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Cleaning Up the Muck

A TAKINGS ANALYSIS OF THE MORATORIUM ON DEEPWATER DRILLING FOLLOWING THE BP OIL SPILL

INTRODUCTION

On April 20, 2010, the Deepwater Horizon drilling platform exploded in the Gulf of Mexico. The blast killed eleven workers and triggered the worst oil spill in America's history.¹ The platform was owned by Transocean Services, Ltd., and was under lease to British Petroleum, PLC (BP), for the purpose of drilling an exploratory well five thousand feet below the ocean's surface off the coast of Louisiana.² Aside from the unfortunate deaths of the workers, another tragedy unfolded as it became clear that the spill could not be stopped for weeks or even months. Around-the-clock video feeds of the oil spewing from the leak showed viewers the enormity of the disaster, capturing the hearts and interest of the nation.³ It was estimated that over two hundred million gallons escaped from the leaking well before it was finally capped in mid-July.⁴ The environmental effects on the region's wildlife—and on the people who depended on that wildlife for their subsistence—were staggering.⁵

¹ See *Hornbeck Offshore Servs., L.L.C. v. Salazar*, 696 F. Supp. 2d 627, 630 (E.D. La. 2010).

² Andrea Chambers & Jerry Brown, *The 2010 Gulf Oil Spill and Questions of Liability*, LEXISNEXIS EMERGING ISSUES ANALYSIS, Aug. 25, 2010, available at 2010 Emerging Issues 5281.

³ In fact, the oil spill was the most searched-for term in Yahoo's search engine in 2010, the first time since 2005 that a celebrity had not topped the list. Michael Liedtke, *BP Oil Spill Swamps Yahoo Search Engine in 2010*, YAHOO!FINANCE, (Dec. 1, 2010, 7:54 AM), <http://finance.yahoo.com/news/BP-oil-spill-swamps-Yahoo-apf-1847949440.html?x=0&.v=6>.

⁴ Editorial, *Gulf Leak Is Over, Impacts Still Uncertain*, DAY (New London, Conn.), Sept. 22, 2010. To put this astronomical number in perspective, the infamous Exxon Valdez disaster that occurred off the coast of Alaska in 1989 resulted in a spill of about eleven million gallons. David Dipino, *Researcher Warns that Current Could Still Bring Oil to the Area*, SUN SENTINEL (Fort Lauderdale, Fla.), Sept. 8, 2010, at 1.

⁵ *Hornbeck*, 696 F. Supp. 2d at 630 n.2 (“As a result [of the spill], nearly one-third of the Gulf of Mexico has been closed to commercial and recreational fishing.”).

Following the Deepwater Horizon disaster, it became immediately apparent that a prolonged oil leak posed a significant threat to wildlife living in and near the Gulf of Mexico. The region “is home to more than 400 marine and coastal fish and wildlife species,” including five endangered species of sea turtle, a variety of birds such as brown pelicans and terns, and several marine mammals including sperm whales and bottlenose dolphins.⁶ Additionally, it is the largest spawning ground in the world for blue fin tuna.⁷ About a month after the spill began, more than seven hundred dead animals had already been collected from the Plaquemines, Jefferson, and Lafourche parishes of Louisiana alone.⁸ Unlike beach goers and bathers in the area, many animals were ill-equipped or unable to avoid exposure to the spill.⁹ One expert expressed concern over the potential threat to the reproductive capabilities of fish in the area, noting, “Fish can swim away from the oil spill . . . , but eggs and larvae cannot.”¹⁰ Even worse, sea turtles in the area were observed attempting to feed on the tar balls that were prevalent in the Gulf.¹¹

Aside from those animals affected by direct exposure to the oil, the damage the spill caused to the marine and coastal habitat also posed more long-term, indirect threats. The salt marshes and mangrove coastlines that make up the wetlands surrounding the Gulf were described as practically impossible to clean without doing additional damage.¹² Coast Guard Admiral

⁶ *Gulf Coast Oil Spill—pt. 1: Hearing Before the H. Comm. on Transp. and Infrastructure*, 111th Cong. (2010) (statement of Larry Schweiger, President/CEO, Nat'l Wildlife Fed'n).

⁷ Dipino, *supra* note 4.

⁸ Kia Hall Hayes, *Coalition Asks BP to Allocate \$750million: Money for Economic Losses, Seafood Safety*, NEW ORLEANS TIMES PICAYUNE, May 30, 2010.

⁹ *See Gulf Coast Oil Spill—pt. 1: Hearing Before the H. Comm. on Transp. and Infrastructure*, 111th Cong. (2010) (statement of Larry Schweiger, President/CEO, Nat'l Wildlife Fed'n). For example, young sea turtles were described as “prone to being poisoned or coated by the sticky oil.” *Id.* Their adult counterparts fared no better as they “show[ed] no natural avoidance behaviors when confronted with an oil slick” and those that remained in the affected area often suffered from malnutrition. *Id.* Likewise, birds that tried to cope with their exposure to the spill by grooming the oil out of their feathers often exacerbated their problems by inadvertently consuming more oil in the process. *Id.*

¹⁰ Dipino, *supra* note 4.

¹¹ *Gulf Coast Oil Spill—pt. 1: Hearing Before the H. Comm. on Transp. and Infrastructure*, 111th Cong. (2010) (statement of Larry Schweiger, President/CEO, Nat'l Wildlife Fed'n).

¹² Matthew Brown, *Cleaning Oil-Soaked Wetlands May Be Impossible, Scientists Say*, ASSOCIATED PRESS (May 22, 2010), http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/05/cleaning_oil-soaked_wetlands_m.html; *see also* Bruce Barcott, *Forlorn in the Bayou*, NAT'L GEOGRAPHIC (Oct. 2010), <http://ngm.nationalgeographic.com/2010/10/gulf-oil-spill/barcott-text>.

Thad Allen, in charge of the federal effort to clean up the spill, described oil in the wetland marshes as a “worst-case scenario.”¹³ These wetlands are essential to the water quality of estuaries, with 98 percent of the fish and shellfish of the Gulf relying on them for food, shelter, and breeding.¹⁴ The potential danger was even more ominous considering that “[m]ore than 20 years after the Exxon Valdez spill, oil can still be found on Alaska’s beaches, and many species have not completely recovered.”¹⁵

In addition to the perils facing the wildlife and the environment, the spill was particularly alarming for those people involved in Louisiana’s seafood, tourism, and recreation industries, which bring in almost \$4 billion each year.¹⁶ Even with the spill barely a month old, and before pictures of the coastal impact inundated the American household, USA Today found that 13 percent of people polled would not eat any seafood that originated in the Gulf.¹⁷ Adding to these fears was a concern that the aggressive cleanup efforts might actually increase the damage to seafood and the environment in general.¹⁸ The chemical dispersants being used were of particular concern.¹⁹ The dispersants used by BP to break up and dissolve the oil were assumed to be safe, but, alarmingly, the long-term health and environmental effects are still not well known.²⁰ Additionally, while the use of dispersants may be an effective means for hastening the degradation of oil, it also “increases the

¹³ Brown, *supra* note 12.

¹⁴ See Barcott, *supra* note 12.

¹⁵ *Gulf Coast Oil Spill—pt. 1: Hearing Before the H. Comm. on Transp. and Infrastructure*, 111th Cong. (2010) (statement of Larry Schweiger, President/CEO, Nat’l Wildlife Fed’n). The larger population size and greater importance of the Gulf of Mexico to the national economy was another reason the impact and liability of the BP spill was predicted to be much greater than that of the Exxon Valdez. Jonathan Stempel, *Special Report: BP Oil Spill a Gusher for Lawyers*, REUTERS (June 30, 2010), <http://www.reuters.com/article/2010/06/30/us-oil-spill-bp-liability-idUSTRE65T2MZ20100630>. One expert noted that “[t]his is not an attenuated 38,000 people on the coast of Alaska 4,000 miles away. Harms are likely to be larger, with a population more than 100 times greater in the impact zone and much larger economies and coastal ecosystems.” *Id.*

¹⁶ Hayes, *supra* note 8.

¹⁷ *Id.*

¹⁸ Kate Kelland, *Analysis: Doing Nothing Might Have Been Best for Oil Spill*, REUTERS (June 28, 2010), <http://www.reuters.com/article/2010/06/28/us-oil-spill-scientists-analysis-idUSTRE65R5RC20100628>.

¹⁹ “BP used an estimated 2 million gallons of the chemical dispersant Corexit to break up oil, both on the surface and deep underwater near the gushing well.” Sandi Doughton, *Seattle’s NOAA Operation Testing Safety of Gulf Seafood*, SEATTLE TIMES, Aug. 6, 2010. According to the Public Employees for Environmental Responsibility, “One of the greatest unaddressed concerns associated with the Deepwater Horizon oil spill is [chemical] dispersant contamination of the seafood consumed by the public.” *Id.*

²⁰ *Id.*

risk that aquatic life in the water and on the sea floor will be exposed to oil . . . and add yet more inherently toxic chemicals to the already toxic oil.”²¹ The federal government acknowledged this potential danger, at one point ordering BP to “identify and use a less toxic and more effective dispersant.”²² Even without proof of actual contamination or danger, the enormous amount of media coverage discussing possible contamination resulted in a general consumer aversion to seafood from the Gulf that, in turn, destroyed the economic prospects of many of those who relied on the seafood industry in the region.²³

In response to the spill, the White House issued a moratorium on all oil drilling in the Gulf of Mexico and the Pacific Ocean.²⁴ Critics argued that this action did nothing more than exacerbate the impact on the region by creating another class of employees to stand in the unemployment line, namely those who rely on the energy industry.²⁵ As a result—much like the blobs of oil that arrived on beaches hundreds of miles from their source—the legal consequences quickly spread throughout the country, touching the lives of thousands of people.²⁶ In addition to the seemingly endless procession of environmental liability lawsuits facing BP, companies and individuals in the industry—who were innocent in causing the spill but who felt they were being punished or forced to suffer nonetheless—brought litigation against the federal government.²⁷ One of these cases was *Hornbeck Offshore Services L.L.C. v. Salazar*, in which a group of offshore oil and gas drilling support

²¹ *Gulf Coast Oil Spill—pt. 1: Hearing Before the H. Comm. on Transp. and Infrastructure*, 111th Cong. (2010) (statement of Larry Schweiger, President/CEO, Nat'l Wildlife Fed'n).

²² Press Release, Env'tl. Prot. Agency, BP Must Use Less Toxic Dispersant (May 20, 2010).

²³ *Gulf Coast Oil Spill—pt. 1: Hearing Before the H. Comm. on Transp. and Infrastructure*, 111th Cong. (2010) (statement of Larry Schweiger, President/CEO, Nat'l Wildlife Fed'n). For instance, “[i]n Hopedale, Louisiana, people who typically make their living from the bounty of the sea are now standing in unemployment lines, waiting for relief.” *Id.*

²⁴ *Hornbeck Offshore Servs., L.L.C. v. Salazar*, 696 F. Supp. 2d 627, 630 (E.D. La. 2010).

²⁵ See Siobhan Hughes & Stephen Power, *New Ban Hits Oil Drillers*, WALL ST. J. (July 12, 2010), <http://online.wsj.com/article/SB10001424052748704288204575362862315524690.html>.

²⁶ A former chairman of the Alaska Oil Spill Commission's legal task force after the Exxon Valdez disaster estimated that BP's clean up and legal liability costs could reach as high as \$90 billion. Stempel, *supra* note 15. The quantity of lawsuits involved in the BP litigation is expected to become so large that it has even been compared to asbestos and tobacco litigation. *Id.*

²⁷ See First Supplemental and Amended Complaint for Declaratory and Injunctive Relief at ¶ 89(b), *Hornbeck*, 696 F. Supp. 2d 627 (No. 10-1663).

and service providers located in the Gulf sued the government, claiming that the overly broad moratorium unjustly deprived them of their service contracts with oil exploration companies unassociated with the spill.²⁸ Further, they claimed that the damage was potentially irreparable if those exploration companies permanently left the Gulf for other waters as a result of the moratorium.²⁹

Certainly, quick government action was required to stop and then clean up the leaking oil and to punish those who caused the spill. But the broad and dramatic oil-drilling moratorium, and its subsequent detrimental impact on the oil industry in the Gulf, illustrates the dangerous potential of reactive government regulation that forces innocent parties to bear a burden more rightly placed on others. Protection against this threat can be found in the takings clause of the United States Constitution. Accordingly, this note will focus on a takings claim that was briefly mentioned but never fully argued or ruled on in *Hornbeck*³⁰ to show that such a claim should provide a valid recourse for future oil industry plaintiffs affected by federal regulations in response to oil spills. Moratoria impose uniquely detrimental burdens on service industry entities that rely on property interests with a definite life span. Incorporating these burdens into a traditional takings analysis will deter the federal government from passing moratoria that are too rash or broad. At a minimum, such an application would provide a compensation mechanism to those who suffer as a result of moratoria that are necessary but nonetheless detrimental. Accordingly, a court applying a takings analysis to a factual situation similar to the events that unfolded in *Hornbeck* should find that a taking occurred and that compensation must be paid—despite an unwillingness to come to such a holding in the past.

Part I of this note discusses the government's response to the Deepwater Horizon disaster. Part II analyzes the legal

²⁸ *Hornbeck*, 696 F. Supp. 2d at 632.

²⁹ *Id.* at 638.

