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Tahoe-Sierra Returns Penn Central to the Center Track

Marla E. Mansfield
TAHOE-SIERRA RETURNS PENN CENTRAL 
TO THE CENTER TRACK®

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I. INTRODUCTION

At one point, an article on takings jurisprudence would have been mercifully short. The original intent of the Fifth Amendment¹ envisioned compensation when the government actually appropriated property.² This single-directional track ended when Justice Holmes declared that regulation could be the equivalent of a “taking” of private property.³ Since then, courts have attempted to define when a regulation might be “too much,”⁴ and thus require compensation when it interfered with an individual’s desire to do something with land. The Supreme Court has not been able to define the concept crisply. One attempt occurred in 1992, in Lucas v. South Carolina Coastal Council,⁵ but the case, rather than making it easier to find a taking, simply raised a new set of questions. In each of the past two years, the Court decided cases that could have—but did not—solidify the Court’s jurisprudence. The last case, Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,⁶ however, did not continue to elevate private property rights over public needs, which had been the tendency of earlier cases, many decided by a five-to-four majority. It seemed as if Justices O’Connor and Kennedy awoke to the possible ramifications of membership in the coalition of five Justices and then left that coalition for the Tahoe-Sierra six-to-three

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1. U.S. Const. amend. V. The Takings Clause of the United States Constitution provides as follows: “[N]or shall private property be taken for public use, without just compensation.” Id.


4. Pa. Coal, 260 U.S. at 415. As stated by the Court, “The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking.” Id.

5. 505 U.S. 1003.


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Nevertheless, the current course of takings law is bound to frustrate those looking for definitions within straight, parallel lines. Current takings law, or that of the Rehnquist Court, dates from the Lucas decision. In the opinion Justice Scalia authored, four Justices held certain governmental activities to be “categorically” considered takings: physical appropriations and restrictions that denied all economically beneficial use. The second category is also described as restrictions rendering property valueless, a difference in language that could have a difference in meaning. Nevertheless, the second category would not create a compensable taking if the governmental regulation was simply abating a nuisance or otherwise enforcing a background principle of law. In other words, if the relevant state definition of property did not include the right to do what the government is now explicitly forbidding, there could be no taking. Last year in Palazzolo v. Rhode Island, the Court addressed whether the fact that a regulation existed when the individual claiming a taking acquired the land in and of itself made the regulation a “background principle of law.” With various nuances and emphases, the Court held that the pre-existence of the regulation alone did not preclude a categorical taking claim, nor did it negate the possibility of a reasonable, investment-backed expectation that development could take place on the land. The latter inquiry is of import if the regulation did not rise to a total deprivation of use or value.

This last Term, the Court looked at a limited question: “whether a moratorium on development imposed during the process of devising a comprehensive land-use plan constitutes a per se taking of property requiring compensation under the Takings Clause.”

7. In Tahoe-Sierra, the line-up was Justices Stevens, Souter, Ginsburg, Breyer, O’Connor, and Kennedy versus Chief Justice Rehnquist, and Justices Scalia and Thomas. Id. The Lucas majority was Chief Justice Rehnquist and Justices Scalia, Thomas, and O’Connor, with a concurrence by Justice Kennedy. Lucas, 505 U.S. 1003. The same four Justices combined on the merits in Palazzolo with Justice Kennedy. See Palazzolo v. R.I., 533 U.S. 606 (2001). This five-to-four configuration held in a slightly different context, the unconstitutional condition or exaction situation, which arises when a government requires dedication of land in response to a request for a building permit. See Nollan v. Cal. Coastal Commn., 483 U.S. 825 (1987) (requiring a nexus between the harm to be remedied and the required dedication); Dolan v. City of Tigard, 512 U.S. 374 (1994) (requiring a “rough proportionality” between the remedy and the harm that would be created by the development).

8. Lucas, 505 U.S. at 1018. Justice Kennedy’s concurrence, however, was based on the regulation creating too great an interference with investment-backed expectations. He did not find possible categorical taking.

9. See infra pt. III. B. (discussing “valueless” and “economically viable use”).

10. Lucas, 505 U.S. at 1018.

11. 533 U.S. 606.

12. Id. at 629. For an extensive review of Palazzolo, see generally Marla E. Mansfield, “By the Dawn’s Early Light:” The Administrative State Still Stands after the 2000 Supreme Court Term (Commerce Clause, Delegation, and Takings), 37 Tulsa L.J. 205, 271-301 (2001).


14. If the denial of either use or value was not total, the Court could not find a “categorical taking,” but would have to make an ad hoc appraisal of the so-called Penn Central factors—namely, the nature of the governmental purpose, the degree of impact on the regulated, and the interference with the claimant’s reasonable, investment-backed expectations. Penn Central Transp. Co. v. City of N.Y., 438 U.S. 104 (1978). This route to a takings decision will be referred to as a “Penn Central analysis.”

15. Tahoe-Sierra, 122 S. Ct. at 1470, 1479.
thus levied a facial attack on the moratorium. The majority, in a Justice Stevens-authored opinion, found that the denial of all use for a limited period was not a per se or categorical taking; a court considering the issue would have to perform a Penn Central analysis. In reaching this conclusion, the Court reiterated that the “property as a whole” was the necessary denominator to determine whether or not “all” value or use was denied. There could be no “severance” of the property in either a physical or temporal sense. Therefore, the property’s remaining value precluded a taking without further analysis. The dissenting Justices sharply disagreed.

The opinion generated two dissents. Justices Scalia and Thomas joined Chief Justice Rehnquist’s dissent. According to Rehnquist, the basic problem was that the majority read Lucas to only apply its categorical rule when property was left “valueless.” To these Justices, when a regulation renders property incapable of use, it is equivalent to a physical taking. Therefore, compensation would be due for the time in which no use at all was allowed. Temporary takings are takings. Justice Thomas wrote the second dissent, which only Justice Scalia joined. Justice Thomas quarreled with the majority’s conclusion that it was a settled issue that examination of “the property as a whole” was the proper way to measure property affected by a regulation. He noted this premise had been questioned several times. Because of this, many Court observers would have guessed that the older view that the property as a whole governed might have been heading for a change.

The result in Tahoe-Sierra, therefore, was a pleasant surprise for proponents of the government’s need to regulate land use for environmental sanity and a mild shock for proponents of property rights. The latter group may be defined by a belief that the ability to use property cannot be denied. Nevertheless, the decision is not satisfactory for those wanting to know what the limits of regulatory power might be. It simply rejects per se rules.

This Article will examine the current state of takings jurisprudence. Part II of the Article explicates the Tahoe-Sierra case. In Part III, the case is put in perspective, with attention paid to three issues: (a) the defection of Justices Kennedy and O’Connor; (b) the significance of making the talisman for a categorical taking “valuelessness” rather than a finding of a “lack of economically viable use”; and (c) the impact of reasserting

17. Tahoe-Sierra, 122 S. Ct. 1465. In the present case, the district court ruled that the moratorium did not result in a Penn Central taking because the delay in development did not greatly interfere with “reasonable, investment-backed expectations.” Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regl. Plan. Agency, 34 F. Supp. 2d 1226, 1240-42 (D. Nev. 1999). Because this finding was not appealed, its appropriateness was not before the Supreme Court.
18. Tahoe-Sierra, 122 S. Ct. at 1476-77.
19. Id. at 1490 (Rehnquist, C.J., dissenting).
20. Id. at 1496 (Thomas & Scalia, JJ., dissenting).
22. See Robert H. Cutting, “One Man’s Ceiling Is Another Man’s Floor”: Property Rights as the Double-Edged Sword, 31 Envtl. L. 819, 823 (2001) (property rights movement champions an owner’s right to use the individual’s property to the highest and best use in the economic sense, thus allowing for transformation from land’s natural state).
the “property as a whole” as the denominator in appraising the extent of a regulation’s impact on property. Finally, Part IV of the Article concludes that takings jurisprudence has backed away from per se rules and remains entrenched in 

Penn Central analysis. This is less than an ideal result, but does allow the law to evolve more easily, as it must do to meet growing ecological knowledge and concerns.

II. THE TAHOE-SIERRA DECISION

A. The Factual Background

The setting for the Tahoe-Sierra case is a place “worth fighting for,”

namely Lake Tahoe, which is a mountainous lake bordered by California and Nevada. The inventor of Tom Sawyer and fabricator of miraculous doings in King Arthur’s Court found little need to embellish when he saw Lake Tahoe. In Roughing It, the author described the lake as follows:

“[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 snow-clad 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.”

Most courts reviewing this case quoted this work. As the Supreme Court noted, no one was disagreeing that the lake was awe-inspiring in its beauty. Moreover, this beauty is tied to its clarity. The need to retain this resource led to the regulations challenged as a taking per se.

Lake Tahoe’s clarity comes from the lack of organic matter in the lake. Without nutrient-rich organic matter, algae will not grow. The lake, therefore, was blue rather than opaque and green. In the past, the lake remained clear. Vegetation filtered the snowmelt feeding the lake. As development began to increase in the late 1950s and early 1960s, environmental impacts on the lake became clear. Development replaced vegetation with impervious surfaces; the more this was done, the more run-off was created because soil could no longer absorb the precipitation. The increased flow led to erosion, which in turn brought nutrients to the lake. The algae growth was more obvious near concentrations of human development.

Dispersed regulatory authority made addressing the problems difficult. The land that could affect the lake was in two states. Additionally, jurisdiction over various lands resided in numerous counties and the federal government, through

24. Id. at 1230 (quoting Mark Twain, Roughing It 169 (facsimile reprint of 1st ed., Hippocrene Books 1872)).
26. Tahoe-Sierra, 122 S. Ct. at 1471.
27. Most notably, nitrogen and phosphorus lead to algae growth. Tahoe-Sierra, 34 F. Supp. 2d at 1231. The lake was referred to as “oligotrophic”—that is, very low in nutrients and lacking a steep temperature gradient that would prevent deep circulation and mixing.” Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regl. Plan. Agency, 216 F.3d 764, 766 (9th Cir. 2000).
the Forest Service. Concerted action was begun in 1969 through the Tahoe Regional Planning Compact, which Congress passed after the legislatures of California and Nevada enacted it. The Compact set up the defendant, the Tahoe Regional Planning Agency ("TRPA"), and gave it a mandate.

Initially, the TRPA incorporated the so-called Bailey system, which ranked lands pursuant to their hazardousness, which was a product of steepness as well as other factors affecting soil erosion tendencies. Generally, steeper slopes are more prone to run-off in a natural state, and therefore smaller decreases in vegetation or increases in surface coverage can create larger amounts of run-off and nutrient loading than similar activities on less steep slopes. The land capability districts were labeled 1 through 7, with 1 corresponding to the most environmentally sensitive. The impervious covering allowed on land in each district was limited, with district 1 having the greatest constraint. In fact, land capability districts 1-3 were designated "high hazard" or "sensitive" lands. Correspondingly, "low hazard" or "non-hazardous" labels were placed on districts 4-7. Additionally, "stream environment zones" ("SEZ") lands were made a sub-classification of class 1.

The protections afforded under the initial regulations TRPA promulgated did not satisfy California regulators. In fact, the entire compact was considered too weak and was amended in 1980 ("1980 Compact"). The 1980 Compact became effective on December 19, 1980. Within eighteen months of that date, the TRPA was to establish environmental threshold carrying capacities. A new regional plan was to be adopted twelve months later. In the interim, the TRPA was to review all projects and the 1980 Compact mandated temporary restrictions on development.

