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What is a Physical Taking?

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ABSTRACT

A "physical taking" claim under the Fifth Amendment to the U.S. Constitution is commonly said to be governed by a longstanding *per se* (or "categorical") liability rule. This apparently means that when the government appropriates or occupies private property, it should have a duty, without regard to any other circumstance, to pay just compensation. According to this understanding, the ostensible *per se* rule stands in stark contrast to the more recently developed, mostly multivariable, and generally indeterminate rule governing regulatory takings claims. However, a deep dive into physical takings reveals a different and more complex story. First, the idea that physical takings claims should be evaluated using a *per se* rule is a relatively recent judicial innovation; the Supreme Court first articulated the idea of a *per se* rule for physical takings after, and in reaction to, the establishment of modern regulatory takings doctrine. Second, the Court has provided contradictory signals on whether it is committed to a *per se* rule or (what amounts to the same thing) how it defines *per se* in this context. This doctrinal confusion is of great consequence given the wide variety of physical takings claims today, ranging from claims based on state "red flag" gun laws, to claims based on flooding, to claims on based on forfeitures and other civil and criminal law enforcement actions, to provide just a few examples. The Supreme Court has so far offered unconvincing justifications for a *per se* approach to physical takings claims. Moreover, courts across the country (including the Supreme Court itself) routinely reject takings claims based on appropriations or occupations, suggesting that the ostensible *per se* rule may be more myth than reality. A fresh look for possible justifications for distinctive treatment of physical takings claims suggests: that compensation for appropriations primarily serves to constrain government exploitation of citizens for its own ends; that compensation for occupations primarily serve to constrain government invasions of privacy; and that all physical takings claims serve an equal treatment principle by generally imposing liability on government for actions that, if taken by private citizens, would generally subject the citizens to liability. Building on these new normative underpinnings for distinctive treatment of physical takings claims, this article argues that courts should evaluate physical takings without regard to the economic impact of the government action, the issue so central in regulatory takings cases. However, it also suggests that courts should determine whether an appropriation or occupation results in a taking by considering the extent of interference with the owner's reasonable expectations and the purpose of the government action. The upshot is that a special liability rule would apply to physical takings claims, but not to the extent of a strict *per se* rule.

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Introduction

A "physical taking" claim under the Fifth Amendment to the U.S. Constitution is commonly said to be governed by a longstanding *per se* (or "categorical") liability rule.[1] This apparently means that when the government appropriates or occupies private property, it should have a duty, without regard to any other circumstance, to pay just compensation. According to this understanding, the ostensible *per se* rule for physical takings stands in stark contrast to the more recently developed, mostly multivariable, and generally indeterminate rule governing regulatory takings claims.[2] However, a deep dive into physical takings suggests a different and more complex story.

First, the idea that physical takings claims should be evaluated using a *per se* rule is actually a relatively modern judicial innovation. The Supreme Court has long recognized that physical intrusions can potentially be takings, depending on the circumstances. But the Court has not traditionally suggested that *all* physical intrusions are necessarily takings. The Court introduced the idea that physical intrusions should be treated as "*per se*" takings relatively late in the development of takings law; it articulated its *per se* rule for physical takings only after, and as a kind of counter point, to the Court's articulation of modern regulatory takings doctrine. The Court's 1982 decision in *Loretto v. Teleprompter Manhattan CATV Corp*.,[3] which ostensibly followed longstanding precedent in applying a *per se* rule to a physical taking claim, was actually a revolutionary decision crafted as a response to the regulatory takings doctrine outlined a mere four years earlier in the landmark case of *Penn Central Transp. Co. v New York City*.[4]

Second, while the Supreme Court frequently recites that physical takings claims are governed by a "*per se"* or "categorical" rule, its it is far from clear that the Court is actually committed to a *per se* rule or (what may amount to the same thing) how the Court defines *per se* in this context. The term "*per se"* is generally defined to mean by itself and without regard to other circumstances, [5] suggesting that a *per se* rule for physical takings would mean that the

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[1] *Tahoe –Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 , 322-23 (2002). *See also Dukeminier at al Property* 1034 (9th ed. 2017) ("*Loretto* represents little more than the U.S. Supreme Court's endorsement of a longstanding rule").

[2] *See Tahoe-Sierra*, 535 U.S. at 322 ("Our regulatory takings jurisprudence, in contrast, is of more recent vintage and is characterized by essentially ad hoc, factual inquiries, designed to allow careful examination and weighing of all the relevant circumstances.) (internal quotations and citations omitted).

[3] 458 U.S. 419 (1982).

[4] 438 U.S. 104 (1978).

[5] *See* Black's Law Dictionary ("By himself or itself; in itself; taken alone; inherently; in isolation; unconnected with other matters.))

government should always be liable under the Takings Clause if it has caused a physical intrusion upon private property, regardless of any other circumstance. Consistent with this understanding, some modern Court opinions state that the factors ordinarily considered in a case governed by *Penn Central* are not relevant in a physical taking case. On the other hand, other Court decisions, including in some of the most recent physical takings cases, contain express limitations and qualifications to the ostensible *per se* rule, suggesting the rule may not be so *per se* after all. In particular, in the recent case of *Horne v. Department of Agriculture*,[6] the Court purported to announce a sweeping *per se* rule for appropriations of personal property. But a close reading of the decision shows that the Court confined its ruling to the particular facts of the case, and indicated that a different outcome might be warranted in different circumstances, effectively contradicting its announcement of a *per se* rule.

In light of this tangled history and doctrinal confusion, physical takings are ripe for thorough reassessment. Courts, government officials and property owners would benefit from clear guidance on what legal test or tests govern physical takings claims. They need to know whether such claims are governed by a literal *per se* test or not, or what *per se* actually means in this context. If a literal *per se* rule for physical claims turns out to be infeasible in practice or indefensible in theory, they need to know what test(s) should apply. The Supreme Court has been content, by and large, to resolve takings claims based on "*ad hoc*, factual inquiries."[7] This approach permits courts to take into account virtually any relevant circumstance in any particular case, but it also invites arbitrary judicial decisions and generates unpredictable results. Over the last forty years, the Court has worked to develop a straightforward, predictable *per se* rule for at least one category of takings cases. But the Court's apparent unwillingness or inability to actually commit in physical takings cases to a literal *per se* approach suggests that the advantages of a mechanical *per se* approach may not be worth the costs.

The issue of how to apply the Takings Clause to appropriations or occupations is important because the success of many significant government policies depends on the government's power to physically seize or occupy private property. In the aftermath of the 2018 shooting incident at the Mandalay Bay Hotel, 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. In the wake of the 2019 shootings in Dayton, Ohio and El Paso, Texas, there has been widespread discussion of a federal "red flag" law, modeled on similar laws already adopted in several states, which would authorize government officials to petition a court to order the removal of firearms from a person who present a danger to himself or others. Other areas of government activity potentially affected by this issue, to name but a few, include regulations designed to safeguard the banking system, criminal law enforcement,

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[6] 569 U.S. 513 (2013).

[7] *Murr v. Wisconsin*, 137 S. Ct. 1933, 1942 (2017).

and rules relating to the safety and security of the food system. Under a literal *per se* rule, all of these measures would be compensable takings.

Scholars exploring physical takings have been virtually unanimous in their criticism of the Supreme Court's physical takings doctrine, but the nature of their criticisms varies widely. Professor Richard Epstein calls for eliminating what he calls the "unprincipled line between occupation and regulation," and subjecting all government intrusions on private property rights to a universal *per se* rule of liability.[8] Applying his law and economics approach to takings, 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 by brute force."[9] In his view, the same analysis applies to restrictions on property use, because "identical forces of self-interest are at work with restrictions on use and development of land."[10] Professor Andrea Peterson also criticizes what she calls the "unjustified analytic divide" between physical and regulatory takings, but from a different perspective.[11] Instead of advocating for a universal rule of *per se* liability, she argues that physical and regulatory takings claims should both be resolved by asking whether the government has acted to control "blameworthy" conduct by the property owner.[12]

The late Professor Joseph Sax, in his ground-breaking 1964 *Yale Law Journal* article, contended that "[t]he formal appropriation or physical invasion theory should be rejected once and for all."[13] He traced the physical takings test back to the "conceptual" approach to takings law originally formulated by the first Justice Harlan in the late nineteenth century, which Sax criticized as elevating form over substance To show why the formal test should be rejected Sax cited *United States v. Central Eureka Mining Company*,[14] which involved a takings claim based on a government order to shut down a private gold mine. Applying the conceptual approach, the Court rejected the mining company's taking claim because "the Government did not occupy, use

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[8] Richard A. Epstein, Physical and Regulatory Takings: One Distinction Too Many, 64 Stan L. Rev. ONLINE 99 (2012)

[9] *Id*. at 101

[10] *Id*. at 102.

[11] Andrea L. Peterson, *The Takings Clause: In Search of underlying Principles--Part II--Takings as Intentional Deprivations of Property without Moral Justification*, 78 CALIF. L. REV. 53 (1990).

[12] *Id*. at 93.

[13] Joseph L. Sax, Takings and the Police Power, 74 Yale L. J. 36, 48 (1964).

[14] 357 U.S. 155 (1958),

or in any manner take physical possession of the gold mines or of the equipment connected with them."[15] Sax thought the government should not escape liability for a taking imposing a substantial economic burden merely because the government "'regulated' the gold mines out of business without invoking the magic talisman of a physical invasion."[16] He thought it was "preposterous" for the resolution of the takings question "to depend on such formalities."[17]

Professor Frank Michelman, in his influential yet Delphic 1967 *Harvard Law Review* article, offers two alternative answers to the question of whether a special rule should govern "physical invasion" claims.[18] He first lays out a utilitarian approach under which entitlement to compensation turns on the "efficiency gains" associated with government action, the "demoralization costs" imposed by the action on the claimant and similarly situated persons, and the "settlement costs" of making just compensation awards to mitigate the demoralization costs. If one considers "psychic phenomena," Michelman says, physical invasions can support a high estimate of demoralization costs:

> Physical possession doubtless is the most cherished prerogative, and the most dramatic index, of ownership of tangible things. Sophisticated rationalizations and assurances of overall evenness which may stand up as long as one's possessions are unmolested may wilt before the stark spectacle of an alien, uninvited presence in one's territory. The psychological shock, the emotional protest, the symbolic threat to all property and security, may be expected to reach their highest pitch when government is an unabashed invader.[19]

Thus, a judge adopting the utilitarian perspective, Michelman suggests, can appropriately "lay great stress on the polar circumstance of a permanent or regular physical use or occupation by the public."[20] In other words, according to this perspective, a *per se* test, or something very much like it, may be appropriate.

On the other hand, Michelman asserts, using a categorical physical takings test "seems unacceptably arbitrary" under an alternative approach derived from John Rawls's theory of "justice as fairness."[21] In contrast with the utilitarian model, he asserts, "rational actors" under

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[15] *Id*. at 165-66.

[16] 74 Yale L. J. at 47

[17] *Id*. at 48

[18] Michelman, Frank I. "Property, Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation" 80 Harv. L. Rev. 1165 (1967).

[19] *Id.* at 1229.

[20] *Id*.

[21] *Id*. at 1219.

the fairness model "must be expected to see that the relevant comparison is between large losses and small losses."[22] Because the capacity of a physical invasion test "to distinguish, even crudely, between significant and insignificant losses is too puny to be taken seriously,"[23] this approach leads to "disapproval of the physical invasion criterion if we judge it by the standards of absolute fairness."[24]

Michelman's analysis is so even-handed and nuanced that *both* the majority and the dissent in *Loretto* cited his 1967 article, with the majority citing his utilitarian analysis,[25] and the dissent citing his fairness analysis.[26] Michelman ultimately concludes that courts cannot practically decide cases based directly on the "the precept of fairness," and that the utilitarian approach yields the most workable rule.[27] Thus, he suggests, under a utilitarian approach, [28]"a physical occupation" is one circumstance that should be singled out for payment of compensation. The advantages of this rule, he asserts, include that it "would be workable; it would be internally consistent; and it would be ethically inoffensive as far as it goes."[29] In addition, he says, it "may actually be in force."[30]

This article, building on these and other prior scholarly work,[31] argues that the Supreme Court should steer a middle course on physical takings, recognizing that physical claims raise distinct concerns calling for special treatment, but eschewing a literal *per se* approach. On the

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[22] *Id*. at 1229.

[23] *Id*. at 1227.

[24] *Id*. at 1229.

[25] *Loretto*, 458 U.S. at 436, citing Michelman, 80 Harv.L.Rev. at 1228, and n. 110.

[26] *Loretto*, 458 U.S. at 447, quoting Michelman, 80 Harv.L.Rev. at 1227.

[27] 80 *Harv. L. Rev.* 1250

[28] *Id*.

[29] *Id*. at. 1250-51.

[30] *Id*. at 1251

[31] *Abraham Bell &Gideon Parchamovsky, The Privacy Interest in Property* , 167 U. Penn. L. Rev. 869 (2019); Lynn Blais, The *Total Taking Myth*, 86 Fordham L. Rev. 47 (2017); John Costonis, *Presumptive and Per Se Takings, A Decisional Model for the Takings Issue*, 58 N.Y.U. L. Rev. 465 (1983).

one hand, this article suggests that appropriations, occupations and regulatory restrictions each affect private property in distinctive ways. Specifically, exploitation of property owners for government's self-interested purposes is the distinctive concern raised by appropriations; infringement on personal privacy is the distinctive concern raised by government-caused occupations; and potentially onerous and unfair redistribution of wealth is the distinctive concern raised by regulatory restrictions on property use. Given that appropriations, occupations and use restrictions affect property in these distinctive ways, it is appropriate that takings claims based on these different types of property intrusions should be evaluated in different ways. Thus, because the question whether an appropriation or occupation has occurred is essentially a binary issue, it is unnecessary to evaluate how much of an owner's property has been affected by an appropriation or occupation. By contrast, because regulatory takings claims necessarily implicate complex questions about how restrictions on use positively and negatively affect the market value of private property, it is appropriate to evaluate regulatory takings claims in the context of the claimant's property as a whole. In addition, appropriation and occupation claims raise special equal-treatment-under-law concerns because these types of takings claims parallel, and in historical terms grew out of, the common law actions of conversion and trespass;. physical takings rules that subject government to liability on the same terms that private parties engaged in the same action would be liable in tort helps advance an equal treatment principle. No similar equality before the law concern arises with regulatory takings claims, because there is no common law analog to a claim of "over regulation" of private property under the Takings Clause.

On the other hand, this article argues that physical takings claims should be evaluated using some of the same factors that are relevant in regulatory takings cases. The extent of the government's interference with investment-backed expectations as well as the purpose of a government action, especially if the government is acting to protect the public from harm, are prominent factors in takings analysis. These considerations are as pertinent to the issue of whether, as matter of fairness and justice, a physical intrusion should be treated as a compensable taking as they are in any other type of takings cases. There is no principled reason, apart from a preference for a mechanical liability rule, for excluding these factors from consideration in physical takings cases. Notwithstanding the Court's recent rhetoric endorsing *per se* analysis for physical takings claims, significant Court precedent supports the conclusion that physical taking claims can properly be rejected based on a lack of interference with investment expectations or the purpose of the government action.

This article proceeds as follows: Section I provides a sketch of modern takings doctrine, outlining the basic elements of regulatory takings and physical takings doctrine, and highlighting how the ostensible *per se* rules governing physical takings claims are a good deal less rigid than they may appear. Section II surveys the historical evolution of the rules governing physical takings claims, demonstrating that the ostensible *per se* approach, though allegedly longstanding, is actually a relative novelty in historical terms. Section III critiques the Supreme Court's articulated rationales for its ostensible *per se* physical takings rule, and explains why,

collectively and individually, the Court's articulated reasons do not provide cogent support for treating physical clams differently than regulatory takings claims, much less for evaluating physical takings claims using a mechanical *per se* rule. Section IV surveys numerous categories of frequently overlooked cases in which the Supreme Court and/or lower courts have rejected physical takings claims, supporting the conclusion that a mechanical *per se* rule is untenable and highlighting circumstances in which additional factors need to be brought to bear in physical taking analysis. Section V lays out alternative, hopefully more persuasive arguments for why physical takings claims are distinctive and should be governed by distinct rules. Section VI presents the case for a reconstructed approach to physical taking claims recognizing that physical takings are different from other takings but incorporating some of the traditional elements of takings analysis, including owner expectations and the government's purposes, and then tests this new approach by applying it to some recent controversies. The article ends with a brief conclusion.

I. The Modern Takings Landscape

This focus of this paper is physical takings claims. But it is useful at the outset to provide a sketch of modern takings law as a whole, in order to contrast and compare regulatory and physical takings doctrine, and to set up a discussion of what commonalities and differences do and should exist between these two branches' of takings law. In addition, this section highlights how Supreme Court decisions reveal that the ostensible *per se* rule for physical takings is a good deal less than literally *per se*.

A. Regulatory Takings

The idea that regulatory restrictions on property use can be compensable takings is generally traced back to the Court's 1992 decision in *Mahon v Pennsylvania Coal Co*, in which the Court offered the famously cryptic observation that a regulation will be deemed a taking if goes "too far."[32] Prior to *Mahon*, the Supreme Court repeatedly asserted that regulatory restrictions on the use of property are not compensable takings. Thus, in 1887, in *Mugler v. Kansas,*[33] the Supreme Court rejected a takings challenge to a statute banning the production of liquor on the ground that a valid police power regulation "cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit." The Court followed this principle "no matter how much the regulation affected the value of private property."[34] *Mahon* overruled this categorical *anti*-takings rule, declaring that "the police power must have its limits." Thus,

[32] 260 U.S. 393, 415 (1922).

[33] 123 U.S. 623, 668 (1887).

[34] William Michael Treanor, The Original Understanding of the Takings Clause and the Political Process," 95 Colum. L. Rev. 782, 797 (1995).

after *Mahon*, simply because a regulation is a valid exercise of the police power is insufficient, by itself, to defeat a regulatory taking claim.[35]

Over fifty years later, in 1978, in *Penn Central Transportation Co. v. New York*, the Court acknowledged that it "quite simply, has been unable to develop any 'set formula for determining when 'justice and fairness' require" payment of compensation for government actions, and that it had been forced to make "essentially ad hoc, factual inquiries" to resolve particular cases.[36] At the same time, the *Penn Central* Court identified three factors as having "particular significance" in takings analysis: the "economic impact" of the government action, the extent of interference with "investment-backed expectations," and the "character' of the government action.[37] Over time, the Court came to rely heavily on these three factors, to the point that they now represent the "polestar" of the Court's regulatory takings analysis.[38]

The Supreme Court and lower courts have provided some guidance on the meaning of the *Penn Central* factors. Economic impact is typically measured by comparing the market value of the claimant's property "without" the regulation with the value of the property "with" the regulation, the difference providing a measure of the "loss" imposed on the property owner.[39] In conducting this calculation, courts do not focus exclusively on the restricted portion of the property but instead consider the claimant's "property as a whole."

The investment-backed expectations factor has been defined in multiple ways. First, courts ask whether the claimant, at the time she purchased the property, had notice of existing regulatory restrictions already in place and may have paid a price that reflected the existence of the restriction. The Supreme Court has made clear that acquisition of property subject to existing regulations is in not an absolute bar to a taking claim,[40] but prior notice is a relevant

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[35] *See Loretto*, 458 U.S. at 425 (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.")

[36] 438 U.S. 104, 124 (1978).

[37] *Id.*

[38] *Tahoe-Sierra*, 535 U.S. at 302, quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring)

[39] See John D. Echeverria, *Making Sense of Penn Central*, 23 UCLA Journal of Environmental Law 172, 180 (2005).

[40] *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001).

factor and, in practice, generally leads to rejection of takings claim.[41] Second, the expectations inquiry may focus on whether the regulatory restrictions were "foreseeable," either in the sense the claimant was operating in a "highly regulated environment" and therefore had reason to know that new restriction might be imposed, or the proposed property use was so obviously controversial that a reasonable investor could anticipate a regulatory response.[42]

The third factor, the character factor, is the most elusive. The *Penn Central* Court stated 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."[43] Subsequent cases have invested the character factor with other meanings.[44] Courts commonly treat the harmfulness of the regulated activity to public health, safety or the environment as weighing against a takings claim. The degree of "reciprocity of advantage" created by a regulation also has been addressed under character factor. Finally, treating the *Penn Central* framework as a kind of rough and ready form of cost-benefit analysis, some courts have defined character in terms of the public benefits of the challenged government action.

The indeterminacy of the *Penn Central* analysis is part of its appeal as well as a source of frustration. The *Penn Central* framework allows courts to consider virtually any fact or circumstance that arises in a case which judicial intuition suggests should be relevant. But the indeterminacy of the *Penn Central* framework makes it hard to predict how courts will resolve *Penn Central* claims, and in turn makes it difficult for government and property owners to tailor their actions and positions to avoid takings problems.

