What Is a Physical Taking?

John D. Echeverria[*]

*The Supreme Court often says that a "*per se*" (or "categorical") rule governs "physical taking" claims under the Taking Clause of the Fifth Amendment to the U.S. Constitution. These statements suggest the government must pay compensation whenever it physically intrudes upon private property, without regard to any other factor or circumstance. However, there are substantial reasons to doubt that a literal* per se *rule for physical taking claims actually does — or should — exist. In practice, the Court has frequently departed from a* per se *analysis of physical taking claims, and in some instances the Court has rejected physical taking claims outright. These outcomes are plainly inconsistent with a* per se *rule. While the Court has suggested the purported* per se *approach to physical taking cases has a venerable history ("as old as the Republic," it has said), it is actually a relatively modern invention and lacks strong support in precedent. The* per se *theory also is impossible to square with the many traditional government physical invasions of private property that have generally not been regarded as implicating the taking issue, including, for example, forfeitures, seizures of distressed financial institutions, or impoundments of dangerous animals or adulterated foods. Finally, the Court has failed to identify persuasive justifications for applying a* per se *rule in physical taking cases, and some of its reasoning in support of* per se *analysis is simply incoherent. The serious problems with the Court's purported* per se *theory reveal the need to rethink physical takings doctrine.*

This Article takes up this challenge by first addressing how to distinguish physical taking claims from other types of taking claims. It proposes that physical takings be classified as either appropriations or occupations, with appropriations defined as de jure *or* de facto *government acquisitions of ownership from a prior owner, and occupations defined as government-*

 Professor of Law, Vermont Law School. I am grateful for the generous suggestions and comments on drafts of this Article from Michal Blumm, Peter Byrne, Thomas Merrill, Janet Milne, and Timothy Mulvaney. An earlier version of the Article was presented to faculty at the Lewis and Clark University Law School. I acknowledge the excellent research assistance from Paul Quackenbush and Lauren Wustenberg.

caused invasions of private property by people or objects. Both types of physical taking claims stand in contrast to taking claims based on restrictions on the use of property, which are generally analyzed under a relatively more forgiving, complex analytic framework. This Article argues that each type of taking claim should be understood as arising from an impairment of a distinctive normative value: in the case of appropriations, the instrumental exploitation of citizens for governmental purposes; in the case of occupations, the impairment of personal privacy; and in the case of restrictions on the use of property, the potentially extreme and unfair redistribution of wealth. Particular government actions may implicate several of these different property-related values with the result that a single government action can potentially support different types of taking claims. However, the values associated with each type of claim are sufficiently distinctive to support different rules for different types of alleged takings. This analysis yields a new approach to physical taking cases that eschews an absolute per se *theory but also recognizes that courts should analyze physical taking claims (based on either appropriations or occupations) differently than claims based on use restrictions. Under the proposed approach, courts would evaluate physical taking claims without regard to the economic impact of the government action or the size of the portion of the property affected by the government action. However, courts would evaluate physical taking claims by considering other factors from traditional takings analysis, including the extent of interference with the owner's reasonable expectations and the purposes of the government action.*

TABLE OF CONTENTS

INTRODUCTION

The Supreme Court frequently says that a "*per se*" (or "categorical") rule applies to "physical taking" claims under the Fifth Amendment to the U.S. Constitution.[1] These statements suggest that courts should automatically order payment of compensation whenever the government physically intrudes upon private property, without regard to any other factor or circumstance.[2] This "*per se*" rule ostensibly stands in contrast to the multivariable, more unpredictable inquiry governing regulatory taking claims.[3] Finally, the *per se* approach to physical takings, the Court has said, is "as old as the Republic" whereas the rest of takings doctrine is of more "recent vintage."[4]

A deep dive into physical takings law suggests a different, more complex story. First, notwithstanding the Court's repeated invocation of a *per se* rule, many of the Court's physical taking decisions include language and analysis pointing to a more nuanced, multifactorial approach. For instance, in the Court's most recent physical taking case, *Horne v. Department of Agriculture*,[5] the Court purported to apply a *per*

[1] Horne v. Dep't of Agric., 576 U.S. 351, 358 (2015); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322-23 (2002).

[2] *See Per Se*, BLACK'S LAW DICTIONARY (2d ed. 1910), http://thelawdictionary.org/per-se/ [http://perma.cc/ZVS7-ZDCH] (defining *per se* as "[b]y himself or itself; in itself; taken alone; inherently; in isolation; unconnected with other matters"); *see also* Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285, 288-89 (1990) ("[T]he safe answer to the question of when the government must compensate for the burdens it imposes is to say 'always' when it physically takes property . . . .").

[3] *See* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 538-39 (2005) (laying out the Court's various approaches to taking claims).

[4] *Tahoe-Sierra*, 535 U.S. at 322; *see also* JESSE DUKEMINIER, JAMES E. KRIER, GREGORY S. ALEXANDER, MICHAEL S. SCHILL & LIOR J. STRAHILEVITZ, PROPERTY 1034 (9th ed. 2017) ("*Loretto* represents little more than the U.S. Supreme Court's endorsement of a rule of long standing.").

[5] 576 U.S. 351.

se rule. Yet it ultimately upheld the plaintiffs' physical taking claim based on the specific facts of the case, and indicated it might well reject a physical taking claim based on different facts, an analysis wholly at odds with a *per se* approach. In some instances, the Court has rejected physical takings claims on the merits, an outcome plainly inconsistent with the idea that physical takings are always compensable takings.[6]

Second, an exploration of the history of *per se* physical taking theory shows that it is a relatively modern innovation. The Court has long recognized that physical intrusions can be compensable takings. However, the notion that physical takings are necessarily compensable takings is relatively new. Furthermore, when the Court announced the launch of its ostensible *per se* rule for physical takings in the early 1980's, the Court departed from prior precedent without acknowledging that it was doing so. Rather than predating regulatory takings doctrine, the Court's ostensible *per se* physical taking test emerged after the development of modern regulatory takings doctrine and in reaction to it.

Third, the *per se* theory is contradicted by many traditional government practices involving seizures and intrusions that have generally not been regarded as implicating the taking issue, including, for example, forfeitures, seizures of distressed financial institutions, or impoundments of dangerous animals or adulterated foods.[7] On their face, each of these examples (and many others) involves "physical takings" that the Supreme Court would treat as compensable takings if it were genuinely committed to a *per se* rule. However, the modern Court has never whispered a suggestion that it would hold these traditional seizures and intrusions to be compensable takings.

The Supreme Court has offered several justifications for applying a *per se* rule to physical takings claims, but none is particularly convincing, and some are simply incoherent. Ultimately, the case for a *per se* approach narrows down to the contention that an automatic rule of liability is easy for all concerned to understand and easy for courts to apply. The insufficiency of this argument is obvious from the fact that the Court has generally not applied a categorical rule to takings claims based on restrictions on use. Nearly 100 years ago Justice Oliver Wendell Holmes declared, "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[8] This aphorism

[6] *See* PruneYard Shopping Ctr. v. Robins, 447 U.S 74, 84 (1980); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261, 277 (1964).

[7] *See infra* notes 166–235 and accompanying text.

[8] Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

applies to all manner of government actions challenged under the Taking Clause with equal force.

For all these reasons there is considerable room for doubt that the Court either has adopted or should adopt a literal *per se* test for physical taking claims. The serious disconnect between the Court's frequent invocations of a *per se* rule and the law of physical takings as revealed by the Court's decisions suggests both that physical takings doctrine is unstable and that the Court's commitment to a *per se* theory is weak, at best. The inconsistency of the *per se* theory with history and tradition and its lack of strong logical underpinnings compound the problems with the theory.

Apart from these doctrinal problems, the ostensible *per se* test has potentially significant practical implications. For instance, in the aftermath of the 2018 shooting incident at the Mandalay Bay Hotel in Las Vegas, Nevada, the U.S. Department of Treasury published a regulation authorizing government seizures of "bump stock" devices that effectively convert semi-automatic weapons into machine guns.[9] In the wake of the 2019 shootings in Dayton, Ohio and El Paso, Texas, there has been widespread discussion of adopting a federal "red flag" law that would authorize seizure of a firearm from a person who presents a danger to himself or others.[10] However, if every physical seizure of private property were compensable under a *per se* rule, the Taking Clause might render these kinds of gun control measures infeasible. Applying a literal *per se* test might produce similarly implausible outcomes in cases based on government seizures of adulterated foods and drugs or of evidence for use in criminal proceedings.[11]

In light of these problems with the ostensible modern rule, this Article argues for thorough reform of physical takings doctrine. Prior academic commentary has advocated one of two approaches to physical takings doctrine. The first, exemplified by Professor Richard Epstein, embraces the Court's ostensible *per se* approach to physical taking claims, but calls for eliminating the "unprincipled line between occupation and

[9] *See* Bump-Stock Devices, Final Rule, 27 C.F.R. §§ 447.11, 478.11, 479.11 (2020).

[10] *See* Diane Feinstein & Mara W. Elliott, Opinion, *Extreme Risk Protection Order Act Will Help Keep Guns Out of the Wrong Hands*, HILL (Jan. 27, 2020), https://thehill.com/blogs/congress-blog/politics/480034-extreme-risk-protection-order-act-will-help-keep-guns-out-of-the [http://perma.cc/VBE2-LX2M].

[11] *See infra* notes 170–83; *see also* Cedar Point Nursery v. Shiroma, 923 F.3d 524, 534 (9th Cir. 2019), *cert. granted*, 2020 WL 6686019 (U.S. Nov. 13, 2020) (No. 20-107) (rejecting claim that regulation of the California Agricultural Labor Relations Board requiring farmers to allow union organizers to enter farm property without owner consent effects a *per se* taking).

regulation" and subjecting all government impairments of private property to a universal *per se* rule.[12] The second approach, exemplified by the work of Professors Andrea Peterson[13] and Lynn Blais,[14] also criticizes the Court's taking doctrine, but from the opposite direction. Each finds fault with the capacity of a *per se* approach to resolve physical taking claims fairly and questions the feasibility of drawing a clear line between physical and regulatory takings cases. They advocate abandoning a *per se* approach to physical taking claims in favor of a more unified approach to takings.[15]

This Article argues for a different approach that eschews a literal *per se* test but recognizes that physical taking claims raise distinct concerns calling for distinctive judicial treatment. It proposes to classify physical takings as either appropriations or occupations. It defines appropriations as *de jure* or *de facto* acquisitions of ownership from the prior owner, and defines occupations as government-caused invasions of private property by people or objects. Both types of physical taking claims stand in contrast to so-called regulatory taking claims, which

[12] *See* Richard A. Epstein, *Physical and Regulatory Takings: One Distinction Too Many*, 64 STAN. L. REV. ONLINE 99, 105 (2012). Applying a law and economics analysis, Epstein argues that a *per se* rule for physical intrusions appropriately "guards against the political risk that greedy neighbors will use the political process to strip their neighbors of their property." *Id.* at 101. He argues the same analysis should apply to restrictions on property use because "identical forces of self-interest are at work with restrictions on use and development of land." *Id.* at 102.

[13] Andrea L. Peterson, *The False Dichotomy Between Physical and Regulatory Takings Analysis: A Critique of* Tahoe-Sierra*'s Distinction Between Physical and Regulatory Takings*, 34 ECOLOGY L.Q. 381, 381 (2007).

[14] Lynn E. Blais, *The Total Takings Myth*, 86 FORDHAM L. REV. 47, 47 (2017).

[15] *See id.* at 88-89 (contending that reform efforts should focus on refining the *Penn Central* factors); Peterson, *supra* note 13, at 441 (suggesting that the principal focus of the takings inquiry should be the justification for the government action). The late Professor Joseph Sax also criticized applying a *per se* rule to physical taking claims. In his groundbreaking 1964 Yale Law Journal article, he contended that "[t]he formal appropriation or physical invasion theory should be rejected once and for all." Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 48 (1964) [hereinafter *Takings and the Police Power*]. Professor Frank Michelman, in his influential, yet Delphic 1967 Harvard Law Review article, offered two alternative answers to the question whether a special rule should govern "physical invasion" claims, depending on whether one adopted a utilitarian approach or justice-as-fairness approach to the issue. *See* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1208, 1218-19 (1967). Michelman's analysis is so even-handed and nuanced that *both* the majority and the dissent in *Loretto* embraced his 1967 article, with the majority citing his utilitarian analysis, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 436 (1982) (citing Michelman, *supra*, at 1228 & n.110), and the dissent citing his fairness analysis, *id.* at 447 (citing Michelman, *supra*, at 1227).

involve claims based on government restrictions on development or other uses of private property. Each of the different types of taking claims — appropriations, occupations and use restrictions — relate to different normative values associated with the ownership of private property: appropriations implicate concerns about government exploitation of property owners for government's own purposes; government-caused occupations infringe on personal privacy; and restrictions on use present concerns about potentially unfair redistributions of wealth. The different core concerns underlying the different types of taking claims support different analytic approaches to the taking question. Whether a government action instrumentally exploits a property owner or impairs privacy presents a binary inquiry that yield a "yes" or "no" answer. By contrast, an inquiry into whether a government use restriction effects an unfair transfer of wealth unavoidably presents a question of degree.

Building on this foundation, this Article proposes that courts treat appropriations or occupations as potential takings based solely on the nature of the government action, without regard to the magnitude of the economic burden imposed on the property owner, as under current law. In the regulatory takings context, courts should evaluate taking claims based on use restrictions by focusing on the relative magnitude of the economic burden imposed on the claimant's entire property. By contrast, in physical taking cases the inquiry should be more straightforward — has the government appropriated or occupied all or part of the claimant's property? — and the economic impact of the government action is beside the point.

Apart from this important difference, all takings claims should otherwise be evaluated in the same fashion. Thus, just as courts look to the extent of interference with owner expectations and the purpose of the government action in evaluating a taking claim based on a use restriction, courts should consider the same factors in evaluating physical taking claims. These factors are just as pertinent to the question of whether, as a matter of fairness and justice, a physical intrusion is a compensable taking as they are in other types of takings cases. As discussed below, while this proposal is not consistent with the law as the Supreme Court has often described it, it conforms reasonably well to the law as it exists today based on the Court's actual decisions.

This Article proceeds as follows: Part I provides a sketch of modern takings law, including the threshold issues in taking litigation and the basic elements of contemporary regulatory and physical takings

doctrine.[16] Part II describes the Court's frequent departures from its ostensible *per se* rule for physical taking claims, traces the relatively recent emergence of the *per se* rule for physical taking claims, and catalogues the many types of uncompensated physical intrusions that have generally never been regarded as raising a serious taking question.[17] Part III systematically analyzes the Court's arguments in favor of a *per se* approach to physical taking claims, and presents the major arguments against a *per se* approach.[18] Part IV lays the foundation for a reformed approach to physical taking claims by explaining the distinction between appropriations and occupations, and then discussing the distinctive normative foundations of taking claims based on appropriations, occupations, and restrictions on use respectively.[19] Part V presents a new framework for evaluating physical takings claims, and then explains how courts would evaluate some familiar physical takings cases using this framework.[20] The Article ends with a short conclusion.

I. OVERVIEW OF THE MODERN TAKINGS LANDSCAPE

While this Article focuses on physical taking doctrine, it will be useful at the outset to provide an overview of takings law and explain how the Supreme Court generally purports to distinguish physical taking claims from regulatory taking claims.

A. Threshold Issues

Litigation under the Taking Clause[21] takes one of two forms, an affirmative exercise of eminent domain or an inverse condemnation claim.[22] The government exercises eminent domain by initiating a legal proceeding to acquire ownership of property from some prior owner. By initiating an eminent domain proceeding, the government effectively concedes it is engaging in a "taking" of "private property." The issues that may be contested in an eminent domain case are whether the taking is for a "public use," or whether government has proffered

[16] *See infra* Part I.

[17] *See infra* Part II.

[18] *See infra* Part III.

[19] *See infra* Part IV.

[20] *See infra* Part V.

[21] U.S. CONST. amend. V ("Nor shall private property be taken for public use, without just compensation.").

[22] *See* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 315 (1987) (discussing these two distinct forms of takings litigation).

constitutionally sufficient "just compensation." The Supreme Court has interpreted the term "public use" broadly; any lawful, reasonable public purpose satisfies the public use requirement.[23] An attempted exercise of the eminent domain power that is not for a public use is impermissible under the Taking Clause and subject to an injunction, regardless of whether the government is able and willing to pay compensation.[24]

In an inverse condemnation case, the government exercises some power (for example, regulatory authority) affecting private property, but neither plans nor expects to "take" private property under the Taking Clause. However, an affected property owner believes the government has engaged in a taking and sues the government "inversely" for taking without paying the just compensation allegedly due. By initiating an inverse condemnation action demanding payment of compensation, the property owner effectively concedes the alleged taking is for a "public use;" if it turns out the action is not for a lawful "public use," the property owner cannot properly invoke the Taking Clause and the claim will fail.[25] The primary disputed issue in an inverse condemnation case is typically whether a taking has occurred triggering a government obligation to pay just compensation. The Supreme Court has repeatedly stated in its inverse condemnation cases that the overarching purpose of the Taking Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[26]

A potentially significant issue in an inverse condemnation case is whether the claimant possesses "property" sufficient to support a taking claim. The Supreme Court has said that the term "property" within the meaning of the Taking Clause is limited to "a specific interest in physical or intellectual property."[27] As a result, a law imposing a generalized financial liability on a firm or individual does not support an inverse condemnation claim under the Taking Clause.[28] A claimant

[23] *See* Kelo v. City of New London, 545 U.S. 469, 481 (2005).

[24] *See* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 543 (2005) ("[I]f a government action is found to be impermissible — for instance because it fails to meet the "public use" requirement or is so arbitrary as to violate due process — that is the end of the inquiry. No amount of compensation can authorize such action.").

[25] *See id.* at 543 ("[A]n inquiry [into a regulation's 'underlying validity'] is logically prior to and distinct from the question whether a regulation effects a taking, for the Taking Clause presupposes that the government has acted in pursuit of a valid public purpose.").

[26] Armstrong v. United States, 364 U.S. 40, 49 (1960).

[27] Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 613 (2013).

[28] *See* E. Enters. v. Apfel, 524 U.S. 498, 544 (1998) (Kennedy, J., concurring in the judgment and dissenting in part) ("[T]he Government's imposition of an obligation

also lacks property for takings purposes if "background principles" of state (or federal) law bar the owner from claiming a property entitlement.[29] The Supreme Court explicitly introduced the "background principle" concept in *Lucas v. South Carolina Coastal* Council,[30] a case involving a "total" regulatory taking claim. However, it is clear that a background principle defense will bar any type of regulatory taking claim,[31] as well as any type of physical taking claim.[32] Thus, it is not literally correct even under the ostensible "*per se*" physical taking theory that *every* physical taking is a compensable taking.

B. Regulatory Takings

The notion that regulatory restrictions on property use can be compensable takings is generally traced to the Court's 1922 decision in *Pennsylvania Coal Co. v. Mahon*,[33] in which the Court offered the cryptic guidance that a regulation will be deemed a taking if it goes "too far." Prior to *Mahon*, the Supreme Court commonly asserted that government restraints on the use of private property pursuant to the police power are not takings.[34] The Court applied this principle "no matter how much the regulation affected the value of private property."[35] *Mahon* overruled this former categorical *anti*-takings rule, declaring, "the police power must have its limits."[36] Post *Mahon*,

between private parties, or destruction of an existing obligation, must relate to a specific property interest to implicate the Takings Clause."); *id.* at 554-56 (Breyer, J., dissenting) ("The 'private property' upon which the Clause traditionally has focused is a specific interest in physical or intellectual property.").

[29] *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1028-29 (1992).

[30] *Id.*

[31] *See* Michael C. Blumm & Rachel G. Wolfard, *Revisiting Background Principles in Takings Litigation*, 71 FLA. L. REV. 1165, 1204 (2019) (collecting recent cases).

[32] *See* Horne v. Dep't of Agric., 576 U.S. 351, 366-67 (2015) (discussing Leonard v. Earle, 279 U.S. 392 (1929)); *Lucas*, 505 U.S. at 1029 (citing Scranton v. Wheeler, 179 U.S. 141 (1900)).

[33] Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[34] *See* Transp. Co. v. Chicago, 99 U.S. 635, 642 (1879) ("[A]cts done in the proper exercise of governmental powers, and not directly encroaching on private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision.").

[35] William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 797 (1995).

[36] *See Mahon*, 260 U.S. at 413.

demonstrating that a regulation is a valid exercise of the police power is insufficient, by itself, to defeat a regulatory taking claim.[37]

Penn Central Transportation Co. v. New York,[38] decided fifty years later, puts flesh on the bones of the "too far" test by identifying three factors having "particular significance" in regulatory takings analysis: the "economic impact" of the government action, the extent of interference with "investment-backed expectations," and the "character" of the government action.[39] Economic impact is ordinarily measured by comparing the market value of the claimant's' property "without" the restriction with the estimated value of the property "with" the restriction.[40] The Supreme Court has instructed that economic impact should generally be measured relative to the "parcel as a whole," not the specific area or portion of the property that is restricted.[41] Thus, for example, the economic impact of a restriction barring development of an area of wetlands within a larger land parcel is calculated by reference to the entire parcel, not the wetland area alone.[42]

The Supreme Court has defined the expectations factor in various ways. First, were the restrictions already in place when the claimant purchased the property, and can it therefore be presumed the claimant

[37] *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 425 (1982) (stating that the issue of whether a regulation "is within the State's police power" is a "separate question" from "whether an otherwise valid regulation so frustrates property rights that compensation must be paid").

[38] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 104 (1978).

[39] *Id.* at 124. Justice Brennan, author of the *Penn Central* opinion, apparently lifted the concept of investment expectations from Professor Michelman's landmark 1967 article. *See* Michelman, *supra* note 15, at 1213 (referring to "investment-backed expectations"). Michelman alluded to investment-backed expectations in the course of making the points that, within the utilitarian framework, the social value of property depends upon reliable assurances about how property can be used and citizens should not be permitted to claim compensation for every legal change that frustrates investment expectations. The *Penn Central* Court cited *Goldblatt v. Hempstead*, 369 U.S. 590 (1962), in its discussion of investment-backed expectations, but that case includes no explicit reference to this factor.

[40] *See* John D. Echeverria, *Making Sense of* Penn Central, 23 UCLA J. ENVTL. L. & POL'Y 171, 180 (2005).

[41] *Penn. Cent.*, 438 U.S. at 130-31 ("'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole . . . ."); *see also* Murr v. Wisconsin, 137 S. Ct. 1933, 1945 (2017) (emphasizing that courts "must consider a number of factors" in defining the "denominator" for takings purposes).

