2017)) for this same proposition. *Id.* However, as these cases are not binding on all jurisdictions, this article will focus on the Supreme Court decisions on which these cases also rely.

106. *Bennis*, 516 U.S. at 442.

107. *Id.* at 443.

process, in violation of the Fourteenth Amendment," and it took "her interest for public use without compensation, in violation of the Fifth Amendment as incorporated by the Fourteenth Amendment."[108] Because it did so, the petitioner believed she was owed compensation in the amount of her one-half interest in the vehicle.[109]

In a 5-4 decision,[110] the Supreme Court decided in favor of the state on the petitioner's Fourteenth Amendment claim,[111] and as a consequence, the Court reasoned, that the state also had to win on the petitioner's Fifth Amendment claim.[112] "[I]f the forfeiture proceeding here in question did not violate the Fourteenth Amendment," Judge Rehnquist explained, then "the property in the automobile was transferred by virtue of that proceeding from petitioner to the State" and there was no taking.[113] This result was required by "a long and unbroken line of cases [which] hold[] that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use."[114] Therefore, the Court held, "[t]he government [could] 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."[115]

In total, the segment of the *Bennis* opinion relating to the Fifth Amendment is three sentences long.[116] More accurately described as dicta, these sections were not central to the Court's holding. Accordingly, they are not binding on any subsequent court.[117]

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108. *Id.* at 446.

109. *Id.* at 444–45. Oddly enough, the vehicle in question was "an 11-year-old Pontiac sedan recently purchased by John and Tina Bennis for $600." *Id.* So even if the Court assumed that the car had not depreciated a dime, Ms. Bennis' interest in the car was $300 at most.

110. *See id.* at 443 (Justice Rehnquist delivered the opinion of the Court, in which Justices O'Connor, Scalia, Ginsburg, and Ginsburg joined. Justice Stevens filed a dissenting opinion in which Justices Souter, Breyer, and Kennedy joined).

111. *See Bennis*, 516 U.S. at 450–52.

112. *Id.* at 452.

113. *Id.*

114. *Id.* at 446. Importantly for our purposes, the "long and unbroken line of cases," to which the *Bennis* Court referred in reaching this holding all involved confiscated property which was instrumental in completing the alleged crime. *See id.* at 446–48.

115. *Id.* at 442.

116. *See Bennis*, 516 U.S. at 452.

117. *See Obiter dictum*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/obiter_dictum (last visited Oct. 12, 2020) (noting that dictum is not legally binding).

For the Tenth Circuit to suggest that the *Bennis* opinion's dicta about the Fifth Amendment "implicitly" supports a compensable "distinction" between eminent domain cases and police powers cases in the context of "physical taking[s]" is an exaggeration of the Court's holding.[118] The reason dicta is not given the same respect as a case's holding is "obvious."[119] As Justice Marshall explained in *Cohens v. Virginia*, a case's holding is treated with reverence because "[t]he question actually before the Court is investigated with care, and considered in its full extent."[120] "Other principles which may serve to illustrate [a case's holding]," like dicta "are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."[121] For this reason, the Supreme Court frowns on inflating the importance of language attendant to a holding.[122]

Moreover, and perhaps more importantly, the Tenth Circuit's mischaracterization of the Supreme Court's Fifth Amendment dicta in *Bennis* is particularly egregious, because the *Bennis* opinion discusses the importance of not overstating the weight of the Court's dicta.[123] As Justice Rehnquist pointed out, the petitioner in *Bennis* cited language from *Calero-Toledo v. Pearson Yacht Leasing Co.* in her brief before the Court,[124] which she insinuated supported her position that her car should not have been forfeited without just compensation because she was "uninvolved . . . and unaware of the wrongful activity" the car was used for.[125] However, the Court corrected, this was merely *obiter dictum*.[126] "[I]t is to the holdings of our cases," Rehnquist reminded us, "rather than their dicta, that [the Court] must attend."[127] Therefore, it is especially frustrating to see the Tenth Circuit make the same mistake as the petitioner in *Bennis*.

