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A SECOND TAKE: RE-EXAMINING OUR REGULATORY TAKINGS JURISPRUDENCE POST-TAHOE

*Robert W. DiUbaldo**

INTRODUCTION

> The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation .... When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.[1]
>
> - Justice Holmes

Since the Bill of Rights gave birth to modern American "takings" law over 200 years ago, courts have struggled to balance the conflict between an individual's property rights and the protection of society as a whole. Recently, the Supreme Court has applied several techniques to determine when a government action has effectuated a compensable taking.[2] The result is a combination of

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1. Pa. Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

2. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 335 (2002) (refusing to adopt a categorical rule that awards compensation to all temporary takings in which a landowner is deprived of all economically viable use of his land); Palazollo v. Rhode Island, 533 U.S. 606, 636 (2001) (O' Connor, J., concurring) (applying a fact-based test to regulatory takings that weighs the relevant circumstances of each particular case); Lucas v. S. C. Coastal Council, 505 U.S. 1003, 1016 (1992) (adopting the categorical rule that when a regulation deprives an owner of all economically beneficial use of his land, he must be awarded compensation); First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 304, 318 (1987) (noting that temporary takings should be evaluated the same as permanent takings); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 501 (1987) (focusing on the entire bundle of the landowners property rights rather than one segment of the property interest); Penn Cent. Transp. Co. v. New York City, 438 U.S.

per se rules and balancing tests that have made defining a landowner's property interest more difficult.[3] For example, the Supreme Court has adopted the per se rule that a landowner who is completely deprived of all "economically beneficial" use of her land must be awarded compensation,[4] unless she is using her land in a way contrary to the "background principles of the state's law of property and nuisance."[5] Determining exactly when and how this "total deprivation" occurs has been subject to much debate, particularly because of the Supreme Court's admonition to look at the "value of the parcel as a whole" when examining if there is a compensable taking.[6] Thus, when faced with a regulation that deprives a landowner of use of ninety percent of her property, it is unclear whether the situation would be analyzed as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere dimunition in the value of the tract as a whole.[7] As a result, a "partial" regulation that denies a landowner use of a

104, 123-24 (1978) (outlining a balancing test to apply to regulatory takings and focusing on the value of the land "as a whole").

3. *See* William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 783 (1995) (arguing that modern takings jurisprudence has misinterpreted the original understanding of the Takings Clause); *see also* Robert J. Hopperton, *Ohio Supreme Court Regulatory Takings Jurisprudence: An Analytical Framework*, 29 CAP. U. L. REV. 321, 358 (describing the analytical framework applied in regulatory takings as a "work in progress"); James E. Krier, *The Takings-Puzzle Puzzle*, 38 WM. & MARY L. REV. 1143 (1997) (noting that regulatory takings are widely regarded as a puzzle); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1165 (1967) ("The courts have developed a bewildering array of rules for determining when a taking occurs."); Tyrone T. Bongard, Comment, *Does Palozollo v. Rhode Island's Upholding of the Transferability of Takings Claims Require a Rethinking of Takings Jurisprudence*, 81 N.C. L. REV. 392, 393 (2002) (arguing the inability to formulate a coherent takings jurisprudence has resulted in Supreme Court decisions that undercut the principles of fairness and equity that underlie this Bill of Rights guarantee).

4. *See Lucas*, 505 U.S. at 1016.

5. *Id.* at 1029.

6. *Compare Tahoe-Sierra*, 535 U.S. at 327 (noting that in regulatory takings cases, we most focus on the "parcel as a whole" and view property "in its entirety"), *and Penn Cent. Transp. Co.*, 438 U.S. at 130-31 (focusing on the landowner's property interest as a whole as compared to only a segment of the land affected), *with Lucas*, 505 U.S. at 1016 (the "parcel as a whole" rule does not make clear the property interest against which the loss of value is to be measured), *and* Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979) (holding that the government's imposition of a public boating easement connecting a private marina to the ocean was a taking based on the principle that it violated the "right to exclude," a fundamental stick in the landowners bundle of rights).

7. *See Lucas*, 505 U.S. at 1016 n.7.

significant amount of her property is less likely to be found a taking than a "total" regulation that results in only a minor loss of value to the property.[8] This partial/total distinction seems to be at odds with the primary purpose of the Takings Clause—to provide a fair and just means of protecting private property.[9]

The Supreme Court's decision in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* further embellished this partial/total takings distinction.[10] In an effort to preserve the environment in the Lake Tahoe Basin, the Tahoe Regional Planning Agency ("TRPA") imposed a temporary moratorium that prevented landowners in the region from building for thirty-two months.[11] The landowners contended that by denying them all economically viable use of their property during this period, the moratoria effectuated a taking and imposed a constitutional obligation on the agency to compensate the landowners for

8. *See* Laurel A. Firestone, Case Comment, *Temporary Moratoria and Regulatory Takings Jurisprudence After: Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 27 HARV. ENVTL. L. REV. 277, 287-88 (noting that under current takings law, temporary ordinances that result in even a total economic deprivation of property will not be considered a compensable taking because the regulation is viewed as only "temporary" in nature and thus does not deprive the owner of all economically beneficial use).

9. Armstrong v. United States, 364 U.S. 40, 49 (1960) (noting that the purpose of the Takings Clause is to prevent property owners from "bearing public burdens, which, in all fairness and justice, should be borne by the public as a whole.").

10. *Tahoe-Sierra*, 535 U.S. at 332. *Tahoe* strengthened the ad hoc approach to regulatory takings jurisprudence by refusing to adopt a per se rule for temporary moratoria. *Id.* at 334. Nevertheless, there are still many questions in this area of the law. *See* Andrew S. Gold, *The Diminishing Equivalence Between Regulatory Takings and Physical Takings*, 107 DICK. L. REV. 571, 572 (2003) (noting that the *Tahoe* holding "ensures continued uncertainty in takings jurisprudence" because of its reluctance "to equate regulatory and physical government acts"); *see also* Firestone, *supra* note 8, at 287-88 (discussing the confusion that exists in certain takings situations).

11. The case involved two moratoria ordered by respondent Tahoe Regional Planning Agency ("TRPA") to maintain the status quo while studying the impact of development on Lake Tahoe and designing a strategy for environmentally sound growth. The first, Ordinance 81-5, was effective from August 24, 1981, until August 26, 1983, whereas the second more restrictive Resolution 83-21 was in effect from August 27, 1983, until April 25, 1984. As a result of these two directives, virtually all development on a substantial portion of the property subject to TRPA's jurisdiction was prohibited for a period of thirty-two months. *Tahoe-Sierra*, 535 U.S. at 306. It should be noted that on April 26, 1984, a new regional plan was adopted, for which the State of California filed an action enjoining its implementation on the ground that it failed to establish land-use controls sufficiently stringent to protect the Lake Tahoe Basin. *Id.* at 312. The District Court entered an injunction that was upheld by the Ninth Circuit and remained in effect until a revised plan was adopted in 1987. *Id.* Both the 1984 injunction and the 1987 plan contained provisions that prohibited new construction on sensitive lands in the Basin. *Id.* The Supreme Court, however, did not consider the validity of these provisions. *Id.* at 312-13.