[42] *See* Walcek v. United States, 303 F.3d 1349, 1356 (Fed. Cir. 2002).

paid a price for the property that reflected the existence of the restrictions? The Supreme Court has established that acquisition of property subject to existing regulations is a relevant though not necessarily determinative factor in regulatory takings analysis.[43] Second, are the regulatory restrictions "foreseeable," either in the sense the claimant is operating in a "highly regulated environment" and therefore had reason to know that the government might impose new restriction, or does the proposed property use so obviously raise public concerns that a reasonable investor could anticipate a possible regulatory response?[44] More generally, the expectations concept reflects the notion that government routinely affects property interests, and dealing with such impacts is one price of "living in a civilized community."[45]

The "character "factor" is the most open-ended of the *Penn Central* factors. Of most direct relevance for present purposes, the *Penn Central* decision states that a taking may "more readily be found" when a government action has the character of a "physical invasion."[46] This statement highlights the point, explored at length below, that the Supreme Court has not always drawn a sharp distinction between regulatory and physical taking claims. The Court also has read the character factor to call for an inquiry into the purpose of the government action, in particular whether it is designed to prevent harm to the public.[47] Importantly, the Court has stressed that government authority to regulate harmful activity without paying compensation does not depend on the activity being "a common-law nuisance."[48] The

[43] *See* Palazzolo v. Rhode Island, 533 U.S. 606, 627 (2001); *id.* at 633 (O'Connor, J., concurring) ("[I]nterference with investment-backed expectations is one of a number of factors that a court must examine . . . . [T]he regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations."); *see also* Echeverria, *supra* note 40, at 183-86.

[44] *See* Echeverria, *supra* note 40, at 184.

[45] Andrus v. Allard, 444 U.S. 51, 67 (1979) (quoting *Pa. Coal Co. v.* Mahon, 260 U.S. 393, 422 (1922)) (Brandeis, J., dissenting) (recognizing that the effects of regulation on private property interests are, "within limits," part of "the burden borne to secure 'the advantage of living and doing business in a civilized community'").

[46] *Penn. Cent.*, 438 U.S. at 124.

[47] *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 488 (1987) (rejecting taking claim based on a state law designed "to protect the public interest in health, the environment, and the fiscal integrity of the area"); *Plymouth Coal Co. v. Pennsylvania,* 232 U.S. 531, 533 (1914) (rejecting taking claim based on law designed to protect employee safety).

[48] Goldblatt v. Hempstead, 369 U.S. 590, 593 (1962); *see Keystone*, 480 U.S. at 491-92 n.22 (referring to a regulatory statute held not to affect a taking as controlling activity

character factor also calls for consideration of whether the government action is designed to confer benefits on the taking claimant and others. The Supreme Court has long recognized that regulatory actions often produce a "reciprocity of advantage" that should be taken into account in determining whether the economic impact of the government action is sufficient to support a taking claim.[49] In the Court's words, "[w]hile each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others."[50]

Over time, the Court has come to rely on the three *Penn Central* factors as the "polestar" for its regulatory takings analysis.[51] Individual justices[52] and some commentators[53] have questioned whether the *Penn Central* analysis provides sufficiently robust support for private property rights or whether it offers a predictable framework for analysis. The Court has nonetheless repeatedly reaffirmed the *Penn Central* framework. *Penn Central*'s durability is attributable to the difficulty of reducing takings analysis to simple formulas and the opportunity it provides to consider a wide range of circumstances that, by broadly shared intuition, are relevant to whether a property owner is entitled to compensation as a matter of "fairness and justice."[54]

In 1992, in *Lucas v. South Carolina Coastal Council*,[55] the Court refined regulatory takings doctrine by adopting what it called a "categorical" rule of takings liability for regulation that "denies all economically beneficial or productive use of land." [56] The Court offered several justifications for its new rule.[57] Of particular relevance for present purposes, the *Lucas* Court said, "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical

"tantamount to a public nuisance" and regulating "activities similar to public nuisances").

[49] *Keystone*, 480 U.S. at 491.

[50] *Id.*

[51] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 336 (2002) (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 636 (2001)) (O'Connor, J., concurring).

[52] *See* Transcript of Oral Argument at 29, Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595 (2013) (No. 11-1447) (Chief Justice Roberts asked, "Do you know of any case where the government has lost a Penn Central case?").

[53] *See* Steven J. Eagle, *The Four-Factor* Penn Central *Regulatory Takings Test*, 118 PENN STATE L. REV. 601, 605 (2014).

[54] *See* Echeverria, *supra* note 40, at 171.

[55] Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

[56] *Id.* at 1015.

[57] *See id.* at 1017-18.

appropriation."[58] In other words, according to this reasoning, it is given that an "appropriation" is a compensable taking, a "total deprivation of use" by regulation is "equivalent" to an appropriation, and therefore a total deprivation of use is necessarily a compensable taking as well.[59] As we shall see, the starting place for this syllogism is deeply problematic.

While the *Lucas* Court explicitly described its new rule as "categorical,"[60] it left the scope of the rule ambiguous. On the one hand, *Lucas* can be read to establish that when a regulation denies an owner all economically viable use of private property, a finding of a compensable taking should automatically follow regardless of any other factor or circumstance. The *Lucas* Court explicitly contrasted its total taking rule with the *Penn Central* framework, suggesting that when a regulation works a total denial of economic use the economic impact factor is determinative and none of the other *Penn Central* factors is relevant.[61] On the other hand, *Lucas* also can be read more narrowly. The South Carolina Supreme Court rejected the taking claim because the state legislature had determined that barring new development along the ocean shore was necessary to protect the public from harm. The U.S. Supreme Court reversed and ruled that a declaration of legislative purpose to prevent public harm is insufficient, by itself, to defeat a "total" regulatory taking claim. If *Lucas* is read to resolve only the issue of the relevance of legislative declarations of harm in a total regulatory taking case, the decision does not necessarily preclude consideration of other *Penn Central* factors in evaluating "total" takings claims.[62] It is especially noteworthy that the *Lucas* Court said nothing

[58] *Id.* at 1017.

[59] *See id.*; *cf.* San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting) ("From the property owner's point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it.").

[60] *Lucas*, 505 U.S. at 1015.

[61] *See id.* at 1017-18; *see also id.* at 1015; *id.* at 1019 ("[W]hen 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." (emphasis in original)); *id.* at 1027 ("Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.").

[62] The *Lucas* Court also said that its new categorical rule "require[d] compensation without the usual case-specific inquiry into the public interest advanced in support of the restraint," *id.* at 1004, but it is ambiguous to what the Court was referring and whether this statement has any continuing relevance. *See* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 540 (2005) (repudiating the "substantially advance" takings test); *see also*

explicit about the potential relevance of the expectations factor in a total taking case, arguably leaving it open as to whether a lack of interference with investment-backed expectations may defeat a *Lucas* claim. In other words, it is far from clear how categorical the *Lucas* categorical rule really is.

C. Physical Takings

In contrast with its regulatory taking jurisprudence, the Supreme Court has stated on numerous occasions that a "*per se*" or "categorical" approach applies to most physical taking claims. In *Loretto v. Teleprompter Manhattan CATV Corp.*,[63] the Court established a "*per se*" or "categorical" rule for government-compelled "permanent physical occupations" of private property. In addition, the Court has said that, "[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner."[64] In the case of *Horne v. Department of Agriculture*,[65] the Court extended the *per se* rule for physical takings from real property to personal property.

The nub of the issue, however, is what does "*per se*," or "categorical," actually mean in this context? These terms imply that recognizing that a physical intrusion has occurred is all that is required to resolve the taking claim in the claimant's favor, and all the other *Penn Central* factors are beside the point. Some of the Court's language supports this interpretation.[66] However, some of the Court's rulings and language point in other directions. The Court has repeatedly stated that the level

Horne v. Dep't of Agric., 576 U.S. 351, 360 (2015) (asserting that the "claimed public benefit" of a government action is beside the point under the categorical rule for appropriations); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) ("[A] permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve.").

[63] *Loretto*, 458 U.S. at 421.

[64] Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322 (2002).

[65] *Horne*, 576 U.S. 351.

[66] *Id.* at 361-62 (quoting *Loretto*, 458 U.S. at 432) (referring to the rule that a physical intrusion is a taking "without regard to other factors that a court might ordinarily examine").

of economic harm,[67] and the extent of physical intrusion,[68] are both irrelevant in a physical taking case. The Court also has suggested that the distinctive feature of physical taking doctrine is that a physical intrusion will result in a compensable taking "without regard to the public interest that [the government action] may serve."[69] The Court has offered relatively little guidance on how, if at all, the extent of interference with investment-backed expectations and the purposes behind the government action may affect the outcome. The primary goal of this Article is to sort out this confusion and define the factors that should apply in physical taking cases.

The Court employs a remarkably cacophonous vocabulary in describing physical taking cases. Thus, in the recent *Horne* case, the Court used all of the following terms: "appropriation," "direct appropriation," "physical appropriation," "physical occupation," "physical invasion," "physical surrender," "physical taking," and "*per se* taking."[70] The Court sometimes equates a physical taking with an occupation,[71] and at other times equates a physical taking with an

[67] *Id.* at 360 (describing *Loretto* as establishing a rule of *per se* liability that applies "without regard to . . . the economic impact on the owner"); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831-32 (1987) (quoting *Loretto*, 458 U.S. at 434-35) (observing that a *per se* physical taking rule requires compensation "without regard to whether the action . . . has only minimal economic impact on the owner"). The *Loretto* Court defended the conclusion that a permanent physical occupation with only minimal adverse economic impact can result in taking liability by observing that a taking with minimal impact will yield only a minimal compensation award. *See Loretto*, 458 U.S. at 437-38 ("Once the fact of occupation is shown, of course, a court should consider the *extent* of the occupation as one relevant factor in determining the compensation due. For that reason, moreover, there is less need to consider the extent of the occupation in determining whether there is a taking in the first instance." (emphasis in original)). Of course, if the economic loss from a government-caused physical intrusion is "zero," then "the compensation that is due is also zero," and a claim for compensation based on an alleged violation of the Taking Clause fails as matter of law. Brown v. Legal Found. of Wash., 538 U.S. 216, 237 (2003).

[68] *See Tahoe-Sierra*, 535 U.S. at 322 (stating that when government "physically takes" property it has a duty to pay compensation "regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof"); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992) (stating that physical occupation requires compensation "no matter how minute the intrusion").

[69] *Loretto*, 458 U.S. at 426; *see also Horne*, 576 U.S. at 360 (observing that *Loretto* recognized that a physical intrusion results in a taking "without regard to the claimed public benefit"); *Lucas*, 505 U.S. at 1015 (observing that *Loretto* requires compensation "no matter how weighty the public purpose behind it").

[70] *Horne*, 576 U.S. at 360-61, 363-65.

[71] *See* Yee v. City of Escondido, 503 U.S. 519, 527 (1992) ("The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land." (emphasis in original)).

appropriation.[72] The Court sometimes uses the terms occupation and appropriation in the same sentence to refer to two apparently distinct forms of physical takings.[73] Sometimes the Court uses the two terms interchangeably, suggesting they are synonyms.[74]

Notwithstanding the linguistic cacophony, a careful reading of Supreme Court cases suggests the Court may perceive two distinct categories of physical takings: appropriations and occupations. The Court has never explicitly said there are two distinct varieties of physical takings, but a handful of decisions support this understanding.[75] This Article seeks to promote the idea that courts should categorize physical takings as either appropriations or occupations. Drawing this distinction helps to distinguish physical takings from other types of takings and to explain why and how the standard for evaluating physical takings claims should differ from the standard governing other takings claims.

For the purposes of the discussion that follows, an appropriation is defined as a government order or other action that either explicitly or effectively divests an owner of her interest in property and transfers ownership to the government[76] or some third party designated by the

[72] *See* E. Enters. v. Apfel, 524 U.S. 498, 522 (1998) (quoting *United States v. Sec. Indus. Bank*, 459 U.S. 70, 78 (1982)) (referring to "the 'classic taking' in which government directly appropriates private property for its own use").

[73] *See* Murr v. Wisconsin, 137 S. Ct. 1933, 1944 (2017) (referring to a "physical taking" as a "physical appropriation or occupation"); *Lucas*, 505 U.S. at 1014 (observing that prior to *Mahon* "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'" (citation omitted)).

[74] *See* Brown v. Legal Found. of Wash., 538 U.S. 216, 235 (2003) (describing the appropriation of funds from a lawyer trust account for the benefit of a non-profit foundation as "akin to the occupation of a small amount of rooftop space in *Loretto*"); *Loretto*, 458 U.S. at 435 ("The historical rule that a *permanent physical occupation* of another's property is a taking has more than tradition to commend it. *Such an appropriation* is perhaps the most serious form of invasion of an owner's property interest." (emphases added)).

[75] *See Murr*, 137 S. Ct. at 1942 (stating that prior to recognition of regulatory takings, "'it was generally thought that the Taking Clause reached only a direct appropriation of property, *or* the functional equivalent of a practical ouster of the owner's possession,' like the permanent flooding of property") (emphasis added) (quoting *Lucas*, 505 U.S. at 1014); Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 537 (2005) ("The paradigmatic taking requiring just compensation is a direct government appropriation *or* physical invasion of private property." (emphasis added)).

[76] *See* Horne v. Dep't of Agric., 576 U.S. 351, 398-99 (2015) (explaining that a government raisin marketing order resulted in an appropriation because that "[a]ctual raisins are transferred from the growers to the Government," the "[t]itle to the raisins passes" to a government entity, and the government "disposes of what becomes its raisins as it wishes"); Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535

government.[77] By contrast, occupations are physical invasions of private property (typically land) by government officials or private citizens acting with governmental authority. Occupations occur when persons enter onto the land or place equipment or materials on land without owner permission.

Even as the Court has so far avoided drawing a clear distinction between appropriations and occupations, it has suggested that temporary occupations should be treated differently from temporary appropriations. In *Loretto v. Teleprompter Manhattan CATV Corp.*,[78] the Court's leading physical occupation case, the Court announced a *per se* rule for occupations limited to "permanent occupations." The *Loretto* Court distinguished "temporary limitations on the right to exclude," which the Court said, "are subject to a more complex balancing process to determine whether they are a taking."[79] In contrast, the Court has stated, at least in *dictum*, that an appropriation is a "categorical taking" regardless of whether it is permanent or temporary. As the Court put it, referring to one type of temporary appropriation, compensation is due for government appropriation of a leasehold for its own use, "even though that use is temporary."[80] The notion that courts should analyze temporary occupations and appropriations differently implicitly turns on the premise that a meaningful distinction can be drawn between appropriations and occupations. This Article draws a distinction between appropriations and occupations, which should be helpful for understanding why physical takings claims should be analyzed differently than regulatory taking claims. Ultimately, however, this Article concludes that temporary appropriations should not be treated any differently than temporary occupations.

One last preliminary point. In *Loretto*, the Court strongly suggested that temporary-occupation claims should be analyzed using the *Penn Central* three-factor framework, in accord with the Court's approach in

U.S. 302, 324 n.19 (2002) (stating that an appropriation of a leasehold interest "gives the government possession of the property, the right to admit and exclude others, and the right to use it for a public purpose.").

[77] *See Brown*, 538 U.S. at 235 (assuming for the sake analysis that a government-compelled transfer of interest earned by funds deposited in lawyer trust accounts to a private non-profit foundation represented a taking); United States v. Sec. Indus. Bank, 459 U.S. 70, 77-78 (1982) (indicating that appropriations are "not necessarily limited to outright acquisitions by the government for itself," but also can occur as a result of "economic regulation which in effect transfers the property interest from a private creditor to a private debtor").

[78] *Loretto*, 458 U.S. 419.

[79] *Id.* at 435 n.12.

[80] *Tahoe-Sierra*, 535 U.S. at 322.

prior cases.[81] Subsequently, however, in *Arkansas Game & Fish Commission v. United States*,[82] the Court shifted gears and declared that the taking claim in that case arising from a temporary government-caused flood should be evaluated based on: (1) the duration of the physical invasion; (2) "the degree to which the invasion is intended or is the foreseeable result of authorized government action;" (3) "the character of the land at issue;" (4) "the owner's 'reasonable investment-backed expectations' regarding the land's use;" and (5) the "[s]everity of the interference."[83] The Court did not explain in *Arkansas Game & Fish* why it ignored *Loretto*'s discussion of the *Penn Central* framework, whether this new alternative framework is intended to displace the *Penn Central* framework, or whether this new framework applies in all temporary taking cases or only in temporary taking cases involving flooding.

II. THE DUBIOUS *PER SE* RULE FOR PHYSICAL TAKINGS

Notwithstanding the Court's repeated statements that it applies a *per se* rule in physical taking cases, there is substantial reason to doubt that the Court is actually committed to a *per se* approach. This critique of the Court's ostensible *per se* rule proceeds in three sections: (1) an examination of whether the Supreme Court has actually articulated and faithfully applies a *per se* approach in physical taking cases; (2) a review of the history of the development of the ostensible *per se* physical taking doctrine in the Supreme Court; and (3) a survey of the numerous different types of appropriations and occupations that, by longstanding tradition, have generally not been regarded as raising serious takings concerns.

A. The Supreme Court's Disregard of Its Ostensible Per Se *Rule*

Starting with appropriations, the Court's recent decision in *Horne v. Department of Agriculture*,[84] while purporting to affirm and extend the scope of *per se* analysis, casts serious doubt on the Court's commitment

[81] *See Loretto*, 458 U.S. at 432-35 (distinguishing PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) and Kaiser Aetna v. United States, 444 U.S. 164 (1979), which applied the *Penn Central* framework, on the ground that they involved temporary physical taking claims); *see also id.* at 435 n.12 (indicating that "temporary limitations on the right to exclude . . . are subject to a more complex balancing process to determine whether they are a taking," again citing *PruneYard* and *Kaiser Aetna*).

[82] 568 U.S. 23 (2012).

[83] *Id.* at 38-39.

[84] Horne v. Dep't of Agric., 576 U.S. 351 (2015).

to this approach. The case involved a taking claim based on a raisin marketing order issued by the U.S. Department of Agriculture that required raisin producers to set aside a portion of their crops for the government in order to restrict the supply and prop up the market price of raisins. The *Horne* Court asserted that the same "*per se*" rule that ostensibly applies to claims arising from appropriations of real property applies to claims arising from appropriations of personal property as well.[85] However, after making this statement, the Court proceeded to address "[w]hether a governmental mandate to relinquish specific, identifiable property as a 'condition' on permission to engage in commerce effects a *per se* taking."[86] The Court's answer was "yes," "at least in this case."[87]

This careful wording seriously undercuts the *Horne* Court's superficial embrace of a *per se* approach. The government had argued in *Horne* against the taking claim by pointing to *Ruckelshaus v. Monsanto Co.*,[88] in which the Court held that the Environmental Protection Agency did not take private property by requiring companies that manufacture pesticides, fungicides, and rodenticides to share trade secrets about the health, safety, and environmental effects of their products with competitors and the public. The *Horne* Court rejected the government's reliance on *Monsanto*, stating that "[r]aisins are not dangerous pesticides; they are a healthy snack. A case about conditioning the sale of hazardous substances on disclosure of health, safety, and environmental information related to those hazards is hardly on point."[89] The *Horne* Court apparently meant that an order to turn over raisins ("a healthy snack") to the government is a taking, but a government requirement to turn over some dangerous material to the government or, as in *Monsanto* itself, turn over data (which *itself* is obviously not hazardous) "related" to some hazard, may not be a taking. Given the limited, qualified scope of the *Horne* ruling, the Court's assertion that it was applying a *per se* rule to appropriations of personal property is an exaggeration. A ruling that is "good for this case only" mirrors the "essentially ad hoc, factual inquiry" employed in *Penn Central*, the supposed antonym of *per se* analysis.

Prior Supreme Court cases rejecting takings claims arising from appropriations cast further doubt on the Court's commitment to a *per*

[85] *Id.* at 361.

[86] *Id.* at 364-65 (emphasis added).

[87] *Id.* at 365.

[88] 467 U.S. 986 (1984).

[89] *Horne*, 576 U.S. at 366.

se rule. In *United States v. Sperry*,[90] the Court rejected a company's taking challenge to a deduction by the U.S. Treasury from a financial award made by the Iran-United States Claims Tribunal. The Court reasoned that the deduction was a reasonable "user fee'" to reimburse the United States for its expenses in administering the arbitration process and therefore not a taking. In *Bennis v. Michigan*,[91] the Court rejected a takings challenge to a government-compelled forfeiture of the family automobile. In a pair of related cases,[92] the Court rejected the argument that a compensable taking occurred when owners of subsurface mineral rights lost their interests to owners of the surface estate by failing to comply with statutory recordation requirement. In addition, in *Monsanto*, discussed above, the Court rejected a claim that a taking occurred when a permit applicant was required to disclose trade secret data to competitors and the public in order to secure a permit from the government.

Even in cases upholding taking claims based on appropriations, the Court has signaled a lack of commitment to a *per se* approach. Thus, in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*,[93] the Court ruled that a county's appropriation of the interest earned on private funds deposited in an interpleader account constituted a compensable taking. The Florida Supreme Court had rejected the claim on the ground that the interest could be "considered public money." The U.S. Supreme Court rejected this theory, saying, "a State, by *ipse dixit*, may not transform private property into public property without compensation."[94] The Court then ruled that the government's seizure of the interest was a taking; the Court said, "the exaction is a forced contribution to the general governmental revenues" that had "the practical effect of appropriating" the interest.[95] Importantly for present purposes, however, the Court did not rule that the county engaged in a compensable appropriation by applying a categorical rule. The Court observed, "[i]t is obvious that the interest was not a fee for services,"[96] suggesting the Court might reject a claim arising from a fee imposed for government services. In addition, the Court said, "[n]o police power

[90] 493 U.S. 52 (1989).

[91] 516 U.S. 442 (1996).

[92] United States v. Locke, 471 U.S. 84 (1985); Texaco, Inc. v. Short, 454 U.S. 516 (1982).

[93] 449 U.S. 155 (1980).

[94] *Id.* at 164.

[95] *Id.* at 163-64.

[96] *Id.* at 162.

justification is offered for the deprivation,"[97] suggesting yet another reason an appropriation claim might fail.

Also instructive is the case of *Eastern Enterprises v. Apfel*,[98] in which the Court struck down federal legislation imposing retroactive liability on companies formerly engaged in coal mining to cover employee health care costs. The plurality thought the case involved an appropriation because the law required the companies to transfer financial assets to a government-designated health care fund.[99] However, the plurality based its conclusion that the law resulted in a taking on an exhaustive *Penn Central* analysis rather than by using a *per se* test.[100] The Court also applied a *Penn Central* analysis in several earlier cases involving similar forced transfers of money.[101] All these cases undermine the idea that appropriations are invariably compensable takings.

The Court's questionable commitment to a *per se* approach is also apparent in cases arising from occupations. *Loretto v. Teleprompter Manhattan CATV Corp.*,[102] the Court's leading modern decision addressing occupation takings, arose from a New York law authorizing cable television companies to install cables and other equipment on the exterior of private apartment buildings without owner permission. While the Court itself did not use the terms "*per se*" or "categorical," the Court has treated *Loretto* as establishing that a government-compelled "permanent occupation" of private property is a *per se* taking.[103] However, the actual scope of Loretto's ostensible *per se* rule is

[97] *Id.* at 163.

[98] 524 U.S. 498 (1998).

[99] *See id.* at 523 ("By operation of the Act, Eastern is permanently deprived of those assets necessary to satisfy its statutory obligation, not to the Government, but to the Combined Fund." (internal quotations omitted)).

[100] *See id.* at 529-37. The fifth justice supporting the judgment believed the act violated the Due Process Clause. *See id.* at 539-50 (Kennedy, J., concurring in the judgment and dissenting in part).

[101] *See* Concrete Pipe & Prods., Inc. v. Constr. Laborers Pension Tr., 508 U.S. 602, 643-47 (1993) (rejecting taking claim based federal statute requiring employers who withdraw from multiemployer pension plan to pay into plan for the benefit of employees, relying on a *Penn Central* analysis); Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 222-23 (1986) (rejecting the theory that a statute working "a permanent deprivation of assets" in favor of a third party "always constitutes an uncompensated taking prohibited by the Fifth Amendment").

