TEMPORARY TAKINGS: SETTLED PRINCIPLES AND UNRESOLVED QUESTIONS

Daniel L. Siegel[*] *& Robert Meltz*[**]

TABLE OF CONTENTS

Introduction 480
I. Temporary Regulatory Actions 482
A. Prospectively Temporary Regulations 482
B. Retrospectively Temporary Regulations: Can *Lucas* Ever Apply? 496
C. *Ultra Vires* Delay 500
II. Temporary Physical Appropriations 502
A. Physical Impositions Versus Use Limitations 503
B. Permanent Versus Temporary Physical Impositions 504
C. Partial Versus Total Temporary Impositions 506
D. Prospectively Versus Retrospectively Temporary Physical Imposition 508
E. *Ultra Vires* Physical Imposition 508
III. Determining Compensation 509
A. Before *First English* 509
B. *First English* 510
C. Broad Considerations Governing Measure of Damages for Temporary Takings 511
D. Formulae Adopted By Courts for Regulatory Takings 512
Conclusion 523

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** Attorney, Congressional Research Service.

INTRODUCTION

When it comes to fundamental principles concerning temporary takings under the Federal Constitution's Takings Clause,[1] the dust has settled. Government is potentially required to pay just compensation when it temporarily limits property uses ("regulatory takings"), as well as when it temporarily occupies or appropriates property for itself or through a third party ("physical takings").[2] Beyond those core principles, however, lurk numerous uncertainties regarding both how to determine whether a governmental action actually amounts to a temporary taking, and how to calculate just compensation for such a taking.

A trilogy of United States Supreme Court cases involved the federal government's total and complete, but temporary, occupation of properties during World War II: *Kimball Laundry Co. v. United States*,[3] *United States v. Petty Motor Co.*,[4] and *United States v. General Motors Corp.*[5] In each case, both the Court and the federal government simply assumed that the government must pay just compensation for those temporary but total physical takings. Up until 1987, however, the Court had not resolved whether a regulation limiting a property's uses could impose a temporary taking. Some state courts, such as those in California, New York, and Pennsylvania, have interpreted federal and state constitutions as not requiring compensation when government rescinded a regulation after a court determined that it was a taking.[6] Inverse condemnation damages were

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1. The Fifth Amendment to the United States Constitution includes what is commonly called the "Takings Clause" or the "Just Compensation Clause." It provides: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

2. This article includes as potential "physical takings" regulations that require owners of private property to submit to occupations by the government or by third parties. *See generally* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (presenting the issue of whether a cable company's physical occupation of a person's property as authorized by New York Law amounted to a taking, and finding that such actions were a taking). In contrast, this article characterizes regulations that restrict uses of property as potential "regulatory takings."

3. Kimball Laundry Co. v. United States, 338 U.S. 1 (1949).

4. United States v. Petty Motor Co., 327 U.S. 372 (1946).

5. United States v. Gen. Motors Corp., 323 U.S. 373 (1945).

6. *See* Agins v. City of Tiburon, 598 P.2d 25, 32 (Cal. 1979) (holding that inverse condemnation is inappropriate for a landowner challenging a zoning ordinance), *aff'd on other grounds*, 447 U.S. 255 (1980); Fred F. French Investing Co. v. City of New York, 350 N.E.2d 381, 386 (N.Y. 1976), *cert. denied*, 429 U.S. 990 (1976); de Botton v. Marple Twp., 689 F. Supp. 477, 480 n.1 (E.D. Pa. 1988). *See generally* Robert I. McMurry, Note, *Just Compensation or Just Invalidation: The Availability of a Damages Remedy in Challenging Land Use Regulations*, 29 UCLA L. REV. 711 (1982) (discussing disagreement among courts "about whether to invalidate the government action as unconstitutional or to invalidate it by ordering requisite compensation").

only available where, after a court determined that the regulation was excessive, the government nevertheless decided to maintain the regulation.[7]

In 1987, the United States Supreme Court resolved this issue in *First English Evangelical Lutheran Church v. County of Los Angeles*, holding that property owners had the right to be compensated for temporary regulatory takings.[8] The Court subsequently described *First English* as establishing the following rule:

> [O]nce a court finds that a police power regulation has effected a taking, the government entity must pay just compensation for the period commencing on the date the regulation first effected the taking, and ending on the date the government entity chooses to rescind or otherwise amend the regulation.[9]

Although *First English* affirmed the right to compensation for a temporary regulatory taking, it left open the question of how to identify such a taking. As will be seen, courts have not fully resolved the factors to consider in answering that question. Moreover, the factors may differ for prospectively temporary governmental actions (from the outset intended to be temporary), as opposed to retrospectively temporary (intended at the outset to be permanent but later become temporary). Uncertainty also remains concerning temporary physical takings. This article will review those uncertainties, as well as why the question of whether an imposition amounts to a taking will often turn on: (a) whether the Court deems the imposition physical, as opposed to a use restriction; (b) if physical, whether the Court considers the imposition to be temporary or permanent; and (c) if physical and temporary, whether the imposition is seen as partial or total. Finally, the article will conclude by reviewing the difficult question of how courts determine just compensation for temporary takings.

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7. *See* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 312 (1987) (explaining that California decisions did not allow a plaintiff to recover damages for a temporary regulatory taking) (citations omitted).

8. *Id.* at 321.

9. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 328 (2002) (internal quotation marks omitted) (quoting San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 658 (1981)) (Brennan, J., dissenting).

I. TEMPORARY REGULATORY ACTIONS

A. Prospectively Temporary Regulations

Some property use restrictions are from the outset intended to be temporary. These restrictions, most commonly in the form of land-use moratoria and permitting delays, are designed to put development and other activities on hold pending triggering events—for example, the drafting of a plan to control development in a region,[10] the availability of sufficient water to allow new water hookups,[11] or a determination of whether it would be safe to allow oil and gas drilling under public lands that were slated for use as a nuclear waste disposal site.[12] As will be seen in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, the Court held that takings challenges to these restrictions, even when they eliminate all economic use or value of the property, should be analyzed under the multi-factor approach articulated in *Penn Central Transportation Co. v. City of New York,* rather than the per se approach outlined in *Lucas v. South Carolina Coastal Council.*[13] In addition, this section will review the special consideration that a number of courts have given to so-called "extraordinary delays" and "erroneous delays."[14]

1. *Lucas* Is Inapplicable

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, the Court reviewed whether a land-use moratorium could impose a so-called per se "total taking" under *Lucas v. South Carolina Coastal Council.*[15] Courts usually determine whether a regulation amounts to a taking by applying the various factors outlined in *Penn Central Transportation Co. v. City of New York.*[16] These factors include "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations," as well as the "character of the governmental

10. *See id.* at 306 ("[I]nvolv[ing] two moratoria . . . to maintain the status quo while studying the impact of development on Lake Tahoe and designing a strategy for environmentally sound growth.").

11. Lockary v. Kayfetz, 917 F.2d 1150, 1153 (9th Cir. 1990).

12. Bass Enters. Prod. Co. v. United States, 381 F.3d 1360, 1361 (Fed. Cir. 2004).

13. *Tahoe-Sierra*, 535 U.S. at 330.

14. *See* Landgate, Inc. v. Cal. Coastal Comm'n, 953 P.2d 1188, 1195–97 (Cal. 1998).

15. *Tahoe-Sierra*, 535 U.S. at 330–31 (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1003 (1992)).

16. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

action."[17] Where, however, a regulation imposes the "complete elimination of a property's value," then, with limited exceptions, there is no need for a court to look at the various *Penn Central* factors; the regulation imposes a per se total taking under *Lucas*.[18] In *Tahoe-Sierra*, landowners asserted that the Tahoe Regional Planning Agency's (TRPA) imposition of a thirty-two-month development moratorium while the agency created a comprehensive regional plan amounted to a *Lucas* per se taking because during that period the owners were allegedly unable to use their properties in economically viable ways.[19]

The *Tahoe-Sierra* Court rejected the property owners' argument. It explained that *Lucas* only applies when a regulation entirely eliminates a property's value.[20] Moreover, in determining whether value remains in a property, courts need to look at the "parcel as a whole."[21] Further, the parcel as a whole is not limited to the physical dimensions of the property; it also includes its temporal dimension—the potential use of the property over time.[22] Considering these concepts together, a moratorium does not make property valueless, as required to come within *Lucas*, because the property "will recover value as soon as the prohibition is lifted."[23] Rather, moratoria should be analyzed using the *Penn Central* approach.[24]

The Court did indicate that in engaging in such a *Penn Central* analysis, the length of a moratorium is an important factor for courts to consider, and that moratoria lasting more than one year may "be viewed with special skepticism."[25] That said, the Court pointed out that given the district court's finding that TRPA's thirty-two-month moratorium was reasonable, a blanket one-year rule would be inappropriate.[26] In rejecting such a blanket rule, the Court also noted that a moratorium ultimately upheld by a California appellate court in *First English* lasted for six years.[27]

As a result of *Tahoe-Sierra*, with the possible exception of a restriction that prohibits all economic use during the entire period of a leasehold,[28]

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17. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538–39 (2005) (internal quotation marks omitted) (quoting *Penn Cent. Transp. Co.*, 438 U.S. at 124).

18. *Id.* at 538–39 (explaining the *per se* rule announced in *Lucas*).

19. *Tahoe-Sierra*, 535 U.S. at 306.

20. *Id.* at 330.

21. *Id.* at 331.

22. *Id.* at 331–32.

23. *Id.* at 332.

24. *Id.* at 342.

25. *Id.* at 341.

26. *Id.* at 341–42.

27. *Id.* at 342 n.36.

28. *See* Steven J. Eagle, *Planning Moratoria and Regulatory Takings: The Supreme Court's Fairness Mandate Benefits Landowners*, 31 FLA. ST. U. L. REV. 429, 472–73 (2004) ("A lesser term than

courts can no longer hold that prospectively temporary development bans are per se takings under *Lucas*. This was starkly apparent in two cases that reversed pre-*Tahoe-Sierra* decisions finding that moratoria caused *Lucas* takings.

In *Bass Enterprises Production Co. v. United States*, the owner of oil and gas rights brought a temporary taking challenge when the government took forty-five months to determine whether drilling near a prospective nuclear waste disposal site was safe.[29] The Court of Federal Claims initially held that the delay constituted a taking.[30] Specifically, citing *Lucas*, the court had held that there was a categorical taking because "[p]laintiffs have not been permitted to use their leases for a substantial period of time. Their loss during that period was absolute."[31]

Following the *Tahoe-Sierra* decision, however, the government moved for reconsideration on the ground that the delay should not have been considered a *Lucas* categorical taking, but instead should have been analyzed utilizing the *Penn Central* factors.[32] The court agreed[33] and went on to apply those factors in rejecting the takings claim.[34] The court explained that, while the owners had a reasonable investment-backed expectation that they could drill, the owners' interest was outweighed by the government's important health and safety interest in delaying the drilling, as well as the minimal economic impact of the delay when looking at the property—that is, the full lease term—as a whole (since, as the government explained, "[t]he property was still there at the end of the delay period").[35] On appeal, the Federal Circuit affirmed.[36]

Tahoe-Sierra had a similar impact in a Florida case, *Leon County v. Gluesenkamp*.[37] *Leon County* is a temporary takings action in which property owners were denied a building permit due to an injunction that had been issued in a separate lawsuit.[38] That injunction prevented the county from issuing any building permits in a certain area until the county

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a fee simple might be rendered valueless because it might terminate before the planning moratorium is set to expire. This might result in a complete deprivation of value and a per se taking under *Lucas*.").

29. Bass Enters. Prod. Co., v. United States, 54 Fed. Cl. 400, 401–02 (Fed. Cir. 2002), *aff'd*, 381 F.3d 1360 (Fed. Cir. 2004).

30. *Id.* at 401.

31. Bass Enters. Prod. Co. v. United States, 45 Fed. Cl. 120, 123 (1999).

32. *Bass Enters.*, 54 Fed. Cl. at 402.

33. *Id.*

34. *Id.* at 403–04.

35. *Id.*

36. Bass Enters. Prod. Co. v. United States, 381 F.3d 1360, 1371 (Fed. Cir. 2004).

37. Leon County v. Gluesenkamp, 873 So.2d 460 (Fla. Dist. Ct. App. 2004).

38. *Id.* at 462.

complied with various requirements of its comprehensive plan.[39] After the county rejected the property owners' permit application, the owners sued the county, alleging a taking.[40] While the takings action was pending, the injunction was dissolved.[41] The trial court then held that the property owners suffered a categorical taking under *Lucas* because they "had suffered a loss of all or substantially all economically viable uses of" their property during the injunction period.[42]

Based on *Tahoe-Sierra*, however, the state court of appeal reversed.[43] The court stated in general terms that *Tahoe-Sierra* "implicitly rejected a categorical rule in the [temporary] regulatory taking context."[44] The court went on to disapprove the trial court's application of *Lucas* to this case, explaining that "under the Court's holding in *Tahoe-Sierra*, the development moratorium could not constitute a per se taking of property under *Lucas*."[45] The court then weighed the *Penn Central* factors and concluded that no taking occurred.[46]

2. Extraordinary Delay (Dragging Feet)

The notion that "normal delays" in regulatory decision-making are not takings, while "extraordinary delays" might be, was first articulated in *Agins v. City of Tiburon*.[47] The *Agins* Court rejected the property owners' claim that the city's precondemnation activities constituted a taking, explaining in a footnote that "[m]ere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are incidents of ownership. They cannot be considered a taking in the constitutional sense."[48] The Court reinforced the difference between normal

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39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 463.
43. *Id.* at 465.
44. *Id.* at 466.
45. *Id.* at 466–67.
46. *Id.* at 467–68.
47. Agins v. City of Tiburon, 447 U.S. 255 (1980).
48. *Id.* at 263 n.9 (internal quotation marks omitted) (quoting Danforth v. United States, 308 U.S. 271, 285 (1939)); *see* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126–27 (1985).

