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NEWS & ANALYSIS

A Turning of the Tide: The *Tahoe-Sierra* Regulatory Takings Decision

by John D. Echeverria

On April 23, 2002, in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[1] the U.S. Supreme Court rejected a regulatory taking claim based on a nearly three-year moratorium on development in the Lake Tahoe Basin. The Court split 6 to 3, with Justice John Paul Stevens writing the decision for the Court, and Chief Justice William H. Rehnquist and Justices Antonin Scalia and Clarence Thomas dissenting. The decision is the first clear-cut victory for the government side in a land use or environmental takings case before the high court in 15 years.[2]

Apart from the unusual result, the decision is significant because the Court actually resolved several important legal issues. Many of the Court's recent takings cases have produced fractured majorities,[3] or narrow holdings that avoided deciding any fundamental legal question.[4] In *Tahoe-Sierra*, a strong majority issued several clear and important rulings, and in the main these rulings are highly favorable to government defendants.

The Court decided a significant question about the definition of a "temporary taking," ruling that an explicitly temporary prohibition on development is entirely different from, and far less likely to result in a taking than, a permanent prohibition. In the course of getting to this conclusion, the Court reaffirmed the traditional parcel as a whole rule, a step with important implications for the scope of regulatory takings law generally. The Court also drew a sharp distinction between physical appropriations of private property (which almost always result in a taking), and restrictions on the use of private property (which seldom do).

In addition, the Court embraced a narrow reading of the "categorical" rule established by *Lucas v. South Carolina Coastal Council*.[5] The Court said that a regulation can result in a *Lucas* taking only if it involves "the permanent 'obliteration of the value' of a fee simple estate . . . ."[6] As a practical matter, this version of the *Lucas* test will result in a finding of a taking in few real-world cases. As a legal matter, this narrow reading of *Lucas* may lay the foundation for the Supreme Court's eventual repudiation of the *Lucas* "categorical" rule as a distinct takings test.

Also, the *Tahoe-Sierra* decision, like last year's decision in *Palazzolo v. Rhode Island*,[7] placed new emphasis on the multifactor framework originally articulated in *Penn Central Transportation Co. v. City of New York*.[8] But the decision provides little guidance on what the *Penn Central* test actually is or how it should be applied. A future challenge for courts and litigants will be to create a predictable legal standard out of the famously muddy language of the *Penn Central* decision. Despite the Supreme Court's recent, intense focus on the regulatory takings issue, regulatory takings doctrine is in some ways as tentative and uncertain as it was after *Penn Central* was decided nearly 25 years ago.

Finally, the *Tahoe-Sierra* decision is important because it offers a ringing endorsement of government's pursuit of "a strategy for environmentally sound growth."[9] Justice Stevens has long been a strong voice on the Court in support

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1. 122 S. Ct. 1465, 32 ELR 20627 (2002).

2. The government's last clear-cut victory was in Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 17 ELR 20440 (1987). The government achieved at least partial victories in several more recent cases. *See, e.g.*, Palazzolo v. Rhode Island, 533 U.S. 606, 32 ELR 20516 (2001) (affirming rejection of claim under standard set forth in Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 22 ELR 21104 (1992)); City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 29 ELR 21133 (1999) (rejecting appeals court's application of "rough proportionality" test set forth in Dolan v. City of Tigard, 512 U.S. 374, 24 ELR 21083 (1994), to use restrictions).

3. In *Palazzolo*, the Court ruled that a claimant's preacquisition notice of a regulatory restriction is not a categorical bar to a taking claim, but Justices Sandra Day O'Connor and Antonin Scalia, who both joined the Court's opinion, each wrote concurring opinions expressing opposite viewpoints on whether preacquisition notice is a relevant factor in a takings case. *See generally* John D. Echeverria, *A Preliminary Assessment of* Palazzolo v. Rhode Island, 31 ELR 11112 (Sept. 2001). *See also* Eastern Enter. v. Apfel, 524 U.S. 498 (1998) (striking down the Coal Act as unconstitutional as applied to the plaintiff, but without a majority opinion agreeing on the rationale for this outcome).

4. In *City of Monterey*, the Court upheld an award of compensation based on a claim that the government action failed to substantially advance a legitimate government interest, but the Court based its ruling on the city's waiver of any objection to this test and did not resolve the legitimacy of this test. *See generally* John D. Echeverria, *Revving the Engines in Neutral:* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 29 ELR 10682 (Nov. 1999). *See also* Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 27 ELR 21064 (1997) (concluding that a takings challenge was ripe for review, but not deciding whether the regulatory program actually effected a taking).

5. 505 U.S. 1003, 22 ELR 21104 (1992).

6. 122 S. Ct. at 1483, 32 ELR at 20632.

7. 533 U.S. 606, 32 ELR 20516 (2001).

8. 438 U.S. 104, 8 ELR 20528 (1978).

9. 122 S. Ct. at 1470, 32 ELR at 20627.

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of reasonable land use controls. In *Tahoe-Sierra*, he persuaded a majority of the Court to endorse this viewpoint.

Background

The litigation arose from a joint federal-state effort to preserve the scenic beauty of Lake Tahoe, a spectacular alpine lake that sits astride the California-Nevada border. Mark Twain described Lake Tahoe as "a noble sheet of blue water, lifted six thousand three hundred feet above the level of the sea, and walled in by a rim of snow-clad mountain peaks that towered aloft full three thousand feet higher still!"[10] Whatever else the parties disputed, there was no question that Lake Tahoe was worth protecting.

The lake's most remarkable feature, the clarity of its water, is a result of the lake's historically oligotrophic (nutrient-free) condition. Intensive development, starting in the 1950s, expanded the area of impervious surface in the basin and increased the volume of runoff carrying nutrient-rich topsoil into the lake. The result has been increased algal growth and a gradual decline in the lake's clarity. Scientists are generally in accord that the most obvious solution to the problem is to restrict development, especially in areas that are particularly sensitive to erosion and on wetlands that naturally filter runoff.

In 1980, in an effort to control development around Lake Tahoe, the California and Nevada legislatures passed, and the U.S. Congress approved, comprehensive revisions to the Tahoe Regional Planning Compact. Recognizing that preparing a regional plan and implementing rules under the new compact would take several years, the Tahoe Regional Planning Agency (TRPA) imposed an essentially complete ban on development on a substantial portion of the land in the basin pending development of the plan. When the complex planning process took longer than originally envisioned, the moratorium was extended, ultimately resulting in a continuous ban on development for 32 months.

In 1984, the TRPA issued a regional plan and officially lifted the moratorium. However, the state of California, believing the plan was not sufficiently protective, immediately sued to block implementation of the plan. The federal district court issued a preliminary injunction and the injunction was upheld on appeal by the U.S. Court of Appeals for the Ninth Circuit.[11] The injunction had the effect of barring the TRPA from processing development applications until the TRPA adopted a completely revised regional plan in 1987.

The plaintiffs, consisting of an association of property owners and approximately 450 individual owners, filed suit in federal court in 1984. On January 15, 1999, after many years of pretrial skirmishing, including several appeals to the Ninth Circuit, followed by a full trial, the district court finally issued its decision.

The District Court Decision

As a threshold matter, the district court rejected the plaintiffs' claims for compensation based on the plan adopted in 1984 on the ground that the court injunction, rather than any action by the TRPA,[12] blocked development between 1984 and 1987. The district court also ruled that the plaintiffs' claims based on the 1987 plan were barred by the applicable statute of limitations because the plaintiffs failed to make a timely amendment to their complaint in order to challenge the 1987 plan.[13] Thus, the district court's takings analysis focused solely on the planning moratorium in place from August 1981 through April 1984.[14]

The district court, citing the 1980 Supreme Court decision in *Agins v. City of Tiburon*,[15] applied the following two-prong takings test: a regulation amounts to a taking "when either (1) it does not substantially advance a legitimate state interest; or (2) it denies the owner economically viable use of her land."[16]

As to the first prong, the court raised the question of what standard of review to apply—a deferential standard analogous to due process rational basis review, or a more searching, intermediate-level scrutiny. However, the court determined that it was unnecessary to resolve the question in this case. The court concluded that, regardless of what standard of review applied, the TRPA moratorium substantially advanced a legitimate state interest. Indeed, the plaintiffs did not even seriously contest the issue. There was no dispute that protection of Lake Tahoe was a worthy, indeed vital, public goal and, as the court stated, "[t]here is a direct connection between the potential development of plaintiffs' lands and the harm the lake would suffer as a result thereof."[17]

The second prong of the test presented a more complicated issue. The plaintiffs contended that they should recover under the *Lucas* "categorical" test, which they construed as essentially equivalent to the *Agins* denial-of-economically-viable-use standard. The TRPA, on the other hand, contended that the claim was more appropriately analyzed under the *Penn Central* multifactor test, which includes an analysis of the economic impact of the regulation, the degree of interference with investment-backed expectations, and the character of the regulation. In the end, the district court evaluated the claim under both *Lucas* and *Penn Central*.

The court first rejected the *Penn Central* claim. The court found that the economic impact factor weighed heavily against the claim because the plaintiffs had introduced no

10. *See* Mark Twain, Roughing It 169 (facsimile reprint of 1st ed., Hippocrene Books 1872), *cited in* Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F. Supp. 2d 1226, 1229, 29 ELR 21290 (D. Nev. 1999).

11. *See* California ex rel. Van de Kamp v. Tahoe Reg'l Planning Agency, 766 F.2d 1308 (9th Cir. 1985).

12. The defendants originally included the states of California and Nevada in addition to the TRPA. The states were dismissed from the case at an early stage based on Eleventh Amendment immunity, *see* Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 938 F.2d 153 (9th Cir. 1991), but the states continued to play an active role in the litigation. *See Tahoe-Sierra*, 34 F. Supp. 2d at 1229 n.1, 29 ELR at 21290 n.1. For convenience, this Dialogue refers to the defendants collectively as the "TRPA."

13. *See* Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 992 F. Supp. 1218 (D. Nev. 1998).

14. Because the district court dismissed the claims based on the 1987 plan, the parties did not introduce evidence concerning the actual effects of the 1987 plan. Before the Supreme Court, the two sides painted very different pictures of the situation post-1987. The plaintiff side described the 1987 plan as one more step in an essentially continuous prohibition on development dating back to 1980. The defendant side described a far more flexible regime that granted certain owners the opportunity to develop their properties and others the opportunity to sell all or part of their interests.

15. 447 U.S. 255, 10 ELR 20361 (1980).

16. 34 F. Supp. 2d at 1239, 29 ELR at 21295.

17. *Id.* at 1240, 29 ELR at 21295.

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specific evidence of any adverse impact on their property values. The investment expectations factor also weighed against the claim because the evidence showed that owners in the basin typically held their property for 25 years before seeking development approval; under any view, the TRPA moratorium lasted far less than 25 years and, therefore, did not interfere with typical owners' development plans. Finally, the court ruled that the "character" factor weighed against a finding of a taking because, in the court's view, limiting development around the lake was "a direct and reasonable" way to address pollution of Lake Tahoe. Treating the *Penn Central* inquiry as basically "a balancing test—a weighing of private and public interests," the court said that "the interest in protecting Lake Tahoe is so strong . . . [that] any test that takes that interest into account would result in victory for the defendants."[18]

However, the court concluded that the plaintiffs had established a "total" categorical taking under *Lucas*. The court recognized that traditionally "it [has been] fairly clear that temporary, interim planning moratoria [are] not considered takings."[19] But it believed that recent, "sweeping changes in the law of regulatory takings,"[20] in particular the decisions in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*[21] and *Lucas*,[22] called for a different result in this case. The district court based its conclusion that the TRPA moratorium effected a taking partly on the fact that the TRPA had initially adopted the moratorium for a set period but then extended the moratorium indefinitely until the 1984 plan was adopted.

Finally, the district court rejected the TRPA's defense that future development, because it would harm water quality and fisheries, represented a common-law nuisance, which would preclude a finding of a taking. The court started with a narrow view of the nuisance defense, reading the *Lucas* "background principles" as "rarely" prohibiting "any habitable or productive improvements."[23] The court therefore believed that the plaintiffs "face[d] a rather difficult battle in attempting to show that the building of single-family homes at Lake Tahoe would have constituted a nuisance."[24] The court acknowledged that water pollution generally represents a nuisance under California and Nevada law, but said that the precedents required "a more significant contribution to the problem," and "a more significant problem to begin with," than the TRPA could establish in this case.[25] Finally, the court recognized that destruction of fisheries could represent a nuisance, but ruled that the TRPA could not rely on this defense because it could not point to a sufficient present injury to the fishery.