The TRPA took three major actions under the 1980 Compact that gave rise to this lawsuit. First, it adopted Ordinance 81-5, which was effective on August 24, 1981. In essence, this ordinance banned all development of SEZ lands in either Nevada or California. It prohibited "any construction, work, use or activity that involved any form of grading, clearing, removal of vegetation, filling or creation of land coverage—with or without a permit." As to Districts 1-3, no permits would be granted for activities in California; as to Nevada, some development would be permissible. The intent was to have this temporary rule in effect until adoption of amendments to the Regional Plan. The TRPA did not meet its eighteen-month deadline for adoption of the capacities, which was "unsurprising" given the

29. Tahoe-Sierra, 34 F. Supp. 2d at 1232.
30. Id. Areas near streams and other wetlands in their natural state acted as filters of debris that run-off from higher elevations could bring to the lake. Therefore, if these "stream environment zones" are covered with impervious material or made hard-packed without vegetation, the result is not only new erosion, but the loss of mitigation for naturally occurring erosion.
32. Tahoe-Sierra, 34 F. Supp. 2d at 1235.
The agency completed this work on August 26, 1982, approximately two months late. Arguably, the TRPA then had until August 26, 1983 to complete the Plan. On August 26, there was no plan completed. This ended an approximately twenty-four month period, which was "Period I."

The second action was Resolution 83-21, which suspended all project reviews and approvals, including acceptance of new proposals. It was implemented on August 26, 1983 because the TRPA feared losing jurisdiction when it failed to meet the plan deadline. As a result of this action, there would be no development on any class 1-3 lands or SEZ lands in either state. The moratorium was to last ninety days, or until November 26, 1983. However, when this date passed with no plan adopted, the staff, with the acquiescence of the TRPA, continued the moratorium until the Plan was adopted on April 26, 1984. Therefore, the time that elapsed for "Period II" was approximately eight months.

After Period II, the third action of the TRPA was the promulgation of the 1984 Regional Plan. To a certain extent, the earlier prohibitions remained, at least on a temporary basis, as further fine-tuning of the Plan continued, but before that was completed, litigation intervened. In addition to takings claims, two lawsuits challenged the Regional Plan as being too environmentally lenient and not up to the requirements of the 1980 Compact. The State of California and an environmental group filed these suits. The plaintiffs won both a temporary restraining order and preliminary injunction forbidding the TRPA from issuing any permits. This injunction lasted until adoption in 1987 of a completely revised regional plan ("1987 Plan"). The period from plan promulgation until lifting of the injunction was "Period III" (April 26, 1984 to July 1, 1987).

Before the injunction was issued, but also after Period II, two other sets of plaintiffs filed suits against the TRPA. These parties claimed that the first two of TRPA's actions created a "taking" of their property and violated their civil rights. One set of plaintiffs owned property in Nevada and filed in the federal district court in Nevada. The second set filed in a district court located in California because they owned California property. After procedural matters were decided and appealed to the Ninth Circuit, the two cases were consolidated in the Nevada court. Again, the district court dismissed all of the plaintiffs' claims and again the Ninth Circuit reversed in part. On remand, after a procedural ruling

33. Id. The task was made even more complex by having to also deal with the requirements of the Clean Water Act, most importantly Section 208 of the Act. Id. at 1233.
that the statute of limitations barred some claims,\textsuperscript{37} the case went to trial. The court further divided the plaintiffs by type of land owned, specifically by SEZ or Class 1-3 lands and the land owned in each state.

Therefore, four groups of plaintiffs were delineated based on type of land and the state in which the land was found. Due to the previous rulings of the district and appellate courts, the only claims addressed were the following:

1. Period I Section 1983 claims for all California claimants and the Nevada SEZ claimants (a two-year moratorium);
2. Period II Section 1983 claims for all California and Nevada claimants (an eight-month moratorium); and
3. Period III Section 1983 claims of the California plaintiffs (a three-year and four-month moratorium).\textsuperscript{38}

The judge bifurcated the trial; only liability was at issue, not what damages could have accrued.

\textbf{B. The District Court Decision}

The district court made several findings of fact and law. Some were appealed, and others were not. To totally understand the scenario before the Supreme Court requires considering those items that were not appealed. These facts became the uncontested background for the Supreme Court's decision.

First, of course, the district court acknowledged that, if a taking arose at all, it would be a regulatory taking. One method in which a governmental action could arise to such a taking is if it "does not substantially advance a legitimate state interest."\textsuperscript{39} The court, however, found that the moratoria clearly advanced such a goal, namely the prevention of Lake Tahoe's eutrophication. Not only was it important to preserve an environmentally significant area, the lake's clarity was part of its draw to tourists and, thus, the area's tourism-based economy.\textsuperscript{40} It was also obvious that the actions denied at least some economically viable use of the property.

The next question was whether this denial of use was total or partial. The answer determines which of two tests would apply to adjudge whether this was a taking—the categorical taking acknowledged in the \textit{Lucas} case or the ad hoc balancing put forward in the \textit{Penn Central} case. The second unappealed finding of the court was that the actions did not give rise to a so-called "partial" taking of the plaintiffs' property under a \textit{Penn Central} analysis.\textsuperscript{41} On all three of the balancing


\textsuperscript{38} To proceed against a state or state agency, the proper method is to allege a deprivation of constitutional rights under color of state law. In other words, a Section 1983 proceeding. \textit{Tahoe-Sierra}, 34 F. Supp. 2d at 1238 (discussing relevance of 42 U.S.C. § 1983).

\textsuperscript{39} \textit{Id.} at 1239 (citing \textit{Agins v. City of Tiburon}, 447 U.S. 255, 260 (1980)).

\textsuperscript{40} \textit{Id.}

\textsuperscript{41} \textit{Id.} at 1240 (citing \textit{Penn Central}, 438 U.S. at 124).
points, the plaintiffs fell short. First, the temporary nature of the restrictions negated interference with investment-backed expectations; the average time between lot acquisition and lot development in the Tahoe region is twenty-five years. In a facial challenge, the plaintiffs could not prove an expectation to develop within the temporary moratoria. The facial attack on the moratoria also militated against weighing loss to the claimants heavily. Finally, the court noted that the nature of the government’s interest—protecting Lake Tahoe—weighed so heavily that it would prevail in any type of determination in which balancing was an issue. A partial taking was therefore impossible.

These legal and factual findings on a partial taking were not appealed. The court, however, opined that if there was a total denial of “economically viable use,” there could be a taking “no matter how noble the goal of protecting the lake.” The court noted that Lucas vacillated between talking about a regulation rendering property “valueless” and leaving it without “economically viable use.” Because all of the land in the Tahoe region had “value,” residual value alone was not deemed sufficient to foreclose a total taking analysis. The court, therefore, concentrated on whether there was any viable use left to the plaintiffs under the various ordinances and the 1984 Plan.

During Period I, the moratorium was embodied in Ordinance 81-5, which was in effect until the scheduled date for adoption of the 1984 Plan. For SEZ lands, removal of vegetation or even minor grading was prohibited. The court found none of the potential uses, such as hiking, to be commercially viable. As for value for these lands, the court discounted evidence of some sales of land because there was no competitive market, that is, no multiplicity of buyers for the land in its natural state beyond adjacent landowners, environmental groups, and the government. Evidence of sales of Class 1-3 lands in California had similar objections. There were several more uses of Class 1-3 lands than SEZ lands under the ordinance, such as golf courses, ski areas, and campgrounds. The court, however, found these unavailable to the owner of a single lot if the lot was not contiguous to other commonly owned lots. Therefore, the allowance of “outdoor recreation facility” use was not sufficient to create “economically viable” use to

42. Id.
43. Obviously, the phrase “temporary moratorium” is redundant because by definition a moratorium is a pause in doing something. Nevertheless, this phraseology is common to the case. See Tahoe-Sierra, 216 F.3d at 780 n. 21.
44. Tahoe-Sierra, 34 F. Supp. 2d at 1242.
45. Id.
46. Id. at 1242-43.
47. Id.
48. The Ninth Circuit questioned the district court’s apparent conclusion that a competitive market was necessary to preclude a taking. It read its prior case reviewing a jury’s finding that a taking had occurred as simply meaning that a taking was not precluded by the evidence that a single buyer existed. Tahoe-Sierra, 216 F.3d at 781 n. 25 (discussing Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 95 F.3d 1422, 1432-33 (9th Cir. 1996)).
49. Because Nevada lands in Class 1-3 had the possibility of case-by-case review of development, the court had found these claims not ripe. Tahoe-Sierra, 911 F.2d at 1339.
isolated owners and the court equated “economically viable” with commercial use.\(^5\)

For Period II, the court similarly reviewed the activities allowed on the properties under Resolution 83-21, which was in effect from the expiration of the prior ordinance until the 1984 Plan was actually adopted. This suspended all permit approvals. Because any use of either SEZ or Class 1-3 lands essentially required a permit except for some minor grading on Class 1-3 lands, there was no economically viable use of the lands without a permit. Additionally, there was no competitive market for the lands. Therefore, the resolution could have been a taking.\(^1\)

The final period examined was the impact of the 1984 Plan. The court noted that the Plan superseded the previous actions, even if it incorporated some of the same provisions. The court found, however, that the source of damage to the plaintiffs was not the 1984 Plan, but the temporary restraining order and injunction issued in the lawsuit challenging the 1984 Plan.\(^5\) The court found that the injunction was not the “foreseeable” result of the TRPA’s action or the secret desire of the agency. The agency had fought the injunction vigorously and had believed its lawyers when it was told that the TRPA’s discretion was entitled to deference.\(^5\) It expected to win. Without the element of causation, the TRPA’s action could not have “taken” the plaintiffs’ property.

In sum, the court concluded that for two of the three time periods, there had been a total denial of economically viable use for at least some of the plaintiffs. Therefore, unless there was an affirmative defense available to the defendant, it would be liable to pay compensation. The court considered two such defenses, the fact that the moratoria were temporary and the possibility that the activity prohibited on the land amounted to a “nuisance” or otherwise was prohibited by background principles of property law. It rejected the latter defense, a finding that was not appealed.\(^5\) The import of the moratoria not being permanent, however, was central to the case as presented to the Supreme Court.

The district court judge noted that at the date of his decision it was an open question whether planning moratoria could be a taking. At one point, “it was fairly clear that temporary, interim planning moratoria were not considered takings.”\(^3\) Maintaining the status quo pending implementation of a plan avoided a rush to development that could destroy any possibility of gaining the benefits of planning. The First English Evangelical Lutheran Church of Glendale v. County of

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\(^5\) Tahoe-Sierra, 34 F. Supp. 2d at 1244.
\(^5\) Id. at 1245.
\(^5\) Id.
\(^5\) Id. at 1248 (finding the agency had acted reasonably and made a good faith attempt to comply with the Compact).
\(^5\) Id. at 1251-55 (building a house was not a nuisance under common law or statutory definitions of nuisance in either Nevada or California). The court did find that anyone who bought property after promulgation of Ordinance 81-5 would be precluded from receiving compensation because the prohibitions contained in it would have been background principles of law. Id. This blanket finding would not have survived the Supreme Court’s Palazzolo decision.
\(^5\) Tahoe-Sierra, 34 F. Supp. 2d at 1248.
Los Angeles\textsuperscript{56} case, however, found that a regulation that was a taking could require compensation for the period during which it was in effect even if it was invalidated later. In other words, the regulation in First English was "retrospectively" temporary because of the finding of unconstitutionality; the regulation in Tahoe-Sierra was "prospectively" temporary.\textsuperscript{57} The district court stated that although there is an argument that temporary moratoria could be exempt from Lucas categorical takings, it believed that the Supreme Court would not so find.\textsuperscript{58} Therefore, the fact that the actions were intended to be temporary from the beginning did not provide a defense to liability for the denial of land use during their effective dates.