Notwithstanding the Tenth Circuit's exaggeration of the dicta in *Bennis*, its opinion also misinterprets the *Bennis* holding.

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118. *Lech 2*, *supra* note 11, at 716.

119. Cohens v. Virginia, 19 U.S. 264, 399–400 (1821).

120. *Id.*

121. *Id.*

122. *Id.*

123. Bennis v. Michigan, 516 U.S. 440, 449–50 (1996).

124. *Id.* (citing Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689 (1974)).

125. *Id.*

126. *Id.*

127. *Id.* at 450 (citing Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 379 (1994)).

Specifically, the Tenth Circuit misunderstands the context in which the Supreme Court tolerated the confiscation of the petitioner's property without compensation. For example, the Tenth Circuit's opinion cherry-picked the language from *Bennis*, which most strongly supported its holding that governmental entities are exempt from paying just compensation when they destroy property pursuant to their police powers: "when [a] state acquires property 'under the exercise of governmental authority other than the power of eminent domain,' government is not 'required to compensate an owner for [that] property.'"[128] By selectively citing to the *Bennis* opinion in this way, the Tenth Circuit gives the impression that the Court has long held that there is a "distinction between the state's police power and the power of eminent domain in cases involving the government's direct physical interference with private property."[129] But in reality, nothing could be further from the truth.

Indeed, a quick dive into the cases cited by the *Bennis* Court for this soundbite proves that this is not the case. In explaining its holding in *Bennis*, for example, the Court relied heavily on three Supreme Court forfeiture cases from the nineteenth and early twentieth centuries:[130] *The Palmyra*,[131] *Dobbins's Distillery v. United States*,[132] and *Van Oster v. Kansas*.[133] In each of these cases, the Supreme Court tolerated the uncompensated forfeiture of personal property used in committing a crime.[134] However, the state allowed for the property in these cases to be forfeited without compensation for several very specific reasons: (1) the forfeited items presented a threat in and of themselves,[135] (2) the forfeited property was volitionally entrusted to the criminal perpetrators,[136] (3) forfeiting the property

128. *Lech 2*, *supra* note 11, at 716 (citing *Bennis*, 516 U.S. at 453–54).

129. *Id.* at 715.

130. *Bennis*, 516 U.S. at 446–48.

131. *Id.* at 446–47 (citing The Palmyra, 25 U.S. 1 (1827)).

132. *Id.* (citing Dobbins's Distillery v. United States, 96 U.S. 395 (1877)).

133. *Id.* (citing Van Oster v. Kansas, 272 U.S. 465 (1926)).

134. *See The Palmyra*, 25 U.S. at 17–18; *see also Dobbins's Distillery*, 96 U.S. at 401–02; *see also Van Oster*, 272 U.S. at 468.

135. *The Palmyra*, 25 U.S. at 8 ("The brig Palmyra is an armed vessel, asserting herself to be a privateer, and acting under a commission of the King of Spain, issued by his authorized officer at the Island of Porto Rico."); *see also Dobbins's Distillery*, 96 U.S. at 396 ("[T]he real and personal property" seized was a distillery and the items necessary to run it, which was illegal at the time); *see also Van Oster*, 272 U.S. at 465–66 (the property seized was a car that was used to smuggle illegal contraband).

136. *The Palmyra*, 25 U.S. at 13 (the vessel was the property of the alleged pirates); *see also Dobbins's Distillery*, 96 U.S. at 396 (the real and personal property used to run the still

achieved "punitive and remedial" goals,[137] and (4) the property in question was vital evidence to the criminal prosecution of the crimes in question.[138] Uncompensated forfeiture in those situations was therefore the fruit of a careful ad hoc inquiry into conflicting constitutional goals: the security of property and criminal deterrence. Not, as the Tenth Circuit suggested in *Lech*, because there was a bright-line rule against compensation when property is taken pursuant to the police power.[139] Justice Rehnquist suggested that had the Petitioner in *Bennis* been able to prove that she was "'in no way . . . involved in the criminal enterprise carried on by [the] lessee' and 'had no knowledge that its property was being used in connection with or in violation of [state law],'" the *Bennis* case may have turned out differently.[140] Unfortunately, the petitioner in *Bennis* failed to make such a showing.[141] However, that does not mean that the same holds true for the Lechs here. Indeed, unlike in *Bennis*, it is beyond dispute that the Lechs were in "no way . . . involved in the criminal enterprise carried on by [Seacat] and [that they] had no knowledge that [their] property was being used in connection with or in violation of [state law]."[142]

