ON THE TWENTY-FIFTH ANNIVERSARY OF *LUCAS*: MAKING OR BREAKING THE TAKINGS CLAIM

Carol Necole Brown[*] and Dwight H. Merriam[**]

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 1,600 cases in state and federal court, we identified only 27 cases in 25 years in which courts found a categorical regulatory taking under Lucas*. By percentage, that works out to a* Lucas *claim success rate of just 1.6 percent. 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' *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 the* Lucas *categorical regulatory takings analysis has been, and will continue to be, the problem of defining the denominator in the regulatory takings equation. The authors' research suggests that* Lucas' *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' *shadow.*

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INTRODUCTION

In *Lucas v. South Carolina Coastal Council*,[1] the 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."[2] In determining whether the regulation at issue meets this standard, courts have traditionally used an "economic value fraction."[3] The numerator is the loss of value of the private property attributable to the impact of the government regulation.[4] The denominator is the entirety of the owner's rights in the "parcel as a whole."[5] 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."[6] As a result, property owners seek to characterize their property rights narrowly for as small a denominator as possible, while government regulators seek to characterize the property owner's property rights broadly for as large a denominator as possible.[7]

Today, *Lucas* remains the controlling law on categorical regulatory takings.[8] But in application, how much does *Lucas* matter? My review of more than 1,600 cases in state and federal court reveals only

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[1] 505 U.S. 1003 (1992).
[2] *Id*. at 1015.
[3] *Walcek v. U.S.*, 49 Fed. Cl. 248, 261–62 (2001), *aff'd*, 303 F.3d 1349 (Fed. Cir. 2002).
[4] *Id.*; *Lucas*, 505 U.S. at 1016-17 n.7.
[5] *Penn Central*, 438 U.S. at 130–31; *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016–17 n.7 (1992); *see infra* Part III (discussing the *Penn Central* test).
[6] *Palazzolo v. Rhode Island*, 533 U.S. 606, 629 (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 States*, 787 F.3d 1111, (2015) (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"). *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992).
[7] DOUGLAS KENDALL, TIMOTHY DOWLING & ANDREW SCHWARTZ, TAKINGS LITIGATION HANDBOOK: DEFENDING TAKINGS CHALLENGES TO LAND USE REGULATIONS 170 (2000).
[8] Wendie L. Kellington, *New Takes on Old Takes: A Takings Law Update*, ALI-ABA 17TH ANNUAL LAND USE INSTITUTE, http://landuselaw.wustl.edu/takings_update.htm (last visited May 10, 2016).

twenty-seven cases in twenty-five years in which courts found a categorical taking under *Lucas.*[9] By percentage, that works out to a *Lucas* claim success rate of just 1.6 percent. 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.

I contend that *Lucas'* 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 the *Lucas* categorical regulatory takings analysis has been, and will continue to be, the problem of defining the denominator in the regulatory takings equation. My research suggests that *Lucas'* 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.[10] Whether this is good or bad is a question I leave for another day. My focus here is identifying the components of a successful *Lucas* claim and the implications of my 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'* shadow.

The discussion proceeds as follows. Part I explores the intricacies of the *Lucas* decision and the guidance that emerges. Part II presents my empirical data, grouping the *Lucas* winners into the following categories: nuisance abatement cases, private agreements and the denominator, pyramidal segmentation, and delay theory. Part III 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 tend to think.

PART I. TAKINGS CLAIMS A LA LUCAS

Understanding *Lucas'* holding means understanding the categorical rule it announced the exceptions to that rule, and the denominator question and parcel as a whole. I start with Justice Scalia's majority decision. Then I 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

[9] These 1,600 cases represent all cases available in the two major online databases (Lexis and Westlaw) that cited *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (2002) through May 10, 2016. A total of 1,585 cases were drawn from a Lexis Shepard's Report and 1607 cases were drawn from a Westlaw Keycite report

[10] *Infra* Part I.C.3.

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.[11] 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.[12] Initially, the Act did not allow for any exceptions.[13]

Lucas sued, alleging that the Act's prohibition was a permanent, compensable taking of his private property. 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.[14] The South Carolina Supreme Court reversed.[15] Important to the South Carolina Supreme Court's decision was Lucas' concession that the Act was valid and proper in its design to preserve the beaches in South Carolina, a public resource.[16] 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.[17]

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' lots had been rendered valueless.[18] 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, [19] (2) the exceptions to the categorical rule — nuisance and background principles defenses, [20] and (3) the denominator question.[21] To these the discussion turns next.

1. THE CATEGORICAL REGULATORY TAKINGS RULE

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[11] LUCAS V. SOUTH CAROLINA COASTAL COUNCIL, 505 U.S. 1003, 1006–08 (1992).
[12] *ID.* AT 1007.
[13] *Id.* at 1011–13.
[14] *Id.* at 1009.
[15] *Id.*
[16] *Id.* at 1010.
[17] *Id.*
[18] *Id.* at 1006.
[19] *Infra* Part I.A.
[20] *Infra* Part I.A.
[21] *Infra* Part I.A.

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."[22] Anything less than a total deprivation would be analyzed under the *Penn Central Transportation v. City of New York* 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.[23] 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.[24]

2. 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 any limitation so severe that it deprives a private property owner of all economically beneficial use of the owner's property "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."[25] 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). [26] 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).[27] 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."[28]

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[22] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992).
[23] *Penn Central*, 438 U.S. at 124.
[24] *Lucas*, 505 U.S. at 1015.
[25] *Id; see* MELTZ ET AL., THE TAKINGS ISSUE, *supra* note 3, at 187–88; Brown, *supra* note 5, at 359–70; David L. Callies and David A. Robyak, *The Categorical (Lucas) Rule: "Background Principles," Per Se Regulatory Takings, and the State of Exceptions*, 30 Touro L. Rev. 371, 380.
[26] *Lucas*, 505 U.S. at 1028; MELTZ ET AL., THE TAKINGS Issue, *supra* note 3, at 168.
[27] *Lucas*, 505 U.S. at 1027—028; Carol Necole Brown, *The Categorical* Lucas *Rule And The Nuisance And Background Principles Exception*, 30 Touro L. Rev. 349, 359 (2014).
[28] *Lucas*, 505 U.S. at 1027; *see* David L. Callies and David A. Robyak, *The Categorical (Lucas) Rule: "Background Principles," Per Se Regulatory Takings, and the State of Exceptions*, 30 TOURO L. REV. 371 (2014) (articulating categories of background principle defenses and surveying cases).

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. To hold otherwise would compromise the limitations the Court had earlier placed on exercises of the police power without compensation.[29] 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."[30]

3. THE DENOMINATOR QUESTION

What is the relevant private property interest against which the regulatory impact will be measured?[31] This is the denominator question. One feature of *Lucas* is that the denominator is essential to the categorical takings claim yet the *Lucas* Court does not provide much guidance.[32] 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.'"[33] 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' lots valueless.[34] Justice Scalia addresses it in dictum, as does Justice Blackmun in his dissent. To the Justices' responses to Justice Scalia's majority opinion, I turn to next.

B. COMPLICATING THE PICTURE: THE DISSENTING AND SEPARATE OPINIONS

[29] *Id.* at 1027 (citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S 393 (1922)).
[30] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1031 (1992).
[31] A recent decision that portends to challenge *Penn Central* as a seminal decision on the point of the relevant denominator is *Lost Tree Vill. Corp. v. United States*, 787 F.3d 1111, (2015).
[32] *Lucas*, 505 U.S. at 1017 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.").
[33] *Id.*
[34] *Id.* at 1016 n.7

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.[35] 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.[36] 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 the public.'"[37] 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."[38]

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.[39]

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[35] *Id.* at 1053–56 (Blackmun, J., dissenting); *Id.* at 1068 (Stevens, J., dissenting).
[36] *Id.* at 1059
[37] *Id.* (quoting *Tewksbury*, 11 Metc., at 57 fn.25).
[38] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003,1044 (1992); John Echeverria, Takings Litigation: A blog about takings law, Lost Tree Redux: How Do We Measure Economic Impact?, http://takingslitigation.com/2015/06/04/lost-tree-redux-how-do-we-measure-economic-impact/ (last visited May 10, 2016) (writing in favor of environmental value, such as private recreational value to be considered in the *Lucas* takings analysis).
[39] *Id.* at 1065–66 (Stevens, J., dissenting).