At the end of the district court case, the government agency was found liable for a complete denial of economically viable use of property for two of the three time frames involved. No liability existed for Period III because an injunction caused the plaintiff's injuries, not the agency's act.

C. The Ninth Circuit Opinion

In the Ninth Circuit, several issues were decided,\textsuperscript{59} but certiorari was only granted on one: whether the defendant was liable to pay compensation to some plaintiffs for the moratoria imposed during Periods I and II. As to the finding that a taking had occurred, the Ninth Circuit found that the district court made an error of law, not necessarily of fact,\textsuperscript{60} and the Court of Appeals concluded that "[b]ecause the temporary development moratorium enacted by TRPA did not deprive the plaintiffs of all of the value or use of their property, we hold that it did not effect a categorical taking."\textsuperscript{61}

To the Ninth Circuit panel hearing the case,\textsuperscript{62} the primary error the district court made was in employing "conceptual severance," that is, not looking at the

\textsuperscript{56} 482 U.S. 304 (1987).
\textsuperscript{57} Tahoe-Sierra, 34 F. Supp. 2d at 1249.
\textsuperscript{58} The district provided three reasons for its conclusion. First, the Supreme Court in First English contrasted the situation requiring compensation with "normal delays" in the permitting process; to the district court, the examples given "all appear[ed] to involve delays that might occur once the process of applying for a permit has actually begun—not something that prevents the permit process from beginning at all." \textit{Id.} at 1250. Second, in deciding First English, the Supreme Court relied on physical appropriation cases that were for determinate, temporary periods. \textit{Id.} (citing U.S. v. Petty Motor Co., 327 U.S. 372 (1946) and U.S. v. Gen. Motors Corp., 323 U.S. 373 (1945)). Third, the court noted that although it might be wise to recognize that temporary moratoria might not always automatically create takings, because the Ordinance and Resolution involved in these cases continued beyond their anticipated end dates, they were not truly time-limited actions. \textit{Id.}

\textsuperscript{59} See Tahoe-Sierra, 216 F.3d 764 (affirming the lower court's decisions finding the Section 1983 claims in regard to the 1987 Plan time-barred by general statutes of limitation in Nevada and California and finding that the defendants were not liable for Period III damages because of lack of causation).
\textsuperscript{60} \textit{Id.} at 782 n. 30.
\textsuperscript{61} \textit{Id.} at 782.
\textsuperscript{62} The Circuit Judges denied a petition to hear the case en banc. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regl. Plan. Agency, 228 F.3d 998 (9th Cir. 2000). Judge Kzinski wrote a dissent from the denial, which four judges joined. He stridently accused the panel of ignoring the holding of First English and "plagiarizing" from the dissent of that opinion. \textit{Id.} at 1000 (Kzinski, J., dissenting from denial of en banc hearing).
"parcel as a whole" when determining whether or not all value or use was destroyed. Property interests exist in multiple dimensions:

For example, the dimensions of a property interest may include a physical dimension (which describes the size and shape of the property in question), a functional dimension (which describes the extent to which an owner may use or dispose of the property interest), and a temporal dimension (which describes the duration of the property interest).63

To the court, the plaintiffs were arguing to separate out the fee into discrete segments, at least in the temporal sense, and declare such a segment to be a distinct property interest for takings purposes.

The Ninth Circuit rejected this attempt, reciting the Supreme Court's disavowal of conceptual severance in several settings. "Physical" severance was not allowed in the setting of coal being left behind in order to prevent subsidence,64 nor when use of airspace above a building was disallowed.65 When the owners of eagle feathers were denied their right to sell those artifacts and the owners claimed a taking, "functional" severance was rejected.66 The Ninth Circuit also read Agins v. City of Tiburon67 as rejecting "temporal" severance. In that case, the city had begun condemnation proceedings against the plaintiffs' property and then dropped the attempt a year later. The plaintiffs alleged the loss of the entire use of the property during that time. In Tahoe-Sierra, the court quoted the following from the Supreme Court:

Even if the appellants' ability to sell or develop their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are "incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense."68

To the Ninth Circuit, the relevance of the owner retaining a future ability to sell the property was clear: the Supreme Court was not looking at property as a series of temporal slices. Thus, the case was consistent with the other disavowals of severance.

63. Tahoe-Sierra, 216 F.3d at 774.
65. Penn Central, 438 U.S. at 117. This case might also deal with rejecting functional severance, that is, examining only one way a person may use property. Arguably, the case dealt with the use of "air rights." Regardless of characterization, it was in Penn Central that the Court made its declaration that "'Taking' jurisprudence does not divide a single parcel into discrete segments...." Id. at 130.
66. Tahoe-Sierra, 216 F.3d at 775 (quoting Andrus v. Allard, 444 U.S. 51, 65-66 (1979), which in turn cites Penn Central, 438 U.S. at 130-31). The Ninth Circuit did note in a footnote that two cases could conceivably be cited for some degree of severance. One case found that the denial of the right to exclude could in certain circumstances be a taking as it could be akin to a physical intrusion. Id. at 775 n. 14 (citing Kaiser Aetna v. U.S., 444 U.S. 164, 179-80 (1979) and also noting Hodel v. Irving, 481 U.S. 704, 716 (1987)).
68. Tahoe-Sierra, 216 F.3d at 776 (quoting Agins, 447 U.S. at 263 n. 9 (emphasis added by Ninth Circuit)).
In addition to the theoretical rationale against finding a temporary moratorium to be a taking, the court marshalled practical reasons against transforming planning moratoria into categorical takings. Moratoria are common land use planning devices that serve several purposes, including preserving the status quo to prevent either increasing a problem or encouraging a race to develop. Additionally, the time-out allows the planning process to respond to all parties.\(^6\) The Ninth Circuit rejected the argument that First English\(^7\) mandated that a “temporary” moratorium was a taking. First English did not address whether or not a truly temporary regulation would or could be considered a taking.\(^7\) Therefore, the Ninth Circuit refused to consider the property affected by the regulation to be anything other than the entire fee interest throughout time.

With this perspective, the Ninth Circuit then turned to the question of whether the regulation destroyed either all of the property’s economic value or its beneficial use.\(^7\) The court found value in property that only had its development stopped for a temporary time, namely, until the adoption of a regional plan. The bulk of the future use was thus preserved, which rights had present economic value.\(^7\) No one anticipated that the development ban would be permanent. Moreover, in addition to the land retaining value, because the bulk of “use” was preserved, there was also no denial of all use: “The ‘use’ of the plaintiffs’ property runs from the present to the future.”\(^7\) There were only forty months of moratorium; the court found that if it “engaged in conceptual severance, [it] would have read into the Takings Clause a requirement that the government never interfere with a property owner’s wish to put his property to immediate use.”\(^7\) Therefore, there was no categorical taking.

The Ninth Circuit also concurred that there had been no taking under a Penn Central analysis. In fact, it commended local government for trying to “engage in orderly, reasonable land-use planning through a considered and deliberative process.”\(^7\) It believed that to have ruled as the district court did would make this impossible to do.

\(^6\) Id. at 777.
\(^7\) First English, 482 U.S. 304.

To the Ninth Circuit, the situation in First English was very different than that before it. In First English, there was only a remedial question, namely, is invalidation of a regulation found to be unconstitutional sufficient to provide just compensation? The Supreme Court said that it was not. The Ninth Circuit read the case narrowly. Tahoe-Sierra, 216 F.3d at 778.

\(^7\) The question of which of the two measures is the trigger of a categorical taking was immaterial to the Ninth Circuit because neither of the measures was violated. Id. at 780-81.

\(^8\) Id. at 781.
\(^9\) Id. at 782.

\(^9\) Id. at 782 n. 28.

\(^7\) Tahoe-Sierra, 216 F.3d at 782.
D. The Supreme Court Decision

1. The Majority Finds No *Per se* Taking.

   Last Term, Justice Stevens was the one Justice in the *Palazzolo* case who found conclusively that no compensation was due to the claimant.\(^{77}\) This Term, he authored a decision that, while not negating a possible taking under similar circumstances, clearly rejected any *per se* rule that a temporary denial of all use of property would be a taking. He was not a soloist this time; Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer joined him, making the decision a six-to-three moderation of the previous solicitude for private property "rights." There were several facets to the decision.

   First, Justice Stevens narrowly phrases the issue: "The question presented is whether a moratorium on development imposed during the process of devising a comprehensive land-use plan constitutes a *per se* taking of property requiring compensation under the Takings Clause of the United States Constitution."\(^{78}\) Phrased differently, the claimants sought a categorical rule in a facial challenge to two moratoria.\(^{79}\) Therefore, they wanted no inquiry into the nature of the governmental interest being forwarded or the expectations of the private party. Justice Stevens asserted that neither precedents nor basic ideas of fairness required or supported such a result.

   The next step of his analysis decoupled regulatory takings analysis from that made in the face of physical takings. Ad hoc balancing rules characterize the first investigation; categorical rules govern the second.\(^{80}\) Part of the reason for this distinction is that, in the physical setting, the prerequisite "taking" is "typically obvious and undisputed."\(^{81}\) The government either occupied the land or interfered with the owner's right to exclude, thus mandating a different treatment for these "physical" takings. To Justice Stevens, it was inappropriate to unquestioningly import precedents from this setting into the regulatory setting and the *Lucas* case did not demand such a result. The *Lucas* case only partially based its finding on a permanent denial of all viable economic use of property being the "functional equivalent" of an appropriation from the landowner's perspective. Justice Stevens notes that *Lucas* also emphasized that instances of permanent

\(^{77}\) Justice Stevens found that the case was ripe for decision, but that compensation would only be payable to the person who owned the property at the time the purportedly offending regulation "took" the property. Chief Justice Rehnquist and Justices Scalia, Thomas, Kennedy, and O'Connor found that the case was ripe and remanded the case for a full *Penn Central* analysis. Justices Souter, Ginsburg, and Breyer dissented, finding that the case was not ripe for decision. See Mansfield, *supra* n. 12, at 276-77.

\(^{78}\) *Tahoe-Sierra*, 122 S. Ct. at 1470.

\(^{79}\) *Id.* at 1477-78. "[T]hey desire... a categorical rule requiring compensation whenever the government imposes such a moratorium on development." *Id.* at 1477. "They contend 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." *Id.*

\(^{80}\) *Id.*

\(^{81}\) *Id.* at 1478 n. 17.
total deprivation would be "relatively rare" or "extraordinary" and would indicate a lack of "average reciprocity of advantage." 82

Therefore, Justice Stevens moved to other precedents to ascertain whether or not Lucas or other cases from the regulatory takings setting compelled a categorical rule. Justice Stevens recognized that the genesis of regulatory taking analysis was the decision in Pennsylvania Coal Company v. Mahon, 83 but further noted that this case did not provide any formula to determine when a regulation went "too far." The Pennsylvania Coal case simply rejected the position Justice Brandeis forwarded, namely that a taking could never occur if a noxious use was being quelled and the landowner retained possession of his or her land. In other words, physical use by the public or governmental appropriation would not be a prerequisite of a taking. 84 Despite insisting that no set formula exists to ascertain whether or not a regulatory taking would be found after regulatory action, Justice Stevens found several clear guideposts to the analysis.

