

On the Twenty-Fifth Anniversary of *Lucas*: Making or Breaking the Takings Claim

Carol Necole Brown and Dwight H. Merriam

ABSTRACT: In Lucas v. South Carolina Coastal Council, the United States Supreme Court established the premier categorical regulatory takings standard with certain limited exceptions. The Lucas rule establishes that private property owners are entitled to compensation for a taking under the Fifth Amendment Takings Clause when a government regulation “denies all economically beneficial or productive use of land.” Today, Lucas remains the controlling law on categorical regulatory takings. But in application, how much does Lucas still matter?

In reviewing more than 1,700 cases in state and federal courts, we identified that Lucas claims were successful in just 1.6% of the cases. This does not mean Lucas is unimportant, however. The small Lucas claim success rate suggests the importance of being strategic in pleading takings claims. The problem of defining the denominator in the regulatory takings equation is essential to understand for litigants pursuing the Lucas categorical regulatory takings analysis. Based upon our research, we argue that Lucas’s holding incentivizes the private contractual agreements entered into by property owners to shrink the takings denominator and tilt the scales slightly in favor of the plaintiff. The ability of a property owner to reduce the denominator remains the loadstar for a Lucas case-winning strategy.

This is important for not only theorists but also for practitioners to know—those who litigate and conduct transactions in Lucas’s shadow.

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Robinson & Cole LLP, Hartford, Connecticut. Mr. Merriam is past president and a fellow of the American Institute of Certified Planners and is also a member of the American College of Real Estate Lawyers as well as a counselor of real estate. He is a co-author of *The Takings Issue* and co-editor of *Rathkopf’s The Law of Zoning and Planning*, 4th.

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I. INTRODUCTION

In *Lucas v. South Carolina Coastal Council*, the Supreme Court established the premier categorical regulatory takings standard with certain limited exceptions.¹ The *Lucas* rule establishes that private property owners are entitled to compensation for a taking under the Fifth Amendment Takings Clause when a government “regulation denies all economically beneficial or productive use of land.”² The Fifth Amendment Takings Clause states that “private property [shall not] be taken for public use, without just compensation.”³ In determining whether the regulation at issue meets this standard, courts have traditionally used an “economic value fraction.”⁴ The numerator is the diminution in value of the private property attributable to the impact of the

1. See generally *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

2. *Id.* at 1015.

3. U.S. CONST. amend. V.

4. *Walcek v. United States*, 49 Fed. Cl. 248, 261-62 (2001), *aff'd*, 303 F.3d 1349 (Fed. Cir. 2002).

government regulation.⁵ The denominator is the entirety of the owner's rights in the "parcel as a whole."⁶ For a *Lucas* categorical taking, the denominator must be at least virtually equal to the numerator such that there is a deprivation of "all economically beneficial or productive use of land."⁷ As a result, property owners seek to characterize their property rights narrowly for as small a denominator as possible.⁸ The smaller the denominator, the more likely it is to be equal to the numerator. On the other hand, government regulators seek to characterize the property owner's property rights broadly for as large a denominator as possible.⁹ This creates a denominator that is much larger than the numerator signaling that the land still has economic benefit to the property owner.

Today, *Lucas* remains the controlling law on categorical regulatory takings.¹⁰ But in application, how much does *Lucas* matter? Our review of more than 1,700 cases in state and federal courts reveals only 28 cases in 25 years in which courts found a categorical taking under *Lucas*.¹¹ By percentage, that works out to a *Lucas*-claim success rate of just 1.6%. This does not mean *Lucas* is unimportant, however. Rather, the paucity of successful *Lucas* claims itself tells a significant story about the importance of pleading takings claims.

We contend that *Lucas*'s most enduring value is not its contribution to the positive law but rather its effect on how litigants shape their cases. A crucial aspect of

5. *Lost Tree Vill. Corp. v. United States (Lost Tree CFC II)*, 115 Fed. Cl. 219, 258, 262 (2014), *aff'd*, 787 F.3d 1111 (Fed. Cir. 2015); *see also Lucas*, 505 U.S. at 1016 n.7 ("Regrettably, the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured.")

6. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130-31 (1978); *see also Lucas*, 505 U.S. at 1016 n.7 (describing "the 'property interest' against which the loss of value is to be measured"). For a discussion on the *Penn Central* test, *see infra* Part IV.

7. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992); *see also Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001) (stating in the context of the *Lucas* total-takings analysis that "[a]ssuming a taking is otherwise established, a State may not evade the duty to compensate on the premise that the landowner is left with a token interest"); *Lost Tree Vill. Corp.*, 787 F.3d at 1113 (finding that a taking resulted from 99.4% diminishment in value in claimant's land and "affirm[ing] that a *Lucas* taking occurred because the government's permit denial eliminated all value stemming from Plat 57's possible economic uses").

8. DOUGLAS T. KENDALL ET AL., *TAKINGS LITIGATION HANDBOOK: DEFENDING TAKINGS CHALLENGES TO LAND USE REGULATIONS* 170 (2000).

9. *See* Danaya C. Wright, *A New Time for Denominators: Toward A Dynamic Theory of Property in the Regulatory Takings Relevant Parcel Analysis*, 34 ENVTL. L. 175, 188 (2004) ("[W]hen the numerator is a small toothpick and the denominator is the entire bundle, the likelihood of the Court requiring compensation is small. Where the numerator is a large portion of the bundle, or cuts across every stick in the bundle, the likelihood of compensation increases until it becomes mandatory if certain core sticks or the entire bundle is taken.")

10. Wendie L. Kellington, *New Takes on Old Takes: A Takings Law Update*, LAND USE L., http://landuselaw.wustl.edu/takings_update.htm (last visited Apr. 29, 2017).

11. These 1,700 cases represent all cases available in the two major online databases (Lexis Advance and WestlawNext) that cited *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), through March 23, 2017. A total of 1,808 cases were drawn from a Lexis Shepard's report and 1,713 cases were drawn from a Westlaw Keycite report. *Compare Citing References for Lucas v. S.C. Coastal Council*, LEXIS ADVANCE (last visited Mar. 23, 2017), *with Citing References for Lucas v. S.C. Coastal Council*, WESTLAW (last visited Mar. 23, 2017).

the *Lucas* categorical regulatory takings analysis has been, and will continue to be, the problem of defining the denominator in the regulatory takings equation. Our research suggests that *Lucas*'s holding incentivizes the private contractual agreements entered into by property owners to shrink the takings denominator and tilt the scales slightly in favor of the plaintiff. The ability of a property owner to reduce the denominator remains the loadstar for a *Lucas* case-winning strategy.¹² Whether this is good or bad is a question we leave for another day. Our focus here is identifying the components of a successful *Lucas* claim and the implications of our findings for those who practice in this area. The *Lucas* rule, and how its many contours play out on the ground, is important for not only theorists but also for practitioners—those who litigate and conduct transactions in *Lucas*'s shadow.

The discussion proceeds as follows: Part II explores the intricacies of the *Lucas* decision and the guidance that emerges; Part III presents our empirical data, grouping the *Lucas* winners into the following categories: nuisance abatement cases, private agreements and the denominator, pyramidal segmentation, and delay theory; Part IV discusses lessons learned and the implications for practitioners, judges, government actors, and scholars. In the end, *Lucas* still matters, just not for the reasons we most tend to think.

II. TAKINGS CLAIMS À LA LUCAS

Understanding *Lucas*'s holding means understanding the categorical rule it announced, the exceptions to that rule, the denominator question, and parcel as a whole. We start with Justice Scalia's majority decision. We then turn to the opinions of the other Justices in the case and their prediction about the ambiguities created by the *Lucas* decision.

A. LUCAS AND ITS HOLDING

In 1986, David Lucas, a South Carolina real-estate developer, purchased two lots in one of his residential subdivisions located in South Carolina on the Isle of Palms.¹³ He planned to construct single-family homes on the lots; however, his plans were interrupted when, in 1988, the South Carolina Legislature enacted the Beachfront Management Act (the "Act"), which prohibited Lucas from placing "any permanent habitable structures" on the lots.¹⁴ Initially, the Act did not allow for any exceptions.¹⁵

Lucas sued, alleging that the Act's prohibition was a permanent, compensable taking of his private property.¹⁶ The South Carolina state trial court agreed and ruled that the Act's prohibition on construction of any permanent structure left the lots "valueless" and therefore constituted a total permanent taking of his property.¹⁷ The

12. See *infra* Part II.D.3.

13. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1006–08 (1992).

14. *Id.* at 1007.

15. *Id.* at 1010–13.

16. *Id.* at 1009.

17. *Id.*

South Carolina Supreme Court reversed.¹⁸ Important to the South Carolina Supreme Court's decision was Lucas's concession that the Act was valid and proper in its design to preserve the beaches in South Carolina, a public resource.¹⁹ The South Carolina Supreme Court held that when the State regulates to prevent uses of property that would otherwise result in serious harm to the public, the State has no duty to pay compensation under the Takings Clause of the Fifth Amendment of the United States Constitution, regardless of the severity of the effect of the regulation on the value of the private property.²⁰

The United States Supreme Court granted certiorari and reversed the South Carolina Supreme Court. In a 6–2 decision, the Court relied upon the South Carolina trial court's determination that Lucas's lots had been rendered valueless.²¹ In the process, the Court established two pivotal points of law in the jurisprudence of takings and fomented additional ambiguities about a third: (1) the categorical regulatory takings rule;²² (2) the exceptions to the categorical rule—nuisance and background principles defenses;²³ and (3) the denominator question.²⁴ The discussion now turns to these points.

B. THE CATEGORICAL REGULATORY TAKINGS RULE

The Supreme Court in *Lucas* articulated a categorical regulatory takings rule: private property owners were entitled to compensation under the Fifth Amendment Takings Clause when a government “regulation denies all economically beneficial or productive use of land.”²⁵ Anything less than a total deprivation would be analyzed under the *Penn Central Transportation Co. v. New York City* three-part balancing test—a test that considered the regulation's economic impact, the extent of the regulation's interference with the property owner's “distinct investment-backed expectations,” and the “character of the governmental action”—which is highly deferential to government decision-making.²⁶ Under *Lucas*, the *Penn Central* sort of balancing is unnecessary because *Lucas* established a *categorical* takings rule, and that is the benefit of *Lucas*. It is a one-part objective analysis: if no “economically beneficial or productive use of land” is left, then compensation is due.²⁷

1. The Nuisance and Background Principles Defenses

Lucas held that the categorical regulatory takings rule was subject to two exceptions. Both are inherent in the Supreme Court's admonition that “[a]ny

18. *Id.*

19. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1009–10 (1992).

20. *Id.* at 1010.

21. *Id.* at 1020.

22. *See infra* Part II.B.

23. *See infra* Part II.B.1.

24. *See infra* Part II.B.2–II.C.

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

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

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

limitation so severe” that it deprives a private property owner of “all economically beneficial use” of the owner’s property and “cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.”²⁸ The first *Lucas* exception is that government regulation is not a taking if the proposed use is contrary to traditional, long-established limitations on private property rights (the “background principles” exception).²⁹ The second *Lucas* exception is that a government regulation is not a taking, regardless of its impact, when the government regulates to prevent uses that otherwise would have been prohibited under the traditional law of nuisance (the “nuisance” exception).³⁰ Thus, the government can avoid paying compensation if it can prove that “the proscribed use interests were not part of [the owner’s] title to begin with.”³¹

Writing for the majority, Justice Scalia cautioned the South Carolina legislature that it could not create, through legislation, a new nuisance that would undermine long-established private property rights.³² To hold otherwise would compromise the limitations the Court had earlier placed on exercises of the police power without compensation.³³ With that, the Supreme Court remanded the case for a determination of whether the Act was consistent with background principles of South Carolina state law of property and nuisance (and therefore took no property interest), something the Court suggested was “unlikely.”³⁴

28. *Lucas*, 505 U.S. at 1029; see MELTZ ET AL., THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND-USE CONTROL AND ENVIRONMENTAL REGULATION 187-88 (1999) (indicating that only the traditional principles of nuisance constitute an exception to *Lucas*); Carol Nicole Brown, *The Categorical Lucas Rule and the Nuisance and Background Principles Exception*, 30 TOURO L. REV. 349, 359-70 (2014) (discussing the nuisance exception to the *Lucas* categorical rule and successful statutory nuisance abatement cases); David L. Callies & David A. Robyak, *The Categorical (Lucas) Rule: “Background Principles,” Per Se Regulatory Takings, and the State of Exceptions*, 30 TOURO L. REV. 371, 379-80, 383 (2014) (discussing select cases in which the nuisance exception was successfully applied to defeat the *Lucas* challenge).

29. *Lucas*, 505 U.S. at 1029; MELTZ ET AL., *supra* note 28, at 168.

30. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027-28 (1992); Brown, *supra* note 28, at 359.

31. *Lucas*, 505 U.S. at 1027; see generally Callies & Robyak, *supra* note 28 (articulating categories of background principle defenses and surveying cases).

32. *Lucas*, 505 U.S. at 1029 (“We believe similar treatment must be accorded confiscatory regulations, *i.e.*, regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State’s law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.”).

33. *Lucas*, 505 U.S. at 1027 (citing *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)).

34. *Id.* at 1031-32.

2. The Denominator Question

The denominator question asks: What is the relevant private property interest against which the regulatory impact will be measured?³⁵ One feature of *Lucas* is that the denominator is essential to the categorical takings claim yet the *Lucas* Court does not provide much guidance.³⁶ The Court acknowledges that the denominator calculation raises a “difficult question” and that there have been “inconsistent pronouncements” because of “uncertainty regarding the composition of the denominator.”³⁷ Noticeably, the Court declined to offer any guidance on how predictably to determine the denominator in the regulatory takings analysis. This is true despite the Court’s acknowledgment of the centrality of the denominator problem.

Justice Scalia does not raise the denominator issue as a central concern because the Court was constrained to accept the South Carolina Court of Common Pleas’ determination that the South Carolina regulation rendered *Lucas*’s lots valueless.³⁸ Justice Scalia addresses it in dictum, as does Justice Blackmun in his dissent.³⁹ To the Justices’ responses to Justice Scalia’s majority opinion, we turn next.

C. COMPLICATING THE PICTURE: THE DISSENTING AND SEPARATE OPINIONS

Justice Scalia’s majority opinion has been the subject of considerable judicial and scholarly commentary over the years. The majority opinion elicited a separate concurrence by Justice Kennedy, separate dissenting opinions by Justices Blackmun and Stevens, and a separate statement by Justice Souter.

Justices Blackmun and Stevens criticized the majority’s nuisance exception as limiting it to common-law nuisance and rejecting the application of statutory nuisance.⁴⁰ Justice Blackmun rejected any common-law limitation on the State’s authority to regulate, without compensation, under the nuisance doctrine. He argued that common-law courts frequently rejected such a limited understanding of the State’s power and that the Takings Clause imposes no such limitation.⁴¹ He rejected the majority’s narrowing of the nuisance doctrine in takings jurisprudence and instead relied upon precedent that recognizes the authority “for the legislature to interpose, and by positive enactment to prohibit a use of property which would be injurious to

35. For a recent decision that portends to challenge *Penn Central* as a seminal decision on the point of the relevant denominator see generally *Lost Tree Vill. Corp. v. United States*, 787 F.3d 1111 (Fed. Cir. 2015) (refusing to extend the parcel as a whole analysis to include developer’s disparate real-estate holdings in the denominator).

36. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992) (“Regrettably, the rhetorical force of our ‘deprivation of all economically feasible use’ rule is greater than its precision, since the rule does not make clear the ‘property interest’ against which the loss of value is to be measured.”).

37. *Id.* at 1017 n.7.