He also wrote that the 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."[40]

Justice Souter anticipated these nuisance abatement cases in his separate *Lucas* statement. 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.[41] Actually, Justice Souter doubted that regulations to prevent nuisances would cause total deprivations in most cases. Emphasizing that nuisance law's focus is conduct on the property and not 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. "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."[42]

Together, Justices Blackmun, Stevens, and Souter raised substantial questions about how the Court's new rule in *Lucas* would play out. 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. For *Lucas* critics, the decision further muddied the already murky regulatory takings waters, increasing the unpredictability and ambiguity in regulatory takings.[43] It is to these ambiguities remaining after *Lucas* that I turn to next.

C. AMBIGUITIES ABOUND

Jerold S. Kayden, a senior fellow with 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.'"[44] One question that arises after

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[40] *Id.* at 1068–69 (Stevens, J., dissenting).
[41] *Id.*; *see infra* Part I.C.2.
[42] *Lucas*, 505 U.S. at 1078.
[43] *See, e.g.* Marc R. Poirier, The Virtue of Vagueness in Takings Doctrine, 24 CARDOZO L. REV. 93, 93 (2002) (making the case that vagueness in takings doctrine is "quite functional and entirely appropriate"); 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"); Carol M. Rose, Mahon Reconstructed: Why the Takings Doctrine Is Still a Muddle, 57 S. Cal. L. Rev. 561, 566 (1984) (arguing that the analysis for regulatory takings is "deeply flawed").
[44] Rebecca Retzlaff & Sarah Sisser, *Property Rights and Coastal Protection: the Case of* Lucas v. South Carolina Coastal Council, 29(3) Planning Perspectives 275, 286 (2014), *citing* David W. Dunlap, *Resolving Property 'Takings,'* N.Y. TIMES (Aug. 23, 1992), http://www.nytimes.com/1992/08/23/realestate/resolving-property-takings.html.

Lucas is the categorical takings rule and whether it turns on a denial of all economic *value* or denial of all economic *use*. A second question is whether statutory nuisances count when considering the *Lucas* nuisance exception or only common law nuisances. 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. Below, I 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*.[45] 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?[46] Recently, 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.[47] However, the court did not distinguish between *value* and *use*, a distinction that has caused considerable confusion.[48]

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*[49] endorses loss of value as the *Lucas* rule.[50] In other words, "[a]nything less than a "'complete elimination of value,' or a 'total loss,'

[45] *See Infra* Part III and accompanying text.
[46] *See Infra* Part I.C.3. and accompanying text.
[47]787 F.3d 1111, (2015).
[48] *Lost Tree*, 787 F.3d 1111,1117 (Fed. Cir. 2015).
[49]535 U.S. 302 (2002).
[50] *See, e.g.*, Richard J. Lazarus, Lucas *Unspun*, 16 SOUTHEASTERN 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).

. . . would require the kind of analysis applied in *Penn Central*."[51] Other courts and scholars have argued in favor of the loss of use construction of the *Lucas* categorical takings rule.[52]

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 successful *Lucas* challenges.[53] 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

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[51] *Lingle v. Chevron*, 544 U.S. 538, 539 (2005) (stating that "[i]n the *Lucas* context, of course, the complete elimination of a property's value is the determinative factor); *Mayhew v. Sunnyvale*, 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."); Daniel L. Siegel & Robert Meltz, *Temporary Takings: Settled Principles and Unresolved Questions*, 11 VT. J. ENVTL. L. 479, 498 (2010).

[52] *Res. Invs., Inc. v. U.S.*, 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., Inc. v. Chapel Hill*, 362 N.C. 649, 656 (2008) (discussing *Lucas* takings in the context of denials of "practical use and reasonable value"); *Palm Beach Isles Assocs. v. United States*, 231 F.3d 1354, 1357 (Fed. Cir. 2000) (seemingly analogizing the concepts).

> 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.

Ann T. Kadlecek, *The Effect of* Lucas v. South Carolina Coastal Council *on the Law of Regulatory Takings*, 68 WASH. L. REV. 415, 427 (1993) (citations omitted).

> 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.

[53] *See e.g., Lost Tree*, 787 F.3d 1111, 1118 (Fed. Cir. 2015) stating:

> 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.

of all rights of use.[54] 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.[55] 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."[56]

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.[57] The difference between common law and statutory law matters and here is why. 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.

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 Kennedy's concurring opinion addressed this reading of the majority opinion and, in fact, he wrote that our whole legal tradition must be considered.[58] 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

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[54] *See, e.g., Lucas*, 505 U.S. at 1065 n.3 (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.'").

[55] *Lost Tree*, 787 F.3d 1111, 1118 (Fed. Cir. 2015).

[56] *State ex rel. Greenacres Foundation v. City of Cincinnati*, 2015 WL 95480 (Ohio App. Dec. 30, 2015) (Appendix: pyramidal segmentation and public law impact case); *City of Sherman v. Wayne*, 266 S.W.3d 34 (Tex. App. 2008) (Appendix: pyramidal segmentation and public law impact case); (*Love Terminal Partners v. United States*, No. 08-536L, 2016 WL 1588327 (Fed. Cl. Apr. 19, 2016) (Appendix: private agreements and the denominator case).

[57] *See* Carol Necole Brown, *The Categorical* Lucas *Rule and the Nuisance and Background Principles Exception*, 30 Touro L. Rev. 349 (2014) (for a more in depth discussion of the nuisance exception defense).

[58] *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring).

initiatives" that respond to our interdependent, complex, and changing society.[59] 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.[60] Dissenting Justices Blackmun and Stevens also criticized the majority's nuisance exception as unduly elevating common law nuisance over statutory nuisance.[61]

A final ambiguity that surfaces in the nuisance defense area, and one discussed in depth in Part II, 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.[62] 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.[63]

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?[64] 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."[65] The numerator is the loss of value of the private property attributable to the impact of the government regulation.[66] The denominator is the relevant parcel against which the regulatory impact should be judged. For a *Lucas* categorical taking, the denominator must be at least virtually equal to the numerator[67] such that there is a deprivation of "all economically beneficial or productive use of land."[68] As a result, property owners seek to characterize their

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[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Infra* Part II.A.
[63] 535 U.S. 302, 331-32, 342.
[64] *Penn Central v. City of New York*, 438 U.S. 104, 130–31 (1978).
[65] *Walcek v. U.S.*, 49 Fed. Cl. 248, 261–62 (2001), *aff'd*, 303 F.3d 1349 (Fed. Cir. 2002).
[66] *Id.*; *Lucas*, 505 U.S. at 1016-17 n.7.
[67] *Palazzolo v. Rhode Island*, 533 U.S. 606, 629 (2001) (stating in the context of the *Lucas* total takings analysis, that "[a]ssuming a taking is otherwise established, a State may note evade the duty to compensate on the premise that the landowner is left with a token interest."); *Lost Tree Vill. Corp. v. United States*, 787 F.3d 1111 (Fed. Cir. 2015) (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"). *Id.* at 1113.
[68] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992).

property rights narrowly for as small a denominator as possible, while government regulators seek to characterize the property owner's property rights broadly for as large a denominator as possible.[69] Thus, the resolution of the denominator question is critical to the success or failure of a *Lucas* challenge.

Penn Central Transportation Co. v. City of New York is the landmark relevant parcel decision.[70] 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." [71] 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.