> The mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking.... A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired. Moreover, even if the permit is denied, there may be other viable uses

and extraordinary regulatory delays in *First English Evangelical Lutheran Church v. County of Los Angeles*, where it went out of its way to distinguish the facts before it from "the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us."[49] More recently, as previously noted, the Court in *Tahoe-Sierra* indicated that courts can consider the length of and justification for a delay as part of their *Penn Central* analysis.[50]

The exact role of an "extraordinary delay" in deterring whether a governmental action amounts to a taking, however, is somewhat confusing. Many courts indicate that extraordinary delay ripens a claim, which should then be reviewed using *Penn Central* factors.[51] Other courts seem to deem extraordinary delay as a per se taking, while still others see it as something to be considered as part of a *Penn Central* analysis.[52]

This article will first examine the factors courts use in determining whether a delay is extraordinary. It will then discuss how a court's finding that a delay is extraordinary relates to the takings determination. Note that extraordinary delay is closely related to, but not the same as, erroneous delay. Extraordinary delay essentially focuses on whether the governmental entity was, to use the vernacular, dragging its feet.[53] Erroneous delay, in contrast, is limited to a governmental decision that was incorrect and therefore reversed by a court.[54]

a. Factors in Determining Whether Delay Is Extraordinary

Courts focus on two factors when they analyze whether a regulatory delay is extraordinary: whether the delay was reasonable given the complexity of the agency's charge, and whether the agency acted in bad

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> available to the owner. Only when a permit is denied and the effect of the denial is to prevent "economically viable" use of the land in question can it be said that a taking has occurred.

Id. (internal citation omitted).

49. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 321 (1987).

50. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 342 (2002).

51. *See generally* Riviera Drilling and Exploration Co. v. United States, 61 Fed. Cl. 395, 405 (2004) (finding that the facts of the case present no extraordinary delay).

52. See *infra* Part I.A.2.a–b, discussing these three approaches.

53. *See* Bass Enters. Prod. Co. v. United States, 381 F.3d 1360, 1366 (Fed. Cir. 2004) (challenging the Bureau of Land Management's forty-five month delay in a permitting decision).

54. *See* Landgate, Inc. v. Cal. Coastal Comm'n, 953 P.2d 1188, 1204 (Cal. 1998) (discussing a "governmental mistake" that led to a delay, but did not amount to a taking).

faith.[55] Generally, courts will not find extraordinary delay unless the agency-caused delay was both unreasonable and the result of bad faith.[56]

i. The Nature of the Regulatory Scheme

In deciding whether a delay is extraordinary, courts not only look at its length, but also whether it "is disproportionate to the regulatory permitting scheme from which it arises."[57] For example, delays will be expected when government review is part of a "complex regulatory permitting process."[58] That is particularly true where review "requires detailed technical information necessary to determine the environmental impact of a proposed project."[59] And, where agencies are involved in a complex process, they "should be afforded *significant deference* in determining what additional information is required to satisfy statutorily imposed obligations."[60] Finally, courts will generally ignore the portion of any delay that is attributable to an applicant.[61]

ii. Rare Without Bad Faith

Courts not only require that a delay be unreasonably long before they deem it extraordinary; they also usually require that the government acted in bad faith.[62] Thus, a Court of Federal Claims decision recently noted the Federal Circuit's "admonition that extraordinary delay rarely travels without bad faith . . . ."[63] Moreover, when property owners seek to establish bad faith, they must overcome "the well-established rule that government officials are presumed to act in good faith."[64]

55. *Bass Enters.*, 381 F.3d at 1366.
56. *Id.*
57. *Id.*
58. Aloisi v. United States, 85 Fed. Cl. 84, 93 (2008).
59. *Id.*
60. *Id.*
61. *Id.*; *see* Res. Invs., Inc. v. United States, 85 Fed. Cl. 447, 502 (2009) (holding that a plaintiff's contribution to the delays raises a genuine issue of material fact that strikes at the heart of a governmental taking).
62. Boise Cascade Corp. v. United States, 296 F.3d 1339, 1347 n.6 (Fed. Cir. 2002).
63. *Res. Invs.*, 85 Fed. Cl. at 499.
64. *Aloisi*, 85 Fed. Cl. at 95.

b. A Shield or a Sword? (Ripening Versus Establishing Claim)

Older cases out of the Federal Circuit suggested that an extraordinary delay in and of itself established a taking.[65] Newer cases, however, indicate that such delays ripen a takings claim, and may be relevant to the takings determination itself, but that the delays do not impose per se takings.[66]

Tabb Lakes, Ltd. v. United States was the first Federal Circuit decision to address the concept of extraordinary delay.[67] In that case, the U.S. Army Corps of Engineers ordered Tabb Lakes to cease and desist from filling its wetlands before receiving a permit.[68] Tabb Lakes then filed a lawsuit that ultimately resulted in a decision that the Corps had no jurisdiction over these wetlands.[69] Tabb Lakes then proceeded with its project.[70] It also brought a takings action against the Corps, asserting among other things that the Corps imposed a taking because its improper assertion of jurisdiction unreasonably delayed Tabb Lakes's project.[71] The Federal Circuit rejected the claim.[72] It did, however, seem to indicate that where a delay becomes unreasonable, a taking occurs from that point forward, explaining that "only after the delay become unreasonable, would the taking begin . . . ."[73]

In 2001, the Federal Circuit likewise appeared to imply that an extraordinary delay can itself constitute a taking. In *Wyatt v. United States*, the court's discussion of extraordinary delay focused on the elements needed to establish such a delay, and why the plaintiff failed to make its

65. *See, e.g.*, Bass Enters. Prod. Co. v. United States, 381 F.3d 1360, 1366 (Fed. Cir. 2004) (stating that an extraordinary delay "may result" in a taking); Wyatt v. United States, 271 F.3d 1090, 1097 (Fed. Cir. 2001) (indicating that an extraordinary delay would be a taking); Tabb Lakes, Ltd. v. United States, 10 F.3d 796, 801 (Fed. Cir. 1993) (stating that "[m]ere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are 'incidents of ownership.' They cannot be considered a 'taking' in the constitutional sense.") (citing Agins v. City of Tiburon, 477 U.S. 255, 263 n.9 (1980)) (quoting Danforth v. United States, 308 U.S. 271, 285 (1993)).

66. *See, e.g.*, Appolo Fuels, Inc. v. United States, 381 F.3d 1338, 1351 (Fed. Cir. 2004) (stating that only extraordinary delays ripen into a compensable taking and "[if] the delay is extraordinary, the question of temporary regulatory takings liability is to be determined using the *Penn Central* factors"); *Res. Invs.*, 85 Fed. Cl. at 494–95 (stating that "[e]ven extraordinary delay requires that the landowner establish that the delay caused a taking"); *Aloisi*, 85 Fed. Cl. at 93 (stating that "[a]n extraordinary delay in permit processing by an agency can give rise to a ripe takings claim"); Riviera Drillings & Exploration Co., Inc. v. United States, 61 Fed. Cl. 395, 405 (2004) (finding that only extraordinary delays ripen into a compensable taking).

67. *Tabb Lakes*, 10 F.3d at 798.

68. *Id.*

69. *Id.* at 798–99.

70. *Id.* at 799.

71. *Id.*

72. *Id.* at 803.

73. *Id.* (emphasis omitted).

case.[74] *Wyatt* did, however, include the following language: "[W]e hold that any delay in processing the permit application was not sufficiently 'extraordinary' to constitute a taking."[75] The court's use of the phrase "constitute a taking" indicated that extraordinary delay would be a taking, but it does not have much weight because there was no discussion or analysis of this issue.[76] The court was even more ambiguous three years later in *Bass Enterprises Production Co. v. United States*.[77] Like *Wyatt*, *Bass Enterprises's* extraordinary delay discussion almost exclusively addressed the elements of such a delay and why the plaintiff did not make its case.[78] The court did, however, include one sentence indicating that an extraordinary delay "may result" in a taking.[79] On the other hand, the court seemed to suggest that even if an extraordinary delay exists, *Penn Central* factors must still be satisfied.[80]

As will be explained, however, the Federal Circuit did address this issue directly in a decision that it issued contemporaneously with *Bass Enterprises*, and in two more recent opinions, all of which point to extraordinary delay as ripening a claim rather than establishing it. In *Appolo Fuels, Inc. v. United States*, the owner of surface mining leases asserted that the government's eventual prohibition of mining on a portion of property covered by its leases constituted a permanent taking.[81] In addition, *Appolo* raised a temporary takings claim based on the government's failure to reach a final decision within a twelvemonth period established by the applicable mining statute.[82] Applying *Penn Central*, the court rejected the permanent takings claim.[83] It found that, even assuming (without deciding) that the economic impact of the government's action was substantial, *Appolo's* lack of reasonable expectations, plus the government's need to protect the public's health and safety, outweighed any economic impact.[84] The court explained that the *Penn Central* factors also apply to extraordinary delay challenges: "Delay in the regulatory process cannot give rise to takings liability unless the delay is extraordinary. If the delay is

74. Wyatt v. United States, 271 F.3d 1090, 1097–1100 (Fed. Cir. 2001).
75. *Id.* at 1097.
76. *Id.*
77. Bass Enters. Prod. Co. v. United States, 381 F.3d 1360 (Fed. Cir. 2004).
78. *Id.* at 1366–68.
79. *Id.* at 1366.
80. *Id.* at 1365.
81. Appolo Fuels, Inc. v. United States, 381 F.3d 1338, 1341 (Fed. Cir. 2004).
82. *Id.*
83. *Id.* at 1347.
84. *Id.* at 1351.

extraordinary, the question of temporary regulatory takings liability is to be determined using the *Penn Central* factors."[85]

The court then rejected *Appolo's* temporary takings claim, stating that given its finding that there was no permanent taking under *Penn Central*, "it would be strange to hold that a temporary restriction imposed pending the outcome of the regulatory decisionmaking process requires compensation."[86]

The Court of Federal Claims addressed this issue directly in two recent decisions.[87] In 2008, the court expressly held in *Aloisi v. United States* that extraordinary delay is a ripeness issue:

> An extraordinary delay in permit processing by an agency can give rise to a ripe takings claim notwithstanding the failure to deny the permit .... If the court determines that there is an extraordinary delay by the government, the question of temporary regulatory takings liability is then determined using the Supreme Court's three-part analysis in *Penn Central*.[88]

Similarly, in 2009, a different judge from that court explained in *Resource Investments, Inc. v. United States* that "[e]ven extraordinary delay requires that the landowner establish that the delay caused a taking, rather than merely retard a permitting process without the requisite impact on property interests."[89] Neither *Appolo*, *Aloisi*, nor *Resource Investments*, however, discussed whether, when a court finds that a case is ripe due to extraordinary delay, that finding affects the merits of its takings analysis.

At least one state court, the Supreme Court of South Carolina, has simply assumed that any permitting delay is ripe for takings review, and that the delay is considered as part of a *Penn Central* analysis.[90] In *Byrd v. City of Hartsville*, a land owner entered an agreement to sell his agricultural parcel to a developer, conditioned on its being zoned for commercial use.[91]

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85. *Id.* (internal citations omitted).

86. *Id.* at 1352. One month before the court decided *Appolo*, the Court of Federal Claims directly stated that once a court finds extreme delay its "next step ... tests the government action for the *Penn Central* factors demonstrating a compensable taking." Riviera Drilling & Exploration Co. v. United States, 61 Fed. Cl. 395, 405 (2004) (holding that the second step—a *Penn Central* analysis—was unnecessary "[b]ecause plaintiff has failed to allege the existence of the extraordinary delay").

87. Aloisi v. United States, 85 Fed. Cl. 84, 93 (2008); Res. Invs., Inc. v. United States, 85 Fed. Cl. 447, 467–68 (2009).

88. *Aloisi*, 85 Fed. Cl. at 93.

89. *Res. Invs.*, 85 Fed. Cl. at 494–95.

90. Byrd v. City of Hartsville, 620 S.E.2d 76, 80 (S.C. 2005).

91. *Id.* at 78.

