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Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency: The Reemergence of Penn Central and a Healthy Reluctance to Craft Per Se Regulatory Takings Rules

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TAHOE-SIERRA PRESERVATION COUNCIL, INC. v. TAHOE REGIONAL PLANNING AGENCY: THE REEMERGENCE OF *PENN CENTRAL* AND A HEALTHY RELUCTANCE TO CRAFT PER SE REGULATORY TAKINGS RULES

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"It is true there is not enough beauty in the world. It is also true that I am not competent to restore it. Neither is there candor, and here I may be of some use."[1]

I. INTRODUCTION

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[2] the Supreme Court held that a moratorium[3] on development imposed during the process of devising a comprehensive land use plan did not constitute a per se taking of property requiring compensation under the Takings Clause[4] of the United States Constitution.[5] The scope of *Tahoe-Sierra*, and thus its ultimate impact on Supreme Court takings jurisprudence, had been severely narrowed and redefined by the courts since the landowners first alleged a taking over fifteen years[6] before the issue was ultimately decided by the Supreme Court. It is important to note that this decision focused solely on Tahoe-Sierra Preservation Council's (the landowners) facial challenge to two consecutive moratoria[7] lasting for a period of thirty-two months, enacted by the Tahoe Regional Planning Agency (TRPA) during a planning process mandated by the States of Nevada and California.[8]

Recognizing Oliver Wendell Holmes's now famous declaration that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking,"[9] the Court in this case rejected a per se takings approach

1. Louise Gluck, *October*, NEW YORKER, Oct. 28, 2002, at 93.

2. 122 S. Ct. 1465 (2002).

3. A moratorium, or planning moratorium, is a tool used by governments to slow down development to "assist jurisdictions in coming with land use plans for an area." Wendie L. Kellington, *Temporary Takings/Moratoria*, SG021 A.L.I.-A.B.A. 105, 124 (2001). "Moratorium" is defined as: "An authorized postponement, *usu. a lengthy one*, in the deadline for paying a debt or performing an obligation .... The suspension of a specific activity." BLACK'S LAW DICTIONARY 1026 (7th ed. 1999) (emphasis added).

4. U.S. CONST. amend. V. The final clause of the Fifth Amendment states "nor shall private property be taken for public use, without just compensation." The Takings Clause is applicable to the states through the Fourteenth Amendment. Dolan v. City of Tigard, 512 U.S. 374, 383 (1994).

5. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S. Ct. at 1489.

6. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F. Supp. 2d 1226, 1229 (D. Nev. 1999).

7. TAHOE REG'L PLANNING AGENCY ORDINANCES 81-5 (1982) and Resolution 83-21 (1985).

8. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S. Ct. at 1472-73. As the two states become aware of the environmental impacts that development was having on the Tahoe Basin area, they enacted the Tahoe Regional Planning Compact (1968 Cal. Stat. 998 § 1; 1968 Nev. Stat. 4 (approved by Congress in 1969, Pub. L. 91-148, 83 Stat. 360)), which set goals for the preservation and protection of the lake and created the TRPA, investing in it the responsibility "to coordinate and regulate development in the Basin and to conserve its natural resources." *Id.* at 1471.

9. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

for regulations that temporarily reduce the value of property to zero.[10] Instead, the Court reaffirmed the precedent of having "'generally eschewed' any set formula for determining how far is too far," and chose instead to engage in an "'essentially ad hoc, factual inquir[y].'"[11] Accordingly, the Court found that the circumstances in this case are best analyzed by using the balancing test within the *Penn Central* framework.[12]

Tahoe-Sierra presented the Court with the opportunity to clarify the increasingly muddy waters of federal takings law, especially that of temporary regulatory takings. Instead, the unique set of facts pertinent to this case and the Court's reluctance to go far beyond its now narrowed decision in *First English Evangelical Lutheran Church v. County of Los Angeles*[13] has resulted in members of the planning and development communities professing wildly different interpretations,[14] and the flurry of commentary published after the decision had both sides claiming partial victory. The title of one article asked "*Will Moratoria Mania Result from Tahoe*?,"[15] the National Association of Home Builders proclaimed that "moratorium on particular property could still be a taking,"[16] and at the same time an association of property owners heralded this case as "a substantial victory for local

10. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S. Ct. at 1489.

11. *Id.* at 1481 (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992)). It is interesting to note that Justice Stevens pointedly cited *Lucas*'s use of the *Penn Central* balancing test to describe the test, rather than cite directly to *Penn Central*. *Id.* In *Lucas*, Justice Scalia begins with the *Penn Central* adage and then goes on to point out the exceptions. Lucas v. S.C. Coastal Council, 505 U.S. at 1015-16. In fact, later on in a footnote Justice Scalia argues that the calculus in *Penn Central* regarding its determination of the diminution in value produced by a municipal ordinance in light of the owner's total property holdings is "unsupportable." *Id.* at 1016 n.7. Justice Stevens's dissent in *Lucas* essentially follows his reasoning in *Tahoe-Sierra*—*Penn Central* holds that regulatory takings analysis proceeds with an "ad hoc inquiry" together with a balancing of private and public interests, and further, that categorical rules have little support in past decisions. *Id.* at 1064-71 (Stevens, J., dissenting).

12. The *Penn Central* holding established several factors, including "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations . . . [and] the character of the governmental action." Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

13. 482 U.S. 304 (1987). For commentary published soon after *First English* was decided, remarking on how it would likely be a landmark decision, see Gus Bauman, *A True Landmark Decision*, LAND USE L. & ZONING DIG., Aug. 1987, at 3.

14. *See generally* Danaya C. Wright & Nissa Laughner, *Shaken, Not Stirred: Has* Tahoe-Sierra *Settled or Muddied the Regulatory Takings Waters?*, 32 ENVTL. L. REP. 11177 (2002), WL 32 ELR 11177. Wright and Laughner, although pleased with the decision, argue that the Court missed its chance to clarify regulatory takings jurisprudence and that it decided some of the issues using incorrect analysis, including whether a facial challenge should be analyzed under the *Agins* or *Penn Central* tests. *Id.* at *9.

15. Dwight H. Merriam, *Will Moratoria Mania Result from* Tahoe*? The Length of the Moratorium Should Be the Shortest Possible to Get the Job Done*, CONN. L. TRIB., Aug. 5, 2002, at 6 (arguing that although the *Tahoe-Sierra* case "contains strong, pro-planning dicta" and that "planners are justifiably gleeful," the decision is limited to its extraordinary facts). *Id.*

16. National Association of Home Builders, *Supreme Court Decision in* Tahoe-Sierra *is Clear: Moratorium on Particular Property Could Still be a Taking* (Aug. 21, 2002), *at* http://www.nahb.org/news_details.aspx?sectionID=122&newsID=68 (noting that the enthusiastic response planners have had to the decision is misplaced, as the Court made clear that a moratorium as applied to a particular property could require the payment of just compensation to the owner under the *Penn Central* test) (on file with Maine Law Review).

regulators."[17] This Note focuses on what, if any, guidance the Court's decision gives to governments and planning professionals in fashioning moratoria to gain time to "put [their] house in order . . . [and] adopt necessary controls or build needed infrastructure."[18] Finally, this Note suggests that it is what the Court does not say regarding how far is too far in temporary restrictions that is most significant; by determining that a factual based, balancing approach as prescribed in *Penn Central* is "better" than a per se rule, the Court truly exerts some candor into the equation that seeks to balance the interests of the private landowners against the protection of one of our Nation's natural treasures.

II. LEGAL BACKGROUND OF REGULATORY TAKINGS JURISPRUDENCE

"The texts underlying constitutional property are often much clearer . . . than its jurisprudential definitions."[19] This rather diplomatic yet undeniably accurate characterization probably does a bit of disservice to the actual academic criticism, which has labeled the Supreme Court regulatory takings jurisprudence as a "a vast sea of uncertainty."[20] Modern regulatory takings law begins and ends with *Pennsylvania Coal Co. v. Mahon*,[21] where the Supreme Court recognized that a government regulation could affect a taking, contrary to its previous holdings that the takings clause only applied to a physical appropriation of property.[22] In this case the Court held unconstitutional a Pennsylvania law that required mining companies to leave a portion of its underground coal unmined to act as a support for the land's surface.[23] This landmark decision set the course for a bifurcated takings analysis: the Court began to plainly demarcate those cases in which a government clearly took, used, prevented the use of, or was physically present on a private property owner's land for the benefit of the public with per se rules (also known as physical takings) and those cases like *Pennsylvania Coal* in which a government

17. Janet L. Holt, *Moratoria Protecting Lake Tahoe Are Not Takings*, TRIAL, Aug., 2002, at 68, 68. *See also* Richard A. Epstein, *Takings by Slivers: Ruling Shows How Factional Politics Can Survive Despite Constitutional Efforts to Limit Government Abuse by Protecting Property Rights*, NAT'L L.J., May 5, 2002, at A21.