In 1992, in *Lucas v. South Carolina Coastal Council*, the Court modified regulatory takings doctrine by adopting what it called a "*per se"* rule of takings liability for a regulation that "denies all economically beneficial or productive use of land."[45] The Court offered various legal policy justifications for its new rule.[46] Of particular relevance for present purposes, the

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[41] *See id.* at 633 (O'Connor., concurring) ("interference with investment-backed expectations is one of a number of factors that a court must examine," and "the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations"). *See also* 23 UCLA Journal of Environmental Law at 183 -186.

[42] *Making Sense of Penn Central*, at 184

[43] 438 U.S. at 124.

[44] *Making Sense of Penn Central*, at 190-95.

[45] 505 U.S. 1003, 1015 (1992).

[46] *Id*. at 1017-18

Lucas Court stated "that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation."[47] The logic appears to be that an "appropriation" is generally treated as a compensable taking, and a "total deprivation of use" due to regulation should generally be treated the same way because its effect on a property owner is "equivalent" to that of an appropriation.[48]

While the *Lucas* Court described its rule as "categorical," [49] the Court left the scope of the *per se* rule ambiguous. Several passages in *Lucas* suggest that a denial of all economically viable use of private property is necessarily a taking, regardless of any other consideration.[50] At other points in the opinion, however, `the Court is more ambiguous. For example, the Court said the categorical rule "require[d] compensation without the usual case-specific inquiry into the public interest advanced in support of the restraint,"[51] suggesting that other factors might be raised in opposition to a *Lucas* claim.

One question left open by *Lucas* is whether the extent of interference with investment-backed expectations might be a relevant factor in a total taking case. David Lucas bought two building lots for nearly 1 million dollars, the law at the time permitted him to develop both lots, and then two years later the State of South Carolina enacted legislation that barred construction on the lots and reduced the market value of the lots to zero, according to the findings of the trial court. What result if, by contrast, the State had enacted the legislation, and David Lucas purchased the lots afterwards for a modest price knowing of the restrictions in place? In the absence of any subsequent Supreme Court guidance, the lower federal courts are in disarray over

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[47] *Id*. at 107.

[48] *Cf. San Diego Gas & Elec. Co v. City of San Diego,* 450 U.S. 621, 652 (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.")

[49] 505 U.S. at 1016.

[50] *See id*. at 1019 ("when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking"); *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.").

[51] *Id*. at 1004.

whether a lack of reasonable investment-backed expectations may bar a *Lucas*-type case.[52] The U.S. Court of Appeals for the Eleventh Circuit has adopted the position that "the extent to which the regulation has interfered with investment-backed expectations" is relevant in a *Lucas*-type case.[53] By contrast, in *Palm Beach Isles Associates v. United State,*[54] the U.S. Court of Appeals for the Federal Circuit held that a lack of reasonable investment-backed expectations does not bar a *Lucas*-type claim.[55] But that decision appears to conflict with earlier decisions of the Federal Circuit holding that a lack of investment-backed expectations may bar a *Lucas*-type claim.[56] The ongoing debate about how expectations factor into a *Lucas per se* claim is obviously related to the question, discussed at length below, of how expectations may factor into a "*per se*" physical takings claim, as discussed below

The *Lucas* case also addressed the question of how the government's intention to protect the public from harm should influence takings analysis. In *Lucas,* the South Carolina Supreme Court rejected the taking claim because the state's coastal law was designed, according to the state legislature, to protect the public from harm. But the U.S. Supreme Court rejected this analysis, ruling that a total taking claim cannot be defeated by the legislature's declaration of a harm-preventing purpose.[57] Observing that "the distinction between regulation that 'prevents harmful use' and that which 'confers benefits' is difficult, if not impossible, to discern on an objective, value-free basis," the Court thought it "self-evident that noxious-use logic cannot serve as a touchstone to distinguish" between government actions that are compensable takings and those that are not. This sweeping statement implicitly raises the question whether it applies

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[52] See *Love Terminal Partners, LP 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.")

[53] *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.").

[54] 208 F.3d 1374 (Fed Cir 2000), denying petition for rehearing *en banc,* 231 F.3d 1354(Fed. Cir. 2000).

[56] See *Good v. United States,* 189 F.3d 1355 (Fed.Cir.1999). *Good* in turn relied on *Loveladies Harbor, Inc. United States,* 28 F3d 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"."

[57] *Id.* at 1026 (observing that 'none' of the Court's prior takings precedents "employed the logic of 'harmful use' prevention to sustain a regulation [that] involved an allegation that the regulation wholly eliminated the value of the claimant's land").

only in a *Lucas*-type case or in all regulatory takings cases. And it is also pertinent to the question, discussed below, of whether the government's harm-preventing purpose is a relevant factor in a physical takings case.

B. Physical Takings

The Supreme Court uses a cacophonous vocabulary to describe physical takings. Thus, in the recent case of *Horne v. Department of Agriculture*,[58] the Court used all of the following terms to refer to a physical taking: "appropriation," "direct appropriation," "physical appropriation," "physical occupation," "physical invasion," "physical surrender," "physical taking," and "*per se* taking."[59] The Court sometimes equates a physical taking with an occupation,[60] and at other times equates a physical taking with an "appropriation."[61] The Court sometimes uses the terms occupation and appropriation in the same sentence to refer to two apparently distinct forms of physical takings.[62] Sometimes the Court uses the terms occupation and appropriation interchangeably, suggesting they are synonyms.[63]

Notwithstanding this linguistic confusion, a careful reading of Supreme Court cases suggests there are two distinct categories of physical takings claims: appropriations and occupations. The Court has never explicitly said there are "two varieties" of physical takings,

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[58] 135 S. Ct. 2419 (2015)

[59] 135 S. Ct. at 2419, 2427, 2429, 2430.

[60] *See Yee*, 503 U.S. at 527 ("The government effects a physical taking only where it requires the landowner to submit to the physical occupation of the land").

[61] *See Eastern Enterprises v. Apfel,* 524 U.S. 498, 522(1998) (plurality) (referring to "the 'classic taking' in which government directly appropriates private property for its own use"), quoting *United States v. Security Industrial Bank,* 459 U.S. 70, 78 (1982).

[62] See *Murr v. Wisconsin,* 137 S. Ct. 1933, 1944 (2017) (referring to a 'physical taking" as a "physical appropriation or occupation"); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1013, 1014 (1992) (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")

[63] *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 as appropriation* is perhaps the most serious form of invasion of an owner's property interest.) (emphases added); *Brown v. Legal Foundation of Washington,*530 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*").

but more than a handful of decisions explicitly support this understanding.[64] This framing appears to comport with a common sense understanding of how government (or government-authorized) actors can physically intrude on private property. Appropriations are government orders or other actions that either explicitly or effectively divest an owner of her ownership interest in property and transfer ownership to the government[65] or some third party designated by the government.[66] The government takes ownership of property when it affirmatively exercises the eminent domain power. An inverse condemnation claim based on an appropriation involves a similar forced transfer of ownership to the public (or some third party), with the difference that the government did not acknowledge it engaged in a taking and/or failed to pay compensation, creating the need for the owner to initiate the litigation. Examples of appropriations include seizure of a portion of a farmer's raisin crop,[67] seizure and management of a private factory,[68] and government destruction of private liens in property seized by the government.[69]

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[64] *Murr v. State of Wisconsin,* 137 S. Ct. 1933, 1942 (2017) (prior to recognition of regulatory takings, "'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,' like the permanent flooding of property") (emphasis added), quoting *Lucas,* 505 U.S. 1013, 104 (1992); *Lingle v. Chevron USA,* 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).

[65] See *Horne v. Department of Agriculture,* 135 S. Ct. 2419 (2015) (government raisin marketing order resulted in an appropriation because that "[a]ctual raisins are transferred from 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,* 535 U.S. at 324 n. 19 (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.")

[66] See *United States v. Security Industrial Bank,* 459 U.S. 70, 77-78 (1982) (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"); *Brown v. Legal Foundation of Washington,* 538 U.S. 216, 235 (2003) (assuming for the sake analysis that a government-compelled transfer of interest earned by funds deposited in lawyer trust accounts to a private nonprofit foundation represented a taking).

[67] *Horne v. Department of Agriculture,* 135 S.C. 2419 (2015).

[68] *United States v. Pewee Coal Co*., 341 U.S. 114 (1951).

[69] *Armstrong v. United States,* 364 U.S. 40 (1960).

By contrast, occupations are physical invasions of private property (typically land) by government officials or private citizens acting with governmental authorization.[70] Occupations occur when persons enter onto the land or place equipment or materials on land. Examples of occupations include inundations of land by a government-owned dam,[71] a state law authorizing a cable television company to install wires and other equipment on the exterior of a private apartment building,[72] government airplanes flying at low-level through the airspace above private property,[73] and government requirements to allow members of the public to pass regularly across private lands.[74]

The Supreme Court has stated that both appropriations and occupations are "*per se"* or "categorical" takings. Thus, with respect to appropriations, 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."[75] Likewise with respect to permanent occupations (but not temporary occupations), the Court has referred to the "bright line" rule that "a permanent physical occupation of property authorized by government is a taking."[76]

Importantly, however, the Court has provided only limited guidance on what *per se*, or categorical, actually means in this context. Starting with appropriations, the Court has repeatedly said the economic impact of a government action is not a relevant factor in determining whether an appropriation results in a compensable taking.[77] The Court also has said that the property as a whole rule, so central in assessing economic impact in a regulatory takings case, has no place in an appropriation case. [78] In *Horne*, the Court also asserted that the "claimed public benefit" of a

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

[71] *Pumpelly v. Green Bay Co.*, 80 U.S. 66 (1871)

[72] *Loretto*

[73] *United States v. Causby*, 328 U.S. 256 (1946).

[74] *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan* v. California Coastal Commission, 483 U.S. 825 (1987)

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

[76] *Arkansas Game & Fish Commission v. United States*, 568 U.S. 23, 31 (2012).

[77] *Horne*, 135 S. Ct. at 2427 (an appropriation supports a finding of liability "without regard to . . . the economic impact on the owner").

[78] *Tahoe-Sierra*, 535 U.S. at 323 ("When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof.").

government action is beside the point under the categorical rule for appropriations.[79] As discussed below, on these points, the categorical rule for appropriations tracks the categorical rule for permanent occupations.

Beyond this, the Court has not provided much direction on the content of the *per se* test in an appropriation case. In recent cases the Court has contrasted the multi-factor, *ad hoc* analysis under *Penn Central* with the ostensible categorical rule governing appropriations,[80] suggesting that the simple fact that the government has engaged in an "appropriation" is determinative of the takings issue. However, the Court has never explicitly stated in any of its modern appropriation cases that a claimant's investment expectations or the purpose of the government action, for example, are necessarily irrelevant in an appropriations case

The Court's 2015 decision in *Horne v. Department of Agriculture*, while ostensibly extending a "*per se* rule" for appropriations to personal property, highlights the uncertainties about the alleged "*per se* rule." One issue in the case was "[w]hether a governmental mandate to relinquish specific, identifiable property as a 'condition' of permission to engage in commerce effects a *per se* taking."[81] The Court's answer, "at least in this case, [was] yes."[82] This carefully worded ruling makes *Horne* a remarkably narrow decision. The government argued against the taking claim by pointing to *Ruckelshaus v. Monsanto Co.,*[83] in which the Court held the Environmental Protection Agency did not take private property by requiring companies manufacturing pesticides, fungicides, and rodenticides, as a condition of receiving a permit to sell their products, to share trade secrets about the health, safety, and environmental effects of their products with competitors and the general public. The government argued in *Horne* that the mandate to turn over raisins to the government was a comparable condition that should also not trigger takings liability. The Court rejected the argument, distinguishing *Monsanto* by observing that a license to sell "dangerous chemicals" can properly be characterized as the grant of a "valuable government benefit," but selling raisins is "not a special governmental benefit that the Government may hold hostage."[84] Stated differently, "[r]aisins are not dangerous pesticides;

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[79] *Horne,* 135 S. Ct. at 2427.

[80] *Tahoe-Sierra*, 535 U.S. at 323 (an appropriation claim requires a court to apply a "clear rule"), quoting *Yee v. City of Escondido*, 503 U.S. 519, 522 (1922).

[81] 135 S. Ct. at 2430.

[82] *Id*.

[83] 467 U.S. 986 (1984).

[84] 135 S Ct. at 2430-31

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." [85]

The Court's endorsement of the taking claim in *Horne* based on the character of the property being regulated as well as the government's regulatory purpose obviously does not reflect application of a strict categorical rule. To the contrary, the Court's analysis appears to mirror the kind of "essentially ad hoc, factual inquiry" applied in a *Penn Central* case. At a minimum, *Horne* confirms that the *per se* rule for appropriations does not mean that *all* appropriations are necessarily compensable takings.

The Court has stated, at least in *dictum*, that an appropriation is a "categorical taking" even if the appropriation is only "temporary."[86] In this respect, the categorical rule for appropriations apparently differs from the categorical rule for occupations, discussed below, which the Court has limited to permanent occupations. To support the conclusion that temporary appropriations are *per se* takings, which originated in the case of *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, the Court pointed to several older cases arising from the government's appropriations of building space for temporary periods during World War II.[87] These cases presented the Court with complex questions about how to calculate the compensation due for "temporary" exercises of the eminent domain power, but the parties did not dispute that the taking for a temporary period was compensable The Court's logic in *Tahoe-Sierra* was apparently that since the government can appropriate a term interest in property through eminent domain, as illustrated by the WW II cases, it necessarily followed that an inverse condemnation claim should lie for a temporary appropriation as well.

Turning to occupations, the Supreme Court announced its "categorical" rule for occupations of private property in its 1982 decision in *Loretto v. Teleprompter Manhattan CATV Corp.*,[88] holding that New York State took private property by enacting legislation authorizing cable television companies to install wires and other equipment on the exterior of private apartment buildings without owner permission. The Court observed, "we have long considered a

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[85] *Id*. at 2431.

[86] *Tahoe-Sierra*, 535 U.S. at 322-23.

[87] *See United States v. Westinghouse Elec. & Mfg. Co.*, 339 U.S. 261, 267, 70 (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 (1949); *United States v. General Motors Corp.*, 323 U.S. 373 (1945).

[88] 458 U.S. 419.

physical intrusion by government" to raise a serious issue under the Takings Clause.[89] With a nod to *Penn Central*'s discussion of the "character" factor, the Court continued, when the intrusion reaches the form of "a permanent physical occupation . . . 'the character of the government action' not only is an important factor in resolving whether the action works a taking but also is determinative."[90] An occupation triggers categorical liability, the Court explained, "without regard to whether the State, or instead a party authorized by the State, is the occupant."[91]

In contrast to the approach under *Penn Central*, and in keeping with the rules governing claims based on appropriations, the *Loretto* Court said the categorical rule for permanent occupations supports a finding of liability without regard to the level of economic impact.[92] In addition, the *Loretto* Court explained that the property-as-a-whole rule that applies in a regulatory taking case does not apply in an occupation case. Finally, the Court said, "a permanent physical occupation is a taking without regard to the public interest that it may serve."[93]

The *Loretto* Court stressed that its holding was "very narrow," observing that the categorical rule for occupations is limited to "permanent" occupations, to be distinguished from "temporary limitations on the right to exclude," which "are subject to a more complex balancing process to determine whether they are a taking."[94] The Court justified treating temporary occupations differently on the ground they "do not absolutely dispossess the owner of his right to use, and exclude others from, his property."[95] Subsequently, in *Arkansas Game & Fish Commission v. United States*,[96] the Court confirmed that claims based on government-caused temporary occupation are not governed by a *per se* rule.

The *Loretto* decision and its progeny leave ambiguous what categorical or *per se* actually means in the occupation context. One possible reading of the occupation precedents, as with the precedents addressing appropriations, is that, if a permanent occupation has occurred, a finding

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[89] *Id*. at 427.

[90] *Id*. at 426.

[91] *Id*. at 433 n.9.

[92] *Id*. at 435.

[93] *Id*. at 426.

[94] *Id*. at 435, n. 12.

[95] *Id.*

[96] 568 U.S. 23 (2012).

of takings liability automatically follows, regardless of any other consideration. The *Loretto* Court said that when an intrusion reaches the "extreme form" of a permanent occupation, the character of the government action is "determinative" of the liability question.[97] It also stated that, when presented with a permanent occupation, it "has invariably found a taking."[98] On the other hand, *Loretto* can be read to support a less than automatic rule. For example, the Court observed that "a permanent physical occupation authorized by government is a taking without regard to the public interest that it may serve," suggesting that other factors might possibly be relevant to the analysis.[99] The Court also said that liability for a permanent occupation is warranted "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner," again begging the question whether other factors might be taken into account in a *per se* occupation case.[100] Significantly, the *Loretto* opinion includes no explicit reference to investment-backed expectations. Jean Loretto purchased her apartment building *before* the New York legislature granted cable companies access to her property. Might the case have come out differently if she had purchased the building *after* the New York legislature acted and with full notice of the law's existence? And, while spreading cable television service is undeniably a permissible public objective, might the outcome of the case have been different if the government occupation served to forestall a serious threat to public health and welfare?

The Loretto decision also suggests that a clamant may waive the right to demand compensation based on an occupation. The *Loretto* Court distinguished its prior decision in *PruneYard Shopping Center v. Robin*,[101] in which the Court held that a California constitutional requirement that a shopping center owner grant political activists access to the center did not offend the Takings Clause. The *Loretto* Court explained that in *PruneYard* the owner "had already invited the general public" to enter and use the shopping center,[102] suggesting that this taking claim failed because the owner had waived its right to object to the occupation. Subsequently, in *Horne*, the Court referred approvingly to *PruneYard*, which it described as involving "an already publicly accessible shopping center."[103] In sum, the Court appears to have

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[97] 458 U.S. at 419.

[98] *Id*. at 427.

[99] *Id*. at 426.

[100] *Id*. at 435-36

[101] 447 U.S. 74 (1980).

[102] *Id*. at 434.

[103] 135 S. Ct. at 2429

embraced the position that, at least in some circumstances, a pre-existing invitation to the public to enter private property can defeat a taking claim based on a government-caused occupation.[104]

In sum, the Supreme Court has plainly articulated the position that takings claims based on appropriations and permanent occupations should be evaluated using a distinctive "*per se*" or "categorical" test. But the Court has not resolved what "categorical" or "*per se*" actually mean, and some Court's rulings and statements suggest that facts and circumstances other than the fact that the government caused a physical intrusion may be relevant in determining whether the government is liable for a physical taking. Categorical is not as categorical as it may first appear.

C. Property and Public Use

Two other basic aspects of takings law require brief discussion in order to frame the analysis of physical takings doctrine. First, it is elementary that a taking claim cannot succeed unless the claimant can point to some "private property" within the meaning of the Takings Clause. A claimant lacks a protected property interest if "background principles" of state (or federal) law bar the owner from claiming a vested property right to begin with.[105] "Background principles" are typically grounded in the common law of property or nuisance, but the Supreme Court has left open the possibility that longstanding "legislative enactments" can be background principles as well.[106] A background principle defense will apply regardless of the theory of takings liability invoked by the claimant. The Supreme Court formally introduced the "background principle" defense in the *Lucas* case, which involved a "total" regulatory taking claim;[107] but it is obvious that a background principle defense may bar a *Penn Central* regulatory takings claim as well.[108] In addition, the Supreme Court has recognized that a background

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[104] *But see Dolan v. City of Tigard*, 512 U.S. 374 (1994) (rejecting argument that Mrs. Dolan's taking claim based on a requirement that she allow a bike path and a greenway on the site of her plumbing supply store should fail because she had already invited members of the public to the store; the *Dolan* Court acknowledged that Ms. Dolan wanted "to attract members of the public to her property," but said she "also wants . . . to be able to control the time and manner in which they enter").

[105] *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992)

[106] *See Palazzolo v. Rhode Island*, 533 U.S. 606, 629 (2001) ("We have no occasion to consider the precise circumstances when a legislative enactment can be deemed a background principle of state law or whether those circumstances are present here.")

[107] *Lucas*, 550 U.S. at 1003

[108] *See* Michael Blumm & Rachel Walford, "Revisiting Background Principles in Takings Litigation," 71 *Florida L. Review* 1, 40 (2019) (collecting recent cases).

principles defense will defeat a physical taking claim, regardless of whether the claim arises from an appropriation, [109] or an occupation. [110]

Given the potential applicability of the background principle defense, it is not literally correct, even under a strict theory of *per se* liability, that every appropriation or occupation will be a compensable taking; if the claimant lacks a property entitlement by virtue of some background principle, a physical taking claim will fail at the threshold. The different question addressed in this article is whether and when the courts should reject physical taking claims even if no background principle applies to bar the claim.