The first clear rule for implementing such an analysis is in Penn Central, which also expresses the credo that case-by-case analysis is the proper approach. The case, however, is adamant that the property to be considered is the "parcel as a whole." 85 Justice Stevens traces this tenet of Penn Central through other precedent:

This requirement that "the aggregate must be viewed in its entirety" explains why, for example, a regulation that prohibited commercial transactions in eagle feathers, but did not bar other uses or impose any physical invasion or restraint upon them, was not a taking. It also clarifies why restrictions on the use of only limited portions of the parcel, such as set-back ordinances, or a requirement that coal pillars be left in place to prevent mine subsidence, were not considered regulatory takings. In each of these cases, we affirmed that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking." 86 Therefore, the "property as a whole" must be examined to see what impact the regulation may have had.

From this point, Justice Stevens then addressed whether or not First English, which he categorized as a case dealing with the "compensation" or "remedial question," 87 supported the categorical position of the claimants. Justice Stevens concluded the opposite, namely that First English "implicitly rejected" the position. 88 At the threshold, Justice Stevens noted that First English assumed that a taking had occurred and was only concerned with the appropriate remedy—whether prospective invalidation of the unconstitutional rule would be sufficient. Moreover, the case, if it could be viewed as addressing the question of whether or not a taking had been accomplished, noted some exceptions from liability for

82. Id. at 1480 n. 19.
83. 260 U.S. 393.
84. Tahoe-Sierra, 122 S. Ct. at 1480-81.
85. Id. at 1481 (quoting Penn Central, 438 U.S. at 120-31).
86. Id. (citations omitted).
87. Id. at 1482 (quoting First English, 482 U.S. at 311).
88. Id.
compensation. First, the particular denial of all use might be justified as a safety regulation.\textsuperscript{89} Second, the case noted it was not deciding the issue of denials of use arising from “normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like . . . .”\textsuperscript{90} Therefore, no categorical rule mandating compensation when a government temporarily denied all use of property emerged from the case.

Similarly, the \textit{Lucas} case did not support such a categorical rule. The Court emphasized that the regulation at issue in \textit{Lucas} “effected a taking that ‘was unconditional and permanent.’”\textsuperscript{91} All value of the fee interest was destroyed:

The categorical rule that we applied in \textit{Lucas} states that compensation is required when a regulation deprives an owner of “\textit{all} economically beneficial uses” of his land. Under that rule, a statute that “wholly eliminated the value” of Lucas’ fee simple title clearly qualified as a taking. But our holding was limited to “the extraordinary circumstance when \textit{no} productive or economically beneficial use of land is permitted.” The emphasis on the word “\textit{no}” in the text of the opinion was, in effect, reiterated in a footnote explaining that the categorical rule would not apply if the diminution in value were 95% instead of 100%. Anything less than a “complete elimination of value,” or a “total loss,” the Court acknowledged, would require the kind of analysis applied in \textit{Penn Central}.\textsuperscript{92}

In light of the “parcel as a whole” analysis of \textit{Penn Central}, Justice Stevens found the \textit{Lucas} categorical rule unavailable:

Petitioners seek to bring this case under the rule announced in \textit{Lucas} by arguing that we can effectively sever a 32-month segment from the remainder of each landowner’s fee simple estate, and then ask whether that segment has been taken in its entirety by the moratoria. Of course, defining the property interest taken in terms of the very regulation being challenged is circular. With property so divided, every delay would become a total ban; the moratorium and the normal permit process alike would constitute categorical takings.\textsuperscript{93}

It was thus inappropriate to look at deprivation of use during specific periods and undertake conceptual severance.

Justice Stevens elaborated: “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 aspect of the owner’s interest.”\textsuperscript{94} Only if the total parcel were permanently affected would all value be destroyed: “Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted.”\textsuperscript{95} The \textit{Lucas} categorical rule could not apply and the “default” rule of fact-

\textsuperscript{89} Tahoe-Sierra, 122 S. Ct. at 1482. On remand, the California courts found the regulation was one justified by safety concerns.
\textsuperscript{90} Id. (quoting \textit{First English}, 482 U.S. at 321).
\textsuperscript{91} Id. at 1483 (quoting \textit{Lucas}, 505 U.S. at 1012).
\textsuperscript{92} Id. (citation omitted).
\textsuperscript{93} Id. (quoting \textit{Penn Central}, 438 U.S. at 130-31).
\textsuperscript{94} Tahoe-Sierra, 122 S. Ct. at 1483.
\textsuperscript{95} Id. at 1484.
specific analysis would govern, unless a new rule was justified under the “fairness and justice” rubric of Armstrong v. United States.96

Justice Stevens posited seven scenarios in which “fairness” might demand compensation for a temporary restriction on all use. Four of these were unavailable as premises in Tahoe-Sierra.97 Three of such arguments would require further thought:

First, even though we have not previously done so, we might now announce a categorical rule that, in the interest of fairness and justice, compensation is required whenever government temporarily deprives an owner of all economically viable use of her property. Second, we could craft a narrower rule that would cover all temporary land-use restrictions except those “normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like” which were put to one side in our opinion in First English. Third, we could adopt a rule like the one suggested by an amicus supporting petitioners that would “allow a short fixed period for deliberations to take place without compensation—say maximum one year—after which the just compensation requirements” would “kick in.”98

Justice Stevens rejects specialized rules to cover any of these situations.

The essential question was whether declaring a per se rule or allowing the ad hoc Penn Central analysis to govern would better serve the interest of fairness and justice. For the first situation, namely compensating a landowner for any temporary inability to make use of property, the answer was clear. To adopt a per se rule would make it impossible to process a building permit or even to put property off-limits as a crime scene or for safety. In short, “[a] rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decisionmaking."99 Justice Stevens bolstered his conclusion by quoting Justice O’Connor’s Palazzolo concurrence, in which she cautioned against making the timing of a regulation in reference to land acquisition conclusive.100 To her, fairness and justice required an individual appraisal of the circumstances.

The next two scenarios similarly required ad hoc review rather than categorical treatment. To simply exclude from automatic compensation normal permitting delays or moratoria of less than one year would too greatly hamstring

96. 364 U.S. 40, 49 (1960). The Fifth Amendment is designed to protect individual property owners from bearing public burdens “which, in all fairness and justice, should be borne by the public as a whole.” Id.
97. Tahoe-Sierra, 122 S. Ct. at 1485. The four foreclosed scenarios were: (1) that the successive actions of the TRPA were “rolling moratoria” equivalent to a permanent regulation, which was foreclosed by the order granting certiorari; (2) that the TRPA was stalling, which was foreclosed by the findings of the district court that the TRPA acted diligently and in good faith; (3) that the TRPA’s actions did not substantially advance a legitimate state interest, which was foreclosed by the findings of the district court that the moratoria were proportional responses to a serious risk of harm; and (4) that the moratoria as applied to individual parcels created a Penn Central partial taking, which was foreclosed by the failure to appeal the district court finding and the desire to obtain a categorical ruling. Id.
98. Id. at 1484.
99. Id. at 1485. The Court goes on to state that “Such an important change in the law should be the product of legislative rulemaking rather than adjudication.” Id.
100. Id. at 1486.
planners. Moratoria are “an essential tool of successful development”; it would be
unwise to require compensation for their use without consideration of the “good
faith of the planners, the reasonable expectations of the landowners or the actual
impact of the moratorium on property values.”¹⁰¹ Again, Justice Stevens turns to
an opinion in Palazzolo to bolster his conclusion, this time looking to Justice
Kennedy, who emphasized that the ripeness requirement in takings cases was
designed to assure that the regulatory agencies had time to exercise their
discretion.¹⁰² The ripeness cases alluded to dealing with an individual landowner
needing to await a regulatory decision, but Justice Stevens ended his discussion by
addressing the increased need for “protecting the decisional process” in a regional
planning setting. A moratorium allows for input from all interested parties,
including those not savvy.

Finally, the temporary ban on developments would limit the possibility that
one landowner would be “singled out” for a special burden.¹⁰³ Importantly,
Justice Stevens echoes cases that uphold restrictions on land use on another
theory:

At least with a moratorium there is a clear “reciprocity of advantage” because it
protects the interests of all affected landowners against immediate construction that
might be inconsistent with the provisions of the plan that is ultimately adopted.
“While each of us is burdened somewhat by such restrictions, we, in turn, benefit
greatly from the restrictions that are placed on others.”¹⁰⁴

If a law provides “an average reciprocity of advantage,” then no
compensation from the government is needed because the law, either in itself or in
combination with other laws, provides its own compensation.¹⁰⁵ Justice Stevens
noted that sometimes moratoria do not even lower the value of property, but may
increase it. Therefore, although moratoria of more than a year might be viewed
with skepticism, there should be no per se rule requiring compensation. Justice
Stevens made clear, however, that compensation might be required after a Penn
Central analysis.¹⁰⁶

¹⁰¹. Id.
¹⁰². Tahoe-Sierra, 122 S. Ct. at 1488 (quoting Palazzolo, 533 U.S. at 620-21).
¹⁰³. Justice Stevens finds that the rationale for finding a taking is the prevention of “singling out”
specific landowners from inordinate burdens. Therefore, he would not have found a taking in Lucas
because the regulation applied to all prospective as well as past developers on the barrier islands.
Lucas, 505 U.S. at 1061 (Stevens, J., dissenting). Justice Stevens did not join in the Court’s decision in
Penn Central; the landmark preservation law put special burdens on only some landowners. Penn
Central, 438 U.S. at 104.
¹⁰⁴. Tahoe-Sierra, 122 S. Ct. at 1489 (quoting Keystone, 480 U.S. at 491) (citations omitted).
¹⁰⁵. Justice Holmes mentioned “average reciprocity of advantage” as justifying a finding of no
“taking” when a statute required coal mine owners to leave coal at the boundaries of the property to
protect the safety of miners in adjacent mines. Pa. Coal, 260 U.S. at 415 (discussing Plymouth Coal v.
Pa., 232 U.S. 531 (1914)). The approved statute governed a limited number of similarly situated
parties and the benefit to each party came from the actions required by the relevant statute. Justice
Stevens apparently broadens the search for reciprocal advantage to the entire field of interlocking
¹⁰⁶. Tahoe-Sierra, 122 S. Ct. at 1487 n. 34.
2. The Dissents

Two dissents to the decisions were filed. Chief Justice Rehnquist authored the first, which garnered the support of both Justices Scalia and Thomas. The phrase, “Where’s the use?” could summarize this dissent. Chief Justice Rehnquist chided the majority for concentrating on the regulation’s impact on the property’s value, rather than its use. Additionally, Justice Thomas questioned the majority opinion for seemingly deciding in stealth that the “parcel as a whole” was the appropriate denominator. Justice Scalia joined his dissent. The two dissents together, therefore, raise the issues that were being considered in recent cases with solicitude towards protection of private property rights.