18. ORLANDO E. DELOGU, MAINE LAND USE CONTROL LAW: CASES, NOTES, COMMENTS 349-50 (2d ed. 1997).

19. Gregory Daniel Page, Lucas v. South Carolina Coastal Council *and Justice Scalia's Primer on Property Rights: Advancing New Democratic Traditions by Defending the Tradition of Property*, 24 WM. & MARY ENVTL. L. & POL'Y REV. 161, 166 (2000).

20. Susan E. Spokes, Note, Florida Rock Industries, Inc. v. United States*: Tipping the Scales in Favor of Private Property Rights at the Public's Expense*, 47 ME. L. REV. 501, 503 (1995).

21. 260 U.S. 393 (1922).

22. *Id.* at 415-16. *See also* Orlando E. Delogu, *The Law of Taking Elsewhere and, One Suspects, In Maine*, 52 ME. L. REV. 324, 325 (2000). Indeed, until Pennsylvania Coal was decided in 1922, a host of government regulations that sought to ameliorate incompatible uses (such as building heights, zoning restrictions, and building material composition) were upheld by the Supreme Court as justified within the police powers of the State. *See generally* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (limitation on land use through implementation of city zoning ordinances); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (ban on the manufacturing of bricks in a residential setting); Welch v. Swasey, 214 U.S. 91 (1909) (building height regulations).

23. Pa. Coal Co. v. Mahon, 260 U.S. at 415-16.

regulation simply *affected* a property owner's use of land.[24] Justice Holmes's adage from *Pennsylvania Coal* that "if regulation goes too far it will be recognized as a taking,"[25] while originating the concept of regulatory taking, has set the course for a body of law that has since struggled to define exactly what is "too far."

Since *Pennsylvania Coal*, the Court has "generally eschewed" finding a set formula for determining how far is too far, and instead prefers to engage in "'essentially ad hoc, factual inquiries.'"[26] Consequently, the Court has crafted per se or categorical rules only in two circumstances,[27] both of which further the continuum of physical takings. First, a regulation that required property owners to set aside some space on their property for cable equipment, however small the physical intrusion may be, is a per se taking.[28] The second type of categorical taking was found in *Lucas v. South Carolina Coastal Council*,[29] where, for the first time, the Court established that a regulation that "deprives land of all economically beneficial use" constitutes a taking regardless of any other factors, and thus requires government compensation.[30] However, the Court pointed out that the holding was limited to situations where the diminution of value was one hundred percent, and would not apply in cases as close as ninety-five percent.[31]

The Court first articulated its "ad hoc inquiry" preference in *Penn Central Transportation Co. v. New York City*,[32] which provides the now standard regulatory takings test.[33] In determining that New York City's historic preservation laws could be used to prevent the owners of Grand Central Station from erecting modernist towers in its airspace, the *Penn Central* Court established three criteria to examine in a takings analysis: (1) the regulation's economic impact on the property owner; (2) the regulation's interference with distinct, investment-backed expectations; and (3) the character of the government action.[34] Since that decision, the Court has embarked on a long process of attempting to clarify the *Penn Central* test, with varying degrees of success. In *Agins v. City of Tiburon*,[35] the Court added to the test by determining that the governmental action must "substantially advance legitimate state interests" and must not "den[y] an owner economically viable use of his land."[36]

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24. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (holding that a statute mandating that cable lines be placed on private buildings was a physical occupation of property that required just compensation); *see also* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992) (holding that when a government regulation denies an owner all economically beneficial or productive use of his land, a categorical taking occurs).

25. Pa. Coal Co. v. Mahon, 260 U.S. at 415.

26. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S. Ct. 1465, 1478 (2002) (quoting Penn. Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)).

27. Delogu, *supra* note 22, at 329-30.

28. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. at 421.

29. 505 U.S. 1003 (1992).

30. *Id.* at 1027.

31. *Id.* at 1019 n.8.

32. 438 U.S. 104, 130-31 (1978).

33. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S. Ct. 1465, 1489 (2002).

34. Penn Cent. Transp. Co. v. New York City, 438 U.S. at 124.

35. 447 U.S. 255 (1980) (finding that a city zoning ordinance limiting the number of residences that can be built on a given lot was not facially unconstitutional).

36. *Id.* at 260.

The first prong of the *Agins* test has not been particularly difficult for governments to overcome when regulations have been adopted in good faith in consideration of the public's health, safety, or general welfare.[37] Indeed, the Supreme Court has articulated a "deferential standard of review" and has found that a state need not articulate the actual objective behind the scheme or submit evidence to support the rationality of the regulation, provided that the courts can conceive of facts that reasonably justify the regulation at issue.[38] However, in *Nollan v. California Coastal Commission*,[39] the Court further "clarified" the *Penn Central* "governmental purpose" requirement to require not only a legitimate state interest, but also an "essential nexus" between what a regulation purports to accomplish and what the developer or land owner is doing.[40] Thus, the *Nollan* Court did not find a nexus between the development approval of a coastal homeowner's house renovation and the condition imposed upon it of granting a shoreline passageway to the public, and thus the Court found a taking because the condition was unrelated to the building of the house.[41] A few years later, in *Dolan v. City of Tigard*,[42] the Court added to this "purpose" safeguard by determining that after a "nexus" had been found, the regulation also must not overly burden the property owner relative to the impact of the proposed development.[43] This "rough proportionality" or reasonable relationship standard in fact speaks to fairness and scale in enforcing governmental regulation.[44]

The economic elements of the test are more muddied.[45] The aforementioned "economically viable diminution in value" and "interference with distinct, investment backed expectations" components must be examined first by determining what exactly the parcel in question is. The *Penn Central* opinion, although while not overruling *Pennsylvania Coal*, disagreed with Holmes in one substantial way: takings analysis must focus on the "whole parcel" and not just be limited to merely the regulated portion or interest in property.[46] Thus any diminution in value must be considered in light of the entire bundle of sticks of rights that a property interest entails, including the "estate" sticks (such the right to use, possess, and exclude) as well as the more abstract sticks such as vertical (surface and air rights), horizontal (all contiguously owned property considered separately or within types of land such as wetland), and temporal rights (present and future interests along a

37. Delogu, *supra* note 22, at 330.
38. FCC v. Beach Commun. Inc., 508 U.S. 307, 314-15 (1993).
39. 483 U.S. 825 (1987).
40. *Id.* at 836-37.
41. *Id.*
42. 512 U.S. 374 (1994).
43. *Id.* at 390-91.
44. Delogu, *supra* note 22, at 335.
45. *See* William W. Wade, *Economic Backbone of the* Penn Central *Test After* Florida Rock V, K&K, *and* Palazzolo, 32 ENVTL. L. REP. 11221 (2002), WL 32 ELR 11221, *2, *9 (pointing out that although *Penn Central* outlines several economic considerations to determine if compensation is due, the courts have confounded the "reasonable expectations vis-à-vis plaintiffs' notice of regulatory prohibitions versus expected return on investments," and that "[f]inancial tools to reveal frustration of investment-backed expectations produce clear results in the hands of trained legal and economic analysts").
46. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130-31 (1978).

timeline).[47] The requirement to look at the parcel as a whole as part of a takings balancing analysis is truly the penultimate factor in *Tahoe-Sierra.* Certainly, the future interest that still exists in so-called temporary takings, however tenuous, is still an interest. In a decision that may have added more confusion than clarity to the concept of temporal rights within a takings analysis, the Court determined in *First English Evangelical Lutheran Church v. County of Los Angeles*[48] that "'temporary takings' which . . . deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation."[49] However, that case, in which the Court looked at a development moratoria affecting rebuilding a campground in a floodplain, was limited to the question of whether *compensation* was available in temporary takings.[50] It did not, as the *Tahoe-Sierra* Court pointed out, decide the question of what exactly constitutes a temporary taking itself.[51]

