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Cleaning Up the Rest of *Agins*: Bringing Coherence to Temporary Takings Jurisprudence and Jettisoning "Extraordinary Delay"

by David W. Spohr

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Editors' Summary:

After decades of confusion, the fuzzy edges of regulatory takings doctrine have grown crisper. No longer a battleground for disputes over regulatory motivation, wisdom, and validity, the takings analysis now focuses squarely on the effect a regulation has on a property owner. However, one vestige of the discredited, substantive due process-like inquiry of past takings cases lingers. To prove a temporary taking, a property owner still has to show that the government committed "extraordinary delay," typically accompanied by "bad faith." Such an inquiry is antithetical to the modern understanding of the Takings Clause.

Whether analyzed in the context of a direct or inverse condemnation, and whether the intrusion is physical or regulatory, permanent, or temporary, the Takings Clause of the Fifth Amendment is not fundamentally about how well the government is doing its job.[1] When the government directly condemns property to build a school, the eminent domain analysis does not consider how wisely the school district acquires school grounds or educates students. Similarly, when the government builds a dam and water from the project continually invades private property, the takings inquiry does not evaluate how beneficial the dam is to the region. The essence of the Taking Clause does not morph when the analysis shifts to regulatory takings; the goal is still to identify regulatory restrictions "functionally equivalent" to a direct appropriation of private property rights.[2] A regulation's "worthiness" does not shield an agency from liability[3] any more than the regulation's ineffectiveness or frivolity causes such liability.[4]

Unfortunately, *Agins v. City of Tiburon*[5] intimated that the failure of a regulation to substantially advance a legiti-

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1. The Takings Clause provides that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. Takings cases involving real property generally fit into two broad categories, direct and inverse condemnations. In direct condemnation cases, the government intends to take property through eminent domain and agrees it needs to pay some amount of compensation. The disputes are typically over whether the government is allowed to take the property (even if it pays) and if so, how much the government owes. In inverse condemnation cases, the government does not intend to or believe it is taking a compensable property interest. Property owners claim that the government has, in fact, functionally taken their property through physical invasion ("physical takings") or through onerous restriction ("regulatory takings"). The disputes are generally over whether the government owes anything at all, and if so, how much.
2. Lingle v. Chevron, U.S.A. Inc., 544 U.S. 528, 539, 35 ELR 20106 (2005).
3. Cienega Gardens v. United States, 331 F.3d 1319, 1340, 33 ELR 20221 (Fed. Cir. 2003). *See also* Friedenburg v. N.Y. State Dep't of Envtl. Conservation, 767 N.Y.S.2d 451, 460 (N.Y. App. Div. 2003) ("the legitimacy of a governmental regulation does not lead to the result that the government has no obligation to pay compensation as a result of that regulation").
4. *Lingle*, 544 U.S. at 539-43. *See also* Dale A. Whitman, *Deconstructing* Lingle*: Implications for Takings Doctrine*, 40 J. Marshall L. Rev. 573, 582 (2007) (post-*Lingle*, "[n]o longer will an extremely worthy, or an extremely unworthy, governmental objective be relevant in deciding whether a taking has occurred"); Robert G. Dreher, Lingle*'s Legacy: Untangling Substantive Due Process From Takings Doctrine*, 30 Harv. Envtl. L. Rev. 371, 404 (2006) ("simple parity would seem to argue that if challengers cannot raise a regulation's lack of redeeming societal value, proponents should not be able to raise its importance in that respect").
5. 447 U.S. 255, 263 n.9, 10 ELR 20361 (1980), *abrogated by Lingle*, 544 U.S. 528.

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mate government purpose was an independent ground for a taking. The Court's pronouncement sent regulatory takings law on a quarter-century detour through the realm of substantive due process, creating a generation of confusion.[6]

Thankfully, in *Lingle v. Chevron, U.S.A., Inc.*,[7] the Court unanimously recognized its *Agins* mistake. *Lingle* recanted *Agins*' "regrettably imprecise" language, determined that the substantially advance test has "no proper place" in the takings arena, and restored the regulatory takings focus to determining whether the restriction is "so onerous that its effect is tantamount to a direct appropriation or ouster."[8] *Lingle* thus disentangled the inquiry into the wisdom of the government action from the constitutional inquiry into whether that action has worked a compensable deprivation.

However, there was a less central and less noticed portion of *Agins*'s dicta, appearing only in a footnote. Agins argued that, in addition to the zoning restriction itself, the city's unsuccessful flirtation with condemning the subject property had itself worked a taking.[9] In dismissing this secondary claim, the Court noted in footnote nine that during governmental decisionmaking processes, fluctuations in value, "absent extraordinary delay . . . cannot be considered as a 'taking' in the constitutional sense."[10] Although the issue was eminent domain, with the Court citing only eminent domain cases in disposing that claim,[11] this "extraordinary delay" language would later become, in the lower courts, a required element for a plaintiff to prove in a purely regulatory temporary takings scenario.

When *Lingle* jettisoned from the takings equation a regulation's motivation, purpose, correctness, validity, value, and effectiveness in implementation,[12] it eliminated the extraordinariness (or reasonableness) of a delay[13] from the takings liability analysis. And while *Lingle* significantly undermined the rationale for considering the extraordinariness of a delay in any part of the takings analysis, it did not kill extraordinary delay entirely: like the seven-headed Hydra that refuses to die, the inquiry clings to life, post-*Lingle*, as a ripeness hurdle.

This Article begins by explaining why retaining the extraordinary delay inquiry is problematic and antithetical to a post-*Lingle* understanding of the Takings Clause. It asserts that much of the confusion and imprecision in temporary takings doctrine, including the supposed necessity for a extraordinary delay test, stems from failing to distinguish scenarios where the temporal nature of restrictions or regulatory processes is only apparent after the fact (presumptively permanent takings unexpectedly cut short) from restrictions designed from the outset to be in place only for a finite period. It describes how ripeness, statute of limitations, economic impact, the availability of a per se claim, and the role of judicial intervention distinctly apply to each category.

The Article then chronicles the long and unfruitful history of extraordinary delay, evaluates how extraordinary delay might have mattered (pre-*Lingle*), and explains how courts currently apply it. It examines various rationales for retaining extraordinary delay, finding none compelling. And it concludes with a plea to put the final nail in *Agins*, banish extraordinary delay from the takings arena once and for all, and shift the focus away from the goodness or badness of the government's conduct and onto the impact of the regulatory delay on the property owner.

I. Setting the Stage

A. *Why "Extraordinary Delay" Poses a Problem*

Lingle removed from takings cases inquires into the motivation or purpose behind a regulation, a regulation's value or benefit, and the correctness or effectiveness of an agency's implementation.[14] The Court explained that an inquiry probing a regulation's "underlying validity" is a separate inquiry from probing whether a regulation causes a taking.[15] The takings inquiry must focus "directly upon the severity of the burden that government imposes upon private property rights."[16] Only inquiries evaluating the "actual burden imposed on property rights, or how that burden is allocated" are now germane to the takings test.[17] *Lingle* has thus greatly disentangled the merits of the government regulatory effort from the confiscatory nature of that effort.

Courts and commentators have largely recognized the change and have amended the regulatory takings inquiry in response.[18] However, even one-half dozen years after *Lingle*, this disentanglement has not been accomplished in the temporary regulatory takings realm. To mount a successful claim, a claimant still typically must show that

6. Nestor Davidson, *The Problem of Equality in Takings*, 102 Nw. U. L. Rev. 1, 5 (2008). *See also* D. Benjamin Barros, *At Last, Some Clarity: The Potential Long-Term Impact of* Lingle v. Chevron *and the Separation of Takings and Subsequent Due Process*, 69 Alb. L. Rev. 343, 344 (2006) (explaining that other, earlier regulatory takings cases contained elements of substantive due process analysis).
7. 544 U.S. 528, 35 ELR 20106 (2005).
8. *Id.* at 542, 547.
9. *Agins*, 447 U.S. at 258 n.3.
10. *Id.* at 263 n.9.
11. *Id.* (citing Danforth v. United States, 308 U.S. 271, 285 (1939) (condemnation of perpetual flowage easement); Thomas W. Garland, Inc. v. City of St. Louis, 596 F.2d 784, 787 (8th Cir. 1979) (condemnation proceedings and "cloud of condemnation" a de facto taking of plaintiff's leasehold); Reservation Eleven Associates v. District of Columbia, 420 F.2d 153, 157-58 (D.C. Cir. 1969) (whether the act of filing a direct condemnation action itself constituted a taking)).
12. *Lingle*, 544 U.S. at 539-43.
13. Courts often use "extraordinary delay" and "unreasonable delay" interchangeably. *E.g.*, Tabb Lakes, Ltd. v. United States, 10 F.3d 796, 803, 24 ELR 20169 (Fed. Cir. 1993); State Dept. of Transp. v. Barsy, 941 P.2d 971 (Nev. 1997). Unless quoting a case, this Article will use "extraordinary delay," since that is the terminology *Agins* used.
14. *Lingle*, 544 U.S. at 539-43.
15. *Id.* at 543.
16. *Id.* at 539.
17. *Id.* at 543.
18. *E.g.*, Rose Acre Farms, Inc. v. United States, 559 F.3d 1260, 1279, 39 ELR 20058 (Fed. Cir. 2009), *cert. denied*, 130 S. Ct. 1501 (2010); Crown Point Dev., Inc. v. City of Sun Valley, 506 F.3d 851, 855 (9th Cir. 2007); City of Coeur D'Alene v. Simpson, 136 P.3d 310, 318 n.5 (Idaho 2006); Whitman, *supra* note 4; Dreher, *supra* note 4; John D. Echeverria, *Making Sense of* Penn Central, 23 UCLA J. Envtl. L. & Pol'y 171 (2005).

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the government was guilty of extraordinary delay,[19] which usually requires a showing of bad faith.[20] A claimant thus has to prove that the government behaved badly in order for a court to find a taking.[21] Such a requirement is suspect in several respects.

First, *Lingle* rejected "any normative component to takings law."[22] *Lingle* precludes the notion that allegations of bad faith can support a taking claim; instead, such allegations are really due process claims.[23] The takings analysis focuses on whether the government took property, and emphatically *not* on whether the government "has a good or bad reason for its action."[24] Asking whether the government acted in bad faith and extraordinarily delayed a process returns courts to the morass *Lingle*, by a vote of nine to zero, climbed out of. It improperly allows, as Justice Anthony Kennedy decried (pre-*Lingle*) "normative considerations about the wisdom of government decisions" to contaminate the regulatory takings analysis.[25]

Second, the requirement places a plaintiff in an almost untenable situation. A claimant normally must accept the validity of the government action and may not launch a collateral attack under the guise of a takings claim.[26] Therefore, a plaintiff attacking a delay as unreasonable may face dismissal, because such an argument is functionally a claim for damages based on unlawful government conduct, not a claim for just compensation based on taking private property for public use.[27] A claimant thus faces the Charybdis of having to show the government extraordinarily delayed the process while avoiding the Scylla of dismissal for collaterally attacking the validity of the government's activities. Courts normally strive to avoid putting a party in such an untenable position.[28]

Third, it creates what one commentator called a "nearly insurmountable test" for a property owner.[29] Courts have established extraordinary delay as a ripeness test, an element a plaintiff must meet in addition to the other *Penn Central* factors.[30] Therefore, a plaintiff must already satisfy the elements of *Penn Central*, including showing that the diminution of the property is "functionally equivalent" to an appropriation of the whole property.[31] A properly applied *Penn Central* test is sufficient to guard against unwarranted takings awards. Adding an additional hurdle appears unnecessary and unjustified.[32]

Finally, *Lingle* decries purported takings inquiries that reveal "nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights."[33] As a ripeness test, extraordinary delay fits that bill.[34] Because a successful plaintiff must already meet all the other *Penn Central* elements, examining how well the government handled the regulatory process adds nothing to the discussion. Just as *Lingle* surmised that a property owner subject to an effective regulation may be as burdened as a property owner subject to an *ineffective* regulation,[35] so too may a property owner subject to a benign regulatory process be just as burdened as a property owner subject to a malicious, intentionally delayed process. Extraordinary delay does not advance the ball.

B. *Two Distinct Categories of Temporary Regulatory Takings*

Much of the confusion and imprecision, including why courts have felt compelled to infuse the extraordinariness of a regulatory delay into the analysis, stems from a failure to consistently distinguish between two very different types of temporary regulatory takings. This section will bifurcate the temporary takings arena and then explain how concepts of ripeness, statute of limitations, economic impact, and the availability of a *Lucas* claim, differ in their application to each category. Such a background will set the stage for Part II's discussion.

The first class of temporary takings claims arises "when what would otherwise be a permanent taking is temporally cut short."[36] That is, a presumptively permanent final agency action is for some reason later rescinded, overturned, or otherwise altered.[37] For example, an agency denies a per-

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19. *E.g.*, Resource Investments, Inc. v. United States, 85 Fed. Cl. 447, 494-95 (2009); Aloisi v. United States, 85 Fed. Cl. 84, 93, 97 (2008), *appeal dismissed*, 356 Fed. Appx. 385 (Fed. Cir. 2010); Grosscup v. Pantano, 725 F. Supp. 2d 1370, 1379 (S.D. Fla. 2010). In duty of full disclosure, the author notes that he worked on earlier stages of *Resource Investments* while with the U.S. Department of Justice.
20. Sieber v. United States, 364 F.3d 1356, 1364-65 (Fed. Cir. 2004); Wyatt v. United States, 271 F.3d 1090, 1098, 32 ELR 20345 (Fed. Cir. 2001); McGuire v. United States, No. 09-380L, 2011 WL 576060 at *7, *10 n.24 (Fed. Cl. Feb. 18, 2011).
21. *Cf.* Cooley v. United States, 324 F.3d 1297, 1307, 33 ELR 20161 (Fed. Cir. 2003) (analyzing whether the agency's conduct evinced bad faith); Bass Enters. Prod. Co. v. United States, 381 F.3d 1360, 1364, 34 ELR 20088 (Fed. Cir. 2004) (government's delay was "reasonable"); Wild Rice River Estates, Inc. v. City of Fargo, 705 N.W.2d 850, 859 (N.D. 2005) (extraordinary delay coupled with bad faith may result in a compensable taking).
22. *Rose Acre*, 559 F.3d at 1277 (citing Dreher, *supra* note 4, at 402).
23. Duncan v. Village of Middlefield, No. 2005-L-140, slip op. at 9-10 (Ohio Ct. App. Apr. 18, 2008), *aff'd*, 898 N.E.2d 952 (Ohio 2008); Echeverria, *supra* note 18, at 202.
24. Barros, *supra* note 6, at 354.
25. Eastern Enters. v. Apfel, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring).
26. Rith Energy, Inc. v. United States, 247 F.3d 1355, 1365, 31 ELR 20603 (Fed. Cir. 2001), and again on denial of rehearing, 270 F.3d 1347, 1352-53, 32 ELR 20253 (Fed. Cir. 2001). There are narrow exceptions to this. *See* David W. Spohr, "*What Shall We Do With the Drunken Sailor?": The Intersection of the Takings Clause and the Character, Merit, or Impropriety of the Regulatory Action*, 17 Southeastern Envtl. L.J. 1, 60-67 (2008).
27. Acadia Tech., Inc. v. United States, 458 F.3d 1327, 1333 (Fed. Cir. 2006).
28. *E.g.*, Ladd v. United States, 603 F.3d 1015, 1025 (Fed. Cir. 2010).
29. Heather G. Wight-Axling, *Will the Durational Element Endure? Only Time Will Tell: Temporary Regulatory Takings in the Court of Federal Claims and Federal Circuit After* Tahoe-Sierra, 45 Nat. Res. J. 201, 237 (2005).
30. See *infra* II.B., for discussion and citation, especially *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124, 8 ELR 20528 (1978).
31. Lingle v. Chevron, U.S.A. Inc., 544 U.S. 528, 539, 35 ELR 20106 (2005).
32. See *infra* II.C., for discussion and citation.
33. *Lingle*, 544 U.S. at 542.
34. See *infra* II.B., for discussion and citation.
35. *Lingle*, 544 U.S. at 543.
36. Sieber v. United States, 364 F.3d 1356, 1364 (Fed. Cir. 2004) (quoting Wyatt v. United States, 271 F.3d 1090, 1097 n.6, 32 ELR 20345 (Fed. Cir. 2001)).
37. *Sieber*, 364 F.3d at 1364. A "cut-short" takings scenario is presented when a "'court invalidates a regulation' that had previously effected a taking . . . when 'the government elects to discontinue regulations after a taking has