[102] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

[103] *See, e.g.*, Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 538 (2005) ("[R]egulatory action . . . generally will be deemed [a] per se taking[] for Fifth Amendment purposes . . . where government requires an owner to suffer a permanent physical invasion of her property — however minor"); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning

uncertain. One plausible reading of *Loretto* is that, if a permanent occupation has occurred, a finding of liability automatically follows, regardless of any other consideration: the *Loretto* Court contrasted the analysis it was applying to a *Penn Central* analysis and said that "when [a] physical intrusion reaches the extreme form of a permanent physical occupation," the "character" of the government action is "determinative."[104] On the other hand, *Loretto* also can be read to not necessarily preclude consideration of other factors. The Court also asserted that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve,"[105] a statement that suggests other factors might be relevant in a permanent occupation case. More significantly, the *Loretto* opinion contains no reference to owner expectations. Ms. Loretto purchased her apartment building *before* the New York legislature enacted the law granting cable companies mandatory access to her property. *Loretto* does not resolve whether the case might have come out differently if Ms. Loretto had purchased the building *after* the New York legislature enacted the law.

Other cases provide even stronger reason to doubt that a *per se* approach governs occupation cases. In *PruneYard Shopping Center v. Robin*,[106] decided a few years prior to *Loretto*, the Court held that a California constitutional requirement that a shopping center owner allow activists to engage in political activity in the center did not offend the Taking Clause. The Court said there was no showing the public access mandate "unreasonably impair[ed] the value or use" of the property, the property was a large commercial complex that was "open to the public at large," and the owner could adopt "time, place, and manner regulations that will minimize any interference with" shopping center operations.[107] In these circumstances, the Court ruled, the mere fact that the properly was "'physically invaded' . . . cannot be viewed as determinative."[108] Importantly, the *Loretto* Court cited *PruneYard* with

Agency, 535 U.S. 302, 321-22 (2002) (indicating that the Taking Clause "requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation.").

104 *Loretto*, 458 U.S. at 426.

105 *Id.*

106 447 U.S. 74 (1980).

107 *Id.* at 83.

108 *Id.* at 84.

approval,[109] and more recently, in *Horne*, the Court affirmed that *PruneYard* remains good law.[110]

Similarly, in *Heart of Atlanta Motel, Inc. v. United States*,[111] the Court rejected a taking claim by a motel owner based on the public accommodations provisions of the Civil Rights Act of 1964. The act requires innkeepers to accept the presence of African American persons even if they wish to exclude them, which subjects innkeepers to a forced, indefinite occupation of their private property.[112] In a long opinion addressing various legal issues, the Court rejected the taking claim in a single sentence, "[n]either do we find any merits in the claim that the Act is a taking of property without just compensation."[113] *Loretto* cited *Heart of Atlanta* with approval, but distinguished the case on the seemingly inconsequential ground that it involved "the landlord-tenant relationship."[114]

Finally, in *National Board of Young Men's Christian Associations v. United States*,[115] the Court rejected a taking claim by the owner of buildings in the Panama Canal Zone who sought to hold the U.S. government responsible for property damage caused by anti-American rioters the U.S. Army allegedly failed to adequately control. Plaintiff contended that the government should be responsible for the damage to the buildings that occurred after soldiers entered the buildings, claiming that the government had engaged in a "physical use and occupation" of plaintiff's private property.[116] The Court rejected the taking claim, emphasizing that the government occupied the buildings in an effort to protect them from damage.[117] When "the private party is the particular intended beneficiary of the governmental activity," the Court said, "'fairness and justice' do not require that losses which may

[109] *Loretto*, 458 U.S. at 434.

[110] Horne v. Dep't of Agric., 576 U.S. 351, 364 (2015). Oddly, the *Horne* Court explained the rejection of the taking claim in *PruneYard*, which plainly involved an alleged occupation of private property, on the ground that, "a regulatory restriction on use that does not entirely deprive an owner of property rights may not be a taking under Penn Central." *Id.*

[111] Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

[112] *See* Jurisdictional Statement and Brief at 52, *Heart of Atlanta*, 379 U.S. 241 (No. 515) ("We contend that the taking of private property has been for the purpose of devoting it to public use, that is, for the use of all people without restriction. We contend that such use without restriction is public use.").

[113] *Heart of Atlanta*, 379 U.S. at 261.

[114] *Loretto*, 458 U.S. at 440.

[115] Nat'l Bd. of Young Men's Christian Ass'ns (*YMCA*), 395 U.S. 85 (1969).

[116] Brief for Petitioners at 16, *YMCA*, 395 U.S. 85 (No. 517).

[117] *YMCA*, 395 U.S. at 90-92.

result from the activity 'be borne by the public as a whole,' even though the activity may also be intended incidentally to benefit the public."[118] The Supreme Court has never subsequently questioned the soundness of this ruling.

B. The Checkered History of "Per Se" *Physical Takings Doctrine*

An examination of the origins and evolution of the Supreme Court's ostensible *per se* physical takings rule reveals both the relative novelty of the supposed rule and the weakness of its foundation in prior precedent. While the Court has suggested that its *per se* rule is "as old as the Republic,"[119] this claim to venerability is a misleading fiction.

Turning first to appropriations, there is no question the Supreme Court has long recognized that appropriations fall within the scope of the Taking Clause. Indeed, in 1870, the Court asserted that the Taking Clause "has always been understood as referring *only* to a direct appropriation."[120] However, it is one thing to say that an appropriation *can* be a taking, and quite another to say that an appropriation is *always* a taking.

The origins of the idea that appropriations are *per se* takings are surprisingly easy to uncover by tracing precedent backward from the recent *Horne* decision. The *Horne* Court addressed the following issue presented in the petition for *certiorari*: "Whether the government's 'categorical duty' under the Fifth Amendment to pay just compensation when it 'physically takes possession of an interest in property' . . . applies only to real property and not to personal property."[121] As this wording makes plain, the question presented by the petition starts from the premise that *Arkansas Game & Fish Comm'n.* recognized that appropriations of real property are *per se* takings. However, *Arkansas* does not so hold, because the case involved a taking claim based on an occupation, not an appropriation. Furthermore, the *Arkansas* Court

---

[118] *Id.* at 92 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

[119] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322 (2002); *see also* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 537 (2005) ("The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property."); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 (1992) ("Prior to Justice Holmes's exposition in [*Mahon*], 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.'" (citation omitted)).

[120] Legal Tender Cases, 79 U.S. 457, 551 (1870) (emphasis added).

[121] Horne v. Dep't of Agric., 576 U.S. 351, 357 (2015) (citation omitted) (quoting Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 31 (2012)).

applied a multivariable analysis, not a *per se* test, to the temporary inundation at issue in that case. The *Arkansas* Court did recite, in *dictum*, "[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner."[122] However, the Court simply lifted this *dictum* from the 2002 *Tahoe-Sierra* decision.[123]

The statement in *Tahoe-Sierra* was itself *dictum*, because the case involved an (unsuccessful) regulatory taking claim, not a physical taking claim. The only authority the *Tahoe-Sierra* Court cited to support this *dictum* was the Court's then fifty-year old decision in *United Sates v. Pewee Coal*,[124] which arose from the government's seizure of a private coalmine during World War II. The *Pewee Coal* case did involve an appropriation, and the Court upheld the taking claim. However, the *Pewee* Court did not apply a categorical rule. The Court stated that "whether there is a 'taking' must be determined in light of the particular facts and circumstances involved,"[125] a formula that mirrors the *ad hoc* approach to taking analysis subsequently articulated in *Penn Central*. Moreover, the Court reached the conclusion in *Pewee Coal* that a taking occurred based on a detailed examination of the government's management of the mine following the seizure.[126] In sum, *Pewee Coal* does not support a *per se* appropriations rule, and the *Tahoe-Sierra* Court's declaration that such a rule could be derived from *Pewee* was pure invention.

Ironically, the *Tahoe-Sierra* Court had no particular reason even to discuss how to analyze an appropriation. The plaintiff in *Tahoe-Sierra* pointed to the then-recent *Lucas* decision to support the claim that a multi-year moratorium on development around Lake Tahoe was a regulatory taking. The Court rejected the argument that *Lucas* supported the claim on the ground that the parcel as a whole has a temporal as well as a geographic dimension. The Court reasoned that the moratorium only lasted a few years (unlike the indefinite development prohibition in *Lucas*), and therefore did not result in a total taking of the lands subject to the moratorium.

The Court might well have left it at that. However, the plaintiff, in an effort to bolster its case, made the extravagant argument that appropriations, occupations and regulatory restrictions on property use all represent different applications of "a unified field theory of takings

[122] Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 31 (2012).

[123] *See Tahoe-Sierra*, 535 U.S. at 322.

[124] 341 U.S. 114 (1951).

[125] *Id.* at 117 n.4.

[126] *See id.* at 115-16.

jurisprudence" in which the permanence or temporariness of the government action is irrelevant.[127] In an arguably unnecessary effort to rebut this extreme argument, the *Tahoe-Sierra* Court distinguished appropriation claims from regulatory claims by asserting — apparently for the first time — that appropriation claims are governed by a special "categorical rule."[128] Depending on one's point of view, it has been either all uphill or all downhill from this point forward with respect to physical takings claims.

Tahoe-Sierra's unnecessary *dictum* that a *per se* test should govern appropriation claims was also based on a misreading of precedent apart from *Pewee Coal*. The Court pointed to several Supreme Court cases arising from the U.S. government's exercise of eminent domain to seize temporary office space during World War II.[129] The cases presented complex questions about how to calculate the compensation due for a taking of property for a "temporary" period. Because the government initiated these eminent domain proceedings, however, the Court had no need to delve into the merits of the taking question. The *Tahoe-Sierra* Court simply assumed from these cases that because the government can take a term interest in property through eminent domain, it must follow that a seizure of property for a limited period is necessarily a compensable taking. This reasoning is problematic, to say the least. Simply because the government can acquire some property interest through eminent domain does not establish that the government can never restrict the same property interest through regulation or other means without having to pay under the Taking Clause.[130]

---

[127] Brief for Petitioners at 15, *Tahoe-Sierra*, 535 U.S. 302 (No. 00-1167).

[128] *See Tahoe-Sierra*, 535 U.S. at 322 (discussing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) and United States v. Causby, 328 U.S. 256 (1946)). *See generally* Andrew S. Gold, *The Diminishing Equivalence Between Regulatory Takings and Physical Takings*, 107 DICK. L. REV. 571 (2003) (describing *Tahoe-Sierra*'s rejection of the theory of "practical equivalence" between regulatory restrictions on property use and physical takings).

[129] *See, e.g.*, United States v. Westinghouse Elec. & Mfg. Co., 339 U.S. 261, 267, 270 (1950) ("Condemnation for indefinite periods of occupancy [was adopted as] a practical response to the uncertainties of the Government's needs in wartime."); Kimball Laundry Co. v. United States, 338 U.S. 1, 5 (1949) ("[L]oss to the owner of nontransferable values deriving from his unique need for property . . . like loss due to an exercise of the police power is properly treated as part of the burden of common citizenship."); United States v. Gen. Motors Corp., 323 U.S. 373, 375 (1945) ("[T]he Secretary of War may cause proceedings to be instituted . . . to acquire, by condemnation, any real property . . . deemed necessary for military or other war purposes.").

[130] For instance, the government commonly purchases easements from farmers in order to keep land in agricultural use. *See* United States Dep't of Agric., *Agricultural*

The evolution of the *per se* rule for permanent occupations has followed a different but equally problematic path. What began as a relatively narrow doctrine in the latter half of the nineteenth century gradually expanded over time, to explode in a dramatic and surprising way with the Court's 1982 decision in *Loretto*.

In 1871, in *Pumpelly v. Green Bay & Mississippi Canal* Co.,[131] the Court expanded takings doctrine beyond appropriations to include occupations.[132] The case arose from construction of a dam on the Fox River in Wisconsin that inundated 640 acres of private land. In response to the defendant's argument that only appropriations can be takings, the Court responded:

> 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, . . . 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.[133]

From this point forward, the Court has recognized that the Taking Clause can apply not only to "conversions" (*i.e.*, appropriations) but also to (at least some) occupations.

Pumpelly announced a very narrow takings test for occupations. The plaintiff argued that, "by reason of the dam, the water of the lake was so raised as to cause it to overflow all his land, . . . the overflow remained *continuously* from the completion of the dam, . . . and . . . it worked *an almost complete destruction* of the value of the land."[134] The Court relied on these allegations to define the elements of a viable occupation claim: "Where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure

Conservation Easement Program, NAT. RESOURCES CONSERVATION SERV., https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/easements/acep/ (last visited Sept. 9, 2020) [https://perma.cc/5WR7-E5AH]. But government also can pursue the same objective using its zoning powers without paying landowners. *See* Mark Cordes, *Agricultural Zoning: Impacts and Future Directions*, 22 N. ILL. U. L. REV. 419, 427 (2002).

131 80 U.S. 166 (1871).

132 *Id.* at 177-78.

133 *Id.*

134 *Id.* at 177 (emphases added).

placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution."[135]

Subsequent decisions confirmed *Pumpelly*'s pronouncement that *both* permanent occupation and destruction of all or most of the value of the property are necessary to establish liability.[136] Thus, in *Lynah v United States*,[137] the Court ruled that impoundment of the Savannah River in South Carolina resulted in a taking because the land was both "permanently flooded" and "wholly destroyed in value."[138] On the other hand, in *Sanguinetti v. United States*,[139] the Court ruled that no taking occurred where there was serious economic loss, but the land was not "permanently flooded."[140] And in *Manigault v. Springs*,[141] the Court ruled that no taking occurred where an inundation of private property, though permanent in duration, did not destroy the value of the property. In rejecting the claim, the Court stressed that the owner could have avoided injury "by raising the banks"[142] at only "some extra expense."[143]

Forty-six years after *Pumpelly*, in *United States v. Cress*,[144] the Court modified occupation doctrine in two important ways. First, it ruled that an occupation could be "permanent" even if it is only intermittent.[145] The Court reasoned, "[t]here is no difference of kind, but only of degree, between a *permanent condition* of continual overflow by backwater and a *permanent liability* to intermittent but inevitably recurring overflows; and, on principle, the right to compensation must arise in the one case as in the other."[146] Second, the Court lowered the threshold of economic impact necessary to establish a taking. In

[135] *Id.* at 181.

[136] *See* Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1101 (1993) ("The cases following *Pumpelly* restricted its holding to similar instances of complete, destructive invasion of property.").

[137] 188 U.S. 445 (1903).

[138] *Id.* at 469.

[139] 264 U.S. 146 (1924).

[140] *Id.* at 147.

[141] 199 U.S. 473 (1905).

[142] *Id.* at 484.

[143] *Id.* at 485.

[144] United States v. Cress, 243 U.S. 316 (1917).

[145] *Id.* at 328.

[146] *Id.* (emphases added). For a more modern case applying the same understanding of permanence, see Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 832 (1987) ("We think a[n invasion] has occurred . . . where individuals are given a permanent and continuous right to pass to and from, so that real property may be continuously traversed, even though no particular individual is permitted to station himself permanently upon the premises.").

response to the argument that no taking occurred because the flooding "depreciated" the value of the property only "to the extent of one half,"[147] the Court said, "it is the character of the invasion, not the amount of damage resulting from it, *so long as the damage is substantial*, that determines the question whether it is a taking."[148]

The next step in the evolution of occupation doctrine was the Court's 1978 decision in *Penn Central Transportation Co. v. City of New York*.[149] Today the Court treats *Penn Central* as a regulatory takings precedent. However, the Court's opinion in *Penn Central* was not actually so limited. The Court set out a comprehensive framework for analyzing taking claims based on restrictions on property use as well as physical intrusions. The Court instructed that *all* takings claims, including physical taking claims, should be evaluated using the now-familiar three-part framework addressing economic impact, investment expectations, and character of government action. This instruction, as applied to physical taking claims, was generally consistent with the nuanced, multifactorial analysis the Court had applied to physical taking claims up to that point, as described above. At the same time, the *Penn Central* Court indicated that claims involving occupations deserved special consideration; the Court said that, "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[150] This

147 *Cress*, 243 U.S. at 328.

148 *Id.* at 328 (emphasis added). For other cases applying the twin requirements of permanent (if only intermittent) occupation and economic loss, see United States v. Causby, 328 U.S. 256, 258, 262 (1946) (holding the United States liable for a taking based on "frequent and regular" low-altitude flights of military aircraft over plaintiffs' land that resulted in serious personal discomfort, destruction of plaintiffs' commercial chicken farm, and "a diminution in value of the property"); Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327, 329-30 (1922) (finding a taking based on the frequency of military barrages that demonstrated "an abiding purpose to fire when the United States sees fit," coupled with proof that "a serious loss has been inflicted upon the claimant").

149 438 U.S. 104 (1978) (holding that the City of New York could restrict the company's property, Grand Central Terminal, as "part of a comprehensive program to preserve historic landmarks . . . in addition to [restrictions] imposed by applicable zoning ordinances — without effecting a 'taking' requiring the payment of 'just compensation.'").

150 *Id.* at 124. In addition, the Court suggested that claims arising from appropriations also deserve particular attention, observing that "government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to be 'takings.'" *Id.* at 128.

observation, too, was generally consistent with the pattern of Supreme Court precedent preceding the *Penn Central* decision.

It was only natural, in the aftermath of *Penn Central*, for the Court to evaluate physical taking claims by applying the *Penn Central* framework. In *Kaiser Aetna v. United States*,[151] arising from a directive by the Army Corps of Engineers to grant the public access to a private pond in Hawaii, the Court upheld the taking claim based on *Penn Central*.[152] In *PruneYard Shopping Center v. Robins*,[153] arising from enforcement of a California constitutional requirement granting political activists access to a shopping center, the Court rejected the taking claim under *Penn Central*.[154] In both cases, the Court took into account the fact that the plaintiff alleged a physical intrusion. However, in both cases the Court also considered the economic impact of the government actions and the extent of interference with owner expectations, also in accordance with *Penn Central*.

Everything changed with the 1982 decision in *Loretto*, ruling that a New York statute authorizing cable companies to install cable equipment on the exterior of private apartment buildings was a taking.[155] *Loretto* rejected use of the *Penn Central* framework for claims based on permanent occupations. The *Loretto* Court asserted that, when "a permanent physical occupation" has occurred, "our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action . . . has only a minimal impact on the owner."[156] In light of the precedent described above, this statement was plainly inaccurate. While the Court's definition of the necessary level of economic harm in physical takings cases evolved over time, *no* Court decision prior to *Loretto* suggested an occupation could support a successful taking claim if the impact were only minimal. The *Loretto* Court's novel position implicitly overruled prior decisions rejecting occupation claims for lack of a sufficient showing of economic loss.[157]

---

151 444 U.S. 164 (1979).

152 *See id.* at 175.

153 PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980).

154 *See id.* at 83-84.

155 *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 420 (1982).

156 *Id.* at 434-35.

157 *See, e.g.*, *PruneYard*, 447 U.S at 84 (rejecting claim when plaintiffs "failed to demonstrate that the 'right to exclude others' is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a 'taking.'"); Manigault v. Springs, 199 U.S. 473, 485 (1905) (finding no taking where plaintiff could avoid economic injury at only "some extra expense").

The *Loretto* Court took pains to attempt to explain away the then recent decisions in *Kaiser Aetna* and *PruneYard*. As discussed, the Court evaluated the occupation claims in both those cases using the multifactor *Penn Central* framework. The *Loretto* Court distinguished both cases on the ground that they involved "temporary" occupations rather than the kind of permanent occupation at issue in *Loretto*. In fact, however, both cases involved permanent occupations in the sense that they arose from government mandates to afford public access to private property on an indefinite basis.[158] More significantly, the *Loretto* Court made no sustained effort to provide an explanation for *why* temporary occupations should be subject to a different analysis than permanent occupations.[159]

The Court's labored effort in *Loretto* to distinguish (rather than forthrightly overrule) *Kaiser Aetna* and *PruneYard* helps explain how the Court backed into its current, problematic position that permanent occupations are subject to a *per se* rule while temporary occupations are evaluated under a multifactor framework. Once the *Loretto* Court determined not to overrule *Kaiser Aetna* and *PruneYard*, but instead to distinguish them on the made-up ground that they involved temporary rather than permanent occupations, the only logical conclusion left to the Court was to confine its new *per se* rule for occupations to permanent occupations. In addition, the Court's contorted logic led to the implicit, novel conclusion that a temporary occupation can be a compensable taking in some circumstances. In sum, the Court's doctrinal disjunction between permanent and temporary occupations has no real foundation in theory or precedent, but is simply the product of the *Loretto* Court's felt need to explain away inconvenient precedent. This history does not prove there is no justification for distinguishing between permanent and temporary occupation claims, but it raises a serious question about whether there is a principled basis for this distinction.[160]

---

158 The *PruneYard* Court observed that the shopping center owner retained the right to impose "time, place, and manner regulations" to minimize interference with the shopping center operations. *PruneYard*, 447 U.S. at 83. This feature of the California access requirement provides a basis for distinguishing the New York law at issue in *Loretto*. *See Loretto*, 458 U.S. at 434. However, this feature of the California access requirement does not make *PruneYard* a "temporary" occupation case.

159 *See Loretto*, 458 U.S. at 435 n.12 (asserting, in tautological fashion, that the "rationale" for subjecting temporary occupations "to a more complex balancing process . . . is evident: they do not absolutely dispossess the owner of his rights to use, and exclude others from, his property").

160 To compound the confusion, whereas *Loretto* indicated, based in part on its (mis)reading of *Kaiser Aetna* and *PruneYard*, that courts should evaluate temporary

C. Traditionally Acceptable Uncompensated Physical Intrusions

The Supreme Court's repeated assertions that appropriations and occupations are *per se* takings also are undermined by numerous familiar appropriations and occupations that traditionally have never been regarded as compensable takings. The Court has proceeded to elaborate its *per se* doctrine either by ignoring these "hard cases" or distinguishing them on dubious grounds. Collectively, these discordant cases raise additional doubts about the validity of the ostensible *per se* test for physical takings.

A forfeiture, conventionally defined as "the loss of any right — ordinarily a property right — as a consequence of a breach of some legal obligation,"[161] is perhaps the most familiar example of a government appropriation of private property that is not a compensable taking. In *Bennis v. Michigan*,[162] the Court rejected a spouse's taking challenge to a Michigan forfeiture order based on her husband's use of the family automobile to engage in sex with a prostitute. In *Calero-Toledo v. Pearson Yacht Leasing Co.*,[163] the Court rejected a taking challenge to a government forfeiture of a yacht used by a lessee, without the owner's knowledge or consent, to transport illegal drugs.

The Court has not offered any persuasive justification for why a forfeiture, which plainly is a literal appropriation, is not a compensable taking. In *Bennis* the Court, observing that "the automobile was transferred by virtue of [the forfeiture] proceeding from petitioner to the State," reasoned 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."[164] This reasoning is plainly nonsensical. Every inverse condemnation claim presumes the government has proceeded under some valid legal authority, and therefore the fact that the government has acquired property under some legal authority other

occupation claims using the multifactor *Penn Central* framework, the Court in *Arkansas Game and Fish* subsequently articulated a multifactor framework that has some commonalities with the *Penn Central* framework but is distinctly different than the *Penn Central* framework. *See supra* notes 81–83 and accompanying text. The *Arkansas Game and Fish* Court did not explain why it announced a new framework for evaluating temporary occupation claims, or whether it intended to disavow the *Penn Central* framework in this context.

