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Will *Arkansas Game & Fish Commission v. United States* Provide a Permanent Fix for Temporary Takings?

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WILL *ARKANSAS GAME & FISH COMMISSION v. UNITED STATES* PROVIDE A PERMANENT FIX FOR TEMPORARY TAKINGS?

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Abstract: The U.S. Supreme Court's decision in *Arkansas Game & Fish Commission v. United States* recognized that any government action that interferes with the enjoyment and use of private property—whether permanent or temporary in duration—can give rise to a claim under the Takings Clause of the Fifth Amendment. Yet dicta in the decision left many pondering whether significantly different tests will apply depending on the duration of the government invasion. This Article reviews the state of the law regarding temporary physical takings both before and after *Arkansas Game & Fish* with particular regard to the test applicable to physical invasions of limited duration, and to what degree the duration of the government invasion should influence the court's resolution of a takings claim. The Article concludes that drawing a distinction between so-called "permanent" and "temporary" invasions, based solely on the duration of the government occupation, is meaningless when determining liability under the Takings Clause.

"When I use a word," Humpty Dumpty said, in a rather scornful tone, "It means just what I choose it to mean—neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master—that's all."

Alice was too much puzzled to say anything; so after a minute Humpty Dumpty began again. "They've a temper some of them—particularly verbs: they're the proudest—adjectives you can do anything with, but

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not verbs—however, I can manage the whole lot of them! Impenetrably! That's what I say!"

—Lewis Carroll, *Through the Looking Glass* Ch. VI (1872)

INTRODUCTION

Few constitutional provisions have generated more interpretive difficulties than the Fifth Amendment's mandate that private property may not be taken for public use, without just compensation.[1] For reasons that probably owe more to case-by-case pragmatism than any concern for doctrinal clarity, the Supreme Court's Takings Clause jurisprudence has divided into two broad categories, commonly referred to as *regulatory* and *physical* takings, respectively.[2] Regulatory takings typically occur when legal restrictions on the use of private property "go too far," depriving the owner of essential attributes of ownership.[3] Physical takings result from incursions onto private property (normally referred to in quasi-military terms as "invasions" or "occupations") by the government or by parties acting under governmental authority.[4]

In 1987, the Supreme Court ruled unequivocally that temporary regulatory takings—those whose adverse effects are terminated by subsequent repeal of the offending measure or by other remedial action—require just compensation for the period of the unconstitutional restrictions.[5] Oddly, however, no such bright-line rule existed for temporary physical takings. That incongruity lay at the heart of one of the most significant takings cases to reach the Court in recent years, *Arkansas Game & Fish Commission v. United States*.[6]

This case addressed the question of whether a physical invasion of property must continue in perpetuity to constitute a compensable taking under the Fifth Amendment. A unanimous Supreme Court held that it does not.[7] The decision is significant because the Court recognized that any government action that interferes with the enjoyment and use of private property can give rise to a takings claim under the Fifth Amendment. There is no

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[1] U.S. CONST. amend. V.

[2] *See, e.g.*, STEVEN J. EAGLE, REGULATORY TAKINGS 880–82 (4th ed. 2009) (contrasting physical takings jurisprudence with regulatory takings jurisprudence).

[3] *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415–16 (1922).

[4] *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 419 (1982) (holding that cable installation effected a permanent physical occupation on the landlord's property, and was thus a taking).

[5] *See* First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles, 482 U.S. 304, 318–22 (1987).

[6] 133 S. Ct. 511, 511 (2012).

[7] *Id.* at 518, 522. Justice Kagan did not participate in the 8–0 decision. *Id.* at 523.

categorical exception for government actions that are temporary in duration. The Court's decision closed a long-standing loophole in takings law that had allowed the federal government in this case to avoid takings liability for having repeatedly flooded the Arkansas Game & Fish Commission's land.[8]

The *Arkansas Game & Fish* opinion, however, is not without faults. In reaching the conclusion that there is no temporary-flooding exception to the Takings Clause, the Court left a host of important takings issues undecided, including the reach of the *per se* physical taking test set forth in *United States v. Causby*[9] and *Loretto v. Teleprompter Manhattan CATV Corp.*[10] By leaving this issue unaddressed, the Court left many pondering whether *Arkansas Game & Fish* provides a permanent fix for the temporary takings question.

This Article reviews the state of the law regarding temporary physical takings after *Arkansas Game & Fish* with particular regard to the questions of what test is applied to physical invasions of limited duration, and to what degree the duration of the government invasion should influence the court's resolution of a takings claim. Part II provides an overview and analysis of the Supreme Court's decision in *Arkansas Game & Fish*. Part III discusses the existing confusion engendered by the Court's discussion of "temporary" physical invasions in *Loretto*. In Part IV, the Article asks whether *Arkansas Game & Fish* changed the test applicable to temporary physical takings. And finally, in Part V, this Article concludes by considering whether there is any meaningful purpose for distinguishing so-called "permanent" invasions from "temporary" invasions when determining liability under the Takings Clause.

I. THE *ARKANSAS GAME & FISH* CASE

A. *The Waterlogged Road to the Supreme Court, or, the Woods are Lovely, Dark, and Damp*

The Arkansas Game & Fish Commission owns 23,000 acres of hardwood forest in the Dave Donaldson Black River Wildlife Management Area, in northeast Arkansas.[11] This land, which contains thousands of acres of

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[8] *See infra* notes 22–37 and accompanying text.

[9] 328 U.S. 256, 264–67 (1946).

[10] 458 U.S. at 441 ("We affirm the traditional rule that a permanent physical occupation of property is a taking.").

[11] *Ark. Game & Fish Comm'n*, 133 S. Ct. 511, 515. The Arkansas Game & Fish Commission is an agency of the State of Arkansas. *See About AGFC*, ARK. GAME AND FISH COMM'N, http://www.agfc.com/aboutagfc/Pages/AboutMission.aspx (last visited Jan. 28, 2014), *available at* http://perma.cc/4C96-WZA4. The Commission's mission is to manage the state's fish and wildlife resources through habitat management, fish stocking, hunting and fishing regulations, and other programs. *Id.*

valuable bottomland hardwood trees such as nuttall, overcup, and willow oak, is used for timber harvesting, hunting, recreation, and wildlife habitat and conservation.[12] Much of the property and trees were seriously damaged when the U.S. Army Corps of Engineers, as part of a dam management plan, inundated the forest with flood waters for several consecutive years during the 1990s.[13]

The Commission successfully sued the federal government for inverse condemnation in the Court of Federal Claims.[14] The court found that the "government's superinduced flows so profoundly disrupted certain regions of the Management Area that the Commission could no longer use those regions for their intended purposes . . . ."[15] Although the Army Corps eventually stopped flooding the forest, the court concluded that "the damage done to the Commission's property interest in its timber was permanent . . . and the Commission was preempted from exercising its property rights over its timber during and after the Corps's deviations."[16] In conclusion, the Court of Federal Claims ruled that "the government's temporary taking of a flowage easement over the Management Area resulted in a permanent taking of timber from that property . . . ."[17] and ordered the Corps to pay approximately $5.6 million for the value of the timber destroyed by the floods, plus an additional $176,428.34 to restore the damaged recreation and conservation lands.[18]

But, in a 2-1 decision in 2011, the U.S. Court of Appeals for the Federal Circuit reversed the trial court's judgment and concluded that, as a matter of law, government flooding of private property can never constitute a taking if it is the result of an "ad hoc" or "temporary" government policy:

> [I]n determining whether a governmental decision to release water from a dam can result in a taking, we must distinguish between action which is by its nature temporary and that which is permanent. But in distinguishing between temporary and permanent action, we do not focus on a structure and its consequence.

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[12] *Ark. Game & Fish Comm'n*, 133 S. Ct. at 515–16; Ark. Game & Fish Comm'n v. United States, 87 Fed. Cl. 594, 600–01 (2009).

[13] *Ark. Game & Fish Comm'n*, 133 S. Ct. at 516. The Army Corps of Engineers operates Clearwater Dam 115 miles upstream from the management area. Between 1993 and 2000, the Army Corps deviated from its ordinary water release plans, which provided downstream farmers with longer harvest times but also resulted in several consecutive years of flooding on the management area. *See id.*; *see also* Ark. Game & Fish Comm'n v. United States, 637 F.3d 1366, 1369–73 (Fed. Cir. 2011).

[14] *Ark. Game & Fish Comm'n*, 87 Fed. Cl. at 647.

[15] *Id.* at 620.

[16] *Id.*

[17] *Id.* at 634.

[18] *See id.* at 647.

> Rather we must focus on whether the government flood control policy was a permanent or temporary policy. Releases that are ad hoc or temporary cannot, by their very nature, be inevitably recurring [and therefore cannot constitute a taking].[19]

Consequently, the majority reasoned, it was unnecessary to consider the extent to which the Army Corps's actions interfered with the Commission's rights in its property.[20] According to the Federal Circuit, government-induced flooding that is not permanent in duration can never qualify as a taking.[21]

B. *The Decision: Temporary Physical Invasions Can Give Rise to Takings*

The Supreme Court granted certiorari to determine whether a temporary physical invasion could be categorically excluded from the requirements of the Takings Clause. Specifically, the Court took review of the case on the question "whether government actions that cause repeated floodings must be permanent or inevitably recurring to constitute a taking of property."[22] At first blush, the answer would seem to be easy. After all, the Court has repeatedly held that the government must compensate landowners for its temporary occupation of private property regardless of how short the duration of the occupation was.[23]

But the Court's treatment of temporary physical invasions has been inconsistent throughout the years—particularly in regard to government-induced, temporary flooding.[24] The Court's early flooding cases repeatedly

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[19] *Ark. Game & Fish Comm'n*, 637 F.3d at 1377.

[20] *See id.* at 1376 ("[W]e need not decide whether the flooding on the Management Area was 'sufficiently substantial to justify a takings remedy' . . . because the deviations were by their very nature temporary and, therefore, cannot be 'inevitably recurring' or constitute the taking of a flowage easement.") (citing Ridge Line, Inc. v. United States, 346 F.3d 1346, 1355 (Fed. Cir. 2003)).

[21] *See id.* at 1376–79.

[22] *Ark. Game & Fish Comm'n*, 133 S. Ct. at 518.