Finally, in a case decided just a year before *Tahoe-Sierra,* the Supreme Court in *Palazzolo v. Rhode Island*[52] upheld a property owner's ability to challenge wetland regulations that were in place prior to his individual ownership.[53] This holding was anchored in the principle that a state's right to restrict use of property is based on reasonableness, and barring successive property owners from claiming a taking would leave no avenue to challenge arguably unreasonable regulations that may have simply been unchallenged in the past.[54] However, the Court still embraced the *Penn Central* test as the central takings analysis,[55] and Justice O'Connor in a concurrence emphasized that several factors have significance in a proper takings balancing test.[56] Although the property owner did not recover compensation on remand under the *Penn Central* test, many environmentalists have viewed this opinion as opening a floodgate of litigation that would have "a chilling effect on government efforts to promulgate environmental regulations and limit environmental protections on fragile ecosystems."[57] This Note will argue that, in light of *Tahoe-Sierra* and its embrace of Justice O'Connor's moderating concurrence in

47. Dan Herber, *Surviving the View Through the* Lockner *Looking Glass:* Tahoe-Sierra *and the Case for Upholding Development Moratoria,* 86 MINN. L. REV. 913, 925-26 (2002) (arguing that because *Penn Central* adopted *Pennsylvania Coal's* holding that regulations that go "too far" are compensable, the "too far" determination hinges on whether the regulated property encompasses all or simply a part of the severed property).

48. 482 U.S. 304 (1987).

49. *Id.* at 318.

50. *Id.* at 307-08.

51. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S. Ct. 1465, 1482 (2002).

52. 533 U.S. 606 (2001).

53. *Id.* at 630.

54. *Id.* at 627.

55. *Id.* at 630.

56. *Id.* at 633 (O'Connor, J., concurring).

57. Courtney Harrington, Penn Central *to* Palazzolo*: Regulatory Takings Decisions and Their Implications for the Future of Environmental Regulation,* 15 TUL. ENVTL. L.J. 383, 397 (2002) (arguing that although it is too early to tell, the impact of *Palazzolo* would likely be that states will be more cautious when choosing environmental policy).

Palazzolo, all is not yet lost.[58]

III. FACTUAL AND PROCEDURAL BACKGROUND OF *TAHOE-SIERRA*

A. Background Facts

The relevant facts of the case are undisputed.[59] Lake Tahoe, the beauty at the root of this litigation, is widely thought to be "indescribably beautiful,"[60] and has been proclaimed by President Clinton to be "a national treasure that must be protected and preserved."[61] Perhaps best known for the clarity of its waters, due to the lack of algae that can discolor other lakes,[62] the lake that has been described by Mark Twain as "a noble sheet of blue water"[63] had deteriorated over the past forty years due to the explosion of development around the Basin.

In response to the increased nutrient loading of the lake, caused by the spread of impervious coverage of land due to burgeoning development, the States of Nevada and California adopted the Tahoe-Regional Planning Compact,[64] which created the Tahoe Regional Planning Agency (TRPA). The goals of TRPA were to protect and preserve the lake and to "coordinate and regulate development in the Basin and to conserve its natural resources."[65] After drafting a plan in 1972 that allowed numerous exceptions and did not have a significant effect on the pace of development, the Compact was amended by the two states with the approval of the President and Congress on December 19, 1980.[66] The amended Compact man-

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58. For an interesting exploration of the Court's recent takings holdings in light of the increasing interconnectedness between land use controls and environmental protection, *see* Michael Allan Wolf, *Earning Deference: Reflections on the Merger of Environmental and Land-Use Law*, 32 ENVTL. L. REP. 11190 (2002), WL 32 ELR 11190, *1-3 (arguing, inter alia, that the traditional deference that courts had given to local officials to craft regulations that protect the public health and safety through environmental ordinances has been eroded due to the Supreme Court's mudd[ying] of regulatory takings law); *see also* Charles M. Haar & Michael Allan Wolf, Euclid *Lives: The Survival of Progressive Jurisprudence*, 115 HARV. L. REV. 2158, 2184-85 (2002) (pointing out examples of antienvironmental bias in *Nollan* and *Dolan* and that when asking "does the challenged regulation substantially advance legitimate governmental interests[]" those Justices who wrote the aforementioned opinions "do not hesitate to reject expert-based findings").

59. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S. Ct. 1465, 1470 (2002).

60. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F. Supp. 2d 1226, 1230 (D. Nev. 1999).

61. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S. Ct. at 1470.

62. *Id.* at 1471.

63. *Id.* (quoting MARK TWAIN, ROUGHING IT 169 (1st ed., Hippocrene Books, n.d.) (1872)). Mark Twain describes the lake as:

> [A] noble sheet of blue water lifted six thousand three hundred feet above the level of the sea, and walled in by a rim of snowclad mountain peaks that towered aloft full three thousand feet higher still! . . . As it lay there with the shadows of the mountains brilliantly photographed upon its still surface I thought it must be the fairest picture the whole earth affords.

MARK TWAIN, ROUGHING IT 169 (1st ed., Hippocrene Books, n.d.) (1872).

64. *See* sources cited *supra* note 8.

65. *See* sources cited *supra* note 8.

66. Tahoe Regional Planning Compact, Pub. L. No. 96-551, 94 Stat. 3233 (1980); CAL. GOV'T CODE § 66801 (West Supp. 2002); NEV. REV. STAT. § 277.200 (1980).

dated the development of "[e]nvironmental [t]hreshold [c]arrying [c]apacities, . . . [including] standards for air quality, water quality, soil conservation, vegetation and noise,"[67] within eighteen months, and that an amended plan shall be adopted within one year after the standards are adopted.[68] Most important to the case at issue, the Compact stated that it may be "necessary to halt temporarily works of development in the region which might otherwise absorb the entire capability of the region for further development or direct it out of harmony with the ultimate plan."[69] In addition to the standards mandated by the Compact, the TRPA at this time was also working on the development of water quality standards in order to comply with the Clean Water Act, and found that it would be unable to meet the deadlines in the Compact.[70] In response, TRPA enacted Ordinance 81-5, the first of the two moratoria at issue in *Tahoe-Sierra*, which banned all construction and activity within designated "Stream Environment Zones" (SEZ) in California and Nevada, and also banned activity in other more sensitive "high hazard" lands in California within the Basin during the period from August 24, 1981, until the completion of the final plan.[71] Although finally adopting thresholds on August 26, 1982, the TRPA was unable to enact a regional plan within a year as mandated by the Compact.[72] Consequently, TRPA adopted Resolution 83-21 on November 26, 1983, the second moratoria at issue in this case, which halted all project review approvals on "high hazard" land in both states for an additional eight months.[73] By the time a regional plan was adopted on April 26, 1984, the two moratoria combined prevented development on "high hazard" lands in California and SEZ lands in both states for a total of thirty-two months, and for "high hazard" land within Nevada for eight months.[74] Two months after the adoption of the regional plan in 1984,[75] the Tahoe-Sierra Preservation Council, a nonprofit corporation representing some 2000 property owners including 400 owners of property within the affected areas, filed suit in the federal district courts in Nevada and California, alleging that the moratoria constituted takings of their property without just compensation.[76]

B. Procedure and Majority Decision

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[77] after ten years, a consolidation from the two district courts, three pub-

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67. Tahoe Regional Planning Compact, Pub. L. No. 96-551, 94 Stat. 3233, 3235, 3239-40 (1980).

68. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S. Ct. at 1472.

69. *Id.* (quoting Tahoe Regional Planning Compact, Pub. L. No. 96-551, 94 Stat. 3233, 3243 (1980)). Until the adoption of the final plan, the Compact prohibited the development of new subdivisions, condominiums, and apartment buildings. *Id.*

70. *Id.* at 1472-73.

71. *Id.*

72. *Id.* at 1473.