The Ninth Circuit Decision

On appeal, the Ninth Circuit took the same narrow view of the case as the district court. The appeals court affirmed the conclusion that the injunction against the 1984 plan could not support a taking claim against the TRPA and also agreed that any claim based on the 1987 plan was barred by the statute of limitations. In addition, the plaintiffs did not appeal the rejection of the substantially advance or the *Penn Central* claims. The TRPA appealed the district court's rejection of the nuisance defense, but the court of appeals did not reach the issue.[26] Thus, the appeal, like the trial in the district court, focused on the *Lucas* claim based on the 32-month moratorium.

The Ninth Circuit, in an opinion by Judge Stephen Reinhardt, reversed the finding of a temporary taking under *Lucas*. First, the court rejected the plaintiffs' efforts to focus on the "temporal 'slice'"[27] while the moratorium was in effect, ruling that this approach was inconsistent with the Supreme Court's long-standing parcel as a whole rule. Based on that determination, the appeals court had little difficulty in disposing of the *Lucas* categorical taking claim. The court recognized the existence of a debate as to whether the denial-of-all-economically-viable-use standard in *Lucas* required the elimination of all use or the destruction of all value, but ruled that under either theory the plaintiffs' claims had to be rejected: the properties retained some value based on the possibility that the properties could be developed once the moratorium was lifted; and the moratorium did not eliminate all use because the 32-month moratorium represented only "a small fraction of the useful life of the Tahoe properties."[28]

Second, the court rejected the plaintiffs' reliance on *First English*. The court interpreted that precedent as only mandating payment of compensation, assuming a taking has already been established, for the temporary period between the restriction's adoption and its rescission following the judicial finding of a taking. The court rejected the argument that *First English* mandated payment of compensation for a prospectively temporary restriction on the use of property, such as a planning moratorium. The court also distinguished Supreme Court precedent involving takings claims based on temporary physical appropriations on the ground that such claims "have always received markedly different analytic treatment than other regulatory takings."[29]

In rejecting the plaintiffs' challenge to the TRPA moratorium, the Ninth Circuit said:

> [W]e preserve the ability of local governments to do what they have done for many years—to engage in orderly, reasonable land-use planning through a considered and deliberative process. To do otherwise would turn the Takings Clause into a weapon to be used indis-

18. *Id*. at 1242, 29 ELR at 21296.
19. *Id*. at 1248, 29 ELR at 21299.
20. *Id*. at 1229, 29 ELR at 21290.
21. 482 U.S. 304, 17 ELR 20787 (1987).
22. 505 U.S. at 1003, 22 ELR at 21104.
23. 34 F. Supp. 2d at 1252, 29 ELR at 21301.
24. *Id*.
25. *Id*. at 1253, 29 ELR at 21301.
26. The district court's ruling on the nuisance issue was certainly vulnerable to attack. In particular, the conclusions that the threat to Lake Tahoe's water quality did not represent a sufficiently significant problem, and that development was not a sufficiently significant contribution to the problem, seem patently erroneous, given the obvious public interest in protecting Lake Tahoe and the scientific evidence about the threats facing the lake. In addition, the court's requirement of a showing of actual damage to the fishery appears nonsensical. The point of the nuisance defense is to provide the government an opportunity to defeat a taking claim when the government has refused to allow an activity to go forward in order to prevent injuries from occurring. For a recent, more sensible application of the nuisance defense in a takings suit, see Machipongo Land & Coal Co. v. Commonwealth, 799 A.2d 751 (Pa. 2002).
27. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 216 F.3d 764, 774, 30 ELR 20638, 20641 (9th Cir. 2000).
28. *Id*. at 782, 30 ELR at 20644.
29. *Id*. at 779, 30 ELR at 20643.

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criminately to penalize local communities for attempting to protect the public interest.[30]

The Ninth Circuit rejected an application for rehearing and rehearing en banc. However, Judge Alex Kozinski, writing for himself and four other members of the court, dissented. In his unusually forceful dissent, Judge Kozinski accused the panel of "reversing" *First English*. By not voting to rehear the case, Judge Kozinski wrote, the full Ninth Circuit "neglected our duty and passed the burden of correcting our mistake on to a higher authority."[31] The plaintiffs then filed a petition for certiorari.[32]

The Case in the Supreme Court

The plaintiffs' petition for certiorari sought—unsuccessfully—to reinvent the case in the Supreme Court. Rather than follow the lower courts' lead and focus on the 32-month moratorium, the petition, authored by the plaintiffs' new Supreme Court counsel, portrayed the case as a "series of rolling, back-to-back" regulatory measures that prohibited any use of the plaintiffs' properties for 20 years and counting.[33] The plaintiffs asked the Court to grant review to consider whether a government defendant can avoid takings liability "by instituting a permanent prohibition through a series of ostensibly short-term restrictions," and whether the appeals court had erred in holding that an ostensibly temporary moratorium can "never" result in a taking.[34]

The TRPA argued that the Court should deny the petition because the Ninth Circuit had not ruled that a moratorium can "never" result in a taking, the Ninth Circuit decision was consistent with *Lucas* and *First English*, and no conflict in the lower courts warranted Supreme Court review.[35] The TRPA also objected to plaintiffs' portrayal of the case. The agency contended that the lower courts properly focused on the 32-month moratorium because they had correctly rejected the claims based on the 1984 and 1987 plans on other grounds. Furthermore, the TRPA argued, the plaintiffs were not directly challenging the lower courts' rejection of these claims, and, in any event, these rulings (lack of causation for the 1984 plan; statute of limitations for the 1987 plan) did not present issues worthy of Supreme Court review. Thus, the TRPA implied, if the Supreme Court were to grant review, the case should be confined to the moratorium in place from 1981 to 1984.

On June 29, 2001, the Supreme Court granted the petition for certiorari, but rejected the statement of the issues presented by the plaintiffs and limited the case to the following question: "Whether the Court of Appeals properly determined that a temporary moratorium on land development does not constitute a taking of property requiring compensation under the Takings Clause of the United States Constitution?"[36]

On April 23, 2002, the Supreme Court issued its decision upholding the Ninth Circuit's rejection of the plaintiffs' claims. In the opening paragraph, Justice Stevens emphasized the "narrow scope" of the Court's holding, highlighting that, given the plaintiffs' abandonment of their *Penn Central* claim in the appeals court, the case in the Supreme Court included only a *Lucas* categorical claim. Justice Stevens also emphasized that the plaintiffs were only pursuing a facial claim, meaning that they faced "an uphill battle" to demonstrate that the "mere enactment" of the TRPA moratorium constituted a taking.

The Court's opinion is divided into two parts—an explanation of why the plaintiffs could not recover under existing precedent, and a discussion of why the Court declined to develop a new rule that would permit the plaintiffs to recover. The Court first rejected the plaintiffs' effort to rely upon takings decisions involving temporary physical appropriations of private property to support their case. The Court acknowledged that some of its prior decisions recognized that a physical occupation can result in a taking, "regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof," and that these precedents support claims based on temporary physical occupation of private property.[37] But, the Court said, a takings challenge to a use restriction must be analyzed differently and that it had to look at the effects of the TRPA moratorium using the parcel as a whole rule. In the context of this case, that meant that the Court had to consider the plaintiffs' period of ownership, not just the period when the moratorium was in effect.

The Court then explained why its decisions in *First English* and *Lucas* did not support the plaintiffs' claims. The Court described *First English* as dealing with the "remedial question" of whether a finding of a taking mandates payment of compensation, rather than with whether a development moratorium results in a taking in the first place. The Court described *Lucas* as involving a permanent prohibition on land use and not addressing the different question of whether a temporary prohibition would constitute a taking. The Court rejected the plaintiffs' effort to bring their case under the *Lucas* rule by focusing solely on the 32-month period when the moratorium was in place. Once again, the Court said, this approach of "conceptual severance" was inconsistent with the Court's parcel as a whole rule.[38]

In the second part of the opinion, the Court considered and rejected the proposal that it adopt a "new rule" to cover this and similar cases. The Court dismissed, primarily on the ground that it was impractical, the idea that compensation should be due "whenever government temporarily deprives

30. *Id*. at 782, 30 ELR at 20644.

31. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 228 F.3d 998, 999 (9th Cir. 2000).

32. Under Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985), most takings claims against state and local governments are litigated, at least initially, in state court. Apparently neither side in the *Tahoe-Sierra* case raised the question of whether the suit should have been filed in state court.

33. Petition for Writ of Certiorari at i, Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, No. 00-1167 (filed Jan. 18, 2001).

34. *Id*. In the third proposed question, the plaintiffs asked the Court to consider whether "a land use regulatory agency [can] purport to 'protect the environment' at a major regional location (here, Lake Tahoe) by compelling a select group of individual landowners to forego all use of their individual homesites, and thereby compel a de facto donation of their land for public use without compensation." *Id*.

35. *See* Brief in Opposition to Petition for Certiorari, Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, No. 00-1167 (filed Mar. 28, 2001).

36. *See* Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 333 U.S. 948 (June 29, 2001) (order granting petition for writ of certiorari).

37. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S. Ct. 1465, 1478, 32 ELR 20627, 20630 (2002).

38. *Id*. at 1483, 32 ELR at 20632.

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an owner of all economically viable use of her property."[39] The Court stated: "A rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decisionmaking."[40]

The Court also rejected variants of this suggested rule that would have allowed exceptions for normal delays associated with permit processing or delays of up to one year. The Court emphasized that, under this option, a planning moratorium could still constitute a taking, notwithstanding the "consensus in the planning community" that planning moratoria "are an essential tool of successful development."[41] This type of strict rule, the Court reasoned, would compel planners to "rush through" the planning process. If communities were forced to abandon use of moratoria altogether, developers could thwart land use planning objectives, "fostering inefficient and ill-conceived growth."[42] Finally, the Court said it would be perverse to apply such a rule to moratoria, given that moratoria generally produce a "reciprocity of advantage" among affected landowners and, therefore, may well increase rather than decrease private property values.[43]

The Court said that it believed that "the interest in 'justice and fairness' will be best served by relying on the familiar *Penn Central* approach when deciding cases like this, rather than by attempting to craft a new categorical rule."[44] While the plaintiffs had abandoned their *Penn Central* claim in the appeals court, the Supreme Court, to the undoubted dismay of the plaintiffs' counsel, seemed to go out of its way to say that "[i]t may be true that under a *Penn Central* analysis [plaintiffs'] land was taken and compensation would be due."[45]

Chief Justice Rehnquist, in a dissent joined by Justices Thomas and Scalia, contended that the TRPA moratorium resulted in a taking. First, the Chief Justice asserted that, contrary to the view of the majority, the issue of the TRPA's potential liability for the 1984 plan was properly before the Court. The injunction blocking the 1984 plan was based on the terms of the Tahoe compact, which the TRPA was responsible for implementing, as well as the TRPA's own regulations. Thus, Chief Justice Rehnquist reasoned, the TRPA could properly be held liable for the plaintiffs' inability to develop their property while the injunction was in place. Under this view, the TRPA moratorium did not last 32 months, but instead lasted 6 years.[46]

Chief Justice Rehnquist also rejected the majority's reading of *Lucas* and *First English*. He argued that a complete denial of a property's economic use, even if temporary, results in a compensable taking under *Lucas*. Citing language in *Lucas* that described a total deprivation of use as equivalent to a physical appropriation, Chief Justice Rehnquist argued that a total deprivation of use for a temporary period should be equated with a temporary physical appropriation. He also read *First English* as rejecting any distinction between permanent and temporary takings when a landowner is deprived of all economically viable use of his property.