³⁰ See Plaintiffs' Original Complaint and Application for Temporary Restraining Order and Injunctive Relief at ¶ 33, *Hornbeck*, 696 F. Supp. 2d 627 (No. 10-1663(F)(2)); First Supplemental and Amended Complaint for Declaratory and Injunctive Relief, *supra* note 27, ¶ 91; Diamond Offshore's Brief in Support of Emergency Motion to Intervene at ¶ 11, *Hornbeck*, 696 F. Supp. 2d 627 (No. 10-1663(F)(2)). Instead of focusing on the takings claim, the bulk of the plaintiffs' argument and the focus of the court rested on grounds that the moratorium was invalid under the Administrative Procedure Act (APA) because it was arbitrary and capricious. See *Hornbeck*, 696 F. Supp. 2d at 636-38.

proceedings stemming from the *Hornbeck* plaintiffs' lawsuit against the federal government. Part III describes the history of the takings claim in order to frame the proper regulatory takings analysis for the oil-drilling moratorium. Part IV presents previous examples of federal government action that affected the property rights of legitimate leaseholders to explore and drill for oil on their property, and describes the litigation that arose from it. Part V applies current takings jurisprudence to determine whether the moratorium in *Hornbeck* amounted to a Fifth Amendment taking of property that required just compensation. Finally, this note concludes by arguing that *Hornbeck* further demonstrates that, while takings jurisprudence remains seriously muddled, case law on the subject provides at least theoretical latitude for plaintiffs to bring takings challenges against federal moratoria. Further, the conclusion asserts that the courts have been too conservative in their analysis of temporary takings and that the oil-drilling moratorium presents a factual scenario where fairness and justice require a more liberal and inclusive takings analysis.

I. THE GOVERNMENT'S RESPONSE

The government took decisive action in response to the unprecedented environmental disaster caused by the Deepwater Horizon explosion. President Obama formed a bipartisan commission dubbed the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling (Commission).³¹ The Commission consisted of a seven-member team led by former Florida governor and former U.S. senator Bob Graham and former Environmental Protection Agency administrator William Reilly.³² It was tasked with "investigating the facts and circumstances concerning the cause of the blowout."³³ Investigations are still ongoing at the time of this writing, but it has been estimated that BP's civil and criminal liabilities for long-term restoration of the Gulf will likely exceed \$15 billion³⁴ and could balloon as high as \$90 billion.³⁵

³¹ Juliet Eilperin & Madonna Lebling, *Digging Deep After the Oil Spill*, WASH. POST, July 12, 2010, at A6.

³² Eilperin & Lebling, *supra* note 31.

³³ *Hornbeck*, 696 F. Supp. 2d at 630.

³⁴ John M. Broder, *Panel Wants BP Fines to Pay for Gulf Restoration*, N.Y. TIMES, Sept. 28, 2010, at A17. In addition to the investigation by the Commission, several other investigations commenced. Eilperin & Lebling, *supra* note 31. These included investigations by the Marine Board of Investigation to identify the factors leading to the explosion, the House Energy and Commerce Committee to determine the

In addition to the various investigations into the causes of and liabilities for the spill,³⁶ President Obama ordered the Secretary of the Interior, Kenneth Salazar, to report and recommend any additional precautions and regulations that should be required to improve the safety of oil exploration and production on the outer continental shelf.³⁷ The examination was conducted by the Department of the Interior in conjunction with a panel of experts from various levels of “state and federal governments, academic institutions, and industry and advocacy organizations.”³⁸ After a thirty-day examination, the White House issued a report³⁹ (Report) purportedly based on the panel’s findings and ordered a six-month moratorium halting all offshore exploratory drilling in depths of more than five hundred feet of water.⁴⁰

The moratorium met with sharply divided reviews from politicians and the media alike. Supporters argued the moratorium was necessary because the government simply could not risk the possibility of another spill.⁴¹ Among these supporters was Representative Edward Markey of Massachusetts, who noted, “The only thing worse than one oil

extent and impact of the oil spill and BP’s response to it, the House Natural Resources Committee to determine problems in the Mineral Management Service’s (MMS) oversight over offshore drilling, and the National Academy of Engineering, which was charged with independently assessing the cause of the accident. *Id.*

³⁵ Stempel, *supra* note 15. For its own part, BP has estimated that \$40 billion should cover its liabilities for the spill. Tom Bergen, *Special Report: How BP’s Oil Spill Costs Could Double*, REUTERS (Dec. 1, 2010), <http://www.reuters.com/article/2010/12/01/us-special-report-how-bps-oil-spill-cost-idUSTRE6B02PA20101201>. However, this number has been disputed as overly optimistic and as an attempt to underestimate the costs. *Id.* Instead, an analysis by Reuters stated that the “fines, damages, costs related directly to the leak, compensation and the damage to BP’s business suggests the final spill bill could, over the long term, end up [being] twice as much.” *Id.*

³⁶ Eilperin & Lebling, *supra* note 31.

³⁷ *Hornbeck*, 696 F. Supp. 2d at 630.

³⁸ *Id.* at 630-31.

³⁹ DEP’T OF THE INTERIOR, INCREASED SAFETY MEASURES FOR ENERGY DEVELOPMENT ON THE OUTER CONTINENTAL SHELF (2010), available at <http://www.doi.gov/deepwaterhorizon/loader.cfm?csModule=security/getfile&PageID=33598>.

⁴⁰ *Hornbeck*, 696 F. Supp. 2d at 631-32. The Report specifically directed the suspension of “all pending, current, or approved offshore drilling operations of new deepwater wells in the Gulf of Mexico and the Pacific regions.” *Id.* A Notice to Lessees (NTL) subsequently followed the Report, indicating that the MMS would not consider any drilling permits for deepwater wells for six months and defining deepwater as depths greater than five hundred feet. *Id.* See generally DEP’T OF THE INTERIOR, MINERALS MGMT. SERV., NTL No. 2010-N04, NOTICE TO LESSEES AND OPERATORS OF FEDERAL OIL AND GAS LEASES IN THE OUTER CONTINENTAL SHELF REGIONS OF THE GULF OF MEXICO AND THE PACIFIC TO IMPLEMENT THE DIRECTIVE TO IMPOSE A MORATORIUM ON ALL DRILLING OF DEEPWATER WELLS (2010), available at <http://www.doi.gov/news/pressreleases/loader.cfm?csModule=security/getfile&PageID=33716>.

⁴¹ Hughes & Power, *supra* note 25.

rig in the bottom of the Gulf of Mexico would be two oil rigs in the bottom of the Gulf of Mexico.”⁴² Likewise, Senator Bill Nelson praised the moratorium stating, “Until we know what happened with the Deepwater Horizon, and we’ll know very soon, it makes sense not to put Gulf Coast residents and the economies there at further risk.”⁴³ The economic consequences of the moratorium on the Gulf Coast region, particularly on the oil industry, were acknowledged by supporters but seen as a necessary evil to prevent additional future harm.⁴⁴

Critics of the moratorium saw the situation dramatically differently, finding the undeniably immense economic consequences impossible to ignore in a region still recovering from Hurricane Katrina.⁴⁵ One estimate predicted the moratorium would cause a nationwide loss of over twelve thousand jobs, \$2.8 billion in economic activity, and \$219 million in tax revenue.⁴⁶ Further, critics worried that drilling companies currently located in the Gulf, or in the process of applying for a future lease to drill, would instead leave for foreign countries rather than wait for the moratorium to end.⁴⁷ Once gone, the concern was that drilling companies would “not return for several years, if ever.”⁴⁸ The long-term effects on the national economy and scientific progress were lamented as being equally dire.⁴⁹

⁴² Ann Woolner, Editorial, *Overreaching Times Two: A Judge Goes Too Far to Overturn a Deepwater Drilling Moratorium that Went Too Far*, PITTSBURGH POST-GAZETTE, June 25, 2010 (internal quotation marks omitted).

⁴³ Hughes & Power, *supra* note 25 (internal quotation marks omitted).

⁴⁴ *Id.*

⁴⁵ Bill Sasser, *Obama Loses in Court Again over Deepwater Drilling Moratorium*, CHRISTIAN SCI. MONITOR (July 9, 2010), <http://www.csmonitor.com/USA/2010/0709/Obama-loses-in-court-again-over-deepwater-drilling-moratorium>. Other critics noted, “The Obama Administration’s immediate policy response to the oil spill, a categorical ban on all deepwater offshore drilling, had as much to do with managing public relations as with managing drilling policy based on sound science.” Ronald J. Krotoszynski, Jr., *Transparency, Accountability, and Competency: An Essay on the Obama Administration, Google Government, and the Difficulties of Securing Effective Governance*, 65 U. MIAMI L. REV. 449, 456 (2011).

⁴⁶ Rebecca Mowbray, *Moratorium to Resound Across U.S., Expert Says*, NEW ORLEANS TIMES PICAYUNE, July 20, 2010.

⁴⁷ Hughes & Power, *supra* note 25. The CEO of Diamond Offshore, one of the plaintiffs in *Hornbeck*, told a presidential commission that his company had already sent two deepwater rigs to foreign waters as a result of the moratorium, and warned that “there won’t be much of a U.S. industry left” if the moratorium remains in place. *Id.*

⁴⁸ Hornbeck’s Memorandum of Law in Support of Its Motion for Preliminary Injunction at 6, *Hornbeck Offshore Servs., L.L.C. v. Salazar*, 696 F. Supp. 2d 627 (E.D. La. 2010) (No. 10-1663).

⁴⁹ Rebecca Terrell, *Oil Leak Outrage*, 26 NEW AMERICAN, July 19, 2010, available at 2010 WLNR 15967962. One senator even compared the moratorium to “the aftermath of the Three Mile Island nuclear power plant disaster . . . that brought all

II. LEGAL FALLOUT

The moratorium also sparked significant legal debate. On the extreme end of the spectrum, the moratorium was condemned as everything from a blatant executive overreach lacking reason and spurred by fear,⁵⁰ to an unconstitutional regulation of commerce by the executive branch in violation of the separation of powers.⁵¹ Armchair debaters aside, there are real and tangible legal issues stemming from the actions of the federal government in the wake of the Deepwater Horizon accident. On June 7, 2010, Hornbeck Offshore Services, L.L.C. (Hornbeck) filed suit in the United States District Court for the Eastern District of Louisiana against the Secretary, the Department of the Interior, the Minerals Management Service (MMS), and the Director of the MMS seeking declaratory and injunctive relief to end the moratorium.⁵² Subsequently, additional plaintiffs joined the litigation.⁵³ Judge Martin Feldman, presiding over the case, issued a preliminary injunction against the enforcement of the moratorium.⁵⁴ The court held that, based on the administrative record, the blanket moratorium on all drilling wells of more than five hundred feet of water was likely to be found “arbitrary and capricious” and was thus invalid under the Administrative Procedure Act (APA) and the Outer Continental Shelf Land Act (OCSLA) and its implementing regulations.⁵⁵ The following section will further explore that decision.

A. *The Hornbeck Decision*

Judge Feldman framed the issue to be decided in *Hornbeck* as “whether the federal government’s imposition of a general moratorium on deepwater drilling for oil in the Gulf of Mexico was imposed contrary to law.”⁵⁶ The statutes governing the

nuclear power plant applications to a screeching halt.” *Id.* The senator added, “In hindsight that was not the right decision. Today, we are 30 years behind the French in nuclear technology.” *Id.*

⁵⁰ Woolner, *supra* note 42.

⁵¹ *The Constitutionality of Obama’s Offshore Drilling Moratorium*, YOUDECIDEPOLITICS.COM (June 22, 2010, 10:17 PM), <http://www.youdecidepolitics.com/2010/06/22/the-constitutionality-of-obamas-offshore-drilling-moratorium/>.

⁵² *Hornbeck*, 696 F. Supp. 2d at 632.

⁵³ *Id.*

⁵⁴ *Id.* at 630.

⁵⁵ *Id.* at 639.

⁵⁶ *Id.* at 630.

outcome were OCSLA, which provides authority to the Secretary to suspend leases in the Gulf under certain circumstances,⁵⁷ and the APA, which authorizes the federal courts to review final agency action.⁵⁸ The plaintiffs generally alleged that the moratorium by the Secretary as well as the Notice to Lessees (NTL) implementing the moratorium were “arbitrary, capricious, an abuse of discretion and otherwise not in accordance with the APA, OCSLA and its implementing regulations.”⁵⁹ Additionally, they made a brief allegation that the moratorium was an impermissible “‘taking’ of . . . property rights in violation of the 5th Amendment to the United States Constitution.”⁶⁰

The focus of the plaintiffs’ complaint was directed at the arbitrary and capricious claim.⁶¹ They claimed that the moratorium was unwarranted based on the Report provided to the Secretary by a panel of experts.⁶² They alleged that the Secretary had exaggerated or entirely invented the experts’ support and recommendations for the moratorium.⁶³ Further, they alleged the Secretary had failed to adequately explain the reasons behind the suspension of operations⁶⁴ or why he had chosen a general depth limit of five hundred feet for the drilling ban.⁶⁵ The plaintiffs pointed to a lack of individualized justification for the moratorium, stating,

The Report itself does not contain any facts, data, analysis or risk assessment concerning why the Secretary imposed a Moratorium on further drilling by the “33 [existing] wells.” Twenty-nine of these

⁵⁷ *Id.* at 632-33 (citing 43 U.S.C. § 1334(a)(1)).

⁵⁸ *Id.* at 634 (citing 5 U.S.C. §§ 702, 704).

⁵⁹ First Supplemental and Amended Complaint for Declaratory and Injunctive Relief, *supra* note 27, ¶ 22. One of the expert panelists stated that if anybody had made the suggestion of a moratorium on existing drilling, “we’d have said that’s craziness.” *Crude Politics*, WALL ST. J., June 17, 2010 (internal quotation marks omitted).

⁶⁰ Diamond Offshore’s Brief in Support of Emergency Motion to Intervene at 4, *Hornbeck*, 696 F. Supp. 2d 627 (No. 10-1663(F)(2)).

⁶¹ See generally First Supplemental and Amended Complaint for Declaratory and Injunctive Relief, *supra* note 27.