161 CHARLES DOYLE, CONG. RESEARCH SERV., 97-139, CRIME AND FORFEITURE 1 n.1 (2015), https://fas.org/sgp/crs/misc/97-139.pdf [https://perma.cc/82M6-W6WX] (quoting BLACK'S LAW DICTIONARY 667 (8th ed. 2004)).

162 Bennis v. Michigan, 516 U.S. 442 (1996).

163 Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

164 *Bennis*, 516 U.S. at 451.

than the eminent domain power cannot possibly provide the basis for rejecting a taking claim. In *Calero-Toledo*, the Court defended forfeitures by observing that the practice predated the founding of the United States,[165] and the practice is "too firmly fixed in the punitive and remedial jurisprudence of the country to now be displaced."[166] These statements may well be correct, but they obviously point to no coherent theory for *why* forfeitures are not compensable takings.

In the same vein, courts have traditionally held that government seizures of "contraband" are not compensable takings.[167] The general definition of contraband is property the mere possession of which the government has declared unlawful.[168] Numerous federal and state statutory provisions define different types of property as contraband, ranging from tobacco products to child pornography.[169] Whether an item is contraband can be context-specific; for example, innocent items of personal property may become contraband when in the possession of incarcerated persons.[170] The U.S. Supreme Court has apparently never specifically addressed the question of whether seizure of contraband is a taking, but the lower courts appear to be in unanimous agreement that it is not.

---

[165] *Calero-Toledo*, 416 U.S. at 683 ("[L]ong before the adoption of the Constitution the common law courts in the Colonies — and later in the states during the period of Confederation — were exercising jurisdiction in rem in the enforcement of (English and local) forfeiture statutes." (quoting C.J. Hendry Co. v. Moore, 318 U.S. 133, 139 (1943))).

[166] *Id.* at 686 (quoting Goldsmith-Grant Co. v. United States, 254 U.S. 505, 510-11 (1921)); *see also Bennis*, 516 U.S. at 453.

[167] *See, e.g.*, Acadia Tech., Inc. v. United States, 458 F.3d 1327, 1332 (Fed. Cir. 2006) (observing that seizure of contraband is an exercise of the police power "that has not been regarded as a taking for public use for which compensation must be paid"); United States v. $7,990.00 in U.S. Currency, 170 F.3d 843, 845 (8th Cir. 1999) ("[T]he forfeiture of contraband is an exercise of the government's police power, not its eminent domain power.").

[168] *See Contraband*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining contraband as "[g]oods that are unlawful to import, export, produce, or possess").

[169] *See, e.g.*, 18 U.S.C. § 2252 (2018) (making the possession of child pornography unlawful); VT. STAT. ANN. tit. 7, § 1009 (2019) (defining cigarettes and other tobacco products offered for sale in violation of Vermont law to be contraband).

[170] *See* 28 C.F.R. § 500.l(h) (2020) (prohibiting federal prisoners from possessing materials "which can reasonably be expected to cause physical injury or adversely affect the security, safety, or good order of the institution"); OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, REVIEW OF THE FEDERAL BUREAU OF PRISONS' CONTRABAND INTERDICTION EFFORTS, at i (2016), https://oig.justice.gov/sites/default/files/reports/e1605.pdf [https://perma.cc/TQY6-LCRW] (prohibiting items in federal prisons including "tobacco, telephones, and electronic devices").

The well-recognized authority of government to seize adulterated foods and drugs represents another challenge to the notion that government appropriations are always compensable takings. Such seizures have a venerable history,[171] and the Supreme Court has long presumed they raise no serious constitutional problem.[172] For over a hundred years, Congress has authorized the U.S. Food and Drug Administration ("FDA") and its predecessor agency to seize adulterated or misbranded foods without compensation,[173] and Congress has conferred the same authority on the Food Safety and Inspection Service in the U.S. Department of Agriculture.[174] Again, the Supreme Court has apparently never specifically addressed the taking issue in this context, but lower courts have ruled, for example, that seizure of beef illegally implanted with a carcinogen was not a taking,[175] and that seizure of adulterated animal feed was not a taking.[176]

Likewise, occupations and seizures of private property for law enforcement purposes are not regarded as compensable takings. Thus, courts have generally rejected taking claims based on police invasions of private property in order to apprehend criminal suspects.[177] No

[171] During the reign of Queen Elizabeth, England adopted a statute providing: "That if any shall bring into any haven, port, creek or town of this realm any salt fish, or salt herrings, which shall not be good, sweet, reasonable and meet for men's meat, and shall offer the same to be sold, then all and every person, owners thereof, shall lose and forfeit to our Sovereign Lady all the said unreasonable fish." PETER HUTT, FOOD AND DRUG LAW 7 (3d ed. 2007).

[172] *See* N. Am. Cold Storage Co. v. City of Chicago, 211 U.S. 306, 308, 315 (1908) (observing, in a case involving seizure and destruction of 47 barrels of poultry that "had become putrid, decayed, poisonous, or infected in such a manner as to render it unsafe or unwholesome for human food," that the plaintiff did not "deny the right [of the government] to seize and destroy unwholesome or putrid food").

[173] *See* Federal Food, Drug, and Cosmetic Act, Pub. L. No. 75-717, § 304, 52 Stat. 1040, 1044-45 (1938) (codified at 21 U.S.C. § 334 (2018)); Pure Food and Drug Act of 1906, Pub. L. No. 59-384, § 10, 34 Stat. 768, 771-72.

[174] *See* 21 U.S.C. § 467 (2018) (poultry products); *id.* § 673 (2018) (meat products); *id.* § 1049 (2018) (egg products).

[175] Jarboe-Lackey Feedlots, Inc. v. United States, 7 Cl. Ct. 329, 339 (1985).

[176] Provimi, Inc. v. United States, 680 F.2d 111, 114 (Ct. Cl. 1982); *see also* State v. 44 Gunny Sacks of Grain, 497 P.2d 966, 967 (N.M. 1972) (rejecting taking claim based on seizure and destruction of grain containing mercury poisoning).

[177] *See, e.g.*, Customer Co. v. City of Sacramento, 895 P.2d 900, 905-06 (Cal. 1995) (rejecting taking claim based on property damage caused by efforts of police to apprehend suspect who took refuge in plaintiff's building); Kelley v. Story Cty. Sheriff, 611 N.W.2d 475, 481 (Iowa 2000) (rejecting taking claim by owner of residence that suffered damage when law enforcement officers made forced entry for purposes of executing arrest warrant). *But see* Wegner v. Milwaukee Mut. Ins. Co., 479 N.W.2d 38, 39 (Minn. 1991) (upholding taking claim based on police intrusion).

taking occurred, a federal appeals court ruled, when government agents seized an automobile as a suspected instrumentality of a crime, even though the government ultimately concluded that the suspect had not used the vehicle to facilitate a crime.[178] Courts routinely hold that a seizure of private property for potential use as evidence in a judicial proceeding is not a compensable taking.[179] In fact, there is apparently no reported decision dissenting from this position.[180] Courts have applied the rule that seizure of evidence is not a taking even if the property was seized from an innocent party,[181] whether or not the property was seized pursuant to a warrant,[182] whether or not the property was subsequently introduced into evidence,[183] and even if the government never returned the property to the owner.[184] Finally, in the realm of parking regulations, the U.S. Court of Appeals for the D.C. Circuit rejected a taking claim based on the District of Columbia's practice of impounding and selling cars with excessive unpaid traffic tickets.[185]

---

[178] United States v. One 1979 Cadillac Coupe de Ville, 833 F.2d 994, 1001 (Fed. Cir. 1987).

[179] *See, e.g.*, Kam-Almaz v. United States, 682 F.3d 1364, 1371 (Fed. Cir. 2012) (holding that seizure of laptop computer as potential evidence by customs agents resulting in loss of valuable business information not a taking); Amerisource Corp. v. United States, 525 F.3d 1149 (Fed. Cir. 2008) (holding that seizure of drugs from drug wholesaler for use as evidence in criminal proceeding against third parties not a taking).

[180] *See Amerisource*, 525 F.3d at 1155 (observing that the plaintiff "does not cite a single case where seizure of property to be used as evidence has resulted in a compensable taking under the Fifth Amendment"); Eggleston v. Pierce County, 64 P.3d 618, 624 (Wash. 2003) ("[W]e are aware of no case that holds or even supports the proposition that the seizure or preservation of evidence can be a taking.").

[181] *E.g.*, *Kam-Almaz*, 682 F.3d at 1371-72 (holding that the seizure of a laptop and data files by United States Customs agents from an innocent traveler did not constitute taking); *Amerisource*, 525 F.3d at 1155 (holding that drugs seized from an innocent pharmaceuticals distributor did not constitute taking).

[182] *Compare* Johnson v. Manitowoc County, 635 F.3d 331, 336 (7th Cir. 2011) (holding that property damage resulting from the execution of a search warrant did not constitute taking), *with* Acadia Tech., Inc. v. United States, 458 F.3d 1327, 1330-31 (Fed. Cir. 2006) ("[A] takings claim is separate from a challenge to the lawfulness of the government's conduct . . . .").

[183] *Compare Kam-Almaz*, 682 F.3d at 1366-67 (property seized at the border for review by United States Immigration and Customs Enforcement officials), *with Johnson*, 635 F.3d at 334 (seized property introduced as evidence in a criminal trial).

[184] *See, e.g.*, Zitter v. Petruccelli, 213 F. Supp. 3d 698, 708-09 (D.N.J. 2016) (holding that seizure and disposal of oysters by state health officials was not a compensable taking); Young v. Larimer Cty. Sheriff's Office, 356 P.3d 939, 944 (Colo. App. 2014) (holding there was no compensable taking when government agents cut and killed marijuana plants during a criminal investigation).

[185] Tate v. District of Columbia, 627 F.3d 904, 909 (D.C. Cir. 2010).

Another form of government-authorized occupation of private property that is not a compensable taking involves union representatives entering a company's private property to attempt to organize the company's workers. Section 7 of the National Labor Relations Act ("NLRA") guarantees employees "the right to self-organization, to form, join, or assist labor organizations,"[186] and Section 8(a)(1) of the act makes it an "unfair labor practice" for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]."[187] The Supreme Court has repeatedly recognized that it may be an unfair labor practice under the NLRA, depending on the facts and circumstances, for an employer to bar union organizers from entering the employer's private property. As the Supreme Court put it in 1956 in the landmark case of *National Labor Relations Board v. Babcock & Wilcox Co.*:[188]

> This is not a problem of always open or always closed doors for union organization on company property. Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other. The employer may not affirmatively interfere with organization; the union may not always insist that the employer aid organization. But when the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize.[189]

In *Loretto*, the Supreme Court stated that mandated access to private property under *Babcock & Wilcox* and its progeny for union organizing purposes is outside the scope of the "*per se*" takings rule announced in that case.[190] Beyond that, there do not appear to be any reported cases

---

[186] 29 U.S.C. § 157 (2018).

[187] *Id.* § 158(a)(1) (2018).

[188] 351 U.S. 105 (1956).

[189] *Id.* at 112. In the sixty-plus years since the *Babcock & Wilcox* decision, the Court has repeatedly reaffirmed that employers may be compelled to grant access to their premises for union organizing purposes. *See* Lechmere, Inc. v. NLRB, 502 U.S. 527, 538 (1992) (discussing relevant Supreme Court rulings).

[190] *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434 n.11 (1982) ("Teleprompter's reliance on labor cases requiring companies to permit access

addressing taking claims based on mandated access to private property under the NLRA, much less successful claims. Takings claims based on a similar access mandate under the California Agricultural Labor Relations Act have been repeatedly rejected.[191]

Government officials also commonly exercise authority to enter private property without owner consent to carry out public health and safety inspections without triggering takings liability.[192] Many cities have rules subjecting public restaurants to mandatory, unannounced inspections by public health officers to check for health code violations,[193] and these commonplace government-compelled invasions apparently have never generated successful taking claims. At the federal level, Congress has granted the Occupational Safety and Health Administration ("OSHA") authority to enter private property to conduct inspections.[194] If an employer denies access for an inspection,

to union organizers, see, *e.g.*, *Hudgens v. NLRB*, 424 U.S. 507 (1976); *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), is similarly misplaced. As we recently explained: '[T]he allowed intrusion on property rights is limited to that necessary to facilitate the exercise of employees' § 7 rights [to organize under the National Labor Relations Act]. After the requisite need for access to the employer's property has been shown, the access is limited to (i) union organizers; (ii) prescribed non-working areas of the employer's premises; and (iii) the duration of the organization activity. In short, the principle of accommodation announced in *Babcock* is limited to labor organization campaigns, and the "yielding" of property rights it may require is both temporary and limited.' *Central Hardware Co.*, *supra*, at 545.").

191 *See* Cedar Point Nursery v. Shiroma, 923 F.3d 524, 536 (9th Cir. 2019), *cert. granted*, 2020 WL 6686019 (U.S. Nov. 13, 2020) (No. 20-107); Agric. Labor Relations Bd. v. Pandol & Sons, 546 P.2d 687, 690 (Cal. 1976).

192 *See* Boise Cascade v. United States, 296 F.3d 1339 (Fed. Cir. 2002) (holding that court injunction authorizing fish and wildlife officials to conduct surveys for presence of endangered species on private property not a taking); Patterson v. City of Gastonia, 725 S.E.2d 82, 94 (N.C App. 2012) (holding that unauthorized entry onto private property in order to enforce city's "Minimum Housing Code" not a taking).

193 *See, e.g.*, D.C. Mun. Regs., tit. 25, § 25-A4402.1 (2012) (stating that "person in charge" of food establishment "shall allow access to the Department [of Health] during the food establishment's hours of operation and other reasonable times as determined by the Department . . . [t]o determine if the food establishment is in compliance with [the Health] Code . . . ."); *id.* § 4402.2 ("If a person denies access to the Department, the Department shall inform the person that . . . [t]he licensee is required to allow access to the Department . . . ."); OMAHA, NEB., MUN. CODE § 11-263 (b) (2020) ("The health authority, after proper identification, shall be permitted to enter, at any reasonable time, any food-service establishment within the city, or its health jurisdiction, for the purpose of making inspections to determine compliance with this article.").

194 *See* 29 U.S.C. § 657 (2018) ("In order to carry out the purposes of [the Occupational Health and Safety Act], the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized . . . to enter without

OSHA may pursue "compulsory process;"[195] in addition, compulsory process may be sought "in advance of an attempted inspection" if, among other things, "the employer's past practice either implicitly or explicitly puts the Secretary on notice that a warrantless inspection will not be allowed."[196] Similarly, Congress has granted the Environmental Protection Agency authority to conduct inspections of private facilities without owner consent.[197] Neither of these federal agencies' inspection programs appears to have generated any successful taking claims.[198]

Government mandates enlisting private citizens to perform certain public duties are also not takings. In *Hurtado v. United States*,[199] the Supreme Court rejected a claim the U.S. government took private property when it incarcerated material witnesses pending trial and paid them only nominal compensation. In the same vein, courts have rejected taking claims based on requirements that attorneys provide uncompensated representation to criminal defendants,[200] or serve as arbitrators in civil cases for minimal compensation.[201] The draft under

delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer . . . .").

195 29 C.F.R. § 1903.4(a) (2020).

196 *Id.* § 1903.4(b).

197 *See, e.g.*, 7 U.S.C. § 136g(1) (2018) ("For purposes of enforcing the provisions of [the Federal Insecticide, Fungicide, and Rodenticide Act], officers or employees of the Environmental Protection Agency . . . are authorized to enter at reasonable times," among other places, "any establishment or other place where pesticides or devices are held for distribution or sale for the purpose of inspecting and obtaining samples of any pesticides or devices, packaged, labeled, and released for shipment, and samples of any containers or labeling for such pesticides or devices . . . ."); *Id.* § 136j(a)(2)(B)(2) (2018) ("It shall be unlawful for any person . . . to refuse to . . . allow any entry, inspection, copying of records, or sampling authorized by this subchapter."); *see also* Environmental Protection Agency, On-Site Civil Inspection Procedures, 85 F.R. 12224, 12225 (Feb. 3, 2020) ("Upon arrival at a facility, EPA inspectors shall present their valid EPA Inspector Credentials to a facility employee, describe the authority and purpose of the inspection, and where possible seek the facilities' consent to enter. Inspectors are required under certain statutes to advise facility personnel that they can deny entry, but EPA may then seek a warrant for entry.").

198 *But cf.* Hendler v. United States, 952 F.2d 1364 (Fed. Cir. 1991) (ruling that installation of monitoring wells on private property along with regular entry onto property by government officials for the purpose of servicing and obtaining information from the wells was a taking under *Loretto*).

199 410 U.S. 578, 589 (1973).

200 United States v. Dillon, 346 F.2d 633, 635-36 (9th Cir. 1965).

201 Scheehle v. Justices of the Supreme Court of Ariz., 508 F.3d 887, 893 (9th Cir. 2007).

the Military Selective Service Act is not a taking,[202] nor is a requirement that conscientious objectors perform alternative service.[203]

In addition, taking claims based on government seizures of privately-owned animals (livestock and pets) routinely fail. The U.S. Supreme Court long ago recognized that states have the authority to order "the slaughter of diseased cattle,"[204] or to "destroy dogs" as "necessary for the protection of [their] citizens."[205] Lower courts have ruled that it is not a compensable taking to seize and destroy cattle with bovine tuberculosis,[206] or to seize and destroy a pet ferret suspected of infection with rabies.[207] In *Rose Acre Farms v. United States*,[208] the U.S. Court of Appeal for the Federal Circuit rejected a "categorical" physical taking claim based on the USDA's seizure, killing and testing of thousands of chickens suspected of infection with salmonella. Courts also have rejected takings claims based on government seizure and destruction of stray animals.[209] Takings claims arising from a relatively new type of animal control measure, authorizing the seizure and destruction of pit bulls, have likewise failed.[210]

Governments commonly seize private property when property owners fail to make mandatory filings in government offices, and courts have repeatedly rejected taking claims based on such seizures. In *Texaco v. Short, Inc.*,[211] the Supreme Court rejected a taking claim based on an Indiana statute transferring a subsurface mineral interest to the owner

202 United States v. Hobbs, 450 F.2d 935, 936-37 (10th Cir. 1971).

203 Roodenko v. United States, 147 F.2d 752, 754 (10th Cir. 1944).

204 Lawton v. Steele, 152 U.S. 133, 136 (1894).

205 Sentell v. New Orleans & C.R. Co., 166 U.S. 698, 704 (1897).

206 Loftus v. Dep't of Agric., 232 N.W. 412, 420 (Iowa 1930).

207 Raynor v. Md. Dep't of Health & Mental Hygiene, 676 A.2d 978, 991 (Md. Ct. Spec. App. 1996).

208 373 F.3d 1177, 1197 (Fed. Cir. 2004).

209 Simpson v. City of Los Angeles, 253 P.2d 464, 469 (Cal. 1953) (rejecting a takings challenge to a Los Angeles ordinance directing local officials to hand over unlicensed strays to medical research institutions); *cf.* Howell v. Daughet, 230 S.W. 559, 560 (Ark. 1921) (rejecting a takings challenge to a statute authorizing the seizure and sale of free-roaming stock animals).

210 Bess v. Bracken Cty. Fiscal Court, 210 S.W.3d 177, 179, 182 (Ky. Ct. App. 2006) (rejecting takings challenge to county ordinance barring possession of pit bulls and making them subject to "forfeiture and euthanasia"); *see also* Weigel v. Maryland, 950 F. Supp. 2d 811, 839 (D. Md. 2013) (rejecting takings claim based on rule banning pit bulls from housing complex). *See generally* Russell G. Donaldson, Annotation, *Validity and Construction of Statute, Ordinance, or Regulation Applying to Specific Dog Breeds, Such as "Pit Bulls" or "Bull Terriers,"* 80 A.L.R.4th 70 (1990) (describing the validity of animal control measures on specific kinds of dogs).

211 454 U.S. 516, 530 (1982).

of the surface estate if the mineral owner failed to file a statement of claim with a county office for a period of twenty years. "We have no doubt," the Court stated, "that the State has the power to condition the permanent retention of [a] property right on the performance of reasonable conditions that indicate a present intention to retain the interest."[212] Subsequently, in *United States v. Locke*,[213] the Court, relying on *Texaco*, rejected a taking claim based on a provision of the Federal Land Policy and Management Act compelling the forfeiture of private mining claims on public lands to the U.S. government if the claim holders fail to make required filings with the government in timely fashion.[214]

Federal statutes authorize government officials to occupy the offices and seize the assets of troubled financial institutions to protect depositors and the soundness of the financial system,[215] and such seizures apparently have never been held to be compensable takings. In

[212] *Id.* at 526.

[213] 471 U.S. 84, 103-04 (1985).

[214] Conventional land recording statutes also facially effect appropriations for failure to make necessary filings. *See* THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 918-19 (2d ed. 2012). But they would presumably be immune from takings claims as well, although there is apparently no reported decision discussing such a claim. *See* Caleb Nelson, *The Constitutionality of Civil Forfeiture*, 125 YALE L.J. 2446, 2512-13 (2016) (observing that "[t]hroughout American history, legislatures have enacted statutes that extinguish property rights belonging to owners who fail to take certain affirmative actions," such as recording acts, statutes of repose, and laws "impos[ing] deadlines for asserting property rights . . . including probate cases, bankruptcy cases, prize cases, and other proceedings in rem"). *But cf.* Jackson ex dem. Hart v. Lamphire, 28 U.S. 280, 290 (1830) (ruling that New York recording act did not violate the Contracts Clause, and observing that "[i]t is within the undoubted power of state legislatures to pass recording acts," but "[c]ases may occur where the provisions of a law on those subjects may be so unreasonable as to amount to a denial of a right").

[215] *See* 12 U.S.C. § 191(a) (2018) ("The Comptroller of the Currency may, without prior notice or hearings, appoint a receiver for any national bank (and such receiver shall be the Federal Deposit Insurance Corporation if the national bank is an insured bank (as defined in section 1813(h) of this title)) if the Comptroller determines, in the Comptroller's discretion, that . . . 1 or more of the grounds specified in section 1821(c)(5) of this title exist . . . ."); *id.* § 1464(d)(2) (2018) ("The appropriate Federal banking agency may appoint a conservator or receiver for an insured savings association if the appropriate Federal banking agency determines, in the discretion of the appropriate Federal banking agency, that 1 or more of the grounds specified in section 11(c)(5) of the Federal Deposit Insurance Act exists . . . . A conservator shall have all the powers of the members, the stockholders, the directors, and the officers of the association and shall be authorized to operate the association in its own name or to conserve its assets in the manner and to the extent authorized by the appropriate Federal banking agency.").

California Housing Securities, Inc. v. United States,[216] the U.S. Court of Appeals of the Federal Circuit rejected a claim that the Resolution Trust Corporation engaged in a *per se* physical taking when it occupied the offices of a troubled savings and loan association. Similarly in *Golden Pacific Bancorp v. United States*,[217] the Federal Circuit ruled that the Comptroller of the Currency did not engage in a compensable taking by declaring a national bank insolvent and placing it in receivership.