Chief Justice Rehnquist stressed that, under his view of the law, not every regulatory delay would necessarily be a compensable taking. Delays from ordinary land use regulation could be defended under *Lucas* based on "background principles" of state law: "[T]he 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."[47] Without resolving whether some planning moratoria could potentially be justified based on background principles, Chief Justice Rehnquist concluded that the six-year TRPA moratorium (according to his calculation) "cannot be said to resemble any 'implied limitation' of state property law."[48]

Justice Thomas, in a separate dissent joined by Justice Scalia, focused on the parcel as a whole issue. While acknowledging that the Court had applied the parcel rule in various regulatory takings cases, Thomas said that *First English* had definitively, and properly, rejected the parcel rule in the temporal dimension. In his view, regulations prohibiting all use, even if temporary, should be treated as compensable takings under *Lucas*. Any potential value the property might have once the moratorium is lifted should affect the amount of compensation due, not whether a taking occurred in the first place. "It is regrettable," Justice Thomas stated, "that the Court has charted a markedly different path today."[49] He described as "puzzling" the majority's "decision to embrace the 'parcel as a whole' doctrine as settled," given that the Court, in several recent cases, had expressed uncertainty about the parcel rule.[50]

39. *Id*. at 1484, 32 ELR at 20632.
40. *Id*. at 1485, 32 ELR at 20633.
41. *Id*. at 1470, 32 ELR at 20627.
42. *Id*. at 1488, 32 ELR at 20634.
43. *Id*. at 1489, 32 ELR at 20634 (citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).
44. 122 S. Ct. at 1489, 32 ELR at 20634.
45. *Id*. at 1478 n.16, 32 ELR at 20630 n.16.
46. Without directly disputing Chief Justice William H. Rehnquist's causation analysis, the majority responded that the point was not within the scope of the Court's limited grant of certiorari and had not been argued by the plaintiffs. In any event, the majority's basic conclusion that *Lucas* does not provide the appropriate test for evaluating a planning moratorium would presumably still hold whether the moratorium lasted six years or three years.
47. 122 S. Ct. at 1495, 32 ELR at 20636 (Rehnquist, dissenting).
48. *Id*. at 1496, 32 ELR at 20637 (Rehnquist, dissenting).
49. *Id*. at 1497, 32 ELR at 20637 (Thomas, dissenting).
50. *Id*. at 1496 *, 32 ELR at 20637 * (Thomas, dissenting) (emphasis omitted). The *Tahoe-Sierra* case did not require the Court to confront, and the opinion sheds no light on, the looming confrontation between claims against states under the Takings Clause and the Supreme Court's increasingly robust law of state sovereign immunity. *See, e.g.*, Federal Maritime Comm'n v. South Carolina State Ports Auth., 122 S. Ct. 1864, 32 ELR 20702 (2002). It is widely recognized that states are immune from suit under the Takings Clause in federal court by virtue of the Eleventh Amendment. Given the Court's recent pronouncements that the Eleventh Amendment is merely illustrative of a broader doctrine of state sovereign immunity, there is a substantial question whether the states can be held liable under the Takings Clause in their own courts, at least absent an effective state waiver of sovereign immunity or appropriate federal legislation pursuant to §5 of the Fourteenth Amendment subjecting the states to liability. It appears to be black letter law that the United States is subject to suit under the Takings Clause only because Congress waived the immunity of the United States through the Tucker Act. *See* Webster v. Doe, 486 U.S. 592, 613 (1988) (Scalia, J., dissenting) ("No one would suggest that, if Congress had not passed the Tucker Act . . ., the courts would be able to order disbursements from the Treasury to pay for property taken under lawful authority (and subsequently destroyed) without just compensation."). However, no comparable federal legislation purports to waive the immunity of the states from takings suits. Moreover, it is, at best, ambiguous whether particular states have agreed to waive their immunity from suit for regulatory takings.

In *Tahoe-Sierra*, as discussed above, the states of California and Nevada were dismissed from the case based on the Eleventh Amendment at an early stage in the litigation. In Lake County Estates v.

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Justice Scalia, ordinarily the most vocal advocate on the Court for an expansive reading of the Takings Clause, did not write a separate opinion.

Analyzing the *Tahoe-Sierra* Decision

What is the meaning and significance of the Supreme Court's *Tahoe-Sierra* decision? This section addresses the several relatively clear lessons of the decision. The following section addresses the more open-ended questions of what the *Penn Central* test is and how it should be applied after the *Tahoe-Sierra* decision.

Land Planning and Regulation Endorsed

Before delving into the purely legal issues, it is worth highlighting the extent to which the *Tahoe-Sierra* opinion supports and promotes community land use planning and regulation. Past Court decisions have made a nod to "the commendable task of land use planning,"[51] but the *Tahoe-Sierra* decision goes beyond this type of generality and explicitly supports the TRPA's efforts to "design[] a strategy for environmentally sound growth."[52]

First, the Court endorsed the basic methods and goals of land use planning and regulation. It rejected the plaintiffs' taking claim in part because "the consensus in the planning community appears to be that moratoria, or 'interim development controls' as they are often called, are an essential tool of successful development."[53] The Court expressed concern that if communities were forced to abandon the use of planning moratoria for fear of takings liability, owners would seek to develop property quickly before a new plan could be put in place, "thereby fostering inefficient and ill-conceived growth."[54] *Tahoe-Sierra* is a clear signal that the Takings Clause should not be read as a bar to reasonable public efforts to control development.

In addition, the Court endorsed planning as a way of "facilitating informed decisionmaking by regulatory agencies."[55] The Court said that the moratorium allowed the TRPA "to obtain the benefit of comments and criticisms from interested parties, such as the [plaintiffs], during its deliberations."[56] Allowing takings claims based on planning moratoria, the Court said, "would likely create added pressure on decisionmakers to reach a quick resolution of land use issues."[57] As a result, it would "disadvantage those landowners and interest groups who are not as organized or familiar with the planning process."[58] In other words, the Court construed the Takings Clause narrowly for the express purpose of facilitating public participation in local land use decisionmaking.

Finally, the Court in *Tahoe-Sierra* made the important observation that planning and regulation do not simply limit property rights but can actually enhance property values. "[W]ith a moratorium," the Court said, "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."[59] In fact, the Court said, "there is every reason to believe property values will continue to increase despite a moratorium."

In a sense, much of what *Tahoe-Sierra* says about land use planning and regulation represents atmospherics. But because they have been offered by the Supreme Court, there are powerful atmospherics. They should constrain efforts to use the Takings Clause to attack reasonable growth control measures in the future. *Tahoe-Sierra* directs that the Takings Clause be interpreted to accommodate reasonable regulatory tools, not that regulatory tools be fashioned to accommodate an absolutist concept of property rights.

Temporary Regulatory Taking Defined

Turning to the key legal issues, first and most obviously, *Tahoe-Sierra* resolves the debate over the definition of a "temporary taking." Prior to *Tahoe-Sierra*, takings claimants could plausibly argue that a restriction adopted for a temporary period should support a finding of a compensable "temporary taking." The *Tahoe-Sierra* decision unequivocally rejects this view. While *Tahoe-Sierra* does not foreclose takings claims based on temporary restrictions, it will now be extremely difficult for property owners to challenge temporary restrictions under the Takings Clause.

The debate centered on the proper interpretation of *First English*, a 1987 Supreme Court case involving a takings claim based on a Los Angeles County ordinance temporarily banning new development in a floodplain. The California courts, without addressing the merits of the takings claim, dismissed the suit based on the then California Supreme Court rule that the remedy for a taking was invalidation of the ordinance, not payment of just compensation. The Supreme Court granted review to address the question, "whether abandonment [of regulations] by government [after a finding of a taking] requires payment for the period of time during which [the] regulations" were in effect.[60] The Court answered the question in the affirmative, ruling that payment of financial compensation is the appropriate remedy for regulatory takings.

First English had been subject to two alternative interpretations. The narrow interpretation was that *First English* dealt solely with the remedial issue, that is, the nature of the proper remedy if a taking has occurred. Under this view, *First English* did not address whether a temporary moratorium constitutes a taking in the first place and did not disturb

Tahoe Reg'l Planning Agency, 440 U.S. 391 (1979), the Supreme Court ruled that the TRPA does not share in the immunity of its parent states and, therefore, it was clear the suit could go forward regardless of the states' immunity.

51. Dolan v. City of Tigard, 512 U.S. 374, 396, 24 ELR 21083, 21088 (1994).
52. 122 S. Ct. at 1470, 32 ELR at 20627.
53. *Id*. at 1487, 32 ELR at 20634.
54. *Id*. at 1488, 32 ELR at 20634.
55. *Id*. at 1487, 32 ELR at 20634.
56. *Id*. at 1488, 32 ELR at 20634.
57. *Id*.
58. *Id*. The Court also reasoned that rejection of the plaintiffs' taking challenge was supported by the Court's "strict" requirement that a landowner pursue available local procedures to completion before filing a taking suit. "We would create a perverse system of incentives," the Court said, "were we to hold that landowners must wait for a taking claim to ripen so that planners can make well-reasoned decisions while, at the same time, holding that those planners must compensate landowners for the delay." *Id*.
59. *Id*. at 1489, 32 ELR at 20634 (citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).
60. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 317, 17 ELR 20787, 20790 (1987).

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the general consensus among lower federal and state courts that planning moratoria do not raise a serious problem under the Takings Clause.

The second, broader interpretation was that *First English* established, or at least strongly implied, that a development moratorium, despite its temporary nature, should be regarded as a taking. One argument was that the Court would not have agreed to resolve the remedial question in *First English* unless it believed the Los Angeles moratorium might well be a taking. Furthermore, the *First English* Court had said that "'temporary' takings which . . . deny a landowner all use of his property are not different in kind from permanent takings, for which the Constitution clearly requires compensation."[61] This language suggested that a regulation that prohibits all use of property for a limited period should be viewed as a taking.

In *Tahoe-Sierra*, the Court adopted the narrow reading of *First English*. It said the Court in *First English* had "characterized the issue to be decided as a 'compensation question' or a 'remedial question,'" and that *First English* did not address "the quite different and logically prior question whether the temporary regulation at issue had in fact constituted a taking."[62] Furthermore, the Court observed that *First English* said that normal delays and at least certain types of temporary restrictions would not amount to takings, a conclusion that implicitly rejected the notion that a temporary restriction would automatically lead to a finding of a taking. (As discussed, the district court believed it was significant that the TRPA moratorium had no clear ending point, but the Supreme Court assigned no importance to this fact.)

Notwithstanding the Court's clear ruling that a temporary restriction is not equivalent to a permanent restriction for takings purposes, the distinction between a temporary restriction and a permanent restriction is not hard and fast. First, the effect of a permanent restriction is not necessarily completely different from the effect of a temporary restriction. A "permanent" restriction is potentially subject to change at virtually any time, and a permanent restriction may turn out to be less long-lived than a nominally temporary restriction. Indeed, the "permanent" regulation in *Lucas* was in force for less than two years, a shorter period than the "temporary" moratorium in *Tahoe-Sierra*.

Second, permanent restrictions will not necessarily have a much more serious impact on property values than temporary restrictions. In *Tahoe-Sierra*, the Court apparently assumed that a permanent prohibition on development would eliminate all or substantially all value, but reasoned that a temporary restriction would not eliminate all value: "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."[63] It is correct that an explicitly temporary measure is not likely to have a serious adverse impact on property values. But the property also may retain significant value when a "permanent" prohibition is imposed. For example, speculators might be willing to purchase the property based on the possibility that the restrictions will be lifted in the future.[64]

Despite these issues, the Court concluded that a temporary prohibition on development is qualitatively different from, and less likely to result in a taking than, a prospectively permanent prohibition. It ultimately based this conclusion on two fundamental principles of takings jurisprudence: the parcel as a whole rule and the distinction between use restrictions and physical occupations. Because both of these points have significance well beyond the context of temporary restrictions, each deserves a separate discussion.

The Parcel as a Whole Rule

The Court's most basic justification for rejecting the plaintiffs' categorical taking challenge to the TRPA planning moratorium was that it was inconsistent with the parcel as a whole rule.

The problem with the plaintiffs' claim, the Court said, was that "it ignores *Penn Central*'s admonition that in regulatory takings cases we must focus on 'the parcel as a whole.'"[65] The parcel rule, long recognized and frequently applied in the Court's past takings decisions, prohibits analysis of a taking claim by focusing on the restricted portion of a larger parcel, or by examining restricted uses to the exclusion of other permitted uses. Although the Court previously only had insisted on analyzing the parcel as a whole in a spatial or functional sense, here it insisted on the same rule in the temporal dimension. The Court said, "the District Court erred when it disaggregated petitioners' property into temporal segments corresponding to the regulations at issue and then analyzed whether petitioners were deprived of all economically viable use during each period."[66] In other words, once the plaintiffs' entire period of ownership was considered, as it should have been, plaintiffs could not establish a denial of all economically viable use of their property and, therefore, could not establish a categorical taking under *Lucas*.