[23] *See, e.g.*, United States v. Pewee Coal Co., 341 U.S. 114, 117 (1951) (asserting that "the Fifth Amendment requires the United States to bear operating losses incurred during the period the government operates private property in the name of the public without the owner's consent"); Kimball Laundry Co. v. United States, 338 U.S. 1, 16 (1949) (finding that the federal government must compensate a laundry company for the value of the temporary use of its property); United States v. Petty Motor Co., 327 U.S. 372, 374, 380–81 (1946) (finding that the appropriation of a building for public use was a taking and the damages were equal to "the use and occupancy of the leasehold for the remainder of the tenant's term"); United States v. General Motors Corp., 323 U.S. 373, 375, 382 (1945) (holding that the proper compensation for the short-term taking of a portion of a building was the "market rental value of such a building on a lease by the long-term tenant to the temporary occupier").

[24] *See* Randall J. Pick, Loretto v. Teleprompter*: A Restatement of the* Per Se *Physical Invasion Test for Takings*, 35 BAYLOR L. REV. 373, 379, 381–83 (1983) (opining that *Loretto* solidified the Court's historical treatment of temporary physical invasions as being different from permanent ivasions).

noted that the floods that gave rise to a taking had created a "permanent" condition on the land.[25] Thus, in the 1924 case *Sanguinetti v. United States*, the Court stated that government-induced flooding must "constitute an actual, permanent invasion of land" to effect a taking.[26] The modern physical takings case, *Loretto v. Teleprompter Manhattan CATV Corp.*, generally summarized the early flooding cases as follows: "[T]his Court has consistently distinguished between flooding cases involving permanent physical occupation, on the one hand, and cases involving a more temporary invasion . . . on the other. A taking has always been found only in the former situation."[27] That decision, which drew a stark contrast between "permanent" and "temporary" government intrusions, cast doubt on whether and under what circumstances a temporary physical invasion could give rise to a taking.[28] And in specific regard to flooding, *Loretto* cited *Sanguinetti* for the rule that government-induced flooding will only constitute a taking if it constitutes an "actual, permanent invasion of land."[29]

Thus, the key question before the Court in *Arkansas Game & Fish* was what the Court had meant when it said that a physical taking must be *permanent* to trigger the constitutional mandate of just compensation.[30] The United States argued that *Sanguinetti* established a *per se* rule that flooding must be perpetual in duration to trigger the constitutional obligation of paying just compensation,[31] whereas the State of Arkansas maintained that compensation is due if the damage resulting from the invasion is substantial, regardless of the duration of the invasion itself.[32]

Justice Ginsburg, writing for a unanimous Court, resolved the apparent conflict between "temporary" and "permanent" flooding cases by tracing two threads through the Court's takings case law.[33] First, the Court analyzed its decisions concerning physical takings to conclude that all physical inter-

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[25] *See* United States v. Cress, 243 U.S. 316, 327–28 (1917) (concluding that a taking occurred where inevitably recurring floods created a "permanent condition" on the land); United States v. Lynah, 188 U.S. 445, 468–70 (1903) (finding a taking where a dam caused the owner's property to be "permanently flooded, wholly destroyed in value, and turned into an irreclaimable bog"); Pumpelly v. Green Bay & Miss. Canal Co., 80 U.S. 166, 177–78 (1871) (a taking occurred when a dam caused "irreparable and permanent injury" to the owner's land).

[26] Sanguinetti v. United States, 264 U.S. 146, 149 (1924).

[27] 458 U.S. at 428.

[28] *See id.* (suggesting that a distinction should be made between permanent and temporary occupation of land for the purposes of determining a taking).

[29] *Id.*

[30] *Ark. Game & Fish Comm'n*, 133 S. Ct. at 519–22; *see infra* notes 31–37 and accompanying text.

[31] *Ark. Game & Fish Comm'n*, 133 S. Ct. at 519–20.

[32] *See* Petitioner's Brief on the Merits at 25–29, 32–35, *Ark. Game & Fish Comm'n*, 133 S. Ct. 511 (No. 11-597), 2012 WL 2561162 at *25–29, *32–35.

[33] *See Ark. Game & Fish Comm'n*, 133 S. Ct. at 518–22. The decision was 8-0; Justice Kagan did not participate in the case. *Id.* at 523.

ferences with private property—regardless of duration—are potentially subject to the Takings Clause.[34] Second, the Court reviewed its government-flooding precedents to determine whether there was any significance to the distinction between "temporary" and "permanent" floods.[35] When read together, the Court found "no solid grounding in precedent for setting flooding apart from all other government intrusions on property."[36] Accordingly, the Court held that "government-induced flooding of limited duration may be compensable" and reversed the Federal Circuit's decision.[37]

1. Takings Claims Are Not Subject to *Per Se* Defenses

The Court began its analysis by restating two fundamental principles of its Takings Clause jurisprudence. First, the Takings Clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[38] And second, "[w]hen the government physically takes possession of an interest in property for some public purpose," it is obligated to compensate the owner.[39] Together, the Court explained, these principles preclude the lower courts from adopting categorical defenses to takings claims.[40] Instead, takings claims that do not fall within one of the court's categories of *per se* takings must be considered on their individual merits:

> We have recognized . . . that no magic formula enables a court to judge, in every case, whether a given government interference with property is a taking. In view of the nearly infinite variety of ways in which government actions or regulations can affect property interests, the Court has recognized few invariable rules in this area.[41]

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[34] *Id.* at 518–19.

[35] *Id.* at 519–22.

[36] *Id.* at 521.

[37] *Id.* at 519, 523.

[38] *Id.* at 518 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

[39] *Id.* (quoting Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322 (2002)).

[40] *See id.* (noting that "most takings claims turn on situation-specific factual inquiries," with the exception of categorical takings).

[41] *Id.* The Court discussed two "bright lines" that denote categorical takings: permanent physical occupation of private property, and regulations that deprive a property owner of all economically viable use of land. *Id.* (citing *Loretto*, 458 U.S. at 426 (permanent physical occupation of private property); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1009 (1992) (deprivation of all economically viable use of land)).

Thus, as a general rule, *Arkansas Game & Fish* holds that there are no categorical exceptions to liability for government actions that are temporary in duration.[42]

2. A Temporary Physical Invasion Can Effect a Taking of Private Property

The Court first reviewed its body of takings case law to determine whether a temporary physical invasion could give rise to liability under the Takings Clause. *Arkansas Game & Fish* recognized that, despite the Court's past use of the terms "permanent" and "temporary" to describe takings and non-takings, the duration of a physical invasion *by itself* is not determinative of whether the government may be held liable for a taking.[43] That principle of takings law, the Court noted, was "solidly established" by a series of cases concerning temporary property seizures during World War II.[44]

In *United States v. Pewee Coal Co.*, for example, the federal government "possessed and operated" the property of a coal mining company for five-and-a-half months to prevent a nationwide miners' strike in the middle of World War II.[45] The Court in that case unanimously agreed that the government's seizure was a taking, with no regard to the limited duration of the occupation.[46] References to the temporary nature of the government's possession were considered only in the context of the amount of compensation due to the plaintiff.[47] Other wartime seizure cases confirm the principle that short-term physical occupations can effect a categorical taking. These precedents include *Kimball Laundry Co. v. United States*, in which the government was required to pay compensation for a laundry plant that was commandeered for less than four years;[48] and *United States v. General Motors*,

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[42] *See id.* at 519 ("[W]e have rejected the argument that government action must be permanent to qualify as a taking."). Based on this rule, the Court indicated that it is not receptive to "slippery slope" arguments when it comes to takings law. *Id.* at 521 (noting the frequency with which the government raises slippery slope arguments in takings cases). Indeed, the Court rejected the federal government's argument that allowing a temporary flooding case to proceed to the merits would result in a deluge of takings cases for the logical fallacy that it was: "To reject a categorical bar to temporary-flooding takings claims," the Court explained, "is scarcely to credit all, or even many, such claims." *Id.*

[43] *See id.* at 518–22.

[44] *See id.* at 519 (citing *Pewee Coal*, 341 U.S. at 114; *Kimball Laundry*, 338 U.S. at 1; *General Motors*, 323 U.S. at 373).

[45] *See* 341 U.S. at 115.

[46] *Id.* (plurality opinion); *id.* at 119 (Reed, J., concurring); *id.* at 121–22 (Burton, J., dissenting).

[47] *See id.* at 117 (plurality opinion) (affirming a judgment for compensation in the amount of $2,241.26); *id.* at 119, 121 (Reed, J. concurring) (affirming the awarded sum on other grounds); *id.* at 121–22 (Burton, J., dissenting) (holding that a taking had occurred, but disputing the awarded compensation).

[48] 338 U.S. at 3–4, 7, 14–16.

in which the government was found liable for taking a portion of a building for a period of one year.[49]

Perhaps the best known temporary invasion case is *United States v. Causby*, wherein the Supreme Court concluded that the noise and glare from military overflights effected a physical taking when they caused a farmer's chickens to panic and die.[50] In that case, the government secured a year-to-year lease of an airport for military purposes, to be terminated in twenty-five years or upon the end of World War II, whichever was earlier.[51] During the term of the lease, the government's operation of the airport entailed the frequent overflight of Causby's home and chicken farm.[52] The noise and glare caused by heavy, four-engine bombers, transports, and squadrons of fighters so interfered with the use and enjoyment of Causby's property and the commercial viability of the farm that the Court held that the government had physically taken an easement for which just compensation was due.[53] The fact that the government's use of Causby's farm was limited to a number of years did not deter the Court from concluding that the injury was tangible and extensive, and could give rise to a compensable taking.[54]

Relying on these precedents, *Arkansas Game & Fish* explained that, since its World War II-era decisions, the Court has consistently "rejected the argument that government action must be permanent to qualify as a taking."[55] The Court reasoned that "[o]nce the government's actions have worked a taking of property, 'no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.'"[56] And, citing *Causby*, the Court held that takings liability can attach to any temporary government action that results in "a direct and immediate interference with the enjoyment and use of the land."[57]

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[49] 323 U.S. at 375–77, 384; *see also* United States v. Petty Motor Co., 327 U.S. 372, 374–75, 380–81 (1946) (plaintiffs received compensation under the Takings Clause for the temporary seizure of their leasehold interests for about two-and-a-half years); Int'l Paper Co. v. United States, 282 U.S. 399, 405–08 (1931) (the government's authorization of a third party to appropriate a river's water flow for a period of ten months was found to effect a physical taking of a paper mill's water rights).