Second, it bears emphasis that, again regardless of the type of claim involved, a viable claim for just compensation under the Taking Clause claim presupposes that the government action serves a "public use."[111] The Supreme Court has interpreted the "public use" language in the Takings Clause broadly; any otherwise lawful, reasonable public purpose will satisfy the public use requirement and support a claim for compensation.[112] Conversely, because a proper claim for compensation presupposes the government is acting for a "public use," no claim for compensation will lie if the government action is not for "public use." [113] Instead, a taking not for a public use is simply an invalid government action that should be enjoined.[114]

Appropriations of private property may -- or may not -- serve a public use. Thus, in *Kelo,* the Court observed "it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just

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[109] *See Horne,* 135 S. Ct. at 2431, discussing *Leonard & Leonard v. Earle*, 279 U.S. 392 (1929).

[110] *See Lucas*, 505 U.S. at 1029, citing *Scranton v. Wheeler*, 179 U.S. 141 (1900).

[111] *Lingle v. Chevron USA, Inc*., 544 U.S. 528 (2005)

[112] *Kelo v. City of New London*, 545 U.S. 469 (2005) (equating "public use" with public purpose); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S., 304, 315 (1987) (explaining that the Takings Clause is designed "secure compensation in the event of *otherwise proper* interference amounting to a taking"). See generally John D. Echeverria, "Takings and Errors," 51 Alabama L. Rev. 1047 (2000).

[113] *Lingle*, 544 U.S. at 543 ("[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.")

[114] *See Kelo*, 545 U.S. 469 (2005) (examining whether plaintiffs were entitled to an injunction to bar the taking of their properties for a redevelopment project alleged not o be for a "public use").

compensation." In the same vein, the Court declared in *Hawaii Housing Authority v. Midkiff*, that "[a] purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void."[115] On the other, a government-compelled transfer of property ownership from party A to party B will satisfy the public use requirement if the appropriation serves some reasonable public purpose, such as the downtown redevelopment at issue in *Kelo* or breaking up a land oligopoly as in *Midkiff*. An appropriation that serves a public use can be remedied under the Takings Clause, if at all, by payment of just compensation.

II. The Surprising History of *Per Se* of Physical Takings Doctrine

Building on this overview of modern takings doctrine, we now turn to the origins and historical evolution of the Court's *per se* physical takings theory. The Supreme Court has repeatedly suggested that physical takings claims call application of longstanding categorical rules. Thus, in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, the Court said, "Our jurisprudence involving . . . physical takings is as old as the Republic and, for the most part, involves the straightforward application of *per se* rules."[116] By contrast, the Court continued, regulatory takings jurisprudence "is of more recent vintage, and is characterized by essentially *ad hoc*, factual inquiries."[117] It is certainly accurate to say the Supreme Court has long recognized that government-caused physical intrusions on private property can *potentially* be compensable takings. But the idea that appropriations or occupations should be treated as "*per se"* takings is a relatively modern invention that postdates the Court's formulation of modern regulatory takings doctrine.

A. Appropriations

While modern Supreme Court precedent asserts that appropriations are compensable taking under a "per se" or "categorical" rule, the historical foundation for this assertion turns out to be extraordinarily weak.

To begin with an important, recent decision, in *Horne v. Department of Agriculture*, the Court addressed the following question, "Whether the government's 'categorical duty' under the Fifth Amendment to pay just compensation when it 'physically takes possession of an interest in

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[115] 467 U.S. 229 (1984).

[116] 535 U.S. 302, 322. *See also Lingle v. Chevron USA, Inc.*, 544 U.S. at 537 ("The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property."); *Lucas*, 505 U.S. at 104 ("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.")

[117] 535 U.S. at 322. *See also Lucas*, 505 U.S. at 104.

property,' *Arkansas Game & Fish Comm'n v. United States*, applies only to real property and not to personal property."[118] As this framing of the question makes plain, the *Horne* Court started from the premise, ostensibly supported by the decision in Arkansas Game & Fish Comm. v. United States,[119] that an appropriation of real property is *obviously* a "*per se*" taking. But, for starters, *Arkansas* involved a taking claim based on an occupation, not an appropriation, of private property. And, more importantly, the *Arkansas* Court did not hold that a permanent physical taking is a *per se* taking. The Court did, to be sure, recite ,in *dictum*, "When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner."[120] But the Court simply lifted that statement verbatim from the 2002 *Tahoe-Sierra* decision.[121] The *Tahoe-Sierra* case involved a regulatory taking, not a physical taking claim, meaning the Court's statement in that case about the nature of an appropriation claim was *dictum* as well.

Continuing along the daisy chain of citations, the only authority cited in *Tahoe Sierra* to support the ostensible *per se* rule for appropriations was the then 50-year old decision in *United Sates v. Pewee Coal*,[122] which arose from the government's seizure and operation of a private coal mine during World War II. *Pewee Coal* certainly involved an appropriation as the Court has defined that term, and the Court did rule that the government seizure resulted in a compensable taking. But *Pewee Coal* did not articulate or apply a categorical rule and the decision provides no support for such a rule. The *Pewee* Court stated that "whether there is a 'taking' must be determined in light of the particular facts and circumstances involved,"[123] anticipating by several decades the *ad hoc* approach to taking analysis laid out in the *Penn Central* case. Moreover, while the *Pewee* Court took into account that the government had physically seized the mine, it reached the conclusion that a compensable taking occurred only after a detailed examination of the government's management activities once it took over the mine.[124] In sum, the *Pewee Court* does not support a *per se* appropriations rule, and the *Tahoe-Sierra* Court's dictum affirming the existence of such a rule based on *Pewee* was pure invention. The subsequent line of decisions reciting *Tahoe-Sierra*'s erroneous *dictum* is just as flimsy.

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[118] 135 S. Ct. at 2425

[119] 568 U.S. 23 (2012).

[120] *Arkansas Game & Fish Commission v. United States*, 568 U.S. 23, 31 (2012)

[121] *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322 (2002).

[122] 341 U.S. 114, 115 (1951).

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

[124] *Id*. at 115-16.

There is no question the Supreme Court has long recognized that appropriations fall within the scope of the Takings Clause. Indeed, in 1870, the Supreme Court asserted that the Takings Clause "has always been understood as referring *only* to a direct appropriation.[125] But a broad survey of the Court's appropriation decisions prior to *Tahoe Sierra* confirms what *Pewee Coal* suggests, that appropriations were traditionally not treated as *per se* taking. Some appropriation claims succeeded, but others did not, depending on the facts of the case.

On the one hand, in *Armstrong v. United States*,[126] the Court ruled that materialmen who held liens on vessels being built for the U.S. Navy suffered a compensable taking when the government exercised its contractual right to seize the vessels. Because any effort to enforce the liens was barred by sovereign immunity, the government's seizure of the vessels made the liens unenforceable, effectively transferring the lien interests to the United States. As the Court put it, "the Government for its own advantage destroyed the value of the liens."[127] In an earlier case, the Court ruled that the U.S. government engaged in an appropriation by building a dam that deprived riparian land owners of their water rights and reallocated the water to new water users.[128] In another case arising from the national mobilization for World War I, the Court held the government appropriated private property by requisitioning the flow of water in a canal from a paper company and transferring it to other firms deemed more important to the war effort.[129]

On the other hand, the Court has also rejected taking claims arising from appropriations. Thus, in *United States v. Sperry*,[130] the Court rejected a company's taking challenge to a deduction by the U.S. Treasury from a financial award to the company 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*,[131] the Court rejected a woman's takings challenge to forfeiture of the family automobile following her husband's arrest for engaging in sex with a prostitute in the vehicle. In a pair of related cases,[132] the Court rejected the argument that a

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[125] *Legal Tender Cases* (*Knox v. Lee*), 79 U.S. 457 (1870) (emphasis added).

[126] 364 U.S. 40 (1960).

[127] *Id*. at 48

[128] *United States v. Gerlach*, 339 U.S. 725 (1950).

[129] *International Paper Co. v. United States*, 282 U.S. 399 (1931).

[130] 493 U.S. 52 (1989).

[131] 516 U.S. 442 (1996).

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

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. And in *Monsanto*, discussed above, the Court rejected a claim that a taking occurred when a permit applicant was required to transfer trade secret data to competitors in order to secure a permit from the government.

In still other cases *upholding* takings claims based on appropriations the Court explicitly declined to endorse the idea that appropriations are automatically compensable takings. Thus, in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*,[133] 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 theory the interest could be "considered public money," which the U.S. Supreme Court rejecting saying "a State, by *ipse dixit*, may not transform private property into public money without compensation."[134] Having determined that the interest was private property, the Supreme Court ruled that the government's seizure of the interest was a taking: "the exaction is a forced contribution to the general governmental revenues" that "has the practical effect of appropriating for the county the value of the use of the fund for the period in which it is held in the registry."[135] Importantly for present purposes, however, the Court did not reach this conclusion by applying a categorical rule. The Court observed, "[i]t is obvious that the interest was not a fee for services,"[136] indicating that if the case had involved a fee for services the claim might properly have been rejected. In addition, the Court said, "No police power justification is offered for the deprivation,"[137] suggesting yet another reason why an appropriation claim might fail. In sum, *Webb's* affirmatively contradicts the notion that appropriation claims are governed by a *per se* rule.

Also instructive is the case of *Eastern Enterprises v. Apfel*,[138] in which the Court struck down federal legislation imposing retroactive liability on companies formerly engaged in coal mining to finance employee health care costs. The case involved a form of appropriation because the law required the companies to transfer financial assets to a government-designated

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[133] 449 U.S. 155 (1980).

[134] *Id.* at 164.

[135] *Id*. at 164.

[136] *Id.* at 162

[137] *Id*. at 163

[138] 524 U.S. 498 (1998).

health care fund.[139] A plurality of the Court said the law resulted in a taking, but it reached this conclusion based on an exhaustive *Penn Central* analysis rather than by using a *per se* test.[140] The Court also applied a *Penn Central* analysis in several earlier cases involving similar forced transfers of money.[141]

This thumbnail survey of the Court's precedents shows that *Tahoe-Sierra's* idle *dictum* and misrepresentation of prior precedent launched takings law in a completely novel direction. That *Tahoe-Sierra* introduced this innovation is doubly ironic given that the claimant in *Tahoe – Sierra* lost its takings case on the merits, and the case involved a regulatory taking claim, not an appropriation claim. Moreover, the *Tahoe-Sierra* Court had no reason to address the standards governing appropriation claims. The plaintiff invoked the then-recent *Lucas* decision and argued that the development moratorium at issue resulted in a taking because it denied all economic use of the affected parcels. The government resisted the *Lucas* claim by arguing that the property as whole has both a temporal and a geographic dimension, and since the restriction only lasted for a few years (rather than indefinitely as in *Lucas*), there was no denial of all economically viable use of the property. The Court accepted this argument and thus rejected the *Lucas* takings claim. The Court could have left it at that. But the claimant had tried to bolster its case by arguing that appropriations, occupations and regulatory restrictions all represent different applications of "a unified field theory of takings jurisprudence" in which the permanence or temporariness of the government action is irrelevant.[142] In arguably excessive zeal to respond to this broader argument, the *Tahoe-Sierra* Court distinguished appropriation claims from regulatory takings claims by asserting (for the first time) that appropriations are governed by a "categorical rule."[143]

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[139] *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).

[140] *See id.* at 529 – 537. The fifth justice supporting he judgment believed the act violated the Due Process Clause. *See id*. at 539 – 50 (Kennedy, J., concurring in the judgment and dissenting in part).

[141] *See Connolly. v. Pension Benefit Guaranty Corp*., 475 U.S. 211, 222 (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"); *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal*., 508 U.S. 602 (1933) (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).

[142] Brief for Brief for Petitioners, in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 2001 WL 1692011 (September 12, 2001)

[143] *See* 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).

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B. Occupations

The evolution of the Court's *per se* rule for permanent occupations has a followed a different but equally problematic path. What began as a relatively narrow and constrained doctrine in the latter half of the 19th century gradually expanded over time, to suddenly 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.,[144] the Court expanded takings doctrine beyond appropriations to include occupations. 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, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use.[145]

From this point forward, the Court recognized that the Takings Clause can apply not only to "conversions" (aka appropriations) but to (at least some) occupations as well.

Pumpelly articulated a narrow rule. 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."[146] The Court pointed to these allegations in defining the elements of a viable occupation claim: "Where real estate is actually invaded by superinduced additions of water, earth, and sand, or other material, or by having any artificial structure placed

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[144] 80 U.S. 166 (1871).

[145] *Id.* at 177-78.

[146] *Id.* at 177

on it, so as to effectually destroy or impair its usefulness, it is taking, within the meaning of the Constitution."[147]

Subsequent decisions confirmed that both permanent occupation and (virtual) destruction of value were necessary to establish takings liability. Thus, in *Lynah v United States*, the Court ruled that impoundment of the Savannah River in South Carolina resulted in a taking of the claimant's property because the land was both "permanently flooded" and "wholly destroyed in value."[148] On the other hand, in *Sanguinetti v. United States*, the Court ruled that no taking occurred where there was evidence of serious economic loss, but the land was not "permanently flooded." [149] And in *Manigault v. Springs*,[150] 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 from the flooding "by raising the banks"[151] at only "some extra expense."[152]

Forty-six year years after *Pumpelly*, in *United States v. Cress*, the Court modified occupation doctrine in two ways. [153] First, the Court ruled that an occupation can be "permanent" even if it is only intermittent. The Court reasoned, "There 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." [154] Second, the Court lowered the

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[147] *Id.* at 181.

[148] 188 U.S. 445, 469 (1903).

[149] 264 U.S. 146, 147 (1924).

[150] 199 U.S. 473 (1905).

[151] *Id*. at 484.

[152] 199 U.S. 473, 484, 485 (1905).

[153] 243 U.S. 316 (1917).

[154] *Id*. at 328. The Court has continued to follow this approach. For example, in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the Court concluded that coastal officials occupied private property by mandating general public access to a private beach, even though no member of the public would literally occupy the property on a continuous basis: "We think a[n invasion] . . . has occurred . . . where individuals are given a permanent and continuous right to pass to and fro, so that real property may be continuously traversed, even though no particular individual is permitted to station himself permanently upon the premises." *Id*. at 832.

threshold of economic impact necessary to establish a taking based on an occupation. In response to the government's argument that no taking had occurred because the flooding "depreciated" the value of the property only "to the extent of one half,"[155] the Court jettisoned the requirement of virtually complete destruction of value articulated in *Pumpelly*, concluding "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."[156]

The Court applied the *Cress* standards in subsequent cases. In *Portsmouth Harbor Land & Hotel Co. United States*, involving firing of artillery over private coastal property, the Court ruled that a taking occurred because the frequency of the military barrages demonstrated "an abiding purpose to fire when the United States sees fit,"[157] and there was "no doubt that a serious loss has been inflicted upon the claimant."[158] In *United States v. Causby*,[159] the Court held the United States liable for a taking based on "frequent and regular" low-levels 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."[160]

Two unusual cases in the 1960's illustrated both the variety of circumstances in which occupation claims could arise and the essentially *ad hoc* character of the Court's analysis of occupations. The case of *Heart of Atlanta Motel, Inc. v. United States*,[161] involved a challenge by a motel owner to the public accommodations provisions of the Civil Rights Act of 1964[162] on numerous grounds, including takings. The taking claim can fairly be read as resting on a government-caused occupation, though the plaintiff did not explicitly frame it in those terms.[163]

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[155] *Id*. at 328.

[156] *Id*. (emphasis added).

[157] *Portsmouth Harbor Land & Hotel Co. United States*, 260 U.S. 327, 330 (1922).

[158] *Id*. at 329.

[159] 328 U.S. 256 (1946)

[160] ***See also*** *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) ("We think a[n invasion] . . . has occurred . . . where individuals are given a permanent and continuous right to pass to and fro, so that real property may be continuously traversed, even though no particular individual is permitted to station himself permanently upon the premises." *Id*. at 832

[161] 379 U.S. 241 (1964).

[162] ***See*** 42 U.S. Code § 2000a.

[163] ***See*** Jurisdictional Statement and Brief, in *Heart of Atlanta Motel, Inc. v. United States*, 1964 WL 81380, at 52 ("We contend that the taking of private property has been for the purpose of

In a long, unanimous opinion the Court rejected the taking claim in a single sentence, "Neither do we find any merits in the claim that the Act is a taking of property without just compensation." In *National Board of Young Men's Christian Associations v. United States*,[164] 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 which 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.[165] The Court rejected the taking claim, emphasizing that the government occupied the buildings in an effort to protect them from damage. Once the soldiers arrived on the scene, the Court explained, "their every action was designed to protect the buildings under attack," first by "expell[ing] the rioters from the buildings," then serving as "guard[s] outside to defend the buildings from renewed attack," and still later, when the soldiers retreated into the buildings, "the mission of the troops . . . continued to be the protection of those buildings."[166] Where "the private party is the particular intended beneficiary of the government activity," the Court concluded, "'fairness and justice," do not require that losses which may 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.'"[167]

The next important step in the development of the law of occupations was the Court's decision in *Penn Central Transportation Co. v. City of New York*.[168] Today *Penn Central* is, of course, regarded as leading precedent prescribing the standards for regulatory takings claims, as opposed to physical takings claims. But the opinion for the Court in *Penn Central* was not actually so limited. The Court's opinion mixed discussion of cases involving appropriations, occupations and regulatory restrictions without placing these various actions into distinct categories. It suggested that the fact that government engaged in an appropriation or occupation was a factor to consider; thus, in discussing the "character" factor, the Court stated, "A 'taking' may *more readily* be found where the interference with property can be characterized as a

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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.")

[164] 395 U.S. 85 (1969).

[165] Brief for Petitioners, 16, in *National Board of the Youngmen's Christian Associations v. United States*, 1969 WL 136814 (January 9, 1969).

[166] 395 U.S. at 90 – 91.

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

[168] 438 U.S. 104 (1978).

physical invasion by government."[169] Similarly, the Court suggested that "government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have *often* been held to constitute 'takings.'"[170] But, broadly speaking, *Penn Central* indicated that all takings claims should be analyzed using the same three-part framework focused on economic impact, extent of interference with investment-backed expectations, and the character of the government action.

Thus, it is hardly surprising that the Court evaluated subsequent physical takings cases by applying the *Penn Central* framework. In *Kaiser Aetna v. United States,* arising from a directive by the Army Corps for Engineers to a property owner to grant public access to a private pond in Hawaii, the Court upheld the taking claim. [171] In *PruneYard Shopping Center v. Robins*, arising from a California constitutional requirement that a shopping center owner allow political activists to distribute leaflets in the center, the Court rejected the taking claim. [172] In both cases the Court considered the fact that the case involved a physical intrusion on private property. But in each case the Court applied the *Penn Central* analysis, and considered a variety of factors, including the economic impact of the government actions and the extent of interference with investment-backed expectations.

Everything changed with the 1982 *Loretto* decision.[173] *Penn Central*, handed down in 1978, was decided by a six to three vote; four years later, *Loretto*, narrowing *Penn Central* to a significant degree, was also decided by six to three vote. The three dissenters in *Penn Central*, Chief Justice Burger, and Justices Rehnquist and Stevens, were in the majority in *Loretto*. They were joined by newly appointed Justice O'Connor, and by Justices Marshall and Powell, who had voted with the government side in *Penn Central*. Justice Brennan, Blackmun and White, in the majority in *Penn Central*, dissented in *Loretto*.

The sea change produced by *Loretto* is attributable to a number of factors. The appointment of a new, relatively conservative justice (O'Connor) is one explanation. Some justices apparently viewed the New York law as an overreach by cable companies seeking to increase their profits at the expense of landlords who had previously accommodated the cable

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[169] *Id*. at 124.

[170] *Id.* at 128.

[171] 444 U.S.164 (1979).

[172] 447 U.S. 74 (1980).

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

companies.[174] Because the economic impact of the New York law was minimal, and the taking claim could not plausibly have succeeded under the *Penn Central* framework, the Court was effectively compelled to devise a new standard to justify upholding the taking claim Lawrence Cook, Chief Justice of the N.Y. Court of Appeals, had written a forceful dissent arguing for use of a strict test in physical takings case, which some members of the U.S. Supreme Court found persuasive.[175] The vote of Justice Marshall, the author of the Court's opinion, and typically a pro-government vote in takings cases, is perhaps the case's greatest mystery.

Loretto squarely rejected the *Penn Central* framework for claims based on permanent occupations and announced a new and different approach for such claims. The precise contours of this categorical approach remain uncertain and open to debate even today. But it is clear that a claim of a taking based on a permanent occupation under *Loretto* claim requires no showing of adverse economic impact, and the relevant parcel issue is beside the point.