The significance of this ruling lies less in the application of the parcel rule in the temporal dimension than in the Court's reaffirmation of the parcel rule itself. After all, if an anti-segmentation principle applies in the geographical dimension, it is only logical for the principle to apply in the temporal dimension. However, the Supreme Court had recently raised questions about the continuing validity of the parcel rule in general. The *Tahoe-Sierra* decision puts these questions to rest.

Last year, in *Palazzolo*, the Court went out of its way to observe that the Court "at times [has] expressed discomfort with the logic of [the parcel as a whole] rule."[67] The Court in *Palazzolo* also referred to an earlier statement in *Lucas*, that the "uncertainty regarding the composition of the denominator in [the Court's] 'deprivation' fraction has produced inconsistent pronouncements by the Court," and that determining the relevant denominator represented a "difficult question."[68] In *Tahoe-Sierra*, the Court closed the door on

61. *Id*. at 318, 17 ELR at 20791.

62. 122 S. Ct. at 1482, 32 ELR at 20631.

63. *Id*. at 1484, 32 ELR at 20632.

64. *Cf.* Florida Rock Indus., Inc. v. United States, 18 F.3d 1560, 1566, 24 ELR 21036, 21038-39 (Fed. Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995) (recognizing that Florida marsh land had significant market value, despite the U.S. Army Corps of Engineers' denial of dredge and fill permit, based on existence of active, speculative market in similar properties).

65. 122 S. Ct. at 1483, 32 ELR at 20632.

66. *Id*.

67. Palazzolo v. Rhode Island, 533 U.S. 606, 631, 32 ELR 20516, 20520 (2001).

68. *See id*. at 631, 32 ELR at 20520 (citing Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 n.7, 22 ELR 21104, 21115 n.7 (1992)).

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the idea of reexamining the parcel rule. With 20-20 hindsight, it is apparent that the questions raised in *Palazzolo* and *Lucas* reflected the concerns of a minority on the Court. Once presented with an opportunity to reaffirm the parcel rule, a majority of the Court was prepared to do so.

The Court's reaffirmation of the parcel rule has broad implications because the rule applies across the board to all takings claims based on use restrictions, whether brought under *Lucas* or *Penn Central*. Under any plausible reading of the Takings Clause, a compensable regulatory taking can arise only in "extreme circumstances."[69] Reaffirmation of the parcel rule means that the courts have to measure a regulation's impact in relation to the other available uses and remaining value of the entire property. As a result, in most cases it will be difficult for taking claimants to establish the kind of serious injury necessary to demonstrate a taking.

The Court's ruling on the parcel issue undoubtedly has created a large wake in the lower federal and state courts. Many takings claimants, encouraged by hints from the Supreme Court that it might reconsider the parcel rule, have filed takings claims relying on narrow definitions of the relevant parcel. A month after the Supreme Court issued its decision in *Tahoe-Sierra*, the Pennsylvania Supreme Court, in *Machipongo Land & Coal Co. v. Commonwealth*,[70] reversed a taking award in part based on the parcel ruling in *Tahoe-Sierra*. Similar decisions are likely in other pending cases which involve a parcel question.

Having said this, it is also possible that it is premature to treat the existence of the parcel rule as completely settled. In *Pennsylvania Coal Co. v. Mahon*,[71] the landmark decision that launched the regulatory takings doctrine, the Court apparently embraced the "conceptual severance" approach. Many decades later, in *Penn Central*, the Court announced the parcel as a whole rule. In *Lucas*, the Court appeared to open the door to reconsideration of the parcel rule. But the following year, in *Concrete Pipe & Products v. Construction Laborers Pension Trust*,[72] the Court unanimously reaffirmed the parcel rule. Now, one year after seemingly setting the stage in *Palazzolo* for reconsideration of the parcel rule, the Court has issued an explicit and forceful reaffirmation of the parcel rule. Based on this history, another reversal in course might seem possible, if not likely.

Notwithstanding the hazards of forecasting in this area, *Tahoe-Sierra*'s reaffirmation of the parcel rule should probably be viewed as a stable resolution of the issue. The case squarely presented the parcel issue, all of the justices focused on the question, and the Court's majority opinion addressed the point at great length. Moreover, the opinion for the Court was endorsed by a strong six-Justice majority. Finally, the three dissenting Justices did not directly challenge the parcel as a whole rule, but instead expressed specific concerns about its application in the temporal dimension. Moreover, Justice Thomas seemed to accept that the majority had definitely resolved the parcel issue by referring to "[t]he majority's decision to embrace the 'parcel as a whole' doctrine as *settled* . . . ."[73]

Tahoe-Sierra does not resolve all of the issues that will arise in applying the parcel rule. The Court's discussion of the parcel rule, as well as prior Court precedent, suggests that, at least in the context of real estate regulation, physical contiguity is the preeminent factor in defining the "whole parcel." But some lower courts have held that noncontiguous parcels may constitute a single parcel if they are held and managed to achieve a common investment objective.[74] The courts have also identified other potentially relevant factors, including the dates of acquisition of the property, whether the parcel has been managed as a single unit, and the degree to which restrictions on a portion of the parcel benefit the parcel as whole.[75]

Another question will be how to define the parcel when an owner has sold off some portion of the property, leaving only one or a few restricted portions. On the one hand, a rule that ignored the full extent of the owner's original ownership would encourage land developers to sell off developable portions in order to manufacture takings claims. Treating owners who develop their property at one time in the same fashion as owners who develop and sell off their property in pieces would produce equal treatment of owners who, arguably, are similarly situated. On the other hand, if an owner sells off pieces of property without regard to and prior to the adoption of a new regulatory regime which allegedly effects a taking, the argument for strict application of the parcel rule based on the risk of strategic behavior is less compelling.

Physical Takings Versus Regulatory Takings

The Court's second justification for rejecting the plaintiffs' temporary taking theory was that a temporary restriction on the use of private property cannot accurately be analogized to a temporary physical occupation of private property.

The Court acknowledged that it had recognized a "categorical duty" on the part of government to pay compensation when it physically appropriates private property, "regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof."[76] Moreover, the Court recognized that it had applied this reasoning to uphold takings claims when the government effected a temporary physical appropriation, for example by compelling owners to grant the government leaseholds to private real property.[77] However, the Court said these precedents did not decide the outcome in *Tahoe-Sierra* because a physical appropriation, whether temporary or not, is qualitatively different from a use restriction.

69. United States v. Riverside Bayview Homes, 474 U.S. 121, 126, 16 ELR 20086, 20087 (1985).

70. 799 A.2d 751 (Pa. 2002).

71. 260 U.S. 393 (1922).

72. 508 U.S. 602 (1993).

73. 122 S. Ct. at 1496 *, 32 ELR at 20637 * (emphasis in original).

74. *See, e.g.*, Naegele Outdoor Adver., Inc. v. City of Durham, 844 F.2d 172, 178 (4th Cir. 1988); Ciampitti v. United States, 22 Cl. Ct. 310, 21 ELR 20866 (Cl. Ct. 1991).

75. *See, e.g.*, District Intown Props. Ltd. v. District of Columbia, 198 F.3d 874 (D.C. Cir. 1999), *cert. denied*, 121 S. Ct. 34 (2000); K& K Constr., Inc. v. Department of Natural Resources, 575 N.W.2d 531, 28 ELR 21156 (Mich. 1997), *cert. denied*, 525 U.S. 819 (1998).

76. 122 S. Ct. at 1478, 32 ELR at 20630. The Court has recognized, however, that physical-occupation claims can be defeated based on the concept of "background principles." *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1028-29, 22 ELR 21104, 21111 (1992) ("[W]e assuredly would permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title.").

77. *See, e.g.*, United States v. General Motors Corp. 323 U.S. 373 (1945); United States v. Petty Motor Co., 327 U.S. 372 (1946).

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On its face, the analogy to physical occupations seemed plausible. Why, for example, should an owner be compensated if the government floods one portion of a large tract of land, but the owner be denied compensation if he is barred by regulation from using the same portion for any economically valuable purpose? Likewise, why would it be appropriate for the government to pay when it physically occupies private property for one year, but to deny compensation to an owner denied all use of the property for a longer period?

The Court nonetheless rejected the analogy, referring to what it called the "longstanding distinction between acquisitions of property for public use . . . and regulations prohibiting private uses."[78] Delineating a sharp boundary between these two types of takings claims, the Court said, "we do not apply the precedent from the physical takings context to regulatory takings claims."[79]

The Court explained the distinction largely in practical terms. On the one hand, "[l]and-use regulations are ubiquitous and most of them impact property values in some tangential way—often in completely unanticipated ways. Treating them all as per se takings, would transform government regulation into a luxury few governments could afford."[80] On the other hand, there is less reason for concern about, and more justification for, a categorical approach to physical appropriations. In comparison with restrictions on the use of private property, "physical appropriations are relatively rare" and "easily identified,"[81] and they "usually represent a greater affront to individual property rights" than restrictions on property use.[82]

The Court's determination to draw a sharp distinction between use restrictions and physical occupations has important implications beyond the issue of temporary takings. First, it undermines the reasoning supporting the "categorical" takings rule announced in *Lucas*. The Court in *Lucas* justified the rule based on the idea that a "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation."[83] Because the Court in *Tahoe-Sierra* said that "we do not apply our precedent from the physical takings context to regulatory takings claims," this part of the reasoning in *Lucas* now seems obsolete.[84] As the *Tahoe-Sierra* Court suggests, the *Lucas* rule can now only be justified (if it can be justified at all) based on other theories, including that, "'in the relatively rare situations where the government has deprived a landowner of all economically viable uses,' it is less realistic to assume that the regulations will secure an 'average reciprocity of advantage,' or that government could not go on if required to pay for every such restriction."[85] In fact, by eliminating part of the doctrinal underpinning for the *Lucas* rule, the *Tahoe-Sierra* decision casts doubt on the long-term viability of the *Lucas* rule as an independent test for a regulatory taking.

The sharpness of the distinction between physical occupations and use restrictions also helps make sense of the Court's approach to another issue—the question of the relevance of an owner's investment expectations in takings analysis. On the one hand, the Court has embraced the view that investment expectations should be a factor in takings cases involving use restrictions. In 2001, in *Palazzolo*, a majority of the Justices, speaking through a series of separate opinions, adopted the position that an owner's lack of reasonable investment expectations, though not a complete bar to a takings claim, is a relevant consideration in deciding whether a regulatory restriction on property use constitutes a taking. In *Tahoe-Sierra*, Justice Stevens' opinion for the Court quotes approvingly, and at length, from Justice Sandra Day O'Connor's concurring opinion in *Palazzolo*, which especially emphasized the relevance of investment expectations in regulatory takings analysis, thereby reinforcing the conclusion that investment expectations is a relevant factor in addressing claims based on use restrictions.

On the other hand, the Court has embraced the view that investment expectations should *not* be a factor in a physical occupation case. In *Palazzolo*, the Court discussed with approval the ruling in *Nollan v. California Coastal Commission*[86] that the claimants' preacquisition notice of a California Coastal Commission policy on beach access did not preclude a taking claim based on a requirement that the landowners grant the public access to their private beach. "So long as the Commission could not have deprived the prior owners of the easement without compensating them," the Court said in *Nollan*, "the prior owners must be understood to have transferred their full property rights in conveying their lots."[87] *Palazzolo*'s reaffirmation of *Nollan*, which involved a physical occupation of private property, demonstrates that investment expectations are irrelevant in a taking claim based on a physical occupation.[88]

There is a strong practical justification for treating an investor's expectations differently in a physical-occupation case than in a use-restriction case. The parcel rule, which applies in cases involving regulatory use restrictions, creates an incentive for owners to divide up their property and create heavily restricted portions in order to maximize their chances of recovery under the Takings Clause. Factoring in a purchaser's expectations helps prevent the manufacture of takings claims by providing the courts a basis for rejecting claims by investors who create heavily restricted parcels, knowing about the restrictions, in the hope of profiting at public expense under the Takings Clause. On the other hand, with physical appropriation claims, in which the parcel rule

78. 122 S. Ct. at 1479, 32 ELR at 20630.

79. *Id.*

80. *Id.*

81. *Id.* The Court stated that in Loretto v. Teleprompter Manahattan CATV Corp., 458 U.S. 419 (1982), "[t]o illustrate the importance of the distinction" between physical occupations and use restrictions, the Court had contrasted cases involving "actual taking of possession and control" of private property with a case involving government regulation requiring an owner or "cease operations." 122 S. Ct. at 1479 n.18, 32 ELR at 20630 n.18.