The city deferred acting on the landowner's rezoning request for eleven months because it wanted to make sure that the rezoning would not lead the National Park Service to revoke the National Historic Landmark designation for related farm property.[92] The city eventually rezoned the parcel, but the delay caused the prospective purchaser to lose financing, and the sale fell through.[93] The South Carolina Supreme Court interpreted *Tahoe-Sierra* as requiring the court to determine whether there was a *Penn Central* taking during the eleven-month period.[94] According to South Carolina's high court, this determination requires an analysis of "whether the delay ever became unreasonable," which in turn involves a consideration of "the reasons for the delay, and the economic impacts on Byrd."[95] Here, the court found that the city had a "legitimate governmental interest" in the landmark designation, and that "delaying the zoning decision was a reasonable means of furthering that interest."[96] The court went on to hold that the economic impact of the delay was "too slight to render the delay unreasonable," given, among other things, the fact that the owner could still farm the property.[97]

An Ohio state court likewise viewed delay as a *Penn Central* factor (along with economic impact and investment-backed expectations) in *Duncan v. Village of Middlefield*.[98] The court also suggested, however, that "normal delays" are shields, that economic impacts due to normal delays can never impose a taking.[99]

On the other hand, a North Dakota Supreme Court decision involving a moratorium, as opposed to the delayed review of a permit application, included language suggesting that delay could itself amount to a taking.[100] In *Wild Rice River Estates, Inc. v. City of Fargo*, the court stated that "extraordinary delay . . . coupled with bad faith . . . may result in a compensable taking."[101] In spite of that statement, however, the court appeared to consider delay and bad faith as factors that courts should consider along with the traditional *Penn Central* factors, as opposed to stand alone factors.[102]

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92. *Id.*
93. *Id.*
94. *Id.* at 81.
95. *Id.*
96. *Id.* at 82.
97. *Id.*
98. Duncan v. Village of Middlefield, 898 N.E.2d 952, 956–58 (Ohio 2008).
99. *Id.* at 956.
100. Wild Rice River Estates, Inc. v. City of Fargo, 705 N.W.2d 850, 859 (N.D. 2005).
101. *Id.*
102. *Id.*

Given the various ways that courts have applied the extraordinary delay concept, which method is correct? This paper suggests that the decisions in cases such as *Appolo*, *Aloisi*, and *Resource Investments*, which view delay as ripening a claim, are correct.[103] The concept of "extraordinary" delay is contrasted with the concept of a "normal" delay, which is never a taking even if it imposes an extreme economic burden on a property owner.[104] Only when the delay crosses the "normal" line and becomes "extraordinary" should it ripen into a potential taking.[105]

Moreover, if extraordinary delay, without more, itself amounted to a taking, then it would impose a taking even where a delay had virtually no economic impact on a property owner.[106] This result would run counter to the Supreme Court's clarification of takings law in *Lingle v. Chevron U.S.A., Inc.*[107] *Lingle* stepped back and clarified years of confusing regulatory takings decisions. It explained that whether a regulation amounts to a taking turns on whether it is "so onerous that its effect is tantamount to a direct appropriation or ouster."[108] The key is identifying "those regulations whose effects are functionally comparable to government appropriation or invasion of private property."[109] Courts should also look at whether governmental action singles out a property owner and requires her to bear public burdens that should be borne by the public.[110] If an extraordinary delay only caused a minor economic impact, however, it would not meet those requirements. Extraordinary delay itself, therefore, should not constitute a per se taking.

That leaves the question of whether, when extraordinary delay ripens a claim, delay factors (reasonableness and bad faith) should be considered as part of a court's *Penn Central* review. Although the Court's decision in *Tahoe-Sierra* hints that both factors may be relevant,[111] the Court's

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103. Appolo Fuels, Inc. v. United States, 381 F.3d 1338, 1351 (Fed. Cir. 2004); Aloisi v. United States, 85 Fed. Cl. 84, 93 (2008); Res. Invs., Inc. v. United States, 85 Fed. Cl. 447, 495 (2009).

104. *See* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 320–21 (1987) (limiting the holding so as to not affect the "normal delays" associated with obtaining building permits, variances, and the like, because absent "extraordinary delay" these activities do not constitute a taking).

105. *See* Boise Cascade Corp. v. United States, 296 F.3d 1339, 1352 (Fed. Cir. 2002) (stating that only "extraordinary delays in the permitting process ripen into a compensable taking").

106. *But cf. First English*, 482 U.S. at 320 (stating that "a taking does not occur until compensation is determined and paid").

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

108. *Id.* at 537.

109. *Id.* at 542.

110. *Id.*

111. *See* Tahoe-Sierra Pres. Council, Inc., 535 U.S. 302, 333 (2002) (listing theories under which "[c]onsiderations of 'fairness and justice' arguably could support the conclusion that TRPA's moratoria were takings").

subsequent decision in *Lingle* tempers their consideration.[112] Unreasonableness and bad faith do not, in and of themselves, establish that a governmental restriction meets *Lingle*'s requirement that the burden be "so onerous" as to be the same as a direct appropriation, or that it is improperly singling out the property owner.[113] They may, however, inform various *Penn Central* factors. For example, unreasonableness and bad faith may be relevant to "the character of the governmental action."[114] Moreover, excessive delay may increase the economic burden of government's action, and thereby be relevant to "[t]he economic impact of the regulation on the claimant."[115] It might also affect whether or not government's actions interfered with "distinct investment-backed expectations."[116] Thus, while a court's finding of extraordinary delay should not amount to a per se taking, it may be applicable to a court's *Penn Central* analysis.

3. Erroneous Delay (Judicial Reversal)

A significant number of state courts have reviewed the closely related question of whether delays due to governmental positions that courts subsequently reverse are normal and therefore not temporary takings.[117] These cases are slightly different than the extraordinary delay cases, as they exclusively focus on invalid governmental decisions, rather than on the length and reasonableness of delays.[118] That said, like the extraordinary delay cases, these opinions tend to find that, absent indicia of bad faith, erroneous delays are not takings.

The leading state court case comes out of California, where the state's Supreme Court held that a two-year delay caused by a commission's "mistaken assertion of jurisdiction" that was corrected on appeal is "in the nature of a 'normal delay' that does not constitute a taking."[119] The court indicated, however, that a different case would be presented if the

112. *Lingle*, 544 U.S. at 528.

113. *Id.* at 537, 542.

114. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

115. *Id.*

116. *Id.*

117. *See* Landgate, Inc. v. Cal. Coastal Comm'n, 953 P.2d 1188, 1190 (Cal. 1998) ("[C]onsider[ing] whether a delay in the issuance of a development permit [partly owning to the mistaken assertion of jurisdiction by a government agency] is a type of 'temporary taking'"); Lowenstein v. City of Lafayette, 127 Cal. Rptr. 2d 79, 81 (Cal. Ct. App. 2002) (considering "whether a two-year delay precipitated by the City's erroneous action is an unlawful temporary taking").

118. *See, e.g.*, *Landgate*, 953 P.2d at 1202 ("Landgate's development was denied because of the Commission's plausible, though perhaps legally erroneous, position that Landgate or its predecessor failed to comply with one of the conditions of obtaining a coastal development permit by illegally reconfiguring the lot boundaries.").

119. *Id.* at 1190.

commission's "position was so unreasonable from a legal standpoint as to lead to the conclusion that it was taken for no purpose other than to delay the development project before it."[120] Subsequently, relying on *Landgate*, a California appellate court held in *Lowenstein v. City of Lafayette* that a city's mistaken denial of a landowner's lot line adjustment request, which resulted in a two-year delay, was not a taking.[121] The court explained that "the City's action was not objectively unreasonable because it was not taken solely to delay the proposed project."[122]

On the other hand, in *Ali v. City of Los Angeles*, a California appellate court found that a city's denial of a permit to demolish a damaged hotel, where the city was seeking to preserve single occupancy units, imposed a temporary taking.[123] The court explained that the denial was "arbitrary and unreasonable" in light of a state statute and existing case law that required the issuance of the permit.[124]

California's approach has been endorsed by at least one federal court. Citing *Landgate* and *Lowenstein*, the district court in *North Pacifica, L.L.C. v. City of Pacifica* held that California provides an adequate remedy for temporary takings based upon allegedly improper delays in processing development applications, and consequently that remedy must be pursued prior to bringing a federal court action.[125]

The Wisconsin Supreme Court, however, has rejected the *Landgate* approach. In *Eberle v. Dane County Board of Adjustment*, property owners alleged that they were improperly denied a permit for a driveway needed to access their property.[126] A trial court subsequently ordered the county to issue the permit.[127] Wisconsin's high court held that these facts stated a temporary taking claim under the Wisconsin Constitution.[128] In doing so, the majority expressly rejected *Landgate's* reasoning.[129] The Chief Justice issued a strong dissent, however, asserting that where an administrative body refuses to allow a particular land use, and a court subsequently

120. *Id.* at 1199.

121. *Lowenstein*, 127 Cal. Rptr. 2d at 87.

122. *Id.*

123. Ali v. City of L.A., 91 Cal. Rptr. 2d 458, 464 (Cal. Ct. App. 1999).

124. *Id.*

125. N. Pacifica, L.L.C. v. City of Pacifica, 234 F. Supp. 2d 1053, 1064–65 (N.D. Cal. 2002). Under *Williamson County Regional Planning Commission v. Hamilton Bank*, "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the *Just Compensation Clause* until it has used the procedure and been denied just compensation." Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 195 (1985).

126. Eberle v. Dane County Bd. of Adjustment, 595 N.W.2d 730, 740 (Wis. 1999).

127. *Id.* at 735.

128. *Id.* at 739.

129. *Id.* at 742 n.25.

overturns the denial and allows the use, there is no temporary taking.[130] In support, she cited—in addition to *Landgate*—decisions from Vermont, New Hampshire, Pennsylvania, and New York.[131]

The holding in *Eberle*, and the dicta concerning bad faith in *Landgate*, are in tension with *Lingle v. Chevron U.S.A., Inc.*[132] As previously outlined in discussing the degree to which an extraordinary delay can be considered in determining the merits of a taking claim, *Lingle*'s explanation that regulatory takings should turn on a regulation's impact on property—whether it is tantamount to a direct appropriation and whether government singles out a particular property owner—means that mistakes and bad faith are at most elements courts can consider when they engage in a *Penn Central* analysis.[133]

Moreover, *Landgate* itself is at least partially based on the very same "substantially advance[s]" formula discarded in *Lingle*.[134] *Landgate* held that a court's erroneous delay determination looks at "whether the [mistaken] development restrictions imposed on the subject property substantially advanced some legitimate state purposes so as to justify the denial of the development permit."[135] After *Landgate* was decided, however, the United States Supreme Court held in *Lingle* that the "substantially advances" test "ensconced in our Fifth Amendment takings jurisprudence . . . is [not] an appropriate test for determining whether a regulation effects a Fifth Amendment taking."[136] As a result, a number of lower California courts have questioned, but not decided, whether *Landgate* is still good law.[137]

The continuing validity of *Landgate* and similar decisions in other states may depend upon whether those cases are interpreted as swords or shields. On the one hand, *Landgate* can be seen as providing an

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130. *Id.* at 749 (Abrahamson, C.J., dissenting).

131. *Id.* at 748; *see, e.g.*, Chioffi v. City of Winooski, 676 A.2d 786, 788 (Vt. 1996) (board's improper denial of permit not a temporary taking); Smith v. Town of Wolfeboro, 615 A.2d 1252, 1257 (N.H. 1992) (board improperly applying ordinance is not a taking); Stoner v. Twp. of Lower Merion, 587 A.2d 879, 886 (Pa. Commw. Ct. 1991), *appeal denied*, 604 A.2d 252 (Pa. 1992) (compensation for temporary taking available only for taking effected by legislation or rule of continuing effect, not for withholding approval under ordinance allowing reasonable use of land); Lujan Home Builders, Inc. v. Town of Orangetown, 568 N.Y.S. 2d 850, 851 (Sup. Ct. 1991) (board's refusal to approve plat not a taking in substantive constitutional sense).

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

133. *Id.* at 537, 542.

134. Landgate, Inc. v. Cal. Coastal Comm'n, 953 P.2d 1188, 1198 (Cal. 1998).

135. *Id.*

136. *Lingle*, 544 U.S. at 532.

137. *See, e.g.*, Shaw v. County of Santa Cruz, 88 Cal. Rptr. 3d 186, 216 (2008) (discussing whether subsequent cases have undercut the *Landgate* holding).

independent theory for finding a taking, that is, delay for arbitrary reasons is a taking whether or not its impact is sufficient to impose a taking under the "so onerous" and singling out concepts sanctioned in *Lingle*.[138] On the other hand, *Landgate* can be viewed as holding that even where a delay imposes impacts that would ordinarily amount to a taking, no taking occurs for delays that are legitimate.[139] The first approach, under which a delay that does not meet a "substantially advances" test provides an independent basis for finding a taking, would appear to conflict with *Lingle*.[140] The latter, in contrast, would not pose a conflict. Rather, the "substantially advances" formula would only be a means of determining whether a delay comes within the "normal delays" that cannot constitute temporary takings under *First English*.[141]

B. Retrospectively Temporary Regulations: Can Lucas *Ever Apply?*

In contrast to prospectively temporary regulations, which at the outset are intended to be temporary, other regulations are intended to be permanent but are subsequently rescinded. The rescission is often in response to an adverse judicial decision or a defensive reaction to a threatened or actual lawsuit.[142] Courts have used the term "retrospectively temporary" to describe this type of temporary restriction.[143] For claims that a permanent use restriction that is cut short amounts to a taking, the most interesting question is whether the claim can be analyzed using the *Lucas* per se rule.

