

PARTIAL REGULATORY TAKINGS LIVE, BUT...

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I. *Rearranging the Furniture*

Tahoe breaks new ground because it is the first majority Supreme Court decision to refer explicitly to a “partial” regulatory taking.¹ In addition, the Court explicitly identifies the multifactor *Penn Central* test as providing the standard for considering partial regulatory takings claims. In this formal sense, at least, these developments contradict one suggestion I offered in Chapter 9 in *Takings Sides on Takings Issues I*: that a partial regulatory claim might not even exist.

Accordingly, *Tahoe* will provide some encouragement to advocates of a relatively expansive view of regulatory takings doctrine. If regulatory takings law were confined to “total” takings claims, the doctrine would obviously be quite circumscribed. On the other hand, a more elaborate doctrine that includes “total” claims and “partial” claims implies a broader scope of takings liability. Why, after all, would takings law need to include two varieties of claims if regulatory takings were truly extraordinary?

On analysis, however, the implications of the Supreme Court’s recognition of the “partial” takings

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1. 122 S. Ct. at 1481.

concept are not so clear-cut. The reason is that the Court in *Tahoe* also adopted a new, extraordinarily narrow reading of the *Lucas* “total” takings test. Prior to the decision in *Tahoe*, courts and commentators debated whether the linchpin of the *Lucas* takings analysis was a complete prohibition on the “use” of private property or the destruction of the “value” of property. The Supreme Court resolved this debate by concluding that destruction of value was the key indicium of a *Lucas* taking. The Court ruled that a *Lucas* taking only takes place when a regulation results in “the permanent ‘obliteration of the value’ of a fee simple estate.”²

It is difficult to see how the Supreme Court could have read *Lucas* any more narrowly. Few if any regulations will rise to the level of a *Lucas* taking under this interpretation. Even when all building is prohibited, land has value, sometimes significant value, as private open space or at least as a speculative investment. The Chief Justice asserted in his dissent that even David Lucas could not have met *Tahoe’s* version of the *Lucas* test for, as he said, “surely the land in *Lucas* retained some market value.”³ The point seems well taken. But if the Chief Justice is correct, what is left of *Lucas*?

The Court’s narrow reading of *Lucas* reduces if it does not eliminate the significance of the Court’s embrace of the “partial” taking theory. While the Supreme Court has long recognized that regulatory takings doctrine is confined to “extreme circumstances,”⁴ it has never suggested that *only* a complete “obliteration” of all property value could establish a taking. By recognizing that claimants can establish a taking under a “partial” theory (for example, when the government has eliminated all development uses but not all value) the Court has not gone beyond existing law. In other words, by simultaneously embracing an extremely narrow reading of *Lucas* while allowing for the possibility of “partial” claims, the Court apparently has rearranged the furniture of takings law without actually expanding the doctrine’s overall scope.

II. *The Uncertain Architecture of Takings Law*

As I discussed in Chapter 9 in *Taking Sides on Takings Issues I*, one reason for skepticism about the “partial” takings theory, at least insofar as it rests on the *Penn Central* framework, is that it has been difficult to discern how the *Penn Central* test differs in

2. *Id.* at 1483.

3. *Id.* at 1494.

4. *United States v. Riverside Bayview Homes*, 474 U.S. 121, 126 (1985).

substance from the analysis called for under *Lucas*. The *Tahoe* decision simply reinforces this uncertainty. Thus, even as *Tahoe* clearly articulates distinct *Lucas* and *Penn Central* tests, it seems to undermine the case for maintaining these two distinct tests over the long term.

The Court in *Tahoe*, like in its decision the year before in *Palazzolo v. Rhode Island*, defined the *Penn Central* inquiry as involving consideration of the government action's economic impact, the owner's investment-backed expectations, and the character of the action. By contrast, the Court has suggested, without great specificity, that the *Lucas* "categorical" rule involves a less nuanced analysis.

The apparent distinctions between the ostensibly separate *Penn Central* and *Lucas* tests are difficult to explain or defend. The most commonly cited bases for distinguishing between the two tests have been: (1) that the character factor, defined as the public 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. The value or importance of the government program cannot logically be viewed as a relevant consideration in *any* regulatory takings case. In an eminent domain case, the government cannot avoid takings liability by arguing that its project serves an important public purpose, and the argument seems equally illogical in an inverse condemnation case. Indeed, if a government regulation provides significant public benefits, the case for compensating those burdened by the regulation seems especially strong.

Similarly, the investment-backed expectations factor does not provide a logical basis for distinguishing between *Lucas* and *Penn Central*. While investment expectations are clearly relevant under *Penn Central*, they cannot logically be excluded from consideration under *Lucas*. 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 takings claim.