the value of the land's use.[12] The Supreme Court held, however, that the mere enactment of the regulations implementing the moratoria did not constitute a per se taking of the landowner's property.[13] In determining whether or not the landowner was deprived of all economic use of her land, the Court focused on the value of the property interest as a whole.[14] They concluded that because the temporary regulation would eventually be lifted, the landowner still retained value of her parcel and thus did not suffer a "total deprivation" deserving of compensation.[15] Writing for the majority, Justice Stevens stated that adoption of a categorical rule that any deprivation of all economic use, no matter how brief, constituted a compensable taking would impose unreasonable financial obligations upon governments for the normal delays involved in processing land use applications and would improperly encourage hasty decision-making.[16] While the Court was prudent in refusing to adopt a per se rule for analyzing temporary takings, the continued distinction between "partial" and "total" takings is problematic because it allows the government too much leeway in taking private property without compensation.[17]

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12. The Court limited its discussion to the claim that three actions taken by the TRPA, Ordinance 81-5, Resolution 83-21, and the 1984 regional plan, constituted takings of the petitioners property without just compensation. *Id.* at 313. As noted, the challenge to the 1984 plan was not addressed because both the District Court and the Court of Appeals held that it was the federal injunction against implementing that plan, rather than the plan itself, that caused the post-1984 injuries that petitioners allegedly suffered, and those rulings were not encompassed within their limited grant of certiorari. *Id.* In 1991, petitioners amended their complaint to allege that the adoption of the 1987 plan also constituted an unconstitutional taking. *Id.* at 314 n.7. Ultimately, both the District Court and the Court of Appeals held that this particular claim was barred by California's one year statute of limitations and Nevada's two year statute of limitations. *Id.* The Supreme Court, however, noted that other litigants have challenged certain applications of that plan. *See* Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 731 (1997).

13. *Tahoe-Sierra*, 535 U.S. at 334 ("[T]he extreme categorical rule that any deprivation of all economic use, no matter how brief, constitutes a compensable taking surely cannot be sustained.").

14. *Id.* at 332.

15. *Id.* at 335.

16. The petitioners' broad submission would apply to numerous "normal delays in obtaining building permits, changes in zoning ordinances, variances and the like," as well as to orders temporarily prohibiting access to crime scenes, businesses that violate health codes, fire-damaged buildings, or other areas that we cannot now foresee. *Id.* Such a rule would undoubtedly require changes in practices that have long been considered permissible exercises of the police power. *Id.* As Justice Holmes warned in *Pennsylvania Coal*, "[G]overnment could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. *Id.* (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922)).

17. *See infra* notes 67-70 and accompanying text.

Part I of this Comment discusses the background of regulatory takings jurisprudence, from Justice Holmes' landmark *Pennsylvania Coal* opinion to the present, and the accompanying gray area surrounding these decisions. Parts II and III analyze the recent *Tahoe* decision in depth, focusing on both the strengths and weaknesses of the decision and its potential impact on the future of takings. Part IV offers a different analytical framework from which to analyze regulatory takings. Under this theory, courts would abandon the partial/total distinction, and instead focus on the actual loss from the landowner's point of view. Courts would apply a number of factors to guide their decision, measuring the actual loss caused by the regulation, any reciprocal or future advantages received post-regulation, and the overall reasonableness of the taking itself, in the context of the state's laws of property and nuisance. Because Takings Clause issues require careful examination and weighing of all the relevant circumstances of each particular case, courts must resist the temptation to adopt per se rules in the takings framework.

I. A BRIEF HISTORY OF REGULATORY TAKINGS

The Fifth Amendment to the United States Constitution states: "[P]rivate property shall not be taken for public use without just compensation."[18] Also known as the "Takings Clause," the Supreme Court has characterized it as a "tacit recognition of a preexisting power"[19] of the government to achieve public ends by taking property from private parties.[20]

The Takings Clause imposes two separate requirements on the government:[21] the property taken must serve some form of public

18. U.S. Const. amend. V.

19. United States v. Carmack, 329 U.S. 230, 241 (1946).

20. *See* Chi. Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 239-40 (1897) (holding that the Takings Clause applies to the individual states through the Fourteenth Amendment); *see also* Mark W. Smith, *A Congressional Call to Arms: The Time Has Come for Congress to Enforce the Fifth Amendment's Takings Clause*, 49 OKLA. L. REV. 295, 319 (1996).

21. *See* Bongard, *supra* note 3, at 398. It should be noted that federal law is not the only source of protection against government takings. Many states have enacted property protection laws that may provide greater protection than the Fifth Amendment. Some examples include Florida's Bert J. Harris, Jr., Property Rights Protection Act, ch. 95-181, 1995 Fla. Laws 1651 (codified as amended Fla. Stat. Ann. 70.001 (West 2002)), which provides for compensation when a government action has "inordinately burdened" the landowner, Fla. Stat. Ann. 70.001(2) (West 2002), and Texas's Private Real Property Rights Preservation Act, ch. 517, 1995 Tex. Gen. Laws 3266 (codified as amended at Tex. Gov't Code Ann. 2007.001-2007.045 (Vernon 2002)), which provides compensation when a government action results in at least a twenty-

use[22] and that when a taking does occur, just compensation must be awarded to the landowner.[23] Historically, compensation was only required and awarded when property was actually physically taken.[24] In 1922, however, the landmark decision in *Pennsylvania Coal v. Mahon* extended the tentacles of the Fifth Amendment to regulatory takings.[25] In that case, Justice Holmes established the general rule that "while property may be regulated to a certain extent, if the regulation goes too far, it will be recognized as a taking."[26]

At issue in *Pennsylvania Coal* was the Kohler Act, a statute that prohibited the mining of coal if it would damage the structural support of "human habitations."[27] The defendant coal company executed a deed with the plaintiff homeowners in which the coal company reserved the right to mine the coal beneath the homeowners' property.[28] The deed also released the coal company from any liability arising from the mining of coal beneath the property.[29] While the Pennsylvania Supreme Court agreed that the defendant had contract and property rights protected by the Constitution, the court nevertheless held the statute was a legitimate exercise of police power and directed a decree for the plaintiffs.[30] The United States Supreme Court reversed the decision, holding that the government regulation had gone "too far" in diminishing the value of

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five percent diminution in the value of real property, Tex. Code Ann. 2007.002(5)(B)(ii) (Vernon 2002).

22. *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 245 (1984) (noting that a purely private taking could not withstand the scrutiny of the public use requirement); Thompson v. Consol. Gas Corp., 300 U.S. 55, 80 (1937) (stating that "one person's property may not be taken for the benefit of another private person without justifying a private purpose, even though compensation be paid.").

23. Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

24. *See* Treanor, *supra* note 3, at 792. (recognizing that "[I]t seems to be settled that, to entitle the owner to protection under this clause, the property must be actually taken in the physical sense of the word." (quoting THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW, 51920 (1857))); *see also* William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 601 (1972) (noting that the dominant early approach to compensable takings was "no taking without a touching.").

25. *See Pa. Coal Co.*, 260 U.S. at 413.

26. *Id.* at 416 (noting that the "[S]trong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.").

27. *Id.* at 412-13.

28. *Id.* at 412.

29. *Id.*

30. *Id.*

the coal company's property, and thus compensation was required.[31]

Pennsylvania Coal was revolutionary not only because it applied the Fifth Amendment to regulatory takings for the first time, but also because it articulated the central conflict that would come to dominate regulatory takings jurisprudence: the preservation of individual property rights versus the deference given to legislatures in protecting "public health, safety and welfare."[32] In particular, Justice Holmes focused on the diminution in property value caused by the regulation, which has become one of the factors courts use in determining compensation.[33]

Holmes opinion was clear in two respects. First, regulatory takings challenges should be determined on a case-by-case basis.[34] Second, there is an implied limitation of property ownership that will yield to the legislature's police power.[35] Thus, the Court repeatedly has recognized the ability of government, in certain cir-

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31. *Id.* at 414 (noting that "[t]he act cannot be sustained as an exercise of the police power, so far as it affects the mining of coal under streets or cities in places where the right to mine such coal has been reserved.").

