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The Total Takings Myth

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THE TOTAL TAKINGS MYTH

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For almost thirty-five years, the U.S. Supreme Court has attempted to carve out a total takings doctrine within its regulatory takings jurisprudence. Most regulatory takings claims are evaluated under the "ad hoc" three-factor test first articulated in Penn Central Transportation Co. v. City of New York. *Exceedingly few of these claims are successful. But the Court has identified certain categories of government actions that are compensable takings per se, otherwise known as total takings. This began in 1982 with* Loretto v. Teleprompter Manhattan CATV Corp., *where the Court held that a land use ordinance requiring a landowner to endure a permanent physical occupation of a portion of her property is always a compensable taking. Ten years later, in* Lucas v. South Carolina Coastal Council, *the Court held that a land use restriction depriving an owner of all economically viable use of her property is also compensable per se. Finally, in 2015, in* Horne v. Department of Agriculture, *the Court extended its total takings jurisprudence to personal property, announcing that the government appropriation of personal property is a per se compensable taking.*

Although the Court has had more than three decades to articulate theoretical justifications for its total takings jurisprudence and to provide guidance for lower courts in determining when a regulation constitutes a total taking, it has failed to do so. This failure reflects the underlying reality that the total takings doctrine is a myth. More particularly, the categories that the Court has identified as constituting total takings are analytically incoherent, and the terms the Court has used to demarcate total takings from regulations that are not per se compensable cannot be applied in the real world. As a result, lower courts struggle to apply the total takings doctrine and the case law remains in utter disarray. In fact, lower courts have resorted to creating "shadow" total takings doctrines that rely on obvious distortions of the plain meaning of outcome-determinative terms and deflect attention from the fundamental question of whether compensation is warranted.

This Article argues that the Court's attempt to create a total takings doctrine has failed, and that the Court should repudiate it. It demonstrates that the Court's initial total takings opinions were conceptually incoherent and woefully undertheorized. And it shows that attempts by lower courts to

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rehabilitate the doctrine by crystallizing the bright-line rules through careful and consistent application were doomed to, and did, fail. This Article also explains why the entire enterprise was misguided from the start. Although bright-line rules have their place, it is not in the heart of regulatory takings doctrine, which is premised on concerns for fairness and justice in distributing the burdens of land use regulation.

Last term, the Court had a perfect opportunity to begin the process of repudiating the total takings myth. Murr v. Wisconsin *was a run-of-the-mill regulatory takings case masquerading as a* Lucas*-type total takings claim, and it presented the Court with a vehicle to either remedy the central doctrinal incoherence of* Lucas*'s bright-line rule or to overrule* Lucas *and turn its attention to the much needed task of clarifying and refining the* Penn Central *test. Instead, by offering a new multifactored test in a sort of regulatory takings "step zero," the Court in* Murr *merely exacerbated the core flaws of the* Lucas *bright-line rule. Now, more than ever, it is imperative that the Court recognize and begin to dismantle the total takings myth.*

INTRODUCTION

In June 2015, the U.S. Supreme Court decided a takings case involving an obscure New Deal government program regulating, of all things, the sale of raisins.[1] This little raisin dispute had been mired in the federal courts for more than twelve years and last term it reached the nation's highest court a second time.[2] While the actual dispute between the raisin growers and the Raisin Administrative Committee appears to have been resolved,[3] *Horne II* ultimately raises more questions than it answers.

In *Horne II*, the Court purported to add yet another bright-line rule to its regulatory takings jurisprudence, holding that any physical appropriation of personal property is a per se taking and therefore categorically compensable.[4] In light of the total takings holding in *Horne II*, the Court now recognizes three circumstances in which government regulation of property is always a taking under the Fifth Amendment.[5] In addition to the *Horne II* rule—that physical appropriation of personal property is a per se taking—the other two categories of government regulation that require compensation per se are those that deprive a landowner of all economically viable use of her land[6] and those that impose a permanent physical occupation on real property.[7] According to the Court, each of these three types of regulations is categorically different from the mine-run of governmental restrictions on property rights because it deprives the property owner of the core interests that constitute property ownership.[8]

The Court's "total takings" jurisprudence comprises these three circumstances.[9] By contrast, regulations limiting the use of real and personal

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1. Horne v. Dep't of Agric., 135 S. Ct. 2419 (2015) (*Horne II*).

2. The first time the case went to the Supreme Court, the issue was jurisdictional. The Court held that the Agricultural Marketing Agreement Act of 1937 (AMAA) provides a comprehensive remedial scheme that withdraws Tucker Act jurisdiction over takings claims brought as a defense to AMAA fines. Horne v. Dep't of Agric., 133 S. Ct. 2053, 2063 (2013) (*Horne I*).

3. The Court declined to remand the case to a lower court to assess takings damages, noting that "[t]his case, in litigation for more than a decade, has gone on long enough." *Horne II*, 135 S. Ct. at 2433. Instead, the Court set damages itself, effectively terminating the litigation. *Id.*

4. *Id.* at 2430–31 (holding that the government's demand that the Hornes turn over a percentage of their raisins without charge for the government's control and use is a unique taking that requires compensation).

5. The Fifth Amendment provides, in part, "[n]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

6. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992).

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

8. *See id.* at 435 ("Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it.' To the extent that the government permanently occupies physical property, it effectively destroys *each* of these rights." (quoting United States v. Gen. Motors Corp., 323 U.S. 373, 378 (1945))).

9. In *Lucas*, the Court announced the "categorical rule that total regulatory takings must be compensated." *Lucas*, 505 U.S. at 1026. Justice John Paul Stevens's dissent in that case reduced this phrase to "total takings" several times. *Id.* at 1065 (Stevens, J., dissenting). Scholars have since referred to *Lucas*-type takings as "total takings," but the phrase has not entered the common lexicon as a description of the Court's three per se rules. The term is

property that do not fit into one of the three categories—that are, in other words, not total takings—are analyzed using more nuanced tests in which the Court evaluates several factors. Land use restrictions that do not deprive the land owner of all economically beneficial use or impose a permanent physical occupation are analyzed under an ad hoc, multifactored approach first articulated in *Penn Central Transportation Co. v. City of New York*.[10] Landowners rarely prevail in takings claims evaluated under the *Penn Central* three-factor test.[11] Similarly, the Court considers many factors in evaluating takings challenges to the mine-run of governmental actions that impact personal property rights, and it has rarely held such restrictions to require compensation.[12] Thus, the Court now purports to draw bright lines that identify three categories of government regulations that are total takings and therefore compensable per se, while all other governmental restrictions on the use of real and personal property are evaluated under multifactored tests and are rarely held to constitute compensable takings.

However, since the Court first began its quest to carve out bright-line per se takings rules almost thirty-five years ago, scholars,[13] courts,[14] and even Supreme Court Justices[15] have lamented the lack of doctrinal coherence and theoretical foundation in the Court's total takings jurisprudence. As these commentators have pointed out, the concept of a deprivation of all economically viable use requires a theoretical and practical understanding of the denominator to be used in the calculus.[16] That is, a regulation prohibiting

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used here because it best describes what the Court claims to be doing in all three circumstances.

10. 438 U.S. 104 (1978).

11. *See* David A. Dana, *Why Do We Have the Parcel-as-a-Whole Rule?*, 39 VT. L. REV. 617, 617 (2015) ("If the [diminution in value] is less than 100%, the *Penn Central Transportation Co. v. City of New York* ad hoc, contextual, multi-factor analysis applies, and generally the government prevails.").

12. *See, e.g.*, Horne v. Dep't of Agric., 135 U.S. 2419, 2438–40 (2015) (Sotomayor, J., dissenting) (explaining the Court's approach to regulatory takings claims aimed at governmental restrictions in the use of personal property that is "a fungible commodity for sale").

13. *See, e.g.*, Steven J. Eagle, *The Four-Factor* Penn Central *Regulatory Takings Test*, 118 PENN ST. L. REV. 601, 602 (2014); Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1088 (1993).

14. *See, e.g.*, City of Coeur d'Alene v. Simpson, 136 P.3d 310, 319 (Idaho 2005) ("Identifying the denominator parcel is no easy task."); Machipongo Land & Coal Co. v. Commonwealth, 799 A.2d 751,768 (Pa. 2002) ("As we have noted above, the Supreme Court has not instructed conclusively how the denominator problem should be resolved.").

15. Even the majority in *Lucas* conceded that the bright-line rule it created lacked theoretical coherence. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1008, 1016 n.7. (1992) ("Regrettably, the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured."); *see also id.* at 1066 (Stevens, J., dissenting) ("In short, the categorical rule will likely have one of two effects: Either courts will alter the definition of the 'denominator' in the takings 'fraction,' rendering the Court's categorical rule meaningless, or investors will manipulate the relevant property interests, giving the Court's rule sweeping effect.").

16. *See, e.g.*, F. Patrick Hubbard, Palazzolo, Lucas, *and* Penn Central*: The Need for Pragmatism, Symbolism, and Ad Hoc Balancing*, 80 NEB. L. REV. 465, 480 (2001) ("*Lucas* is factually narrow and conceptually vague. Consequently, the case does not clearly guide and

development on one acre of wetlands in the corner of a five-acre lot can be viewed as depriving the landowner of 100 percent of that acre of land or 20 percent of the entire lot. The Court has not provided a doctrinal explanation or theoretical foundation for choosing one view or the other.[17] Similarly, no regulation that imposes a physical occupation on a landowner, such as the requirement that she allow a cable company to attach a cable to her apartment building, is ever truly permanent in the metaphysical sense of the word. But the Court's limited attempt to define what counts as a permanent physical occupation versus a temporary physical invasion for per se takings purposes is theoretically incomplete, and what little theory the Court has offered does not even explain the outcomes in its own cases applying the rule.[18] The new per se rule announced in *Horne II* is similarly undertheorized and impossible to reconcile with prior cases.

Rather than add to the now-copious scholarship criticizing or attempting to rehabilitate the Court's total takings jurisprudence, this Article argues that the Court should acknowledge that its attempt to draw bright-line rules in regulatory takings jurisprudence failed at its inception and should abandon the total takings enterprise altogether.[19] Notwithstanding the Court's continued insistence that there are categories of government regulation that require compensation per se without consideration of any other factors, this Article contends that no such categories exist. Because the total takings categories have no theoretically coherent content or boundaries, lower courts[20] have been forced to make sense of nonsensical standards. In doing

limit lower courts. Instead, *Lucas* performs the symbolic function of strongly endorsing the value of property rights and criticizing regulatory excess while also allowing regulation to restrict the use of property in a wide range of circumstances."); Danaya C. Wright, *A New Time for Denominators: Toward a Dynamic Theory of Property in the Regulatory Takings Relevant Parcel Analysis*, 34 ENVT'L L. 175, 180 (2004) ("The current approach to the denominator issue is . . . incoherent and illogical.").

17. The Court has not just failed to provide an answer to "this difficult question," it has actually "produced inconsistent pronouncements" and often simply declined to address the question. *See Lucas*, 505 U.S. at 1016 n.7 ("Unsurprisingly, this uncertainty regarding the composition of the denominator in our 'deprivation' fraction has produced inconsistent pronouncements by the Court. . . . In any event, we avoid this difficulty in the present case . . . ." (citations omitted)).

18. *See infra* Part II.

19. Professor Michael McConnell recently suggested that the Court abandon its *Lucas* holding as well. *See* Michael W. McConnell, *The Raisin Case*, 2015 CATO SUP. CT. REV. 313, 318 ("The total-loss rule has long been recognized as a conceptual disaster area, incapable of objective and consistent administration. It should be abandoned where it now holds sway . . . .").

20. Because the Court's takings jurisprudence is applied in both federal and state courts, and state courts are not inferior tribunals to the U.S. Supreme Court, the term "lower courts" is not a strictly accurate way to refer to the courts that are forced to wrestle with the Supreme Court's total takings myth. However, "[a]n overwhelming majority of states whose constitutions or statutes contain provisions similar to the Takings Clause have interpreted these provisions as encompassing regulatory takings, and these states have used the analytical framework developed by the United States Supreme Court when adjudicating regulatory takings claims." Phillips v. Montgomery County, 442 S.W.3d 233, 240 (Tenn. 2014). In this context, state courts are subordinate to the Supreme Court. Therefore, this Article refers to both lower federal courts and state supreme courts as "lower courts." Some states, however, have interpreted the takings clauses in their own state constitutions as providing greater

so, lower courts crafted shadow total takings doctrines that distort the language the Court used to carve out the categories in the first instance and now incorporate other factors—some of which are inconsistent with the total takings cases—to determine whether a regulation constitutes a total taking. Thus, the jurisprudence of total takings is a myth, and continued attempts to bring coherence to the concept are both futile and counterproductive.

The unveiling of the total takings myth is not merely an exercise in semantics. The myth exerts powerful influence over the scope and extent of regulatory takings litigation and property ownership practices in several ways. First, the Court's resort to a vocabulary of bright lines and categorical takings obfuscates its regulatory takings jurisprudence. By focusing its attention on total takings doctrine for the past thirty-five years, the Court has evaded its obligation to provide much-needed guidance on the resolution of mainstream regulatory takings claims. Eliminating the per se rules will force courts to face the difficult issues still plaguing regulatory takings jurisprudence. Second, the allure of using a bright-line rule and a potential per se takings holding encourages litigants to attempt to shoehorn their mainstream regulatory takings claims into one of the total takings categories. This litigation strategy forces lower courts to wrestle with lines that cannot logically be drawn. As a result, lower courts have developed and adopted creative interpretations of the Court's total takings language that often subsume many of the *Penn Central* factors into the decision whether to apply the categorical rule at all. In doing so, these courts introduce extraneous factors into the total takings inquiry and thus detract from, rather than refine and develop, the *Penn Central* test. Third, the *Lucas* total takings doctrine encourages landowners to engage in conceptual severance by structuring ownership interests in novel and economically inefficient ways to take advantage of the *Lucas* rule if those interests are impacted by future regulation.[21]

This article proceeds in four parts. Part I lays out the history of the Court's attempt to draw bright-line rules for total takings beginning with *Loretto* in 1982 and ending with *Horne II* in 2015. Next, Part II examines the theoretical weaknesses inherent in each total takings rule—weaknesses that were apparent from the conception of the rule and have been the subject of much judicial and scholarly commentary since. Then, Part III explores the challenges lower courts face trying to implement the Court's theoretically incoherent bright-line rules and the creative but ultimately detrimental ways they have responded. Finally, the Part IV argues that the Court should repudiate rather than rehabilitate the total takings doctrine because bright-line rules have no rational place in regulatory takings jurisprudence and the

protection to property owners and requiring compensation for regulatory takings in more circumstances than would be required by federal precedents. For a fascinating empirical study of the broader, richer world of state court regulatory takings cases, see generally James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 35 (2016).

