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## Celebrating Tahoe-Sierra

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### Celebrating *Tahoe-Sierra*

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# ESSAY

## CELEBRATING *TAHOE-SIERRA*

By  
RICHARD J. LAZARUS\*

*The Court's ruling in Tahoe-Sierra is a realization of the current Court's potential to reach a sensible result in a regulatory takings case. Tahoe-Sierra is a major victory for government regulators and environmentalists, but not because it eliminates the takings issue as a substantial concern. Tahoe-Sierra instead finds its significance in its restoration of balance to the Court's takings jurisprudence, signified by a new Court majority with Justice Scalia relegated to a dissent. Without reversing the Court's recent rulings in favor of landowners in takings cases, the Court makes clear that a majority of the Justices have never been prepared to endorse the kind of exaggerated readings of those earlier cases that property rights advocates have been proffering.*

I. INTRODUCTION .....	2
II. THE ESSENTIAL BACKGROUND FACTS.....	4
A. <i>Tahoe's Tragedy of the Commons</i> .....	4
B. <i>The Tahoe Regional Planning Agency</i> .....	5
C. <i>The Ninth Circuit Decision</i> .....	6
III. THE HIGHLIGHTS .....	7

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\* © Richard J. Lazarus, 2003. Professor of Law, Georgetown University Law Center. The author served as co-counsel for respondent Tahoe Regional Planning Agency in the *Tahoe-Sierra* case before the Supreme Court and as counsel for several parties in many of the other Supreme Court regulatory takings cases discussed in this Essay, including *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1996). The views expressed in this Essay are the author's alone and do not purport to represent the views of any of those parties. Thanks are owed to Katherine Mayer and Kelly Moser, both members of the Georgetown University Law Center Class of 2004, for their valuable research assistance in the preparation of this Essay.

A.	<i>Severance of Physical from Regulatory Takings</i> .....	9
B.	<i>Reaffirmation of "Parcel as a Whole"</i> .....	10
C.	<i>Diminishment of Lucas</i> .....	12
D.	<i>Potentially Favorable Future Applications of the Penn Central Test</i> .....	13
IV.	TWO CAVEATS .....	14
A.	<i>The Takings Issue Remains Alive in the Supreme Court</i> .....	15
B.	<i>A Temporary Restriction on Land Use May Constitute a Partial Taking Requiring Just Compensation</i> .....	15
V.	LESSONS FOR FUTURE LITIGATION .....	17
A.	<i>The Opposition to the Petition for a Writ of Certiorari</i> .....	17
B.	<i>Audience</i> .....	21
C.	<i>Opinion Assignments</i> .....	24
VI.	CONCLUSION .....	25

## I. INTRODUCTION

For those who have been defending government agencies in takings challenges before the United States Supreme Court, the Court's ruling in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*<sup>1</sup> ended a long run of mostly adverse decisions. *Agins v. City of Tiburon*,<sup>2</sup> decided in June 1980, was the last sweeping win for government in a regulatory takings case, but even that unanimous opinion written by Justice Powell contained the seeds of future adversity, most notably the problematic "substantially advanced" and "economically viable use" tests.<sup>3</sup> Since *Agins*, government regulators lost *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles (First English)*,<sup>4</sup> *Nollan v. California Coastal Commission*,<sup>5</sup> *Lucas v. South Carolina Coastal Council*,<sup>6</sup> *Dolan v. City of Tigard*,<sup>7</sup> *Suitum v. Tahoe Regional Planning Agency*,<sup>8</sup> and, most recently *Palazzolo v. Rhode Island*.<sup>9</sup> The government's victories were largely confined to cases such as *San Diego Gas & Electric v. City of San Diego*,<sup>10</sup> *Williamson County Regional Planning Commission v. Hamilton Bank*,<sup>11</sup> and *Yee v. City of Escondido*,<sup>12</sup> in which the "win" amounted to avoiding what might otherwise have been a far worse result. The only clear government victory in a takings case since *Agins* was *Keystone Bituminous Coal*

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<sup>1</sup> 535 U.S. 302, 122 S. Ct. 1465 (2002).

<sup>2</sup> 447 U.S. 255 (1980).

<sup>3</sup> *Id.* at 260.

<sup>4</sup> 482 U.S. 304 (1987).

<sup>5</sup> 483 U.S. 825 (1987).

<sup>6</sup> 505 U.S. 1003 (1992).

<sup>7</sup> 512 U.S. 374 (1994).

<sup>8</sup> 520 U.S. 725 (1996).

<sup>9</sup> 533 U.S. 606 (2001).

<sup>10</sup> 450 U.S. 621 (1981).

<sup>11</sup> 473 U.S. 172 (1985).

<sup>12</sup> 503 U.S. 519 (1992).

*Association v. DeBenedictis*,<sup>13</sup> but even that ruling could hardly be meaningfully enjoyed because it was sandwiched between the Court's adverse rulings that same Term in *First English* and *Nollan*.

Notwithstanding all these mostly adverse rulings, it always seemed there were hints that a favorable majority might still exist in a future case presenting the legal issues in a factual setting more sympathetic to government regulators. Snippets of language from the Court's opinions and those of individual Justices could invariably be pieced together to suggest that Justices Kennedy and O'Connor, in particular, would ultimately reject the more extreme implications of Justice Scalia's takings opinions for the Court. Indeed, my own scholarship was so notoriously replete with such Pollyanna-ish claims that I appeared akin to the optimistic child who, finding himself wholly immersed in manure, refuses to despair and instead enthusiastically exclaims: "This is great. With all this manure, there must be a pony here somewhere!"<sup>14</sup> But no matter how sincere—and persuasive (at least to me)—my forecasts of an imminent favorable Court opinion, such contentions were no doubt falling on increasingly (and understandably) deaf ears.

The ruling in *Tahoe-Sierra* is a realization of the current Court's potential to reach a sensible result in a regulatory takings case. *Tahoe-Sierra* is a major victory for government regulators and environmentalists, but not because it eliminates the takings issue as a substantial concern. *Tahoe-Sierra* instead finds its significance in its restoration of balance to the Court's takings jurisprudence, signified by a new Court majority where Justice Scalia is relegated to a dissent.

Moreover, it is especially fitting to celebrate the Court's ruling in *Tahoe-Sierra* in this symposium issue honoring the thirtieth anniversary of the Clean Water Act because of the Act's relevance to the land use regulations challenged in *Tahoe-Sierra*. Those land use regulations, including the temporary development moratorium directly at issue in *Tahoe-Sierra*, were products of the very kind of comprehensive basin-wide land use planning that section 208 of the Clean Water Act promotes for the effective control of nonpoint source water pollution<sup>15</sup>—the primary source of pollution degrading Lake Tahoe.<sup>16</sup> The Tahoe Regional Planning Agency's (TRPA) section 208 planning process occurred in part when the development moratorium was in place and the information within TRPA's final seven-volume section 208 plan served as the basis for many of the land use restrictions ultimately promulgated by the TRPA in 1987.<sup>17</sup> Indeed, the TRPA

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<sup>13</sup> 480 U.S. 470 (1987).

<sup>14</sup> See, e.g., Richard J. Lazarus, *Counting Votes and Discounting Holdings in the Supreme Court's Takings Cases*, 38 WM. & MARY L. REV. 1099 (1997).

<sup>15</sup> As I described long ago, "[a] nonpoint source is difficult to conceive since it is precisely the negative of a point source" and only the latter, not the former, is defined by the Clean Water Act. See Federal Water Pollution Control Act, 33 U.S.C. § 1362(14) (2000) (defining a point source as "any discernible, confined, and discrete conveyance[.]"); Richard James Lazarus, *Nonpoint Source Pollution*, 2 HARV. ENVTL. L. REV. 176, 176 n.2 (1977).

<sup>16</sup> Federal Water Pollution Control Act, 33 U.S.C. § 1288 (2000).

<sup>17</sup> See TAHOE REGIONAL PLANNING AGENCY, WATER QUALITY MANAGEMENT PLAN FOR THE LAKE

1987 final land use plan could, for that reason, be fairly considered among section 208's greater successes.

The purpose of this Essay is threefold. First, it highlights what I perceive are some of the potentially more significant aspects of the Court's ruling, especially those worthy of celebration by government regulators. Second, it adds a few cautionary notes to the discussion, lest government counsel repeat the mistake of those who litigated in favor of the property owners in *Tahoe-Sierra* and who exaggerated in their own minds the willingness of the Court to match their own unbounded zeal for property rights protection. Finally, the Essay briefly describes a few practical lessons to be taken from *Tahoe-Sierra* for future Supreme Court government litigation on the takings issue.