Chief Justice Rehnquist had a predicate to his main criticism, which was that the majority ignored the importance of use. First, he asserted the relevant time frame to judge the governmental action was six years, from 1981-87. It was incorrect to ignore the period after the 1984 Plan was adopted simply because an injunction directly stopped all permitting:

The Court of Appeals is correct that the 1984 Plan did not cause petitioners' injury. But that is the right answer to the wrong question. The causation question is not limited to whether the 1984 Plan caused petitioners' injury; the question is whether respondent caused petitioners' injury.107

Because the TRPA was the “moving cause” of the inability to develop, it was responsible. The TRPA knew that when it set environmental thresholds pursuant to the 1980 Compact, it would forbid development projects exceeding the thresholds.108

Chief Justice Rehnquist then determined that a deprivation of all economic use for six years was a compensable taking under Lucas. He disputes the distinction between “permanent” and “temporary” prohibitions, noting especially that the “permanent” Lucas restriction only lasted two years because of a law change:

Land-use regulations are not irrevocable. And the government can even abandon condemned land. Under the Court’s decision today, the takings question turns entirely on the initial label given a regulation, a label that is often without much meaning. There is every incentive for government to simply label any prohibition on development “temporary,” or to fix a set number of years. As in this case, this initial designation does not preclude the government from repeatedly extending the “temporary” prohibition into a long-term ban on all development.109

In addition to the practical problem of distinguishing permanent from temporary, to Chief Justice Rehnquist, First English “rejects any distinction between temporary and permanent takings when a landowner is deprived of all economically beneficial use of his land.”110

107. Id. at 1490-91 (Rehnquist, C.J., dissenting).
108. Id. at 1491.
109. Id. at 1492.
110. Id.
The primary problem with the majority's decision, however, was that it ignored the admonition in *Lucas* that a total deprivation of use is the equivalent of an appropriation:

The regulation in *Lucas* was the “practical equivalence” of a long-term physical appropriation, i.e., a condemnation, so the Fifth Amendment required compensation. The “practical equivalence,” from the landowner’s point of view, of a “temporary” ban on all economic use is a forced leasehold. If a leasehold is taken, compensation is required; a governmental agency should not be able to “do by regulation what it cannot do through eminent domain—i.e., take private property without paying for it.” If a landowner can make no use of property, it is possible that the property is to be pressed into public use by the idleness. The denial of all use of the property is what distinguishes this case from other cases in which there were temporary denials of particular uses.

To Chief Justice Rehnquist, the *Lucas* categorical rule is triggered when there is a total denial of “all economically beneficial or productive use of land.” The majority thus erred when it read *Lucas* as being concerned with value:

The Court’s position that value is the *sine qua non* of the *Lucas* rule proves too much. Surely, the land at issue in *Lucas* retained some market value based on the contingency, which soon came to fruition . . . that the development ban would be amended.

The inability to use property is the basis of the taking, even if “temporary.”

Chief Justice Rehnquist then proceeded to calm fears that a holding recognizing a taking in temporary situations would make even the delays inherent in any building permit review trigger the *Lucas* categorical rule. Such a holding would not lead to that result because *Lucas* acknowledged that all property is held subject to background principles of state law. Valid zoning and land use restrictions are part of that law: “Thus, the short-term delays attendant to zoning and permit regimes are a longstanding feature of state property law and part of a landowner’s reasonable investment-backed expectations.” A moratorium that prohibits all economical use of property (as opposed to one that might prohibit use for a specific purpose, such as fast-food restaurants), however, was a newer technique and might not be part of a limitation on all property rights. Nevertheless, Chief Justice Rehnquist is not ready to answer this question because

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111. *Tahoe-Sierra*, 122 S. Ct. at 1492-93.
112. Id. at 1493 (Kozinski, J., dissenting from denial of rehearing en banc) (quoting *Tahoe-Sierra*, 228 F.3d at 998, 999).
113. Id. (quoting *Lucas*, 505 U.S. at 1015).
114. Id. at 1494.
115. Id. at 1495.
116. *Tahoe-Sierra*, 122 S. Ct. at 1495. He then states: “Moreover, unlike a permit system in which it is expected that a project will be approved so long as certain conditions are satisfied, a moratorium that prohibits all uses is *by definition contemplating a new land-use plan that would prohibit all uses.*” Id. (emphasis added). The last phrase is not necessarily true. The land-use plan could very well allow use in a controlled manner.
the duration of this moratorium exceeded what he would categorize as "ordinary." Therefore, he finds the six-year denial of all use to be a taking.

Justice Thomas similarly argued that denial of use, not value, was the sine qua non of the Lucas rule:

I would hold 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. To my mind, such potential future value bears on the amount of compensation due and has nothing to do with the question whether there was a taking in the first place. 117

He also, however, objected to "the majority's conclusion that the temporary moratorium at issue here was not a taking because it was not a 'taking' of 'the parcel as a whole.'" 118 He opined not only that First English settled this matter differently on the temporal level, but also questioned that characterization of the need to look at a "parcel as a whole" generally. To him, it was not a "settled" issue, but one that had been questioned recently. 119

The two dissents, therefore, raise two tenets common to the property rights movement. The first is that developmental or other profitable use is the basic interest of a property owner and what must be protected. The second is that each individual aspect of property ownership should be appraised separately when ascertaining the impact of a regulation. The majority seemingly rejected both propositions.

III. TAHOE-SIERRA IN PERSPECTIVE

A. The "Capture" of Justices O'Connor & Kennedy

One of the first noticeable aspects of the Tahoe-Sierra decision is, of course, that Justices O'Connor and Kennedy joined what was a minority grouping of Justices in the past. These two had aligned recently with the Justices more likely to side with private property interests. Nevertheless, the realignment was not totally unanticipated. What was at issue in Tahoe-Sierra was a per se rule declaring a temporary moratorium to automatically be a compensable taking. Neither Justice Kennedy nor Justice O'Connor have been strong advocates of categorical rules. Moreover, Justice Stevens drafted the majority opinion in Tahoe-Sierra catering to the interests of these Justices. Key to the outcome in Tahoe-Sierra was the Palazzolo decision.

In the Tahoe-Sierra case, Justice Stevens cites or quotes Justice Kennedy's opinion in Palazzolo two times 120 and also highlights Justice Kennedy's position in Lucas, 121 in which he did not embrace the categorical taking proposition that the

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117. Id. at 1497 (Thomas, J., dissenting).
118. Id. at 1496.
119. Id.
120. Id. at 1488.
121. Tahoe-Sierra, 122 S. Ct. at 1483 n. 24 (citing Lucas, 505 U.S. at 1034 (Kennedy, J., concurring)).
majority opinion had forwarded. The *Palazzolo* majority decision, which Justice Kennedy authored, likewise rejected a *per se* rule, albeit one that would have barred a private landowner's taking claim. Both these positions foreshadow Justice Kennedy's position in the *Tahoe-Sierra* majority, one that rejects a categorical finding of a taking. The remaining citation to Justice Kennedy's jurisprudence involves the concept of ripeness.

Justice Stevens bolsters his opinion in *Tahoe-Sierra* by way of analogy to Justice Kennedy's position on ripeness. The *Tahoe-Sierra* case makes a paragraph-long quote from *Palazzolo*, one emphasizing the rationale behind insisting that a private landowner's claim be ripe for court decision. To achieve ripeness, the landowner must complete “reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property . . . .” Justice Kennedy had concluded that only in this manner would the “extent of the restriction on property” be known. In *Tahoe-Sierra*, Justice Stevens uses this same rationale to ensure that an agency has sufficient time to apply its decisionmaking processes. In other words, making the landowner wait for a decision and then requiring the agency to compensate for the waiting time would be a “perverse system of incentives.” The *Tahoe-Sierra* opinion, therefore, echoes Justice Kennedy's concerns with decisional integrity.

Even more obvious is the opinion's reflection of Justice O'Connor's thinking. Justice Kennedy cites or quotes her concurrence in *Palazzolo* seven times. Most of these quotations deal with the necessity to examine each case individually, and to avoid hard and fast rules in either direction. She has hearkened to the *Penn Central* analysis, emphasizing that its three factors must be considered and urging that no single factor be conclusive. Moreover, the *Tahoe-Sierra* decision also spends pages considering whether or not “fairness and justice” require the government to compensate for injuries public action caused; this echo of the *Armstrong* case is similar to one that Justice O'Connor made in *Palazzolo*.

If investment-backed expectations are given exclusive significance in the *Penn Central* analysis and existing regulations dictate the reasonableness of those expectations in every instance, then the State wields far too much power to redefine property rights upon passage of title. On the other hand, if existing regulations do nothing to inform the analysis, then some property owners may reap windfalls and an important indicium of fairness is lost.

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122. *Id.* at 1488 (quoting *Palazzolo*, 533 U.S. at 620).
123. *Id.*
125. *Palazzolo*, 533 U.S. at 633-34 (O'Connor, J., concurring). The three factors are: (1) the impact on the regulated; (2) the nature of the government's interest; and (3) the impact on reasonable investment-backed expectations.
127. *Id.* at 635 (O'Connor, J., concurring) (emphasis added).
Additionally, Justice Stevens quotes Justice O'Connor's discussion of the temporal aspect of whether a regulation's existence on the date property was acquired controls whether a taking has been accomplished.

Justice O'Connor and Justice Kennedy were the logical Justices to disengage from the Scalia-Rehnquist-Thomas triad. Their thoughts have diverged from these three in the past. For example, Justice Scalia and Justice O'Connor bordered on impoliteness in their disagreement in Palazzolo about how to judge the influence of existing regulations on a landowner's expectations. At another juncture, Justice O'Connor joined Justice Stevens in his dissent in First English. More fundamentally, both of the defecting Justices have expressed discomfort at "pigeon-holing" takings analysis instead of employing case specific reviews. Most notably, Justice Kennedy never endorsed the Lucas categorical taking analysis. Not only did he not find a categorical taking in that case, but he opined that common law nuisance could not be the only instance of allowable governmental preclusion of use; statutory and regulatory law might also reflect a situation in which governmental compensation would not be needed.

Therefore, it is not surprising that these two Justices would coalesce and form a new majority to reject the concept of developmental moratoria being takings *per se*. It was as if Justice Kennedy and Justice O'Connor were jolted into recognition of exactly where the predilections of Scalia, Thomas, and Rehnquist might lead, and they said "whoa." Absolute rules box-in the government too greatly. This does not, however, indicate that they will not in the future side with private landowners in particular cases; the right to examine the particular facts of each case was at the heart of their "revolt."

B. The "Value" Versus "Use" Debate

Central to Justice Stevens' majority opinion in Tahoe-Sierra is the conclusion that the regulated land retained "value" throughout the moratorium. If this was the case, there could be no "categorical taking" under Lucas because the

128. See Richard J. Lazarus, Counting Votes and Discounting Holdings in the Supreme Court's Taking Cases, 38 Wm. & Mary L. Rev. 1099, 1103-04, 1133 (1997) (stating that Justice Kennedy may frame the next takings coalition).

129. Justice Scalia chides Justice O'Connor for intimating that "it may in some (unspecified) circumstances be ['un]fair[,] and produce unacceptable 'windfalls,' to allow a subsequent purchaser to nullify an unconstitutional partial taking (though, inexplicably, not an unconstitutional total taking) by the government." Palazzolo, 533 U.S. at 626 (Scalia, J., concurring). See id. at 635 (O'Connor, J., concurring).

130. First English, 482 U.S. 304. She did not, however, concur in Part II of the dissent, which found that compensation for a "temporary taking" was an improper segmentation of property interests. She did join in this premise in Tahoe-Sierra.