In light of the precedent described above, the Court's assertion that, when "a permanent physical occupation" has occurred, "our cases uniformly have found a taking . . . without regard to whether the action . . . has only a minimal impact on the owner" is amazingly 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 that an occupation could support a successful taking claim if the impact were only minimal. The *Loretto* Court's novel position effectively overturned prior decisions specifically rejecting occupation claims for lack of a sufficient showing of economic loss.[176]

The Court's efforts to distinguish the occupation cases decided after *Penn Central* was thoroougly disingenuous. As discussed above, in *Kaiser Aetna* and *PruneYard* the Court evaluated occupation claims using the multi-factor *Penn Central* framework, upholding the claim in the first case and rejecting it in the second. In *Loretto* the Court attempted to distinguish both cases on the ground they involved only "temporary" intrusions. In fact, both cases plainly involved permanent or at least indefinite occupations of private property.[177] By assigning these

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[174] 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. Rev. 769 (2006)

[175] *Id.*

[176] *See, e.g., Pruneyard Shopping Center v. Robins*, 447 U.S 74, 84 (1980) (finding no taking 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").

[177] The *Pruneyard* Court noted that the shopping center owner retained the right to impose "time, place, and manner regulations" to minimize interference with the shopping center operations, 447 U.S. at 83, and this aspect of the California access requirement provided one

cases to a novel, "temporary occupation" category in which a different takings standard ostensibly applied, Court created serious confusion about occupation doctrine that lingers to this day.

In sum, *Loretto*, the cornerstone of the Court's so-called *per se* rule for permanent occupations, rests on a remarkably weak foundation. Weak support in prior precedent is hardly fatal to the vitality of a legal rule, especially one reaffirmed by the Supreme Court on multiple occasions. But it surely justifies pause to consider how broadly the supposed rule should be read going forward.

III. The Supreme Court's Flawed Justifications for a *Per Se* Rule

The Supreme Court has articulated various justifications for a "*per se*" liability rule for appropriations and occupations, even while exhibiting uncertain commitment to this approach. None of the Courts justifications for a "*per se*" approach is persuasive.

A. Plain Language and Original Understanding

The Court has baldly asserted that the "plain language" of the Takings Clause "requires the payment of compensation *whenever* the government acquires private property for a public purpose . . . [as] the result of . . . a physical appropriation,"[178] This statement is an obvious over-reading of the text. Accepting appropriation as a synonym for "take," an appropriation certainly qualifies as a potential taking under the Takings Clause. But it is neither necessary nor reasonable to read the Takings Clause as mandating that every appropriation be a compensable taking. In interpreting other facially absolute commands of the Bill of Rights the Supreme Court has avoided *per se* interpretations. For example, the Equal Protection Clause can be read to bar any law that discriminates between different citizens, but 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,"[179] Similarly, the First Amendment includes a facially absolute prohibition on laws "abridging the freedom of speech." but the Court has long recognized that government can sometimes restrict speech, including, for

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possible basis for distinguishing *Loretto,* but it did not make the occupation in *PruneYard* "temporary."

[178] *Tahoe-Sierra,* 535 U.S. at 321 (emphasis added).

[179] *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 classifications so long as it bears a rational relation to some legitimate end.")

example "fighting words," defamatory falsehoods, or legally obscene materials.[180] There is no more warrant for applying a mechanical literalism to the Takings Clause than there is to applying it to other provisions of the Bill of Rights.

As to history, in *Horne* the Court purported to rely on history to support the conclusion that takings claims based on appropriations are governed by a *per se* rule, but the Court's reasoning is unpersuasive. As discussed, the *Horne* Court started with the premise, based on a daisy chain of *dictum* and distortion of precedent, that an appropriation of real property is a "*per se*" taking. The *Horne* Court then cited examples from history in which appropriations of personal property were treated, based on the facts of the particular cases, as takings. Perceiving "no reason" to treat claims involving personal property differently than claims involving real property, the Court drew the conclusion that appropriations of personal property should be regarded as *per se* takings. While the Court suggest that this conclusion is grounded, in history, the Court's historical examples only show that appropriations of personal property were sometimes regarded as takings, not that they necessarily were takings, just as with appropriations of real property.

In contrast with appropriations, the Supreme Court has never attempted to ground its *per se* rule for occupations in either the language or history of the Takings Clause. As discussed, in *Pumpelly*, the Court read the language of the Takings Clause as limited to "absolute conversions," that is, appropriations of private property. The *Pumpelly* Court expanded takings doctrine to encompass occupations on the ground it would be "a very curious and unsatisfactory result" to not apply the Takings Clause to an occupation "because, in the narrowest sense," the property has not been "taken." Whatever else might be said about *Pumpelly*, it was not grounded any original understanding of the Takings Clause.

B. Fundamental "Right to Exclude"

The Supreme Court has also said a *per se* rule for occupations can be justified on the ground they affect "the right to exclude," which the Court has characterized as "perhaps the most fundamental of all property interests."[181] This frequently-quoted rationale has never been adequately explained and is deeply problematic as a matter of constitutional doctrine.

This problematic rationale has a revealing history. Then Justice William Rehnquist launched the idea in his 1970 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."[182] To support

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[180] See Erwin Chemerinsky, Constitutional Law (5th Ed. 2017).

[181] *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 539 (2005).

[182] *Id*. at 179-80.

this statement he cited a handful of obscure authorities,[183] including two lower court decisions[184] and a dissenting opinion in a 50-year old Supreme Court case.[185] 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,"[186] and as "one the most treasured strands in an owner's bundle of property rights,"[187] 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 USA, Inc*., the Court described the right to exclude as "perhaps the most fundamental of all property interests.[188] elevating the right to exclude to preeminence relative to every other property interest. The Court has not acknowledged, much less justified this gradual elevation of the right to exclude from "a" fundamental interest, to a "more" fundamental interest, to perhaps the "most" fundamental interest.

More importantly, the idea that the "right to exclude" has special significance is problematic from a constitutional federalism standpoint. "The Constitution protects rather than creates property interests,"[189] meaning that property interests "are created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law."[190] Thus, state law defines the sticks in the bundle of property rights, and state law defines

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[183] *See id.* at 180 n. 11.

[184] In *United 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. 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 has the right to expel intruders."

[185] In *International News Service 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 Brandies dissented from the Court's ruling. *See id*. at 248-267. While he stated that "[a]n essential element of individual property is the legal right to exclude others from enjoying it," he appears to have been making an abstract point about the nature of property generally and in any event found no violation of the right to exclude in this case.

[186] 458 U.S. at 433, 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.

[187] *Id.* at 435.

[188] *Lingle*, 544 U.S. at 539.

[189] *Phillips v. Washington Legal Found*., 524 U.S. 156, 164 (1998).

[190] *Webb's Fabulous Pharmacies v. Beckwith,* 449 U.S. 155, 161 (1980).

the relative importance of each stick As Professor Thomas Merrill has cogently explained, the Takings Clause defines, as a matter of federal law, what types of interests qualify as "property" within the meaning of the Takings Clause.[191] Bui it is still left to state law to identify and define the scope of the interests. Contrary to the Supreme Court's "right to exclude" fundamentalism, the Court no constitutional warrant to impose its own normative judgment about the relative significance of state-defined property interests.[192]

C. Severity of the Injury.

The *Loretto* Court also said that occupations are particularly likely to trigger takings liability because they involve especially severe intrusions on private property. First, it said that "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."[193] The characterization of an occupation as necessarily demanding "complete dominion" over private property is hyperbolic, especially as applied to the *Loretto* case itself. The New York law resulted in a permanent occupation, to be sure, but the occupation only affected a very small portion of Ms. Loretto's property, leaving her free to manage, lease or sell the building as she wished. It cannot plausibly be asserted that the New York law imposed a "complete dominion" over her property.

Second, the Court asserted that "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." [194] In the Court's when government (or a third party) installs equipment on private property it owns the equipment, whereas if the government directs the owner to install equipment the owner owns the equipment. Ownership makes a difference, the Court reasoned, because it means the owner may have "rights to the placement, manner, use, and possibly the disposition of the installation."[195] But building regulations or government officials commonly dictate where property owners must install "utility connections, mailboxes, smoke detectors, fire extinguishers, and the like," making owners' supposed liberty to choose locations for "their" equipment largely if not completely

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[191] Thomas Merrill, The Landscape of Constitutional Property, 86 VA. L. REV. 885 (2000)

[192] Historically, the right to exclude, as defined by state law, was apparently one of the least absolute of the sticks in the bundle or rights. *See* Eric Freyfogle, *The Enclosure of America*, Univ. of Illinois Research Paper 07-10 (2007) (describing the history of the decline of public rights to roam on private lands),

[193] *Id*. at 436.

[194] *Id*.

[195] Id. at 440 n. 19.

illusory.

D. "Every Stick in the Bundle."

Another Court argument for a *per se* rule is that a permanent occupation supposedly takes a slice of every stick in the bundle of property rights. Property rights, the *Loretto* Court explained, "have been described as the rights 'to possess, use and dispose of it.'"[196] The distinguishing feature of a permanent occupation, the Court asserted, is that it "does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand:"[197]

> First, the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space . . . . Second, the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no non-possessory use of the property. . . . Finally, even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property.[198]

Subsequently, in *Horne*, the Court applied this characterization of a physical taking to an appropriation of personal property.[199] Thus, the Court has made the "every strand" rationale a cornerstone of *per se* physical takings doctrine generally.

The problem with this rationale is that it assumes the answer to the question the Court is trying to answer -- whether physical taking claims should be governed by a *per se* rule. An occupation or appropriation can be viewed as having a drastic negative effect on the rights to possess, use and dispose of private property, if one focuses on the specific portion of a property affected by the intrusion – the square yard occupied by the cable equipment in *Loretto*, or the portion of the raisin crop seized by the government.in *Horne*. But, if one takes a broader view of the relevant property, the impact of the government action is far more modest. In *Loretto*, the

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[196] *Id.*, quoting *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945).

[197] *Id*. at 435.

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

[199] *See Horne* v. *Department of Agriculture*, 133 S.Ct. 2419, 2428 (2015) (explaining that the *Loretto* bundle of sticks metaphor was "equally applicable" in a case involving an alleged appropriation of personal property: "Raisin growers subject to the reserve requirement thus lose the entire "bundle" of property rights in the appropriated raisins—"the rights to possess, use and dispose of" them.")

New York statute had a trivial impact on Jean Loretto's ability to manage or dispose of her building, and in *Horne* the government's seizure of only a portion of the annual crop allowed the Hornes to earn money from selling the balance of the crop. The point is that the *Loretto* Court's "every stick" rationale for adopting a *per se* approach assumes that the property as a whole rule does not apply, and then points to the serious negative effects of the government action on the property, *as thus defined*, to argue for applying a *per se* rule which calls for disregarding the property as a whole. The Court's reasoning is completely circular: it is appropriate to apply a *per se* rule because the impact of the law appears to be severe if one assumes the *per se* rule applies to begin with.

E. Decision-Making Convenience.

Finally, the Court has justified a categorical rule for permanent occupations on the ground that it facilitates efficient judicial decision-making. First, the *Loretto* Court asserted that "whether a permanent physical occupation has occurred [or not] presents relatively few problems of proof."[200] While this statement is generally accurate, in practice courts and litigants expend enormous time and resources debating whether an alleged takings is physical or not. Because the label affixed to a claim determines what liability test applies, and because the test applied will often be outcome determinative, parties to litigation have a strong incentive to vigorously contest the threshold issue of what takings test governs the case. The high cost of litigating this boundary line issues would be avoided entirely if the Court had not adopted a *per se* rule for physical taking claims to begin with.

Second, the Court has contended that using the categorical rule announced in *Loretto* "avoids otherwise difficult line-drawing problems,"[201] meaning that once it is determined a case involves a physical taking, a finding of a taking can quickly follow without further analysis. The *Loretto* 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."[202] It suggested that if the company's cable installation "occupied as much space," again "few would disagree that the occupation would be a taking."[203] In the *Loretto* case the cable installation occupied a relatively small space, but a finding of a taking was still warranted, the Court asserted, because "the rights of private property

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[200] 458 U.S. at 437.

[201] *Id*. at 436

[202] *Id.*

[203] *Id.*

cannot be made to depend on the size of the area permanently occupied."[204] But this reasoning simply begs the question why regulatory taking claims should be analyzed differently than physical taking claims. Just as it avoids the need for line-drawing to condemn as a taking any permanent occupation of private property, regardless of the size of the area occupied, it also would avoid the need for line-drawing to conclude that every regulatory restriction on property use, no matter how modest, is a compensable taking. If the rights of property have been "made to the depend" on the relative economic impact of a regulatory restriction on the use of property, as they surely have been under the *Penn Central* framework, why cannot "the rights of private property . . . be made to depend on the size of the area permanently occupied?" The Court's line-drawing rationale offers no independent support for a special rule for physical taking claims.

IV. Numerous "Hard" Physical Taking Cases

The notion that physical taking claims should governed by a strict *per se* rule also is in tension with a large body of precedent, including more than a handful of Supreme Court decisions, rejecting takings claims based on government actions involving appropriations or occupations. All or most of these cases are appropriately described as "hard" because they contradictsthe strict *per se* theory but are likely to appear intuitively correct to most observers. The sheer volume of these cases, arising in wide variety of circumstances, reinforces the need to reexamine physical takings theory.

A. Forfeitures

Forfeitures represent one familiar type of government appropriation that has been held not to be a compensable taking. A forfeiture is conventionally defined as "the loss of any right – ordinarily a property right -- as a consequence of a breach of some legal obligation."[205] A forfeiture can occur in either criminal or civil proceedings.[206] Criminal forfeitures are imposed in *in personam* proceedings against an individual; the property is forfeited as part of the individual's punishment upon conviction of a crime. Civil forfeitures are imposed in *in rem* proceedings brought against the property. Numerous federal and state statutes authorize forfeitures in a wide variety of circumstances; "virtually every kind of property, tangible or intangible, may be subject to confiscation under the appropriate circumstances."[207] The

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[204] *Id*.

[205] Black's Law Dictionary (8th Ed. 2004)

[206] *See* Congressional Research Service, Crime and Forfeitures 5-6 (2015)

[207] *Id*. at 3.

government becomes the owner of forfeited property and typically sells it, placing the proceeds from the sale in a government account.

While commentators have observed the obvious tension between physical takings doctrine and forfeiture practice,[208] the Supreme Court has repeatedly rejected arguments that forfeitures are compensable takings. Most recently, in *Bennis v. Michigan*,[209] the Court ruled that a forfeiture is not a taking even if the owner of the seized property is innocent of wrongdoing, rejecting the taking claim of a spouse who forfeited her half interest in the family automobile following the arrest of her husband for engaging in sexual activity in the automobile with a prostitute. The *Bennis* decision relied heavily upon a prior decision, *Calero-Toledo v. Pearson Yacht Leasing Co.*,[210] in which the Court rejected a takings challenge to the forfeiture of a yacht used by the boat's lessee, without the owner's knowledge or consent, to transport illegal drugs.

The *Bennis* Court reasoned that the forfeiture did not violate the Due Process Clause, and that it necessarily followed that there was no taking either. If the forfeiture did not violate due process, the Court said, "the property in the automobile was transferred by virtue of th[e] forfeiture proceeding from petitioner to the State." It then asserted, "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."

This reasoning, to be charitable, is weak. In general, the question whether a government action violates due process is "logically prior to and distinct from the question whether [the government action] effects a taking,"[211] Thus, the conclusion that a forfeiture does not violate due process does not address whether a taking occurred. In addition, it is simply nonsensical to say that forfeited property has not been "taken" within the meaning of the Takings Clause because the government has "already lawfully acquired" the property using some authority other than "the power of eminent domain." Every inverse condemnation claim challenges an alleged taking that has already been executed under some legal authority other than the eminent domain power.

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[208] *See* J. Kelly Stradler, *Taking the Wind Out of the Government's Sails?: Forfeiture and Just Compensation*, 2 Pepperdine Law Review 449, 478 (1996) (arguing that modern developments in takings law "portend an inevitable collision between the Government's expansive use of forfeiture statutes and the law of takings").

[209] 516 U.S. 442 (1996).

[210] 416 U.S. 663 (1974).

[211] *Lingle*, 544 U.S. at 543.

In *Calero-Toledo* the Court defended forfeitures against taking challenges by pointing to the long historical tradition of forfeiture proceedings, [212] and the Court's "prior decisions sustaining the constitutionality" of forfeitures.[213] Forfeitures, the Court said, serve valuable "punitive and deterrent purposes,"[214] and in any event are "too firmly fixed in the punitive and remedial jurisprudence of the country to now be displaced."[215] None of this reasoning, as otherwise compelling as it may be, confronts the fact that a forfeiture is an appropriation which, under a strict *per se* rule, should be treated as a compensable taking.

B. Food and Drug Safety

Seizures of adulterated food or drugs are another form of appropriation generally held not to be a compensable taking. For centuries, governments have exercised the power to seize and destroy adulterated goods without paying compensation. 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."[216]

In the reign of King George I, England enacted a law banning the mixing of tea "with any other substance under penalty of seizure, and a £100 fine," and in France "it was forbidden to mix two different wines, under penalty of confiscation and a fine." [217] In early America, states and local jurisdictions adopted similar food safety laws.[218]

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[212] *See Calero-Toledo*, 416 U.S. at 683, quoting *C. J. Hendry Co. v. Moore*, 318 U.S. 133,139 (1943) ("Long 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.").

[213] 416 U.S. at 683; *see also id*. at 684-99 (describing Court precedents upholding forfeitures).

[214] *Id*. at 686.

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

[216] *See* Peter Hutt, Food and Drug Law 7 (3rd ed. 2007).

[217] *Id*.

[218] *Id*. Early European food laws imposed variety of other penalties for selling adulterated foods. A London ordinance of about 1400 subjected any person who sold "poultry that is unsound and unwholesome "to "pain of punishment by the pillory." Even more dramatically, a Nuremberg law of the 15th century punished an adulterator of saffron, among the most expensive

The Supreme Court has never questioned the ability of government to seize unwholesome foods without compensation. The case of *North American Cold Storage Co. v. City of Chicago* arose from 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."[219] The Court observed that plaintiff did not "deny the right [of the government] to seize and destroy unwholesome or putrid food."[220] In a passage that speaks directly to the taking issue the Court said:

> "Even if it be a fact that some value may remain for certain purposes in food that is unfit for human consumption, the right to destroy it is not, on that account, taken away. The small value that might remain in said food is a mere incident, and furnishes no defense to its destruction when it is plainly kept to be sold at some time as food."[221]

The Court explained that the authority of government to seize unwholesome food without compensation "is based upon the right and duty of the state to protect and guard, as far as possible, the lives and health of its inhabitants, and that it is proper to provide that food which is unfit for human consumption should be summarily seized and destroyed to prevent the danger which would arise from eating it."[222]

In 1906 Congress adopted comprehensive food and drug legislation,[223] authorizing the seizure of misbranded and adulterated articles "by a process of libel for condemnation."[224] In 1938 Congress created the Food and Drug Administration and vesting it with seizure

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of spices, to "burning. . . at the sake, over a fire of his own saffron." See Peter Hutt, et al. Food and Drug Law 10 (4th Edition 2007).

[219] 211 U.S. 306, 308 (1908).

[220] *Id*. at 315.

[221] *Id*. at 320-21

[222] *Id*. at 315.

[223] *See* P. L, 59-384, the Federal Food and Drugs Act of 1906.

[224] Id., section 10. See generally Peter Hutt, et al. Food and Drug Law 10 (4th Edition 2007).

authority.[225] Congress also has conferred seizure authority on the Food Safety and Inspection Service within the U.S. Department of Agriculture.[226]

Taking claims based on seizures of dangerous foods or drugs, though not common, have consistently been rejected. For example, in *Rose Acre Farms v. United States*, 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 bein infected with salmonella.[227] The Court said it would be "clear" there would be "no *per se* taking" if the producer were required to kill and test the hens itself, and reasoned "the mere fact that government officials carried out the testing (and the prerequisite seizure and destruction of the hens)" did not support a different result.[228] Again, while intuition suggests this ruling is correct, it flies in the face of the strict *per se* rule of liability for physical takings.[229]

Some courts have rejected takings claims based on seizures of unhealthy foods on the ground that valid "police power" regulations are never takings. Thus, in *Jarboe-Lackey Feedlots, Inc. v. United States*, the U.S. Court of Federal Claims rejected a claim based on the seizure and detention of beef illegally implanted with a carcinogen.[230] The court reasoned the seizure of the meat was "an inherent exercise of the police power . . . intended to prevent a harm—a health hazard—to the public. . . and not actionable as a taking."[231] Similarly, in

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[225] The FDA's seizure authority, as it currently appears in the U.S. Code, reads as follows:

> "Any article of food, drug, or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce or while held for sale (whether or not the first sale) after shipment in interstate commerce, or which may not, under the provisions of section 331(ll), 344, or 355 of this title, be introduced into interstate commerce, shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States or United States court of a Territory within the jurisdiction of which the article is found."

21 USC §334

[226] 21 U.S.C. §§ 67 (meat products), 467 (poultry products), 1049 (egg products).

[227] 373 F.3d 1177 (Fed. Cir. 2004)

[228] *Id*. at 1197. *See also Provimi, Inc v. United States*, 680 F.2d 111 (Ct. Cl. 1982) (ruling that seizure of adulterated animal and drugs by the Food and Drug Administration "works a complete divestiture of the property rights of the owner of the condemned goods, permitting "the goods [to be] destroyed without compensation").