82. 122 S. Ct. at 1479, 32 ELR at 20630.

83. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1017, 22 ELR 21104, 21108 (1992).

84. 122 S. Ct. at 1479, 32 ELR at 20631.

85. *Id.* at 1479 n.19, 32 ELR at 20631 n.19 (citing *Lucas*, 505 U.S. at 1017-18, 22 ELR at 21108).

86. 483 U.S. 825, 17 ELR 20918 (1987).

87. *Id.* at 833 n.2, 17 ELR at 20923 n.2.

88. *See* Echeverria, *supra* note 3 (explaining this attempt at a logical reconciliation of *Palazzolo* and *Nollan* at greater length). On the other hand, some courts have treated investment expectations as a relevant factor in a taking case based on a physical occupation. *See, e.g.*, California Hous. Sec., Inc. v. United States, 959 F.2d 955 (Fed. Cir. 1992) (rejecting savings and loan institution's taking claim based on physical seizure of institution's assets by the Resolution Trust Company pursuant to federal regulations designed to safeguard institution's assets); *see also* Golden Pac. Bancorp. v. United States, 15 F.3d 1066 (Fed. Cir. 1994) (same).

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does not apply, it is unnecessary to factor in investment expectations to prevent manufactured claims. A physical appropriation will result in a taking regardless of the size of the parcel as a whole. Thus, an owner has no incentive to rearrange her property interests in order to manufacture a physical-occupation taking claim.

In sum, the Court's approach to both the expectations issue and the parcel issue, in both categories of takings cases (physical takings and regulatory takings), now form a coherent, consistent package. The parcel rule does not apply, and investment expectations are irrelevant, in a physical occupation case; the parcel rule does apply, and investment expectations are relevant, in a case involving use restrictions.

In a fundamental sense, however, the sharp distinction between use restrictions and physical appropriations remains problematic. It is hardly obvious that physical appropriations (such as the cable box placed on Mrs. Loretto's property) actually represent a greater intrusion on private property rights than many landmark use restrictions (such as the multimillion dollar business opportunity destroyed by the historic designation of Grand Central Terminal). If physical appropriations are truly "rare," as *Tahoe-Sierra* suggests, the distinction between these two types of claims may not be enormously important. But, given that the distinction has at least some real-world significance, how can it be explained?

One explanation that the Court has offered is based on the law's need to draw clear, if somewhat arbitrary, lines. As the Court stated in *Loretto v. Teleprompter Manhattan CATV Corp.*,[89] the categorical rule for permanent physical occupations is justified in part by the fact that it avoids "otherwise difficult line-drawing problems."[90] The Court in *Loretto* also stated that "[t]he power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights" and "an owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property."[91]

Yet another part of the answer may rest on the fact that use restrictions typically affect private property values differently than physical occupations. Government regulation of private property is generally conducted through broad schemes that apply, in varying degrees, to broad categories of properties. A regulation may burden one portion of an owner's property but, considering the parcel as a whole, will enhance the value of the rest of the owner's property by constraining adjacent and nearby land uses. Arguably, the same kinds of reciprocal benefits do not occur—or at least not to same degree—with government actions involving outright physical appropriations.

Moreover, the apparent unfairness in treating claimants subject to physical appropriations more favorably than claimants subject to regulatory restrictions may be less problematic than it first appears. Just compensation under the Takings Clause is pegged to a property's fair market value. Requiring the public to pay an owner what a private party would pay in a commercial transaction ignores the differences between private actors and the government. Unlike a private commercial actor who acquires private property, the government affects the value of an owner's property in a continuous and pervasive fashion, not only through regulatory restrictions but also based on outright subsidies.[92] Thus, unlike in the case of an arm's-length commercial transaction, when the government pays "fair market value" for property, it is partly paying for value the public created. As a result, leaving the restricted landowner uncompensated while the government pays the owner subject to a physical appropriation may simply deprive regulated owners of the chance to share in windfalls conferred on other owners by the Takings Clause. Different owners are, of course, subject to disparate treatment under this approach. But it is ultimately not the type of harmful disparate treatment that calls out for a judicial fix, and certainly not in the direction of more expansive compensation awards to those subject to restrictions on the use of their private property.

The New, Narrower Lucas *Rule*

Once the Court in *Tahoe-Sierra* decided to reaffirm the parcel as a whole rule and to apply it in a temporal context, it was a foregone conclusion that the Court would reject the plaintiffs' challenge to the moratorium as a "categorical" taking under *Lucas*. But the Court's discussion of *Lucas* went beyond what was strictly necessary to resolve the case.

Takings scholars have debated whether the linchpin of the *Lucas* takings analysis is a complete prohibition on the "use" of private property or the destruction of the "value" of the property. As discussed, the Ninth Circuit found it unnecessary to resolve the debate, for it concluded that the TRPA's moratorium did not effect a taking under either interpretation. The Supreme Court, however, waded into the middle of the debate, concluding that destruction of value was the key indicium of a *Lucas* taking. A *Lucas* taking occurs, the Court said, when a regulation results in "the permanent 'obliteration of the value' of a fee simple estate."[93] It is difficult to see how the Supreme Court could have read *Lucas* any more narrowly, at least without expressly overruling the decision.

After *Tahoe-Sierra*, few—if any—regulations will rise to the level of a *Lucas* taking. Even when all building is prohibited, land has value, sometimes significant value, as private open space or at least as a speculative investment. The Court decided *Lucas* on the premise, supported by the unchallenged finding of the trial court, that Lucas' property had been rendered "valueless." But in *Lucas* many of the Justices were openly skeptical of this factual premise. In *Tahoe-Sierra*, Chief Justice Rehnquist asserted in his dissent that even Mr. Lucas could not have met *Tahoe-Sierra*'s version of the *Lucas* test for, as he said, "surely the land in *Lucas* retained some market value."[94] If the Chief Justice is correct, it is uncertain whether *Lucas* has any remaining practical import.

The Court in *Tahoe-Sierra* further limited the scope of the *Lucas* test by indicating that the test applies exclusively to the regulation of land. In *Lucas* itself the Court had focused on the regulation of land and indicated that its new categorical rule would not apply to regulation of personal property—"at least if the property's only economically produc-

89. 458 U.S. 419 (1982).

90. *Id*. at 436.

91. *Id*. (emphasis in original).

92. C. Ford Runge, *The Congressional Budget Office's Regulatory Takings and Proposals for Change: One-Sided and Uninformed*, 7 Envtl. L. & Prac. 5 (1999).

93. *Tahoe-Sierra*, 122 S. Ct. at 1483, 32 ELR at 20632.

94. *Id*. at 1494, 32 ELR at 20636.

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tive use is sale or manufacture for sale."[95] Moreover, one of the Court's primary justifications for its categorical rule related specifically to the characteristics of land:

> [R]egulations that leave the owner of land without economically beneficial or productive options for its use—typically, as here, by 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.[96]

Justice Stevens' opinion in *Tahoe-Sierra* reinforces the apparent meaning of *Lucas* by describing the *Lucas* rule as focusing on an owner's "uses of his land" or the "beneficial use of land."[97]

In addition, *Tahoe-Sierra* repeatedly refers to the *Lucas* rule as applicable only to "fee simple estates," possibly indicating that the *Lucas* rule does not apply to the total destruction of a partial interest in real property. Thus, for example, an owner of mineral rights might not be able to claim a categorical taking based on the enactment of a rule barring exploitation of these rights. Similarly, an oil company that obtained a lease to operate a gas station might not be able to claim a categorical taking because the zoning was changed to prohibit gas stations.

The suggestion that the *Lucas* test only applies to "fee simple estates" is supported by the reasoning of the *Lucas* decision itself. The Court in *Lucas* said that the categorical rule applies "where regulation denies all economically beneficial or productive use of land."[98] Alleged takings of partial property interests do not prohibit all economically beneficial or productive use of land. Moreover, *Lucas* said that the categorical rule would only apply in "rare" circumstances. Because many regulations can be characterized as destroying at least one stick in the bundle of property rights, *Lucas* takings would not be rare if *Lucas* applied to partial property interests. In addition, the Court justified the *Lucas* rule based partly on the concern "that private property is being pressed into some form of public service."[99] While this concern can apply to rules eliminating all use and value of a fee simple estate, it appears less plausible with respect to restrictions on one particular use of property.

This narrow interpretation of *Lucas* assumes that the Court in *Tahoe-Sierra* actually meant what it said, and that a *Lucas* taking only occurs when there is a "complete obliteration" of property value. One year earlier, in *Palazzolo*, the Court had indicated that the *Lucas* rule applies to the case where an owner is left with a "nominal" value. While a nominal value may be modest, this word choice suggested that *Lucas* might apply when regulation has produced less than a "complete obliteration" of property value. Surprisingly, the Court in *Tahoe-Sierra* did not refer to *Palazzolo*'s discussion of the scope of the *Lucas* rule. *Tahoe-Sierra* represents the latest word on this issue, but the narrow difference in the description of the *Lucas* test in *Palazzolo* and *Tahoe-Sierra* will undoubtedly encourage those intent on trying to keep the *Lucas* test alive.

On the other hand, the Court's confinement of the *Lucas* test to practical irrelevance may set the stage for the Court's eventual repudiation of *Lucas*. Given the narrow majority that supported the decision in *Lucas*, and the subsequent changes in Court personnel, such an outcome would not be surprising. *Lucas* was decided by a vote of 6 to 3, but Justice Anthony M. Kennedy merely concurred in the judgment and wrote a separate opinion. Since *Lucas* was handed down, Justice Byron R. White, who joined Justice Scalia's opinion in *Lucas*, has retired, to be replaced by Justice Ruth Bader Ginsburg, who has frequently voted on the government side in takings cases. In short, the thin majority on the Court that supported the *Lucas* opinion has evaporated. Barring some further unexpected twist, *Lucas* may soon become a dead letter in law as well as in fact.

The Once and Future *Penn Central* Test

One clear teaching of the *Tahoe-Sierra* decision is that claimants and courts should generally address regulatory takings issues, not by using the Court's "categorical" *Lucas* test, but by using the Court's more flexible *Penn Central* test. The 2001 *Palazzolo* ruling conveyed essentially the same message by narrowly construing the *Lucas* test and affirming the Rhode Island courts' rejection of a *Lucas* claim, but remanding the case for consideration under *Penn Central.* After an experimental effort to establish clear, prescriptive rules for regulatory takings claims, a majority of the Supreme Court has apparently determined to abandon the project. In a very real sense, this unexpected development largely recreates the legal status quo of takings law of several decades ago.

Unfortunately for litigants as well as for judges, the Supreme Court has provided little guidance on the actual content of the *Penn Central* test or how it should be applied. *Penn Central* apparently provides the dominant analytic framework in regulatory takings law today. But is there any there there? The Court in *Tahoe-Sierra* has provided no direct answers, of course, because no *Penn Central* claim was presented to the Court in this case. Nonetheless, the Court's opinion contains some suggestive hints about the scope and content of the *Penn Central* test.

Deciphering the Penn Central *Test*

The difficulty of deciphering *Penn Central* is highlighted by the fact that the Court has repeatedly insisted on emphasizing the essentially *un*law-like character of this test. The *Tahoe-Sierra* decision is replete with statements emphasizing the fact-dependent nature of the *Penn Central* analysis.[100] Thus, the Court said the *Penn Central* test is "characterized by 'essentially ad hoc, factual inquiries,'" is "designed to allow 'careful examination and weighing of all the relevant circumstances,'" and is based on a preference for "examin[ing] 'a number of factors' rather than a simple

95. *Lucas*, 505 U.S. at 1028, 22 ELR at 21110.

96. *Id*. at 1018, 22 ELR at 21108.

97. 122 S. Ct. at 1475, 32 ELR at 20629.

98. 505 U.S. at 1015, 22 ELR at 21107.

99. *Id*. at 1018, 22 ELR at 21108.

100. Justice O'Connor has been a particular advocate of this ad hoc approach. *See* Palazzolo v. Rhode Island, 533 U.S. 606, 635-36, 32 ELR 20516, 20521 (2001) (O'Connor, J., concurring) (stating that "[t]he temptation to adopt what amount to per se rules in either direction must be resisted," and that "[t]he Takings Clause requires careful examination and weighing of all the relevant circumstances"). The endorsement of an ad hoc approach in *Tahoe-Sierra* undoubtedly reflects the influence of Justice O'Connor, who joined in the opinion for the Court and did not write a separate opinion.