21. *See generally* Carol Necole Brown & Dwight H. Merriam, *On the Twenty-Fifth Anniversary of* Lucas*: Making or Breaking a Takings Claim*, 102 IOWA L. REV.1847 (2017).

myth of their existence is detracting from the robust development of the *Penn Central* analysis. This section also demonstrates that overruling *Lucas* requires nothing more than a straightforward application of the Court's settled jurisprudence for remedying its constitutional errors.

I. BRIGHT-LINE RULES AND TOTAL TAKINGS

The Takings Clause of the Fifth Amendment provides, in part, "nor shall private property be taken for public use, without just compensation."[22] Although there has been much debate about the original meaning of the Takings Clause and its historical application,[23] the story of bright-line rules and the total takings doctrine is relatively succinct and straightforward.

For its first one hundred years, the application of the Takings Clause generated "surprisingly little debate."[24] During that time, it was generally accepted that the provision applied only to circumstances in which the government actually took title to a landowner's real property.[25] In 1871, in *Pumpelly v. Green Bay Co.*,[26] the Court first applied the Takings Clause to a government action that did not take title to real property, holding that a statute authorizing construction of a dam that resulted in the permanent flooding of the claimant's real property caused a taking.[27] Then, in 1922, in *Pennsylvania Coal v. Mahon*,[28] the Court held for the first time that the application of a regulation that merely limits a landowner's use of her property, without taking title or physically invading it, could also constitute a taking.[29] In an opinion wisely characterized as "more practical than theoretical in its focus,"[30] the Court in *Mahon* set forth the remarkably unhelpful "general rule" that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[31] In that case the Court held that a Pennsylvania law prohibiting coal companies from mining the support estate, which they owned as a separate estate under state law, effected a compensable taking.[32]

22. U.S. CONST. amend V.

23. *See generally* RICHARD A. EPSTEIN, SUPREME NEGLECT: HOW TO REVIVE CONSTITUTIONAL PROTECTION FOR PRIVATE PROPERTY (2008) (arguing that except in very limited circumstances the Takings Clause bars the government from acting in ways that diminish the value of private property); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 782 (1995) (arguing that the original understanding of the Takings Clause was that it "required compensation when the federal government physically took private property, but not when government regulations limited the ways in which property could be used").

24. John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003, 1009 (2003).

25. Rubenfeld, *supra* note 13, at 1081.

26. 80 U.S. 166 (1871).

27. *Id.* at 177–81.

28. 260 U.S. 393 (1922).

29. *Id.* at 414–16.

30. Fee, *supra* note 24, at 1015.

31. *Mahon*, 260 U.S. at 415.

32. *Id.* at 416.

After *Mahon*, more than fifty-five years passed before the Court offered further guidance on how to determine when a regulation "goes too far."[33] In 1978, in *Penn Central*, the owners of Grand Central Terminal argued that the application of New York City's Landmarks Preservation Law, which severely restricted their attempts to develop their iconic property to maximize its value, was a compensable taking.[34] In rejecting this claim, the Court acknowledged that "[t]he question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty," and that the Court resolved takings cases by "engaging in . . . essentially ad hoc, factual inquiries."[35] Nonetheless, the *Penn Central* Court set forth three factors that have particular significance: (1) "[t]he economic impact of the regulation on the claimant," (2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) "the character of the governmental action."[36] The Court went on to note 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."[37]

These three factors are now generally referred to as the *Penn Central* factors, and this short paragraph represents the last serious guidance the Court has offered to assist lower courts in resolving regulatory takings claims. As the Court said in 2005, "[t]he *Penn Central* factors—though each has given rise to vexing subsidiary questions—have served as the principal guidelines for resolving regulatory takings claims."[38]

Since announcing the *Penn Central* test, the Court has studiously avoided resolving the "vexing subsidiary questions" generated by its three-factor test. Instead, it has devoted its Takings Clause attention to identifying cases that do not fall within the ambit of the *Penn Central* test at all. Beginning in 1982, the Court decided a series of cases in which it drew a bright line between government actions that constitute total takings, which categorically call for just compensation, and those that are merely partial interferences with property rights, which are evaluated under the *Penn Central* factors. The total takings cases are discussed in turn below.

A. Permanent Physical Occupations

The Court announced its first bright-line rule in 1982 in *Loretto v. Teleprompter Manhattan CATV Corp.*[39] In that case, the landowner challenged a 1973 New York statute prohibiting landlords from interfering with the installation of cable television equipment on their property or demanding a payment from the cable company in excess of the amount set

33. *Id.* at 415.
34. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 119 (1978).
35. *Id.* at 123–24.
36. *Id.* at 124 (citations omitted).
37. *Id.*
38. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005).
39. 458 U.S. 419 (1982).

by state regulation.[40] Loretto owned an apartment building in New York City and after the cable company attached two cable boxes and a cable line to her building she filed suit, claiming that the application of the statute to her property was a compensable taking.[41] The New York Court of Appeals applied the *Penn Central* factors to Loretto's claim and, concluding that the economic impact of the regulation was not excessive and that the regulation did not interfere with any investment-backed expectations, held that the cable access ordinance did not constitute a taking for which compensation was required.[42]

The Supreme Court reversed, holding that a regulation that imposes a permanent physical occupation on real property is a categorical taking requiring compensation per se.[43] The Court made clear that the land use restriction at issue in *Loretto* was not a total taking simply because it entailed a physical invasion.[44] Rather, the determinative factor was that the physical invasion imposed by the statute was permanent rather than temporary.[45]

The Court justified this bright-line rule by explaining that a permanent physical occupation was, in effect, a total taking. The Court explained:

> Property rights in a physical thing have been described as the rights "to possess, use and dispose of it." To the extent that the government permanently occupies physical property, it effectively destroys *each* of these rights. 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. The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights. 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 nonpossessory 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.[46]

Of course, the taking was total with respect to only a very tiny portion of Loretto's property. The two cable boxes were affixed to a small segment of the roof, occupying only "about one-eighth of a cubic foot of space on the roof of [Loretto's] Manhattan apartment building,"[47] and the cable line dangling down the front of the building was less than half an inch in

40. *Id.* at 424.
41. *Id.*
42. *Id.* at 426.
43. *Id.*
44. *Id.*
45. *Id.* ("[W]e have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause. Our cases further establish that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred.").
46. *Id.* at 435–36 (citations omitted) (quoting United States v. Gen. Motors Corp., 323 U.S. 373, 378 (1945)).
47. *Id.* at 443 (Blackmun, J., dissenting).

diameter.[48] Still, with respect to that tiny portion of Loretto's real property, the Court held that the taking was total and therefore compensation was required. It stated that "constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied."[49]

B. Deprivation of All Economically Beneficial Use

The Court announced its second bright-line total takings rule ten years after the first.[50] In *Lucas v. South Carolina Coastal Council*,[51] the Court held that a regulation that deprives a landowner of all economically viable use of her land is a per se taking.[52] Again, the Court justified the rule in total takings language, reiterating its claim that total takings are categorically compensable without regard to other factors.

Lucas owned two residential beachfront lots in South Carolina, which he bought for $975,000 in 1986.[53] In 1988, South Carolina enacted the Beachfront Management Act, which prevented Lucas from building any habitable structures on his property.[54] The trial court held that this restriction "deprive[d] Lucas of any reasonable economic use of the lots, . . . eliminated the unrestricted right of use, and render[ed] them valueless."[55]

Lucas sought compensation for a regulatory taking. The South Carolina Supreme Court analyzed Lucas's claim under the three *Penn Central* factors and added a fourth factor, the nature of the state's interest in the regulation, which the court identified from prior U.S. Supreme Court cases.[56] Ultimately, the state court concluded that the fourth factor was determinative and held that the regulation was not a taking because it was "designed to prevent serious public harm."[57]

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48. *Id.*

49. *Id.* at 436.

50. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992). Although the Court in *Lucas* claimed that it was simply applying a long-standing rule that had never been determinative in a takings case but had been asserted repeatedly in many, *id.* at 1016 n.6 (1992), most commentators agree with the *Lucas* dissent's assertion that this case was the first to recognize this bright-line rule, *see, e.g.*, Rubenfeld, *supra* note 13 at 1080.

51. 505 U.S. 1003 (1992).

52. *Id.* at 1015.

53. *Id.* at 1006.

54. *Id.* at 1007.

55. *Id.* at 1009.

56. Lucas v. S.C. Coastal Council, 404 S.E.2d 895, 899 (S.C. 1991); *see* Goldblatt v. Hempstead, 369 U.S. 590, 593 (1962) (finding prohibition against excavating below the water table in order to extract gravel not a taking when weighing public interest); Miller v. Schoene, 276 U.S. 272, 279–80 (1928) (analyzing the "public interest" to find that state action destroying diseased cedar trees of certain property owners to prevent the infection of apple orchards is not a taking); Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915) (weighing the "good of the community" to find that an ordinance prohibiting the manufacture of bricks near residents in Los Angeles did not effect a taking); Mugler v. Kansas, 123 U.S. 623, 668–69 (1887) (analyzing the community interest in a takings claim about the prohibition on the manufacture and sale of intoxicating liquors).

57. *Lucas*, 404 S.E.2d at 901.

The Supreme Court reversed, announcing a new bright-line rule and creating the second category of government action that constitutes a total taking. The *Lucas* Court held that "where regulation denies all economically beneficial or productive use of land," it is categorically compensable without regard to any case-specific factors.[58]

Although the Court had never expressly applied this bright-line rule in the past, it announced it in *Lucas* as if it were simply reiterating established doctrine and, therefore, did not have to offer extensive reasons for the rule.[59] But as with the justifications for the bright-line rule announced in *Loretto*, the sparse reasoning the Court did offer for the *Lucas* rule sounded in total takings: "We have never set forth the justification for this rule. Perhaps it is simply, as Justice Brennan suggested, that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation."[60]

C. Physical Appropriations

The 2015 *Horne II* decision is the latest case in the Court's total takings jurisprudence.[61] Marvin and Laura Horne grow raisins.[62] Since the New Deal, raisin sales in the United States have been extensively regulated by the Department of Agriculture through the use of "Marketing Orders."[63] In most years, the marketing order for raisins requires growers to give a percentage of their crops to the U.S. government.[64] The amount required to be given to the government (called "reserves") is determined by the Raisin Administrative Committee, "a Government entity composed largely of growers and others in the raisin business appointed by the Secretary of Agriculture."[65] The Raisin Administrative Committee acquires title to the reserve raisins and decides how to dispose of them at its discretion.[66] Options for disposal include selling them in noncompetitive markets, donating them to charitable causes, releasing them to growers who agree to reduce their own

58. *Lucas*, 505 U.S. at 1015.

59. *Id.* at 1016 ("As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests or *denies an owner economically viable use of his land*.'" (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980))). Interestingly, the Court has since repudiated the first half of this statement, acknowledging that the question whether a government regulation "substantially advance[s] legitimate state interests" sounds in due process, not takings law. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 531 (2005).

60. *Lucas*, 505 U.S. at 1017.

61. Horne v. Dep't of Agric., 135 S. Ct. 2419, 2431 (2015).

62. Actually, the Hornes "handle" raisins too, and the marketing orders at issue in this case technically apply only to raisin handlers. But by custom in the industry handlers pass on the entire cost of the marketing-order regime to growers. The Hornes became raisin handlers before beginning this litigation so that they could challenge the costs that the marketing orders were imposing on them as growers. *Id.* at 2424.

63. *Id.*

64. *Id.*

65. *Id.* Whether such a committee, made up of politically unaccountable industry insiders, can constitutionally exercise the power of eminent domain is an interesting topic for another article.