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mit, and no uncertainty remains about what activity the agency will allow. If the applicant later convinces a court to reverse the denial, she has effectively converted a restriction intended to continue indefinitely into a temporary restriction. We can refer to these cases as "*retro*spectively temporary" or, more colloquially, "cut-short" claims.[38]

The second class of claims involves restrictions designed from the outset only to be in place for a finite period. This would include regulatory hurdles, such as moratoria, permitting processes, or orders to stop work until a permit is obtained. The restriction was always and only intended to be temporary. A plaintiff is, in a sense, seeking compensation for her "property loss incurred while the government was in the process of deciding whether to allow the contested activity."[39] We can refer to these cases as "*pro*spectively temporary" or, more colloquially, "process" claims.[40]

1. Ripeness

Ripeness is not an issue in a cut-short taking. More accurately, ripeness may be an issue, but only in the same way that it is an issue in a permanent takings claim. The takings claim is ripe on the day of the presumptively final act, such as the day a permit is denied, a variance request is turned down, a last administrative remedy is exhausted, or a final and authoritative determination of the permitted use of property occurs.[41] Ripeness disputes may arise, but the arguments should parallel those from permanent takings jurisprudence.[42]

A process regulatory takings claim is fundamentally different. The property owner is not challenging what the government eventually allowed (or may allow) her to do; her claim is that the mere length the regulatory process dragged (or may continue to drag) on functionally appropriated her property, even if at the end of the process the government allowed (or will allow) full use. Ripeness is not as clear. The act of requiring a property owner to apply for a permit does not itself amount to a taking.[43] There is no convenient peg (such as a denial date) to hang the ripeness hat on, no obvious day after which a claim may be brought. Courts have latched onto extraordinary delay as the trigger that, absent a "final" decision, ripens a takings claim.[44] Whether that is wise is analyzed in Part II.C.

2. Statutes of Limitations

When a statute of limitations starts to run follows closely on claim ripeness.[45] Once a claim ripens, a plaintiff typically has a certain number of years to bring a takings claim.[46] One slice of the case law, typically in opinions failing to distinguish fully between pro- and retrospectively temporary restrictions, indicates that the statute of limitations begins to run only at the *end* of the takings period.[47] Certainly, for process cases, delaying to the end of the period may be appropriate to allow a full liability inquiry regarding the regulation's impact.[48] Given the Court's longstanding concern with forcing a plaintiff to prematurely bring a takings suit where uncertainties abound,[49] a court would not lightly bar a suit until after the regulatory process has run its course and the length of that process has been definitively determined.

A cut-short taking, however, is fundamentally different. It is not true, or at least makes no logical sense to have it be treated as true, that the statute of limitations should start at the end of the period. For presumptively final restrictions, claim accrual is triggered the day the permit is denied or other presumptively final regulatory action occurs. The permit denial or similar "final" action provides a date certain against which to measure liability.[50] As discussed directly

occurred,' . . . or when 'the government denies a permit [and] at some [later] point reconsiders the earlier denial and grants a permit (or revokes the permitting requirement).'" *Id.* (quoting Boise Cascade Corp. v. United States, 296 F.3d 1339, 1347, 32 ELR 20797 (2002)).

38. *See* Daniel L. Siegel & Robert Meltz, *Temporary Takings: Settled Principles and Unresolved Questions*, 11 Vt. J. Envtl. L. 480, 496 (2010); Spohr, *supra* note 26, at 82.
39. *Sieber*, 364 F.3d at 1364-65; *Wyatt*, 271 F.3d at 1098.
40. *See* Siegel & Meltz, *supra* note 38, at 482; Spohr, *supra* note 26, at 82.
41. This Article does not attempt to advance the scholarship on applying the ripeness doctrine to permanent takings claims. For one such discussion, see Gordon C. Strachan & Adam Strachan, *The Ripeness Doctrine in Regulatory Takings Litigation*, 22 J. Land Resources & Envtl. L. 19, 21-30 (2002).
42. A government may argue that a later rescission shows the initial action, such as a permit denial, was never intended to be final. But courts should and do look beyond this. In *Cooley v. United States*, 324 F.3d 1297, 33 ELR 20161 (Fed. Cir. 2003), the government denied a permit in 1993; facing a takings claim, it offered the plaintiff a permit in 1996. *Id.* at 1300-01. The Federal Circuit had little trouble determining that, notwithstanding the government's post-hoc protestations, the 1993 permit was a final agency decision, ripening the takings claim. *Id.* at 1301-04. *See also Sieber*, 364 F.3d at 1365 (initial denial "final" despite later rescission).
43. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 127, 16 ELR 20086 (1985). See *infra* II.C.4., for one anomaly where a short review process could, at least theoretically, work a taking.
44. McGuire v. United States, No. 09-380L, 2011 WL 576060 at *7 (Fed. Cl. Feb. 18, 2011).
45. Though usually one and the same, the date a claim ripens is not necessarily the date the statute of limitations begins to run. While the Court expressed discomfort with the statute of limitations commencing *before* a claim is ripe for filing, the Court has not expressed the same qualms with the statute of limitations not starting to run until sometime *after* a claim has ripened. *Compare* Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Febar Corp. of Cal., Inc., 522-192, 200-01 (1997), *with* Wallace v. Kato, 549 U.S. 384, 388-90 & n.3 (2007). *See also* Ladd v. United States, 603 F.3d 1015, 1024-25 (Fed. Cir. 2010) ("untenable" that a statute of limitations period could start running before a property owner had the right to bring suit).
46. For takings claims against the United States, the claim must be filed "within six years after such claim first accrues." 28 U.S.C. §2501 (2004). Some states match this, *see, e.g.*, Hager v. City of Devils Lake, 773 N.W.2d 420, 432 (N.D. 2009) (six years), some have longer periods, *see, e.g.*, Vanek v. State, Board of Fisheries, 193 P.3d 283, 288 n.18 (Alaska 2008) (10 years), and some have shorter periods, *see, e.g.*, B & B Enters. of Wilson County, LLC v. City of Lebanon, 318 S.W.3d 839, 846 (Tenn. 2010) (one year).
47. *See, e.g.*, Creppel v. United States, 41 F.3d 627, 632 (1994), cited recently in Petro-Hunt, LLC v. United States, 90 Fed. Cl. 51, 65 (2009).
48. *Petro-Hunt*, 90 Fed. Cl. at 66. *See, e.g.*, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 342, 352, 24 ELR 20169 (2002) (both the six-judge majority and the three-judge dissent agreeing that the regulatory process's actual length, compared to the length the applicant should have expected the process to take, played into the reasonableness of a plaintiff's investment-backed expectations); Cienega Gardens v. United States, 503 F.3d 1266, 1279 (Fed. Cir. 2007) (citing *Tahoe-Sierra*, 535 U.S. at 342) (discussing interplay of duration and economic impact). Measuring economic impact in a temporary taking is discussed *infra* I.B.3.
49. United States v. Dickinson, 331 U.S. 745, 749 (1949). *Cf. Ladd*, 603 F.3d at 1024-25.
50. Resource Investments, Inc. v. United States, 85 Fed. Cl. 447, 483 (2009) ("It is well-settled that when a regulatory takings claim arises from a permit

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below, all the elements that affix liability occur on that day; later changes, such as judicial intervention, can impact the final just compensation calculation, but not liability.[51] As the Federal Circuit explains, "the question of damages is discrete from the question of claim accrual," and the obligation to sue can arise regardless of whether damages are "complete and fully calculable."[52] The duration of the cut-short taking is a damages question, not a liability question.[53]

B & B Enters. of Wilson County, LLC v. City of Lebanon[54] recently showed the statue of limitations at work in such a retrospectively temporary taking. Plaintiff waged a successfully judicial challenge to a presumptively final permit denial.[55] In a subsequent temporary taking suit seeking compensation for the time the denial was in effect, the Tennessee Supreme Court determined that the final agency decision started the statute of limitations running.[56] The length of the ensuing judicial proceeding challenging that agency decision might be relevant to determining the length of the taking, but not to claim accrual.[57] That the extent of the damages might not be known until after the judicial process finished did not impact the statute of limitations.[58]

In addition to being doctrinally sound, beginning the statute of limitations on the date of the presumptively final agency action has a strong policy advantage. It avoids what would otherwise be a perverse incentive for a government, having allowed a restriction to remain in place long enough to exhaust the statute of limitations, not to rescind a denial or to allow other relief, lest it revive an otherwise dead takings claim. Setting the start of claim accrual at the date of the presumptively final action, just as in a truly permanent takings claim, more properly aligns the government's incentives.

3. Measuring Economic Impact

a. General Principles Across Takings Law

The *Penn Central* inquiry analyzes three elements: the regulation's interference with the property owner's investment-backed expectations; its character; and (most pertinent to this discussion), its economic impact on the property owner.[59] In general, the economic impact prong "compares the value that has been taken from the property with the value that remains in the property."[60] Economic impact primarily measures how a restriction affects the fair market value of the property.[61] For a temporary taking, this means the value change caused by the regulatory imposition.[62] This section will discuss the differing temporal lenses used to view diminution in a retro- versus prospectively temporary taking.[63] But first, there are two other metrics that have at times been advanced as complete substitutes for probing lost market value; this has created some confusion.

It is not controversial that, in measuring economic impact, economically viable use may be a supplemental factor to consider in addition to diminution in market value. In *Penn Central*, the plaintiff alleged that the regulatory restriction both deprived it of "gainful use" and also "significantly diminished the value" of its property; the majority discussed both "use" and "value," and the opinion explicitly connected the two, describing the intersection of reasonable use and a property's value.[64] *Lucas v. South Carolina Coastal Council*[65] expressly linked the concept of "economically beneficial or productive use of land" to diminution in value. The government's restriction there had a "dramatic effect on the economic value of Lucas's lot,"[66] Lucas' claim was for a "complete elimination of his property's value,"[67] and the Court explained that its categorical rule applied where "the regulation wholly eliminated the value of the claimant's land."[68]

denial, the taking accrues when a permit is denied.").

51. See *infra* I.B.3.b., for discussion and citation.
52. Goodrich v. United States, 434 F.3d 1329, 1336, 36 ELR 20008 (Fed. Cir. 2006).
53. *Ladd*, 630 F.3d at 1025.
54. 318 S.W.3d 839 (Tenn. 2010).
55. *Id.* at 843-44.
56. *Id.* at 847.
57. *Id.* at 847.
58. *Id.* at 849.
59. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124, 8 ELR 20528 (1978). *CCA Assoc. v. United States*, 91 Fed. Cl. 580, 591, 599 (2010), attempted to graft onto the traditional three elements a fourth element, the duration of the restriction. Certainly, the restriction's duration is an "important factor[ ]" a court must consider. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 342, 24 ELR 20169 (2002). But duration is not a stand-alone, fourth element. Instead, it shapes each of the three elements. Most importantly, duration influences economic impact. Cienega Gardens v. United States, 503 F.3d 1266, 1279 (Fed. Cir. 2007) (citing Tahoe-Sierra, 535 U.S. at 342). In addition, all nine *Tahoe-Sierra* Justices agreed that the regulatory process' actual length, compared to the length the applicant should have expected the process to take, may play into the reasonableness of a plaintiff's investment-backed expectations. 535 U.S. at 342; 535 U.S. at 352 (Rehnquist, C.J., dissenting). Finally, the fact that a restriction is temporary and not permanent may play into the character of the government action. Appolo Fuels, Inc. v. United States, 381 F.3d 1338, 1352, 34 ELR 20087 (Fed. Cir. 2004) ("A temporary restriction is necessarily less burdensome to the property owner than a permanent one."). Duration is part of, not an addition to, the traditional, three-pronged *Penn Central* test.
60. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497, 17 ELR 20440 (1987). *See also* Florida Rock Indus., Inc. v. United States, 18 F.3d 1560, 1567, 24 ELR 21036 (Fed. Cir. 1994) (economic impact is measured by the "change, if any, in the fair market value caused by the regulatory imposition").
61. *See, e.g.*, Concrete Pipe & Prod. v. Construction Laborers Pension Trust, 508 U.S. 602, 644 (1993); *Keystone*, 480 U.S. at 497; Hodel v. Irving, 481 U.S. 704, 714-15 (1987); Rose Acre Farms, Inc. v. United States, 559 F.3d 1260, 1268, 39 ELR 20058 (Fed. Cir. 2009), *cert. denied*, 130 S. Ct. 1501 (2010); Cienega Gardens v. United States, 503 F.3d 1266, 1281 (Fed. Cir. 2007); Brace v. United States, 72 Fed. Cl. 337, 345, 36 ELR 20168 (2006) (change in fair market value the "cynosure" of economic impact), *aff'd*, 250 Fed. Appx. 359 (Fed. Cir. 2007).
62. Sieber v. United States, 364 F.3d 1356, 1371 (Fed. Cir. 2004). *See also* Bass Enters. Prod. Co. v. United States, 381 F.3d 1360, 34 ELR 20088 (Fed. Cir. 2004) (affirming trial court decision applying diminution-of-value test to a temporary taking).
63. The focus here is evaluating economic impact, not computing damages ("just compensation") after courts weigh economic impact, expectations, and character and find liability. There are undoubtedly many ways, depending on the circumstances, to measures damages, City of Carrolton v. RIHR Inc., 308 S.W.3d 444, 452 (Tex. App. 2010), a topic beyond the scope of this Article.
64. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 130, 131, 127, 8 ELR 20528 (1978).
65. 505 U.S. 1003, 1015, 22 ELR 21104 (1992).
66. *Id.* at 1007.
67. *Id.* at 1009.
68. *Id.* at 1026.

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Instead, the controversy arises where a court attempts to treat lost use as a complete surrogate for a market-value analysis.[69] In whatever direction takings doctrine ideally should have matured, and however heartfelt the arguments may be, the use-is-a-complete-substitute-for-value battle has been joined and lost. A six-Justice majority in *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*[70] confirmed that inquiry into the value sacrificed and remaining in a parcel is a necessary component of a temporary takings case. Chief Justice William H. Rehnquist openly lamented that the majority was interpreting *Lucas* as "fundamentally concerned with value" rather than use, decrying the majority's decision to make value "*sine qua non*"[71] (literally, "an indispensible condition or thing").[72] *Lingle* would later reaffirm that *Lucas* applied to a "complete elimination of a property's value."[73]

Requiring consideration of value may not necessarily be disadvantageous to property owners.[74] But regardless of its strategic import, at least since *Tahoe-Sierra*, the economic impact inquiry cannot be unmoored from an analysis of how the regulation impacts the property's value. Whether in the context of a temporary or a permanent takings claim, "the impact on the value of the property as a whole is an important consideration."[75]

The second attempted usurper has been a lost profits/return on investment approach. Such data points are not irrelevant; they have long been items courts have considered as an additional lens supplementing diminution-in-market-value. *Penn Central* itself considered profit and ability to obtain a reasonable return on investment.[76] The Federal Circuit observed that while it needed to measure economic impact according to the change in fair market value the regulatory imposition caused,[77] it could not ignore an owner's ability to recoup her investment.[78] A trial court need not rely on the magnitude of the diminution-in-market-value alone to determine the severity of the economic impact, but can additionally consider investment recoupment.[79]

The controversy has arisen where fair market value is completely ignored. In two mid-2000s cases, *Cienega Gardens v. United States*[80] and *Rose Acre Farms, Inc. v. United States*,[81] the Federal Circuit seemed willing to view "lost profits" or "diminution-in-returns" as complete surrogates for diminution-in-market-value. Had these opinions survived, they had the potential to dramatically alter the course of takings jurisprudence.