38. *Id.*

39. *Id.*; *id.* at 1054–55 (Blackmun, J., dissenting).

40. *Id.* at 1053–56 (Blackmun, J., dissenting); *id.* at 1067–68 (Stevens, J., dissenting).

41. *Id.* at 1059–60 (Blackmun, J., dissenting).

the public.”⁴² Justice Blackmun also said that Lucas had not been deprived of all economic value in his lots because he retained the right of alienation and the lots “would have value for neighbors and for those prepared to enjoy proximity to the ocean without a house.”⁴³

Justice Stevens questioned the majority opinion given the elasticity of the concept of private property rights and the rational strategy of owners to manipulate the nature of their property interest—the denominator, post-*Lucas*—to improve the odds of a *Lucas* takings challenge. Justice Stevens explained:

[D]evelopers and investors may market specialized estates to take advantage of the Court’s new rule. The smaller the estate, the more likely that a regulatory change will effect a total taking. Thus, an investor may, for example, purchase the right to build a multifamily home on a specific lot, with the result that a zoning regulation that allows only single-family homes would render the investor’s property interest “valueless.” In short, the categorical rule will likely have one of two effects: Either courts will alter the definition of the “denominator” in the takings “fraction,” rendering the Court’s categorical rule meaningless, or investors will manipulate the relevant property interests, giving the Court’s rule sweeping effect.⁴⁴

He also wrote that “[t]he Court’s [decision] effectively freezes the State’s common law, denying the legislature much of its traditional power to revise the law governing the rights and uses of property.”⁴⁵

Justice Souter anticipated these nuisance abatement cases in his separate *Lucas* statement.⁴⁶ He wrote that the Court’s opinion assumes cases may arise in which nuisance abatement under state law could preclude all economically beneficial use of land.⁴⁷ Actually, Justice Souter doubted that regulations to prevent nuisances would cause total deprivations in most cases.⁴⁸ Emphasizing that nuisance law’s focus is conduct on the property and “not on the character of the property” itself, he wrote that nuisance remedies typically leave the owner with the right to engage in reasonable uses of the property.⁴⁹ “Indeed, it is difficult to imagine property that can be used only to create a nuisance, such that its sole economic value must presuppose the right to occupy it for such seriously noxious activity.”⁵⁰

42. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1059 (1992) (quoting *Commonwealth v. Tewksbury*, 52 Mass. (11 Met.) 55, 57 (1846)).

43. *Id.* at 1044; see John Echeverria, *Lost Tree Redux: How Do We Measure Economic Impact?*, TAKINGS LITIG. (June 4, 2015), <https://takingslitigation.com/2015/06/04/lost-tree-redux-how-do-we-measure-economic-impact> (writing in favor of environmental value, such as private recreational value to be considered in the *Lucas* takings analysis).

44. *Lucas*, 505 U.S. at 1065–66 (Stevens, J., dissenting) (footnote omitted).

45. *Id.* at 1068–69.

46. *Id.* at 1077–78 (Souter, J., separate statement).

47. *Id.* at 1077 (Souter, J., separate statement).

48. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1077 (1992).

49. *Id.*

50. *Id.* at 1078.

Together, Justices Blackmun, Stevens, and Souter raised substantial questions about how the Court's new rule in *Lucas* would play out.⁵¹ It is clear from their responses to the *Lucas* majority that Justices Stevens and Souter were concerned about an unhealthy amount of gamesmanship being inserted into the takings analysis by both property owners and courts.⁵² For *Lucas* critics, the decision further muddied the already murky regulatory takings waters, increasing the unpredictability and ambiguity in regulatory takings.⁵³ Next, this Article turns to the ambiguities remaining after *Lucas*.

D. AMBIGUITIES ABOUND

“Jerold Kayden, a senior fellow at the Lincoln Institute of Land Policy . . . [said] shortly [after *Lucas* was decided] that ‘the issue of what is the property interest at stake is going to be a whole new battleground. Defining what the property is determines whether the owner wins or loses.’⁵⁴ One question that arises after *Lucas* is the categorical takings rule and whether it turns on a denial of all economic *value* or denial of all economic *use*.⁵⁵ A second question is whether statutory nuisances count when considering the *Lucas* nuisance exception or only common-law nuisances.⁵⁶ Yet a third question is the denominator question—in other words, what is the relevant property interest against which the government’s regulatory impact should be measured?⁵⁷ Below, we discuss these lingering uncertainties surrounding the *Lucas* rule, the exceptions to that rule, and the denominator question.

1. The Categorical Regulatory Takings Rule

The first question that arises is whether the *Lucas* categorical rule turned on denial of economic *value* or economic *use*. In other words, if a regulation eliminated all use but left a property owner with non-speculative or even speculative value, would the *Lucas* analysis apply or would the *Penn Central* balancing test apply?⁵⁸ Recently,

51. See *supra* notes 38–45 and accompanying text.

52. *Lucas*, 505 U.S. at 1066 (Stevens, J., dissenting); *id.* at 1077–78 (Souter, J., separate statement).

53. See, e.g., Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93, 141–42 (2002) (“[T]here is an unfortunate tendency to understand the automatic, handwriting critique of vagueness in takings doctrine as automatically recommending clearer rules that favor protection of private property. An assumption that clear rules are always better should be resisted. Clarity is only one value within the Rule of Law, and while it may contribute to stability in many circumstances, it may not contribute to overall efficiency or fairness here.”); Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 566 (1984) (arguing that the analysis for regulatory takings “is deeply flawed”); Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1081 (1993) (stating that “[t]akings law is out of joint” and that “only the right of privacy [constitutional doctrine] can compete seriously with takings law for the doctrine-in-most-desperate-need-of-a-principle prize”).

54. Rebecca Retzlaff & Sarah Sisser, *Property Rights and Coastal Protection: The Case of Lucas v. South Carolina Coastal Council*, 29 PLAN. PERSP. 275, 286 (2014) (quoting David W. Dunlap, *Resolving Property ‘Takings,’* N.Y. TIMES (Aug. 23, 1992), <http://www.nytimes.com/1992/08/23/realestate/resolving-property-takings.html>).

55. See *infra* Part II.D.1.

56. See *infra* Part II.D.2.

57. See *infra* Part II.D.3.

58. See *supra* notes 25–27 and accompanying text.

the United States Court of Appeals for the Federal Circuit in *Lost Tree Village Corp. v. United States* held that *environmental value* should be disregarded for purposes of the *Lucas* taking claim and that only *economic value* should be considered.⁵⁹ However, the court did not distinguish between *value* and *use*.⁶⁰

The distinction between value and use has caused considerable confusion. In fact, courts and other legal authorities differ on this point. Some contend that the Court's opinion in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*⁶¹ endorses loss of value as the *Lucas* rule.⁶² In other words, "[a]nything less than a 'complete elimination of value,' or a 'total loss,' . . . would require the kind of analysis applied in *Penn Central*."⁶³ Other courts and scholars have argued in favor of the loss of use construction of the *Lucas* categorical takings rule.⁶⁴

An understanding of the *Lucas* categorical regulatory takings rule as only applying when a government regulation deprives an owner of all value would significantly heighten the already substantial impediments to property owners' ability to mount

59. *Lost Tree Vill. Corp. v. United States*, 787 F.3d 1111, 1116–17 (Fed. Cir. 2015).

60. *Id.*

61. *See generally* *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002).

62. *See* Richard J. Lazarus, *Lucas Unspun*, 16 SE. ENVTL. L.J. 13, 28 & n.99 (2007) (discussing the *Lucas* decision in the context of economic value and citing to the *Tahoe-Sierra* decision and others as interpreting the *Lucas* decision in the total diminution of all value context).

63. *Tahoe-Sierra*, 535 U.S. at 330 (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 n.8 (1992)); *see also, e.g.,* *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005) ("In the *Lucas* context, of course, the complete elimination of a property's value is the determinative factor."); *Mayhew v. Town of Sunnysvale*, 964 S.W.2d 922, 935 (Tex. 1998) ("A restriction denies the landowner all economically viable use of the property or totally destroys the value of the property if the restriction renders the property valueless. Determining whether all economically viable use of a property has been denied entails a relatively simple analysis of whether value remains in the property after the governmental action." (citations omitted)); Daniel L. Siegel & Robert Meltz, *Temporary Takings: Settled Principles and Unresolved Questions*, 11 VT. J. ENVTL. L. 479, 498 (2010) ("*Lucas* turns on the loss of value, not the inability to use property.>").

64. *Palm Beach Isles Assocs. v. United States*, 231 F.3d 1354, 1357 (Fed. Cir. 2000) ("A 'categorical' taking is, by accepted convention, one in which *all* economically viable use, i.e., all economic value, has been taken by the regulatory imposition. Such a taking is distinct from a taking that is the consequence of a regulatory imposition that prohibits or restricts only some of the uses that would otherwise be available to the property owner, but leaves the owner with substantial viable economic use."); *Res. Invs., Inc. v. United States*, 85 Fed. Cl. 447, 493 (2009) ("[T]here appears to be no genuine issue of material fact that Corps' denial of plaintiffs' 404 permit application left plaintiffs without economically viable use of the project site. Thus, plaintiffs' claim falls under *Lucas* rather than *Tahoe-Sierra* and *Penn Central*, and the Corps' denial of the 404 permit may very well have left plaintiffs without economically viable use of their property."); *Chapel Hill Title & Abstract Co. v. Town of Chapel Hill*, 669 S.E.2d 286, 290 (N.C. 2008) (discussing *Lucas* takings in the context of denials of "practical use and reasonable value"); Ann T. Kadlecsek, *The Effect of Lucas v. South Carolina Coastal Council on the Law of Regulatory Takings*, 68 WASH. L. REV. 415, 427 (1993) ("The *Lucas* Court indicated two factors that are relevant to determining whether property has an economically viable use. The first is the remaining market value of the land. If a regulation renders property 'valueless', then no economically viable use remains. . . . The second factor is the remaining uses available to the landowner. The Court gave little specific guidance for the application of this factor, but did indicate that a regulation that requires land to be left substantially in its natural state deprives the owner of economically viable use.>").

successful *Lucas* challenges.⁶⁵ It is difficult to imagine a situation in which a speculator could not be found who would pay some de minimis amount for a property even if the property had been completely deprived of all development rights and even temporarily deprived of all rights of use.⁶⁶ The law is dynamic, and this dynamism, with the potential of favorable future regulatory change for a property owner, creates speculative value at some price point.⁶⁷ Moreover, if *Lucas* is understood as only applying when there is no value, so that even speculative value counts against the *Lucas* takings claim, then it truly is difficult to make the case of a *Lucas* categorical taking. In order to truly have no value, we would need to see the lack of development potential combine with other negative factors such as environmental remediation costs, holding costs, demolition costs, and property tax liability to create “negative value.”⁶⁸

2. The Nuisance Defense

A second question is whether both statutory nuisances and common-law nuisances count when considering the nuisance defense to a *Lucas* claim or, instead, whether common-law nuisances are the only ones that should be considered.⁶⁹ The difference between common law and statutory law matters. If the nuisance exception to a categorical *Lucas* taking is limited to only common-law nuisances, then the only nuisances that can defeat a plaintiff’s right to compensation under the *Lucas* categorical rule are those long-standing nuisances that we have already agreed on collectively as being nuisances. If statutory nuisances can also defeat a *Lucas* claim, then any legislature can pass nuisance statutes to “pull the rug” right out from under a plaintiff who has already proven a *Lucas* claim by establishing a total deprivation of economically beneficial or productive use of land as a result of government regulation.⁷⁰

One reading of Justice Scalia’s majority opinion is that by background principles of nuisance, the Court intended a narrow construction of nuisance doctrine in this instance to include only background principles of *common-law* nuisance. Justice

65. See, e.g., *Lost Tree Vill. Corp. v. United States*, 787 F.3d 1111, 1118 (Fed. Cir. 2015) (“To establish a per se claim under the government’s reading of *Lucas*, a landowner would have to demonstrate that a regulation destroyed all land value, regardless of its source [economic and non-economic value, i.e. environmental value]. Yet the fact that the landowner could make such a showing, according to the government’s hypothetical, would prompt speculation giving rise to post-regulation land value. In other words, speculators would value otherwise valueless land based solely on the possibility that a *Lucas* taking could be maintained and that a takings judgment could be won. Land value resulting from such speculation would defeat the very *Lucas* claim on which the speculation was based.”).

66. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1065 n.3 (1992) (Stevens, J., dissenting) (“*Lucas* may put his land to ‘other uses’—fishing or camping, for example—or may sell his land to his neighbors as a buffer. In either event, his land is far from ‘valueless.’”).

67. *Lost Tree Vill. Corp.*, 787 F.3d at 1118.

68. See *infra* notes 195–200, 248–56 and accompanying text (discussing cases where the courts found negative value).

69. For a more in-depth discussion of the nuisance exception defense, see generally Brown, *supra* note 28 (discussing categories of defenses and surveying cases).

70. See *Lucas*, 505 U.S. at 1027–28 (discussing the newly enacted State measures and the elimination of “all economically valuable use”).

Kennedy's concurring opinion addressed this reading of the majority opinion and, in fact, he wrote that our whole legal tradition must be considered.⁷¹ In his more expansive view of the nuisance exception, "[t]he common law of nuisance is too narrow a confine for the exercise of regulatory power" and the states "should not be prevented from enacting new regulatory initiatives" that respond to our interdependent, complex, and changing society.⁷² Moreover, he criticized the Supreme Court of South Carolina for citing general purposes supporting the enactment of the Beachfront Management Act without also making findings as to whether the regulation was consistent with the property owner's reasonable expectations of use.⁷³ Dissenting Justices Blackmun and Stevens also criticized the majority's nuisance exception as unduly elevating common-law nuisance over statutory nuisance.⁷⁴

A final ambiguity that surfaces in the nuisance defense area, and one discussed in depth in Part III, is that the successful *Lucas* cases in the nuisance abatement category involve statutory nuisances, and the applicable statutes mandated temporary closures of properties that were deemed nuisance properties under the statutes.⁷⁵ All of the cases in this category were decided before *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, in which the Supreme Court held that in cases of prospectively temporary takings, the takings analysis should occur under the *Penn Central* three-part balancing test and not the *Lucas* categorical takings test.⁷⁶

3. The Denominator Question and the Parcel as a Whole

The "denominator question" is the third question, and it asks, what is the "relevant parcel" against which the government's regulatory impact should be measured?⁷⁷ In determining whether a regulation meets the *Lucas* test of denying the property owner of all economically beneficial or productive use of land, courts have traditionally used an "economic value fraction."⁷⁸ The numerator is the loss of value of the private property attributable to the impact of the government regulation.⁷⁹ The denominator is the relevant parcel against which the regulatory impact should be judged.⁸⁰ For a *Lucas* categorical taking, the denominator must be at least virtually equal to the numerator⁸¹ such that there is a deprivation of "all economically beneficial

71. *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring).

72. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring).

73. *Id.*

74. *Id.* at 1052-53 (Blackmun, J., dissenting); *id.* at 1068-69 (Stevens, J., dissenting).

75. *See infra* Part III.A.

76. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 331-32, 342 (2002).

77. *See Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130-31 (1978).

78. *Walcek v. United States*, 49 Fed. Cl. 248, 261-62 (2001), *aff'd*, 303 F.3d 1349 (Fed. Cir. 2002).

79. *Id.*; *see also Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992).

80. *Walcek*, 49 Fed. Cl. at 261.

81. *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001) (stating in the context of the *Lucas* total takings analysis that, "[a]ssuming a taking is otherwise established, a State may not evade the duty to compensate on the premise that the landowner is left with a token interest"); *Lost Tree Vill. Corp. v. United*

or productive use of land.”⁸² As a result, property owners want to define their denominator so that it is as small as possible while the government wants to broadly define the regulated property to keep the denominator as large as possible.⁸³ Thus, the resolution of the denominator question is critical to the success or failure of a *Lucas* challenge.