73. *Id.*

74. *Id.*

75. Shortly after the 1984 plan was adopted, the State of California sought and received an injunction to block its implementation. Order Granting Preliminary Injunction, No. Civ. S-84-0565 EJG (E.D. Cal. Aug. 9, 1984). This injunction remained in place until a revised plan was adopted in 1987. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F. Supp. 2d 1226, 1236 (D. Nev. 1999).

76. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S. Ct. at 1474.

77. 34 F. Supp. 2d 1226 (D. Nev. 1999).

lished Ninth Circuit opinions,[78] and at least five district court opinions and orders,[79] the present case commenced after having been severely narrowed by those earlier decisions.[80] This case ultimately became a facial challenge: whether the two moratoria of thirty-two months constituted a taking of property.

The United States District Court of the District of Nevada's analysis began by recognizing the uniqueness and beauty of Lake Tahoe.[81] First, the court acknowledged that the constitutional interest at stake was whether the landowners' land had been subjected to a regulatory taking.[82] The District Court stated that under the *Agins v. City of Tiburon*[83] test, government regulation would be seen as going "too far" if either (1) it does not substantially advance a legitimate state interest or (2) it denies the owner economically viable use of her land.[84] The court quickly disposed of the first prong of the test, determining that under the *Nollan v. California Coastal Commission*[85] and *Dolan v. City of Tigard*[86] essential nexus/rough proportionality standard,[87] further development on the landowners' property would significantly impact the environmental quality of the lake, and any less severe response would not adequately address the environmental degradation problems.[88]

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78. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F.3d 753 (9th Cir. 1994); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 938 F.2d 153 (9th Cir. 1991); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 911 F.2d 1331 (9th Cir. 1990).

79. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F. Supp. 2d 1226 (D. Nev. 1999); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 992 F. Supp. 1218 (D. Nev. 1998); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 808 F. Supp. 1474 (D. Nev. 1992); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 638 F. Supp. 126 (D. Nev. 1986); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 611 F. Supp. 110 (D. Nev. 1985).

80. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F. Supp. 2d at 1230. In earlier proceedings, the landowners had been grouped in separate classes based on which areas they lived in, and the entire period from the first moratorium to the final amended plan adoption in 1987 was originally at issue. However, through procedural and statute of limitations grounds, the plaintiffs were consolidated and the focus of the case became the period of the two moratoria. *Id.* at 1237-38.

81. As noted above, both the District Court and the Supreme Court quoted Mark Twain's description of Lake Tahoe extensively. *See supra* note 66. The District Court further cited Twain approvingly:

> . . . [the lake] was glassy and clear, or rippled and breezy, or black and storm-tossed, according to Nature's mood; and its circling border of mountain domes, clothed with forests, scarred with land-slides, cloven by canons and valleys, and helmeted with glittering snow, fitly framed and finished the noble picture. The eye was never so tired of gazing, day or night, in calm or storm; it suffered but one grief, and that was that it could not look always, but must close sometimes in sleep.

Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F. Supp. 2d at 1230 (quoting TWAIN, *supra* note 66, at 173).

82. *Id.* at 1238.

83. 447 U.S. 255 (1980).

84. *Id.* at 260.

85. 483 U.S. 825, 837 (1987).

86. 512 U.S. 374, 386 (1994).

87. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F. Supp. 2d at 1239.

88. *Id.* at 1239-40. Before engaging in the nexus/rough proportionality analysis, the court suggested that *Dolan/Nollan* may not apply at all to facial challenges like this case due to the holding in *Garneau v. City of Seattle*, 147 F.3d 802, 811 (9th Cir. 1998). However, the Supreme Court did resolve this question in its decision.

However, under the second prong of the *Agins* test, the court applied a *Penn Central* analysis to determine whether there had been either a temporary taking or a total taking.[89] Under a temporary takings analysis, the court determined that, given an average preconstruction holding time of a lot in the Lake Tahoe region of twenty-five years, the landowners did not have "reasonable, investment backed expectations" that they would have been able to build during the time of the moratoria.[90] However, the court did find that, although some value remained in the property during the moratoria, the landowners had temporarily been deprived of "all economically viable use of their land," and the moratorium was thus a categorical per se taking under the *Lucas* decision.[91]

On appeal to the United States Court of Appeals for the Ninth Circuit, the only issue raised by the landowners was whether *Lucas* applied and whether the moratoria denied the landowners all economically viable use of their land.[92] The landowners did not challenge that, under the *Penn Central* "ad hoc balancing approach," there would be no taking.[93] Concluding that property interests have many dimensions, including a physical dimension (size and shape), a functional dimension (extent of use allowed), and a temporal dimension (duration of property interests), the Ninth Circuit found that the *Lucas* test applied to the "relatively rare" case in which a regulation denied all productive use of a property, whereas the moratoria in question only affected the "temporal slice" of the fee interest.[94] The Ninth Circuit stated that regulatory takings jurisprudence focuses on the impact of the regulation as a whole and further, that moratoria are a form of regulation that was widespread and well established.[95] Finally, the court rejected the landowners' claim that *First English* was controlling, determining that *First English* was limited to whether *compensation* would be available for a temporary taking, and only if a court reached a finding that a temporary taking had indeed occurred.[96] The Ninth Circuit concluded that the proper test to determine whether a temporary taking had occurred was the *Penn Central* balancing approach and overturned the District Court in favor of TRPA.[97]

On appeal to the United States Supreme Court, the landowners' facial attack on the two moratoria contended that the "mere enactment of a temporary regulation that, while in effect, denies a property owner all viable economic use of her property gives rise to an unqualified constitutional obligation to compensate her for the value of its use during that period."[98] The property owners relied on *First English* and *Lucas*, both regulatory takings cases, to argue for a categorical rule that such a temporary deprivation, regardless of the length of time, is a per se taking.[99] Finally, the property owners argued that the Takings Clause was "de-

89. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S. Ct. 1465, 1470 (2002).

90. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F. Supp. at 1240-41.

91. *Id.* at 1245.

92. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 216 F.3d 764, 766 (9th Cir. 2000).

93. *Id.* at 773.

94. *Id.* at 774.

95. *Id.* at 775-77.

96. *Id.* at 778.

97. *Id.*

98. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S. Ct. 1465, 1477 (2002).

99. *Id.* at 1478.

signed to bar Government from forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole."[100]

The Court disagreed. The Court began its analysis much as the district court did by recognizing the exceptionality of this case due to the national treasure that is Lake Tahoe, whose clear waters are "not *merely* transparent, but dazzlingly, brilliantly so."[101] First, the Court recognized the long standing use of per se rules when government condemns or physically appropriates private property for a public purpose.[102] However, the Court pointed out that there is a real distinction between acquisitions of property for public purpose and regulations prohibiting private uses, and it is inappropriate to treat cases involving physical takings as precedent for analysis of a claim of regulatory takings.[103] Thus, proceeding along a regulatory takings analysis, and from the outset recognizing that land use regulations and planning tools such as moratoria are ubiquitous and useful and to treat them as takings would "transform government regulation into a luxury few governments could afford,"[104] the Court found that *Lucas* was inappropriate in this case.[105]

Resisting the temptation to adopt per se rules in cases involving partial regulatory takings, the Court instead affirmed the *Penn Central* analysis of examining "a number of factors" that focus on the "parcel as a whole."[106] The Court noted that the requirement that "'the aggregate must be viewed in its entirety'" in regulatory takings cases had become a cornerstone of analysis, and approvingly cited *Andrus v. Allard*,[107] where the Court found that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking."[108] Thus, in *Lucas*, where an "unconditional and permanent" regulation that "rendered valueless" the residential lots in question was found to be a per se taking, the Supreme Court emphasized that the holding in *Lucas* was limited to "'the extraordinary circumstance when *no* productive or economically beneficial use of the land is permitted.'"[109] However, the Court determined that a thirty-two month segment cannot be severed from a fee simple estate under the *Penn Central* approach, and thus the district court erred in disaggregating the property into tempo-

100. *Id.* (citing Armstrong v. United States, 364 U.S. 40, 49 (1960)).