The Federal Circuit quickly corrected itself in later iterations of *Cienega Gardens* and *Rose Acre*. The later *Cienega Gardens* concluded that "the impact on the value of the property as a whole is an important consideration."[82] It rejected a return-on-equity approach as befitting the damages, not liability, analysis.[83] The later *Rose Acre* recognized that ignoring lost value and relying solely on lost profits fails to "provide a sufficiently accurate view," cuts against the "vast majority of takings jurisprudence," and is "inherently relative."[84] The Federal Circuit lamented as "unfortunate" its earlier analysis, declaring it "'clear error' to place sole reliance on the diminution in return metric."[85]

As with not allowing use to supplant value, not allowing profits or recoupment to supplant value may not necessarily be a negative for property owners.[86] But in whatever direction takings doctrine ideally should have matured, diminution in the value of the property as a whole remains today a necessary component for any takings analysis.

What is less clear is what diminution in value qualifies as severe economic impact. There has never been a "magic number."[87] One court pointed to a 75% diminution as the "notional rule of thumb or tipping point."[88] Another believed that the Court generally requires "diminutions well in excess of 85 before finding a regulatory taking."[89] Certainly the Court has required the diminution to be significant enough to render a restriction "functionally comparable to govern-

69. *See, e.g.*, Resource Investments, Inc. v. United States, 85 Fed. Cl. 447, 486 (2009) (deeming the impact on property values not necessary to the liability analysis).
70. 535 U.S. 302, 333, 32 ELR 20627 (2002).
71. *Id.* at 350 (Rehnquist, C.J., dissenting).
72. Blacks Law Dictionary 1511 (9th ed. 2009).
73. Lingle v. Chevron, U.S.A. Inc., 544 U.S. 528, 539, 35 ELR 20106 (2005) (citing *Lucas*, 505 U.S. at 1017). *See also* Norman v. United States, 63 Fed. Cl. 231, 252, 34 ELR 20157 (2004) (pre-*Lingle* case interpreting *Lucas* as requiring a "complete elimination of value"), *aff'd*, 429 F.3d 1081 (Fed. Cir. 2005).
74. For example, in *Dodd v. Hood River County*, 855 P.2d 608, 184-86 (Or. 1993) (en banc), although the regulatory restriction caused a significant loss in value, the court denied compensation simply because there was some remaining beneficial use.
75. Cienega Gardens v. United States, 503 F.3d 1266, 1282 (Fed. Cir. 2007).
76. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 136, 8 ELR 20528 (1978).
77. Florida Rock Indus., Inc. v. United States, 18 F.3d 1560, 1567, 24 ELR 21036 (Fed. Cir. 1994).
78. Florida Rock Indus., Inc. v. United States, 791 F.2d 893, 905, 16 ELR 20671 (Fed. Cir. 1986).
79. Florida Rock Indus., Inc. v. United States, 45 Fed. Cl. 21, 36-38 (1999).
80. Cienega Gardens v. United States, 331 F.3d 1319, 1343, 33 ELR 20221 (Fed. Cir. 2003).
81. Rose Acre Farms v. United States, 373 F.3d 1177, 1187 (Fed. Cir. 2004).
82. Cienega Gardens v. United States, 503 F.3d 1266, 1281 (Fed. Cir. 2007).
83. *Id.* at 1281-82.
84. Rose Acre Farms, Inc. v. United States, 559 F.3d 1260, 1268-69, 39 ELR 20058 (Fed. Cir. 2009), *cert. denied*, 130 S. Ct. 1501 (2010). The panel observed that a diminution-in-profits approach was too "dependent on the magnitude of the starting profit margin"; while a diminution in value will always be between 0 and 100%, a diminution in profit could, depending on the initial profit margin, be infinite, creating special problems when the company was (prerestriction) operating at a loss or when the profit margin is very small. *Id.* at 1269-70.
85. *Id.* at 1271.
86. For example, in *Sheffield Development Co. v. City of Glenn Heights*, 120 S.W.3d 660 (Tex. 2004), although the agency action greatly diminished the market value of the property, the court denied compensation based on its belief that "more important" than the diminution in value was the fact that the property was still (after the restriction) worth four times its cost; the plaintiffs' investment profits thus precluded recovery. And *Rith Energy, Inc. v. United States*, 270 F.3d 1347, 1352, 31 ELR 20603 (Fed. Cir. 2001), concluded that despite the regulatory action having caused a "substantial diminution" in value, plaintiff's "opportunity to make a profit" was enough to render the economic impact insufficient.
87. *Rose Acre*, 559 F.3d at 1282.
88. Cienega Gardens v. United States, 67 Fed. Cl. 434, 470 (2005), *vacated on other grounds*, 503 F.3d 1266 (Fed. Cir. 2007).
89. Brace v. United States, 72 Fed. Cl. 337, 357 (2006), *aff'd*, 250 Fed. Appx. 359 (Fed. Cir. 2007) (affirming "based upon the well-reasoned opinion of the trial court").

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ment appropriation."[90] For purposes of later discussion, this Article will assume that, if the character and expectations prongs together favor the property owner, a restriction that reduces the market value of the property by roughly three-quarters[91] (especially if it eliminates the ability to earn a profit or recoup an investment), would likely be sufficient economic impact to render the restriction "so onerous that its effect is tantamount to a direct appropriation."[92]

With this background on the economic impact prong and the magnitude of required impact, the next two subsections will distinguish the temporal lens through which to view that diminution in retro- versus prospectively temporary cases.

b. Economic Impact for a Cut-Short Scenario

In the retrospectively temporary scenario, a court should undertake the liability analysis just as it would a permanent restriction, namely a "snapshot" of the property on the day the government imposes the presumptively final restriction.[93] Economic impact measures how, as of the date of that presumptively final action, the restriction affected the value of the parcel as a whole, viewed from the lens of information available on that date.[94]

If the government rescinds the restriction, offers a later permit, or a court strikes down the restriction, such a change effects only the amount of compensation potentially due, not whether the original denial had worked a taking.[95] As *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*[96] teaches, once a restriction creates a taking, compensation is due even if the restriction is abandoned or discontinued. The government retains the option of withdrawing the regulation, making the taking temporary, not permanent. But, in the Court's words, "no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."[97]

First English was, in a sense, simply the logical extension of the general rule that events subsequent to the date of taking are not relevant.[98] Occurrences after the presumptively final determination is made, such as rescission of a permit denial, do not affect the liability inquiry.[99] The cut-short nature of the denial only "informs the amount of just compensation."[100]

c. Economic Impact in a Process Scenario

A prospectively temporary taking claim is quite different. There is no snapshot in time, no obvious, finite date (like a permit disapproval, variance denial, or final administrative

90. Lingle v. Chevron, U.S.A. Inc., 544 U.S. 528, 537, 35 ELR 20106 (2005).
91. This is supported by the 77% diminution the Federal Circuit upheld as a taking in *Yancey v. United States*, 915 F.2d 1534, 1539-41 (Fed. Cir. 1990), and also by the 73% diminution the court found sufficient in *Florida Rock Indus., Inc. v. United States*, 45 Fed. Cl. 21, 36-38 (1999), where the court did not rely on the magnitude of the diminution in market value alone to determine the severity of the economic impact, but also considered the inability to recoup investment.
92. *Cf. Lingle*, 544 U.S. at 537. One dramatic departure from this is *CCA Assoc. v. United States*, 91 Fed. Cl. 580, 618-19 (2010), where the trial court found an 18% loss significant enough to support a taking. What makes the holding even more amazing is that it was issued by the same court that had christened 75% as the "tipping point." *See Cienega Gardens*, 67 Fed. Cl. at 470. Given that the Federal Circuit determined that a 10% diminution in value "did not even approach the level of severe economic harm," *Rose Acre*, 559 F.3d at 1275, and had affirmed a trial court's holding that it "stretches the concept" of a taking "too far" to claim that a 60% diminution is a taking, Walcek v. United States, 49 Fed. Cl. 248, 266 (2001), *aff'd*, 303 F.3d 1349, 33 ELR 20045 (Fed. Cir. 2002), one would not expect *CCA* to survive appeal. If it survives, and if a reduction of less of a one-fifth of the property's value henceforth can be considered a "taking" of the whole parcel, it could dramatically recast the Court's admonition that a restriction has to be "functionally equivalent" to an appropriation, *Lingle*, 544 U.S. at 537, potentially revolutionizing takings jurisprudence.
93. Siegel & Meltz, *supra* note 38, at 498 ("Where a restriction is intended to be permanent, its economic impact will be the same as a permanent restriction."). *Cf.* Laura M. Schleich, *Takings: The Fifth Amendment, Government Regulation, and the Problem of the Relevant Parcel*, 8 J. Land Use & Envtl. L. 381, 408 (1993) (discussing the "snapshot" concept in the "relevant parcel" context).
94. Resource Investments, Inc. v. United States, 85 Fed. Cl. 447, 489 n.65, 484 (2009) (liability "depends only on the effect of that particular denial on plaintiffs' property interest at the time of the denial"). Some precedent holds that even after a permanent restriction, the government may show the existence, on the date of denial, of a market of speculators that would willingly purchase the property at a certain price, betting the restriction would change. Florida Rock Indus., Inc. v. United States, 791 F.2d 893, 902-03, 16 ELR 20671 (Fed. Cir. 1986). This certainly complicates the with- and without-restriction calculation. It also, and somewhat perversely, creates market value *because* a restriction is so Draconian that investors speculate on its revocation. Steven Eagle, *Planning Moratoria and Regulatory Takings: The Supreme Court's Fairness Mandate Benefits Landowners*, 31 Fla. St. U. L. Rev. 429, 446 (2004). But, however questionable the merit, such an analysis still only attempts to divine the market's reaction as of the date of the denial, not how the market actually reacted after the restriction lifted.
95. Cooley v. United States, 324 F.3d 1297, 1305, 33 ELR 20161 (Fed. Cir. 2003) (permit denial ripened takings claim; permit issued during the course of litigation transformed permanent taking claim into a temporary one). *See also* Independence Parks Apts. v. United States, 465 F.3d 1308, 1311 (Fed. Cir. 2006).
96. 482 U.S. 304, 317-18, 17 ELR 20787 (1987).
97. *Id.* at 321.
98. *See, e.g.*, Lake County Forest Preserve Dist. v. Bank & Trust Co. of Arlington Heights, 436 N.E.2d 237, 244 (Ill. App. 1982) (value of the subject property determined as of the date of taking, not with reference to subsequent acts); State Highway Commission v. Hamilton, 168 S.E.2d 419, 422 (N.C. App. 1969) (evidence of what occurred subsequent to date of taking not relevant or pertinent). This general rule should not imply a blanket prohibition against all information acquired after the date of taking. In the direct condemnation case of *United States v. 4.85 Acres of Land*, 546 F.3d 613, 619 (9th Cir. 2008), the panel rejected a per se rule excluding all post-date of taking sales from consideration. That does not create an inconsistency with the general rule. Allowing evidence of, for instance, a February sale of a comparable property in a case with a January date of taking does not mean it is proper to view the subject property through a February lens; it only means that a February sale might (with or without adjustment) provide insight into market's mood in January. A proper ex ante analysis should be limited to the facts and circumstances known as of the date of taking. CCA Assoc. v. United States, 91 Fed. Cl. 580, 620 n.64 (2010).
99. *Resource Investments*, 85 Fed. Cl. at 484. The lack of precise delineation between pro- and retrospectively temporary restrictions has artificially skewed the results of some cases. For example, in *K & K Const. v. DEQ*, 705 N.W.2d 365, 374, 372 (Mich. App. 2005), the trial court found liability for what would have been a permanent taking; the state then issued a permit explicitly to mitigate its damages. *Id.* at 371-72. After the initial liability finding was reversed on other grounds, the trial court on remand logically declined to include the subsequent permit in its amended liability analysis. *Id.* at 375. However, the appellate court reversed and concluded that the later-issued permit eliminated liability. *Id.* at 375, 381. Failing to recognize the "cut short" nature of the case ignored *First English*'s requirement that once a restriction works a taking, some compensation is due regardless of whether the restriction is later lifted. *First English*, 483 U.S. at 317-18.
100. *Resource Investments*, 85 Fed. Cl. at 484. *See also Independence Parks*, 465 F.3d at 1311.

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appeal rejection) on which to measure economic impact. The liability inquiry would typically consider all information acquired by the time the restrictive period ends or a court considers liability.