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'mathematically precise' formula."[101] These statements, interpreted in the worst light, point to a law of takings so lacking in discernable principles that the outcome of any particular case will turn on unreviewable trial court discretion. However, over the long term, it is difficult to imagine how such an unprincipled approach could prevail.

Not surprisingly, lower courts seeking to apply *Penn Central* have been all over the map. For example, in *Animas Valley Sand & Gravel, Inc. v. Board of County Commissioners*,[102] the Colorado Supreme Court recently stated that a claim will lie under *Penn Central* only when "the level of interference [is] very high" and the claimant "must show that it falls into the rare category of landowners whose land has a value slightly greater than de minimis but, nonetheless, given the totality of the circumstances, has had its land taken by government regulation."[103] On the other hand, in another recent case, *City of Glenn Heights v. Sheffield Development Co.*,[104] the Texas Court of Appeals upheld a *Penn Central* claim, ruling that a zoning amendment that reduced the permitted density of development by about one-half, reducing the market value of the land by 38%, constituted a taking. While the *Glenn Heights* decision is aberrational in practice, it illustrates the malleability of *Penn Central* as a legal standard.

The Supreme Court has traditionally defined the *Penn Central* test as involving consideration of three factors—economic impact, investment-backed expectations, and character. The Court has provided some (but not too much) guidance on the meaning of these factors.

The economic impact of a regulation or other government action has long been identified as having particular significance. The closer the impact is to total destruction of economic value, the greater the likelihood that a taking will be found, everything else being equal. At the same time, the Supreme Court recently said, in a case decided under *Penn Central*, that "mere diminution in value, however serious, is insufficient to demonstrate a taking."[105] Thus, apparently, severe economic impact—*plus* something else—is necessary to establish a taking under *Penn Central*.

One important issue in addressing the economic impact factor is what benchmark to use in measuring the effect of the government action. One approach is to estimate the probable current market value of a property if a government restriction were removed, and to compare that value to the property's current market value under restriction. Another approach, which has strong support in the U.S. Court of Appeals for the Federal Circuit,[106] is to compare the restricted value of the property with the claimant's original purchase price. This latter approach is helpful in assessing the degree to which a government action interferes with investment-backed expectations (the second *Penn Central* factor), because it focuses specifically on the owner's actual investment. In addition, this approach provides the courts useful insight into whether a regulation has created a "reciprocity of advantage," because it provides an implicit measure of the cumulative negative and positive effects of a regulation on a particular property.

The second *Penn Central* factor is the reasonableness of the owner's investment-backed expectations, which the Court has given a variety of alternative definitions. One definition focuses on whether the takings claimant purchased the property after the regulatory regime already was in place. A majority of the Justices in *Palazzolo* agreed that "preacquisition notice" is a relevant consideration in determining whether a taking claimant should be permitted to recover. A related approach to investment expectations, based on the idea that firms and individuals who engage in certain fields of business expect to be regulated, holds that "[t]hose who do business in . . . [a] regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end."[107] Finally, the investment expectations factor has been interpreted to weigh against a claim when the owner purchased the property many years prior to the alleged taking, particularly where the claimant has had the opportunity to implement his original purpose in purchasing the property.[108]

The final and most amorphous *Penn Central* factor is the "character" of the government action. In *Penn Central* itself, the Court described the character issue as relating to whether the government action involved a physical occupation (more suspect) or a mere restriction on use (less suspect). But that definition has been largely superseded by subsequent Supreme Court decisions treating permanent physical occupations as subject to their own, per setakings rule.[109] Alternative Supreme Court definitions of character focus on the degree to which a government action advances a public purpose,[110] or the extent to which it singles out one or a few property owners to bear a particular burden.[111] Various other considerations mentioned in other Supreme

101. *Tahoe-Sierra*, 122 S. Ct. at 1478, 32 ELR at 20630 (citing Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124, 8 ELR 20528, 20533 (1978); Palazzolo v. Rhode Island, 533 U.S. 606, 633, 634, 636, 32 ELR 20516, 20521 (2001)).

102. 38 P.2d 59 (Colo. 2001).

103. *Id.* at 67.

104. 61 S.W.3d 634 (Tex. App. 2001), appeal pending to the Texas Supreme Court.

105. Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust, 508 U.S. 602, 645 (1993).

106. *See* Florida Rock Indus., Inc. v. United States, 18 F.3d 1560, 1567, 24 ELR 21036, 21039 (Fed. Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995) (in analyzing a case under *Penn Central* "the owner's opportunity to recoup its investment or better, subject to the regulation, cannot be ignored"); Forest Properties, Inc. v. United States, 177 F.3d 1360, 1367, 29 ELR 21174, 21176 (Fed. Cir. 1999) (stating that a finding that the value of the property increased more than threefold in 11 years, despite the challenged regulatory restraint, "itself undermine[d the claimant's] contention that its property was taken"). *See also* Walcek v. United States, 49 Fed. Cl. 248, 266 (Fed. Cl. 2001) (applying both measures of economic impact in particularly thoughtful and detailed opinion).

107. *Concrete Pipe*, 508 at 645.

108. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 136, 8 ELR 20528, 20536 (1978):

> [D]esignation [of Grand Central Terminal] as a landmark not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions. So the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel.

109. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

110. *See Penn Cent.*, 438 U.S. at 127, 8 ELR at 20534 ("a use restriction . . . may constitute a taking if [it is] not reasonably necessary to the effectuation of a substantial public purpose").

111. *See* Agins v. City of Tiburon, 447 U.S. 255, 260, 10 ELR 20361, 20362 (1980) (rejecting taking claim in part because "[t[here is no indication that the appellants' 5-acre tract is the only property affected by the ordinances").

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Courts takings cases can also be assigned to the seemingly open-ended "character" factor.[112]

Underlying the uncertain scope and content of the *Penn Central* analysis is a more fundamental confusion about the exact nature and purpose of regulatory takings analysis. Under one view, regulatory takings jurisprudence is largely if not exclusively concerned with the redistributive consequences of government action, rather than with whether the government can proceed with its action. Under this view, the Takings Clause does not prohibit the government from acting, but simply imposes a condition on the exercise of governmental power. Assuming the government action is otherwise permissible, an action that amounts to a taking can go forward under the Takings Clause so long as the government pays "just compensation." In other words, a valid taking claim effectively grants the property owner the unilateral right to exercise a sales agreement with the government. Under this view, a takings claim is akin to a contract claim.

Under the alternative view, regulatory takings law is concerned with the "fairness" of government action in the broader sense of whether the government action is fundamentally fair, that is, for example, whether the action is irrational or arbitrary, violative of some other provision of law, or taken in bad faith. This view of takings law focuses on the appropriateness of the government's ends and the reasonableness of the means selected to achieve those ends. According to this viewpoint, regulatory takings law does not only impose a conditional obligation but also asks whether the government should proceed at all. A takings action, under this view, is less akin to a contract action and more akin to a tort action.

Both viewpoints have support in Supreme Court takings jurisprudence. In *First English*,[113] the Court said that the Takings Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power," and that the clause "is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking."[114] On the other hand, in *Eastern Enterprises v. Apfel*,[115] dealing with a takings challenge to retroactive provisions of the Coal Industry Retiree Health Benefit Act of 1992, Justice O'Connor, speaking for a four-Justice plurality, said that the law effected a taking because it imposed a "severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties experience."[116] As observed by one commentator, Justice O'Connor's approach represents the type of "generalized inquiry into the fundamental fairness" of federal legislation more traditionally conducted under the rubric of substantive due process rather than takings.[117] In addition, the takings as fundamental fairness viewpoint is reflected in the Supreme Court's often repeated, but rarely applied, pronouncement that a government action represents a taking if it fails to "substantially advance legitimate state interests."[118]

The better view is that the first understanding of the nature and purpose of the Takings Clause is the correct one. It is more consistent with the language of the Takings Clause and with the traditional law of condemnation of which regulatory takings (or "inverse condemnation") law is or should be a part. It properly assigns questions about the fundamental fairness of government action to the arena of due process, and in the process simplifies and clarifies the law of regulatory takings. In addition, this viewpoint arguably has the strongest support on the current Supreme Court. In particular, in *Eastern Enterprises*, five Justices who either concurred or dissented in that case rejected Justice O'Connor's position and agreed that questions about the fundamental fairness of government action cannot properly be addressed under the Takings Clause. With respect to the ostensible "substantially advance" takings test, in recent years, seven Justices have written opinions or joined in opinions questioning the validity of this takings test,[119] raising a substantial question whether this ostensible test will long survive.

But the most fundamental reason to reject the view that takings law authorizes a general inquiry into the fundamental fairness of government action is that this approach threatens to revive a discredited, highly intrusive type of judicial scrutiny of legislative action. In the era of *Lochner v. New York*,[120] the Supreme Court closely examined the wisdom and legitimacy of legislative determinations under the Due Process Clause. Based on the realization that this type of judicial scrutiny of social and economic regulation was inconsistent with the role of the courts in a republican democracy, the Court since the 1930s has abandoned *Lochner* in favor of a more deferential "rational basis" test. The view that takings law authorizes a general inquiry into the fundamental fairness of government action accords no particular deference to the judgments of elected officials,[121] and threatens to recreate *Lochner*-style review under the banner of takings. Relabeling *Lochner*-style review as a takings inquiry rather than as a due process question does not make it any less objectionable.

Another, related question contributing to the confusion surrounding the *Penn Central* test is whether the government can avoid takings liability by pointing to the importance or public value of the objective the government is try-

112. *See* Robert Meltz, *Applying Substantive Takings Law to a Taking Claim: A Seven-Step Method*, materials prepared for Georgetown University Law Center CLE Conference on Regulatory Takings Law, Coral Gables, Fla. (Oct. 18-19, 2001).

113. 482 U.S. at 304, 17 ELR at 20787.

114. *Id.* at 314-15, 17 ELR at 20790.

115. 524 U.S. 498 (1998).

116. *Id.* at 528-29.

117. *See* Ronald Krotoszynski, *Expropriatory Intent: Defining the Proper Boundaries of Substantive Due Process and the Takings Clause*, 80 N.C. L. Rev. 713, 724 (2002).

118. Agins v. City of Tiburon, 447 U.S. 255, 260, 10 ELR 20361, 20362 (1980).

119. *See* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 732 n.2, 29 ELR 21133, 21142 n.2 (1999) (Scalia, J., concurring in part and concurring in the judgment); *see id.* at 753 n.12, 29 ELR at 21146 n.12 (Souter, J., dissenting, joined by Justices O'Connor, Stephen Breyer, and Ruth Bader Ginsburg); *Eastern Enter.*, 524 U.S. at 545 (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 554 (Breyer, J., dissenting, joined by Justices Ginsburg, David H. Souter, and John Paul Stevens). *See generally* S. Keith Garner, *"Novel" Constitutional Claims: Rent Control, Means-Ends Tests, and the Takings Clause*, 88 Cal. L. Rev. 1547, 1556-62 (2000) (discussing the problematic nature of the substantially advance test).

120. 198 U.S. 45 (1905).

121. For a particularly expansive application of the "fundamental fairness" theory of takings, see *Chevron, U.S.A. v. Cayetano*, 198 F. Supp. 2d 1182 (D. Haw. 2002), appeal pending to the Ninth Circuit.

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ing to achieve. The Supreme Court itself has said that takings law "necessarily requires a weighing of private and public interests."[122] As discussed, the district court in this case believed that the *Penn Central* test required consideration of the fact that the TRPA was seeking to prevent the destruction of Lake Tahoe. Indeed, the court believed that the interest in protecting Lake Tahoe was so powerful that "any test that takes that interest into account would result in victory for the defendants."

As a matter of logic, however, it seems nonsensical to treat the value or public importance of what the government is trying to achieve as a factor that should count against a taking claim. In a classic eminent domain case, no one would contend that the government can be excused from paying compensation for taking land for a school because the school will serve an important educational purpose. It likewise makes no sense to suppose, in an inverse condemnation case, that the importance of the regulatory objective can excuse the public's obligation to pay compensation if the regulation rises to the level of a taking. After all, both types of claims arise under the same Takings Clause of the Fifth Amendment to the U.S. Constitution. Moreover, if anything, when a government action provides significant public benefits, it seems more appropriate, not less appropriate, to require the public to pay compensation.