⁶² *Id.* ¶ 52.

⁶³ *Id.* ¶ 83. At least some of this skepticism was confirmed when it “was exposed that an important White House official had changed the Safety Report before its public release, which created the misleading appearance of scientific peer review.” *Hornbeck Offshore Servs., L.L.C. v. Salazar*, No. 10-1663(F)(2), 2011 WL 454802, at *2 (E.D. La. Feb. 2, 2011).

⁶⁴ *Hornbeck*, 696 F. Supp. 2d at 631.

⁶⁵ The Deepwater Horizon operation was conducted at a depth of over five thousand feet. *Hornbeck’s Memorandum of Law in Support of Its Motion for Preliminary Injunction*, *supra* note 48, at 10. The Report issued to the Secretary noted that, compared to drilling in shallow water, risks were greater after one thousand feet. First Supplemental and Amended Complaint for Declaratory and Injunctive Relief, *supra* note 27, ¶ 89(d).

wells had been subjected to additional inspections following the Incident. According to the “MMS Deepwater Drilling Rig Inspection Report” . . . , issued on May 11, 2010, MMS found no violations of governing regulations or existing permit terms on 27 of the 29 drilling rigs inspected and only minor violations on the two others. Further, each of the 33 rigs had previously satisfied the rigors of the MMS permitting process.⁶⁶

Additionally, they expressed concern about the injurious economic effects of the moratorium, exclaiming that “lost wages for direct and indirect jobs lost could be over \$165 million to \$330 million per month for every month the 33 platforms are idle.”⁶⁷ The long-term effects were viewed as similarly alarming. The Report stated that the offshore operations provide employment for approximately 150,000 people.⁶⁸ The moratorium put many of these jobs at risk. Further, without robust and continuous drilling activities, this labor force would lack incentive to remain in the region, thus reducing the ability of companies like the *Hornbeck* plaintiffs to find workers.⁶⁹ Finally, the plaintiffs also pointed to the possibility that the moratorium might actually last substantially longer than six months,⁷⁰ an unacceptable possibility for an industry that relied on contracts and equipment with a limited useful life.⁷¹

The government countered by citing the relevant portions of OCSLA that specifically authorize the Secretary to direct a suspension of drilling whenever it determines that “activities pose a threat of serious, irreparable, or immediate harm or damage’ to human or animal ‘life, property, [] mineral deposit, or the marine, coastal, or human environment.”⁷² The Secretary highlighted that the moratorium was needed to “address critical

⁶⁶ First Supplemental and Amended Complaint for Declaratory and Injunctive Relief, *supra* note 27, ¶ 46.

⁶⁷ Hornbeck’s Memorandum of Law in Support of Its Motion for Preliminary Injunction, *supra* note 48, at 23. *But see* Woolner, *supra* note 42 (noting that “five days before filing suit, Hornbeck Offshore Services Inc. assured the Securities and Exchange Commission and the investing public that the ban would have little effect on it”).

⁶⁸ First Supplemental and Amended Complaint for Declaratory and Injunctive Relief, *supra* note 27, ¶ 89a.

⁶⁹ *Id.*

⁷⁰ *Id.* ¶ 54.

⁷¹ *Id.* ¶¶ 93-98. Plaintiffs noted that they could lose as much as \$500,000 per day for each rig while the moratorium remained in place. *See* Plaintiffs’ Original Complaint and Application for Temporary Restraining Order and Injunctive Relief at ¶ 10, *supra* note 30. Additionally, some contractual parties were cancelling their contracts with plaintiffs altogether. First Supplemental and Amended Complaint for Declaratory and Injunctive Relief, *supra* note 27, ¶ 67.

⁷² Defendants’ Opposition to Plaintiff’s Motion for Preliminary Injunction at 6, *Hornbeck Offshore Servs., L.L.C. v. Salazar*, 696 F. Supp. 2d 627 (E.D. La. 2010) (No. 10-1663(F)(2)) (quoting 30 C.F.R. § 250.172(b)).

spill containment and response deficiencies” and warned that there were “insufficient available response resources should another deepwater spill occur while the containment and clean up efforts [were ongoing]”⁷³ The government pointed out that courts must defer to agency decisions that are supported by a thorough administrative record, and in this case, “the interim safety measures in the Safety Report and the corresponding suspension of deepwater drilling [were] appropriately supported by the Administrative Record.”⁷⁴ The defendants spent little time addressing the Fifth Amendment takings claim, asserting only that it was “both wholly without merit and outside of the jurisdiction of this Court to adjudicate.”⁷⁵

Judge Feldman issued his decision on June 22, 2010, holding that the moratorium was contrary to law and that he was “unable to divine or fathom a relationship between the findings and the immense scope of the moratorium.”⁷⁶ He noted that the Report—supposedly the supporting basis for the moratorium—focused narrowly on the Deepwater Horizon incident alone.⁷⁷ In contrast, the resulting moratorium was exceedingly broad, applying to rigs that had exemplary safety records and that drilled in significantly shallower water than the Deepwater Horizon.⁷⁸ Judge Feldman found it hard to believe that such a suspension would be deemed appropriate in other contexts, asking, “If some drilling equipment parts are flawed, is it rational to say all are? Are all airplanes a danger because one was? All oil tankers like Exxon Valdez? All trains? All mines? That sort of thinking seems heavy-handed, and

⁷³ Memorandum in Support of Defendants’ Motion to Dismiss Complaint at 5, *Hornbeck*, 696 F. Supp. 2d 627 (No. 10-1663(F)(2)).

⁷⁴ Defendants’ Opposition to Plaintiff’s Motion for Preliminary Injunction, *supra* note 72, at 16. The government argued that an agency’s investigation and choice of methodology are entitled to particularly broad deference when the agency is responding to an emergency. *See id.*

⁷⁵ Defendants’ Response to Diamond Offshore’s Motion to Intervene at 3 n.4, *Hornbeck*, 696 F. Supp. 2d 627 (No. 10-1663(F)(2)).

⁷⁶ *Hornbeck*, 696 F. Supp. 2d at 637.

⁷⁷ *See id.* “[The Report] is incident-specific and driven: Deepwater Horizon and BP only. None others.” *Id.*

⁷⁸ *See id.* at 637-38 & n.11; *see also* Hornbeck’s Memorandum of Law in Support of Motion for Preliminary Injunction, *supra* note 48, at 10. The Deepwater Horizon well was drilled in nearly five thousand feet of water, and the Report addressed wells in depths greater than one thousand feet, yet the NTL set the moratorium at the significantly shallower depth of five hundred feet. Hornbeck’s Memorandum of Law in Support of Motion for Preliminary Injunction, *supra* note 48, at 10.

rather overbearing.”⁷⁹ Accordingly, the court held that the government’s actions in implementing the moratorium had been “arbitrary and capricious” and were thus contrary to the requirements of the APA and OSCLA.⁸⁰ Therefore, the court granted the plaintiffs’ motion for a preliminary injunction preventing the moratorium from being enforced.⁸¹ Because the parties had failed to fully argue it, and perhaps to avoid entering the difficult and muddled jurisprudence of takings analysis, the court did not analyze or even mention the merits of the plaintiffs’ takings claim.⁸²

B. *The Government’s Response to the Injunction*

The decision by Judge Feldman led to additional controversy surrounding the moratorium. Only days after the ruling, the Secretary publicly announced that the government was working on passing a second moratorium.⁸³ The government reiterated this intention when—just hours before the district court’s decision was appealed before the United States Court of Appeals for the Fifth Circuit—a senior administration official announced that the government “would immediately issue a new moratorium” regardless of the outcome of the appeal.⁸⁴ The maneuver sparked outrage from critics who claimed that the statements were made in a brazen attempt to intimidate the court.⁸⁵ Nevertheless, on July 12, 2010, the Secretary issued a

⁷⁹ *Hornbeck*, 696 F. Supp. 2d at 637. Also of import was the fact that since 1969 there had only been three deepwater blowouts before the Deepwater Horizon, none of which were in the Gulf of Mexico. *See id.* at 638 n.11.

⁸⁰ *Id.* at 639. The court was careful to note that “a suspension of activities directed after a rational interpretation of the evidence could outweigh the impact on the plaintiffs and the public” but that here the facts of the case could not support such a determination. *Id.*

⁸¹ *See id.*

⁸² *See generally Hornbeck*, 696 F. Supp. 2d 627.

⁸³ Plaintiffs’ Response in Opposition to Defendants’ Motion to Dismiss Complaint at 2, *Hornbeck*, 696 F. Supp. 2d 627 (No. 10-1663(F)(2)). After the first injunction was ordered, the Secretary stated, “The decision to impose a moratorium on deepwater drilling was and is the right decision’ and that ‘I will issue a new order in the coming days that eliminates any doubt that a moratorium is needed, appropriate, and within our authorities.’” *Id.* at 5.

⁸⁴ *Id.* at 6.

⁸⁵ *See* Kingsley Guy, Op-Ed., *Obama’s Over-Reach: President Remaking Courts*, SUN SENTINEL (Ft. Lauderdale, Fla.), July 25, 2010, at F5 (comparing the Obama administration’s response to Judge Feldman’s injunction to the court packing of FDR and expressing that “[r]egardless of their views on offshore drilling, Americans should be concerned about the heavy-handed action by the Obama administration of reinstating a moratorium. It demonstrates contempt for the judicial system and the attitude of, ‘I’m the president and I can do anything I want.’”).

memorandum rescinding the first moratorium but ordering a new—yet similar—blanket suspension on offshore oil drilling.⁸⁶ Additionally, the government moved to dismiss the original suit on the grounds of mootness since the original moratorium was no longer in effect.⁸⁷ Counsel for the plaintiffs, incensed by the government's actions, invoked *Marbury v. Madison* and exclaimed that the decision to pass a new moratorium with the same practical effects as the now enjoined original one constituted executive interference with the judicial branch and the judicial review process.⁸⁸

The motion for dismissal was addressed on September 1, 2010, when Judge Feldman again ruled against the government, holding that mootness did not apply and stating that the second moratorium was essentially the same as the first one.⁸⁹ In addressing the issue of whether the Secretary had the authority to rescind the first moratorium, he noted that the proper procedure for an agency seeking to reconsider a decision that is under judicial review is for the agency to move the court to remand.⁹⁰ The court voiced its concern that “if agencies are not required to move to remand, they may use rescission and reissuance of their decisions as a way to manipulate the federal jurisdiction of U.S. courts.”⁹¹ Ultimately, Judge Feldman concluded the rescission did have “some administrative force,”⁹² but this was not enough to save the defendants’ motion to dismiss. The court criticized their maneuvering, expressing that, “In reality, the new moratorium covers precisely the same rigs and precisely the same deepwater drilling in the Gulf of Mexico as did the first moratorium.”⁹³ The court did not specifically decide whether the second moratorium was again

⁸⁶ See *Hornbeck Offshore Servs., L.L.C. v. Salazar*, No. 10-1663(F)(2), 2010 WL 3523040, at *1 (E.D. La. Sept. 1, 2010).

⁸⁷ See *id.*

⁸⁸ See Plaintiffs’ Response in Opposition to Defendants’ Motion to Dismiss Complaint, *supra* note 83, at 16. “Simply put, the law does not allow for the manipulation of the ‘orderly operation of the federal judicial system,’ . . .” *Id.* (quoting *U.S. Bancorp Mortg. Co. v. Bonner Mall P’ship*, 513 U.S. 18, 26 (1994)). According to the plaintiffs, it did not matter how necessary or right the defendants believed their actions to be; instead, “It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.” Plaintiffs’ Response in Opposition to Defendants’ Motion to Dismiss Complaint, *supra* note 83, at 16 (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

⁸⁹ See *Hornbeck*, 2010 WL 3523040, at *1, *7-8.

⁹⁰ See *id.* at *4-5.

⁹¹ *Id.* at *4.

⁹² *Id.*

⁹³ *Id.* at *1.

arbitrary and capricious (the sole issue before the court was whether the case surrounding the first moratorium was now moot), but instead focused on whether the harm imposed by the first moratorium would also be imposed by the second.⁹⁴ Under the voluntary cessation exception to mootness claims, a federal court will only find a case to be moot if the subsequent government action makes it clear that the initial harm could not reasonably be expected to recur.⁹⁵ Judge Feldman noted that the government's public announcements immediately following his initial ruling sharply undermined their argument that the second moratorium was based on a significantly supplemented administrative record.⁹⁶ More importantly, these public announcements and posturing indicated that there was a reasonable expectation the harm to the plaintiffs could recur and thus the government's repeal of the first moratorium did not render the action moot.⁹⁷ Accordingly, Judge Feldman denied the defendants' motion to dismiss.⁹⁸

For some time, while the *Hornbeck* suit was underway, new litigation continued to emerge as a result of the moratorium. Additional plaintiffs brought claims that the moratorium had effectively ended drilling in shallow water located in entirely different parts of the country.⁹⁹ But it now

⁹⁴ See *id.* at *7. Defendants argued that the new moratorium was based on new information and a new administrative record and that by lifting the old moratorium all plaintiffs' claims had become moot. See *id.* at *1.

⁹⁵ See *id.* at *5. Plaintiffs argued that their claims were not moot because the new moratorium applied to the same rigs, in the same area, for the same amount of time, and thus the new moratorium would cause them the same harm as the old one. See *id.* at *2.

⁹⁶ *Id.* at *7. Commenting on the Secretary's announcement promising a second moratorium just moments after the first injunction was entered, the court stated, "It is difficult to square such public expressions of resoluteness, with the government's assertion that its rescission of the first moratorium and its issuance of a new moratorium is entitled to solicitude and should not be considered litigation posturing." *Id.* at *8.

⁹⁷ *Id.* at *7.

⁹⁸ *Id.* at *8.