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138. *Lingle*, 544 U.S. at 537, 542.

139. *Landgate*, 953 P.2d at 1190.

140. *Lingle*, 544 U.S. at 548 ("We hold that the 'substantially advances' formula is not a valid takings test, and indeed conclude that it has no proper place in our takings jurisprudence.").

141. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 321 (1987).

142. Along these lines, the Court in *First English* explained that the government has the right to convert a potentially permanent taking into a temporary taking:

> Nothing we say today is intended to abrogate the principle that the decision to exercise the power of eminent domain is a legislative function . . . . Once a court determines that a taking has occurred, the government retains the whole range of options already available—amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain.

Id.

143. *See* Res. Invs., Inc. v. United States, 85 Fed. Cl. 447, 482 (2009) (exemplifying the various governmental actions that can constitute "retrospectively temporary" restrictions); Woodbury Place Partners v. City of Woodbury, 492 N.W.2d 258, 262 (Minn. Ct. App. 1992) (describing the restrictions addressed in *First English* as "retrospectively temporary"); Keshbro, Inc. v. City of Miami, 801 So.2d 864, 873 (Fla. 2001) (applying the *Lucas* categorical takings analysis to prospectively and "retrospectively temporary" takings).

The Federal Circuit has questioned, but not expressly resolved, whether *Tahoe-Sierra*'s rejection of *Lucas*'s per se rule extends to retroactively temporary takings.[144] In *Seiber v. United States*, the government initially denied a permit to log a portion of the landowner's property that had been designated as protected spotted owl nesting habitat.[145] Two years later, the government lifted the restriction, finding that the spotted owls had left the area and that the area no longer needed protection.[146] Seiber asserted various takings theories, including an argument that the government's actions constituted a temporary taking that should be deemed per se under *Lucas*.[147] In response, the government argued that the case did not fall under *Lucas* because, among other things, after *Tahoe-Sierra* "there is no such legal category as a temporary categorical taking because by its very nature a temporary taking allows a property owner to recoup some measure of its property's value."[148] Although the court declined to address that question, holding that there was no categorical taking because the landowners could have logged other portions of their parcel, it did question the government's argument:

> In *Boise Cascade* we explained that the Supreme Court may have only rejected the application of the per se rule articulated in *Lucas* to temporary development moratoria and not to temporary takings that result from the rescission of a permit requirement or denial.[149]

More recently, a Court of Federal Claims case addressed this issue and expressly rejected the government's argument that *Lucas* can never apply to a retrospectively temporary taking. In *Resource Investments, Inc. v. United States*, the court reasoned that *Tahoe-Sierra* did not apply.[150] It said that where a permit denial is "unconditional and permanent," the government takes "the parcel as a temporal whole."[151] The court categorized the denial before it as "prospectively permanent," and reasoned that the fact that "the taking was 'cut short' does not transmute the interests that it had

144. Seiber v. United States, 364 F.3d 1356, 1368 (Fed. Cir. 2004).
145. *Id.* at 1360.
146. *Id.* at 1362.
147. *Id.* at 1368.
148. *Id.*
149. *Id.* (internal citations omitted).
150. Res. Invs., Inc. v. United States, 85 Fed. Cl. 447, 493 (2009).
151. *Id.* at 484.

taken . . . ."[152] *Resource Investments* went on to conclude that the alleged taking "falls under *Lucas* rather than *Tahoe-Sierra* and *Penn Central*."[153]

The answer to whether *Lucas* applies to retrospectively temporary regulations turns on the appropriate temporal focus: should it be the time that the government first prohibited the use, or should it be the present? *Resource Investments* looked at the burden from the vantage point of when it was imposed, that is, as a permanent burden.[154] This viewpoint is attractive. In *Lingle*, the Court explained that regulatory takings liability is to a large degree based upon whether a restriction's impact on property is extremely onerous.[155] Where a restriction is intended to be permanent, its economic impact at the time of its imposition will be the same as a permanent restriction.[156] From this point of view, the fact that the restriction was lifted would affect the amount of compensation, if any, that the government owes, but it would not seem to affect liability.

Apart from whether *Resource Investments* was correct in reaching its conclusion, however, the court included some faulty reasoning. For example, *Resource Investments* found that *Lucas* applied to the facts before it by ignoring *Tahoe-Sierra's* determination that *Lucas* turns on the loss of value, not the inability to use property.[157] *Resource Investments* stated that "[a]s *Lucas* elaborates, categorical assessment of an alleged taking is appropriate when the property is purportedly without *economically viable use*, and does not require the parcel to be without all accounting or appraisal value."[158] *Resource Investments* compounds its error by implying that the *Lucas* Court intentionally applied its categorical rule to property that retained value.[159] The Court of Federal Claims thus states that "[e]ven the property at issue in *Lucas* retained some accounting or appraised value."[160]

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152. *Id.*

153. *Id.* at 493.

154. *Id.* at 484.

155. *See supra* text accompanying notes 107–110.

156. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1012 (1992) ("Yet, Lucas had no reason to proceed on a 'temporary taking' theory at trial, or even to seek remand for the purpose prior to submission of the case to the South Carolina Supreme Court, since as the Act then read, the taking was unconditional and permanent.").

157. In *Tahoe-Sierra*, the Court stressed that "[a]nything less than a 'complete elimination of value,' or a 'total loss,' the [*Lucas*] Court acknowledged, would require the kind of analysis applied in *Penn Central*." Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 330 (2002). *Tahoe-Sierra* thus emphasized that unless a challenged restriction "permanently deprives property of all value," *Lucas* does not apply. *Id.* at 332. Chief Justice Rehnquist issued a dissent that underscores this aspect of the majority's decision; the Chief Justice criticized "the Court's position that value is the *sine qua non* of the *Lucas* rule." *Id.* at 350 (Rehnquist, C.J., dissenting).

158. Res. Invs., Inc. v. United States, 85 Fed. Cl. 447, 486 (2009).

159. *Id.*

160. *Id.* at 488 (internal citations omitted).

That observation, however, is very misleading. In *Lucas*, the trial court had determined that the regulations prohibiting development on Lucas' lots "rendered them valueless."[161] The Supreme Court declined to question this conclusion because the government did not raise this point in opposing the petition for certiorari.[162] Specifically, the Court explained that "[t]his [valueless] finding was the premise of the petition for certiorari, and since it was not challenged in the brief in opposition we decline to entertain the argument in respondent's brief on the merits . . . that the finding was erroneous."[163]

Resource Investments notably never cites any portion of the majority decision for the proposition that property comes within the *Lucas* categorical rule even where it retains some accounting or appraised value. Rather, the Court of Federal Claims points to Justice Blackmun's dissent.[164] In doing so, however, *Resource Investments* ignores Justice Blackmun's agreement that the majority "has the power to decide a case that turns on an erroneous finding," as well as his "question[ing] the wisdom of" doing so.[165] Likewise, *Resource Investments* fails to note Justice Kennedy's concurring opinion, expressing "reservations" about the valueless assumption, but explaining that "we must accept the finding as entered below."[166]

The value-versus-use distinction is important because even where no uses of property remain, it might still have speculative value and thereby be excluded from a *Lucas* per se evaluation. Thus, in *Florida Rock Industries, Inc. v. United States*, the United States Court of Appeals for the Federal Circuit reversed the lower court's review of a takings claim under the *Lucas* per se rule.[167] There, even though the Army Corps of Engineers denied a permit to mine limestone under the landowner's wetlands, the court found that the property had value due to the existence of a speculative market.[168]

But the authors of this article digress. While the authors believe that *Resource Investments* failed to properly apply *Lucas*, the court may have been correct in concluding that *Lucas* can apply to retroactively temporary takings.

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161. *Lucas*, 505 U.S. at 1009.
162. *Id.* at 1020 n.9.
163. *Id.*
164. *Res. Invs.*, 85 Fed. Cl. at 488.
165. *Lucas*, 505 U.S. at 1045 (Blackmun, J., dissenting).
166. *Id.* at 1034 (Kennedy, J., dissenting).
167. Fla. Rock Indus., Inc. v. United States, 18 F.3d 1560, 1566 n.12 (Fed. Cir. 1994).
168. *Id.*

C. Ultra Vires *Delay*

The concept that acts of government officials must be authorized before they can violate the Takings Clause goes back at least to 1910. In *Hooe v. United States*, the Court rejected a landlord's claim for additional rent for offices leased by a federal agency on the ground that Congress had not authorized the higher payment.[169] According to the Court:

> The constitutional prohibition against taking private property for public use without just compensation is directed against the Government, and not against individual or public officers proceeding without the authority of legislative enactment. The taking of private property by an officer of the United States for public use, without being authorized, expressly or by necessary implication, to do so by some act of Congress, is not the act of the Government.[170]

Similarly, in *Regional Rail Reorganization Act Cases*, the Court cited *Hooe* in reiterating that "Government action must be authorized."[171]

Consistent with these Supreme Court opinions are lower court decisions, primarily out of the Federal Circuit, which state that unauthorized acts, by definition, cannot constitute a taking.[172] As a result, if a governmental entity or representative imposed a delay without authority to do so, there is no taking. The concept of "unauthorized act," however, does not provide governments with a broadly applicable defense, that is, the ability to say that almost any action that amounts to a taking could not have been authorized and therefore is not a taking. At least in the Federal Circuit, the courts have limited the notion of "unauthorized" by deeming even unlawful acts as authorized for takings purposes when the acts fall within an official's or governmental entity's general charge.

The Federal Circuit's approach was summarized by the Court of Federal Claims in *Pi Electronics Corp. v. United States*.[173] That court first explained that an act must be "authorized" to be a taking:

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169. Hooe v. United States, 218 U.S. 322, 335 (1910).

170. *Id.* at 335–36.

171. Reg'l Rail Reorganization Act Cases, 419 U.S. 102, 127 n.16 (1974).

172. *See, e.g.*, Acadia Tech., Inc. v. United States, 458 F.3d 1327, 1331 (Fed. Cir. 2006) (citing numerous decisions, mainly from that circuit).

173. Pi Elecs. Corp. v. United States, 55 Fed. Cl. 279, 288 (2003).

> It is well settled that a "compensable taking arises only if the government action in question is authorized." *Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358, 1362 (Fed. Cir.1998); *see also Rith Energy, Inc. v. United States*, 247 F.3d 1355, 1365 (Fed. Cir. 2001). An unauthorized action cannot predicate liability for a compensable taking, given that it does not "vest some kind of title in the government and entitlement to just compensation in the owner or former owner." *Armijo v. United States*, 229 Ct. Cl. 34, 40, 663 F.2d 90, 95 (1981) (cited with approval in *Del-Rio*, 146 F.3d at 1362). Therefore, a "claimant must concede the [authorization] of the government action which is the basis of the takings claim to bring suit under the Tucker Act." *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 802 (Fed. Cir. 1993).[174]

Pi Electronics noted, however, that acts within an entity's or individual's responsibilities may be authorized even if they are illegal:

> [T]he Federal Circuit has "drawn an important distinction between conduct that is 'unauthorized' and conduct that is authorized but nonetheless unlawful." *Del-Rio*, 146 F3d at 1362. The "mere fact that a government officer has acted illegally does not mean he has exceeded his authority for Tucker Act purposes, even though he is not 'authorized' to break the law." *Id.* at 1362.[175]

In *Del-Rio*, the court thus stated that an *ultra vires* action is one that was "either explicitly prohibited or was outside the normal scope of the government official's duties."[176]

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174. *Id.*

175. *Id.* at 289.

176. Del-Rio Drilling Programs, Inc. v. United States, 146 F.3d 1358, 1363; *see* Cienega Gardens v. United States, 503 F.3d 1266 (Fed. Cir. 2007). *Cienega Gardens* provides a relatively recent example of an unauthorized activity. In that case, the Federal Circuit had previously held that federal statutory provisions, which restricted the ability of owners of certain low-income housing projects from pre-paying their mortgages, and thereby prospectively avoiding rent control requirements, imposed a taking on four "model plaintiffs" before it. *Id.* at 1275. In this latest opinion, reviewing the claims of other plaintiffs, the court explained that the analysis of whether their property was taken needs to include a consideration of the duration of the pre-payment restriction. Significantly for our purposes, the statutory restriction was eventually lifted, but plaintiffs asserted that government officials nevertheless refused to allow pre-payments even after the statutory change. The Federal Circuit determined that any actions of the officials that occurred after the statute was changed could not count in calculating the duration of the alleged taking. The court explained that since the actions were not authorized, they could not have imposed a taking. *Id.* at 1287 n.18.