Moreover, in addition to misunderstanding the reasoning behind the *Bennis* opinion, the Tenth Circuit ignored self-imposed limits on the case's holding.[143] Specifically, the Tenth Circuit ignored *Bennis'* explicit requirement that any uncompensated forfeiture be proportional to the health, safety, or welfare goals purportedly being achieved by a state.[144] For example, in rejecting concerns

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belonged to the alleged criminals); *see also Van Oster*, 272 U.S. at 465–66 (the owner of the vehicle entrusted it to an associate who used it to illegally transport liquor).

137. *The Palmyra*, 25 U.S. at 15 (forfeiting the vessel served as punishment to the pirates); *see also Dobbins's Distillery*, 96 U.S. at 401–03 (forfeiting the still and its appurtenances served as punishment to the distillers); *see also Van Oster*, 272 U.S. at 465–66 (forfeiting the vehicle served as punishment to the alleged criminal).

138. *See The Palmyra*, 25 U.S. at 8 (the ship was evidence of privateering); *see also Dobbins's Distillery*, 96 U.S. at 396 (the site and tools used to distill were evidence of the crime of illegal production of alcohol); *see also Van Oster*, 272 U.S. at 465-466 (the vehicle was evidence of the crime of illegal transportation of alcohol).

139. *Lech 2*, *supra* note 11, at 716–17, 719.

140. Bennis v. Michigan, 516 U.S. 440, 449–50 (1996) (citing Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 668 (1974)).

141. *Id.* ("Petitioner has made no showing beyond that here.").

142. *Id.* (citing *Calero-Toledo*, 416 U.S. at 668); *see also Lech 2*, *supra* note 11 at 712–14 (the Lechs were victims of Seacat's crime and in fact helped the police apprehend Seacat).

143. *See, e.g.*, *Bennis*, 516 U.S. at 450–51.

144. *See id.*

by the dissent that the majority opinion may "justify the confiscation of an ocean liner just because one of its passengers sinned while on board," Judge Rehnquist explained that such a disproportionate forfeiture would not be justifiable under existing case law.[145] This is particularly important because this proportionality requirement undercuts the Tenth Circuit's holding in *Lech* that governmental entities are categorically exempt from paying just compensation when they destroy property pursuant to their police powers—whatever the scale of destruction.[146] If that were the case, why then would the Court require some measure of proportionality in state forfeitures in *Bennis*? By the Tenth Circuit's reasoning, governmental entities should be insulated from paying just compensation once they confiscate property pursuant to their police powers, no questions asked. As that is obviously not the case, it is difficult to understand how the Tenth Circuit believed that the *Bennis* opinion supported such a rule.

C. Miller v. Schoene

Next, the Tenth Circuit cited *Miller v. Schoene* in support of its position that the Supreme Court has "implicitly indicated" that there is a compensable "distinction" between property taken pursuant to a state's police powers and that taken pursuant to its eminent domain powers in the context of "physical taking[s]."[147] However, as with *Bennis*, the Tenth Circuit misstated this holding.[148] Not only does *Miller* not support such a distinction between eminent domain and police powers cases, but in fact, it actually supports the idea of providing compensation to landowners for the costs attendant to the execution of a state's police powers.[149]

In *Miller*, for example, the question before the Court was whether a Virginia statute that empowered the state's entomologist to order the destruction of certain trees in order to prevent the spread of a plant disease was constitutional under the Fourteenth

145. *Id.* at 450. ("None of our cases have held that an ocean liner may be confiscated because of the activities of one passenger.").