Penn Central Transportation Co. v. New York City is the landmark relevant parcel decision.⁸⁴ In this case, the Supreme Court held that the relevant parcel in the denominator of the takings fraction is the entirety of the owner’s “rights in the parcel as a whole.”⁸⁵ The parcel as a whole approach tends to increase the property owner’s denominator, making the *Lucas* regulatory takings challenge less viable. Courts have rejected *Lucas* takings challenges by applying the parcel as a whole analysis.⁸⁶

States, 787 F.3d 1111, 1113–14 (Fed. Cir. 2015) (finding a 99.4% diminishment in value and “affirm[ing] that a *Lucas* taking occurred because the government’s permit denial eliminated all value stemming from Plat 57’s possible economic uses”).

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

83. KENDALL ET AL., *supra* note 8, at 170; Wright, *supra* note 9, at 191.

84. *See generally* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

85. *Penn Cent.*, 438 U.S. at 130–31.

86. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency, 535 U.S. 302, 331 (2002) (“Petitioners seek to bring this case under the rule announced in *Lucas* by arguing that we can effectively sever a 32-month segment from the remainder of each landowner’s fee simple estate, and then ask whether that segment has been taken in its entirety by the moratoria. Of course, defining the property interest taken in terms of the very regulation being challenged is circular. With property so divided, every delay would become a total ban; the moratorium and the normal permit process alike would constitute categorical takings. Petitioners’ ‘conceptual severance’ argument is unavailing because it ignores *Penn Central’s* admonition that in regulatory takings cases we must focus on ‘the parcel as a whole.’ We have consistently rejected such an approach to the ‘denominator’ question.” (quoting *Penn Cent.*, 438 U.S. at 130–31)).

The parcel as a whole analysis exists in contrast to a segmentation or “conceptual severance”⁸⁷ approach to property, whether vertical,⁸⁸ horizontal,⁸⁹ temporal,⁹⁰ or functional.⁹¹ Conceptual severance reflects the idea of real property as a bundle of rights consisting of many strands that can be severed or destroyed.⁹² Conceptual severance would include

vertical severance (division of subsurface, surface, and air rights); temporal severance (division of property based on the time regulation is in effect and not in effect—i.e. temporary takings); functional severance (division of property interests based on easements, rights of way, and servitudes); and

87. See *Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, 737 S.E.2d 601, 615 & n.14 (S.C. 2013) (“The United States Supreme Court has indicated several times that ‘piecemeal[ing] various property interests is not permitted. . . . However, other United States Supreme Court decisions have implicitly acknowledged, though never explicitly held, that ‘conceptual severance’ of a parcel can be appropriate under the particular facts presented.” (citations omitted)); Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1674 (1988) (reviewing some of the “salient” Supreme Court cases addressing conceptual severance); Angela Chang, Note, *Demystifying Conceptual Severance: A Comparative Study of the United States, Canada, and the European Court of Human Rights*, 98 CORNELL L. REV. 965, 966 (2013) (“Conceptual severance refers to plaintiffs’ attempts to conceptually sever their property physically, functionally, or temporally to show that a regulation diminishes a significant portion or 100% of the parcel’s value.” (footnote omitted)). See generally Dwight H. Merriam, *What is the Relevant Parcel in Takings Litigation?*, SC43 ALI-ABA 505 (1998) (describing the various ways in which courts separate parcels for takings analysis).

88. See *Dunes W. Golf Club*, 737 S.E.2d at 615 n.14 (describing vertical severance as “division of subsurface, surface, and air rights”); see also *Penn Cent.*, 438 U.S. at 137 (discussing the transferability of air rights).

89. See *Dunes W. Golf Club*, 737 S.E.2d at 615 n.14 (describing horizontal severance as “subdivision of parcel into smaller lots”); see also generally *Lost Tree Vill. Corp. v. United States*, 787 F.3d 1111 (Fed. Cir. 2015) (applying the appropriate takings framework to lots); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2011) (same).

90. See *Dunes W. Golf Club*, 737 S.E.2d at 615 n.14 (describing temporal severance as “division of property based on the time regulation is in effect and not in effect”); see also *Tahoe-Sierra*, 535 U.S. at 318–19 (discussing temporal segmentation in the moratorium context).

91. See *Tahoe-Sierra*, 535 U.S. at 318 (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 216 F.3d 764, 774 (9th Cir. 2000)) (“[T]he dimensions of a property interest may include . . . a functional dimension (which describes the extent to which an owner may use or dispose of the property in question)”); *Dist. Intown Props. Ltd. P’ship v. District of Columbia*, 198 F.3d 874, 880 (D.C. Cir. 1999) (stating that in defining the relevant parcel for the takings analysis, “the parcel should be functionally coherent. In other words, more should unite the property than common ownership by the claimant. Thus, a court must also consider how both the property-owner and the government treat (and have treated) the property”); *Dunes W. Golf Club*, 737 S.E.2d at 615 n.14 (“[F]unctional severance [is the] division of property interests based on easements, rights of way, and servitudes”); see also *Hodel v. Irving*, 481 U.S. 704, 717 (1987) (“[C]omplete abolition of both the descent and devise of a particular class of property may be a taking.”); *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979) (holding that rights to exclude fall within a “category of interests that the Government cannot take without compensation”). As the cases illustrate, the concept of a functional dimension can be used in two different ways. In *Dist. Intown*, it means how the numerous parcels are used together. But in *Tahoe-Sierra*, it likely includes the potential for permitting.

92. See Chang, *supra* note 87, at 973.

horizontal severance (subdivision of a parcel into smaller lots).⁹³

The more factors courts include in the property owner's denominator as an expression of the extent and nature of the owners' rights in property impacted by regulation, the less viable the *Lucas* takings challenge becomes.⁹⁴

Justice Stevens expressed concern in his *Lucas* dissent about manipulating the denominator.⁹⁵ He said that *Lucas's* categorical rule would "likely have one of two effects: [e]ither courts [would] alter the definition of the 'denominator'" to neutralize the *Lucas* categorical rule, or property owners would alter the denominator by manipulating their property interests to reduce the denominator in the takings fraction, thereby giving the categorical rule broader effect than intended by the *Lucas* majority.⁹⁶

These concerns were given new life in the United States Court of Appeals for the Federal Circuit's decision in *Lost Tree Village Corp. v. United States*.⁹⁷ In response to the government's arguments about gaming to better the chances of a *Lucas* claim, the *Lost Tree* court stated "that if such strategic behavior presented itself, '[o]ur precedent displays a flexible approach, designed to account for factual nuances.'" ⁹⁸ Noted scholar John Echeverria wrote that the court's recent decision in *Lost Tree* "deepens the mystery surrounding the *Lucas per se* rule" and incorrectly "divorces takings analysis from the realities of the actual marketplace in land."⁹⁹ He opined that the takings analysis is "already subject to too much gamesmanship" and that it is likely to "become

93. *Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, 737 S.E.2d 601, 615 n.14 (S.C. 2013); see also *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 318, (2002) ("Property interests may have many different dimensions. For example, the dimensions of a property interest may include a physical dimension (which describes the size and shape of the property in question), a functional dimension (which describes the extent to which an owner may use or dispose of the property in question), and a temporal dimension (which describes the duration of the property interest). At base, the plaintiffs' argument is that we should conceptually sever each plaintiff's fee interest into discrete segments in at least one of these dimensions—the temporal one—and treat each of those segments as separate and distinct property interests for purposes of takings analysis. Under this theory, they argue that there was a categorical taking of one of those temporal segments." (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 774 (9th Cir. 2000)); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 330 (1987) (Stevens, J., dissenting) ("Regulations are three dimensional; they have depth, width, and length. As for depth, regulations define the extent to which the owner may not use the property in question. With respect to width, regulations define the amount of property encompassed by the restrictions. Finally, . . . regulations set forth the duration [or length] of the restrictions.").

94. See *supra* Part II.D.3.

95. See *supra* note 44 and accompanying text.

96. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1066 (1992) (Stevens, J., dissenting).

97. See generally *Lost Tree Vill. Corp. v. United States*, 787 F.3d 1111 (Fed. Cir. 2015). The factual details of *Lost Tree* are discussed in detail later. See *infra* Part III.B; see also *supra* text accompanying notes 42 and 90 (discussing Stevens's opinion that the effect of *Lucas's* categorical rule will be to incentivize courts and property owners to attempt to game the denominator in the takings equation).

98. *Lost Tree*, 787 F.3d at 1118 (quoting *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994)).

99. Echeverria, *supra* note 43.

more random and unpredictable” if future courts follow the *Lost Tree* precedent.¹⁰⁰ It therefore should be unsurprising that the denominator problem is a recurring issue of contemporary significance.

How much do these lingering ambiguities matter? To the answer to that question, and the *Lucas* winners, we turn next.

III. SUCCESSFUL *LUCAS* TAKINGS CASES: EMPIRICAL DATA

This Part presents the results of an examination of approximately 1,700 *Lucas* cases filed across the United States. Of those 1,700 cases, only 27 were successful. What the *Lucas* winners had in common helps clarify *Lucas* in practice. In the discussion below, we group the *Lucas* winning cases into the following categories: (1) the nuisance abatement cases; (2) private agreements and the denominator; (3) public law and pyramidal segmentation; and (4) delay theory.¹⁰¹

While analyzing the *Lucas* winners, at times we compare and contrast several of the *Lucas* losers. There are almost 1,700 losers so we only discuss *Lucas* losers where we believe they can help us understand the winners. To a discussion of the cases, by category, we turn next.

A. THE NUISANCE ABATEMENT CASES (THE *LUCAS* EXCEPTION)

In this category, we can see the nuisance exception to the *Lucas* categorical rule play out. Several cases concretely make the point of the impact of the nuisance defense on the *Lucas* takings challenge: the less viable the nuisance defense (e.g., because statutory nuisances are deemed not to count for *Lucas* nuisance defense purposes or because when they do count, the government’s application is overly broad), the more viable the *Lucas* categorical claim.¹⁰² These four cases represent seven disputes because two of the four cases are consolidated cases with multiple disputes.¹⁰³

First, in *City of Seattle v. McCoy*, the City brought a proceeding to abate the McCoy’s operation of their lounge and restaurant (Oscar’s II) under a drug nuisance statute.¹⁰⁴ The McCoy’s property interest was a leasehold on the property on which

100. *Id.*

101. *See infra* Appendix (presenting the categories of *Lucas* winning cases).

102. *Supra* Part II.D.2.

103. *Keshbro, Inc. v. City of Miami*, 801 So. 2d 864, 866 (Fla. 2001) (consolidating two cases: *City of Miami v. Keshbro, Inc.*, 717 So. 2d 601 (Fla. Dist. Ct. App. 1998) and *City of St. Petersburg v. Kablinger*, 730 So. 2d 409 (Fla. Dist. Ct. App. 1999)); *State ex rel. Pizza v. Rezcallah*, 702 N.E.2d 81, 83–85 (Ohio 1998) (consolidating three cases, numbers 96-1894, 96-1895, and 96-1897).

104. *City of Seattle v. McCoy*, 4 P.3d 159, 163 (Wash. Ct. App. 2000). *McCoy* was the only nuisance exception case in which the owner restricted the denominator by acquiring only a leasehold interest. The *First English* dissent likely imagined this type of case when describing the qualities of temporary *Lucas* takings. *See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 329 (1987) (Stevens, J., dissenting) (“A temporary interference with an owner’s use of his property may constitute a taking for which the Constitution requires that compensation be paid. At least with respect to physical takings, the Court has so held. Thus, if the government appropriates a leasehold interest and uses it for a public purpose, the return of the premises at the expiration of the lease would obviously not erase the fact of the government’s temporary occupation.” (citation omitted)). A leasehold of sufficiently short remaining duration and a sufficiently lengthy nuisance abatement closure—when combined with other

Oscar's II was located.¹⁰⁵ The trial court found Oscar's II to be a drug nuisance and ordered it closed for one year.¹⁰⁶ The trial court's order resulted in Oscar's II being placed in the court's custody pursuant to an applicable statutory provision.¹⁰⁷ On appeal, the court found that application of the nuisance statute to the McCoys was a temporary taking.¹⁰⁸ The court articulated the nuisance exception as "whether the common law of nuisance would have allowed abatement of the lawful business activity against an innocent owner for the illegal drug activities of unidentified business patrons which, when the activities occurred, were unknown and may not have been observable."¹⁰⁹ The court determined that the McCoys were innocent owners, that they acted reasonably to attempt to abate the nuisance, and that the common-law nuisance exception in that state was based upon whether the owners, given their constructive and actual knowledge, took reasonable steps to abate the nuisance.¹¹⁰ The court held that the City did not meet its burden of proving a common-law nuisance according to the *Lucas* exception.¹¹¹

Second, *City of St. Petersburg v. Bowen* involved application of a nuisance abatement statute to the property owner's 15-unit apartment complex.¹¹² Bowen owned the apartment complex that was ordered closed for one year after being found to constitute a statutory nuisance because of purported drug use by tenants and others who were on the property.¹¹³ The court found a temporary *Lucas* taking because the building could not be put to any economic use during the one-year closure period.¹¹⁴ The court stated that the *Lucas* exception limited the matter to common-law nuisances and that no common-law nuisance doctrine prohibited using a building for rental purposes.¹¹⁵

factors such as insufficient tailoring and acquiescence or participation by the owner in the nuisance activity—might be sufficient to overcome the *First English* dissent and the *Tahoe-Sierra* Court's caution against temporal segmentation in the application of the *Lucas* categorical rule and its nuisance exception. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 331 (2002) ("Thus, the District Court erred when it disaggregated petitioners' property into temporal segments corresponding to the regulations at issue and then analyzed whether petitioners were deprived of all economically viable use during each period. The starting point for the court's analysis should have been to ask whether there was a total taking of the entire parcel; if not, then *Penn Central* was the proper framework." (citation omitted)).

105. *McCoy*, 4 P.3d at 162.

106. *Id.* at 164.

107. *Id.* at 166.

108. *Id.* at 167.

109. *Id.*

110. *City of Seattle v. McCoy*, 4 P.3d 159, 168, 171-72 (Wash. Ct. App. 2000).

111. *Id.*

112. *City of St. Petersburg v. Bowen*, 675 So. 2d 626, 629 (Fla. Dist. Ct. App. 1996).

113. *Id.* at 627-28.

114. *Id.* at 631.