The *Tahoe* decision, even though it plainly describes *Lucas* and *Penn Central* as distinct tests, actually represents movement toward resolving the illogic of maintaining these two separate tests. First, *Tahoe* can be viewed as resolving the conflict, in practice if not in theory, by reducing *Lucas* to insignificance. As a result of *Tahoe*, *Lucas* will apply only to a small, bordering on nonexistent, set of extreme cases. If *Lucas* is reserved for the rare

to nonexistent case, the challenge of reconciling *Lucas* and *Penn Central* as a matter of theory will have little practical import.

In addition, however, the *Tahoe* decision makes progress in resolving this legal muddle by reducing if not eliminating the ostensible differences between the two tests. As discussed, the better view is that the importance of the government program should be treated as irrelevant in both types of cases, and that a lack of reasonable investment-backed expectations should be treated as relevant in both types of cases. The *Tahoe* decision provides support for taking both of these steps.

The Supreme Court's stance in *Tahoe* on the relevance of the regulation's public importance contrasts dramatically with the approach to this issue by the district court in the case. The district court rejected the *Penn Central* claim on the grounds that the character factor refers to the importance of the governmental objective, and protecting Lake Tahoe is very important. Treating the *Penn Central* inquiry as basically "a balancing test—a weighing of private and public interests," the district 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."⁵

Before the Supreme Court, the plaintiffs had abandoned the *Penn Central* claim, and therefore the Court had no reason to rule on this specific issue. Nonetheless, the Court carefully avoided endorsing the importance or value of the government activity as a factor under *Penn Central*. In describing the prior proceedings in the case, the Supreme Court simply skipped over the portion of the district court's opinion quoted above.⁶ And while the Court indicated that one or more of the plaintiffs might have pursued a *Penn Central* claim, the Court did not affirmatively state that the importance or value of protecting Lake Tahoe would be relevant to such a claim.

The Court also has provided some important guidance relating to the issue of whether a lack of investment-backed expectations should play a role in a *Lucas* case. Because the Court in *Tahoe* 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 expectations issue. Nonetheless, the legal analysis in *Tahoe* supports the conclusion that investment expectations should

5. *Tahoe-Sierra Preservation Council, Inc v. Tahoe Regional Planning Agency*, 34 F. Supp. 2d 1226, 1242 (D. Nev. 1999).

6. *Id.* at 1475.

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, and it is well established that investment expectations are irrelevant in a physical occupation case.⁷ The Court in *Tahoe* 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 produce a taking under *Lucas*. But the Court’s discussion of the “longstanding 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* is that physical occupations affect private property interests in a fundamentally different way than use restrictions do, and the rules applicable to one type of takings claim are not transferable to the other.

In sum, after *Tahoe*, the *Penn Central* and *Lucas* tests appear to be alive as distinct takings tests, but the rationale for maintaining these two separate tests is increasingly weak.

III. *Arguments for a Narrow Partial Takings Theory*

Finally, echoing several of the points I made in *Takings Sides*, the *Tahoe* decision contains a good deal to suggest that, regardless of the specifics of the architecture of takings doctrine, regulatory takings doctrine should have a narrow scope.

First, the Court’s description of regulatory takings as essentially derivative of “true” takings supports a narrow understanding of regulatory takings doctrine. The Court stated that the “plain language” of the text indicates 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.”⁸

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

8. 122 S. Ct. 1465, 1478 n.17.

Second, the Court 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.”⁹ 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,”¹⁰ and that a regulation effects a taking when it “has very nearly the same effect for constitutional purposes as appropriating or destroying [property].”¹¹ All of these variations on the same theme support the conclusion that regulatory takings claims should succeed only when regulations have truly onerous effects.

Third, the Court cited with 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 takings claim based on a 95 percent reduction in property value.¹² This reading of takings law is consistent with the U.S. Supreme Court’s own recent, approving citation of *Village of Euclid v. Ambler Realty Co.*,¹³ rejecting a claim involving a 75 percent diminution in value, and *Hadacheck v. Sebastian*,¹⁴ rejecting a claim involving a 92.5 percent diminution in value.

Finally, the Court emphasized the importance of the concept of “reciprocity of advantage,” that is, the idea that regulations often simultaneously benefit and burden affected owners. This concept helps explain why regulations that, considered in isolation, appear to seriously reduce the value of a claimant’s property may not in fact have any net adverse effect at all. It supports a law of regulatory takings that is confined to truly extreme cases

9. *Id.*

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

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

12. 122 S. Ct. at 1477, *citing* *William C. Haas & Co. v. City & County of San Francisco*, 605 F.2d 1117, 1120 (9th Cir. 1979) (value reduced from \$2,000,000 to \$100,000).

13. 272 U.S. 365, 384 (1926), *cited with approval in* *Concrete Pipe & Products v. Construction Laborers Pension Trust*, 508 U.S. 602, 645 (1993).

14. 239 U.S. 394, 405 (1915), *cited with approval in* *Concrete Pipe*, 508 U.S. at 645.

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.”¹⁵

15. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017-18 (1992) (emphasis added).

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