32. *Id.* at 413.

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the dimunition. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power.

Id.

33. *Id.*

34. *Id.* (noting that the question of whether or not a regulation has gone "too far" depends on the facts of the particular case).

35. *Id.*; *see also* Keystone Bituminous Coal Ass'n. v. Debenedictis, 480 U.S. 470, 491-92 (1987).

> Long ago it was recognized that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community, and the Takings Clause did not transform that principle to one that requires compensation when the State asserts its power to enforce it.

Id. Thus the court has frequently upheld regulations imposed to arrest a significant threat to the common welfare, whatever their economic effect on the owner. *See, e.g.*, Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962) ("Although a comparison of values before and after is relevant, it is by no means conclusive."); Gorieb v. Fox, 274 U.S. 603, 608 (1927); Mugler v. Kansas, 123 U.S. 623, 668 (1887).

cumstances, to regulate property without compensation, no matter how adverse the financial effect on the owner.[36]

A. The Next Step: *Penn Central Transportation Co. v. New York City*—Providing the Analytical Framework for Regulatory Takings

The Supreme Court established the analytical framework for determining whether regulations go "too far" in the landmark case of *Penn Central Transportation Co. v. City of New York*.[37] In that case, the New York City Land Preservation Commission failed to approve plans for construction of a fifty-story office building above the Grand Central Station terminal.[38] Since Grand Central Station had been designated a landmark, the owners had to obtain permission from the Land Preservation Commission before they could "alter the architectural features of the landmark or construct any exterior improvement on the landmark site."[39] This was to ensure

36. "A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property." *See Mugler*, 123 U.S. at 668 (upholding an ordinance that prohibited operation of a previously lawful brewery, although the establishment was deemed to have lost all value as property); *see also* Miller v. Schoene, 276 U.S. 272, 280 (1928) (holding that the Fifth Amendment did not require Virginia to pay compensation to the owner of cedar trees ordered destroyed to prevent a disease from spreading to nearby apple orchards); Omnia Commercial Co. v. United States, 261 U.S. 502, 508 (1923) (stating that "destruction of, or injury to, property is frequently accomplished without a taking in the constitutional sense."); Powell v. Pennsylvania, 127 U.S. 678, 682 (1888) (upholding legislation prohibiting the manufacture of oleomargarine, despite the owner's allegation that the entire value of his property would be lost and he would be deprived of his livelihood).

37. 438 U.S. 104, 124 (1978).

38. *Id.* at 115-16.

39. There were three separate procedures available through which administrative approval could be obtained if an owner wished to alter a landmark site. First, the owner could apply to the Commission for an order approving the improvement or alteration on the grounds that it would not change or affect any architectural feature of the landmark. Denial of that certificate was subject to judicial review. *Id.* at 112. Second, the owner could apply to the Commission for a certificate of "appropriateness." *Id.* These certificates were granted if the Commission concluded that the proposed construction on the landmark site would not unduly hinder the protection, enhancement, perpetuation, and use of the landmark from an aesthetic, historical and architectural perspective. *Id.* Again, the denial of this certificate was subject to judicial review. Moreover, if the owner was denied either a certificate of no exterior effect or a certificate of appropriateness, they could submit an alternative or modified plan for approval. *Id.* The final procedure available, obtaining a certificate of appropriateness on the ground of insufficient return, provided special mechanisms which varied depending on whether or not the landmark was tax exempt, to ensure that the designation did not cause economic hardship. *Id.*

that "decisions concerning construction on the landmark site" were made with due consideration of both the public interest in the maintenance of the structure and the landowner's interest in the use of the property.[40] Following Holmes's lead in *Pennsylvania Coal*, the Court embraced the position that physical possession was not necessary for a taking,[41] and recognized that determining whether or not a regulation constituted a taking depended largely on the "particular circumstances of the case."[42]

Penn Central is an important decision because it outlined a balancing test consisting of three factors to be used in evaluating the constitutionality of a government regulation: 1) the economic impact of the regulation on the claimant;[43] 2) the extent to which the regulation interfered with the landowners "reasonable investment backed expectations;"[44] and 3) the overall character of the government action.[45] The Supreme Court acknowledged that in balancing these factors, courts are deciding regulatory takings cases by "essentially ad hoc, factual inquiries."[46] Applying these factors, the Court found the regulation imposed on the Grand Central Station owners had not gone "too far".[47]

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40. *Id.*

41. *Id.* at 122-23 ("As is implicit in our opinion, we do not embrace the proposition that a 'taking' can never occur unless government has transferred physical control over a portion of the parcel.").

42. *See id.* at 124 (recognizing that "[t]his court, quite simply has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." (citing Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962))); *see also* United States v. Cent. Eureka Mining Co., 357 U.S. 155, 168 (1958) (noting that courts have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely upon the particular circumstances of that case).

43. The court noted that although the designation of a landmark and landmark site restricted the owner's control over the parcel, this designation also enhanced the economic position of the landmark's owner in a significant respect. *Penn. Cent. Transp. Co.*, 438 U.S. at 113-114. Under New York City's zoning laws at that time, owners of real property who were unable to develop their property to the full extent permitted by the applicable zoning laws were allowed to these "restricted" development rights to contiguous parcels on the same city block, where they normally would not have been able to build. *Id.*

44. *Id.* at 124.

45. In engaging these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are relevant considerations. *Id.* at 124 (citing *Goldblatt*, 369 U.S. at 594).

46. *Id.* 438 U.S. at 130-31.

47. *Id.*

First, the Court noted that the regulation was substantially related to the promotion of general welfare, and served a legitimate societal interest.[48] In their view, New York City had a vested interest in structures and areas with special historic, aesthetic, and cultural significance, and preserving this was a permissible goal.[49] Second, the Court focused on the severity of the impact of the regulation on the investment backed expectations regarding the appellant's parcel.[50] Because the New York City law did not interfere with how the Terminal was presently used,[51] and the landowners still retained the ability to develop their airspace over other buildings in the city,[52] the disturbance of the property was not of "such a magnitude that there must be an exercise of eminent domain and compensation to sustain it."[53]

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48. In instances where a "legislature has reasonably concluded that health, morals, or general welfare would be promoted by prohibiting particular contemplated uses of land, Courts have upheld land use regulations that destroyed or adversely affected recognized real property interests." *Id.* at 105. Zoning laws are a classic example of this, and have been viewed as a permissible government action even when prohibiting the most beneficial use of property. *See* East Lake v. Forest City Enter., Inc., 426 U.S. 668, 674 (1976); Euclid v. Amber Realty Co., 272 U.S. 365, 395-96 (1926) (allowing zoning laws which prohibited industrial use).

49. States and cities may enact land use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city. *See* Vill. of Belle Terre v. Boraas, 416 U.S. 1, 9-10 (1974).

50. *See Penn Cent. Transp. Co.*, 438 U.S. at 136.

51. *Id.*

> Its designation 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 sixty-five 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.

Id.

52. *Id.* at 137.