115. *Id.*

Third, *Keshbro, Inc. v. City of Miami*¹¹⁶ consolidated two cases, *City of St. Petersburg v. Kablinger*¹¹⁷ and *City of Miami v. Keshbro, Inc.*¹¹⁸ The property owners in the two cases owned an apartment complex and a motel, respectively.¹¹⁹ The court considered whether ordering the complete closure of the apartment complex for one year and the complete closure of the motel for six months for violation of public nuisance statutes deprived the owners of all economically beneficial use of their property.¹²⁰

The court found that the regulation in *Kablinger* resulted in a *Lucas* taking and that the *Lucas* nuisance exception did not apply.¹²¹ However, in *Keshbro*, the court said the nuisance exception did apply and was a defense to the property owner's claim of a *Lucas* categorical taking.¹²² The reason for the different results was the question of specific tailoring of the closure orders "to abate the objectionable conduct, without unnecessarily infringing upon the conduct of a lawful enterprise."¹²³ The temporary closing of the apartment in *Kablinger*, according to the court, was not attended by the same extensive record indicating that the nuisance (drug activity) had become inextricable from the operation of the motel in *Keshbro*.¹²⁴ Absent such a record, the court found the closure order for one year in *Kablinger* was not sufficiently tailored to benefit from the *Lucas* nuisance exception.¹²⁵ In contrast, the court found that the drug and prostitution activity at the Stardust Motel in *Keshbro* "had become part and parcel of the operation of the Stardust" and that the City of Miami had failed to eradicate this nuisance activity despite patient attempts.¹²⁶

Finally, the Ohio case of *State ex rel. Pizza v. Rezcallah* involved three consolidated cases in which the property interest was a fee simple absolute in residential property.¹²⁷ In all three cases, it was alleged that non-owner residents, while occupying three different residential properties, committed drug-related felonies.¹²⁸ Each property owner was found to have taken affirmative, good faith action to investigate and remove offending residents.¹²⁹ The court found that application of the nuisance abatement statute was a *Lucas* taking as it required, upon the finding of a nuisance, the issuance of a temporary, one-year closure order forbidding use of the property for any purpose.¹³⁰

116. See generally *Keshbro, Inc. v. City of Miami*, 801 So. 2d 864 (Fla. 2001).

117. See generally *City of St. Petersburg v. Kablinger*, 730 So. 2d 409 (Fla. Dist. Ct. App. 1999).

118. See generally *City of Miami v. Keshbro, Inc.*, 717 So. 2d 601 (Fla. Dist. Ct. App. 1998).

119. *Keshbro*, 801 So. 2d at 867-68.

120. *Id.* at 867-69.

121. *Id.* at 876-77.

122. *Keshbro, Inc. v. City of Miami*, 801 So. 2d 864, 876 (Fla. 2001).

123. *Id.*

124. *Id.* at 876-77.

125. *Id.* at 877.

126. *Id.* at 876.

127. *State ex rel. Pizza v. Rezcallah*, 702 N.E.2d 81, 85-86 (Ohio 1998).

128. *Id.*

129. *Id.* at 85.

130. *Id.* at 92-93.

In summary, each of these cases shows that when courts perceive that the statutory nuisance defenses are weak or unsupported, sometimes because they are inconsistent with common-law nuisance principles, then the likely result is that the *Lucas* claim will be successful. However, in these statutory nuisance cases, it bears noting that all of these cases were decided before *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, which held that temporary takings should be analyzed under *Penn Central* and not *Lucas*.¹³¹ For this reason, these nuisance abatement cases do not hold much potential for successful *Lucas* takings challenges in the future.

B. PRIVATE AGREEMENTS AND THE DENOMINATOR

This category consists of eight conceptual severance cases unified by private agreements such as restrictive covenants, lease agreements, and development plans that, in the context of public land use regulations, reduced the property owner's denominator.¹³² The decisions in these conceptual severance cases draw attention to the courts' demonstrable inclination to include the impact of private agreements in their denominator analysis.¹³³ As one scholar recognized,

[t]he Supreme Court has accepted some of these attempts at conceptual severance but has failed to provide a coherent theory justifying conceptual severance. As a result, confusion and debate ensue among courts and commentators on how best to determine the relevant parcel in a regulatory takings claim. Lower courts can and do accept the plaintiff's proffered denominator without intense scrutiny, sometimes avoiding the conceptual severance issue altogether.¹³⁴

These cases show the impact that private agreements can have: the stronger the private agreement, the stronger the *Lucas* claim.

This Part discusses five of the eight successful *Lucas* cases in this category in detail. The first is *Loveladies Harbor, Inc. v. United States*.¹³⁵ The second is *State ex rel. R.T.G., Inc. v. State*.¹³⁶ The third is *Lost Tree Village Corp. v. United States*.¹³⁷ The fourth is *Chapel Hill Title & Abstract Co. v. Town of Chapel Hill*.¹³⁸ The fifth case is the most recent *Lucas* success, *Love Terminal Partners v. United States*.¹³⁹

131. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 331-32, 342 (2002).

132. *See infra* Appendix.

133. *See infra* Part III.B.

134. Chang, *supra* note 87, at 966 (footnotes omitted).

135. *See generally* *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994), *abrogated by* *Bass Enters. Prod. Co. v. United States*, 381 F.3d 1360 (Fed. Cir. 2004).

136. *See generally* *State ex rel. R.T.G., Inc. v. State*, 780 N.E.2d 998 (Ohio 2002).

137. *See generally* *Lost Tree Vill. Corp. v. United States*, 787 F.3d 1111 (Fed. Cir. 2015).

138. *See generally* *Chapel Hill Title & Abstract Co. v. Town of Chapel Hill*, 669 S.E.2d 286 (N.C. 2008).

139. *See generally* *Love Terminal Partners v. United States*, 126 Fed. Cl. 389 (2016).

First, the complexity of the denominator possibilities are central to the United States Court of Appeals for the Federal Circuit's finding of a *Lucas* taking in *Loveladies Harbor, Inc. v. United States*.¹⁴⁰ The company developed 199 acres of a 250-acre tract before the United States Army Corps of Engineers' ("Corps") denial of the company's request for a Federal Water Pollution Control Act ("FWPCA") section 404 permit to fill wetlands.¹⁴¹ "The Government argue[d] that the proper denominator [was] the original 250 acre[s]."¹⁴² The court rejected this argument.¹⁴³ It held that the 199 acres developed or sold before the enactment of the FWPCA and the 38.5 acres that *Loveladies* essentially promised to New Jersey in exchange for permit permission from the New Jersey Department of Environmental Protection were not affected by the Corps' permit denial.¹⁴⁴ The Federal Circuit held the remaining 12.5 acres constituted the denominator and were left with de minimis value after the permit denial.¹⁴⁵ *Loveladies* demonstrated that intent to develop its property long before the state and federal regulatory environment changed was important to the court's conclusion that *Loveladies* had treated its acreage as legally separate parcels and that, for purposes of the relevant-parcel analysis, the entire 250 acres did not constitute the relevant parcel, as the government argued.¹⁴⁶

Second, in *State ex rel. R.T.G., Inc. v. State, R.T.G., Inc.* ("RTG") owned surface and coal rights in fee simple in approximately 200 acres, and it leased or owned coal rights in approximately 300 acres.¹⁴⁷ The state designated "a substantial portion of RTG's property" as unsuitable for mining ("UFM").¹⁴⁸ The Supreme Court of Ohio held that the UFM designation resulted in a *Lucas*

taking of RTG's coal that lies under the tracts of land in which RTG owned only coal rights and that are located within the UFM-designated area, as well as the coal rights that lie under the tracts of land that RTG owned in fee and that are located in the UFM-designated area.¹⁴⁹

Central to the court's takings analysis was the mineral rights law of Ohio, pursuant to which, "coal rights are severable and may be considered as a separate property interest if the property owner's intent was to purchase the property solely for the purpose of mining the coal."¹⁵⁰ In tackling the denominator issue, the court analyzed

140. *Loveladies Harbor*, 28 F.3d at 1173, 1183 (upholding a just-compensation award of \$2,658,000 issued by the United States Claims Court).

141. *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1173 n.1, 1180-81 (Fed. Cir. 1994).

142. *Id.* at 1180.

143. *Id.* at 1181.

144. *Id.* (stating that the government failed to convince the court that the trial court was wrong in concluding that the land developed or sold before the regulatory environment existed should not be included in the denominator).

145. *Id.* at 1181.

146. *Id.* at 1183.

147. *State ex rel. R.T.G., Inc. v. State*, 780 N.E.2d 998, 1001 (Ohio 2002).

148. *Id.*

149. *Id.*

150. *Id.* at 1008.

the relevant parcel in the vertical and horizontal contexts.¹⁵¹ The court determined that in the vertical context, the coal rights were the relevant parcel for the regulatory takings analysis.¹⁵² And, in the horizontal context, the court rejected the state's argument that the relevant parcel was all 500 acres of RTG property pursuant to the parcel as a whole rule.¹⁵³ Of the 500 contiguous acres of RTG property, approximately 100 acres were "located outside the UFM-designated area."¹⁵⁴ These "fringe amounts of coal" outside of the UFM-designated area became economically impracticable for RTG to mine after the UFM designation prevented RTG from mining nearly 1.3 million tons of coal located within the UFM-designated area.¹⁵⁵ Thus, the court found the relevant parcel in the horizontal context to be limited to RTG's property located within the UFM-designated area because RTG could not economically mine the coal outside of the UFM-designated area independent of the coal reserves within the UFM-designated area.¹⁵⁶

The third and fourth cases, *Lost Tree Village Corp. v. United States*¹⁵⁷ and *Chapel Hill Title & Abstract Co. v. Town of Chapel Hill*,¹⁵⁸ are perfectly emblematic of the potential for private agreements to transform the denominator for purposes of the *Lucas* analysis. In the third case, *Lost Tree*, a Florida property owner and land developer, sought a section 404 permit from Corps to fill wetlands on a 4.99-acre parcel (Plat 57).¹⁵⁹ Plat 57, along with another parcel, Plat 55, and some scattered wetlands, were the remaining parcels from approximately 1,300 acres that *Lost Tree* purchased and developed over more than two decades.¹⁶⁰ *Lost Tree* built several homes around Plat 57 but did not consider developing Plat 57 until 2002, when the impetus for developing Plat 57 was to use mitigation credits that accrued because of improvements made by a neighboring landowner.¹⁶¹ It obtained all state and local approvals but the Corps denied *Lost Tree*'s wetland fill permit application because it said less environmentally damaging alternatives were available.¹⁶²

151. *Id.* at 1007-09.

152. *Id.* at 1009.

153. *State ex rel. R.T.G., Inc. v. State*, 780 N.E.2d 998, 1009 (Ohio 2002).

154. *Id.*

155. *Id.*

156. *Id.*

157. *See generally* *Lost Tree Vill. Corp. v. United States*, 787 F.3d 1111 (Fed. Cir. 2015) (holding that denying a wetland fill permit was a regulatory taking).

158. *See generally* *Chapel Hill Title & Abstract Co. v. Town of Chapel Hill*, 669 S.E.2d 286 (N.C. 2008) (holding that the town board was obligated to consider an environmental regulation when determining how a property owner might use the property).

159. *Lost Tree*, 787 F.3d at 1113-14.

160. *Id.*

161. *Id.* at 1113.

162. *Lost Tree Vill. Corp. v. United States*, 787 F.3d 1111, 1113-14 (Fed. Cir. 2015).

The government argued that the relevant denominator was the entire John's Island Community, about 1,300 acres previously developed by Lost Tree.¹⁶³ Lost Tree argued that the denominator was solely Plat 57.¹⁶⁴ As in *Loveladies Harbor*, the private agreements in *Lost Tree* that were critical to the success of the *Lucas* takings claim were Lost Tree's formal and informal development plans and its course of development over more than 20 years that resulted in the court treating Plat 57 as a separate economic unit from Lost Tree's other holdings.¹⁶⁵ The court evaluated Lost Tree's economic expectations with respect to its scattered holdings to determine which of Lost Tree's properties made up its denominator.¹⁶⁶ The court refused to extend the parcel as a whole analysis to include Lost Tree's disparate real-estate holdings in the denominator along with Plat 57 and instead chose "a flexible approach, designed to account for factual nuances."¹⁶⁷

The United States Court of Appeals for the Federal Circuit held that the denominator was Plat 57 alone and that Lost Tree's other holdings in the vicinity of Plat 57 could not be aggregated because "Lost Tree had [established] distinct economic expectations for . . . its scattered . . . holdings."¹⁶⁸ The court articulated the following three guidelines for establishing the denominator: "First, the property interest [that is] taken [should] not [be] defined in terms of the regulation being challenged . . ."¹⁶⁹ Instead, "the takings analysis must focus on 'the parcel as a whole.'"¹⁷⁰ Second, all of the property owner's disparate holdings and properties that are located "in the vicinity of the regulated property" are not to be included in the parcel as a whole.¹⁷¹ Finally, the critical issue in determining the relevant parcel is the economic expectations of property owners with regard to the regulated property when they own or have previously held other properties in the vicinity of the regulated property.¹⁷² If such property owners "treat[] several legally distinct parcels as a single economic unit, together they may constitute the relevant parcel" for the takings analysis.¹⁷³ "Conversely, even when contiguous land is purchased . . . the relevant

163. See *id.* at 1113–14; *Lost Tree Vill. Corp. v. United States (Lost Tree II)*, 707 F.3d 1286, 1291 (Fed. Cir. 2013). Lost Tree developed the John's Island community beginning in 1969 through the mid-1990s. *Lost Tree I*, 707 F.3d at 1288.

164. *Lost Tree I*, 707 F.3d at 1291.

165. *Id.* at 1293–94.

166. *Id.*

167. *Id.* at 1293 (quoting *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994)).

168. *Id.* at 1294.

169. *Lost Tree Vill. Corp. v. United States (Lost Tree II)*, 707 F.3d 1286, 1292 (Fed. Cir. 2013) (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe-Sierra Reg'l Planning Agency*, 535 U.S. 302, 331 (2002)).

170. *Id.* (quoting *Tahoe-Sierra*, 535 U.S. at 331).

171. *Id.* at 1292–93.

172. *Id.* at 1293.

173. *Id.* (quoting *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir. 1999)).

parcel may be a subset of the original purchase where the [property] owner develops distinct parcels at different times and treats the parcels as distinct economic units.”¹⁷⁴

On remand from the United States Court of Appeals for the Federal Circuit, the Court of Federal Claims concluded that the permit denial reduced the value of Plat 57 by 99.4%, from \$4,245,387.93 (the value of Plat 57 with the permit and ready for development as a home site) to \$27,500 (Plat 57’s nominal value without the permit).¹⁷⁵ The court said that such a diminution in value was a taking under the *Lucas* categorical framework.¹⁷⁶

When the government appealed the award in favor of Lost Tree in 2015, it argued that Lost Tree’s ability to sell the affected parcel left Lost Tree with an *economic use*, thereby precluding the per se *Lucas* treatment.¹⁷⁷ Rejecting this argument, the United States Court of Appeals for the Federal Circuit held that the *Lucas* decision did not stand for the proposition “that a land sale qualifies as an economic use.”¹⁷⁸ The court observed that typical economic uses would allow owners to benefit from their actual ownership of land instead of requiring the owner to sell the affected parcel to realize any benefit.¹⁷⁹ The court further noted that the government’s argument would lead to a circularity in which no landowner could ever win a *Lucas* challenge. According to the government’s framing, a landowner would have to demonstrate total deprivation by regulation of all land value, including speculative value, to win a *Lucas* challenge.¹⁸⁰ This showing would prompt land speculators to attribute value to the land that was otherwise valueless, based upon the potential viability of a winning *Lucas* claim.¹⁸¹ This attribution of land value based upon speculation would mean that “the very *Lucas* claim on which the speculation was based” would be defeated.¹⁸²

Fourth, *Chapel Hill Title & Abstract Co. v. Town of Chapel Hill* is another compelling example of the interplay of private agreements, public land regulation, and the challenges facing local government decision-makers.¹⁸³ In this case, it was the local government’s enactment of the Resource Conservation District (“RCD”) ordinance, in combination with the impact of private restrictive covenants that gave rise to the *Lucas* takings claim.¹⁸⁴ Chapel Hill Title and Abstract and Jonathan and Lindsay Starr (“Chapel Hill Title”) sought and were denied a variance from the Town of Chapel Hill and the Board of Adjustments to construct a home on a vacant lot zoned for

174. *Id.*

175. *Lost Tree Vill. Corp. v. United States (Lost Tree CFC II)*, 115 Fed. Cl. 219, 233 (2014).

176. *Id.* (stating that the diminution in value was also a compensable taking under the *Penn Central* framework).

177. *Lost Tree Vill. Corp. v. United States*, 787 F.3d 1111, 1117 (Fed. Cir. 2015).

178. *Id.*

179. *Id.*

180. *Id.* at 1118.