⁹⁹ Margaret Fisk, *Alaska Claims in Suit U.S. Government Improperly Banned Off-Coast Drilling*, BLOOMBERG (Sept. 10, 2010), <http://www.bloomberg.com/news/print/2010-09-09/u-s-improperly-banned-drilling-off-alaska-coast-state-alleges-in-lawsuit.html>. For instance, the state of Alaska brought suit against the Secretary, *Alaska v. Salazar*, 3:10-cv-00205 (D. Alaska 2010), in early September 2010 claiming that the Secretary improperly banned drilling off the coast of Alaska following the Deepwater Horizon oil spill. No drilling permits have been issued in the Arctic since the incident, even though an Interior Department spokeswoman acknowledged that "[t]he moratorium is on deep-water drilling and there is no deep-water drilling in Alaska." *Id.* Additionally, suits were also brought closer to the site of the spill. For example, Exxon Mobile Corporation sued the federal government in August 2011 claiming that it was being deprived of its right to drill in the Julia field in the Gulf of Mexico, an area estimated to contain billions of barrels of oil. Jonathan Stempel, *Exxon*

appears that any formal need for the courts to enjoin the moratorium has largely passed; the moratorium was lifted on October 12, 2010, several weeks before it was scheduled to terminate.¹⁰⁰ Following the lifting of the moratorium, the *Hornbeck* plaintiffs continued to evaluate their legal options, but it was generally believed that “this [was] a dispute that [had] run its course.”¹⁰¹ There was lingering concern, however, that a de facto moratorium remained in place.¹⁰² Todd Hornbeck (CEO of Hornbeck) stated,

[T]he industry hasn't seen the final requirements for what we would have to do to be able to actually get a permit issued. . . . Until that is done, lifting the moratorium may be just a moot or perfunctory act. . . . I'm skeptical that it will be anytime soon that permits will be issued¹⁰³

Critical politicians also exuded skepticism as to the practical effects of lifting the moratorium.¹⁰⁴ These concerns proved to be legitimate. In a later decision on February 2, 2011, stemming from the *Hornbeck* litigation, Judge Feldman stated, “Still . . . no drilling permits have been issued for activities barred by [the moratorium] as of this date.”¹⁰⁵ Indeed, more than a year after the spill, the offshore oil exploration and

Sues U.S. to Reverse Offshore Ruling; Canceled Leases Estimated to Hold Billions of Barrels, NAT'L POST (Can.), Aug. 19, 2011, available at 2011 WLNR 16476759.

¹⁰⁰ See Matthew Daly, *Administration Lifts Freeze on Drilling, Official Says New Rules Improved Safety, Cut Risks of Another Disaster*, CHARLESTON DAILY MAIL, Oct. 13, 2010, available at 2010 WLNR 20480874.

¹⁰¹ Rebecca Mowbray, *Moratorium Suits Become Moot, Hornbeck Takes Some Credit for Action*, NEW ORLEANS TIME PICAYUNE, Oct. 13, 2010, available at 2010 WLNR 20432013. Litigation stemming from the moratorium continued, however. For instance, in *Hornbeck* the plaintiffs would later file a claim seeking attorney's fees and costs expended in an attempt to prevent the government from circumventing the first moratorium by passing a second nearly identical one. The plaintiffs prevailed on this claim and Judge Feldman, holding that the government had contemptuously ignored the injunction halting the first moratorium, eventually awarded the Hornbeck plaintiffs \$528,801.18 in attorney's fees and \$444.33 in costs. *Hornbeck Offshore Services, L.L.C. v. Salazar*, 2011 WL 454802, at *1-3 (E.D. La. Feb. 2, 2011); *Hornbeck Offshore Services L.L.C. v. Salazar*, 2011 WL 2516907, at *3 (E.D. La. June 23, 2011).

¹⁰² Daly, *supra* note 100.

¹⁰³ *Id.* Likewise, the executive director of the Shallow Water Energy Security Coalition warned his colleagues about the practical effect of the ending of the moratorium, telling them that “as soon as they try to pop the champagne bureaucrats will be there to stick the cork back in the bottle.” Gerard Shields, *Deep-Water Drilling Ban Lifted*, BATON ROUGE ADVOC., Oct. 13, 2010, available at 2010 WLNR 204881285.

¹⁰⁴ Daly, *supra* note 100. For example, Louisiana Senator Mary Landrieu placed a hold on a Senate vote to confirm President Obama's nomination of Jacob Lew for head of the Office of Management and Budget until drilling activity actually resumed. *Id.*

¹⁰⁵ *Hornbeck*, 2011 WL 454802, at *2.

production industry was only “slowly opening up once more” in the Gulf of Mexico.¹⁰⁶

The new regulations instituted “after the spill strengthened safety measures and reduced the risk of another catastrophic blowout.”¹⁰⁷ But as the Secretary stated, “there will always be risks involved with deep water drilling.”¹⁰⁸ Because future oil spills remain a likely possibility, it is necessary to clearly define the rights and responsibilities of the government in responding to these spills with blanket, albeit temporary, moratoria or similar regulations. Although the arbitrary and capricious arguments presented in *Hornbeck* proved to be an effective protection against an improper restriction of property rights, such claims provide better protection against a flawed decision-making process than they do against an unjust decision or result. Future problems may instead arise in circumstances where the government’s decision to implement a moratorium is supported by an adequate Administrative Record, limiting the protection provided by the APA. These situations pose a threat to innocent parties whose property rights are unfairly burdened by that moratorium. Alternatively, there may be situations where the circumstances require a proper moratorium but where notions of justice and fairness nonetheless require some form of compensation to those negatively affected. Accordingly, takings claims should serve to fill this gap in protection, even though historically they have met with little success.

III. THE *HORNBECK* TAKINGS CLAIM IN THE CONTEXT OF TAKINGS CLAUSE JURISPRUDENCE

Although the focus in *Hornbeck* began with a claim that the moratorium was arbitrary and capricious,¹⁰⁹ the plaintiffs

¹⁰⁶ John Shimkus, *ExxonMobil Battles U.S. over Gulf Oil Discovery*, ENERGYDIGITAL.COM (Aug. 18, 2011), http://www.energydigital.com/oil_gas/exxonmobil-battles-us-over-gulf-oil-discovery.

¹⁰⁷ Daly, *supra* note 100.

¹⁰⁸ *Id.* In addition to the Secretary’s acknowledgement of the inherent risk associated with deepwater drilling, a presidential panel reported to President Obama that absent significant reform in both the industry and the government’s policies, a similar oil spill “might well recur.” Wendy Koch, *Panel Warns Gulf Oil Spill Could Happen Again*, USA TODAY (Jan. 6, 2011), <http://content.usatoday.com/communities/greenhouse/post/2011/01/panel-gulf-oil-spill-happen-again/1>.

¹⁰⁹ As previously discussed, *see supra* Part II.A, the court focused on the arbitrary and capricious allegations despite a takings claim briefly made by the plaintiffs. The court, in fact, did not mention any takings claim. The reason for this omission is unclear.

also briefly asserted that the moratorium constituted an unconstitutional taking of private property.¹¹⁰ Additionally, after joining the case in July 2010, Diamond Offshore alleged the following:

By virtue of their actions, Defendants have violated Plaintiffs' rights under the Fifth Amendment to the U.S. Constitution. That amendment provides that no person shall suffer a "taking" of private property without due process of law or just compensation. As set forth above, the actions of Defendants herein constitute a taking of Plaintiffs' contract rights without due process of the law for which Plaintiffs seek non-monetary relief.¹¹¹

The relevant provision of OSCLA requires the Secretary to manage the offshore leasing program, stating, "Leasing activities shall be conducted to assure receipt of fair market value for the lands leased and the rights conveyed by the Federal Government."¹¹² Certainly, the moratorium prevented leaseholders in the Gulf, even those operating safe rigs, from enjoying the fair market value of their property while the moratorium was in place. Undoubtedly, it can be said that much of this value in terms of access to the oil and gas was restored as soon as the moratorium was lifted, but this fails to account for the fact that entities in the oil industry rely on contracts and equipment that often have a limited lifespan. The industry as a whole was likewise threatened if oil rig operators and their crews chose to take their business to other, more business-friendly waters.¹¹³

The defendants' only response to the takings allegation was relegated to a footnote claiming that it should be "dismissed . . . because the second claim for relief, which purports to assert a Fifth Amendment Takings claim, is both

¹¹⁰ The *Hornbeck* takings claim may present procedural questions of ripeness and proper jurisdiction. These issues are outside the scope of this note, which will assume that future plaintiffs would properly address the concerns associated with them. See generally Robert Meltz, *Inverse Condemnation and Related Government Liability*, SC 43 ALI-ABA 57 (1998) (discussing common problems and obstacles arising in takings claims against the federal government).

¹¹¹ Plaintiffs' Original Complaint and Application for Temporary Restraining Order and Injunctive Relief, *supra* note 30, ¶ 33. Before Diamond Offshore joined Hornbeck, Hornbeck more generally alleged that the moratorium infringed on its property rights as protected by the Fifth Amendment but did not specify a takings claim. First Supplemental and Amended Complaint for Declaratory and Injunctive Relief, *supra* note 27, ¶ 91.

¹¹² 43 U.S.C. § 1344(a)(4) (2006).

¹¹³ Hornbeck's Memorandum of Law in Support of Its Motion for Preliminary Injunction, *supra* note 48, at 6; Plaintiffs' Original Complaint and Application for Temporary Restraining Order and Injunctive Relief, *supra* note 30, ¶ 34.

wholly without merit and outside the jurisdiction of this Court to adjudicate.”¹¹⁴ Yet, it appears that the issue may not be as cut and dry as the defendants asserted. Takings law is extremely unsettled and has been described as “both lacking in theory and unpredictable in application.”¹¹⁵ The United States Supreme Court has acknowledged as much, with Justice John Paul Stevens commenting that “[e]ven the wisest lawyers would have to acknowledge great uncertainty about the scope of this Court’s takings jurisprudence.”¹¹⁶ This means that future court decisions are required to settle the area of takings law and that future plaintiffs have some latitude to persuade these courts to expand the protections afforded by the takings clause. Because future cases may not involve factual circumstances amenable to alternative legal remedies such as the arbitrary and capricious claims presented in *Hornbeck*, the takings clause could serve as an alternative means for protecting against overly broad and unfairly burdensome regulations.

The Supreme Court has established two main categories of unconstitutional takings: per se takings and regulatory takings.¹¹⁷ The two types require very different analytical approaches to determine whether a taking has occurred.¹¹⁸ According to *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,¹¹⁹ *Hornbeck* must be analyzed under the ad hoc balancing test established for regulatory takings in *Penn Central Transportation Co. v. City of New York*.¹²⁰ Traditionally, courts have been hesitant to find a taking under this framework in circumstances similar to *Hornbeck*.¹²¹ But, the ad hoc test courts have been applying is not ad hoc enough. These courts have failed to differentiate between the value taken in the case of land development moratoria (that

¹¹⁴ Defendants’ Response to Diamond Offshore’s Motion to Intervene at 3 n.4, *Hornbeck Offshore Servs., L.L.C. v. Salazar*, 696 F. Supp. 2d 627 (E.D. La. 2010) (No. 10-1663(F)(2)).

¹¹⁵ John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003, 1006 (2003).

¹¹⁶ *Id.* at 1007 (quoting *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 866 (1987) (Stevens, J., dissenting)).

¹¹⁷ Emily S. Newton, *Executive Use of Private Claims to Strike a Public Bargain*, 19 FED. CIR. B.J. 487, 496 (2006) (comparing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), with *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978)).

¹¹⁸ *Id.*

¹¹⁹ 535 U.S. 302 (2002).

¹²⁰ 438 U.S. 104 (1978).

¹²¹ *See, e.g.*, *Bass Enters. Prod. Co. v. United States*, 381 F.3d 1360, 1370-71 (Fed. Cir. 2004).

temporarily affect the value of real property or a potential home, for example) compared to the value taken by moratoria on a service industry that relies on property rights with limited lifespans. In the former case, property values may continue to rise while the moratorium is in place, or, even if that proves not to be the case, full value should be restored upon rescission of the moratorium.¹²² In the latter circumstance, however, moratoria do not simply result in a temporary diminution in the resale value of the property. Instead, any rebound in value after rescission fails to mitigate the significant lost time and investment, potentially resulting in irreparable harm including the destruction of the industry entirely.¹²³

Despite the unsettled nature of takings jurisprudence and courts' reluctance to engage in takings analysis, the more recent additions to the Supreme Court's takings framework provide the opportunity for enforceable takings claims in these *Hornbeck*-like circumstances. In the interest of "fairness and justice,"¹²⁴ the long-term threat posed by a moratorium and the nature of the property right at issue should be taken into greater consideration by courts as they apply the *Penn Central* balancing test. Thus, the circumstances that led to *Hornbeck* provide a tangible example of a claim that—based on the theoretical justifications for temporary takings law presented in *Tahoe-Sierra*—could be held a taking.

A. *Regulatory Takings and the Penn Central Balancing Test*

The text of the Takings Clause of the United States Constitution reads as follows: "nor shall private property be taken for public use, without just compensation."¹²⁵ This seemingly straightforward text, however, has proven exceedingly difficult in practice and application.¹²⁶ Part of the problem stems from a lack of evidence indicating the Framers' meaning behind the takings clause or the reasons for including it.¹²⁷ Thus, courts have needed to flesh out the meaning and

¹²² See *Tahoe-Sierra*, 535 U.S. at 332, 341.

¹²³ See Plaintiffs' Original Complaint and Application for Temporary Restraining Order and Injunctive Relief, *supra* note 30, ¶ 33.

¹²⁴ *Tahoe-Sierra*, 535 U.S. at 342.

¹²⁵ U.S. CONST. amend V.

¹²⁶ Fee, *supra* note 115, at 1007.