Taking claims based on government destruction of private property to forestall an imminent threat of greater damage to other private property, or where the government must choose between allowing natural forces to injure one set of property owners or another, also have consistently failed. In *Bowditch v. Boston*,[218] the Court rejected a taking claim based on a decision by the Boston fire department to demolish (after first physically entering, presumably) a commercial building standing in the path of a major fire in order to arrest the fire's progress and the destruction of additional buildings. A similar case, *Miller v. Schoene*,[219] arose from an order by the Virginia state entomologist to a property owner to cut down ornamental cedar trees on his property in order to prevent the infection of nearby apple orchards with "rust" disease. The state entomologist acted under a statute authorizing him to order the owner to destroy the trees and, if the owner failed to do so, to destroy the trees himself. Because the government could have come on to the property and destroyed the trees, the case can appropriately be regarded as a physical taking case. The Supreme Court rejected the taking argument on the theory that the government:

> was under the necessity of making a choice between the preservation of one class of property and that of the other wherever both existed in dangerous proximity. It would have been nonetheless a choice if, instead of enacting the present statute, the state, by doing nothing, had permitted serious injury to the apple orchards within its borders to go on unchecked. When forced to such a choice, the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public.[220]

[216] 959 F.2d 955, 958 (Fed. Cir. 1992).
[217] 15 F.3d 1066, 1075-76 (Fed. Cir. 1994).
[218] 101 U.S. 16, 19 (1879).
[219] 276 U.S. 272, 277 (1928).
[220] *Id.* at 279.

In sum, when property damage is unavoidable, the government can prefer one class of property over another by occupying it to reduce the total level of destruction without incurring takings liability.

The classic doctrine of adverse possession doctrine also works a literal government-compelled appropriation of private property from one owner to another. Yet the general judicial consensus is that the doctrine does not result in a compensable taking. This is apparently the unquestioned law when one private party acquires the ownership interest of another private party through adverse possession.[221] Courts have followed the same rule with near unanimity when the government acquires ownership from a private property owner through adverse possession.[222]

Finally, there is the thorny and controversial topic of alleged takings based on laws banning the possession and/or authorizing the seizure of firearms. Gun seizures raise a special issue under the Taking Clause because the Second Amendment protects an individual right to possess firearms, and a government seizure of firearms in violation of the Second Amendment is unconstitutional on that basis.[223] As discussed above, a valid claim for compensation under the Taking Clause presupposes that the government is acting for a lawful public purpose.[224] A seizure of a firearm in violation of the Second Amendment cannot support a claim under the Taking Clause because such a seizure

[221] *E.g.*, Willner v. Frey, 421 F. Supp. 2d 913, 927 (E.D. Va. 2006) ("It is clear beyond dispute that Virginia's resolution of a private land dispute through the use of its law of adverse possession does not constitute a taking under the Fifth Amendment.").

[222] *See, e.g.*, Weidner v. Alaska Dep't of Transp. & Pub. Facilities, 860 P.2d 1205, 1212 (Alaska 1993) (holding that the expiration of a prescriptive period extinguishes a landowner's right to compensation from the state); City of Des Plaines v. Redella, 847 N.E.2d 732, 737 (Ill. App. Ct. 2006) (holding that it did not amount to a taking when the city acquired a prescriptive easement), *overruled on other grounds by* Nationwide Fin., LP v. Pobuda, 21 N.E.3d 381 (Ill. 2014); Stickney v. City of Saco, 770 A.2d 592, 603 (Me. 2001) (holding that landowners forfeit any takings claims relating to a prescriptive easement once the prescriptive period has expired); William C. Marra, *Adverse Possession, Takings, and the State*, 89 U. DET. MERCY L. REV. 1, 30 (2011) (contending that the Framers would not have intended for the government to pay compensation for adverse possession). *But see* Pascoag Reservoir & Dam, LLC v. Rhode Island, 217 F. Supp. 2d 206, 226 (D.R.I. 2002), *aff'd on other grounds*, 337 F.3d 87 (1st Cir. 2003). In *Pascoag*, the Federal District Court held that the property owner alleged facts sufficient to find that the State of Rhode Island's adverse possession constituted a taking. However, the District Court still dismissed the claim on the ground that it was time-barred. The U.S. Court of Appeals for the First Circuit affirmed that the claim was time-barred, and did not address the merits of the taking issue. Apparently, no other court has embraced the District Court's novel takings theory in *Pascoag*.

[223] *See* District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

[224] *See supra* text accompanying note 25.

is not lawful. However, this does not exhaust the possibilities for takings litigation involving firearms. The Supreme Court has recognized that the Second Amendment does not create "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."[225] Specifically, it does not bar restrictions on possession of firearms by "felons and the mentally ill," rules "forbidding the carrying of firearms in sensitive places such as schools and government buildings," or prohibitions on "dangerous and unusual weapons," such as "M-16 rifles and the like."[226] If a government seizure of a firearm conforms with the Second Amendment, a claim for compensation under the Taking Clause is not foreclosed.

Setting this complexity aside, courts have generally rejected taking claims based on government seizures of firearms. In 2013, the Indiana Court of Appeals rejected a taking claim based on a red flag law, which authorizes government officials to seize firearms from persons who have been determined dangerous to themselves or others.[227] More recently, a federal District Court in California rejected, at least at the preliminary injunction stage, a taking claim based on a California ballot measure requiring gun owners to surrender high capacity magazines.[228] Other cases have reached the same result.[229]

However, the tension between gun owner property rights and efforts to control gun violence appears to be increasing. According to the Giffords Law Center,[230] at least seven states now have laws requiring

[225] *Heller*, 554 U.S. at 626.

[226] *Id.* at 626-27.

[227] Redington v. Indiana, 992 N.E.2d 823, 836 (Ind. Ct. App. 2013).

[228] Wiese v. Becerra, 263 F. Supp. 3d 986, 995-97 (E.D. Cal. 2017). The same court later granted the government's motion to dismiss the case, but, on the ground the plaintiffs' *per se* physical takings claim failed because the measure afforded owners options other than surrendering their high-capacity magazines, including selling the magazines to licensed gun dealers, removing them from the state, or permanently modifying the magazines so they no longer accept more than ten rounds. Wiese v. Becerra, 306 F. Supp. 3d 1190, 1198-99 (E.D. Cal. 2018). *Contra* Duncan v. Becerra, 265 F. Supp. 3d 1106, 1138-39 (S.D. Cal. 2017) (finding that the measure did result in a taking).

[229] *See* Akins v. United States, 82 Fed. Cl. 619, 623 (2008) (rejecting a taking claim based on the reclassification of the Atkins Accelerator (a type of bump stock) as a machine gun by the Bureau of Alcohol, Tobacco, Firearms and Explosives, which had the effect of outlawing the device); Fesjian v. Jefferson, 399 A.2d 861, 865-66 (D.C. 1979) (rejecting a takings challenge to a District of Columbia law prohibiting machine guns and requiring owners to surrender their firearms to the chief of police, "lawfully dispose of them," or "lawfully remove" them from the District of Columbia).

[230] *Disarming Prohibited People*, GIFFORDS L. CTR., https://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/disarming-prohibited-people (last visited Sept. 7, 2020) [https://perma.cc/MVZ2-8TYX].

owners of firearms to relinquish ownership upon conviction of specified crimes; at least fifteen states have laws requiring individuals convicted of domestic violence crimes to relinquish their firearms; and seventeen states have "red flag" laws authorizing government officials to seize firearms from persons who have been determined dangerous to themselves or others. State legislatures continue to consider new measures to limit the possession of dangerous firearms.[231]

In October 2017, a gunman in Las Vegas, Nevada, killed fifty-nine people by shooting them from a suite in the Mandalay Bay Resort and Casino using rifles equipped with bump stocks, a device that enables a gun to fire hundreds of rounds a minute, like a machine gun. In response, the Trump administration issued a regulation banning bump-stocks for civilian use.[232] This rulemaking initiative generated numerous public comments, including over 1200 comments objecting that the rule violated the Taking Clause.[233] Many commenters asserted that the government would be "mandating relinquishment" of private property, resulting in a *per se* "physical taking" of personal property under *Horne*. The Department rejected the argument, stating that "the nature" of the government action is "critical in takings analysis," and the classification of bump-stock devices as machine guns "does not have the nature of a taking."[234] The Department supported its conclusion by citing many of the decisions discussed above rejecting takings claims based on restrictions on "'contraband or noxious goods,' and dangerous articles."[235] Significantly, the Department did not respond to the commenters' invocation of *Horne*, arguably the most important and directly relevant Supreme Court precedent. Inevitably, this rulemaking has precipitated extensive litigation, the ultimate outcome of which is uncertain at this writing.[236]

---

[231] *E.g.*, Laura Vozzella & Gregory S. Schneider, *Four Firearms Bills Advance in Virginia's Newly Gun-Free Capitol*, WASH. POST (Jan. 13, 2020, 1:59 PM PST), https://www.washingtonpost.com/local/virginia-politics/democrats-take-up-firearms-bills-in-virginias-newly-gun-free-capitol/2020/01/13/1c5e1d82-35b0-11ea-bb7b-265f4554af6d_story.html [https://perma.cc/E427-GCJH] (discussing several gun control measures considered by the Virginia legislature).

[232] Bump-Stock-Type Devices, 83 Fed. Reg. 66514, 66514 (Dec. 26, 2018) (to be codified at 27 C.F.R. pts. 447-49).

[233] *Id.* at 66523.

[234] *Id.* at 66524.

[235] *Id.*

[236] Opponents of the bump stock rule filed several takings claims against the United States based on the rule in the U.S. Court of Federal Claims. *E.g.*, Modern Sportsman, LLC v. United States, 145 Fed. Cl. 575, 576-77 (2019); McCutchen v. United States, 145 Fed. Cl. 42, 53 (2019). In *McCutchen*, the first of these cases, the court dismissed

III. ARGUMENTS FOR AND AGAINST A *PER SE* PHYSICAL TAKING TEST

This Part advances the analysis of the ostensible *per se* approach to physical taking claims by systematically evaluating the arguments the Supreme Court has presented in favor of *per se* analysis of physical taking claims as well as what appear to be the strongest arguments against this approach. The arguments the Court has presented in favor of a *per se* approach are generally unconvincing while the arguments against such an approach are relatively more compelling.

A. Arguments in Favor of Per Se *Analysis*

Precedent. The Supreme Court has repeatedly asserted that a *per se* rule for physical taking claims is supported by Court precedent. For example, in *Loretto*, the Court stated, "[w]hen faced with a constitutional challenge to a permanent physical occupation of real property, this Court has *invariably* found a taking."[237] More recently, in *Horne*, the Court referred to *per se* physical taking precedent as to which it said there was "no doubt."[238]

In view of the survey of prior precedent presented above, it is apparent the Court's invocation of precedent is wholly unjustified. The Court announced a *per se* approach relatively recently based on serious misreading and outright disregard of Court precedent contradicting the existence of a *per se* rule. Prior to *Loretto,* the Supreme Court repeatedly applied a multifactorial approach to takings claims based of permanent occupations. The *Loretto* Court dismissed some of this inconvenient precedent by disingenuously asserting that the most directly relevant cases involved temporary rather than permanent occupations. The

the claim. The court's primary rationale was that no taking occurs when "the government acts pursuant to its police power, i.e. where it criminalizes or otherwise outlaws the use or possession of property that presents a danger to the public health and safety." *McCutchen*, 145 Fed. Cl. at 51. The court acknowledged that "it is insufficient to avoid the burdens imposed by the Taking Clause simply to invoke the 'police powers' of the state." *Id.* (quoting Acadia Tech., Inc. v. United States, 458 F.3d 1327, 1332 (Fed. Cir. 2006)). However, the court said, "certain exercises of the police power" will not trigger takings liability, such as "prohibitions on the use and possession of dangerous contraband, or to require the forfeiture of property used in connection with criminal activity." *Id.* The court concluded that the bump stock ban fell within the category of police power regulation exempt from the Taking Clause because it was "consistent with our nation's 'historical tradition of prohibiting . . . dangerous and unusual weapons.'" *Id.* at 52 (quoting District of Columbia v. Heller, 554 U.S. 570, 627 (2008)).

[237] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 427 (1982) (emphasis added).

[238] Horne v. Dep't of Agric., 576 U.S. 351, 357-58 (2015).

Court distinguished the landmark *Heart of Atlanta Motel* decision on the ground that it involved "the landlord tenant relationship," without explaining how this circumstance made the ostensible *per se* rule inapplicable.

The manipulation of precedent in the *Horne* case addressing appropriations amounts to a sleight of hand. The Court based its analysis entirely on what it called the "undisputed" premise that appropriations of real estate are *per se* takings. However, as explained above, this premise is based on a daisy chain of *dictum* leading back to *Pewee Coal*, which plainly did *not* endorse or apply a *per se* approach. Relying on this problematic premise and perceiving "no reason" to treat personal property differently than real property,[239] the *Horne* Court extended *per se* appropriations doctrine to personal property. Because the premise of the Court's reasoning is incorrect, the Court's ruling lacks support in precedent.

Plain Language and Original Understanding. The Court has made a "plain language" argument in favor of a *per se* rule, asserting that the "plain language" of the Taking Clause "requires the payment of compensation whenever the government acquires private property for a public purpose . . . [as] the result of . . . a physical appropriation."[240] This blithe statement plainly reads too much into the text. An "appropriation" may be a "taking" within the meaning of the Taking Clause. However, it is neither necessary nor reasonable to read the language of the Taking Clause to mean that every action representing an appropriation is necessarily a compensable taking. In interpreting other facially absolute commands of the Bill of Rights, the Supreme Court has avoided absolute interpretations. For example, the Equal Protection Clause on its face bars any law that discriminates. However, the Supreme Court has recognized that "[t]he Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must-co-exist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons."[241] Similarly, the First Amendment contains a facially absolute prohibition on laws "abridging the freedom of speech," but the Court has recognized that government can restrict certain

---

[239] *Id.* at 359-60.

[240] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 321 (2002).

[241] Romer v. Evans, 517 U.S. 620, 631 (1996) ("We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.").

speech, including, for example, "fighting words" or legally obscene materials.[242] There is no more warrant for applying a mechanical literalism to the Taking Clause than to any other provision of the Bill of Rights.

The Supreme Court has never attempted to ground the ostensible *per se* rule for occupations in either the language or original understanding of the Taking Clause. As discussed, in *Pumpelly*, the Court understood the Taking Clause to be limited to "conversions," that is, appropriations of private property. The *Pumpelly* Court expanded takings doctrine to encompass occupations because it thought it would be "a very curious and unsatisfactory result" not to apply the Taking Clause to occupations as well as appropriations.[243] This reasoning, regardless of whatever else might be said about it, is plainly not grounded in either the language or original understanding of the Taking Clause.

"Every Stick in the Bundle." Another prominent Supreme Court argument for a *per se* approach is that a physical taking "is perhaps the most serious form of invasion of an owner's property interests" because "the government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand."[244] In the *Loretto* case, the Court said, the permanent occupation of space on the exterior of Ms. Loretto's building with cable equipment "chop[ped]" through the bundle of sticks because it infringed on "the right to exclude," denied her the power to control use of the property, and "empt[ied]" the right to dispose of the property "of any value."[245] Over thirty years later, the *Horne* Court invoked the "bundle of sticks" metaphor and said it was "equally applicable" to an "appropriation" of a portion of a raisin crop.[246]

The problem with this argument is that it begs the question the Court is trying to answer: whether to apply a *per se* rule or not. As discussed above, the Supreme Court has instructed that taking claims should generally be evaluated by assessing the impact of the government's action on the claimant's "parcel as whole." In the case of physical taking claims governed by the ostensible *per se* rule, however, the Court has said the parcel rule does not apply and a permanent occupation should

---

[242] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1351 (5th ed. 2017).

[243] *See supra* text accompanying note 153.

[244] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982).

[245] *Id.* at 435-36.

[246] Horne v. Dep't of Agric., 576 U.S. 351, 361-62 (2015) ("Raisin growers subject to the reserve requirement . . . lose the entire 'bundle' of property rights in the appropriated raisins 'the rights to possess, use and dispose of' them . . . ." (quoting *Loretto*, 458 U.S. at 435)).

be regarded as a compensable taking even if it affects only a portion of the claimant's entire property. The flaw in the Court's bundle of sticks argument for adopting a *per se* test for physical taking claims is that it *presumes* at the outset that the parcel rule does not apply by focusing on how an occupation impairs an owner's interests in a specific area subject to an occupation. In other words, the Court's "bundle of sticks" argument in favor of a *per se* approach assumes the *per se* approach, including its special definition of the relevant parcel, already applies to begin with.

The facts of the *Loretto* case highlight the fatal circularity of this reasoning. The New York law destroys the rights to possess, use, and dispose of property if one focuses on the specific area of the building occupied by the cable equipment. However, treating Ms. Loretto's entire apartment building as the relevant unit of property, the law only impairs her ability to exclude others from an inconsequential area of her building; does not adversely affect her primary use of the building, that is, for rental apartments; and almost certainly does not interfere with any potential sale of the building. To adopt the first perspective to justify adoption of a *per se* test simply assumes the *per se* test already applies and does not help explain *why* a *per se* test should apply.

Severity of the Injury. The Court also has argued that occupations should trigger automatic takings liability because they involve especially severe intrusions on private property. The *Loretto* Court said, "property law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property. To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury."[247] The Court continued, "an occupation is qualitatively more severe than a regulation of the *use* of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the invasion."[248]

The Court's contention that, as a general proposition, "an occupation is qualitatively more severe than a regulation of the *use* of property" is problematic at best. First, it is opaque what metric the Court is using to judge the "severity" of the government intrusion. It is difficult to take seriously the notion that Ms. Loretto suffered a "severe injury" when she incurred only a nominal inconvenience due to installation of the cable equipment on the exterior of her apartment building. Furthermore, the *Loretto* Court stated that government mandates to

[247] *Loretto*, 458 U.S. at 436.

[248] *Id.* (emphasis omitted).

private owners to install certain equipment (e.g., mail boxes, fire extinguishers) on their property were not covered by the Court's *per se* rule.[249] Contrary to the Court's reasoning, it is not plausible that government mandates to owners to accept the installation of equipment by third parties are necessarily "qualitatively more severe" than mandates to owners to install equipment themselves.[250] Regulations requiring owners to install equipment can be very prescriptive,[251] and the actual physical burden on the property owner due to the installation of equipment is essentially the same regardless of who owns the equipment. The ultimate ownership of physical equipment on private property is too thin a reed to support a major divide in constitutional takings doctrine.

Avoiding Line-Drawing. The *Loretto* Court also argued in support of a *per se* rule that it would avoid the need for "line-drawing."[252] The Court posited that "[f]ew would disagree that if the State required landlords to permit third parties to install swimming pools on the landlords' rooftops for the convenience of the tenants, the requirement would be a taking."[253] The Court went on to suggest that if the company's cable installation "occupied as much space," again "few would disagree that the occupation would be a taking."[254] "But," the Court concluded, "the rights of private property cannot be made to depend on the size of the area permanently occupied."[255] The Court's conclusion is plainly a *non sequitur*. To assert that liability "cannot" turn on the size of an occupation is simply an assertion, not an explanation. In regulatory taking cases, the greater the economic burden imposed by a regulation the stronger the taking claim. It is not self-evident that the likelihood of takings liability should not increase the larger the extent of an occupation or the greater the magnitude of an appropriation.

The *Loretto* Court can be understood to suggest that treating all occupations and appropriations as compensable takings has the advantage of avoiding the need to differentiate between compensable and non-compensable physical intrusions. Adopting a blanket liability

[249] *Id.* at 440.

[250] *See id.* at 440 n.19.

[251] *See, e.g.*, N.Y.C., N.Y. FIRE CODE § 601 (2014) (prescribing detailed rules "govern[ing] the design, installation, operation and maintenance of fuel-fired appliances, devices, equipment and systems, emergency power systems, electrical systems and equipment, refrigerating systems").

[252] *Loretto*, 458 U.S. at 436.

[253] *Id.*

[254] *Id.*

[255] *Id.*

rule arguably provides a clear standard that allows citizens to structure their affairs with confidence and courts to decide takings cases quickly, predictably and even-handedly. Whether or not it is ultimately persuasive, this "line drawing" argument in favor of a *per se* approach is at least coherent and plausible.[256] As discussed below, however, the *per se* approach to physical taking claims itself creates new line drawing problems, and the burdens of dealing with those problems likely match if not exceed the burdens associated with differentiating between major and minor physical intrusions.

The *Loretto* Court sought to bolster the case for a *per se* test for physical occupations by observing, "whether a permanent physical occupation has occurred presents relatively few problems of proof."[257] The Court said, "placement of a fixed structure on land or real property is an obvious fact that will rarely be subject to dispute."[258] The Court was overly sanguine; as discussed below, drawing the line between cases subject to and not subject to the *per se* physical taking rule has proven contentious and time-consuming.

The "Fundamental Right to Exclude." Finally, the Supreme Court has justified a *per se* rule for physical intrusions on the ground that "the right to exclude" is "perhaps the most fundamental of all property interests."[259] This justification is related obliquely to one normative value — protection of personal privacy — that does appear to provide a plausible foundation for physical takings doctrine, as discussed below. However, the Court's discussion of a "fundamental right to exclude" has needlessly muddied the issue.

First, the "right to exclude" justification for a *per se* rule has a checkered history. Then Justice William Rehnquist introduced this justification for physical takings doctrine in his 1979 opinion for the Court in *Kaiser Aetna* by describing the "right to exclude" as "universally held to be a fundamental element of the property right."[260] He pointed to no authoritative precedent to support this assertion. Instead, he cited a handful of obscure authorities,[261] including two unpersuasive lower court decisions[262] and a dissenting opinion in a 100-

---

256 *See generally* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (presenting the classic argument for clear legal rules).

257 *Loretto*, 458 U.S. at 437.

258 *Id.*

259 Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 539 (2005).

260 Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979).

261 *See id.* at 180 n.11.

262 In *United States v. Pueblo of San Ildefonso*, 513 F.2d 1383, 1394 (Ct. Cl. 1975), the court merely observed that "[g]enerally speaking, a true owner . . . possesses the right

year old Supreme Court case.[263] Three years later, in *Loretto*, the Court described the right to exclude as "one of the most essential sticks in the bundle of property rights,"[264] and as "one of the most treasured strands in an owner's bundle of property rights,"[265] suggesting for the first time that the right to exclude is *more* fundamental (or "essential" or "treasured") than other property interests. Finally, in 2005, in *Lingle v. Chevron U.S.A., Inc.*, the Court described the right to exclude as "perhaps the most fundamental of all property interests,"[266] elevating the right to exclude to apparent preeminence relative to every other property interest. The Court has never acknowledged, much less explained, its gradual expansion of the importance of the right to exclude from "a" fundamental interest, to a "more" fundamental interest, to perhaps the "most" fundamental interest.

The right to exclude argument is also problematic because the Court has never explained why the right to exclude is "fundamental" in this context. "The Constitution protects rather than creates property interests,"[267] meaning that property interests "are created and their dimensions [are] defined by existing rules or understandings that stem from an independent source such as state law."[268] In other words, state law, not federal law, generally creates the various sticks in the bundle of property rights. At the same time, as Professor Thomas Merrill has explained, the Taking Clause defines, as a matter of federal law, what types of interests qualify as "property" within the meaning of the Taking

to expel intruders." In *United States v. Lutz*, 295 F.2d 736, 740 (5th Cir. 1961), the court merely described the "right . . . to exclude others" in passing as one of the "numerous different attributes" of private property.

