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Tahoe-Sierra Preservation Counsil, Inc. v. Tahoe Regional Planning Agency: The Supreme Court Reaffirms the Importance of Land-Use Planning and Wisely Refuses to Set Concrete Outer Limits

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NOTES

TAHOE-SIERRA PRESERVATION COUNCIL, INC. V. TAHOE REGIONAL PLANNING AGENCY: THE SUPREME COURT REAFFIRMS THE IMPORTANCE OF LAND-USE PLANNING AND WISELY REFUSES TO SET CONCRETE OUTER LIMITS

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Lake Tahoe has been recognized as one of the most beautiful and serene places in the United States.[1] This lofty alpine lake was the catalyst for the Supreme Court's most recent regulatory takings case. In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, the Court held that two development moratoria totaling thirty-two months did not constitute a taking, a result that was both somewhat surprising in light of the Court's prior regulatory takings cases and hotly debated.[2] The Fifth

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1. Justice Stevens, writing for the majority in *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 307 (2002), summarized the praise Lake Tahoe receives. The district court called the lake "uniquely beautiful," President Clinton felt it is a "national treasure that must be protected and preserved," and Mark Twain remarked that it is "not *merely* transparent, but dazzlingly, brilliantly so." *Id.* (citations omitted). Lake Tahoe, the second-deepest lake in the United States, is located on the border between California and Nevada. *Facts About Lake Tahoe*, Lake Tahoe Data Clearinghouse, *at* http://blt.wr.usgs.gov/facts.html (last modified June 17, 2003); *Geography & History Overview*, Lake Tahoe Data Clearinghouse, *at* http://blt.wr.usgs.gov/geography.html (last modified Jan. 16, 2003).

2. The surprise stems in part from *Tahoe-Sierra*'s alleged divergence from the Court's opinion in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987). In *First English*, the Supreme Court held that a temporary restriction on land requires compensation if the restriction constitutes a taking. *Id.* at 318. Chief Justice Rehnquist, although avoiding any extension of the Court's holding to land-use planning in general, intimated that the holding may make land-use planning tools such as moratoria more likely to constitute takings. *Id.* at 321. The Chief Justice, however, was on the dissenting side of the Court in *Tahoe-Sierra*. 535 U.S. at 343. The debate over the correctness of the Court's rule in *Tahoe-Sierra* began almost immediately. *Compare In Defense of Lake Tahoe*, S.F. CHRON., Apr. 25, 2002, at A22 (arguing that the case "gives clear direction that sensible planning—which by definition will limit property 'rights'—will survive constitutional challenges"), *with Tahoe Ruling Leaves Owners With Empty Lots*, S.F. CHRON., Apr. 25, 2002, at A17 (chronicling the plight of landowners whose parcels are worth much less undeveloped than if they were allowed to build on the lots).

Amendment mandates that private property not "be taken for public use, without just compensation."[3] Through the Due Process Clause of the Fourteenth Amendment, this mandate also applies to the States.[4] The *Tahoe-Sierra* Court, however, recognized these moratoria not as takings but as something else, something more basic: an essential tool of successful development.[5]

Underlying all Fifth Amendment takings cases is the fundamental distinction between physical and regulatory takings.[6] When the government physically takes property for public use, the Fifth Amendment clearly requires compensation.[7] Whether a regulation affecting an owner's use of his land is a "taking" in the constitutional sense, however, involves a fact-specific inquiry.[8] Both regulatory takings and physical takings jurisprudence

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3. U.S. CONST. amend. V. Although the Constitution does not expressly grant to the federal government the power of eminent domain, the presence of the just compensation clause is evidence that the power exists even without an express grant to Congress. *See, e.g.*, United States v. Carmack, 329 U.S. 230, 241 (1946). The origins of eminent domain, though not certain, date at least to biblical times. 1 NICHOLS ON EMINENT DOMAIN § 1.2[1] (Julius L. Sackman rev. 3d ed., 2002). The power also roots in English history as a prerogative of the Crown—though there is no comparable requirement that the property be for "public use." 1 *id.* §§ 1.21, 1.21[5]. One rationale for the power of eminent domain was the principle that the sovereign retained absolute ownership in all property. 1 *id.* § 1.13.

4. Chicago, B. & Q.R. Co. v. City of Chicago, 166 U.S. 226, 236-39 (1897). At issue in the case was an award of compensation of one dollar to a railroad company when a public street was constructed on its land. *Id.* at 232. The Court held the just compensation requirement of the Fifth Amendment is binding on the states by incorporation through the Fourteenth Amendment. *Id.* at 239.

5. *Tahoe-Sierra*, 535 U.S. at 337-38. The Court unequivocally supported the type of moratoria in this case:

> [T]he financial constraints of compensating property owners during a moratorium may force officials to rush through the planning process or to abandon the practice altogether. To the extent that communities are forced to abandon using moratoria, landowners will have incentives to develop their property quickly before a comprehensive plan can be enacted, thereby fostering inefficient and ill-conceived growth.

Id. at 339.

6. *Id.* at 321 (noting that "[t]he text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings").

7. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."); *see also* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434-35 (1982) (holding that "when the 'character of the governmental action' . . . is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation") (quoting Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)).

8. As discussed *infra* in Parts I.B.-C., regulatory takings jurisprudence consists of two subdivisions: regulations that deny a landowner all economically beneficial use of his property, *e.g.*, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992), and regulations that only affect or limit the use of a portion of the land, *e.g.*, *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001). Thus, the facts regarding the nature of the regulation and its

strive to strike a balance between the rights of individual property owners and the public.[9] A taking likely occurs when a regulation concentrates economic injuries disproportionately on a few individuals.[10] The law seeks some middle ground between avoiding individualized economic burdens and meeting the goals of necessary land-use planning. The Court's use of a fact-specific methodology in most regulatory takings cases[11] has led to a degree of uncertainty.[12] But *per se* rules are restrictive, and in a time of burgeoning development, flexibility is necessary in good land-use planning.[13]

Tahoe-Sierra arose after the Tahoe Regional Planning Agency (TRPA) enacted two land-use planning ordinances severely restricting development in the Lake Tahoe basin.[14] Land owners brought suit, claiming that the restrictions constituted a taking of their property without compensation in violation of the Fifth Amendment.[15] The basis of the action focused on TRPA Ordinance 81-5 and Resolution 83-21.[16] The moratoria, exclusive of other procedural wrangling by the parties, were in effect for thirty-two months.[17] The U.S. District Court for the District of Nevada held that the ordinances constituted categorical takings under the Supreme Court's rule in *Lucas v. South Carolina Coastal Council*.[18] It ordered the TRPA to pay

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effect on a particular parcel of land are important in determining whether a regulation constitutes a taking.

9. *See Palazzolo*, 533 U.S. at 617-18.

10. *See* Armstrong v. United States, 364 U.S. 40, 49 (1960). In *Lucas*, for example, the South Carolina Supreme Court considered the regulation in question a valid exercise of the State's police power to prevent environmental harms to the public at large. 505 U.S. at 1021. The regulation, however, specifically prohibited Lucas from developing his lots, for which he paid $975,000. *Id.* at 1006-09.

11. *But see Lucas*, 505 U.S. at 1015, where the court used a categorical rule, rather than a factual inquiry, because the regulation had the *same effect* as a physical taking.

12. Douglas W. Kmiec, *At Last, the Supreme Court Solves the Takings Puzzle*, 19 HARV. J.L. & PUB. POL'Y 147 (1995) (noting that "[m]any commentators and practitioners, ranging from property rights advocates to police power hawks, have viewed the Supreme Court's takings cases as incoherent, piecemeal, or categorical").

13. The total number of housing units in the United States increased from approximately 88 million in 1980 to 120 million in 2000. U.S. CENSUS BUREAU, 2001 STATISTICAL ABSTRACT OF THE UNITED STATES, § 20 *Construction and Housing*, No. 947 (2001), *available at* http://www.census.gov/prod/2002pubs/01statab/stat-ab01.html (last visited Oct. 16, 2003). The total value of private nonresidential construction doubled between 1993 and 2000, from approximately $111 billion in 1993 to $213 billion in 2000. *Id.* at No. 931.

14. Tahoe-Seirra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 311-12 (2002).

15. *Id.* at 312-14.

16. *Id.* at 312.

17. *Id.*

18. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F. Supp. 2d 1226, 1245 (D. Nev. 1999). A "categorical taking," at least in the sense used in and after *Lucas*, is a "government regulation that interferes with a property owner's use of her property to the extent that it accomplishes nearly the same result as a direct appropriation." *Id.* at 1238.

damages for the thirty-two-month period.[19] The Court of Appeals for the Ninth Circuit reversed the district court, holding that the moratoria were a form of regulation that is widespread and well established, involving only a portion of the property interest.[20] The Supreme Court granted certiorari and affirmed the judgment of the court of appeals, holding that (1) formulating a general rule is a suitable task for legislatures, not the courts, and (2) the duration of the regulatory restriction is only one factor indicating a taking; cases must be decided on a fact-specific basis.[21]

This Note discusses why the *Tahoe-Sierra* majority was correct in concluding that the Lake Tahoe moratoria did not constitute takings. It begins with a comparison of physical and regulatory takings and traces the development of these diverging areas of the law. This Note then analyzes the Supreme Court's primary regulatory takings cases prior to *Tahoe-Sierra* in order to illustrate the ongoing land-use regulation debate. Next, this Note discusses the Court's acceptance of a fact-based inquiry in its regulatory takings jurisprudence and the effects of such a test on land use planning. In light of this fact-based approach, this Note explores the majority and dissenting opinions of *Tahoe-Sierra* and explains that the majority was true to the Court's prior regulatory takings law in holding that the moratoria did not constitute a taking. Finally, this Note proposes that the majority's approach, which is based on ad hoc factual inquiries, is essential to good land-use planning and development because flexibility is needed in the law when local and state authorities draft property regulations.

I. FUNDAMENTAL DISTINCTIONS IN TAKINGS JURISPRUDENCE

A. Physical Takings and the Government's Duty to Compensate

In *Loretto v. Teleprompter Manhattan CATV Corp.*, the Supreme Court reaffirmed the longstanding rule that the government's permanent physical

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The term was used by the *Lucas* Court to emphasize the absolute requirement of compensation when a regulation deprives a land owner of all economically beneficial use of her land. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1026 (1992) (noting that even the legislature cannot attempt to circumvent this rule by merely reciting noxious-use justifications).