¹²⁷ ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS: CASES AND MATERIALS* 134 (2005). "Precedents for the Fifth Amendment's Takings Clause were relatively few in number and narrow in application . . . [and] the compensation

scope of the clause.¹²⁸ One of the first cases to distinguish between physical and regulatory appropriation of property was *Mugler v. Kansas*,¹²⁹ but it was the rise of the modern government and the case of *Pennsylvania Coal Co. v. Mahon*¹³⁰ that really began to define the scope of the clause.¹³¹ *Pennsylvania Coal* involved a mining company that had sold the surface rights of a plot of land but had expressly and contractually reserved the rights to remove any coal found under it.¹³² Subsequent to the sale, Pennsylvania passed a statute forbidding the mining of coal that would result in the subsidence of any structure used for human habitation, essentially voiding the contractual reservation.¹³³ The Supreme Court determined that the statute made it commercially impracticable to mine the coal and had “very nearly the same effect for constitutional purposes as appropriating or destroying it.”¹³⁴ Accordingly, the Court held that the statute was invalid because it amounted to a taking without just compensation.¹³⁵ In a later case, the Supreme Court would describe *Pennsylvania Coal* as being the “leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a taking.”¹³⁶ Thus, after *Pennsylvania Coal* it was clear that the Court would deem some legislative acts as going “too far” and rising to the level of a taking of private property.¹³⁷ The obvious question that remained before the Court, and a question that still remains unsettled today, is how far is too far?¹³⁸ More than fifty years later, in *Penn Central*, the Supreme Court would finally attempt to set forth a framework for answering that question.¹³⁹

requirement was not generally recognized at the time of the framing of the Fifth Amendment.” *Id.* Additionally, James Madison initially proposed the Fifth Amendment, but “[t]here are apparently no records of discussion about the meanings of the clause in either Congress or, after its proposal, in the states.” *Id.*

¹²⁸ *Id.* at 136. Because of the lack of precedent in the area, most of the early Supreme Court decisions accorded with early state decisions. *Id.*

¹²⁹ 123 U.S. 623 (1887).

¹³⁰ 260 U.S. 393 (1922).

¹³¹ *Fee*, *supra* note 115, at 1009.

¹³² *Pa. Coal*, 260 U.S. at 412.

¹³³ *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 127 (1978).

¹³⁴ *Pa. Coal*, 260 U.S. at 414.

¹³⁵ *Id.* at 414-15.

¹³⁶ *Penn Central*, 438 U.S. at 127 (internal quotation marks omitted).

¹³⁷ *Pa. Coal*, 260 U.S. at 415.

¹³⁸ *See Fee*, *supra* note 115, at 1010.

¹³⁹ *See generally Penn Central*, 438 U.S. 104.

The question presented in *Penn Central* was whether a city could, as part of a program to preserve historic landmarks, place restrictions on the development of these landmarks without the restriction amounting to a constitutional taking requiring payment of just compensation.¹⁴⁰ The case again addressed the issue of regulatory takings, and the Court implicitly rejected the “proposition that a ‘taking’ can never occur unless government has transferred physical control over a portion of a parcel.”¹⁴¹ In a landmark decision, the Court established what would become known as the *Penn Central* balancing test, later described as a “multi-factor test for determining whether a regulation restricting the use of property effects a taking.”¹⁴² The test consisted of a case-by-case analysis of three factors¹⁴³: (1) the economic impact of the regulation on the plaintiff; (2) the extent to which the regulation has interfered with distinct¹⁴⁴ investment-backed expectations; and (3) the character of the governmental action.¹⁴⁵ The Court may have laid out the framework for regulatory takings, but the application of that framework to this day remains disjointed. In fact, critics have condemned it as being both “convoluted and seemingly arbitrary.”¹⁴⁶

B. *Lucas and Its Progeny: Per Se Takings*

Although the evolution of takings jurisprudence now makes per se takings inapplicable to the case at hand, it is useful to briefly discuss this second category because previous cases¹⁴⁷ have used such analysis under similar factual

¹⁴⁰ *Id.* at 107.

¹⁴¹ *Id.* at 122 n.25.

¹⁴² *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592, 2603 n.6 (2010).

¹⁴³ The Court never actually announced a specific set of factors to be used in the balancing test, but these three were “especially prominent” and were again cited by the Court a year later, solidifying their importance in regulatory takings analysis. Joshua P. Borden, *Derailing Penn Central: A Post-Lingle, Cost-Basis Approach to Regulatory Takings*, 78 GEO. WASH. L. REV. 870, 875-76 (2010).

¹⁴⁴ Later cases have changed the word “distinct” to “reasonable.” Christopher Serkin, *Existing Uses and the Limits of Land Use Regulations*, 84 N.Y.U. L. REV. 1222, 1251 (2009). The Court made this change without acknowledging any distinction between the terms, but the change has had tangible effects on subsequent courts’ analysis of takings claims. *See id.* “[T]his factor is now principally used to distinguish a property owner’s reasonable expectations from pie-in-the-sky development dreams.” *Id.*

¹⁴⁵ *See Penn Central*, 438 U.S. at 124.

¹⁴⁶ Borden, *supra* note 143, at 870-71 (exclaiming that “one cannot help but believe that a better, sounder, approach *must* exist”).

¹⁴⁷ *See, e.g., Bass Enters. Prod. Co. v. United States*, 45 Fed. Cl. 120, 123 (1999) (finding that a per se taking had occurred where government delay in deciding

circumstances. Shortly after instituting the *Penn Central* balancing test, the Supreme Court began to carve out exceptions that required a different analytical framework. These exceptions reflected circumstances where the claimant was automatically entitled to just compensation, without an “inquiry into the public interest advanced in support of the restraint.”¹⁴⁸ The per se takings exception to the *Penn Central* balancing test applies to the following: (1) takings that amount to a physical occupation of the property by the government and (2) regulations that result in the total loss of value of the property.¹⁴⁹ The case that defined the first exception was *Loretto v. Teleprompter Manhattan CATV Corp.*, where the Court held that permanent physical occupation of property—even in the case of two measly four-inch by four-inch metal cable boxes—is always a taking, “without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.”¹⁵⁰ The Court justified its holding by noting that a permanent physical occupation destroys many strands from the “bundle of property rights” that have historically been protected by property law, including the right to possess, use, dispose, and exclude.¹⁵¹ It also noted that a balancing test was largely unnecessary because such cases present “relatively few problems of proof” compared with regulatory takings.¹⁵²

The second category of per se exceptions to the *Penn Central* balancing test—those regulations that deny all economically beneficial or productive use of the land—was defined in *Lucas v. South Carolina Coastal Council*.¹⁵³ The Court noted that these types of regulations “carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.”¹⁵⁴ Further, like permanent physical occupations, the Court explained,

application to develop oil leases for a substantial period of time amounted to an absolute loss of value in the property during that time).

¹⁴⁸ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992).

¹⁴⁹ *Id.*

¹⁵⁰ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 419-20 (1982).

¹⁵¹ *Id.* at 435 (citing *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979); *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945)).

¹⁵² *Id.* at 437.

¹⁵³ *See generally Lucas*, 505 U.S. 1003. The plaintiff in *Lucas*, an owner of two undeveloped parcels of land, argued that by passing a law barring the erection of any permanent habitable structures on certain beachfront property, the state legislature had taken his property and that he was thus entitled to compensation. *Id.* at 1009.

¹⁵⁴ *Id.* at 1018.

We believe similar treatment must be accorded confiscatory regulations, *i.e.*, regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership.¹⁵⁵

Thus, “[w]hen . . . a regulation that declares ‘off-limits’ all economically productive or beneficial uses of land goes beyond what the relevant background principles [of property and nuisance law] would dictate, compensation must be paid to sustain it.”¹⁵⁶

C. *Temporary Takings and Moratoria: The Importance of Tahoe-Sierra*

The fact that a moratorium lasts for only a limited period of time¹⁵⁷ is not fatal to a regulatory takings claim.¹⁵⁸ Instead, the duration of the restriction is only one factor for courts to consider.¹⁵⁹ The Supreme Court has held that the “effect of a regulation must be measured against the ‘parcel as a whole,’” however the Court has failed to fully define this term.¹⁶⁰ Earlier cases usually focused on the amount of physical or spatial portions of a land parcel impaired by a restriction to determine if a taking had occurred.¹⁶¹ The Supreme Court in

¹⁵⁵ *Id.* at 1029.

¹⁵⁶ *Id.* at 1030. The Court attempted to lay out a clear framework for per se takings analysis, stating:

The “total taking” inquiry we require today will ordinarily entail . . . analysis of among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant’s proposed activities, the social value of the claimant’s activities and their suitability to the locality in question, and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike.

Id. at 1030-31 (citations omitted).

¹⁵⁷ In *Hornbeck*, the moratorium lasted less than six months, although at the time the claim was originally filed, there was concern that it might last much longer. First Supplemental and Amended Complaint for Declaratory and Injunctive Relief, *supra* note 27, ¶ 54.

¹⁵⁸ *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 334-35 (2002).

¹⁵⁹ *Id.* at 342.

¹⁶⁰ Fee, *supra* note 115, at 1029-30.

¹⁶¹ See Glenn P. Sugameli, *Takings Law Symposium: Lucas v. South Carolina Coastal Council: The Categorical and Other “Exceptions” to Liability for Fifth Amendment Takings of Private Property Far Outweigh the “Rule,”* 29 ENVTL. L. 939, 948-53 (1999) (discussing how various cases have dealt with the fact that regulations “are three dimensional [and] have depth, width, and length” (quoting First English Evangelical

Tahoe-Sierra, however, focused on a different slice of the property—the temporal dimension affected by the regulation.¹⁶² Specifically, the Court addressed the issue of how to analyze a temporary land development moratorium and how to determine if such a regulation could ever amount to a taking.¹⁶³ Unfortunately, because the Court answered the question by responding “neither ‘yes, always’ nor ‘no, never,’”¹⁶⁴ the analysis is not exactly straightforward. The Court’s description of and focus on “fairness and justice” as central tenants of takings analysis, though, should provide at least some future takings victims the opportunity to bring a successful claim.¹⁶⁵

The Court in *Tahoe-Sierra* built upon the principle established in *First English Evangelical Lutheran Church v. County of Los Angeles*, where the Court previously addressed temporary takings in general.¹⁶⁶ The Court in *First English* held, “[W]here the regulation has already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.”¹⁶⁷ In that case, though, the Court was concerned with determining compensation once a taking had concededly occurred, and thus did not specifically address the threshold question of whether the temporary denial of land use had constituted a taking in the first place.¹⁶⁸ In *Tahoe-Sierra*, the Court took that first step and established the framework to be used for analyzing temporary moratoria in the takings context.¹⁶⁹ The Court rejected the petitioners’ claim that a temporary taking that resulted in the total deprivation of all economic use while the moratorium was in place was

Lutheran Church v. Cnty. of L.A., 482 U.S. 304 (1987)). At least in terms of physical restrictions, landowners are not permitted to conceptually sever individually affected segments from the property as a whole in order to argue that the use or value of these segments has been totally destroyed by the regulation. Fee, *supra* note 126, at 1030. Yet, courts have sometimes struggled in determining what the relevant parcel to be analyzed is in order to determine both whether a taking has occurred, and if so, how much compensation is required. See Meltz, *supra* note 110, at 72; Fee, *supra* note 126, at 1029-32.

¹⁶² *Tahoe-Sierra*, 535 U.S. at 331-32.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 321.

¹⁶⁵ See *id.* at 334; Steven J. Eagle, *Planning Moratoria and Regulatory Takings: The Supreme Court’s Fairness Mandate Benefits Landowners*, 31 FLA. ST. U. L. REV. 429, 505 (2004).

¹⁶⁶ See generally *First English*, 482 U.S. 304.

¹⁶⁷ See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 n.17 (1992) (internal brackets omitted) (quoting *First English*, 482 U.S. at 321).

¹⁶⁸ *Tahoe-Sierra*, 535 U.S. at 328.

¹⁶⁹ See *id.* at 334-38.

subject to the per se takings analysis established in *Lucas*.¹⁷⁰ The Court worried that such a categorical rule would open the floodgates to takings litigation and would apply to even “normal delays in obtaining building permits . . . as well as to orders temporarily prohibiting access to crime scenes.”¹⁷¹ Rather, the Court stated that Justice Brennan’s “parcel as a whole” theory of takings analysis established in *Penn Central* must be applied to the temporal dimensions of a property the same way it applies to the physical dimensions.¹⁷² Accordingly, the Court held that the “better approach to claims that a regulation has effected a temporary taking requires careful examination and weighing of all the relevant circumstances” by using the *Penn Central* balancing test.¹⁷³ But, important to a *Hornbeck*-type scenario, the Court made it clear that “[i]n rejecting petitioners’ per se rule, we do not hold that the temporary nature of a land-use restriction precludes finding that it effects a taking.”¹⁷⁴ Instead, “the duration of the restriction is one of the important factors that a court must consider in the appraisal of a regulatory takings claim”¹⁷⁵ Further, throughout the opinion, the Court repeatedly referenced notions of fairness and justice as instructive to the holding.¹⁷⁶

The question of how long a restriction is too long is one that remains unclear and confusing. For instance, courts have held, “A permanent physical occupation does not necessarily mean a taking unlimited in duration. [Instead, a] ‘permanent’ taking can have a limited term.”¹⁷⁷ Interestingly, many temporary regulations held to not constitute takings at all are longer in duration than the “permanent” deprivation that required application of the per se rule in *Lucas*.¹⁷⁸ One thing is

¹⁷⁰ *Id.* at 334.

¹⁷¹ *Id.* at 335 (citations omitted).