66. *Id.*

raisin production, or disposing of them by "any other means" consistent with the purposes of the raisin program.[67] The order typically also provides that the raisin producers retain the right to the "net proceeds from the disposition of reserve tonnage raisins"[68] and requires that the reserve raisins be sold "at prices and in a manner intended to maxim[ize] producer returns."[69]

In 2002, the Hornes challenged the reserve requirement by refusing to set aside any raisins for the government.[70] The government sent trucks to the Hornes' facility and demanded the raisins, but the Hornes refused to turn them over.[71] As a result, the government assessed a fine against the Hornes equal to the value of the reserves they had refused to turn over to the government—approximately "$480,000—as well as an additional civil penalty of just over $200,000" for their failure to obey the government's marketing order.[72] The Hornes challenged both fines, claiming that the reserve requirement was a per se taking of their personal property.[73]

The Ninth Circuit rejected the Hornes' argument that the reserve requirement was a per se taking, reasoning that "the Takings Clause affords less protection to personal than to real property" and concluding that the Hornes "are not completely divested of their property rights" because growers retain an interest in the proceeds from any sale of reserve raisins by the Raisin Administrative Committee.[74]

The Supreme Court reversed, holding that the Raisin Marketing Order's requirement that the Hornes turn over a portion of their raisin crop to the government is a physical appropriation that categorically calls for compensation.[75] The *Horne II* Court brushed off intimations in prior cases that real property should be treated differently from personal property[76] and held that the physical appropriation of personal property is a per se compensable taking.[77]

Although its prior cases had created considerable confusion over whether regulations of personal property should be subject to the same takings standards as regulation of real property, the Court treated its decision in *Horne II* as an unremarkable application of the direct appropriation jurisprudence that applies to real property. According to the Court:

> There is no dispute that the "classic taking [is one] in which the government directly appropriates private property for its own use." Nor is there any dispute that, in the case of real property, such an appropriation is a *per se* taking that requires just compensation. Nothing in the text or history of the

67. *See, e.g.*, 7 C.F.R. § 989.67(b)(5) (2015).
68. *Id.* § 989.66(h).
69. *Id.* § 989.67(d)(1).
70. *Horne II*, 135 S. Ct. at 2424.
71. *Id.*
72. *Id.* at 2425.
73. *Id.*
74. Horne v. Dep't of Agric., 750 F.3d 1128, 1139 (9th Cir. 2014).
75. *Horne II*, 135 S. Ct. at 2425–28.
76. *Id.* at 2427–28; s*ee also* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027–28 (1992).
77. *Horne II*, 135 S. Ct. at 2430.

> Takings Clause, or our precedents, suggests that the rule is any different when it comes to appropriation of personal property. The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home.[78]

This facile analogy fails to acknowledge, however, that there are many cases in which the Court has held that Government can indeed take title to personal property—including, in fact, your car[79]—without paying just compensation. Thus, *Horne II* actually announced a new bright-line rule applicable to the physical appropriation of personal property, rather than simply applying the well-settled rule of eminent domain. Unfortunately, as with the Court's first two bright-line rules, the line dividing the total taking in *Horne II* from noncompensable appropriations of personal property is hardly bright at all.

II. THE MYTH OF BRIGHT-LINE RULES

In announcing these three bright-line rules and establishing its jurisprudence of total takings, the Court sought to define categories of government restrictions on property rights that are, in every instance, the theoretical and functional equivalent of taking title to the property. Providing clear definitions of these categories, the Court reasoned, would permit lower courts, land owners, and government actors to carve out from the difficult realm of regulatory takings analysis those cases that could be identified and resolved with relative ease.[80]

Unfortunately, it turns out that the bright-line rules demarking government regulations that are total takings from those restrictions that are evaluated under the ad hoc *Penn Central* factors are actually quite unclear. Rather, the Court's total takings cases are analytically inconsistent with other cases in which it declined to find a per se taking, and its total takings jurisprudence is insufficiently theorized. Thus, the Court's purported bright-line rules are actually blurry standards lacking analytic rigor and theoretical content.

A. Permanent Occupations Versus Temporary Invasions

In announcing the first bright-line rule applicable to permanent physical occupations, the Court in *Loretto* viewed the rule's application as a straightforward exercise. Indeed, the Court stated that ease of line drawing was a virtue of its new rule: "whether a permanent physical occupation has occurred presents relatively few problems of proof," because "[t]he

78. *Id.* at 2425–26 (alteration in original) (citation omitted) (quoting Tahoe–Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 324 (2002)).

79. *See, e.g.*, Bennis v. Michigan, 516 U.S. 442, 452–53 (1996) (holding that the government can order the forfeiture of a car used by a husband in criminal activity even if the car was jointly owned by the wife who knew nothing about the crime and rejecting the wife's claim that the taking of her interest in the car required just compensation).

80. *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 436–38 (1982) (explaining that the permanent physical occupation rule "avoids otherwise difficult line-drawing problems" because determining "whether a permanent physical occupation has occurred presents relatively few problems of proof").

placement of a fixed structure on land or real property is an obvious fact that will rarely be subject to dispute."[81] Notwithstanding the Court's confidence in the clarity and simplicity of its new bright-line rule, however, the elusiveness of the line between a permanent physical occupation and a temporary physical invasion can hardly be overstated.

The Court in *Loretto* emphasized that it was the permanent nature of the regulatory invasion in that case that rendered it a per se taking. To make that point clear, the Court distinguished two recently decided cases that involved temporary, rather than permanent, physical invasions that therefore did not implicate the total takings rule—*Kaiser Aetna v. United States*[82] and *Pruneyard Shopping Center v. Robins*.[83] In *Kaiser Aetna*, the Court applied the *Penn Central* factors in holding that the government's imposition of a navigational servitude requiring public access to a previously private pond was a compensable taking.[84] The Court affirmed that reasoning in *Loretto*, noting that "the easement of passage, not being a permanent occupation of land, was not considered a taking per se."[85] Similarly, in *Pruneyard*, the Court applied the *Penn Central* factors to a state constitutional requirement that shopping center owners permit individuals to enter their property to exercise free speech and petition rights on their property, and concluded that the land use restriction was not a compensable taking.[86] In *Loretto*, the Court distinguished *Pruneyard* the same way it distinguished *Kaiser Aetna*—by noting that the physical invasion was "temporary and limited in nature," and therefore not a per se taking.[87]

Notwithstanding the Court's insistence that the per se rule offers a bright line distinguishing between permanent and temporary physical invasions, that distinction is far from clear. Indeed, even the attachment of the cable boxes and cable lines to Loretto's property obviously was not permanent in the common sense meaning of that word. The *Oxford English Dictionary* defines "permanent" as "[c]ontinuing or designed to continue or last indefinitely without change; abiding, enduring, lasting; persistent. Opposed to *temporary*."[88] *Merriam-Webster's Collegiate Dictionary* concurs, defining "permanent" as "continuing or enduring without fundamental or marked change; stable."[89] As the dissent in *Loretto* pointed out, however, the statute at issue "[did] not require [Loretto] to permit the cable installation forever, but only '[s]o long as the property remains residential and a CATV company wishes to retain the installation.' This is far from 'permanent.'"[90] In that sense, therefore, the cable boxes and cable line in *Loretto* are no more "permanent" than the boaters in *Kaiser Aetna* or the picketers in *Pruneyard*—

81. *Id.* at 437.
82. 444 U.S. 164 (1979).
83. 447 U.S. 74 (1980).
84. *Kaiser Aetna*, 444 U.S. at 180.
85. *Loretto*, 458 U.S. at 433.
86. *Pruneyard Shopping Ctr.*, 447 U.S. at 96.
87. *Loretto*, 458 U.S. at 434.
88. *Permanent*, OXFORD ENGLISH DICTIONARY (3d ed. 2005) (emphasis added).
89. *Permanent*, MERRIAM-WEBSTER'S DICTIONARY (11th ed. 2006).
90. *Loretto*, 458 U.S. at 448 (Blackmun, J., dissenting) (citation omitted).

intrusions that the *Loretto* Court said were temporary, not permanent. Just as the intrusion by the cable company could last for a long time or end tomorrow, so too could the intrusions by the boaters and picketers.

After *Loretto*, then, it appeared that what the Court meant by permanent was something more like fixed: the cable box in *Loretto* was a fixed attachment to Loretto's property, while the boaters in *Kaiser Aetna* and the picketers in *Pruneyard* were transient passers-through.

Unfortunately, attempts to make sense of the Court's *Loretto* total takings doctrine based on fixed versus transient invasions were nullified just five years later by *Nollan v. California Coastal Commission*,[91] in which the Court held that an easement of ingress and egress is a permanent physical occupation.[92] In *Nollan*, a beachfront landowner challenged the imposition of a condition on his building permit that required him to convey an easement of ingress and egress across his privately owned beach.[93] Nollan argued that the easement requirement was a taking for which compensation was due and that California could not evade the compensation requirement by making the easement grant a condition on Nollan's home remodel building permit.[94]

Although *Nollan* is best known for announcing the essential nexus requirement for conditions on permits, for our purposes the most interesting part of *Nollan* is the Court's relatively offhand holding that an easement is a permanent physical occupation. Observing that "perhaps because the point is so obvious, we have never been confronted with a controversy that required us to rule upon it," the Court stated that "a permanent physical occupation" occurs for purposes of the bright-line rule "where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises."[95]

However, contrary to the Court's observation, it *had* been presented just a few years earlier with not one, but two controversies involving takings challenges to government actions that imposed permanent rights of access on real property. It held in both those cases that the easements were temporary invasions, not permanent occupations. In 1979, the Court had applied the *Penn Central* factors to the government's imposition of an easement of ingress and egress on a private pond in *Kaiser Aetna*. In 1980, the Court had applied those same factors to a right of access to a privately owned shopping center in *Pruneyard*. And in 1982, the Court had affirmed those cases in *Loretto* by noting that the easements of passage were temporary physical invasions, not permanent physical occupations.

Yet in *Nollan*, the Court announced that an easement of passage is self-evidently a permanent physical occupation, without overruling *Kaiser Aetna* or *Pruneyard*. Indeed, the *Nollan* Court did not seriously attempt to distinguish either of those cases. Rather, in a three-sentence footnote, the

91. 483 U.S. 825 (1987).
92. *Id.* at 841.
93. *Id.* at 828.
94. *Id.* at 829.
95. *Id.* at 831–32.

Court asserted that *Pruneyard* "is not inconsistent" with *Nollan* "since there the owner had already opened his property to the general public, and in addition permanent access was not required," and that *Kaiser Aetna* "is not inconsistent because it was affected by traditional doctrines regarding navigational servitudes."[96] Because neither of these statements (which cannot really be called explanations) address the temporal distinction between permanent and temporary occupations, neither shed any light on why the Court concluded that the rights of passage in *Pruneyard* and *Kaiser Aetna* are less permanent than the right of passage in *Nollan*.

Moreover, the Court's holding in *Nollan* that the right-of-way at issue in that case was categorically different from the rights-of-way at issue in *Kaiser Aetna* and *Pruneyard* put to rest the Court's claim in *Loretto* that the line between permanent physical occupations and temporary physical invasions would be easy to draw. After *Nollan*, the concept of a permanent physical occupation, which is a total taking, is no longer limited to "[t]he placement of a fixed structure on land or real property"[97] but may sometimes include the imposition of an easement of passage in which people come and go across private property at various times.

B. Deprivation of All Economically Viable Use and the Denominator Problem

As with the *Loretto* bright-line rule, the *Lucas* bright-line rule became blurry in the very opinion in which it was announced. Although in *Lucas* the Court buried its disclaimer in a footnote, the majority was well aware that it had announced an unworkable rule. As the Court conceded:

> Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.[98]

Justice Blackmun elaborated on the denominator problem in his dissent:

> The threshold inquiry for imposition of the Court's new rule, "deprivation of all economically valuable use," itself cannot be determined objectively. As the Court admits, whether the owner has been deprived of all economic value of his property will depend on how "property" is defined. The "composition of the denominator in our 'deprivation' fraction" is the

96. *Id.* at 832 n.1.
97. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 437 (1982).
98. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 n.7 (1992).

> dispositive inquiry. Yet there is no "objective" way to define what that denominator should be.[99]

Moreover, just as the Court neglected in *Nollan* to explain or overturn its inconsistent prior permanent physical occupation cases, the Court failed in *Lucas* to reconcile its new rule with prior cases that had made inconsistent pronouncements about the appropriate denominator. For example, in *Mahon*, the case that first acknowledged the possibility of a compensable regulatory taking, the Court held that a law restricting the subsurface extraction of coal from the support estate was a compensable taking because the support estate was recognized as a separate legal estate in Pennsylvania and the law "purport[ed] to abolish" the entire support estate.[100] In contrast, sixty-five years later in *Keystone Bituminous Coal v. DeBenedictis*,[101] the Court held that a nearly identical law was not a taking because the support estate comprised only a small percentage of all the coal the company owned, without overruling *Mahon*.[102] While the Court acknowledged this inconsistency in *Lucas*, it chose not to resolve it.[103]

Indeed, *Lucas* compounded the confusion over the denominator issue by questioning the continued viability of one of the Court's prior denominator holdings without overruling it. In *Penn Central*, the Court rejected the claimant's attempt to engage in "conceptual severance" of its property holdings and instead evaluated the impact of the challenged regulation on the "parcel as a whole," which, according to the Court, consisted of the entire "city tax block designated as the 'landmark site.'"[104] In particular, *Penn Central* made clear that:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the 'landmark site.'[105]

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99. *Id.* at 1054 (Blackmun, J., dissenting) (citation omitted); *see also* Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1614 (1988) ("We have long understood that any land-use regulation can be characterized as the 'total' deprivation of an aptly defined entitlement . . . . Alternatively, the same regulation can always be characterized as a mere 'partial' withdrawal from full, unencumbered ownership of the landholding affected by the regulation . . . .").

100. Pa. Coal v. Mahon, 260 U.S. 393, 414 (1922).

101. 480 U.S. 470 (1987).

102. *Id.* at 496.

103. *Lucas*, 505 U.S. at 1016 n.7 ("Unsurprisingly, this uncertainty regarding the composition of the denominator in our 'deprivation' fraction has produced inconsistent pronouncements by the Court. . . . In any event, we avoid this difficulty in the present case, since the 'interest in land' that Lucas has pleaded (a fee simple interest) is an estate with a rich tradition of protection at common law, and since the [court below] found that the Beachfront Management Act left each of Lucas's beachfront lots without economic value.").

104. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 131 (1978).

105. *Id.* at 130–31.

The Court walked back that statement in *Lucas*, calling it "an extreme—and . . . unsupportable—view of the relevant calculus."[106] But by merely questioning, rather than overruling, *Penn Central* on this fundamental issue the *Lucas* Court obfuscated, rather than clarified, the denominator issue.