It first appeared the Court might move in a very different direction. *First English* analogized a temporary regulatory restriction to a temporary physical taking, the taking of a temporary slice of a property's use.[101] While liability was not at issue in *First English*,[102] the text implies that a prospectively temporary restriction might work a taking immediately upon issuance of a moratorium (or, perhaps the beginning of the permit approval process), creating a sort of "leasehold interest" for as long as the delay lasted.[103] In *Tahoe-Sierra*, Chief Justice Rehnquist attempted to expand this analogy into a holding. He likened regulatory restrictions to physical takings, referencing cases where the government temporarily occupied a property and had to pay for its period of occupancy.[104]

However, the six-judge *Tahoe-Sierra* majority definitively rejected such a "conceptual severance" approach, reversing the trial court's decision to disaggregate the property into "temporal segments."[105] Physical takings cases are not controlling precedents for regulatory takings claims.[106] *Tahoe-Sierra* clarified that the "whole" in "parcel as a whole" included "temporal future interests as well as present possessory interests."[107] The Court harkened back to *Penn Central*'s pronouncement that "'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."[108] Because a prospectively temporary measure is "expressly temporary when enacted," it is not "a taking of the parcel of the whole because the landowners' future interests though diminished in value, always remained intact."[109] The proper temporal framework is the entire period of plaintiffs' operation, not simply the period over which the government bar is in place.[110]

Thus, a process can work a taking only if the restriction or process drags (or is expected to drag) on so long that it becomes "functionally equivalent" to an appropriation.[111] *Cienega Gardens* explains how to perform such an assessment.[112] There, the Federal Circuit determined that the trial court had committed reversible err by focusing on more discrete time increments and failing to consider the "impact of the restriction on the property as a whole."[113] The Federal Circuit explained two ways to measure economic impact properly. First, a court can compare "the market value of the property with and without the restrictions on the date that the restriction began (the change in value approach)."[114] Alternatively, a court can compare "the lost net income due to the restriction (discounted to present value at the date the restriction was imposed) with the total net income without the restriction over the entire useful life of the property (again discounted to present value)."[115]

Under either sanctioned approach, the delay will likely need to extend over many years before the diminution approaches the "tipping point."[116] Under a market value approach, a court could compare the estimated value of a property facing a moratorium or other regulatory delay to the value of similar property facing no such regulatory hurdles. Although obviously fact-dependent, the market would typically need to expect a restriction to last many years before it would discount the purchase price by 75%.[117] From a net income approach, it would take a decade of delay (even at a high, property-owner friendly discount rate) to create such a reduction.[118]

101. *First English*, 482 U.S. at 318-19.
102. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 328, 32 ELR 20627 (2002) (explaining that *First English* did not determine liability).
103. *First English*, 482 U.S. at 319 (likening an interim ordinance to a "leasehold interests").
104. *Tahoe-Sierra*, 535 U.S. at 348-49.
105. *Id.* at 331.
106. *Id.* at 323-24. *See also* Cienega Gardens v. United States, 503 F.3d 1266, 1281-82 (Fed. Cir. 2007).
107. Resource Investments, Inc. v. United States, 85 Fed. Cl. 447, 477 (2009) (citing *Tahoe-Sierra*, 535 U.S. at 331-32).
108. *Tahoe-Sierra*, 535 U.S. at 327 (quoting Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 130-31, 8 ELR 20528 (1978)).
109. *Resource Investments*, 85 Fed. Cl. at 480-81 (citing *Tahoe-Sierra*, 535 U.S. at 317 n.13).
110. Rith Energy, Inc. v. United States, 247 F.3d 1355, 1362, 31 ELR 20603 (Fed. Cir.), and again on denial or rehearing, 270 F.3d 1347, 1349, 32 ELR 20253 (Fed. Cir. 2001). *Accord* Maritrans, Inc. v. United States, 342 F.3d 1344, 1355 (Fed. Cir. 2003) (citing *Tahoe-Sierra* to affirm trial court's consideration of entire time frame during which plaintiff owned subject property).
111. *Cf.* Lingle v. Chevron, U.S.A. Inc., 544 U.S. 528, 539, 35 ELR 20106 (2005).
112. 503 F.3d 1266 (Fed. Cir. 2007).
113. *Id.* at 1281. *Cienega Gardens* recognized the distinction, but apparently not the impact, of a restriction being pro- versus retrospectively temporary. The procedural history of the case is convoluted, but it involves a 1988 restriction designed from the outset to be temporary, plus a 1990 restriction initially intended as a permanent measure but which was cut short by 1996 legislation. *Id.* at 1272, 1276. Yet, the court appears to have applied a prospectively temporary analysis not only to the 1988 statute, but to the 1990 statute as well.
114. *Id.* at 1282.
115. *Id. Cf.* SDDS, Inc. v. State, 650 N.W.2d 1, 19 (S.D. 2001) (damages the difference between interest on present value of cash flows, with and without the delay).
116. See *supra* I.B.3.a., for discussion of the necessary percentage diminution and *infra* II.C.4., for discussion of the "closing window" scenario, where even a relatively brief regulatory delay could potentially create such a diminution.
117. *See, e.g.*, Bass Enters. Prod. Co. v. United States, 54 Fed. Cl. 400, 33 ELR 20102 (2002), *aff'd*, 381 F.3d 1360, 34 ELR 20088 (Fed. Cir. 2004). *Bass* compared the value of the property with a 45 month delay against the value without, using a cash flow analysis. *Id.* at 404. The court found that the four-year delay had not worked a diminution in value substantial enough to sustain a takings claim. *Id.* Again, as discussed *infra* II.C.4., the "closing window" scenario presents at least a potential exception.
118.

Delay (years)	Diminution in value (%) at select discount rates		
	5%	10%	15%
3	13.62	24.87	34.25
4	17.73	31.70	42.82
5	21.65	37.91	50.28
6	25.37	43.55	56.77
7	28.93	48.68	62.41
8	32.32	53.35	67.31
9	35.54	57.59	71.57
10	38.61	61.45	75.28

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4. Availability of a *Lucas* Claim

Where the economic impact is so severe that a restriction causes a "'total wipeout,'"[119] leaving only a "'nominal'"[120] or "token interest,"[121] according to *Lucas*, the regulation works a per se taking.[122] A plaintiff showing that a regulation eliminated "all economically viable use, *i.e.*, all economic value," need not show anything else (such as the reasonableness of her expectations) to be entitled to just compensation.[123] Is a *Lucas* claim applicable to temporary takings? The correct answer should depend on the class of temporary taking at issue. Here again, the failure to properly distinguish between pro- and retrospectively temporary restrictions leads to confusion.

A *Lucas* claim cannot exist in the presumptively temporary context, as the property will by definition retain some market value.[124] For example, even for a lengthy expected delay, some buyer likely would be willing to pay more than a token or nominal amount for the right to use or develop the property after the delay is expected to end.[125] *Tahoe-Sierra* rejected a lower court ruling that ignored the property's retention of value and found a *Lucas* taking by focusing solely on the use lost during a moratorium.[126] The Court concluded that "a fee simple estate cannot be rendered valueless by a temporary restriction on economic use."[127] It rejected applying the categorical rules of per se permanent regulatory takings.[128]

However, in a retrospectively temporary context, where liability is analyzed as of the date of the presumptively final action (such as a variance denial),[129] it is not so clear why a *Lucas* claim should be any less available than it would in a truly permanent takings scenario.[130] If a "final" denial would have resulted in a total taking, had the restriction remained in place as originally intended, then for liability purposes, it should be regarded as a total taking even if, for instance, a year after issuance a court reverses the denial.[131] A *Lucas* claim may be, as a matter of fact, difficult to successfully assert.[132] But a *Lucas* claim should be, as a matter of law, available, despite the fact that the restriction is later lifted.[133]

5. The Impact of Judicial Intervention

Finally, litigation directly challenging the government's action often plays into subsequent takings claims. How does a court's invalidation of an agency decision affect the takings claim? There is an unmistakable current in the case law that a judicial appeal to overturn an erroneous government decision is simply part of the normal regulatory process,[134] a delay "inherent in . . . obtaining agency permits,"[135] and that any attendant delays are by definition noncompensable. As Justice John Paul Stevens once proclaimed, "[l]itigation challenging the validity of a land-use restriction gives rise to a delay that is just as 'normal' as an administrative procedure seeking a variance or an approval of a controversial plan."[136]

Calculations provided by Christopher Lattanzi, past president of Micon International Limited and an expert valuation witness in several takings cases. (Calculations on file with author).

119. Rith Energy, Inc. v. United States, 247 F.3d 1355, 1362, 31 ELR 20603 (Fed. Cir. 2001) (citing Palm Beach Isles Assocs. v. United States, 208 F.3d 1374, 1380, 30 ELR 20481 (Fed. Cir. 2000)).
120. *Id.* (citing Florida Rock Indus., Inc. v. United States, 18 F.3d 1560, 1567, 24 ELR 21036 (Fed. Cir. 1994)).
121. Palazzolo v. Rhode Island, 533 U.S. 606, 631, 32 ELR 20516 (2001).
122. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 115, 22 ELR 21104 (1992).
123. *Rith Energy*, 247 F.3d at 1362 (citing *Palm Beach Isles*, 208 F.3d at 1380). To escape liability, the government must show that the proscribed interests were not a part of the property owner's title to begin with, or that the limitations inhered in the title itself or in background principles of property or nuisance law. *Lucas*, 505 U.S. at 1027-30.
124. Sieber v. United States, 364 F.3d 1356, 1368 (Fed. Cir. 2004) (citing Boise Cascade Corp. v. United States, 296 F.3d 1339, 1350-52, 32 ELR 20797 (Fed. Cir. 2002)). At some absurd limit, such as a multiple-decade moratorium, the lines may merge and the property would be left with such a token, nominal present value that categorical treatment would be available. And while something like a limited leasehold that expires before a moratorium is to end could conceivably be categorically taken, *cf.* Eagle, *supra* note 94, at 444 n.116, the Court has not extended *Lucas* beyond full, fee simple ownership.
125. *See* Eagle, *supra* note 94, at 437 ("the present value of a parcel of land gradually decreases as the interval from the present until beneficial enjoyment is to be derived from it increases").
126. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 316, 329-32, 32 ELR 20627 (2002).
127. *Id.* at 332.
128. *Id.* at 334.
129. See *supra* I.B.3.b., for discussion and citation.
130. In rejecting the application of the per se rule to prospectively temporary delays, the Federal Circuit noted that this rejection did not necessarily extend "to temporary takings that result from the rescission or a permit requirement or denial." *Sieber*, 364 F.3d at 1368 (citing *Boise Cascade*, 296 F.3d at 1350-52). In *Cooley v. United States*, 324 F.3d 1297, 1306, 33 ELR 20161 (Fed. Cir. 2003), in a post-permit denial rescission case, the panel ordered the trial court on remand to apply *Penn Central*, reserving *Lucas* for permanent deprivations. But *Cooley* may not have been distinguishing pro- versus retrospectively temporary takings categories.
131. Just compensation would then be adjusted accordingly. *See, e.g.*, First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 317-18, 17 ELR 20787 (1987); Independence Parks Apts. v. United States, 465 F.3d 1308, 1311 (Fed. Cir. 2006) ("When subsequent action converts an otherwise permanent taking into a temporary one, just compensation is . . . adjusted to account for the subsequent events so that the damages will accurately reflect the value of what was taken.").
132. In *Cooley*, 324 F.3d at 1304-05, the presumptively final permit denial resulted in a very significant, 98.8 % reduction in value; yet, the court concluded that the remaining value made a *Lucas* claim unsuitable, reversing the trial court's per se takings finding.
133. *Cf.* Resource Investments, Inc. v. United States, 85 Fed. Cl. 447 (2009). As the trial court explained, *Lucas* applies differently to the two temporary takings categories. Restrictions temporary only in hindsight can cause per se takings; restrictions explicitly temporary when enacted cannot. *Id.* at 480-81. As discussed *supra* I.B.3.a., *Resource Investments* appears to have performed the *Lucas* test incorrectly (believing itself free to avoid any consideration of the impact of the restriction on the value of the parcel as a whole), but it does confirm that while plaintiff is precluded from bringing a *Lucas* claim for a prospectively temporary restriction, there is no such bar in a retrospectively temporary scenario. *See also* Williams v. City of Central, 907 P.2d 701, 706 (Colo. App. 1995) ("the pivotal factor underlying the respective analyses in *Lucas/First English I* was the intended permanence of the regulations ultimately invalidated").
134. *See, e.g.*, Steinberg v. City of Cambridge, 604 N.E.2d 1269, 1274-75 (Mass. 1992) (although plaintiff had to resort to litigation to lift city's seemingly presumptively final denial, court nonetheless concluded that "plaintiffs' investment expectations had to reflect the anticipated delay in the litigation process," and "the delay to which the plaintiffs were subject is the same kind of delay that commonly occurs in seeking regulatory approvals").
135. Eberle v. Dane County Bd. of Adjustment, 595 N.W.2d 730, 749 (Wis. 1999) (Abrahamson, C.J., dissenting).
136. First English Evangelical Lutheran Church of Glendale v. County of L.A., 482 U.S. 304, 334-35, 17 ELR 20787 (1987).

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Those sentiments, and indeed much of the jurisprudence assessing litigation delays, fail to grasp three distinctions. First, a challenge handled within the administrative system differs fundamentally from one requiring judicial intervention. Second, a property owner challenging a decision as overly restrictive differs from a neighbor or environmental group challenging a decision as not restrictive enough. Finally, a challenge to a final decision about the uses a property may be put to differs from a challenge to more preliminary decisions.

First, and with all due respect to Justice Stevens, delays suffered only after exhausting all administrative remedies and having to file suit are not as normal as delays incurred during administrative processes. Administrative processes often have extensive systems built in precisely to ensure that potentially erroneous decisions or decisions that overly burden property rights are rectified before resort to the judiciary is necessary. The corrective system may run through the agency itself (like waivers, variances, or exceptions), or through appeals to hearing examiners, commissions, boards, or councils. These all intend to ensure that the government's ultimate decision is the correct one and to, as the Court described it, "soften[ ] the strictures of the general regulations."[137]

Delays encountered through resort to such administrative corrective systems might indeed be characterized as "normal." But requiring a citizen to resort to the judicial branch on top of all that seems an odd definition of "normal." Incorrect, final regulatory decisions "are not 'incidents of ownership.'"[138] The time required to prosecute a lawsuit to correct a government error cannot be excused as "mere delay."[139] Justice Stevens' position was rejected by the other eight Justices.[140] Judicial proceedings are not simply a continuation of administrative proceedings.[141]

Second, a blanket statement about the impact of time spent in the court system overlooks the very different ways a court can be called on to overturn an agency decision related to land use or property rights. The typical procedural posture involves the government restricting the use of property and the property owner challenging that restriction. If the property owner must resort to judicial proceedings (after exhausting all administrative remedies) to show that the government overly regulated,[142] and he or she is successful,[143] the litigation time should not be viewed as part of the "normal delay in the development process."[144] Unless the plaintiff delays the litigation process, the potential temporary takings period should include this litigation time.[145]

The procedural posture can be reversed, however. It could be neighbors, environmental groups, or others suing to enjoin the government from allowing a property use. For example, in *Tahoe-Sierra*, one litigation delay resulted from the government attempting to lift a restriction and a third party successfully enjoining the government because the agency position was not "sufficiently stringent."[146] The Court ruled that that time period was not attributable to the government.[147] Indeed, it would be the height of irony, not to mention ultimately contrary to the interests of the property rights community, if an agency attempting to allow a property owner use of her property was liable to pay her compensation for time spent in front of, or for an injunction imposed by, the judicial branch.[148] Such time is not attributable to the government.[149]

137. Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 738-39, 27 ELR 21064 (1997).
138. Kimberly Horsley, *The Abnormalcy of Normal Delay*, 28 Pepp. L. Rev. 415, 436 (2001).
139. John D. Echeverria, *Takings and Errors*, 51 Ala. L. Rev. 1047, 1090 (2000).
140. In *First English*, two Justices joined Parts I and III of Justice Stevens' dissent. 482 U.S. at 322. The relevant position came in Part II, where Justice Stevens stood alone. *Id.* at 328-35.
141. B & B Enters. of Wilson County, LLC v. City of Lebanon, 318 S.W.3d 839, 848 (Tenn. 2010).
142. The thrust of this discussion is the government acting in its *regulatory* capacity. Where the government enters court in its *proprietary* capacity, as a private party would, court delays could not be considered "regulatory delay." For example, where a government seeks declaratory and injunctive relief regarding a property boundary line, the time spent in litigation is not attributable to the government. Mackin v. City of Couer D'Alene, 347 Fed. Appx. 293, 295 (9th Cir. 2009).
143. If a property owner brings an *unsuccessful* claim, the government is not responsible for time the property owner's detour caused. For example, in *Walcek v. United States*, 44 Fed. Cl. 462, 468 (1999), *aff'd*, 303 F.3d 1349, 33 ELR 20045 (Fed. Cir. 2002), the court had no trouble concluding that the years occupied by plaintiff's unsuccessful litigation was not attributable to the government in a subsequent takings suit.
144. Ali v. City of Los Angeles, 91 Cal. Rptr. 2d 458, 465 (2000).
145. This is not the direction of most of the case law. For example, in one case where the property owner went to court to get a presumptively final permit denial reversed, the U.S. Court of Appeals for the Fourth Circuit explicitly determined that because the "bulk of the delay" occurred during the plaintiff's appeal and because the government did not delay the litigation, the litigation time was not attributable to the government for purposes of the *Penn Central* analysis, even though the underlying city decision had been adjudged arbitrary, subjective, and abusive. Sunrise Corp. of Myrtle Beach v. City of Myrtle Beach, 420 F.3d 322, 325-26, 330 (4th Cir. 2005).
146. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 312, 32 ELR 20627 (2002).
147. *Id.* at 314-15 (six-Justice majority). *But see id.* at 345 (Rehnquist, C.J., dissenting along with two other Justices) (agency should be responsible for time period covered by injunction).
148. A contrary rule, where an agency was liable in such a scenario, would create a perverse incentive *against* the exercise of property rights. Suppose a government were considering a property owner's proposal for full development of her property, a proposal the government believed likely legal, but potentially susceptible to a challenge from environmental interests. If the government worried it might be liable to the property owner for delays caused by an environmental group's future challenge, it would have a strong incentive to allow only a more scaled-back proposal, providing the property owner just enough remaining value and use to satisfy *Penn Central*, yet modest enough to avoid the ire of the community. If the Tahoe-Sierra Regional Planning Agency had been held liable, future agencies would need to ensure that their decisions were "sufficiently stringent" to avoid environmental interests' suits.
149. *Tahoe-Sierra*, 535 U.S. at 314-15; Leon County v. Gluesenkamp, 873 So. 2d 460, 464-66 (Fla. App. 2004) (government not liable for time spent in litigation by third parties seeking to enjoin permit issuance). The four-Justice plurality recognizing the judicial takings concept in *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 130 S. Ct. 2592, 40 ELR 20160 (2010), likely does not alter this. First, the plurality was only discussing "judicial elimination of established private property rights," *id.* at 2606, and judicial declarations that "what was once an established right of private property no longer exists," *id.* at 2602, not temporary delays. Second, the plurality clarified that if it found a court had caused an uncompensated taking, it would not require compensation but would simply reverse the court judgment, leaving the government the choice to "*either* provide compensation *or* acquiesce." *Id.* at 2607.