19. *Tahoe-Sierra*, 34 F. Supp. 2d at 1255. Media outlets reported that the plaintiffs initially sought $27 million in damages. Associated Press, *Setback for PropertyRights*, (Apr. 23, 2002), *available at* http://www.cbsnews.com/stories/2002/04/23/supremecourt/main506996.shtml.

20. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 216 F.3d 764, 782 (9th Cir. 2000) (noting that "[i]n reaching this conclusion, we preserve the ability of local governments to do what they have done for many years—to engage in orderly, land-use planning through a considered and deliberative process").

21. *Tahoe-Sierra*, 535 U.S. at 335-37.

occupation of property constitutes a taking.[22] *Loretto* involved the practice of installing cable television components on the roofs of urban buildings.[23] Many buildings included cables servicing the tenants of those premises and "crossover" lines completing the neighborhood cable network.[24] Prior to 1973, the cable company routinely obtained authorization for the installations and paid the property owners five percent of the gross revenue realized from that property.[25] But in 1973, a New York statute took effect prohibiting landlords from interfering with cable installation on their premises and limiting their demands for compensation for such installation to one dollar.[26] Property owners brought a class action suit seeking just compensation for the permanent use of the rooftop space.[27]

Loretto's holding is consistent with other physical takings cases,[28] but it is important because it reinforces the rationale behind the Court's physical takings law. Although the actual size of the physical appropriation was disputed,[29] the majority felt that size did not matter.[30] The rationale is best stated in the classic explanation of the Court's physical takings rule by Justice Marshall: "[w]hen the 'character of the governmental action' . . . is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."[31] Thus, because a permanent physical taking

22. 458 U.S. 419, 434-35 (1982). The Court found that the installation of cable equipment "involved a direct physical attachment of plates, boxes, wires, bolts, and screws to the building, completely occupying space immediately above and upon the roof and along the building's exterior wall." *Id.* at 438.

23. *Id.* at 421-22.

24. *Id.* at 422.

25. *Id.* at 423.

26. *Id.* at 423-24. The purpose of the statute was to facilitate tenant access to cable television and reduce property owners' ability to thwart the development of cable television, "which has important educational and community benefits." *Id.* at 423, 425. The State Cable Commission ruled that landlords were only entitled to one dollar compensation because that was what they would have received if the property were condemned pursuant to New York law. *Id.* at 423-24.

27. *Id.* at 424.

28. *See, e.g.*, United States v. Causby, 328 U.S. 256 (1946) (holding that government use of private airspace to approach a government airport is a taking).

29. *See Loretto*, 458 U.S. at 442-43 (Blackmun, J., dissenting). Justice Blackmun argued in his dissent that the physical space "taken" amounted to less than "one-eighth of a cubic foot of space" and thus was not of constitutional significance. *Id.* at 443. Writing for the Court, Justice Marshall disagreed and argued that the size of the space taken was much larger, though the actual size of the area taken was not clear in the record. *Id.* at 438 n.16.

30. *Id.* (noting that "[i]n any event, these facts are not critical: whether the installation is a taking does not depend on whether the volume of space it occupies is bigger than a breadbox").

31. *Id.* at 434-35.

destroys the property rights retained by the land owner, compensation is always due.[32]

The Court also has long recognized the government's duty to compensate for *temporary* physical seizures of property.[33] In *United States v. Pewee Coal Co.*, the United States seized and operated a coal mine for a temporary period in order to avoid a coal miners' strike.[34] The Court held that even though the seizure was temporary, it constituted a taking and required compensation.[35]

B. Regulatory Takings: A Per Se Rule

A land-use regulation that is not a physical taking may also be considered a taking in limited circumstances; Justice Holmes was first to recognize that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[36] The issue remains whether a regulation has gone "too far." This question was addressed at length in *Lucas v. South Carolina Coastal Council.*[37] This contentious case[38]

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32. *Id.* at 435-36. Justice Marshall continued:

> To the extent that the government permanently occupies physical property, it effectively destroys [the rights to possess, use, and dispose of it]. First, the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space .... Second, the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property .... Finally, even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property.

Id. at 435-36.

33. United States v. Pewee Coal Co., Inc., 341 U.S. 114, 115-17 (1951).

34. *Id.* at 115. The government possessed and operated the mine from May 1 to October 12, 1943. *Id.*

35. *Id.* The Court ruled that a taking had clearly occurred, given the circumstances:

> [The Government] required mine officials to agree to conduct operations as agents for the Government; required the American flag to be flown at every mine; required placards reading "United States Property!" to be posted on the premises; and appealed to the miners to dig coal for the United States as a public duty.

Id. at 116. The Court agreed with the Court of Federal Claims regarding damages, the amount of which was set at $2241.26. *Id.* at 117. Justice Reed, concurring, noted the difficulty inherent in a temporary taking, "especially in the fixing of the just compensation." *Id.* at 119 (Reed, J., concurring). Although Justice Reed was addressing physical takings, his recognition of the valuation problems with temporary takings foreshadows one of the contentious points in temporary *regulatory* takings cases.

36. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922); *see also* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1014, (1992) (explaining that before Justice Holmes's opinion in *Mahon*, "it was generally thought that the Takings Clause reached only a 'direct appropriation' of property").

37. *Lucas*, 505 U.S. at 1006.

reiterated the proposition that a regulation denying all economically beneficial or productive use of property constitutes a taking.[39] The State can avoid paying compensation only if the landowner's title did not include the proscribed uses when he acquired it.[40] The justification for this categorical rule rests on the practical and economic equivalence of physical appropriations and elimination of all beneficial use of land.[41]

Thus, when the South Carolina Legislature enacted the Beachfront Management Act in 1988, two years after David Lucas paid $975,000 for residential property on the Isle of Palms, thereby precluding Lucas from building any permanent structures on his parcels, the State had effectively taken Lucas's property.[42] The South Carolina Supreme Court held that the Beachfront Management Act was a valid exercise of the State's police power to control possible harm to the public interest "occasioned" by Lucas's use of his land.[43] The U.S. Supreme Court conceded that no compensation would be required for a prohibition against "harmful or noxious uses," that is, against a nuisance.[44] But the Just Compensation Clause cannot be avoided with a simple claim of "nuisance."[45] Absent some "background principles" in state property law placing nuisance restrictions on the property, a regulation denying all economically beneficial use of the property constitutes a taking and demands compensation.[46]

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38. *Lucas* was the result of a fractured Court. Justice Scalia wrote the opinion of the Court, in which Chief Justice Rehnquist and Justices White, O'Connor, and Thomas joined. *Id.* at 1005. Justice Kennedy concurred. *Id.* at 1032. Justice Blackmun and Justice Stevens filed dissenting opinions. *Id.* at 1036, 1061. Justice Souter felt the case should have been dismissed because certiorari was improvidently granted. *Id.* at 1076.

39. *Id.* at 1015.

40. *Id.* at 1027.

41. *Id.* at 1017.

42. *Id.* at 1006-07. The case was remanded to allow the State to show that the Beachfront Management Act did not constitute a taking of Lucas's property under the common law nuisance doctrine. *Id.* at 1031-32. South Carolina could not make this showing, notes Kmiec, *supra* note 12, at 151 n.27. The State settled with Mr. Lucas for $425,000 for each of his two lots plus $725,000 for interest, attorneys' fees, and costs. *Id.* The State then sold the lots to a developer for $785,000. *Id.* South Carolina ultimately lost $790,000 on the transaction.

43. *Lucas*, 505 U.S. at 1020-21.

44. *Id.* at 1022.

45. *Id.* at 1026. The Court was suspicious of this pretext:

> [T]he legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated. If it were, departure would virtually always be allowed. The South Carolina Supreme Court's approach would essentially nullify [our] affirmation of limits to the noncompensable exercise of the police power.

Id.

46. *Id.* at 1029. These "background principles," broadly defined, are inherent limitations in the land owner's title arising under the state's police power. *See id.* at 1027. One such limitation is the prohibition against "harmful or noxious uses"—nuisances—by which a land-

C. Regulatory Takings: A Factual Approach

One can imagine many circumstances in which a regulation does *not* deprive a land owner of all economically beneficial use of his property.[47] A landmark preservation ordinance, for example, that prohibits certain types of property development may affect the value of that property without rendering it valueless to the owner.[48] New York City enacted such a law in 1965.[49] The purpose of the law was to protect historic buildings and neighborhoods from demolition.[50] The result, in many circumstances, restricted what property owners could do to their property.[51] This type of regulation, however, is not necessarily a taking.[52]

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use regulation "substantially advances legitimate state interests." *Id.* at 1023-24 (quoting Nollan v. California Coastal Comm'n, 438 U.S. 825, 834 (1987)). The *Lucas* Court noted that a long history of use of similar parcels may provide evidence that a regulatory prohibition lacks any common-law basis, and that it "seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land." *Id.* at 1031. On remand, South Carolina was required to show that the limitations in Mr. Lucas's title were based on common-law principles of nuisance and property law. *Id.* The State failed to make such a showing. *See supra* note 42. One scholar argues that reliance on background principles is the proper analysis. *See* Kmiec, *supra* note 12, at 152. If the legislature alone determined what rights are inherent in title, without any reference to the common law, it would be all too easy to avoid paying compensation for regulatory prohibitions. *Id.* at 153. State courts, rather, are in the best position to determine the background principles of property law as they subtly change over time. *Id.* at 154. The federal courts, then, can use these principles in adjudicating a regulatory takings claim. *Id.*

47. Zoning laws provide an example. 12 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 79C.01 (Michael Allan Wolf ed., 2000) (noting that in *Village of Euclid v. Ambler Realty Co.* the Supreme Court "held that a comprehensive municipal zoning ordinance on its face is a proper exercise of the police power and does not constitute an unconstitutional deprivation of private property"). There are also judicially imposed limitations, e.g., the law of nuisance, and privately imposed restrictions such as covenants, equitable servitudes, and easements. *See Lucas*, 505 U.S. at 1023-24 (noting that the law of nuisance is a traditional judicial limitation on the use of property); 9 POWELL, *supra* § 60.01[2] (stating that "[a] covenant is an agreement or promise of two or more parties that something is done, will be done, *or will not be done*") (emphasis added); 9 *id.* § 60.01[4] (noting that equitable courts expanded enforcement of covenants, hence "equitable servitudes"); 4 *id.* § 34.02[1]-[2] (explaining that easements alter the pre-existing property rights in land).

48. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 107, 131 (1978) ("[A]ppellants, focusing on the character and impact of the New York City law, argue that it effects a 'taking' because its operation has significantly diminished the value of the Terminal site.").

49. *Id.* at 108-09.

50. *Id.* at 109. The underlying rationale of the ordinance sought to promote the beauty, economy, and tourism of the city by preserving its historic areas and landmarks. *Id.*

51. *Id.* at 111 (stating that "[f]inal designation as a landmark results in restrictions upon the property owner's options concerning use of the landmark site"). Landmark designation and the resulting controversies between developers and those who would save historic structures continue to the present time. *See, e.g., It's Battle Stations on Bowery*, N.Y. POST, Aug. 5, 2002, at 1 (chronicling the fight over the Bowery Savings Bank on Manhattan's Lower East Side); Hilarie M. Sheets, *Capturing Destruction at the End of the Track*, NEWSDAY, June

In *Penn Central Transportation Co. v. New York City*, the owners of Grand Central Terminal challenged the New York City landmark preservation law.[53] The Supreme Court held that the regulation was not a taking,[54] noting that "it is not literally accurate to say that [the owners] have been denied *all* use of even those pre-existing . . . rights."[55] The parcel itself remained able to earn a reasonable return, and the owners could still "transfer" the development rights (those rights pertaining to the Terminal site abrogated by the ordinance) to other parcels in the area.[56] The Court also held that both the supposed diminution in value of the terminal and the regulation's interference with investment-backed expectations were factors in finding a taking, but neither was dispositive.[57]

In *Penn Central*, the Terminal owners planned to build an office tower above the existing facade, but the city landmark commission denied their proposals.[58] Penn Central Transportation Co. filed suit in the New York

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14, 2002, at B25 (explaining the continuing controversy over the demolition of Penn Station in 1963—prior to the Landmark Preservation Law—to make way for Madison Square Garden).

52. *Penn Central*, 438 U.S. at 138 (holding that the regulations allowed reasonable uses of the property).

53. *Id.* at 116, 119. Owned by Penn Central Transportation Co. and still in use as a railroad station, the terminal was one of the buildings designated as a landmark under the ordinance. *Id.* at 115-16. The building "is regarded not only as providing an ingenious engineering solution to the problems presented by urban railroad stations, but also as a magnificent example of the French beaux-arts style." *Id.*

54. *Penn Central*, 438 U.S. at 138.

55. *Id.* at 137. The court continued:

> Their ability to use these rights has not been abrogated; they are made transferable to at least eight parcels in the vicinity of the Terminal, one or two of which have been found suitable for the construction of new office buildings. Although appellants and others have argued that New York City's transferable development-rights program is far from ideal, the New York courts here supportably found that, at least in the case of the Terminal, the rights afforded are valuable. While these rights may well not have constituted "just compensation" if a "taking" had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation.

Id.

56. *Id.* at 129. Under the preservation ordinance, owners who had not fully developed their property could transfer their development rights to neighboring parcels. *Id.* at 113-14.

57. *Id.* at 124, 131. Investment-backed expectations focus on "the specific uses for the subject property that were contemplated by the property owner when the property was acquired." 13 POWELL, *supra* note 47, § 79F.05[4][a][ii][B]. These expectations must be reasonable in relation to the purchase price. 13 *id.* In addition, the expectations must be further qualified when the property is located in a heavily regulated area or where regulations are expected to change over time. 13 *id.*

58. *Penn Central*, 438 U.S. at 116. The developers had two proposals, one for a fifty-five-story building and one for a fifty-three-story tower. *Id.* at 116-17. The second proposal was more daring than the first, calling for demolition of a portion of the Terminal, including the famous 42nd Street facade. *Id.* at 117. The commission dismissed the second proposal

Supreme Court claiming that the preservation ordinance constituted a taking by preventing construction on the property.[59] The trial court found a taking, but the appellate division reversed,[60] and the U.S. Supreme Court affirmed.[61]

With respect to investment-backed expectations, the Court has consistently recognized that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[62] The classic land-use regulations adversely affecting property values are zoning laws.[63] Zoning laws, upheld since *Village of Euclid v. Ambler Realty Co.*,[64] "have been viewed as permissible governmental action *even when prohibiting the most beneficial use of the property*."[65] But zoning laws often affect property differently than

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summarily, noting that "[t]o protect a Landmark, one does not tear it down. To perpetuate its architectural features, one does not strip them off." *Id.* (citation omitted). The first proposal, that of merely balancing an office tower on top of the terminal, received greater consideration but was still denied:

> to balance a 55-story office tower above a flamboyant Beaux-Arts facade seems nothing more than an aesthetic joke. Quite simply, the tower would overwhelm the Terminal by its sheer mass. The "addition" would be four times as high as the existing structure and would reduce the Landmark itself to the status of a curiosity. Landmarks cannot be divorced from their settings—particularly when the setting is a dramatic and integral part of the original concept. The Terminal, in its setting, is a great example of urban design. Such examples are not so plentiful in New York City that we can afford to lose any of the few we have. And we must preserve them in a meaningful way—with alterations and additions of such character, scale, materials and mass as will protect, enhance and perpetuate the original design rather than overwhelm it.

Id. at 117-18 (citation omitted).

59. *Id.* at 119. Aside from submitting additional plans for the commission's consideration, Penn Central had no choice but to file a takings claim. *Id.* at 118-19. Because the site was tax-exempt, "suitable for its present and many future uses, and was not the subject of a contract of sale, there were no further administrative remedies available." *Id.* at 118.

60. *Id.* at 119. The New York Court of Appeals affirmed, holding that there was no taking because the City did not assume control of the site. *Id.* at 120-21. Specifically, the court concluded that, (1) the landmark law did not prohibit the use for which the building was employed; (2) Penn Central failed to show that it could not earn a reasonable return; (3) even though the Terminal operated at a loss (or failed to earn a reasonable profit), some of the income from Penn Central's other real estate holdings in the area must be imputed to the Terminal site; and (4) the transferability of the development rights above the Terminal were extremely valuable. *Id.* at 121-22.

61. *Id.* at 138.

62. *Id.* at 124 (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922)).

63. *Id.* at 125.

64. 272 U.S. 365 (1926).

65. *Penn Central*, 438 U.S. at 125 (emphasis added).

a regulation challenged as a taking.[66] Moreover, a regulation that prohibits a beneficial use of property and causes significant harm need not be a taking.[67] Thus, *Penn Central* reaffirms the Court's land-use planning jurisprudence and applies those rules to regulatory actions that may be challenged as takings.

The Supreme Court's most recent foray, prior to *Tahoe-Sierra*, into the regulatory takings arena was *Palazzolo v. Rhode Island*, which reiterated that the categorical rule of *Lucas* does not apply to parcels that retain some value.[68] In 1959, Mr. Palazzolo purchased three undeveloped parcels of land in Westerly, Rhode Island, with the intention of subdividing the parcels into eighty lots.[69] Between the purchase date and 1966, the State denied all attempts to develop the property.[70] In 1971, Rhode Island created the Coastal Resources Management Council to protect the state's shoreline.[71] Palazzolo resumed his efforts to develop the property in 1983.[72] The Council denied his applications, and Palazzolo filed an inverse condemnation suit claiming that the State had taken his property without just compensation.[73]

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66. *See id.* (stating that "[z]oning laws generally do not affect existing uses of real property, but 'taking' challenges have also been held to be without merit in a wide variety of situations when the challenged governmental actions prohibited a beneficial use to which individual parcels had previously been devoted and thus caused substantial individualized harm").

67. *Id.* at 125-26 (citing Miller v. Schoene, 276 U.S. 272, 279 (1928)) (holding that the destruction of one type of property (trees) to save another type that, "in the judgment of the legislature," is more important, is not a taking requiring compensation).

68. *Palazzolo*, 535 U.S. 606, 631-32 (2001).

69. *Id.* at 613. Mr. Palazzolo formed Shore Gardens, Inc. (SGI) with business associates for the purpose of purchasing and holding the property. *Id.* The company's first development proposal included seventy-four lots over approximately twenty acres. *Id.*

70. *Id.* at 613-14. Because most of the land consisted of salt marsh and was subject to tidal flooding, soil fill was required, in some places as much as six feet, before any significant development could take place. *Id.* The first application, in 1962, was denied by the Rhode Island Division of Harbors and Rivers for "lack of essential information." *Id.* at 614. The Rhode Island Department of Natural Resources denied the second and third applications after initial approval was withdrawn, and SGI did not appeal these denials. *Id.*

71. *Id.* The Council promulgated regulations that severely limited development on "coastal wetlands" such as Palazzolo's. *Id.*

72. *Id.* Palazzolo, rather than SGI, spearheaded the development efforts in the 1980s because SGI's corporate charter had been revoked for failure to pay taxes. *Id.* As a matter of law, then, Palazzolo became the sole title holder to the property. *Id.* This was a significant issue in both the state courts and the Supreme Court. The State argued that with this change in title, Palazzolo took title subject to the existing coastal wetlands regulations. *See* Palazzolo v. State, 746 A.2d 707, 716 (R.I. 2000). While the Rhode Island courts agreed, the Supreme Court did not. *Palazzolo*, 533 U.S. at 616, 626-30. This issue, however, is not critically important to the issues in *Lake Tahoe*.

73. *Palazzolo*, 533 U.S. at 615-16. An inverse condemnation suit is "an action brought by a property owner for compensation from a governmental entity that has taken the owner's

Palazzolo relied on *Lucas*, arguing that the Council's actions had deprived him of all "economically beneficial use" of his land.[74] This argument was problematic at best because the Rhode Island Supreme Court accepted the trial court's finding that Palazzolo's parcel retained $200,000 in development value.[75] Before the U.S. Supreme Court, Palazzolo accepted this finding, but he continued to maintain that the regulation constituted a total taking under *Lucas* because he was left with "a few crumbs of value."[76] The Supreme Court disagreed, noting that "[a] regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property 'economically idle.'"[77] In the end, the Court held that if land retains some value, even if only on a portion of the tract, there is no taking.[78]

Justice O'Connor's concurrence supplied the most relevant part of *Palazzolo*, for the purpose of an analysis of *Tahoe-Sierra*, where she stated, "*Penn Central* does not supply mathematically precise variables, but instead provides important guideposts that lead to the ultimate determination whether just compensation is required."[79] Justice O'Connor argued that the Rhode Island Supreme Court, in denying Palazzolo's claim, relied too heavily on the investment-backed expectations prong of *Penn Central*.[80] She reasoned that the State would become too powerful if investment-backed expectations were given special prominence.[81] These expectations are only

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property without bringing formal condemnation proceedings." BLACK'S LAW DICTIONARY 287 (7th ed. 1999).