[50] 328 U.S. 256, 259, 265–66 (1946).

[51] *See id.* at 258–59.

[52] *Id.* at 259.

[53] *Id.* at 266–67.

[54] *See id.* at 259, 267–68 (noting that Causby's property was now unusable as a commercial chicken farm, and remanding for determination whether the government took a permanent or temporary easement over the farm).

[55] *Ark. Game & Fish Comm'n*, 133 S. Ct. at 519.

[56] *Id.* (quoting *First English*, 482 U.S. at 321).

[57] *Id.* (quoting *Causby*, 328 U.S. at 266). In a footnote, the Court also explained that the prospect that land can be reclaimed and restored after a physical invasion "does not disqualify a land-

3. Temporary Flood Invasions Are Not Categorically Excluded from Takings Liability

In light of the well-established principle that a temporary interference with property may rise to the level of a taking, the *Arkansas Game & Fish* Court turned to the federal government's argument that "flooding is different" and, therefore, deserves a special exemption to generally applicable physical takings rules.[58] The Court reviewed its flooding cases to determine whether its use of the word "permanent" in relation to the flooding in *Sanguinetti* had established a *per se* rule that excludes temporary floods from the protections of the Takings Clause.[59] The Court concluded that it did not.[60]

The federal government's argument relied primarily on *Sanguinetti*.[61] In that case, the government had constructed a diversion canal intended to protect downstream properties from seasonal flooding.[62] Sanguinetti's land, nonetheless, was repeatedly inundated during a period of record-setting rains and flooding.[63] Sanguinetti sued and claimed that the canal project effected a taking by exposing his land to increased flooding.[64] Sanguinetti, however, failed to show that the canal project caused increased flooding on his property or that his land was "overflowed for such a length of time in any year as to prevent its use for agricultural purposes."[65] As a result, the Supreme Court determined that there was no "permanent impairment of value" and therefore no compensable appropriation of Sanguinetti's land.[66] Citing the Court's early flooding cases, the *Sanguinetti* opinion explained that "in order to create an enforceable liability against the government, it is at least necessary that the overflow be the direct result of the structure, and constitute an actual, permanent invasion of the land, amounting to an appropriation of and not merely an injury to the property."[67] Six decades later, in *Loretto*, the Court parenthetically quoted *Sanguinetti* for the proposition

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owner from receipt of just compensation for a taking." *Id.* at 523 n.2 (citing United States v. Dickinson, 331 U.S. 745, 751 (1947)).

[58] *See id.* at 519–21.

[59] *Id.*

[60] *Id.* at 520–21 ("There is certainly no suggestion in *Sanguinetti* that flooding cases should be set apart from the mine run of takings claims . . . . There is thus no solid grounding in precedent for setting flooding apart from all other government intrusions on property.").

[61] *See id.* at 519.

[62] 264 U.S. at 146–47.

[63] *Id.* at 147.

[64] *Id.*

[65] *Id.* at 147, 149.

[66] *Id.* at 149.

[67] *Id.*

that government-induced flooding will constitute a taking if it results in an "actual, permanent invasion of the land."[68]

The federal government argued that *Sanguinetti* and *Loretto* established a *per se* rule excluding temporary flooding from takings liability.[69] *Arkansas Game & Fish* rejected the federal government's contentions. In regard to *Sanguinetti*, the Court noted that the case was decided on questions of "foreseeability and causation"—not the duration of the flooding.[70] Thus, when considered in its proper context, *Sanguinetti*'s use of the word "permanent" was only intended to summarize the facts of prior decisions, which had unsurprisingly involved permanent floods.[71] Moreover, *Arkansas Game & Fish* noted that *Sanguinetti*'s discussion of temporary flooding "appears in a nondispositive sentence in *Sanguinetti*"—in other words, the passage was nonbinding dicta.[72] *Sanguinetti*, therefore, could not be read to create a "blanket exclusionary rule[]" that excludes temporary flood invasions from takings liability.[73]

Loretto's discussion of "temporary" and "permanent" invasions, however, required closer analysis.[74] In *Loretto*, the Court generally summarized its flooding cases as having distinguished between flooding cases involving permanent physical occupation on the one hand, and cases involving a more temporary invasion on the other.[75] Then, in a footnote discussing the potential viability of temporary physical taking claims, *Loretto* noted that the

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[68] 458 U.S. at 428 (quoting *Sanguinetti*, 264 U.S. at 149). Ironically, even though *Loretto* used the term "permanent" to describe the physical occupation at issue in that case—the installation of a cable box—the statute at issue only required landlords to permit cable companies to install facilities on their properties for a limited and readily determinable period of time. *See id.* at 421, 439 (the statute provided for a physical occupation for "[s]o long as the property remain[ed] residential and a [cable] company wishe[d] to retain the installation").

[69] *See Ark. Game & Fish Comm'n*, 133 S. Ct. at 519–21 (stating with regard to the finding in *Sanguinetti* that "the Government would have us extract from this statement a definitive rule that there can be no temporary taking caused by floods" and that "[t]he Government also asserts that the Court in *Loretto* interpreted *Sanguinetti* the same way the Federal Circuit did in this case").

[70] *Id.* at 520 (citing *Sanguinetti*, 264 U.S. at 148).

[71] *Id*.

[72] *Id*. (quoting Cohens v. Virginia, 19 U.S. 264, 399 (1821) ("[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.").

[73] *Id*. at 520–21.For the same reason, *Loretto*'s parenthetical quotation of *Sanguinetti* cannot create a categorical exclusion to the Takings Clause. *See id*. (explaining that the court in *Loretto* created separate categories of "permanent physical occupations" and "temporary invasions of property" and did not intend to exclude flooding from either category).

[74] *See id*. (noting that *Loretto* explicitly categorizes flooding as a temporary invasion of property, despite some ambiguous language early in the opinion).

[75] *Loretto*, 458 U.S. at 428 (citing United States v. Kansas Life Ins. Co., 339 U.S. 799, 809–10 (1950); *Sanguinetti*, 264 U.S. at 149; *Cress*, 243 U.S. at 316, 327–28; Bedford v. United States, 192 U.S. 217, 225 (1904); United States v. Lynah, 188 U.S. 445, 468–70 (1903)).

Court's "intermittent flooding cases," like other cases involving temporary interferences with private property, "are subject to a more complex balancing test to determine whether they are a taking."[76] That footnote—while raising additional questions discussed below concerning the appropriate test for adjudicating temporary physical invasions—effectively resolved the question presented in *Arkansas Game & Fish*.[77] The Court held that "there is thus no solid grounding in precedent for setting flooding apart from all other government intrusions on property."[78]

On the question presented, *Arkansas Game & Fish* was an unequivocal victory for the property owner. The decision reaffirmed the rule that any invasion that causes direct and substantial harm to property may give rise to a compensable taking:

> Because government-induced flooding can constitute a taking of property, and because a taking need not be permanent to be compensable, our precedent indicates that government-induced flooding of limited duration may be compensable. No decision of this Court authorizes a blanket temporary-flooding exception to our Takings Clause jurisprudence, and we decline to create such an exception in this case.[79]

The decision, however, was accompanied by the Court's expansive dicta about the variety of ways that duration can be relevant in a takings inquiry.[80] And that dicta has the potential of further confusing courts and litigants about what test applies to temporary physical takings.[81]

II. IS THERE A COHERENT TEST FOR *TEMPORARY* PHYSICAL TAKINGS AFTER *ARKANSAS GAME & FISH COMMISSION*?

At the outset of the opinion, the Supreme Court in *Arkansas Game & Fish Commission v. United States* confirmed the general rule that when "the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner."[82] And, in specific regard to temporary physical invasions, the Court recog-

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[76] *Loretto*, 458 U.S. at 435 n.12.

[77] *See Ark. Game & Fish Comm'n*, 133 S. Ct. at 521 (stating that footnote 12 from *Loretto* demonstrates the absence of precedent for categorizing flooding separately from other takings cases).

[78] *Id.*

[79] *Id.* at 519.

[80] *See id.* at 522–23.

[81] *See infra* notes 82–118 and accompanying text.

[82] Ark. Game & Fish Comm'n v. United States, 133 S. Ct. 511, 518 (2012) (quoting Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322 (2002)).

nized that a taking could occur "when government action occurring outside the property gave rise to 'a direct and immediate interference with the enjoyment and use of the land.'"[83] But later, the decision indicated that, according to a footnote to *Loretto*, "temporary limitations are subject to a more complex balancing process to determine whether they are a taking."[84] And in extended dicta toward the end of the opinion, the Court provided an overview of various regulatory and physical takings inquiries in which the duration of a government act can be relevant to a takings claim:

> We rule today, simply and only, that government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection. When regulation or temporary physical invasion by government interferes with private property, our decisions recognize, time is indeed a factor in determining the existence *vel non* of a compensable taking. See *Loretto*, 458 U.S., at 435, n. 12 (temporary physical invasions should be assessed by case-specific factual inquiry); *Tahoe-Sierra*, 535 U.S., at 342 (duration of regulatory restriction is a factor for court to consider); *National Bd. of YMCA v. United States*, 395 U.S. 85, 93 (1969) ("temporary, unplanned occupation" of building by troops under exigent circumstances is not a taking).
>
> Also relevant to the takings inquiry is the degree to which the invasion is intended or is the foreseeable result of authorized government action. See *supra*, at 517 [discussion of causation and foreseeability]; *John Horstmann Co. v. United States*, 257 U.S. 138, 146 (1921) (no takings liability when damage caused by government action could not have been foreseen). See also *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1355–1356 (Fed. Cir. 2003); *In re Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 799 F.2d 317, 325–326 (7th Cir. 1986). So, too, are the character of

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[83] *Id.* at 519 (quoting United States v. Causby, 328 U.S. 256, 266 (1946)).