131. He concurred in the judgment only. Of the five who joined the majority opinion, only four remain on the bench: Justices Scalia, Thomas, O'Connor, and Chief Justice Rehnquist. Justice Kennedy also did not join the other four in Eastern Enterprises v. Apfel, 524 U.S. 498 (1998). His concurrence in the result employed a due process rationale, rather than a takings analysis, to invalidate a law providing for retroactive liability. Justice O'Connor, however, had found a taking.

132. Lucas, 505 U.S. at 1035 (Kennedy, J., concurring) (common law of nuisance does not restrict the government's ability to regulate without compensation because that doctrine is "too narrow a confine for the exercise of regulatory power in a complex and interdependent society").
threshold for such a taking was not crossed. Chief Justice Rehnquist, however, argued that the issue was not whether or not the land retained "value," but whether or not the landowner was denied all economic use of the property. These differing views of what is the prerequisite for a "categorical taking" under the Lucas case reflect differing views of the nature and value of property. Insistence that the private party be able to make economic use of property concentrates on the individualistic aspects of property. Justice Stevens, however, leaves more room for public attributes. The particulars of Lucas are pivotal to the discussion.

The Lucas case involved two lots on the Isle of Palms, a barrier island east of Charleston, on which the owner was not allowed to build a habitable structure. The case uses both "valueless" and absence of "economically viable use" to describe the result of the regulation; a simple word count reveals approximately twenty references to lack of economic uses and nine to the lack of value remaining in the land. Most likely, Justice Scalia primarily was addressing the inability to use the property. His statements of the "rule" of the case reflect this: "Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." Nevertheless, the case was decided in a specific context, with specific factual findings.

The lower court had found the land to be "valueless," a fact Justice Scalia notes in the first paragraph of his decision. Moreover, his prefatory statement of the issue was "whether the Act's dramatic effect on the economic value of Lucas' lots accomplished a taking of private property...." The opinion, therefore, lends itself to a view that lack of value was crucial to the decision, especially in light of the dissenting and concurring opinions and Justice Scalia's responses to them. Four Justices doubted that the land could be truly valueless, noting that some could use the property without a building and it might be sold to such a person or for use in conjunction with adjacent land. Justice Scalia

133. When the case was pending, the statute was amended to provide landowners an opportunity to apply for an exception. The Supreme Court, however, decided the case as if the prohibition was permanent. Id. at 1010-11.

134. Id. at 1027. "Any limitation so severe [that it prohibits all economically beneficial use of land] cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon such ownership." Id. at 1029.

135. Id. at 1027.

136. Id. at 1006.

137. Lucas, 505 U.S. 1003 (emphasis added).

138. Id. Justice Kennedy concurred in the opinion, accepting that "curious finding," but also requiring it to be viewed in light of reasonable, investment-backed expectations. Id. at 1033-34. Justice Blackmun dissented with the conclusion that the regulation that left the property valueless was "implausible," but nevertheless the basis of the majority's decision. Id. at 1036. Justice Stevens also dissented, noting that non-economic uses such as bird-watching remain. Id. at 1065 n. 3. Finally, Justice Souter, in a separately filed statement, claimed review was granted on the assumption the regulation "deprived the owner of his entire economic interest in the property" and that the trial court's conclusion was "highly questionable." Id. at 1076.
vigorously rejected the idea that the finding of lack of value could be questioned at the Supreme Court level:

This finding was the premise of the petition for certiorari, and since it was not challenged in the brief in opposition we decline to entertain the argument in respondent’s brief on the merits that the finding was erroneous. Instead, we decide the question presented under the same factual assumptions as did the Supreme Court of South Carolina. 139

Therefore, lack of value was definitely a critical fact in the Lucas setting. Justice Stevens had room to distinguish Tahoe-Sierra from Lucas if value could be shown, even if economic use was precluded. 140

Chief Justice Rehnquist’s focus on whether or not economically viable use was precluded, however, reflects the individual ownership 141 or transformative 142 view of property. Under such a view, land serves the function of bringing a return to an individual, or, in an oft-made but out of context use of the old words, “[F]or what is the land but the profits thereof?” 143 According to Justices Scalia and Thomas and the Chief Justice, if the private landowner cannot make economic use of the property, it is evidence that the public is somehow getting a “use” of the property through the restriction: “[r]egulations requiring land to be left substantially in its natural state . . . carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.” 144 As Chief Justice Rehnquist asserted in Tahoe-Sierra, the “practical equivalence,” from the landowner’s point of view, of a ‘temporary’ ban on all economic use is a forced leasehold. 145 By way of example, he posited that, if the federal government was contemplating an area’s inclusion in a national park, it could lease the area to freeze development and the government

139. Id. at 1022 n. 9 (citation omitted).
140. Of course, Justice Stevens also did not find that all economic uses of the property were foreclosed; future use remained. This is the result of his refusal to “segment” the property owned on a temporal basis.
143. Lucas, 505 U.S. at 1017 quoting 1 Sir Edward Coke, Institutes of the Laws of England ch. 1, § 1 (1st Am. ed. 1812)). The district court in Tahoe-Sierra cites this quotation from Lucas. Tahoe-Sierra, 34 F. Supp. 2d at 1242. In context, however, Coke was defining the feudal relationship to land; if a person having seisin in property in fee “by his deed granteth to another the profits of those lands to have and hold to him and his heirs, and maketh livery . . . the whole land itself doth pass.” Coke, supra.
144. Lucas, 505 U.S. at 1018.
145. Tahoe-Sierra, 122 S. Ct. at 1493 (Rehnquist, C.J., dissenting). See generally Tahoe-Sierra, 122 S. Ct. at 1496-97 (Thomas, J., dissenting) (taking occurs when there is no economically beneficial use allowed; “potential future value bears on the amount of compensation due and has nothing to do with the question whether there was a taking in the first place[”]).
would have to compensate for the leasehold taken.\textsuperscript{146} Again, the obsession is on the "use" of property, be it by the government or the private party. "Use," however, is only one of the traditional hallmarks of property even in the individualistic sphere.

The classic individualistic definition of property is "the group of rights inherent in the citizen's relation to the physical thing, as the right to possess, use and dispose of it."\textsuperscript{147} Blackstone's hoary explication of the concept notes that property "consists in the free use, enjoyment, and disposal of all [a person's] acquisitions, without any control or diminutions, save only be the laws of the land."\textsuperscript{148} Both of these formulations include three ways that the property owner interacts with private property. To "use" property is correlated with development, but the other two attributes are not. A second attribute in these formulations is labeled either "possession" or "enjoyment"; neither benefit requires change in the property's natural state. The third attribute, the right to dispose of property, also is not destroyed by the inability to develop it, albeit the restriction might lessen the universe of buyers.\textsuperscript{149} To a certain extent, ignoring the substantial property interests the remaining right of disposal represents is a flip-side of \textit{Andrus v. Allard},\textsuperscript{150} which questioned whether forbidding sale was a taking.\textsuperscript{151} The \textit{Allard} Court found no taking because the right to donate, devise, and possess remained. A later case, however, found a taking when descent and devise of land was totally abolished.\textsuperscript{152} Nevertheless, from either the perspective of lost rights or retained rights, the various rights of disposal are important property strands.

If the private party still has rights of disposal, there has not been an elimination of individual rights. Moreover, if the person also has a right to exclude others, which might be a subset of the right to possess or enjoy the property, it is more obvious that a ban on transformation, or even a ban on economic use of the property in an unmodified state, does not equate with the taking of a leasehold over the property. A leasehold burdens disposal of the property as well as who can possess the property; a new owner would have to take

\textsuperscript{146} Id.
\textsuperscript{149} This was the point taken in the lower court. Lack of a "competitive market" was crucial: "[If] there is only one willing buyer, there would not, by definition, appear to be a 'competitive' market. Thus the fact that someone, such as the government or an environmental group, may be willing to pay for land that can only be 'used' in its natural state does not necessarily mean that the 'use' of leaving the property in its natural state is an 'economically viable' one." \textit{Tahoe-Sierra}, 34 F. Supp. 2d at 1243 (citation omitted).
\textsuperscript{150} 444 U.S. 51.
\textsuperscript{151} Id. at 66.
\textsuperscript{152} \textit{Hodel}, 481 U.S. 704. There is a dispute about whether \textit{Hodel} overruled \textit{Andrus}. Justices Brennan, Blackmun, and Marshall opined that it did not. Id. at 718. Justices Scalia and Powell said \textit{Hodel} overruled \textit{Andrus}. Id. at 719-20.
the property subject to the lease and the lessee controls entry onto the property.\textsuperscript{153} With a developmental moratorium, the owner retains not only the right to dispose free of other possessory interests, but the owner maintains his or her right to exclude others.

A mere restriction on use, therefore, does not destroy all attributes of ownership in the individualistic sense. The restriction, however, may reflect the community's interest in property. The situation encountered in the \textit{Tahoe-Sierra} case presents the epitome of the modern environmental dilemma. Without a curb on development, the very reason people want to be in the area will be destroyed for all. To quote the California Supreme Court, "the region's natural wealth contains the virus of its ultimate impoverishment."\textsuperscript{154}

Making loss of "economic use" the talisman for a categorical taking ignores the reality that the "wealth" of the land near Lake Tahoe enables non-economic possession and enjoyment of property. Especially in scenic areas, land can have value without development.\textsuperscript{155} In a similar manner, criticism was leveled against the \textit{Lucas} opinion, claiming it assumed that the only property interests the Constitution protects are developmental ones.\textsuperscript{156} Justice Scalia responded that his opinion in \textit{Lucas} was not insensitive to non-developmental uses of property: "Though our prior takings cases evince an abiding concern for the productive use of, and economic investment in, land, there are plainly a number of noneconomic interests in land whose impairment will invite exceedingly close scrutiny under the Taking Clause."\textsuperscript{157} His authority for this is \textit{Loretto v. Teleprompter Manhattan CATV Corp.},\textsuperscript{158} which he characterizes as dealing with the "interest in excluding strangers from one's land."\textsuperscript{159} \textit{Loretto}, however, involved a clash between two economic interests. The landlord wanted to control access to his tenants for provision of commercial cable service, and wanted to profit from such access.\textsuperscript{160} If the landlord overturned the city's regulated rates for the cable company's use of the apartment building roof, the cable company could be held hostage, so that it either had to pay higher fees to the landlord or forego gaining revenue from the tenants. Finding a taking in \textit{Loretto}, therefore, was not necessarily a protection of non-economic or non-developmental aspects of property.\textsuperscript{161} Criticizing Justice

\textsuperscript{153} \textit{See Tahoe-Sierra}, 122 S. Ct. at 1493 (Justice Steven's discussion concerning the World War II cases dealing with mines).


\textsuperscript{155} The district court found that even with the restrictions, the land had value. \textit{Tahoe-Sierra}, 34 F. Supp. 2d at 1242-43.

\textsuperscript{156} \textit{Lucas}, 505 U.S. at 1065 n. 3 (Stevens, J., dissenting).

\textsuperscript{157} \textit{Id.} at 1019 n. 8.

\textsuperscript{158} 458 U.S. 419, 436 (1982).

\textsuperscript{159} \textit{Lucas}, 505 U.S. at 1019 n. 8.

\textsuperscript{160} As Chief Justice Rehnquist emphasized in \textit{Phillips v. Washington Legal Foundation}, 524 U.S. 156, 170 (1998) (citation omitted), the apartment building \textit{per se} increased in market value with cable television access. Therefore, the argument was over additional economic returns.