## II. THE ESSENTIAL BACKGROUND FACTS

A full description of the relevant factual and procedural background of the *Tahoe-Sierra* litigation is well beyond the scope of this Essay, just as it was beyond the Court's purview in its decision. Indeed, as described below, the narrowness of the slice of that litigation and the background facts before the Court in *Tahoe-Sierra* may well have played a significant role in securing an outcome favorable to the government. In all events, for the purposes of this Essay, I set forth only the barebones background information relevant to the Court's ruling.

### A. *Tahoe's Tragedy of the Commons*

First of all, no one disputes the seriousness and the imminency of Lake Tahoe's environmental problems. Here, at least, there is essentially common ground among landowners, environmentalists, and government planners. Lake Tahoe presents a classic environmental commons, all too reminiscent of Garret Hardin's famed essay, *The Tragedy of the Commons*.<sup>18</sup> Lake Tahoe is a mountain lake of extraordinary beauty because of its setting and its exceptional clarity. The latter results from many ecological factors, most significantly the relatively small amount of land surrounding the lake, coupled with the physical character of much of that land. The land, technically referred to as either "mountain wetlands" or "stream environment zones," has—virtually like a sponge—served as a physical buffer, preventing sediment, nitrogen, phosphorous, and other chemicals from rain runoff and snowmelt from entering the lake.<sup>19</sup>

Lake Tahoe's own tragedy is that its exceptional beauty attracts commercial and residential development that in turn destroys those fragile physical features upon which that beauty depends. Not only does such

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TAHOE REGION—SECTION 208 PLAN (1988) (seven volumes) (on file with the author).

<sup>18</sup> Garret Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968).

<sup>19</sup> See generally DOUGLAS H. STRONG, *TAHOE—AN ENVIRONMENTAL HISTORY* (1984); Carl R. Payten & Cameron W. Wolfe, Jr., *Lake Tahoe: The Future of A National Asset*, 52 CAL. L. REV. 563 (1964).

development itself increase the amount of runoff contamination into the lake, but the development further threatens to replace those buffering lands with impervious land surfaces that filter out almost nothing. What makes Lake Tahoe's ecological plight especially portentous, however, is that what goes into the lake, stays in the lake. Many large water bodies naturally flush themselves out in just a few years: Existing water—including water-soluble and waterborne contaminants—goes out, and new, cleaner water comes in. Lake Tahoe does not possess that flushing ability. Because there are very few outlets from the lake, contaminants remain in the lake for hundreds of years. Increased discharges of sediments and chemicals that promote eutrophication in the lake, accordingly, are essentially irreversible.<sup>20</sup>

### *B. The Tahoe Regional Planning Agency*

In the late 1960s, with congressional approval, California and Nevada by interstate compact created a bistate agency, the Tahoe Regional Planning Agency (TRPA), to address the pressing ecological problems threatening Lake Tahoe and its surrounding lands.<sup>21</sup> The border between the two states literally splits the lake in two. As much as no state easily transfers regulatory authority to an agency outside its exclusive control, by the 1960s both California and Nevada well understood the futility of the two states attempting, independently, to protect a lake they shared.

At issue in *Tahoe-Sierra* was a 32-month development moratorium imposed from 1981–1984. The moratorium was the product of the TRPA's efforts to develop a comprehensive land use plan to regulate commercial and residential development in the Tahoe Basin. After earlier planning efforts failed to adequately limit development in the region, California and Nevada—again with congressional approval—amended their compact to instruct TRPA to produce a new plan that, based on a series of specifically determined “environmental thresholds,” more effectively limited the timing and location of development as necessary to protect the lake.<sup>22</sup> Not surprisingly, because of the immense scientific and political complexity of that undertaking, such a comprehensive land use plan could not be created without several years of scientific research and public discussion and debate. The 32-month moratorium was simply TRPA's effort to call a temporary time-out on further destructive development of the most ecologically sensitive lands while that necessary planning process took place. Understandably, TRPA worried that, absent such a planning moratorium, the planning process itself could perversely trigger an accelerated and irreversibly destructive rush to develop that would completely undermine the final land use plan's ability to protect the lake even before the plan was ever finalized and implemented.

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<sup>20</sup> See generally John Ayer, *Water Quality Control at Lake Tahoe: Dissertation on Grasshopper Soup*, 1 *ECOLOGY L.Q.* 3 (1971).

<sup>21</sup> Tahoe Regional Planning Compact, Pub. L. No. 91-148, 83 Stat. 360 (1969).

<sup>22</sup> Pub. L. No. 96-551, 94 Stat. 3233 (1980).

Although TRPA's formal moratorium on development in the most sensitive lands ended in April 1984 with TRPA's adoption of a new comprehensive plan, it was not until 1987 that a revised, final plan became legally effective. A court immediately enjoined implementation of the 1984 TRPA Plan on the ground that it did not sufficiently protect the lake.<sup>23</sup> Accordingly, the final 1987 TRPA Plan imposed even more stringent restrictions on development. The 1987 Plan also reflected the scientific and public deliberations that preceded the plan's adoption, and it established a scoring system under which each parcel of land received a numeric score reflecting the predictable effect of the parcel's development on the lake's water quality. A parcel's score directly determined the allowable "land coverage" assigned to that parcel. The 1987 Plan further combined development restrictions with significant property rights enhancements designed both to achieve a more equitable sharing of the burdens and benefits resulting from the restrictions, and to steer residential development to the most physically suitable locations. Under the plan, every property owner may sell certain transferable development rights (TDRs) to owners of other eligible properties. Even those who own parcels with scores that do not permit them to develop their own parcels—because of the offsite impact of such development on the lake—are eligible to receive TDRs, which the landowner can sell for significant sums to apply to parcels elsewhere in the Basin where development is allowed. As the plan contemplated, a viable market for TDRs has since arisen in the Tahoe Basin.<sup>24</sup>

### *C. The Ninth Circuit Decision*

Aggrieved landowners initiated a series of lawsuits against TRPA challenging the validity of the 1987 Plan and the related planning process. This litigation has produced a labyrinth of trial and appellate court rulings. Fortunately, the litigation concerning the constitutionality of the 32-month moratorium, which was the only issue addressed by the Court in *Tahoe-Sierra*, is fairly isolable from these widespread court proceedings.

In 1999, the federal district court for the district of Nevada considered the landowners' regulatory takings claim against TRPA based on the moratorium and agreed with the landowners' contention that the 32-month moratorium amounted to an unconstitutional taking of property for which the Fifth and Fourteenth Amendments compelled the government's payment of "just compensation."<sup>25</sup> The trial court's reasoning, however, was quite novel because the court concluded that, although there was a regulatory taking under *Lucas v. South Carolina Coastal Council*,<sup>26</sup> there was no

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<sup>23</sup> See *People of the State of California v. Tahoe Reg'l Planning Agency*, No. S-84-0561-EJG (E.D. Cal. June 15, 1984), *aff'd*, 766 F.2d 1308 (9th Cir. 1985).

<sup>24</sup> See *generally* *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 730, 741-42 (1996).

<sup>25</sup> *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 34 F. Supp. 2d 1226 (D. Nev. 1999).

<sup>26</sup> 505 U.S. 1003 (1992).



regulatory taking under *Penn Central Transportation Co. v. City of New York* (*Penn Central*).<sup>27</sup>

The district court's decision under *Penn Central* was based on its factual findings as applied to the three factors the Supreme Court specified in *Penn Central* as "relevant" to evaluating the merits of a regulatory takings claim: 1) the character of the governmental action, 2) the extent of any interference with reasonable, distinct investment-backed expectations, and 3) the regulation's economic impact.<sup>28</sup> The district court concluded that the moratorium was reasonable in nature; the landowners did not have a "reasonable investment-backed expectation" that they would be able to build during the moratorium period; and the landowners had failed to establish that they had suffered any diminution in value as a result of the moratorium. The trial court nonetheless concluded that the moratorium amounted to a *Lucas* per se taking because the landowners had no "economically viable use" of their property during the 32-month moratorium time period.<sup>29</sup>

On appeal, the Ninth Circuit reversed on the *Lucas* analysis, ruling that a temporary moratorium on development is not readily susceptible to treatment as a categorical per se taking under *Lucas* because, unless it is of indefinite duration, a moratorium does not completely eliminate all economic value.<sup>30</sup> The appellate court further rejected the landowners' argument that the Supreme Court's earlier decision in *First English* compelled the conclusion that a temporary prohibition on all use is a per se taking of all economically viable use within the meaning of *Lucas*, and its temporary nature is relevant only to the amount of just compensation to be paid. The Ninth Circuit denied rehearing en banc, but with five judges dissenting.<sup>31</sup>

### III. THE HIGHLIGHTS

The Supreme Court affirmed the Ninth Circuit panel by a 6-3 vote, with Justice Stevens writing for the majority. The Chief Justice and Justices Scalia and Thomas dissented. The Court held that the temporary moratorium on development imposed during the government's comprehensive land use planning process did not amount to a per se taking under *Lucas*.<sup>32</sup> For those not intimately involved in the litigation, the result was no doubt a surprise, and for good reason. I expect that the Justices who originally voted to hear the case did not do so with the expectation that the Court would affirm the

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<sup>27</sup> 438 U.S. 104 (1978).