263 In *Int'l News Serv. v. Associated Press*, 248 U.S. 215 (1918), the Court upheld a claim that a news organization had engaged in unfair competition by misappropriating news gathered by another news organization. Justice Brandeis dissented from the Court's ruling. *Id.* at 248-67 (Brandeis, J., dissenting). While he stated that "[a]n essential element of individual property is the legal right to exclude others from enjoying it," Brandeis appears to have been making an abstract point about the nature of property and in any event thought there was no violation of any right to exclude in this case. *Id.* at 250-51.

264 Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982) (quoting *Kaiser Aetna*, 444 U.S. at 176). The cited passage from *Kaiser Aetna* did not represent the *Kaiser* Court's characterization of the right to exclude, but rather the *Kaiser* Court's description of the plaintiff's description of its asserted property rights. *Kaiser Aetna*, 444 U.S. at 176.

265 *Loretto*, 458 U.S. at 435.

266 Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 539 (2005).

267 Phillips v. Wash. Legal Found., 524 U.S. 156, 164 (1998).

268 Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155, 161 (1980) (quoting Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972)).

Clause.[269] In describing the right to exclude as fundamental the Court has left it ambiguous whether it is federal or state law that makes this property stick "fundamental." More importantly, the Court has not explained why the right to exclude should be deemed fundamental, regardless of whether the right is rooted in federal or state law.

B. Arguments Against Per Se *Analysis*

The following appear to be the strongest arguments against a *per se* rule of liability for physical takings. Together with the Supreme Court's weak arguments for a *per se* approach, they raise serious questions about whether the Court should continue to defend and purport to apply a *per se* approach.

Excessive Liability. The most obvious argument against a *per se* approach is that it simply exposes the government to too much liability. As discussed, a *per se* approach has the benefit of avoiding the need for line drawing; the downside of not drawing lines is imposing liability in every physical taking case, including in individual cases in which a more nuanced analysis might lead to the conclusion that liability is unwarranted. In general, takings doctrine seeks to achieve a balance between safeguarding private property interests and avoiding wasteful litigation, destructive financial burdens on the public, and deterring valuable public actions. In Justice Holmes famous words: "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[270] While he offered this observation in a regulatory taking case, his point is equally applicable in the physical takings context. The ostensible *per se* rule for physical takings casts Justice Holmes's wisdom into the wind.

Furthermore, new government restraints on property are a natural byproduct of social and political evolution. As the Court has said: "Under our system of government one of the State's primary ways of preserving the public weal is restricting the uses individual can make of their property."[271] Again, this point is equally applicable to physical intrusions. To impose financial liability on the government for every physical intrusion would almost certainly impose serious social costs and impede governments' ability to address new threats, from dangerous firearms to contaminated foods. The numerous Supreme

[269] *See* Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 934-42 (2000).

[270] Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

[271] Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491 (1987).

Court and lower court cases discussed above not following a *per se* rule, but instead rejecting various types of physical taking claims, support this conclusion.

Creating New Line-Drawing Problems. As discussed, the *Loretto* Court optimistically declared that determining whether a physical taking has occurred or not "presents relatively few problems of proof."[272] However, in practice, distinguishing between physical takings and other types of takings has turned out to be a contentious, time-consuming challenge. Because the opportunity to frame a case as a *per se* physical taking rather than as a case subject to multivariable analysis will often be outcome determinative, litigants have a strong incentive to contest vigorously the threshold issue of what takings test applies.

The line-drawing problem created by a *per se* rule arises in several dimensions. First, parties often debate whether a case involves a physical taking or a regulatory taking, and courts commonly struggle over which label to apply.[273] Second, even if it is clear a case involves a physical intrusion rather than a use restriction, parties often contest the issue of whether an occupation is temporary or permanent.[274] None of these costly and time-consuming line-drawing disputes would arise if the Court's had not devised a special "*per se*" test for certain physical intrusions.

As discussed, one plausible argument *in favor* of a *per se* rule for physical takings is that it avoids line-drawing problems, because it

[272] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 437 (1982).

[273] For example, parties before the U.S. Court of Federal Claims and the U.S. Court of Appeals for the Federal Circuit have debated whether or not *per se* physical taking analysis should apply to restrictions on the exercise of appropriative water rights pursuant to the Endangered Species Act for over twenty years without resolving the issue. *See* Baley v. United States, 942 F.3d 1312, 1341 n.31 (Fed. Cir. 2019) (affirming dismissal of a taking claim based on restrictions on water use imposed pursuant to the Endangered Species Act without resolving the threshold question whether the claim called for physical or regulatory taking analysis).

[274] *See* Caquelin v. United States, 959 F.3d 1360, 1362-63 (Fed. Cir. 2020) (ruling that the Surface Transportation Board's issuance of a Notice of Interim Trail Use or Abandonment blocking railroad from abandoning a railroad right of way for 180 days resulted in a compensable taking). *Compare* Hendler v. United States, 952 F.2d 1364, 1377 (Fed. Cir. 1991) (defining "temporary" to refer "to those governmental activities which involve an occupancy that is transient and relatively inconsequential, and thus properly can be viewed as no more than a common law trespass *quare clausum fregit*"), *with* Boise Cascade Corp. v. United States, 296 F.3d 1339, 1356 (Fed. Cir. 2002) (observing that *Hendler* "has been widely misunderstood and criticized" as undermining the permanency requirement of *Loretto*). *See generally* Blais, *supra* note 14, at 60 ("Notwithstanding the Court's insistence that the *per se* rule offers a bright line distinguishing between permanent and temporary invasions, that distinction is far from clear.").

eliminates the need to distinguish between major and minor intrusions. However, it is apparent that adoption of a *per se* rule for certain physical takings claims — distinct from other types of taking claims — creates a *new* set of line-drawing problems, effectively negating the only clear, cogent argument in favor of the *per se* approach.

Disregard of Relevant Factors. Finally, the ostensible *per se* rule excludes from consideration various factors courts arguably should consider in physical taking cases to achieve fairness and justice. As discussed, regulatory takings doctrine generally calls for consideration of the economic impact of government restrictions, the degree of interference with investment-backed expectations and the character of the government action. It can be argued that excluding consideration of these factors impoverishes judicial assessment of physical taking cases.

First, excluding consideration of economic impact leads to arguably anomalous outcomes in *per se* cases. Mrs. Loretto's apartment building is only a few dozen blocks north and west of the Grand Central Terminal at issue in the *Penn Central* case. Ms. Loretto suffered no significant economic injury, but she prevailed on her physical taking claim. By contrast, the Penn Central company lost a very valuable development opportunity due to of the landmark designation of its building, but its case failed. Assuming consideration of economic impact helps achieve fair and just outcomes in regulatory taking cases, is the lack of consideration of economic impact a weakness of the *per se* approach to physical taking claims?

Second, the reasonableness of a claimant's expectations is arguably as pertinent to the merits of a physical taking claim as it is to a regulatory taking claim. If a property owner should anticipate restrictions on use of his property when operating in a "highly regulated environment," why should a property owner in such an environment not also anticipate at least certain property seizures and occupations as well? In addition, if rules already in place when the property is purchased give an owner fair notice of restrictions, why should they not give fair notice of potential appropriations and invasions?

Third, it may be a defect of a *per se* approach that it fails to take into account certain aspects of the "character" of government action. As discussed in Part I, the *Penn Central* Court indicated that a taking may "more readily be found" when the government action has the character of a "physical invasion." The modern Court has elevated the importance of the physical intrusiveness of the government action from a relevant factor to being dispositive of the taking issue, at least when an occupation is permanent. Thus, the Court not only considers the *Penn Central* character factor in this sense, it elevates it to paramount

importance. On the other hand, a *per se* approach to physical takings potentially disregards other definitions of government character that may weigh against a taking claim. The Court has recognized that it should weigh against a regulatory taking claim that the government is acting to protect the public from harm or regulating in a way that creates a "reciprocity of advantage." If consideration of these factors supports fair and just outcomes in regulatory takings cases, why not in a physical taking case?

IV. RETHINKING PHYSICAL TAKINGS DOCTRINE

Given the problems with the Supreme Court's ostensible *per se* physical takings test, the next question is how the Court could improve on its analysis of physical taking claims. When and in what circumstances should courts treat physical intrusions as compensable takings and how (if at all) should the analysis of physical takings claims differ from the analysis applied to other types of taking claims? This Part builds a foundation for a new approach to physical taking claims by identifying the core normative concerns that appear to underlie different types of taking claims.

A. Appropriations Versus Occupations

An initial question is how to define a physical taking and distinguish a physical taking from other types of takings. As discussed in Part I,[275] the Supreme Court has offered little help on this point, often using a cacophonous terminology that seems designed to muddle rather than clarify the meaning of a physical taking. At the same time, some Court cases suggest takings doctrine appropriately divides physical takings between appropriations and occupations. This Article advocates explicit recognition that appropriations and occupations represent distinct types of physical takings.

Several considerations support this approach. First, appropriations and occupations are intuitively distinguishable from each other. Straightforward examples of government appropriations representing potential compensable takings include seizure of a farmer's raisin crop,[276] seizure of a private factory,[277] or extraction of a user fee from a citizen availing herself of government services.[278] Examples of

[275] *See supra* Part I.C.

[276] *See* Horne v. Dep't of Agric., 576 U.S. 351, 361-62 (2015).

[277] *See* United States v. Pewee Coal Co., 341 U.S. 114, 115-17 (1951).

[278] *See* United States v. Sperry Corp., 493 U.S. 52, 62 (1989).

government occupations from Supreme Court case law include inundation of land by an impoundment behind a dam;[279] airplanes flying at low-level through the private airspace above a farm;[280] or mandated public access to private land.[281] In sum, there is a workable, common sense distinction between appropriations and occupations, and between both types of physical takings and restrictions on use.[282]

History also supports the distinction between appropriations and occupations. Research into the original understanding of the Taking Clause suggests that the drafters of the Bill of Rights were primarily motivated to add a Taking Clause by unpopular uncompensated appropriations, such as military impressments and government transfers of land titles from one owner to another.[283] The Supreme Court originally declared the Taking Clause was limited to appropriations. The Court's recognition that occupations could also be compensable takings came later, which by itself suggests they are different.

In addition, there is an obvious analogy between the common law torts of trespass and conversion, on the one hand, and occupations and appropriations under the Taking Clause, on the other, that supports recognizing appropriations and occupations as distinct types of potential takings. A trespass is an intentional, uninvited entry upon the

[279] *See* Pumpelly v. Green Bay Co., 80 U.S. 166, 177-78 (1872).

[280] *See* United States v. Causby, 328 U.S. 256, 264-65 (1946).

[281] *See* Dolan v. City of Tigard, 512 U.S. 374, 380 (1994); *see also* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 828, 832 (1987).

[282] The fact that the Court has from time to time highlighted the commonalities between physical and regulatory takings does not undermine this argument. In his famous dissent in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981), Justice Brennan wrote: "Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property." *Id.* at 652 (Brennan, J., dissenting); *see also* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 539 (2005) ("Although our regulatory takings jurisprudence cannot be characterized as unified, these three inquiries (reflected in *Loretto*, *Lucas*, and *Penn Central*) share a common touchstone. Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain."); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1017 (1992) ("[T]otal deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation."). These statements support the point that regulations as well as appropriations and occupations can be compensable takings. They do not contradict the separate point that the standards for determining whether physical or regulatory actions are compensable takings may differ.

[283] Treanor, *supra* note 35, at 791-92.

land of another.[284] A government-caused occupation of private property amounts to essentially the same thing, with the difference that the taking claim depends on an entry made by or at least caused by government. Construction of a dam and consequent flooding injures property owners in the same way whether the dam is private or public and regardless of whether the claim is framed as a taking or a trespass action. Not surprisingly, some takings lawsuits include trespass claims; indeed, the seminal *Loretto* case included separate taking and trespass claims.[285] Similarly, an appropriation is comparable to the common law tort of conversion, an intentional interference with the owner's possession of property.[286] From a citizen's standpoint, there is no practical difference between the government's appropriation of her automobile and a conversion of it by her neighbor.

The close substantive relationship between physical takings and common law torts helps explain why physical takings are commonly treated as compensable takings.[287] Imposing liability on the government for appropriations and occupations under the Taking Clause means that a citizen who suffers a trespass or a seizure of private property has a claim for relief, whether the trespasser or the appropriator is another citizen or the government. Holding the government liable under the Taking Clause for actions that support claims against private citizens

[284] DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 49 (2d ed. 2020).

[285] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 424 (1982). The City of New York, which had granted the cable company its franchise to operate in this city, intervened in the case to defend the constitutionality of the statute. *Id.*

[286] *See* DOBBS ET AL., *supra* note 284, at § 61.

[287] The understanding that takings doctrine rests in part on analogy to common law claims arising from private wrongs to private property owners also helps explain one of the more mysterious features of modern takings doctrine, the so-called "emergency" exception to takings liability. *See Lucas*, 505 U.S. at 1029 n.16 (referring to "litigation absolving the State (or private parties) of liability for the destruction of 'real and personal property, in cases of actual necessity, to prevent the spreading of a fire' or to forestall other grave threats to the lives and property of others" (quoting *Bowditch v. Boston*, 101 U.S. 16, 18 (1879))); *see also* United States v. Pac. R.R., Co., 120 U.S. 227, 238-39 (1887). Justice Scalia's parenthetical reference to "private parties" implicitly refers to the extensive body of private tort law recognizing "private necessity" as a defense to trespass actions and other tort claims. *See* RESTATEMENT (SECOND) OF TORTS § 196 (AM. LAW INST. 1965) ("One is privileged to enter land in the possession of another if it is, or if the actor reasonably believes it to be, necessary for the purpose of averting an imminent public disaster."); Nestor M. Davidson, *Nationalization and Necessity: Takings and a Doctrine of Economic Emergency*, 3 BRIGHAM-KANNER PROP. RTS. CONF. J. 187, 203 (2014) ("This constitutional doctrine of emergency parallels a tort doctrine of public necessity that provides a limited, but clear, exemption from liability to avert imminent harm."); *see also* DOBBS ET AL., *supra* note 284, at § 117.

under the common law affirms that the government is not above the law.[288]

Moreover, the overlap between takings and common law tort claims goes beyond the substance of the claims. As Professor Robert Brauneis has explained, in the nineteenth century courts and litigants framed what we now recognize as taking claims as common law torts rather than as direct takings actions.[289] Property owners objecting to governmental appropriations or occupations sued in tort, not under the Taking Clause. Government defendants typically responded to these claims by pointing to their statutory authorizations for the challenged action. Plaintiffs could then counter by arguing that courts should disregard the statutory authorization because the government action resulted in a taking of private property. If the taking argument failed, the tort suit failed. If the taking argument succeeded, the court stripped the government of its defense of statutory authorization, and plaintiffs could proceed with their tort claims. Starting in the late nineteenth century, state courts interpreting state taking clauses,[290] and the U.S.

[288] One important doctrinal distinction between government defendants and private defendants is that some governments, including the federal government and the States, possess sovereign immunity whereas private parties enjoy no comparable immunity from suit. However, the federal government has waived its immunity from taking claims by adopting the Tucker Act. *See* Lynch v. United States, 292 U.S. 571, 581 (1934) (explaining that the liability of the United States to pay compensation under the Taking Clause depends on the government's voluntary waiver of sovereign immunity). Some state courts have read the Taking Clause as implicitly abrogating state sovereign immunity. *See, e.g.*, Boise Cascade Corp. v. State *ex rel.* Or. State Bd. of Forestry, 991 P.2d 563, 569 (Or. Ct. App. 1999) ("[B]ecause of the 'self-executing' nature of the Fifth Amendment, as applied to the states . . . a state may be sued in state court for takings in violation of the federal constitution."); SDDS, Inc. v. State, 650 N.W.2d 1, 8-9 (S.D. 2002) ("South Dakota's sovereign immunity is not a bar to SDDS's Fifth Amendment takings claim."). The argument presented here takes it as given that private parties and governments are, as a practical matter, equally subject to suit for wrongs to property interests. If government has not waived its immunity from monetary claims under the Taking Clause, a suit for injunctive relief would still lie, *see* Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 698-99 (1949), and an injunction is a permissible remedy for trespass as well. *See* RESTATEMENT (SECOND) OF TORTS § 936(1) (AM. LAW INST. 1979). Thus, takings and tort claims would still be largely parallel even if government asserted immunity from demands for financial compensation under the Taking Clause.

[289] Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57, 64-65, 69 & n.33 (1999); *see also* Knick v. Township of Scott, 139 S. Ct. 2162, 2175-76 (2019) (discussing the history of the development of takings doctrine).

[290] *Knick*, 139 S. Ct. at 2166 ("[I]n the 1870s . . . state courts began to recognize implied rights of action for damages under the state equivalents of the Takings Clause . . . .").

Supreme Court interpreting the federal Taking Clause,[291] adopted the view that property owners complaining of violations of their property rights by government can sue directly under the Taking Clause. Even as the structure of takings litigation has evolved, however, claims involving appropriations and occupations have retained the flavor of their common law origins. The Court still commonly equates occupations with trespasses,[292] and appropriations with conversions.[293]

By the time the Court embraced the concept of regulatory takings in the early twentieth century, the Court had already recognized that an owner could bring a taking claim directly under the Taking Clause, meaning there was no need for litigants to hunt for a common law form of action to support a regulatory taking claim. In fact, there is no obvious common law right of action that parallels a regulatory taking claim, which may help explain why regulatory takings doctrine did not emerge until after the Supreme Court recognized a direct right of action under the Taking Clause.[294]

---

[291] Initially the Supreme Court ruled a right to sue for just compensation for a taking rested on an implied contract theory. *See* Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327, 330 (1922). Subsequently, the Court ruled that claims for compensation for takings of private property rested on the Taking Clause itself. *See* United States v. Causby, 328 U.S. 256, 258, 260-61 (1946).

[292] *See, e.g.*, Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 39 (2012) ("[W]hile a single act may not be enough, a continuance of them in sufficient number and for a sufficient time may prove [a taking]. Every successive trespass adds to the force of the evidence." (quoting Portsmouth, 260 U.S. at 329-330)); *Causby*, 328 U.S. at 267 ("We need not decide whether repeated trespasses might give rise to an implied contract.").

[293] *See, e.g.*, Horne v. Dep't of Agric., 576 U.S. 351, 361 (2015) ("The Committee disposes of what become its raisins as it wishes, to promote the purposes of the raisin marketing order."); Pumpelly v. Green Bay Co., 80 U.S. 166, 177 (1872) (referring to a government appropriation of private property as an "absolute conversion").

[294] Not surprisingly, given that the Supreme Court has interpreted the Taking Clause to support taking claims based on government actions analogous to the common law torts of conversion and trespass, the Court long ago recognized that government actions analogous to common law nuisances also may support claims under the Taking Clause. *See* Richards v. Wash. Terminal Co., 233 U.S. 546, 553 (1914). While the Supreme Court has not had a recent opportunity to apply this theory of takings liability, lower federal and state courts continue to apply it. *See, e.g.*, Argent v. United States, 124 F.3d 1277 (Fed. Cir. 1997) (upholding the viability of taking suit by owners of land adjacent to airfield used by military to practice airplane landings); Varjabedian v. City of Madera, 572 P.2d 43 (Cal. 1977) (upholding viability of taking claim brought by homeowner based on city's construction of nearby sewage treatment plant). *See generally* Carlos A. Ball, *The Curious Intersection of Nuisance and Takings Law*, 86 B.U. L. REV. 819 (2006) (discussing the connections between nuisance doctrine and takings law).

Finally, and most importantly for the purpose of this Article, dividing the universe of physical takings between appropriations and occupations helps illuminate the normative values associated with private property that are threatened by appropriations and occupations. Ironically, breaking down the physical taking category into the subcategories of appropriations and occupations represents a crucial first step in formulating a coherent doctrine for physical takings writ large.

B. Appropriations as Instrumental Exploitations

Appropriations are of concern from a fairness and justice standpoint because they present a special risk that government will seek to enrich itself at the expense of its own citizens. An appropriation not only deprives an owner of a property interest, but also confers a new ownership interest on the government (or its designee). Appropriations serve government interests in a more direct and significant way than other kinds of government actions, in particular regulations designed to advance the general public welfare. Thus, it is not surprising the Supreme Court has observed, "government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute 'takings.'"[295]

The late Professor Joseph Sax, in his seminal 1964 *Yale Law Journal* article,[296] proposed a general distinction in takings doctrine between government acting in an "enterprise capacity" and government acting in the "role as mediator," with the former generally requiring payment of compensation and the latter not. "The precise rule" he proposed was the following: "when an individual or limited group in society sustains a detriment to legally acquired existing economic values as a consequence of government activity which enhances the economic value of some governmental enterprise, then the act is a taking, and compensation is constitutionally required; but when the challenged act is an improvement of the public condition through resolution of conflict within the private sector of the society, compensation is not constitutionally required."[297] Sax stressed that his theory did not turn on government's "acquisition of a formal proprietary interest,"[298] but his theory necessarily encompasses actual *de jure* or *de facto*

[295] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 128 (1978).

[296] Sax, *Takings and the Police Power*, *supra* note 15.

[297] *Id.* at 67.

[298] *Id.* at 63.

appropriations. While Professor Sax subsequently presented a revised approach to the takings problem,[299] his 1964 article usefully explains why appropriations present especially serious fairness and justice concerns.

Sax identified several particular risks associated with government acting in an "enterprise capacity." First, when government "engage[s] in resource acquisition for its own account," it plays a "central role" in creating and defining the need for the property, and therefore there is a risk the government will "play favorites" for its own benefit.[300] Second, when government is working to advance "its own projects," there is a risk government will act with "excessive zeal" to achieve its goal.[301] Finally, because government does not operate under the same neighborly and community constraints as individual citizens, government may subject citizens to "extraordinary and unprecedented" risks when it acts in its enterprise capacity.[302] He conceded that these dangers are "not always present" when the government acts in its enterprise capacity, and they are not "always absent" was government acts in a different mode.[303] However, he thought this reasoning supported a "general policy" of requiring compensation for property intrusions associated with enterprise activity.[304]

Sax's reasoning justifies a distinct approach to takings claims based on appropriations. It offers a reason to be especially concerned about appropriations; the direct benefit government receives from appropriations creates a particular risk that government will act to exploit private property owners. It does not necessarily justify a *per se* approach to appropriation claims. However, it provides a rationale for applying a different and relatively greater level of judicial scrutiny to appropriation claims than to other types of taking claims.[305]

---

[299] Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 150 n.5 (1971).

[300] Sax, *Takings and the Police Power*, *supra* note 15, at 64.

[301] *Id.* at 65.

[302] *Id.* at 66-67.