\textsuperscript{161} Additionally, of course, it was a case dealing with physical occupation. The case itself recognized the narrowness of its holding: "We do not, however, question the equally substantial authority upholding a State's broad power to impose appropriate restrictions upon an owner's use of his property." \textit{Loretto}, 458 U.S. at 441 (emphasis in original).
Scalia for short-sightedness as to certain types of property attributes is not off the mark.

Surprisingly, in another setting, a fellow dissenter with Justice Scalia waxed eloquent on whether a physical object could be “property” and worthy of protection even if it had no economic value. In Phillips, Chief Justice Rehnquist wrote an opinion in which the issue was the nature of interest earned on small sums of money lawyers held for clients. If the money of each client were separately held, such money would earn no cognizable interest. Nevertheless, the interest potential was itself property:

We have never held that a physical item is not “property” simply because it lacks a positive economic or market value. . . . Our conclusion in this regard was premised on our longstanding recognition that property is more than economic value; it also consists of “the group of rights which the so-called owner exercises in his dominion of the physical thing,” such “as the right to possess, use and dispose of it.” While the interest income at issue here may have no economically realizable value to its owner, possession, control, and disposition are nonetheless valuable rights that inhere in the property.

When control over money was at issue, attributes of property other than its developmental possibilities were highlighted. Therefore, it is ironic that land which has value, as well as some of the other attributes of property remaining, would be deemed a wash-out simply because economic use is foreclosed.

To change the focus of inquiry from economic use, the majority in Tahoe-Sierra concentrated on whether the land was rendered “valueless” rather than whether it was left “without economic use.” This paradigm shift avoids triggering a Lucas categorical taking; the land had value during the moratorium and would also have the possibility of economic use through development in the future. Even with a “permanent” denial of development, it would, in the words of Lucas, be a “relatively rare situation[]” to have land fit this “valueless” category.

Chief Justice Rehnquist is correct; this approach does gut the categorical taking realm set out in Lucas. The narrowing of the categorical taking, however, does not foreclose the possibility that government action requires compensation. A balancing of the three Penn Central factors in an individual setting could result in the finding of a taking.

162. See Phillips, 524 U.S. at 169.
164. One explanation that reconciles the two cases is that the Justices and plaintiffs seeking to invalidate these laws do so because the laws are redistributive of wealth, as were the wage laws of the Lochner era. See Molly S. McCusie, The Ghost of Lochner: Modern Takings Doctrine and Its Impact on Economic Legislation, 76 B.U. L. Rev. 605, 609 (1996). The IOLTA case uses the interest to fund indigent legal representation. Environmental and land use laws prevent people from acting in manners that create externalities, thereby making a developer forego what would otherwise be a profitable activity.
165. Lucas, 505 U.S. at 1018.
166. See text accompanying supra notes 113-14.
Balancing, however, would take into account not only the extent of the financial impact of regulation on the private party, but also whether or not it interfered with that party’s “reasonable” expectations. In making this second assessment, whether development should have been anticipated, a court would look at the totality of the regulatory climate and particularities of the property’s value. More importantly, the nature of the government’s interest in preventing the prohibited activity can influence the degree of restriction that the private party must bear. The public interest in the land fully enters the equation; in the categorical setting, it is not directly considered. 167

C. The Denominator Question

One of the first exercises in a takings analysis is to determine what property the regulation affected, or, in other words, what purportedly was taken. This is necessary to answer whether a regulation has destroyed either all the value or all economic use of a private property owner. Similarly, if a Penn Central analysis is made, the question must be answered to determine the financial impact on the regulated as well as the degree of interference with investment-backed expectations. This is referred to as the “denominator question”—that is, the property affected is the denominator to which the diminution in value is compared as a numerator. 168

This question is as old as the concept of a regulatory taking. In Pennsylvania Coal, part of Justice Brandeis’ quarrel with Justice Holmes over whether a restriction on mining coal was a taking revolved around computing what “value” was diminished by the restriction on mining some coal beneath houses and roads:

The rights of an owner as against the public are not increased by dividing the interests in his property into surface and subsoil. The sum of the rights in the parts can not [sic] be greater than the rights in the whole. The estate of an owner in land is grandiloquently described as extending ab orco usque ad coelum. But I suppose no one would contend that by selling his interest above 100 feet from the surface he could prevent the state from limiting, by the police power, the height of structures in a city. And why should a sale of underground rights bar the state’s power? For aught that appears the value of the coal kept in place by the restriction may be negligible as compared with the value of the whole property, or even as compared with that part of it which is represented by the coal remaining in place and which may be extracted despite the statute. 169

167. Background principles of law may encompass some of this public interest. However, some Justices require these to be more “long-standing” than new ecological concerns. See id. at 1495 (Rehnquist, C.J., dissenting) (avowing that “normal” delays with zoning and building permits are part of “background principles,” but that the “newer” moratoria would not).

168. Justice Stevens uses the denominator language in Keystone. “Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property ‘whose value is to furnish the denominator of the fraction.’” Keystone, 480 U.S. at 497 (quoting Frank I. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law, 80 Harv. L. Rev. 1165, 1192 (1967)).

Naturally, Justice Holmes had a different view. He considered the property affected by the regulation to be either the tons left behind\textsuperscript{170} or the support estate, an invention of Pennsylvania law that controlled whether or not subsidence would be actionable.\textsuperscript{171} The debate resurfaced in \textit{Keystone Bituminous Coal Association v. DeBenedictis},\textsuperscript{172} with the Brandeis view in the ascendance. Two important cases provided precedent for Justice Stevens' decision in \textit{Keystone}.

Between \textit{Pennsylvania Coal} and \textit{Keystone}, the Court decided \textit{Penn Central} and \textit{Andrus}. Perhaps the most famous quotation on this issue comes from \textit{Penn Central}:

"Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature of the interference with rights in the parcel as a whole—here the city tax block designated as the "landmark site."\textsuperscript{173}

In \textit{Penn Central}, under landmark protection laws, the property owner could not add on numerous stories over the existing Penn Central Station. The situation resembled the hypothetical Justice Brandeis posed about severing rights above the ground from a property.\textsuperscript{174} The answer was to reject at least one of the three potential types of segmentation;\textsuperscript{175} a parcel would not be divided in space so as to make the property affected smaller than the total physical tract. Justice Stevens echoed this rejection of spatial severance in \textit{Keystone}.\textsuperscript{176}

The second important precedent Justice Stevens employed in \textit{Keystone} looked at functional segmentation, that is, whether interfering with one aspect of the "bundle" of rights that constitute property ownership should be considered a taking. The answer of the \textit{Andrus} case was "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety."\textsuperscript{177} In the case, the

\textsuperscript{170} \textit{Id.} at 413-15.

\textsuperscript{171} \textit{Id.} at 416. At common law, the owner of the surface had a common law right to force the mineral owner to avoid subsidence as a result of mining. This could be rearranged by contract. In Pennsylvania, a "support estate" may be owned separately from either the mineral or surface estates. In the particular case, the coal estate had the "support estate," which meant it could mine without liability for causing subsidence.

\textsuperscript{172} 480 U.S. 470. Of the twenty-seven million tons of coal required to remain in place for thirteen mines from 1966-1972 out of the 1.46 billion tons in the mine, Justice Stevens noted that less than two percent was required to be left in place; therefore the tons were not separate property interests and, even without the regulation, only seventy-five percent of the coal was mineable. \textit{Id.} at 496. Additionally, the support estate needed a context; it was a part of the value of either the surface or the coal estate because, as a practical matter, it was always owned by one of the two. It was not an individual piece of property. \textit{Id.}

\textsuperscript{173} \textit{Penn Central}, 438 U.S. at 130-31.

\textsuperscript{174} See \textit{Pa. Coal}, 260 U.S. at 419 (Brandeis, J., dissenting) (quoted in \textit{supra} n. 169).

\textsuperscript{175} The three aspects of segmentation are the spatial, temporal, and functional. \textit{Tahoe-Sierra}, 216 F.3d at 774. For a discussion on segmentation, see Patty Gerstenblith, \textit{Protection of Cultural Heritage Found on Private Land: The Paradigm of the Miami Circle and Regulatory Takings Doctrine after Lucas}, 13 St. Thomas L. Rev. 65, 83-93 (2000).

\textsuperscript{176} \textit{Keystone}, 480 U.S. at 496.

\textsuperscript{177} \textit{Andrus}, 444 U.S. at 65-66.
owner of eagle feathers could no longer sell the feathers, but could still control disposition through gift, loan, or bequest. Therefore, despite Justice Holmes’ decision in Pennsylvania Coal, Justice Stevens was on firm ground when he decided Keystone.

Nevertheless, the disparity in the holdings in the two cases could raise questions. Justice Scalia highlighted the result, stating, “Unsurprisingly, this uncertainty regarding the composition of the denominator in our ‘deprivation’ fraction has produced inconsistent pronouncements by the Court.” Nevertheless, as Justice Kennedy noted in the recent Palazzolo case, the legal rule as of 2001 was to keep a “whole” denominator and not to subdivide the property into various tracts, although dictum had questioned the premise.

There was, therefore, an unresolved tension between the two views on whether segmentation was appropriate. On the side favoring rejecting it in the spatial dimension, Justice Stevens is the only Justice remaining on the Court from the Keystone majority. Chief Justice Rehnquist dissented, joined by current Justices O’Connor and Scalia. As Chief Justice Rehnquist phrased the facts in Keystone, the regulation did “not merely inhibit one strand in the bundle, but instead destroy[s] completely any interest in a segment of property.” Lower courts have split on whether to look at an entire tract of physical land or to divide it acre by acre. There was similar discord on the second issue, functional severance. For example, Justice Stevens in Dolan v. City of Tigard accused the majority in the Rehnquist-authored opinion as concentrating too greatly on one “strand” of the private owner’s property rights, namely the right to exclude. Additionally, all the members of the Andrus majority are no longer present on the bench, and the continued viability of the decision has been questioned.

Therefore, Justice Thomas was not alone in believing that the Court was in flux on

178. Lucas, 505 U.S. at 1016 n. 7, in which he invites the reader to: “Compare Pennsylvania Coal Co. (law restricting subsurface extraction of coal held to effect a taking), with Keystone Bituminous Coal Assn. (nearly identical law held not to effect a taking).”

179. Palazzolo, 533 U.S. at 631 (citations omitted).


182. Chief Justice Loren Smith of the United States Court of Federal Claims epitomizes the lower court judge who employs functional severance. See The Stearns Co., Ltd. v. U.S., 53 Fed. Cl. 446 (2002) (requiring the mineral owner to request discretionary permission to mine is a taking of the full value of the coal even if the permission was likely to be given because the mineral owner had a right to be the dominant estate).

183. 512 U.S. 374.

184. Dolan, 512 U.S. at 409 (Stevens, J., dissenting). The majority, in addition to Chief Justice Rehnquist, included Justices Kennedy, O’Connor, Scalia, and Thomas.

185. See supra n. 152.
the current viability of the “property as a whole” rule. Justice Thomas especially believed the matter was settled in favor of segmentation in its third aspect, that is, segmentation of a property’s value through time, when the Court decided in First English that compensation was necessary for the period during which an unconstitutional regulation was in effect.