<sup>28</sup> See *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 34 F. Supp. 2d at 1240-41 (citing *Penn Central*, 438 U.S. at 124).

<sup>29</sup> *Id.* at 1245.

<sup>30</sup> *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764 (9th Cir. 2000).

<sup>31</sup> *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 228 F.3d 998 (9th Cir. 2000) (Kozinski, J., joined by O'Scannlain, Trott, T.G. Nelson, & Kleinfeld, JJ., dissenting from denial of rehearing en banc).

<sup>32</sup> *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency* (*Tahoe-Sierra*), 535 U.S. 302, 122 S.Ct. 1465, 1486-90 (2002).

Ninth Circuit. Perhaps they were a bit put off by the fact that the panel opinion was authored by Judge Reinhardt, who is well known for sharply criticizing the Court in op-eds in the major newspapers.<sup>33</sup> Regardless of any role Judge Reinhardt's involvement might have played, those voting in favor of certiorari were most certainly influenced by Judge Kozinski's dissent from denial of rehearing. That dissent, which was repeated exhaustively in the certiorari petition, loudly accused the panel of seeking to reverse the Supreme Court's decision in *First English*. "The panel does not like the Supreme Court's Takings Clause jurisprudence very much, so it reverses *First English* . . . and adopts Justice Stevens's *First English* dissent."<sup>34</sup>

Of course, the Supreme Court's subsequent affirmance of the Ninth Circuit's ruling in *Tahoe-Sierra* strongly suggests that Judge Kozinski was quite mistaken in his understanding of the "Supreme Court's Takings Clause jurisprudence," especially both *First English* and *Lucas*. On the other hand, the fact that Justice Stevens authored the Court's opinion in *Tahoe-Sierra* and also authored the *First English* dissent that Judge Kozinski claimed the Ninth Circuit panel improperly embraced, hints at another possibility: The Supreme Court itself "d[id] not like the Supreme Court's Takings Clause jurisprudence very much," so the Court itself changed it in *Tahoe-Sierra*.

My own view is that *Tahoe-Sierra* does change the Court's jurisprudence, but not by reversing any of its prior rulings. No doubt Justice Stevens (who dissented in both *First English* and *Lucas*) would have liked to have done so, but his opinion for the Court did not. *Tahoe-Sierra* instead accomplished this jurisprudential shift by making clear that a majority of the Justices has never been prepared to endorse the kind of exaggerated readings of those earlier cases long proffered by property rights advocates. A careful examination of the various opinions of the Justices over the years instead reveals that, given the proper procedural and factual context, the Court stood ready to restore balance to what had become a takings jurisprudence unduly skewed by the peculiar facts and procedural postures of those earlier cases.<sup>35</sup>

What happened in *Tahoe-Sierra* was that the property rights bar mistakenly believed its own headlines and, as a result, unwittingly delivered to the Court the kind of case for which environmental land use planners had long hoped, but had never themselves successfully brought before the Court. *Tahoe-Sierra* presented the takings issue in a factual and procedural setting favorable to environmental land use planning. The upshot was a realization of the longstanding potential for the Court to reject some of the more extreme views of the Takings Clause propounded by property rights advocates, just as the Court had previously rejected what the Court considered some of the more extreme views advanced by government regulators and environmentalists.

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<sup>33</sup> See, e.g., Stephen Reinhardt, "Conservative" Rehnquist Court Unmasks Its Naked Activism, L.A. TIMES, May 7, 1991, at B7.

<sup>34</sup> *Tahoe-Sierra*, 228 F.3d at 999.

<sup>35</sup> See Lazarus, *Counting Votes and Discounting Holdings*, *supra* note 14.

Highlighted below are some of the specific aspects of the Court's underlying reasoning worthy of special celebration by environmental land use planners. They are not presented as exclusive of the opinion's significance, but as merely illustrative.

*A. Severance of Physical from Regulatory Takings*

One of the most jurisprudentially significant analytic steps taken by Justice Scalia's opinion for the Court in *Lucas* was its equating of physical and regulatory takings. The *Lucas* Court described a regulation that deprived property of all economic value as the functional equivalent of a physical taking. It was upon that rationale that the Court concluded that a regulation with such an economic impact should, like a permanent physical occupation by the government, be subject to a per se categorical takings rule.<sup>36</sup> In *Tahoe-Sierra*, the landowners relied heavily on that equivalency in contending that a temporary deprivation of all economically viable use, like a temporary physical invasion or occupation, should be subject to a per se rule.

However, in *Tahoe-Sierra*, the Court stepped away from that analysis and characterized physical and regulatory takings as completely distinct and therefore subject to different kinds of constitutional analyses. *Tahoe-Sierra*, in short, split apart what *Lucas* sought to merge together. The majority opinion could hardly have been any clearer in this respect: "[W]e do not apply our precedent from the physical takings context to regulatory takings."<sup>37</sup> The Court stressed that the "ubiquitous" nature of land use regulations invariably caused those regulations to "impact property values in some tangential way" and "[t]reating them all as per se takings would transform government regulation into a luxury few governments could afford."<sup>38</sup> The Court described "critical differences," for instance, "between a leasehold and a moratorium."<sup>39</sup> The former "gives the government possession of the property, the right to admit and exclude others, and the right to use it for a public purpose."<sup>40</sup> A moratorium, however, "does not give the government any right to use the property, nor does it dispossess the owner or affect her right to exclude others."<sup>41</sup> In a playful reference to the famous words of *Pennsylvania Coal v. Mahon*, the *Tahoe-Sierra* majority accused the Chief Justice's dissent of "stretch[ing] *Lucas*' 'equivalence' language *too far*."<sup>42</sup>

The Court's opinion in this respect is no incidental matter. The threshold notion that physical and regulatory takings are constitutionally equivalent under the Takings Clause served as a fundamental premise of Professor Richard Epstein's original manifesto urging the courts to

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<sup>36</sup> See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017 (1992).

<sup>37</sup> *Tahoe-Sierra*, 122 S. Ct. at 1479.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 1480.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 1480 n.19.

<sup>42</sup> *Id.* (emphasis added).

reinvigorate the Clause.<sup>43</sup> His legal theories have long provided academic fuel to property rights advocates. In the aftermath of the Court's ruling in *Tahoe-Sierra*, however, it is now clear that six Justices on the Court, including both Justices O'Connor and Kennedy, reject Epstein's fundamental premise. Several lower courts have since relied on the *Tahoe-Sierra* Court's distinction between physical and regulatory takings in rejecting takings claims.<sup>44</sup>

### B. Reaffirmation of "Parcel as a Whole"

The *Tahoe-Sierra* Court further handed environmental planners a major victory by reaffirming the validity of the "parcel as a whole" rule in regulatory takings law.<sup>45</sup> To determine whether, as Justice Holmes put it in *Pennsylvania Coal*, a regulation has gone "too far,"<sup>46</sup> courts must naturally consider the regulation's impact on the property, including what uses of the property remain. As it happens, however, even that inquiry has proven fraught with controversy because identifying the remaining uses depends on how one defines the relevant property in the first instance. Land use regulations almost never prohibit all uses of property for all time. They more typically restrict some uses on some lands, based on the lands' respective physical characteristics.

Until the Supreme Court's decision in *Lucas*, it had seemed fairly well-settled takings law that the judicial inquiry must consider the entire parcel or "the parcel as a whole," which made it more difficult for landowners to prevail in takings litigation. Justice Brennan's opinion for the Court in *Penn Central* had squarely endorsed examining the entire parcel: "'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been abrogated."<sup>47</sup> In *Lucas*, however, the Court not only announced a per se takings test based on economic impact alone, but—in a footnote—also appeared indirectly to question the continuing validity of the "parcel as a whole" approach.<sup>48</sup> Even more recently, the Court in *Palazzolo*<sup>49</sup> expressly and directly invited litigants to raise anew the ongoing validity of the "parcel as a whole" approach. In *Palazzolo*, the Court noted that it had "expressed discomfort with the logic of this rule" in *Lucas* and then seemed to cite favorably to some scholarship of Professor Epstein that called for the rule's wholesale abandonment.<sup>50</sup> The Court declined to reach the legal issue in *Palazzolo* only because both Rhode Island and the United States—as

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<sup>43</sup> RICHARD EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

<sup>44</sup> See, e.g., *Covington v. Jefferson County*, 53 P.3d 828 (Idaho 2002); *Mays v. Bd. of Trs. of Miami Township*, 2002 Ohio App. Lexis 3347 (June 28, 2002); *Barefoot v. City of Wilmington*, 306 F.3d 113 (4th Cir. 2002).