101. *Id.* at 1471 (quoting TWAIN, *supra* note 66, at 174-75.) The full quote reads:

> So singularly clear was the water, that where it was only twenty or thirty feet deep the bottom was so perfectly distinct that the boat seemed floating in the air! Yes, where it was even *eighty* feet deep. Every little pebble was distinct, every speckled trout, every hand's breadth of sand . . . . Down through the transparency of these great depths, the water was not *merely* transparent, but dazzlingly, brilliantly so. All objects seen through it had a bright, strong vividness, not only of outline, but of every minute detail, which they would not have had when seen simply through the same depth of atmosphere. So empty and airy did all the spaces seem below us, and so strong was the sense of floating high aloft in midnothingness, that we called these boat-excursions "balloon-voyages."

102. *Id.* at 1478.

103. *Id.* at 1479.

104. *Id.*

105. *Id.* at 1480.

106. *Id.* at 1481.

107. 444 U.S. 51 (1979).

108. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S. Ct. at 1481 (quoting Andrus v. Allard, 444 U.S. at 65-66).

109. *Id.* at 1483 (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1017 (1992)).

ral segments corresponding to the regulations at issue.[110] Ultimately, the Court embraced a fact specific inquiry as the default rule in regulatory takings cases, and categorized *Lucas* as appropriate only in "extraordinary case[s]."[111]

The Court also quickly disposed of the landowners' contention that *First English* supported a per se temporary takings rule.[112] Finding that the *First English* decision was specifically related to the availability of compensation, the Court quoted its "unambiguous" determination: "We merely hold that where the government's activities *have already worked a taking* of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."[113] In fact, the Court noted that *First English* expressly limited the holding to the facts presented in *First English* and recognized that, if the question of "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like" were before the *First English* Court, a different inquiry would take place.[114] Thus, the *Tahoe-Sierra* Court rejected the contention that a new categorical rule crafted from *First English* applied here.[115]

Finally, in dealing with the property owners' contention that concepts of "fairness and justice"[116] would be best served by a categorical rule, the Court determined that the rule that government was required to pay compensation for every delay in the use of property "would render routine government processes prohibitively expensive or encourage hasty decisionmaking."[117] The Court quoted Justice O'Connor's concurring opinion in *Palazzolo v. Rhode Island*,[118] where she stated that the "fairness and justice" concept was less than fully determinate; thus any analysis under it must "eschew any set formula" and instead the outcome would depend largely "upon the particular circumstances [of the] case."[119] Here, the Court understood that moratoria like those used by the TRPA are widely recognized as an effective tool to preserve the status quo during development of a permanent development strategy, and are essential to "informed decisionmaking."[120] Otherwise, the Court determined, landowners will have incentives to quickly develop their property before comprehensive plans are enacted, thereby "fostering inefficient and ill-conceived growth."[121] In conclusion, the Court determined that an interest in "fairness and justice" would be best served by relying on the *Penn Central* approach, rather than a per se rule.[122]

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110. *Id.* at 1483-84. Justice Stevens points out that Chief Justice Rehnquist's analysis "makes the same mistake by carving out a 6-year interest in the property, rather than considering the parcel as a whole, and treating the regulations covering that segment as analogous to a total taking under Lucas." *Id.* at 1484 n.26.

111. *Id.* at 1484.

112. *Id.* at 1482.

113. *Id.* (quoting First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 321 (1987) (emphasis added)).

114. *Id.*

115. *Id.*

116. *Id.* at 1484 (citing Armstrong v. United States, 364 U.S. 40, 49 (1960)).

117. *Id.* at 1485.

118. 533 U.S. 606 (2001).

119. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S. Ct. at 1486.

120. *Id.* at 1487.

121. *Id.* at 1488.

122. *Id.* at 1489.

C. The Dissent

Chief Justice Rehnquist, writing for the dissent,[123] rejected the majority's focus on the thirty-two month moratoria period, and instead looked at the six-year period that included the permanent injunction placed on the 1984 plan that lasted until 1987.[124] Thus, stating the proposition that "a court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes,"[125] the dissent found that regardless of "proximate causation," (i.e., a court-enforced injunction or an agency-imposed moratorium), the TRPA was undoubtedly the "moving force" behind the landowners' inability to use their land during the six-year period.[126] Under that rationale, the dissent contended that the six-year period was the correct period to examine for a takings claim.[127]

The dissent argued that the *Lucas* rule applied here because even the moratoria examined alone "did in fact deny the landowners all economically viable use of their land."[128] Finding that the distinctions between "temporary" and "permanent" were tenuous in a prohibition on building that lasted six years, the dissent noted that in *Lucas*, the "permanent" regulation ended up lasting only two years before being amended by the South Carolina Legislature.[129] Since "land-use regulations are not irrevocable," the dissent was wary that the majority's opinion would give governments an incentive to simply label a regulation "temporary" to escape the finding of a taking.[130]

Next, the dissent insisted that *First English* would apply to the case at hand, as that case found that "temporary takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation."[131] Indeed, Chief Justice Rehnquist argued that when all economically beneficial or productive use of land has been taken away from a land owner, it is the functional equivalent of a physical appropriation.[132] Finally, the dissent suggested that the majority's concern that a *Lucas* application here would put traditional planning devices in danger of being takings was unfounded given *First English*'s admonition that a temporary taking did not apply "in the case of normal delays in obtaining building permits, changes in zoning ordinances, and the like."[133] However, because this six-year moratorium "far exceeds" ordinary moratoria and "is not one of the longstanding, implied limitations of property law," the dissent argued that a per se rule regarding whether moratoria that prohibit all economic use of property need not be applied here.[134]

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123. *Id.* at 1490. Chief Justice Rehnquist wrote the dissent, and Justice Scalia and Justice Thomas joined.

124. *Id.* (Rehnquist, C.J., dissenting).

125. *Id.* (Rehnquist, C.J., dissenting) (quoting MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 348 (1986)).

126. *Id.* at 1491 (Rehnquist, C.J., dissenting) (citing Monell v. New York City Dep't of Soc. Servs., 436 U.S. 658, 694 (1978), which held that a § 1983 causation is established when a government action is the "moving force" behind an alleged constitutional action).

127. *Id.* (Rehnquist, C.J., dissenting).

128. *Id.* (Rehnquist, C.J., dissenting) (citing the findings of fact in the Tahoe-Sierra district court, 34 F. Supp. 2d 1226, 1245 (D. Nev. 1999)).

129. *Id.* at 1492 (Rehnquist, C.J., dissenting).

130. *Id.* (Rehnquist, C.J., dissenting).

131. *Id.* (Rehnquist, C.J., dissenting) (citing First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 318 (1987)).

132. *Id.* (Rehnquist, C.J., dissenting).

133. *Id.* at 1494 (Rehnquist, C.J., dissenting).

134. *Id.* at 1495 (Rehnquist, C.J., dissenting).

Justice Thomas wrote a separate dissent that took issue with the majority's conclusion that a temporary moratorium could not be a taking because it was not "a taking of the parcel as a whole."[135] In fact, Justice Thomas seemed to read the Court's recent decisions as putting aside the differences between temporary and permanent takings when a landowner is "deprived of all beneficial use of his land," regardless of whether a regulation affected only a "temporal slice" of property.[136] Justice Thomas insisted that a taking occurred in this case and argued that "regulations prohibiting all productive uses of property are subject to *Lucas*' per se rule, regardless of whether the property so burdened retains theoretical useful life and value if, and when, the 'temporary' moratorium is lifted."[137]

IV. DISCUSSION

Although environmentalists and commentators have begun to interpret *Tahoe-Sierra* as a major step towards opening the door for regulation that mandates eco-stewardship of land[138] and as a reinterpretation of the *Lucas* and *First English* holdings,[139] this Note suggests that perhaps not all has changed. In fact, it appears that the Court has not gone nearly as far as property rights activists feared, or as proponents of land use regulations wished.[140] Three issues examined in the con-

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135. *Id.* at 1496 (Thomas, J., dissenting). In a footnote, Justice Thomas stated that the majority's opinion went against the recent tide of takings jurisprudence. The footnote reads:

> The majority's decision to embrace the "parcel as a whole" doctrine as *settled* is puzzling. See, e.g., Palazzolo v. Rhode Island, 533 U.S. at 631, (noting that the Court has "at times expressed discomfort with the logic of [the parcel as a whole] rule"); Lucas v. South Carolina Coastal Council, 505 U.S. at 1016, n.7, (recognizing that "uncertainly regarding the composition of the denominator in [the Court's] 'deprivation' fraction has produced inconsistent pronouncements by the Court," and that the relevant calculus is a "difficult question").