The conclusion that courts should not weigh the value or importance of the government action in deciding whether a particular action effects a taking does not mean that these considerations are irrelevant in interpreting the Takings Clause. Modern government pursues a variety of important objectives, and determining how and when to deploy government power obviously requires value judgments. To ensure that these judgments are generally made by elected officials rather than by unelected judges, the courts should interpret the Takings Clause narrowly. In this significant respect, the value or importance of what the government is trying to accomplish should inform takings jurisprudence. But, whatever the scope of regulatory takings law, the purpose served by a government action cannot be a logical consideration for determining whether a specific government action constitutes a compensable taking.

The final fundamental confusion regarding the *Penn Central* inquiry relates to how the *Penn Central* test differs from and relates to the *Lucas* test. The Court's takings jurisprudence over the last decade suggests that *Lucas* applies to some quite narrow set of extreme cases and that *Penn Central* applies to some broader set of presumably not so extreme cases. The *Penn Central* inquiry entails consideration of the action's economic impact, the owner's investment-backed expectations, and the character of the government action, whereas the *Lucas* "categorical" rule presumably involves a less nuanced analysis.

Upon reflection and analysis, however, the apparent distinctions between the ostensibly separate *Penn Central* and *Lucas* tests become difficult to explain or defend.[123] The most commonly cited bases for distinguishing between the two tests have been: (1) that the character factor, defined as the value or importance of the government program, is relevant in a *Penn Central* case but not in a *Lucas* case; and (2) that a claimant's lack of reasonable investment-backed expectations is a relevant factor under *Penn Central* but not under *Lucas*. In fact, neither of these purported distinctions makes any sense.[124]

For the reasons discussed, the value or importance of the government program cannot plausibly be viewed as a relevant consideration in *any* regulatory takings case. Thus, the value or importance of the government action should not matter in either a *Lucas* or a *Penn Central* case. As a result, the relevance *vel non* of the value or importance of the government action cannot provide a basis for distinguishing between *Penn Central* and *Lucas*.

Similarly, the investment-backed expectations factor does not provide a logical basis for distinguishing between *Lucas* and *Penn Central*. A claimant's lack of investment-backed expectations should be a relevant factor in *every* regulatory takings case. It is well established that investment expectations are relevant under *Penn Central*, and they cannot logically be excluded from consideration in a *Lucas* case either. The primary justification for this conclusion is practical: if a lack of investment-backed expectations were not relevant in a *Lucas* case, a claimant could recover even if he purchased a highly restricted portion of property, knowing about the restrictions, for the express purpose of manufacturing a taking claim.[125] This, in turn, would mean that property owners could eviscerate the parcel as a whole rule by selling off restricted pieces of property to sharp speculators. As Justice O'Connor observed in her concurring opinion in *Palazzolo*, consideration of a claimant's investment expectations in a *Penn Central* case prevents claimants from reaping unfair windfalls. This reasoning applies with additional force to an investor who purchases very tightly restricted property at a deep discount and seeks a speculative windfall under *Lucas*.

At least since the *Lucas* decision, it is fair to say that the Supreme Court has recognized that distinct *Penn Central* and *Lucas* tests exist. It is also fair to say that the Court has not provided any meaningful guidance on why there should be two separate tests or how they might differ.

What Does Tahoe-Sierra *Say About the* Penn Central *Test?*

The Court in *Tahoe-Sierra* has provided some useful guidance and hints on how to make sense of the *Penn Central* test. This section first addresses what *Tahoe-Sierra* has to say about each of the three traditional *Penn Central* factors, and then addresses how *Tahoe-Sierra* affects

122. *Agins*, 447 U.S. at 261, 10 ELR at 20362.

123. *See generally* John D. Echeverria, *Is the* Penn Central *Three-Factor Test Ready for History's Dustbin?*, 52 Land Use L. & Zoning Dig. 3 (2000).

124. An alternative view is that the claimant's lack of investment expectations should be a potential bar to either a *Lucas* claim or a *Penn Central* claim, but that the two tests can be distinguished, on the ground the value or importance of what the government is trying to accomplish is relevant in a suit under *Penn Central*, but not in a *Lucas* case. *See* Palm Beach Isles Assocs. v. United States, 231 F.3d 1365, 1368 (Fed. Cir. 2002) (Gajarsa, J., dissenting from denial of application for rehearing en banc).

125. *See* Palazzolo v. Rhode Island, 533 U.S, 606, 655, 32 ELR 20516, 20525 (2001) (Breyer, J. dissenting):

> Several amici have warned that to allow complete regulatory takings claims, *see Lucas*, to survive changes in land ownership could allow property owners to manufacture such claims by strategically transferring property until only a nonusable portion remains. But I do not see how a constitutional provision concerned with 'fairness and justice,' could reward any such strategic behavior.

(Internal citations abbreviated and omitted.)

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some of the deeper doctrinal confusions infecting *Penn Central* analysis.

First, there is a good deal in the opinion to support the view that regulatory takings claims, regardless of the specific label attached, can succeed only in cases involving relatively extreme economic impacts. The Court stated that the "plain language" of the Takings Clause applies only to government acquisitions of private property through condemnations or physical appropriations. To extend the clause to regulations, the Court said, it has had to "interpret" the constitutional language in circumstances where "the predicate of a taking is not self-evident, and the analysis is more complex."[126] The Court's acknowledgment that regulatory takings are, in a sense, derivative of "true" takings supports the conclusion that regulatory takings doctrine must have a narrow scope.

The Court also said that the basic touchstone for regulatory takings is whether "a law or regulation imposes restrictions so severe that they are tantamount to condemnation or appropriation."[127] This formulation is consistent with prior Court statements that the task under the Takings Clause is "to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical appropriation,"[128] and that a regulation effects a taking when it "has very nearly the same effect for constitutional purposes as appropriating or destroying [property]."[129] All of these variations on the same theme support the conclusion that regulatory takings claims should only succeed when regulations have truly onerous effects.

There is, it must be acknowledged, something of a logical embarrassment in the Court's equation of compensable regulatory takings with physical appropriations. As discussed, the Court in *Tahoe-Sierra* recognized that, based on long-standing precedent, condemnations and physical appropriations are compensable without regard to the parcel as a whole rule. On the other hand, the parcel rule does apply to claims based on use restrictions. Because physical occupations are, in this sense, more vulnerable to takings challenges than use restrictions, it is ambiguous how analogizing compensable regulatory takings to physical appropriations actually limits the scope of regulatory takings doctrine.

However, the Court may intend to compare these two varieties of takings at a higher level of generality. As the Court explained in *Tahoe-Sierra*, physical appropriations are generally compensable because they represent a particularly significant "affront" to private property interests. Regulations that eliminate all or substantially all value are arguably compensable because they result in a different but equally significant "affront" to private property interests.

Another important indication in *Tahoe-Sierra* that the *Penn Central* analysis triggers a finding of a taking only in extreme cases is that the Court cited, with apparent approval, various decisions rejecting takings challenges to regulations causing quite severe reductions in the value of private property. The Court quoted a passage from the Ninth Circuit's opinion stating that the Supreme Court has "rejected takings challenges to regulations eliminating all 'use' on a portion of the property, and to regulations restricting the type of 'use' across the breadth of property," and citing, among other decisions, an earlier Ninth Circuit decision rejecting a taking claim based on a 95% reduction in property value.[130] This reading of takings law is consistent with the Supreme Court's recent, approving citation of *Village of Euclid v. Ambler Realty Co.*,[131] rejecting a claim involving a 75% diminution in value, and *Hadacheck v. Sebastian*,[132] rejecting a claim involving a 92.5% diminution in value.

Finally, the Court's emphasis on the relevance of "reciprocity of advantage" in takings analysis supports the conclusion that only relatively serious economic impacts can effect a taking. The concept of reciprocity of advantage recognizes that regulations often simultaneously benefit and burden affected owners, and helps explain why regulations that appear to seriously reduce the value of a claimant's property, considered in isolation, may not in fact have any net adverse effect at all. Thus, this concept justifies a law of regulatory takings that is confined to truly extreme cases in which, in the words of Justice Scalia, "it is less realistic to indulge our *usual assumption* that the legislature is simply adjusting the benefits and burdens of economic life in a manner that secures an average reciprocity of advantage to everyone concerned."[133]

The Court in *Tahoe-Sierra* also has provided some useful guidance on the meaning of the expectations factor, primarily by embracing the views expressed by Justice O'Connor in her concurring opinion in *Palazzolo*. The Court in *Palazzolo* rejected the so-called categorical notice rule, which barred a taking claimant from ever recovering if the purchase occurred after the regulations that allegedly effected the takings were already in place. On the other hand, a majority of the Justices in *Palazzolo* (Justice O'Connor, in her concurring opinion, and the dissenters) quite clearly embraced the view that a lack of investment-backed expectations, including a claimant's preacquisition notice, is a relevant factor in takings analysis. The majority opinion in *Tahoe-Sierra* embraced this view by quoting at great length, and with evident approval, from Justice O'Connor's concurring opinion in *Palazzolo*.

The Court also indirectly endorsed the relevance of expectations by observing, in an aside, that "the petitioners who purchased land [following adoption of the initial Tahoe compact] did so amidst a heavily regulated zoning scheme."[134] This statement suggests that the Court believed that these plaintiffs, if they otherwise possessed a viable taking claim under *Penn Central,* might have been barred from recovering by a lack of reasonable investment-backed expectations.

The Court also has provided some suggestive guidance on the narrower question of whether a lack of invest-

126. *Tahoe-Sierra*, 122 S. Ct. at 1478 n.17, 32 ELR at 20630 n.17.

127. *Id*.

128. Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 199 (1985).

129. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922).

130. 122 S. Ct. at 1477, 32 ELR at 20630 (citing William C. Haas & Co. v. City & County of San Francisco, 605 F.2d 1117, 1120 (9th Cir. 1979) (value reduced from $2 million to $100,000)).

131. 272 U.S. 365, 384 (1926), *cited with approval in* Concrete Pipe & Prods. of Cal. v. Construction Laborers Pension Trust, 508 U.S. 602, 645 (1993).

132. 239 U.S. 394, 405 (1915), *cited with approval in Concrete Pipe*, 508 U.S. at 645.

133. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1017-18, 22 ELR 21104, 21108 (1992) (emphasis added).

134. *Tahoe-Sierra*, 122 S. Ct. at 1473 n.5, 32 ELR at 20628 n.5.

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ment-backed expectations should play a role in a *Lucas* case. Because the Court in *Tahoe-Sierra* rejected the *Lucas* claim on the straightforward ground that the plaintiffs did not demonstrate a "permanent obliteration" of their property values, the Court had no reason to specifically address the issue. Nonetheless, the legal analysis in *Tahoe-Sierra* supports the conclusion that investment expectations should play a role in a *Lucas* case. The principal argument for ignoring investment expectations in a *Lucas* case has been that a *Lucas* "total" taking is analogous to a physical occupation taking, that investment expectations are irrelevant in a physical occupation case, and, therefore, investment expectations should be ignored in a *Lucas* case as well.[135] The Court in *Tahoe-Sierra* contradicted this reasoning by drawing a sharp line between physical-occupation claims and regulatory takings claims. The Court addressed the issue of whether use restrictions can be equated with physical occupations in the course of explaining why decisions involving temporary physical occupations do not support the conclusion that temporary use restrictions result in a taking. But the Court's discussion of the "long-standing distinction" between physical occupations and use restrictions applies with equal force in the context of deciding whether the rule regarding investment expectations in a physical occupation case can be applied to a case involving use restrictions. The basic principle articulated in *Tahoe-Sierra* is that physical occupations affect private property interests in a fundamentally different way than use restrictions, and the rules applicable to one type of taking claim are not transferable to the other. As the Court said, "we do not apply our precedent from the physical takings context to regulatory takings claims."[136] Thus, *Tahoe-Sierra* represents powerful authority for the proposition that a lack of reasonable investment expectations may be a relevant factor in a *Lucas* case.

Finally, the Court in *Tahoe-Sierra* provided some guidance on the definition of the "character" factor. The Court down played (without necessarily eliminating) the relevance of the value or importance of the governmental action in determining whether a taking has occurred. Certainly the Supreme Court's approach to this issue contrasts with that of the district court. As discussed, the district court believed that considering the importance of protecting Lake Tahoe would essentially dispose of the *Penn Central* claim. But the Supreme Court in its description of the prior proceedings simply skipped over this portion of the district court's opinion,[137] and the Court did not state or suggest that the importance of protecting Lake Tahoe would have precluded a *Penn Central* claim. Whereas the Court has sometimes said that the Takings Clause requires a "weighing of public and private interests," that formula is noticeably absent from the *Tahoe-Sierra* opinion.