<sup>45</sup> *Tahoe-Sierra*, 122 S. Ct. at 1481–83 (2002).

<sup>46</sup> See *Pennsylvania Coal*, 260 U.S. 393, 415 (1922).

<sup>47</sup> *Penn Central*, 438 U.S. 104, 130 (1978).

<sup>48</sup> *Lucas*, 505 U.S. 1003, 1016–17 n.7 (1992).

<sup>49</sup> 533 U.S. 606 (2001).

<sup>50</sup> *Id.* at 631.

amicus curiae—persuaded the Justices that the legal issue had not been fairly presented by the petition for a writ of certiorari in that case.<sup>51</sup>

For that very reason, however, the Court's grant of certiorari in *Tahoe-Sierra*, issued the day after its ruling in *Palazzolo*, first seemed foreboding to TRPA. *Tahoe-Sierra* posed a severance issue, albeit in a temporal rather than spatial context. If, therefore, there were in fact a majority in *Palazzolo* ready to reverse the Court's longstanding *Penn Central* "parcel as a whole" approach, but just lacking a case that fairly presented the issue, it seemed quite possible that those same Justices had concluded that *Tahoe-Sierra* would provide the necessary vehicle. Or at least that is what the petitioners in *Tahoe-Sierra* and their supporting amici could understandably have hoped.

The Court's *Lucas* decision also made the so-called denominator issue absolutely critical to takings law. Because the Court ruled in *Lucas* that complete economic wipe-outs are per se takings (and therefore not subject to the vagaries of applying *Penn Central*'s three-factor test), a spatial or temporal severance of the relevant property would mean the *Lucas* per se rule would be triggered far more frequently. Indeed, absent any such severance, *Lucas* was likely almost never to be triggered. Certainly, it can be fairly argued (or at least I have done so) that it was not rightly triggered in *Lucas* itself because there in fact remained economic value even in the extreme circumstances presented by that case.<sup>52</sup>

The *Tahoe-Sierra* Court, however, failed to deliver for property rights advocates on the severance issue. The Court declined to sever the property temporally, rejecting the landowners' contention that the Court should focus only on that period of time during which the moratorium was in place. The Court reasoned that it was relevant to a takings inquiry that property subject to a temporary moratorium retains substantial market value even during the moratorium because of the property's potential for future development. The Court's discussion of the question was also not confined to the propriety of a landowner's proposed temporal severance of the property. Citing *Penn Central*, the Court broadly repudiated an automatic spatial or physical severance of property in judicial takings analysis: "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.'"<sup>53</sup>

In the relatively short time period since the Court's *Tahoe-Sierra* ruling, its reaffirmance of the "parcel as a whole" rule has had the greatest impact on pending litigation. Lower courts have seized on the *Tahoe-Sierra* language to reject various landowner severance arguments and therefore their takings claims as well.<sup>54</sup>

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<sup>51</sup> *Id.*

<sup>52</sup> See Richard J. Lazarus, *Putting the Correct "Spin" on Lucas*, STAN. L. REV. 1411, 1412 (1993).

<sup>53</sup> *Tahoe-Sierra*, 122 S. Ct. 1465, 1483 (2002) (citing *Penn Central*, 438 U.S. 104, 130-31 (1978)).

<sup>54</sup> See, e.g., *Walcek v. United States*, 303 F.3d 1349 (Fed. Cir. 2002); *Machipongo Land & Coal Co.*, 799 A.2d 751 (Pa. 2002); *Seiber v. United States*, 53 Fed. Cl. 570 (Fed. Cl. 2002).

*C. Diminishment of Lucas*

Within a year of the Court's landmark decision in *Lucas*, it was clear that a majority of the Justices no longer embraced it. Justice White, who supplied the necessary fifth vote in *Lucas*, resigned from the Court less than one year later and was replaced by Justice Ginsburg, whose views on the takings issue have proven much closer to those of Justice Stevens than to those of Justice Scalia. What is even more frequently overlooked is that Justice Kennedy, who has long been concerned about safeguarding constitutional protections of private property rights, declined to join Justice Scalia's majority opinion in *Lucas*. He instead concurred only in the judgment and endorsed a legal analysis far more sympathetic to environmental land use regulators than found in the *Lucas* majority. Justice Kennedy's separate opinion eschewed per se rules in favor of balancing tests that focus primarily on the reasonableness of a landowner's economic expectations. His opinion further specifically acknowledged the necessity of land use regulations extending beyond the scope of common law nuisance regulation, especially when faced with proposed development of lands in fragile ecosystems.<sup>55</sup>

The *Tahoe-Sierra* opinion realized the longstanding potential of splitting Justice Kennedy from Justice Scalia on the regulatory takings issue.<sup>56</sup> The case's added bonus was that Justice O'Connor similarly split from Justice Scalia, a result foreshadowed by the conflicting concurring opinions filed by the two Justices in *Palazzolo*. In *Palazzolo*, Justice O'Connor filed a separate concurring opinion similar in tone and outlook to Justice Kennedy's concurring opinion in *Lucas*.<sup>57</sup> Justice O'Connor joined the *Palazzolo* majority, authored by Justice Kennedy, but went on to stress that a land purchaser's notice of preexisting land use regulations was *relevant*, although not automatically preclusive of the merits of any later takings claim.<sup>58</sup> Justice Scalia took sharp (and sharp-witted) disagreement with Justice O'Connor, arguing in his opinion that the pre-purchase notice was wholly irrelevant, equating such notice with a thief simply announcing beforehand an intent to steal someone else's property.<sup>59</sup>

The Court's opinion in *Tahoe-Sierra* further diminished the significance of *Lucas* in two additional respects. First, the Court made plain that a ninety-five percent diminution in economic value does not trigger a *Lucas* per se taking. According to the Court, its references in *Lucas* to no value meant just that: "no" value.<sup>60</sup> Second, the Court further rejected the landowners' claim

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<sup>55</sup> See *Lucas*, 505 U.S. 1003, 1033–35 (1992) (Kennedy, J., concurring); see generally Lazarus, *Counting Votes and Discounting Holdings*, *supra* note 14, at 1133–35.

<sup>56</sup> See Lazarus, *Counting Votes and Discounting Holdings*, *supra* note 14, at 1131 (predicting a "Justice Kennedy-Led Majority on the Court for a New Regulatory Takings Test").

<sup>57</sup> See *Lucas*, 505 U.S. 1003, 1032–36 (1992) (Kennedy, J., concurring).

<sup>58</sup> See *Palazzolo*, 533 U.S. 606, 632–36 (2001) (O'Connor, J., concurring).

<sup>59</sup> *Id.* at 636–37 ("I write separately to make clear that my understanding of how the issues discussed in Part II-B of the Court's opinion must be considered on remand is not Justice O'Connor's.").

<sup>60</sup> *Tahoe-Sierra*, 122 S. Ct. 1465, 1483 (2002) (emphasis added).

that an elimination of all “use” should be sufficient to trigger *Lucas* regardless of remaining economic value. The Court declined the landowners’ invitation to distinguish use from value and, on that ground, to hold that the *Lucas* per se rule is triggered when all use is barred even if some positive market value remains. As described instead by the Court in *Tahoe-Sierra*, “the categorical rule in *Lucas* was carved out for the ‘extraordinary case’ in which a regulation permanently deprives property of all value.”<sup>61</sup>

The upshot is that *Lucas* has likely been relegated to a mere incidental footnote in takings law and the Court’s earlier opinion in *Penn Central* is again the primary judicial text for adjudicating takings claims. Six Justices in *Tahoe-Sierra* expressed their displeasure with per se rules favoring landowners. Virtually the whole Court in *Palazzolo* similarly expressed their displeasure with per se rules that favored environmental planners. To be sure, some on both sides of the takings issue—property rights advocates and environmentalists—condemn the *Penn Central* analysis as unduly vague and ultimately incoherent. Be that as it may,<sup>62</sup> *Tahoe-Sierra* has now made clear that *Penn Central* best expresses the Court’s own uncertainty about takings analysis, and its ultimate conclusion that an analytical framework that promotes case-by-case adjudication is more likely to lead to sensible results than will any of the competing per se approaches advocated by either property rights advocates or environmentalists.