> [T]o the extent the appellants have been denied the right to build above the Terminal, it is not literally accurate to say that they have been denied *all* use of even those pre-existing air rights. Their ability to use these rights have not been abrogated; they are made transferable to at least eight parcels in the vicinity of the Terminal, one or two of which have been found suitable for the construction of new office buildings. Although appellants and others have argued that New York City's transferable development rights program is far from ideal, the New York courts here supportably found that, at least in the case of the Terminal, the rights afforded are valuable. While these rights may well not have constituted 'just compensation' if a 'taking' had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of the regulation.

Id.

53. *Id.* at 136. (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922)).

The most influential aspect of *Penn Central's* holding, however, was its admonition to focus on the landowner's property interest as a whole, which essentially divided regulatory takings into two categories—partial and total.[54] The appellants urged that because the Landmarks law had deprived them of any gainful use of the air rights above the Terminal, a taking had occurred, entitling them to compensation regardless of the value of the remainder of their parcel.[55] The Court found this argument "untenable," instead focusing on the nature and extent of the government's interference with the "parcel as a whole."[56] Under this analysis, the appellants' property still retained significant value because it was operating as a train station, its primary purpose. Even though the landowner was being deprived of use of her air rights, and had sustained a significant economic loss, the Court reasoned that the remaining property could still be put to productive use. In other words, because the regulation had only caused a partial loss to the landowner, it did not constitute a compensable taking under the Fifth Amendment. This reasoning spawned the movement toward distinguishing between "partial" and "total" regulatory takings. Under current case law, takings that fit the *Penn Central* mold are considered "partial" and analyzed under the balancing test the Court laid out in that decision.[57]

B. *Lucas v. South Carolina Coastal Council*: Introducing Total Takings

Unlike partial regulatory takings, courts have distinguished a "total" regulatory taking as one that completely deprives a land-

54. *See id.* at 130-131.

55. "This court has previously held that the 'air rights' over an area of land are 'property' for purposes of the Fifth Amendment." *Id.* at 143 (citing United States v. Causby, 328 U.S. 256 (1946) (a landowners air rights taken by low flying planes was deserving of compensation)); *see also* Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327, 329-30 (1922) (firing of projectiles over summer resort can constitute taking).

56. *Penn Cent. Transp. Co.*, 438 U.S. at 130.

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

Id.

57. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 331 (2002) (noting that *Penn Central* is the proper framework for partial regulatory takings).

owner of all economically viable use of his property.[58] The framework for this analysis was illustrated in the 1992 decision *Lucas v. South Carolina Coastal Council.*[59] In *Lucas*, the claimant purchased two residential lots for $975,000, only to have them rendered "valueless" by a statue enacted two years later.[60] Lucas filed suit, claiming a taking under the Fifth Amendment.[61] The trial court found that a taking had occurred and ordered compensation of $1,232,387.50, representing the value of the property, plus interest.[62] The South Carolina Supreme Court reversed, holding that the regulation was proscribed to prevent serious public harm and thus did not constitute a compensable taking, irrespective of the regulation's effect on the property's value.[63] The Supreme Court upheld the trial court's decision, establishing the categorical rule that when a regulation deprives an owner of all economically beneficial uses of her land, she has suffered a taking and deserves compensation.[64]

Under this rule, a statute or governmental action that wholly eliminates the value of a fee simple title clearly qualifies as a taking.[65] Thus, *Lucas* established the rule that if there is a "total" taking, the landowner is due complete compensation,[66] but if there is only a "partial taking," courts must use the *Penn Central* balancing approaching.[67]

This is significant because takings claims under the *Penn Central* analysis typically fall short of compensation.[68] The Supreme Court has only once found a taking compensable under the partial takings analysis,[69] and will generally deny compensation as long as the

58. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992) (holding that when the government forces a landowner to give up "*all* economically beneficial uses . . . . [of his property], he has suffered a taking").

59. *Id.*

60. *Id.* at 1006-07.

61. *Id.* at 1009.

62. *Id.*

63. *Id.* at 1010.

64. *Id.* at 1027.

65. *Id.* at 1030.

66. *Id.* at 1016-17.

67. *Id.* at 1015-16.

68. *See* Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1377-78 (1993) (stating that partial takings, while virtually total in form, will remain uncompensated under the Court's current approach); *see also* Dist. Intown Props. Ltd. v. D.C., 198 F.3d 874, 886 (D. C. Cir. 1999) (Williams, J., concurring) (noting that "in partial takings cases, the government wins").

69. *See* E. Enter. v. Apfel, 525 U.S. 498, 529-30 (1998).

regulation "substantially furthers a legitimate state interest."[70] As more than one commentator has noted, this partial/total distinction has made it increasingly difficult for a landowner to prove a compensable taking.[71]

C. The Importance of the Nuisance Exception

Every takings claim is subject to what is known as the "nuisance exception."[72] Since the beginning of our regulatory takings jurisprudence, courts have recognized that property rights "are enjoyed under an implied limitation."[73] This is crucial, because if a regulation on the use of property "inheres in the title itself, in the restrictions that background principles of the State's law of property and nuisance already placed upon land ownership," there will be no taking, regardless of the economic effect on the owner.[74] It is important to note that these "background principles" cannot be newly legislated.[75] They must be a long-standing part of the state's property law, such as restrictions on using property as a common law nuisance.[76] Thus, while analyzing takings challenges involves the consideration of a multitude of factors, the Supreme Court has repeatedly acknowledged that a claim must first pass this initial inquiry of the nuisance exception.[77]

D. The Emergence of Conceptual Severance: Breaking Up Is Hard To Do

Traditionally, landowners' property rights have consisted of three different components: the right to possession (including the right to exclude others[78]), use, and disposition.[79] The Supreme

70. *See* Dolan v. City of Tigard, 512 U.S. 374, 385 (1994); Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

71. *See Dist. Intown Props. Ltd.*, 198 F.3d at 886 (Williams, J., concurring) (stating that "few regulations will flunk this nearly vacuous test"); *see also* Epstein, *supra* note 68, at 1376-77 (stating that "this approach invites the form of governmental abuse the Bill of Rights was designed to protect").

72. Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) (noting that "[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power").

73. *Id.* at 413.

74. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 351 (2002) (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992)).

75. *Lucas*, 505 U.S. at 1027-28.

76. *Id.*

77. *See Tahoe-Sierra*, 535 U.S. at 351; *Lucas*, 505 U.S at 1027-28.

78. The right to exclude others is "universally held to be a fundamental element" of one's property rights. Kaiser Aetna v. United States, 444 U.S. 164, 179-180 (1979); Int'l News Serv. v. Associated Press, 248 U.S. 215, 250 (1918) (Brandeis, J., dissent-

Court has recognized these basic elements stating that property rights are not limited to the "physical thing" but instead "denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use, and dispose of it."[80]

Determining the "property interest" at stake in takings claims, however, has been a continuing challenge.[81] Courts have often splintered property interests into spatial, functional, temporal, and economic units to determine whether a government action has resulted in the taking of private property without just compensation.[82] This process, known as conceptual severance, is an abstract treatment of property that allows any one of the classic property rights to be fragmented, no matter how small, and held up by the owner as constituting its own distinct property right.[83] This theory is important because it conflicts directly with the partial/total

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ing) ("[A]n essential element of individual property is the legal right to exclude others from enjoying it."). The right to possession includes the right to exclude others from one's land. The Supreme Court has classified the right to exclude as "one of the most essential sticks in the bundle of rights that are commonly characterized a property." *Kaiser Aetna*, 444 U.S. at 176.