At least one commentator, however, has asserted that illegal governmental acts cannot amount to takings even if they come within an agency's or official's duties.[177] That is because illegal acts, by their nature, arguably do not meet the Taking Clause's "public use" requirement.[178] An illegal act does not appear to be a public use. Two courts have noted this concept, although neither ended up addressing it. In *Custer County Action Association v. Garvey*, the Tenth Circuit called the position "intriguing," although the court did not reach the issue because it rejected the takings claim before it on other grounds.[179] The California Supreme Court also acknowledged this argument in *Landgate, Inc. v. California Coastal Commission*, although like the Tenth Circuit it ruled on other grounds and therefore did not reach this issue.[180]

Finally, courts have issued apparently conflicting decisions concerning whether a governmental act is *ultra vires* when government bases its jurisdiction on an incorrect factual determination. In *Bailey v. United States*, the Court of Federal Claims suggested in dictum that such an action may nevertheless be "authorized" and subject to a takings claim.[181] A prior Federal Circuit decision, however, indicates otherwise. In *Florida Rock Industrial, Inc. v. United States*, the court explained that the federal government's Clean Water Act jurisdiction over a mining project turned on whether the project threatened to pollute certain waters.[182] Absent that threat, the governmental action would be unauthorized and therefore would not support a takings award.[183] The court thus explained that the government could defeat the takings claim by showing that its pollution assumption was incorrect.[184]

II. TEMPORARY PHYSICAL APPROPRIATIONS

With physical takings, the key questions are usually: (1) whether the imposition is in fact physical as opposed to a use restriction; (2) if physical, whether an imposition is permanent or temporary; and (3) if physical and

177. John D. Echeverria, *Takings and Errors*, 51 ALA. L. REV. 1047, 1087 (2000).

178. *Id.*

179. Custer County Action Ass'n v. Garvey, 256 F.3d 1024, 1042 (10th Cir. 2001).

180. Landgate, Inc. v. Cal. Coastal Comm'n, 953 P.2d 1188, 1201 n.7 (Cal. 1998).

181. Bailey v. United States, 78 Fed. Cl. 239, 256 n.31 (2007).

182. Fla. Rock Indus., Inc. v. United States, 791 F.2d 893, 899 (Fed. Cir. 1986).

183. *Id.*; *see* Marks v. United States, 34 Fed. Cl. 387, 409–10 (1995) (stating that the federal government's actions were unauthorized and thus could not be the basis for a taking where it prohibited development above the mean high water line).

184. *Fla. Rock Indus.*, 791 F.2d at 899.

temporary, whether the imposition is total or only partial.[185] Citing *Loretto v. Teleprompter Manhattan CATV Corp.*,[186] the Court therefore reiterated in *Lingle v. Chevron U.S.A., Inc.* that "where government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation."[187] *Loretto* also explained, however, that the per se rule does not apply where imposed occupations are only temporary.[188] Rather, the government's actions are "subject to a more complex balancing process to determine whether they are a taking."[189] This paper will now analyze these questions in more detail.

A. Physical Impositions Versus Use Limitations

Because permanent physical occupations are per se takings, while takings based upon regulatory limitations of use are considerably more difficult to establish, litigants can expend considerable energy over whether a governmental action amounts to a physical imposition or a use limitation. These disputes have been particularly heated concerning water rights, as exemplified by the California state court decision in *Allegretti & Co. v. County of Imperial* and the Federal Circuit's decision in *Casitas Municipal Water District v. United States*.[190]

In *Allegretti*, the county granted Allegretti a permit to redrill an inoperable well, but limited the amount of groundwater that he could draw. Allegretti asserted that the county restriction amounted to a permanent physical taking of his right to use the groundwater, as well as a regulatory taking.[191] The court rejected his claims.[192] Its rejection of the physical taking claim illustrates the potential difficulty in identifying some per se physical takings. The court first noted that the federal court in *Tulare Lake*

185. *See generally* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426–35 (1982) (retracing the evolution of takings jurisprudence and the incorporation of the three issues into the Court's reasoning).

186. *Id.* at 419.

187. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538 (2005).

188. *Loretto*, 458 U.S. at 440.

189. *Id.* at 436 n.12. In *Tahoe-Sierra*, the Court includes a broad comparison of physical takings and regulations of property uses, in which it seems to indicate that government's physical acquisition of property, even if temporary and minor, is always a taking. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322 (2002). The Court, however, was not focusing on the physical takings doctrine, because the case before it involved a regulation of property uses. *Id.* at 306. Moreover, in support the Court cites *Loretto* without any discussion of *Loretto*'s express explanation that temporary physical takings are not per se takings. *Id.* at 322.

190. Allegretti & Co. v. County of Imperial, 42 Cal Rptr. 3d 122 (Cal. Ct. App. 2006); Casitas Mun. Water Dist. v. United States, 543 F.3d 1276 (Fed. Cir. 2008).

191. *Allegretti*, 42 Cal. Rptr. 3d at 125–26.

192. *Id.* at 126.

Basin Water Storage District v. United States had held that pumping restrictions can constitute *Loretto*-type takings because they were, in the *Tulare Lake* court's view, no different than actual physical diversions of water.[193] Based in part, however, on a prior federal decision that was highly critical of *Tulare Lake*,[194] the *Allegretti* court explained that the county's groundwater limitation was different than an actual appropriation of water because it was passive—it only required Allegretti to leave water in place.[195]

After *Allegretti* was decided, a Federal Circuit majority panel added to the confusion. *Casitas* held that certain governmental actions requiring water diversions to protect endangered fish should be analyzed as physical takings.[196] In that case, a water district diverted river water into its canal.[197] The federal government purportedly required the district to return some of that water over a fish ladder and then back to the river.[198] The court held that, as a result, "the government did not merely require some water to remain in stream, but instead actively caused the physical diversion of water away from the" canal.[199] A strong dissent asserted that there was no physical taking because the "usufructuary" nature of a water interest makes it unamenable to physical invasion, and because government neither made proprietary use of Casitas's water rights, nor diverted those rights to a third party.[200]

Where an imposition is physical, it still may not amount to a taking if it is temporary. Determining whether an imposition is temporary, however, is not always easy.

B. Permanent Versus Temporary Physical Impositions

In *Loretto*, the Court downplayed as "overblown" the dissent's concern that the distinction between "a permanent physical occupation and a temporary invasion will not always be clear."[201] Nine years later, however,

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193. *Id.* at 132 (citing Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed Cl. 313, 319–20 (2001)).

194. Klamath Irrigation District v. United States, 67 Fed. Cl. 504, 538 (2005) ("But, with all due respect, *Tulare* appears to be wrong on some counts, incomplete in others and, distinguishable, at all events.").

195. *Allegretti*, 42 Cal. Rptr. 3d at 132.

196. Casitas Mun. Water Dist. v. United States, 543 F.3d 1276, 1296 (Fed. Cir. 2008).

197. *Id.* at 1280.

198. *Id.* at 1282.

199. *Id.* at 1291.

200. *Id.* at 1298.

201. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 n.12 (1982). The Court also dismissed the concern as "irrelevant." *Id.*

the Federal Circuit sowed significant confusion about that dividing line. In *Hendler v. United States*, a case involving the federal government's installation and maintenance of wells on private property, the court took what appeared to be an expansive view of the term "permanent":

> [I]n this context, "permanent" does not mean forever, or anything like it. A taking can be for a limited term—what is "taken" is, in the language of real property law, an estate for years, that is, a term of finite duration as distinct from the infinite term of an estate in fee simple absolute.[202]

At least one court sharply reacted to *Hendler*'s characterization of permanency. In *Juliano v. Montgomery-Otsego-Schoharie Solid Waste Management Authority*, the district court characterized *Hendler* as "completely emasculat[ing]" the concept.[203] The court went on to mockingly state:

> [T]he *Hendler* court's creative use of language calls to mind Lewis Carroll's famous passage: "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."[204]

Subsequent Federal Circuit decisions, however, tried to put the genie back in the bottle. Most notably, in *Boise Cascade Corp. v. United States*, the court clarified that the *Hendler* language "has been widely misunderstood and criticized as abrogating the [*Loretto*] permanency requirement."[205] *Boise Cascade* explained that *Hendler* "must be read in context. And in context, it is clear that the court merely meant to focus attention on the *character* of the government intrusion necessary to find a permanent occupation, rather than solely focusing on temporal duration."[206]

Boise Cascade went on to further limit the apparently expansive *Hendler* decision, stating that:

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202. Hendler v. United States, 952 F.2d 1364, 1376 (Fed. Cir. 1991).

203. Juliano v. Montgomery-Otsego-Schoraie Solid Waste Mgmt. Auth., 983 F. Supp. 319, 327 (N.D. N.Y. 1997).

204. *Id.* at 327 n.7 (N.D. N.Y. 1997) (quoting LEWIS CARROLL, THROUGH THE LOOKING GLASS 190 (Roger L. Green ed., Oxford Univ. Press 1971) (1872)).

205. Boise Cascade Corp. v. United States, 296 F.3d 1339, 1356 (Fed. Cir. 2002).

206. *Id.*

> Putting its dicta to one side, *Hendler*'s holding was unremarkable and quite narrow: it merely held that when the government enters private land, sinks 100-foot deep steel reinforced wells surrounded by gravel and concrete, and thereafter proceeds to regularly enter the land to maintain and monitor the wells over a period of years, a per se taking under *Loretto* has occurred.[207]

Boise Cascade contrasted that with the "transient invasion by owl surveyors" involved in the case before it.[208]

C. Partial Versus Total Temporary Impositions

Finally, where an imposition is temporary, it is considerably more likely to be seen as a taking if the occupation or appropriation is total as opposed to partial. Thus, in the three World War II cases reviewed in the introduction to this article, where government totally took over buildings for its own use, the parties and the Court assumed that a government's temporary occupations imposed takings.[209] The only issue in those cases was how to calculate just compensation.[210]

In exceptional cases, however, even total occupations are not inevitably takings. For example, in *National Board of YMCA v. United States*, United States troops protecting the Panama Canal Zone occupied a YMCA building for one night during a battle with rioters.[211] A mob had been wrecking the building before the troops arrived.[212] After the troops arrived and subsequently entered the building, the rioters set it afire.[213] The building owner filed suit seeking just compensation for the damages that rioters caused after the troops had entered the building.[214] The Court rejected the claim.[215] As part of its reasoning, the Court pointed to the limited nature of the government's occupation.[216] The owner could not have used the

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207. *Id.* at 1357.

208. *Id.*

209. *See supra* notes 3–5 and text accompanying those notes; *see also* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 318 (1987) (explaining that in those cases there was "no question that compensation would be required for the government's interference with the use of the property").

210. *See, e.g.*, *First English*, 482 U.S. at 304 (answering "whether the Just Compensation Clause requires the government to pay for 'temporary' regulatory takings").

211. Nat'l Bd. of YMCA v. United States, 395 U.S. 85, 87 (1969).

212. *Id.*

213. *Id.* at 87–88.

214. *Id.* at 88.

215. *Id.* at 93.

216. *Id.*

property during its occupation, since it was under heavy attack by rioters.[217] Moreover, the Court explained that "the temporary, unplanned occupation of petitioners' buildings in the course of battle does not constitute direct and substantial enough government involvement to warrant compensation under the Fifth Amendment."[218] That said, courts will generally find that government's temporary, total occupation of property constitutes a taking.

Partial temporary occupations, in contrast, may not amount to takings where they are minor. For example, as previously noted, the Federal Circuit rejected a claim that the "transient invasion by owl surveyors" constituted a per se physical taking.[219] Similarly, in *Tennessee Scrap Recyclers Association v. Bredesen*, the Sixth Circuit Court of Appeals upheld inspections of real property by law enforcement officials and potential victims.[220] In that case, an ordinance authorized those individuals to inspect scrap dealers' premises during business hours to see if metal was stolen.[221] The court rejected the dealers' claim that the inspections constituted physical takings.[222] These decisions are consistent with the "overwhelming majority" of state court cases, which reject takings claims based upon "examinations and surveys" of property.[223] One district court, therefore, expressly distinguished partial temporary occupations from the World War II cases, explaining that the latter "involved total *appropriations*: i.e., the government appropriated the claimant's entire property."[224]

In *Otay Mesa Property L.P. v. United States*, the Court of Federal Claims summarized Federal Circuit decisions in a manner that seemed to blend the partial versus total imposition concept with the issue of duration.[225] In essence, the court's decision indicated that the permanency determination turns on a combination of the degree of the physical imposition and its duration.[226] Although *Otay Mesa* accurately described Federal Circuit law, it is in tension with *Loretto*'s limitation of the per se approach in these cases to permanent physical takings. Where a physical

217. *Id.*

218. *Id.*

219. Boise Cascade Corp. v. United States, 296 F.3d 1339, 1357 (Fed. Cir. 2002).

220. Tenn. Scrap Recyclers Ass'n v. Bredesen, 556 F.3d 442, 446–47 (6th Cir. 2009).

221. *Id.* at 454.