#### *D. Potentially Favorable Future Applications of the Penn Central Test*

Finally, the Court’s opinion in *Tahoe-Sierra* includes much language favorable to those defending environmental land-use regulations in future takings challenges brought under *Penn Central*. This part of *Tahoe-Sierra* is essentially dictum because the Court never applied *Penn Central*; the issue was not before the Court because the landowners in *Tahoe-Sierra* failed to preserve the *Penn Central* issue in the court of appeals. Supreme Court dictum, however, is valuable currency in the lower courts and even in future Supreme Court cases. Justice Scalia’s opinions for the Court in *Nollan* and *Lucas* skillfully used dictum to promote law reform beyond the four corners of the Court’s formal holdings in those cases.<sup>63</sup> Justice Stevens’s opinion for the Court in *Tahoe-Sierra* makes clear that he is equally skilled in such opinion writing.

The *Tahoe-Sierra* opinion, for example, includes favorable language regarding the significance for *Penn Central* analysis of a landowner’s notice of land use regulation at the time of purchase. This was, of course, the very

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<sup>61</sup> *Id.* at 1484.

<sup>62</sup> For a thoughtful discussion of the virtues of *Penn Central*’s vagueness, see Marc R. Poirer, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93 (2002).

<sup>63</sup> For instance, in *Lucas*, Justice Scalia’s opinion for the Court cast doubt on the vitality of the Court’s then-recent ruling in *Keystone Bituminous Coal Assn v. DeBenedictis*, 480 U.S. 470 (1987), which rejected a takings challenge to a restriction on coal mining quite similar to that found to be a taking in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), but his opinion succeeded in raising those doubts with indirect references and without formally addressing the issue. See 505 U.S. at 1016 n.7.

issue described above that separated Justices O'Connor and Scalia in *Palazzolo*. In *Tahoe-Sierra*, Stevens's opinion for the Court stressed how the landowners purchased with notice because, even before the 1987 Plan was in place, they had notice of the highly regulated nature of the property and the possibility of even more regulation in the future.<sup>64</sup> The clear intimation is that such notice can defeat the reasonableness of any expectations to undertake unrestricted development that a landowner claims he harbored at the time of purchase.

Similarly, important language in *Tahoe-Sierra* concerns the proper application of the "reciprocity of advantage" factor that, tracing from *Pennsylvania Coal* to *Penn Central*, has long figured in the Court's takings analysis.<sup>65</sup> In particular, environmental land use planners have long contended that there are positive economic impacts of sound land use planning that should be taken into account in considering the economic impact and overall justice and fairness of land use controls in a takings case. In *Tahoe-Sierra*, the Court's opinion supported the value of comprehensive land use planning, including the reciprocities of advantage to all landowners that such planning provides. The opinion further underscored how it takes time to address serious environmental problems carefully and that planning delays are, for that reason, a necessary and important, indeed "essential,"<sup>66</sup> part of the planning process, which may even ultimately increase rather than decrease property values as a result.<sup>67</sup> In this respect, the Court squarely rejected the invitation of one amicus (and the Chief Justice's dissent) to establish a hard and fast "one year" rule for the reasonable length of planning moratoria.<sup>68</sup> The Court instead agreed that while a moratorium that lasts longer than a year may warrant "special skepticism," the facts necessitating the 32-month moratorium at issue in *Tahoe-Sierra* show why the Court "could not possibly conclude that every delay of over one year is constitutionally unacceptable."<sup>69</sup> The Court's opinion is, in short, a sweeping endorsement of the importance of comprehensive land use planning in areas, such as Lake Tahoe, dominated by fragile ecosystems.

#### IV. TWO CAVEATS

Lest government lawyers repeat the mistake of those representing the landowners in *Tahoe-Sierra*, they should guard against reading too much into *Tahoe-Sierra*. Even though Justices O'Connor and Kennedy joined Justice Stevens's opinion for the Court in its entirety, this is far from a stable majority in favor of land use regulation in takings cases before the Court. No doubt that is why Justice Stevens's opinion for the Court includes so many lengthy and generous quotations from prior opinions of both O'Connor and

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<sup>64</sup> *Tahoe-Sierra*, 122 S.Ct. at 1473 & n.5, 1475 & n.11.

<sup>65</sup> See *Pennsylvania Coal*, 260 U.S. 393, 415 (1922); see also *Penn Central*, 438 U.S. 104 (1978).

<sup>66</sup> *Tahoe-Sierra*, 122 S. Ct. at 1487.

<sup>67</sup> *Id.* at 1488-89.

<sup>68</sup> *Id.* at 1487 n.34.

<sup>69</sup> *Id.* at 1489.



Kennedy, as he worked overtime to keep his majority intact. But that is also likely why the opinion suggests some caveats to which government lawyers should pay special heed in future takings litigation.

*A. The Takings Issue Remains Alive in the Supreme Court*

The Supreme Court has limited the reach of the Takings Clause, but the Court has not endorsed the position, favored by many environmentalists and some academics, that regulatory takings claims rest on an illegitimate, ahistorical reading of the Constitution. There remains after *Tahoe-Sierra*, as before *Tahoe-Sierra*, a majority of Justices on the Court who strongly believe the Takings Clause must be aggressively applied to protect landowners from the overreaching of environmental land-use regulators. That majority—which includes both Justices Kennedy and O'Connor—remains ready to rule against government agencies in factual circumstances that those two Justices believe to be unduly harsh. The questions posed by Justices Kennedy and O'Connor during oral argument in *Tahoe-Sierra* make that clear, as have their prior opinions in earlier takings cases. Justices O'Connor and Kennedy departed from the Chief Justice and Justices Scalia and Thomas in *Tahoe-Sierra* not because they no longer share a common desire to invoke the Takings Clause to prevent the erosion of private property rights in land, but because Justices O'Connor and Kennedy have concluded that per se rules sweep too broadly in this particular constitutional context.

With the support of Justices O'Connor and Kennedy, the Court in *Tahoe-Sierra* has therefore restored much-needed balance to the Court's takings jurisprudence. But that is a far different outcome than a wholesale repudiation of the property rights movement, which likely still has more allies on the Court than do environmental regulators. The property rights movement and its counsel simply overplayed their hand in *Tahoe-Sierra*.

*B. A Temporary Restriction on Land Use May Constitute a Partial Taking Requiring Just Compensation*

It would be an overreading of *Tahoe-Sierra* to posit that a temporary restriction on land use could *never* be a taking. There is instead reason to believe that a majority of Justices on the current Court might find such a temporary restriction to constitute a taking under either *Lucas* or *Penn Central* in some factual circumstances.

At oral argument in *Tahoe-Sierra*, Justice Kennedy repeatedly asked TRPA's counsel whether a temporary moratorium on development as applied to an owner of a mere leasehold interest in property might constitute a *Lucas* taking. Perhaps for that reason, when the Court in *Tahoe-Sierra* rejected the application of *Lucas*, the Court stated only that a "fee simple estate cannot be rendered valueless by a temporary prohibition."<sup>70</sup> The Court repeated the phrase "fee simple estate" consistently in its analysis.<sup>71</sup> Further

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<sup>70</sup> *Tahoe-Sierra*, 122 S. Ct at 1484 (emphasis added).

<sup>71</sup> See, e.g., *id.* at 1483.

reinforcing the possibility that the Court may be ready to apply *Lucas* if a plaintiff landowner has less than a fee simple interest, the Court's opinion arguably described the relevant interest in property in terms of the "owner's interest": "An interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspects of the owner's interest."<sup>72</sup>

The Court also stressed that it was not holding that the "temporary nature of a land use regulation precludes finding that it effects a taking: we simply recognize that it should not be given exclusive significance one way or the other."<sup>73</sup> Consistently, the Court did not even wholly rule out the possibility that the moratorium's application might have constituted a taking of individual parcels under *Penn Central*. Without deciding that issue one way or the other, because it was not presented by the record before it, the Court in *Tahoe-Sierra* acknowledged that "[i]t may be true that under a *Penn Central* analysis petitioners' land was taken and compensation due."<sup>74</sup> The Court further asserted that "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."<sup>75</sup>

One significant development in the Court's reasoning is that *Tahoe-Sierra* is the first instance in my recollection when the Court has formally endorsed the notion of a "partial" regulatory taking. To be sure, the Court's prior decision in *First English* provides precedent in a related circumstance: when a permanent land use restriction is subsequently lifted because of a successful takings claim. But, as *Tahoe-Sierra* itself made plain in rejecting the petitioners' overreading of *First English*, the latter ruling does not address the question of when a regulatory taking has occurred; *First English* addressed only the distinct issue: If a regulatory taking has occurred, what is a constitutionally adequate remedy for such a taking? *Tahoe-Sierra*, however, answered the former question and plainly contemplated the possibility of a "partial taking." In a footnote that looks very much like the product of a specific request by another Justice for its inclusion, the Court stated that it is "perfectly clear that Justice Black's oft-quoted comment about the underlying purpose of the guarantee that private property shall not be taken for a public use without just compensation applies to *partial takings* as well as total takings."<sup>76</sup> Whenever the Court stresses that something is "perfectly clear" it is frequently a red flag that the Court's precedent is, in fact, anything but clear on the point, which is why someone on the Court likely insisted that it now be made clear, albeit in dictum. Government lawyers in future takings cases will no doubt see this language quoted in many of the briefs filed by their opposing counsel.