74. *Palazzolo*, 533 U.S. at 615-16. Palazzolo sought damages of $3,150,000 based on the appraised value of his planned seventy-four-lot subdivision. *Id.* at 616.

75. *Id.* (citing *Palazzolo*, 746 A.2d at 715).

76. *Id.* at 630-31 (citing Brief for Petitioner at 37).

77. *Id.* at 631 (quoting Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992)).

78. *Id.* at 630-32. The case was remanded for consideration of Palazzolo's *Penn Central* claim: whether the regulations interfered with his investment-backed expectations. *Id.* at 632. Because Palazzolo took title from SGI in 1978, the Rhode Island Courts held that he did so with notice of the restrictions. *Palazzolo*, 746 A.2d at 716-17. Thus the *Penn Central* test was not needed, as he took title with no expectations of development. *See supra* note 72. The Supreme Court reversed this portion of the Rhode Island courts' holdings, which necessitates an analysis under *Penn Central*. *Palazzolo*, 533 U.S. at 616, 626-30. As of the date of this writing, the Rhode Island Supreme Court has remanded the case to the trial court for such an analysis. Palazzolo v. State *ex rel.* Tavares, 785 A.2d 561 (R.I. 2001).

79. *See Palazzolo*, 533 U.S. at 632, 634 (O'Connor, J., concurring).

80. *Id.* at 634. In addition, Justice O'Connor noted that "the state of regulatory affairs at the time of acquisition is not the only factor that may determine the extent of investment-backed expectations." *Id.* The Court, she said, has never denied a takings claim solely because the land owner lacked a personal investment in the land acquired after the enactment of a restrictive regulation. *Id.* at 634-35. Instead, the courts must focus on "those circumstances which are probative of what fairness requires in a given case." *Id.* at 635.

81. *Id.* at 635 (noting that the State could "redefine property rights upon passage of title").

one part of the analysis; "[t]he temptation to adopt what amount to *per se* rules in either direction must be resisted."[82] It is precisely this approach that was reaffirmed in *Tahoe-Sierra*.

D. Regulatory Takings: Temporary Restrictions on Property Use

The method used to determine whether a regulation amounts to a permanent taking is similar to that used in allegations of temporary takings.[83] Chief Justice Rehnquist, writing for the majority in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* argued that temporary takings "are not different in kind from permanent takings, for which the Constitution clearly requires compensation."[84] The Chief Justice's argument is important to the facts of *Tahoe-Sierra* because moratoria are inherently temporary.[85]

The question in *First English* was whether compensation is required for the period prior to the time a court declares the regulation a taking.[86] Compensation is required both for temporary *physical* takings[87] and in situations where a regulation denies an owner all economically beneficial use of his land.[88] *First English*, like the cases before it, did not set any per se standards.[89]

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82. *Id.* at 636. Justice O'Connor insisted that "[t]he Takings Clause requires careful examination and weighing of all the relevant circumstances in this context." *Id.*

83. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 318 (1987). The Chief Justice noted that the "Fifth Amendment's just compensation provision is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Id.* at 318-19 (citation omitted). Justice Stevens was skeptical that permanent and temporary regulatory takings were the same and dissented: "[u]ntil today, we have repeatedly rejected the notion that all temporary diminutions in the value of property automatically activate the compensation requirement of the Takings Clause." *Id.* at 332. Justice Stevens delivered the opinion of the Court in *Tahoe-Sierra*. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 306 (2002).

84. *First English*, 482 U.S. at 318. This idea was not adopted by the majority in *Tahoe-Sierra*. *See* 535 U.S. at 324.

85. *See* BLACK'S LAW DICTIONARY 1026 (7th ed. 1999) (defining "moratorium" as a "postponement," "delay," or "suspension").

86. *First English*, 482 U.S. at 306-07. This narrow issue allowed the *Tahoe-Sierra* Court to find that the temporary takings in the case before it did not require compensation. *Tahoe-Sierra*, 535 U.S. at 328 (noting that "it is important to recognize that we did not address in [*First English*] the quite different and logically prior question whether the temporary regulation at issue had in fact constituted a taking").

87. United States v. Pewee Coal Co., 341 U.S. 114, 115-17 (1951).

88. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027 (1992). *First English* involved a regulation that deprived the property owner of all use of his land, as in *Lucas*. *First English*, 482 U.S. at 322.

89. The Court was careful to limit its holding to the question presented. Foreshadowing the debate in *Tahoe-Sierra*, the Court stated,

First English Evangelical Lutheran Church owned a twenty-one-acre parcel in the Angeles National Forest that it used as a campground.[90] Located along Mill Creek, buildings stood on twelve acres of flat land.[91] In 1978, significant flooding destroyed the campground.[92] The County of Los Angeles responded to the flood by adopting Interim Ordinance No. 11,855 in January 1979, which prohibited any construction on the Church's land.[93] The Church immediately filed a complaint claiming that the ordinance denied it all use of the land;[94] the California courts denied its claim.[95]

The Supreme Court reversed, noting that the merits of the Church's takings claim had not yet been addressed, and the prohibition faced by the Church was substantial.[96] The fact that the ordinance had not been invalidated as a taking was irrelevant to the compensation issue.[97] The

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> We . . . do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us. We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations.

First English, 482 U.S. at 321.

90. *Id.* at 307. The campground was known as "Lutherglen" and was used as a retreat and recreation area for handicapped children. *Id.*

91. *Id.* Lutherglen consisted of a dining hall, two bunkhouses, a caretaker's lodge, an outdoor chapel, and a footbridge across the creek. *Id.*

92. *Id.* The flooding was precipitated by a forest fire upstream in 1977, which created a significant flood hazard. *Id.*

93. *Id.* The ordinance was for the "immediate preservation of the public health and safety." *Id.* (citation omitted).

94. *Id.* at 308. The Church also blamed the county and its Flood Control District for the flood hazards created upstream and sought to recover in inverse condemnation and in tort for the Flood Control District's cloud seeding during the storm that led to the flood. *Id.*

95. *Id.* at 309. The California courts relied primarily on *Agins v. City of Tiburon*, 598 P.2d 25 (Cal. 1979), *aff'd on other grounds*, 447 U.S. 255 (1980). *First English*, 482 U.S. at 308-09. *Agins* held that a landowner cannot seek recovery by an inverse condemnation suit based solely on a regulatory taking; instead, the landowner must first seek to have the regulation invalidated. *Agins*, 598 P.2d at 29-31. But the U.S. Supreme Court found the question ripe for review in *First English*:

> Our cases have also required that one seeking compensation must "seek compensation through the procedures the State has provided for doing so" before the claim is ripe for review. It is clear that appellant met this requirement. Having assumed that a taking occurred, the California court's dismissal of the action establishes that "the inverse condemnation procedure is unavailable . . . ." The compensation claim is accordingly ripe for our consideration.

First English, 482 U.S. at 312 n.6 (citations omitted).

96. *First English*, 482 U.S. at 319. The California courts never reached the merits of the case because of their reliance on *Agins*. *See supra* note 95. The California Supreme Court denied review in 1985, effectively extending the ban on development for six years. *See First English*, 482 U.S. at 319.

97. *First English*, 482 U.S. at 320-21. This is because "[o]nce a court determines that a taking has occurred, the government retains the whole range of options already available—

Court noted that the valuation of property taken is to be calculated as of the time of restriction.[98] Because the Los Angeles County ordinance denied the Church all use of its property for a prolonged period of time, mere invalidation of the ordinance without compensation for the intervening time was insufficient.[99] The Court stopped short of a bright-line regulatory takings rule, however, noting in dictum that depreciation in value due to mere enactment of regulatory prohibitions is not chargeable to the government.[100]

II. *TAHOE-SIERRA*: CONTINUITY OR RADICAL CHANGE?

Before *Lucas*, *First English*, or *Palazzolo* reached the Supreme Court, 449 individual and corporate plaintiffs began fighting for just compensation based on the regulatory actions of the TRPA.[101] *Tahoe-Sierra* traveled its long and winding journey to the Supreme Court while the Court was still shaping its regulatory takings jurisprudence.[102] The facts of the case, although analogous to *Penn Central*, *Palazzolo*, and *First English* in part, raised new issues.[103] It is appropriate, then, to look to *Tahoe-Sierra* as the most recent culmination of the Court's regulatory takings law.

A. Good Planning or Theft?: The Regulations that Precipitated an Eighteen-Year Battle

Swift development began creating problems in the Lake Tahoe basin as early as the 1960s.[104] The lake's formerly deep blue color[105] has deteriorated

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amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain." *Id.* at 321. The Court also noted that "no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."

98. *Id.*

99. *Id.* at 322. The case was remanded for consideration of the valuation question. *Id.*

100. *Id.* at 320.

101. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F. Supp. 2d 1226, 1229 (D. Nev. 1999). The plaintiffs—individuals, corporations, partnerships, and nonprofit organizations—all owned property in the Lake Tahoe Basin. *Id.* The complaint in this case was filed on June 25, 1984, but the trial did not begin until December 1, 1998. *Id.* at 1229, 1236.

102. *See id.* at 1229. The trial court noted that in the fourteen and one-half years of litigation before trial, the case resulted in three opinions from the Ninth Circuit, five published district court opinions, and many more unpublished orders. *Id.* The action was originally filed in two parts: one by California plaintiffs in the U.S. District Court for the Eastern District of California, another by the Nevada plaintiffs in the District of Nevada, where they were consolidated in 1992. *Id.* at 1236. The numerous opinions and orders served mainly to narrow the issues for trial and to dispose of claims that were time-barred or moot. *See id.* at 1237-38.

103. *See supra* Parts I.C.-D.

104. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 307 (2002). The California Supreme Court, referencing the development around Lake Tahoe,

over the decades.[106] Not only has the lake's clarity decreased, but the water has almost turned green.[107] The California and Nevada legislatures, along with the federal government, created the TRPA in 1968 to halt (and hopefully reverse) this process.[108] The stated purpose of the TRPA is "to coordinate and regulate development in the Basin and to conserve its

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noted nearly thirty years ago that "the region's natural wealth contains the virus of its ultimate impoverishment." Tahoe-Sierra, 34 F. Supp. 2d at 1232 (quoting People *ex rel.* Younger v. County of El Dorado, 487 P.2d 1193-94 (Cal. 1971)). The following facts illustrate the development in the Lake Tahoe Basin:

> Most of the development and urbanization has occurred since the 1960's [sic], during and following the Squaw Valley Winter Olympics. Between 1960 and 1990, the Basin's population multiplied fivefold. Most of that population boom—about 80 percent—ended up on the California side. By 1991 the Basin held some 24,500 single-family homes, 14,100 multi-family homes, 12,000 tourist accommodations units, and 2,000 campground units. There are some 20 developed towns, and casino gaming areas are located at both north and south ends of the Lake. The Basin continues to be an extremely popular year-round destination for visitors seeking water sports, gaming, hiking, sailing, fishing, and many other forms of recreation. The year round resident population of [sic] is dwarfed by the estimated three million visitors a year.

Tahoe Center for a Sustainable Future, *The Lake Tahoe Basin*, *at* http://ceres.ca.gov/tcsf/PresidentialEvent/lake_tahoe.html (last updated June 4, 1997).

105. *Tahoe-Sierra*, 535 U.S. at 307 (noting that "Lake Tahoe's exceptional clarity is attributed to the absence of algae that obscures the waters of most other lakes").

106. *Id.* While the record does not reveal the exact level of deterioration, TRPA officials are hopeful that the problem is beginning to turn around. *See, e.g.*, Glen Martin, *Unclear If Tahoe Clarity on Mend; 2001 Improvement Could Be Anomaly*, S.F. CHRON., June 17, 2002, at B1. The Secchi disc, a small white disc used to measure water visibility, could be seen at a depth of twenty-three meters in 2001, three meters deeper than in 2000. *Id.* This could simply be the result of 2001's drought, but officials at the TRPA are optimistic that water quality is improving. *Id.* The goal is a return to visibility down to 29.6 meters, which was the level in the 1970s. *Id.* Notwithstanding the recent improvement, reaching the goal of 29.6 meters could still take years, or decades. *Id.*

107. *Tahoe-Sierra*, 535 U.S. at 308. The Court adopted the findings of the district court, noting that "[t]he upsurge of development in the area has caused 'increased nutrient loading of the lake largely because of the increase in impervious coverage of land in the Basin resulting from that development.'" *Id.* (quoting *Tahoe-Sierra*, 34 F. Supp. 2d at 1231). The Court recounted the district court's findings:

> "Impervious coverage—such as asphalt, concrete, buildings, and even packed dirt—prevents precipitation from being absorbed by the soil. Instead, the water is gathered and concentrated by such coverage. Larger amounts of water flowing off a driveway or a roof have more erosive force than scattered raindrops falling over a dispersed area—especially one covered with indigenous vegetation, which softens the impact of the raindrops themselves." Given this trend, the District Court predicted that "unless the process is stopped, the lake will lose its clarity and its trademark blue color, becoming green and opaque for eternity."

Id. (quoting *Tahoe-Sierra*, 34 F. Supp. 2d at 1231).

108. Tahoe Reg'l Planning Compact, Pub. L. No. 91-148, 83 Stat. 360 (1969).

natural resources."[109] Specifically, the TRPA divides land into "land capability districts" based on the land's potential for runoff,[110] places development restrictions on those parcels according to their district designation, and creates water quality plans to comply with the Clean Water Act.[111]

1. The TRPA Classifies Land Into Land-Capability Districts

In 1972, the TRPA began in earnest its coordination of the development in the Basin.[112] The TRPA's primary business was to set standards for preserving the lake.[113] To this end, the TRPA enacted Ordinance No. 4, which classified land in the Basin into "land capability districts" numbered one through seven.[114] The TRPA designated the most sensitive areas, land capability districts one through three, as Stream Environment Zones (SEZs), and less environmentally-fragile parcels received higher numbers.[115] A level one or level two designation was a virtual death knell to the property's development capacity; in those cases, only one percent of the land could be covered by "impervious coverage."[116] "Impervious coverage"—natural land covered by unnatural creations such as parking lots or homes—causes significantly more runoff, which lies at the root of the lake's clarity problems.[117]

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109. Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency, 440 U.S. 391, 394 (1979).

110. *Tahoe-Sierra*, 535 U.S. at 309. Focused restrictions on "high hazard" areas are essential to solving the lake's water clarity problems. *Id.* at 308. These "high hazard" areas consist of "areas in the Basin that have steeper slopes [that] produce more runoff" and "areas near streams or wetlands . . . because, in their natural state, they act as filters for much of the debris that runoff carries." *Id.* These areas have been the focus of the most onerous development restrictions. *Id.* at 308-09.

111. *Id.* at 309-10. The compact creating the TRPA underwent significant revisions in 1980. *Id.* These revisions "redefined the structure, functions, and voting procedures" and in an attempt to remedy the earlier ineffectiveness of the agency. *Id.* at 310.

112. *Tahoe-Sierra*, 34 F. Supp. 2d at 1232. Coordination was needed because the land in the Basin encompasses two states, five counties, multiple municipalities, and U.S. government property owned by the U.S. Forest Service. *Id.*

113. *Id.*

114. *Id.* These designations, derived from the so-called "Bailey system," were based on the steepness of the land, flood hazards, water tables, soil drainage, landslides, the amount and type of flora and fauna, and erodibility. *Id.*

115. *Id.* at 1231-32.

116. *Id.*

117. *Id.* Impervious coverage causes runoff to reach the Lake because, as the natural environment is replaced by unnatural changes, the ground is no longer able to filter runoff before it reaches the water's edge. *Id.* at 1231. Stream Environment Zones act as natural filters, and when replaced by impervious coverage, cannot fulfill this function. *Id.*

2. The TRPA is Forced to Enact Two Development Moratoria

Despite the TRPA's efforts, Ordinance No. 4 allowed too many exceptions and as a result, failed to solve many problems.[118] In response, California and Nevada adopted a major overhaul of the TRPA in 1980, and the revamped TRPA began tightening restrictions on development.[119] On June 25, 1981, the TRPA enacted the first moratorium at issue in *Tahoe-Sierra*: Ordinance 81-5.[120] Ordinance 81-5 prohibited nearly all residential construction and completely banned commercial construction on SEZs and land capability districts 1-3 until the TRPA could promulgate a more comprehensive regional plan.[121] Unable to adopt the plan within the period prescribed by its enabling statute, the TRPA enacted a companion moratorium, Ordinance 83-21.[122] Ordinance 83-21 called for a complete halt to all project reviews and proposals.[123] The TRPA adopted its regional plan in April 1984, and Ordinance 83-21 expired.[124] Many of the provisions of Ordinance 81-5 remained in effect for a period of thirty-two months.[125]

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118. *Id.* at 1233. The district court explained that Ordinance No. 4 did not significantly limit residential building and noted that the State of California was so dissatisfied with the TRPA's progress that it withdrew its funding from the TRPA and began imposing stricter standards on the California side of the lake. *Id.*

119. *Id.* First, the TRPA defined the word "project" to include "an activity undertaken by any person, including any public agency, if the activity may substantially affect the land, water, air, space or any other natural resources of the region." *Id.* (citation omitted). Second, the reorganization of the TRPA required that the TRPA itself approve any "projects." *Id.* For the most part, this meant that prior to any new home construction on class 1-3 and SEZ lands, landowners were required to obtain a permit from the TRPA. *Id.*

120. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 533 U.S. 302, 311 (2002). The district court construed the ordinance as prohibiting "construction or other activity that involved the removal of vegetation or the creation of land coverage on all SEZ lands [in both California and Nevada], as well as on class 1, 2, and 3 lands in California." *Tahoe-Sierra*, 34 F. Supp. 2d at 1233-35.

121. *Tahoe-Sierra*, 34 F. Supp. 2d at 1233-34. The Compact that overhauled the TRPA in 1980 required this comprehensive plan, and required the TRPA to adopt certain environmental standards within eighteen months of the 1980 overhaul and mechanisms to enforce those standards within one year of their adoption. *Id.* at 1233.

122. *Id.* at 1235.

123. *Id.* The restrictions were greater in California. *See supra* note 120. The State of California sought an injunction against the TRPA's comprehensive plan the day of its adoption in 1984. *Tahoe-Sierra*, 535 U.S. at 312. The district court granted this injunction, which remained in force for three more years, yet the Supreme Court did not consider the injunction in its analysis. *Id.*

124. *Tahoe-Sierra*, 34 F. Supp. 2d at 1236.

125. *Tahoe-Sierra*, 535 U.S. at 312. The majority viewed the moratoria as lasting only thirty-two months, while the dissenting justices argued that the time during which the preliminary injunction was in force should be added to the thirty-two month period. *Id.* at 313-14, 313 n.8.

3. Lake Tahoe Basin Property Owners Cry Foul

Basin property owners filed complaints against the TRPA, individual members of its Board, and the States of Nevada and California seeking declaratory and injunctive relief for their claim that the moratoria constituted a taking.[126] The plaintiffs also claimed that they were charged assessments on their land for services that were rendered useless by the moratoria.[127] At first, the plaintiffs were unsuccessful, but the Ninth Circuit allowed some of the takings claims to survive on remand.[128] After a bench trial, the district court found that the moratoria did result in takings and ordered compensation.[129] The court of appeals reversed.[130]

B. The Supreme Court Eschews a Categorical Rule

In one sense, the *Tahoe-Sierra* majority opinion seemed merely to solidify prior regulatory takings jurisprudence. At the same time, the Court made some powerful statements regarding the power of governments—or quasi-governmental units like the TRPA—to tinker with significant property rights in the name of land-use planning. Justice Stevens, writing for six members of the Court, began by quoting Justice O'Connor's concurring opinion in *Palazzolo* and remarked that the Court designed its regulatory takings analysis to allow "careful examination and weighing of all the relevant circumstances."[131] As in the takings cases before *Tahoe-Sierra*, Justice Stevens pointed out the differences between physical appropriations and regulations that prohibit private use of land.[132] Then, near the end of the general discussion of regulatory takings law, Justice Stevens briefly discussed *First English*, noting that the Court limited its holding to a specific

126. *Tahoe-Sierra*, 34 F. Supp. 2d at 1236-37. The complaint also alleged violations of the Equal Protection and Due Process Clauses and violations of sections 1983 and 1985 of the Civil Rights Act of 1964. *Id.*

127. *Id.* at 1237. Sewer service is one example of an assessment from which the owner of an undeveloped parcel would receive little benefit. *Id.*

128. *Id.* at 1237-39. This process actually involved two trips to the court of appeals; after the second round of arguments and opinions, the issues were essentially reduced to what reached the Supreme Court. *Id.*

129. *Id.* at 1255. Although the court found for the defendants under the *Penn Central* theory, it held that the moratoria constituted a taking under *Lucas* for the thirty-two month period. *Id.* at 1248, 1251.

130. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 216 F.3d 764, 782 (9th Cir. 2000) (affirming the *Penn Central* analysis but rejecting the conclusion based on *Lucas*).

131. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322 (2002) (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring)).

132. *Id.* at 322-25.

ordinance and suggested that the *First English* rule might not apply to "normal delays" inherent in zoning and planning.[133]

After framing the issues, the Court discussed how the district court erred in applying *Lucas*. The Court noted that the *Lucas* categorical rule does *not* apply to temporary restrictions, although one may logically draw this conclusion from the text of *Lucas* itself.[134] The Court stated that if a landowner's interest in property could be segmented into individual temporal pieces, any delay placed on development, whether a moratorium or permit application, would be considered a taking.[135] This view, the Court asserted, "ignores *Penn Central*'s admonition that in regulatory takings cases we must focus on 'the parcel as a whole.'"[136] Because the moratoria did not constitute a taking of the entire ownership interest, the appropriate analytical framework was *Penn Central*, not *Lucas*.[137]

The ultimate question for the Court was whether considerations of "fairness and justice" required a new categorical rule, because *Lucas* was not applicable, or an application of the *Penn Central* standards.[138] The

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133. *Id.* at 329. Some commentators suggest that this distinction is not accurate. J. David Breemer, *Temporary Insanity: The Long Tale of* Tahoe-Sierra Preservation Council *and Its Quiet Ending in the United States Supreme Court*, 71 FORDHAM L. REV. 1, 24 (2002). Breemer notes that the Court's rationale is "uncomfortably similar to Stevens's own *dissenting* opinion in *First English*." *Id.* Yet Breemer acknowledges that *First English* did not resolve the question of when a temporary regulation constitutes a taking; it only held that compensation is due when a taking occurs. *Id.* at 25. The debate depends on whether one views temporary and permanent regulatory takings as different. This schism is discussed in parts II.C. and III.A., *infra*.

134. *Tahoe-Sierra*, 535 U.S. at 330-31.

135. *Id.* at 331. The Court explained why the district court erred in disaggregating the petitioners' property into temporal segments for purposes of a takings analysis:

> With property so divided, every delay would become a total ban; the moratorium and the normal permit process alike would constitute categorical takings. Petitioners' "conceptual severance" argument is unavailing because it ignores *Penn Central*'s admonition that in regulatory takings cases we must focus on "the parcel as a whole." . . . Hence, a permanent deprivation of the owner's use of the entire area is a taking of "the parcel as a whole," whereas a temporary restriction that merely causes a diminution in value is not. Logically, 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.

Id. at 331-32 (citations omitted).

136. *Id.* at 331 (quoting Penn Central Transp. Co. v. New York City, 438 U.S. 104, 130-31 (1978)).

137. *Id.* at 331.

138. *Id.* at 334. The Court was willing to consider the possible implications of "fairness and justice" in this case and the possible rule that might result:

> First, even though we have not previously done so, we might now announce a categorical rule that, in the interest of fairness and justice, compensation is required whenever government temporarily deprives an owner of all economically viable use of her property. Second, we could craft a narrower rule that would cover all temporary land-use restrictions except those "normal delays in obtaining building

Court rejected the former alternative because "[a] rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decisionmaking."[139] The Court instead adopted the methodology espoused by Justice O'Connor in her *Palazzolo* concurrence.[140] Because even a narrowly circumscribed per se rule might still require compensation for the most routine delays, and because careful planning is in everyone's best interest, the totality of the circumstances should be evaluated.[141] In this case, because the district court determined that thirty-two months was not an unreasonable amount of time to formulate the TRPA regional plan, the moratoria did not constitute a taking.[142]

C. The Chief Justice's Dissent: Six Years, Not Thirty-Two Months

The Chief Justice began his dissent with the *Lucas* premise: when a government deprives landowners of all economically beneficial use of their land, the Takings Clause requires compensation.[143] That premise was the extent of the agreement between the dissenters and the majority. Chief

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> permits, changes in zoning ordinances, variances, and the like" .... Third, we could adopt a rule . . . that would "allow a short fixed period for deliberations to take place without compensation—say maximum one year—after which the just compensation requirements" would "kick in." Fourth, ... we might characterize the successive actions of TRPA as a "series of rolling moratoria" that were the functional equivalent of a permanent taking. Fifth, were it not for the findings of the District Court that TRPA acted diligently and in good faith, we might have concluded that the agency was stalling in order to avoid promulgating the environmental threshold carrying capacities and regional plan mandated by the 1980 Compact. Sixth, apart from the District Court's finding ... petitioners might have argued that the moratoria did not substantially advance a legitimate state interest. Finally, if petitioners had challenged the application of the moratoria to their individual parcels, instead of making a facial challenge, some of them might have prevailed under a *Penn Central* analysis.

Id. at 333-34 (citations omitted). This last consideration hints at a fatal flaw in the petitioners' argument. The petitioners may have prevailed if they challenged the moratoria *as applied* to their individual parcels. The Court noted, however, that its ruling was limited by the facts that the grant of certiorari did not allow consideration of the last four theories, recovery under a bad faith theory was limited by the district court's express findings to the contrary, and a *Penn Central* analysis was foreclosed because the petitioners did not appeal the district court's judgment that the facts did not support a *Penn Central* analysis. *Id.* at 334.

139. *Id.* at 335. The Court surmised that a categorical rule requiring compensation for deprivation of all economic use would apply to building code application delays, zoning ordinance changes and variances, delays inherent in the investigation of crime scenes, health codes, fires, and other routine delays. *Id.* at 334-35. The Court felt that such a severe rule should be the product of legislative deliberation. *Id.* at 335.

140. *Id.* at 335.

141. *See id.* at 338-39.

142. *See id.* at 341-42.

143. *Id.* at 343 (Rehnquist, C.J., dissenting).

Justice Rehnquist, in contrast to the majority and the Ninth Circuit, calculated the taking in *Tahoe-Sierra* by including the moratoria *and* other delays in the case to reach a total of six years.[144] The Chief Justice concluded that the adoption of the 1984 Regional Plan left the landowners in the same position as they were prior to its enactment: unable to build on their land.[145]

This theory relied in large part on causation arguments.[146] The Chief Justice admitted that the 1984 Regional Plan did allow construction contingent on the approval of permits by the TRPA, but he argued that, in fact, permits were never issued.[147] Because the Plan would have allowed construction in violation of other existing ordinances, the district court issued an injunction that lasted for seven years.[148] The Chief Justice argued that the TRPA was responsible for the promulgation of its own regulations and compliance with the Compact so the six-year span—from the enactment of Ordinance 81-5 in 1981 to 1987—should control.[149] Without the ordinances and the preliminary injunction they precipitated, the 1984 Plan would have allowed the construction of single-family homes with permits.[150] Chief Justice Rehnquist argued that the TRPA should have foreseen that its 1984 Plan would conflict with earlier ordinances with the effect of continuing the building prohibition.[151]

Although he calculated a taking of nearly six years, the Chief Justice was still confronted with the Court's holding that a temporary taking must be

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144. *Id.* (Rehnquist, C.J., dissenting). The Chief Justice remarked, "[B]ecause a ban on all development lasting almost six years does not resemble any traditional land-use planning device, I dissent." *Id.* The majority and the court of appeals considered only the period during which Ordinance 81-5 and Resolution 83-21 prohibited most development in the basin. *Id.* at 313-14.

145. *Id.* at 344 (Rehnquist, C.J., dissenting). The Chief Justice did not consider himself bound by the appellate court's "flawed determination." *Id.*

146. *Id.* at 344-45 (Rehnquist, C.J., dissenting). Because the plaintiffs sued under § 1983 of the Civil Rights Act, they were required to demonstrate that it was the defendant's conduct that caused their injury. *See id.* Chief Justice Rehnquist felt that the TRPA "was undoubtedly the 'moving force' behind petitioners' inability to build on their land...." *Id.* at 345.

147. *Id.* at 344 (Rehnquist, C. J., dissenting). This reliance on judicial hindsight was expressly rejected by the majority. *Id.* at 334.

148. *Id.* at 344-45 (Rehnquist, C.J., dissenting). The Plan would have allowed 42,000 metric tons of soil to erode, which exceeded the permissible amount under Resolution 82-11. *Id.* (citing California v. Tahoe Reg'l Planning Agency, 766 F.2d 1308, 1315 (9th Cir. 1985)). In addition, the district court found that the Plan did not comply with the Compact establishing the TRPA. *Id.*

149. *Id.* at 345 (Rehnquist, C.J., dissenting).

150. *Id.* at 346 (Rehnquist, C.J., dissenting).

151. *See id.* (Rehnquist, C.J., dissenting). The majority also rejected this view, based on the district court's findings that the TRPA acted diligently and in good faith. *Id.* at 334.

analyzed under *Penn Central*, not *Lucas*.[152] The Chief Justice began by arguing that the distinction between temporary and permanent regulatory prohibitions is dubious.[153] He relied heavily on the *Lucas* categorical rule, that total deprivation, temporary or not, is the equivalent of a physical appropriation from the landowner's perspective.[154] The Chief Justice acknowledged, but dismissed, the majority's concern that a categorical rule might cause ordinary delays in the development process to be deemed takings.[155]

Chief Justice Rehnquist argued that a categorical rule would recognize certain limitations inherent in the ownership of property.[156] He conceded that "background principles" in state property law, for example the law of nuisance, limit what a landowner can do with his property.[157] These background principles, whether grounded in nuisance, the State's zoning

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152. *Id.* at 346 (Rehnquist, C.J., dissenting).