[303] *Id.*

[304] *Id.*

[305] In discussing the measure of compensation due an owner subject to a taking, the Supreme Court has frequently said that the owner's loss, not the taker's gain, is the measure of such compensation. *See* Brown v. Legal Found. of Wash., 538 U.S. 216, 236 (2003) (quoting *Bos. Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910)); *see also Bos. Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910) ("[T]he question is what has the owner lost, not what has the taker gained."). This rule regarding the measure of compensation is not inconsistent with the contention here that, in determining if a taking has occurred, whether the government has directly gained from

C. Occupations as Invasions of Privacy

Occupations are distinctive for takings purposes because they involve intrusions upon personal privacy. An occupation involves an unwanted physical entry onto private land by government officials or third parties acting with government authority. As with appropriations, the special way occupations intrude on private property owners justifies a special taking test for occupations.[306]

The law of privacy is a sprawling doctrine protecting a wide variety of interests, including access to contraception, the right to an abortion and freedom of political association, to cite a few examples.[307] The common law, statutes, and various provisions of the U.S. Constitution protect privacy in different ways. For example, the common law of trespass secures personal privacy against physical intrusions. Numerous federal and state statutes protect privacy in other ways.[308] Various federal constitutional provisions provide privacy protection rooted in real property interests. The Third Amendment bars quartering of troops "in any house" during peacetime "without the consent of the owner," and allows such use of a private home in time of war only "in a manner to be prescribed by law,"[309] and the Fourth Amendment declares, "[t]he right of the people to be secure in their . . . houses . . . against unreasonable searches and seizures shall not be violated."[310]

The cutting edge of privacy doctrine for over a century has been protection of interests *not* associated with traditional property. The seminal 1890 *Harvard Law Review* article by Samuel Warren and Louis Brandies proposed a right of privacy protecting citizens from intrusive

an alleged taking should be a relevant consideration; the issue of whether there is liability and what constitutes just compensation are distinct issues appropriately evaluated in different ways.

306 This is not to deny that government-caused occupations may have some adverse economic impact as well. Indeed, unless an occupation produces some economic loss, a claimant is barred from pursuing a claim of a taking "without compensation" under the Taking Clause on any theory. *See supra* note 67. The point is simply that the gravamen of a taking claim based on an occupation is an invasion of privacy, and the economic burden imposed by the government action generally only affects the amount of compensation that may be due.

307 *See* CHEMERINSKY, *supra* note 242, at 1007, 1017, 1672.

308 *See, e.g.*, Right to Financial Privacy Act of 1978, 12 U.S.C. § 3402 (2018) (limiting federal government access to financial records of individuals); Video Privacy Protection Act of 1994, 18 U.S.C. § 2710(b)(1) (2018) (protecting consumers' privacy when renting videos); Driver's Privacy Protection Act of 1994, *id.* § 2721(a)(1) (2018) (protecting against sale of personally identifiable information collected from the department of motor vehicles).

309 U.S. CONST. amend. III.

310 *Id.* amend. IV.

journalism.[311] Yet protection of privacy is a core function of private property rights in land. Indeed, Warren and Brandies took it as a starting place that land ownership provides a measure of personal privacy protection,[312] and built their new theory of a "right to be left alone" atop that foundation.[313]

Privacy protection has been a consistent if generally overlooked theme running through takings jurisprudence. In *Kaiser Aetna* the Court noted that the residents of the Hawaii Kai Marina development paid to support patrol boats that "maintain the privacy" of Kuapa Pond.[314] In *Loretto*, the Court repeatedly referred to "strangers" entering private property because of a government occupation.[315] In both of these cases, property owners seeking to defend privacy prevailed, but privacy (or, more accurately, a lack of privacy) has also been an issue in unsuccessful takings cases. Thus, in *PruneYard*, the Court rejected the taking claim in part because the plaintiff could not show an invasion of a privacy interest, observing: "The PruneYard is a large commercial complex that covers several city blocks, contains numerous separate business establishments, and is open to the public at large."[316] In a concurring opinion, Justice Thurgood Marshall made the point more directly by observing that the California access requirement did not result in "an invasion of any personal sanctuary."[317] In addition, Justice Byron White, in another concurring opinion, wrote that the case dealt "with public or common areas in a large shopping center and not with

311 Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 215 (1890).

312 *See id.* at 193.

313 The right to privacy protected by property ownership is related to the so-called "right to exclude," as suggested by the Court's frequent use of this phrase to describe the interest protected by occupation doctrine. However, the phrase right to exclude is generally used in a more general sense to refer to a defining characteristic of the institution of private property. *See* Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 643 (1999) (referring to a "deprivation of property" within the meaning of the Fourteenth Amendment as a potential abrogation of the "right to exclude"). *See generally* Thomas W. Merrill, Property and the Right to Exclude, 77 NEB. L. REV. 730 (1998) (emphasizing the importance of the right to exclude in defining property).

314 Kaiser Aetna v. United States, 444 U.S. 164, 167-68 (1979).

315 Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 436 (1982) ("Moreover, an owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property.").

316 PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 83 (1980).

317 *Id.* at 94 (Marshall, J., concurring) (citing Stanley v. Georgia, 394 U.S. 557 (1969)).

an individual retail establishment within or without the shopping center or with the property or privacy rights of a homeowner."[318]

The understanding that occupation claims seek to protect privacy not only suggests why a distinctive standard might apply to occupation claims but also helps define the scope of the claim. In Fourth Amendment cases, where the goal is to protect individuals' "reasonable expectations of privacy," no Fourth Amendment claim will lie where an individual can claim no reasonable expectation of privacy, such as when some item of property is left in "plain sight."[319] Following a similar approach to occupation claims under the Taking Clause, an occupation claim should fail when the owner has waived her interest in privacy based on property ownership.

Grounding protection against occupations in privacy implicates the question of whether corporations possess a constitutional right to privacy. The Supreme Court has apparently never squarely addressed the issue and the lower courts have reached divergent conclusions.[320] Recently, a California Court of Appeals ruled that Article I, Section 1 of the California Constitution, which provides that "all people" have an "inalienable right of privacy," does not apply to corporations.[321] In the *PruneYard* case, the Supreme Court said a corporate property owner had made its property "open to the public at large," waiving any possible right to privacy, thereby eliding the issue of whether a corporation may claim such a right. Future taking cases brought by corporation based on occupation claims may squarely present the issue of whether corporations can claim an invasion of privacy interests under the Taking Clause.

One of the notable implications of the conclusion that privacy interests underpin occupation doctrine is that it undermines the Court's problematic distinction between permanent occupations and temporary occupations. As demonstrated in the historical survey of the development of physical takings doctrine above, the *Loretto* Court appears to have adopted the position that permanent occupations are subject to a *per se* rule while temporary occupations are not as a way of explaining away inconsistent precedent. The Court has never offered a cogent, principled justification for the permanent vs temporary distinction, and no obvious explanation is waiting in the wings.

---

[318] *Id.* at 95 (White, J., concurring in part and concurring in the judgment).

[319] *See* Horton v. California, 496 U.S. 128, 139 (1990) (holding that Fourth Amendment protections do not apply when an object is visible in plain sight).

[320] *See* Elizabeth Pollman, *A Corporate Right to Privacy*, 99 MINN. L. REV. 27, 27 (2014).

[321] SCC Acquisitions, Inc. v. Superior Court, 243 Cal. App. 4th 741, 755 n. 4 (2015).

Under the analysis presented in this Article, there is no reason to preserve the distinction between permanent and temporary occupations. Government occupations of private property intrude on personal privacy regardless of whether they are temporary or permanent. Notably, under the common law, an intentional physical intrusion on private property constitutes a trespass regardless of whether the intrusion is permanent or temporary.[322] Thus, the Court should consider abandoning its differential treatment of permanent and temporary occupation claims. Adopting this recommendation would not mean that any particular temporary occupation claim would necessarily be more likely to succeed than under current law. But it would mean that analysis of the merits of the claim would focus on issues other than the temporariness or permanence of the occupation.

D. Restrictions on Property Use as Wealth Redistributions

In contrast with physical taking claims, taking claims based on government restrictions on the use of property primarily implicate concerns about potentially unfair redistributions of wealth from one or a few property owners to the public as a whole. In general, restrictions on use, like appropriations and occupations, may disadvantage some and benefit others. However, regulations of use, such as zoning rules, are typically designed to safeguard individual property values as well as advance broad societal interests, with the result that "most of them impact property values in some tangential way — often in completely unanticipated ways."[323]

The Supreme Court's regulatory takings jurisprudence has consistently emphasized the central importance of the degree of economic harm in evaluating taking claims based on use restrictions. The *Penn Central* framework directs courts to consider various factors, but "[p]rimary among those factors are 'the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.'"[324] In *Lucas v. South Carolina Coastal Council*,[325] the

[322] *See* Babb v. Lee Cty. Landfill, 747 S.E.2d 468 (S.C. 2013) (prescribing standards for measuring damages in temporary trespass cases); Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154, 159 (Wis. 1997) (holding that unauthorized temporary intentional trespass inflicts legally cognizable harm on property owner).

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

[324] Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 538-39 (2005) (quoting Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)).

[325] Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

Court established that a taking claim based on a regulation that denies an owner "all economically beneficial use" of her property warrants "categorical treatment."[326] While the Court has left the parameters of the *Lucas* categorical rule somewhat opaque, the essential message of *Lucas* is the more severe the economic burden due to restrictions on property use the stronger the taking claim.

The central focus on economic impact in takings cases arising from restrictions on property use has important implications for the structure of regulatory takings analysis. In particular, it explains and justifies the well-established parcel as a whole rule applicable in regulatory taking cases. A restriction on the permitted future uses of some portion of a property typically has a negative effect on the value of that portion considered in isolation. However, a regulation applied across an entire community may positively affect the value of property not restricted by the regulation. Regulations typically have a positive influence on property values insofar as they preserve amenities that make a community a desirable place to live and work. In addition, by restricting development opportunities, regulations tend to increase the scarcity and hence the market value of areas available for development in the future. As a result, a regulation may reduce the value of one portion of a claimant's property but increase the economic value of the previously developed portions of the property as well as other portions of the property that remain available for future development consistent with the regulation. Using the claimant's entire property, and not just the regulated portion, as the relevant "property" allows a court to calculate economic impact taking into account both the positive and negative effects of a restriction. The parcel rule is crucial for ensuring that both the positive and negative economic impacts of regulatory restrictions on property use are considered.

V. A REFORMED PHYSICAL TAKINGS DOCTRINE

This final Part tackles the ultimate question of what standard(s) courts should use in evaluating whether an appropriation or an occupation is a compensable taking. This Article advocates a middle-ground position prescribing a different analysis for physical taking claims than regulatory taking claims but eschewing a literal *per se* approach to physical taking claims. Under this proposal, the extent of the economic burden (if any) imposed by an appropriation or occupation would be irrelevant to the merits of a physical taking claim, as under current law. In addition, the parcel as a whole rule, so crucial

[326] *Id.* at 1015.

in regulatory taking cases, would be beside the point in a physical taking case, also as under current law; thus, the success of a physical taking claim would not be affected by whether the government has intruded on all or only a portion of the claimant's property. However, under this proposal, both the extent of interference with owner expectations and the purpose of the government action would be relevant considerations in physical taking cases. A final section illustrates how the proposed approach would resolve some familiar takings controversies.

A. The Elements of a Reformed Physical Takings Doctrine

One clearly established rule in current physical takings doctrine is that courts should evaluate a physical taking claim without regard to the economic impact of the government action and regardless of whether the intrusion affects all or only part of the claimant's property.[327] The foregoing analysis suggests that these features of current doctrine are appropriate, and the Court should retain them. The underpinning of taking claims based on appropriations is a concern about potential government exploitation of citizens for its own advantage, and the underpinning of taking claims based on occupations is protection of personal privacy associated with property ownership. Courts can properly resolve whether government has engaged in exploitation or invasion of privacy without inquiring into the adverse economic impact of the government action. Any potential adverse economic impact associated with a physical intrusion implicates a different normative concern than those implicated by appropriations or occupations. The economic impact (if any) of the government action is simply irrelevant to the question whether exploitation or invasion of privacy has occurred.

In addition, the Court properly disregards the whole parcel rule in physical taking cases. For the reasons explained above, the whole parcel rule is essential for determining the net economic impact of a government restriction on property use in a regulatory case. However, the parcel rule has no utility in addressing the binary question of whether an appropriation or occupation has occurred. Thus, the whole parcel rule should have no role in physical taking cases.

On the other hand, this analysis leads to the conclusion that courts should make no distinctions in the treatment of claimant's expectations and the purpose of the government action in physical taking cases versus regulatory taking cases. The Court has repeatedly said that it

[327] *See supra* notes 67-68 (explaining the "*per se*" rules governing physical taking claims).

follows a "*per se*" approach to physical takings, language that, on its face, might be read to preclude consideration of these factors. However, as explained above, the Court has not clearly foreclosed consideration of these factors in physical cases,[328] and some Court precedent offers affirmative support for including these factors in physical taking analysis. The Supreme Court should resolve this ambiguity by recognizing that expectations and government purpose are relevant factors in physical taking cases. In the meantime, lower courts should feel free in light of the uncertain and ambiguous Supreme Court precedent to take these factors into account in physical taking cases.

Several considerations support this position. The first can be explained briefly; the second and third considerations require more extended treatment.

First, courts should consider claimant expectations and government purpose in analyzing physical taking claims because doing so makes sense of the numerous diverse circumstances discussed above in which courts deny takings claims based on physical intrusions. The large volume of precedent rejecting taking claims based on forfeitures, seizures of contraband, destruction of unwholesome food or diseased animals, and so forth become explicable as a matter of legal doctrine if claimant expectations and government purpose are relevant in a physical taking case. On the other hand, these cases merely represent strange "outliers" if claimant expectations and government purpose cannot be considered in physical taking cases. A legal doctrine that makes sense of the complete universe of cases covered by the doctrine

[328] Perhaps the closest the Court has come to foreclosing consideration of expectations in a *per se* physical taking case is *Horne v. Department of Agriculture*, 576 U.S. 351 (2005), in which the Court distinguished *Lucas* by stating that, "Whatever *Lucas* had to say about reasonable expectations with regard to regulations, people still do not expect their property, real or personal, to be actually occupied or taken away." *See id.* at 361. The *Lucas* Court explained that its *per se* rule for total regulatory takings did not apply to personal property, observing that an owner of personal property "ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale)." *See Lucas*, 505 U.S. at 1027-28. The *Horne* Court ruled that that the "implied limitation" on interests in personal property that they are inherently subject to the risk of being rendered valueless by government action did not extend to *per se* physical takings. *Horne*, 576 U.S. at 361. This ruling is a far cry from a holding that the reasonableness of a claimant's expectations are always beside the point in a physical taking case, whether involving land or personal property. Significantly, in describing the scope of the *Loretto per se* rule, the *Horne* Court said that *Loretto* required compensation for occupations "without regard to the claimed public benefit or the economic impact on the owner," notably omitting any reference to the expectations issue (or the purpose of the government action). *Id.* at 398.

is obviously superior to a doctrine riddled with inexplicable gaps. The former represents application of a rule of law, while the latter represents unguided judicial improvisation.

Second, claimant expectations and government purpose should be considered in physical taking cases because these considerations are vitally important in informing the fairness and justice calculus in taking cases generally, and there is no good reason for courts not to consider both of these factors in evaluating the merits of physical taking claims.

The expectations factor operates in taking cases in several different ways, some of which are potentially relevant in a physical taking case. The expectations inquiry may focus on whether an investor relied on the existing regulatory regime when she made the decision to purchase the property; in that sense, the expectations inquiry helps assess in subjective terms the economic burden a new regulation may impose on a claimant. That interpretation of the expectations factor has no relevance in a physical taking case, because economic burden plays no role in a physical taking case. However, the expectations inquiry may focus instead on the level of psychological shock an owner may suffer from a government intrusion given the nature of the claimant's property use, the potential problems generated by the owner's activities, or the character of the regulatory environment. The level of interference (if any) with expectations in these latter senses is just as pertinent to the merits of a taking claim based on a physical intrusion as it is to the merits of a regulatory taking claim. In accord with this understanding, in *Arkansas Game & Fish Commission*,[329] the Court recognized that the reasonableness of a claimant's expectations is a relevant factor in a temporary physical taking case,[330] demonstrating that it is perfectly feasible to incorporate expectations into physical taking analysis.

Likewise, the government's purpose in pursuing an action (in several different senses) may be just as relevant to the merits of a physical taking claim as a regulatory taking claim. The Supreme Court long ago recognized that a government objective to protect the public from harm is a relevant factor in taking analysis. In the classic nineteenth century case *Mugler v Kansas*,[331] the Court rejected a taking challenge to a Kansas law prohibiting the manufacture and sale of intoxicating liquors, explaining that a state's regulatory authority "cannot 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

[329] 568 U.S. 23 (2012).

[330] *See id.* at 39; *see also* Murr v. Wisconsin, 137 S. Ct. 1933, 1942 (2017).

[331] 123 U.S. 623 (1887).

permitted, by a noxious use of their property, to inflict injury upon the community."[332] Subsequent Supreme Court cases have continued to recognize that the harm-preventing character of a regulation may defeat a taking claim.[333]

As discussed above, the Court has recognized that the mere fact that the government is exercising the police power cannot, by itself, bar a taking claim.[334] However, that principle does not detract from the relevance of harm-prevention as a factor in takings analysis. The police power defines the full breadth of state governments' power to act. The taking question assumes the government has the power to act and addressees the separate issue of whether the government must pay as a condition of doing so. The police power authority is broader than the targeted use of government authority to prevent public harms. The police power "extends not only to regulations which promote the public health, morals, and safety, but to those which promote the public convenience or the general prosperity."[335] Regulations designed to prevent public harms exercise only a portion of the police power authority.[336]

---

[332] *Id.* at 669.

[333] *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 488 (1987) (rejecting taking claim based on a state law designed "to protect the public interest in health, the environment, and the fiscal integrity of the area"); Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531 (1914) (rejecting taking claim based on law designed to protect employee safety).

[334] *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 425 (1982) (accepting New York Court of Appeals' determination that cable law was within the scope of the "police power," but recognizing that "it is a separate question whether an otherwise valid regulation so frustrates property rights that compensation must be paid").

[335] *See* Eubank v. City of Richmond, 226 U.S. 137, 142-43 (1912) (observing that the police power "is the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government") (quoting District of Columbia v. Brooke, 214 U.S. 138 (1909)); *see also* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1022-23 (1992) (distinguishing between the "harmful and noxious uses" principle and the "full scope of the State's police power," which encompasses any action designed to promote "health, safety, morals, or general welfare").

[336] *See* Acadia Tech., Inc. v. United States, 458 F.3d 1327, 1332-33 (Fed. Cir. 2006) (acknowledging that "it is insufficient to avoid the burdens imposed by the Takings Clause simply to invoke the 'police powers' of the state," yet concluding that a "prohibition on importing goods bearing counterfeit marks that misrepresent their quality and safety is the kind of exercise of the police power that has repeatedly been treated as legitimate even in the absence of compensation to the imported property").

While precedent as well as commentators[337] support consideration of harm prevention in regulatory taking cases, the theoretical basis for this element of takings doctrine is admittedly obscure.[338] Part of the explanation may be that inverse condemnation doctrine focuses on a class of cases that are functionally equivalent to government exercises of eminent domain, which involves government compelling property owners to turn over property to the government in exchange for financial compensation. Government action to arrest harmful activity fits at best awkwardly into the general model of forced exchanges of property for money. In addition, from a fairness and justice standpoint, there is an intuitive logic to compelling the public to compensate those burdened by government action designed to benefit the public, but the same logic does not apply to making payments to those blocked from inflicting harm on the public.[339] Lastly, the Supreme Court's recognition that background principles of state nuisance law may bar a taking claim supports the conclusion that government's harm-preventing purpose should be relevant in taking analysis. When a government regulation prohibits a property owner from engaging in an activity that amounts to a common law nuisance, the owner is barred from pursuing a taking claim based on the regulation because no one can claim a property entitlement to engage in a nuisance. Not every harmful activity represents a nuisance, but it would be odd if the harmfulness of a government action became completely irrelevant to the outcome of a taking case because the activity is one step short of being a nuisance. Thus, it is entirely understandable that the Supreme Court has recognized that the authority of government to regulate harmful activity

[337] *See, e.g.*, Peterson, *supra* note 13 (advocating consideration of the harm preventing purpose of the government action in regulatory takings cases).

[338] Professor Jed Rubenfeld, in his ambitious *Usings* article, contends that the Taking Clause's compensation mandate should be limited to the situation where government conscripts private property for use by the state. *See* Rubenfeld, *supra* note 136, at 1080. Under this theory, a restraint on some harmful use of property use is not a compensable taking because the government is not putting the property to "public use" within the meaning of the Taking Clause. *See id.* at 1151-52 (discussing contraband). Whatever the abstract appeal of this reading of public use, the Supreme Court has rejected it in favor of the understanding that a public use is a threshold requirement for any viable taking claim.

[339] *See* Echeverria, *supra* note 40, at 208 ("[W]hile it will sometimes make sense to require those who benefit from regulation to redistribute the gains to those burdened by the regulation, it will generally make less sense to require those protected from harm to pay those who have been restrained from harming others and the community.").

without paying compensation does not depend on the activity being "a common-law nuisance."[340]

Whatever the justification for considering government's harm-preventing purpose in evaluating whether government has caused a compensable taking by restricting uses of property, there is no principled basis for assigning less weight to government's harm-preventing purpose in a physical taking case than in a regulatory taking case. The government's purpose of arresting wrongful, blameworthy action excuses from liability actions that are so economically burdensome they would otherwise amount to compensable regulatory takings. Likewise, government's purpose to prevent harmful activity should excuse government from liability for appropriations or occupations.[341]

[340] Goldblatt v. Town of Hempstead, 369 U.S. 590, 593 (1962); *see also* Keystone Bituminous Coal Ass'n. v. DeBenedictis, 480 U.S. 470, 491-92 & n.22 (1987) (referring to a regulatory statute held not to effect a taking as controlling activity "tantamount to public nuisances" and regulating "activities similar to public nuisances").

[341] Taking claims based on appropriations or occupations also may fail based on applicable "background principles," *see supra* text accompanying notes 29–32, and some lower courts have held that particular physical seizures are not takings because they prevented nuisances. *See, e.g.*, Raynor v. Md. Dep't of Health & Mental Hygiene, 676 A.2d 978, 991-92 (Md. Ct. Spec. App. 1996) (rejecting taking claim based on government seizure and destruction of pet ferret because "a biting, wild animal represents a public nuisance due to the mere risk of infection it represents to humans"). It might be contended that the Court's ostensible *per se* rule for physical takings can be reconciled with idea that harm prevention should not give rise to takings liability by concluding that harm-preventing actions reflect background principles. However, a background principle defense based on nuisance doctrine is inadequate to address the full range of physical taking cases arising from government harm-prevention. First, the *Lucas* Court indicated that background principles are limited to "common law principles." Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992); *see also* RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 120 (1985) (articulating this position). Given the scope and variety of public threats addressed by governments at all levels, common law nuisance is an overly narrow and backward-looking framework for evaluating whether government can control threats of harm to the public without incurring takings liability. Second, while the background principles concept ostensibly offers a value-free basis for decision, *see id.* at 118 (referring to state property law as providing a "neutral baseline"), this claim is both mistaken and misleading. The *Lucas* decision itself acknowledged that application of a nuisance defense in a takings case necessarily involves examination of "the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities." *Lucas*, 505 U.S. at 1030-31. In other words, judicial resolution of a nuisance defense to a taking claim will often rely on the same kind of analysis of the harmfulness of a particular activity that, under this proposal, courts would address in deciding whether an appropriation or occupation is a compensable taking. Burying the issue of harm in a threshold inquiry into whether a state court would decide an activity would be a nuisance would often not change the substance of the analysis of

The same reasoning applies to government actions designed to confer benefits on taking claimants. The Court has long recognized that regulatory restrictions may create a "reciprocity of advantage" by simultaneously burdening property owners with restrictions on the use of their property and conferring benefits on them through application of the same restrictions to their neighbors and other property owners. Denial of taking liability based on regulatory restrictions is self-evidently just and fair if the regulations impose no net loss on the owners. The same basic logic should apply in physical taking cases.