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<sup>72</sup> *Id.* at 1484.

<sup>73</sup> *Id.* at 1486.

<sup>74</sup> *Id.* at 1478 n.16.

<sup>75</sup> *Id.* at 1485.

<sup>76</sup> *Id.* at 1484 n.27 (emphasis added).

## V. LESSONS FOR FUTURE LITIGATION

There are also several positive lessons to be drawn by government lawyers from the successes gained in the *Tahoe-Sierra* litigation. A favorable Supreme Court ruling was not preordained; if litigated differently, this case could have been lost. The victory was likely the result of a series of strategic judgments made during the course of the entire litigation, including decisions made by the very able counsel who represented TRPA before the federal district court and Ninth Circuit. Perhaps the most important decision made by government counsel at trial was to litigate, rather than stipulate, the factual issues pertaining to *Penn Central*. The resulting trial record prompted a series of favorable factual findings by the trial judge that both precluded any effective appeal of that judge's *Penn Central* ruling by the landowners and created a very sympathetic factual context for TRPA in the Supreme Court.

The favorable outcome in *Tahoe-Sierra* more particularly offers lessons for how government counsel should approach Supreme Court litigation in regulatory takings cases. Three of those lessons for future government litigants are outlined below.

*A. The Opposition to the Petition for a Writ of Certiorari*

The government's success in *Tahoe-Sierra* was the product of many important factors, but one factor was present in *Tahoe-Sierra* that had been missing in prior regulatory takings cases: an effective brief in opposition to the petition. It is no exaggeration that TRPA's opposition likely changed the outcome of the case.

The government won *Tahoe-Sierra* because of the narrowness of the legal issue considered by the Court: whether TRPA's 32-month moratorium on development amounted to a per se *Lucas* taking in a facial challenge. Entirely removed from the judicial equation were factors that could have depicted the petitioner landowners' claims in a more sympathetic and legally defensible light. In their stead was a legal issue that effectively compelled the petitioners to propound a legal theory that had virtually no chance of prevailing before the Court, which is why the petitioners' briefs on the merits repeatedly sought to rewrite the question presented before the Court.<sup>77</sup>

Normally, of course, a question presented before the Court is determined by the petition itself, and, consequently, it is the petitioner's own fault if that question does not present the petitioner's case in the most favorable light possible. In *Tahoe-Sierra*, however, the legal issue before the Court was *not* one of the questions presented by the petition for certiorari. It was instead the question set forth in the Court's own order granting certiorari: "Whether the Court of Appeals properly determined that a temporary moratorium on land development does not constitute a taking of

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<sup>77</sup> See Petitioners' Brief at 13, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 122 S. Ct. 1465 (2002) (No. 00-1167).

property requiring compensation under the Takings Clause of the United States Constitution?"<sup>78</sup> The source of that narrow question was TRPA's brief in opposition, which naturally posed the question in the light most favorable to TRPA.

The *Tahoe-Sierra* petition set forth three very different questions, all of which could have steered the litigation before the Court in a direction far more favorable to the petitioners:

- (1) [I]s it permissible for the Ninth Circuit Court of Appeals to hold—as a matter of law—that a temporary moratorium can *never* require constitutional compensation.
- (2) Can a land use regulatory agency escape its constitutional duty to pay for land taken for public use by the expedient of enacting a series of rolling, back to back “temporary” moratoria/prohibitions extending over twenty years[.]
- (3) Can a land use regulatory agency purport to “protect the environment” at a major regional location . . . by compelling a selected group of individual landowners to forego *all* use of their individual homesites, and thereby compel a *de facto* donation of their land for public use without compensation.<sup>79</sup>

TRPA's brief in opposition, however, directly challenged the validity of all of the questions set forth by the petition. The opening paragraphs of the “Reasons for Denying the Writ” stated:

None of the sweeping questions of law set forth by the petition is, in fact, presented by the record and rulings of the lower courts in this case. The court of appeals did *not* rule “that a temporary moratorium can *never* require constitutional compensation.” [Certiorari] Pet. at i (emphasis in original). The court did *not* rule that a land use regulatory agency can “escape its constitutional duty to pay for land . . . by the expedient of enacting a series of rolling, back to back ‘temporary’ moratoria/prohibitions extending over a period of twenty years.” *Id.* Nor did the court of appeals hold that TRPA can “compell[] a selected group of individual landowners to forego *all* use of their individual homesites, and thereby compel a *de facto* donation of their land for public use without compensation.” *Id.*

The court of appeals instead expressly acknowledged that some temporary moratoria may rise to the level of a regulatory taking requiring just compensation, and simply held that petitioner's facial challenge fell short of that standard. The factual findings of the district court, upheld by the court of appeals, also wholly contradict petitioners' overbroad characterizations of TRPA's regulatory measures. Indeed, no facts concerning TRPA's action after

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<sup>78</sup> *Tahoe-Sierra*, 533 U.S. 948, 948 (2001).

<sup>79</sup> Petition for a Writ of Certiorari, at i, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 122 S. Ct. 1465 (2002) (No. 00-1167).

1987 are in the record because the district court ruled that petitioners' takings claim [for that period] is barred by the applicable statute of limitations.<sup>80</sup>

The question the Supreme Court posed in granting the petition is, moreover, virtually verbatim the question TRPA's brief in opposition described as the "only issue" before the appellate court—and, therefore, potentially the Supreme Court: the "narrow question" whether TRPA's 32-month moratorium amounted to a *Lucas* per se taking.<sup>81</sup> Hence, while contrary to the opposition's conclusion, the Court did grant certiorari, the Court nonetheless apparently agreed with TRPA on what constituted the only legal issue fairly presented by the rulings in the lower courts. The end result was that the legal issue presented for Supreme Court briefing was one TRPA was most likely to win and the petitioners most likely to lose. For that reason, TRPA's greatest worry in the Supreme Court should have been the possibility that the petitioners might succeed in persuading five Justices to answer a different question, notwithstanding the explicitness of the Court's grant of certiorari. Otherwise, so long as the Court remained focused on the only question before it under the Court's order granting review, TRPA had reason to be fairly confident that it could and should win the case in the Court.

By contrast, the lack of similarly effective oppositions in prior takings cases helped produce the extent of the resulting government losses. In *Palazzolo*, the petitioner sought to have the Court review legal issues that did not accurately reflect the issues as litigated in the lower courts.<sup>82</sup> These legal issues included factual premises that did not reflect the actual record in the case and included legal arguments never presented to the lower courts. But because the opposition in *Palazzolo* did not similarly contest the petition on those grounds, the Court ultimately deemed any such objection waived pursuant to Supreme Court Rule 15.2<sup>83</sup> and went on to rule against the government on those legal questions.<sup>84</sup> As described in Justice Ginsburg's dissenting opinion in *Palazzolo*, there was considerable unfairness in the Court's invocation of the waiver rule in the circumstances

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<sup>80</sup> TRPA Brief in Opposition at 7–8, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 122 S. Ct. 1465 (2002) (No. 00-1167).

<sup>81</sup> *Id.* at 9 ("The only issue before the appellate court, therefore, was the narrow question whether the two year, eight month moratorium on development resulting from two temporary TRPA land use regulations amounted to 'one of the "relatively rare situations" where "regulation denies all economically beneficial or productive use of land."'" (citations omitted)).

<sup>82</sup> *Palazzolo*, 533 U.S. 606, 650 (2001) (Ginsburg, J., joined by Souter & Breyer, JJ., dissenting) ("The critical point, however, underplayed by the Court, is that *Palazzolo* never raised or argued the *Penn Central* issue in the state system: not in his complaint; not in his trial court submissions; not—even after the trial court touched on the *Penn Central* issue—in his briefing on appeal.").