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Finally, and here is where the distinction between the pro- and retrospective categories explicitly enters, it matters *what* government decision a court overturns. Even where an aggrieved property owner brings a successful judicial challenge to an overly restrictive regulation, proper treatment is not one-size-fits-all. As discussed above, if the government action the court overturns was a presumptively final agency determination of the uses allowed on the property,[150] the cut-short takings analysis should view liability from the lens of the property on the date of the restriction, with the subsequent court reversal impacting only the damages phase.[151]

But if the government action at issue was not a presumptively final act, the property owner convincing a court to overturn the order or moratorium or other presumptively temporary act does not create a cut-short scenario. Consider a stop-work order barring a property owner from continuing work until she applies for and obtains a permit.[152] The stop-work order was not an attempt to make a "final and authoritative determination" of what uses the government will ultimately allow on the property.[153] The order could not be interpreted as defining "to a reasonable degree" those uses that might be permitted once the agency exercises it full discretion, including the opportunity to grant variances or waivers.[154] The property owner is in the process box whether she applies for the permit or goes to court to successfully challenge the necessity of applying for a permit.[155] The time between the initial stop-work order and the court's reversal might, if the property owner can meet the *Penn Central* test (including showing that the delay caused sufficient diminution in the value of the property), amount to a temporary taking.[156] But the fact that resort to the judiciary was necessary does not transmute the nature of government action from a pro- into a retrospectively temporary restriction.[157]

II. The Long, Unfruitful History of "Extraordinary Delay"

A. *The Fools Errand From* Agins *to* Lingle

With the delineation of temporary taking categories in hand, we turn to the history of the "extraordinary delay" concept. The term entered the regulatory temporary takings lexicon with a whimper, not a bang, a mere footnote in *Agins v. City of Tiburon*.[158] *Agins* addressed the paradigmatic, permanent regulatory takings scenario; the Court noted the uncontroverted allegation that the zoning ordinance would "forever" prevent certain development, giving no indication that the challenged zoning regime was meant to be anything but permanent.[159] However, in several footnotes, the Court alluded to the city's aborted attempt to acquire the subject property through eminent domain, as well as to Agins' argument that this unsuccessful acquisition effort had (separate and apart from the zoning regime) worked an inverse condemnation.[160] Within the footnotes' discussion of the city's precondemnation activities, the Court simply noted that during the government's condemnation-related decisionmaking process, fluctuations in value, "absent extraordinary delay . . . cannot be considered as a 'taking' in the constitutional sense."[161] The cases *Agins* cited in the footnote were all eminent domain cases.[162]

The claim Agins raised regarding the city's attempted eminent domain is commonly referred to as "precondemnation blight."[163] It has at least two common variations.[164] The first is a damages-related issue arising where the government eventually completes an intended condemnation. A property owner may argue that precondemnation activities had so depressed area property values prior to the date of the taking that using date-of-taking market values would not provide just compensation. The second occurs where the government has not completed eminent domain on a particular property, but the property owner claims that the government's preliminary, direct condemnation activities have functionally worked an inverse condemnation.[165] It was this second iteration that *Agins* tackled in

150. *Steinbergh v. City of Cambridge*, 604 N.E.2d 1269, 1274-75 (Mass. 1992), provides an example of a court overturning what appeared to be a final permit denial.
151. See *supra* I.B.3.b., for discussion and citation.
152. This was functionally the scenario in *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 24 ELR 20169 (Fed. Cir. 1993), involving a cease-and-desist order.
153. *Cf.* MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 348, 16 ELR 20807 (1986).
154. *Cf.* Palazzolo v. Rhode Island, 533 U.S. 606, 620-21, 32 ELR 20516 (2001).
155. *Landgate, Inc. v. Cal. Coastal Comm'n*, 953 P.2d 1188, 1197, 28 ELR 21236 (Cal. 1998), involved a court overturning a mistaken assertion of jurisdiction rather than a final agency determination of allowed uses on a property.
156. If the reason the court overturned the stop-work order was because the government agency did not have the statutory *authority* to regulate the particular property or activity at issue, that is a very different manner. As counterintuitive as it might initially seem, lack of legislative authority to undertake the challenged regulation is actually fatal to a takings claim; unauthorized agency activity cannot work a taking. See Spohr, *supra* note 26, at 9-50, for an analysis of "unauthorized takings."
157. *Adam Bros. Farming, Inc. v. County of Santa Barbara*, 604 F.3d 1142 (9th Cir. 2010), highlights this lack of precise distinction. There, the county concluded that plaintiffs' activities required a grading permit, issuing a stop-work order until plaintiff obtained such a permit. *Id.* at 1145, 1147. Rather than apply for the grading permit, plaintiff successfully convinced a state court to enjoin the regulatory requirement. *Id.* at 1146. Yet, the U.S. Court of Appeals for the Ninth Circuit seemed to treat the county's decision as a final decision about how the property could be used. *Id.* at 1147. In reality, the county had only decided that a grading permit was required, not what uses the property could ultimately be put to.
158. Agins v. City of Tiburon, 447 U.S. 255, 263 n.9, 10 ELR 20361 (1980), *abrogated by* Lingle v. Chevron, U.S.A. Inc., 544 U.S. 528, 35 ELR 20106 (2005).
159. *Id.* at 257, 259 n.6, 262.
160. *Id.* at 275 n.1, 258 n.3, 259 n.5, 263 n.9.
161. *Id.* at 263 n.9.
162. *Id.* at 263 n.9 (citing Danforth v. United States, 308 U.S. 271, 285 (1939) (analyzing condemnation of perpetual flowage easement); Thomas W. Garland, Inc. v. City of St. Louis, 596 F.2d 784, 787 (8th Cir. 1979) (condemnation proceedings and "cloud of condemnation" a de facto taking of plaintiff's leasehold); Reservation Eleven Associates v. District of Columbia, 420 F.2d 153, 157-58 (D.C. Cir. 1969) (claim that filing direct condemnation action itself constituted a taking)).
163. G & A Land, LLC v. City of Brighton, 233 P.3d 701, 708 (Colo. App. 2010).
164. *See, e.g.*, Joseph M. Jackovich Revocable Trust v. State Dept. of Transp., 54 P.3d 294, 298-301 (Alaska 2002), for a discussion of the two variations.
165. *Id.* at 300.

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the footnotes.[166] What makes *Agins*' language ironic is that even in the context of such incomplete eminent domain activity, "extraordinary delay" and "bad faith" are not necessarily even elements.[167]

Moreover, courts transferring such eminent domain precedent to regulatory takings scenarios is unfortunate. The Court would later recognize that treating cases involving condemnations or physical takings as controlling precedents for regulatory takings claims is "inappropriate."[168] However, *Agins* preceded the *Loretto v. Teleprompter Manhattan CATV Corporation*[169] decision that cemented the physical-versus-regulatory takings distinction. At the time of *Agins*, the distinction was not so clear.[170] It was not even certain that there could ever be a temporary regulatory taking. That open question lingered until *First English Evangelical Lutheran Church v. County of Los Angeles*,[171] decided eight years after *Agins*.

First English presented a classic, prospectively temporary scenario, an "Interim Ordinance" that banned construction in a flood protection area, but only until a final ordinance could be enacted.[172] Yet, the opinion did not even consider the temporal nature of the Ordinance. Legally, what made *First English* a temporary takings case, in the majority's eyes, was the then-existing California rule that a property owner had to seek a declaratory determination that the restriction worked a taking and, if successful, and only if the government thereafter decided to retain the regulation, would any compensation be due.[173] *First English* only tackled the "remedial" question of whether, once a regulation works a taking, subsequent action can relieve the government of needing to provide compensation.[174]

From earlier discussion, it should be clear that, despite the prospectively temporary nature of the restriction, the Court was actually analyzing a classic, retrospectively temporary taking.[175] The Court exclusively analyzed a series of cut-short issues. Is compensation required for regulatory takings ultimately invalidated by courts?[176] May a property owner recover damages for the period leading up to a court determination that the regulation constitutes a taking?[177] How should courts react where a government discontinues a regulation and converts a permanent restriction into a temporary one?[178]

The majority, in fact, noted that it was *not* addressing prospectively temporary restrictions, those normal delays in obtaining regulatory approval.[179] The majority's only mention of *Agins*' "extraordinary delay" language was that *Agins* (and *Danforth*, the primary case cited in *Agins*' footnote nine) "merely stand for the unexceptional proposition that the valuation of property which has been taken must be calculated as of the time of the taking, and that depreciation in value of the property by reason of preliminary activity is not chargeable to the government."[180] To repeat, *Agins*' footnote discussion and the cases cited (such as *Danforth*) all dealt with direct condemnations. There was no inkling from at least eight of the *First English* Justices that administrative foot-dragging or "extraordinary delay" was integral to a temporary regulatory takings claim.[181]

The jurisprudence jumped the rails when *Agins*' footnote nine (as repeated in *First English*) metastasized into temporary regulatory takings tests in the lower courts. *Dufau v. United States*[182] announced, in a paradigmatic, prospectively temporary regulatory takings claim, that extraordinary delay was a necessary component, a "key factor" that could create a temporary taking. *Dufau* indicated that such a determination turned on a plaintiff's ability to show that the government "acted in bad faith."[183] Extraordinary delay, and its apparent predicate, bad faith, would become standard, temporary regulatory takings inquiries in the Court of Federal Claims,[184] in the Federal Circuit,[185] and in state courts.[186] Extraordinary delay took on a life of its own.

The Court had a golden opportunity to consider whether and how the reasonableness of a delay mattered when it next delved into temporary takings. *Tahoe-Sierra* involved a purely prospectively temporary taking scenario, a 32-month moratorium.[187] *Tahoe-Sierra* is

166. *Agins*, 447 U.S. at 257 n.1, 258 n.3, 259 n.5, 263 n.9.
167. *Jackovich*, 54 P.3d at 299-300.
168. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322-23, 32 ELR 20627 (2002).
169. 458 U.S. 419 (1982).
170. *E.g.*, Kaiser Aetna v. United States, 444 U.S. 164, 178-79 & n.9, 10 ELR 20042 (1979).
171. 482 U.S. 304, 332, 17 ELR 20787 (1987).
172. *Id.* at 307-08.
173. *Id.* at 308.
174. *Id.* at 311, 321.
175. Woodbury Place Partners v. City of Woodbury, 492 N.W.2d 258, 262 (Minn. App. 1992) (discussing pro- versus retrospectively temporary takings and determining that *First English* applied only to the latter).
176. *First English*, 482 U.S. at 310.
177. *Id.* at 306-07.
178. *Id.* at 317-20.
179. *Id.* at 321.
180. *Id.* at 320.
181. In Justice Stevens' dissent, Part II comes slightly closer to equating litigation that cuts short a permanent taking with administrative procedures such as variances or regulatory approvals, *id.* at 334-35, and Part IV discusses "improperly motivated, unfairly conducted, or unnecessarily protracted governmental decisionmaking," *id.* at 339. No other Justice joined these parts of the dissent.
182. Dufau v. United States, 22 Cl. Ct. 156, 162-64, 21 ELR 20814 (1990) (citing *First English*, 482 U.S. at 321, and Agins v. City of Tiburon, 447 U.S. 255, 263 n.9, 10 ELR 20361 (1980), *abrogated by* Lingle v. Chevron, U.S.A. Inc., 544 U.S. 528, 35 ELR 20106 (2005)).
183. *Id.* at 164.
184. 1902 Atlantic Ltd. v. United States, 26 Cl. Ct. 575, 578, 23 ELR 21202 (1992); Tabb Lakes, Ltd. v. United States, 26 Cl. Ct. 1334, 1353-55, 23 ELR 20104 (1992), *aff'd*, 10 F.3d 796, 24 ELR 20169 (Fed. Cir. 1993); Walcek v. United States, 44 Fed. Cl. 462, 468 (1999), *aff'd*, 303 F.3d 1349, 33 ELR 20045 (Fed. Cir. 2002).
185. *E.g.*, *Tabb Lakes*, 10 F.3d at 803; Wyatt v. United States, 271 F.3d 1090, 1098, 32 ELR 20345 (Fed. Cir. 2001) (flushing out the elements of extraordinary delay and observing that it is rare that a court would find extraordinary delay without bad faith); Cooley v. United States, 324 F.3d 1297, 1306-07, 33 ELR 20161 (Fed. Cir. 2003).
186. *E.g.*, Williams v. City of Central, 907 P.2d 701, 706 (Colo. App. 1995); Landgate, Inc. v. California Coastal Comm'n, 953 P.2d 1188, 1199, 28 ELR 21236 (Cal. 1998); Griffith v. State Dept. of Environmental Protection, 775 A.2d 54, 61 (N.J. Super. A.D. 2001).
187. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 306, 32 ELR 20627 (2002). Technically, the Court did analyze at least one temporary taking between *First English* and *Tahoe-Sierra*. *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 29 ELR 21133 (1999), presented a "cut short" temporary taking, in that the state purchased the property during the pendency of what would have been a permanent regulatory tak-

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important to temporary takings doctrine on issues such as measuring economic impact for a prospectively temporary taking.[188] However, the Court offered very little on extraordinary delay.

Tahoe-Sierra included a sentence implying that had the agency not "acted diligently and in good faith" but had instead been "stalling," such facts "arguably could support" a "bad faith" takings claim.[189] The Court stopped any real discussion by summarily concluding that such an inquiry was procedurally foreclosed.[190] Another portion of the opinion cited *Agins*' footnote nine, but only in the context of whether a temporary prohibition could render property valueless; the Court offered no additional insight into extraordinary delay.[191] In short, there was no indication that either the *Tahoe-Sierra* majority or dissents saw extraordinary delay or bad faith as a necessary predicate for a temporary regulatory takings claim. The failure of *Tahoe-Sierra* to definitively state whether these were factors, and if so how they mattered, left a fair amount of uncertainty heading into 2005's pivotal *Lingle* decision.