222. *Id.*

223. Sandra Bullington, *Entry Onto Private Property*, *in* 9 NICHOLS ON EMINENT DOMAIN § G32.06, at G32-25 (3d ed. 2007).

224. Juliano v. Montgomery-Otsego-Schoharie Solid Waste Mgmt. Auth., 983 F. Supp. 319, 327 (N.D. N.Y. 1997). That court went on to hold that the particular structures that the governmental entity built on the property at issue were permanent, and therefore imposed per se takings. *Id.* at 328.

225. Otay Mesa Prop. L.P. v. United States, 86 Fed. Cl. 774, 777 (2009).

226. *Id.* at 786.

imposition will last for only a number of years, even if it is major it is still temporary. It is not, as the Court put it in *Loretto*, "forever."[227] Rather, the imposition should be subject to the "more complex balancing process" that *Loretto* explained should be applied to temporary physical takings.[228] That process would consider the factors discussed in *Otay Mesa*: the degree of the imposition and its duration.

D. Prospectively Versus Retrospectively Temporary Physical Imposition

For alleged physical takings, the distinction between prospectively and retrospectively temporary impositions is even more significant than for regulatory takings claims. If an imposition is initially intended to be permanent, it would appear to amount to a per se taking. This article previously noted skepticism with the argument that, in the regulatory taking context, a *Lucas* per se claim cannot be stated concerning a retroactively temporary use restriction.[229] A court would likely look at the alleged taking from the perspective of when government imposed the restriction, and if that imposition removed all value from property, a *Lucas* taking would likely have occurred (barring a background principles defense).[230] Similarly, government's physical appropriation of property would likely be viewed from the perspective of the intent at the time of the imposition: if the appropriation was meant to be permanent, then the alleged taking would be permanent. Government's subsequent rescission of the imposition may go to the question of compensation, but probably not to liability.

E. Ultra Vires *Physical Imposition*

The answer to the question of whether an unauthorized governmental act can amount to a physical taking should be the same as the answer concerning an alleged regulatory taking. If a government official lacked the authority to engage in an action that allegedly imposed a taking, there is no Takings Clause violation.[231] The Court reiterated that point in a physical takings case—one in which railroads asserted that a federal act requiring them to convey their properties to Conrail amounted to a taking. In *Regional Rail Reorganization Act Cases*, the Court explained that a taking

227. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 436 (1982).

228. *Id.* at 435 n.12.

229. *See supra* discussion in Part II.B (discussing disbelief over the argument that a *Lucas* per se claim cannot be found when there is a retroactive temporary use restriction).

230. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992).

231. Hooe v. United States, 218 U.S. 332, 335–36 (1910).

must be expressly or implicitly "authorized."[232] Thus, *ultra vires* government acts cannot impose a taking, whether they involve an onerous restriction on the use of property or an actual physical imposition on that property.

III. DETERMINING COMPENSATION

A. Before First English

How is a court to assess just compensation when the government action found to be a taking has ended? This issue first came to the fore in the trio of World War II direct condemnation decisions noted in this article's introduction: *United States v. General Motors Corp.*,[233] *United States v. Petty Motor Co.*,[234] and *Kimball Laundry Co. v. United States*.[235] Each dealt with a formal government takeover of a property for a period, during which the existing business on the property was suspended and a government activity conducted in its place. All three decisions rejected the usual standard of compensation for permanent takings, market value, and opted instead for rental value.[236] The rental value standard, of course, may have to be specially calibrated to the circumstances.[237]

Another World War II decision, *United States v. Pewee Coal Co.*, offers a scenario in which, instead of the government bringing a direct condemnation action against an owner, the owner sues the government asserting that governmental actions temporarily took its property and therefore amounted to a temporary "inverse" condemnation.[238] Here, the United States took over operation of the business on the property (coal mines needed for the war effort) rather than, as above, substituting its own activity.[239] After holding that a Fifth Amendment taking had occurred, a

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232. Reg. Rail Reorganization Act Cases, 419 U.S. 102, 127 n.16 (1974).

233. United States v. Gen. Motors Corp., 323 U.S. 373 (1945).

234. United States v. Petty Motor Co., 327 U.S. 372 (1946).

235. Kimball Laundry Co. v. United States, 338 U.S. 1 (1949).

236. *See, e.g., id.* at 7 (rejecting the market value on the date of taking minus market value on the date of return as the compensation standard).

237. *See, e.g., Gen. Motors Corp.*, 323 U.S. at 382 (when United States condemns short-term occupancy of warehouse from long-term lessee, compensation must be based on market rental value on a sublease by long-term tenant to temporary occupier, not long-term rental rent for empty building; such sublease rental value may reflect cost of removing stored items at beginning of sublease and returning them at end).

238. United States v. Pewee Coal Co., 341 U.S. 114, 115 (1951).

239. *Id.*

five-justice majority awarded the business owners the operating losses incurred during the period of government operation.[240] Because plaintiffs did not seek the value of the use of a going concern, the Court avoided the "difficult problems" inherent in fixing that amount.[241]

The World War II cases establish the principle that for temporary takings, as for permanent ones, the constitutional standard of just compensation is a flexible one, changing to suit the circumstances. For example, Justice Reed explained in his concurring opinion in *Pewee Coal* that:

> [I]n the temporary taking of operating properties . . . market value is too uncertain a measure to have any practical significance. The rental value for a fully functioning railroad for an uncertain period is an unknowable quantity. . . . The most reasonable solution is to award compensation to the owner as determined by a court under all the circumstances of the particular case.[242]

Importantly, the Supreme Court routinely cites its World War II decisions involving temporary direct condemnations as precedent for the compensation required for temporary inverse condemnations.[243] This seems only appropriate: it is hard to see why the determination of compensation for a temporary taking should depend on whether the taking was effectuated through inverse as opposed to direct condemnation.

B. First English

The World War II decisions revolved around physical takings. Decades later, as discussed in the introduction to this article, the Court addressed temporary regulatory takings in *First English Evangelical Lutheran Church v. County of Los Angeles* and held that once a court finds a regulation to be a taking, the government must compensate for the period during which the regulation was in effect.[244] Although *First English* clarified that the remedy for temporary regulatory takings is compensation, it did not resolve the sticky question of how to determine the compensation amount. It simply

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240. *Id.* at 118.

241. *Id.* at 117.

242. *Id.* at 120 (Reed, J., concurring) (internal citations omitted).

243. *See, e.g.*, Brown v. Legal Found. of Wash., 538 U.S. 216, 233 (2003) (citing the World War II cases, *inter alia*, in discussing compensation for temporary regulatory takings).

244. First Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 321 (1987).

referred to the World War II decisions, previously mentioned, dealing with temporary physical takings.[245]

C. Broad Considerations Governing Measure of Damages for Temporary Takings

The Supreme Court decisions suggest two broad concerns as animating the judicial search for "just" measures of interim damages. The first, as with permanent takings, is that the property owner is to be put in as good a position monetarily as he or she would have occupied if the property had not been taken.[246] A corollary is the well-worn adage that just compensation is to be measured by the property owner's loss, not the government's gain.[247]

The second concern in these decisions is that just compensation for temporary takings should be guided by the value of the property's use for the period in question.[248] Most often, this "value of the use" standard devolves to fair rental value, as it did in *General Motors*, *Petty Motor Co.*, and *Kimball Laundry*, but as the following list shows, there are many variants. Such use value should, at least in the short term, be less than the market-value compensation generally required for a permanent taking. This follows from the fact that with a temporary taking, the property is returned to the plaintiff and retains long-term use.

Finally, note that in all temporary taking cases, the plaintiff has a duty to mitigate damages.[249]

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245. *Id.* at 318.

246. Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 473–74 (1973); Olson v. United States, 292 U.S. 246, 255 (1934); Heydt v. United States, 38 Fed. Cl. 286, 309 (1997).

247. *Brown*, 538 U.S. at 235–36; United States v. Causby, 328 U.S. 256, 261 (1946); *see* Kimball Laundry Co. v. United States, 338 U.S. 1, 5 (1949) ("Because gain to the taker . . . may be wholly unrelated to the deprivation imposed upon the owner, it must also be rejected as a measure of [compensation].").

248. *First English*, 482 U.S. at 319; *see* Lake Pointe Const. Co. Inc. v. City of Avon, 913 N.E.2d 1022, 1026 (Ohio Ct. App. 2009) (citing State *ex. rel.* Shemo v. Mayfield Heights, 765 N.E.2d 345, 354 (Ohio 2002)) (quoting *First English*, 482 U.S. at 319) (discussing recent affirmations endorsing prior cases holding that the just compensation clause requires payment for the use of land for finite periods).

249. *See, e.g.*, *Heydt*, 38 Fed. Cl. at 310 (stating that although the government occupied a private facility, owner had access and could have moved its machines from the facility to another location or sold them); Shelden v. United States, 34 Fed. Cl. 355, 373 (1995) ("[P]laintiffs had an obligation to mitigate damages by paying on time."); *accord* 767 Third Ave. Assocs. v. United States, 48 F.3d 1575, 1584 (Fed. Cir. 1995) (noting that claimant was not precluded from alternative economically viable use of property).

D. Formulae Adopted By Courts for Regulatory Takings[250]

Although determining compensation can be difficult for both physical temporary takings and regulatory temporary takings, it can be particularly vexing for the latter. In the wake of *First English*, commentators and courts alike have been unable to agree on a consistent measure of compensation for temporary regulatory takings and have instead adopted a wide range of formulations.[251] Unsurprisingly, many of the law review articles in this area came out in the years after *First English*.[252] As for the courts, the principal approaches are discussed below. To a greater or lesser degree, most of these approaches may be viewed as approximations of "value of use" or its less abstract embodiment, fair rental value. Some are quite fact-specific, paralleling the dominant ad hoc analysis used in regulatory takings to determine liability. In *United States v. Miller*, the Supreme Court explained that "[i]t is conceivable that an owner's indemnity should be measured in various ways depending upon the circumstances of each case and that no general formula should be used for the purpose."[253]

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250. Robert Meltz, Dwight H. Merriam & Richard M. Frank, *Money Damages, Interest, and Fees*, *in* THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND USE CONTROL AND ENVIRONMENTAL REGULATION 483, 492–93 (1999) (portions of this section D are adapted from the discussion of measures of damages for temporary takings, by Richard M. Frank, found here).

251. *See* Primetime Hospitality, Inc. v. City of Albuquerque, 168 P.3d 1087, 1094 (N.M. Ct. App. 2007) ("[A]cademic commentators agree that no one measure of damages is appropriate to meet all the factual scenarios bound to be seen in temporary takings."), *rev'd on other grounds*, 206 P.3d 112 (N.M. 2009).

252. *See, e.g.*, David Schultz, *The Price Is Right! Property Valuation for Temporary Takings*, 22 HAMLINE L. REV. 281, 282 (1998) (examining the issue of valuation and compensation for the land acquired through temporary takings and, specifically, examining the holding of *First English* and issues left unresolved by *First English*); Glynn S. Lunney, Jr., *Compensation for Takings: How Much Is Just?*, 42 CATH. U. L. REV. 721, 724 (1993) (examining the "basic rules the Supreme Court has established for determining the appropriate amount of compensation" and "two aspects of the calculation . . . that have proven particularly troublesome"); J. Margaret Tretbar, Comment, *Calculating Compensation for Temporary Regulatory Takings*, 42 U. KAN. L. REV. 201, 218 (1993) (hereinafter *Calculating Compensation*) (discussing the several approaches to compensation arising after *First English*); Joseph P. Mikitish, Note, *Measuring Damages for Temporary Regulatory Takings: Against Undue Formalism*, 32 ARIZ. L. REV. 985, 987 (1990) (discussing the strengths and weaknesses of each method of compensation); *see also* RICHARD J. Roddewig & Christopher J. Duerksen, *Measuring Damages in Takings Cases: The Next Frontier*, *in* 1993 ZONING AND PLANNING LAW HANDBOOK 273 (Kenneth H. Young ed., 1993) (providing an overview of the confusion among lower courts caused by *First English*); Kurtis A. Kemper, J.D., Annotation, *Elements and Measure of Compensation in Eminent Domain Proceeding for Temporary Taking of Property*, 49 A.L.R. 6th 205 (2009) (listing the types of compensation for temporary takings). For a pre-*First English* analysis, see Donald G. Hagman, *Temporary or Interim Damages Awards in Land Use Control Cases*, *in* 1982 ZONING AND PLANNING LAW HANDBOOK, 218–27 (1982), discussing the different types of compensation for a temporary taking.

253. United States v. Miller, 317 U.S. 369, 373–74 (1943); *see* Corrigan v. City of Scottsdale, 720 P.2d 513, 518 (Ariz. 1986) (explaining that the "proper measure of damages in a particular [temporary taking] case is an issue to be decided on the facts of each individual case").