[84] *Id.* at 521 (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 n.12 (1982)). After *Loretto*, several commentators suggested that the Court's reference to "a more complex balancing test" in footnote 12 meant that temporary physical invasions should be adjudicated under the multi-factorial, ad hoc test developed in *Penn Central* for adjudicating non-categorical regulatory takings cases. *See*, *e.g.*, Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 ECOLOGY L.Q. 307, 362–63 (2007) ("Physical encroachments that fall short of permanent physical occupations are known as 'temporary physical invasions' and are examined under the *Penn Central* three-factor test."); Dennis H. Long, Note, *The Expanding Importance of Temporary Physical Takings: Some Unresolved Issues and an Opportunity for New Directions in Takings Law*, 72 IND. L.J. 1185, 1194 (1997) (noting that *Loretto* "declares that all (temporary) physical invasions . . . are to be subjected not to the *per se* test but rather to the *Penn Central* balancing test").

> the land at issue and the owner's "reasonable investment-backed expectations" regarding the land's use. *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001). . . . Severity of the interference figures in the calculus as well. *See Penn Central*, 438 U.S., at 130–131; *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 329–330 (1922) ("[W]hile a single act may not be enough, a continuance of them in sufficient number and for a sufficient time may prove [a taking]. Every successive trespass adds to the force of the evidence.").[85]

If read in isolation, that passage can be confusing.[86] After all, it lists, without any differentiation, various tests that have been developed over the years to determine different types of takings in very different circumstances.[87] But when read in conjunction with *Loretto*'s enigmatic footnote 12, the passage has the real potential of leading courts and takings litigants down a path never intended by the Court.[88]

A. *Confusion Arising from* Loretto

The reason for this confusion has more to do with the Court's imprecise description of past takings decisions than anything doctrinal.[89] In *Loretto*, a New York statute required landlords to permit cable companies to install facilities on their properties—not indefinitely, but only "[s]o long as the property remain[ed] residential and a [cable] company wishe[d] to retain

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[85] *Ark. Game & Fish Comm'n*, 133 S. Ct. at 522–23 (citations omitted).

[86] *See*, *e.g.*, Timothy M. Mulvaney, *Foreground Principles*, 20 GEO. MASON L. REV. 837, 847 n.40 (2013); Timothy M. Mulvaney, *Takings Case Set for Oral Argument at the SCOTUS on January 15*, ENVTL. L. PROF BLOG (Jan. 13, 2013), http://lawprofessors.typepad.com/environmental_law/2013/01/takings-case-set-for-oral-argument-at-the-scotus-on-january-15th-.html, *available at* http://perma.cc/6EM9-7M25 (noting that the Court's discussion of the *Penn Central* factors in this passage from *Arkansas Game & Fish* departed from the traditional understanding of the ad hoc regulatory takings test).

[87] *See Ark. Game & Fish Comm'n,* 133 S. Ct. at 522–23. For example, the Court recited the "intent or foreseeability" test that is applied as a threshold inquiry to distinguish physical takings from torts such as negligence and trespass. *See* Ridge Line, Inc. v. United States, 346 F.3d 1346, 1355–56 (Fed. Cir. 2003). The Court also references the "reasonable investment backed expectations" test developed specifically for ad hoc regulatory takings in Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978). The Court next refers to the "severity of the interference" inquiry, which requires substantially different analyses in the physical and regulatory contexts. *Compare Penn Central*, 438 U.S. at 130–31 (noting that regulatory takings analysis relies on "both the character of the action and on the nature and extent of the interference with rights"), *with* Portsmouth Harbor Land & Hotel Co. v. United States, 260 U. S. 327, 329–30 (1922) (noting that a "continuance" of physical invasions in number and time may establish a taking, regardless of intent).

[88] *See infra* notes 90–118 and accompanying text.

[89] *See infra* notes 98–102 and accompanying text.

the installation."[90] The statute was challenged on the grounds that the forced acquiescence in the occupation of one's property by third parties effected a taking, and this Court agreed.[91] The Court observed that a temporary physical interference with property that falls short of an occupation, and regulations that merely restrict property use, are properly analyzed under "a more complex balancing test"—presumably, the multi-factor balancing analysis of *Penn Central*.[92] When the character of the regulatory action "reaches the extreme form of a permanent physical occupation," however, the *Penn Central* test can be unnecessary.[93] In such cases, the character of the government's action becomes the determinative factor and can give rise to a compensable taking without regard to other considerations.[94]

This holding was based in part on prior decisions that recognized that even short-term physical occupations by the government may constitute *per se* violations of the Takings Clause, including *Pewee Coal*.[95] The *Loretto* Court attached no significance to the fact that the *Pewee Coal* occupation was short-lived, focusing on the character—not the duration—of the government's action.[96] Indeed, the Court has repeatedly reaffirmed the continued vitality of these temporary physical taking cases as "paradigmatic" and "categorical" examples of takings for which compensation must be paid.[97]

Inexplicably, however, while expressly relying on the analysis of *Pewee Coal*, dictum in *Loretto* purported to distinguish a compensable "permanent physical occupation" from a mere "temporary invasion," which would be subject to *Penn Central*'s balancing test.[98] In an especially enigmatic footnote, the Court noted:

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[90] *Loretto*, 458 U.S. at 439.

[91] *Id.* at 421. The question presented in *Loretto* was "whether a minor but permanent physical occupation of an owner's property authorized by government constitutes a 'taking' of property for which just compensation is due under the Fifth and Fourteenth Amendments of the Constitution." *Id*. The New York Court of Appeals found that no taking had occurred under *Penn Central*'s multi-factor balancing test applied to a physical takings; the court rejected as inapplicable the physical takings test of Causby. *Id*. at 425–26; *see also* Loretto v. Teleprompter Manhattan CATV Corp., 423 N.E.2d 320, 330 (N.Y. 1981). The threshold issue, therefore, before the U.S. Supreme Court was whether *Penn Central* had supplanted the physical takings test. *Loretto*, 458 U.S. at 425–26. On that question, the Court held that *Penn Central* did not change the test for physical takings. *Id*. at 426, 432.

[92] *Loretto*, 458 U.S. at 435 n.12.

[93] *Id.* at 426.

[94] *Id.*

[95] *Id.* at 431–32.

[96] *See id.* at 431 (stating that because of the "'actual taking of possession and control,' the taking was as clear as if the Government held full title and ownership") (citing United States v. Pewee Coal Co., 341 U.S. 114, 116 (1951)).

[97] Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 537 (2005); *Tahoe-Sierra*, 535 U.S. at 321; *see also* First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles, 482 U.S. 304, 318 (1987).

[98] *Loretto*, 458 U.S. at 428.

> The permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude. Not every physical *invasion* is a taking. . . . [S]uch temporary limitations are subject to a more complex balancing process to determine whether they are a taking. The rationale is evident: they do not absolutely dispossess the owner of his rights to use, and exclude others from, his property.[99]

"This single judicial pronouncement is a principal source of the current uncertainty in the temporary physical takings jurisprudence."[100] If, as the *Loretto* dictum suggests, *Penn Central*'s test applies to all "temporary" government incursions, then *Loretto* must be interpreted to have overruled *sub silentio* the wartime seizure cases, including *Pewee Coal*. Yet this is impossible: *Loretto* unqualifiedly, expressly relies on *Pewee Coal*.[101] A more plausible interpretation is that *Loretto* sought to relegate to *Penn Central* "a class of temporary takings claims in which the duration is less than some as yet unspecified threshold"—presumably less than the five-and-a-half months spanning the *Pewee Coal* occupation.[102]

Courts have struggled to determine exactly which physical occupations are subject to *Loretto*, with conflicting results. In *Preseault v. United States*, plaintiffs owned land through which a railroad had for years owned an easement for its tracks.[103] After the rail company abandoned the easement, plaintiffs expected the easement to revert back to them under state law.[104] But under an intervening federal statute, the government authorized transfer of the easement as a hiking trail to a neighboring town for a maximum of thirty years.[105] Plaintiffs challenged the government's action as a *per se* taking.[106] The Court of Federal Claims found that the government's forced transfer of the easement to a third party effected a physical occupation, but only a temporary one, because of the thirty-year lease limit.[107] Consequently, the court analyzed the physical occupation under the *Penn Central* balancing test and held there was not a taking.[108] But the U.S. Court of Appeals for the Federal Circuit subsequently reversed and held that is was error to

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[99] *Id.* at 435 n.12.
[100] Long, *supra* note 84, at 1194.
[101] *Loretto*, 458 U.S. at 431.
[102] Long, *supra* note 84, at 1194.
[103] 27 Fed. Cl. 69, 71–72, 75 (1992).
[104] *Id.* at 81.
[105] *See id.* at 81–82.
[106] *Id.* at 86.
[107] *See id.* at 95.
[108] *Id.* at 95–96.

interject the *Penn Central* analysis into what was clearly a "physical occupation case."[109]

In contrast to the trial court decision in *Preseault* stands *Hendler v. United States*.[110] To combat ground water pollution, the federal government in *Hendler* requested access to plaintiffs' property to install wells for monitoring and extracting waste migrating from a nearby site.[111] Notwithstanding plaintiffs' refusal, government agents installed the wells anyway.[112] Plaintiffs challenged the government's actions as effecting a taking. The Court of Federal Claims ruled in the government's favor, but the Federal Circuit reversed.[113] Consistent with the wartime seizure cases, the Federal Circuit held that the installation of wells on plaintiffs' property constituted a physical occupation, and thus a *per se* taking—regardless of the finite or even short-term duration of the occupation.[114] Addressing the government's claim that the occupation was temporary, the Federal Circuit offered a different interpretation of "temporary" occupations than that of the Court of Federal Claims in *Preseault*:

> "[P]ermanent" does not mean forever . . . . A taking can be for a limited term—what is "taken" is . . . an estate for years, that is, a term of finite duration as distinct from the infinite term of an estate in fee simple absolute . . . . 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 . . . .[115]

Unless litigants closely read the Court's temporary takings case law, the degree of confusion about the appropriate test will likely increase after *Arkansas Game & Fish*. Indeed, despite the Supreme Court's insistence that physical and regulatory takings be treated differently,[116] takings defendants have already begun to argue that *Arkansas Game & Fish* intended to overturn and replace the well-settled test for adjudicating physical takings with

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[109] Preseault v. United States, 100 F.3d 1525, 1540 (Fed. Cir. 1996).