¹⁷² Eagle, *supra* note 165, at 445. Justice Brennan stated in *Penn Central*:

“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. . . . [T]his Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole

Id.

¹⁷³ *Tahoe-Sierra*, 535 U.S. at 335 (internal quotation marks omitted).

¹⁷⁴ *Id.* at 337.

¹⁷⁵ *Id.* at 342.

¹⁷⁶ *See id.* at 321, 332-36; *see also* Eagle, *supra* note 165, at 505.

¹⁷⁷ Eagle, *supra* note 165, at 456 (quoting *Skip Kirchorfer, Inc. v. United States*, 6 F.3d 1573, 1482 (Fed. Cir. 1993)).

¹⁷⁸ *See id.* The delay in development in *Lucas* lasted only two years. *Id.*

clear, however: courts have tended to put great weight on the durational factor of temporary takings.¹⁷⁹

The impact of *Tahoe-Sierra* on takings jurisprudence cannot be overemphasized. For example, its effect can clearly be discerned from the two opposing decisions reached by the United States Court of Federal Claims in *Bass Enterprises Production Co. v. United States*.¹⁸⁰ The litigation commenced in *Bass Enterprises* after the Bureau of Land Management denied the plaintiff lessees' application to explore and drill for oil and gas on their leased property for forty-five months while the Environmental Protection Agency (EPA) determined the environmental impact that such development posed.¹⁸¹ The Court of Federal Claims initially found a temporary (but per se) taking, stating, "Plaintiffs have not been permitted to use their leases for a substantial period of time. Their loss during that period was absolute."¹⁸² The court cited *Lucas*, explaining that the limited duration of the regulation did not bar constitutional relief, and ordered damages in the amount of the interest that the plaintiffs would have earned on the oil and gas profits during the delay period.¹⁸³ Following the Supreme Court's decision in *Tahoe-Sierra*, however, the government's motion for reconsideration was granted.¹⁸⁴ This time the Court of Federal Claims applied a *Penn Central* balancing test and found that "the economic impact on Bass was de minimis and that the Government's delay was reasonable given the importance of protecting the public"¹⁸⁵ After "[w]eighing the factors and the circumstances surrounding the delay as a whole," the court concluded that there had not been a taking.¹⁸⁶

Bass Enterprises is an example of the heavy emphasis courts have placed on the duration of the delay when applying a temporary takings analysis following *Tahoe-Sierra*.¹⁸⁷ Accordingly, under a similar judicial application, Hornbeck, or

¹⁷⁹ See *Bass Enters. Prod. Co. v. United States*, 381 F.3d 1360, 1366 (Fed. Cir. 2004) (noting that an extraordinary delay in governmental decision making may constitute a taking, but citing delays of eight years, seven years, and forty months that were not held to be takings).

¹⁸⁰ Compare *id.*, with *Bass Enters. Prod. Co. v. United States*, 45 Fed. Cl. 120 (1999).

¹⁸¹ *Bass Enters. Prod. Co.*, 381 F.3d at 1362-64.

¹⁸² *Bass Enters. Prod. Co.*, 45 Fed. Cl. at 123.

¹⁸³ *Id.* at 123-24.

¹⁸⁴ *Bass Enters. Prod. Co.*, 381 F.3d at 1364.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 1365. The Federal Circuit affirmed the Court of Federal Claims, holding that the delay was not extraordinary in duration and that the *Penn Central* factors were properly applied. *Id.* at 1370-71.

¹⁸⁷ See *id.* at 1366-69.

plaintiffs similarly situated, may have difficulty bringing a successful takings claim despite the significant value that was lost—and which could not be recovered—during and following the moratorium. Still, this result may not be fair or justified based on takings law as it currently stands, and it therefore warrants a closer look. Additionally, while there are many factual similarities between *Bass Enterprises* and the circumstances leading to *Hornbeck*, there are enough distinctions to warrant further analysis.¹⁸⁸ To begin this analysis, it is useful to look at how courts have previously treated takings claims in cases following moratoria on oil drilling. This examination will illustrate how the evolution of takings jurisprudence requires a different outcome here than was reached in both *Bass Enterprises* and these previous moratoria cases.

IV. PREVIOUS CASES INVOLVING MORATORIA BY THE FEDERAL GOVERNMENT FOLLOWING OIL SPILLS

Moratoria have been used by administrative agencies as a common means to “preserve the status quo while formulating a more permanent . . . strategy.”¹⁸⁹ Moratoria have been employed in a wide variety of contexts, from use of the death penalty,¹⁹⁰ to the prohibition of killing marine mammals,¹⁹¹ to the suspension of mining of valuable fossil fuels.¹⁹² Likewise, moratoria and regulations suspending operations involving gas, oil, and mineral rights have been the subjects of takings analysis in the past.¹⁹³ In fact, the Deepwater Horizon incident is not the first time that the Department of the Interior has

¹⁸⁸ See *infra* Part V.B.

¹⁸⁹ See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 337 (2002).

¹⁹⁰ See Victor L. Streib, *Moratorium on the Death Penalty for Juveniles*, 61 LAW & CONTEMP. PROBS. 55, 72 (1998) (discussing the American Bar Association's 1997 resolution instituting a moratorium on death penalty jurisdictions “to correct several flaws and to afford greater fairness in the process”).

¹⁹¹ See Carol B. Koppelman, *Anderson v. Evans: The Ninth Circuit Harmonizes Treaty Rights and the Marine Mammal Protection Act*, 16 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 353, 368 (2010) (describing the 1972 moratorium against killing marine mammals).

¹⁹² See Sam Kalen, *The Devolution of NEPA: How the APA Transformed the Nation's Environmental Policy*, 33 WM. & MARY ENVTL. L. & POL'Y REV. 483, 524 (2009) (discussing the Department of the Interior's informal moratorium on new coal mining leases and permits until “the Department could develop a coherent approach to the leasing and development of the nation's coal resources”).

¹⁹³ See, e.g., *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 475-76 (1987); *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 395 (1922); *Pauley Petroleum Inc. v. United States*, 591 F.2d 1308, 1310 (Ct. Cl. 1979).

broadly suspended drilling rights via moratorium following an oil blowout.¹⁹⁴ Nor is it the first time that—in response—a takings claim was brought by an aggrieved plaintiff.¹⁹⁵

The massive oil spill in Santa Barbara, California, in January 1969 spurred several cases that explored the property rights of leaseholders in the Santa Barbara Channel.¹⁹⁶ The spill “caused severe property and environmental damage” and prompted the Secretary of the Interior to order all companies in the Santa Barbara Channel to cease all drilling and production regardless of their involvement in the spill.¹⁹⁷ This line of cases focused on the authority of the Secretary to pass regulations that amounted to a taking and determined that the duration of the regulation was a requisite factor in determining that authority.¹⁹⁸

In *Gulf Oil Corp. v. Morton*, the Secretary of the Interior followed up the initial moratorium with a second one in 1971 that was to last until 1973.¹⁹⁹ He justified the second suspension by stating that it was necessary to give Congress time to consider whether it wished to pass legislation to terminate the leases in the interest of conservation.²⁰⁰ The plaintiffs in the case—who had paid \$153 million for the leases—filed suit, seeking, among other things, declaratory judgment that the suspension was outside the scope of the Secretary’s authority and must be revoked.²⁰¹ In addressing the first suspension the court declared that “[a]fter the leases in question were made, events occurred in the Santa Barbara Channel that were both unexpected and very dangerous to the environment . . . [causing] the Secretary to reconsider the dangers to the natural resources of the area if drilling were to proceed under the leases.”²⁰² As was the case in *Hornbeck*, the case focused on whether the suspension was arbitrary and capricious and contrary to the

¹⁹⁴ See, e.g., *Pauley Petroleum*, 591 F.2d at 1312.

¹⁹⁵ See, e.g., *Union Oil Co. of Cal. v. Morton*, 512 F.2d 743, 750 (9th Cir. 1975).

¹⁹⁶ See generally *Gulf Oil Corp. v. Morton*, 493 F.2d 141 (9th Cir. 1973); *Union Oil*, 512 F.2d at 743; *Pauley Petroleum*, 591 F.2d 1308.

¹⁹⁷ *Pauley Petroleum*, 591 F.2d at 1312.

¹⁹⁸ See generally *Gulf Oil*, 493 F.2d 141; *Union Oil*, 512 F.2d 743; *Pauley Petroleum*, 591 F.2d 1308.

¹⁹⁹ *Gulf Oil*, 493 F.2d at 143.

²⁰⁰ *Id.* The decision was supported by the director of the United States Geological Survey, who noted that continued operation under the leases posed the following risks: “[T]he possibility of another blowout; the possibility that wells would be improperly plugged . . . should [they later be abandoned]; [and] the possibility that geologic structures such as the one which contributed to the 1969 spill would be encountered and fractured, thus causing large quantities of oil and gas to escape.” *Id.*

²⁰¹ *Id.*

²⁰² *Id.* at 146.

APA; the court, however, also touched on several aspects associated with a takings analysis, including just compensation.²⁰³ In addressing a possible takings claim, the court noted that in a letter accompanying the proposed bill to terminate the leases, the Secretary wrote that the legislation would “offer[] a mechanism for determining and paying just compensation to the lessees”²⁰⁴ The court held that “Congress authorized the Secretary to suspend operations under existing leases whenever he determines that the risk to the marine environment outweighs the immediate national interest in exploring and drilling for oil and gas.”²⁰⁵ The court also held that, since the lessees had not yet begun drilling, the circumstances at hand permitted a suspension while Congress weighed the merits of the proposed bill.²⁰⁶ The court cautioned, however, that the Secretary could not “continue to issue comparable orders one after another and justify them by repeatedly having his proposed legislation introduced in the Congress . . . at some point, if Congress does not act, there must be an end to the matter.”²⁰⁷

The same facts that led to *Gulf Oil* spurred litigation in *Union Oil Co. of California v. Morton*.²⁰⁸ The Secretary of the Interior had initially granted plaintiffs the right to build a new floating drilling platform.²⁰⁹ But, following the spill, the Secretary announced that Union Oil would not be permitted to build the additional platform.²¹⁰ Unlike *Gulf Oil*, which discussed a temporary suspension, the issue in this case was whether the Secretary had the power to permanently suspend the plaintiffs’ lease.²¹¹ The plaintiffs claimed that the Secretary had denied them the full exercise of their rights under their lease with the federal government²¹² and that the suspension amounted to a permanent taking without compensation.²¹³ The

²⁰³ See *id.* at 146-47.

²⁰⁴ *Id.* at 147.

²⁰⁵ *Id.* at 144.

²⁰⁶ *Id.* at 146.

²⁰⁷ *Id.* at 148. Indeed, on petition for rehearing the court held that the bill had been before Congress for four sessions without any substantial action to push the bill forward towards law and that therefore the Secretary’s power to suspend the leases vanished on October 18, 1972. *Id.* at 149.

²⁰⁸ 512 F.2d 743 (9th Cir. 1975).

²⁰⁹ A provision in plaintiff’s lease specifically allowed for the erection of floating drilling platforms. *Id.* at 746.

²¹⁰ *Id.*

²¹¹ See *id.* at 751.

²¹² *Id.* at 746.

²¹³ *Id.* at 750.

court acknowledged that, while the Secretary had the authority to suspend the lease under certain circumstances,²¹⁴ the executive branch had no intrinsic power of condemnation and thus could not suspend the lease indefinitely.²¹⁵ Further, a suspension that “depriv[ed] Union of all benefit from the lease in that particular area” would be a permissible taking if enacted by Congress (as long as just compensation was provided), but was outside the scope of the Secretary’s power.²¹⁶ Accordingly, the court analyzed whether the Secretary had impermissibly taken Union’s property by determining whether the suspension was temporary or was instead an indefinite suspension amounting to a “pro tanto cancellation of [the] lease.”²¹⁷ A suspension that was limited in time by the “occurrence of new events or the discovery of new knowledge which can be anticipated within a reasonable period of time” would not constitute a taking, according to the court.²¹⁸ Ultimately, the court determined that the facts were insufficient on the record to determine the answer to that question and remanded the case to the district court.²¹⁹

The Santa Barbara oil spill also led to *Pauley Petroleum Inc. v. United States*.²²⁰ In that case, the plaintiffs were a consortium of oil corporations who acquired leases from the federal government to explore and drill off the coast of Santa Barbara.²²¹ In conjunction with the general moratorium, the Secretary promulgated a regulation relating to the level of liability for general lessees involved in oil spills.²²² The Secretary also required all drilling companies in the area to submit “all geological, geophysical and structural information,” explaining that after this information was studied on a lease-by-lease basis the companies would be permitted to resume drilling.²²³ The plaintiffs brought suit claiming, among other things, that the absolute liability requirement and clearance program amounted to a regulatory taking because it rendered their leases “economically worthless and exposed them to

²¹⁴ *Id.* at 748.

²¹⁵ *Id.* at 750 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)).

²¹⁶ *Id.* at 751.

²¹⁷ *Id.*

²¹⁸ *Id.* at 752.

²¹⁹ *Id.*

²²⁰ 591 F.2d 1308, 1308 (1979).

²²¹ *Id.* at 1311-12.

²²² *Id.* at 1312.