Since *Lucas*, the Court has only exacerbated the denominator enigma.[107] One year after the *Lucas* decision the Court again embraced a broad view of the relevant denominator and rejected the claimant's argument that the denominator should be defined by the scope of the property taken.[108] The Court pointed out that, "[t]o the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question."[109] And then, in 2002, the Court once again relied on what it had called in *Lucas* an "unsupportable . . . view of the relevant calculus"[110] to reject a *Lucas* total takings claim in *Tahoe–Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*.[111] In *Tahoe–Sierra*, the Court rejected the property owner's attempt to engage in conceptual severance over time, holding that temporary restrictions on a parcel are not "total takings" for the period in which the restriction is in effect.[112]

Most recently, in *Murr v. Wisconsin*,[113] the Court further confused the denominator dilemma and undermined any pretense that *Lucas* created a bright-line rule by adopting a vague and subjective multifactored test to identify the appropriate denominator in regulatory takings cases. In *Murr*, the common owners of two contiguous lots subject to a county land use restriction argued that the restriction constituted a *Lucas* total taking of one of the lots and that the lower court erred in treating the two lots together as the relevant denominator.[114] The Court rejected this argument and held that the lower courts had been correct in treating the two parcels as the relevant denominator for the regulatory takings inquiry. In doing so, the Court offered a new multifactored test to help lower courts identify the appropriate denominator. Under *Murr*, to determine the appropriate denominator, lower courts should: (1) "give substantial weight to the treatment of the land, in particular how it is bounded and divided, under state and local law"; (2) "look to the physical characteristics of the landowner's property"; and (3) "assess

106. *Lucas*, 505 U.S. at 1016 n.7. Oddly, the Court in *Lucas* did not aim its criticism directly at the *Penn Central* holding, focusing instead on the state supreme court's denominator determination. *Id.* However, the *Penn Central* Court employed the same denominator as the state supreme court, so the *Lucas* Court's disapproval applies equally to the *Penn Central* calculus.

107. For a thorough discussion of the Court's lack of consistency on the denominator issue, see, for example, Daniel L. Siegel, *How the History and Purpose of the Regulatory Takings Doctrine Help to Define the Parcel as a Whole*, 36 VT. L. REV. 603, 604–08 (2012).

108. Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal., 508 U.S. 602, 643–44 (1993).

109. *Id.* at 644.

110. *Lucas*, 505 U.S. at 1016 n.7.

111. 535 U.S. 302 (2002).

112. *Id.* at 332 n.27.

113. 137 S. Ct. 1933 (2017).

114. *Id.* at 1941.

the value of the property under the challenged regulation, with special attention to the effect of burdened land on the value of other holdings."[115] These vague, subjective factors hardly bring clarity to the already confused denominator dilemma. Moreover, the Court tethered the denominator factors to considerations that are already part of the *Penn Central* inquiry, inviting lower courts to double count these factors or to engage in merits inquiries at the denominator stage.

In particular, the Court in *Murr* explained that, in applying its multifactored denominator test, a court should focus on "the reasonable expectations of an acquirer of land," "reasonable private expectations," whether "the property is located in an area that is subject to, or likely to become subject to, environmental or other regulation," and whether the regulation of one lot increases the value of the landowner's other lots or is "unmitigated."[116] Even these considerations "may not exhaust the list of potentially relevant factors" because the "Court also emphasize[d] that 'the reasonable expectations at issue derive from background customs and the whole of our legal tradition.'"[117] Thus, the *Murr* test not only fails to resolve the denominator dilemma but also essentially incorporates important aspects of the *Penn Central* test—including "the whole of our legal tradition"—into the denominator inquiry.[118] And, of course, the fact that this multifactored test is to be applied before the *Lucas* inquiry effectively undermines any plausible assertion that *Lucas* created a meaningful bright-line rule.

Thus, the *Lucas* total takings rule purports to draw a bright line between regulations that deprive a landowner of all economically viable use of her property and those that do not. But even after its latest attempt in *Murr*, the Court has failed to provide a workable standard or meaningful theoretical guidance for determining the appropriate denominator for that inquiry. This theoretical gap at the heart of the *Lucas* total takings rule is so enormous that one scholar has called it a "conceptual black hole."[119]

C. Physical Appropriations, Retained Interests, and Concomitant Government Benefits

The bright-line rule announced in *Horne II*—that a government regulation effecting a direct appropriation of personal property is a categorical taking—

115. *Id.* at 1945–46. The dissent articulated factors somewhat differently from the majority, arguing that the majority created "an elaborate test looking not only to state and local law, but also to (1) 'the physical characteristics of the land,' (2) 'the prospective value of the regulated land,' (3) the 'reasonable expectations' of the owner, and (4) 'background customs and the whole of our legal tradition.'" *Id.* at 1950 (Roberts, J., dissenting).

116. *Id.* at 1945–46 (majority opinion).

117. Ilya Somin, *A Loss for Property Rights in* Murr v. Wisconsin, WASH. POST (June 23, 2017) (quoting *Murr*, 137 S. Ct. at 1945), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/23 [https://perma.cc/4S8J-ZSNK].

118. *Murr*, 137 S. Ct. at 1955 (Roberts, J., dissenting) ("The result is that the government's regulatory interests will come into play not once, but twice—first when identifying the relevant parcel, and again when determining whether the regulation has placed too great a public burden on the property.").

119. Fee, *supra* note 24, at 1032.

suffers from theoretical and analytic shortcomings as problematic as those plaguing the *Loretto* and *Lucas* total takings rules. Like those rules, the *Horne II* rule lacks a coherent theoretical foundation, cannot be reconciled with the Court's prior cases, and will be impossible to apply in the future.

First, the Court's reasoning as to why the reserve requirement is a total taking is plainly wrong. As noted above, the *Horne II* Court offered this platitude as one reason for finding a total taking: "The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home."[120] But in *Bennis v. Michigan*,[121] the Court held that the government did not have to pay just compensation for taking a car from its owner.[122] The Court rejected a takings claim from a woman who owned a joint interest in a car that was forfeited as an abatable nuisance following her husband's use of the car for prostitution.[123] It was undisputed in *Bennis* that the wife had a separate property interest in the car and had no knowledge of, or culpability in, her husband's criminal activity.[124] Even so, the Court held that the forfeiture of the wife's property interest in the car was not a taking requiring compensation because "[t]he 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."[125] The Hornes' raisins, of course, were acquired under the exercise of governmental authority other than the power of eminent domain—the Raisin Marketing Order. But the Court offered no explanation for why the abatable nuisance authority rendered the takings claim invalid in *Bennis*, while the authority of the Raisin Marketing Order was irrelevant in *Horne II*.

Similarly, as Justice Sotomayor pointed out in her dissent in *Horne II*, the government's appropriation of the Hornes' raisins is not a "total" appropriation as that term is used in *Loretto*.[126] The *Loretto* Court based its total takings rule on its contention that a permanent physical occupation destroys each of the sticks in the property bundle of rights—the rights "to possess, use and dispose of" the property.[127] When the Government required the Hornes to turn over some of their raisins to satisfy the reserve requirement, it did not take every aspect of their ownership interest. Under the Raisin Marketing Order, the Hornes retained the right to profit from the reserve raisins when the Government disposed of them. Thus, the reserve requirement is more like the regulation at issue in *Andrus v. Allard*,[128] which the Court held was not a compensable taking.[129]

In *Andrus*, merchants who traded in bald eagle feathers used in Native American artifacts challenged a regulation that prohibited all commercial

120. Horne v. Dep't of Agric., 135 S. Ct. 2419, 2426 (2015).
121. 516 U.S. 442 (1996).
122. *Id.* at 443.
123. *Id.* at 453.
124. *Id.* at 443, 459.
125. *Id.* at 452.
126. Horne v. Dep't of Agric., 135 S. Ct. 2419, 2443 (2015) (Sotomayor, J., dissenting).
127. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982).
128. 444 U.S. 51 (1979).
129. *Id.* at 67–68.

transactions in parts of certain birds as a means to prevent the destruction of those species.[130] Because of the difficulty of determining when such bird parts were acquired, the regulation prohibited commercial transactions in all regulated bird parts, even those that had been acquired lawfully before the enactment of the statute.[131] The merchants claimed that the ban on selling their "pre-existing" bird parts (bald eagle feathers) was a total taking because it completely deprived them of the opportunity to earn a profit from their artifacts.[132] The Court rejected that claim, holding that because the owners retained some rights to the artifacts—in particular the right to possess, transport, donate, or devise them—the prohibition on sale was not only not a total taking, it was not a taking at all.[133] The Court in *Horne II* failed to explain why the Hornes' retained right to profit from their appropriated raisins is categorically different for takings purposes than those rights retained by Allard and other merchants.

Finally, in *Horne II* the Court failed to persuasively reconcile its decision with prior cases holding that appropriations assessed as a condition on the receipt of a substantial government benefit are not compensable takings. In *Ruckelshaus v. Monsanto Co.*,[134] the Court relied on just that reasoning to reject Monsanto's takings challenge to the Environmental Protection Agency's requirement that it disclose protected trade secrets as a condition for receiving a permit to sell its pesticides.[135] The Court held that the government's disclosure requirement was not a taking because Monsanto received a "valuable Government benefit" in exchange for the appropriation of its trade secrets.[136] *Horne II* distinguished *Monsanto* with the conclusory assertion that "[s]elling produce in interstate commerce . . . is . . . not a special governmental benefit."[137] But, of course, the Hornes were not simply selling raisins in interstate commerce; they were selling raisins in a highly structured and controlled interstate market, tightly regulated to keep raisin prices high. In any event, *Horne II* sheds no light on the line to be drawn between appropriations that are not takings because they are conditioned on the receipt of a special benefit and those that are per se takings because they are not so conditioned.

Thus, the *Horne II* total takings rule is the third instance of the Court's futile attempt to use bright lines to carve out total takings islands within its regulatory takings jurisprudence.

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130. *Id.* at 54.
131. *Id.* at 53–54.
132. *Id.* at 54.
133. *Id.* at 66. It also warrants noting that, except for the right to transport, which makes no sense in the context of real property, Lucas retained each of these rights with respect to his beachfront property (that is, the right to possess, donate, or devise it). He also retained the right to convey the property, but the Court nonetheless held in *Lucas* that the land use restriction that left the property owner with each of those rights was a total taking.
134. 467 U.S. 986 (1984).
135. *Id.* at 1010–12.
136. *Id.* at 1007.
137. Horne v. Dep't of Agric., 135 S. Ct. 2419, 2430 (2015).

III. BLURRY LINES IN THE LOWER COURTS

Lower courts are confounded by the total takings myth. The total takings per se rules may be the law of the land, but they are impossible to apply on their own terms. Moreover, the Court's opinions announcing these rules do not provide the theoretical foundation or analytic rigor needed for the lower courts to construct coherent operational doctrine based on the Court's foundational pronouncements.[138]

Consequently, lower courts have created a shadow jurisprudence of total takings to resolve cases involving total takings claims. But the shadow total takings jurisprudence is problematic on many fronts. In some circumstances, lower courts engage in semantic contortions so extreme that they undermine any claim to analytic consistency and reasoned decision-making.[139] In other circumstances, lower courts import into their shadow total takings jurisprudence extraneous factors unrelated to the Court's per se rules and divorced from the principles underlying the Takings Clause itself. Finally, the entire shadow total takings enterprise detracts from the important work of developing a coherent regulatory takings jurisprudence built on the fundamental principles underlying the Takings Clause.

This section highlights some of the difficulties caused by the lower courts' efforts to apply *Loretto* and *Lucas* by analyzing the shadow doctrines of each case.[140] It is not intended to be a comprehensive catalogue of lower court decisions in total takings cases, or even a thorough analysis of all the mischief that has been sown by the total takings myth. The goal here is merely to demonstrate that the total takings myth has caused more problems than it has solved, and that the Court would do well to repudiate it.

A. The Shadow Loretto *Doctrine*

Because the permanent-temporary line that the Court attempted to draw in *Loretto* simply cannot do the work set out for it, lower courts have had to resort to exceptional linguistic contortions to apply the *Loretto* per se rule. It is generally agreed that the *Loretto* Court could not really have meant to draw

138. While it is not uncommon for the Supreme Court to announce new constitutional standards in broad terms and delegate to lower courts the task of fleshing out the doctrine in its application, that strategy cannot work when the doctrine is inadequately theorized and incapable of being implemented logically.

139. *Cf.* Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 375 (1998) ("Reasoned decisionmaking, in which the rule announced is the rule applied, promotes sound results, and unreasoned decisionmaking the opposite. The evil of a decision that applies a standard other than the one it enunciates spreads in both directions, preventing both consistent application of the law by subordinate agency personnel (notably ALJ's), and effective review of the law by the courts.").

140. The decision in *Horne II* is too recent to have engendered a robust shadow doctrine of its own, but there is no doubt that it will do so in the fullness of time. In particular, *Horne II* opens a Pandora's box of problems in the ongoing challenge to distinguish between monetary and nonmonetary exactions for Takings Clause purposes. The Eastern District of Washington recently wrestled with a litigant's claim that the imposition of a quarterly *monetary* assessment under the Fair and Equitable Tobacco Reform Act of 2004, 7 U.S.C. § 518d (2012), constitutes a per se taking under *Horne II*. *See* United States v. King Mountain Tobacco Co., 131 F. Supp. 3d 1088, 1093–94 (E.D. Wash. 2015).

a bright line between permanent and temporary physical invasions, at least not in any temporal sense of those two terms. Recognizing that there is no theoretically coherent way to determine when a physical invasion is permanent and when it is temporary in the common understanding of those terms, lower courts have simply redefined the word "permanent" to mean something else. Some courts define "permanent" to mean "substantial" or "not inconsequential."[141] In doing so, however, these courts neglect a key premise of *Loretto* itself—that a permanent physical occupation is a taking regardless how inconsequential it is. Other lower courts focus on the "fixed" nature of the cables in *Loretto* and equate "permanent" occupations with occupations that are "fixed." Those courts have created a shadow total takings doctrine that is inconsistent with *Loretto*'s progeny, most notably *Nollan*.