[110] 952 F.2d 1364 (Fed. Cir. 1991).

[111] *Id.* at 1369.

[112] *Id.* at 1369–70.

[113] *Id.* at 1367, 1368.

[114] *See id.* at 1378.

[115] *Id.* at 1376–77. Of course, other courts vehemently adhere to the view that all temporary physical takings be reviewed under *Penn Central*. *See* Juliano v. Montgomery-Ostego-Schoharie Solid Waste Mgmt. Auth., 983 F. Supp. 319, 327 (N.D.N.Y. 1997) (noting that *Hendler* would "completely emasculate" takings law).

[116] *See Lingle*, 544 U.S. at 538–39 (2005) (contrasting *Loretto* with *Penn Central*); *see also Tahoe-Sierra*, 535 U.S. at 322–23.

one new, multi-factorial test that borrows inquiries from the Court's regulatory takings cases.[117] The purpose of this argument is plain—it is well-known that landowners rarely prevail under multi-factor balancing tests.[118]

B. Arkansas Game & Fish *Should Refocus the "Permanent" Versus "Temporary" Inquiry*

Arkansas Game & Fish clearly missed an opportunity to directly address the question from *Loretto* that has been a source of confusion and conflict among the lower courts. But that is not to say that the decision did not advance our understanding of the law of temporary takings. The Court took a small step toward resolving the confusion created by *Loretto* when it recognized that *Causby*, *Pewee Coal*, and *General Motors* involved temporary physical invasions.[119] The Court also overruled *Sanguinetti* insofar as the decision held that temporary government-induced flooding is exempt from the Takings Clause.[120] Thus, the bases upon which *Loretto* distinguished "temporary" from "permanent" physical takings are no longer valid.[121]

So, what does the "permanence" requirement mean if this Court has repeatedly found physical invasions of limited duration to constitute "per-

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[117] *See* Supplemental Brief for the United States at 2–3, 7, 12–13, Ark. Game & Fish Comm'n v. United States, 736 F.3d 1364 (Fed. Cir. 2013) (Nos. 2009-5121, 2010-5029); *see also* Brief Regarding Impact of Arkansas Game & Fish Commission v. United States on Order Dismissing Plaintiffs' Takings Claims at 2 n.2, Big Oak Farms Inc. v. United States, 105 Fed. Cl. 48 (2012) (No. 11-275L) (brief dated Feb. 22, 2013).

[118] *See generally* Adam R. Pomeroy, *Penn Central* After 35 Years: A Three-Part Balancing Test or a One-Strike Rule? (Aug. 31, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2139729 and http://perma.cc/QTT8-9GB8 (demonstrating that plaintiffs rarely prevail in appellate courts relying on *Penn Central*). Balancing tests have proven entirely unworkable under this Court's regulatory takings doctrine, and for that reason should be avoided where clear standards are available. *See* R.S. Radford & Luke A. Wake, *Deciphering and Extrapolating: Searching for Sense in* Penn Central, 38 ECOLOGY L.Q. 731, 735–36 (2011) (observing that the *Penn Central* balancing test remains shrouded in a "formless, directionless haze," and noting the constant calls for further guidance from courts and commentators). Indeed, in the 32 years since *Penn Central* relegated (most) regulatory takings claims to its multi-factor balancing test, that area of takings jurisprudence has become a veritable jungle of contradictory opinions. *See* John D. Echeverria, *Making Sense of* Penn Central, 23 UCLA J. ENVTL. L. & POL'Y 171, 174–75 (2005) (arguing that the *Penn Central* balancing test, absent further clarification, will serve as nothing more than "legal decoration for judicial rulings based on intuition"). *Penn Central* and its progeny have remained rudderless, and commentators invariably agree that neither property owners nor government regulators have any way of rationally assessing takings liabilities under that regime. *See* Steven J. Eagle, *Some Permanent Problems with the Supreme Court's Temporary Regulatory Takings Jurisprudence*, 25 U. HAW. L. REV. 325, 352 (2003) ("[E]mphasis on balancing tests gives . . . no one much predictability.").

[119] *Ark. Game & Fish Comm'n*, 133 S. Ct. at 519.

[120] *Id.* at 520–21.

[121] *Compare id.* at 519–21, *with Loretto*, 458 U.S. at 430–35.

manent" physical takings subject to categorical treatment?[122] Most immediately, it means that, standing alone, the duration of a physical invasion is not dispositive of whether a *per se* physical taking has occurred.[123] It also suggests that the words "temporary" and "permanent" are being used to elicit something other than just the duration of the government interference. A review of the Court's takings cases confirms that suggestion.[124]

The Court's "permanence" requirement is intended to distinguish those physical intrusions that have the effect of dispossessing a property owner of his or her rights in the land from those that are so ephemeral as to result in the type of consequential harm that is typically only recoverable in a tort action.[125] For an intrusion to give rise to a taking, the condition must be sufficiently fixed and the harm substantial enough to be able to determine the extent to which the government's interference dispossesses a landowner of his or her rights.[126] For example, *Loretto* contrasted a "permanent physical occupation" from those "temporary and shifting" conditions that are akin to an "ordinary traveler, whether on foot or in a vehicle, pass[ing] to and fro along the streets. . . . The space he occupies one moment he abandons the next to be occupied by any other traveller [sic]", as opposed to an invasion that becomes a fixed and stable condition of the property such that it dispossesses the owner of his or her rights.[127]

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[122] *See supra* notes 95–97 and accompanying text; *see also First English*, 482 U.S. at 318 ("'[T]emporary' takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings.").

[123] Legal commentators have noted that, despite confusion surrounding the use of the terms "permanent" and "temporary" in regard to physical invasion takings, the Supreme Court has repeatedly found temporary invasions to constitute takings. *See, e.g.*, Jan G. Laitos, *The Takings Clause in America's Industrial States After* Lucas, 24 U. TOL. L. REV. 281, 293 (1993) ("While the Court has distinguished between 'temporary physical invasions' and 'permanent physical occupations,' after [*First English*], even temporary physical invasions may be *per se* takings, requiring just compensation for the time the property is occupied."); *see also* John J. Costonis, *Presumptive and* Per Se *Takings: A Decisional Model for the Taking Issue*, 58 N.Y.U. L. REV. 465, 543–46 (1983) (noting that temporary physical invasions may constitute takings); David F. Coursen, *The Takings Jurisprudence of the Court of Federal Claims and the Federal Circuit*, 29 ENVTL. L. 821, 832 (1999) (criticizing Federal Circuit decisions finding temporary physical invasions to be *per se* takings); Marcus J. Lock, *Braving the Waters of Supreme Court Takings Jurisprudence: Will the Fifth Amendment Protect Western Water Rights from Federal Environmental Regulation?*, 4 U. DENV. WATER L. REV. 76, 90 (2000) (noting that temporary physical invasions could justifiably be treated as *per se* takings after *First English*).

[124] *See infra* notes 155–195 and accompanying text.

[125] *See Loretto*, 458 U.S. at 428–29, 435–36 (noting that physical occupations substantially interfere with an owner's property rights, whereas temporary invasions may only cause consequential damages); *see also Ridge Line*, 346 F.3d at 1355 (citing Barnes v. United States, 538 F.2d 865, 870 (Ct. Cl. 1976) (noting that "mere consequential injury" falls under the scope of tort law).

[126] *Loretto*, 458 U.S. at 428–29.

[127] *Id.* (quoting St. Louis v. Western Union Telegraph Co., 148 U.S. 92, 98–99 (1893)).

That distinction finds its roots in the Court's 1871 flooding decision, *Pumpelly v. Green Bay Co*.[128] There, the landowner brought suit against two companies that, acting under state authority, constructed a dam across the Fox River that caused the water to back up and flood his land.[129] The companies argued that the flooding was not a compensable taking because the harm to the land was the consequential result of a public improvement project.[130] In other words, according to the companies, the flooding did not deprive the owner of his land; instead, it merely injured the land, for which there was no Constitutional remedy. The Court agreed in principle that the Takings Clause does not require compensation for consequential injuries.[131] The Court rejected the companies' argument, however, because the term "consequential" had been used too broadly by the lower courts to excuse governments from the obligation to compensate landowners for actions that effectively took an interest in private property.[132] The Court recognized that when the government causes a "serious interruption to the common and necessary use of property" the injury to the land is the "equivalent to the taking of it" and cannot be dismissed as a consequential harm.[133] Applying this principle to flood invasions, *Pumpelly* held that "where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, . . . so as to effectively destroy or impair its usefulness, it is a taking, within the meaning of the Constitution."[134] And when the government uses private property in a manner that inflicts "irreparable and permanent injury *to any extent*," it must compensate the owner.[135]

Shortly after *Pumpelly*, the New Hampshire Supreme Court issued an opinion in *Eaton v. Boston, Concord & Montreal Railroad* that elaborated on the type of injury that will give rise to a taking.[136] In *Eaton*, a railroad company, acting pursuant to a state statute, removed a natural flood barrier while constructing tracks, which resulted in the occasional flooding of

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[128] 80 U.S. 166, 179–80 (1871).

[129] *Id.* at 167–69.

[130] *Id.* at 171–74.

[131] *Id.* at 180–81.

[132] *Id.* at 181 ("[W]e are of the opinion that the decisions referred to have gone to the uttermost limit of sound judicial construction in favor of [finding no redress under the Takings Clause], and, in some cases, beyond it.").

[133] *Id.* at 179.

[134] *Id*. at 181; *accord* United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950); United States v. Dickinson, 331 U.S. 745 (1947); Jacobs v. United States, 290 U.S. 13 (1933); United States v. Welch, 217 U.S. 333 (1910); United States v. Lynah, 188 U.S. 445 (1903).

[135] *Pumpelly*, 80 U.S. at 177–78 (emphasis added); *see also Lynah*, 188 U.S. at 470 ("Where the government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the Fifth Amendment.").

[136] 51 N.H. 504, 513–16 (1872).