Id. at 1496 n.1 (Thomas, J., dissenting). This appears to miss the ultimate fact that the Court, however "discomfort[ed]" or "inconsistent," has not abandoned the *Penn Central* approach. In fact, each of those two decisions ultimately embrace it, and as the majority points out in this case, Justice O'Connor's concurring opinion in *Palazollo* states, "Our polestar instead remains the principles set forth in *Penn Central* itself and our other cases that govern partial regulatory takings. Under these cases, interference with investment-backed expectations is one of a number of factors that a court must examine." Palazzolo v. Rhode Island, 533 U.S. 601, 633 (2001) (O'Connor, J., concurring).

136. *Id.* at 1496 (Thomas, J., dissenting).

137. *Id.* at 1497 (Thomas, J., dissenting).

138. Robert J. Goldstein, *The Future of Environmental Law: Adjusting Expectations After* Tahoe-Sierra, 19 PACE ENVTL. L. REV. 489, 491 (2002).

139. J. David Breemer, *Temporary Insanity: The Long Tale of* Tahoe-Sierra Pres. Council *and Its Quiet Ending in the United States Supreme Court*, 71 FORDHAM L. REV. 1, 54 (2002).

140. *See* Boise Cascade Corp. v. United States, 296 F.3d 1339, 1350-52 (Fed. Cir. 2002) (holding although *Tahoe* is the starting point for analyzing temporary moratoria, it does not apply in cases where ripeness is at issue); State *ex rel.* Shemo v. City of Mayfield Heights, 775 N.E.2d 493, 496-97 (Ohio 2002) (where, the day before *Tahoe* was decided, property owners were awarded compensation for a temporary taking due to the unconstitutionality of a zoning restriction, on appeal the court determined that even if *Tahoe* would apply and a *Penn Central* test should be used, there would not be a different result when the regulation did not substantially advance a legitimate state interest). *Cf.* ROBERT MELTZ ET AL., THE TAKINGS ISSUE, CONSTITUTIONAL LIMITS ON LAND-USE CONTROL AND ENVIRONMENTAL REGULATION 9 (1999) (arguing that past decisions that have been hailed as great victories for property rights have essentially been interpreted as doctrinally cautious and are often limited in application).

text of this litigation illustrate that the future of regulatory takings has perhaps not been altered, but instead continues along much the same path as before, perhaps even strengthened by being rooted back to the seminal "rules": (1) the landowners' legal strategy in light of regulatory takings precedent; (2) the uniqueness of the Tahoe Basin and the limited time frame focused on by the Court; and (3) a reaffirmation of the *Penn Central* balancing test in light of *Tahoe-Sierra*. These issues, all touched upon by the majority, demonstrate that although regulatory takings jurisprudence was not clarified as hoped for by this decision, the Court feels comfortable with its current path. Ultimately, the central tenets of takings law were left untouched, and the importance in this case lies more in what the Court did not say than what it did.

A. *Pushing the Envelope Too Far: Moratoria and a General Reluctance in Crafting Per Se Rules*

The landowners' central argument in this case was that a "temporary taking" is a taking requiring compensation like any other taking, and that "a 'police power' freeze on use of vacant land and an 'eminent domain' taking are functionally and constitutionally the same."[141] By advocating that temporary development moratoria should trigger a per se takings rule, the landowners overplayed their hand and misinterpreted the line of cases used in their reasoning. The Court has long maintained that per se rules in regulatory takings law are rarely created and often limited in application.[142] Indeed, the Court is doctrinally cautious when proceeding along takings lines in general,[143] and to ask the Court to stretch *Lucas*'s categorical taking rule for when "all economically viable use" of property is restricted, regardless of how long, was too much to ask of this Court.

Besides not properly understanding the Court's general reluctance to craft per se rules,[144] the argument that this new categorical rule should be applied to the concept of moratoria was a related flaw in the landowners' appeal. Surely, the courts have long held valid the tools used for planning purposes, although often impacting property values in tangential ways.[145] Moratoria, one of many tools in

141. Brief for Petitioner at 36, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S. Ct. 1465 (2002) (No. 00-1167). In oral argument, Justice Breyer questioned the landowners' council, asking if a moratoria "would have . . . reduced the value of the land by 5, 10 percent . . . why . . . should the public have to give compensation for that small diminution in value?" Attorney Berger responded "[b]ecause it's not the diminution in value that we're talking about . . . . It's the total elimination of the ability to make use of the property." Oral Argument, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S. Ct. 1465 (2002) (No. 00-1167), *available at* 2002 U.S. TRANS LEXIS 2 at *5-6 (Jan. 7, 2002).

142. MELTZ ET AL., *supra* note 140, at 9.

143. *Id.*

144. *E.g.*, Palazzolo v. Rhode Island, 533 U.S. 606, 635-36 (2001) (stating that "the temptation to adopt what amount to *per se* rules in either direction must be resisted").

145. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S. Ct. 1465, 1497 (2002) (Scalia, J., dissenting).

the planner's belt, are found at all levels of government,[146] and though not the most commonly used, they are upheld more often than not.[147] They are often critical in developing reasoned, forward thinking comprehensive plans in areas that experience greater than anticipated development pressures that overly burden the current infrastructure and/or carrying capacity of natural resources, and are usually limited in duration by statute.[148] Here, the Tahoe Basin is undeniably one of the most unique and beautiful locations in the country,[149] and random development patterns had been threatening the quality and clarity of the lake. To ask the Court to potentially allow this popular and important natural area to undergo development without a well-reasoned plan was too much for the Court. Tahoe's

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146. In fact, a number of states have enacted statutes that authorize the use of moratoria, and in some cases impose specific time limits. The majority opinion in footnote 37 listed several, including: CAL. GOV'T. CODE § 65858 (West Supp. 2002) (moratoria allowed up to two years); COLO. REV. STAT. § 30-28-121 (2001) (six months); KY. REV. STAT. ANN. § 100.201 (Michie 2001) (one year); MICH. COMP. LAWS ANN. § 125.215 (West 2001) (three years); MINN. STAT. § 394.34 (West 2000) (two years); N.H. REV. STAT. ANN. § 674:23 (2001) (one year); ORE. REV. STAT. § 197.520 (1997) (ten months); S.D. CODIFIED LAWS § 11-2-10 (Michie 2001) (two years); UTAH CODE ANN. § 17-27-404 (1995) (eighteen months); WASH. REV. CODE ANN. § 35.63.200 (West 2001) (two years); WIS. STAT. ANN. § 62.23(7)(d) (West 2001) (two years). *See also* 30-A M.R.S.A. § 4356 (1996) (180 days). *But see* N.J. STAT. ANN. § 40:55D-90(a) (West 2002) ("The prohibition of development in order to prepare a master plan and development regulations is prohibited.").

147. MELTZ ET AL., *supra* note 140, at 273.

148. California's statute allows for a two-year moratorium, which must be tied to public health and safety. The relevant portion of CAL. GOV'T. CODE § 65858 follows:

> §65858. Interim ordinance; adoption or extension; expiration; subsequent ordinance; definitions
>
> (a) Without following the procedures otherwise required prior to the adoption of a zoning ordinance, the legislative body of a county, city, including a charter city, or city and county, to protect the public safety, health, and welfare, may adopt as an urgency measure an interim ordinance prohibiting any uses that may be in conflict with a contemplated general plan, specific plan, or zoning proposal that the legislative body, planning commission or the planning department is considering or studying or intends to study within a reasonable time. That urgency measure shall require a four-fifths vote of the legislative body for adoption. The interim ordinance shall be of no further force and effect 45 days from its date of adoption. After notice pursuant to Section 65090 and public hearing, the legislative body may extend the interim ordinance for 10 months and 15 days and subsequently extend the interim ordinance for one year. Any extension shall also require a four-fifths vote for adoption. Not more than two extensions may be adopted.
>
> (b) Alternatively, an interim ordinance may be adopted by a four-fifths vote following notice pursuant to Section 65090 and public hearing, in which case it shall be of nor further force and effect 45 days from its date of adoption. After notice pursuant to Section 65090 and public hearing, the legislative body may by a four-fifths vote extend the interim ordinance for 22 months and 15 days.
>
> (c) The legislative body shall not adopt or extend any interim ordinance pursuant to this section unless the ordinance contains legislative findings that there is a current and immediate threat to the public health, safety, or welfare, and the approval of additional subdivisions, use permits, variances, buildings permits, or any other applicable entitlement for use which is required in order to comply with a zoning ordinance would result in that threat to public health, safety, or welfare . . . .