In *Hendler v. United States*,[142] for example, the Federal Circuit pointed out that no physical occupation is ever permanent and therefore looked to whether the challenged physical invasion was long-standing and substantial, as opposed to transient and relatively inconsequential, to determine whether it constituted a total taking under *Loretto*.[143] Hendler challenged the EPA's authorization of government agents to construct wells on private property to monitor and extract migrating hazardous substances from a Superfund cleanup site located nearby.[144] The district court denied the landowner's motion for summary judgment based on *Loretto*, stating that the court needed more information about the government's "long-range intentions" regarding the wells before it could determine whether they were permanent or temporary invasions.[145] The Federal Circuit vacated and remanded for lack of jurisdiction and noted that, regardless of how much longer the wells would be on the claimant's property, the intrusion already constituted a permanent physical occupation.[146] According to the court, in a *Loretto* total takings inquiry "permanent does not mean forever, or anything like it."[147] Rather, the court explained that

> [a]ll takings are "temporary," in the sense that the government can always change its mind at a later time . . . . The long drawn out battle [over temporary versus permanent takings] was not a fight over principle, but a dispute over the illogical use of a word. If the term "temporary" has any real world reference in takings jurisprudence, it logically refers to those governmental activities which involve an occupancy that is transient and relatively inconsequential, and thus properly can be viewed as no more than a common law trespass *quare clausum fregit*.[148]

141. John R. Sand & Gravel Co. v. United States, 457 F.3d 1345, 1357 (Fed. Cir. 2006); Hendler v. United States, 952 F.2d 1364, 1376–78 (Fed. Cir. 1991).
142. 952 F.2d 1364 (Fed. Cir. 1991).
143. *Id.* at 1376–78.
144. *Id.* at 1369–70.
145. *Id.* at 1374.
146. *Id.* at 1377.
147. *Id.* at 1376.
148. *Id.* at 1376–77.

The court concluded that the wells were "at least as 'permanent' in this sense as the CATV equipment in *Loretto*."[149]

While the Federal Circuit has at times attempted to cabin the broad language in *Hendler*,[150] it continues to consider factors other than duration when applying the *Loretto* total takings test. For example, in *John R. Sand & Gravel Co. v. United States*,[151] it considered a landowner's claim that the EPA's erection of a security fence around a Superfund cleanup site constituted a permanent physical occupation.[152] The fence was six feet tall and anchored to the ground with posts set forty-eight inches deep, but it had been moved several times during the course of the cleanup and was expected to be removed when the cleanup was complete.[153] Thus, it was clearly not "permanent" in the sense of lasting forever. Nonetheless, the court held that the fence was a permanent physical occupation, explaining that:

> "Permanent" has a special meaning in the determination of whether a physical occupation has occurred. In the context of physical takings "'permanent' does not mean forever, or anything like it." A government occupation is "permanent" when the government's "intrusion is a substantial physical occupancy of private property." The government's occupation may be permanent even if it is not "exclusive, or continuous and uninterrupted."[154]

In perhaps the most striking substitution of the term "substantial" for the *Loretto* requirement of permanence, the Federal Circuit held in 2012 that a U.S. Border Patrol easement to install, maintain, and service underground sensors on private property constituted a "permanent physical taking" even though the easement was subject to termination by either party at any time.[155] In particular, the easement provided that the sensors would be removed when they were no longer needed by the Border Patrol or within thirty days after the landowner notified the Border Patrol that he wished to develop the property.[156] Notwithstanding that the agreement between the parties

149. *Id.* at 1376.

150. *See* Boise Cascade Corp. v. United States, 296 F.3d 1339, 1356 (Fed. Cir. 2002) (asserting that "this dicta in *Hendler* . . . has been widely misunderstood and criticized as abrogating the permanency requirement established . . . in *Loretto*").

151. 457 F.3d 1345 (Fed. Cir. 2006).

152. *Id.* at 1353.

153. *Id.* at 1348.

154. *Id.* at 1357 (citation omitted) (quoting Hendler v. United States, 952 F.2d 1364, 1376–77 (Fed. Cir. 1991)).

155. Otay Mesa Prop. v. United States, 670 F.3d 1358, 1365 (Fed. Cir. 2012). Interestingly, the government argued that the easement was permanent and the landowner argued that the mutual right to terminate rendered the easement temporary. Both parties agreed that the easement constituted a taking, and both seemed to believe that less compensation would be owed for the condemnation of a permanent easement than for a temporary easement. The Court of Appeals was skeptical. *Id.* at 1368 ("It does not seem to us logical that Otay Mesa should receive less compensation for the taking of a permanent easement than it would for the taking of a temporary easement.").

156. *Id.* at 1361–62.

expressly provided for the impermanence of the sensors, the Federal Circuit rejected the trial court's finding that physical invasion was not permanent.[157]

State supreme courts have similarly declined to impart temporal relevance to the permanent-temporary distinction when reviewing *Loretto* total takings claims. For example, in *Benson v. South Dakota*,[158] the Supreme Court of South Dakota held that invasions that might well last forever did not constitute a per se taking under *Loretto* because they were "not fixed structures placed on the land."[159] In that case, landowners challenged a state statute permitting the shooting of small game from a public right-of-way.[160] The landowners claimed that the lawful hunting from the roadway left shotgun shells littered all over their property, and they argued that the shells constituted a permanent physical occupation and therefore a total taking under *Loretto*.[161] The court rejected that argument, concluding that the "acts of the hunters result[ed] in temporary and intermitted [sic] physical invasions rather than a permanent occupation" because they were not "fixed physical structures."[162]

Thus, faced with the incoherence of the permanent-temporary distinction drawn by the Court in *Loretto*, lower courts have responded by incorporating concepts of substantiality and fixedness into their *Loretto* total takings inquiries and using these factors to determine whether a physical invasion is a total taking. This shadow total takings doctrine seems eminently reasonable—whether a landowner should be compensated for a forced physical invasion of her property perhaps *should* depend on how substantial the invasion is or whether the invading item is fixed to the land. However, that is not what the Court held in *Loretto*, and the facile substitution of "substantial" or "fixed" for *Loretto*'s requirement of "permanent" undermines the analytic rigor and legitimacy of the total takings test.

In fact, the introduction of concepts of substantiality and fixedness into the *Loretto* test is inconsistent with *Loretto* and its progeny. One of the most salient aspects of the *Loretto* decision was its rejection of substantiality as a factor in determining permanence. As the *Loretto* Court insisted, "permanent occupations of land . . . are takings even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land."[163] Subsequently, in *Nollan*, the Court made clear that easements of ingress and egress constituted permanent

157. Another important factor in the court's decision was that the easement had not terminated at the time of the litigation. *See id.* at 1365 (distinguishing an earlier case because there, "by the time the court decided the issue, the easement had terminated"). But, of course, this factor should be irrelevant. While the fact that an easement has ended is a clear indication that it was not permanent, that conclusion does not mean that the inverse is true—it is entirely possible for a temporary easement to remain in effect at the time the status of the easement is being litigated.

158. 710 N.W.2d 131 (S.D. 2006).

159. *Id.* at 152.

160. *Id.*

161. *Id.*

162. *Id.*

163. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 430 (1982).

physical occupations, even though such easements did not result in the attachment of any *fixed* physical structures on the landowner's property.[164] Thus, the centrality of substantiality and fixedness to the lower courts' shadow *Loretto* total takings doctrine is impossible to reconcile with the *Loretto* doctrine itself.

B. The Shadow Lucas *Doctrine*

The *Lucas* total takings test has vexed the lower courts even more than the *Loretto* test. This may be because land use regulations causing an economic impact are much more prevalent than regulations causing a physical invasion. Or, it may be because the *Lucas* total takings test invites landowners to engage in conceptual severance, either in their ownership instruments or their pleadings, in an attempt to recast virtually any land use restriction as one that deprives the property owner of all economically beneficial use of *something*. The *Loretto* total takings rule, in contrast, does not offer the landowner a similar opportunity for contrivance. Either way, lower courts have devoted enormous resources to their attempts at applying the *Lucas* total takings rule, and their struggles have also generated a shadow total takings doctrine.

The Supreme Court adopted its own shadow total takings doctrine for the *Lucas* bright-line rule last term in *Murr*. The *Murr* multifactored test not only fails to resolve the denominator dilemma, but it neglects to analyze, reject, or build on, the extensive work lower courts have done since *Lucas* to address the issue. Thus, lower courts will now be compelled to start anew, crafting a new *Lucas* shadow takings doctrine from the Court's vague and subjective multifactored test.[165]

Prior to *Murr*, three troubling trends had emerged in the *Lucas* shadow total takings jurisprudence in lower courts.[166] First, some courts simply rejected *Lucas*'s insistence on drawing a bright line at 100 percent deprivation of economically viable use. These courts have found a *Lucas* total taking even when the challenged land use regulation leaves some value remaining. Second, and relatedly, courts disagree about the meaning of the doctrine's central concept—economically beneficial use. Some lower courts reason that in *Lucas* the Court meant to protect certain use values over others, while other courts conclude that the rule only applies if a landowner is left with no economically beneficial use of any kind. Finally, because the Court provided no doctrinal or theoretical guidance on the denominator issue in *Lucas*, lower courts wrestled unsuccessfully with the intractable denominator dilemma. The decision in *Murr* merely kicks that can down the road.

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164. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 832 (1987).

165. It may be of some comfort to these courts that the *Murr* Court has unqualified confidence in their ability to take on this daunting task. *See* Murr v. Wisconsin, 137 S. Ct. 1933, 1946 (2017) ("State and federal courts have considerable experience in adjudicating regulatory takings claims that depart from these examples in various ways. The Court anticipates that in applying the test above they will continue to exercise care in this complex area.").

166. Given the *Murr* Court's failure to engage these lower court cases, these trends continue to warrant attention.

1. Almost All Economically Beneficial Use

Perhaps the most surprising aspect of the *Lucas* shadow total takings doctrine is that some lower courts have simply ignored the Court's admonition that a total taking occurs only in the extraordinarily rare case in which a land use restriction deprives the property owner of *all* economically beneficial use. While this 100 percent threshold is problematic for a variety of reasons,[167] the Court has steadfastly reaffirmed it. In *Tahoe–Sierra*, the Court noted:

> [O]ur [*Lucas*] holding was limited to "the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted." The emphasis on the word "no" in the text of the opinion was, in effect, reiterated in a footnote explaining that the categorical rule would not apply if the diminution in value were 95% instead of 100%. Anything less than a "complete elimination of value," or a "total loss," the Court acknowledged, would require the kind of analysis applied in *Penn Central*.[168]

Nonetheless, lower courts have not faithfully embraced that 100 percent threshold. To the contrary, it is not uncommon for a lower court to conclude that a challenged regulation is a *Lucas* total taking even though it deprives the landowner of something less than 100 percent of the value of her property.

For example, in *Loveladies Harbor, Inc. v. United States*,[169] the Federal Circuit held that a land use restriction was a *Lucas* total taking even though the restriction did not deprive the land of all value.[170] The government had denied the landowner's application for a Clean Water Act § 404 permit to fill and develop wetlands on its property.[171] The trial court had found that the denial of the permit reduced the fair market value of the land from over $2 million to $12,500—less than 1 percent of the original value.[172] Agreeing with the trial court's conclusion that this remaining value was de minimis, the Federal Circuit held that the relevant parcel was "deprived of all economically feasible use" and therefore held that the permit denial was a total taking under *Lucas*.[173]

In *Lost Tree Village Corp. v. United States*,[174] (*Lost Tree Village II*) the Federal Circuit similarly held that a land use restriction constituted a *Lucas*

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167. As Justice Stevens pointed out in his *Lucas* dissent, "the Court's new rule is wholly arbitrary. A landowner whose property is diminished in value 95% recovers nothing, while an owner whose property is diminished 100% recovers the land's full value." Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1064 (1992) (Stevens, J., dissenting).

168. Tahoe–Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 330 (2002) (footnote omitted) (quoting *Lucas*, 505 U.S. at 1017, 1019 n.8).

169. 28 F.3d 1171 (Fed. Cir. 1994).

170. *Id.* at 1182.

171. *Id.* at 1173. Many federal takings claims involve § 404 of the Clean Water Act, the provision that establishes criteria the Army Corps of Engineers must apply in evaluating applications for permits to dredge and fill protected wetlands. *See* Clean Water Act, 33 U.S.C. § 1344 (2012).

172. *Loveladies Harbor, Inc.*, 28 F.3d at 1174–75.

173. *Id.* at 1182.

174. 787 F.3d 1111 (Fed. Cir. 2015).

total taking even though it did not deprive the land of all of its value.[175] *Lost Tree Village II* also involves a § 404 permit application, the denial of which left a small portion of the landowner's holdings with only minimal residual value.[176] After recognizing that the permit denial decreased the value of the property 99.4 percent from more than $4 million with a § 404 permit to $27,500 without the permit,[177] the court concluded that the denial of the permit constituted a total taking under *Lucas*.[178]

2. Economically Beneficial Use Versus Sale Value

The Federal Circuit's rejection of *Lucas*'s 100 percent threshold is most likely the result of residual uncertainty over what type of value counts for purposes of the *Lucas* total takings test. As noted above, *Lucas* held that a regulation that "denies all economically beneficial or productive use of land" is a per se taking.[179] Unfortunately, in *Lucas* the Court also used other phrases to describe the boundary of its bright-line rule, including: "*denies an owner economically viable use of his land*"[180] and "eliminate[s] all economically valuable use."[181] Later, the Court described the *Lucas* test as requiring compensation whenever a regulation results in "the complete elimination of a property's value."[182] Lower courts have struggled to implement the *Lucas* rule in close cases in part because they cannot make sense of these disparate directives. Again, the complete lack of theoretical groundwork in *Lucas* leaves the lower courts without meaningful guidance to resolve this issue.