181. *Id.*

182. *Id.*

183. *See generally* *Chapel Hill Title & Abstract Co. v. Town of Chapel Hill*, 669 S.E.2d 286 (N.C. 2008).

184. *Id.* at 287.

residential use.¹⁸⁵ Most of the lot, 78.5%, was in the RCD and subject to an ordinance that prohibited construction within the RCD.¹⁸⁶ The remaining 21.5% was located outside of the RCD and was burdened by a restrictive covenant preventing construction of a home on this portion.¹⁸⁷ The combination of the RCD ordinance and the restrictive covenant meant that, absent a variance from the RCD ordinance, Chapel Hill Title would not be able to build on the lot.¹⁸⁸

The case was eventually appealed to the Supreme Court of North Carolina, which articulated the legal question as “whether the Board should consider the operation of the RCD ordinance independently, or in conjunction with, the effect of the private restrictive covenants, when determining if [Chapel Hill Title was] entitled to a variance.”¹⁸⁹ The court determined that the RCD ordinance required the Board of Adjustment “to consider the actual state in which the property is found—including both its physical and legal conditions—and how those conditions interact with the RCD ordinance, when determining if a variance is necessary to leave an owner with a ‘legally reasonable use’ of the property.”¹⁹⁰ Ultimately, the court held that the board of adjustment did not properly consider the available uses of the entire lot for the property owners within the context of the restrictive covenants and the RCD ordinance.¹⁹¹

Justice Brady, concurring, made the *Lucas* takings argument. He rejected the contention that the property outside of the RCD ordinance was developable because the argument failed to consider the impact of the restrictive covenants that burdened and ran with the land.¹⁹² He believed the restrictive covenants that were imposed more than 20 years prior to the RCD ordinance could not be separated from the other legal components of the parcel in the evaluation of the variance request.¹⁹³ He concluded that the Town of Chapel Hill had two options, either grant the variance or compensate the owners for a *Lucas* taking of their property.¹⁹⁴

The fifth case, *Love Terminal Partners v. United States*, is the most recent case in this category and represents a huge win for property owners with a just-compensation award of \$133,500,000.¹⁹⁵ The plaintiffs were leaseholders of property located at Dallas Love Field Airport when the federal government enacted the Wright Amendment Reform Act of 2006 (“WARA”).¹⁹⁶ The plaintiffs alleged that the

185. *Id.* at 286–87.

186. *Id.* at 287.

187. *Id.* at 288.

188. *Id.* at 287–88.

189. *Chapel Hill Title & Abstract Co. v. Town of Chapel Hill*, 669 S.E.2d 286, 288 (N.C. 2008).

190. *Id.*

191. *Id.*

192. *Id.* at 290 (Brady, J., concurring).

193. *Id.*

194. *Id.*

195. *Love Terminal Partners v. United States*, 126 Fed. Cl. 389, 440 (2016), *appeal docketed*, No. 16-2276 (Fed. Cir. Jun. 30, 2016).

196. *Id.* at 394.

enactment of WARA directly “prohibited the use of their property” for its highest and best use as a passenger air terminal, which also was the only use permitted under the master lease.¹⁹⁷ Specifically, one of the plaintiffs’ experts, whom the court found persuasive, testified that after the enactment of WARA, “there were ‘no other economical uses’” for the leasehold property, and he “defined economical use as whether revenue would exceed expenses.”¹⁹⁸ Essentially, he imagined a negative-value situation after enactment of WARA. The court concluded that because WARA prohibited the plaintiffs from using the leased property as a commercial airline terminal that was both the highest and best purpose of the leasehold and also the only use permitted under the master lease, the enactment of WARA left the property with no remaining economic value, thus, a *Lucas* categorical taking of the plaintiffs’ entire leasehold.¹⁹⁹ The United States appealed to the Federal Circuit in June of 2016.²⁰⁰

In summary, the winning *Lucas* cases represent a reinvigoration of the Takings Clause, albeit modest, as a check on government regulatory action against property owners.²⁰¹ The owners succeeded in establishing their development and economic expectations in such a manner that the courts were willing to treat the regulated parcels as separate economic units for the purpose of the *Lucas* categorical takings analysis. The *Lucas* losers help isolate what it takes to be a *Lucas* winner because the losers did not have what the *Lucas* winners had. Meaning, the owners in the losing cases did not establish sufficient factual underpinnings so that courts, looking behind the structure of their acquisitions and development plans, found an economic reality that warranted treating the regulated parcel as a separate economic unit.

There are three unsuccessful *Lucas* challenges in this category of private agreements and the denominator that are noteworthy for their potential to help focus the lens on the successful *Lucas* challenges. The first is *Appollo Fuels, Inc. v. United States*.²⁰² The second is *Forest Properties, Inc. v. United States*.²⁰³ The third is *National Lime & Stone Co. v. Blanchard Township*.²⁰⁴

At issue in the first case, *Appollo Fuels, Inc. v. United States*, was whether the government’s prevention of surface mining based upon a citizen petition pursuant to

197. *Id.*

198. *Id.* at 413 & n.17.

199. *Id.* at 418.

200. *Love Terminal Partners v. United States*, 126 Fed. Cl. 389, 440 (2016), *appeal docketed*, No. 16-2276 (Fed. Cir. Jun. 30, 2016).

201. See Richard A. Epstein, *The Seven Deadly Sins of Takings Law: The Dissents in Lucas v. South Carolina Coastal Council*, 26 LOY. L.A. L. REV. 955, 956 (1993) (describing Justices Scalia’s and Kennedy’s *Lucas* opinions as “efforts to rehabilitate the Takings Clause as a limit on government action in the teeth of an unbroken line of cases upholding state land use regulation from the days of *Village of Euclid v. Ambler Realty Co.* to the present.” (footnote omitted)). See generally Carol Necole Brown, *Justice Thomas’s Kelo Dissent: The Perilous and Political Nature of Public Purpose*, 23 GEO. MASON L. REV. 273 (2016) (discussing a check on government takings).

202. See generally *Appollo Fuels, Inc. v. United States*, 54 Fed. Cl. 717 (2002).

203. See generally *Forest Props., Inc. v. United States*, 177 F.3d 1360 (Fed. Cir. 1999).

204. See generally *Nat’l Lime & Stone Co. v. Blanchard Twp.*, Nos. 6-04-04, 6-04-05, 2005 WL 2840493 (Ohio Ct. App. Oct. 31, 2005).

section 1272 of the Surface Mining Control and Reclamation Act (“SMCRA”) effected a *Lucas* taking of the plaintiff’s property interests.²⁰⁵ Plaintiff’s property interests consisted of numerous “leases grant[ing] surface, deep, and auger mining rights” and other unspecified fee interests located both inside of and outside of the Creek watershed.²⁰⁶ The government’s regulatory activity was limited to the Creek watershed, which left the plaintiff with some areas it could mine without the government’s regulatory interference.²⁰⁷

The *Appollo* court rejected *Loveladies Harbor, Inc. v. United States* as providing support for the plaintiff’s description of the denominator as consisting only of the coal reserves mineable by surface that it held within the Creek watershed.²⁰⁸ The court found that, based upon the plaintiff’s acquisition of its property interests more than ten years after the passage of the SMCRA, the plaintiff’s development expectations formed *after* the “imposition of [the] regulatory framework” that it alleged created a taking.²⁰⁹ “The relevant parcel in *Loveladies* coincided with the area covered by the permit only because the remainder of plaintiff’s property was either developed before the imposition of the federal regulatory scheme or was required by the state to remain undeveloped wetlands.”²¹⁰ Relying upon factual nuances to distinguish the cases raised, the court stated that controlling case law required it to look “beyond the regulated portion of the property in determining the appropriate parcel as a whole”²¹¹ and “to consider [the] plaintiff’s overall business plan for the land at issue.”²¹²

Interestingly, the court reiterated what other federal courts have said: property owners may not engineer a successful *Lucas* claim.²¹³ While there was no direct indication that the plaintiff’s acquisitions and limitations were strategic for improving the odds of a *Lucas* claim, and while the plaintiff denied such, the court expressly noted that the plaintiff did not support its disclaimer with any evidence.²¹⁴

In the second case, the United States Court of Appeals for the Federal Circuit in *Forest Properties, Inc. v. United States* also found *Loveladies* inapplicable and rejected the property owner’s argument that the relevant parcel for the denominator was 9.4 acres of lake bottom.²¹⁵ Instead, the court held that the relevant parcel was the entire 62-acre tract, consisting of the 9.4 acres of lake bottom and 53 acres of upland

205. *Appollo Fuels*, 54 Fed. Cl. at 722.

206. *Id.* at 726.

207. *Id.*

208. *Appollo Fuels, Inc. v. United States*, 54 Fed. Cl. 717, 724, 726–27 (2002).

209. *Id.* at 727–28.

210. *Id.* at 727.

211. *Id.* at 725; *see also* *State ex rel. R.T.G., Inc. v. State*, 780 N.E.2d 998, 1006 (Ohio 2002) (adopting the definition of the denominator as consisting only of the regulated land).

212. *Appollo Fuels*, 54 Fed. Cl. at 730.

213. *Id.* at 727–28.

214. *Appollo Fuels, Inc. v. United States*, 54 Fed. Cl. 717, 727–28 (2002).

215. *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir. 1999).

property.²¹⁶ The property owner had alleged a *Lucas* taking when the government denied a section 404 dredge and fill permit.²¹⁷

In both *Loveladies* and *Forest Properties*, the original purchase and the owners' economic intentions at the outset were critically important in establishing the relevant parcel through the denominator. Ultimately, what set *Forest Properties* apart from *Loveladies* was the *Forest Properties* court's perception that, from the beginning, the entire 62-acre project was one integrated, single project that was comprised of two tracts.²¹⁸ *Forest Properties* acquired interests in a total of 62 acres, though at separate times, but always with a single project of 62 acres in mind.²¹⁹ So, even though the two tracts were legally separate, for the *Forest Properties* court, they were a single economic unit and therefore properly constituted the relevant parcel of the denominator.²²⁰

In the third case, *National Lime & Stone Co. v. Blanchard Township*, the owner argued that the court should follow the precedent of *State ex rel. R.T.G., Inc. v. State*,²²¹ which held that pursuant to state law, "mineral rights are recognized . . . as separate property rights. Therefore . . . ownership of the coal is 'both severable and of value in its own right.'"²²² The property owner purchased approximately 235 acres of real property intending to convert it into a limestone quarry.²²³ The property had been previously farmed, and at the time of its acquisition by the plaintiff, there were no restrictive zoning ordinances in force.²²⁴ Approximately four months after the plaintiff acquired the property, the municipality passed a zoning resolution prohibiting use of the property as a limestone quarry.²²⁵

The court rejected *RTG* as binding precedent, relying upon the intent of the purchaser as controlling guidance.²²⁶ The court distinguished the facts in its case from those in *RTG*, noting that the coal company in *RTG* engaged in significant testing of the property for coal deposits and spent a substantial amount of money assessing the property's viability.²²⁷ Additionally, *RTG* had successfully mined coal for several years prior to the state designating the property as unsuitable and so had engaged in mining before the alleged taking, unlike the property owner.²²⁸ Based upon these findings, the

216. *Id.*

217. *Id.* at 1364-65.

218. *Id.* at 1365.

219. *Id.*

220. *Id.*

221. *Nat'l Lime & Stone Co. v. Blanchard Twp.*, Nos. 6-04-04, 6-04-05, 2005 WL 2840493, at *7 (Ohio Ct. App. Oct. 31, 2005).

222. *State ex rel. R.T.G., Inc. v. State*, 780 N.E.2d 998, 1008 (Ohio 2002) (citation omitted) (quoting *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 520 (1987) (Rehnquist, J., dissenting)).

223. *Nat'l Lime & Stone Co.*, 2005 WL 2840493, at *1.

224. *Id.*

225. *Id.*

226. *Id.* at *8- *9.

227. *Nat'l Lime & Stone Co. v. Blanchard Twp.*, Nos. 6-04-04, 6-04-05, 2005 WL 2840493, at *9 (Ohio Ct. App. Oct. 31, 2005).

228. *Id.*

National court concluded that RTG had done significantly more than the property owner.²²⁹

In sum, the difference between the *Lucas* winners and losers turns on the property owners' economic expectations, how those expectations shaped the owners' use of their property, and the owners' ability to profit from the use of their properties in the shadow of the regulatory scheme. The winners were able to establish from their acquisition, use, and development that the regulated property was a separate estate for purposes of defining the denominator and that their economic expectations pre-dated the regulation that they claimed resulted in a *Lucas* taking. In the losing cases, the economic reality underlying the property arrangements inclined the courts to see the regulated parcels as part of larger economic units that included other unregulated property, resulting in applying the parcel as a whole approach.

C. PYRAMIDAL SEGMENTATION AND PUBLIC LAW IMPACT

The parcel as a whole rule addresses the segmentation of possessory interests vertically,²³⁰ horizontally,²³¹ temporally,²³² or functionally.²³³ In contrast, what we call "pyramidal segmentation" describes segmentation of uses under the ubiquitous zoning pyramid. The zoning pyramid, often referred to as "cumulative" zoning, traces its roots back to the landmark Supreme Court decision, *Village of Euclid v. Ambler Realty Co.*²³⁴ In that case, the Village enacted its zoning ordinance in 1922, creating six use-zoning classifications that were based upon a pyramid of uses that increased in their inclusiveness as one moved down the pyramid.²³⁵ The least intensive use zones are at the very top of the zoning pyramid—e.g., single-family—and the most intensive use zones are at the bottom of the zoning pyramid—e.g., industrial.²³⁶

Downzoning is the process of changing the allowable density on a parcel by rezoning the property from a less restrictive use regulation category to a more restrictive use regulation category (moving up the zoning pyramid).²³⁷ Such rezoning, for example from commercial use to residential use, is called downzoning because, in theory, as one moves up the zoning pyramid, property becomes less valuable because fewer uses are permitted of the property.²³⁸ Upzoning is changing the allowable density

229. *Id.*

230. *See supra* notes 88, 151–52 and accompanying text.

231. *See supra* notes 89, 151, 153 and accompanying text.

232. *See supra* note 90 and accompanying text.

233. *See supra* note 91 and accompanying text.

234. *See generally* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

235. *Id.* at 379–81.

236. *Id.* at 380–81.

237. Vicki Been et al., *Urban Land-Use Regulation: Are Homevoters Overtaking the Growth Machine?*, 11 J. EMPIRICAL LEGAL STUD. 227, 229 (2014).

238. *See id.* at 238 (“[F]or parcels initially zoned for commercial, business, or industrial uses (but not residential), as the difference between the estimated value of the property under an alternative zoning category and its existing value increases, so does the probability of it being rezoned.”).

on a parcel by rezoning the property from a more restrictive use regulation category to a less restrictive use regulation category further down the zoning pyramid—for example, moving from a single-family residential zoning classification to a multi-family residential zoning classification.²³⁹ Property owners typically do not object to upzoning because, in theory, property becomes more valuable as one moves down the zoning pyramid to permit more uses of the property and to impose fewer land use restrictions on the property.²⁴⁰

The 12 cases in this category show the impact of inclusionary zoning: the less inclusive the zoning classification (meaning the less intensive the permitted uses), the more viable the *Lucas* claim.²⁴¹ Of the 12 cases, this section discusses six. The first case is *State ex rel. Greenacres Foundation v. City of Cincinnati*.²⁴² The second case is *City of Sherman v. Wayne*.²⁴³ The third case is *Steel v. Cape Corp.*²⁴⁴ The fourth case is *Galleon Bay Corp. v. Board of County Commissioners of Monroe County*.²⁴⁵ The fifth case is *Ali v. City of Los Angeles*.²⁴⁶ And the sixth case is *Dunlap v. City of Nooksack*.²⁴⁷

First, in *State ex rel. Greenacres Foundation v. City of Cincinnati*, a charitable foundation applied for a demolition permit to remove an existing, dilapidated single-family home that had been uninhabited since 1961.²⁴⁸ The house, known as the Gamble House because it was once occupied by James N. Gamble, the son of one of the founders of Procter & Gamble, was located on a 2.85-acre portion of a 22-acre site owned by the Greenacres Foundation.²⁴⁹ The house was located on land zoned in a “single family residential district with no historic overlay.”²⁵⁰ After the demolition permit request, the Cincinnati City Council imposed historic district zoning on the acreage where the house was located.²⁵¹ Ultimately, the court concluded that the demolition permit application ought to have been processed pursuant to the law as it was pending when Greenacres applied for the permit.²⁵² Nearly three years after Greenacres applied for the demolition permit, the City of Cincinnati issued the

239. *Id.* at 244 & n.97.