The parcel as a whole analysis exists in contrast to a segmentation or "conceptual severance"[72] approach to property, whether vertical,[73] horizontal, [74] temporal,[75] or functional.[76] Conceptual severance reflects the idea of real property as a bundle of rights consisting of many strands that can be severed or destroyed. 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—e.g. temporary takings); functional severance (division of property interests based on easements,

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[69] DOUGLAS KENDALL, TIMOTHY DOWLING & ANDREW SCHWARTZ, TAKINGS LITIGATION HANDBOOK: DEFENDING TAKINGS CHALLENGES TO LAND USE REGULATIONS 170 (2000).
[70] 438 U.S. 104, 130-31 (1978).
[71] *Penn Central*, 438 U.S. at 130–31; *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016–17 n.7 (1992); *see infra* Part III (discussing the *Penn Central* test).
[72] Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1674 (1988); *Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, 737 S.E.2d 601, 616 n.14 (Sup. Ct. S.C. 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." Angela Chang, *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). Dwight H. Merriam, *What is the Relevant Parcel in Takings Litigation?*, SC43 ALI-ABA 505, 538-39 (1998).
[73] *Dunes W. Golf Club, LLC*, 737 S.E.2d at 615 n.14; *Penn Central*, 438 U.S. 104 (air rights).
[74] *Dunes W. Golf Club, LLC*, 737 S.E.2d at 615 n.14; *Lost Tree*, 787 F.3d 1111, (2015) (lots); *Palazzolo*, supra notes 6 & 69.
[75] *Dunes W. Golf Club, LLC*, 737 S.E.2d at 615 n.14; *Tahoe-Sierra*, 535 U.S. 302 (discussing temporal segmentation in the moratorium context.)
[76] *Dunes W. Golf Club, LLC*, 737 S.E.2d at 615 n.14; *Dist. Intown Properties Ltd. P'ship v. D.C.*, 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."); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 318, (2002) (stating that functional describes how property may be disposed or used by its owner); *Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979) (rights to exclude); *Hodel v. Irving*, 481 U.S. 704, 717 (1987) (rights to devise and descent). 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.

rights of way, and servitudes); and horizontal severance (subdivision of a parcel into smaller lots)).”[77] 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.[78]

Justice Stevens expressed concern in his *Lucas* dissent about manipulating the denominator.[79] He said that *Lucas’* categorical rule would likely have one of two effects: either 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.[80]

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*.[81] 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.’”[82] 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

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[77] *Dunes W. Golf Club, LLC*, 737 S.E.2d at 615 n.14.; *First English Evangelical Lutheran Church of Glendale v. 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.”). *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 318, (2002) (*quoting Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 774 (9th Cir. 2000) *aff'd*, 535 U.S. 302, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002) *overruled by Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012)).

> “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.”

[78] *Supra* Part I.C.3.

[79] *Supra* note 56 and accompanying text.

[80] *Lucas*, 505 U.S. at 1065-66 (Stevens, J., dissenting).

[81] 787 F.3d 1111 (Fed. Cir. June 1, 2015). The factual details of *Lost Tree* are discussed in detail, infra at Part I.B.3.; Supra notes 33 and 55, and accompanying text (discussing Stevens’ opinion that the effect of *Lucas’* categorical rule will be to incentivize courts to and property owners to attempt to game the denominator in the takings equation.

[82] *Lost Tree*, 787 F.3d 1111, 1118 (2015) (citing *Loveladies Harbor*, 28 F.3d 1171, 1181 (Fed. Cir. 1994)).

marketplace in land."[83] He opined that the takings analysis is "already subject to too much gamesmanship" and that it is likely to "become more random and unpredictable" if future courts follow the *Lost Tree* precedent.[84] 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, I turn next.

PART II. SUCCESSFUL *LUCAS* TAKINGS CASES: EMPIRICAL DATA

This Part presents the results of an examination of more than 1,600 *Lucas* cases filed across the United States. Of those 1,600 cases, only twenty-seven were successful. What the *Lucas* winners had in common helps clarify *Lucas* in practice. In the discussion below, I 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.[85]

While analyzing the *Lucas* winners, at times I compare and contrast several of the *Lucas* losers. There are almost 1,600 of them so I only discuss *Lucas* losers where I believe they can help us understand the winners. To a discussion of the cases, by category, I 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)

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[83] John Echeverria, Takings Litigation: A blog about takings law, Lost Tree Redux: How Do We Measure Economic Impact?, http://takingslitigation.com/2015/06/04/lost-tree-redux-how-do-we-measure-economic-impact/ (last visited May 10, 2016).
[84] *Id.*
[85] *Infra.* Appendix.

the more viable the *Lucas* categorical claim.[86] These four cases represent seven disputes because two of the four cases are consolidated cases with multiple disputes.[87]

First, in *City of Seattle v. McCoy*, the City brought a proceeding to abate the McCoys' operation of their lounge and restaurant (Oscar's II) under a drug nuisance statute. [88] The McCoys' property interest was a leasehold on the property on which Oscar's II was located.[89] Oscar's II was found to be a drug nuisance by the trial court and it was ordered closed for one year.[90] The trial court's order resulted in Oscar's II being placed in the court's custody pursuant to an applicable statutory provision.[91] On appeal, the court found that application of the nuisance statute to the McCoys was a temporary taking.[92] 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."[93] 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.[94] The court held that the City did not meet its burden of proving a common law nuisance according to the *Lucas* exception.[95]

Second, *City of St. Petersburg v. Bowen* involved application of a nuisance abatement statute to the property owner's 15-unit apartment complex.[96] 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

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[86] *Supra* notes 56-63 and accompanying text.
[87] *Keshbro v. Miami*, 801 So.2d 864 (Fla. 2001) (consolidates two cases: *Miami v. Keshbro* and *Petersburg v. Kablinger*); *Pizza v. Rezcallah*, 702 N.E.2d 81 (Ohio 1998) (consolidating three cases: case number 96-1894, case number 96-1895, and case number 96-1897).
[88] 101 Wash. App. 815 (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. A leasehold of sufficiently short remaining duration and a sufficiently lengthy nuisance abatement closure when combined with other 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.
[89] *Id.* at 820.
[90] *Id.* at 824.
[91] *Id.* at 825.
[92] *Id.* at 829.
[93] *Id.* at 830.
[94] *Id.* at 832, 839.
[95] *Id.* at 839.
[96] 675 So.2d 626 (Fla. Dist. Ct. App. 1996).

tenants and others who were on the property.[97] The court found a temporary *Lucas* taking because the building could not be put to any economic use during the one-year closure period.[98] 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.[99]

Third, *Keshbro, Inc. v. City of Miami* consolidated two cases, *City of St. Petersburg v. Kablinger* and *City of Miami v. Keshbro*.[100] The property owners in the two cases owned an apartment complex and a motel, respectively. 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.[101]

The court found that the regulation in *Kablinger* resulted in a *Lucas* taking and that the *Lucas* nuisance exception did not apply.[102] 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.[103] 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."[104] 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*.[105] 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.[106] In contrast, the court found that the drug and prostitution activity at the Stardust Motel in *Keshbro* had become "part and parcel" of the Stardust's operation and that the City of Miami had failed to eradicate this nuisance activity despite patient attempts.[107]

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[97] *Id.* at 627.
[98] *Id.* at 631.
[99] *Id.* at 631.
[100] 801 So.2d 864 (Fla. 2001).
[101] *Id.* at 867-869.
[102] *Id.* at 876-77.
[103] *Id.* at 876.
[104] *Id.* at 876.
[105] *Id.* at 877.
[106] *Id.* at 877.
[107] *Id.* at 876.

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.[108] In all three cases, it was alleged that non-owner residents, while occupying three different residential properties, committed drug-related felonies.[109] Each property owner was found to have taken affirmative, good faith action to investigate and remove offending residents.[110] 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.[111]

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*. [112] 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.[113] 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.[114] 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."[115]

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[108] 84 Ohio St.3d 116 (1998).
[109] *Id.* at 120.
[110] *Id.* at 120.
[111] *Id.* at 129-131.
[112] 535 U.S. 302, 331–32, 342 (2002).
[113] Appendix.
[114] Infra Part II.
[115] Angela Chang, *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).