For its part, the Federal Circuit has concluded that *Lucas* intended to distinguish between the value derived from economic or productive use of land and sale or market value when it defined a total taking as the deprivation of "all economically beneficial use." Thus, in *Lost Tree Village II* that court refused to consider residual sale value in applying the *Lucas* test and held that the denial of the § 404 permit constituted a total taking even though the property retained a market value of nearly $30,000.[183] In doing so, the court distinguished *Palazzolo v. Rhode Island*,[184] in which the Supreme Court found that a decrease in value of more than 93 percent was not a *Lucas* taking.[185] The decision was not made not on the ground that the diminution in *Lost Tree Village II* was much closer to 100 percent than the diminution of value in *Palazzolo*, but rather because the *type* of value that remained in *Lost Tree Village II* was different from the *type* of value that remained in

175. *Id.* at 1119.
176. *Id.* at 1113.
177. *Id.* at 1114.
178. *Id.* at 1119.
179. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992).
180. *Id.* at 1016 (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)).
181. *Id.* at 1028.
182. Lingle v. Chevron U.S.A., 544 U.S. 528, 539 (2005).
183. *Lost Tree Village II*, 787 F.3d at 1114.
184. 533 U.S. 606 (2001).
185. *Id.* at 616.

Palazzolo.[186] In rejecting the government's argument that a landowner's ability to sell a regulated parcel precludes a successful *Lucas* claim, the Federal Circuit stated:

> Even if we assume that Plat 57's value necessarily enables Lost Tree to sell the parcel, we disagree that all sales qualify as economic uses. When there are no underlying economic uses, it is unreasonable to define land *use* as including the sale of the land. Typical economic uses enable a landowner to derive benefits from land ownership rather than requiring a landowner to sell the affected parcel.[187]

The Ninth Circuit draws a similar distinction. That court upheld a *Lucas* total takings jury finding even though the landowner was able to sell his restricted property for $800,000 more than he paid for it before the restriction was enacted.[188] The Ninth Circuit explained the importance of the distinction between use value and sale value this way:

> Focusing the economically viable use inquiry solely on market value or on the fact that a landowner sold his property for more than he paid could inappropriately allow external economic forces, such as inflation, to affect the takings inquiry . . . . Although the value of the subject property is relevant to the economically viable use inquiry, our focus is primarily on use, not value.[189]

By contrast, other courts consider all possible uses or sources of value in applying the *Lucas* total takings rule. In *District Intown Properties Ltd. v. District of Columbia*,[190] for example, the Federal Circuit explained—albeit in dicta—that a land use restriction prohibiting any construction on the lots constituting the lawn of a historic landmark would not effect a *Lucas* total taking because the landowner had not proved that the economic or market value of the lots was totally destroyed as a result of the restriction.[191] Similarly, the Eighth Circuit rejected a *Lucas* total takings challenge raised by the owner of hundreds of TouchPlay lottery machines after Iowa enacted

186. *Lost Tree Village II*, 787 F.3d at 1116–17 ("In *Palazzolo*, the 93% loss in value was insufficient to trigger *Lucas* because the landowner was left with value attributable to economic uses.").

187. *Id.* at 1117.

188. Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 95 F.3d 1422, 1432 (9th Cir. 1996), *aff'd*, 526 U.S. 687 (1999). Although the judgment in this case was affirmed, the Court addressed only the issue of whether it was error to submit the total takings question to a jury.

189. *Id.* at 1432–33.

190. 198 F.3d 874 (D.C. Cir. 1999).

191. *Id.* at 882–83. In his concurrence, Judge Stephen Williams took the majority to task for expressing this view, even in dicta, asserting that the majority "gratuitously takes an even harsher stance against compensation than does present law." *Id.* at 890 (Williams, J., concurring) ("The majority finds that District Intown has failed to offer evidence that the regulation denies it 'economically viable use of [the] land,' even though the Mayor's own agent found that 'any construction that destroyed the lawn would be incompatible with the lawn's status as an historic landmark.' Thus, so long as the lawn is untouched, 'economically viable' uses are permissible. It is hard to imagine what 'economically viable' use that constraint leaves, unless the majority means that the very barest thread of value, yielded by some thoroughly bucolic use, is enough to defeat a total takings claim. By this standard, no regulation can ever effect a total taking, and at best will be tested only under the far weaker partial takings rubric.").

legislation ending the TouchPlay lottery game, a legislative action that eliminated virtually all beneficial use and most of the sale value of the machines.[192] Indeed, the trial court concluded that the machines "have virtually no market value outside Iowa" and only salvage value in Iowa.[193] Nonetheless, the Eighth Circuit held that the statute "did not deprive [the owner] of '*all* economically beneficial uses' of its property."[194] The Supreme Court of South Carolina has also rejected a *Lucas* total takings claim because the challenged land use restriction left the landowner with residual recreation and conservation uses.[195]

3. The Intractable Denominator Dilemma

By far the biggest challenge to implementing the *Lucas* total takings rule in the lower courts is the denominator dilemma. Even if courts could agree on what types of value count for purposes of the *Lucas* total takings test, and whether residual sale or salvage value dooms a *Lucas* claim, to determine whether a challenged land use regulation deprives the owner of all economically viable use a court must first establish the appropriate denominator for the inquiry.[196] This issue is at the heart of most *Lucas* claims.[197] But, as explained above, the *Lucas* opinion provided neither practical nor theoretical guidance for this fundamental analytic step.[198] As a result, lower courts have developed shadow *Lucas* total takings doctrines involving various multifactored tests to determine the appropriate denominator. These shadow doctrines, in turn, have essentially swallowed *Lucas*'s purported bright-line rule, replacing it with multifactored inquiries—

192. Hawkeye Commodity Promotions, Inc. v. Vilsack, 486 F.3d 430, 442 (8th Cir. 2007).

193. *Id.* at 441.

194. *Id.* (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992)).

195. Dunes W. Golf Club, LLC v. Town of Mount Pleasant, 737 S.E.2d 601, 614–18 (S.C. 2013) ("On these facts, we find there was no categorical taking because the [land use restriction] permits numerous recreation and conservation uses, and Appellant has failed to produce any evidence that those permitted uses are not economically beneficial.").

196. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987) ("Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.'" (quoting Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1192 (1967))). The denominator problem at the heart of *Lucas*'s incoherence is not unique to the total takings myth. Rather, the same challenge plagues one of the three *Penn Central* factors—determining the degree of interference with the landowner's distinct investment-backed expectations. Thus, even if the Court overrules *Lucas* as a first step in repudiating the total takings myth, it will not render the denominator dilemma moot. *See infra* Part III.

197. To be clear, repudiating the *Lucas* total takings rule will not eliminate the denominator dilemma in regulatory takings cases because *Penn Central*'s reasonable investment-backed expectations factor requires the determination of the relevant denominator as well. But removing the distortion created by the total takings rule will facilitate clarification of the denominator issue in *Penn Central* cases.

198. *See, e.g.*, Laura S. Underkuffler, *Property and Change: The Constitutional Conundrum*, 91 TEX. L. REV. 2015, 2019 (2013) ("Despite the Court's recognition of this crucial problem more than twenty years ago, it has—to date—never explained the reasons for its choices or otherwise attempted to resolve this issue.").

different from the *Penn Central* multifactored inquiry—that resolve regulatory takings claims at the denominator stage, and *Murr* has merely entrenched this dilemma.

The denominator dilemma is essentially an issue of conceptual severance. As the Ninth Circuit has explained:

> Property interests may have many different dimensions. For example, the dimensions of a property interest may include a physical dimension (which describes the size and shape of the property in question), a functional dimension (which describes the extent to which an owner may use or dispose of the property in question), and a temporal dimension (which describes the duration of the property interest).[199]

Property owners engage in conceptual severance when they "delineat[e] a property interest consisting of just what the government action has removed from the owner, and then assert[] that that particular whole thing has been permanently taken" by the challenged regulation.[200] Because the Court has issued conflicting opinions and offered inconsistent guidance on the issue of conceptual severance,[201] lower courts must contend with landowners' creative attempts to divide their ownership interests into the smallest legally protected units possible to enhance the likelihood of prevailing in a *Lucas* challenge.[202]

Courts have, for the most part, rejected attempts at conceptually severing property along functional and temporal dimensions. The Supreme Court itself rejected temporal conceptual severance in *Tahoe–Sierra* when it declined to apply the *Lucas* total takings rule to a thirty-two-month development moratorium.[203] And while landowners have been creative in their attempts to claim a *Lucas* total taking based on functional conceptual severance, lower courts have been generally consistent in rejecting those

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199. Tahoe–Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 216 F.3d 764, 774 (9th Cir. 2000), *aff'd*, 535 U.S. 302 (2002).

200. Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1676 (1988) (coining the phrase "conceptual severance" and providing the first sustained analysis of the problem of conceptual severance in this seminal article).

201. *Id.* at 1675–77 (discussing the Court's inconsistent holdings regarding conceptual severance). *Compare* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130 (1978) (stating that "'[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated"), *with* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 834 (1987) (treating an easement as a legally distinct property interest and holding that requiring a landowner to grant an easement over her property is a per se taking).

202. In a forthcoming article, Lee Fennell insightfully describes the denominator dilemma as an instantiation of a more general aggregation problem that runs through various legal doctrines. *See* Lee Anne Fennell, *Accidents and Aggregates*, 59 WM. & MARY L. REV. (forthcoming 2018) (manuscript at 52–53).

203. *Tahoe–Sierra*, 535 U.S. at 331 ("Of course, defining the property interest taken in terms of the very regulation being challenged is circular. With property so divided, every delay would become a total ban; the moratorium and the normal permit process alike would constitute categorical takings. Petitioners' 'conceptual severance' argument is unavailing because it ignores *Penn Central*'s admonition that in regulatory takings cases we must focus on 'the parcel as a whole.'" (citing *Penn Cent.*, 438 U.S. at 130–31)).

attempts as well. For example, in *Clajon Production Corp. v. Petera*,[204] a Wyoming rancher argued that the state's two-license limit on supplemental hunting licenses available to large landowners constituted a "complete evisceration of a single stick in the bundle of property rights—i.e., the right to hunt on one's property" and was therefore a per se taking under *Lucas*.[205] The Tenth Circuit rejected the landowner's attempt to conceptually sever his land into functional components and held that "the relevant denominator must be derived from the entire bundle of rights associated with the parcel of land."[206] However, until the Court clarifies its position on separating sticks from the bundle of rights for purposes of determining the denominator in a regulatory takings claim, landowners will continue to face incentives to present functional conceptual severance total takings claims in the lower courts.[207]

The more persistent, and theoretically intractable, denominator problem in *Lucas* total takings cases involves geographical severance—the problem that *Murr* took on and failed to resolve. Most land use restrictions apply to only a portion of a landowner's total property holdings, either because the restriction applies to a portion of a lot or because the landowner owns more than one lot.[208] When that occurs, landowners nonetheless often bring *Lucas* total takings claims using geographical conceptual severance to argue that the regulation has deprived them of all economically viable use of the restricted portion of their property.

Two cases illustrate the denominator dilemma in the context of geographical severance and, at the same time, highlight the incoherence this dilemma brings to the *Lucas* total takings doctrine. First, in *Forest Properties, Inc. v. United States*,[209] the landowner brought a *Lucas* total takings challenge to the denial of a § 404 permit to dredge and fill a nine-acre lake on his sixty-two-acre tract.[210] The landowner owned the lake and fifty-three contiguous upland acres.[211] He planned to build a residential development on the upland fifty-three acres and to dredge and fill various

204. 70 F.3d 1566 (10th Cir. 1995).

205. *Id.* at 1577.

206. *Id.*

207. *Compare* Pa. Coal v. Mahon, 260 U.S. 393, 415 (1922) (treating the mineral estate as a separate property interest from the rest of the fee for denominator purposes), *with Penn Cent.*, 438 U.S. at 130–31 ("'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the 'landmark site.'"), *and* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 501–02 (1987) (rejecting the conceptual severance of the mineral estate from the rest of the fee for denominator purposes).

208. If a land use restriction eliminated the beneficial use of every portion of the entire holdings of a property owner, the *Lucas* test would be easily satisfied, and there would be no interesting litigation.

209. 177 F.3d 1360 (Fed. Cir. 1999).

210. *Id.* at 1362–63.

211. *Id.* at 1362.

part of the lake to create peninsulas to enhance the value of the upland lots.[212] The Army Corps of Engineers found that the lake was a protected wetland and denied the landowner's request for a permit to dredge and fill the lake.[213] The landowner sought compensation, claiming that the 9.4 acres of lake-bottom land was a separate property interest and therefore the permit denial constituted a *Lucas* total taking.[214] Notwithstanding that the landowner had purchased the lake bottom and upland portions in different transactions with different instruments and held them with separate titles, the court held that the entire sixty-two acres should be treated as the denominator for purposes of the takings claim.[215] According to the Federal Circuit, the lower court "properly looked to the economic reality of the arrangements, which transcended these legalistic bright lines."[216] Therefore, a complete prohibition on the use of nine out of sixty-two acres was held not to be a *Lucas* total taking.[217]

The second case provides a striking contrast to the first. In *Lost Tree Village Corp. v. United States*,[218] (*Lost Tree I*) the landowner bought approximately 1300 acres on Florida's mid-Atlantic coast and over the course of about twenty-five years developed most of the land into an upscale gated residential community.[219] The community currently "includes two golf courses, a beach club, a private hotel, condominiums, and single family homes."[220] Ultimately, the landowner was left with just a couple of parcels of undeveloped land on a peninsula on the southernmost corner of its holdings.[221] One of these parcels, Plat 57, is a 4.99-acre wetland. When the Army Corps of Engineers denied the landowner's request for a permit to fill and develop Plat 57 into a residential lot, the landowner filed a takings claim, arguing that Plat 57 itself should be the denominator and that the denial of the permit therefore constituted a total taking under *Lucas*.[222] The Court of Federal Claims disagreed, holding that the relevant denominator was Plat 57, Plat 55 (a nearby developed plat), and some scattered wetlands, and therefore rejected the *Lucas* claim.[223] The Federal Circuit, however, reversed, holding that Plat 57 alone was the relevant parcel for denominator purposes[224] and concluding that the denial of a permit to dredge and fill Plat 57 was a *Lucas* total taking.[225] Thus, in contrast to *Forest Properties*, a complete prohibition on the use of 4.99 out of 1300 acres was held to constitute a *Lucas* total taking.