[229] *See Horne v. Department of Agriculture*, 135 S. Ct. 2419, 2428 (2015) (rejecting the argument that an appropriation should not be treated as compensable taking because the government might have proceeded through a regulation instead, and observing, "The Constitution, is concerned with means as well as ends.")

[230] 7 Ct. Cl. 329, 339 (1985)

[231] *Id*. at 339

State v. 44 Gunny Sacks of Grain, the New Mexico Supreme Court rejected a claim based on the "seizure and destruction of grain containing mercury poisoning," observing that "[t]he right to seize and destroy unfit or impure foods is a reasonable exercise of the right and duty of the State to protect the public health and is predicated upon the police power."[232] The Court continued, "[i]njury which results from the proper exercise of the police power is not compensable," and "i[t] therefore follows that the State is not required to make compensation when it seizes and destroys food found to be contaminated within the provisions of The New Mexico Food Act."[233]

C. Law Enforcement

Courts have consistently ruled that no compensable taking occurs when the government seizes and retains personal property declared contraband, property used as an instrumentality of criminal activity, or property seized for use as evidence in judicial proceedings.

Contraband, property the possession of which is unlawful, has a long history.[234] Thus, during the Civil Water, Congress enacted the Confiscation Act of 1861 authorizing the confiscation of property used to support the Confederate cause, including slaves.[235] During Prohibition, the federal and state governments declared the possession of liquor unlawful.[236] Contemporary examples of contraband include goods carrying counterfeit marks[237] or vehicles with the VIN numbers erased.[238] Courts have repeatedly ruled that government seizures of contraband are not compensable takings. [239]

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[232] 497 P.2d 966, 967 (NM 1972)

[233] *Id.*

[234] *See* Black's Law Dictionary (defining contraband as "goods that are unlawful to import, export, produce, or possess").

[235] 12 Statutes at Large 319 (1863).

[236] See *Samuels v McCurdy*, 267 U.S. 188 (1925) (rejecting due process challenge to Georgia law declaring prohibited liquors and beverages to be "contraband," and providing that they are "to be forfeited to the state when seized, and may be ordered and condemned to be destroyed after seizure").

[237] *Acadia Technology, Inc. v. United States*, 458 F.3d 1327, 1332 (Fed. Cir. 2006) (addressing seizure of goods suspected of bearing "a counterfeit mark").

[238] *See City & County of Denver v. Desert Truck Sales, Inc*., 837 P. 2d 759 (Colo. 1992) (addressing seizure of vehicle that had VIN number removed).

[239] *See, e.g., Acadia Technology*, 458 F.3d 1332 (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

Courts have also ruled that no taking occurs when property is seized as a "suspected instrumentality of a crime," even if the government ultimately abandons the criminal investigation and returns the property to the owner. Thus, in *United States v. One 1979 Cadillac Coupe de Ville Vin 6D479926699,* the Court of Appeals for the Federal Circuit ruled that no taking occurred when the government seized a vehicle in the belief that it had been used to facilitate a narcotics transaction..[240] The court said the "fact that the jury ultimately found that the vehicle had not been used to facilitate a narcotics transaction did not make the government seizure and possession of the vehicle until the forfeiture proceeding was completed any less proper, or convert that seizure into a taking'[241]

Finally, courts have held that a seizure of private property for use as evidence in a criminal proceeding is not a compensable taking.[242] This rule has been applied frequently by federal and state courts across the country, apparently without dissent.[243] It has been applied in a wide variety of different circumstances, regardless of whether the property was seized from an alleged wrongdoer or an innocent party,[244] whether the property was seized pursuant to a warrant or

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be paid"); *United States v. $7,990.00 in U.S. Currency,* 170 F3d 843 845 (8th Cir. 1999) ("[T]he forfeiture of *contraband* is an exercise of the government's police power, not its eminent domain power.").

[240] 633 F.2d 994 (Fed Cir. 1987)

[241] *Id*. at 1000.

[242] *See, e.g., Ka-Almaz v. United States,* 682 F.3d 1364 (Fed. Cir. 2012); *Johnson v. Manitowoc, County*, 635 F.3d 331 (7th Cir. 2011).

[243] *See Amerisource Corp. v. United States*, 525 F.3d 1149 (Fed. Cir. 2008) (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*, 148 Wash.2d 760, 64 P.3d 618, 624 (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,").

[244] *Compare Amerisource* (property seized from innocent owner) with *Ka-Almaz* (property seized from innocent target of customs investigation).

not,[245] whether the property was subsequently introduced into evidence or not[246] and even if the property was not ultimately returned to the owner.[247]

Courts have offered various rationales for not treating law enforcement seizures as compensable takings. Some say a law enforcement seizure, as a lawful exercise of the police power, cannot be a compensable taking.[248] Others suggest that a law enforcement seizure does not represent a taking for a "public use" within the meaning of the Takings Clause.[249] And still others make the policy argument that the criminal justice system "cannot function if property holders are free to withhold property that might form part of the government's case."[250] One important precedent supporting this particular perspective is *Hurtado v. United States*,[251] in which the Supreme Court rejected the claim that it was a compensable taking for the government to incarcerate material witnesses denied release for failure to post bond and pay them only $1 per day. The Court reasoned that "[i]t is beyond dispute that there is in fact a public obligation to provide evidence," and "the Fifth Amendment does not require that the Government pay for the performance of a public duty it is already owed." [252] While the *Hurtado*

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[245] *Compare Acadia* (without a warrant) with *Johnson v. Manitowo Countyc*, 635 F3d 331 (7th Cir. 2011) (with a warrant).

[246] Compare *Manitowoc County* (seized property introduced as evidence) with *Ka-Almaz v. United States*, 682 F.3d 1364 (Fed. Cir. 2012) (seized property not introduced as evidence).

[247] *See, e.g., Young v Larimer*, 356 P. 3d 939 (Colo Ct. Apps. Colo. 2014) (no compensable taking when government agents cut and killed marijuana plants during a criminal investigation); *Zitter v. Petruccelli*, 213 F. Supp.3d 698 (D.N.J. 2016 (seizure and disposal of oysters by state health officials not a compensable taking).

[248] *See United States v. $7900 in* U.S. *Currency*, 170 F.3d at 845 ("the forfeiture of contraband is an exercise of the government's police power, not its eminent domain power."); *Johnson v. Manitowoc County*, 635 F3d 331, 336 (7th Cir. 2011) (when government seizes property as of evidence pursuant to the state police power, "[the] Takings Clause is a non-starter").

[249] *Acadia*, at 1332-33 (seizure of allegedly counterfeit goods not "the sort of 'public use'" for which the Takings Clause requires compensation); *Amerisource*, 525 F.3d at 1153 ("Property seized and retained pursuant to the police power is not taken for a 'public use.'")

[250] *Amerisource*, 525 F3d at 1153 n. 4

[251] 410 U.S. 578 (1973).

[252] *Id.* at 588-89.

case did not involve a seizure of private property, its reasoning supports the conclusion that a seizure of property for law enforcement purposes is not a compensable taking.[253]

D. Animals

Governments commonly seize privately owned animals (livestock as well as pets), and takings claims based on such seizures are routinely rejected. The U.S. Supreme Court long ago recognized that states have the authority to order "the slaughter of diseased cattle,"[254] or to "destroy dogs" as "necessary for the protection of [their] citizens."[255] The courts have repeatedly said that "[s]uch action is not taking of private property for public use."[256] Thus, the courts have ruled that it is not a compensable takingsto seize and destroy cattle with bovine tuberculosis,[257] or to seize and destroy a pet ferret suspected of being infected with rabies.[258]

The courts also have repeatedly rejected takings challenges to ordinances addressing the disposition of stray animals. Local governments commonly authorize officials to determine, on an expedited basis, whether to destroy stray animals or convey them to new owners. Again courts have routinely rejected takings claims based on such seizures. Thus, the California Supreme Court rejected a takings challenge to a Los Angeles ordinance directing local officials

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[253] *See Emery v. Oregon*, 688 P.2d 72 (1984) ("If a person by virtue of his very existence in civilized society, owes a duty to the community to disclose for the purposes of justice all that is in his control which can serve the ascertainment of the truth, this duty includes not only mental impressions preserved in his brain and the documents preserved in his hands, but also the chattels and premises within his control."); but cf. *Johnson v. Manitowoc*, 635 F3d 331, 336 (7th Cir. 2011) (after concluding that landlord whose property was damaged by law enforcement officials lacked a viable takings claim, adding that "it seems quite unfair to make an innocent, unlucky landlord absorb the costs associated with the execution of a search warrant directed at a criminally-inclined tenant"); *Amerisource*, 525 F3d at 1157 ("It is unfair that any one citizen or small group of citizens should have to bear alone the burden of the administration of a justice system that benefits us all. But the war memorials only a short distance from the Federal Circuit courthouse remind us that individuals have from time to time paid a dearer price for liberties we all enjoy.").

[254] *Lawton v Steele*, 152 U.S. 133, 136 (1894).

[255] *Sentell v. New Orleans & C.R. Co.,* 166 U.S. 698 (1897).

[256] *Kroplin v. Truax*, 165 N.E. 498 (Ohio 1929).

[257] *Loftus v. Dep't of Agriculture,* 232 N.W. 412, 420 (Iowa 1930)

[258] *Rayynor v. Maryland Department of Health & Mental Hygiene*, 110 Md. App. 165. (1996).

to hand over unlicensed strays to medical research institutions,[259] and the Arkansas Supreme Court rejected a takings challenge to a statute authorizing the seizure and sale of stray animals with the proceeds deposited in the county road and bridge fund.[260]

One current focus of this type of legislation is pit bulls.[261] In line with prior precedent, courts have rejected takings challenges to laws banning the possession and authorizing the destruction of pit bulls by government officers.[262] In a particularly evocative case, *Garcia v. Village of Tijeras*,[263] the New Mexico Supreme Court rejected a taking challenge to an ordinance banning ownership or possession of pit bulls in a rural village and subjecting unlawful animals to forfeiture and destruction. Eighteen of the eighty households in the community had possessed one or more pit bulls when the ordinance was enacted. Pit bulls had repeatedly attacked community residents and their animals, resulting in injuries to several residents and the death of several animals. "Two months prior to enactment of the ordinance, a nine-year-old girl was severely mauled by pit bull dogs on her way home from school."[264] The New Mexico Court ruled the ordinance was justified by "necessity," and rejected the taking claim.

Courts rejecting takings claims based on seizures of animals generally have reasoned that such seizures are appropriate exercises of the "police power" and therefore are not compensable

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[259] *Simpson v. City of Los Angeles*, 40 Cal. 2d 271 (Cal. 1953)

[260] *Howell v. Daughet*, 148 Ark. 450 (Ark. 1921)

[261] *See generally* 80 ALR4th 70, Validity and construction of statute, ordinance, or regulation applying to specific dog breeds, such as "pit bulls" or "bull terriers."

[262] *See, e.g.*, *Weigel v. Maryland*, 950 F.Supp2d 811 (D. Md. 2013) (rejecting takings claim based on rule banning pit bulls from the housing complex); *Bess v. Bracken County Fiscal Office*, 210 SW3d 177 (Ky. Ct. Apps. 2006) (rejecting takings challenge to county ordinance barring possession of pit bulls and making them subject to "forfeiture and euthanasia").

[263] 767 P.2d 355 (NM 1988).

[264] *Id.* at 356

takings.[265] In the case of diseased animals, courts also have defined the animals as "nuisances" subject to abatement without compensation. [266]

E. Bank Safety

Under longstanding federal law, government agencies have the authority to occupy the offices and seize the assets of troubled financial institutions to protect depositors and the soundness of the financial system. [267] In *California Housing Securities, Inc. v. United States*, the U.S. Court of Appeals of the Federal Circuit rejected a claim that the Resolution Trust Corporation ("RTC") took private property when it seized the asserts of a troubled savings and loan association.[268] The court did not question that seizure of the offices of the association

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[265] *See, e g., v. Bracken County Fiscal Court*, 210 S.W.3d 177, 182 (2006) ("Because the forfeiture and destruction of such dogs is pursuant to a valid exercise of the police power, no compensation is required or due to the dogs' owners."); *Simpson v. City of Los Angeles*, 40 Cal. 2d 271 (Cal. 1953) "(It is clear . . . that when dogs have been lawfully impounded under the police power and have become subject to disposition under the terms of the ordinance . . . , private property rights in such dogs must, in the interest of public welfare, be treated as having been terminated.")

[266] *See, e.g., Raynor v. Maryland, Department of Health & Mental Hygiene*, 676 A. 2d 978, 991 (Md. 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"); *Kroplin v. Truax*, 165 N.E. 498, 501 (Ohio 1929) ("If the state were to requisition cattle for the use of its armies in the field, that would constitute a taking of private property for public use; but the destruction of diseased cattle is merely the abatement of a public nuisance.")

[267] *See* 12 U.S.C. § 1464(d)(2)(A) "(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."); 12 U.S.C. § 1464(d)(2)(E)(i) ("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.'); 18 U.S.C. § 181(a) ("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").

[268] 959 F.2d 955 Fed. Cir. 1992).

represented a form of occupation. However, the Court distinguished *Loretto* on the ground that Ms. Loretto possessed a "historically rooted expectation of compensation" for governmental interference with her right to possess her apartment building. By contrast, the Court reasoned, the owner of the savings and loan association voluntarily subjected itself to an expansive regulatory scheme when it obtained federal deposit insurance, and "understood with what may only be viewed as a historically rooted expectation that the federal government would take possession of its premises and holdings as conservator or receiver if it dissipated assets."[269] The *Loretto* decision, the court said, "simply does not fit cases such as this where the historically rooted expectations of ownership that underlie *Loretto* do not exist." [270]

Applying essentially the same reasoning, the Federal Circuit in *Golden Pacific Bancorp v. United States* 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..[271] The Court acknowledged, "when the Comptroller placed the Bank in . . . receivership for liquidation there was, in a very real sense, a physical invasion and permanent occupation, certainly as far as the premises of the bank were concerned."[272] However, the Court observed, the owner of the bank "voluntarily entered the highly regulated banking industry by choosing to invest in the Bank," and "[t]he actions of the Comptroller simply enforced 'portions of an extensive regulatory scheme designed to promote the public interest in a sound banking system.'"[273] The bank, because of its own voluntary action, "could [not] have developed a historically rooted expectation of compensation' for the seizure which resulted from the Comptroller's actions."[274]

F. User Fees

The Supreme Court has repeatedly affirmed that "user fees" are not takings. As discussed above, in *United States v. Sperry*, the Court held the U.S. government did not take private property by subtracting a percentage of an award made by the Iran-United States Claims Tribunal to cover expenses incurred by the government in securing the company's award.[275]

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[269] *Id*. at 958

[270] *Id*. at 959.

[271] 15 F.3d 1066 (Fed. Cir. 1994).

[272] *Id*. at 1073.

[273] *Id*. at 1074, quoting *American Continental Corp. v. United States*, 22 Cl. Ct. 692, 696 (1991)

[274] 15 F.3d at 1074, quoting *California Housing Securities*, 959 F.2d at 958.

[275] 493 U.S. 52, 60 (1989). *But cf. id*. at 62 (allowing for the possibility that particular user fees might be "so clearly excessive as to belie their purported character as user fees").

More recently, in *Koontz v. St John's River Water Management District*, the Court stated, in categorical fashion, "[i]t is beyond dispute that 'user fees are not takings.'"[276]

However, some user fees, on their face, facially match the Court's definition of an appropriation. In *Sperry,* the government subtracted the fee from a specific fund of money held by the company, and it transferred the amount of the fee from the company to itself. The Court resisted the physical taking claim by asserting that it was "artificial to view deductions of a percentage of a monetary award as physical appropriations of property," and also observed, "[i]f the deduction in this case" were treated as a taking, "so would be any fee for services, including a filing fee that must be paid in advance."[277] These arguments plainly do not address why no physical taking occurred.

Somewhat more convincingly, the *Sperry* Court reasoned that the user fee was not a taking because it was designed "to reimburse the United States for its costs in connection with the Tribunal."[278] The company did not challenge this defense, merely arguing that the fee exceeded the government's actual costs, to which the Court responded by explaining that "the amount of a user fee" need not be "precisely calibrated to the use that a party makes of Government services."[279] In addition, the Court said it was irrelevant that the company was being forced to pay costs associated with use of the tribunal when it would have preferred not to have used it at all, observing that the government "has an obvious interest in making those who specifically benefit from its services pay the cost."[280] While there is an obvious force to these arguments against the takings claim, it is still difficult to reconcile this result with the ostensible *per se* rule for physical takings.

G. Enforcement of Government Charges

Another appropriation courts typically do not treat as a compensable taking is a seizure of private property to enforce monetary debts to the government. These types of seizures are

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[276] *Id*. at 615, quoting *Brown v. Legal Foundation of Washington*, 538 U.S.216, 243, n. 2, (2003) (Scalia, J., dissenting).

[277] 493 U.S. at 62 n. 9.

[278] *Id*. at 60.

[279] *Id.*

[280] *Id*. at 62, quoting *Massachusetts v. United* States, *435* U.S. 444, 462 (1978) (plurality opinion).

commonplace, including impoundments of vehicles for unpaid parking tickets and real estate foreclosures for unpaid property taxes.

For example, in *Tate v. District of Columbia*, the U.S. Court of Appeals for the D.C. Circuit rejected a taking claim based on the District of Columbia's impoundment of cars with unpaid traffic tickets.[281] The District of Columbia towed cars with unpaid tickets to an impoundment lot and, after 45 days, declared them abandoned and sold them at auction with the proceeds going to the District.[282] Following the logic of *Bennis*, the court said the District seized the cars through "'the exercise of governmental power other than the power of eminent domain,'"[283] and characterized the government's process of auctioning off private vehicles as "the culmination of a sort of graduated forfeiture process."[284] The court said this procedure, "which both deters drivers from committing traffic and parking infractions in the first instance and induces delinquents to pay penalties once incurred – is, like the *Bennis* forfeiture process 'firmly fixed in the punitive and remedial jurisprudence of the country.'"[285]

From one perspective, this ruling is hardly remarkable. Private individuals and firms are can invoke judicial process to seize private property to secure payment of lawful debts. It would be surprising if the government could not seize private property for the same purpose. Yet, these kinds of seizures are plainly appropriations, further undermining the plausibility of the Court's ostensibly strict *per se* rule.

H. Recording Acts

Conventional real estate recording acts also result in facial appropriations, but courts have not called them takings. Most states have recording acts regulating the public filing of deeds and other interests in property and determining the priority between parties claiming interests in property.[286] A recording act does not require a purchaser of real estate to record her deed, but places a purchaser who fails to record at risk of losing title to a subsequent purchaser of the property who lacks notice of the first purchaser. A recording act effectively authorizes a subsequent claimant to appropriate the property of the prior claimant based on the latter's failure

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[281] 627 F.3d 904 (D.C. Cir. 2010).

[282] *Id.* at 906-07

[283] *Id*. at 909, quoting *Bennis*, 516 U.S. at 452.

[284] *Id*. at 909.

[285] *Id*., quoting *Bennis*, 516 U.S. at 453.

[286] *See* Thomas H. Merrill & Henry E. Smith, Property: Principles and Policies 918-19 (2nd ed 2012)

to follow statutory rules. It would be surprising to real estate practitioners to discover that longstanding recording acts create a potential takings problem. Yet, on its face, a recording act involves a straightforward appropriation.

There are apparently no reported decisions specifically addressing whether a recording act results in a compensable taking. However, in a line of case going back to the early 19th century, the U.S. Supreme Court has rejected Contract Clause challenges to recording acts in broad language that can be read to implicitly resolve any potential takings question. In *Jackson v. Lamphire*,[287] the Court rejected a claim that a New York recording act that divested a prior grantee in favor of a successor violated the Contracts Clause. In rejecting the claim the Court emphasized that "there is no contract on the part of the state" involved, and the case involved a private dispute over property ownership between two citizens.[288] More generally, the Court stated

> "It is within the undoubted power of state legislatures to pass recording acts, by which the elder grantee shall be postponed to a younger, if the prior deed is not recorded within the limited time, and the power to do the same whether the deed is dated before or after the passage of the recording acts. Though the effect of such a law is to render the prior deed fraudulent and void against a subsequent purchaser, it is not a law impairing the obligation of contracts, such too is the power to pass acts of limitations, and their effects."[289]

The Court has repeatedly reaffirmed this holding.[290]

In a related line of cases, the Supreme Court has ruled that statutes that divest owners of their property interests if they fail to make required public filings do not result in takings. In *Texaco v. Short, Inc*.,[291] the Supreme Court rejected a takings claim based on an Indiana statute under which a mineral interest would lapse if the owner failed to file a statement of claim with the county recorder's office for a period of 20 years. The extinguishment of the mineral interest meant that the subsurface interest transferred to the surface owner. The Court said:

> "We have no doubt that, just as a State may create a property interest that is entitled to constitutional protection, the State has the power to condition the permanent retention of

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[287] 28 U.S. 260 (1830).