CAL. GOV'T. CODE § 65858 (West Supp. 2002).

149. *See supra* notes 66, 84 & 104 and accompanying text. The majority went to great lengths to point out the unique character of Lake Tahoe, and the particular circumstances that gave rise to the need for a regional planning agency in this area in the first place.

"uniqueness" will ultimately limit the holding of the case, and should send a signal to planners that moratoria of this magnitude must be for a significant purpose.

When the landowners and amici[150] asked the Court to examine moratoria, an unintended consequence was that the Court properly read *Lucas's* holding as applying to *permanent* takings. Thus, the Court reinforced and strengthened the "parcel as a whole" test when determining what exactly is permanent and what denies "all economically viable use." Although the Court had previously interpreted the parcel as a whole in a spatial or functional sense, here it looked further and focused on the "temporal dimension" of property rights.[151] Conceivably, after the moratorium was over, the landowners' development rights would return, albeit in a potentially more regulated environment.

A landowner's bundle of rights is affected differently by the three types of temporary takings that have been identified by the courts: the physical temporary taking, the regulatory temporary taking, and the temporary development moratorium.[152] One commentator illustrated the differences through an enlightening hypothetical.[153] In the case of a temporary physical taking, imagine a government official (perhaps in wartime) approaching a potato farmer and explaining to him that his potato house will be needed to be used as a government storage facility for a period of four years. The landowner in this situation is precluded from exercising any of his property rights over the next four years: the right to exclude, the right to use, and the right to sell. This would clearly be a taking under the physical appropriation standard. The next situation, a regulatory temporary taking, (the type imagined in *First English*) would apply if a government decides to enact a regulation that would permanently prohibit the farmer from building any potato houses on his land. Even though the farmer retained his right to exclude and possess, he was denied the right to use his land and the market value would probably decline given the permanent nature of the regulation. Thus, if the farmer can prove to a court that the regulation should be repealed, he may be compensated for the period of time that the ordinance was in effect. Finally, in a temporary development moratorium, a government would tell the farmer that all development would be halted over a fixed period of time in order to properly consider the impact that sprawl is having on the agricultural land of the area. Here, the farmer still has possession and exclusion rights and the right to sell remains; the market value of the property value may not be affected because the moratorium is for a fixed period of time, and there may be a benefit due to the potential of protected open spaces around the property.[154]

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150. Among the parties that submitted amicus briefs on behalf of the landowners were well known property rights organizations including The Pacific Legal Foundation, the California Association of Realtors, and the Defenders of Property Rights, who argued that the *Lucas* rule applied to temporary as well as permanent takings. *See* Brief of Amici Curiae Pacific Legal Foundation and California Association of Realtors, 2001 WL 1082473 at *5, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S. Ct. 1465 (2002) (No. 00-1167); Brief of Amici Curiae Defenders of Property Rights, 2001 WL 1082462 at *10-11, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S. Ct. 1465 (2002) (No. 00-1167).

151. John D. Echeverria, *A Turning of the Tide: The* Tahoe-Sierra *Regulatory Takings Decision*, 32 ENVTL. L. REP. 11235 (2002), WL 32 ELR 11235, *8 (arguing that a landowner's entire period of ownership should be considered).

152. 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).

153. *Id.* at 417-19. The hypothetical that follows in the main text is adapted from the example given in Fox's piece.

154. *Id.*

Although the *Tahoe-Sierra* decision does contain strong, pro-planning dicta,[155] it also suggests that there be an important resource or need at stake, not something menial.[156] Planners and environmentalists should thus temper their enthusiasm a bit; although the Court determined that moratoria would not constitute a per se taking, it essentially enforced what it has held all along. The Court explained that the outcome to its question of "whether a temporary moratorium effects a taking is neither 'yes, always' nor 'no, never'; the answer depends on the particular circumstances of the case."[157] Thus, moratoria should be adopted only when they leave some economically beneficial use of property, and should be crafted to provide a meaningful and finite period of time.[158] The moratoria should be tied to real data and/or quantifiable public health and safety concerns, and should allow for the maintaining of some ownership rights.[159] In fact, in an earlier case in which a single property owner challenged the moratorium at Lake Tahoe, the Nevada Supreme Court found no taking as long as the restriction was for a "reasonable period of time" and "the benefit received by the property from the ordinances [was] directed and substantial and the burden imposed [was] proportional."[160]

Thus, the Court properly determined that the "best" way to determine whether a moratorium is a taking is a balancing of factors under *Penn Central.* Indeed, this decision strongly reaffirms the principle that the sensitivity of ad hoc cases is, and should be, the very hallmark of takings law.[161]

B. The Reemergence of Penn Central

If there is one clear statement to be gleaned from this decision, it is that the Court appears to have settled on a set of criteria to analyze takings claims. *Penn Central* was firmly endorsed as the preeminent test for determining takings claims, whether permanent or temporary.[162] The Court has apparently finally abandoned its twenty-year-old project to create more lucid, prescriptive rules, and has largely returned to the legal status quo created when *Penn Central* was initially handed down.[163] Although the merits of that test were not reached in this case as it only reached the landowners' facial challenge to the moratoria, the Court firmly el-

155. The majority opinion states that moratoria are "used widely among land-use planners to preserve the status quo while formulating a more permanent development strategy. In fact, the consensus in the planning community appears to be that moratoria . . . are an essential tool of successful development." Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S. Ct. 1465, 1487 (2002). *But see* ORLANDO E. DELOGU, MAINE LAND USE CONTROL LAW: CASES, NOTES, COMMENTS 407 (2d ed. 1997) (stating that "moratorium is seldom justified. It is more often misused than used within its limitations").

156. Merriam, *supra* note 15, at 6.

157. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S. Ct. at 1478.

158. Wendie L. Kellington, *Temporary Takings/Moratoria*, SG021 A.L.I.-A.B.A. 105, 123 (2001).

159. Delogu, *supra* note 22, at 352.

160. Kelly v. Tahoe Reg'l Planning Agency, 855 P.2d 1027, 1035 (Nev. 1993) (emphasis omitted).

161. MELTZ ET AL., *supra* note 140, at 105.

162. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S. Ct. at 1483, 1489.

163. Echeverria, *supra* note 151, at *18. Echeverria essentially argues that the return to this status quo may create more confusion than clarity, since the application of *Penn Central* itself has not always been well understood.

evated *Penn Central* beyond just as-applied challenges as many lower courts had been interpreting it;[164] courts had been favoring either the two-part *Agins* analysis or a limited *Penn Central* test.[165] This past confusion due to the lack of direction has resulted in lower courts crafting or proposing a number of alternative tests that encompass parts of one or both of the *Agins/Penn Central* elements.[166]

The majority embraced *Penn Central* in three contexts. First, by holding that the District Court erred by disaggregating the landowners' property into temporal segments and then determining whether there had been a deprivation of "all economically viable use during each period,"[167] the Court in effect limited the *Lucas* holding. Indeed the Court in dicta went further than was needed to decide whether a categorical taking had occurred and seemed determined to point out what *Lucas* did not say.[168] By defining the interest in property as the "metes and bounds that describe its geographic dimensions and the term of years that describe the temporal aspect,"[169] and then determining that the starting point in a categorical taking analysis "should be to ask whether there was a total taking of the entire parcel; if not, then *Penn Central* was the proper framework,"[170] the Court has fully embraced the "parcel as a whole" concept. The Court has previously expressed discomfort with the concept as applied to determining the extent of economic deprivation, questioning it in *Lucas*[171] and again in *Palazzolo*[172] only a year before *Tahoe-Sierra* was decided.[173]

This embrace clearly defines *Lucas* as applying only to permanent takings (as a temporary taking would likely retain *some* future value).[174] As one commentator noted, after this reading of *Tahoe*, "few—if any—regulations will rise to the level of a *Lucas* taking."[175] Even Chief Justice Rehnquist noted this effect in his

164. MELTZ ET AL., *supra* note 140, at 139.

165. *See, e.g.*, Reahard v. Lee County, 968 F.2d 1131, 1136 (11th Cir. 1992) (interpreting the *Agins* second "economical deprivation" prong as encompassing the second and third *Penn Central* "economic impact" and "reasonable investment-backed expectations" elements).