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212. *Id.* at 1363.
213. *Id.* at 1362–63.
214. *Id.* at 1364.
215. *Id.* at 1364–65.
216. *Id.* at 1366.
217. *Id.* at 1367.
218. 707 F.3d 1286 (Fed. Cir. 2013).
219. *Id.* at 1288.
220. *Id.*
221. *Id.* at 1290.
222. *Id.* at 1293.
223. *Id.* at 1293–94.
224. *Id.* at 1294.
225. Lost Tree Vill. Corp. v. United States, 787 F.3d 1111, 1118–19 (Fed. Cir. 2015).

Notwithstanding the stark contrast between the outcomes of the two cases discussed above, the Federal Circuit's resolution of these two cases was not necessarily as arbitrary as the bare factual presentation these examples might suggest. In fact, the Federal Circuit has developed a multifactored inquiry for determining the relevant denominator. The Court of Federal Claims explained the Federal Circuit's approach to the *Lucas* denominator issue, noting that

> [o]n [the denominator] question, there is no bright-line rule; rather, the court takes "a flexible approach, designed to account for factual nuances."
>
> . . . .
>
> The relevant-parcel analysis focuses on, among other things, "the owner's actual and projected use of the property." Relevant takings precedent has yielded a number of factors that bear on the inquiry, including: (1) the degree of contiguity between property interests, (2) the dates of acquisition of property interests, (3) the extent to which a parcel has been treated as a single income-producing unit, (4) the extent to which a common development scheme applied to the parcel, and (5) the extent to which the regulated lands enhance the value of the remaining lands. The court previously also stated that a sixth factor, "(6) the extent to which any earlier development had reached completion and closure" was also a relevant consideration in the relevant-parcel analysis.[226]

Over the years, other lower courts have developed their own multifactored tests for determining the denominator in *Lucas* total takings cases, employing many of the factors used by the Federal Circuit.[227] Additional factors that courts have considered relevant for determining the appropriate denominator in *Lucas* total takings challenges include: whether the parcels are divided by a road,[228] the timing of the development of the parcels,[229] whether the parcels are put to the same use or different uses,[230] and the treatment of the parcels under state law.[231]

In *Murr*, the Court effectively replaced these relatively objective, nuanced, and focused multifactored tests with a vague, broadly drawn three-factor inquiry that seeks to determine what "reasonable expectations about property ownership" reveal about the parcel and regulation at issue.[232] These "reasonable expectations . . . derive from background customs and the whole

226. Lost Tree Vill. Corp. v. United States, 100 Fed. Cl. 412, 427–28 (2011) (citations omitted) (first quoting Loveladies Harbor, Inc., v. United States, 28 F.3d 1171, 1181 (Fed. Cir. 1994); then quoting Forest Props., Inc. v. United States, 177 F.3d 1360, 1365 (Fed. Cir. 1999); and then quoting Lost Tree Vill. Corp. v. United States, 92 Fed. Cl. 711, 718 (2010)).

227. *See, e.g.*, Coeur D'Alene v. Simpson, 136 P.3d 310, 321–24 (Idaho 2006); Giovanella v. Conservation Comm'n of Ashland, 857 N.E.2d 451, 461–62 (Mass. 2006); K&K Constr., Inc. v. Dep't of Nat. Res., 575 N.W.2d 531, 535–37 (Mich. 1998).

228. *Coeur D'Alene*, 136 P.3d at 321.

229. Palm Beach Isles Assocs. v. United States, 231 F.3d 1354, 1358 (Fed. Cir. 2000).

230. *Loveladies Harbor*, 28 F.3d at 1178.

231. *Coeur D'Alene*, 136 P.3d at 310.

232. Murr v. Wisconsin, 137 S. Ct. 1933, 1945 (2017).

of our legal tradition."[233] As Ilya Somin observed, the *Murr* test "is a recipe for confusion, uncertainty, and constant litigation."[234]

As with the shadow *Loretto* doctrines developed to determine when a physical invasion is permanent rather than temporary, these shadow *Lucas* doctrines, including the new *Murr* test, belie the myth that the Court has created a total takings doctrine premised on bright-line rules.[235] These shadow doctrines require fact-intensive inquiries to resolve the total takings claims, and the facts relevant to these inquiries are often far afield of the concerns that animate the Takings Clause.

Moreover, in the *Lucas* context, the shadow doctrines are likely to be outcome determinative. Because landowners rarely prevail on regulatory takings claims that do not fall within one of the purported bright-line categories of the total takings myth,[236] the denominator determination in *Lucas* claims is usually outcome determinative. Either the denominator is determined to be coextensive with the regulated parcel and the landowner prevails under *Lucas*, or the denominator is determined to be larger than the affected parcel and the court applies the *Penn Central* factors, in which case the landowner will rarely prevail.[237] The *Murr* Court recognized the risk that "the answer to [the denominator] question might be outcome-determinative," but insisted that "[d]efining the property at the outset . . . should not necessarily preordain the outcome in every case."[238]

Ultimately, however, the Court's own actions betrayed its assertion. After thoroughly evaluating the denominator under its new multifactored test, the Court concluded that the appropriate denominator included both parcels, which effectively ruled out a viable *Lucas* total takings claim. The Court then dispatched Petitioners' *Penn Central* claim with a scant four-sentence paragraph.[239] Thus, by preordaining the result of the *Penn Central* inquiry,

233. *Id.*

234. Somin, *supra* note 117.

235. *See* Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93, 112 (2002) ("A supposedly clear categorical takings rule that is applied this unpredictably and infrequently, with such large exceptions and qualifications, is not much of a rule.").

236. *See* Michelman, *supra* note 99, at 1621 ("In all the years between 1922 and 1987, however, the Court never once clearly applied the open-ended balancing test in favor of a takings claim and against a regulating government.").

237. *See* Dana, *supra* note 11, at 634 ("What would be the result of a regime where 'the property' almost always or always was the exact area restricted by regulation? In many cases, the result would be a finding by the court that the relevant 'property' had been deprived of all economically viable use or reduced to zero market value, and that the government therefore owed just compensation."); McConnell, *supra* note 19, at 315 ("Regulatory takings are subject to a vague and forgiving balancing test—the *Penn Central* test—that almost never results in compensation being due.").

238. *Murr*, 137 S. Ct. at 1944.

239. *Id.* at 1955 (Roberts, C.J., dissenting) ("The majority assures that, under its test, '[d]efining the property . . . should not *necessarily* preordain the outcome in *every* case.' The underscored language cheapens the assurance.").

the *Murr* denominator test will swallow not only the purported bright-line rule of *Lucas* but also the entire regulatory takings inquiry.[240]

IV. REPUDIATING THE TOTAL TAKINGS MYTH

Where does this leave us? As demonstrated above, over the past thirty-five years the Court has created three purported per se rules within regulatory takings jurisprudence that are doctrinally and theoretically incoherent and impossible for lower courts to apply. As a result, the total takings myth has fostered more, not less, confusion in regulatory takings law. Given the opportunity in *Murr* to resolve some of the incoherence in one branch of the total takings doctrine, the Court merely exacerbated the problem. Moreover, by focusing the attention of litigants and lower courts on the contours of these purported bright lines, the total takings myth has interfered with the important work of clarifying foundational regulatory takings doctrine. In response to the chaos it has created, the Court is presented with two choices—it can either clarify its bright-line rules or it can repudiate the total takings myth and refocus its attention on refining the *Penn Central* balancing test to more fairly and consistently implement its regulatory takings doctrine.[241] The time has come for the Court to end the total takings charade and repudiate the total takings myth, beginning by overruling *Lucas*.

A. The Problem with Bright-Line Rules in Regulatory Takings Law

The total takings myth was adopted as part of the Court's, and particularly Justice Antonin Scalia's,[242] attempt to replace constitutional standards with constitutional rules in the 1980s and early 1990s.[243] As noted above, the total takings rules were justified in part by the benefits of carving out a small portion of otherwise messy regulatory takings claims for easy resolution.[244] The bright-line rules, however, have been anything but easy to implement. Indeed, rather than readily resolving a small portion of regulatory takings litigation, the total takings myth has made fixing the boundaries of these purported bright-line rules the focus of regulatory takings claims. The

240. *Id.* at 1956 ("In deciding whether there is a taking under [the *Penn Central* factors], the regulation will seem eminently reasonable given its impact on the pre-packaged parcel. Not, as the Court assures us, 'necessarily' in 'every' case, but surely in most.").

241. Of course, a third option also begs for consideration: the Court could reject the entire regulatory takings doctrine as misguided. *See, e.g.*, Rubenfeld, *supra* note 13, at 1077 (arguing that the Takings Clause requires compensation only when the government "uses" private property, not when it merely regulates the landowner's use of the property); Mark Tunick, *Constitutional Protections of Private Property: Decoupling the Takings and Due Process Clauses*, 3 U. PA. J. CONST. L. 885, 887–88 (2001) (arguing that land use regulations should be evaluated for constitutional validity under the Due Process Clause, not the Takings Clause). I leave consideration of this option to a future paper.

242. *See* Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 83 (1992) ("Justice Scalia, more than any other current Justice, favors operative rules and condemns operative standards."). *See generally* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

243. *Cf.* Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 231 (1984); Sullivan, *supra* note 242 at 77–83.

244. *See supra* Introduction.

struggles of the lower courts in their attempts to determine and clarify the edges of the *Lucas* and *Loretto* bright-line rules, and their ultimate resort to standards and multifactored tests, suggests the difficulties the Supreme Court might encounter if it seeks to sharpen those rules into actual bright lines.

Even if the Court *could* crystallize the edges of the total takings doctrine into actual bright-line rules, it should not do so. Much has been written about the relative virtues of rules and standards, and this Article does not intend to add to that literature.[245] It is sufficient to note the broad outlines of consensus regarding the relative strengths and weaknesses of each type of legal standard. It is widely accepted that bright-line rules are best suited to circumstances where certainty and ease of administration are more important than precision and particularized decision-making.[246] Bright-line rules focus on one or two triggering facts and limit the discretion of the decision-maker once those facts are determined, thereby sacrificing fine-grained equity for broad-stroke goals, such as predictability and administrability.[247] As a result, bright-line rules facilitate advance planning, offer ease of administration, and limit the potential for arbitrary decision-making.[248] At the same time, bright-line rules are likely to be both over- and under-inclusive, thereby sacrificing particularized equity based on relevant circumstances.[249]

Standards, in contrast, permit consideration of multiple relevant factors and provide a decision-maker discretion to tailor the legal outcome to the particularized facts of each case.[250] As a result, standards offer less predictability than rules and are costlier to implement, but they are thought to provide a more just and fair result in each particular case.[251]

Advocates of bright-line rules in regulatory takings doctrine celebrate the potential for clarity, efficiency, notice, and property rights protection offered by takings formalism.[252] But even if these benefits were achievable, they come at a steep cost—the loss of circumstantial justice and fairness.[253]

Regulatory takings law is quintessentially about justice and fairness. As the Court has often repeated, "[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was

245. For an overview and synopsis of the relative strengths and weakness of rules and standards, see Sullivan, *supra* note 242, at 57–69. For the seminal discussion of rules and standards in the context of property law, see CAROL M. ROSE, *Crystals and Mud in Property Law*, *in* PROPERTY AND PERSUASION 199, 199 (1994). The general discussion of the strengths and weaknesses of rules and standards that follows draws heavily from these two important works.

246. *See* Sullivan, *supra* note 242, at 58.

247. *Id.* at 62–63.

248. *Id.* at 62.

249. *Id.*

250. *Id.* at 58–59.

251. *See, e.g.*, Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 33 (2000).

252. *See, e.g.*, Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CALIF. L. REV. 609, 619–20 (2004) (detailing the potential benefits of bright-line rules in regulatory takings doctrine).

253. *See id.* at 652–81 (discussing the ways in which "disappointment and frustration" are "endemic to takings formalism").

designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[254] The doctrine is purposefully ad hoc and multifaceted,[255] and the Court has "frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case.'"[256] While regulatory takings law serves other values as well,[257] the Court has consistently and adamantly insisted that fairness and justice are the central concerns of the regulatory takings doctrine.[258]

But, as they stand now, the Court's total takings rules are the antithesis of justice and fairness. Instead, these bright-line rules create takings "cliffs and ledges"[259]—a property owner whose land is regulated right up to the edge of the precipice receives no compensation at all, while a landowner whose property is regulated over the cliff is compensated for 100 percent of the value of her property. Justice John Paul Stevens highlighted the inequity of the *Lucas* takings cliff in his dissent in *Lucas*: "In addition to lacking support in past decisions, the Court's new rule is wholly arbitrary. A landowner whose property is diminished in value 95% recovers nothing, while an owner whose property is diminished 100% recovers the land's full value."[260] A similar cliff is created by the bright-line rule in *Loretto*, such that a landowner subjected to a substantial physical invasion that is long-lasting but not quite permanent (say, ninety-nine years) would likely not be entitled to any compensation, while a landowner subject to a so-called permanent physical occupation would be fully compensated.[261]

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254. Armstrong v. United States, 364 U.S. 40, 49 (1960); *see also* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123 (1978).