Eaton's farmland.[137] The railroad argued that the flooding did not rise to the level of a taking because it was temporary and the resulting damages were therefore too inconsequential.[138] The court rejected this argument and noted that the impact was not a "mere personal inconvenience or annoyance" but involved "physical injury to the land itself, a physical interference with property rights, and actual disturbance of the plaintiff's possession."[139] The court reasoned that "occasional innundation may produce the same effect in preventing the plaintiff from making a beneficial use of the land as would be caused by a manual asportation of the constituent materials of the soil."[140] "Taking of a part is as much forbidden by the constitution as taking the whole. The difference is only one of degree; the quantum of interest may vary, but the principle is the same".[141] Thus, the court concluded that "[c]overing the land with water . . . is a serious interruption of plaintiff's right to use it in the ordinary manner" and effected a taking.[142]

By rejecting the notion that duration *alone* is determinative of whether a taking has occurred, *Arkansas Game & Fish* should have the effect of re-focusing courts and litigants on the fundamental principles found in the Court's temporary takings case law.

III. What Is the Test for Temporary Physical Takings After *Arkansas Game & Fish*?

There is a real danger that the Supreme Court's overview in *Arkansas Game & Fish Commission v. United States* of various takings tests in which questions of duration may be relevant will be read as establishing a new, multi-factor test applicable to temporary physical takings. It is essential, therefore, to acknowledge what *Arkansas Game & Fish* says and what it does not say in regard to takings law. This Article then reviews the Court's takings case law to determine what test applies to temporary takings.

A. Arkansas Game & Fish *Did Not Create a Hybrid Regulatory/Physical Takings Test*

As to the question whether *Arkansas Game & Fish* intended to change the test applicable to temporary physical takings, the answer is clearly "no."

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[137] *Id*. at 507.
[138] *Id*. at 513.
[139] *Id*.
[140] *Id*.
[141] *Id*. at 512 (internal quotation marks and citation omitted).
[142] *Id*. at 513. "To turn a stream of water on to a plaintiff's premises is as marked an infringement of his proprietary rights as it would be for the defendants to go upon the premises in person and dig a ditch, or deposit upon them a mound of earth." *Id*. at 514 (internal quotation marks and citation omitted).

A plain reading of *Arkansas Game & Fish* establishes that the Court did not intend to modify or overturn the test for adjudicating physical takings claims by incorporating inquiries from its regulatory takings cases into a new, multi-factor test.[143] As noted above, the Court has long-recognized that physical takings and regulatory takings are distinct and separate legal concepts:[144]

> The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. But the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property. . . . When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner . . . regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof. . . . But a government regulation . . . that bans certain private uses of a portion of an owner's property . . . does not constitute a categorical taking. "The first category of cases requires courts to apply a clear rule; the second necessarily entails complex factual assessments of the purposes and economic effects of government actions."[145]

Accordingly, the Court held that physical and regulatory takings are subject to their own distinct rules:

> This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a "regulatory taking," and vice versa.[146]

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[143] Indeed, to reach the conclusion that the Court did intend to modify the test for physical takings, one would have to also conclude that *Arkansas Game & Fish* modified its regulatory takings test to include inquiries developed specifically to evaluate whether a physical intrusion upon private property effected a taking.

[144] *See* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 536–40 (2005); *see also* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322–23 (2002).

[145] *Tahoe-Sierra*, 535 U.S. at 321–22 (2002) (quoting Yee v. City of Escondido, 503 U.S. 519, 523 (1992)) (citations omitted).

[146] *Id*. at 322–23.

Inquiries designed to evaluate the extent of the government's interference with an owner's reasonable investment-backed expectations "have served as the principal guidelines for resolving regulatory takings claims that do not fall within the physical takings . . . rules."[147] Such inquiries are not probative of whether a physical invasion interferes with one's rights in his or her property.[148]

Subjecting a physical invasion to a multi-factor, hybrid regulatory/physical takings test would represent a sea change in takings law. And such a radical change cannot be implied from reading one passage in isolation. Indeed, *Arkansas Game & Fish* cautioned that a single passage from an opinion cannot be read out of context to create a rule that the Court did not intend: "[T]he first rule of case law . . . interpretation is: Read on."[149] And when *Arkansas Game & Fish* is read in its entirety—and is read in context with the Court's takings jurisprudence—it is readily apparent that the Court did not write that passage with the intention of modifying its well-established takings tests. Nor did the Court intend that the passage overrule its past takings cases, such as *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* or *Lingle v. Chevron U.S.A., Inc*.

To the contrary, the Court expressly limited its opinion to the question whether temporary flooding was exempt from the requirements of the Takings Clause,[150] and emphasized that it remains "incumbent on courts to weigh carefully the relevant factors and circumstances in each case, *as instructed by our decisions*."[151] And, far from overturning its past decisions establishing different tests for regulatory and physical takings, the Court relied on *Tahoe-Sierra* as setting out the proper test for physical takings.[152] It would be more consistent with the entire opinion and the Court's takings jurisprudence to read the passage on pages 522–23 of *Arkansas Game & Fish* as providing examples of the various ways in which the duration of a government interference with private property can be relevant to a takings inquiry—a point that is directly responsive to the single question decided by the Court.[153] Thus, despite the decision's confusing overview of takings

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[147] *Lingle*, 544 U.S. at 539. Similarly, the Court does not ask "whether a physical appropriation advances a substantial government interest or whether it deprives the owner of all economically viable use." *Tahoe-Sierra*, 535 U.S. at 323.

[148] *Tahoe-Sierra*, 535 U.S. at 323; *see also Loretto*, 458 U.S. at 432 (*Penn Central* "does not repudiate the rule that a permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine").

[149] Ark. Game & Fish Comm'n v. United States, 133 S. Ct. 511, 520 (2012).

[150] *Id*. at 522.

[151] *Id.* at 521 (emphasis added).

[152] *Id*. at 518 (citing *Tahoe-Sierra*, 535 U.S. at 322).

[153] *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 272 (1990) ("The Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of ante-

tests, the only conclusion that can be drawn from *Arkansas Game & Fish* is that tests that control physical invasion takings *still* control physical takings cases, and the tests that control regulatory takings *still* only apply in regulatory takings cases.[154]

B. *The Same Test for "Permanent" Invasions Has Always Applied to "Temporary" Invasions*

Arkansas Game & Fish confirmed the well-settled rule that when "the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner."[155] And in specific regard to temporary physical invasions, the Court recognized that a taking will occur "when government action occurring outside the property gave rise to 'a direct and immediate interference with the enjoyment and use of the land.'"[156]

This test for evaluating temporary physical taking claims grew out of a series of decisions wherein the Supreme Court applied the rules it had developed in early permanent occupation cases to physical invasions of increasingly limited duration.[157] In the 1903 decision *United States v. Lynah*,[158] the Court found that a physical taking occurred when the government placed dams, training walls, and other obstructions in a river in a manner that caused the water level to rise and partially inundate the plaintiffs' land.[159] Relying on the distinction between direct and consequential injury as set out in *Pumpelly v. Green Bay Co.* and *Eaton v. Boston, Concord & Montreal Railroad*, the *Lynah* Court held that the government will be held liable for a taking when it causes a physical invasion of private property that results in a "serious interruption to the common and necessary

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cedent propositions, . . . and such assumptions—even on jurisdictional issues—are not binding in future cases that directly raise the questions.").

[154] *See Ark. Game & Fish Comm'n*, 133 S. Ct. at 522 ("[G]overnment-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection. When regulation or temporary physical invasion by government interferes with private property, our decisions recognize, time is indeed a factor in determining the existence *vel non* of a compensable taking."); *see also Tahoe-Sierra*, 535 U.S. at 323 (It is "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking' and vice versa").

[155] *Ark. Game & Fish Comm'n*, 133 S. Ct. at 522 (quoting *Tahoe-Sierra*, 535 U.S. at 322).

[156] *Id.* at 519 (quoting United States v. Causby, 328 U.S. 256, 266 (1946)).

[157] *See infra* notes 158–187 and accompanying text.

[158] 188 U.S. 445 (1903).

[159] *Id.* at 467–68, 474.

use of property" or "so as to substantially destroy" the land's value and effect a "practical ouster" of that land.[160]

The first time a majority of the Court spoke directly to the effect of a temporary invasion was the 1910 decision *United States v. Welch*.[161] There, once again, the Court was faced with a dispute whether injuries caused by government-induced flooding were direct or consequential.[162] A dam on the Kentucky River permanently flooded a strip of land adjacent to Welch's farm, which deprived Welch of the only practical way to access the county road from his property.[163] The government admitted that it was required to compensate landowners for the value of the flooded property, but argued that the injury to Welch's land was collateral and consequential—at most a tort.[164] The Court rejected the government's argument and held that the flooding, even though it occurred on land adjacent to Welch's farm, had a direct impact on Welch's right to access his land.[165] The government flooding effectively appropriated Welch's interest in his right of way.[166] The Court further explained, in a passage of importance to temporary takings jurisprudence, that even if the government had caused flood waters to enter and destroy private property, then stopped the flooding, its actions would still amount to a taking: "But if it were only destroyed and ended, a destruction for public purposes may as well be a taking as would be an appropriation for the same end."[167]

Several years later, in *United States v. Cress*, the Court applied *Pumpelly* to conclude that government-induced flooding does not have to be a continuous condition on the land to rise to the level of a taking.[168] In *Cress*, the federal government's construction and operation of locks and dams on the Kentucky and Cumberland rivers caused the rivers and their tributaries to back up and intermittently overflow a portion of one plaintiff's property and interfere with another plaintiff's operation of a mill.[169] The Court found

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[160] *Id.* at 469–70, 472–73. Three Justices dissented and explained that they would have found no taking because the land could be reclaimed, thereby remedying any permanent injury to the property. *See id.* at 484 (White, J., dissenting).

[161] 217 U.S. 333 (1910).

[162] *See id.* at 338–39.

[163] *Id.* at 338.

[164] *Id.*

[165] *See id.* at 339 ("[B]oth petition and finding in substance show clearly that the way has been permanently cut off.").

[166] *See id.*

[167] *Id.* The importance of this passage would manifest four decades later in the wartime seizure cases. Two of the temporary wartime seizure cases discussed above relied on *Welch* for the rule that the government's temporary occupation and use of private property effected a taking for which compensation was required. *See* United States v. Petty Motor Co., 327 U.S. 372, 378 (1946); United States v. General Motors Corp., 323 U.S. 373, 378 n.5 (1945).