79. *See* Margaret Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1668 (1988) ("[T]he conception of property includes the exclusive rights of possession, use, and disposition." (quoting RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 304 (1985))).

80. United States v. Gen. Motors Corp., 323 U.S. 373, 378 (1945).

81. *See* Radin, *supra* note 79, at 1671 ("Unlike Richard Epstein, our Supreme Court has not fully constitutionalized (that is, found 'in' the Constitution) the classical liberal conception of property.").

82. This splintering of the whole fee simple into separate interests is known as conceptual severance, a term first coined by Radin, *supra* note 79 at 1676:

> It consists of delineating a property interest consisting of just what the government action has removed from the owner, and then asserting that that particular whole thing has been permanently taken. Thus, this strategy hypothetically or conceptually 'severs' from the whole bundle of rights just those strands that are interfered with by the regulation, and then hypothetically or conceptually construes those strands in the aggregate as a separate whole thing.

Id. For examples of these various forms of conceptual severance and how they have been applied by courts throughout the years, see Tedra Fox, *Annual Review of Environmental and Natural Resources Law: Land Use Law Takings, Lake Tahoe's Temporary Development Moratorium: Why a Stitch in Time Should Not Define the Property Interest in a Takings Claim*, 28 ECOLOGY L.Q. 399, 400 n.2 (2001) and Marc Lisker, *Regulatory Takings and the Denominator Problem*, 27 RUTGERS L.J. 663, 696-702 (1996) (discussing various ways courts have interpreted property interests).

83. *See* Radin, *supra* note 79, at 1676; *see also* Courtney C. Tedrowe, *Conceptual Severance and Takings in the Federal Circuit*, 85 CORNELL L. REV. 586, 592-93 (2000) ("Conceptual severance for the purpose of Takings Clause cases views any conceptually distinct aspect of a person's property as a separate strand within the bundle of rights-as property itself.").

framework of *Penn Central's* holding. Instead of focusing on the regulation's impact on the parcel as a whole, conceptual severance separates the land directly affected by the regulation from the unaffected portions.[84] For instance, suppose a regulation completely deprived a landowner of seventy-five percent of his property. Using conceptual severance, a court would ignore the remaining twenty-five percent of the property that is unaffected and only focus on the sections rendered unusable by the regulation; thus concluding that the landowner had lost one hundred percent of the value of his land. Under the *Penn Central* analysis, this same piece of property would be analyzed differently. Using that framework, a court would focus on the value of the land in its entirety, and conclude that because a quarter of the land is unaffected, the land is not deprived of all economically beneficial use.

While the Supreme Court has seemingly applied conceptual severance in several decisions, this line of reasoning is not without fault.[85] Several commentators have noted that conceptual severance is ambiguous, and views property in a vacuum, disregarding the future economic value of property, a key factor in measuring the extent of the loss the landowner has faced.[86]

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84. Radin, *supra* note 79, at 1676.

85. *Compare* Kaiser Aetna v. United States, 444 U.S. 164, 179-180 (1979) (holding that the government's imposition of a public boating easement connecting a private marina to the ocean was a taking based on the principle that it violated the "right to exclude," a fundamental stick in the landowners bundle of rights), *and* Hodel v. Irving, 481 U.S. 704, 717-18 (1987) (finding that a federal regulation affecting the right to dispose of property via intestacy or devise violated the Takings Clause), *with* Agins v. City of Tiburon, 447 U.S. 255, 263 (1980) (noting that because the plaintiffs were able to sell or develop their property after the condemnation period ended, the entire bundle of sticks was not affected, and the government action was thus not a taking in the constitutional sense), *and* Andrus v. Allard, 444 U.S. 51, 65-66 (1979) (using the "parcel as a whole rule to explain why a regulation impacting the right to sell eagle feathers would be viewed as a taking in its entirety, because it only affected 'one strand' of the plaintiffs bundle of rights").

86. *See* Firestone, *supra* note 8, at 286 (describing conceptual severance as "ambiguous" and emphasizing the importance of the future value of one's property in regulatory takings analysis); *see also* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Ass'n, 535 U.S. 302, 331 (2002) ("With property so divided, every delay would become a total ban; the moratorium and the normal permit process alike would constitute categorical takings."); Carla Boyd, Comment, *Temporal Severance and the Exclusion of Time in Determining the Economic Value of Regulated Property*, 36 U.S.F.L. REV. 793, 820 (2002) ("Allowing temporal severance and looking at property in a vacuum could have serious implications.").

E. Temporal Severance: Opening the Door to the *Tahoe* Debate

Temporal severance, by comparison, is a form of conceptual severance used to examine the impact of a temporary regulation, similar to the moratorium at issue in *Tahoe*.[87] Instead of viewing the entire duration of the regulation, temporal severance examines whether a regulation constitutes a "total taking" over a specific period of time.[88] Thus to prove a total taking under this framework, a landowner must show that her property interest was rendered valueless for a certain period of time, regardless of the value of the land after the regulation.[89] This is problematic because a fee simple estate cannot be deprived of all value by a temporary prohibition on economic use in that the property will recover value as soon as the restriction is lifted.[90]

Nevertheless, the Supreme Court's holding in *First English Evangelical Lutheran Church v. County of Los Angeles*,[91] has been interpreted by some as applying temporal severance to temporary takings.[92] In that case, the government enacted a regulation prohibiting construction in an area that had been subject to extensive flooding and damage.[93] The government later repealed the ban on development, and the landowners brought a takings action, alleging the ordinance denied them all economically viable use of their land.[94] The Supreme Court addressed the limited question of whether the county's repeal of the ordinance would be a sufficient remedy if the ordinance was found to violate the Takings Clause.[95]

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87. *See* Boyd, *supra* note 86, at 793-94.

88. *Id.*

89. *See Tahoe-Sierra*, 535 U.S. at 331 ("Petitioners seek to bring this case . . . by arguing that we can effectively sever a 32-month segment from the remainder of each landowner's fee simple estate, and then asking whether that segment has been taken in its entirety by the moratoria.").

90. *Id.* at 1484.

91. First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987).

92. For a discussion of the various interpretations of *First English*, see Boyd, *supra* note 86, at 817-20. *See also* Brief for Petitioner at 29, Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Ass'n, TSPC III, 121 S. Ct. 2589 (2001) (No. 00-1167) ("[S]urely the Court would not have addressed the issue in First English if it believed that the underlying substantive claim could not result in a Fifth Amendment taking as a matter of law.").

93. *First English*, 482 U.S. at 307.

94. *Id.* at 311-12.

95. The majority concluded that an invalidation of an ordinance or its successor ordinance after a period of time, though converting the taking into a "temporary" one, is not a sufficient remedy to meet the demands of the Takings Clause. *Id.* at 319.

The majority concluded that "temporary takings that deny a landowner all use of her property are no different than permanent ones, for which the Constitution clearly requires compensation."[96] *First English's* holding is important because there has been considerable debate over whether the Court implicitly condoned the application of temporal severance in temporary takings analysis.[97] Nevertheless, this language may have fueled the *Tahoe* controversy by sending the message that development moratoriums are fair game for "temporary takings" attacks.[98]

This influence was at the heart of *Tahoe*, because in order to prove a total taking had occurred, the petitioners had to "temporally sever" the thirty-two month segment from which their land was affected by the temporary moratoria, and separate it from the remainder of the landowner's fee simple.[99] Thus in *Tahoe*, the landowners urged the Supreme Court to adopt a categorical rule that any temporary moratorium that deprives a landowner of all economic use is a compensable taking.[100]

II. THE SUPREME COURT'S DECISION IN *TAHOE*

A. *Tahoe*—Behind the Scenes

Lake Tahoe, one of the most beautiful natural settings in the United States, has been approaching an environmental breaking point since the 1960s.[101] Its exceptional clarity and pristine blue waters are a result of the absence of algae that obscures the waters

96. *Id.* at 318.