240. *See id.* at 244 & n.97, 247 (describing upzoning as a process, after which, property can be developed at great density).

241. *See infra* Appendix, Table 3.

242. *See generally* *State ex rel. Greenacres Found. v. City of Cincinnati*, 56 N.E.3d 335 (Ohio Ct. App. 2015).

243. *See generally* *City of Sherman v. Wayne*, 266 S.W.3d 34 (Tex. Ct. App. 2008).

244. *See generally* *Steel v. Cape Corp.*, 677 A.2d 634 (Md. Ct. Spec. App. 1996).

245. *See generally* *Galleon Bay Corp. v. Bd. of Cty. Comm'rs*, 105 So. 3d 555 (Fla. Dist. Ct. App. 2012).

246. *See generally* *Ali v. City of Los Angeles*, 91 Cal. Rptr. 2d 458 (Cal. Ct. App. 1999).

247. *See generally* *Dunlap v. City of Nooksack*, No. 63747-9-I, 2010 WL 4159286 (Wash. Ct. App. Oct. 25, 2010).

248. *State ex rel. Greenacres Found. v. City of Cincinnati*, 56 N.E.3d 335, 337 (Ohio Ct. App. 2015).

249. *Id.*

250. *Id.*

251. *Id.* at 338.

252. *Id.* at 339.

permit, and it took nearly seven additional months from the issuance of the permit for the city to remove the historic district overlay designation from Greenacres' property.²⁵³ The court held that denial of Greenacres' application caused a *Lucas* temporary regulatory taking even though it was only part of a much larger property in single ownership because the house was uninhabitable and could not be used without incurring extensive expense, and use as a museum, as advocated by permit opponents, would have required additional millions of dollars for maintenance, rendering the property economically unviable and creating a property with negative value.²⁵⁴

Second, the property in *City of Sherman v. Wayne* had been used commercially as an armory and vehicle storage site when the municipality downzoned the property to a residential zone and then refused to grant the owner non-conforming use status.²⁵⁵ The court found that enforcement of the residential ordinance was a *Lucas* taking because the environmental remediation costs and the lack of demand for residential use resulted in the property having a negative value.²⁵⁶

Third, after the owner's property in *Steel v. Cape Corp.* was improperly downzoned from a residential classification to an open space classification, permitting no residences, the owner requested a rezoning to the original residential classification.²⁵⁷ The government denied the request on the basis that the rezoning to a residential classification would make the school facilities inadequate.²⁵⁸ The court found that a *Lucas* taking resulted from the combination of the zoning regulation and the adequate facilities ordinance that left the property unusable for viable economic purposes.²⁵⁹ Against a background of aberrational facts²⁶⁰—impermissible rezoning of property to an open space classification that did not include and was not intended to include viable economic residential or commercial uses except as an accessory to an already existing residential use—the court held that the statutory scheme resulted in a *Lucas* taking.²⁶¹

253. *Id.* at 339-40.

254. *State ex rel. Greenacres Found. v. City of Cincinnati*, 56 N.E.3d 335, 343-45 (Ohio Ct. App. 2015).

255. *City of Sherman v. Wayne*, 266 S.W.3d 34, 39-40 (Tex. App. 2008).

256. *Id.* at 46-47.

257. *Steel v. Cape Corp.*, 677 A.2d 634, 635-37 (Md. Ct. Spec. App. 1996). The downzoning occurred at the request of an entity that improperly alleged that it held an ownership interest in the subject property. *Id.* at 635-36.

258. *Id.* at 638-39.

259. *Id.* at 649.

260. *See id.* at 646 ("The hearing officer was not an owner of the property and there was no proper application before him for RLD. He had the authority to grant or deny that particular application, not some other application not made. We hold that to grant rezoning to a classification not applied for was improper. Moreover, in light of his comments, we hold that the hearing examiner/administrator, when he denied appellee's request for rezoning and purported to grant to appellee an unsought for RLD classification, was attempting to create the new rezoning equivalent of the South Carolina new 'special permit' procedure adopted by that state to thwart the constitutional takings resolution.").

261. *Id.* at 650-51.

Fourth, the plaintiff in *Galleon Bay Corp. v. Board of County Commissioners* owned 10.64 acres of land in fee simple.²⁶² Six of the acres were landlocked, subject to utility easements and roads, or restricted by perpetual conservation easements.²⁶³ Amendment of the Rate of Growth Ordinance in the Florida Keys Year 2010 Comprehensive Plan made it practically impossible for Galleon to build on the remaining 4.64 acres that were divided into 14 residential lots.²⁶⁴ The court of appeals found a *Lucas* taking, holding that the trial court erred in considering the plaintiff's separately platted subdivisions that had been developed decades earlier when the court determined the impact of the regulation on the plaintiff.²⁶⁵

Fifth, in *Ali v. City of Los Angeles*, the property owner applied for a permit to demolish his hotel after it "was substantially destroyed by fire in . . . 1988."²⁶⁶ The City thought the hotel was a single room occupancy ("SRO") hotel and denied the demolition permit because "the City had an ordinance [that] prohibit[ed] demoli[shing] . . . such low-income housing unless (1) it was infeasible to repair, or (2) the owner agreed to replace it with similar housing, or (3) the owner established extreme hardship for an exemption."²⁶⁷ Almost two years later, the City determined that the hotel "was not an SRO hotel" and issued the demolition permit.²⁶⁸ In the interim, the City contracted for security for the abandoned hotel and assessed the cost against the owner, pursuant to a City ordinance.²⁶⁹

On a previous appeal, the court held that the City's "delay in issuing the demolition permit" pursuant to "the SRO ordinance violated the Ellis Act" that forbade public entities from "compel[ling] . . . owner[s] of . . . residential real property to offer or to continue to offer" residential property for lease or rent.²⁷⁰ This court found that the wrongful denial and delay in issuing the demolition permit was not the type of "normal delay in the development process" that allows governments to escape takings liability.²⁷¹ The court noted that the SRO ordinance's inapplicability in light of the Ellis Act was evident from a 1988 Santa Monica rent-control ordinance case that involved similar requirements to this case.²⁷² And, because of the almost two-year delay during which Ali could not do anything with the property, the court found that Ali was temporarily deprived of all economically viable use and upheld the trial court's finding of a *Lucas* taking.²⁷³

262. *Galleon Bay Corp. v. Bd. of Cty. Comm'rs*, 105 So. 3d 555, 557 (Fla. Dist. Ct. App. 2012).

263. *Id.* at 557-58.

264. *Id.* at 562.

265. *Id.* at 567, 569.

266. *Ali v. City of Los Angeles*, 91 Cal. Rptr. 2d 458, 459 (Cal. Ct. App. 1999).

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.* at 460.

271. *Id.* at 465-66.

272. *Ali v. City of Los Angeles*, 91 Cal. Rptr. 2d 458, 464-65 (Cal. Ct. App. 1999) (citing *Javidzad v. City of Santa Monica*, 251 Cal. Rptr. 350 (Cal. Ct. App. 1988), *superseded by statute as stated in Lincoln Place Tenants Ass'n v. City of Los Angeles*, 66 Cal. Rptr. 3d 120 (Cal. Ct. App. 2007)).

273. *Id.* at 460, 465-66.

Interestingly, the *Ali* court did not decide the dispute on substantive due process grounds even though the court, citing *Landgate, Inc. v. California Coastal Commission*,²⁷⁴ found that the delay in issuing the demolition permit under the circumstances “was ‘so unreasonable from a legal standpoint’ as to be arbitrary[] [and] not in furtherance of any legitimate governmental objective.”²⁷⁵ Perhaps the answer lies in the fact that nearly 20 years prior to *Ali*, the United States Supreme Court said in *Agins v. City of Tiburon* that “[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests.”²⁷⁶ Six years after *Ali*, the Court in *Lingle v. Chevron U.S.A. Inc.* held that *Agins*’s “‘substantially advances’ formula . . . is not a valid method of identifying regulatory takings for which the Fifth Amendment requires just compensation.”²⁷⁷ So, these twists and turns in Supreme Court jurisprudence may undermine *Ali*’s precedential value in the eminent-domain context for future courts presented with similar facts.

Sixth and finally, a denial of an area variance was the *Lucas* taking precipitant in *Dunlap v. City of Nooksack*.²⁷⁸ The plaintiff owned separate 29.5-acre and 0.25-acre parcels in fee simple.²⁷⁹ The 0.25-acre parcel was zoned residential when the plaintiff requested an area variance to build a house and to retain a constructed fence.²⁸⁰ The court found the denial of the variance resulted in a *Lucas* taking of the 0.25-acre parcel.²⁸¹ According to the court, though the plaintiffs could build a 480-square-foot house on the parcel, it would not be economically viable, and the buffers rendered the remaining 95.6% of the lot useable.²⁸²

The essence of these winning *Lucas* cases in the pyramidal segmentation and public law impact category is that the *Lucas* claim gains more strength the more government restricts the use and development on property already situated in the least inclusive use zones. The difference between the *Lucas* winners and losers is that the winners frequently could point to some improper, erroneous, or aggressive application by the government of its zoning or permitting discretion that, in combination with the already restrictive zoning, left the property valueless.²⁸³ In many of the winning *Lucas*

274. See generally *Landgate, Inc. v. Cal. Coastal Comm’n*, 953 P.2d 1188 (Cal. 1998).

275. *Ali*, 91 Cal. Rptr. 2d at 464 (citation omitted).

276. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), *abrogated by* *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005).

277. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 545 (2005).

278. *Dunlap v. City of Nooksack*, No. 63747-9-I, 2010 WL 4159286, at *4-5 (Wash. Ct. App. Oct. 25, 2010).

279. *Id.* at *1.

280. *Id.*

281. *Id.* at *6.

282. *Id.*

283. See generally *Ali v. City of Los Angeles*, 91 Cal. Rptr. 2d 458 (Cal. Ct. App. 1999); *Steel v. Cape Corp.*, 677 A.2d 634 (Md. Ct. Spec. App. 1996); *State ex rel. Greenacres Found. v. City of Cincinnati*, 56 N.E.3d 335 (Ohio Ct. App. 2015). Denial of a certificate of appropriateness and the application of the Cumberland Historic Zoning Ordinance to the church to demolish a monastery was a *Lucas* taking because buildings were in serious disrepair and the refusal “require[d] the Church to maintain the Monastery at a

cases, the government seemed oblivious to the fact that the combination of the restrictive zoning classification and the refusal to exercise its discretion in the form of a variance denial, non-conforming use application denial, or other development denial left the property undevelopable and even with negative value.²⁸⁴ The losers in this category help isolate these distinguishing qualities of the winning *Lucas* cases. They make the point of the winning cases, just from the other side.

Next, we take a quick look at five pyramidal segmentation and public law impact cases that were unsuccessful in joining that small, inner circle of the winning *Lucas* cases in this category. The first is *Erb v. Maryland Department of the Environment*.²⁸⁵ The second is *Beyer v. City of Marathon*.²⁸⁶ The third is *Collins v. Monroe County*.²⁸⁷ The fourth is *Loewenstein v. City of Lafayette*.²⁸⁸ And the fifth is *Allegretti & Co. v. County of Imperial*.²⁸⁹

First, in *Erb v. Maryland Department of the Environment*, the property owner alleged a *Lucas* taking after being denied a permit for a septic system essential to developing his property.²⁹⁰ The court found the property owner had not established anything more than a great diminution in value from the present inability to build.²⁹¹ Further, there was evidence of alternative means of sewage disposal possibly available to the owner.²⁹² The court held that the owner had not presented sufficient evidence of a denial of all economically beneficial use to establish a *Lucas* taking.²⁹³ Additionally, unlike *Steel v. Cape Corp.*, in which the court found a *Lucas* taking after rejecting a nuisance abatement defense and under highly unusual facts in the form of an improper rezoning at the request of an entity with no legal interest in the rezoned property,²⁹⁴ the *Erb* court held that the Maryland Department of Environment's

safe standard of repair.” *Keeler v. Mayor of Cumberland*, 940 F. Supp. 879, 888 (D. Md. 1996). The church estimated complete renovation costs at two million dollars, and the church estimated “[t]he cost to ‘retain and adequately maintain’ the shell” and minimal building interior temperatures at \$386,440. *Id.* The city “stipulated that ‘no economically feasible plan can be formulated’ for the preservation of the Church buildings.” *Id.*

284. See generally *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1996), *aff'd*, 526 U.S. 687 (1999); *Galleon Bay Corp. v. Bd. of Cty. Comm’rs*, 105 So. 3d 555 (Fla. Dist. Ct. App. 2012); *Heaphy v. State*, No. 03-45407-AA, 2004 WL 5573602 (Mich. Cir. Ct. Apr. 28, 2004); *Moroney v. Mayor of Old Tappan*, 633 A.2d 1045 (N.J. Super. Ct. App. Div. 1993); *City of Sherman v. Wayne*, 266 S.W.3d 34 (Tex. App. 2008).

285. See generally *Erb v. Md. Dep’t of the Env’t*, 676 A.2d 1017 (Md. Ct. Spec. App. 1996).

286. See generally *Beyer v. City of Marathon*, 197 So. 3d 563 (Fla. Dist. Ct. App. 2013). The Beyers were allowed to camp on the property but not build. *Id.* at 565.

287. See generally *Collins v. Monroe County*, 118 So. 3d 872, 873 (Fla. Dist. Ct. App. 2013).

288. See generally *Loewenstein v. City of Lafayette*, 127 Cal. Rptr. 2d 79 (Cal. Ct. App. 2002).

289. See generally *Allegretti & Co. v. County of Imperial*, 42 Cal. Rptr. 3d 122 (Cal. Ct. App. 2006).

290. *Erb*, 676 A.2d at 1025-26.

291. *Erb v. Md. Dep’t of the Env’t*, 676 A.2d 1017, 1026 (Md. Ct. Spec. App. 1996).

292. *Id.*

293. *Id.* at 1027-28.

294. *Steel v. Cape Corp.*, 677 A.2d 634, 650-51 (Md. Ct. Spec. App. 1996).

sewage regulatory scheme did “no more than could be accomplished under the nuisance laws of [the] State.”²⁹⁵

In essence, the *Erb* court found that in *Steel v. Cape Corp.* the imposition of the zoning scheme left the property with no economic use, and the nuisance exception did not apply to provide a defense to the *Lucas* taking.²⁹⁶ In contrast, according to the *Erb* court, the property owner in that case did not meet his burden of showing a deprivation of all economic use and, even if he had met this burden and proven that the imposition of the regulatory scheme left his property “economically barren, no compensation would be due because the State has a right—and, indeed, an obligation—to regulate against the creation of nuisances.”²⁹⁷ In other words, the nuisance defense applied in *Erb* and would defeat a *Lucas* takings claim.