B. The Framework: How Might Extraordinary Delay Matter?

In the quarter century between *Agins* and *Lingle*, there were three open possibilities for how exactly extraordinary delay and its bedfellow bad faith figured into prospectively temporary takings cases. (The concepts have never been germane to the retrospectively temporary scenario.)[192] They could reasonably have been a sword for plaintiffs, a stand-alone test to prove liability. They could reasonably have been part of the "character of the government action" analysis, with a property owner and government fighting over how well the government behaved during the regulatory process. Finally, they could reasonably have been a shield for the government, a ripeness threshold the government could force a property owner to prove before a court would even turn to the liability inquiry. As explained below, *Lingle* removed the first two of these three potential options, leaving only a government ripeness shield.

Pre-*Lingle*, a property owner could have asserted extraordinary delay (and/or bad faith) as a stand-alone, independent liability test. The Federal Circuit's *Tabb Lakes v. United States*[193] and *Wyatt v. United States*[194] opinions appear to espouse this view. The concept that an extraordinarily delayed process created liability (regardless of whether a plaintiff could meet the *Penn Central* factors) was not inconsistent with *Agins*' understanding of the Takings Clause. After all, if a government action failing to substantially advance a legitimate government end automatically created takings liability, was not a government extraordinarily and in bad faith delaying a hapless applicant's permitting process a textbook example of that failure?[195] *Tahoe-Sierra* even hinted that an agency not acting "diligently and in good faith" might lead to recovery on a "bad faith theory."[196]

Lingle removed that arrow from the property owner's quiver.[197] The regulatory takings test focuses "directly upon the severity of the burden that the government imposed upon private property rights."[198] An inquiry that "tells us nothing about the actual burden imposed on property rights, or how that burden is allocated" is not a valid part of the takings test.[199] The "notion" that regulation takes property "merely by virtue of its ineffectiveness or foolishness is untenable."[200] Extraordinary delay no longer provides an independent avenue for showing takings liability.[201] Post-*Lingle*, the Federal Circuit confirmed that a plaintiff cannot claim that "unreasonable delay" created a taking.[202]

Second, extraordinary delay could have been an element of the character of the government action. The trial court opinions in *Tabb Lakes*[203] and *1902 Atlantic Ltd. v. United States*,[204] along with the Federal Circuit opinion in *Cooley v. United States*,[205] appeared to adopt this view. Post-*Agins*

ings claim against the city. *Id.* at 700. The Court simply noted that it had not previously provided a "definitive statement" of the temporary regulatory taking elements, *id.* at 704, and because of the procedural posture of the case, declined to "define with precision" those elements, *id.* at 721, or to add much to the discussion.

188. See *infra* I.B.3.c., for discussion and citation.
189. *Tahoe-Sierra*, 535 U.S. at 333-34.
190. *Id.*
191. *Id.* at 332.
192. Sieber v. United States, 364 F.3d 1356, 1365 (Fed. Cir. 2004).
193. 10 F.3d 796, 803, 24 ELR 20169 (Fed. Cir. 1993).
194. 271 F.3d 1090, 1098, 32 ELR 20345 (Fed. Cir. 2001).
195. *See* Ali v. City of Los Angeles, 91 Cal. Rptr. 2d 458, 464-66 (Cal. Ct. App. 1999) (city acted "for no other purpose than to delay" and was "so unreasonable from a legal standpoint to be arbitrary and not in furtherance of any legitimate governmental objective"). *See also* Horsley, *supra* note 138, at 423 (explicitly linking, in a pre-*Tahoe-Sierra* article, the first prong of *Agins* with compensation for regulatory delays).
196. *Tahoe-Sierra*, 535 U.S. at 333-34.
197. *See* Siegel & Meltz, *supra* note 38, at 485-93.
198. Lingle v. Chevron, U.S.A. Inc., 544 U.S. 528, 539, 35 ELR 20106 (2005).
199. *Id.* at 543.
200. *Id.* at 543.
201. To be sure, certain post-*Lingle* cases, especially at the state level, recite pre-*Lingle* case law that extraordinary delay and/or bad faith could create a temporary taking. *E.g.*, Duncan v. Village of Middlefield, 898 N.E.2d 952, 956-58 (Ohio 2008); Wild Rice River Estates, Inc. v. City of Fargo, 705 N.W.2d 850, 859 (N.D. 2005); Byrd v. City of Hartsville, 620 S.E.2d 76, 81 (S.C. 2005). None of those explained how such a continuation could be consistent with *Lingle*. One case has recognized the problem. Shaw v. County of Santa Cruz, 170 Cal. App. 4th 229 (Cal. App. 6th Dist. 2008). *Shaw* observed that California's leading temporary takings case, *Landgate, Inc. v. California Coastal Comm'n*, 953 P.2d 1188, 28 ELR 21236 (Cal. 1998), had pegged the liability question for regulatory delay to whether an agency was arbitrarily delaying or discouraging development (liability) versus acting objectively reasonably, but nonetheless erroneously (no liability). *Id.* at 215-16. *Shaw* understood that *Landgate* was based on *Agins* and recognized that such a rule may have been eviscerated by *Lingle*. *Id. Shaw* avoided ruling on the ultimate question by concluding that the trial court judgment was correct under both *Lingle* and *Landgate*. *Id.* at 266, 88 Cal. Rptr. 3d at 218.
202. Acadia Tech., Inc. v. United States, 458 F.3d 1327, 1333 (Fed. Cir. 2006).
203. Tabb Lakes, Ltd. v. United States, 26 Cl. Ct. 1334, 1352-55, 23 ELR 20104 (1992) (explicitly including extraordinary delay as part of its character analysis and observing that claimant might get relief where she demonstrates "extraordinary delay in the permit process, *coupled with* a diminution in value"), *aff'd*, 10 F.3d 796, 24 ELR 20169 (Fed. Cir. 1993).
204. 26 Cl. Ct. 575, 580, 23 ELR 21202 (1992) (analyzing whether the government had acted in "bad faith" and with "sinister" motives under the character of the government action prong).
205. 324 F.3d 1297, 1306-07, 33 ELR 20161 (Fed. Cir. 2003) (analyzing reasons for delay and agency's bad faith as part of the character prong).

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but pre-*Lingle*, this too was reasonable. After all, prior to *Lingle*, the character analysis was a veritable referendum on items such as social values, public benefits, beneficial purposes, and how effectively regulatory efforts advanced such purposes.[206] So, why should a court not have considered good versus bad faith or the reasonableness of the government's conduct? The property owner could have argued that in bad faith the government extraordinarily delayed the process, while the government could have argued that it behaved reasonably and with benign motives, each party attempting to bolster its respective "character" arguments.

Lingle wiped out this rationale as well. *Lingle* removed from the taking inquiry the motivation or purpose behind the regulation, the regulation's value or benefit, and the correctness or effectiveness of the agency's implementation.[207] The government's bad (or good) faith and its reasonable (or unreasonable) behavior no longer impacts the character analysis. Just as *Lingle* found "untenable" the idea that a regulation works a taking by its "ineffectiveness or foolishness,"[208] the concept that a malign or unreasonable regulatory process is necessarily more burdensome than a benign, justifiable one is similarly untenable. The takings inquiry "focuses directly upon the *severity* of the burden that government imposes upon private property rights."[209]

Courts post-*Lingle* have recognized that the "appropriate focus of the character inquiry should be on 'the nature rather than the merit of the governmental action.'"[210] The character inquiry now looks at whether the regulation targets the owner, applies retroactively to her, provides her any offsetting benefits, prevents her from doing harm, or has caused something akin to a physical invasion.[211] The character prong can no longer "justify inquiry into the relative goodness of the action."[212] The reasonableness of the government's actions is no longer relevant to the character prong.[213] A post-*Lingle* court would say that a plaintiff stepped "over the line drawn in the sand by *Lingle*"[214] if she attempts to weave such an argument into the character analysis, and should say the same if the government attempts to tout the reasonableness of its process.[215]

This leaves ripeness as the only realistic refuge. Even before *Lingle*, extraordinary delay (and/or bad faith) was predominantly treated as a threshold test, a necessary hurdle for a plaintiff to clear to even reach a *Penn Central* liability analysis.[216] The Federal Circuit's opinion in *Boise Cascade v. United States*[217] explicitly treats extraordinary delay as a ripeness threshold, which, once met, enables a court to turn to the traditional *Penn Central* liability analysis.[218] *Cane Tennessee, Inc. v. United States*[219] held that a plaintiff must first show unreasonable delay before the court can analyze liability.[220] By the eve of *Lingle* in 2005, it was apparent that extraordinary delay was an additional, obligatory, threshold element for a plaintiff to meet.[221]

Treatment as a ripeness test was consistent with the Court's pre-*Lingle* pronouncements. *Agins* did not say that extraordinary delay created a taking; it said the inverse, that absent extraordinary delay, a governmental decisionmaking process could not be considered a taking.[222] *First English* similarly cast the discussion in the negative: without extraordinary delay, a process could not rise to a taking and "preliminary activity is not chargeable to the government."[223] Extraordinary delay could thus be a necessary, but not sufficient, predicate, with all reasonable delays a "safe harbor" where the government operates completely immune from takings liability.[224]

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206. Rith Energy, Inc. v. United States 247 F.3d 1355, 1364, 31 ELR 20603 (Fed. Cir. 2001). *See also* Palazzolo v. Rhode Island, 533 U.S. 606, 634, 32 ELR 20516 (2001) (O'Connor, J., concurring) ("The purposes served, as well as the effects produced, by a particular regulation inform the takings analysis."); Bass Enters. Prod. Co. v. United States, 381 F.3d 1360, 1370, 34 ELR 20088 (Fed. Cir. 2004) (courts consider the regulation's purpose, its importance, and the ease of preventing harm).
207. *See* Lingle v. Chevron, U.S.A. Inc., 544 U.S. 528, 539-43, 35 ELR 20106 (2005).
208. *Id.* at 543.
209. *Id.* at 539 (emphasis added).
210. Wensmann Realty, Inc. v. City of Eagan, 734 N.W.2d 623, 639 (Minn. 2007) (quoting Small Prop. Owners of S.F. v. City & County of S.F., 141 Cal. App. 4th 1388, 1409 (Cal. Dist. Ct. App. 2006)).
211. Spohr, *supra* note 26, at 68-81. While on the surface it might appear that issues such as targeting, retroactivity, or harm prevention improperly go to the wisdom or motivation of the government, that is not the case. *Id.* at 74-79.
212. City of Coeur D'Alene v. Simpson, 136 P.3d 310, 318 n.5 (Idaho 2006) (observing that "[t]his is what the Court corrected in *Lingle*").
213. *But see* Siegel & Meltz, *supra* note 38, at 493, 495 (suggesting that unreasonableness/bad faith "may" be relevant to character).
214. Rose Acre Farms, Inc. v. United States, 559 F.3d 1260, 1279, 39 ELR 20058 (Fed. Cir. 2009), *cert. denied*, 130 S. Ct. 1501 (2010).
215. The very nature of a restriction as temporary (versus permanent) may play into the character prong. Appolo Fuels, Inc. v. United States, 381 F.3d 1338, 1352, 34 ELR 20087 (Fed. Cir. 2004) ("A temporary restriction is necessarily less burdensome to the property owner than a permanent one."). And, of course, the length of the regulatory process attributable to the government would greatly affect the other two prongs of *Penn Central*. It profoundly shapes economic impact. Cienega Gardens v. United States, 503 F.3d 1266, 1279 (Fed. Cir. 2007) (citing Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 342, 32 ELR 20627 (2002)). And all nine *Tahoe-Sierra* Justices agreed that the length of the regulatory process (as compared to the length an applicant should have expected) to take, may play into the reasonableness of a plaintiff's investment-backed expectations. 535 U.S. at 342; 535 U.S. at 352 (Rehnquist, C.J., dissenting). Still, such inquiries fundamentally view regulatory timing from the perspective of the burden to the property owner, not from the perspective of the government's behavior being good or bad.
216. *See* Wight-Axling, *supra* note 29, at 227 (describing the state of the law a few months before *Lingle*, the author notes that, post *Tahoe-Sierra*, the Court of Federal Claims had made extraordinary delay a threshold requirement in addition to the other *Penn Central* factors).
217. 296 F.3d 1339, 1347 & n.6, 32 ELR 20797 (2002).
218. As discussed *supra* I.B.4., for prospectively temporary takings claims, a *Lucas* claim is unavailable.
219. 57 Fed. Cl. 115 (2003).
220. *Id.* at 133.
221. Wight-Axling, *supra* note 29, at 227-28, 231. *See also* Appolo Fuels, Inc. v. United States, 54 Fed. Cl. 717, 736 (2002), *aff'd*, 381 F.3d 1338, 34 ELR 20087 (Fed. Cir. 2004); Daniel L. Siegel, *The Impact of* Tahoe-Sierra *on Temporary Regulatory Takings Law*, 23 UCLA J. Envtl. L. & Pol'y 273, 300 (2005) ("To be consistent with *Tahoe-Sierra*, even a delay based on bad faith should only be a taking if that delay, in combination with the other *Penn Central* factors, point [sic] to a takings.").
222. Agins v. City of Tiburon, 447 U.S. 255, 263 n.9, 10 ELR 20361 (1980), *abrogated by* Lingle v. Chevron, U.S.A. Inc., 544 U.S. 528, 35 ELR 20106 (2005).
223. First English Evangelical Lutheran Church of Glendale v. County of L.A., 482 U.S. 304, 320, 17 ELR 20787 (1987).
224. Whether such a rule is wise is discussed directly below (*infra* II.C.).

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Although *Lingle* contains very strong language about the proper focus of the takings test, it did not, technically, preclude requiring extraordinary delay (and/or bad faith) as a ripeness requirement.[225] While an inquiry into motivation violates the spirit of *Lingle*, since the takings analysis should focus on the "severity" and "magnitude" and "distribut[ion]" of a regulatory burden,[226] it may not violate the letter. *Lingle* held that an inquiry that "probes the regulation's underlying validity" is "logically prior to and distinct from the question whether a regulation effects a taking."[227] A ripeness inquiry is in some sense logically prior to and distinct from the question of whether the regulatory process has effected a taking. In general, ripeness is a threshold inquiry not involving adjudication on the merits.[228] Thus, a court's opinion that finding extraordinary delay is a "*condition precedent* to undertaking the *Penn Central* analysis"[229] is not necessarily disturbed by *Lingle*. In sum, post-*Lingle*, extraordinary delay seems firmly entrenched as a ripeness threshold, an element that, once met, enables a court to turn to the traditional *Penn Central* liability analysis.[230]

C. The Arguments for Retaining Extraordinary Delay as a Ripeness Test Are Not Compelling

As *Lingle* does not completely foreclose employing extraordinary delay as a ripeness threshold in a prospectively temporary taking, the query this Article poses is whether future courts should. Is there value in having a ripeness requirement sufficient to justify recontaminating takings jurisprudence with normative inquiries of good and bad, diverting the takings lens from the impact of a regulation on a property owner, and making every claim for a prospectively temporary taking claim a referendum on the (un)reasonableness of the government's activities?