[288] *Id.* at 289.

[289] *Id*. at 290.

[290] *See, e.g., Sveen v. Melin*, 138 S.Ct. 1815, 1824 (2018) (observing that in "cases going back to the 1800's" the Court has "upheld so-called recording statutes, which extinguish contractual interests unless timely recorded at government offices").

[291] 454 U.S. 516 (1982),

that property right on the performance of reasonable conditions that indicate a present intention to retain the interest."[292]

The Court also observed that the state has a "legitimate" interest in encouraging owners to develop their mineral interests and in promoting the collection of property taxes, and the recording requirement furthered both of these goals.[293]

In *United States v. Locke*,[294] the Court, relying on *Texaco*, rejected a taking claim based on a provision of the Federal Land Policy and Management Act forcing holders of mining claims on federal public lands to forfeit their interests to the government if they fail to make required annual filings in timely fashion. The Court said, "*Texaco* is controlling" despite the fact that the case involved an appropriation in favor of the government itself rather than another private party, as in *Texaco*.[295]

One of the Court's explanations for these rulings is deeply problematic. The *Texaco* Court first posited that it was not a taking of private property to require an owner to periodically submit a statement to the government.[296] Building from that premise, the Court then reasoned it was also not a taking to divest owners of their property for failure to make the necessary filings, on the ground that a failure to file was due to the owner's own voluntary inaction rather than government action. [297] This reasoning artificially disaggregates the recording requirement from the divestiture provision, obscuring the fact that the law, considered as a whole, effectively appropriated private property.

More convincing is the *Texaco* Court's observation that these requirement are "reasonable," serve "legitimate state goals," and impose only a "slight burden" on the owners.[298] And in *Locke*, the Court said, "Regulation of property rights does not 'take' private property when an individual's reasonable investment-backed expectations can continue to be realized as long as he complies with reasonable regulatory restrictions the legislature has imposed."[299]

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[292] *Id*. at 526.

[293] *Id*. at 529.

[294] 471 U.S. 84 (1985).

[295] *Id*. at 107.

[296] *Texaco*, 454 U.S. at 530

[297] *Id.*

[298] See *Id.* at 529, 530 *See also Locke*, 471 U.S. at 107 ("Their property loss was one appellees could have avoided with minimal burden.")

[299] *Locke*, 471 U.S. at 107.

However appealing this reasoning may be, it does not address the fact that recording acts literally work an appropriation.

I. Adverse Possession

Adverse possession doctrine also generates appropriations that courts have generally held not be compensable takings. The doctrine of adverse possession extends "back to beyond the thirteenth century,"[300] and the courts recognized it early in the history of this country. Nearly two hundred years ago, in *Hawkins v Barney's Lessee*,[301] the Supreme Court offered a broad endorsement of adverse possession statutes:

> "[N]o class of laws is more universally sanctioned by the practice of nations, and the consent of mankind, than laws which give peace and confidence to the actual possessor and tiller of the soil. Such laws have frequently passed in review before this court; and occasions have occurred, in which they have been particularly noticed as laws not to be impeached on the ground of violating private right."[302]

The Court responded to the argument that adverse possession doctrine "effects a complete divesture and transfer of right" by saying:

> "This is unquestionably true and yet in no wise fatal to the validity of this law. The right to appropriate a derelict is one of universal law, well known to the civil law, the common law, and to all law: it existed in a state of nature, and is only modified by society, according to the discretion of each community."[303]

Since *Barney's Lessee*, apparently no court has expressed doubt about the constitutionality of adverse possession statutes, despite the fact they effect a straightforward appropriation of property from owner A in favor of owner B.[304]

The acquisition of property through adverse possession by the government itself arguably presents a different issue, as illustrated by *Pascoag Reservoir & Dam v. Rhode Island*,[305] a controversial, widely discussed federal District Court decision holding that the State of Rhode Island took private property by successfully claiming ownership of formerly private property by

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300 *See* Powell on Real Property, § 91.01 (Michael A. Wolf gen ed. 2009).

301 30 U.S. 457 (1831).

302 *Id*. at 466.

303 *Id*. at 467.

304 *See Wilner 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.")

305 217 F. Supp.2d 206 (D.R.I. 2002), *aff'd* on other grounds, 337 F.3d 87 (1st Cir. 2003).

adverse possession. The Rhode Island Supreme Court ruled that the State had acquired fee title to a portion of the land beneath a reservoir and a prescriptive easement to use the surface of the reservoir.[306] The former owner then sued in federal district court under the federal Takings Clause. Applying the Supreme Court's physical takings precedents, the federal court ruled that transfer of property ownership to the state pursuant to the doctrine of adverse possession was a compensable taking.[307] Despite upholding the plaintiff's taking theory in principle, the court dismissed the claim on the ground that it was time-barred. The U.S. Court of Appeals for the First Circuit affirmed on that basis without addressing the merits of the takings issue.[308]

The *Pascoag* Court was well aware that it was breaking new ground, observing that state courts have generally rejected the theory,[309] and that "No federal court has addressed this question before."[310] The *Pascoag* court's logic was very thin. It reasoned that adverse possession by the government, as opposed to a private party, should be regarded as a compensable taking because the government possesses the power of eminent domain. This argument is contradicted by Supreme Court precedent recognizing that a government-compelled "appropriation" can result in a taking regardless of whether the government or a private party acquires the property.[311] The *Pascoag* court also reasoned that adverse possession cannot be regarded as a "background principle" defense defeating the claim because this defense only applies to a claim of "denial of all economically viable use of property," not to a claim based on an "occupation," [312] This position is plainly incorrect given Supreme Court precedent

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[306] *Reitsma v. Pascoag Reservoir & Dam, LLC*, 774 A.2d 826 (RI 2001)

[307] 217 F. Supp.2d 206 (D.R.I. 2002). The District Court stated that with respect to the state's acquisition of a fee interest, the state gained "permanent possession of the land resulting in the ouster of the record owner" and the state "acquired all the sticks in the bundle of property rights," and, with respect to the acquisition of the easement, the state terminated the "property owner's the right to seclude others." In the terminology of physical takings doctrine, the district court believed the former owner suffered both an appropriation and an occupation. *Id.* at 221-22.

[308] 337 F.3d 87 (1st Cir. 2003).

[309] *Id*. at 222-24. In fact, state courts have apparently been unanimous in ruling that state and local governments can acquire ownership of private property by adverse possession without triggering taking liability. *See, e g*., *See City of Des Plaines, v. Redella*, 65 Ill.App.3d 68 (2006); *Stickney v. City of Saco*, 770 A.2d 592 (Me. 2001); *Weidner v. State*, 860 P.2d 1205, 1212 (Alaska 1993).

[310] 217 F. Supp.2d at 217.

[311] *See* note 66, *supra*.

[312] 217 F.Supp. 2d at 226.

recognizing that a background principles defense can defeat an occupation claim.[313] Finally, the court said a background principle can defeat a taking claim only "when a property right that was allegedly taken is determined to have *never* been part of the property in dispute,"[314] and in this instance, the reservoir property was privately owned before it was taken by adverse possession. This crabbed understanding of background principles ignores the fact that owners of land in Rhode Island and the rest of the United States have *always* been subject to the risk they might lose their property due to adverse possession.[315]

J. *Heart of Atlanta Motel*

The public accommodations provision of the Civil Rights Act of 1964, which requires innkeepers to accept guests without regard "to race, color, religion, or natural origin,[316] is another type of occupation held not to be a compensable taking. In its 1964 decision in *Heart of Atlanta Motel, Inc. v. United States*,[317] the Supreme Court disposed of the taking challenge to the public accommodations provision in a single sentence, "Neither do we find any merit in the claim that the Act is a taking of property without just compensation."[318] On its face, however, the claim appears to involve a straightforward, permanent occupation that in theory should trigger *per se* liability. The owner wished to exclude members of the public from its property and federal law compelled the owner to accept such persons as guests against its will. No individual guest would occupy the property for an extended period, but under *Cress* and *Nollan* it is sufficient to establish a permanent physical taking that occupiers have "a permanent and continuous right" to occupy the property.

One possible theory in defense of *Heart of Atlanta Motel* is that once an innkeeper has invited the public as guests to its motel it cannot object to an "occupation" based on a

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313 *See* notes 109 & 110, *supra*.

314 217 F. Supp2d at 226

315 *Cf. United States v. Chicago, Milwaukee St. Paul & Pac. R.R.*, 312 U.S. 592, 599 (1941) (riparian property owners along navigable rivers are generally entitled to utilize their property as they wish, but cannot object that their property rights have been impaired if the federal government chooses to make navigation improvements that interfere with their use and enjoyment of the property).

316 42 U.S.C. § 2000a.

317 379 U.S. 241 (1964).

318 *Id*. at 261

requirement to accommodate guests of a particular race or religion. Thus, in *Yee v, City of Escondido,*[319] the Court read *Heart of Atlanta Motel* to establish that "[w]hen a landowner decides to rent his land to tenants, the government may . . . require the landowner to accept tenants he does not like.[320] But this reading of *Heart of Atlanta Motel* is in serious tension with *Dolan,* in which the Court ruled that a store owner who welcomed the general public as potential customers suffered a physical occupation when required to accept walkers and bikers; even though the owner had invited the general public, the Court reasoned, the owner" still wanted "to be able to control the time and manner in which" members of the public enter the property. The owner's motivation for excluding members of the public in *Heart of Atlanta Motel* can be distinguished from the motivation in *Dolan,* but why should motivation matter in determining whether a compensable taking has occurred or not?[321]

K. Firearms

Government efforts to regulate firearms, including by seizing firearms that are inherently dangerous or are held by dangerous persons, have given rise to the most recent legal controversies testing the plausibility of a *per se* liability rule for appropriations of private property.

Applying the Takings Clause to seizures of firearms presents distinct issues in light of the Second Amendment. Possession is, of course, a traditional stick in the bundle of property rights

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[319] 503 U.S. 519 (1992).

[320] *Id*. at 529, citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964). See also 503 U.S. at 531 ("Because they voluntarily open their property to occupation by others, petitioners cannot assert a *per se* right to compensation based on their inability to exclude particular individuals."). Cf *Loretto,* 458 U.S. at 440 (distinguishing *Heart of Atlanta Motel* on the ground the Court "has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails.")

[321] Another theory, suggested by the Court's discussion of the substantive due process claim, *see* 379 U.S. at 259-60, is that the public accommodations provisions can be viewed as codifying the common law "innkeeper rule." This rule generally mandates that, once an innkeeper opens her inn for business, she has an obligation to accommodate all comers. *See* Joseph Hempling, *Innkeeper's Liability at Common Law and Under the Statutes*, 4 Notre Dame Lawyer 421 (1929) Under this view, *Heart of Atlanta Motel* was correctly decided because a motel owner lacks a property interest under state law to exclude guests on the basis of race. While technically plausible, this theory has a ring of absurdity to it. Congress enacted the Civil Rights Act to overcome government-sanctioned racial discrimination, especially in the Southern States, belying the idea that the act imposed a duty on the motel owner that already existed under Georgia law.

as defined by state law. However, as the Supreme Court recognized in its landmark decision in *District of Columbia v. Heller*,[322] the Second Amendment of the U.S. Constitution specifically protects the right to possess certain firearms. Government seizure of a firearm in violation of the Second Amendment will not support a claim for just compensation under the Takings Clause because, as discussed in section I, a valid taking claim requires a government action serving a lawful "public use."[323] A government seizure of a firearm in violation of the Second Amendment is not lawful, and therefore a court should enjoin.

However, this does not exhaust the possibilities for takings claims arising from seizures of firearms. The Second Amendment does not create "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."[324] The *Heller* Court said "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."[325] The Court also said the Second Amendment does not bar prohibitions on "dangerous and unusual weapons," such as "M-16 rifles and the like"[326] Because seizures of firearms not proscribed by the Second Amendment may be lawful, such seizures can at least potentially support viable takings claims. Even if an owner of a firearm cannot invoke the Second Amendment, the owner has a state-law property right to possess the firearm. A person might be judged dangerously insane, and thus cannot assert an entitlement to possess a firearm under the Second Amendment, but still "own" the firearm under state law and can potentially assert a taking claim based on the deprivation of his property.

In October 2017, a gunman in Las Vegas, Nevada, killed 59 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 to this tragedy, the Trump administration banned bump-stocks for civilian use. In 2018, the Department of Treasury issued a rule "clarifying" that "machine guns" as defined by the National Firearms Act of 1934 and the Gun Control Act 1968 include bump stock devices.[327]

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[322] 554 U.S. 570 (2008).

[323] *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005).

[324] 554 U.S. at 626-27.

[325] *Id*. The Court cited these "presumptively lawful regulatory measures only as examples," and said they were not intended to be "exhaustive." *Id*. at 627 n. 26.

[326] *Id*. at 627

[327] Bump-Stock Devices, Final Rule, 83 FR 66514-01, 2018 WL 6738526 (December 26, 2018).

Because the U.S. government has long barred machine guns for civilian use,[328] classifying bump stocks as machine guns effectively makes bump stocks illegal as well. According to the Trump administration's theory, because the Second Amendment permits banning civilian use of machine guns, banning bumps stocks as a type of machine gun is permitted as well. The rule requires those possessing bump stocks to either destroy the devices or surrender them to the government.

This initiative generated numerous complaints, including over 1200 comments on the proposed bump stock rule objecting that the rule violated the Takings Clause.[329] Many of these comments asserted that the government would be "mandating relinquishment" of private property, resulting in a *per se* "physical taking" under *Horne*. The Department rejected this 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."[330] The Department supported its conclusion by citing many of the decisions discussed above rejecting takings claims based on restrictions on "contraband, noxious goods, and dangerous articles."[331] The Department did not respond to the commenters' specific argument based on *Horne*, much less attempt to harmonize its position with *Horne*.

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. [332] In 2019, in *McCutcheon v. United States*, the first of the cases to reach a decision, the claims court dismissed the taking claim. The court's primary rationale for rejecting the claim was that no taking occurs when "the government acts pursuant to its police power, *i.e.*, where it criminalizes or otherwise outlaws the use of or

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[328] *See* 18 U.S.C. § 922(o).

[329] 83 Fed. Reg. 66523

[330] *Id*. at 66524

[331] *Id*.

[332] See *McCutchen v. United States*, U.S. Court of Federal Claims, No. 18-1965 C (filed December 26, 2018); *The Modern Sportsman, LLC v. United States*, U.S. Court of Federal Claims, No. 1:10-cv-449 (filed December 26, 2018). In addition, a takings claim was included in an omnibus challenge to the bump stock rule filed in federal District Court, but the district court dismissed the claim on the ground that injunctive relief is not available under the Takings Clause. *See Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 356 F. Supp. 3d 109 (D.D.C. 2019), *aff'd on other grounds*, 920 F.3d 1 (D.C Cir. 2019).

possession of property that presents a danger to the public health and safety."[333] The court acknowledged that "it is insufficient to avoid the burdens imposed by the Takings Clause simply to invoke the 'police powers' of the state," but it 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." [334] The court concluded that the bump stock ban fell within the category of police power regulation exempt from the Takings Clause because it was 'consistent with our nation's 'historical tradition of prohibiting . . . dangerous and unusual weapons."[335]

Courts have dismissed other takings claims based on similar seizures of firearms using similar reasoning. For example, the U.S. Court of Federal Claims rejected a takings claim based on classification of the "Atkins Accelerator" (a specific type of bump-stock) as a machine gun, reasoning that the government acted "pursuant to the police power conferred on it by Congress" and the plaintiff had "voluntarily entered into an area subject to pervasive federal regulation – the manufacture and sale of firearms."[336] Earlier, in *Fesjian v. Jefferson*, the District of Columbia Court of Appeals applied the "police power" rationale in rejecting a taking challenge to a law prohibiting machineguns and requiring owners to surrender such firearms to the chief of police, "lawfully dispose" of them, or "lawfully remove" them from the District of Columbia. [337]

More recent litigation arising from a California voter-approved measure requiring surrender of high capacity magazines has produced mixed outcomes. One federal District Court in California denied a motion for preliminary injunction against the measure, in part based on what it characterized as "[a] long line of federal cases . . . authorize[ing] the taking or destruction of private property in the exercise of the state's police power without compensation."[338]

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[333] *McCutchen v. United States*, Order Granting Motion to Dismiss, No. 18-1965C (September 23, 2019)

[334] *Id*., quoting *Acadia Tech, Inc. v. United States*, 458 F3d 1327, 1332 (Fed Cir. 2006)

[335] Id., quoting *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008). The claim court's invocation of *Heller* suggests that any seizure of firearms not proscribed by the Second Amendment also will not support a claim for compensation under the Takings Clause. The claims court also reasoned that, "even if the police power doctrine were inapplicable," the bump stock rule did not result in a physical appropriation because the owner had the option of simply destroying its bump stocks himself.

[336] *See Atkins v. United States,* 82 Fed Cl. 619, 623, 624 (2008).

[337] 399 A.2d 861, 865 (D.C. 1979).

[338] *Wiese v. Becerra,* 263 F.Supp.3d 986, 995 (E.D. Cal. 2017). Later the same Court granted the government's motion to dismiss the case, but, shifting gears, reasoned that plaintiffs' *per se*

Another federal District Court in California granted a preliminary injunction against the measure on the ground that the ban was a straightforward *per se* appropriation under *Horne*,[339] and the Ninth Circuit upheld that ruling in an unreported decision.[340]

Many states have adopted a variety of other laws authorizing government seizures of firearms in different circumstances.[341] At least seven states have adopted laws requiring owners of firearms owners to relinquish ownership of their firearms upon conviction of specified crimes.[342] At least fifteen states have adopted laws requiring individuals convicted of domestic violence crimes to relinquish their firearms upon conviction.[343] Seventeen states have adopted "red flag" laws, authorizing government officials to seize firearms from persons who have been determined dangerous to themselves or others.[344] Most of the laws of this type have not been

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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 10 rounds. *Wiese v. Becerra*, 306 F.Supp.3d 1190, 1198 (E.D. Cal. 2017).

339 *Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1138 (S.D. Cal. 2017).

340 *Duncan v. Becerra*, 2018 WL 3433828 (9th Cir. July 17, 2018). Subsequently the District Court for the Southern District of California granted summary judgment to the plaintiffs on their takings claim, *Duncan v. Becerra*, 366 F. Supp. 3d 1131 (S.D. Cal 2019), and that final judgment is now on appeal to the Ninth Circuit.

341 *See* Giffords Law Center, Disarming Prohibited People , https://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/disarming-prohibited-people/

342 *See e.g.*, California Penal Code, § 29810 (a) ("Upon conviction of any offense that renders a person subject to Section 29800 [making it a "felony" for a person convicted of, or subject to an outstanding warrant for, a felony, or certain other offenses, "or who is addicted to the use of any narcotic drug," to possess a gun] or Section 29805 [making it a "public offense" for a person convicted of, or subject to warrant for, certain misdemeanors to possess a gun] the person shall relinquish all firearms he or she owns, possesses, or has under his or her custody or control in the manner provided in this section.").

343 *See* Giffords Law Center, Disarming Prohibited People, https://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/disarming-prohibited-people/. *See also* Battered Women's Justice Project, Police Seizure of Firearms at Scenes of Domestic Violence, https://www.preventdvgunviolence.org/assets/documents/legal-landscape/police-seizure-of-firearms-at-scenes-of-domestic-violence.pdf (listing 18 states that "have laws addressing the seizure of firearms at scenes of domestic violence').

344 *See* Mike Baker, Fearing a Mass Shooting, Police Took His Guns. A Judge Gave them Back, *The New York Times* (Nov. 18, 2019).

challenged as takings, at least not yet. However, in 2013 the Indiana Court of Appeals rejected a claim that a red flag law results in compensable taking,[345] reasoning in summary fashion that the measure "was a valid exercise of the state's police power."[346]

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The foregoing cases demonstrate not only the variety of circumstances in which courts reject physical takings claims, but also the diverse reasons they offer for doing so. These reasons include the great social utility of certain government actions, history and tradition, the classic police power, lack of reasonable investment-backed expectations, harm and nuisance abatement, fair payment for government services, and the modesty of some of the government intrusions. These diverse justifications bring to mind the *Penn Central* Court's acknowledgement of the difficulty of "develop[ing] any set formula for determining when 'justice and fairness' require payment of compensation" in takings cases. It might be argued these hard cases demonstrate that physical takings claims, like regulatory takings claims, cannot be reduced to a pat formula. Perhaps the Supreme Court should simply acknowledge the futility of its attempt to construct *per se* approach to physical takings claims.