[168] 243 U.S. 316, 327–28 (1917).

[169] *Id.* at 318–19, 327.

that the periodic intrusions appropriated an easement because, during periods of overflow, the government's actions directly and substantially interfered with each landowner's rights to make valuable use of his property.[170] The Court concluded that, although intermittent, the flooding directly interfered with the landowner's rights to possess, use, exclude others, and/or dispose of his or her property.[171] *Cress* stated that "[t]here is no difference of kind . . . between a permanent condition of continual overflow by backwater and a permanent liability to intermittent but inevitably recurring overflows."[172] The only distinction between permanent and intermittent flooding was that, in the latter circumstance, the landowner could retain possession of his land and the government would be obligated to compensate the owner for the value of the easement taken.[173] Thus, *Cress* rephrased the *Pumpelly* test as follows: "[I]t is *the character of the invasion*, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question of whether it is a taking."[174]

Later, in the 1947 case *United States v. Dickinson*, the Supreme Court found that government-induced flooding constituted a taking even though most of the affected land had been reclaimed prior to the takings claim being filed.[175] The government constructed a dam as part of a project to improve river navigability.[176] The dam caused the water level to rise and flood the plaintiff's land.[177] Afterward, at great expense, the plaintiff reclaimed most of his land from the flooding.[178] *Dickinson* concluded that, by subjecting the property to flooding, the government had exercised dominion over the land and, therefore, appropriated an easement for which just compensation was due.[179] The temporary duration of the government's invasion did not defeat the takings claim. The Court in *Dickinson* reasoned that, for the period of time the land was underwater, the government had taken the property: "[N]o use to which Dickinson could subsequently put the property by his reclamation efforts changed the fact that the land was taken when it was taken and an obligation to pay for it then arose."[180]

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[170] *Id.* at 329–30.
[171] *See id.* at 328, 330.
[172] *Id.* at 328.
[173] *See id.* at 329 ("If any substantial enjoyment of the land still remains to the owner, it may be treated as a partial instead of a total divesting of his property in the land. The taking by condemnation of an interest less than the fee is familiar in the law of eminent domain.").
[174] *Id.* at 328 (emphasis added).
[175] 331 U.S. 745, 751 (1947).
[176] *Id.* at 746.
[177] *Id.* at 746–47.
[178] *Id.* at 751.
[179] *Id.*
[180] *Id.*

United States v. Causby is perhaps the most significant decision in this line of cases because the Court was directly confronted with the question of what test applies to a temporary invasion of private property.[181] The Court began its analysis with the most basic tenet of takings law: A government act that destroys all uses of private property constitutes a taking for which just compensation is due.[182] The Court reasoned that the same tenet should hold true whether the government takes an easement over a portion of property, or whether the government only uses the land for a discrete period of time:

> There is no material difference between the supposed case [a complete occupation] and the present one, except that here enjoyment and use of the land are not completely destroyed. But that does not seem to us to be controlling. The path of glide for airplanes might reduce a valuable factory site to grazing land, an orchard to a vegetable patch, a residential section to a wheat field. Some value would remain. But the use of the airspace immediately above the land would limit the utility of the land and cause a diminution in its value.[183]

Accordingly, the Court applied the same test that it had applied in *Pumpelly*, *Cress*, and *Portsmouth*.[184] Quoting *Cress*, the Court explained that " . . . it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking."[185] The Court found that a taking had occurred because "the damages were not merely consequential. They were the product of a direct invasion of respondents' domain."[186] The government's "intrusion was so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it."[187]

The question whether harm resulting from a government intrusion is direct or consequential does not require the courts to establish a new test. The well-established test for adjudicating physical takings already accounts for the directness of the invasion when determining whether a taking oc-

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[181] *See* 328 U.S. 256, 258 (1946).

[182] *Id.* at 261. The Court cited cases involving destruction of property by flooding to illustrate the point. *Id.* at 261 n.6 (citing *Pumpelly*, 80 U.S. 166; *Lynah*, 188 U.S. 445; *Welch*, 217 U.S. 333).

[183] *Id.* at 262.

[184] *See id.* at 265–66; *see also supra* notes 168–174 and accompanying text.

[185] *Causby*, 328 U.S. at 266.

[186] *Id.* at 265–66.

[187] *See id.* at 265 (comparing the character of the invasion to a hypothetical invasion by an elevated railway).

curred.[188] Under that test, the duration of the government intrusion is considered, along with other information, to determine (1) whether the invasion is the direct cause of the injury to the property, and (2) whether the injury is substantial enough to subtract from the owner's full enjoyment of the property and to limit his exploitation of it.[189] If the injury to property is substantial, it does not matter whether the injury was caused by an invasion of limited duration.[190] The owner's rights in his or her property are irreparably harmed because they are of a more limited and circumscribed nature than they were before the intrusion, and the government has a categorical duty to pay just compensation.[191]

We know from the above discussion of *Dickinson*, *Welch*, and *Lynah* that the Court has found a taking where the duration of the flood was finite, making the invasion itself a temporary condition.[192] We also know that neither *Cress* nor *Causby* relied on a balancing test; these cases established the rule that the "character of the invasion" is determinative of a physical taking case.[193] And the Supreme Court relied on the rules and principles developed in its flooding cases to hold that the temporary physical invasions at issue in the wartime seizure cases and *Causby* effected takings.[194] Thus, after *Arkansas Game & Fish*'s recognition that *Causby* involved a temporary taking, there is nothing in *Loretto v. Teleprompter Manhattan CATV Corp.* that warrants application of a different test for government invasions of limited duration.

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[188] *See Arkansas Game & Fish Comm'n*, 133 S. Ct. at 522 (citing Ridge Line, Inc. v. United States, 346 F.3d 1346, 1355–56 (Fed. Cir. 2003)) ("Also relevant to the takings inquiry is the degree to which the invasion is intended or is the foreseeable result of authorized government action.").

[189] *See Ridge Line*, 346 F.3d at 1355–56; *see also Causby*, 328 U.S. at 265; Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327, 329–30 (1922).

[190] *See supra* notes 155–187 and accompanying text.

[191] *See Pumpelly*, 80 U.S. at 177–78 (when the government uses private property in a manner that inflicts "irreparable and permanent injury to any extent," it must compensate the owner); *see also General Motors*, 323 U.S. at 378.

[192] *Dickinson*, 331 U.S. at 750–51; *Welch*, 217 U.S. at 338–39; *Lynah*, 188 U.S. at 469–70, 474.

[193] *See Causby*, 328 U.S. at 266; *Cress*, 243 U.S. at 328; *see also* Sanguinetti v. United States, 264 U.S. 146, 147–49 (1924) (applying the *Cress* "character of invasion" test).

[194] *See Petty Motor*, 327 U.S. at 378 (citing *Welch,* 217 U.S. at 333*,* for the rule that the government's temporary occupation and use of private property effected a taking for which compensation is required); *General Motors*, 323 U.S. at 378 n.5 (citing *Welch*, 217 U.S. 333); *Causby*, 328 U.S. at 261 n.6, 266 (citing *Cress*, 243 U.S. at 316; *Welch*, 217 U.S. at 333; *Lynah*, 188 U.S. at 445; *Pumpelly*, 80 U.S. at 166). In fact, the principles established by the Court's flooding cases are so universal that they supplied the basis for the Court to recognize the viability of a claim for a temporary regulatory taking. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 306–07, 316–18 (1987) (relying on *Pumpelly*, 80 U.S. at 177–78).

IV. IS THERE A MEANINGFUL DISTINCTION BETWEEN A *TEMPORARY* AND *PERMANENT* PHYSICAL INVASION?

Given the significance that the Supreme Court has—*at times*—placed on the terms "temporary" and "permanent," one would expect to find that the duration of a government interference provides some meaningful basis for distinction in the Court's takings case law. But, as discussed above, that expectation does not bear out.[195] Instead, we find remarkable consistency in the way that the Court resolves temporary and permanent physical takings cases.

The Court's consistent treatment is largely due to the nature of a physical appropriation of private property. The term "property" refers to the collection of protected rights inhering in an individual's relationship to his or her land or chattels.[196] Among these are the rights to possess, use, exclude others, and dispose of the property.[197] A government act that physically intrudes upon private property in a manner that substantially interferes with one of these rights constitutes a taking for which just compensation is due.[198] Questions regarding the duration of the government invasion are only meaningful to the resolution of a takings case if the duration was so fleeting or temporary that it did not impact the owner's rights in his land.[199]

Compare, for example, *Portsmouth Harbor Land & Hotel Co. v. United States*[200] and *Peabody v. United States*.[201] Both cases involved the same resort property, which was located adjacent to a military fort.[202] In both cases, the landowner claimed that the government had taken an interest in the

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[195] *See supra* notes 155–195 and accompanying text.

[196] *See*, *e.g.*, United States v. General Motors, 323 U.S. 373, 377–78 (1945); Richard A. Epstein, *The Disintegration of Intellectual Property? A Classical Liberal Response to a Premature Obituary*, 62 STAN. L. REV. 457, 459–61 (2010).

[197] *General Motors*, 323 U.S at 377–78; *see also* Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).

[198] *See General Motors,* 323 U.S. at 378; *see also* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005) (holding that a physical invasion will always effect a taking because it eviscerates the owner's right to exclude others from entering upon and using his or her property, which is "perhaps the most fundamental of all property interests"); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982) (when the government invades private property, "the government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand"); Pumpelly v. Green Bay & Miss. Canal Co., 80 U.S. 166, 177–78 (1871).

[199] *See, e.g.*, Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327, 329–30 (1922) (stating that a continuous series of acts might establish a taking where a single act would not).

[200] *Id.*

[201] 231 U.S. 530 (1913).