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

This section discuss five of the eight successful *Lucas* cases in this category in detail. The first is *Loveladies Harbor, Inc. v. United States.*[116] The second is *State ex rel. R.T.G., Inc. v. State*.[117] The third is *Lost Tree Village Corp. v. United States*.[118] The fourth is *Chapel Hill Title and Abstract v. Town of Chapel Hill*.[119] The fifth case is the most recent *Lucas* success, *Love Terminal Partners v. United States*.[120]

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.*[121] 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.[122] The Government argued that the proper denominator was the original 250 acres. The court rejected this argument. 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.[123] The Federal Circuit held the remaining 12.5 acres constituted the denominator and were left with de minimis value after the permit denial.[124] *Loveladies'* demonstrated 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.[125]

Second, in *State ex rel. R.T.G., Inc. v. State,* R.T.G., Inc. ("R.T.G.") owned surface and coal rights in fee simple in approximately 200 acres and it leased or owned coal rights only in approximately 300

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[116] 28 F.3d 1171 (Fed. Cir. 1994), *abrogated by Bass Enterprises Prod. Co. v. United States*, 381 F.3d 1360, 1369 (Fed. Cir. 2004).
[117] 98 Ohio St. 3d 1 (2002).
[118] 787 F.3d 1111 (Fed. Cir. June 1, 2015).
[119] 669 S.E.2d 286 (N.C. 2008).
[120] No. 08-536L, 2016 WL 1588327 (Fed. Cl. Apr. 19, 2016).
[121] 28 F.3d 1171 (Fed. Cir. June 15, 1994) (upholding a just compensation award of $2,658,000 issues by the United States Claims Court, 21 Cl. Ct. 153 (July 23, 1990)).
[122] *Id.* at 1180-1181.
[123] *Id.* at 1181 (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); *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381, 383 (1988).
[124] *Loveladies Harbor, Inc.*, 28 F.3d 1171 at 1182.
[125] *Id.* at 1183.

acres.[126] The state designated a substantial portion of R.T.G.'s property as unsuitable for mining ("UFM").[127] The Supreme Court of Ohio held that the UFM designation resulted in a *Lucas* taking "of R.T.G.'s coal that lies under the tracts of land in which R.T.G. 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 R.T.G. owned in fee and that are located in the UFM-designated area."[128]

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 coal."[129] In tackling the denominator issue, the court analyzed the relevant parcel in the vertical and horizontal contexts.[130] The court determined that in the vertical context, the coals rights were the relevant parcel for the regulatory takings analysis.[131] And, in the horizontal context, the court rejected the state's argument that the relevant parcel was all 500 acres of R.T.G. property pursuant to the parcel as a whole rule.[132] Of the 500 contiguous acres of R.T.G. property, approximately 100 acres were located outside the UFM-designated area. These "fringe amounts of coal" outside of the UFM-designated area became economically impracticable for R.T.G. to mine after the UFM designation prevented R.T.G. from mining nearly 1.3 million tons of coal located within the UFM-designated area.[133] Thus, the court found the relevant parcel in the horizontal context to be limited to R.T.G.'s property located within the UFM-designated area because R.T.G. could not economically mine the coal outside of the UFM designated area independent of the coal reserves within the UFM-designated area.[134]

The third and fourth cases, *Lost Tree Village Corp. v. United States*,[135] and *Chapel Hill Title and Abstract v. Town of Chapel Hill*[136] 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 the United States Army Corps of

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[126] 98 Ohio St. 3d at *2.
[127] *Id.*
[128] *Id.* at *2.
[129] *Id.* at *11 (citing the Takings Clause of the Ohio Constitution, section 19, Article 10).
[130] *Id.* at *12.
[131] *Id.* at *11.
[132] *Id.* at *12.
[133] *Id.* at *12.
[134] *Id.* at *12.
[135] 787 F.3d 1111 (Fed. Cir. June 1, 2015).
[136] 669 S.E.2d 286 (N.C. 2008).

Engineers ("Corps") to fill wetlands on a 4.99 acre parcel (Plat 57).[137] 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.[138] 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.[139] 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.[140]

The government argued that the relevant denominator was the entire John's Island Community, about 1,300 acres previously developed by Lost Tree.[141] Lost Tree argued that the denominator was solely Plat 57.[142] 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 twenty years that resulted in the court treating Plat 57 as a separate economic unit from Lost Tree's other holdings.[143] 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.[144] 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[.]'"[145]

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 investment expectations" for its scattered holdings.[146] 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 challenged regulation.[147] Instead, the takings analysis must focus on

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[137] *Lost Tree*, 787 F.3d at 1113-1114.
[138] *Id.* at 1113-1114.
[139] *Id.* at 1113.
[140] *Id.* at 1291.
[141] *Id.* at 1114; *Lost Tree Vill. Corp. v. United States ("Lost Tree I")*, 707 F.3d 1286, 1289, 1291 (Fed. Cir. June 6, 2013). *Lost Tree* developed the John's Island community beginning in 1969 through the mid- 1990s.
[142] *Lost Tree I*, 707 F.3d at 1291, 1293-94.
[143] *Id.* at 1287, 1293–94.
[144] *Id.*
[145] *Id.* at 1292–93.
[146] *Id.* at 1294.
[147] *Id.* at 1292.

the parcel as a whole.[148] 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.[149] Finally, the critical issue in determining the relevant parcel are 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.[150] 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.[151] Conversely, the relevant parcel could be a subset of a larger purchase of land, even contiguous land, when the property owner treats the parcels as distinct economic units and develops them at different times.[152]

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 preparation as a home site) to $27,500 (Plat 57's nominal value without the permit).[153] The court said that such a diminution in value was a taking under the *Lucas* categorical framework.[154]

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.[155] 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."[156] 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.[157] And, the court further noted that the government's argument would lead to a circularity in which no landowner could never 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.[158] This showing would prompt land speculators to attribute value to the land that was otherwise valueless, based

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[148] *Id.*
[149] *Id.* 1292–93.
[150] *Id.* at 1293.
[151] *Id.*
[152] *Id.*
[153] *Lost Tree Vill. Corp. v. United States (Lost Tree CFC II)*, 115 Fed. Cl. 219, 233 (2014).
[154] *Id.* (stating that a compensable taking also occurred under the *Penn Central* framework).
[155] *Lost Tree Vill. Corp. v. United States*, 787 F.3d 1111, 1117 (Fed. Cir. June 1, 2015) (emphasis added).
[156] *Id.*
[157] *Id.*
[158] *Id.*

upon the potential viability of a winning *Lucas* claim.[159] This attribution of land value based upon speculation would mean that the very *Lucas* claim on which the speculation was based would be defeated.[160]

Fourth, *Chapel Hill Title and Abstract 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.[161] In this case, it was the local government's decision-making in writing the Resource Conservation District ("RCD") ordinance, in combination with the impact of private restrictive covenants that helped make the *Lucas* takings claim. 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 residential use.[162] Most of the lot, 78.5 percent, was in the RCD and subject to an ordinance that prohibited construction within the RCD.[163] The remaining 21.5 percent was located outside of the RCD and was burdened by a restrictive covenant preventing construction of a home on this portion.[164] 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.[165]

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."[166] 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 whether a variance is necessary to leave an owner with a 'legally reasonable use' of the property."[167] 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.[168]

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[159] *Id.*
[160] *Id.*
[161] CHAPEL HILL TITLE & ABSTRACT CO., INC. V. CHAPEL HILL, 669 S.E.2D 286 (N.C. 2008).
[162] *Id.* at 286–87.
[163] *Id.* at 287.
[164] *Id.* at 288.
[165] *Id.* at 287.
[166] *Id.* at 288.
[167] *Id.*
[168] *Id.*

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.[169] He believed the restrictive covenants that were imposed more than twenty 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.[170] 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.[171]

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. [172] 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").[173] The plaintiffs alleged that the 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.[174] Specifically, one of the plaintiffs' experts, whom the court said it 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."[175] 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 which 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.[176]

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.[177] The owners succeeded in

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[169] *Id.* at 290 (Brady, J., concurring).
[170] *Id.*
[171] *Id.*
[172] No. 08-536L, 2016 WL 1588327 (Fed. Cl. Apr. 19, 2016).
[173] *Id.*
[174] *Id.* at *26.
[175] No. 08-536L, 2016 WL 1588327 at *20 fn17.
[176] *Id.* at *25.
[177] 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); *see also* 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).