255. *Penn Cent.*, 438 U.S. at 123; *see also* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1071 (1992) (Stevens, J., dissenting) ("[T]he Court's new rule and exception conflict with the very character of our takings jurisprudence. We have frequently and consistently recognized that the definition of a taking cannot be reduced to a 'set formula' and that determining whether a regulation is a taking is 'essentially [an] ad hoc, factual inquir[y].'" (second and third alterations in original) (quoting *Penn Cent.*, 438 U.S. at 124)).

256. *Penn Cent.*, 438 U.S. at 123 (quoting United States v. Cent. Eureka Mining Co., 357 U.S. 155, 168 (1958)).

257. Eagle, *supra* note 13, at 613 ("These values include the roles of just compensation in preventing wasteful and excessive government, by ensuring that property taken is worth more to the government than it is in the marketplace; and in protecting individual liberty, by placing a check on a government's ability to squelch opposition by taking the land of political opponents.").

258. *See* Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part I—A Critique of Current Takings Clause Doctrine*, 77 CALIF. L. REV. 1299, 1304 (1989) ("The Court has repeatedly stated that the ultimate issue in a takings case is whether 'fairness and justice' require that compensation be paid for economic injuries caused by the government.").

259. *See* Fennell, *supra* note 202, at 52 (recognizing regulatory takings law's formidable "cliff effect").

260. *Lucas*, 505 U.S. at 1064 (Stevens, J., dissenting).

261. As noted above, lower courts have interpreted the permanent-temporary distinction in *Loretto* to soften this cliff effect. But the ability of lower courts to artfully avoid the cliffs created by the Court's bright-line rules is not a persuasive justification for maintaining the total takings myth.

Similarly, the bright-line rules of the total takings myth create takings contradictions in which seemingly identically situated landowners are treated differently based on idiosyncrasies unrelated to any purpose underlying Takings Clause doctrine. For example, under *Lucas*, if a landowner owns a one-acre lot and a land use restriction prohibits all use of one-half of the lot, the landowner will not be entitled to compensation. But if her neighbor owns two separate one-half acre lots and is prohibited from all use of one of those separate lots, she will be fully compensated.[262] Similarly, under *Horne II*, a person subject to an order to turn over $400,000 worth of raisins as part of a market regulatory scheme is entitled to full compensation under the Takings Clause, while a person ordered to turn over $400,000 in fees for a similar scheme would not be entitled to any compensation.[263] The takings cliffs and contradictions created by the total takings myth are the antithesis of the fairness and justice goals of regulatory takings doctrine.

Not only are these takings cliffs and contradictions arbitrary and unfair, they create adverse incentives for land ownership and takings litigation.[264] The *Lucas* bright-line rule encourages landowners to structure their holdings in the smallest possible legal unit to take advantage of the *Lucas* rule if the state imposes land use restrictions on their property in the future. Justice Stevens foresaw precisely this adverse incentive in his dissent in *Lucas*: "[D]evelopers and investors may market specialized estates to take advantage of the Court's new rule. The smaller the estate, the more likely that a regulatory change will effect a total taking."[265] The *Lucas* bright-line rule also encourages takings claimants to characterize every regulatory takings claim as a *Lucas* claim in order to avoid having to litigate their challenges under the *Penn Central* test.[266] This distortion in litigation practices wastes judicial resources and diverts the attention of lower courts from the important task of implementing and refining the *Penn Central* factors.

B. The Return to Standards in Regulatory Takings Law

Because bright-line rules have no place in regulatory takings doctrine, the Court should begin the task of dismantling the total takings myth. Doing so

262. Fee, *supra* note 24, at 1030. The *Murr* decision may ameliorate this contradiction in some cases but at the expense of any pretense that *Lucas* provides a bright-line rule.

263. United States v. King Mountain Tobacco Co., 131 F. Supp. 3d 1088, 1095 (E.D. Wash. 2015) (holding that quarterly assessments under the Fair and Equitable Tobacco Reform Act are not appropriations for purposes of the *Horne II* total takings rule).

264. *But see* Susan Rose-Ackerman, *Against Ad-Hocery: A Comment on Michelman*, 88 COLUM. L. REV. 1697, 1700 (1988) (arguing that "what takings law needs is a good dose of formalization" to foster certainty in private investment decisions).

265. *See Lucas*, 505 U.S. at 1065–66; *see also* Brown & Merriam, *supra* note 21, at 19–44 (describing landowners' attempts to segment their property ownership interests in order to prevail on *Lucas* total takings claims).

266. *See* Brown & Merriam, *supra* note 21, at 44 ("Every plaintiff's attorney is trying desperately to get out from under the *Penn Central* analysis, or at least ought to be, because of the unpredictability of *Penn Central*'s ad hoc approach and because property owners are at a dramatic disadvantage under *Penn Central*.").

would not be hard for the Court to justify.[267] Under any but the most restrictive views of the Court's authority (and obligation) to revisit erroneous constitutional precedent, a decision to renounce the total takings myth should be a simple one.

In a constitutional democracy, adherence to precedent is a "foundation stone of the rule of law"[268] that "promotes the evenhanded, predictable, and consistent development of legal principles [and] fosters reliance on judicial decisions."[269] And the Court has made clear that "[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights."[270] Still, constitutional precedent is not immutable,[271] and the Court has a particular obligation to revisit erroneous constitutional precedent because it is the only branch of government that can readily reverse a mistaken constitutional interpretation.[272] Thus, while the Court employs a presumption against overruling its prior cases,[273] it nonetheless will do so if consideration of several relevant factors demonstrates that the values of stare decisis should give way to the importance of coherent, correct constitutional interpretation. In *Citizens United v. FEC*,[274] the Court announced factors relevant to analyzing continued reliance on constitutional precedents, including: (1) how long the precedent has been in existence, (2) the reliance interests at stake in changing the legal rule, (3) whether the precedent is workable in lower courts, and (4) whether the original decision announcing

267. Not surprisingly, substantial disagreement exists among scholars on the importance of constitutional precedent and the wisdom of the Court's current approach to overruling its prior constitutional interpretations. *Compare, e.g.*, Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 155 (2006) (noting that "[c]onstitutional stare decisis is a hot topic" and arguing that the Court should be bound by its prior decisions), *with* Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Decisions*, 87 VA. L. REV. 1, 1 (2001) (arguing against a rebuttable presumption against overruling prior decisions if the prior decision is "demonstrably erroneous"). This Article does not intend to engage in that particular debate. Rather, it assumes that the Court will sometimes find it necessary to overturn settled constitutional precedent and that it will apply the basic rules it generally applies when deciding whether to do so.

268. Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2036 (2014).

269. Payne v. Tennessee, 501 U.S. 808, 827 (1991).

270. *Id.* at 828.

271. *See* Pearson v. Callahan, 555 U.S. 223, 233 (2009) ("Although '[w]e approach the reconsideration of [our] decisions . . . with the utmost caution,' '[*s*]*tare decisis* is not an inexorable command.'" (alterations in original) (quoting State Oil Co. v. Kahn, 522 U.S. 3, 20 (1997))).

272. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 954–55 (1992) (Rehnquist, C.J., concurring in part and dissenting in part) ("Erroneous decisions in . . . constitutional cases are uniquely durable, because correction through legislative action, save for constitutional amendment, is impossible. It is therefore our duty to reconsider constitutional interpretations that 'depar[t] from a proper understanding' of the Constitution."); *cf.* Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401, 2409 (2015) (noting that in a statutory interpretation case, stare decisis carries greater weight because "unlike in a constitutional case, critics of our ruling can take their objections across the street, and Congress can correct any mistake it sees").

273. Citizens United v. FEC, 558 U.S. 310, 362 (2010) (stating that "precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error").

274. 558 U.S. 310 (2010).

the precedent was well reasoned.[275] All of these factors counsel in favor of repudiating the total takings myth.

In fact, the Court recently corrected another mistake in its regulatory takings jurisprudence when it jettisoned a long-standing regulatory takings rule with little fanfare in *Lingle v. Chevron U.S.A. Inc.*[276] Twenty-five years before *Lingle*, in *Agins v. City of Tiburon*,[277] the Supreme Court first stated that a regulation of private property "effects a taking if [it] does not substantially advance legitimate state interests."[278] In the ensuing years, the Court repeated that legal standard often, and it eventually became "ensconced in . . . Fifth Amendment takings jurisprudence."[279] The Court itself, however, never actually held a regulation to be a compensable taking on the basis of the "substantially advance" test.[280] Finally, when the Ninth Circuit applied the test in an outcome-determinative manner in 2004, the Court granted certiorari and reversed.[281] Conceding that its original use of the "substantially advance" formula in *Agins* was "regrettably imprecise,"[282] the Court explained that test sounds more in the nature of due process than regulatory takings and therefore it "is not a valid method of discerning whether private property has been 'taken' for purposes of the Fifth Amendment."[283] In *Lingle* the Court never mentioned stare decisis and did not invoke the stare decisis factors mentioned above. Rather, the Court simply announced that the "substantially advances" test "is not a valid takings test" and thereby repudiated a takings myth that had been circulating for decades.[284]

Commentators have lauded *Lingle* and the Court's decision to reverse course and disentangle substantive due process from takings claims, largely because the substantive due process language was detracting from the development of core regulatory takings doctrine.[285] As Mark Fenster observed,

> Viewed four years later, *Lingle*'s narrow project of separating regulatory takings from substantive due process has been largely successful. Courts no longer apply stray language from an earlier decision that *Lingle* struck from the overstuffed box of key phrases that compose the takings canon,

275. *See id.* at 362–63.
276. 544 U.S. 528 (2005).
277. 447 U.S. 255 (1980).
278. *Id.* at 260.
279. *Lingle*, 544 U.S. at 531.
280. *Id.* at 546 ("[I]n no case have we found a compensable taking based on [a substantially advance] inquiry. Indeed, in most of the cases reciting the 'substantially advances' formula, the Court has merely assumed its validity when referring to it in dicta.").
281. Chevron USA, Inc. v. Bronster, 363 F.3d 846, 849–55 (9th Cir. 2004), *rev'd sub nom.* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005).
282. *Lingle*, 544 U.S. at 542.
283. *Id.*
284. *Id.* at 545.
285. *See, e.g.*, D. Benjamin Barros, *At Last, Some Clarity: The Potential Long-Term Impact of* Lingle v. Chevron *and the Separation of Takings and Substantive Due Process*, 69 ALB. L. REV. 343, 349 (2006); J. Peter Byrne, *Due Process Land Use Claims after* Lingle, 34 ECOLOGY L.Q. 471, 471–72 (2007); Fenster, *supra* note 252, at 527.

> and they now seem to understand the distinction between takings and substantive due process claims.[286]

Benjamin Barros agreed, arguing that by eliminating substantive due process language from regulatory takings claims "the Court took at least a modest step in clarifying its regulatory takings doctrine" and created "great potential" for further clarification.[287]

The total takings myth should not be much more difficult to dispatch than *Lingle*, and the repudiation of the purported bright-line rules will provide similar jurisprudential benefits. The *Lucas* doctrine should be the first to go, because it causes the most mischief in the lower courts and is the least justifiable of the total takings rules. Applying the *Citizens United* factors, *Lucas* is an easy case for overturning a failed precedent: (1) the original *Lucas* opinion is widely perceived to be poorly reasoned and dramatically undertheorized,[288] (2) it has proved unworkable in the lower courts,[289] (3) it has been on the books for almost twenty-five years, and (4) landowners cannot assert any legitimate or reasonable reliance on its holding.[290] The Court's recent decision in *Murr* is certain to generate a flood of *Lucas* total takings litigation, so the Court will have ample opportunity in the near future to apply the *Citizens United* factors and overturn *Lucas*.

CONCLUSION

The Court missed an important opportunity to begin the work of dismantling the total takings myth in *Murr*. Overruling *Lucas* would be an important first step toward addressing and resolving the very real problems still plaguing the Court's regulatory takings jurisprudence. Although the Court has repeatedly said that the *Lucas* total takings rule should apply only "exceedingly rarely,"[291] it is, in fact, invoked in a large number of regulatory takings cases.[292] Removing the siren's call of *Lucas* from regulatory takings doctrine will eliminate the adverse incentives that drive litigants to cast their run-of-the-mill regulatory takings claims as total takings claims and will redirect judicial attention to the merits of underlying regulatory takings claims. The Court's current approach to regulatory takings, encapsulated in

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286. Fenster, *supra* note 252, at 526–27.

287. Barros, *supra* note 285, at 349.

288. *See, e.g.*, Michael W. McConnell, *The Raisin Case*, 2015 CATO SUP. CT. REV. 313, 318 ("The total-loss rule has long been recognized as a conceptual disaster area, incapable of objective and consistent administration. It should be abandoned where it now holds sway . . . .").

289. *See supra* Part II.B.

290. Indeed, in order to claim reliance on the *Lucas* total takings rule, a property owner would have to assert that she structured her ownership interests in such a way that if a particular type of land use, or the development of a particular portion of her property, were restricted by a land use regulation, she would be entitled to compensation per se.

291. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1018 (1992); *see also* Tahoe–Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 330 (2002) ("[O]ur holding [in *Lucas*] was limited to 'the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted.'" (quoting *Lucas*, 505 U.S. at 1017)).

292. *See* Brown & Merriam, *supra* note 21, at 3–4 (reviewing more than 1600 cases raising *Lucas* claims in the past twenty-five years).

the *Penn Central* factors, is much in need of refinement or redefinition.[293] Dismantling the total takings doctrine will make room for that important work.

293. *See, e.g.*, Eagle, *supra* note 13, at 605 (clarifying doctrinal inaccuracies in the *Penn Central* test but also arguing that "*Penn Central* and its progeny fail to meet the most basic practical requirement for a legal rule [because] with its lack of objective criteria [it] does not impart knowledge of the legal rights and obligations of either property owners or public officials, resulting in protracted litigation and arbitrary outcomes" (citations omitted)).