[202] *Portsmouth*, 260 U.S. at 328 (noting that *Peabody* involved "similar claims in respect of the same land").

property by shooting guns over the land.[203] But, despite common facts, the Court concluded a taking might have occurred only in *Portsmouth*.[204] The key distinction between the two cases was that in *Peabody*, the plaintiff was unable to show that the invasion substantially interfered with his property rights, but the plaintiff in *Portsmouth* did.[205] In *Peabody*, the plaintiff claimed that the government had taken an easement over his land when it fired guns across the property on two or three occasions the year after it built the fort.[206] There was no evidence that the government intended to fire the guns again in a time of peace; at best, the plaintiff showed a general apprehension that the government might do so again at some point in the future.[207] His apprehension was insufficient to prove a taking.[208] The Court explained that, to prove a taking, the plaintiff must show an actual interference with the owner's rights in his property:

> [I]f the Government had installed its battery . . . with the purpose and effect of subordinating the strip of land between the battery and the sea to the right and privilege of the Government to fire projectiles directly across it for the purpose of practice or otherwise, whenever it saw fit, in time of peace, with the result of depriving the owner of its profitable use, the imposition of such a servitude would constitute an appropriation of property for which compensation should be made.[209]

In *Portsmouth*, however, the character of the government's actions had changed in a significant enough manner for the Court to reverse a lower court's order dismissing the takings case.[210] The government replaced the old guns with heavy coastal defense artillery.[211] Although the government only fired the new guns once—an inherently temporary condition—its establishment of a fire control indicated that it planned to do so again.[212] These facts, if proven on remand, could have been sufficient to establish

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[203] *Id.* at 328–29; *Peabody*, 231 U.S. at 531.

[204] 260 U.S. at 328, 330 (remanding to the Court of Claims to determine whether a taking had occurred, after noting that a similar claim in *Peabody* had been denied).

[205] *Compare Portsmouth*, 260 U.S. at 329–30 (holding that a taking might have occurred where the government was alleged to have fired guns over plaintiffs' land), *with Peabody*, 231 U.S. at 539–40 (dismissing a takings claim where the same guns had not been fired over an eight-year period).

[206] 231 U.S. at 537, 539–40.

[207] *Id.* at 537–38.

[208] *Id.* at 540.

[209] *Id.* at 539 (citing *Welch*, 217 U.S. 333, 339 (1910); United States v. Lynah, 188 U.S. 445, 469 (1903); *Pumpelly*, 13 U.S. at 177).

[210] 260 U.S. at 329–30.

[211] *Id.* at 329.

[212] *Id.* at 329–30.

that the government's temporary act of firing guns over the plaintiff's property had imposed a servitude on the land.[213]

Once a government invasion of private property appropriates the rights therein, its character as a taking does not change if the government relinquishes control over the private property after using it for a period of time.[214] In Professor Eagle's classic treatise on regulatory takings, he explains that when the government causes a physical invasion of private property for a limited period of time, it imposes a servitude on the land for the duration of the invasion.[215] When the property is subsequently relinquished, the government exercises the appropriate right of alienation to return the property in its permanently diminished state to the owner.[216] Although the owner of property that is taken for a limited duration of time may still hold some valuable rights in the land, those rights are irreparably harmed because they are of a more limited and circumscribed nature than they were before the intrusion.[217] And, as recognized by *Arkansas Game & Fish Commission*, "Once the government's actions have worked a taking of property, 'no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.'"[218] Accordingly, the Supreme Court recognized, in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, that "'Temporary' takings . . . are not different in kind from permanent takings, for which the Constitution clearly requires compensation."[219]

Although the Supreme Court has sometimes appeared to use the terms "permanent" and "temporary" to distinguish those physical intrusions that effect a taking from those that do not,[220] its case law as a whole suggests that there is no meaningful distinction in the takings implications of a physical invasion that continues in perpetuity, compared to one of limited duration.[221] As Justice Stevens noted in *First English*, in dissent, "there is no distinction between temporary and permanent takings" in physical invasion cases:[222]

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[213] *Id.* at 330.

[214] *See infra* notes 216–220 and accompanying text.

[215] EAGLE, *supra* note 2, at 962–63.

[216] *Id.*

[217] *See General Motors*, 323 U.S. at 378.

[218] Ark. Game & Fish Comm'n v. United States, 133 S. Ct. 511, 519 (2012) (quoting First English Evangelical Lutheran Church v. Cnty. of Los Angeles, 482 U.S. 304, 321 (1987)).

[219] 482 U.S. at 318; *see id.* at 331–32 (Stevens, J., dissenting) (noting that the proposition "there is no distinction between temporary and permanent takings" applies to physical takings).

[220] *See Loretto*, 458 U.S. at 427–28.

[221] *See supra* notes 155–195 and accompanying text.

[222] *First English*, 482 U.S. at 331–32 (Stevens, J., dissenting) ("[T]he state certainly may not occupy an individual's home for a month and then escape compensation by leaving and declaring the occupation 'temporary.'").

> [I]f the government appropriates a leasehold interest and uses it for a public purpose, the return of the premises at the expiration of the lease would obviously not erase the fact of the government's temporary occupation. Or if the government destroys a chicken farm by building a road through it or flying planes over it, removing the road or terminating the flights would not palliate the physical damage that had already occurred. These examples are consistent with the rule that *even minimal physical occupations constitute takings* which give rise to a duty to compensate.[223]

It should be noted that Justice Stevens wrote this passage in dissent not because the majority of the Court disagreed with his analysis, but because—unlike the majority—he did not believe that the same reasoning should be extended to regulatory takings. This led Professor Laitos to conclude:

> While the Court has distinguished between "temporary physical invasions" and "permanent physical occupations," after [*First English*], even temporary physical invasions may be *per se* takings, requiring just compensation for the time the property is occupied.[224]

Some analysts suggest that the judicial designation of physical invasions as "permanent" or "temporary" may be little more than a semantic marker, signifying whether the court believes compensation is warranted on a case-by-case basis.[225] Others have searched for some underlying consistency in the Supreme Court's use of these terms that departs from normal usage:

> [P]ermanency for doctrinal purposes is not synonymous with permanency in a temporal sense. Rather, it is a label attached to property interference of a sufficiently severe nature. Thus, in developing its [physical] takings doctrine, the Supreme Court has focused on the quality, not the duration of invasion. This was true in early cases and more recent cases. The Court has even viewed interference with limited term leaseholds as a compensable taking. Occasional, periodic, or intermittent occupations can also fall

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[223] *Id.* at 329 (emphasis added).

[224] Laitos, *supra* note 127, at 293; *see also* Costonis, *supra* note 127, at 543–46; Lock, *supra* note 127, at 90; Coursen, *supra* note 127, at 831–32.

[225] *See*, *e.g.*, ROBERT MELTZ ET AL., THE TAKINGS ISSUE 124–25 (1999) ("Where the courts have found an invasion to be temporary, they have not found a taking. That is not to say that short-term or finite invasions are not compensated as physical takings. Rather, the courts take some liberty and classify these as permanent takings.").

> within the rule. In contrast, an isolated, or technical trespass has been viewed as a temporary invasion. Indeed, the Court's latest land use decisions reject any literal distinction between temporary and permanent interferences as determinative in either regulatory or [physical] takings cases. . . . *"Permanency" is thus a legal conclusion, rather than an evidentiary fact.*[226]

As Stephen Blevit has noted:

> It almost goes without saying that "when the Court speaks in terms of a permanent physical occupation, it does not necessarily mean that the occupation is one which will last forever." . . . The term "permanent" is really the Court's shorthand way of describing which physical occupations, because of the character of the occupation, have a sufficiently severe effect on the property owner such that no public interest can outweigh the impact on the property owner. Thus, no further inquiry into the purpose of the governmental action is necessary. The temporal character of the invasion is a relevant consideration, but not controlling.[227]

Questions concerning the duration of an invasion become meaningless if they are not probative of whether the government's actions interfere with the owner's rights and expectations in property. In an article surveying the Court's temporary takings jurisprudence, Professor Eagle insightfully asked whether the word "temporary" has any real meaning in "a society marked by impermanence."[228] He explained that, putting aside the law's attraction to broad "talismanic definitions," such distinctions lose meaning in application.[229] For example, the "temporary" land use moratoria at issue in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* lasted six years; whereas, the regulation resulting in a "permanent" deprivation of all use of economically viable land uses in *Lucas v. South Carolina Coastal Council* was only in effect for two years.[230] Professor Eagle cautions that such "standardless discourse about 'permanent' and 'temporary' [acts] simply magnifies the confusion" surrounding takings law.[231] That point was illustrated in spades by the U.S. Court of Appeals for the Federal Circuit's

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[226] Karl Manheim, *Tenant Eviction Protection and the Takings Clause*, 1989 WIS. L. REV. 925, 994–96 (emphasis added).

[227] Stephen Blevit, *A Tale of Two Amendments: Property Rights and Takings in the Context of Environmental Surveillance*, 68 S. CAL. L. REV. 885, 905–06 (1995) (quoting Florida Power Corp. v. FCC, 772 F.2d 1537, 1544 (11th Cir. 1985), *rev'd on other grounds*, 480 U.S. 245 (1987)).

[228] Eagle, *supra* note 122, at 340.

[229] *See id.* at 340–41.

[230] *Id.* at 340.

[231] Eagle, *supra* note 122, at 352.

repudiated decision in *Arkansas Game & Fish*, where the court relied on the distinction between "permanent" and "temporary" government action as an arbitrary touchstone for deciding the case without any consideration of how the government's repeated flood invasions interfered with the Commission's property rights.[232]

For all of the confusion that the *Arkansas Game & Fish* dicta may cause, the Supreme Court's discussion of the various ways in which duration may be relevant to a takings claim should at the very least disabuse courts and litigants of the notion that the temporal character of a government act, standing alone, is in any way dispositive of the claim.[233]

CONCLUSION: A TEMPORARY FIX FOR A PERMANENT PROBLEM

Without question, *Arkansas Game & Fish Commission v. United States* constitutes a major step forward in protecting property rights. The Supreme Court's decision holds that there is no categorical exception to liability for government actions that are temporary in duration, nor is there any reason to treat one form of physical interference differently than other physical invasions upon private property. And in that regard, the opinion recognizes principles that should fend off future categorical rules limiting government liability under the Takings Clause. The decision, however, provides only a temporary fix for the temporary takings issue because it left unresolved the question how a court should review such a claim. The Court missed an important opportunity to correct an error in its case law. And as a result, the Court created an uncertainty in its takings case law that is likely to arise again.

[232] *See Ark. Game & Fish Comm'n*, 637 F.3d at 1377.
[233] *See Ark. Game & Fish Comm'n*, 133 S. Ct. at 522–23.