Before considering how physical takings doctrine might be reformed to address these challenges, it is appropriate to first consider whether the numerous rulings rejecting physical takings claims can be justified by reference to applicable 'background principles." As discussed above, it is well established that a physical taking claim, like any other taking claim, will fail if "background principles" of state or federal property or tort law preclude a property owner from claiming a property entitlement in the first place. Thus, a taking claim based on an appropriation will fail if the government has a superior entitlement to ownership of the property, and a taking claim based on an occupation will not lie if the property owner lacks the right to exclude the public from the property. If all or even most of the rulings discussed above could be justified on the ground that the claims were barred by applicable background principles, the rulings would not present a significant challenge to the plausibility of a *per se* rule for physical takings. While some of the rulings discussed above can be justified by reference to applicable background principles, most of the cases cannot be disposed of so easily.

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[345] *See Reddington v. State*, 992 N.E. 2d 823, 836 (Ind. App. 2013).

[346] *Id*. at 836. *But see* Stephen Schwartz, Horne v. USDA: An Exercise in Minimalism, 10 New York University Journal of Law & Liberty 777, 793 (2016) (contending that the issue of whether it is a taking to seize a firearm from someone determined to be dangerous to themselves or other "may be closer" than some contend, observing "if property were to be taken from persons who have committed no crimes, why should they not be compensated? Along similar lines, if a state authorized a state to take title to, say, automobiles owned by persons whose driver licenses have been revoked, would that not be a taking?").

The Supreme Court has provided little guidance on the scope of background principles concept. The Court first formalized the concept in the *Lucas* case, stating that a taking claim should fail 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."[347] At another point, the Court said background principles "must inhere in the title itself," and reflect restrictions that "the State's law of property and nuisance already place upon land ownership."[348] The *Lucas* opinion strongly suggested that background principles are ordinarily rooted in the common law, but, as observed above, the Court has also suggested that longstanding statutory enactments might qualify as background principles.

Justice Scalia, the author of the *Lucas* opinion, no doubt derived the background principles concept in part from the influential writings of Professor Richard Epstein. While advocating an expansive theory of taking liability, Epstein says government should be able to resist claims when it acts to protect the public from nuisances caused by property owners. Epstein bases this exception on the theory "the wrong of the citizen justifies conduct otherwise wrongful by the state as representative of and in defense of it its citizens."[349] He believes the defense has a principled basis because it is grounded in the "neutral baseline" provided by state property law. Justice Scalia embraced this thinking when he said that the Court's takings jurisprudence "has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property."[350]

The fundamental difficulty with Scalia's (and Epstein's) theory is that their quest for a value free takings jurisprudence is chimerical. In practice, judicial resolution of a nuisance claim depends on the same kind of judgments about the harmfulness of particular property uses that legislatures make in drafting legislation. In addition, as Justice Blackmun pointed out in his dissent in *Lucas*, "there is nothing magical" about determinations of harmfulness made by judges rather than legislatures.[351]

The suggestion that longstanding legislative measures might represent background principles appears to rest on a different theory, that is, that longstanding laws shape property owners' expectations about the lawful uses of their property and therefore enforcement of such

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[347] *Lucas*, 505 U.S. at 1027.

[348] *Id*. at 1029.

[349] Richard Epstein, Takings: *Private Property and the Power of Eminent Domain* 120 (1985).

[350] *Id*. at 1027.

[351] *Id.* at 1055 (Blackmun, J., dissenting).

laws should not give rise to takings liability. However, this theory is equally problematic. The premise is that a newly enacted law, of the kind at issue in *Lucas*, cannot be a background principle and therefore may give rise to takings liability. To the extent takings claims based on such a law succeed, the awards will reinforce property owner expectations that government cannot enforce the law (without compensation) under the Takings Clause. Each successive successful taking claim will further reinforce property owners' expectations. Given this legal regime, it is impossible to explain how, either in theory or in practice, a law generating successful takings claims can, at some magic moment in time, suddenly become sufficiently venerable age to justify rejection of all subsequent takings claims.

Background principles unquestionably do and should play an important role in takings analysis, including in cases based on physical takings claims.[352] Some of the rulings discussed above can plausibly be defended on the ground they reflect the limitations placed on property interests by applicable backgrounds principles. For example, the essentially universal rule that property owners are subject to the risk that they may lose ownership of their property through the doctrine of adverse possession can sensibly be grounded in background principles.[353] However, the background principles framework is simultaneously too narrow and too malleable to serve as the exclusive basis for rejecting takings claim in cases involving appropriations or occupations.

As to the too narrow, emerging social problems and technological innovations commonly create a need for government interventions that have no obvious support in common law traditions. Similarly, new forms of environmental contamination and novel means for adulterating food or drugs may warrant unprecedented government actions. Decisions rejecting takings claims based on the impositions of user fees or the enforcement of recording acts are based squarely on the fairness and justice of the government action, rather than any limitations of the underlying property interests. In addition, as the survey of hard cases also reveals, rulings in physical takings cases commonly turn on straightforward judicial assessment of the extent of interference with investment-backed expectations and the purposes of the government actions. These factors are already prominent in takings doctrine generally and there is no principled justification for completely excluding them from consideration in physical takings cases.

As to the too malleable, the risk with the backgrounds principles concept is that it will inject a new formalism into takings law that will conceal significant normative judgments rather reveal them and subject them explicit scrutiny and analysis. When a background principle

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[352] See Michael Blumm, "*Lucas*'s Unlikely Legacy: the Rise of Background Principles as Categorical Takings Defenses," 29 *Harv. Envtl. L. Rev*. 321 (2005).

[353] Another context in which the background principles concept may appropriately apply is adverse possession. *See, e.g.*, William Mara, *Adverse Possession, Takings, and the State*, 89 U. Det. Mercy L. Rev. 1, 30 (2014) ("Adverse possession is one of the oldest rules of property law, and certainly qualifies as a 'background principle' of the state property law that imposes limitations inherent in the title,")

applies, it serves as a categorical defense to a taking claim. However, the determination whether background principles can properly be invoked often turns on an analysis of various factors that parallel the analysis of the takings question. A background principles defense that is formal in appearance but actually dependent on nuanced multifactor analysis is likely to be more malleable and unpredictable in operation than a legal doctrine that explicitly recognizes the unavoidable complexity of the judicial decision-making in this context.

In short, the Supreme Court cannot avoid the need to grapple with the difficult challenge of determining whether appropriations or occupations result in a "takings" and devising standards that reflect the complexity of the issue. It is to that task that the balance of this article is devoted.

V. Alternative Justifications for a Special Physical Takings Rule

As discussed above, the Supreme Court has not provided persuasive reasons for applying a distinctive standard to takings claims based on appropriations or occupations, much less for a strict *per se* rule. The question remains whether there are other, better arguments for applying a distinctive test to physical takings claims.

A. The Character of Physical Intrusions

One promising approach is to start with the distinctive character of intrusions on property interests caused by appropriations and occupations, and then ask whether the distinctive character of these intrusions justifies a distinctive liability test.

Appropriations as Government Exploitation. Appropriations appear problematic from a fairness and justice standpoint because they present a special risk that government officials will seek to enrich the government at the expense of its own citizen. The defining characteristic of an appropriation is that the property owner not only suffers a loss due to dispossession at the hands of government officials, but the government itself acquires an ownership interest in the property as a result. The potential for appropriations to serve government self-interest in a uniquely significant and direct way suggests the need for heightened scrutiny of appropriations under the Takings Clause. This reasoning provides a theoretical underpinning for the Supreme Court's observation 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.[354]

The late Professor Joseph Sax, in his seminal 1964 *Yale Law Journal* article,[355] identified some specific reasons why appropriations are problematic. Sax proposed a general

[354] *Penn Central*, 438 U.S. at 128

[355] Joseph Sax, *Takings and the Police Power*, 74 Yale L. J. 36 (1964).

distinction in takings doctrine between government action in an "enterprise capacity" and government action in the "role as mediator," with the former generally requiring payment of compensation and the latter generally not. "The precise rule" he proposed was this: "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."[356] Sax stressed that his theory did not turn on "whether the government has asserted a proprietary interest for itself in the affected property,"[357] but his theory necessarily encompasses straightforward appropriations of ownership.

Sax identified three reasons to be concerned about the risk government officials will burden private property owners unfairly when acting in an "enterprise capacity." First, when government "engages 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.[358] Second, when government is working to advance "its own projects," there is greater risk government will act with "excessive zeal" to achieve its goals.[359] Finally, since government does not operate under the same neighborly and community constraints as individual citizens, there is a greater risk that government will subject citizens to "extraordinary and unprecedented risks" when it acts in its enterprise capacity.[360] 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.[361] However, he thought this reasoning supported a "general policy" of requiring compensation for property intrusions associated with enterprise activity.[362]

The concerns pinpointed by Sax justify heightened judicial scrutiny of takings claims based on appropriations as opposed to simple restrictions on property use. His reasoning does

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[356] *Id*. at 62.

[357] *Id*. at 38.

[358] *Id*. at 64-65

[359] *Id.* at 65.

[360] *Id.* at 65-67.

[361] *Id*. at 67

[362] *Id.*

not necessarily support a *per se* approach to takings claims based on appropriations. However, it provides a rationale for greater judicial skepticism of government appropriations than other types of government action and for a relatively greater willingness to award compensation for appropriations. [363]

Occupations and Privacy. Occupations appear to be problematic from a takings standpoint chiefly because they commonly intrude on personal privacy. An occupation involves a government-caused, unwanted physical entry onto private land, as a result of government officials or other citizens entering the property or placing objects or material on the property. An occupation of private property should be more likely than other types of government actions to trigger takings liability because it is an intrusion of a distinctive and especially serious kind. Unlike the Court's traditional justification for occupation doctrine based on the state-law "right to exclude," this theory places the focus on the term "taking" itself.

The law of privacy is a large, sprawling doctrine protecting a wide variety of interests, including access to contraception, school choice, and freedom of political association, to cite a few examples.[364] Privacy is protected by the common law, statute, and various provisions of the U.S. Constitution. The common law of trespass secures personal privacy against intrusions. Various federal constitutional provisions provide privacy protection rooted in real property interests. The Third Amendment bars the 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." The Fourth Amendment declares that "[t]he right of the people to be secure in their . . . houses . . . against unreasonable searches and seizures shall not be violated." Various federal and state statutes also protect privacy.[365]

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[363] In discussing the measure of compensation due an owner subject to a taking, the Supreme Court has frequently said that "[t]he owner's loss, not the taker's gain, is the measure of such compensation." *Brown v. Legal Found. of Washington*, 538 U.S. 216, 236 (2003). *See also Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910) ("the 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 an alleged taking should be relevant consideration.

[364] *See* Erwin Chemerinsky, Constitutional Law (5th ed. 2017).

[365] See, e.*g*., Driver's Privacy Protection Act, 18 U.S.C. §2721 (protects against sale of personally identifiable information collected from the department of motor vehicles); Video Privacy Act, 18 U.S.C. § 2710 (protects consumers' privacy when renting videos); Right to Financial Privacy Act, 12 U.S.C. § 3401 (limiting federal government access to financial records of individuals).

The cutting edge of privacy doctrine for at least the last century has been protection of interests *not* associated with traditional property. The seminal 1890 *Harvard Law Review* article by Samuel Warren and Louis Brandies articulated the idea that a right of privacy should protect citizens from intrusive, irresponsible journalism.[366] Yet protection of privacy is a core function of enforcing private property rights. Indeed, Warren and Brandies took it as a starting place that property ownership provides a measure of personal privacy protection,[367] and built their new theory of a "right to be left alone" atop that foundation.

Privacy protection has been a consistent if overlooked thread running through takings jurisprudence. In *Kaiser Aetna* the Court noted that residents of the Hawaii Kai Marina development had paid to support patrol boats that "maintain the privacy" of Kuapa Pond.[368] In *Loretto*, the Court repeatedly referred to "strangers" entering private property as a result of government-authorized occupations.[369] In both of these cases property owners seeking to defend privacy prevailed, but privacy (or, more accurately, a lack of privacy) has also been a n issue in unsuccessful takings cases. In *PruneYard* the Court rejected the taking claim in part because the plaintiff could not show an invasion of privacy, 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."[370] In a concurring opinion Justice Thurgood Marshall stated more pointedly that enforcement of the California access requirement did not result in "an invasion of any personal sanctuary,"[371] and Justice Byron White, in yet another concurring opinion, wrote the case dealt "with public or common areas in a large shopping center and not with an individual retail establishment within or without the shopping center or with the property or privacy rights of a homeowner." [372]

The understanding that occupation claims under the Takings Clause seeks to protect privacy not only suggests why a distinctive standard might apply to occupation claims but also defines the scope of the claim. In Fourth Amendment cases, where the goal is protect individuals' "reasonable expectations of privacy," no Fourth Amendment claim will lie where an

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366 The Right to Privacy, 4 Harv. L.R. 193 (1890).

367 *Id*. at 204.

368 444 U.S. at 168.

369 458 U.S. at 436.

370 447 U.S. at 83.

371 *Id*. at 94.

372 *Id*. at 95.

individual can claim no reasonable expectation of privacy, such where some item of property is left in "plain sight."[373] Similarly as illustrated by the *PruneYard* case, no liability should lie for an occupation under the Takings Clause when the owner has waived any expectations of privacy. The rejection of the taking claim in *Heart of Atlanta Motel* can perhaps also be best explained based on a waiver of any expectation of privacy.

Grounding protection against occupations in privacy implicates the much-debated question whether corporations possess a constitutional right to privacy.[374] The Supreme Court has never squarely addressed the issue and the lower courts have reached divergent conclusions. Recently, a California Court of Appeals ruled that the Article I, Section 1 of the California Constitution, which provides that "all people" have an "inalienable right of privacy," does not apply to corporations.[375] In some cases, like in *PruneYard*, a corporate landowner may make its property "open to the public at large," waiving any possible right to privacy and mooting the issue of whether such a right even exists. However, in other instances in which corporations do exclude members of the public from their properties, the issue of whether corporations can claim an invasion of their right to privacy under the Takings Clause will be squarely raised.

B. Common Law Analogs

Special scrutiny of government-caused appropriations and occupations under the Takings Clause is also justified by their considerable overlap with the common law torts of trespass and conversion. A trespass is an intentional, uninvited entry upon the land of another.[376] A government-caused occupation of private property amounts to the same thing, with the difference that the taking claims depends upon an entry made by or at least caused by government. Not surprisingly, some claimants have joined takings claims with trespass claims; indeed, the seminal *Loretto* case included both taking and trespass claims,[377] An appropriation – type taking is parallel to the common law tort of conversion, an intentional interference with the owner's possession of property.[378]

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[373] *See Horton v. California*, 496 U.S. 128 (1990).

[374] *See* Elizabeth Pollman, A Corporate Right to Privacy, 99 Minn. L. Rev. 27 (2014).

[375] *SCC Acquisitions, Inc. v. Superior Court*, 2015 Cal. App. LEXIS 1180 (2015).

[376] Dan Dobbs, The Law of Torts 95 (2004)

[377] *Loretto*, 458 U.S. at 424. 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.

[378] Dan Dobbs, The Law of Torts 122 (2004)

Apart from this substantive overlap, takings doctrine has deep roots in tort law. As Professor Robert Brauneis has explained, in the 19th century courts and litigants framed what we now recognize as takings claims as common law torts.[379] In other words, property owners objecting to government appropriations or occupations sued in tort, not under the Takings Clause. Government defendants typically responded to these claim by pointing to their statutory authorizations for the challenged action. Plaintiffs could then counter by arguing that that the statutory authorizations should be disregarded because they amounted to government takings 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 claim.

Starting in the late nineteenth century, state courts interpreting state takings clauses,[380] and the U.S. Supreme Court interpreting the federal takings Clause,[381] adopted the view that property owners complaining of violations of their property rights can sue directly under the Takings Clause. Even as the structure of takings litigation evolved, however, claims involving appropriations and occupations retained the flavor of their common law origins. The Court commonly equates occupations with trespasses,[382] and appropriations with conversions.[383] By

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[379] *See* Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 Vand. L. Rev. 57, 69–70, and n. 33 (1999). *See also Knick v. Township of Scott, Pennsylvania*, 139 S. Ct. 2162, 2176 (2019) (discussing the history of the development of takings doctrine).

[380] *See Knick v. Township of Scott*, 139 S.Ct. 2162, 2176 (2019) ("in the 1870s . . . state courts began to recognize implied rights of action for damages under the state equivalents of the Takings Clause.").

[381] Initially the 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 Takings Clause itself. *See United States v. Causby*, 328 U.S. 256 (1946).

[382] *See Arkansas Game and Fish Com'n v. United States*, 568 U.S. 23, 39 (2012), quoting *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 329–330 (1922) ("[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."); *United States v. Causby*, 328 U.S. 256 (1946**)** ("We need not decide whether repeated trespasses might give rise to an implied contract.").

[383] *Pumpelly*, 80 U.S. at 177 (referring to a government appropriation of private property as an "absolute conversion"); *cf. Horne*, 135 S. Ct. at 2428 ("The Committee disposes of what become its raisins as it wishes, to promote the purposes of the raisin marketing order.")

the time the Court embraced the concept of regulatory takings in the early 20th century, the Court had already recognized that a taking claim can be brought directly under the Takings Clauses, meaning there was no need for litigants to hunt for a common law form of action to support a regulatory taking claim. There is no common law right of action that parallels a regulatory taking claim, which may help explain why regulatory takings doctrine did not begin to emerge until after the Court had recognized a direct right of action under the Takings Clause.[384]

Apart from history, the close substantive relationship between appropriations and occupations, on the one hand, and common law conversions and trespasses, on the other, helps explain both why courts regard appropriations and occupations as potential takings and why a distinctive standard should govern claims based on appropriations or occupations.[385] Holding the government liable under the Takings Clause for actions that support claims against private citizens under the common law furthers an important equal treatment principle and demonstrates that the government is not above the law. A property owner will be injured in the same way by construction of a dam that floods his land whether the dam is privately or publicly owned, and ordinarily a citizen would make no distinction between an appropriation of his automobile by his neighbor or some government official. Imposing broad liability on the government for appropriations and occupations under the Takings Clause ensures 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.[386]

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[384] On the other hand, in accord with its recognition of physical takings claims that are parallel to common law trespass and conversion claims, the Supreme Court has recognized that government-caused nuisances can potentially support successful takings claims. *See Richards v. Washington Terminal Co*., 253 U.S. 546 (1914).

[385] The theory that takings doctrine can be explained in part by analogy to common law claims arising from private wrongs to private property owners 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. *Bowditch v. Boston*, 101 U.S. 16, 18–19 (1880); see *United States v. Pacific R., Co.*, 120 U.S. 227, 238–239 (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 Dan Dobbs, The Law of Torts 248-52 (2004).

[386] One important theoretical 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) (Although consent to sue was . . . given [by the Tucker Act]. . . Congress retained power to withdraw the consent at any time. For

C. Economic Redistributions Compared

If concerns about government exploitation and invasion of privacy represent the normative cores of appropriation and occupation doctrine, what is at the core of regulatory takings doctrine? The answer the Supreme Court has implicitly provided is that scrutiny of use restrictions under the Takings Clause primarily guards against redistributions of wealth from individual property owners to the public as a whole. Government restrictions on the use of private property obviously implicate numerous different personal and social interests, as well as a variety of constitutional protections, but the Takings Clause, in the context of challenges to use restrictions, treats property primarily as an economic commodity and supports rules policing against excessive diminutions in property values caused by the government to advance public purposes. As Justice Scalia asked rhetorically in *Lucas*, quoting Lord Coke, "For what is the land but the profits thereof?"[387]

VI. Reconstructing Physical Takings Doctrine

This final section tackles the ultimate question of what standard(s) the Supreme Court should prescribe for evaluating whether an appropriation or an occupation is a compensable taking. The proposed answer is that physical taking claims should be treated differently than regulatory takings claims, because physical takings claims implicate different normative concerns than regulatory takings claims and involve important equal application of the law concerns not raised by regulatory takings claims. The upshot is that the Court should continue its current approach of not applying the "parcel as a whole" rule in physical takings cases, but continue to evaluate regulatory taking claims using the parcel rule. However, the Court, in accord with *some* of its conflicted precedent, should eschew a literal *per se* approach to physical takings claims. Economic impact should be irrelevant in physical takings cases, but other elements of traditional *Penn Central* analysis – notably the extent of interference with a claimant's expectations, and the "character" or purpose of the government action – should be included in physical takings analysis. This version of physical takings doctrine is still "*per se*," at least in the sense that it disregards economic impact and the parcel as a whole rule. However, it is not a literal, mechanical *per se* approach. It has the advantages of permitting consideration of

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consent to sue the United States is a privilege accorded, not the grant of a property right protected by the Fifth Amendment."), and most states have read their state takings clauses as implicitly abrogating state sovereign immunity. *See, e g*., *SDDS, Inc. v. South Dakota*, 650 N.W.2d 1, 9 (S.D. 2002); *Boise Cascade Corp. v. Oregon*, 991 P.2d 563 (Or. Ct. App. 1999). The argument presented here based on equality before the law assumes that private parties and governments are, as a practical matter, equally subject to suit for wrongs to property interests.