146. *Lech 2*, *supra* note 11, at 717.

147. *Id.* at 714–15.

148. Miller v. Schoene, 276 U.S. 272, 277, 280–81 (1928) (finding that removal of privately-owned trees was allowed pursuant to state police power, and tree owners were entitled to $100 in compensation for removal).

149. *Id.*

Amendment's Due Process Clause.[150] In ruling that it was, the Court explained that state legislatures have broad authority to eliminate public nuisances that threaten "the preservation of [a] class of property" which, "in [their] judgment" is "of greater value to the public."[151] However, this power to choose winners and losers does not come without potential costs. In so holding, for instance, the *Miller* Court affirmed a payment of one hundred dollars to the landowner to cover the cost of the tree removal.[152] And the Court took careful time to explain that such police power authority was not unbounded. Indeed, as Judge Stone put it, had certain characteristics of the Virginia cedar rust statute been different, such as vesting the decision of whether to destroy cedar trees with "private citizens" rather than the state entomologist,[153] or had there not been a legislative investigation and determination to value a community concern "over the property interest of the individual," the case may have turned out differently.[154]

There are several key differences between the *Miller* case and the Lechs' case, making it inappropriate to apply *Miller* here. First and foremost, *Miller* is not a takings case.[155] Indeed, the *Miller* opinion goes to great lengths to explain that it is interpreting the Due Process Clause of the Fourteenth Amendment, rather than the Fifth Amendment.[156] Therefore, it strains credulity to understand how the Tenth Circuit came to the conclusion that that *Miller* spoke so forcefully about the limits of the Just Compensation Clause, when in reality, it did nothing of the sort.[157]

Second, and perhaps most importantly, *Miller* "implicitly indicated"[158] that landowners should be compensated for the costs attendant to the destruction of their private property.[159] Specifically, the *Miller* Court did this by affirming a one hundred dollar payment for tree removal to the landowners in the case, even though there

150. *Id.* at 277.

151. *Id.* at 277–79.

152. *Id.* at 277.

153. *See id.* at 281.

154. *See Miller*, 276 U.S. at 279–81.

155. *Id.* at 277. ("[P]laintiffs in error challenged the constitutionality of the statute under the due process clause of the Fourteenth Amendment and the case is properly here on writ of error.").

156. *See id.*

157. *See id.*

158. *Lech 2*, *supra* note 11, at 716.

159. *Miller*, 276 U.S. at 277.

was no dispute that neither the lower court's decision nor the "statute as interpreted allow[ed] [for] compensation" to the landowners.[160] How then can the Tenth Circuit hold that compensation should be withheld from the Lechs here in the face of "unfair" circumstances thrown upon them?[161]

Third, the *Miller* opinion supported limits to a state's right to extinguish private property rights without paying just compensation, not, as the Tenth Circuit suggests, a categorical exception to just compensation when a state acts pursuant to its police powers.[162] Take, for example, the cases *Miller* cited to in reaching its decision.[163] Each are regulatory cases that acknowledge limits on the state's police power to regulate the use of property without just compensation.[164] Eventually, the Supreme Court explained in *Mahon*, six years before the *Miller* opinion, that the government can go "too far" in regulating the private uses of property, at which point, it effects a taking.[165]

And lastly, it was crucial to the *Miller* Court's holding that the decision to destroy cedars was the outcome of a thorough and well-reasoned debate about Virginia's public welfare.[166] As Judge Stone expounded, "red cedar, aside from its ornamental use, has occasional use and value as lumber,"[167] and while native to Virginia, it "is not cultivated or dealt in commercially on any substantial scale, and its value throughout the state is shown to be small as compared with that of the apple orchards of the state."[168] Growing apples, on the other hand, was among the state's dominant agricultural

160. *Id.*

161. *Lech 2*, *supra* note 11, at 717.

162. *Compare Miller*, 276 U.S. at 277 (allowing compensation of $100 for exercise of state police power) *with Lech 2*, *supra* note 11, at 10 (stating *Miller* "[did] not require state to compensate").