153. *Id.* at 346-47 (Rehnquist, C.J., dissenting). This is the same argument the Chief Justice made when he wrote the majority opinion in *First English*. *See supra* notes 83 - 84 and accompanying text. But the question before the court in *First English* was one of compensation, not an antecedent takings question. *Id.* Therefore, the Chief Justice's reliance on *First English* is misplaced. *See Tahoe-Sierra*, 535 U.S. at 347-48. The Chief Justice's view does have some support in the literature, however. *See* Breemer, *supra* note 133, at 28. Breemer finds support for this view in the language of *First English*. *Id.* This language, Breemer believes, "seems to mean that a temporary compensable taking results when a regulation that would otherwise amount to a taking if it were permanent turns out to be of limited duration." *Id.* He points out that many courts, federal and state, have adopted such a reading of *First English*. *Id.* Yet the other point of view—the view adopted by the *Tahoe-Sierra* majority—is also well-advocated. One commentator frames the questions this way: "If a temporary development moratorium and a temporary physical taking both deny landowners use of their property, why should the latter action be compensable under settled constitutional principles while the former is not?" Tedra Fox, *Lake Tahoe's Temporary Development Moratorium: Why a Stitch in Time Should Not Define the Property Interest in a Takings Claim*, 28 ECOLOGY L.Q. 399, 417 (2001). The answer, argues Fox, lies in an examination of the "bundle of rights" retained by the landowner during a development moratorium. *Id.* During a temporary *physical* taking, the land owner is denied the right to use, possess, and dispose of her land. *Id.* A temporary *regulatory* taking is a bit trickier, because, as in *First English*, the regulation is promulgated to last for an indefinite time. *Id.* at 418. Under this theory, the land owner retains the rights to possess and dispose of her land, but she cannot use it. *Id.* Her likelihood of disposing of it for any reasonable consideration, however, is minimal. *Id.* Finally, in the temporary development moratorium, the restriction is by definition intended to be temporary. *Id.* Even though the land owner loses the right to use her property, she expects to regain it at some time in the future. *Id.*

154. *Tahoe-Sierra*, 535 U.S. at 348 (Rehnquist, C.J., dissenting).

155. *Id.* at 351-52 (Rehnquist, C.J., dissenting).

156. *Id.* at 352 (Rehnquist, C.J., dissenting).

157. *Id.* at 351 (Rehnquist, C.J., dissenting). The Chief Justice claimed that "[z]oning regulations existed as far back as colonial Boston, . . . and New York City enacted the first comprehensive zoning ordinance in 1916. Thus, the short-term delays attendant to zoning and permit regimes are a longstanding feature of state property law and part of a landowner's reasonable investment-backed expectations." *Id.* at 352 (citations omitted).

power, or other property law, allow routine delays in land-use planning.[158] A six-year ban on development, however, is not inherent in the "background principles" of property law, the Chief Justice contended, and should require compensation under the Takings Clause.[159]

D. Justice Thomas's Dissent: Temporal Severance

Justice Thomas also dissented, arguing that *First English* held that a landowner deprived of all economically beneficial use of his land—even for a finite time—is entitled to compensation.[160] Justice Thomas disagreed, like the Chief Justice, with the Court's characterization of the moratoria as involving only a "temporal slice" of the owners' fee interest.[161] Less concerned with the length of time at issue, Justice Thomas was convinced that a taking occurred because landowners were absolutely deprived of the opportunity to develop their land for some time, and he argued that the Court should have applied the *Lucas* per se rule.[162]

III. WITH LAND-USE PLANNING IN THE BALANCE, A *PENN CENTRAL* APPROACH IS NECESSARY

A. A Logical Progression in the Court's Regulatory Takings Jurisprudence

The Court's analysis in *Tahoe-Sierra* follows precedent in its basic distinction between physical takings and regulatory prohibitions; more importantly, it recognizes that there should be different frameworks for analyzing temporary and permanent regulatory restrictions. Chief Justice Rehnquist clearly believes that the law of regulatory takings has no place for a permanent-temporary distinction.[163] But the Court was wise to avoid a

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158. *See id.* at 351-52 (Rehnquist, C.J., dissenting).

159. *Id.* at 352 (Rehnquist, C.J., dissenting). The Chief Justice described the nature of "typical moratoria":

> [They] prohibit only certain categories of development . . . [they] do not implicate *Lucas* because they do not deprive landowners of all economically beneficial use of their land. As for moratoria that prohibit all development, these do not have the lineage of permit and zoning requirements and thus it is less certain that property is acquired under the "implied limitation" of a moratorium prohibiting all development.

Id. at 353 (citations omitted).

160. *Id.* at 355-56 (Thomas, J., dissenting).

161. *Id.* at 355 (Thomas, J., dissenting).

162. *Id.* 355-56 (Thomas, J., dissenting).

163. *See* First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 318 (1987) (noting that, in effect, temporary and permanent takings are no different); *Tahoe-Sierra*, 535 U.S. at 346-47 (Rehnquist, C.J., dissenting) (arguing that "a distinction between 'temporary' and 'permanent' prohibitions is tenuous"). But the "rule" of

universal rule for all regulatory takings—temporary or permanent. It noted that the issue in *First English* was compensation, and not the takings claim itself.[164] Thus, *First English* does not stand for a categorical takings rule that requires compensation for any regulation depriving the landowner of all use of his land no matter how short the duration.[165] *First English* only requires the government to compensate the landowner *after* the Court finds a taking.[166]

First English that the Chief Justice would have applied in *Tahoe-Sierra* was not the actual holding of *First English*. *See supra* note 86 and accompanying text.

164. *Tahoe-Sierra*, 535 U.S. at 328. The Court asserted that "our decision in *First English* surely did not approve, and implicitly rejected, the categorical submission that petitioners are now advocating." *Id.* at 329. Because the issue in *First English* was a "compensation question" or a "remedial question," extending it to a categorical rule for all regulatory takings—permanent or temporary—is inappropriate. *Id.* at 328-29.

165. *Id.* at 328-29. If this were the case, *any* absolute regulatory prohibition, no matter how short, would trigger the government's duty to compensate the land owner. *See id.* at 334-35; *see also* Terri Pandolfi, Comment, *Putting the Cart Before the Horse: Just Compensation for Regulatory Takings in* First English Evangelical Lutheran Church v. County of Los Angeles, 54 BROOK. L. REV. 1413, 1442-43 (1989). The Court's own jurisprudence prior to *First English* recognizes that the Takings Clause requires an examination of both the "use" and "value" questions. Pandolfi, *supra*, at 1442. Pandolfi argues that the *Pennsylvania Coal* Court was correct in holding that invalidation of an ordinance was a sufficient remedy for a short-lived taking. *Id.* In *Pennsylvania Coal*, an ordinance prohibited mining (the "use") for a short time, thus allowing the mine operators to recoup their loss quickly (the "value"). *Id.* Because the ordinance did not render the property valueless, no compensation was due. *Id.* Pandolfi convincingly argues that the *First English* Court ignored the "value" question and focused exclusively on the "use" prohibition. *Id.* at 1442-43. The *Tahoe-Sierra* Court implicitly agreed when it said:

> [A] permanent deprivation of the owner's use of the entire area is a taking of "the parcel as a whole," whereas a temporary restriction that merely causes a diminution in value is not. Logically, 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.

Tahoe-Sierra, 535 U.S. at 332.

166. *First English*, 482 U.S. at 321. On remand in *First English*, the California courts found that the governmental action in that case did *not* constitute a taking. *Tahoe-Sierra*, 535 U.S. at 329. The California Court of Appeal explained:

> (1) [T]he interim ordinance in question substantially advanced the preeminent state interest in public safety and did not deny appellant all use of its property. (2) The interim ordinance only imposed a reasonable moratorium for a reasonable period of time while the respondent conducted a study and determined what uses, if any, were compatible with public safety.

First English Evangelical Church of Glendale v. County of Los Angeles, 258 Cal. Rptr. 893, 894 (Cal. Ct. App. 1989), *cert. denied*, 493 U.S. 1056 (1990). The court remanded the case to resolve the cloud seeding issue. *Id.* at 907. Moreover, Breemer's argument, *supra* note 133, at 31, that "the Court failed to explain adequately why the traditional understanding of *First English* is erroneous" is unconvincing. He points to similarities in language between Justice Stevens's dissenting opinion in *First English* and his majority opinion in *Tahoe-Sierra*. *Id.* at 34-35. Similarities and mere semantics aside, Breemer's argument cannot succeed. As noted in *supra* note 86 and accompanying text, the holding of *First English* was limited to the

The Court rightly considered the ramifications of a categorical regulatory takings rule. The dissenters' view that "ordinary" development delays would not fall prey to this rule is unconvincing. The Chief Justice is correct that background principles in state property law limit what a landowner can do with his property.[167] These principles may include temporary prohibitions on development.[168] But Chief Justice Rehnquist never really answered the question presented in the case. Instead, he simply stated that the moratoria imposed by the TRPA constituted a taking because they were too long to be included in the background limitations inherent in property ownership.[169] This assertion sounds too much like Justice Holmes's proclamation in *Pennsylvania Coal Co. v. Mahon* that "while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking."[170]

The Chief Justice's approach raises more questions than it answers. Although he argued that a moratorium of six years was not a background principle in property law, he proposed no standard for testing whether the length of a moratorium *is* acceptable under the limitations of state property law.[171] In addition, his reliance on the figure of six years, as opposed to the

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compensation question. The language on which the Chief Justice and commentators such as Breemer rely is merely dictum and not binding on the Court.

167. *Tahoe-Sierra*, 535 U.S. at 351-52 (Rehnquist, C.J., dissenting). These "background principles" are explained *supra* note 46.

168. *Id.* (Rehnquist, C.J., dissenting). The Chief Justice suggested, based on a limited survey of statutes, that a moratorium should not exceed six to twelve months, with shorter periods being preferable. *Id.* at 354 & n.5. The Chief Justice noted:

> California, where much of the land at issue in this case is located, provides that a moratorium "shall be of no further force and effect 45 days from its date of adoption," and caps extension of the moratorium so that the total duration cannot exceed two years. [The State of Oregon] limits moratoria to 120 days, with the possibility of a single 6-month extension. Others [Colorado and New Jersey] limit moratoria to six months without any possibility of an extension.

Id. at 353-54 & n.5.

169. *Id.* at 353 (Rehnquist, C.J., dissenting) (arguing that "the duration of this 'moratorium' far exceeds that of ordinary moratoria"). The Chief Justice, without really explaining his reasoning, stated:

> [I]t has long been understood that moratoria on development exceeding these short time periods are not a legitimate planning device .... Because the prohibition on development of nearly six years in this case cannot be said to resemble any 'implied limitation' of state property law, it is a taking that requires compensation.