[387] 505 U.S. at 107, quoting1 E. Coke, Institutes, ch. 1, § 1 (1st Am. ed. 1812).

important indicators of fairness and may actually reflect the nuanced version of physical takings doctrine toward which the Court has been groping.

A. The Relevance and Irrelevance of the Parcel Rule

While there is much about physical takings law that is obscure, the Supreme Court has been clear on one point: the so-called "parcel as a whole" rule has no role to play in a physical takings case. In a regulatory takings case, as discussed in section I, the impact of a restriction on the permitted uses of property is assessed by examining how it changes the value of the claimant's property as whole. Thus, if a regulation bars development of one acre of wetlands on a 100-acre property, the negative economic impact (if any) is measured by comparing the value of the 100 acres with and without the restriction on the one acre of wetlands. By contrast, an appropriation or occupation of one acre of the claimant's property is treated the same for the purpose of determining taking liability regardless of whether the appropriation or occupation affects the entirety or only a portion of the claimant's property.

These divergent approaches to the parcel issue are justified in light of the distinctive normative concerns implicated by the different types of takings claims. As discussed, a regulatory taking claim primarily explores the economic loss (if any) a landowner suffers as a result of a regulatory restriction on property use. With that objective in mind, the whole parcel rule serves several useful purposes. First, it refers to a unit of property that is commonly exchanged in the marketplace, the value of which (with and without the regulatory restriction) can be determined from available market data with relative ease. Second, and more importantly, the whole parcel approach permits courts to consider the positive as well as the negative effects of regulatory restrictions on property value. A restriction on the use of a portion of a property will typically exert a negative effect on the value of that portion considered in isolation. But other portions of a claimant's contiguous property may already be developed or remain available for development under the regulations. Reasonable regulations applied across a community can positively impact property values by preserving amenities that make a community a desirable place to live and work, and by restricting development opportunities, thereby limiting the supply of developable land, and increasing the value of already development parcels and portions of property still available for development. An objective assessment of the burden allegedly imposed by a land sue restriction calls for consideration of both sides of the equation. The parcel rule is crucial in making an objective assessment of the net economic impact of a regulatory restriction.

Physical takings claims, by contrast, call for an essentially binary inquiry into whether or not the government has either (1) exploited the property owner by appropriating her private property for the government's own use, or (2) invaded her privacy by occupying her property. Unlike a regulatory taking claim, which calls for toting up the positive and the negative impacts of the regulation of property value, a physical taking presents the simpler question of whether or not the government has appropriated or occupied private property. The answer to that question is

not influenced by whether the owner possesses other property that may be unaffected by the government action.

In addition, the equality before the law principle also supports disregarding the parcel as a whole concept in the context of appropriation and occupation claims. The common law of trespass and conversion do not distinguish between trespasses and conversions that affect the entirety of an owner's property holding or only a part. A citizen's invasion of a neighbor's property is still a common law trespass even if it only affects a portion of the neighbor's land. A conversion of some part of another citizen's property is still a common law conversion. Thus, equal treatment of appropriations and occupations, whether committed by private parties or government officials, is best served by not applying the parcel rule in physical takings cases.

B. Alternative Architectures of Takings Doctrine

Beyond the threshold parcel issue, there are a variety of ways, recognizing the different normative concerns raised by the different types of takings claims, in which takings doctrine could be constructed. This subsection lays out these alternatives, and the following subsection analyzes the pros and cons of each approach.

Starting from scratch, one option would be a "kitchen sink" approach for all takings claims regardless of the type of government action involved. This option is, for all intents and purposes, the analytic framework outlined in the Court's original 1978 *Penn Central* opinion, prior to the Court's formulation of distinct, ostensibly "*per se*" tests for appropriations and occupations. As discussed above, while the *Penn Central* case is now viewed as a regulatory taking precedent, the Court wrote its 1978 opinion to encompass claims based on use restrictions, appropriations, and occupations. The *Penn Central* Court suggested that all takings claim should be analyzed using the same basic framework, focusing on economic impact, extent of interference with investment-backed expectations, and the character of the government action. At the same, as described above, the Court suggested that physical claims should be heard with some unquantified extra judicial sympathy. That extra sympathy could be interpreted to implicitly reflect the special concerns about government exploitation and invasion of privacy raised by appropriations and occupations, but the Court did not frame its discussion in those terms.

Going to the opposite extreme, another alternative would be an absolute categorical liability rule that applies to all forms of alleged takings. Under this alternative, any regulatory restriction on the use of property, any appropriation, and any occupation, regardless of any other consideration, would be treated as a compensable taking. This alternative is, in effect, the extreme theory of takings law championed by Professor Richard Epstein.

Yet a third alternative, intermediate between the two alternatives laid out above, would apply different standards to takings claim depending on whether they arise from regulatory

restrictions on property use, appropriations or occupations. Because the goal of this article is to articulate a standard for physical takings claims, established regulatory takings analysis will be taken as a given, with the *Penn Central* multi-factor framework applied to partial regulatory takings and the *Lucas* "*per se"* rule applied to "total" regulatory takings. The meaning of the *Lucas per se* rule is a matter of controversy, and that controversy is not unrelated to questions about the nature and scope of the "*per se"* rule for physical takings, but the focus here is on physical takings.

Under this third approach, Supreme Court case law suggests two possible ways to handle physical takings claims as a category distinct from regulatory takings claims. First, physical takings claims could be governed by an absolute categorical rule. In other words, assuming no pertinent background principle bars the claim at the threshold, appropriations and occupations would automatically be treated as takings based simply on the fact that an appropriation or occupation occurred. Second, physical takings claims could be evaluated using some test intermediate between a traditional regulatory takings analysis and a strict categorical rule. Bowing to strong and consistent Supreme Court precedent, and for sound reasons to be explored below, economic impact would be banished from consideration under this alternative. On the other hand, evaluations of physical takings claims would take into account the extent of the interference with the claimant's expectations and the character or purpose of the government action.

C. A Reconstructed Physical Takings Doctrine.

The "kitchen sink" approach, though already discarded by the Court, offers several potential benefits. Applying a single comprehensive analytic framework has the advantage of simplicity. It also avoids the need for line-drawing between different categories of takings cases. On the other hand, this approach is difficult for courts to apply in a principled, predictable fashion. The adverse economic impact and physical intrusiveness of a government action are certainly both relevant in the takings calculus generally, and it is possible to weigh each factor together and against the other in a single case. Indeed, for most of the history of physical takings doctrine, the Supreme Court called for consideration of both the physical intrusiveness of the government action and its economic impact in physical takings cases. But physical intrusiveness and economic impact are incommensurate factors, making it difficult for courts to decide cases using this multivariable approach. Moreover, for the reasons discussed above, physical takings claims implicate, at their core, normative concerns about exploitation and privacy to which the economic impact of the government action is largely if not completely tangential. Furthermore, while reference to a relevant parcel is necessary to assess economic impact, the whole parcel has no useful role to play in gauging government exploitation or invasion of privacy. In sum, attempting to weigh all takings claims using a single multi-factor framework would

The second approach, applying an absolutist *per se* rule to all types of takings claims, also has some advantages. Courts could apply a mechanical rule of universal takings liability in

straightforward fashion. And since all forms of alleged takings would be subject to the same categorical rule, there would be no line-drawing challenges. The most obvious problem with this approach, especially as applied to regulations, is that it would convert virtually every government action affecting private property into a compensable taking. Apart from its lack of support in precedent or history, this approach would be irrational economically. As Professor Michelman observed many years ago, adjudicating and processing claims for just compensation generates burdensome "settlement costs," which may well exceed the fairness benefits of awarding compensation. Furthermore, as discussed above, regulations commonly confer substantial benefits on regulated property owners (as well as society as whole). Requiring the public to pay for every regulatory constraint would either confer an unfair windfall on some property owners and/or block government from adopting economically beneficial regulations.

The third approach, which divides regulatory takings claims from physical takings claims, could be implemented either by applying an absolutist *per se* approach or a more nuanced approach to physical takings cases. As the survey of case law in Sections I and II demonstrates, the Supreme Court has not definitively endorsed one approach or the other. The basic case for rejecting the first alternative and embracing the second is that there are convincing reasons for taking into account both owner expectations and the character or purpose of the government action in physical takings cases as well as in regulatory takings cases.

The Court introduced the expectations factor in the *Penn Central* case; Justice Brennan, author of the Court's opinion, apparently lifted the concept from Professor Michelman's 1967 article.[388] As discussed in section 1, the Supreme Court has defined the expectations factor in various ways, including whether the claimant had "notice" of the regulation when she acquired the property, and whether the regulation was "foreseeable" based on the nature of the regulatory environment or the probable public concerns associated with the regulated activity. More generally, the expectations concept reflects idea that government routinely affects property values, both positively and negatively, and dealing with such impacts is part of the price of "living in a civilized community."[389]

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[388] See Michelman, 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 the uses to which property can be put and that 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.

[389] *See Andrus v Allard*, 444 U.S. 51, 67 (1979), quoting *Pennsylvania 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.'").

The same reasons that support consideration of expectations in other takings cases support consideration of expectations in physical taking cases. A legal regime already in place when the property is acquired provides fair warning that the property might be appropriated or occupied by the government. If and when the property is appropriated or occupied, the owner cannot claim that such an interference impairs investment-backed expectation. The character of the regulatory environment and the nature of the regulated activity itself also may give fair warning. Just as a lack of interference with investment-backed expectations may not bar a regulatory taking claim, a lack of interference with investment-backed expectations may not preclude a physical taking claim. However, it is at least a factor worthy of consideration. This conclusion is consistent with and supported by the decisions discussed in section IV rejecting physical takings claims based on banking regulations and recording acts for lack of a significant interference with investment-backed expectations.

The conclusion that a lack of expectations should weigh against physical takings claims is supported by the substantial authority supporting consideration of expectations in a Lucas-type regulatory taking case. The *Lucas* case involved a property owner who paid a substantial sum for two developable lots, after which the State of South Carolina adopted legislation prohibiting development of the lots, rendering them valueless. While *Lucas* decision contains language suggesting that a regulatory denial of all economic use of private property is a "*per se*" taking, the decision does not resolve how the courts should resolve an otherwise similar case in which the claimant sued based on a regulatory prohibition that was *already in place* at the time of purchase. A discussed in section 1, several federal appellate courts have declined to read *Lucas* as precluding consideration of a claimant's lack of investment-backed expectations in a "total" taking case. If a lack of investment-backed expectations can play a role in a "*per se"* regulatory takings case, why not in a "*per se"* physical taking case?

Courts also should consider the characater or purpose of the government action in evaluating physical takings claims. More specifically, courts should consider whether the government action at issue is designed to protect against threats to public health and safety or to recoup the value of some special benefit conferred on a property owner by the government.

Implicit in the suggestion that courts should consider the government's harm-preventing purpose in physical taking cases is the premise that a meaningful distinction can be drawn between benefit-conferring and harm-preventing action. Justice Scalia, writing for the majority in *Lucas,* famously disparaged the notion that benefit-conferring government action can be distinguished, "on an objective, value-free basis," from harm-preventing action. His position stands in stark opposition to the Court's longstanding position that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the

community."[390] *Lucas* resolved the tension between these two viewpoints by holding that a *legislative* determination that government action is necessary to protect the public from harm cannot defeat a total taking claim; to defeat such a claim, *Lucas* ruled, a government defendant must point to some "background principle" of nuisance or property law that bars the claimant from asserting a vested property right to begin with.

However, importantly, *Lucas* does not necessarily proscribe consideration of the harm-preventing purpose of a legislative measure that is only alleged to effect a partial taking subject to challenge under *Penn Central*. Indeed, Justice Scalia argued that applying the harm prevention-principle on the facts of *Lucas* would "essentially nullify *Mahon*'s affirmance of limits to the noncompensable exercise of the police power,"[391] an argument that implicitly leaves open the possibility that a legislature's harm-preventing purpose would be relevant in a partial taking case. Finally, Justice Scalia pointed out in *Lucas* 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," an observation that again implicitly recognized that the legislature's harm-preventing purpose may be taken into account in a partial taking case.More fundamentally, the idea that "no meaningful distinction" can be drawn between benefit–conferring and harm-preventing regulation is deeply problematic.

While there are undoubtedly borderline cases, the distinction can ordinarily be clearly drawn. For example, on the landmark designation preserving Grand Central Terminal in its relatively pristine historical form plainly conferred a public benefit; by contrast the regulations designed to protect campers from the risk of flooding at issue in *First English* were a harm-preventing measure. On the physical takings side, a marketing order designed to maintain price stability in the raisin industry is a benefit –conferring regulation whereas a law authorizing the seizure of adulterated drugs, diseased animals, or lethal weapons naturally fit into the harm-prevention category As I have expressed before, "while 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."[392]

The fact that nuisance doctrine is a "background principle" for takings purposes supports the conclusion that the harm-preventing character of a government action is a relevant factor in

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[390] *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491-92 (1987); *Mugler v. Kansas*, 123 U.S. 623, 665 (1887).

[391] 505 U.S. at 1026

[392] See John D. Echeverria, *Making Sense of Penn Central*, 23 UCLA Journal of Environmental Law 172, 209 (2005).

physical takings analysis. The nuisance defense is rooted in the idea that some harmful activity is so inherently problematic that a property owner should be barred from claiming a property entitlement to engage in such activity. It would make little sense to conclude that a physical appropriation or occupying preventing harmful activity can never be a taking if it represents a common law nuisance, but that the harmfulness of an activity that stops a few steps short of being a nuisance should be completely irrelevant in the takings analysis. Making such a sharp distinction would unreasonably privilege judicial judgments about what activities are harm-producing over legislative judgments. The legislative branch is at least as well equipped as the judiciary to discern whether particular activities pose a threat of harm to the public, and it may be better equipped than the judiciary to identify new and emerging threats. The cases discussed in section IV rejecting takings claims based on seizures of diseased animals or adulterated foods or drugs can be justified based this harm-preventing rationale.

The purpose of government action also should come into play when the government has acted for the specific purpose of benefiting the claimant herself. A property owner should not be able 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 exchange for some other benefit conferred on the property owner by the government. The first scenario is illustrated by the case of *National Bd. of YMCA v. United States,* in which the Court rejected a claim that the government took private property when military personnel occupied a private office building to protect and defend them building from rioters. Tellingly, the Court rejected the takings claim on the ground that the military acted for the "protection" of the claimant's buildings. While the Court recognized that "any protection of private property also serves a broader public purpose," it reasoned that, "where, as here, the private party is the particular intended beneficiary of the governmental activity, 'fairness and justice' do not require that losses which may result from that activity 'be borne by the public as a whole,' even though the activity may also be intended incidentally to benefit the public."[393] This logic seems unassailable.

The second scenario is illustrated by the case of *United States v. Sperry*, in which the Court rejected a claim that the government took private property by deducting a charge akin to a "user fee" from an award made by the Iran-United Claims Tribunal. The United States successfully argued the deduction was intended to reimburse the government for its expenses incurred in connection with the arbitration process and the paying out of claims. The Court observed that this type of financial imposition "is not a taking if it is imposed for the reimbursement of the cost of government services."[394] This logic applied, the Court said, even if

[393] 395 U.S. at 92.

[394] 493 U.S. at 63, citing *Massachusetts v. United States*, 435 U.S. at 462 (plurality opinion) ("A governmental body has an obvious interest in making those who specifically benefit from its services pay the cost.").

the government was "charging" the company "for the use of procedures that it has been forced to use, or at least that it would rather not have used."[395]

D. Applying the Reconstructed Approach to Physical Takings

The final step is to ask how some of the Supreme Court's leading cases would be resolved, and how some of the key elements of modern physical takings doctrine stand up, when analyzed under this proposed reconceptualization of physical takings doctrine.

The *Loretto* case would come out the same way. 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 tiny and its economic impact was minimal, but neither of these facts would bar the claim. Ms. Loretto could properly assert that the New York statute interfered with her investment-backed expectations, because it was enacted after she purchased the property. The defendants could not plausibly contend that the statute was designed to prevent some public harm, nor could they contend that the statute was enacted for Ms. Loretto's specific benefit. It could be contended that cable installation increased the value of the building for rental purposes or for resale, but the primary beneficiaries of the New York law were the cable companies and their customers, not building owners like Ms. Loretto.

The *Loreto* case is unquestionably a "hard" case because the proposed *per se* rule leads to the conclusion that a taking occurred even though the economic impact of the government action was virtually nil. But this outcome is the inevitable result of a doctrinal architecture in which the degree of economic impact is confined to one category of cases and excluded from consideration in another. Hard cases are the unavoidable outcome of applying predictable general rules the overall advantages of which are designed to outweigh their disadvantages.

On the other hand, the *Horne* case appears to endorse a flexible physical takings test consistent with the approach suggested here. As discussed, the *Horne* Court distinguished *Monsanto*, in which the Court rejected a physical taking claim based on an appropriation intended to limit the effects of a "hazardous" and "dangerous" product. The *Horne* Court's implicit reaffirmation of *Monsanto* is consistent with the argument that the harm-preventing purpose of a government action should be factored into the physical takings analysis.

Another argument that could have been made, but that was not made, in *Horne* is that there was no compensable taking because the primary purpose of the marketing order was to confer a direct benefit on the plaintiff and other raisin growers. The raisin marketing order, like other similar agricultural marketing orders, was instituted in the Great Depression in response to ruinously low crop prices as a way to prop up the income of agricultural producers. It is not an exaggeration to describe the marketing order as a government-orchestrated (but largely producer-

[395] Id. at 63.

run) cartel designed to benefit producers at the expense of consumers forced to pay above market prices for raisins. The government did not raise this argument and the Court did not address it, but the *Horne* Court might well have ruled, based on the authority of *National Bd. of YMCA and Sperry*, that there was no taking because the government acted for the specific purpose of directly benefiting the plaintiffs and other growers.

Finally, the analytic framework proposed in this article suggests a different approach than that followed by the Supreme Court in *Arkansas Game and Fish Commission*. As discussed, the case arose from temporary flooding caused by the Army Corps of Engineers' modifications to operations of a dam upstream from the claimant's property. The Supreme Court upheld the plaintiff's taking theory, rejecting the argument that "temporary" flooding cannot support a taking claim as a matter of law." But the Court also rejected the argument that the claim should be evaluated using the *per se* test applicable to permanent occupations, ruling instead that the claim should be evaluated using a multi-variable framework that is similar to but not he same as her traditional *Penn Central* framework.[396] The Court offered no explanation for why this special test should apply to temporary takings claims, other than to observe that since *Loretto* the Court has confined the "*per se*" test for physical occupations to *permanent* occupations. As discussed above, this reasoning rest on a thin reed because the *Loretto* Court did not attempt to explain why, as a matter of first principles, permanent occupation claims should be treated differently than temporary occupation claims. Instead, the Court essentially invented the distinction between permanent and temporary occupations out of whole cloth, apparently largely as a way of distinguishing prior occupation cases which the Court had analyzed suing the *Penn Central* framework. [397]

Under the framework presented in this article, the Court erred in *Arkansas Game and Fish Commission* in ruling that different standards govern taking claims based on temporary as opposed to permanent occupations. The justifications for the distinctive takings test governing occupations is that occupations involve an invasion of privacy and the same kind of property impairment addressed by common law trespass actions. Whether or not a government action invades privacy is not dependent on whether the invasion is temporary or permanent, and common law liability for trespass will lie for a purely temporary trespass. This, in light of the justifications for physical takings doctrine outlined in this article, there is no basis for drawing

[396] Specifically, the Court referenced the following "relevant considerations:" the degree to which the occupation "is intended or the foreseeable result of authorized government action;" the "character of the land at issue;" the owner's "'reasonable investment-backed expectations' regarding the land's use;" and the "severity of the interference." 568 U.S. at 39.

[397] *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. at 435 n. 12 ("The permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude," the Court declared, citing *PruneYard* and *Kaiser Aetna* as examples of temporary occupations).

any distinction in the test governing temporary and permit occupations claims. This conclusion does not necessarily mean that a temporary occupation claim would be more or less likely to succeed than under the Court's current temporary occupation test, but it does mean that the claim would be analyzed based on (mostly) other considerations, the same considerations that would apply to a permanent occupation claim.

CONCLUSION

The problems with modern physical takings doctrine have been hiding in plain sight for many years. Relegated to a corner as simple and obvious, especially relative to the ostensibly more modern, complicated and contentious doctrine of regulatory takings, physical takings doctrine has been left to languish, largely unexamined and untested. As revealed in part by the Supreme Court's own halting and tentative approach to physical takings issues, modern takings claims turn out to be as interesting and complicated as the rest of takings law. Moreover, many of the crucial questions about how to construct a physical takings doctrine that advances the Supreme Court's goals of fairness and justice turn out to be largely the same in both the realms of physical and regulatory takings. They key to better physical takings doctrine is to recognize that it has, or should have, more in common with regulatory takings doctrine than is commonly assumed.