<sup>83</sup> See Sup. Ct. R. 15.2 ("Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition. Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention.").

<sup>84</sup> *Palazzolo*, 533 U.S. 606, 622 (2001) (Ginsburg, J., dissenting).

presented in *Palazzolo*,<sup>85</sup> but the fact remains that government counsel must now be on notice of the Court's apparent willingness to allow a petitioner—in the absence of respondent's objection in its opposition brief—to adopt legal theories not advanced in the lower courts and even change the factual premises of the case as actually supported by the record in the courts below.

Even in *Lucas* a similar shortcoming in the opposition may have determined the outcome. The factual premise upon which the Court reviewed the case—a deprivation of all economically viable use—was more than a bit suspect, if not largely fictitious. At the very least, a strong claim could be made based on the record in the case that no such deprivation had occurred. Because, however, the opposition to the petition failed to assert that argument at the certiorari stage, the Court deemed it waived,<sup>86</sup> resulting in Justice Scalia's opinion for the Court.

To be sure, it is understandable that government briefs in opposition often lack the objections and challenges necessary at the certiorari stage. Many advocates do not appreciate the significance of not including a formal objection because they have little or no experience litigating cases on the merits in the Supreme Court or little experience with the Court's application of Supreme Court Rule 15.2. They also have no reason to know that the Court has recently been much more willing to deem matters waived by briefs in opposition. Nor is it easy in any event for government counsel at the jurisdictional pleading stage to identify those misstatements and mischaracterizations in a petition for writ of certiorari worthy of formal objection in the opposition brief. At the certiorari stage, it is very difficult to anticipate the myriad ways in which different statements in the petition might turn out to be relevant if the Court grants review and the case is fully briefed on the merits. This is especially true when, as in *Palazzolo*, the petitioner is also permitted to shift dramatically his legal theories. *Palazzolo*

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<sup>85</sup> *Id.* at 652

To be sure, the Brief in Opposition did overlook Palazzolo's change in his theory of the case, a change that, had it been asserted earlier, could have rendered insufficient the evidence the State intelligently emphasized below. But the State's failure to appreciate that Palazzolo had moved the pea to a different shell hardly merits the Court's waiver finding.

*Id.* at 652 (citations omitted).

[A]ided by new counsel, Palazzolo sought—and in the exercise of this Court's discretion obtained—review of two contentions he did not advance below. The first assertion is that the state regulations take the property under Penn Central. The second argument is that the regulations amount to a taking under an expanded rendition of *Lucas* covering cases in which a landowner is left with property retaining only a 'few crumbs of value.' Again, it bears repetition, Palazzolo never claimed in the courts below that, if the State were correct that his land could be used for a residence, a taking nonetheless occurred.

*Id.* at 650–51.

Furthermore, Palazzolo's argument is unfair: The argument transforms the State's legitimate defense to the only claim Palazzolo stated below into offensive support for other claims he states for the first time here. Casting away fairness (and fairness to a State, no less), the Court indulges Palazzolo's bait-and-switch maneuver.

*Id.* at 652.

<sup>86</sup> *Lucas*, 505 U.S. 1003, 1020 n.9 (1992).

was an extreme case in this respect, but there is almost always considerable evolution in the legal arguments of a case as both parties come to grips with the challenges of Supreme Court litigation. At least in the takings area, the burden on government counsel in preparing an opposition can be especially great because the petitions are often not the work product of the trial counsel who handled the case in the lower courts, but of a more expert Supreme Court counsel who knows of the Court's interest in certain legal issues and, accordingly, substantially recharacterizes the case to implicate those legal issues.

An important lesson to be drawn from *Tahoe-Sierra* is how important, notwithstanding these difficulties, it is for government counsel to allocate the resources necessary to draft an effective opposition in takings cases. Only by directly confronting such petitions can government counsel both successfully resist Supreme Court review and ensure that if certiorari is granted, the Court's review is on a basis that fairly represents the issues as actually litigated in the lower courts. Fortunately, in *Tahoe-Sierra*, TRPA's counsel were well aware of the potential for a grant of certiorari in the case because of the high decibel level of Judge Kozinski's dissent from denial of rehearing en banc, joined by four other Ninth Circuit judges. As a result, counsel allocated the substantial resources necessary to prepare an opposition that ultimately produced a favorable outcome on the merits, even though certiorari was granted over that same opposition.

### *B. Audience*

The Supreme Court litigation in *Tahoe-Sierra* further underscored the importance of knowing your audience and steering your arguments to that audience. The exclusive purpose of a Supreme Court brief should be to persuade a majority of the Justices to rule in your favor or, when that is not possible, to rule in a way that is the least harmful. Many Supreme Court briefs, however, fail this simple threshold test. They present arguments that the briefs' authors would themselves embrace were they on the Court rather than arguments likely to persuade a majority of the Justices who are in fact on the Court. The brief a lawyer signs is not, in short, the Court's opinion. Nor should counsel view the brief as a personal statement of what he or she personally believes the law should be.

In *Tahoe-Sierra*, for instance, the petitioners' brief on the merits and their oral argument were remarkable for the purity of adherence to the uncompromising agenda of the property rights movement including that movement's far-reaching view of the Takings Clause. In *Tahoe-Sierra*, it should have been clear, based on the Court's precedent and separate opinions authored by individual Justices in that precedent, that there were *not* five Justices on the Court willing to embrace that position. Because the membership of the Court has not changed since Justice Breyer's appointment in 1994, advocates should have a fairly good sense of the individual Justices' views on the takings issue. Everyone knew coming into *Tahoe-Sierra* that Justices O'Connor and Kennedy were most likely the keys to winning. Therefore, to win the case, an advocate needed to pay

heightened attention to the Court's regulatory takings opinions that either of those Justices had joined, any separate opinions that either had authored in those cases, and any questions that either Justice had posed at oral argument during those cases.

In *Suitum*,<sup>87</sup> for example, as soon as the Court granted review, it was readily apparent that reversal was virtually preordained.<sup>88</sup> The challenge, therefore, for TRPA and its supporting amici was largely to ensure that the "landing" in the event of reversal and remand was soft rather than hard. TRPA's brief, accordingly, sought to maximize the chance that the legal issues addressed by the Court would cause the least harm to TRPA's position in all of its takings litigation, not just *Suitum*. In particular, the brief sought to ensure that if TRPA were to lose on ripeness, the loss would be very narrow and, even more importantly, there would be no occasion for the Court to address other legal issues raised in the case, including the "parcel as a whole" rule and the status of transferable development rights in takings analysis. Consistent with that goal, TRPA's brief avoided sweeping arguments in favor of narrowly tailored, case-specific arguments that, even if rejected, would produce less damaging precedent.<sup>89</sup> TRPA did lose on ripeness, but the opinion by Justice Souter established no particularly unfavorable precedent.<sup>90</sup> Indeed, on balance, several aspects of the Court's opinion are likely to prove more favorable than unfavorable to TRPA.

In *Tahoe-Sierra*, however, even after the Court shaped the legal issue in a manner sympathetic to TRPA, the landowner petitioners decided against shaping their arguments to any extent in anticipation of the very real possibility that Justices O'Connor and Kennedy were ready to abandon Justice Scalia's views. The petitioners wrote and argued—in a completely uncompromising fashion—what they sincerely believed should be the law. Based on the language (not always the holdings) of the Court's opinions, they crafted a statement of the law that would have provided property owners with the maximum degree of constitutional protection. There is, of course, something quite commendable about such principled adherence to strongly held personal beliefs, but that is not the same thing as effective Supreme Court advocacy. A Supreme Court advocate must craft a position that maximizes the chances of his or her client obtaining the best result realistically possible before the present Court. This can include, of course, persuading an individual Justice that an opinion he or she previously joined or authored means something very different than what the Justice may have supposed or that the opinion even was in error. But advocacy must be tempered with a heavy dose of realism, including the realistic bounds of changing minds, coupled with a respect for the Justices' previously stated views.

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<sup>87</sup> *Suitum*, 520 U.S. 725 (1996).

<sup>88</sup> Richard J. Lazarus, *Litigating Suitum v. Tahoe Regional Planning Agency in the United States Supreme Court*, 13 J. LAND USE & ENVTL. L. 179, 200 (1997).

<sup>89</sup> *Id.* at 202–05.

<sup>90</sup> *Id.* at 212–13.