163. *See Miller*, 276 U.S. at 279–80 (citing Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Northwestern Laundry v. Des Moines, 239 U.S. 486 (1916); Hadacheck v. Los Angeles, 239 U.S. 394 (1915); Reinman v. Little Rock, 237 U.S. 171 (1915); Sligh v. Kirkwood, 237 U.S. 52 (1915); Lawton v. Steele, 152 U.S. 133 (1894); Fertilizing Co. v. Hyde Park, 97 U.S. 659 (1878)).

164. *Id.*

165. 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.").

166. *Miller*, 276 U.S. at 279–80.

167. *Id.* at 279.

168. *Id.*

activities.[169] And unfortunately, this activity was the chief victim of cedar rust.[170] Considering the significant financial investment in Virginia's apple orchards, which provided employment for many people and brought about development of related transportation and storage facilities, the Commonwealth of Virginia was well within its constitutional powers to "destr[oy] one class of property in order to save another which, in the judgment of the legislature, [was] of greater value to the public."[171] However, no such reasoned debate concerning legislative priorities occurred in the Lechs' case.[172] Instead, the Lechs' home was destroyed by executive decision, in the heat of the moment, without debate of the potential value to the public of providing just compensation in this circumstance.

III. WHAT THE TENTH CIRCUIT'S HOLDING MEANS FOR FUTURE CASES

Notwithstanding the inapposite holdings in *Mugler*, *Bennis*, and *Miller*, the Tenth Circuit nevertheless took it upon itself to create an unprecedented exception to the Just Compensation Clause in its opinion in *Lech*.[173] Strongly worded, the Tenth Circuit's holding reads as follows:

> [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 . . . [and this] distinction remains dispositive in cases that, like this one, involve the direct physical appropriation or invasion of private property.[174]

Purportedly required by the Takings Clause, which, as the Tenth Circuit puts it, "simply does not entitle all aggrieved owners to recompense," this holding does not just sit at odds only with

169. *Id.*

170. *Id.* at 277 (under the statute challenged, "the state entomologist, ordered the plaintiffs in error to cut down a large number of ornamental red cedar trees growing on their property, as a means of preventing the communication of a rust or plant disease with which they were infected to the apple orchards in the vicinity.").

171. *Id.* at 279.

172. *See generally Lech 2*, *supra* note 11, at 714–19.

173. *Id.* at 717.

174. *Id.*

historic Supreme Court cases—it defies more recent cases as well.[175] This will have serious and far reaching consequences on takings law as we know it. As recently as 2012, for example, the Supreme Court wrote at length about the perils of establishing bright-line takings rules in *Ark. Game & Fish Comm'n v. United States.*[176] There, the U.S. government intentionally flooded the petitioner's land pursuant to its police powers, and the landowners claimed that such flooding effected a taking.[177] In ruling in the landowners' favor, the Court expounded on its disapproval of the lower court's holding that "Government-induced flooding can give rise to a takings claim . . . *only if* the flooding is permanent or inevitably recurring."[178]

> The Takings Clause is 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. And when the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner. These guides are fundamental in our Takings Clause jurisprudence. We have recognized, however, that no magic formula enables a court to judge, in every case, whether a given government interference with property is a taking. In view of the nearly infinite variety of ways in which government actions or regulations can affect property interests, the Court has recognized few invariable rules in this area. True, we have drawn some bright lines, notably, the rule that a permanent physical occupation of property authorized by government is a taking. So, too, is a regulation that permanently requires a property owner to sacrifice all economically beneficial uses of his or her land. But aside from the cases attended by rules of this order, *most takings claims turn on situation-specific factual inquiries.*[179]

This makes sense. What is, and what is not, a taking is often a difficult question to answer. In large part, because government actions affect property in "tangential . . . [and] completely

175. *Id.* (citations omitted).

176. Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 31–32 (2012).

177. *Id.* at 26.

178. *Id.* at 31 (emphasis added) (citation omitted).