166. *See* Fla. Rock Indus., Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994) (instructing the trial court that after finding that a property has retained some value, to ask two further questions: "whether a regulation must destroy a certain proportion of a property's economic use or value in order for a compensable taking of property to occur," and second "what that proportion is"). *Id.* at 1568; Reahard v. Lee County, 968 F.2d at 1136 (proposing an eight-part test).

167. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S. Ct. at 1483.

168. Echeverria, *supra* note 151, at *16.

169. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S. Ct. at 1484.

170. *Id.* at 1483-84.

171. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 n.7 (1992).

172. Palazzolo v. Rhode Island, 533 U.S. 606, 631 (2001).

173. For articles that also express discomfort with the notion that the extent of deprivation effected by a regulatory action is measured by looking at the parcel as a whole rule, *see* Richard Epstein, *Takings: Descent and Resurrection*, 1987 SUP. CT. REV. 1 (1987); John Fee, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. CHI. L. REV. 1535, 1537 (1994) (arguing that courts must make decisions regarding the definition of a relevant parcel without exploring the basis for their methodology and inconsistency, making regulatory takings determinations unpredictable). *See also* Haar & Wolf, *supra* note 58, at 2199-200 (arguing that the Court in *Tahoe-Sierra*, rather than rehashing the morass of regulatory takings, could have more constructively addressed the issue through the progressive jurisprudence endorsed in Village of Euclid v. Ambler Realty Co, 272 U.S. 365 (1926)).

174. Joel R. Burcat & Julia M. Glencer, Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency: *Is There a There There?*, 32 ENVTL. L. REP. 11212 (2002), WL 32 ELR 11212, *10.

175. Echeverria, *supra* note 151, at *16.

dissent, arguing that even *Lucas* may not have been decided in the way that it was through this analysis because, "[s]urely, the land at issue in *Lucas* retained some market value" since the development ban was amended after two years.[176]

Next, the Court went to great pains to enforce the notion that *First English* was solely a "compensation question," applicable only after a court first found that there was a taking in the first place.[177] This finding, Justice Stevens pointed out, must be a more fact-specific inquiry, which would presumably help to determine whether a temporary development ban was a normal delay due to "changes in zoning ordinances" and the like.[178] This fact-specific inquiry, much like *Lucas*, must be conducted in the light of the *Penn Central* factors.[179] Although this does not radically change the effect of *First English*, it provides some much needed guidance as to what exactly a "normal delay" is.[180] Due to this past confusion, *First English* has not been widely cited owing to a general reluctance by lower courts to wade into this murky water, and a belief that the Supreme Court was on its way to crafting a much grander story.[181]

Accordingly, perhaps what *Tahoe-Sierra* affirmed about *First English* was what the opinion was known for all along—temporary takings require compensation under the Fifth Amendment. However, it rooted the temporary takings notion in the context of all other regulatory takings; when a temporary government restriction on property goes "too far" it is a taking. Thus, by returning to the "ad hoc, factual inquiry" and embracing Justice O'Connor's concurrence in *Palazzolo* that "'[our] polestar instead remains the principles set forth in *Penn Central*,'"[182] *Tahoe-Sierra* may have taken a step further towards truly "solving" the takings puzzle.[183]

Finally, by concluding that the "interest in 'fairness and justice' will be best served by relying on the familiar *Penn Central* approach when deciding cases like this,"[184] this Court properly left the *Armstrong*[185] principle unconstrained by hard and fast indicia and set its inquiry firmly within *Penn Central*'s factual examination of the particular circumstances. The landowners' attempt to infuse a tempo-

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176. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S. Ct. at 1494 (Rehnquist, C.J., dissenting).

177. *Id.* at 1482.

178. *Id.*

179. *Id.* at 1483-84.

180. In his *First English* dissent, Justice Stevens criticized the majority opinion's lack of guidance on how to determine what exactly is a temporary taking, and asked rhetorically if "the Court has repeatedly recognized that it itself cannot establish any objective rules to asses when a regulation becomes a taking. . . . How then can it demand that land planners do any better?" First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 340 n.17 (1987) (internal citations omitted).

181. *See* MELTZ ET AL., *supra* note 140, at 271 (suggesting that courts do not cite *First English* more frequently because its remand essentially affirmed the well known *Agins* indicia); DELOGU, *supra* note 155, at 58 (arguing the lack of litigation arising out of *First English* was due to a general caution of governments to adopt cutting edge land use controls).

182. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S. Ct. at 1481 n.23 (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring)).

183. *But see* Douglas W. Kmeic, *At Last, the Supreme Court Solves the Takings Puzzle*, 19 HARV. J. L. & PUB. POL'Y 147, 152-53 (1995) (arguing that the line of cases ending with *Lucas* correctly has provided more objective standards rooted in the common law and in the context of police power limits).

184. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S. Ct. at 1489.

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

rally segmented, temporary takings, per se argument with the *Armstrong* proclamation[186] that the Takings Clause was "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,"[187] was a tactical mistake and a clear overreaching. First, a moratorium will affect all property owners within the Basin, and is thus less likely to single out an individual owner.[188] Further, because short moratoria may in fact both increase property values and preserve natural lands surrounding an individual's particular land,[189] it is not clear that the individual burdens will not be outweighed by the potential benefits. A per se rule would remove the ability to ensure that equity could be achieved through flexible analysis, which was the true desired outcome of *Armstrong*. Further, such an application here would preclude the ability of governments to create well-informed land use guidelines, which would likely result in hasty decision making by planners.[190] Surely, as Justice Stevens points out, this would be much "too blunt an instrument"[191] and would limit the ability of government to ensure the public's health and safety through reasonable land use controls.[192] If moratoria are crafted with reasonable limits on a landowner's future use of property, if they have clear deadlines, and if they are enacted for a legitimate government purpose, they will and should be sustained.

V. CONCLUSION

The *Tahoe-Sierra* Court's unwillingness to read the *Lucas* per se rule (a taking occurs when a regulation "deprives land of all economically beneficial use")[193] together with the *First English* compensation requirement (if a temporary regulation is found to be a taking) to create a new rule that moratoria constitute a per se taking is a necessary and important step away from the current direction of takings jurisprudence. This decision firmly pushes *Penn Central* back to the forefront as the indispensable framework in which to analyze takings challenges that do not meet one of the per se rules. However, even the *Lucas* rule itself has been weakened due to the reemergence of the "parcel as a whole" doctrine; future interests cannot be conceptually severed when determining what, if any, value remains on the property.

The holding in this case, however, must be seen in light of its unique, extraordinary facts. The national treasure that is the Tahoe Basin was in peril due to intense development pressures, and Nevada and California created an organization to ensure the integrity of the lake and region. If anything, this decision should put planners on notice that moratoria, especially of this length, should not be used lightly.

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186. Brief for Petitioner, 2001 WL 1692011 at *34, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S. Ct. 1465 (2002) (No. 00-1167).

187. Armstrong v. United States, 364 U.S. at 49.

188. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S. Ct. at 1488.

189. *Id.* at 1489.

190. *Id.* at 1488.

191. *Id.* at 1489 (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 628 (2001)).

192. Land use controls and regulations have been the preferred and arguably most successful method that legislatures have used to control environmental and land-related problems. *See* JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 777 (4th ed. 1998).

193. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992).

However, the *Tahoe-Sierra* case does not break any new ground; if anything, it returns to well-reasoned but recently neglected foundations of takings jurisprudence. All inquiry still returns to Mr. Holmes's adage that "if regulation goes too far it will be recognized as a taking."[194] *Tahoe-Sierra* simply suggests that to ask how far is too far requires an examination of facts and a careful and flexible balancing, not any hard and fast rules. Only then will "fairness and justice"[195] truly be served.

Philip R. Saucier

194. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).
195. Armstrong v. United States, 364 U.S. 40, 49 (1960).