The *Tahoe-Sierra* petitioners, for example, should have sought to craft a position that took more account of the fact that there are not five Justices on the Court likely to embrace an aggressive reading of *Lucas*, because of Justice Kennedy's failure to join the Court's opinion in that case. They should likewise have taken greater account of the fact that, in *Palazzolo*, Justice O'Connor had parted ways with Justice Scalia on the wisdom of *per se* takings rules and the viability of the *Penn Central* analysis. TRPA, by contrast, crafted its position to take account of those Justices' views. TRPA did not purport to present some uncompromising, pro-government, pro-environment position that did not recognize a legitimate, significant role for judicial scrutiny of environmental land use regulation under the Takings Clause. TRPA's brief and oral argument took pains to emphasize that TRPA's position left ample room for such scrutiny and respected the stated concerns of Justices O'Connor and Kennedy regarding the necessity of that kind of constitutional oversight. In short, TRPA did not advocate a view of the Takings Clause that would be wholeheartedly and enthusiastically embraced by environmentalists. It sought to win the case in the Court and obtain the best opinion possible from the Court.

Both the landowner petitioners and TRPA, however, also learned about the problems that even one's purported friends (*i.e.*, amici) can present in Supreme Court litigation. Perhaps the most helpful brief for TRPA filed by any amicus in the case was that authored by Professor Richard Epstein, even though it was intended to support the landowner petitioners.<sup>91</sup> Epstein's brief carefully explained why *Penn Central* should be overruled.<sup>92</sup> His brief further explained how his reading of the Takings Clause meant that municipalities could, in effect, be constitutionally compelled to tax existing homeowners to pay for the loss of economic expectations suffered by those whose expectations of building homes were frustrated by a land use restriction.<sup>93</sup> Whatever the merits of these arguments, it is quite clear that their presentation before the Court was not likely to make the petitioners' case appear more appealing to either Justice O'Connor or Justice Kennedy. Both Justices, including most recently Justice O'Connor in *Palazzolo*, have made clear their general support for a *Penn Central* approach, notwithstanding the inevitable circularity of any "reasonable expectations" analysis. And, neither Justice is likely to be drawn favorably to the specter of courts' mandating taxes to equalize all the benefits and burdens of land use regulation. Quite the opposite is true. They are more likely to be repelled.

TRPA, however, had its own unhelpful amicus. An amicus brief filed on behalf of the National Audubon Society stressed the vacuousness of *Penn Central*,<sup>94</sup> even to the extent of quoting a law review article authored by one

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<sup>91</sup> Brief of Amicus Curiae Institute for Justice, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 122 S. Ct. 1465 (2002) (No. 00-1167).

<sup>92</sup> *Id.* at 18.

<sup>93</sup> *Id.* at 26 ("The correct solution therefore is to impose a tax on those who have developed their lands to compensate the others for the loss of their development rights, be they great or small.").

<sup>94</sup> Brief of Amicus Curiae National Audubon Society at 20, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 122 S. Ct. 1465 (2002) (No. 00-

of TRPA's co-counsel to support that proposition and thereby indirectly impeach TRPA's reliance on *Penn Central*.<sup>95</sup> The National Audubon Society amicus brief further agreed with the landowner petitioners' essential position that the relative importance of the government interest furthered by an environmental land use regulation should be irrelevant to a takings case.<sup>96</sup> To the extent that TRPA needed to appeal to Justices who had left little question that their willingness to read *Lucas* narrowly was contingent on a broader application of *Penn Central*, this amicus brief was as unhelpful to TRPA as Epstein's brief was to the landowner petitioners. Not surprisingly, TRPA's brief highlighted Epstein's argument to undermine the petitioners' position,<sup>97</sup> while the petitioners' reply brief began with a lengthy verbatim quotation from the arguments made by the National Audubon Society to impeach those of TRPA.<sup>98</sup>

### C. Opinion Assignments

Of course an advocate cannot even pretend to be able to influence the assignment of opinion writing in a particular case. Both the number and nature of the factors relevant to that assignment are far beyond any advocate's ability to affect, and it would be foolhardy to venture otherwise. What *Tahoe-Sierra* nonetheless teaches is how important the opinion assignment can be and, even more pointedly, why—for that reason—it can be far better to win by a smaller rather than a larger margin these days.

My own assessment of the case immediately after certiorari was granted, but especially after the petitioners' opening merits brief had been filed, was that TRPA was likely to win the case by a 7-2 vote. Only Justices Scalia and Thomas would be in the dissent. The petitioners' arguments were, I thought, so extreme that there was not only little chance that Justices O'Connor and Kennedy would embrace them, but I also thought it likely that the Chief Justice would abandon them as well. As much as the Chief Justice has generally been a reliable vote in favor of private property owners in many regulatory takings cases, the federalism implications of takings litigation have always seemed to stay his judicial hand a bit in those cases.<sup>99</sup> His dissent in *Penn Central*, which Justice Stevens joined, included much

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1167) (stating "[i]t is clear that the *Penn Central* multi-factor analysis has little, if any, contemporary relevance").

<sup>95</sup> *Id.* at 6 (quoting Richard J. Lazarus, *Putting the Correct "Spin" on Lucas*, 45 STAN. L. REV. 1411, 1429 (1993)).

<sup>96</sup> *Id.* at 22 ("[I]t would make no sense to conclude that the importance of the police power objective being pursued should weigh against a finding of a compensable taking.").

<sup>97</sup> See Respondent's Brief at 19, n.5, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 122 S. Ct. 1465 (2002) (No. 00-1167).

<sup>98</sup> See Petitioners' Reply Brief at 1, *quoting* Brief of Amicus Curiae National Audubon Society, 21-22; *id.* at 2 ("The Audubon Society's brief not only bolsters the landowners' legal theory, it lays to rest the arguments made by TRPA and the rest of its amici that moratoria in general, and this series of moratoria in particular, should not require compensation because they are imposed to achieve praiseworthy goals."); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 122 S. Ct. 1465 (2002) (No. 00-1167).

<sup>99</sup> See Lazarus, *Counting Votes*, *supra* note 14, at 1111-14.

language favorable to government regulation;<sup>100</sup> his opinion for the Court in *PruneYard Shopping Center v. Robbins*<sup>101</sup> reflected deference to state property law; and his opinion for the Court in *Dolan*<sup>102</sup> was far more tempered in its reasoning and ruling than if the opinion for the Court in that same case had been authored by Justice Scalia. Even after the oral argument in *Tahoe-Sierra*, during which the Chief Justice displayed considerable skepticism towards TRPA's legal position, I still thought it possible that the Chief Justice would vote for TRPA; I just no longer considered that possibility more likely than not to occur.

The Court's ruling in *Tahoe-Sierra*, authored by Justice Stevens, underscores the advantages of winning by a vote of 6-3, rather than 7-2. Had the vote been 7-2, the Chief Justice would have been the senior Justice in the majority and therefore responsible for the opinion assignment. Perhaps, of course, the Chief might have assigned the opinion to Justice Stevens. But perhaps not. Had the Chief assigned the opinion to himself, the Court's opinion would undoubtedly have been written very differently. The same is true if the Chief had assigned the case to either Justice O'Connor or Justice Kennedy. The bottom-line affirmance would, of course, have been the same, but there were many ways to write an opinion affirming the Ninth Circuit; Justice Stevens's opinion for the Court was as broadly favorable to environmental land use planning as an opinion for the Court could have possibly been. What made the opinion especially successful, moreover, was that it kept the votes of both Justices O'Connor and Kennedy, and that neither of those Justices decided to write a separate opinion.

## VI. CONCLUSION

*Tahoe-Sierra* is worthy of celebration. It restores a needed balance to the judicial takings analysis that has been missing since the Court's rulings in *Nollan* and *Lucas*. The Court's opinion also makes plain that the current Court stands ready to reject per se taking rules favored by the property rights movement just as the Court has previously rejected per se "no taking" rules favored by environmentalists. The result may be unsatisfying to those in search of a single, grand unifying theory for the Takings Clause, but at least the Court's current test more accurately reflects the competing concerns actually at stake in reconciling the nation's need for sound environmental land use planning with its constitutional commitment to the protection of private property rights. Perhaps *Tahoe-Sierra's* final gift will be to prompt the Justices to take a long overdue hiatus from deciding regulatory taking cases to allow the lower courts an opportunity to further develop the law through the incremental process of case-by-case adjudication. Whatever the Court decides, *Tahoe-Sierra* is a ready reminder that it is far more fun to win than it is to lose in the Supreme Court. It is also a reminder that the substantial environmental protection gains achieved by

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<sup>100</sup> *Penn Central*, 438 U.S. 104, 138-53 (1978).

<sup>101</sup> 447 U.S. 74 (1980).

<sup>102</sup> 512 U.S. 374 (1994).

the Clean Water Act during the past thirty years extend beyond classic point source controls to include, as in the case of Lake Tahoe, land use controls necessary for effective nonpoint source management.