1. Rental Value

This is the most commonly used measure of compensation for temporary regulatory takings, and is the standard closest to that used in the World War II temporary condemnation cases.[254] Fair rental value is defined as "the price that a willing lessee would pay to a willing lessor for the period of the taking."[255] The rental value standard derives from the leasehold nature of the temporary interest taken by the government.[256]

As the determination of market value in permanent takings is generally based on comparable sales, the determination of rental value in temporary takings is typically measured by comparable rentals—that is, contemporaneous rentals of nearby properties reasonably similar to the property taken.[257] In the absence of comparable rental data, a recent prior lease between the owner of the property and another lessee is useful.[258] In contrast with permanent takings, where a temporary government occupation requires the suspension of an ongoing business on the property, the rental value should reflect loss in going-concern value (i.e., lost profit and good will).[259]

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254. *See* Reunion, Inc. v. United States, No. 09-280L, 2009 WL 4800045, at *8 (Fed. Cl. Dec. 10, 2009) (affirming recently that "just compensation for a temporary taking . . . frequently is measured by the fair market *rental* value of the property") (emphasis in original); *see also* Kimball Laundry Co. v. United States, 338 U.S. 1, 7 (1949) (holding that "the proper measure of compensation is the rental [value]"); United States v. Gen. Motors Corp., 323 U.S. 373, 382 (1945) (holding that the value should be determined based on "the market rental value of such a building on a lease by the long-term tenant to the temporary occupier"); Yuba Natural Res., Inc. v. United States, 904 F.2d 1577, 1581 (Fed. Cir. 1990) ("The usual measure of just compensation for a temporary taking . . . is the fair rental value of the property for the period of the taking."); Sixth Camden Corp. v. Twp. of Evesham, 420 F. Supp. 709, 728–29 (D.N.J. 1976) ("The compensation for a 'temporary taking' is normally the fair rental value of the property.").

255. Heydt v. United States, 38 Fed. Cl. 286, 309 (1997); *accord Yuba Natural*, 904 F.2d at 1581.

256. *See, e.g.*, United States v. Banisadr Bldg. Joint Venture, 65 F.3d 374, 378 (4th Cir. 1995) ("[I]t is well established that when the Government takes property only for a period of years . . . it essentially takes a leasehold in the property. Thus, the value of the taking is what rental the marketplace would have yielded for the property taken.").

257. *Heydt*, 38 Fed. Cl. at 309; Yaist v. United States, 17 Cl. Ct. 246, 257 (1989).

258. *Yuba Natural*, 904 F.2d at 1581; Shelden v. United States, 34 Fed. Cl. 355, 369 (1995).

259. *Kimball Laundry Co.*, 338 U.S. at 11–16. The Supreme Court justified the distinction in the treatment of going-concern value by noting that in a permanent taking, the owner can relocate his or her business elsewhere and presumably preserve much of going-concern value. By contrast, a temporary taking generally leaves the owner without a practical option of briefly setting up business elsewhere. For one thing, his or her investment remains tied up at the original site. Rather, the owner must wait until the temporary taking comes to an end and then resume operations at the original location, with diminished going-concern value. *See* State *ex rel.* Comm'r of Transp. v. Arifee, 2009 WL 2612367, at *4 (N.J. Super. Ct. App. Div. Aug. 27, 2009) (discussing the previously mentioned distinction made between permanent takings and temporary takings).

The rental value method is generally suitable only when the property has a preexisting use as of the start of the temporary regulatory taking. By contrast, the typical regulatory taking case involves restrictions on the future use of property. Thus, courts and commentators have discouraged use of the rental value method for undeveloped property.[260] The speculation involved in assigning a rental value for unimproved land includes both what type of development would have been permitted, and would have occurred if permitted, had the offending regulation not existed, and also the profitability of such development.

Where the same facts give rise to both a temporary taking and a breach of contract, damages have been assessed under the breach claim—but nonetheless were equated with fair rental value.[261]

2. Actual Damages—A Ceiling?

Some courts assert that the standard for calculating compensation is the property owner's actual loss, but they are often unclear whether this standard is intended as a ceiling on the compensation amount after applying some other formula, or as the goal of applying that other formula.[262] When stated, the standard is often accompanied by a disavowal that any particular formula for determining temporary-taking compensation is generally appropriate.[263] A requirement of actual damages may limit recovery in some circumstances, as when the owner has no plans for the use of an undeveloped parcel at the time of the temporary regulatory taking. In the published decisions referring to actual damages, it is difficult to ascertain whether on remand (in the final determination of compensation by the trier of fact) one of the formulae listed elsewhere in this section was ultimately used because state trial court decisions are rarely reported.

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260. *See, e.g.*, City of Austin v. Teague, 570 S.W.2d 389, 395 (Tex. 1978) ("Anticipated rentals from land that is presently undeveloped is just as speculative and uncertain as measuring anticipated profits from a presently unestablished business.").

261. Allenfield Assocs. v. United States, 40 Fed. Cl. 471, 488–89 (1998).

262. *See, e.g.*, Bd. of County Comm'rs of Weld v. Slovek, 723 P.2d 1309, 1314–15 (Colo. 1986) (describing the numerous variables involved in calculating compensation).

263. *See, e.g.*, SDDS, Inc. v. State, 650 N.W.2d 1, 13–14 (S.D. 2002) (informing jury of various damage-calculating methods while reemphasizing the importance of a fact-specific award); Lucas v. S.C. Coastal Council, 424 S.E.2d 484, 486 (S.C. 1992) (emphasizing that there is no specific method for calculating damages for a temporary takings); Corrigan v. City of Scottsdale, 720 P.2d 513, 519 (Ariz. 1986) (stating that "no matter what measure of damages is appropriate in a given case, the award must only be for *actual damages*") (emphasis in original); Poirier v. Grand Blanc Twp., 481 N.W.2d 762, 766 (Mich. Ct. App. 1992) (making same statement as in *Corrigan* and endorsing "a flexible approach" to compensation awards for temporary takings).

3. Before-and-After-Market-Value Approach

This approach calls for determining the market value of the property just before the regulation was imposed, then subtracting the value of the property either (1) just after it was imposed, or (2) on the date that the regulatory restriction was lifted.[264] A moment's thought reveals that this standard corresponds only loosely, if at all, to the Supreme Court's call for a criterion based on the value of use during the restriction period. Moreover, subtracting the value when the restriction was lifted means that when real estate values are falling, the before-and-after standard poses the danger that the property owner will be overcompensated, and when real estate values are rising, undercompensated.

The number of regulatory cases adopting the before-and-after approach appears to be rather small, and deservedly so.[265] The approach has been criticized or rejected in favor of other compensation standards.[266] The Supreme Court explicitly rejected it in a temporary condemnation case.[267]

4. Option Value

The New Jersey courts have determined that the measure of damages for a temporary regulatory taking may, in appropriate circumstances, be the value of a hypothetical option to purchase the property for the period during which the regulation was in effect.[268] In the seminal case, the state's highest court dealt with a state statute providing that upon receiving an application for plat approval, a municipality may reserve for one year the location and extent of parks and playgrounds for future public use.[269] If, during that year, the municipality does not enter into a contract to purchase the property or institute condemnation proceedings, the reservation shall no longer bind

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264. *See, e.g.*, Washington Mkt. Enters., Inc. v. City of Trenton, 343 A.2d 408, 416–17 (N.J. 1975) (landowner entitled to value of property before the city announced a redevelopment project minus the value of the property after the city abandoned that project).

265. *See, e.g.*, Kimball Laundry Co. v. United States, 338 U.S. 1, 7 (1949) (rejecting the before-and-after-market-value approach in a temporary takings case).

266. *See, e.g.*, Wheeler v. City of Pleasant Grove, 896 F.2d 1347, 1351 (11th Cir. 1990) (rejecting the use of the before-and-after value of land as a measure of damages for temporary takings; alternative method must be used "to arrive at an accurate damage award"); Bass Enters. Prod. Co. v. United States, 48 Fed. Cl. 621, 623–24 (2001) (reiterating rationale for rejecting the before-and-after method stated in *Kimball Laundry*); *see infra* note 267.

267. *Kimball Laundry*, 338 U.S. at 7 (noting that, if change in market value during the temporary taking was the standard, "there might frequently be situations in which the owner would receive no compensation whatever because the market value of the property had not decreased").

268. *See* Lomarch Corp. v. Mayor of Englewood, 237 A.2d 881, 884 (N.J. 1968) (holding that "[t]he landowner should receive the value of an 'option' to purchase the land for a year").

269. *Id.* at 882.

the applicant.[270] Thus, said the court, the state statute[271] essentially granted the municipality a one-year option for the purchase of the land in question, and the value of that option fixed the measure of damages.[272]

On facts paralleling those above, the option value method can be an accurate measure of the property interest actually taken. Because there is often a market for options to purchase undeveloped land, this approach is more appropriate than the rental value method when vacant property is at issue. On the other hand, the value of the option does not necessarily bear any relation to the property owner's actual losses.[273]

5. Market Rate of Return

This standard gives the property owner an amount designed to approximate the temporary loss of the ability to produce income or profits.[274] It does so by assuming that this loss can be approximated by applying a market rate of return to the difference between the value of the property with and without the challenged regulation, calculated over the period of time the regulation was in effect.[275] This approach was adopted in *Nemmers v. City of Dubuque*[276] and was modified two years later by the Eleventh Circuit in *Wheeler v. City of Pleasant Grove*.[277]

Wheeler modified *Nemmers* by replacing the difference between the property's value with and without the temporary regulation with something quite different.[278] In *Wheeler*, the court determined that where a city withdraws a permit to build an apartment complex only to have the courts invalidate the withdrawal, the relevant quantity is the market rate of return on the difference between equity interests—that is, the difference between the equity that the property owner would likely have had in the apartment complex had it been built and the equity the owner would likely have had in

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270. *Id.*

271. N.J. REV. STAT. § 40:55D-44 (1966) (option value is the proper method of calculating just compensation when the "reservation of public areas" constitutes a taking).

272. *Lomarch*, 237 A.2d at 884.

273. *See* Beech Forest Hills, Inc. v. Borough of Morris Plains, 318 A.2d 435, 442 (N.J. Super. Ct. App. Div. 1974) (noting that the general principle that "where part of the land is taken, compensation is allowed for diminution in value to the remainder resulting from the taking" does not apply to temporary regulatory takings under *Lomarch*).

274. Wheeler v. City of Pleasant Grove, 833 F.2d 267, 271 (11th Cir. 1987).

275. *Id.*

276. Nemmer v. City of Dubuque, 764 F.2d 502, 505 (8th Cir. 1985). *Accord* PDR Dev. Corp. v. City of Santa Fe, 900 P.2d 973, 975 (N.M. Ct. App. 1995).

277. *Wheeler*, 833 F.2d at 267.

278. *Id.* at 271.

the undeveloped land—in each case, based on the prevailing loan-to-value ratio at the time.[279]

One can speculate that the *Wheeler* court moved from value difference to equity difference because, as it acknowledged, the value of the undeveloped land in this case was unaffected by the permit withdrawal.[280] Thus, use of value difference would have yielded zero compensation, something the court seemed to feel would not be fair to the property owner.[281] In any event, the use of the difference in equity interests as opposed to the difference in values has sometimes led commentators to put the Eleventh Circuit's approach into a new category called "the equity interest approach."[282] At least one district court outside the Eleventh Circuit has followed this approach.[283] Courts and commentators, however, have expressed concern that the equity interest approach (1) improperly relies on speculation that a project will meet its developer's full expectations; (2) fails to consider the developer's construction costs; and (3) neglects to consider alternative available uses of the property under the challenged regulation.[284]

6. Probability Method

Like several of the other formulae for computing damages, the probability method was born of the circumstances involved in the case that announced it. The decision in *Herrington v. County of Sonoma* arose from property owners' challenge to the county's rejection of their thirty-two-lot subdivision proposal as inconsistent with the county's general plan.[285] The court invalidated the rejection and awarded compensation for the period between the rejection and its invalidation, based on the owners' claim under section 1983.[286] Though the owners' claim was based on due process, having abandoned their takings claim, the measure of damages used to

279. *Id.*

280. *Id.*

281. *Id.*

282. *Calculating Compensation*, *supra* note 252, at 229.

283. *See* Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal, 749 F. Supp. 1439, 1445 (W.D. Va. 1990) (finding that employment of an equity interest approach results in "a remedy which is fair and adequate"), *vacated on other grounds*, 945 F.2d 760 (4th Cir. 1991).

284. *See, e.g.*, Corn v. City of Lauderdale Lakes, 771 F. Supp. 1557, 1571 (S.D. Fla. 1991), *aff'd in part, rev'd in part*, 997 F.2d 1369 (11th Cir. 1993) (citing Green Briar, Ltd. v. City of Alabaster, 881 F.2d 1570, 1576 n.11 (11th Cir. 1989) ("[I]t is simply unfair to award compensatory damages for 'an injury to the property's potential for producing income' . . . when the property could still be put to its highest and best use."); *Calculating Compensation*, *supra* note 252, at 232 (noting commentators' criticism related to first factor).