Next, the courts in two cases rejected attempts by property owners to bring their claims under the umbrella of *Galleon Bay Corp. v. Board of County Commissioners*.²⁹⁸ The second of the unsuccessful cases highlighted in this category is *Beyer v. City of Marathon* in which the government adopted a comprehensive plan and subsequently denied the property owners the right to engage in any development on their property.²⁹⁹ The owners sued, alleging a deprivation of all or substantially all economic use of the property.³⁰⁰ In ruling against the owners, the *Beyer* court distinguished this case from *Galleon Bay* in which the appeals court held that *Galleon* had suffered a *Lucas* taking after many years of unsuccessful attempts at approvals to improve and develop its property.³⁰¹ The *Beyer* court found that the points assigned to the property under the City’s Residential Rate of Growth Ordinance had a value of \$150,000 and constituted “reasonable economic use of the property” and that this value, coupled with the recreational uses permitted on the property, left the owners with economically beneficial use.³⁰²

Third, in *Collins v. Monroe County* the property owners filed a petition for a Beneficial Use Determination (“BUD”), which required that the property owners prove that the land development regulations and the comprehensive plan that were effective at the time of the BUD application deprived them of all reasonable use of the regulated property.³⁰³ The court found no *Lucas* taking and contrasted the situation of the property owners in *Collins* to the situation of the property owners in *Galleon Bay*.³⁰⁴ The *Collins* court stated that the property owners in *Galleon Bay* spent

295. *Erb*, 676 A.2d at 1026.

296. *Id.*

297. *Erb v. Md. Dep’t of the Env’t*, 676 A.2d 1017, 1026–27 (Md. Ct. Spec. App. 1996).

298. *See generally* *Galleon Bay Corp. v. Bd. of Cty. Comm’rs*, 105 So. 3d 555 (Fla. Dist. Ct. App. 2012).

299. *Beyer v. City of Marathon*, 197 So. 3d 563, 564 (Fla. Dist. Ct. App. 2013).

300. *Id.* at 565 (discussing the Beyers’ complaint which alleged a deprivation “of all or substantially all reasonable economic use of the property by virtue of the changes in land use regulations over the years”).

301. *Id.* at 566.

302. *Id.* at 565.

303. *Collins v. Monroe County*, 118 So. 3d 872, 873 (Fla. Dist. Ct. App. 2013).

304. *Id.* at 876.

hundreds of thousands of dollars pursuing reasonable investment-backed expectations and trying to develop the property.³⁰⁵ In contrast, the property owners in *Collins* were passive and did not invest much into the improvement or development of the regulated property other than their initial cost of purchase.³⁰⁶

In sum, the *Collins* property owners could not take advantage of the *Galleon Bay* precedent because they failed to explore the development options of their land that were available to them in a meaningful way prior to the regulatory impact.³⁰⁷ Without having made substantial efforts to explore their property's development potential over the decades of their ownership and in light of the fact that building permits were available to them under the regulatory framework, the *Collins* court found that the facts of the *Galleon Bay* case starkly contrasted the facts in *Collins*.³⁰⁸

In the fourth and fifth cases, the property owners in *Loewenstein v. City of Lafayette*³⁰⁹ and *Allegretti & Co. v. County of Imperial*³¹⁰ unsuccessfully attempted to bring their cases within the precedent of *Ali v. City of Los Angeles*,³¹¹ in which the court held that a “delay in demolition caused by the erroneous enforcement of [a single room occupancy] ordinance despite the prohibitions of the Ellis Act . . . temporarily deprived [the property owner] of all use of his property and . . . was a temporary regulatory taking.”³¹² The *Loewenstein* court distinguished its facts from those of *Ali* when it held that a two-year delay before denying a lot-line-adjust application did not constitute a taking.³¹³ The *Loewenstein* court noted that, unlike in *Ali*, the City did not violate a state law in denying the application and the resolution of the application was a normal delay in the land use permitting process.³¹⁴ Similarly, the court in *Allegretti* held that the County's restrictions on the property owner's ground water use did not constitute a *Lucas* taking and the case was not comparable to the *Ali* facts because the County's actions were “not objectively unreasonable” unlike *Ali* in which the court found the City's actions violated state law.³¹⁵

In summary, the properties in the successful *Lucas* cases were mostly owned in fee simple absolute and were zoned in the least inclusive zoning classifications—ones higher up the zoning pyramid.³¹⁶ The *Lucas* takings issues arose when governments enforced zoning ordinances and denied owners' requests for development approval or some other land use concession.³¹⁷ The *Lucas* takings resulted from the

305. *Id.* at 876 n.7.

306. *Id.* at 876 & n.7.

307. *Id.* at 876.

308. *Id.*

309. *See generally* *Loewenstein v. City of Lafayette*, 127 Cal. Rptr. 2d 79 (Cal. Ct. App. 2002).

310. *See generally* *Allegretti & Co. v. County of Imperial*, 42 Cal. Rptr. 3d 122 (Cal. Ct. App. 2006).

311. *See generally* *Ali v. City of Los Angeles*, 91 Cal. Rptr. 2d 458 (Cal. Ct. App. 1999).

312. *Id.* at 465.

313. *Loewenstein*, 127 Cal. Rptr. 2d at 92–93.

314. *Id.* at 93.

315. *Allegretti*, 42 Cal. Rptr. 3d at 139.

316. *See supra* Part III.A.

317. *See supra* Part III.C.

combination of the properties' classification in the least intensive zones of the zoning pyramid and governments' refusal to exercise their discretion to allow for deviations from the as-of-right uses.³¹⁸ Restrictive zoning policies and refusal by governments to exercise their zoning discretion are unifying themes in these cases.

D. DELAY THEORY

Normal delays in the permitting process are typically reviewed under the *Penn Central* takings framework and often will not result in compensable regulatory takings.³¹⁹ But, in the four cases in this category, the courts applied a *Lucas* takings framework because they involved something other than a normal development delay. Governmental bad behavior and a close hewing to common-law nuisance principles are unifying themes of the delay theory cases.

In the first and second cases, *People ex rel. Department of Transportation v. Diversified Properties Co.*³²⁰ and *Jefferson Street Ventures, LLC v. City of Indio*,³²¹ the courts found that unreasonable delay by the state in instituting its condemnation proceedings deprived the property owners of all of their development rights in commercially zoned properties, thereby rendering the restricted properties unmarketable.³²² In sum, the courts were willing to segment the denominator, moving away from a parcel as a whole approach, when they perceived government as essentially attempting to take property from a constitutional perspective but without the formal process of condemnation and payment of just compensation.³²³

First, in *Diversified Properties*, the property owner, Diversified Properties Co. ("DPC"), purchased more than 17 acres of land in fee simple for commercial development.³²⁴ Prior to completing the purchase, DPC was aware that the state had designated part of the land for a possible freeway right of way.³²⁵ A total of 4.5 acres were set aside to accommodate the state's future highway plans.³²⁶ The court found a *Lucas* taking resulting from the city's decision to block the development of the 4.5 acres until the state finalized its highway plans.³²⁷ Affirming the trial court's ruling, the

318. See *supra* Part III.

319. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 320-21 (2002) (rejecting a categorical rule that "the mere enactment of a temporary regulation that, while in effect, denies a property owner all viable economic use of her property gives rise to an unqualified constitutional obligation to compensate her for the value of its use during that period" and concluding that the *Penn Central* framework was the appropriate framework for analyzing the case); see also *supra* Part II.D.3 (discussing the "denominator question" found in the *Penn Central* framework).

320. See generally *People ex rel. Dep't of Transp. v. Diversified Props. Co. III*, 17 Cal. Rptr. 2d 676 (Cal. Ct. App. 1993).

321. See generally *Jefferson St. Ventures, LLC v. City of Indio*, 187 Cal. Rptr. 3d 155 (Cal. Ct. App. 2015).

322. See generally *id.*; *Diversified Props.*, 17 Cal. Rptr. 2d 676.

323. See generally *Jefferson St. Ventures*, 187 Cal. Rptr. 3d 155; *Diversified Props.*, 17 Cal. Rptr. 2d 676.

324. *Diversified Props.*, 17 Cal. Rptr. 2d at 678.

325. *Id.*

326. *People ex rel. Dep't of Transp. v. Diversified Props. Co. III*, 17 Cal. Rptr. 2d 676, 679 (Cal. Ct. App. 1993).

327. *Id.*

court of appeals said that the state “sat back” while the City, through use of its development restrictions, “bank[ed]” DPC’s property “presumably so that the State could, at a later date, condemn the subject property in an undeveloped (and, consequently, less costly) condition.”³²⁸

Second, in *Jefferson Street Ventures, LLC v. City of Indio*, the court found a *Lucas* taking of 11 acres of a 26.85-acre parcel when the City conditioned approval of the property owner’s application for development of a shopping center upon the owner “leaving approximately one-third of [the] property undeveloped [in order] to accommodate the reconstruction of a major freeway interchange that was in the planning stages.”³²⁹ The City could not acquire the property at the time of Jefferson’s application because it did not have the money.³³⁰ City staff explained to Jefferson during the application process that it would not approve development of the portion of the site designed for the freeway interchange because if the site were later taken for the interchange, “the City would incur additional costs” if it were developed as opposed to undeveloped.³³¹ Applying the reasoning of the *Diversified Properties* holding, the court said that this type of “banking” of property that was otherwise commercially viable and developable so that it could be condemned in the future at a cheaper price constituted a de facto taking that occurred prior to the direct condemnation and deprived the owner of the ability to obtain any economic value from the property.³³²

In both cases, the government’s decision to “bank” a portion of the owner’s total acreage was enough for the courts to essentially treat those banked portions as separate when applying the whole parcel analysis.³³³ So, the *Lucas* taking analysis occurred in the context of the banked acreage constituting the relevant parcel, the denominator, as the courts considered what value remained after the regulatory impact.

In the last two cases, *Monks v. City of Rancho Palos Verdes*³³⁴ and *Brost v. City of Santa Barbara*,³³⁵ the courts hewed closely to common-law nuisance principles in finding *Lucas* takings where governments imposed building moratoria that prohibited construction on residentially zoned property under the rationale that the properties were unstable because they were located in landslide areas.

In the first case, *Monks v. City of Rancho Palos Verdes*, the court found a *Lucas* taking where the government imposed a construction moratorium on 16 vacant lots located near where landslides had recently occurred.³³⁶ The properties were zoned for residential use, utilities including a sewer system had been installed, and the court

328. *Id.* at 682.

329. *Jefferson St. Ventures, LLC v. City of Indio*, 187 Cal. Rptr. 3d 155, 161 (Cal. Ct. App. 2015).

330. *Id.*

331. *Id.* at 162.

332. *Id.* at 176–78.

333. *See id.* at 178 (“[I]n this case, it is the City that has divided the Property into discrete segments.”).

334. *See generally* *Monks v. City of Rancho Palos Verdes*, 84 Cal. Rptr. 3d 75 (Cal. Ct. App. 2008).

335. *See generally* *Brost v. City of Santa Barbara*, No. B246153, 2015 WL 1361196 (Cal. Ct. App. Apr. 21, 2015).

336. *Monks*, 84 Cal. Rptr. 3d at 80.

agreed with the trial court that, at best, there was remaining uncertainty about the area's stability.³³⁷ Finally, the court found that the intended use of the vacant lots to build homes was not a common-law nuisance. According to the court, common-law nuisance principles rarely support prohibiting uses of land that are "essential."³³⁸ After engaging in a lengthy discussion of the government's nuisance argument, the court concluded that given the differing and, at times, conflicting views offered in the various reports and expert witness testimonies, it could not reach a definitive finding on the stability and safety factor.³³⁹ Absent such a definitive finding, the government failed to meet its burden of proof under *Lucas* and under state nuisance law.³⁴⁰

Finally, the California Court of Appeals in *Brost v. City of Santa Barbara* affirmed the lower trial court's finding of a *Lucas* taking when the City of Santa Barbara refused to amend Chapter 22.90 of its municipal code, permanently enjoining the plaintiffs from rebuilding their homes after being destroyed by the 2008 Tea Fire.³⁴¹ Chapter 22.90 permanently enjoined construction on land that was located entirely within Slide Mass C, an active landslide area.³⁴² The court of appeals affirmed the trial court's finding of a *Lucas* taking and rejected the state-law nuisance defense raised by the government.³⁴³ In doing so, the court of appeals said that the City's argument that the plaintiffs' development of their lots would cause significant harm to property or persons was undercut by the fact that owners of existing homes were allowed to remain in their homes and to repair damage to those homes caused by earth movement.³⁴⁴

One reading of *Monks* and *Brost* is that courts will insist on concrete evidence of actual harm and not merely speculative evidence of possible harm before they would apply the *Lucas* nuisance defense. Absent this type of concrete evidence, courts will be unwilling to find that building homes on residentially zoned property was a common-law nuisance.

IV. IMPLICATIONS

Having identified the successful *Lucas* cases and their foundational underpinnings, we consider *Lucas's* implications for the future and why *Lucas* matters. First, we discuss the jurisprudential implications of *Lucas*, focusing on lessons learned from our empirical study. Then we turn to *Lucas's* practical implications—how the case has transformed land use transactions between governments and property owners and the case's continuing influence on land use litigation.

337. *Id.* at 98.

338. *Id.* at 107-08.

339. *Id.* at 110.

340. *Monks v. City of Rancho Palos Verdes*, 84 Cal. Rptr. 3d 75, 110 (Cal. Ct. App. 2008).

341. *Brost v. City of Santa Barbara*, No. B246153, 2015 WL 1361196, at *8-9 (Cal. Ct. App. Apr. 21, 2015). Plaintiffs' lots were zoned for residential purposes. *Id.*

342. *Id.* at *8.

343. *Id.* at *12.

344. *Id.* at *10-11.

A. JURISPRUDENTIAL IMPLICATIONS

As we think about the winning *Lucas* cases in terms of prospective unique lessons, many of them are special circumstances cases in which an intervening act or situation enabled the successful *Lucas* takings claim. To be clear, there is no indication that these changes in circumstances or other limitations in ownership, operation, and use were strategic by the property owners for the purpose of improving the odds of a *Lucas* claim. And, in fact, the federal court in *Lost Tree* recently expressed doubt about the plausibility and likelihood that property owners would find strategies to manipulate the denominator and improve the likelihood of a *Lucas* taking.³⁴⁵ The court agreed with *Lost Tree*'s assertion "that '[i]n the real world, real estate investors do not commit capital either to undevelopable property or to long, drawn-out, expensive and uncertain takings lawsuits.'"³⁴⁶

Famously, the United States Claims Court stated in *Ciampitti v. United States* that

[t]he effect of a taking can obviously be disguised if the property at issue is too broadly defined. Conversely, a taking can appear to emerge if the property is viewed too narrowly. The effort should be to identify the parcel as realistically and fairly as possible, given the entire factual and regulatory environment.³⁴⁷

So, the federal courts have been clear that intentional efforts by property owners to manipulate their denominators are not to be countenanced.³⁴⁸

First, when it comes to the nuisance abatement cases, we can conclude that despite the apprehension about statutory nuisances that can be read into the *Lucas* majority opinion,³⁴⁹ subsequent courts and scholars seem to have accepted that the decision is not limited to common-law nuisances.³⁵⁰ The state courts' discussions of these statutory nuisance abatement cases, in the successful *Lucas* challenges, emphasize the breadth of the application of the nuisance statute (the extent to which non-nuisance activities are also prohibited) and the bona fides of the property owners.³⁵¹ The more the abatement statutes prohibited legal uses and the greater the bona fides of the owners, the more likely courts were to find the nuisance defense inapplicable to the *Lucas* takings claim.³⁵² Still, these nuisance abatement and *Lucas* exception cases are likely outliers and hold little precedential value because of the

345. *Lost Tree Vill. Corp. v. United States*, 787 F.3d 1111, 1118 (Fed. Cir. 2015).