97. *See* Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1619 (1988) (noting that in his dissenting opinion in *First English*, Justice Stevens feared that the "majority unambiguously bought into the general doctrine of conceptual severance by time shares"); Fox, *supra* note 82, at 423 ("Conceptual severance is too susceptible to manipulation to achieve fairness consistently, can actually thwart efficient distribution of resources, and is incompatible with the evolution of sustainable and sound land use practices."); Boyd, *supra* note 86, at 805 (citing Steven J. Eagle, *Just Compensation for Permanent Takings of Temporal Interests*, 10 FED. CIR. B.J. 485 (2001) (arguing that compensation must be provided for a temporary development moratorium)).

98. *See* Fox, *supra* note 82, at 409. This is despite the fact that the Court stated that the state's authority to enact safety regulations may insulate the ordinance from a takings finding. *Id.* On remand, the lower court found that the ordinance 'advanced the preeminent state interest in public safety and did not deny the appellant all use of its property.' *Id.* at n.51. The court reasoned that the pre-existing use of the land could continue because camping activities could still be conducted on the property. *Id.* (citing First English Evangelical Lutheran Church v. Los Angeles County, 210 Cal. App. 3d. 1353, 1356 (1989)).

99. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Ass'n, 535 U.S. 302, 331-32 (2002).

100. *Id.* at 307.

101. *Id.*

of most other lakes.[102] Historically, the lack of nitrogen and phosphorous, which nourish the growth of algae, has ensured the transparency of its waters.[103] An influx of residences, casinos, resorts, and other development in the area, however, eventually replaced the native vegetation with impervious surfaces.[104] This "impervious coverage," such as asphalt, concrete, buildings, and even packed dirt, prevents precipitation from being absorbed by the soil.[105] As a result, water is gathered and concentrated in larger amounts, which has led to increased surface run-off, flooding, and soil erosion.[106] Lake Tahoe was fed a steady diet of nitrogen and phosphorous, which in turn had a distinct affect on the lake's famous clarity.[107] Given this trend, the District Court predicted that "unless the process is stopped, the lake will lose clarity and its trademark blue color, becoming green and opaque for eternity."[108]

The areas in the Basin that have steeper slopes produce more runoff, and therefore are usually considered "high hazard" lands.[109] Moreover, certain areas near streams or wetlands, known as "Stream Environment Zones" ("SEZs") are especially vulnerable to the impact of the development because, in their natural state, they act as filters for much of the debris that runoff carries.[110] Because the best way to alleviate this problem is to restrict or prevent development around the lake, particularly in areas already naturally prone to runoff, conservation efforts have focused on controlling growth in these highly sensitive areas.[111]

In the 1960s, the legislatures of Nevada and California adopted the Tahoe Regional Planning Compact,[112] which set goals for the

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102. *Id.*

103. According to a Senate Report:

> Only two other sizable lakes in the world are of comparable quality—Crater Lake in Oregon, which is protected as part of the Crater Lake National Park, and Lake Baikal in the former Soviet Union. Only Lake Tahoe, however, is so readily accessibly from large metropolitan centers and is so adaptable to urban development.

Id. at n.2.

104. *Id.* at 308.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* The District Court there also added: "Or at least, for a very, very long time. Estimates are that, should the lake turn green, it could take over 700 years for it to return to its natural state, if that were ever possible at all." *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 309.

protection and preservation of the lake and created the Tahoe Regional Planning Association ("TRPA"), "to coordinate and regulate development in the Basin and to conserve its natural resources."[113] Over the years, the state legislatures amended the compact's conservation plan several times.[114]

The two moratoria at issue in *Tahoe* were adopted by the TRPA to maintain the status quo while studying the impact of development on Lake Tahoe, and design a strategy for environmentally sound growth.[115] The first, Ordinance 81-5, was effective from August 24, 1981 to August 26, 1983. The second, more restrictive Resolution 83-21 was in effect from August 27, 1983 to April 25, 1984.[116] As a result of these two directives, virtually all development on a substantial portion of the property subject to the TRPA's jurisdiction was prohibited for a period of thirty-two months.[117] The petitioners, real estate owners affected by the moratoria, filed parallel suits, later consolidated, claiming that the TRPA's actions constituted a taking of their property without just compensation.[118] Following the partial/total framework for regulatory takings, the District Court concluded that the TRPA's moratoria had not effectuated a "partial taking" under *Penn Central* analysis,[119] but did constitute a "total taking" under the categorical rule announced in *Lucas*,[120] because the TRPA temporarily de-

113. *See id.* (quoting Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency, 440 U.S. 391, 394 (1979)).

114. For a general discussion of this, see *Tahoe-Sierra*, 535 U.S. at 309-14.

115. *Id.* at 306.

116. *Id.* For a brief overview of these moratoria, see *supra* notes 11-12 and accompanying text.

117. *Tahoe-Sierra*, 535 U.S. at 306.

118. *Id.* at 312.

119. The District Court began its constitutional analysis by identifying the distinction between a direct government appropriation of property without just compensation and a government regulation that imposes such a severe restriction on the owner's use of property that it produces "nearly the same result s a direct appropriation." Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F. Supp. 2d 1226, 1238 (Nev. 1999). It then stated that a "regulation will constitute 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." *Id.* at 1239. The District Court rejected the first alternative, finding that "further development on high hazard lands such as the petitioners would lead to significant additional damage to the lake." *Id.* at 1240. With respect to the second alternative, the court first considered whether the analysis adopted in *Penn Central* would lead to the conclusion that the TRPA had effected a "partial taking," and then whether those actions effected a "total taking." *Id.* at 1240. Under this analysis, it found a taking had not occurred. *Id.*

120. The District Court concluded that because the moratoria had denied the landowner of "all economically viable use" for a period of time, it was a total taking under the *Lucas* rule. *Id.* at 1245.

prived petitioners of all economically viable use of their land.[121] The Court of Appeals of the Ninth Circuit reversed, holding that the District Court's "total takings" analysis was incorrect in that the "temporary" regulation did not deprive the landowner of "all economically viable use" of his property.[122] The Ninth Circuit noted that because the regulation was only temporary in nature, the moratoria only partially affected the petitioner's property interest, and thus did not meet the "total" deprivation of value required to constitute a categorical taking under *Lucas*.[123] The Ninth Circuit thus rejected the petitioner's argument of conceptually severing the property interest into temporal segments, instead focusing on the impact of the moratoria on the value of the parcel as a whole.[124] Because of the importance of the case, the Supreme Court granted certiorari, limiting the question to whether a moratorium on development, imposed during the process of devising a comprehensive land-use plan, constitutes a categorical taking of property requiring compensation under the Takings Clause.[125]

B. The *Tahoe* Court's Decision

1. *Refusal to Adopt a Categorical Rule for Temporary Takings*

The first aspect of the Supreme Court's holding was its refusal to adopt the categorical, per se rule that any deprivation of all eco-

121. Although the court was satisfied that the petitioner's property did retain some value during the moratoria, it found that they had been temporarily deprived of "all economically viable use of their land." *Id.* at 1245. The court thus concluded that those actions therefore constituted "categorical" takings under the *Lucas* decision. *Id.* (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030 (1992) (holding that a regulation that deprives a landowner of all economically viable use of his property must receive compensation)).

122. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 216 F.3d 764, 774 (9th Cir. 2000).

123. *Id.*

124. Property interests may have many different dimensions. For example, a property interest may include a physical dimension (which describes the size and shape of the property in question), a functional dimension (which describes the extent to which an owner may use or dispose of the property in question), and a temporal dimension (which describes the duration of the property interest). At the base, the plaintiff's argument is that we should conceptually sever each plaintiff's fee interest into discrete segments in at least one of these dimensions, the temporal one, and treat each of those segments as separate and distinct property interests for purposes of takings analysis. *Id.* Under this theory, they argue that there was a categorical taking of one of those temporal segments. *Id.* Putting to one side "cases of physical invasion or occupation," the court read the cases involving regulatory taking claims to focus on the impact of the regulation on the parcel as a whole. *Id.* at 776.

125. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 306 (2002).

nomic use, no matter how brief, constitutes a compensable taking.[126] Writing for the majority, Justice Stevens noted that since the petitioners only made a facial attack on the moratorium,[127] they faced an "uphill battle"[128] made especially steep by their desire for a categorical rule requiring compensation whenever the government imposes such a moratorium on development.[129]

This is noteworthy for several reasons. First, acceptance of the petitioners' categorical rule would diminish the importance of factors such as the landowners' reasonable investment backed expectations, the actual impact of the regulation on the individual, the importance of the public interest served by the regulation, and the reasons for imposing the temporary restriction, all of which are critical in determining the affect of the regulation on the landowner.

Second, acceptance of an extreme and narrow categorical rule would severely hinder the government in its ability to employ temporary land use procedures that are necessary to regulate the public's "health, safety, and welfare."[130] Such a rule would undoubtedly restrict or alter the legislature's ability to exercise police power in certain instances. As Justice Holmes warned in *Pennsylvania Coal*, "[G]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[131]

Third, categorical rules, when applied to regulatory takings, only serve to create ambiguity and confusion. Land use regulations are ubiquitous and most impact property values in some tangential,

126. *Id.* at 334.

127. *Id.* at 320-21 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

> For the petitioners, it is enough that a regulation imposes a temporary deprivation—no matter how brief—of all economically viable use to trigger a per se rule that a taking has occurred. Petitioners assert that our opinions in *First English* and *Lucas* have already endorsed their view, and that it is a logical application of the principle that the Takings Clause was 'designed to bar government from forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole.'

Id.

128. *Id.* at 320 (quoting Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495 (1987)).

129. *Id.* at 320.

130. *Id.* at 334-35 ("Petitioners' broad submission would apply to numerous normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like, as well as to order temporarily prohibiting access to crime scenes, businesses that violate health codes, fire-damaged buildings, or other areas that we cannot now foresee.").

131. Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

completely unanticipated way.[132] They are more difficult to define than physical takings, which are relatively rare and easily identified.[133] Treating them all as per se takings would "transform government regulation into a luxury few governments could afford," and severely inhibit the ability of legislatures to exercise police power in permissible situations.[134] Thus, when analyzing regulatory takings, the *Tahoe* Court was prudent in following Justice O'Connor's concurrence in *Palazollo v. Rhode Island,*[135] in which she urged the Court to resist the "temptation to adopt what amounts to per se rules in either direction" and "carefully examine and weigh all of the relevant circumstances" in making their decision.[136]

2. Tahoe's *Rejection of Conceptual Severance*

Another key aspect of the *Tahoe* holding was the Supreme Court's rejection of conceptual severance.[137] The theory of conceptual severance was at the heart of the *Tahoe* controversy, because in order to prove a categorical taking, the plaintiffs needed to demonstrate that the thirty-two month development moratorium denied "all beneficial or productive use" of their land.[138] They urged the Court to temporally sever this thirty-two month segment from the remainder of each landowner's fee simple estate, and then ask whether that segment has been deprived of all value by the moratoria.[139]

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132. *Tahoe-Sierra,* 535 U.S. at 324 .

133. *Id.*

134. *Id.*

135. 533 U.S. 606, 636 (2001) (O'Connor, J., concurring).

136. *Id.*

137. *Tahoe-Sierra,* 535 U.S. at 331.

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

Id.

138. To prove a per se, categorical taking, the plaintiff must show: 1) he has suffered a permanent physical occupation of his property as the result of government action; or 2) he has been denied "all economically beneficial or productive use of his land." *See, e.g.*, Lucas v. S.C. Coast Council, 505 U.S. 1003, 1016 (1992); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 427 (1982).

139. *Tahoe-Sierra,* 535 U.S. at 331.

This form of conceptual severance is problematic in two ways. First, to make this determination, one must calculate the proportion of the plaintiff's property that the moratorium affects, and then compare the property's value after the regulation (the numerator) with its value before the regulation (the denominator).[140] Courts have routinely wrestled with this test[141] because if the denominator is defined broadly enough, a taking may never result. If, however, it is defined narrowly, a taking almost always will be found.[142] The Court's decisions in *Pennsylvania Coal*[143] and *Keystone Bituminous*[144] provide a vivid illustration of how the identity of the denominator can tilt the wheels of takings law towards a particular outcome. Both cases involved challenges of a Pennsylvania law that prevented the removal of coal from underground "support estates" as a legitimate regulatory exercise of health, safety, and welfare. In *Pennsylvania Coal*, the Court appeared to have viewed the support estate as both the numerator and denominator in the takings equation, thus finding a compensable taking.[145] In *Keystone*, however, the Court seemed to enlarge the denominator to include the company's mineral, surface, and support estates, and found that no taking had occurred.[146] Thus identifying the relevant parcel is crucial in regulatory takings analysis. Because the *Tahoe* Court focused on the aggregate of the landowner's parcel, rather than just a slice of the fee simple, they may have sparked the movement toward identifying all of the landowner's holdings as the relevant parcel in takings cases.

140. *See* Lisker, *supra* note 82, at 666 (discussing the struggles courts have had in determining the relevant denominator in Takings claims).

141. As Justice Scalia observed in *Lucas*, the rule does not make clear the "property interest" against which the loss of value is to be measured. *Lucas,* 505 U.S. at 1016. When, for example, a regulation requires a developer to leave ninety percent of a rural tract in its natural state, it is "unclear whether we would analyze the situation as one which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in the value of the tract as a whole." *Id.* at 1016.

142. *See id.* at 1065 (Stevens, J., dissenting).

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

144. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 470 (1987).

145. *Pa Coal Co.*, 260 U.S. at 414.

146. The petitioners in *Keystone* "sought to narrowly define certain segments of their property" by contending that the support estate had been taken. *Keystone Bituminous Coal Ass'n*, 480 U.S. at 496-97. The Court viewed the support estate as "merely a part of the entire bundle of rights" and concluded that there was no taking because "petitioners retain the right to mine virtually all of the coal in their mineral estates." *Id.* at 501.

Second, conceptual severance focuses only on the present value of the property, and ignores any future value the property may have. This future economic value is crucial in determining both the present value of one's property,[147] and the actual loss the landowner has sustained as a result of the regulation. For instance, if a temporary regulation significantly increases the value of the land post-regulation, the harm done to the landowner is minimized.