In permanent (and presumptively permanent) takings, the ripeness requirement serves a clear purpose. In analyzing economic impact, a court must measure the percentage diminution in market value caused by a restriction.[231] In other words, how does the value of the property with the challenged restriction (the numerator) compare to the value of the property without the restriction (the denominator).[232] A court cannot compute that until it knows what uses the regulatory body would, if asked, ultimately allow.[233] Requiring a "final and authoritative" agency determination of what uses the government intended to allow on the property[234] achieves this certainty. Since the cut-short liability analysis should mirror that of a permanent taking,[235] ripeness (in the form of presumptive finality) serves that same clear purpose in retrospectively temporary takings cases.[236] Extraordinary delay is not, under established law, an element in such a cut-short scenario.[237]

It is less obvious what ripeness accomplishes in prospectively temporary takings cases. After all, in a process temporary taking, the ultimate use the government will eventually allow for the property is typically not known. The government may ultimately permit full, partial, or no use of a property. It is the process itself, the waiting period before the government renders a final determination, that matters. It is here where courts have alighted on extraordinary delay to serve the ripeness function that finality serves in a (presumptively) permanent takings claim.[238]

As analyzed above, this "extraordinary delay" requirement is problematic in several respects: it is not consistent with *Lingle* rejecting a normative component to takings law and focusing on a regulation's impact on a property owner (versus the regulation's merit); it places a plaintiff in an almost untenable situation of having to show that the government in bad faith extraordinarily delayed the process, while avoiding dismissal for trying to collaterally attack the government's activities; it creates a nearly insurmountable hurdle, given that a property owner must additionally satisfy all the other liability elements; and, because all the other liability elements must already be satisfied, it violates *Lingle*'s teaching against a takings inquiry that adds nothing.[239] In light of all this, is having a ripeness requirement for a prospectively temporary taking claim necessary? The government may offer several justifications. None seem particularly persuasive.

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225. Resource Investments, Inc. v. United States, 85 Fed. Cl. 447, 494 n.70 (2009) (*Lingle* did not overrule *Agins* on extraordinary delay).
226. *Lingle*, 544 U.S. at 539-42.
227. *Id.* at 543.
228. Toca Producers v. F.E.R.C., 411 F.3d 262, 265 (D.C. Cir. 2005).
229. Cane Tenn., Inc. v. United States, 57 Fed. Cl. 115, 132 (2003).
230. Ladd v. United States, 90 Fed. Cl. 221, 227 (2009) ("any takings claim based on unreasonable delay would be analyzed according to the *Penn Central* balancing tests and by standards established in *Tahoe*"), *rev'd on other grounds*, Ladd v. United States, 603 F.3d 1015 (Fed. Cir. 2010); Resource Investments, Inc. v. United States, 85 Fed. Cl. 447, 494-95 (2009) ("once delay becomes extraordinary, courts must use *Penn Central* to determine whether this delay, going forward, has effected a taking"); Aloisi v. United States, 85 Fed. Cl. 84, 93, 97 (2008), *appeal dismissed*, 356 Fed. Appx. 385 (Fed. Cir. 2010) ("plaintiffs failed to establish the requisite showing of extraordinary delay and bad faith by defendant to ripen a temporary takings claim" and allow a *Penn Central* analysis); Grosscup v. Pantano, 725 F. Supp. 2d 1370, 1379 (S.D. Fla. 2010). For prospectively temporary takings claims, *Lucas* is unavailable. *See supra* I.B.4.
231. See *supra* I.B.3.a., for a discussion of measuring economic impact in temporary takings cases.
232. *E.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497, 17 ELR 20440 (1987) ("our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property").
233. Palazzolo v. Rhode Island, 533 U.S. 606, 622, 32 ELR 20516 (2001) (quoting MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 348, 16 ELR 20807 (1986) (a "'court cannot determine whether a regulation goes 'too far' until it knows how far the regulation goes'")).
234. *Cf. MacDonald*, 477 U.S. at 348.
235. See *supra* I.B.3.b., for discussion and citation.
236. Boise Cascade Corp. v. United States, 296 F.3d 1339, 1347, 32 ELR 20797 (2002) (initial permit denial "still a necessary trigger for a ripe takings claim").
237. Sieber v. United States, 364 F.3d 1356, 1365 (Fed. Cir. 2004).
238. *See, e.g.*, *Boise Cascade*, 296 F.3d at 1347 n.6; McGuire v. United States, No. 09-380L, 2011 WL 576060 at *7 (Fed. Cl. Feb. 18, 2011); Aloisi v. United States, 85 Fed. Cl. 84, 93, 97 (2008), *appeal dismissed*, 356 Fed. Appx. 385 (Fed. Cir. 2010).
239. See *supra* I.A., for discussion and citation.

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1. "Government Should Not Be Responsible for Periods Beyond Its Control"

The government could argue that periods during a regulatory process where the proverbial ball is functionally in someone else's court should not be attributable to the government. However, the government does not need a ripeness threshold to achieve such protection in most scenarios. The basic "causation" requirement already eliminates from consideration portions of the regulatory period attributable to the property owner.[240] Therefore, for reasons unrelated to ripeness, plaintiff-caused delays are not attributable to the government.[241] Similarly, the causation requirement excludes time periods where the government is enjoined by a court from taking the step the property owner sought.[242]

2. "'Reasonable' Delay by the Government Always Should Be Excused"

Turning to time periods where the government is "on the clock," the government could claim that it should never be responsible for "reasonable" delay, for a justifiable time period spent processing a permit, or using a moratorium to craft wise, permanent regulations. After all, if requiring a property owner to apply for a permit prior to undertaking an activity is not itself a taking,[243] and given that all but the most ministerial, over-the-counter permits require some government review time, it seems to follow that the government should not be responsible for a nonextraordinary period of decisionmaking. Similarly, because the mere enactment of a moratoria or other temporary regulation is not per se a taking,[244] it seems to follow that the government should enjoy a "safe harbor," some reasonable period of time to formulate a permanent solution.[245] Perhaps reasonable delays should never be takings.[246] Although appealing, such arguments rest on an *Agins*-inspired view of takings law.

The premise that liability should turn on the extraordinariness or reasonableness of the government's behavior and the government's good or bad faith, and thus that the government could never be liable for a nonextraordinary, well-intentioned regulatory period, was not without counterbalance, even pre-*Lingle*. The Court had established only that requiring a permit application would not "necessarily or even probably constitute a taking."[247] *First English* itself had divined the Takings Clause's purpose as securing compensation for an "otherwise proper interference amounting to a taking."[248] A majority of *Eastern Enterprises v. Apfel*[249] Justices reserved the takings analysis for "cases where the governmental action is otherwise permissible."[250] Such teachings cut against the concept of a guaranteed safe harbor.

And then *Lingle* determined that a plaintiff can be burdened as much by an effective regulatory process as by a bungled one, and that it is the regulatory impact on the property owner that counts.[251] It should no longer matter that the government's delay was caused by malign motives versus simple staff shortage or well-intentioned, understandable mistakes. *Lingle* reaffirmed that the Takings Clause "presupposes that the government has acted in pursuit of a valid public purpose."[252] There should be no absolute safe-harbor for nonextraordinary delays. Post-*Lingle*, inquiring into the sensibility of the government process runs counter to the principle that the takings analysis is no longer concerned with the government's reasonableness.[253]

Instead, such ill motivations or extreme behavior bespeak of some other wrong. Claims about an agency's motives for delaying a regulatory proceeding are already a standard substantive due process inquiry.[254] The applicant's contention that the government acted in "bad faith" by "creating bogus issues to delay" a project is not pertinent to the takings analysis, but instead essentially asserts a due process claim.[255] Alternatively, with the ability of

240. Wyatt v. United States, 271 F.3d 1090, 1098, 32 ELR 20345 (Fed. Cir. 2001) ("delay in the permitting process may be attributable to the applicant as well as the government"); Resource Investments, Inc. v. United States, 85 Fed. Cl. 447, 502 (2009) (inquiring "who [the applicant or the agency] was waiting on whom" in order to decide "responsibility" for a particular time period); Benson v. State, 710 N.W.2d 131, 154, 36 ELR 20023 (S.D. 2006) ("the cause-in-fact of the harm must be examined when analyzing the nature or character of the government action").

241. For example, in *Walcek v. United States*, 44 Fed. Cl. 462, 468 (1999), *aff'd*, 303 F.3d 1349, 33 ELR 20045 (Fed. Cir. 2002), the court concluded that plaintiff's failure to complete the permitting process and his unsuccessful pursuit of litigation accounted for seven of the eight years between the initial permit application and the permit's issuance. The court excluded those seven years from consideration. *Id.*

242. See s*upra* I.B.5., for discussion and citation of litigation-related delays.

243. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 127, 16 ELR 20086 (1985); *Wyatt*, 271 F.3d at 1097.

244. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 320-21, 334-35, 32 ELR 20627 (2002).

245. *Id.* at 340 (discussing the need to protect the decisional process).

246. *See* Siegel & Meltz, *supra* note 38, at 492.

247. *Riverside Bayview*, 474 U.S. at 128 n.5.

248. First English Evangelical Lutheran Church of Glendale v. County of L.A., 482 U.S. 304, 315, 17 ELR 20787 (1987).

249. 524 U.S. 498 (1998).

250. *Id.* at 546 (Kennedy, J., concurring); *id.* at 554 (Breyer, J., dissenting) ("at the heart of the [Takings] Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing *compensation* for legitimate government action that takes 'private property' to serve the 'public' good").

251. Lingle v. Chevron, U.S.A. Inc., 544 U.S. 528, 543, 35 ELR 20106 (2005). *See also* Rose Acre Farms, Inc. v. United States, 559 F.3d 1260, 1279, 39 ELR 20058 (Fed. Cir. 2009) (rejecting plaintiffs' contentions that "challenge the effectiveness of the regulations, which *Lingle* says we cannot do in a takings analysis"), *cert. denied*, 130 S. Ct. 1501 (2010).

252. *Lingle*, 544 U.S. at 543 (citations omitted). *See also* Pheasant Bridge Corp. v. Township of Warren, 777 A.2d 334, 343 (N.J. 2001) (holding that because the zoning ordinance was invalid, the Takings Clause does not apply).

253. Duncan v. Village of Middlefield, No. 2005-L-140, slip op. at 9-10 (Ohio Ct. App. Apr. 18, 2008), *aff'd*, 898 N.E.2d 952 (Ohio 2008).

254. *See, e.g.*, North Pacifica LLC v. City of Pacifica, 526 F.3d 478, 480 (9th Cir. 2008) (claim for delays in regulatory process really substantive due process, not takings claim); Torromeo v. Town of Fremont, New Hampshire, 438 F.3d 113 (1st Cir. 2006) (discussing town's unjustified delay in issuing previously approved building permits); United Artists Theatre Circuit, Inc. v. Twp. of Warrington, Pa., 316 F.3d 392 (3d Cir. 2003) (Judge (now Justice) Samuel A. Alito's analysis of the motivations for the agency's permitting delay).

255. *Duncan*, slip op. at 9-10. *See also* David Hill Dev. v. City of Forest Grove, 688 F. Supp. 2d 1193, 1220 (D. Or. 2010) (refusing to dismiss developer's substantive due process claim that government acted to "frustrate" development).

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"class-of-one" claimants (no longer only claimants of protected classes) to bring equal protection claims in land use cases,[256] an egregious delay may give rise to an equal protection claim.[257] If the government intentionally treats one developer differently from another or engaged in irrational delay, that states an equal protection claim.[258] Finally, common-law remedies for delays may provide an alternative source of compensation. One recent case upheld a $10 million judgment resulting from a government's improper delay in permitting a project.[259]

Thus, it is hard to understand the continuing doctrinal basis for one recent court's reasoning that if a delay was caused by a poorly organized or understaffed organization acting to further a legitimate public interest, instead of by some improper, anti-development philosophy, the government is immune from temporary takings liability.[260] The government's benign basis for delay should be no more a shield for the government than a malign basis should be a sword for a property owner.[261] Once again, *Lingle* resolved that the regulatory takings inquiry "focuses directly upon the severity of the burden that government imposes upon private property rights," and not upon the reasonableness of the government's conduct.[262]

In fact, there is an argument that, in a situation where an agency goes off the proverbial deep end and in bad faith delays a process, the public should be *less* responsible to pay just compensation than in a situation where an undermanned, underfunded agency takes significantly too long. Scenarios where the public (through its elected representatives) creates a complex regulatory regime, yet does not provide funding to effectively administer that process, seem more like "public burdens which, in all fairness and justice, should be borne by the public as a whole,"[263] than scenarios where, unbeknownst to taxpayers, regulators have strung along a process.[264]

3. "Removing Extraordinary Delay Would Open the Floodgates for Successful Claims"

The government could assert that without a ripeness hurdle, the floodgates would burst open, rendering the government liable for even routine, reasonable regulatory processes. That would have been a legitimate fear after *First English* and *Lucas* but before *Tahoe-Sierra*. *First English* analogized temporary regulatory restrictions to temporary physical takings; although the case did not answer the liability question, it intimated that a prospectively temporary restriction might work a taking immediately, creating a sort of "leasehold interest" for as long as the delay lasted.[265] *Lucas* later held that a regulation that denies economically viable use of property is a per se or categorical taking, typically requiring compensation.[266]

Almost any regulatory delay effectively might deny, at least for vacant land, all economically viable use for the entire regulatory period. No reasonable developer would make an alternative use of the property that would conflict with her desired project. Thus, if *First English* and *Lucas* had been married in a certain way, a developer could claim (depending on the property) that the government had denied her, for some period of time, all economically viable use of her property. Every regulatory process, even one lasting a month, could deny all economically viable use for that month and thus require (absent a ripeness hurdle) compensation.[267] Under such a framework, extraordinary delay could serve as a sort of gatekeeper, assuring that compensation is reserved for lengthy delays.

Ripeness, however, is not necessary to solve this quandary. As analyzed above, a one-month delay is likely not a taking for reasons unrelated to the reasonableness of the government's behavior.[268] *Tahoe-Sierra* clarified that "the "whole" in "parcel as a whole" includes "temporal future interests as well as present possessory interests."[269] Because a prospectively temporary measure is "expressly temporary when enacted," it is not "a taking of the parcel of the whole because the landowners' future interests, though diminished in value, always remained intact."[270] The proper

256. Village of Willowbrook v. Olech, 528 U.S. 562, 30 ELR 20360 (2000) (equal protection claims not limited to protected classes). *See generally*, Robert C. Farrell, *Classes, Persons, Equal Protection, and* Village of Willowbrook v. Olech, 78 Wash. L. Rev. 367, 399 (2003) (discussing the "dramatic effect" *Olech* has had on subsequent litigation).

257. *North Pacifica*, 526 F.3d at 481.

258. *Id.* at 486. Such class-of-one treatment may not be appropriate if the regulatory action by its nature involves subjective, individualized, discretionary determinations. Enquist v. Oregon Dep't of Agriculture, 553 U.S. 591, 602-03 (2008). But *Enquist* took pains to distinguish government in a proprietary capacity (the employment context Enquist presented, where government gets the most leeway) from government in a regulatory capacity (the role it typically occupies when it regulates property). *Id.* at 604-05. An *Olech* claim is still available in the property regulation context. *See David Hill*, 688 F. Supp. 2d at 1217 (refusing to dismiss developer's equal protection claim that it was treated differently from other developers).

259. Westmark Dev. Corp. v. City of Burien, 166 P.3d 813, 815, 818, 823 (Wash. App. 2007).

260. Shaw v. County of Santa Cruz, 170 Cal. App. 4th 229, 276 (Cal. App. 6th Dist., 2008). As discussed *supra* note 201, *Shaw* recognized that *Lingle* may have undercut such a rationale. *Id.* at 275 n.47.

261. Lingle v. Chevron, U.S.A. Inc., 544 U.S. 528, 539-43, 35 ELR 20106 (2005); Cienega Gardens v. United States, 331 F.3d 1319, 1340, 33 ELR 20221 (Fed. Cir. 2003); Whitman, *supra* note 4, at 582 (post-*Lingle*, "[n]o longer will an extremely worthy, or an extremely unworthy, governmental objective be relevant in deciding whether a taking has occurred"); Dreher, *supra* note 4, at 404.