Specifically, a property owner should not be permitted to claim a compensable physical taking when the government has appropriated or occupied private property either to confer a direct benefit on the property owner or in exchange for some benefit previously conferred on the owner by the government. This result comports with fundamental fairness by barring taking claims by those who are recipients of government "givings." It is also strongly supported by Supreme Court precedent, notwithstanding the Court's rhetorical commitment to a "*per se*" rule.[342]

Courts also should evaluate physical taking claims by weighing whether the government has appropriated or occupied private property either for the purpose of forestalling a larger threat to the property or to minimize harm to property owners and the public generally that would flow from a natural disaster or some other event outside the government's control. As discussed above, the first scenario is exemplified by the case of *Bowditch v. Boston*,[343] in which the Court applied an "actual necessity" defense to justify government destruction of one property in the path of a major fire to save many other properties. The second scenario is exemplified by the case of *Miller v. Schoene*,[344] which upholds the authority of government to enter onto private property in order to defend one owner at the expense of another, where one or the other owner will inevitably be harmed no matter how the government proceeds.

harmfulness. However, it would risk injecting a misleading, faux formalism into the judicial analysis. The background principles defense, by definition, generates a blunt yes or no answer to the question of whether the claimant can point to "property" sufficient to allow a taking case to proceed. Addressing harm as part of the taking inquiry allows courts to weigh the relative extent of the harm at issue, along with the other factors, in deciding the case.

342 *See supra* text accompanying notes 90, 115 (discussing *Sperry* and *National Board of Young Men's Christian Associations*).

343 101 U.S. 16, 18 (1879).

344 276 U.S. 272 (1928).

It bears emphasis that under this proposal the assessment of governmental purpose in a physical taking case does not call for a balancing of the burdens imposed by the government action against the potential benefits of the action for society as a whole. As discussed, in *Loretto* the Court asserted that a taking claim based on a government intrusion should be evaluated "without regard to the public interest that it may serve."[345] This statement is correct so far as it goes. But the statement implies that weighing the public interest might be appropriate in a regulatory taking case, though not in a physical taking case. Contrary to this implication, the reason the statement in *Loretto* is correct is not because the public purpose served by a government action is irrelevant in a physical taking case; instead, it is irrelevant to the merits of *any* inverse condemnation claim. The *Loretto* Court's confusion on this point is attributable to the Court's ill-fated "substantially advance" taking test. For several decades the Court maintained that a regulation should be deemed a taking if it "does not substantially advance legitimate state interests."[346] The implicit converse of this ostensible taking test was that a determination that a regulation serves a legitimate state interest should weigh *against* a taking claim. In 2005, in *Lingle v. Chevron U.S.A., Inc.*,[347] the Court repudiated the substantially advance test. *Lingle* explained that the substantially advance takings test was invalid because it was, in substance, a due process inquiry, and it was inconsistent with the foundational principle that "[t]he Taking Clause presupposes that the government has acted pursuant to valid public purpose."[348] In so ruling the Court foreclosed the idea expressed in *Loretto* that the fact that a government action serves a public purpose is a factor weighing against a taking claim. After *Lingle* (if not before), it is clear that whether a government action serves a public purpose is irrelevant in determining whether a taking claimant is entitled to compensation, on a physical takings theory or any other theory.

Finally, considering claimant expectations and government purpose in physical taking cases is supported by the fact that that the Court's *Lucas* decision, establishing the Court's "other" *per se* rule, can fairly be read to support, or at least to allow, consideration of these two factors. As discussed in Part I, the *Lucas* case established what the Court described as a "*per se*" regulatory taking test for restrictions that deny

[345] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982); *see supra* note 69 (citing additional cases).

[346] *See* Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

[347] 544 U.S. 528 (2005).

[348] *Id.* at 543.

owners all economically viable use of their properties. However, it can be contended that *Lucas* does not mandate a literal *per se* rule precluding consideration of claimant expectations or government purpose. If *Lucas* established less than a literal *per se* rule, *Lucas* supports the understanding that the takings test for physical takings may be less than a literal *per se* test as well.

David Lucas bought two building lots along the South Carolina oceanfront for nearly one million dollars at a time when the state's coastal law permitted him to develop the lots. Two years later, South Carolina enacted new legislation barring development of the lots, reducing the market value of the lots to zero. In that circumstance, the Supreme Court held, Mr. Lucas was entitled to recovery, absent some background principle barring the claim at the threshold. Because Mr. Lucas suffered a serious interference with his investment-backed expectations, the *Lucas* case did not address the question of how a court should resolve a total taking case if the claimant purchased the property after the regulation was in place and did not suffer a frustration of investment expectations. Given this silence, it not unreasonable to presume that a court should default to the usual approach in regulatory taking cases of taking the claimant's expectations into account.

In the absence of further guidance from the Supreme Court, lower courts have split on the issue,[349] with the weight of authority supporting consideration of claimant expectations in a *Lucas*-type case. The U.S. Court of Appeals for the Eleventh Circuit has ruled that "the extent to which the regulation has interfered with investment-backed expectations" is relevant in a *Lucas*-type case.[350] By contrast, in *Palm Beach Isles Associates v. United States*,[351] the U.S. Court of Appeals for the Federal Circuit held that reasonable investment-backed expectations are not a relevant factor in a *Lucas*-type claim.[352] That decision, however, conflicts with earlier decisions of the Federal Circuit holding that a lack of investment-backed expectations may bar a *Lucas*-

[349] *See* Love Terminal Partners, L.P. v. United States, 889 F.3d 1331, 1346 n.6 (Fed. Cir. 2018) ("We note that there appears to be conflict between circuits as to whether reasonable, investment-backed expectations are relevant to the *Lucas* analysis.").

[350] Reahard v. Lee County, 968 F.2d 1131, 1136 (11th Cir. 1992) (holding that, "to resolve the question of whether the landowner has been denied all or substantially all economically viable use of his property, the factfinder must analyze, at the very least: (1) the economic impact of the regulation on the claimant; and (2) the extent to which the regulation has interfered with investment-backed expectations").

[351] 208 F.3d 1374 (Fed. Cir. 2000), *reh'g en banc denied*, 231 F.3d 1354 (Fed. Cir. 2000).

[352] *See id.* at 1379.

type claim.[353] The dominant understanding that *Lucas* supports the position that a lack of reasonable expectations can be considered in a "*per se*" regulatory taking case suggests that a lack of expectations may appropriately be considered in a "*per se*" physical taking case as well.

The *Lucas* decision also can be read to permit consideration of the purpose of the government action in a physical taking case. Justice Scalia, author of the *Lucas* opinion, disparaged the notion that benefit-conferring government action can be distinguished, "on an objective, value-free basis," from harm-preventing action. This statement stands in stark conflict with the Court's traditional recognition that the government's harm-preventing purpose *is* a relevant factor in a taking case. However, the specific holding in *Lucas* is that a legislative determination that government action is necessary to protect the public from harm cannot defeat a total taking claim. *Lucas*'s holding does not proscribe consideration of the harm-preventing purpose of a government action outside of a *Lucas*-type total regulatory taking case. Justice Scalia pointed out that "[n]one" of the Court's prior cases "that employed the logic of 'harmful' use prevention to sustain a regulation involved an allegation that the regulation wholly eliminated the value of the claimant's land."[354] He thus implicitly conceded that that harm-preventing purpose of a government action retains vitality outside the total regulatory taking context, including perhaps in physical taking cases.

B. Lumping Versus Splitting

The conclusion that courts should evaluate physical taking claims and regulatory taking claims differently does not necessarily point to one particular architecture for physical takings doctrine as a whole. The final topic to be considered in designing a reformed approach to physical taking claims is whether to lump or split different types of taking claims.

Individual government actions can potentially give rise to multiple taking claims based on alternate theories. As discussed, appropriations, occupations and restrictions on use affect, in the abstract, distinct normative interests associated with property ownership. However, any particular government action may impair more than one normative

[353] *See* Good v. United States, 189 F.3d 1355, 1361, 1363 (Fed. Cir. 1999) (relying on *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1178 (Fed. Cir. 1994), in which the Federal Circuit also ruled that a *Lucas*-type claimant must demonstrates that he "had distinct investment-backed expectations").

[354] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1026 (1992).

interest. For example, government flooding of the land behind a dam, as in the *Pumpelly* case, can be viewed as producing either an occupation or a restriction on property use; the impoundment represents a government-caused invasion of the property, but the impoundment also restricts the owner's use of the property. Similarly, a government mandate that mining companies avoid surface subsidence, as in *Mahon*, can be viewed as either a restriction on property use or an appropriation; the Kohler Act restricted the companies' ability to mine coal and effectively transferred ownership of the support estate from the companies to the surface owners.

Another complexity is that the character of a government action does not determine the character of a potential taking. Government regulations can cause occupations, whereas physical government actions can cause restrictions on use. For example, in *Nollan* v. *California Coastal Commission*,[355] the coastal commission caused a compensable physical occupation through a regulatory permit condition. Conversely, in *Northern Transportation Co. v. City of Chicago*,[356] the government built a cofferdam along the boundary of plaintiff's property, restricting its use but not causing a physical taking.

There are two basic options for structuring physical takings doctrine to take account of these complexities. First, courts could evaluate physical takings claims by considering not only the physical nature of the government intrusion, but each of the *Penn Central* factors as well. Second, courts could evaluate physical takings claims based on the nature of the physical intrusion, as well as the owner's expectations and the purpose of the government action, but without regard to the economic impact of the government action. Under the second approach, takings claims based on economic impact would be prosecuted separately from claims on appropriations or occupations. For example, a *Pumpelly* dam building scenario could give rise to distinct taking claims based on occupation or adverse economic impact. The choice may be framed as one between lumping and splitting.

The lumping option effectively duplicates the approach to takings analysis laid out in the original *Penn Central* decision. The character of the government action as a physical intrusion, the economic impact of the government action, the claimant's investment expectations, and the purpose of the action would all be relevant elements of the takings calculus. In accordance with the analysis above, courts would address the character of the government action by determining whether the

[355] 483 U.S. 825 (1987).

[356] 99 U.S. 635 (1878).

government appropriated or occupied private property, without regard to whether the intrusion affected all or only a part of the claimant's property. By contrast, courts would address the economic impact of the restriction on use by reference to the claimant's parcel as a whole. The relevant economic impacts could encompass not only impacts attributable to restrictions on affirmative use but also to restrictions on use due to invasions or appropriations.

By contrast, under the splitting approach to physical taking claims, economic impact would not be included in the analysis. The relevant factors would include the character of the government action as a physical intrusion, the claimant's investment expectations, and the purpose of the action. As under the lumping option, courts would address the character of the government action by determining whether the government appropriated or occupied the property, without regard to the parcel issue. The splitting option would not preclude owners from challenging physical intrusions based on their economic impact; however, owners would present such challenges as distinct claims in which economic impact would be the focus and the physical intrusiveness of the government action would be put to one side.

Both options are plausible, but the splitting option appears superior. The lumping option would generate maximal doctrinal complexity forcing courts to weigh multiple incommensurate factors to arrive at a judgment. Courts would be hard-pressed to arrive at consistent, principled decisions; property owners could not easily predict the outcome of particular cases, and government officials and citizens would have difficulty conforming their actions to the law. If a government action involves an appropriation or an occupation, that fact alone should be sufficient to establish a serious property impairment. Considering the economic impact (if any) of the government intrusion as well would rarely add much if any weight to the taking analysis. By contrast, the splitting approach has the virtue of relative simplicity and supports more predictable physical takings doctrine. The splitting approach creates line drawing problems similar to those created by current doctrine. However, under this proposal less would be at stake in the choice between physical and regulatory claims. Neither option is self-evidently superior, but splitting appears to be the better option.

C. Applying the Reformed Doctrine

The final step is to explain how the proposed reform doctrine would apply to some leading Supreme Court's takings cases.

As an initial matter, simply recognizing that appropriations, occupations and restrictions on property use raise distinct normative

concerns justifying distinct judicial treatment can help clear up one curiosity in takings jurisprudence. In *Babbitt v. Youpee*,[357] and *Hodel v. Irving*,[358] the Court ruled that the Indian Land Consolidation Act caused a taking of Indians' right to pass on property to their heirs or devisees by mandating that small fractional interests pass to their tribes. The Court purported to apply the *Penn Central* framework, and based its takings findings in part on the "extraordinary character" of the regulation in light of the fact that "the right to pass on property . . . has been part of the Anglo-American legal system since feudal times."[359] The Court's rulings are hard to defend or explain under the modern understanding of *Penn Central*, given the modest economic impact of the legislation. However, the rulings are far more defensible when the federal legislation is understood for what it really is, a forced transfer of property from individual tribal members to the tribes.

The *Loretto*[360] case would likely come out the same way, in favor of Ms. Loretto, under this proposal. The New York statute plainly resulted in an occupation of private property without owner consent. The portion of the property affected by the occupation was small and its economic impact was minimal, but neither of these facts diminishes the strength of the claim under the reformed approach to physical taking claims. Whether the expectations factor weighs for or against the claim is debatable. On the one hand, the New York legislature adopted the law *after* Ms. Loretto purchased the property, arguably interfering with her expectations. On the other hand, the prior owner apparently granted the cable company permission to install the equipment and Ms. Loretto was unaware that the equipment was already present on the property when she purchased the building.[361] As to purpose, the New York legislature did not enact the measure to prevent a harm to the public. Ms. Loretto arguably benefited from the mandatory cable installation, because it provided her tenants access to cable television, presumably allowing her to charge tenants higher rent, increasing the value of her building. However, this potential benefit to the property owner was largely incidental. The New York legislature's primary motivation was apparently to confer a windfall on politically powerful cable companies. Prior to enactment of the law, cable companies negotiated with building owners for access and typically paid them five percent of their gross

357 519 U.S. 234 (1997).

358 481 U.S. 704 (1987).

359 *Id.* at 716.

360 Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

361 *See id.* at 424.

revenues.[362] The new law relieved cable companies of the need to negotiate for access with building owners and allowed them to cease sharing revenue with building owners. Under this proposed approach, this kind of government purpose would tend to support a taking claim based on an occupation.[363]

The Supreme Court arguably decided the *Horne*[364] case incorrectly. Under the proposed approach, the fact that the government seized only a portion of the Horne's raisin crop would be beside the point, as would be the value of the raisins seized. On the other hand, the Court should have weighed both the extent of interference with the Hornes' expectations and the purpose of the government program. Under the Agricultural Marketing Agreement Act of 1937, the Department of Agriculture had been issuing raisin-marketing orders for many decades. Thus, the Hornes were or should have been aware of the regulatory regime in place when they entered the business. In addition, unlike in *Loretto*, the Hornes and other raisin producers were the primary, direct beneficiaries of the marketing order. Congress adopted the Agricultural Marketing Agreement Act during the Great Depression in response to low agricultural prices and widespread economic distress in rural America in order to drive up crop prices and support agricultural producers financially.[365] A Raisin Administrative Committee, made up largely of raisin producers, effectively operated as a government-authorized cartel for the benefit of members of the industry. To carry out the program's goals, the marketing order required "handlers" (in effect wholesalers) to divide the annual raisin crop into two batches, one available for sale and another reserved from the market.

The Court arguably should have rejected the claim in *Horne* based on *National Board of YMCA* because, when a claimant is "the particular intended beneficiary of [a] governmental activity,"[366] fairness and

---

[362] *See id.* at 423.

[363] The impression that the New York law reflected egregious political overreach by the cable industry may well have influenced some justices' votes. *See* Richard Lazarus, *The Measure of a Justice: Justice Scalia and the Faltering of the Property Rights Movement within the Supreme Court*, 57 HASTINGS L.J. 759, 781 (1982) (indicating that Justice Blackmun's notes of the conference recorded Justice O'Connor describing the case as "shocking" and "unbelievable").

[364] Horne v. Dep't of Agric., 576 U.S. 351 (2015).

[365] *See* Daniel Bensing, *The Promulgation and Implementation of Federal Marketing Orders Regulating Fruits and Vegetable Crops Under the Agricultural Marketing Agreement Act of 1937*, 5 SAN JOAQUIN AGRIC. L. REV. 3, 6 (1995) (explaining that the "primary focus" of the agricultural marketing program is to "maximize return to the grower").

[366] Nat'l Bd. of Young Men's Christian Ass'ns (*YMCA*) v. United States, 395 U.S. 85, 92 (1969).

justice do not call for payment of just compensation from the public as a whole. The Hornes would have preferred, for ideological reasons, not to be included in the cartel at all. However, as the Court explained in *Sperry*, fairness requires that the special benefit conferred by a government program on a claimant be taken into account even if the claimant "has been forced to use" the program and simply "would rather not have used" the program. Justice Breyer, in his dissent in *Horne*, recognized that justice and fairness required that the benefit conferred on the Hornes by the marketing order somehow should be factored into the analysis. He argued that the Court should have allowed the government to attempt to demonstrate that the Hornes were not entitled to compensation because the benefit conferred on them by the program exceeded any losses. While Justice Breyer's instinct was correct, he erred, under the approach suggested here, by assuming that a taking occurred and that the Court should have considered the benefits conferred by the order solely for determining whether just compensation was due. Instead, he should have recognized that the intended benefits of the program for raisin growers went to the issue of whether a taking had occurred at all.

Two of the Court's most curious physical takings case — *Heart of Atlanta Motel*[367]and *PruneYard*[368] — are easily explained under the proposed approach to physical takings. Both cases plainly involved government-caused occupations. The key point in both cases is that the owners had already voluntarily opened their properties to the public. In *Heart of Atlanta Motel*, the owner had opened the property to motel guests. In *PruneYard*, the owner had invited large numbers of persons to enter the shopping center property. In each case, the owners had effectively waived any interest they might otherwise have had in maintaining their privacy interest in their property. When a property owner has voluntarily waived her interest in maintaining privacy, an occupation-taking claim designed to safeguard privacy necessarily fails.

The Supreme Court also should have analyzed the *Arkansas Game and Fish*[369] case differently under the approach proposed here. The flooding of the claimant's property was unquestionably an occupation. And under the proposed approach, it was irrelevant that flooding only affected a portion of the commission's property and that the inundation was only temporary. The expectations factor could be argued either way. Everyone who holds property along a river can be expected to

[367] 379 U.S. 241 (1964).

[368] 447 U.S. 74 (1980).

[369] 568 U.S. 23 (2012).

know that water flow will be variable, and that a river will, from time to time, even overflow its banks. But the Court observed that the increased flood flows giving rise to the claim exceeded any flows prior to the dam's construction. On balance, the expectations factor probably tilted in favor of the commission.

The purpose of the government action presents a more interesting issue. The flooding could not be justified on the theory that the government was acting to avert some serious public harm, or on the ground that the government was acting to recoup a giving. However, *Miller v. Schoene*,[370] in which the Virginia state entomologist was forced to choose between destruction of cedar trees and apple trees, arguably supports rejection of the claim. In *Arkansas Game and Fish*, like in *Schoene*, the government was forced to choose between harming one set of property owners or another. The U.S. Army of Corps Engineers changed the operating criteria for the dam in response to complaints from downstream famers that excessively high flood water was interfering with their ability to harvest crops in the floodplain. To address the farmers' concern, the Army Corps of Engineers reduced water releases from the dam during one part of the year. Because the same volume of water ultimately had to be released from the dam eventually, accommodating the farmers led to increased water releases in other parts of the year, causing increased flooding of the commission's land. No property owner along the river had a vested entitlement in any particular operating plan for the dam. The Army Corps confronted the challenge of choosing which of two groups of property owners to sacrifice. Under *Schoene*, it appears to be a close and interesting question whether the Army Corps committed a taking simply by making the hard choice between the two options available.

Finally, the Supreme Court's cases rejecting takings claims based on forfeitures, *Bennis*[371] and *Calero-Toledo*,[372] were correctly decided, but for reasons different from those identified by the Court. As discussed, in *Bennis*, the Court offered the nonsensical rationale that a forfeiture was not a taking so long as it was executed in accordance with the Due Process Clause, and the *Calero-Toledo* Court mostly relied on citations to voluminous precedent to support rejection of the claim. However, under this proposed approach, the Court properly rejected the taking claims for the simple reason that the government was acting to enforce the law to protect the public from harm. As Justice Ginsburg succinctly

370 276 U.S. 272 (1928).

371 Bennis v. Michigan, 516 U.S. 442 (1996).

372 Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

stated in her concurring opinion in *Bennis*, "Michigan has decided to deter johns from using cars they own (or co-own) to contribute to neighborhood blight."[373]

CONCLUSION

The basic problem with the Supreme Court's physical takings doctrine is hiding in plain sight. On the one hand, the Court has made a strong *rhetorical* commitment to using a *per se* approach to physical taking claims, and in recent years the Court has announced that this approach should apply more expansively. On the other hand, the Court is not actually committed to this absolutist approach, as demonstrated by various Court rulings rejecting physical taking claims and other decisions acknowledging limits to the physical taking theory. Meanwhile, lower courts refuse to apply *per se* liability in physical taking cases on a regular basis. The upshot is a serious disconnect between what the Court *says* the law of physical takings is and what the law actually *is*.

The Court should abandon its purported *per se* test for physical taking claims. In the absence of strong support in history, precedent, or theory, the case for the *per se* approach ultimately rests on the arguments that it avoids line-drawing, courts can easily apply a *per se* rule, and citizens and government officials can readily understand and conform their conduct to such a rule. However, maintaining a strict *per se* rule for physical taking claims alongside a multivariable approach for other taking claims creates its own line-drawing problem that is at least as troublesome as the line-drawing problem the *per se* doctrine is supposed to solve. More fundamentally, the disconnect between the Court's announced commitment to a *per se* approach to physical taking claims and the numerous widely accepted departures from the announced doctrine belies the Court's claim to have established a *per se* rule. A legal rule subject to numerous exceptions the courts cannot explain much less justify is not a rule worth defending.

To date, the challenge for courts and litigants in the arena of physical takings has generally been framed as a choice between a *per se* rule and a multivariable analysis along the lines of *Penn Central*. This Article suggests a third path that recognizes the distinctive issues raised by

[373] *Bennis*, 516 U.S. at 458; *see also Calero-Toledo*, 416 U.S. at 686-87 ("Forfeiture of conveyances that have been used — and may be used again — in violation of the narcotics laws fosters the purposes served by the underlying criminal statutes, both by preventing further illicit use of the conveyance and by imposing an economic penalty, thereby rendering illegal behavior unprofitable.").

taking claims based on appropriations and occupations while acknowledging the limitations of the *per se* approach. It does not eliminate line drawing, but it at least lowers the stakes in deciding which test to apply to taking claims. It provides a framework for analysis that is more likely to achieve fairness and justice than current law. In addition, it probably conforms more closely to what the law of physical takings actually is than what the Supreme Court has been saying it is.