285. Herrington v. County of Sonoma, 790 F. Supp. 909, 911 (N.D. Cal. 1991).

286. *Id.*

compensate for the development delay seems useful in a takings context and is often cited by commentators.[287]

The *Herrington* formula has three key steps. First, it multiplies the probability that the county would have approved the development proposal had it applied proper criteria by the value of the land with that development allowed.[288] Similarly, the formula multiplies the probability that the county would have denied all development by the value of the land as so restricted.[289] The sum of these multiplicative products represents a probability-weighted estimate of the property's value during the delay period.[290] As explained by the court, this formula:

> [R]educes speculation on what subdivision proposals might have been submitted, and on possible levels of development short of 32 lots that the County might have approved. The formula also factors in the reasonableness of the Herringtons' subdivision proposal and the County's procedures in handling subdivision applications after a consistency determination.[291]

Second, the formula calculates the difference between this sum and the value of the property with no development allowed.[292] This is its lost use value. Third, the formula multiplies this lost use value by both a market rate of return and the period of the delay.[293] As an adjustment to this final dollar figure, the formula allows an addition for any increased costs of development owing to the delay (again, weighted by the probability that the development would be approved).[294]

7. Profit and Loss

In the usual case, lost profits are but a factor in gauging the fair rental value of the temporarily taken property; courts generally refuse to award them directly. For example, in *Yuba Natural Resources, Inc. v. United*

287. *See, e.g.*, LINDA A. MALONE, ENVIRONMENTAL REGULATION OF LAND USE § 14:16, at 14, 59–62 (2009) (describing the merits of the *Herrington* formula as a method for compensation); Richard J. Roddewig & Christopher J. Duerksen, *Measuring Damages in Takings Cases: The Next Frontier*, *in* 1993 ZONING AND PLANNING LAW HANDBOOK 273, 283–87 (Kenneth H. Young ed., 1993) (explaining and critiquing the *Herrington* damages formula).

288. *Herrington*, 790 F. Supp. at 916.

289. *Id.*

290. *Id.*

291. *Id.* at 915.

292. *Id.* at 916.

293. *Id.* at 915–16.

294. *Id.* at 916.

States, involving a government-caused delay in mineral extraction, the court asserted without qualification that lost profits, as a form of consequential damages, are "not an appropriate element of just compensation for the temporary taking of property."[295] And, in *Pettro v. United States*, another delayed extraction case, lost profits were denied as a supplement to fair rental value to avoid the possibility of double recovery and because they would be too speculative.[296] But, in at least one case, lost profits were held to be the sole measure of fair rental value. In *Primetime Hospitality, Inc. v. City of Albuquerque*, the plaintiff had begun construction of a hotel when it accidentally ruptured an encroaching city water line, delaying the hotel's opening.[297] The city stipulated to liability for an inverse condemnation, leaving only the issue of compensation.[298] The New Mexico Supreme Court held that under the state's constitution[299] and the circumstances presented, lost profits were the best evidence of rental value.[300] The parties had not advanced any other measure of compensation (so there were no concerns about double recovery), and the lost profits were a direct and easily ascertainable (i.e., non-speculative) result of the city-caused delay.[301]

In *United States v. Pewee Coal Co.*, recall that a very different situation was involved—the United States took over operation of the business on the property.[302] The Supreme Court was relieved of the unenviable task of determining the value of the use of a going concern because the business owner sought only a clarification that the United States should bear any losses during its period of operation.[303] The Court agreed, but it sent conflicting signals as to whether such losses represented an element of constitutionally required compensation.[304] In a concurrence, one Justice argued that in light of the takings principle that the measure of just compensation is the loss to the property owner, and not the gain to the

295. Yuba Natural Res., Inc. v. United States, 904 F.2d 1577, 1582 (Fed. Cir. 1990).

296. Pettro v. United States, 47 Fed. Cl. 136, 151 (2000) (determining that the spectre of double recovery could arise from the fact that the minerals whose extraction the government delayed could still be sold after the delay period).

297. Primetime Hospitality, Inc. v. City of Albuquerque, 206 P.3d 112, 114 (N.M. 2009).

298. *Id.*

299. The state constitution at issue prescribes compensation when property is either taken or "damaged," different from the federal constitution which calls for compensation only when property is taken. N.M. CONST. art. II, § 20. The presence of the term "damaged" in the state constitution appears to have played a small role in the court's focus on lost profits. *Primetime*, 206 P.3d at 123.

300. *Primetime*, 206 P.3d at 123.

301. *Id.* at 119.

302. United States v. Pewee Coal Co. Inc., 341 U.S. 114, 115 (1951).

303. *Id.* at 117.

304. *Id.* at 118–19.

government, the United States should only have to pay for those losses resulting from acts of the government.[305]

8. Cash Flow

Yet another formula was articulated in *Bass Enterprises Production Co. v. United States*, which dealt with a forty-five-month delay imposed by the United States on oil and gas extraction by the lessees of federal land.[306] The formula was shaped by two key facts. First, the oil and gas remained in the ground until Bass was permitted to develop it, meaning that "Bass has not lost any of the oil and gas. Bass has lost time."[307] Second, the plaintiffs' initial investment costs would likely have precluded any profit during the delay period, making unfair a compensation formula based on lost profits owing to the delay.[308] Accordingly, the court held that fair rental value was approximated by "the difference between the interest on the present value of the cash flows with and without delay."[309] The court concluded that awarding the plaintiffs a royalty stream or the present value of the income stream would lead to double recovery.[310]

Another court likened the facts before it to those in *Bass* and adopted the same compensation formula. In *SDSS, Inc. v. State*, a property owner was prevented for forty-three months from developing its land as a solid waste disposal site.[311] After finding a temporary taking, the court noted in its damages discussion that as in *Bass*, the resource (i.e. available landfill space) was still in place when the delay ended and that owing to upfront costs, plaintiffs would have made no profit during the delay period had the delay not occurred.[312]

9. Section 1983-Based Damages Approach

Takings actions against non-federal defendants are today routinely brought under the Civil Rights Act of 1871, 42 U.S.C. § 1983, and are commonly called "1983 actions." Indeed, there is some authority, not

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305. *Id.* at 121 (Reed, J., concurring).

306. Bass Enters. Prod. Co. v. United States, 48 Fed. Cl. 621, 621 (2001), *rev'd on other grounds*, 54 Fed. Cl. 400 (2002), *aff'd*, 381 F.3d 1360 (Fed. Cir. 2004).

307. *Id.* at 624.

308. *Id.* at 625.

309. *Id.*

310. *Id.* at 622.

311. SDSS, Inc. v. State, 650 N.W.2d 1, 14 (S.D. 2002).

312. *Id.* at 16.

undisputed, for the proposition that a Fifth Amendment takings claim against a municipality must be brought under § 1983.[313]

A problem arises, however. Much case law independent of regulatory takings litigation has developed on how money damages should be measured in § 1983 cases. If these § 1983-based principles are applied in the temporary regulatory takings context, different damage awards may result. The reason is that § 1983 is grounded in traditional tort law principles.[314] For example, a cardinal precept of § 1983 is that damages awarded under that statute are compensatory in nature, and that a plaintiff may therefore only recover if he or she is able to prove actual loss or injury resulting from the government's act.[315] A landowner may have a hard time proving damages under this standard. For example, if real estate is not being used at the time of the temporary (regulatory or physical) taking, it may be difficult to show injury. An illustration would be the government's use of undeveloped private land for military training, during a period when the landowner had no plans to make economic use of the land—and indeed may not have discovered the incursion until after it was terminated.

As noted under subsection two above, the actual damages concept has been sporadically held to fix a ceiling for damages in temporary takings cases where, as far as appears in the court's opinion, § 1983 was not invoked. Thus, it may not always make a difference whether or not the temporary taking claim proceeds under § 1983. It would be highly useful to have the benefit of judicial illumination in this area.

10. Addendum: Separately Compensable and Permanent Injuries

It is a general postulate of takings law that the Fifth Amendment requires compensation only for the property interest taken, not for the effects of that taking—so-called "consequential damages."[316] Perhaps owing to the peculiarities of compensating for temporary takings, this postulate has been honored in the breach with some regularity in temporary takings cases. Courts deciding temporary takings claims have addressed

313. *See, e.g.*, Azul-Pacifico, Inc. v. City of Los Angeles, 973 F.2d 704, 705 (9th Cir. 1992) (dismissing the appeal for lack of subject matter jurisdiction because the claim was not brought under § 1983), *questioned in* Lawyer v. Hilton Head Pub. Serv. Dist. No. 1, 220 F.3d 298, 302 n.4 (4th Cir. 2000).

314. *See, e.g.*, City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 709 (1999) (quoting Heck v. Humphrey, 512 U.S. 477, 483 (1994)) ("[W]e have repeatedly noted that 42 U.S.C. § 1983 creates a species of tort liability.").

315. *See, e.g.*, Farrar v. Hobby, 506 U.S. 103, 112 (1992) (reiterating the principle that 42 U.S.C. § 1983 provides successful litigants with compensatory damages upon a showing of actual injury).

316. Yuba Natural Res., Inc. v. United States, 904 F.2d 1577, 1581 (Fed. Cir. 1990).

numerous particular items of damage, and in many cases appear to have found them compensable separately from the use or rental value of the property for the takings period. This is to be contrasted with consideration of such items not as standing alone but as factors influencing the use or rental value of the interest taken—as, for example, the moving costs of a tenant (from and back to the leased property) when only a portion of the lease term is taken.[317]

It is beyond the scope of this article to review the temporary takings case law on all such items of damage. Some examples where compensation was required under the circumstances are: physical injury to a landowner during activity on a condemned temporary construction easement (i.e., as from removal of trees and crops by the condemnor);[318] loss of access to the unburdened portion of a tract during activity on a temporary easement;[319] equipment wear and tear beyond the ordinary at a laundry plant temporarily condemned by the United States;[320] the cost of restoring property to its pre-taking condition;[321] and excess construction costs directly resulting from a developer's accidental rupture of an encroaching city water line.[322]

This list makes evident that a temporary taking can produce a permanent injury. In two factually similar cases,[323] this situation led plaintiffs to focus on the permanent injury as the basis for compensation—likely to avoid the uncertainties of valuing temporary property interests. In the more recent case, *Arkansas Game & Fish Commission v. United States*, the state argued that the Corps of Engineers's water releases from its dam during 1993–2000 caused flooding of a state-owned wildlife management area, thereby taking a temporary flowage easement.[324] The state did not seek compensation for the temporary easement, however. Rather, it sought compensation only for the timber value of the trees destroyed by the flooding, a permanent injury. As the court put it, the "temporary taking of a flowage easement . . . resulted in a permanent taking of timber . . . and the

317. *See* United States v. Gen. Motors Corp., 323 U.S. 373, 383 (1945) (stating that "such items may be proved not as independent items of damage, but to aid in the determination of what would be the usual—the market—price" in temporary occupancy situations).

318. *E.g.*, Colonial Pipeline Co. v. Weaver, 310 S.E.2d 338, 342 (N.C. 1984).

319. D'Addario v. Comm'r of Transp., 429 A.2d 890, 893–94 (Conn. 1980); Kadlec v. State, 694 N.Y.S.2d 123, 125 (App. Div. 1999).

320. Kimball Laundry Co. v. United States, 338 U.S. 1, 7–8 (1949).

321. Fowler Irrevocable Trust 1992-1 v. City of Boulder, 17 P.3d 797, 805–06 (Colo. 2001); Kula v. Prososki, 424 N.W.2d 117, 121 (Neb. 1988).

322. Primetime Hospitality, Inc. v. City of Albuquerque, 206 P.3d 112, 124 (N.M. 2009).

323. Cooper v. United States, 827 F.2d 762 (Fed. Cir. 1987); Ark. Game & Fish Comm'n v. United States, 87 Fed. Cl. 594 (2009).

324. *Ark. Game*, 87 Fed. Cl. at 600.

value of the timber thus serves as the basic measure of monetary relief to which the Commission is entitled."[325]

CONCLUSION

The broad contours of temporary takings are set. Total physical acquisitions of property are always takings, and regulations that temporarily restrict property uses can be takings that require government to pay just compensation. Beyond these basic principles, however, lurk many temporary takings uncertainties such as whether *Lucas* can ever apply to a retroactively temporary regulation; whether extraordinary delay is a ripeness issue or a (or the) takings factor itself; how to deal with delays due to government's erroneous assertion of jurisdiction; and the exact role of allegedly *ultra vires* actions by government officials on takings liability. The courts will likely refine, if not resolve, some of these issues over time. The courts are unlikely, however, to resolve how to determine compensation for temporary takings. The compensation questions in temporary taking cases appear to be too fact-specific for the courts to develop one formula, or even a small number of formulas, that they can apply in most or all cases. Rather, like Sisyphus, the courts are probably destined to forever struggle with their various ad-hoc approaches to calculating compensation for temporary takings.

325. *Id.* at 634–35; *see Cooper*, 827 F.2d at 763 (holding, under similar facts that loss of timber was a compensable permanent taking of property interest).