Id. at 354.

170. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). This remark precipitated the framework eventually announced in the Court's principal regulatory takings cases. Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001).

171. *Tahoe-Sierra*, 535 U.S. at 354 (Rehnquist, C.J., dissenting). The Chief Justice was convinced simply by the duration of the restrictions. *Id.* But the Court explained that his reasoning was flawed:

> [The Chief Justice's] dissent offers no explanation for why 6 years should be the cut-off point rather than 10 days, 10 months, or 10 years. It is worth emphasizing that

thirty-two month period relied on by the Court, is fundamentally flawed.[172] The ordinances enacted by the TRPA lasted only thirty-two months; it was a judicially imposed injunction that extended the development prohibitions an extra forty months.[173] The district court's finding of fact that the TRPA acted diligently and in good faith foreclosed the Chief Justice's novel causation theory that the TRPA should have foreseen a conflict requiring judicial intervention.[174] Thus, the TRPA was not simply stalling, as the Chief Justice seems to suggest, so that the moratoria could be extended beyond the enactment of the 1984 Regional Plan.

The majority opinion encompasses what the dissenting opinions ignore: a categorical regulatory takings test is too inflexible. Temporary restrictions must instead be analyzed according to the *Penn Central* factors.[175] In *Tahoe-Sierra*, the landowners were not faced with a total loss of value in their property, as was the case in *Lucas*.[176] The Lake Tahoe property owners affected by the moratoria retained significant rights in their property.[177] The temporary nature of the restrictions in *Tahoe-Sierra* is important. While the landowner in *Lucas* had no expectation of a future ability to develop his property, the landowners in the Lake Tahoe Basin had a reasonable expectation that the moratoria would eventually expire.[178] As advocated by

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> we do not reject a categorical rule in this case because a 32-month moratorium is just not that harsh. Instead, we reject a categorical rule because we conclude that the *Penn Central* framework adequately directs the inquiry to the proper considerations—only one of which is the length of the delay.

Id. at 338-39 n.34.

172. For the Chief Justice's derivation of the six year figure, *see supra* notes 146-51 and accompanying text. The Court strongly disputed the Chief Justice's theory, noting that causation was not within the grant of certiorari, not briefed, and not argued. *Tahoe-Sierra*, 535 U.S. at 313-14 n.8.

173. *Tahoe-Sierra*, 535 U.S. at 312.

174. *Id.* at 334.

175. *See supra* note 138 and accompanying text.

176. *Tahoe-Sierra*, 535 U.S. at 330. In *Lucas*, the state amended its regulations, effectively giving the land owner the opportunity to apply for a permit. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1011-12 (1992). Because this amendment took place during the pending appeal, however, the landowner did not have the opportunity to argue the temporary taking issue at trial, and the Supreme Court decided the case on the issue presented—the permanent takings claim. *Id.* at 1012

177. Fox, *supra* note 153, at 418 (noting that under a development moratorium, the land owner still retains the rights of possession and disposition).

178. *Tahoe-Sierra*, 535 U.S. at 311-12 (noting that Ordinance 83-21 was only to be effective until the Regional Plan was developed). The land owners in this case retained hope that the moratoria would be lifted; therefore, *Tahoe-Sierra* is entirely outside the orbit of the *Lucas* rule:

> [The land owner] can still exclude others from her land. She also retains some market value based on the future use of her land since only a fraction of the property's lifetime is affected. Potential buyers may still be available because they understand the ordinance is temporary, although they may pay less because of the

Justice O'Connor in *Palazzolo*, a "careful examination and weighing of all the relevant circumstances" reveals that the Court was correct in holding that the TRPA moratoria did not constitute a taking.[179]

B. Tahoe-Sierra *and Its Implications for Land-Use Planning*

One of the strengths of the Court's rule in *Tahoe-Sierra* is the underlying recognition of the importance of temporary prohibitions on development for successful land-use planning.[180] The Court rightly preserved the distinction between temporary and permanent regulatory prohibitions and applied a categorical rule only to the latter. The Court's adoption of the Chief Justice's reasoning would have jeopardized novel planning devices such as inclusionary zoning.[181] Governments could continue to use these devices, but the costs of takings compensation would likely be prohibitive.[182]

> uncertainties raised by the moratorium. In fact, in the *Tahoe-Sierra* case, an appraiser testified that some lots had sold despite the moratorium. Most importantly, the Tahoe property owner may actually *benefit* from the moratorium if a sustainable land use plan is created that preserves the ecological integrity and aesthetic beauty of her community. In the long run, the enjoyment and market value she derives from her property may increase.

Fox, *supra* note 153, at 418 (footnotes omitted).

179. Palazzolo v. Rhode Island, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring).

180. *Tahoe-Sierra*, 535 U.S. at 337-38 (calling moratoria "an essential tool of successful development").

181. Inclusionary zoning is a device used by localities to provide affordable housing. *See* Barbara Ehrlich Kautz, Comment, *In Defense of Inclusionary Zoning: Successfully Creating Affordable Housing*, 36 U.S.F. L. REV. 971, 972 (2002). Kautz provides a simple illustration of such a program:

> An inclusionary program works like this: A developer proposes to build a new subdivision, called Sweetbriar, in Suburbia Ritz, USA. The developer plans 100 homes and 100 apartments. Suburbia requires that ten percent of all new homes be sold at prices affordable to moderate-income families and that ten percent of all new apartments be rented at prices affordable to lower income families (the affordable units are sometimes called "inclusionary units"). While the market price of the new homes is $500,000, requiring an annual income of $144,000, the ten inclusionary homes are sold to moderate-income families earning a maximum of $89,400 per year, for $308,000. Similarly, while the market rent of the luxury two-bedroom apartments is $2,135 per month, requiring an annual income of $85,400, the ten inclusionary apartments are rented to lower income families, who earn a maximum of $46,400 per year, for $894 per month. Suburbia controls the resale price of the homes and rent increases in the apartments so that they remain affordable for at least fifty years. The net effect is that twenty families are able to live in Sweetbriar who could not otherwise have done so. The families are happy, as is Suburbia, which created affordable housing at no public cost. However, the developer finds himself with $1,920,000 less in proceeds from sales (3.8% less than the $50 million he would otherwise receive) and with $12,410 less per month in rent (5.8% less than the $213,500 he would otherwise receive).

Id. at 973-74. Developers have protested these regulations and argued that they constitute takings, but courts have sided with local governments. *Id.* at 972. The U.S. Supreme Court and the California Supreme Court have refused to hear inclusionary zoning cases, so local

Neither the majority nor the dissenters could determine the time at which a regulatory prohibition turns into a taking.[183] The majority considered it imprudent to set such a limit and chose to rely instead on the *Penn Central* analysis.[184] The problem created by this approach is that it gives little concrete guidance to regulatory authorities concerning the outer limits of their power. Yet this uncertainty is balanced by the *Penn Central* test; it encompasses *all* relevant circumstances.[185] Application of *Penn Central* allows a regulatory agency to carefully and deliberately consider all relevant options in formulating a land-use plan.[186]

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governments can continue to utilize this "effective tool to provide affordable housing." *Id.* For more on the mechanics of inclusionary zoning, its history, and the policy debates on both sides of the issue, see *id.* at 977-89.

182. *See Tahoe-Sierra*, 535 U.S. at 335. Reexamine the figures in *supra* note 181. Assuming that Kautz is correct and that an inclusionary zoning program is meant to endure for fifty years, the financial effect on the government if it is required to pay for such a program is large. The developer has lost $1.92 million on the houses and $148,920 in rent in the first year alone. Thus, in the first year of the inclusionary zoning program, the local government must pay the developer $2,068,920. Even if we assume that the houses are never resold, the cost to the government over the fifty-year-period would be nearly $10 million (not considering inflation). In the unlikely event that the houses are sold on a yearly basis, the zoning program will cost the government over $100 million.

183. *Tahoe-Sierra*, 535 U.S. at 342.

184. *Id.* The Court thought that the setting of temporal limits should be left to state legislatures. *Id.* at 335.

185. In addition to the *Penn Central* balancing test, one commentator suggests a balancing approach combining the "critical elements" of at least three Supreme Court cases. Fox, *supra* note 153, at 421-22. Tedra Fox would use the following balancing test:

> (1) Does the development moratoria further a legitimate state goal? (2) Is there a substantial nexus between the enactment of the moratorium and the community land use issues it purports to address? (3) Is the duration of a reasonable nature, as measured by (a) the property's future land use and value (that is, not so speculative or uncertain as to destroy all of the property's present value); and (b) the amount of time required to complete the planning process in a diligent fashion?

Id. (footnote omitted). This balancing approach essentially represents an application of the *Penn Central* factors to a development moratorium. The first and second questions primarily go to the character of the government action, while both parts of the third question address the interference with investment-backed expectations and the economic impact of the regulation.

186. *Tahoe-Sierra*, 535 U.S. at 340 (noting that "[w]e would create a perverse system of incentives were we to hold that landowners must wait for a takings claim to ripen so that planners can make well-reasoned decisions while, at the same time, holding that those planners must compensate landowners for the delay"). The Court was also worried that "[a] rule that required compensation for every delay . . . would . . . encourage hasty decisionmaking." *Id.* at 335.

IV. CONCLUSION

The Supreme Court's regulatory takings jurisprudence may not be as clear as some would desire.[187] *Penn Central*'s ad hoc factual inquiry is inexact because most regulatory prohibitions do not fall into the *Lucas* category of outright restrictions on development.[188] However, the Court recognized that proper land-use planning is necessary and therefore should not constitute a taking in most reasonable circumstances.[189] Because a categorical rule would endanger the practical ability of many governments to utilize these land-use regulations, a takings question must be decided on the facts of each case.[190] *Tahoe-Sierra* was as much about policy as it was about the law. The ability of governments to regulate property is important to the health, safety, and welfare of the people and for this reason should only be restrained in cases where the government has significantly abused its eminent domain power.

187. *See* Kmiec, *supra* note 12.

188. *See Tahoe-Sierra*, 535 U.S. at 319 (noting that cases like *Lucas*, in which a regulation denies all use of land, are "relatively rare").

189. *Id.* at 339-40.

190. *See id.* at 340-41.