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 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 four 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 *Appolo Fuels, Inc. v. United States*.[178] The second is *Forest Properties, Inc. v. United States*.[179] The third is *National Lime and Stone Company v. Blanchard Township*.[180] And, the fourth is *Machipongo Land & Coal Co., Inc. v. Commonwealth of Pennsylvania, Department of Environmental Resources*.[181]

At issue in the first case, *Appolo Fuels, Inc. v. United States*, was whether the government's prevention of surface mining based upon a citizen petition pursuant to Section 1272 of the Surface Mining Control and Reclamation Act ("SMCRA") effected a *Lucas* taking of the plaintiff's property interests. [182] Plaintiff's property interests consisted of numerous leases granting auger, deep and surface mining rights, and other unspecified fee interests located both inside of and outside of the Creek watershed.[183] 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.[184]

The *Appolo* 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.[185] 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.[186] "The relevant parcel in *Loveladies* coincided with the area covered by the permit only because the remainder

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[178] 54 Fed. Cl. 717 (2002).
[179] 177 F.3d 1360 (Fed. Cir. May 1999).
[180] 2005 WL 2840493 (Ct. App. Ohio Oct. 31, 2005).
[181] 719 A.2d 19 (Pa. 1998).
[182] 54 Fed. Cl. 717 (2002).
[183] *Id*. at 726, 728.
[184] *Id*. at 726.
[185] *Id*. at 724, 726.
[186] *Id*.

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."[187] 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"[188] and "to consider the plaintiff's overall business plan for the land at issue."[189]

Interestingly, the court reiterated what other federal courts have said; property owners may not engineer a successful *Lucas* claim.[190] 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. [191]

In the second case, the United States Court of Appeals for the Federal Circuit in *Forest Properties, Inc. v. United States*[192] 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.[193] 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 property.[194] The property owner alleged a *Lucas* taking when the government denied a Section 404 dredge and fill permit.[195]

In both *Loveladies* and *Forest Properties*, the original purchase and the owners' economic intentions at the outset were critically important to establishing the relevant parcel to constitute 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.[196] Forest acquired interests in a total of 62 acres, though at separate times, but always with a single project of 62 acres in mind.[197] So, even though the two tracts were legally separate,

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[187] *Id*. at 727.
[188] *Id.* at 725; see also infra note 215 (discussing *Machipongo Land & Coal Co., Inc. v. Commonwealth of Pennsylvania, Department of Environmental Resources*, 719 A.2d 19 (Commonwealth Court of Penn., Oct. 20, 1998) and adopting the definition of the denominator as consisting only of the regulated land).
[189] *Id. at 730.*
[190] *Id*. at 727-728.
[191] *Id.* at 727-28
[192] 177 F.3d 1360 (Fed. Cir. May 1999)
[193] *Id.* at 1365.
[194] 177 F.3d at 1365.
[195] *Id.* at 1364.
[196] *Forest Properties, Inc. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir. 1999).
[197] *Id*.

for the *Forest Properties* court, they were a single-economic unit and therefore properly constituted the relevant parcel of the denominator.[198]

In the third case, *National Lime and Stone Company v. Blanchard Township*,[199] the owner argued that the court should follow the precedent of *State ex rel. R.T.G., Inc. v. State*,[200] which held that pursuant to state law, "mineral rights are 'severable and of value in their own right.'"[201] The property owner purchased approximately 235 acres of real property intending to convert it into a limestone quarry.[202] The property had been previously farmed and at the time of its acquisition by the plaintiff, there were no restrictive zoning ordinances in force.[203] Approximately four months after the plaintiff acquired the property, the municipality passed a zoning resolution prohibiting use of the property as a limestone quarry.[204]

The court rejected *R.T.G.* as binding precedent, relying upon the intent of the purchaser as controlling guidance. The court distinguished the facts in its case from those in *R.T.G.*, noting that the coal company in *R.T.G.* engaged in significant testing of the property for coal deposits and spent a substantial amount of money assessing the property's viability.[205] Additionally, R.T.G. had successfully mined for coal for several years prior to the state designating the property as unsuitable and so had engaged in mining before the alleged taking, unlike National. Based upon these findings, the *National* court concluded that R.T.G. had done significantly more than National.[206]

Fourth, in *Machipongo Land & Coal Co., Inc. v. Commonwealth of Pennsylvania, Department of Environmental Resources* the court held that the Commonwealth of Pennsylvania recognizes three distinct estates in land – the surface estate, the coal or mineral estate, and the right to support and that the appropriate denominator in the *Lucas* analysis of the impact of a regulation that designated certain areas as unsuitable for surface mining of coal ("UFM") was solely the coal estate.[207] Even after adopting a *Lucas*-friendly

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[198] *Id.*
[199] 2005 WL 2840493 (Ct. App. Ohio Oct. 31, 2005).
[200] 98 Ohio St.3d 1 (2002).
[201] 2005 WL 2840493 at *8.
[202] *Id* at *1.
[203] *Id.*
[204] *Id.*
[205] *Id.* at *9.
[206] *Id.* at *8-*9.
[207] 719 A.2d 19 (Pa. 1998). The court identified three approaches that courts had taken to the problem of identifying the denominator in regulatory takings cases: contiguous land under common ownership, regulated land, and multi-factor analysis. For a detailed discussion of the approaches and the rationales behind them, *see, id.* at 27.

approach to the denominator, the court rejected the property owners' *Lucas* claims.[208] The court's reason for rejecting the *Lucas* claim was because the plaintiffs owned thousands of acres of land but the evidence established that the regulatory designation only affected a small percentage of their coal property.[209] Thus, there was not the type of evidence like in the *R.T.G.* case.[210] Recall that in *R.T.G.*, the court first determined that the relevant estate for the denominator was the coal remaining in the acreage subject to government regulation. Then, the court found that the UFM designation made it impossible for RTG to mine its coal profitably. Once the court found that RTG could not profit from its coal rights, the result was a *Lucas* categorical taking of those coal rights.[211]

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 the denominator question 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, hence 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,[212] horizontally,[213] temporally,[214] or functionally.[215] In contrast, what I call "pyramidal segmentation" describes segmentation of uses under the ubiquitous zoning pyramid. The zoning pyramid traces its roots back to the landmark Supreme Court decision, *The Village of Euclid, Ohio v. Ambler Realty Co.*[216] 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.[217] The

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[208] *Id.* at 31.
[209] *Id.* at 31.
[210] Supra notes 200-06 and accompanying text.
[211] *State Ex Rel. R.T.G., Inc. v. State*, 780 N.E.2d 998, 1009 (Sup. Ct. of Ohio 2002).
[212] Supra notes 75, 79, 135, 136, and accompanying text.
[213] Supra notes 76, 79, 135, 137, 139, and accompanying text.
[214] Supra notes 74, 77, 79, 91, and accompanying text.
[215] Supra notes 78, 79, and accompanying text.
[216] 272 U.S. 365 (1926).
[217] *Id.* at 380.

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.[218]

Downzoning is the process of rezoning property from a more inclusive use to a less inclusive use (moving up the zoning pyramid). Such rezoning, for example from commercial use to residential use, is called down zoning because, in theory, as one moves up the zoning pyramid, property becomes less valuable because fewer uses are permitted of the property. Upzoning is rezoning property from a less inclusive use to a more inclusive use further down the zoning pyramid, for example, moving from a single-family residential zoning classification to a multi-family residential zoning classification. 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.