Although there was some adherence to the “parcel as a whole” standard in passing, the most eloquent defenses of the concept came in Keystone and in a First English dissent, both and authored by Justice Stevens in 1987. The Tahoe-Sierra Ninth Circuit opinion echoed the First English dissent, noting that segmentation should not occur in any of the three dimensions of a property’s existence: spatial, temporal, or functional. The Supreme Court’s Tahoe-Sierra decision rejects segmentation in at least two of these dimensions: “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 aspect of the owner’s interest. Both dimensions must be considered if the interest is to be viewed in its entirety.” All aspects of functional severance were not clearly addressed; in fact, the opinion quotes Andrus and talks of the inapplicability of a taking conclusion when one “strand” is removed “where an owner possesses a full ‘bundle’ of property rights.” This could, theoretically, allow the equation to differ when less than a full bundle of rights are owned.

To allow the denominator to reflect what a particular party owns rather than “full” functional interests in the property would be contrary to Justice Brandeis’ assertion that the sum of the parts could not exceed the whole. It also would allow for manipulation of interests, as Justice Stevens feared when he noted that trying to find a “total” destruction of use or value would further accentuate the “denominator” issue:

[Developers and investors may market specialized estates to take advantage of the Court’s new rule. The smaller the estate, the more likely that a regulatory change will effect a total taking, . . . In short, the categorical rule will likely have one of two effects: Either courts will alter the definition of the “denominator” in the takings “fraction,” rendering the Court’s categorical rule meaningless, or investors will manipulate the relevant property interests, giving the Court’s rule sweeping effect.]

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186. Tahoe-Sierra, 122 S. Ct. at 1496-97 (Thomas, J., dissenting). See Mansfield, supra n. 12, at 295 (discussing the belief that members of the Palazzolo majority were more likely to embrace a theory of segmentation).
187. First English, 482 U.S. at 317.
188. See Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 644 (1993). “To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question.” Id.
189. Compare First English, 482 U.S. at 330 (Stevens, J., dissenting), with Tahoe-Sierra, 216 F.3d at 774, 776, 777.
190. Tahoe-Sierra, 121 S. Ct. at 1481, 1484.
191. Id. at 1481 (quoting Andrus, 444 U.S. at 65-66).
Manipulating the relevant property interests could make the prohibition of mining a "total" taking even if a hotel could be built on the surface of the property if the relevant owner only held mining rights. It is not clear whether the Tahoe-Sierra ruling would prohibit this tactic.

The question of whether to view the "property as a whole" functionally from the perspective of the individual owner reflects another open question, namely, the question of when to judge the spatial or geographic confines of the "parcel as a whole." In the preceding hypothetical, a proper inquiry would include determining whether the severance of the minerals from the surface took place before or after the regulatory scheme was instituted or whether the current owner of the mineral estate profited from the sale of the surface. In other words, these questions should be relevant and lead to different perspectives on the functional dimension of the "parcel as a whole" based on answers to them. Closeness of the severance to the alleged taking and the financial gains the current owner made from other aspects of ownership in the physical tract should militate against a taking even if the "parcel as a whole" could be conceived as something less than the physical tract of land.

The more typical aspect of the timing problem in assessing the "parcel as a whole" actually involves the dimensions of the property spatially or geographically. For example, in the wetlands situation, the current owner of the wetlands acreage may own additional acreages at the time of the alleged taking that were clearly to be developed in conjunction with the wetlands. In this situation, the answer to the denominator question is the whole property, wetlands as well as uplands. If, however, the developer had already developed and sold the majority of the uplands, the answer potentially could cloud. Again, the answer to whether the present or past configuration of the land is the true "parcel as a whole" would depend on the relationship of the owner to the land through time. More importantly, lands that were logical parts of a developmental plan should be treated together, whether the current owner was a late acquirer of a small tract or formerly owned a larger parcel. 194 The Supreme Court has not clearly addressed these issues.

The majority in Tahoe-Sierra, however, did begin to solve the dilemma by re-asserting the "parcel as a whole" model of identifying the property affected by a regulation. This narrows the situations where all of either a property's value or economic use may be destroyed. Nevertheless, there are open questions as to timing in judging both the functional reach and the geographical dimensions of a current owner's full parcel. When takings analysis moves from the categorical review to the ad hoc balancing of Penn Central analysis, however, the flexibility remaining might be a plus, rather than a detriment.

194. Dist. Intown Properties Ltd. Partn. v. D.C., 198 F.3d 874, 880 (D.C. Cir. 1999), cert. denied, 121 S. Ct. 34 (2000) (finding that the tract was one parcel because lots were "spatially and functionally contiguous").
IV. CONCLUSION

Steel may be fabricated into many things. A sculpture by Alexander Calder flows almost free-form, while a railroad track tends to go straight and narrow. Some of the Justices on the Supreme Court also like the straight and narrow when it comes to takings jurisprudence, but they were the minority in Tahoe-Sierra. The majority, rather than endorsing categorical or per se takings, want to rely on a more individualist appraisal, allowing elements to move and interpose amongst themselves like a Calder mobile. Ironically, the case specific approach is embodied in a decision that takes its name not from an artist, but from a railroad, Penn Central.

The end result of the two important “leanings” of Tahoe-Sierra is to put Penn Central back in the center of takings jurisprudence. First, the majority concentrated on whether a regulation eliminated all “value” of a property rather than all its economic use. Because the nature of property is that it is a limited resource, almost all land has value. It can either be “used” in its natural state for personal pleasure or sold to others for use with other land or as a natural reserve. Therefore, few situations if any would result in categorical status based on loss of all economic value.

The tack of the dissenting trio of Justices, however, would make it too easy to find a categorical taking, especially in light of their tendency to segment property functionally, spatially, and temporally. The difficulty with categorical takings is that the nature of the governmental purpose is not considered. Without factoring this in, the examination ignores the second master property serves, the public. This “public” aspect of property has had numerous incarnations. The Jeffersonian/Rousseauian concept imbues property with a social purpose, creating citizens. To Joseph Singer, property ownership obligates the owner, requiring recognition of others in a clash of rights. To the environmentalist, there is an aspect of property found in the “economy of nature,” in which “land is systems, defined by their function, not by man-made boundaries.” Because of this duality about property ownership, less reliance on a per se category is needed. Looking at land’s retained value and considering the restriction on use in relation to the “parcel as a whole” encourages reliance on case-by-case appraisal. The dilemma at Lake Tahoe cries out for such.

195. With the mercurial nature of takings jurisprudence, it is sometimes hard to cull firm “holdings” from these cases. As clearly indicated in the dispute over the meaning of Lucas, judges sign on to results in the cases, and do not necessarily embrace every word of the decisions. Justice O’Connor joined both Justice Scalia in Lucas and later Justice Stevens as he repositioned Lucas’ thrust in Tahoe-Sierra.


197. In Palazzolo, the Rhode Island Supreme Court had found that the undevelopable wetlands had a value of $157,500 as an “open space gift.” Palazzolo v. St. ex rel. Tavares, 746 A.2d 707, 715 (R.I. 2000).

198. See Mansfield, supra n. 142, at 205-08.

199. See generally Singer, Entitlement, supra n. 141; Singer, Edges of the Field, supra n. 141.

200. Sax, supra n. 142, at 1442.
One of the problems in the Lake Tahoe scenario is that the current owners of many tracts are the owners of small lots in subdivisions that were platted but not developed. The lots were bought, but simply held pending retirement or some other life event.\(^{201}\) If the relevant restriction on use arises from limitations on the percentage of area that impervious material can cover, then it is difficult to do anything on a small lot. Insufficient area would remain for development. However, if the land was still in larger parcels, there might be enough room for a residence. The basic problem arose from the subdivision; there are more people holding rights in what was once a large and developable “parcel as a whole” and is now numerous small parcels, which may or may not be separate “wholes.” Unfortunately, subdivision beyond the ecological carrying capacity of the land has now led to an analytical dilemma in ascertaining the dimensions of the “parcel as a whole” in light of fairness and justice for both an individual owner and the communal interest in a clear Lake Tahoe. The concept of transferable development rights, which the Tahoe Regional Plan incorporated, in essence recognizes the larger “parcel as a whole” by allowing a tract that is not to be developed to transfer developmental rights to another tract that could be developed. By selling this right, the small lot owner shares in the value of the larger parcel.

Through a return of attention to the “parcel as a whole” and redirection to “value,” takings jurisprudence will have the flexibility to respond to changing concepts of property ownership and ecosystem importance. Three elements are balanced in a *Penn Central* analysis: the financial impact of the regulation on the private party, the degree of interference with reasonable investment-backed expectations, and the nature of the governmental interest being forwarded. The amount of “value” the private party retains or has previously realized is influenced by the description of the property affected by the regulation, which also helps measure the financial impact of the regulation. The lesser the financial impact, the more the landowner would expect to have to accommodate the public need. The property description also helps measure the amount of interference with reasonable expectations. Expectations about property, however, are not limited to the private “owner” of the property.

Because of the two masters property serves, there actually are two sets of expectations. The public relies upon retaining these public values, which may directly provide ecological services,\(^{202}\) and the landowner expects profit from either development or resale.\(^{203}\) Public expectations are tied to the other balancing factor in *Penn Central*, the nature of the governmental interest forwarded. In fact, the district court in *Tahoe-Sierra* found that the strength of the

\(^{201}\) *Suitum v. Tahoe Regl. Plan. Agency*, 520 U.S. 725 (1997) (site held pending retirement); *Tahoe-Sierra*, 34 F. Supp. 2d at 1240 (average holding time of lot before development is twenty-five years).


\(^{203}\) Some of this profit may be in the form of individual pleasure from residing on the land before resale. That is, even if resale is not the immediate plan, there is still “profit,” even if not monetary.
purpose behind protecting the clarity of Lake Tahoe would trump any amount of financial impact or interference with reasonable expectations.\textsuperscript{204} There is, of course, interplay between the factors in the \textit{Penn Central} setting. When the public purpose forwarded is stronger, the reasonable landowner should expect more limitations.\textsuperscript{205} The more knowledge that is garnered about public needs, the acknowledgment of the strength of the public purpose will become part of private reality.\textsuperscript{206} \textit{Penn Central} analysis, therefore, allows for much more evolutionary growth of knowledge and attitudes toward property than categorical treatment can provide.

The return of \textit{Penn Central} to the center of takings analysis, therefore, acknowledges the difficulty of accommodating both the private and public aspects of property. While not an ideal solution, it allows work toward a better understanding of property's role in both public and private life. At some point, however, it might be best to rethink the entire field of takings jurisprudence, perhaps taking the lead of Justice Stevens in his \textit{Lucas} dissent and \textit{Palazzolo} opinion, namely a valid exercise of the police power, which is of general applicability and seeks to prevent a substantial harm, would not be a taking.\textsuperscript{207} That, however, is a topic for another article.

\textsuperscript{204} \textit{Tahoe-Sierra}, 34 F. Supp. 2d at 1242.

\textsuperscript{205} In this regard, distinctions would emerge based on whether the regulation had curtailed an existing use or stopped an activity after the private party had initiated other individualized activity indicating a strong expectation of imminent development before the regulatory action. If neither situation was present, the landowner's expectations would be weaker. \textit{Cf.} Marla E. Mansfield, \textit{Regulatory Takings, Expectations and Existing Rights}, 5 J. Mineral L. & Policy 431, 465-68 (1990) (arguing for a “strong expectation test” to determine valid existing rights under the Surface Mining Control and Reclamation Act).


\textsuperscript{207} \textit{Palazzolo}, 121 S. Ct. at 2470 n. 3 (Stevens, J., concurring and dissenting).