²²³ *Id.* at 1313. The lead plaintiff “delayed its response to this demand and never fully answered.” *Id.*

unmeasurable risks.”²²⁴ They argued that the regulation applied retroactively and imposed absolute liability for all cleanup costs as well as for any damage to third-party property caused by a spill.²²⁵ The court held that the power to suspend leases could not rise to such a level that it resulted in a total suspension of rights because the Secretary does not have the authority to take property.²²⁶ As was the case in *Union Oil*, the court determined that the plaintiffs had “fail[ed] to meet at least one of the prerequisites for a constitutional taking—the requirement that the taking be authorized by Congress.”²²⁷ Thus, the plaintiffs could not bring a takings claim because the power to take property was solely vested in Congress, and did not extend to actions by the Secretary.²²⁸ According to the court, “Congress clearly did not intend to grant leases so tenuous in nature that the Secretary could terminate them, in whole or in part at will.”²²⁹ Further, the court noted that the “short, temporary suspension was plainly not so severe a property deprivation as to constitute a fifth amendment taking.”²³⁰ Accordingly, the court held that a takings claim was not the proper means of recourse for the plaintiffs.²³¹ Again the court required a regulation to be permanent and authorized by Congress for it to afford a valid takings claim.²³²

Many of these cases share similar factual circumstances to the *Hornbeck* scenario. Despite this precedent, however, the outcome of a takings claim in *Hornbeck*, or future claims arising under similar circumstances, remains unclear. The courts in the Santa Barbara spill cases held that takings claims were precluded because the Secretary lacked authority to restrict property rights in this manner, often hinging that authority on the duration or permanence of the suspension.²³³ This position is outdated, however, in light of subsequent precedent.²³⁴ The *Hornbeck* takings claim need not hinge on the

²²⁴ *Id.* at 1314.

²²⁵ *Id.* at 1313.

²²⁶ *Id.* at 1326.

²²⁷ *Id.*

²²⁸ *Id.* (citing *Union Oil Co. of Cal. v. Morton*, 512 F.2d 743, 751 (9th Cir. 1975)).

²²⁹ *Id.* (citing *Union Oil*, 512 F.2d at 751).

²³⁰ *Id.* at 1327.

²³¹ The court also dismissed the plaintiffs’ other causes of action, which included breach of contract and mutual mistake claims. *Id.* at 1326 (citing *Union Oil*, 512 F.2d at 751).

²³² *Id.*

²³³ See, e.g., *Union Oil*, 512 F.2d at 751.

²³⁴ 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

permanent versus temporary distinction because the duration of the regulation is now only a part of the more fully established regulatory takings framework.²³⁵ And any notion that only actions by Congress, and not those by a member of the executive branch, can amount to a taking is similarly misplaced in today's analysis.²³⁶ Instead, "the Takings Clause bars *the State* from taking private property without paying for it, no matter which branch is the instrument of the taking."²³⁷ Accordingly, it is necessary to analyze the *Hornbeck* claim under the more modern approach to temporary regulatory takings. Although the Supreme Court has attempted to clarify and establish a working framework for this area, *Hornbeck* illustrates how the unsettled state of takings jurisprudence has made some plaintiffs unwilling to bring these kinds of claims and courts hesitant to venture into such an analysis if provided an alternative.²³⁸ It is precisely because this area is still malleable, though, that plaintiffs and courts should look to the takings clause to protect worthy victims from regulations that go too far.

V. AN AD-HOC ANALYSIS OF THE TAKINGS CLAIM IN *HORNBECK*

A court may be hesitant to find a takings claim in *Hornbeck*, despite the expansion of takings jurisprudence since the Santa Barbara oil spills and facts that distinguish *Hornbeck* from *Bass Enterprises*. Such a result, however, is both unfortunate and undesirable, and should be modified in light of the concepts of fairness and justice discussed in *Tahoe-Sierra*.²³⁹ Admittedly, there is still confusion and discord in takings law, but a proper reading of *Tahoe-Sierra* illustrates

Regulatory Action, 17 S.E. ENVTL. L.J. 1, 21 (2008) (noting that "[a] legislative grant of authority to an agency to exercise discretion over various affairs could lead to acts by [executive] officials that were illegal but still within the [congressionally defined] scope of agency authority" (citing *Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358 (Fed. Cir. 1998))); *see also* *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 342 (2002) (holding that the duration of a regulation is not dispositive regarding the takings question).

²³⁵ *Tahoe-Sierra*, 535 U.S. at 335.

²³⁶ "The Takings Clause . . . is not addressed to the action of a specific branch or branches. It is concerned simply with the act, and not with the government actor . . ." *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2601 (2010) (discussing a judicial takings claim).

²³⁷ *Id.* at 2602.

²³⁸ *See* Meltz, *supra* note 110, at 73 (describing confusion as to when cases should be analyzed as a breach of contract instead of a taking and noting the general preference of the federal courts to take the breach of contract route if possible).

²³⁹ 535 U.S. at 333-34.

the “considerable latitude” available to property owners to assert claims based on these concepts.²⁴⁰ The facts in *Hornbeck* provide an example of the danger for plaintiffs in a service industry who may be injured uniquely and significantly because of the permanent effects of a temporary regulation. Accordingly, these types of claims are worthy of relief under a more contextually inclusive three-part *Penn Central* analysis that looks at (1) the economic impact of the regulation; (2) the distinct investment-backed expectations of the plaintiff; and (3) the character of the government regulation.²⁴¹

A. *The Economic Impact of the Regulation*

The economic impact is a fact-specific question, and in the case of the *Hornbeck* plaintiffs it is immense in terms of sheer numbers. The plaintiffs alleged that the moratorium led to the termination of valuable service contracts with the oil and exploration companies in the Gulf of Mexico.²⁴² Plaintiffs noted that lost job wages could be more than \$330 million for each month the moratorium remained in place.²⁴³ Likewise, the Bureau of Ocean Energy Management (BOEM) predicted “that the moratorium would lead to the loss of more than 23,000 jobs in the . . . region and that oil and gas industry spending in [the Gulf would] be reduced by more than \$10 billion.”²⁴⁴

The leases,²⁴⁵ contracts, and vessels that constitute the property rights in the industry last for only a limited time, and thus it is difficult or impossible to recoup any lost expenses as a result of suspensions of operations.²⁴⁶ These effects can be distinguished from those imposed by moratoria in other

²⁴⁰ Eagle, *supra* note 165, at 505.

²⁴¹ See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

²⁴² First Supplemental and Amended Complaint for Declaratory and Injunctive Relief, *supra* note 27, ¶¶ 58-67. The allegations were not mere conjecture; as early as June 2010 valuable contracts were being cancelled or reduced. See *id.*

²⁴³ Hornbeck’s Memorandum of Law in Support of Its Motion for Preliminary Injunction, *supra* note 48, at 23.

²⁴⁴ Plaintiff’s Memorandum in Opposition to Defendants’ Cross-Motion for Partial Summary Judgment at 14 n.13, *EnSCO Offshore Co. v. Salazar*, 2010 WL 3973222 (E.D. La. Sept. 9, 2010) (No. 10-CV-01941). It was also reported that the moratorium would result in approximately \$500 million in lost wages for workers in the oil industry. Steven Shavell, *Should BP Be Liable for Economic Losses Due to the Moratorium on Oil Drilling Imposed After the Deepwater Horizon Accident?*, 64 VAND. L. REV. 1995, 1999 (2011).

²⁴⁵ Complaint at ¶ 55(b), *EnSCO Offshore Co. v. Salazar*, 2010 WL 2812241 (E.D. La. July 9, 2010) (No. 10-CV-01941).

²⁴⁶ Hornbeck’s Memorandum of Law in Support of Motion for Preliminary Injunction, *supra* note 48, at 3.

contexts,²⁴⁷ and make the plaintiffs more worthy of relief considering the immense level of investment that they have made into both their own equipment and the industry as a whole in the region.²⁴⁸ Additionally, unlike in other contexts, the plaintiffs in *Hornbeck* do not enjoy any reciprocity of advantage that might mitigate the damage suffered when they are subjected to a stop-drilling order.²⁴⁹ Instead, for plaintiffs, and similarly situated companies, the harm suffered by moratoria is without any potentially positive consequences.

Also, the final economic impact may be even greater than initial estimates suggested. The BOEM estimates were based on a six-month moratorium, but at the time the complaint was filed the moratorium was predicted to last much longer.²⁵⁰ Additionally, the Department of the Interior estimated that long-term job loss might significantly exceed BOEM's initial estimates due to the potential relocation of rigs to other regions and the potential demise of some drilling companies.²⁵¹ Those fears did not fully materialize (the moratorium did in fact end before six months), yet the lifting of the moratorium did not bring about an immediate end to the negative economic effects it created.²⁵² Thus, the impact of the

²⁴⁷ See *infra* notes 271-74 and accompanying text.

²⁴⁸ Hornbeck's Memorandum of Law in Support of Motion for Preliminary Injunction, *supra* note 48, at 3-6. Regarding investments put into their own equipment, Diamond Offshore explained, for example, that the cost of one of its floating rigs can exceed \$500,000 per day. Plaintiffs' Original Complaint and Application for Temporary Restraining Order and Injunctive Relief, *supra* note 30, ¶ 10. Likewise, the value of the deepwater vessels built by plaintiff Bollinger Shipyard Company in the last five years exceeds \$200 million. First Supplemental and Amended Complaint for Declaratory and Injunctive Relief, *supra* note 27, ¶ 38.

²⁴⁹ See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 341 (2002). The Supreme Court in *Tahoe-Sierra* noted that all landowners in the community benefited from the moratorium because the development restriction also prevented their neighbors from engaging in unwanted development. *Id.* In fact, in that case, the moratorium might protect or even increase the property values in the area. *Id.*

²⁵⁰ First Supplemental and Amended Complaint for Declaratory and Injunctive Relief, *supra* note 27, ¶ 54.

²⁵¹ Plaintiff's Memorandum in Opposition to Defendants' Cross-Motion for Partial Summary Judgment at 14 n.13, *EnSCO Offshore Co. v. Salazar*, 2010 WL 3973222 (E.D. La. Sept. 9, 2010) (No. 2:10-CV-01941-MLCF-JCW); Hornbeck's Memorandum of Law in Support of Motion for Preliminary Injunction, *supra* note 48, at 6 (explaining that "[w]hen a deepwater rig or vessel leaves a drilling region, it does so under a long-term contract and will not return for several years, if ever"). At least two deepwater rigs had left for foreign waters as early as July 2010. Hughes & Power, *supra* note 25. But see Daly, *supra* note 100 (noting that loss of jobs in the Gulf region is likely temporary).

²⁵² People in the industry feared the possibility that a de facto moratorium would remain in place, which would extend the suspension of operations and increase the injury. See Matthew Daly, *Administration Lifts Freeze on Drilling, Official Says New Rules Improved Safety, Cut Risks of Another Disaster*, CHARLESTON DAILY MAIL,

regulation could potentially be felt far into the future. More importantly, future moratoria could last significantly longer, thus resulting in an even greater impact and illustrating the need for takings clause protection.

B. Reasonable Investment-Backed Expectations

The reasonable investment-backed expectations of plaintiffs affected by the moratorium provide several distinguishing characteristics from previous precedent that help support the finding of a taking. Whether a regulation results in a change to the status quo is an important factor for the Supreme Court in a takings analysis. For example, the *Penn Central* Court “hinted that it may have [ruled differently] if the . . . regulation had prevented [the property] from being used as it always had been.”²⁵³ Thus, it is more reasonable for parties to expect their permits and contracts to continue unhindered once they have obtained all necessary authorizations and drilling has already commenced. The plaintiffs here are not seeking to develop property beyond its current state; rather, they simply seek to continue using their property as they have for many previous years. Similarly, they are not seeking an initial permit to *begin* utilization of their property by exploring and drilling for oil, as was the case in *Bass Enterprises*.²⁵⁴ Accordingly, while the delays in both *Bass Enterprises* and *Hornbeck* stemmed largely from the need to protect against a “possible environmental and health hazard,”²⁵⁵ only the *Bass Enterprises* delay resulted in an extension—rather than a disruption—of the status quo.

The facts in *Bass Enterprises* represent a situation where the plaintiffs had more reason to expect delays than do the plaintiffs in *Hornbeck*. In *Bass Enterprises*, the lease in question was above a portion of an underground nuclear waste storage site.²⁵⁶ The delay was imposed while the EPA

Oct. 13, 2010; *see also* *Hornbeck Offshore Servs., L.L.C. v. Salazar*, No. 10-1663, 2011 WL 454802, at *3 (E.D. La. Feb. 2, 2011). In fact, several months after the moratorium was lifted, drilling permits were still not being issued. *Id.* at *2.

²⁵³ *ELLICKSON & BEEN*, *supra* note 127, at 197. Further, the Supreme Court noted that the type of moratoria at issue in *Tahoe-Sierra* was one that is routinely used to preserve, not disrupt, the status quo. *Tahoe-Sierra*, 535 U.S. at 337.

²⁵⁴ *See* *Bass Enters. Prod. Co v. United States*, 381 F.3d 1360, 1362 (Fed. Cir. 2004).

²⁵⁵ *Id.* at 1367. The court in *Bass Enterprises* noted that such a situation justifies delay because “we do not want to ‘encourage hasty decisionmaking’ by the Government.” *Id.*

²⁵⁶ *Id.* at 1362.

determined if it was necessary to condemn and obtain the leasehold in its entirety to protect the integrity of the site.²⁵⁷ Thus, it was unknown whether *any* safe use of the lease could *ever* be engaged in by the leaseholder.²⁵⁸ In contrast, the leases and contracts in *Hornbeck* were for rigs that had recently passed inspections and had been deemed to conform to all safety regulations by the MMS.²⁵⁹ Also, there had been no similar blowouts in the Gulf of Mexico since 1969.²⁶⁰ Thus, there was little reason to anticipate another spill. Instead, it was more reasonable to expect that as long as the parties continued to comply with all safety regulations they would not suffer any delays.