The twelve 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. Of the twelve cases, this section discusses six. The first case is *State ex rel. Greenacres Foundation v. Cincinnati, Greenacres*.[219] The second case is *City of Sherman v. Wayne*.[220] The third case is *Steel v. Cape Corp.*[221] The fourth case is *Galleon Bay Corp. v. Board of County Commissioners of Monroe County.*[222] The fifth case is *Ali v. City of L.A.*[223] And the sixth case is *Dunlap v. City of Nooksack*.[224]

First, in *State ex rel. Greenacres Foundation v. Cincinnati, Greenacres*,[225] a charitable foundation applied for a demolition permit to remove an existing single-family home that had been uninhabited since 1961. The house was located on land zoned in a single-family residential district with no historic overlay.[226] After the demolition permit request, the Cincinnati City Council proceeded to impose historic district zoning on the acreage where the house was located.[227] Ultimately, the court concluded that the demolition permit application ought to have been processed pursuant to the law as it was in effect when Greenacres

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[218] *Id.* at 380-381.
[219] 2015 WL 9594380 (Ohio App. Dec. 30, 2015).
[220] 266 S.W.3d 34 (Tex. App. 2008).
[221] 111 Md. App. 1, 4 (Ct. Special App. Md. 1996).
[222] 105 So.3d 555 (Fla. Dist. Ct. App. 2012).
[223] 77 Cal. App. 4th 246, 248 (Ct. App. Calif., Second Appl. Dist., Div. Four Dec. 28, 1999).
[224] 158 Wash. App. 1016 (2010).
[225] 2015 WL 9594380 (Ohio App. Dec. 30, 2015).
[226] *Id.* at *1.
[227] *Id.* at *2.

applied for the permit.[228] Nearly three years after Greenacres applied for the demolition permit, the City of Cincinnati issued the permit and it took nearly seven additional months from the issuance of the permit for the City to remove the historic district overly designation from Greenacres' property.[229] The court held that denial of Greenacres' application caused a *Lucas* taking 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.[230]

Second, the property in *City of Sherman v. Wayne*[231] had been used commercially use as an armory and vehicle storage site when the municipality downzoned[232] the property to a residential zone and then refused to grant the owner non-conforming use status.[233] 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.[234]

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.[235] The government denied the request on the basis that the rezoning to a residential classification would make the school facilities inadequate.[236] 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.[237] Against a background of aberrational facts[238] – impermissible rezoning of property to an open space classification that did not

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[228] *Id.* at *3.
[229] *Id.*
[230] *Id.* at *9.
[231] 266 S.W.3d 34 (Tex. App. 2008).
[232] *Id.* at 39-40.
[233] *Id.* at 40.
[234] *Id.* at 46-47.
[235] *Steel v. Cape Corp.*, 111 Md. App. 1, 4 (Ct. Special App. Md. 1996). The downzoning occurred at the request of an entity that improperly alleged that it held an ownership interest in the subject property.
[236] *Id.* at 11.
[237] *Id.* at 31.
[238] *Supra* note 237 and accompany text; *Steel*, 111 Md. App. at 26.

> 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

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.[239]

Fourth, the plaintiff in *Galleon Bay Corp. v. Board of County Commissioners of Monroe County* owned 10.64 acres of land in fee simple.[240] Six of the acres were either landlocked, subject to utility easements and roads, or restricted by perpetual conservation easements.[241] 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.[242] 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 determining the impact of the regulation on the plaintiff.[243]

Fifth, in *Ali v. City of L.A.*,[244] the property owner applied for a permit to demolish his hotel after it was substantially destroyed by fire in 1988. The City thought the hotel was a single room occupancy ("SRO") hotel and denied the demolition permit because the City had an ordinance that prohibited demolishing "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."[245] Two years later, the City determined that the hotel was not an SRO hotel and issued the demolition permit.[246] In the interim, the City contracted for security for the abandoned hotel and assessed the cost against the owner, pursuant to a City ordinance.[247]

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 compelling owners of

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> 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.

[239] *Steel*, 111 Md. App. at 33.
[240] 105 So.3d 555 (Fla. Dist. Ct. App. 2012).
[241] *Id.* at 557-558.
[242] *Id.* at 562.
[243] *Id.* at 567.
[244] 77 Cal. App. 4th 246, 248 (Ct. App. Calif., Second Appl. Dist., Div. Four Dec. 28, 1999).
[245] *Id.*
[246] *Id.*
[247] *Id.*

residential real property to offer or to continue to offer residential property for lease or rent.[248] 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.[249] 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.[250] And, because of the 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.[251]

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,*[252] 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. . . ."[253] Perhaps the answer lies in the fact that nearly twenty 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. . ."[254] Six years after *Ali*, the Court in *Lingle v Chevron U.S.A. Inc.* held that *Agins'* "'substantially advances' formula is not a valid method of identifying compensable regulatory takings. It prescribes an inquiry in the nature of a due process test, which has no proper place in the Court's takings jurisprudence."[255] 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.*[256] The plaintiff owned a 29.5 acre and a 0.25 acre parcel in fee simple.[257] The 0.25 acre parcel was zoned residential when the plaintiff requested an area variance to build a house and to retain a

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[248] *Id.*
[249] *Id.* at 256 (Ct. App. Calif., Second Appl. Dist., Div. Four Dec. 28, 1999).
[250] *Id.* at 256.
[251] *Id.* at 249, 256.
[252] 953 P.2d 1188 (1998).
[253] *Ali*, 77 Cal. App. 4th at 255.
[254] *Agins v. City of Tiburon*, 447 U.S. 255, 260, 100 S. Ct. 2138, 2141 *abrogated* by *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005).
[255] *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 529 (2005).
[256] 158 Wash. App. 1016 (2010).
[257] *Id.* at *1.

constructed fence.[258] The court found the denial of the variance resulted in a *Lucas* taking of the 0.25 acre parcel.[259] 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.[260]

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 adds to the use and development restrictions 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.[261] In many of the winning *Lucas* 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.[262] 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, I take a quick look at five pyramidal segmentation and public law impact cases that were unsuccessful in bringing themselves under the umbrella of the winning *Lucas* cases in this category. The first is *Erb v. Maryland Department of Environment*.[263] The second is *Beyer v. City of Marathon*.[264] The

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[258] *Id.* at *1.
[259] *Id.* at *6.
[260] *Id.* at *6.
[261] *E.g.*, *Ali v. City of L.A.*, 77 Cal. App. 4th 246 (Dec. 28, 1999); *Steel v. Cape Corp.*, 111 Md. App. 1 (1996); *State ex rel. Greenacres Foundation v. City of Cincinnati*, __ N.E.3d __ , 2015 WL 959480 (Ohio App. Dec. 30, 2015); *Keeler v. Mayor & City Council of Cumberland*, 940 F. Supp. 879 (D. Md.1996). Denial of Certificate of Appropriateness and the application of the Historic Zoning Ordinance to the Church to demolish a monastery was a *Lucas* taking because buildings were in serious disrepair and the refusal required the Church to maintain the monastery in a safe standard of repair. The Church estimated complete renovation costs at 2 million dollars and the Church estimated the cost to retain and adequately maintain the shell and minimal building interior temperatures at $386,440. The city "stipulated that 'no economically feasible plan can be formulated' for the preservation of the Church buildings.'" *Id.*at 888.
[262] *Moroney v. Mayor and Council of Borough of Old Tappan*, 268 N.J.Super. 458 (App. Div. 1993), *Galleon Bay Corp. v. Board of County Com'rs of Monroe County*, 105 So.3d 555 (Fla. Dist. Ct. App. 2012), *Heapy v. State of Michigan*, 2004 WL 5573602 (April 28, 2004), *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1996), *aff'd* 119 S.Ct. 1624 (1999), *City of Sherman v. Wayne*, 266 S.W.3d 34 (Tex. App. 2008).
[263] 110 Md. App. 246 (Ct. of Special App. May 30, 1996).
[264] 2013 WL 5927690, at 1 (Dist. Ct. App. 3rd Dist. Fla. Nov. 6, 2013). The Beyers were allowed to camp on the property but not build.

third is *Collins v. Monroe County*.[265] The fourth is *Loewenstein v. City of Lafayette*.[266] And the fifth is *Allegretti & Company v. County of Imperial*.[267]