179. *Id.* at 31–32 (emphasis added) (citations omitted).

unanticipated ways."[180] That is precisely why the Supreme Court frowns on bright line takings rules like the one in *Lech*.[181] Unfortunately, however, after the Tenth Circuit's opinion, district courts will not have much discretion to operationalize any other kind of rule.[182] 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.[183] Their job will be fairly perfunctory: did the government act pursuant to its police powers? If so, then there is no taking.

This prohibition against ad hoc inquiries into whether a government's use of its police powers effected a taking will create a fundamental shift in how we interpret the Takings Clause. Examine what would have happened had the *Lech* holding applied to various historic Supreme Court cases. Take, for example *United States v. Pewee Coal Co.*,[184] where the United States used its police powers to take over operations of a coal mine whose workers had recently gone on strike.[185] Had the United States not acted, the Government argued, the strikes might have prevented "the effective prosecution of [World War II] by curtailing vitally needed production in the coal mines directly affecting the countless war industries and transportation systems dependent upon such mines."[186] Although the Government's operation of these private mines was clearly authorized under the Government's police powers, the Supreme Court nevertheless held that these actions effected a taking.[187] But, according to *Lech*, the Supreme Court was wrong. As the Tenth Circuit put it, "when the state acts pursuant to its police power, rather than the power of eminent domain, its actions do not constitute a taking for purposes of the Takings Clause."[188] Thus, the Government

180. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 324 (2002).

181. *See Ark. Game & Fish Comm'n*, 568 U.S. at 31–32.

182. *See* Theodore Eisenberg, *Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes*, 1 J. EMPIRICAL LEGAL STUD. 659, 659 (2004) (Appeals are only "filed in 10.9 percent of filed cases," so it is likely that district courts will be the ones operationalizing the *Lech* test).

183. *See Tahoe-Sierra Pres. Council*, 535 U.S. at 324; *c.f. Lech 2*, *supra* note 11, at 717.

184. United States v. Pewee Coal Co., 341 U.S. 114, 114–22 (1951).

185. *Id.* at 114.

186. Exec. Order No. 9340: Possession and Operation of Coal Mines, 8 Fed. Reg. 5,695 (May 1, 1943).

187. *See Pewee Coal Co.*, 341 U.S. at 115–16.

188. *Lech 2*, *supra* note 11, at 717.

could not have been held to have effected a taking where it was operating pursuant to its police powers in counteracting the harmful effects of a coal industry strike.

The *Lech* Court's opinion would have also required a different result in *Lucas v. S.C. Coastal Council.*[189] There, the South Carolina legislature used its police powers to pass the Beachfront Management Act, "which had the direct effect of barring [landowners] from erecting any permanent habitable structures on [their land]."[190] Although there was no dispute that the Act was validly enacted pursuant to the state's police power,[191] the Supreme Court nevertheless held that the Act effected a taking as to the petitioners.[192] According to *Lech*, the Supreme Court also reached the wrong result in this case. This incongruous result is a consequence of the *Lech* holding, which is not limited to physical takings cases.[193] Rather, it applies to regulatory takings and physical takings cases alike.[194] Thus, the *Lech* opinion requires foundational Supreme Court regulatory takings cases like *Lucas* to be overturned.

IV. CONCLUSION

Hardly confined to the *Pewee Coal Co.* and *Lucas* cases, the *Lech* opinion would have reversed the holdings in countless other takings cases.[195] This inappropriate result thus begs the obvious question—what will be done about this case? And, perhaps unsurprisingly, the answer appears to be a resounding "nothing." When

189. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1003 (1992).

190. *Id.* at 1007.

191. *Id.* at 1009.

192. *Id.* at 1019.

193. *Lech 2*, *supra* note 11, at 717.

194. *Id.* ("[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 . . . [and this] distinction *remains* dispositive in cases that, like this one, involve the direct physical appropriation or invasion of private property." (emphasis added)). The *Lech* Court's use of the word remains implies that this rule extends to regulatory cases as well.