Likewise, although “delay is inherent in complex regulatory . . . schemes,”²⁶¹ such a delay is more reasonably expected when operations have not yet commenced. The decision to allow drilling on a portion of a site designated for nuclear waste storage required careful deliberation to determine the effects on the site as a whole. The *Bass Enterprise* plaintiffs had knowledge that these regulations were in place before they began any drilling activities. Thus, they should have expected that they might not immediately be granted the use of their lease, and such a delay would do nothing to alter the status quo. Like the disposal of nuclear waste, the oil industry is highly regulated,²⁶² still, the oil rigs in *Hornbeck* had conformed to these regulations and procedural requirements and had previously been operating safely and without issue.²⁶³ There was little reason for the plaintiffs to expect any change to these operations, barring individual safety violations by the rig operators. Thus, by banning the operation of all oil rigs, the broad moratorium seriously disrupted the status quo, unfairly burdened innocent parties,

²⁵⁷ *Id.* at 1363.

²⁵⁸ Additionally, the *Bass Enterprise* plaintiffs had the security of knowing they would be compensated if the government determined drilling to be permanently unsafe because the federal government would then condemn the property and pay just compensation. *See id.* at 1362-63.

²⁵⁹ First Supplemental and Amended Complaint for Declaratory and Injunctive Relief, *supra* note 27, ¶ 46. Twenty-seven of twenty-nine recently inspected rigs had no violations; the other two had only minor violations. *Id.*

²⁶⁰ *See Hornbeck Offshore Servs. v. Salazar*, 696 F. Supp. 2d 627, 638 n.11 (E.D. La. 2010).

²⁶¹ *Bass Enters. Prod. Co.*, 381 F.3d at 1366 (quoting *Wyatt v. United States*, 271 F.3d 1090, 1098 (Fed. Cir. 2001)).

²⁶² Takings are generally less likely to be found in industries that are highly regulated. Meltz, *supra* note 110, at 66. This alone does not bar all takings claims though. *Id.* at 67.

²⁶³ First Supplemental and Amended Complaint for Declaratory and Injunctive Relief, *supra* note 27, ¶ 46.

and destroyed the investment-backed expectations of the oil service industry in the Gulf.

Further, in determining the safety of oil exploration and drilling, Congress has provided an expectation that the Department of the Interior will proceed expeditiously.²⁶⁴ The relatively short time frame of thirty days that Congress has allowed for the agency to approve exploration plans submitted under OSCLA²⁶⁵ supports a reasonable expectation of freedom from extended delay in the industry. Accordingly, it is reasonable for plaintiffs with property interests in the oil industry in the Gulf of Mexico to expect government-imposed delay not to last much longer than thirty days. The length of the moratorium here far exceeded that expectation.

A similar argument draws support from dicta in *Tahoe-Sierra*. In acknowledging that considerations of “fairness and justice” were the touchstone of moratoria aimed at curbing abusive land development, Justice Stevens indicated that, under the right circumstances, the Court could “craft a narrower rule that would cover all temporary land-use restrictions except those ‘normal delays’” associated with the industry or application process.²⁶⁶ There is little precedent for what constitutes a normal delay as it applies to moratoria on drilling following an oil spill. Oil drilling resumed under heightened standards following the Santa Barbara spill, however, after only about two months.²⁶⁷ Therefore, it is reasonable for the plaintiffs to expect that their investment in the Gulf would not be disturbed by the government for any substantially longer duration.²⁶⁸

In contrast, a takings argument is weakened by the fact that the moratorium officially lasted less than six months, a very short period of time compared with other delays that have

²⁶⁴ See *In re Core Commc'ns., Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008).

²⁶⁵ 43 U.S.C. § 1340(c) (2006).

²⁶⁶ *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 333 (2002) (quoting *First English Evangelical Lutheran Church v. Cnty. of L.A.*, 482 U.S. 304, 321 (1987)); see also *Eagle*, *supra* note 165, at 442. The Court determined that such a rule “would certainly have a less severe impact on prevailing practices,” but cautioned that “it would still impose serious financial constraints on the planning process.” *Tahoe-Sierra*, 535 U.S. at 337.

²⁶⁷ See *Pauley Petroleum Inc. v. United States*, 591 F.2d 1308, 1312, 1314 (Ct. Cl. 1979). The Secretary immediately requested that drilling operations cease when the spill occurred on January 28, 1969. *Id.* at 1312. The Secretary gave approval to recommence operations on April 1, 1969. *Id.* at 1314.

²⁶⁸ Although the moratorium officially lasted only about five months, the added regulations imposed by the government prevented operations from resuming for longer. *Daly*, *supra* note 100; see also *supra* note 252 and accompanying text.

been held to not be takings.²⁶⁹ Although the economic impact was drastic and potentially devastating to companies in the oil drilling and exploration business in the Gulf of Mexico, these companies should be able to regain most of the value of their leases in time, now that the moratorium has been lifted. Yet, for those service companies that rely on other entities that have left for foreign waters, this reassurance is not nearly as comforting.²⁷⁰ Moreover, the *Tahoe-Sierra* Court justified its refusal to find the temporary restriction in that case to be a taking by explaining, “[l]ogically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted.”²⁷¹ This assertion may be true in the case of temporary planning/development restrictions on real estate (as was the restriction at issue in *Tahoe-Sierra*), but it fails to account for the significant loss in value imposed in the present situation. Unlike the *Tahoe-Sierra* landowner, many companies in the oil industry rely on property interests that amount to less than a fee simple estate. Instead, their property interests are vested in contracts²⁷² and support vessels that have a limited useful life.²⁷³ Accordingly, the higher the percentage of these useful lives consumed by the moratorium, the more likely a court should be to find a taking.²⁷⁴

Finally, the Court in *Tahoe-Sierra* articulated that the petitioners had failed to offer a persuasive account of why moratoria should be treated differently from ordinary permit delays.²⁷⁵ Further, the Court condemned the petitioners’ claim

²⁶⁹ See *Bass Enters. Prod. Co. v. United States*, 381 F.3d 1360, 1366 (Fed. Cir. 2004). The Supreme Court has indicated that while the length of the moratorium is not dispositive, the longer the delay, the more likely a taking has occurred. See *Tahoe-Sierra*, 535 U.S. at 341 (“It may well be true that any moratorium that lasts for more than one year should be viewed with special skepticism.”).

²⁷⁰ Only two of the thirty-three deepwater oil rigs left the Gulf for other fields, but this result could have been much worse if the first moratorium had not been enjoined in *Hornbeck*. See Cynthia A. Drew, *The Gulf Deepwater Drilling Moratorium: While Merits Still Pending, Already Significant Practical Effect?*, ENVTL. L. REP. (2010), available at LEXIS, 40 ELR 11137. Future plaintiffs who do not have the ability to enjoin regulations under alternative means may not be as lucky. See *supra* Part IV.

²⁷¹ *Tahoe-Sierra*, 535 U.S. at 332.

²⁷² Complaint at ¶ 1, *Enso Offshore Co. v. Salazar*, 2010 WL 2812241 (E.D. La. July 9, 2010) (No. 10-CV-01941).

²⁷³ *Hornbeck’s Memorandum of Law in Support of Motion for Preliminary Injunction*, *supra* note 48, at 2.

²⁷⁴ See *Eagle*, *supra* note 165, at 473.

²⁷⁵ *Tahoe-Sierra*, 535 U.S. at 337 n.31.

as being too broad when brought as a facial challenge,²⁷⁶ leaving open the possibility that petitioners may have succeeded on an as-applied claim.²⁷⁷ Here, the shortened lifespan of the property interests at issue provides this kind of persuasive reasoning. Additionally, as applied to this case, there is another clear reason why a moratorium is different and indeed more burdensome than a normal permit delay—the long-term potential to lose existing business contracts and clients permanently to other regions of the world. This type of threat is unique to the context of property interests that may move, terminate, or disappear in response to government action, such as the mobile deep-water oil rigs that are the source of business for the *Hornbeck* plaintiffs.

C. *The Character of the Government Regulation*

The final *Penn Central* factor is the “character of the governmental action.”²⁷⁸ It is not entirely clear what the Court had in mind when it described this factor, although it might have been an “attempt to separate out physical invasions from all other types of regulation or [an] attempt to distinguish one subset of permissible regulations from others.”²⁷⁹ Some courts in the past have given this factor significant weight and have appeared unwilling to find a taking where the moratorium is clearly a regulatory action that “arises from some public program adjusting the benefits and burdens of economic life to promote the common good.”²⁸⁰ More recently, however, the Court has been reluctant to place much weight on this third factor and has explicitly rejected any analysis looking into whether the regulation serves a public purpose.²⁸¹ Accordingly, the third *Penn Central* factor may now mean little more than whether the government action is characterized as physical as

²⁷⁶ *Id.* at 334; see also *Eagle*, *supra* note 165, at 464, 470, 501 (noting that the Court’s hand in ruling was largely forced by procedural issues of the case such as the way the challenge was phrased and presented).

²⁷⁷ *Tahoe-Sierra*, 535 U.S. at 334.

²⁷⁸ *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

²⁷⁹ *Eagle*, *supra* note 165, at 449. “The need to more readily characterize the physical invasion as a taking lasted only for four years [until the holding in *Loretto*] . . .” *Id.*

²⁸⁰ *Penn Central*, 438 U.S. at 124. Some courts have also looked for evidence of bad faith on the part of the government in determining whether a taking has occurred. See *Eagle*, *supra* note 165, at 476. Such an inquiry is no longer appropriate, though, under *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 532 (2005).

²⁸¹ See *Lingle*, 544 U.S. at 532 (holding that the “substantially advances” for a legitimate public use test is inappropriate for takings analysis).

opposed to regulatory, and will need to be more clearly defined by future court decisions.

Ultimately, any court deciding the outcome under factual circumstances similar to the *Hornbeck* case would need to weigh all these circumstances²⁸² to determine whether the magnitude of the government's interference with the plaintiffs' property rights was so severe that it required compensation. Despite many persuasive arguments and facts supporting the finding of a taking in *Hornbeck*, it is unclear whether the plaintiffs could have succeeded in their takings claim. Courts have exhibited a tendency to put strong emphasis on the length of temporary moratoria and have displayed a general reluctance to find temporary takings.²⁸³ Nonetheless, *Hornbeck* provides an interesting example illustrating the arguments that are available to future plaintiffs subjected to similar regulations, at a time in the future when takings jurisprudence has begun to accept and apply the interests in fairness and justice articulated in *Tahoe-Sierra*.²⁸⁴

CONCLUSION

The limited focus on a potential takings claim by the parties in *Hornbeck* illustrates that this area of law is still very much uncertain and in flux. Yet, future plaintiffs need not view this uncertainty as a problem. Instead, it should be seen as providing increased flexibility, allowing individual plaintiffs to shape persuasive arguments based on their specific circumstances. A more factually inclusive and flexible approach to the current takings framework would provide better protection and induce the government to more thoroughly internalize the consequences of regulations that may go too far.

Critics have complained that “[t]he persistence of incoherence, instability and incomplete explanations in this area of the law suggests that the [Supreme] Court itself is dissatisfied with the tests it has developed, yet is unable to produce a more satisfying jurisprudence.”²⁸⁵ Accordingly, there have been numerous proposals for both the expansion and

²⁸² Significantly more facts from both sides would certainly be desirable, but presumably these would be presented in a case that involved a takings claim advanced more assertively than in *Hornbeck*.

²⁸³ See generally Meltz, *supra* note 110.

²⁸⁴ *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321, 334 (2002).

²⁸⁵ Holly Doremus, *Takings and Transitions*, 19 J. LAND USE & ENVTL. L. 1, 2 (2003).

contraction of the scope of protection provided by the takings clause. On one side of the argument is Richard Epstein, who has recommended a dramatic expansion of takings protection.²⁸⁶ According to Epstein, the “government must compensate for every diminution in value it causes to owners by restricting the use of property beyond inherent common law limitations.”²⁸⁷ On the “other end of the spectrum, Peter Byrne has argued that . . . [b]eyond physical intrusions, the regulatory takings doctrine should be abolished.”²⁸⁸ Because *Tahoe-Sierra* expressly left open the prospect of “as applied” challenges to moratoria, there is room for the case law to move towards either end of the spectrum.²⁸⁹ A takings analysis based on the specific circumstances of each case, determined through a more contextually inclusive application of *Penn Central*, would establish an appropriate middle ground. Indeed, such an application seems to embody the language used in *Tahoe-Sierra*, where the Court explained, “we are persuaded that the better approach to claims that a regulation has effected a temporary taking ‘requires careful examination and weighing of all the relevant circumstances.’”²⁹⁰

Yet the courts have been overly reluctant to find takings due to a rigid application of the *Penn Central* test. There are inherent differences between the temporary regulation discussed in *Tahoe-Sierra* and regulations like the oil drilling moratorium that warrant an end to this reluctance. Thus, instead of applying a single rule for all moratoria, courts should look at how that moratorium is affecting the property right at issue. Courts must account for the fact that temporary regulations place a greater burden on property interests in the oil service industry—because of their limited duration—as compared to property interests in other settings. This is especially true in a case like *Hornbeck* where the property interests are movable and may not return if prohibited for too long.

Including these contextual circumstances in a *Penn Central* analysis would more closely adhere to the theories behind takings protection discussed in *Tahoe-Sierra*. Such an application would prevent the government from unfairly

²⁸⁶ Fee, *supra* note 115, at 1015.

²⁸⁷ *Id.*

²⁸⁸ *Id.* at 1016.

²⁸⁹ See *Tahoe-Sierra*, 535 U.S. at 334.

²⁹⁰ See *id.* at 335 (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring)).

burdening plaintiffs in service industries; it would also, at a minimum, result in more thoughtfully crafted regulations by forcing the government to internalize the possibility of compensation. Further, it would not prevent the government from instituting moratoria when absolutely necessary, but would simply require payment to those unfairly or disproportionately burdened by those regulations. Finally, adopting a more context-specific application seems appropriate as a concession to the ill-defined state of modern takings law. Doing so would allow courts to worry less about futile attempts to decipher and rigidly apply this jurisprudence and more about finding a result that is fair and just.

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