First, in *Erb v. Maryland Department of Environment*,[268] the property owner alleged a *Lucas* taking after being denied a permit for a septic system essential to developing his property.[269] The court found the property owner had not established anything more than a great diminution in value from the present inability to build.[270] Further, there was evidence of alternative means of sewage disposal possibly available to the owner.[271] The court held that the owner had not presented sufficient evidence of a denial of all economically beneficial use to establish a *Lucas* taking.[272] Additionally, unlike *Steel v. Cape Corp.*[273] 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, the *Erb* court held that the Maryland Department of Environment's sewage regulatory scheme did "no more than could be accomplished under the nuisance laws of [the] State."[274]

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.[275] 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."[276] 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 of Monroe County*.[277] The second of

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[265] *Collins v. Monroe Cty.*, 118 So. 3d 872, 873, fn. 3 & 7 (Fla. Dist. Ct. App. 2013), *reh'g denied* (Sept. 3, 2013), review denied, 139 So. 3d 884 (Fla. 2014).
[266] 103 Cal. App. 4th 718 (Nov. 13, 2002).
[267] 138 Cal. App. 4th 1261 (March 28, 2006)
[268] 110 Md. App. 246 (Ct. of Special App. May 30, 1996).
[269] *Id.* at 252.
[270] *Id.* at 263-264.
[271] *Id.* at 264.
[272] *Id.* at 265-266.
[273] 111 Ms. PP. 1 (1996)
[274] 110 Md. App. 246 at 264 (Ct. of Special App. May 30, 1996).
[275] *Id.*
[276] *Id.*
[277] *Galleon Bay Corp. v. Bd. of Cty. Comm'rs of Monroe Cty.*, 105 So. 3d 555 (Fla. Dist. Ct. App. 2012).

the unsuccessful cases highlighted in this category is *Beyer v. City of Marathon*[278] in which the government adopted a comprehensive plan and subsequently denied the property owners the right to engage in any development on their property. The owners sued, alleging a deprivation of all or substantially all economic use of the property.[279] 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.[280] 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.[281]

Third, in *Collins v. Monroe County*[282] 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.[283] 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*. The *Collins* court stated that the property owners in *Galleon Bay* spent hundreds of thousands of dollars pursing reasonable investment-backed expectations and trying to develop the property. 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.[284]

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. Without having made meaningful efforts to explore their property's development potential over the decades of their ownership and in light of the fact that building

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[278] 2013 WL 5927690, at 1 (Dist. Ct. App. 3rd Dist. Fla. Nov. 6, 2013) (the Beyers were allowed to camp on the property but not build).
[279] *Id.* at *2 (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").
[280] *Id.* at *2 (discussing *Galleon*).
[281] *Id.* at *1 and *3.
[282] *Collins v. Monroe Cty.*, 118 So. 3d 872, 873, fn 3 & 7 (Fla. Dist. Ct. App. 2013), *reh'g denied* (Sept. 3, 2013), *review denied*, 139 So. 3d 884 (Fla. 2014).
[283] *Id.* at 873.
[284] *Collins v. Monroe Cty.*, 118 So. 3d 872, 876 (Fla. Dist. Ct. App. 2013), *reh'g denied* (Sept. 3, 2013), *review denied*, 139 So. 3d 884 (Fla. 2014).

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*.[285]

In the fourth and fifth cases, the property owners in *Loewenstein v. City of Lafayette*[286] and *Allegretti & Company v. County of Imperial*[287] unsuccessfully attempted to bring their cases within the precedent of *Ali v. City of L.A.*[288] in which the court held that "the erroneous denial of a demolition permit, in violation of the Ellis Act,[289] . . . temporarily deprived [the property owner] of all economically viable use of the property. . . ."[290] 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.[291] 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.[292] 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.[293]

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.[294] The *Lucas* takings issues arose when governments enforced zoning ordinances and denied owners' requests for development approval or some other land use concession.[295] The *Lucas* takings resulted from the 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.[296] Restrictive zoning policies and refusal by governments to exercise their zoning discretion are unifying themes in these cases.

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[285] *Id.*
[286] 103 Cal. App. 4th 718 (Nov. 13, 2002).
[287] 138 Cal. App. 4th 1261 (March 28, 2006).
[288] 77 Cal. App. 4th 246 (Dec. 28, 1999).
[289] *Id.* at 246.
[290] *Ali v. City of Los Angeles*, 77 Cal. App. 4th 246, 253, 91 Cal. Rptr. 2d 458 (1999).
[291] *Loewenstein*, 103 Cal. App. 4th 718, 735 (2002).
[292] *Id.* at 736
[293] *Allegretti & Co.*, 138 Cal. App. 4th 1261, 1283-1284 (2006).
[294] *Supra* Part II.
[295] *Supra* Part II.
[296] *Supra* Part II.

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.[297] 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 as will become evident. Government 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. Dept. of Transportation v. Diversified Properties Co.*[298] and *Jefferson Street Ventures, LLC v. City of Indio,*[299] 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. 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.[300]

First, in *Diversified Properties*, the property owner, DPC, purchased more than 17 acres of land in fee simple for commercial development.[301] Prior to completing the purchase, DPC was aware that the State had designated part of the land for a possible freeway right of way.[302] A total of 4.5 acres were set aside to accommodate the State's future highway plans.[303] 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. Affirming the trial court's ruling, the 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."[304]

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[297] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 122 S. Ct. 1465, 1489-90; *supra* note 73 and accompanying text discussing *Penn Central*.
[298] 14 Cal. App. 4th 429 (1993).
[299] 236 Cal. App. 4th 1175 (2015).
[300] , *People ex rel. Dept. of Transportation v. Diversified Properties*, 14 Cal. App. 4th 429 (1993); *Jefferson Street Ventures, LLC v. City of Indio*, 236 Cal. App. 4th 1175 (2015).
[301] 14 Cal. App. 4th 429, 437 (1993).
[302] *Id.*
[303] *Id* at 438-439.
[304] 14 Cal. App. 4th 429, 443 (1993).

Second, in *Jefferson Street Ventures, LLC v. City of Indio,*[305] 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.[306] The City could not acquire the property at the time of Jefferson's application because it did not have the money.[307] 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.[308] 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.[309]

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.[310] 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 Ranco Palos,*[311] and *Brost v. City of Santa Barbara,*[312] 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 third case, *Monks v. City of Ranco Palos,*[313] the court found a *Lucas* taking where government imposed a construction moratorium on sixteen vacant lots located near where landslides had recently occurred. The properties

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[305] 236 Cal. App. 4th 1175 (2015).
[306] *Id.* at 1182
[307] *Id.*
[308] *Id.*
[309] *Id.* at 1200-02.
[310] *See id.* at 1202 (stating that "in this case, it is the City that has divided the Property into discrete segments").

[311] *Monks v. City of Rancho Palos Verdes*, 167 Cal. App. 4th 263, 270, 84 Cal. Rptr. 3d 75, 80 (2008), *as modified on denial of reh'g* (Oct. 22, 2008).
[312] 2015 WL 1361196 (Ct of App., 2nd Dist, Div. 6, Calif. April 21, 2015).
[313] *Monks v. City of Rancho Palos Verdes*, 167 Cal. App. 4th 263, 270, 84 Cal. Rptr. 3d 75, 80 (2008), *as modified on denial of reh'g* (Oct. 22, 2008).

were zoned for residential use, utilities and sewer had been installed, and the court agreed with the trial court that, at best, there was remaining uncertain about the area's stability.[314] 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."[315] 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. And, absent such a definitive finding, the government failed to meet its burden of proof under *Lucas* and under state nuisance law.[316]

Finally, the California Court of Appeals in *Brost v. City of Santa Barbara*,[317] affirmed the lower trial court's finding of a *Lucas* taking when the City of Santa Barbara refused to amend Chapter 22.90[318] of its municipal code, permanently enjoining the plaintiffs from rebuilding their homes after being destroyed by the 2008 Tea Fire.[319] Chapter 22.90 permanently enjoined construction on land that was located entirely within Slide Mass C, an active landslide area.[320] 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. 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. [321]

One reading of Monks and *Brost* is that courts insisted 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 were unwilling to find that building homes on residentially zoned property was a common law nuisance.