195. *See, e.g.*, Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 31–32 (2012). The Government intentionally flooded property pursuant to its police powers, so *Lech* would have categorically exempted the Government from paying Just Compensation. *See also* Pumpelly v. Green Bay Co., 80 U.S. 166, 174–78 (1871). The Government also intentionally flooded property pursuant to its police powers, so *Lech* would have categorically exempted the Government from paying Just Compensation. *See also* Pa. Coal Co. v. Mahon, 260 U.S. 393, 412–13 (1922). Pennsylvania used its police powers to restrict a company from mining subsistence coal, so *Lech* would have categorically exempted the Government from paying Just Compensation in this case as well.

it was given the opportunity, the Supreme Court denied writ of certiorari for the Lechs' case.[196] And it is truly unfortunate that it did. As various periodicals have explained, this "ordeal financially upended the Lech family's life,"[197] and without Supreme Court review, the Lechs' pain will be cemented in place. For example, Leo Lech had to take out a $390,000 loan to tear down the remains of his home in addition to incurring $28,000 in legal fees.[198] Why would the Supreme Court tolerate such an injustice?

However unsatisfying, the answer may merely be bad timing. Unluckily, the Lechs' writ of certiorari was submitted for review in the middle of the summer of 2020,[199] which also happened to be the height of the George Floyd murder protests.[200] A key aspect of this social movement was questioning whether police militarization had "gone too far."[201] As some have already noted, the Lechs' case may have been seen as a "microcosm" for these issues because of the weapons and equipment the Police used to destroy the Lechs' home.[202] Granting certiorari then may have been seen as tacit support for the police de-militarization movement in particular, and the George Floyd protests in general. In this context, it is unsurprising then that certiorari was denied for the Lechs case along with "several [other] cases on qualified immunity" that were also denied during the Lechs' term.[203]

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196. Lech v. Jackson, No. 19-1123, 2020 WL 3492667, at *1 (U.S. June 29, 2020) ("Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit denied.").

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

198. *Id.*

199. Search Results for *Docket No.19-1123*, SUP. CT. OF THE U.S. (Mar. 16, 2020), https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-1123.html.

200. *See Protests across the globe after George Floyd's death*, CNN (June 13, 2020, 3:22 PM), https://www.cnn.com/2020/06/06/world/gallery/intl-george-floyd-protests/index.html.

201. *See* Shirsho Dasgupta & Tara Copp, *Police departments equip, train and sometimes dress like soldiers – at what cost?*, MCCLATCHY DC (July 7, 2020, 3:56 PM), https://www.mcclatchydc.com/news/nation-world/national/national-security/article243760662.html#storylink=cpy.

202. Binion, *supra* note 195 ("The Lech case is a microcosm for several discussions around what needs to change. There was the intensely militarized presence: Why does apprehending a petty thief necessitate grenades and armored vehicles? There was a rather plain violation of the homeowners' constitutional rights. And there was—and is—the lack of accountability, which the Lechs no longer have hope of seeing rectified.").

203. *Id.*

Whatever the reasons behind the denial of certiorari for the Lechs' case, the fact remains that, absent review, the *Lech* holding jeopardizes the constitutional protections in place meant to ensure the security of property. As Justice Scalia explained in *Lucas*, when "the uses of private property [are] subject to unbridled, uncompensated qualification under the police power," as it is under the *Lech* opinion, "the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappeared."[204] Indeed, these were the considerations behind the creation of "the oft-cited maxim that, while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[205]

While the consequences of the *Lech* holding may not be readily apparent, it is only a matter of time before they fully manifest. Now is our opportunity to act before others, like the Lechs, will have "to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[206] As Justice Brewer once wrote, no one person should be asked to "surrender[] to the public something more and different from that which is exacted from other members of the public."[207] Let us act quickly now so that we can ensure that does not happen. If we do not, we risk allowing more innocent property owners to suffer the consequences of our inaction.

204. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 (1992) (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

205. *Id.* (quoting *Mahon*, 260 U.S. at 415).

206. Armstrong v. United States, 364 U.S. 40, 49 (1990).

207. Monongahela Navigation Co. v. United States, 148 U.S. 312, 325 (1893).