346. *Id.*

347. *Ciampitti v. United States*, 22 Cl. Ct. 310, 318-19 (1991).

348. *Id.*

349. *See supra* Part II.A.

350. *See, e.g.*, Michael C. Blumm & Lucus Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 331-33 (2005); *see supra* Part III.A.

351. *See supra* Part III.A.

352. *See supra* Part III.A.

Supreme Court's temporary takings jurisprudence that developed subsequent to the nuisance abatement cases.

Second, the private agreements and denominator case winners were able to shrink or limit the denominators in their takings fraction—sometimes through sheer luck, sometimes through sound business and development models, sometimes because of government fiat—so that the numerator and denominator were equal.³⁵³ While the role of private agreements in establishing the relevant denominator in the *Lucas* takings equation is unsettled in the state and federal courts,³⁵⁴ what is clear is that the denominator matters and courts have been willing to honor private property owners' restrictions on their property interests when ascertaining the denominator for *Lucas* takings purposes.

We suggest that *Lucas* has become the Higgs boson³⁵⁵ of takings law as it applies to the denominator issue. We know it exists and has had a discernable impact on judicial decision-making and perhaps more importantly, on strategies employed by landowners and developers; however, we still struggle to understand all that lies behind the decision. What seems somehow embedded in these successful private agreements and denominator *Lucas* cases are intentional or unintentional actions by property owners or accidents of ownership, laws and public regulation, that made the denominator in the takings fraction smaller and, in so doing, enabled courts to find a categorical *Lucas* taking. The most recent example is *Love Terminal Partners*, in which the federal court expressly accounted for the use limitations in the privately negotiated master lease in the first instance when determining the denominator and undertaking the *Lucas* takings analysis and then secondarily, in the just compensation analysis.³⁵⁶

Third, the pyramidal segmentation and public law impact winners' success can be attributed to two factors. The properties in this category were zoned in some of the least intensive use classifications on the Euclidean zoning pyramid, and government decision-makers refused to reasonably exercise their zoning and planning discretion to simultaneously protect the integrity of the community and neighboring lands while also leaving property owners with more than a pittance of value.³⁵⁷ These cases give life

353. See *supra* Part III.B; *infra* Appendix.

354. See Dwight H. Merriam, *Rules for the Relevant Parcel*, 25 U. HAW. L. REV. 353, 385 (2003); *supra* Part III.B.

355. Adam Mann, *Higgs Boson Gets Nobel Prize, But Physicists Still Don't Know What It Means*, WIRED (Oct. 8, 2013, 3:54 PM), <http://www.wired.com/2013/10/higgs-nobel-physics>.

More than a year ago, scientists found the Higgs boson. This morning, two physicists who 50 years ago theorized the existence of this particle, which is responsible for conferring mass to all other known particles in the universe, got the Nobel, the highest prize in science.

For all the excitement the award has already generated, finding the Higgs—arguably the most important discovery in more than a generation—has left physicists without a clear roadmap of where to go next.

Id.

356. See generally *Love Terminal Partners v. United States*, 126 Fed. Cl. 389 (2016).

357. See *supra* Part III.C; *infra* Appendix.

to Justice Rehnquist's dissent in *Penn Central Transportation Co. v. New York City*,³⁵⁸ which serves as a useful framework for understanding these successful *Lucas* cases. In his *Penn Central* dissent, Justice Rehnquist conceptualizes regulatory takings in terms of nonconsensual servitudes.³⁵⁹ He cites earlier Supreme Court precedent that in the non-noxious use setting "[p]roperty is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired."³⁶⁰ The burden is unique to the property owner and not offset by similar burdens, the so-called average reciprocities of advantage, placed upon a broad group of similar properties.³⁶¹

Finally, for the delay theory winners, government error in exercising its eminent domain powers or in meeting its burden of proof on the nuisance defense made the *Lucas* claims.³⁶² Bad faith on the part of government in delaying the exercise of its power of eminent domain is a hallmark of the cases in this category as well. The lesson to be learned from the delay theory cases is that failures in government decision-making can be the immediate precipitant of the *Lucas* taking. These cases are factually unique and the property owners' *Lucas* successes can be attributed almost entirely to failures in decision-making by government.³⁶³

Twenty-five years after the *Lucas* decision, articulating the denominator remains fact-intensive, uncertain, and variable. And, as long as the answer to the denominator question remains the key to measuring economic impact, the *Lucas* decision retains a centrality in takings jurisprudence that is perhaps unexpected if measured solely by the scarcity of successful *Lucas* challenges. *Lucas* incentivizes a struggle over the denominator question because the upside for property owners is significant: if the property owner wins, the property owner gets out from under the murky balancing test of *Penn Central*. And for this reason, the denominator question that *Lucas* pushes to the forefront makes the *Lucas* case important for not only the *Lucas* takings question but for *Penn Central* as well because economic impact is a central question under both tests.

B. PRACTICAL IMPLICATIONS

The United States Supreme Court heard oral argument on March 20, 2017, in *Murr v. Wisconsin*, a regulatory takings case that shines a spotlight on the parcel as a whole rule and the relevant-parcel question.³⁶⁴ The issue before the Court is whether contiguous parcels under common ownership should be treated as a single parcel for regulatory takings analysis, as was addressed by the United States Court of Appeals for

358. See generally *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

359. *Id.* at 143 (Rehnquist, J., dissenting).

360. *Id.* at 146 (quoting *United States v. Dickinson*, 331 U.S. 745, 748 (1947)).

361. *Id.* at 146-47.

362. *Supra* Part III.D.

363. *Supra* Part III.

364. See generally *Murr v. State*, No. 2013AP2828, 2014 WL 7271581 (Wis. Ct. App. Dec. 23, 2014), *review denied*, 366 Wis.2d 59 (Wis. 2015), *cert. granted*, 136 S. Ct. 890 (2016).

the Federal Circuit in *Lost Tree*.³⁶⁵ No one knows how much or how little guidance the Court will provide on this critical question. One knowledgeable commentator believes, based on what he heard at oral argument, there is a chance the Court will come up with a multifactor test.³⁶⁶ Regardless, *Murr v. Wisconsin* may impact the future viability of the *Lucas* claim and of government liability for regulatory takings more generally, for the reasons discussed in this Article.

As discussed above, we are perhaps standing in the forefront of a changing landscape—a shift in theorizing about how to construct the denominator in the takings equation. An implication of the changing landscape is that property owners may be more willing to try to make the *Lucas* claim than if they just considered the numbers. This is as opposed to seeing the *Lucas* claim as a type of second-class legal theory with little chance of success that is thrown into the takings mix after the *Penn Central* analysis has been thoroughly developed. The real news is that the *Lucas* winners and losers indicate that property owners retain an almost surprising amount of control in protecting their property rights, in ways we may not have expected. The most interesting part is the extent to which courts truly are open to legitimate efforts to protect those property rights. The *Lucas* losers and winners highlight two essential takeaways for practitioners.

First, establishing the regulated parcel as a separate economic unit from the larger property owners' holdings is critical to a winning *Lucas* strategy. Every plaintiff's attorney is trying desperately to get out from under the *Penn Central* analysis, or at least ought to be, because of the unpredictability of *Penn Central's* ad hoc approach and because property owners are at a dramatic disadvantage under *Penn Central*.³⁶⁷ While property owners rarely win on their *Lucas* challenges, the benefit of successfully articulating the *Lucas* categorical claim is that once an owner gets within the four corners of *Lucas*, as small a landscape as it is, the only question is how much compensation must be paid. For litigators, their lives will be made easier and they will appreciate every bit of what transactional attorneys do in the acquisition and development of real property to assist in making a winning case for reducing the denominator. Litigators need to frame their claims in ways that couch the denominator in the ways we described in this Article. Nevertheless, all litigators are limited by the facts presented to them. For example, the choice of what to acquire—fee simple or only leasehold; surface and subsurface estates; or only mineral estates—will go a long way toward making or breaking the litigator's *Lucas* claim.

Second and relatedly, courts are willing to consider private ordering in constituting the denominator as long as the ordering is predicated upon what the

365. *Murr v. Wisconsin*, No. 15-214 (U.S. argued Mar. 20, 2017).

366. Ilya Somin, *Thoughts on the Oral Argument in Murr v. Wisconsin*, WASH. POST: VOLOKH CONSPIRACY (Mar. 20, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/03/20/thoughts-on-the-oral-argument-in-murr-v-wisconsin/?utm_term=.e1ac0371ddab.

367. F. Patrick Hubbard et al., *Do Owners Have a Fair Chance of Prevailing Under the Ad Hoc Regulatory Takings Test of Penn Central Transportation Company?*, 14 DUKE ENVTL. L. & POL'Y F. 121, 141-44 (2003).

courts believe to be a legitimate factual basis.³⁶⁸ Owners need to have rationally treated the regulated parcel as a separate economic interest from the owners' larger holdings. This suggests that compartmentalization or separation of one's development plans and strategies may make sense from the start. In other words, it is never too early to think about protecting property interests from regulatory takings. The key to solving the mystery of the successful *Lucas* claim is to look behind the denominator to find the common denominator, and that may be the public or private law structuring that facilitates or even mandates segmentation. In an area where the law is so unclear, owners have a chance of winning by seriously making the *Lucas* takings claim because it is not clear that they should lose.

Earlier in this Article, we discussed the many ambiguities that abound in *Lucas's* wake.³⁶⁹ Analysis of the winning *Lucas* cases reveals that the property owners in those cases frequently won because they were able to play to these lingering ambiguities and uncertainties surrounding the *Lucas* rule, the exceptions to the rule, and the denominator question. In these *Lucas* winners, perhaps we see, albeit modestly, some "efforts to rehabilitate the Takings Clause as a limit on government action in the teeth of an unbroken line of cases upholding state land use regulation."³⁷⁰ What is interesting is how the law has evolved in the 25 years since *Lucas* was decided and without much guidance from the *Lucas* Court. Even though *Lucas* set out a categorical rule, the rule is so fact-intensive that the gravitational pull is back toward the *Penn Central* weighing. What does this say about the law? It says that the law is resistant to a categorical rule. It is just as resistant to a compensable taking post-*Lucas* as it was pre-*Lucas*.

V. CONCLUSION

The answer to why *Lucas* matters given so few *Lucas* successes lies in *Lucas's* contribution to the denominator question. Many thought the denominator question was resolved when the Supreme Court first articulated the parcel as a whole rule in *Penn Central* but the question was clearly not resolved as courts and property owners alike continue to think about and litigate around the proper resolution of the denominator in the regulatory takings equation.

Lucas's impact is understated if one focuses exclusively on the successful *Lucas* cases, which are few, because most takings cases proceed under the *Penn Central* analysis.³⁷¹ Even as the *Lucas* Court announced the categorical takings rule, it predicted that the categorical rule would apply in "relatively rare situations"³⁷² and only under the most "extraordinary circumstance[s]."³⁷³ Our review of all of the reported regulatory takings cases affirm that prediction.

368. *Supra* Part III.B.

369. *Supra* Part II.C.

370. Epstein, *supra* note 201, at 956.

371. *Home v. Dep't of Agric.*, 135 S. Ct. 2419, 2437 (2015) (Sotomayor, J., dissenting).

372. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1018 (1992).

373. *Id.* at 1017.

Successful *Lucas* challenges often have involved special circumstances in which an intervening act or event sets up the *Lucas* taking by reducing the denominator in the takings equation, offering a new perspective on these “extraordinary circumstances.” We contend *Lucas’s* significance is in its impact on how best to resolve the denominator issue for both *Lucas* and *Penn Central* cases. A favorable resolution of the denominator issue is the loadstar for every regulatory takings claim brought under *Lucas* or *Penn Central*, which will capture the majority of regulatory takings challenges. In the end, only by understanding how *Lucas* works in practice, and why, can we understand what the true significance of *Lucas* really is—a matter of importance for theory and practice alike.

Appendix
Successful *Lucas* Cases

The Nuisance Abatement Cases, The Lucas Exception

City of Seattle v. McCoy, 4 P.3d 159 (Wash. Ct. App. 2000)
City of St. Petersburg v. Bowen, 675 So. 2d 626 (Fla. Dist. Ct. App. 1996)
Keshbro, Inc. v. City of Miami, 801 So. 2d 864 (Fla. 2001). Two consolidated cases, only one was found to be a <i>Lucas</i> taking.
State <i>ex rel.</i> Pizza v. Rezcallah, 702 N.E.2d 81 (Ohio 1998)

Private Agreements and the Denominator

Love Terminal Partners v. United States, 126 Fed. Cl. 389, 440 (2016), <i>appeal docketed</i> , No. 16-2276 (Fed. Cir. Jun. 30, 2016).
Bowles v. United States, 31 Fed. Cl. 37 (1994)
Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994), <i>abrogated by</i> Bass Enters. Prod. Co. v. United States, 381 F.3d 1360 (Fed. Cir. 2004).
State <i>ex rel.</i> R.T.G., Inc. v. State, 780 N.E.2d 998 (Ohio 2002)
Vulcan Materials Co. v. City of Tehuacana, 369 F.3d 882 (5th Cir. 2004)
Ala. Dep't of Transp. v. Land Energy, Ltd., 886 So. 2d 787 (Ala. 2004)
Chapel Hill Title & Abstract Co. v. Town of Chapel Hill, 669 S.E.2d 286 (N.C. 2008)
Lost Tree Village Corp. v. United States, 707 F.3d 1286 (Fed. Cir. 2013), <i>aff'd</i> 787 F.3d 1111 (Fed. Cir. 2015)

Pyramidal Segmentation and Public Law Impact

State <i>ex rel.</i> Greenacres Found. v. City of Cincinnati, 56 N.E.3d 335 (Ohio Ct. App. 2015)
City of Sherman v. Wayne, 266 S.W.3d 34 (Tex. App. 2008)
Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 95 F.3d 1422 (9th Cir. 1996), <i>aff'd</i> , 526 U.S. 687 (1999)
Dunlap v. City of Nooksack, No. 63747-9-I, 2010 WL 4159286 (Wash. Ct. App. Oct. 25, 2010).
Moroney v. Mayor of Old Tappan, 633 A.2d 1045 (N.J. Super. Ct. App. Div. 1993)
Galleon Bay Corp. v. Bd. of Cty. Comm'rs, 105 So. 3d 555 (Fla. Dist. Ct. App. 2012)
Steel v. Cape Corp., 677 A.2d 634 (Md. Ct. Spec. App. 1996)
Keeler v. Mayor of Cumberland, 940 F. Supp. 879 (D. Md. 1996)
Lopes v. City of Peabody, No. 139663, 1995 WL 17215782 (Mass. Land Ct. March 31, 1995)
United States v. Hardage, No. 93-6099, 1993 WL 207380 (10th Cir. June 9, 1993)
Heapy v. State, No. 03-45407-AA, 2004 WL 5573602 (Mich. Cir. Ct. April 28, 2004)
Ali v. City of Los Angeles, 91 Cal. Rptr. 2d 458 (Cal. Ct. App. 1999)

Delay Theory

People <i>ex rel.</i> Dep't of Transp. v. Diversified Props. Co. III, 17 Cal. Rptr. 2d 676 (Cal. Ct. App. 1993)

Jefferson St. Ventures, LLC v. City of Indio, 187 Cal. Rptr. 3d 155 (Cal. Ct. App. 2015)
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Monks v. City of Rancho Palos Verdes, 84 Cal. Rptr. 3d 75 (Cal. Ct. App. 2008)
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Brost v. City of Santa Barbara, No. B246153, 2015 WL 1361196 (Cal. Ct. App. Apr. 21, 2015)
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