PART III. IMPLICATIONS

Having identified the successful *Lucas* cases and their foundational underpinnings, I consider *Lucas'* implications for the future and why *Lucas* matters. First, I discuss the jurisprudential implications

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[314] *Id.* at 306-07.
[315] *Id.* at 306.
[316] *Id.* at 309.
[317] 2015 WL 1361196 (Ct of App., 2nd Dist, Div. 6, Calif. April 21, 2015).
[318] *Id.* at *8-9.
[319] *Id.* at *8. Plaintiffs' lots were zoned for residential purposes.
[320] *Id.* at *8.
[321] *Brost*, 2015 WL 161196 at *10-11.

of *Lucas*, focusing on lessons learned from my empirical study. Then I turn to *Lucas'* 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.

A. JURISPRUDENTIAL IMPLICATIONS

As I think about the winning *Lucas* cases in terms of prospective lessons, many of them are special circumstances cases in which an intervening act or circumstance 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. 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.'"[322]

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." [323] So, the federal courts have been clear that intentional efforts by property owners to manipulate their denominators are not to be countenanced.[324]

First, when it comes to the nuisance abatement cases, what we can draw is that despite the apprehension about statutory nuisances that can be read into the *Lucas* majority opinion,[325] subsequent courts and scholars seem to have accepted that the decision is not limited to common law nuisances.[326] 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

[322] *Lost Tree Vill. Corp. v. United States* 787 F.3d 1111, 1118 (Fed. Cir. June 1, 2015).
[323] 22 Cl. Ct. 310, 318-19 (1991).
[324] *Supra* note 358.
[325] *Supra* Part I.A.
[326] *See, e.g.*, Blumm & Ritchie, *Lucas' Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defense*, 29 HARV. ENVIRONMENTAL L. REV. 331, 331–32 (2005); *Infra* Part II (discussing the nuisance abatement cases and observing that none of the courts the *Lucas* exception as applying exclusively to common law nuisances).

are also prohibited) and the bona fides of the property owners.[327] 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.[328] Still, these nuisance abatement and *Lucas* exception cases are likely outliers and hold little precedential value because of the 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 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.[329] While the role of private agreements in establishing the relevant denominator in the *Lucas* takings equation is unsettled in the state and federal courts,[330] 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.

I suggest that *Lucas* has become the Higgs boson[331] 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

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[327] *Infra* Part I.C.2.
[328] Supra Part I.C.2.
[329] *Infra* Appendix.
[330] Dwight H. Merriam, *What is the Relevant Parcel in Takings Litigation?*, SC43 ALI-ABA 505, 534 (1998); Dwight H. Merriam, *Rules for the Relevant Parcel*, 25 U. Haw. L. Rev. 353, 415 (2003); supra part I.C.3.
[331] *Higgs Boson Gets Nobel Prize, But Physicists Still Don't Know What It Means*, WIRED.COM, http://www.wired.com/2013/10/higgs-nobel-physics/ (last visited May 11, 2016).

> 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.

Master Lease in the first instance when determining the denominator and undertaking the *Lucas* takings analysis and then secondarily, in the just compensation analysis.[332]

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.[333] These cases give life to Justice Rehnquist's dissent in *Penn Central Transportation Co. v. City of New York*,[334] 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.[335] 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.'"[336] 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.[337]

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.[338] 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.[339]

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,

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[332] *Love Terminal Partners v. United States*, 2016 WL 1588327 (Fed. Cl. Ar. 19, 2016).
[333] *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001); *Lost Tree*, 787 F.3d 1111, 1116 (2015).
[334] 438 U.S. 104 (1978).
[335] *Id.*
[336] *Id.* at 146 (quoting *United States v. Dickinson*, 331 U.S. 745, 748 (1947)).
[337] *Id.* at 146-47.
[338] *Supra* Part II.D.
[339] Supra part II.

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

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 for property owners to be more willing to try sincerely to make-out 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 good 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*.[340] While property owners rarely win on their *Lucas* challenges, the benefit of successfully articulating the *Lucas* categorical claim is that once an owner is under the *Lucas* umbrella, 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 I 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

[340] 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).

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 courts believe to be a legitimate factual basis. Owners need to have rationally treated the regulated parcel as a separate economic interest from the owners' larger holdings. This may mean 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, if you will, 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, I discussed the many ambiguities that abound in *Lucas'* wake. 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 modest, 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. . . ."[341] What is interesting is how the law has evolved in the twenty-five 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*.

CONCLUSION

The answer to why *Lucas* matters given so few *Lucas* successes lies in *Lucas'* 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'* impact is understated if one focuses exclusively on

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[341] 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).

the successful *Lucas* cases, which are few, because most takings cases proceed under the *Penn Central* analysis.[342] Even as the *Lucas* Court announced the categorical takings rule, it predicted that the categorical rule would apply in "relatively rare situations"[343] and only under the most "extraordinary circumstances."[344] My review of all of the reported regulatory takings cases affirm that prediction.

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." I contend *Lucas'* 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.

[342] *Horne v. Dep't of Agric.*, No. 14-275, 2015 WL 2473384, at *17 (U.S. June 22, 2015) (Sotomayor dissenting).
[343] *Lucas*, 505 U.S. at 1018.
[344] *Id.* at 1017.

APPENDIX: SUCCESSFUL *LUCAS* CASES

THE NUISANCE ABATEMENT CASES, THE *LUCAS* EXCEPTION

City of Seattle v. McCoy, 101 Wash.App. 815 (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 Lucas taking
State ex rel. Pizza v. Rezcallah, 84 Ohio St.3d 116 (1998)

PRIVATE AGREEMENTS AND THE DENOMINATOR

Love Terminal Partners v. United States, No. 08-536L, 2016 WL 1588327 (Fed. Cl. Apr. 19, 2016)
Bowles v. United States, 31 Fed. Cl. 37 (Fed. Cl. 1994)
Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994)
State ex rel. R.T.G., Inc. v. State, 98 Ohio St.3d 1 (2002)
Vulcan Materials Co. v. Tehuacana, 369 F.3d 882 (5th Cir. 2004)
Alabama Dept. of Transp. v. Land Energy, Ltd., 886 So.2d 787 (2004)
Chapel Hill Title & Abstract Co., Inc. v. Town of Chapel Hill, 362 N.C. 649 (2008)
Lost Tree Village Corporation v. United States, 707 F.3d 1286 (Fed. Cir. 2013), *aff'd* 2015 WL 3448943 (Fed. Cir. June 1, 2015)

PYRAMIDAL SEGMENTATION AND PUBLIC LAW IMPACT

State ex rel. Greenacres Foundation v. City of Cincinnati, __ N.E.3d __ , 2015 WL 959480 (Ohio App. Dec. 30, 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), *aff'd* 119 S.Ct. 1624 (1999)
Dunlap v. City of Nooksack, 158 Wash.App. 1016 (2010)
Moroney v. Mayor and Council of Borough of Old Tappan, 268 N.J.Super. 458 (App. Div. 1993)

Galleon Bay Corp. v. Board of County Com'rs of Monroe County, 105 So.3d 555 (Fla. Dist. Ct. App. 2012)
Steel v. Cape Corp., 111 Md. App. 1 (1996)
Keeler v. Mayor & City Council of Cumberland, 940 F. Supp. 879 (1996)
Lopes v. City of Peabody, 1995 WL 17215782 (March 31, 1995)
U.S. v. Hardage, 996 F.2d 312 (10th Cir. 1993), 1993 WL 207380 (1993)
Heapy v. State of Michigan, 2004 WL 5573602 (April 28, 2004)
Ali v. City of L.A., 77 Cal. App. 4th 246 (Dec. 28, 1999)

DELAY THEORY

People ex rel. Dept. of Transportation v. Diversified Properties Co., 14 Cal. App. 4th 429 (1993)
Jefferson Street Ventures, LLC v. City of Indio, 236 Cal. App. 4th 1175 (2015)
Monks v. City of Ranco Palos, 167 Cal.App.4th 263 (2008)
Brost v. City of Santa Barbara, 2015 WL 1361196 (Ct of App., 2nd Dist, Div. 6, Calif April 21, 2015) (unpublished opinion)