AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 12: The Contemporary Era – Individual Rights/Property/Takings

**Lech v. Jackson, No. 18-1051 (10th Cir. 2019)**

*An apparent shoplifter fled from police in Greenwood Village, Colorado. In an attempt to evade the police, the suspect broke into a home owned by Leo and Alfonsia Lech, tripping an automated burglar alarm. The police surrounded the house, and the suspect fired a shot through the garage door at the police. This led to an extended standoff, during which the police attempted to physically extract the suspect after negotiations failed. After further exchanges of gunfire and failed attempts to breech the home, the police eventually broke through a wall of the home using an armored vehicle and successfully apprehended the suspect. After these events, the house was deemed uninhabitable. The Lechs demolished the structure and built a new house on the site.*

*The Lechs filed suit in federal district court seeking compensation under the takings clauses of the federal and state constitutions. The suit was dismissed by the trial court, and they appealed to the federal circuit court. The federal circuit court affirmed the trial court’s ruling, and the Supreme Court declined to take the case for further review. The circuit court held that the destruction of the home was not a constitutional taking requiring compensation but was instead a noncompensable exercise of the police power intended to protect public safety.*

Judge MORITZ.

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[C]ontrary to the Lechs' position, at least three of our sibling circuits and the Court of Federal Claims have expressly relied upon the 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. For instance, in *AmeriSource Corp. v. United States* (D.C. Cir. 2008)*,* the Federal Circuit held that no taking occurred where the government physically seized (and ultimately "rendered worthless") the plaintiff's pharmaceuticals "in connection with [a criminal] investigation" because "the government seized the pharmaceuticals in order to enforce criminal laws"—an action the Federal Circuit said fell well "within the bounds of the police power." . . .

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. *Bennis v. Michigan* (1996); *Miller v. Schoene* (1928).

And we have likewise implicitly treated the distinction between the police power and the power of eminent domain as dispositive of the taking question, even when the interference at issue is physical, rather than regulatory, in nature. For instance, in *Lawmaster v. Ward* (10th Cir. 1997)*,* we held that the plaintiff failed to establish a Takings Clause violation where federal agents physically damaged his property—by, for example, tearing out door jambs and removing pieces of interior trim from his home—while executing a search warrant. In doing so, we reasoned that the plaintiff "fail[ed] to allege any facts showing how his property was taken for public use." And although we did not expressly note as much in *Lawmaster,* we have previously equated the state's power to "take[ ] property for public use" with the state's power of eminent domain, as opposed to its police power. *Lamm v. Volpe* (10th Cir. 1971). Thus, by holding that the plaintiff in *Lawmaster* could not show a Fifth Amendment violation because he failed to show "how his property was taken for public use," we implicitly held his Takings Clause claim failed because he could not show the government acted pursuant to its power of eminent domain, rather than pursuant to its police power. . . .

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We do not disagree that the defendants' actions benefited the public. But as the Court explained in *Mugler v. Kansas* (1887)*,* when the state acts to preserve the "safety of the public," the state "is not, and, consistent[] with the existence and safety of organized society, cannot be, burdened with the condition that the state must compensate [affected property owners] for pecuniary losses they may sustain" in the process. Thus, "[a]s unfair as it may seem," the Takings Clause simply "does not entitle all aggrieved owners to recompense."

Accordingly, we reject the Lechs' first broad challenge to the district court's ruling and hold that when the state acts pursuant to its police power, rather than the power of eminent domain, its actions do not constitute a taking for purposes of the Takings Clause. And we further hold that this distinction remains dispositive in cases that, like this one, involve the direct physical appropriation or invasion of private property. But that does not end the matter. We must next determine whether, as the district court ruled, the defendants acted pursuant to the state's police power here.

"[T]he police power encompasses `the authority to provide for the public health, safety, and morals.'" *Dodger’s Bar & Grill, Inc. v. Johnson County Board of County Commissioners* (10th Cir. 1994). The "contours of [the police power] are difficult to discern." But as discussed above, we have described the police power in contrast to the power of eminent domain: "the former controls the use of property by the owner for the public good," while the latter "takes property for public use."

The parties have not pointed us to any Tenth Circuit authority that affirmatively resolves whether the defendants' conduct here damaged the Lechs' home for the public good or for public use. But the Court of Federal Claims has applied this distinction to facts that are nearly identical to those at issue here. In *Bachmann v. United States* (Fed. Cl. 2017)*,* the United States Marshals Service "used gunfire, smoke bombs, tear gas, a battering ram, and a robot to gain entry" to the plaintiffs' rental property, which— unbeknownst to the plaintiffs—had become a hideout for a fleeing fugitive. The plaintiffs then sued the Marshals Service, alleging the damage to their property constituted a taking under the Fifth Amendment. The Marshals Service moved to dismiss, arguing that because it acted under the police power, any damage it caused to the plaintiffs' property in the process "could not amount to a compensable Fifth Amendment taking."

Relying in large part on the Federal Circuit's decision in *AmeriSource,* the Court of Federal Claims agreed with the Marshals Service and granted the motion to dismiss. Critically, in doing so, it rejected the plaintiffs' argument that "when law enforcement officials damage private property in the process of enforcing criminal law, they . . . take private property for public use." Instead, the court reasoned, the Marshals Service damaged plaintiffs' property while "us[ing] perhaps the most traditional function of the police power: entering property to effectuate an arrest or a seizure." Thus, the court concluded, the plaintiffs did not suffer "a taking of their property for public use," and their Fifth Amendment claim failed as a result.

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We likewise reject the Lechs' assertion that the police power does not encompass the state's ability to seize property from an *innocent* owner. . . . "[S]o long as the government's exercise of authority was pursuant to some power other than eminent domain, then the plaintiff has failed to state a claim for compensation under the Fifth Amendment. The innocence of the property owner does not factor into the determination." *AmeriSource Corp*.

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*Affirmed*.