262. *Lingle*, 544 U.S. at 539.

263. Armstrong v. United States, 364 U.S. 40, 49 (1960).

264. Of course, as discussed directly above, such a malign motivation may be the basis for a successful due process, equal protection, or tort-like claim, theories separate from the Takings Clause.

265. First English Evangelical Lutheran Church of Glendale v. County of L.A., 482 U.S. 304, 319, 17 ELR 20787 (1987) (likening an interim ordinance to "leasehold interests").

266. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015, 22 ELR 21104 (1992).

267. *Cf.* Walcek v. United States, 44 Fed. Cl. 462, 467 (1999) (noting that the two elements in a temporary taking were denial of all or substantially all economic use during the time in question, coupled with extraordinary delay), *aff'd*, 303 F.3d 1349, 33 ELR 20045 (Fed. Cir. 2002).

268. See *supra* I.B.3.c., for discussion and citation.

269. Resource Investments, Inc. v. United States, 85 Fed. Cl. 447, 477 (2009) (citing Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 331-32, 32 ELR 20627 (2002)).

270. *Resource Investments*, 85 Fed. Cl. at 480-81 (citing *Tahoe-Sierra*, 535 U.S. at 317 n.13).

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temporal framework is the entire period of plaintiffs' ownership or operation, not simply the period over which the government bar is in place.[271] A process can work a taking only if the restriction or process drags on so long that it becomes "functionally equivalent" to an appropriation.[272] A court already has to consider the impact of the temporary regulation on the value of the whole property.[273]

Under this framework, on the day a regulatory encumbrance begins, the market value of the property would likely drop. A potential purchaser typically would offer less, to account for the cost, uncertainty, and likely extended time line for recouping an investment that accompany a property being required to jump through regulatory hoops. But a short delay generally would not result in a diminution anywhere near the 75% value drop for the property as a whole necessary to prove a taking; the delay would typically need to stretch years before a serious takings claim could be mounted.[274] Takings law need not be recontaminated with normative considerations such as extraordinary delay and bad faith simply to prevent the feared flood of successful cases that might spill forth if courts neglect the proper economic impact inquiry.[275]

4. "Without a Threshold, Even Short Periods Could Be Compensable"

While jettisoning extraordinary delay would not cause a torrent of compensable takings claims, it might cause a trickle. Changing market conditions or some other factor could theoretically create a scenario where even a relatively short regulatory process could eviscerate a property's market value. Perhaps an economic "window" closes, such that a short regulatory process causes a confiscatory level of diminution.[276] The government could argue that the mere specter of paying compensation for a brief regulatory period would threaten the decisional process, a process *Tahoe-Sierra* determined was so important to preserve.[277] And it could assert that it is not "fair" to require the government to pay for a brief regulatory effort.

That the government might on rare occasions be liable for brief regulatory processes should not overly threaten government decisionmaking. *Tahoe-Sierra* discussed the need to protect the decisional process from an "extreme categorical rule" that all regulatory delays would require compensation. It is true that, as the case that birthed the regulatory taking concept teaches, "[g]overnment could hardly go on" if it owned compensation every time it restricted property rights.[278] An extreme categorical rule that required compensation for every delay might, as *Tahoe-Sierra* feared, eviscerate routine government.[279] But that sets up a straw man to knock down.

As long as the economic impact inquiry includes a diminution in market value of the whole property inquiry,[280] situations where a short regulatory time frame sufficiently diminishes a property's value will be rare.[281] The remote threat that a certain perfect storm would render a brief regulatory process an appropriation provides less of a "chill" than the existing and more tangible threat that the government may have to pay compensation for a final decision that "goes too far."[282] That government could not go on if it *always* had to pay for a short delay does not mean the government could not go on if it *occasionally* had to pay for a short delay. That there is no guaranteed safe harbor for the government in every case is, to borrow from *First English*, an impact that, although lessening regulatory flexibility to some extent, may be an acceptable consequence of the need to uphold a constitutional right.[283]

Is that "fair" to the government? Certainly, a delay would typically have to stretch many years before the economic impact to the parcel as a whole would be sufficient to cause a taking,[284] beyond what most would consider a "reasonable" time frame.[285] And the length of the process, contrasted with the length an applicant should have

271. Rith Energy, Inc. v. United States, 247 F.3d 1355, 1362, 31 ELR 20603 (Fed. Cir.), and again on denial or rehearing, 270 F.3d 1347, 1349, 32 ELR 20253 (Fed. Cir. 2001). *Accord* Maritrans, Inc. v. United States, 342 F.3d 1344, 1355 (Fed. Cir. 2003) (citing *Tahoe-Sierra* to reject a challenge that the trial court "erred in considering the entire time frame during which Maritrans owned the tank barges alleged to have been taken")
272. Lingle v. Chevron, U.S.A. Inc., 544 U.S. 528, 539, 35 ELR 20106 (2005).
273. Cienega Gardens v. United States, 503 F.3d 1266, 1277, 1280-81 (Fed. Cir. 2007).
274. See *supra* I.B.3.a., for discussion of economic impact, and *infra* II.B.4., for discussion of the "closing window" scenario, where even a relatively brief regulatory delay could be compensable.
275. Of course, this dismissal of the floodgates fear presumes that the economic impact analysis described *supra* I.B.3.c., where a significant decrease in the market value of the whole property is required to show a taking, prevails. If the lost profits/return-on-equity approach the courts tinkered with as a complete substitute for a market value analysis (prior to rejecting that approach, *see supra* I.B.3.a.) were to reemerge, then the floodgates fear might be very real. Similarly, if *CCA Assoc. v. United States*, 91 Fed. Cl. 580, 618-19 (2010)'s holding that an 18% drop in market value is compensable becomes the law, the floodgates might indeed open. This Article's thesis about jettisoning the extraordinary delay ripeness hurdle is premised on the assumption that they will not.
276. *Cf.* Cooley v. United States, 324 F.3d 1297, 1306, 33 ELR 20161 (Fed. Cir. 2003).
277. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 340, 32 ELR 20627 (2002).
278. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).
279. *Tahoe-Sierra*, 535 U.S. 334-35. *See also* David Spohr & Lara B. Fowler, *Application of the Endangered Species Act to Tribal Actions: Can Ambiguity Be a Good Thing*?, 1 Bellwether: Seattle J. Envtl. L. & Pol'y 64, 101-02 (2009) (discussing the impact of a strict liability takings regime).
280. *See supra* I.B.3.a., for discussion and citation.
281. To provide a hypothetical, suppose agency approval was required to consummate some air transport-related project, and the applicant submitted a complete packet days before September 11. Even if the agency approved the application a mere week after receipt, the events of September 11 might have, in the interim, eviscerated the property's market value. *Cf.* Byrd v. City of Hartsville, 620 S.E.2d 76 (S.C. 2005) (delay, which caused sale to fall through, not a taking because delay "reasonable" and economic impact "too slight").
282. *Cf. Mahon*, 260 U.S. at 413.
283. First English Evangelical Lutheran Church of Glendale v. County of L.A., 482 U.S. 304, 321, 17 ELR 20787 (1987).
284. See *supra* I.B.3.c., for discussion and citation.
285. *See, e.g.*, Wyatt v. United States, 271 F.3d 1090, 1098, 32 ELR 20345 (Fed. Cir. 2001) (Court has upheld delays of up to eight years). *Landgate, Inc. v. Cal. Coastal Comm'n*, 953 P.2d 1188, 1200, 28 ELR 21236 (Cal. 1998), implied that the delay would need to be "so objectively unreasonable as to give rise to the inference" that the government was acting "solely for purposes of delay or some other illegitimate reason."

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expected the regulatory process to take, may play into the reasonableness of a property owner's investment-backed expectations; an owner may have had no reasonable expectation of a quick response.[286] However, if the applicant can meet *Penn Central*, the government should pay compensation, whether or not it was guilty of extraordinary delay. That is no more or less "fair" than requiring the government to pay compensation for a permanent taking where the government acts for a worthy purpose but nonetheless restricts property sufficient to cause a taking.

After all, the focus of the takings analysis post-*Lingle* is the "severity" and "magnitude" of a regulatory burden to a property owner, not how well or poorly the government behaves.[287] If events are such that even a short, understandable regulatory process sufficiently impacts a property owner, then some compensation is owed, just as an unreasonable delay that does not meet the *Penn Central* elements does not lead to takings-related compensation.[288]

5. "Removing Extraordinary Delay Would Open the Floodgates for *Un*successful Claims"

Perhaps the most serious argument for retaining extraordinary delay is that, although eliminating the ripeness hurdle would not lead to a flood of successful claims, it could lead to a flood of *un*successful claims. Where the claim is that the process itself (regardless of uses allowed at the end of the regulatory period) has created a temporary taking, the normal ripeness requirement of a final agency action does not apply.[289] Without some other bar to filing such claims early in a (or after a short) regulatory process, the government (and courts) could conceivably clog handling and ultimately dismissing numerous takings claims filed over delays far too short to be compensable. In fact, there is even a potentially plaintiff-friendly angle, albeit a paternalistic one. As established above, a prospectively temporary delay of a few months or even a few years would rarely meet *Penn Central*.[290] And yet if a claim were denied on its merits, the property owner could find herself barred by issue or claim preclusion from relitigating what later (if the delay continued) might have become a much more viable claim. Dismissal on ripeness grounds would allow that later claim.[291] In a sense, a ripeness hurdle saves the unsavvy from themselves and the government and courts from the unsavvy.

These are not specious concerns. Avoiding wasted judicial (not to mention government and plaintiff) resources on premature claims is a legitimate end.[292] But the reality is that the extraordinary delay requirement has not served as much of a deterrent thus far. The case law is replete with property owners claiming a temporary taking after relatively short regulatory delays, time periods falling far short of what any published opinion has concluded could qualify as extraordinary delay.[293] And yet courts typically (if not always) analyze liability along with extraordinary delay.[294] Thus, the parties already are preparing cases on, and courts are weighing, the merits of liability. Forcing what amounts to an additional consideration of a delay's extraordinaryness saves nothing.[295] And it costs much, in the form of contaminating takings claims with what functionally become referenda on how reasonable the government is behaving, how benign or malign its motives. The upside of concentrating the takings inquiry on the impact of a regulation on a property owner outweighs the downside of jettisoning a theoretically available, but in practice not very useful, method of winnowing premature or meritless claims.[296]

III. Conclusion

From its superfluous beginnings in a footnote's discussion of eminent domain, through its subsequent injection into temporary regulatory takings doctrine, inquiries into how well or efficiently the government behaves during a regulatory process (and into whether its delays were motivated

286. All nine Justices in *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 32 ELR 20627 (2002), agreed that the regulatory process' actual length, compared to the length the applicant should have expected the process to take, may play into the reasonableness of a plaintiff's investment-backed expectations. 535 U.S. at 342; 535 U.S. at 352 (Rehnquist, C.J., dissenting). An applicant trying to permit Yucca Mountain should expect the process to take longer than an applicant trying to permit a deck for her house.

287. Lingle v. Chevron, U.S.A. Inc., 544 U.S. 528, 539-42, 35 ELR 20106 (2005).

288. As discussed *supra* II.C.2., it may lead to tort or some other form of compensation, but those are different theories of recovery.

289. Sieber v. United States, 364 F.3d 1356, 1365 (Fed. Cir. 2004).

290. See *supra* I.B.3.c., for discussion and citation.

291. Shuck v. Bank of America, N.A., 862 So. 2d 20, 24 (Fla. App. 2003) (dismissal of a prematurely filed claim does not bar a subsequent action once the claim ripens).

292. *See, e.g.*, McInnis-Misenor v. Maine Medical Center, 319 F.3d 63, 72 (1st Cir. 2003).

293. *E.g.*, Mackin v. City of Couer D'Alene, 347 Fed. Appx. 293 (9th Cir. 2009) (five months); Appolo Fuels, Inc. v. United States, 381 F.3d 1338, 1352, 34 ELR 20087 (Fed. Cir. 2004) (18 months "far short of extraordinary"); Kawaoka v. City of Arroyo Grande, 17 F.3d 1227, 1237 (9th Cir. 1994) (one year, which court deemed too "short-term" a delay to "rise to constitutional dimensions"); Hanford v. United States, 63 Fed. Cl. 111, 121 (2004) (less than five months). Again, as discussed *supra* I.B.3.b., even a brief delay caused by a "cut short" permanent taking may be compensable.

294. See *Bass Enters. Prod. Co. v. United States*, 381 F.3d 1360, 1366-69, 34 ELR 20088 (Fed. Cir. 2004), for one such lengthy discussion.

295. For an even more exhaustive discussion, see the almost 20 pages of extraordinary delay analysis contained within an almost 80-page opinion discussing various aspects of liability. Resource Investments, Inc. v. United States, 85 Fed. Cl. 447 (2009).

296. Given, as discussed *supra* I.B.2., that the statute of limitations in a prospectively temporary takings claim likely does not start running until the regulatory period ends, it might seem unbalanced to allow a plaintiff to file a claim (ripeness) before the defendant can benefit from the statute of limitations beginning to run. First, that scenario already exists: under the current law, a prospectively temporary claim ripens at that point during the process where the delay becomes extraordinary, while the statue of limitations does not start running until the end of the process. See *supra* I.B.2., for discussion and citation. In addition, while the Court expressed discomfort with the statute of limitations commencing *before* a claim is ripe for filing, the Court has not expressed the same qualms with the statute of limitations not starting to run until sometime *after* a claim has ripened. *Compare* Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Febar Corp. of Cal., Inc., 522-192, 200-01 (1997), *with* Wallace v. Kato, 549 U.S. 384, 388-90 & n.3 (2007). *See also* Ladd v. United States, 603 F.3d 1015, 1024-25 (Fed. Cir. 2010) ("untenable" that a statute of limitations period could start running before a property owner had the right to bring suit).

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by good or bad faith) has further muddied one of the most confused subsets (temporary takings) of what is already one of the most confused areas of constitutional law (regulatory takings).[297] Categorizing the two types of temporary takings (pro- versus retrospectively temporary), a distinction often missed or glossed over, and explaining how different issues apply disparately to each category, should remove some of this confusion and imprecision.

Pinning down the sole potential use of the extraordinary delay concept that has survived *Lingle*—a ripeness threshold a government can force a property owner to prove before a court touches liability—shows the concept's limited remaining usefulness. Exposing the shortcomings of the potential arguments for retaining extraordinary delay lays bare the superfluous nature of the concept. Ripeness is, after all, not a holy grail; the Court has explicitly emphasized the limited purposes it serves in regulatory takings cases.[298] Whatever usefulness ripeness might have in the temporary taking arena is not significant enough to justify muddling the takings analysis with accusations and protestations about how well or poorly the government is behaving.

The takings analysis is not fundamentally about whether the government behaved badly and should be punished versus whether it behaved reasonably and so should be immune from owing compensation. That would not be the analysis where, for example, the government acquires property for a school or repeatedly floods property via a dam (i.e., owe no compensation if the dam and school were "good," pay if they were not). Post-*Lingle*, it would not be the analysis in a permanent regulatory takings case either.[299] And it should no longer be the analysis in temporary regulatory takings claims. It is time to lay *Agins* fully to rest, jettison extraordinary delay from the takings arena once and for all, and keep the takings lens focused on the impact of regulatory delays on property owners.

297. Barros, *supra* note 6, at 343.
298. Palazzolo v. Rhode Island, 533 U.S. 606, 622, 32 ELR 20516 (2001).
299. Lingle v. Chevron, U.S.A. Inc., 544 U.S. 528, 539-43, 35 ELR 20106 (2005).