At the same time, several statements in the *Tahoe-Sierra* opinion suggest that the Court may not be prepared to completely jettison the value or importance of the government program as a factor under *Penn Central*. For example, the Court criticized the plaintiffs' proposed categorical rule by stating: "Under their proposed rule, there is no need to evaluate . . . the importance of the public interest served by the regulation, or the reasons for imposing the temporary restriction."[138] This can be read to imply that the plaintiffs' proposed test contrasts with the *Penn Central* test, under which "the importance of the public interest served" presumably would be considered. Similarly, the Court contrasted claims based on physical appropriations with claims based on regulatory restrictions by stating, "we do not ask whether a physical appropriation advances a substantial government interest," arguably implying that the Court would ask whether a regulation "advances a substantial government interest" in regulatory cases.[139] The Court does not directly say that the importance of the governmental objective is a valid consideration under *Penn Central* and, especially given the importance attached to this point by the district court, the Supreme Court's reticence seems telling. On the other hand, the opinion leaves the door open to consideration of such evidence in a *Penn Central* case.

The Court also referred briefly to "bad faith" as a potentially relevant factor in takings analysis. In cataloguing a series of possible legal theories that might have supported the plaintiffs' claims, the Court said that, "were it not for the findings of the District Court that TRPA acted diligently and in good faith, we might have concluded that the agency was stalling in order to avoid promulgating the environmental threshold carrying capacities and regional plan mandated by the 1980 Compact."[140] The Court also indicated that "a bad faith theory . . . is foreclosed by the District Court's unchallenged findings of fact."[141] Certainly these statements leave open the possibility that a taking claim might be advanced on a bad-faith theory. But these statements do not affirmatively endorse such a theory and, for the reasons discussed, a claim of bad faith seems to fit awkwardly into traditional takings law.

The Court's ambiguous approach to "bad faith" is similar to its ambiguous treatment of the ostensible "substantially advance" test. Because the district court rejected the substantially advance claim, and the plaintiffs did not appeal on that issue, the Court had no reason in *Tahoe-Sierra* to address the legitimacy of this test. The Court observed that the plaintiffs "might have argued that the moratoria did not substantially advance a legitimate state interest," but it said that this claim, too, was foreclosed by the district court findings.[142] Again the Court has not provided much direction one way or the other, leaving the validity of this ostensible takings test for resolution in some subsequent case.

For all the reasons described above, the "character" factor remains the most elusive among the *Penn Central* factors. One potentially promising way to create some meaningful order in takings analysis would be to define the character factor as principally addressing the degree to which regula-

135. *See, e.g.*, Palm Beach Isles Assocs. v. United States, 231 F.3d 1354, 1361-64 (Fed. Cir. 2002) (denying application for rehearing).

136. It is noteworthy that the Court in *Tahoe-Sierra* went out of its way to observe that Justice Anthony M. Kennedy had concurred in *Lucas* "on the basis of the regulation's impact on 'reasonable, investment-backed expectations.'" 122 S. Ct. at 1483 n.24, 32 ELR at 20632 n.24. This observation is significant because, as discussed above, after Justice Ginsburg joined the Court following Justice Byron R. White's retirement, Justice Kennedy effectively becomes the fifth vote on the Court in favor of the judgment in *Lucas* as well as the dispositive voice on the Court on how the *Lucas* precedent should be applied in the future

137. 122 S. Ct. at 1475, 32 ELR at 20629.

138. *Id.* at 1477-78, 32 ELR at 20630.

139. *Id.* at 1479, 32 ELR at 20631.

140. *Id.* at 1485, 32 ELR at 20633.

141. *Id.*

142. *Id.* at 1485, 32 ELR at 20633.

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tions single out owners to bear a particular burden rather than create a reciprocity of advantage among a community of owners. Supreme Court precedent suggests that whether a government regulation singles out a particular owner represents a relevant consideration in takings analysis.[143] Singling out represents, in effect, the obverse of reciprocity of advantage, which, as discussed, *Tahoe-Sierra* highlights as an important factor in takings analysis. The set of concerns raised by singling out and reciprocity of advantage can perhaps most appropriately be addressed in a *Penn Central* case under the character factor.

Finally, what does *Tahoe-Sierra* suggest about the architecture of regulatory takings law, that is, whether takings law contains distinct *Lucas* and *Penn Central* tests and, if so, how one test relates to the other? First, the Court in *Tahoe-Sierra* was evidently content to continue to recognize *Lucas* and *Penn Central* as separate and distinct takings tests. In this respect, *Tahoe-Sierra* reinforces the *Palazzolo* decision, in which the Court also described *Lucas* and *Penn Central* as separate tests. At the same time, the *Tahoe-Sierra* decision contains much to suggest that there is little substance to the purported distinctions between these two tests.

As a threshold matter, *Tahoe-Sierra* resolved the seeming illogic of the district court's ordering of the *Penn Central* and *Lucas* tests. Because a "total" *Lucas* taking claim is presumably the most difficult to establish, with a *Penn Central* claim representing the less demanding fallback, the natural assumption is that a claimant who cannot establish a *Penn Central* taking also should not be able to establish a taking under *Lucas*. Nonetheless, the district court in *Tahoe-Sierra* rejected the claim under *Penn Central* but found a *Lucas* taking, seemingly reversing the natural order between the two tests. This odd result was based on the district court's expansive reading of *Lucas* as well as its belief that the importance or value of the governmental program was relevant in a *Penn Central* case but not a *Lucas* case.

The Supreme Court established a seemingly more natural ordering of the *Lucas* and *Penn Central* tests. The Court concluded that the *Lucas* claim failed but that the plaintiffs still might have been able to pursue a claim under *Penn Central*. This reordering of the *Lucas* and *Penn Central* tests can be interpreted as a recognition that the value or importance of the government action, to which the district court attached such significance, represents an incoherent consideration in takings analysis. However, for the reasons discussed, this would probably be reading too much into the Supreme Court's decision.

The *Tahoe-Sierra* decision, despite the fact that it plainly describes *Lucas* and *Penn Central* as distinct tests, represents some movement toward resolving the illogic of maintaining the two irreconcilable tests. First, *Tahoe-Sierra* can be viewed as resolving the conflict, in practice if not in theory, by reducing *Lucas* to practical insignificance. As a result of *Tahoe-Sierra*, *Lucas* will apply in the future only to a small, bordering on nonexistent, set of extreme cases. If *Penn Central* represents the dominant test, and *Lucas* is truly reserved for the extraordinary case, there is arguably relatively little cause for concern if the two tests continue to create a muddle as matter of theory.

However, the *Tahoe-Sierra* decision also makes progress in the direction of eliminating the muddle itself by reducing if not eliminating the ostensible differences between the two tests. As discussed, the *Lucas* and *Penn Central* tests are most commonly distinguished on the ground that the value or importance of the government program and the lack of investment-backed expectations are relevant considerations in a *Penn Central* case, but not under *Lucas*. However, it is more reasonable to conclude that the importance of the government program should be treated as irrelevant in every regulatory takings case, and that a lack of reasonable investment-backed expectations should be treated as relevant in both types of cases. The *Tahoe-Sierra* decision provides support for taking both of these steps. The Court carefully avoided endorsing reliance on the importance or public value of the government program in a *Penn Central* case, notwithstanding precedent supporting such an approach and the district court's heavy reliance on this approach. And, as explained, by sharply distinguishing between physical occupations and restrictions on use, *Tahoe-Sierra* effectively destroys the doctrinal underpinning for the idea that expectations should matter in a *Penn Central* case but not a *Lucas* case. In sum, the *Penn Central* and *Lucas* tests appear to be alive, but the rationale for maintaining these two separate tests is increasingly weak.

Tahoe-Sierra breaks new ground because it is the first majority Supreme Court regulatory takings opinion to refer to *Penn Central* as supplying the test for "partial" takings,[144] a word choice that clearly indicates that a less than complete "obliteration" of value can be a taking. While the partial takings concept was arguably foreshadowed in *Palazzolo* as well as in *Lucas*, the Court's use of the term will undoubtedly be seized upon by advocates of an expansive reading of the Takings Clause.

On the other hand, it is also possible to read *Tahoe-Sierra* in a more favorable light from the standpoint of government defendants. While the Supreme Court has traditionally indicated that regulatory takings doctrine is confined to extreme circumstances, it has never suggested that only a "permanent obliteration" of value suffices to demonstrate a taking. Thus, recognizing that claimants can establish a taking when a regulation has not gone so far as to obliterate all value arguably does not go beyond existing law. By simultaneously embracing an extremely narrow reading of *Lucas* while allowing for the possibility of some "partial" taking claims not covered by *Lucas*, the Court may have simply rearranged the architecture of takings law but not actually expanded the doctrine's overall scope.

The ultimate significance of the Court's embrace in *Tahoe-Sierra* of the "partial takings" concept may lie in the answer to a question only hinted at in the Court's opinion: Under the "partial taking" theory, does the government pay for the part it has taken (and does the government receive ti-

143. Agins v. City of Tiburon, 447 U.S. 255, 262, 10 ELR 20361, 20363 (1980):

> There is no indication that the appellants' 5-acre tract is the only property affected by the ordinances. Appellants therefore will share with other owners the benefits and burdens of the city's exercise of its police power. In assessing the fairness of the zoning ordinances, these benefits must be considered along with any diminution in market value that the appellants might suffer.

R&Y, Inc v. Municipality of Anchorage, 34 P.2d 289, 299 (Alaska 2001) (relevant considerations in takings analysis include whether a disputed regulation "applies broadly to many landowners," and whether it "directly benefits those that it burdens").

144. 122 S. Ct. at 1481, 32 ELR at 20632.

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tle to only that portion), or does a finding of a partial taking mean that the government has taken the whole property and therefore it must pay for the whole property (and does the government obtain title to the whole property)?

Logically, a regulatory taking is an all or nothing proposition: If a regulation, considered in light of the property as a whole, effects a taking, but the owner is left with some residuum of use or value, the taking still affects the entire property. Under this view, if a taking is found, the owner must offer to relinquish the entire property and the government acquires the entire property. As a practical matter, this understanding of takings law tends to confine regulatory takings doctrine to relatively extreme cases.

However, in *Florida Rock Industries, Inc. v. United States*,[145] Judge S. Jay Plager of the Federal Circuit articulated the novel idea that a partial regulatory taking should only require payment for, and transfer of title to, the part taken. Judge Plager based this approach to partial takings on an analogy to physical appropriations, where the government only pays for the part taken. Subject to some exception for de minimis regulatory impositions, virtually any kind of regulatory burden could be treated as a compensable taking under this approach.

While the Court in *Tahoe-Sierra* did not directly address the possible alternative meanings of the term "partial" taking, the Court's reasoning supports the former approach. Judge Plager's analysis relied on the supposed close analogy between physical occupations and use restrictions. Because the Supreme Court rejected this analogy and drew a sharp line between use restrictions and physical occupations, the Court has arguably destroyed the foundation of Judge Plager's partial taking theory.

Conclusion

Passage of time is required before a Supreme Court decision achieves landmark status. But *Tahoe-Sierra* appears to be a good candidate to become a landmark because it may turn out to mark the limits of the expansion of regulatory takings doctrine. In *Lucas*, the Court launched a new paradigm borrowed in large measure from the writings of Prof. Richard Epstein.[146] Under this paradigm, virtually any regulatory imposition is a taking, subject to only two relatively narrow exceptions: where the burdened owner receives perfect, implicit compensation from the regulation's enforcement; and where the owner lacks the right to engage in the activity to begin with under background principles of nuisance or property law. *Lucas* only applied this paradigm in the extreme "total taking" case, but the decision set the stage for the potential transformation of the law of regulatory takings down the line. In *Tahoe-Sierra*, the Court rejected an opportunity to extend the Epstein paradigm and actually trimmed the scope of the *Lucas* categorical test. In the face of the Chief Justice's strenuous efforts to preserve *Lucas*, the Court balked. Instead, a strong majority embraced the position, deeply rooted in basic principles of American republicanism, that the people and their elected representatives have broad authority to shape the physical and social character of their communities without triggering an obligation to pay compensation under the Takings Clause.

The takings tide, it seems, is finally beginning to turn.

145. 18 F.3d 1560, 24 ELR 21036 (Fed. Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995).

146. *See* Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain (1985).