Tahoe's holding is important because it signals a possible movement towards defining property in this context—by viewing all of the landowner's property interests as compromising the denominator in takings cases.[148] The Court reasoned that the moratoria had only affected a small portion of the landowner's property interest—the temporal one—and held that the *Lucas* rule of "complete obliteration of value of the parcel" did not apply.[149] By focusing on both the present and the future value of a fee simple estate, the *Tahoe* Court recognized that a landowner's loss must be viewed in its entirety, and not by conceptual severance.[150]

III. PROBLEMS WITH *TAHOE*

A. The Dilemma of Partial/Total Takings Analysis

In *Tahoe*, the Supreme Court noted that had the petitioners challenged their takings claim in a different fashion, they may have prevailed.[151] Rather than challenging the application of the moratoria on their individual parcels of land, the petitioners made a broad facial challenge, claiming a categorical total taking.[152] The Court viewed their proposed categorical rule as simply "too blunt an instrument" to decide regulatory takings claims.[153] Because the

147. *See* Boyd, *supra* note 86, at 805 ("In order to determine the present economic value of property, the future value is an essential element.").

148. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Ass'n, 535 U.S. 302, 329-32 (2002).

149. *Id.* at 330 ("[O]ur holding in *Lucas* was limited to the extraordinary circumstances when *no* productive or economically beneficial use of land is permitted." (citing Lucas v. S. C. Coastal Council, 505 U.S. 1003, 1017 (1992))).

150. *Id.* at 331-32 ("An interest in real property is defined in metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner's interest. Both dimensions must be considered if the interest is to be viewed in its entirety." (citation omitted)).

151. *Id.* at 321 n.16 ("It may be true that under a *Penn Central* analysis petitioners' land was taken and compensation would be due. But petitioners failed to challenge the District Court's conclusion that there was no taking under *Penn Central.*")

152. *Id.* at 317-18.

153. *Id.* at 342 ("There may be moratoria that last longer than one year which interfere with reasonable investment-backed expectations, but as the District Court opinion illustrates, the petitioners' proposed rule is "too blunt an instrument" for

petitioners limited their challenge to a broad facial takings claim, the court only looked at the "mere enactment of the regulation" and not its application to any particular plaintiff.[154] Accordingly, the Court held that the circumstances of the case were best analyzed within the partial takings framework, rather than the total taking that the petitioners sought to prove.[155] Thus, *Tahoe* continued to perpetuate the distinction between partial and total takings. This partial/total analysis has been used by courts to explain the difference between regulations that leave landowners with some use of their property and those that leave land with no use at all. Governmental entities commonly use this dichotomy as a defense to takings claims because, as noted, under current case law most regulations will fall short of depriving landowners all use of their property.[156] This distinction is problematic for a number of reasons.

First, under this analysis, a landowner whose property is ninety-five percent diminished in value will likely recover nothing, while an owner whose property is one hundred percent diminished recovers the land's full value.[157] As noted, the Supreme Court rarely finds a taking compensable under the partial takings analysis, and will generally deny compensation as long as the regulation furthers a legitimate governmental goal.[158] For example, a partial taking on property resulting in multi-million dollar loss may result in no compensation, whereas a total taking on land resulting in only a minimal loss of value to the property owner will result in complete compensation. This can lead to the anomalous situation where a "partial" taking, for which the landowner does not receive compensation, results in a much greater monetary loss than another landowner's "total" compensable taking.[159]

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identifying those cases." (quoting Palazollo v. Rhode Island, 533 U.S. 606, 628 (2001))).

154. *Id.* at 318 ("Moreover, because petitioners brought only a facial challenge, the narrow inquiry before the Court of Appeals was whether the mere enactment of the regulations constituted a taking.").

155. *Id.* at 321 ("Resisting the 'temptation to adopt what amount to per se rules in either direction,' we conclude that the circumstances in this case are best analyzed within the *Penn Central* framework." (quoting *Palazollo*, 533 U.S. at 636 (O'Connor, J., concurring))).

156. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1028 (1992) (noting that it is 'relatively rare' that a total taking is found); *see also supra* notes 68-71 and accompanying text.

157. *Lucas,* 505 U.S. at 1064 (Stevens, J., dissenting).

158. *See supra* notes 68-71 and accompanying text.

159. Bongard, *supra* note 3, at 403 (criticizing this partial/total dichotomy).

Yet another problem with this distinction is that the Fifth Amendment does not distinguish between partial and total takings. The text explicitly states that what is taken must be compensated.[160] Thus the analytical framework may be at odds with precedent, because the Supreme Court has, on many occasions, fully compensated partial takings to the extent of the value taken from their land.[161] While many of these takings were physical in nature, it seems troublesome to distinguish these from partial regulatory takings because a restriction on the use of one's land often has the same effect as an actual physical invasion. From the landowner's standpoint, there is no difference between a physical invasion that occupies part of her property or a regulation that partially deprives her of its use. As the Supreme Court stated in *United States v. Causby*, "[I]t is the owner's loss, not the taker's gain, which is the measure of the value of property taken."[162]

Finally, many view this partial/total distinction as an invitation for the government to take property without paying compensation.[163] With the state of current regulatory takings framework, it is unlikely that any legislature will impose a regulation that encompasses all of a landowner's property, when they can regulate the majority of someone's property and probably not have to pay compensation. As Professor Richard Epstein has noted, "[T]he court has provided an effective blueprint for confiscation that budget-conscious state legislators will be eager to follow to the letter."[164]

B. The Majority's Use of Temporary/Permanent Labeling

Another problem with the *Tahoe* decision was the Supreme Court's distinction between "temporary" and "permanent" regula-

160. U.S. CONST. amend. V.

161. *See, e.g.*, First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304, 322 (1987) (holding that if a taking has occurred, it is irrelevant whether the government regulation is permanent or temporary); Griggs v. Allegheney County, 369 U.S. 84, 90 (1962) (holding that a landing path for an airport that interfered with the plaintiff's air rights was an easement and thus compensable under the Fifth Amendment); United States v. Causby, 328 U.S. 256, 267 (1946) (finding a compensable taking in the form of an easement, even though many uses of the land remained available to the plaintiff).

162. *Causby*, 328 U.S. at 261.

163. *See* Epstein, *supra* note 68, at 1377 ("Partial takings . . . though virtually total in form, will remain uncompensated."); Boyd, *supra* note 86, at 406 (noting this dichotomy may be inconsistent with the another purpose of the Takings Clause—to restrain the appetite of the government).

164. Epstein, *supra* note 68, at 1377.

tions.[165] In his dissent, Chief Justice Renquist noted that neither the Takings Clause, nor case law supports such a finding.[166] To that end, the Supreme Court's decision in *First English* explicitly states that when a compensable taking has occurred, its irrelevant whether the regulation is temporary or permanent in nature.[167] Nevertheless, the Court in *Tahoe* distinguished "temporary" regulations from "permanent" ones in their takings analysis.[168] This is problematic, because courts may interpret this decision as implying that the takings question turns "entirely on the initial label given to a regulation, a label that is often without much meaning."[169] Land use regulations, however, are often very tenuous. There are many instances where a regulation that permanently restricts the use of one's land is later repealed, altered, or withdrawn. In *Lucas*, the "permanent" prohibition the Court held to be a taking lasted less than two years, because it was eventually amended to allow the issuance of certain residential development.[170] By contrast, the "temporary" moratoria at issue in *Tahoe* lasted thirty-two months.[171] Allowing this permanent/temporary labeling into regulatory takings jurisprudence creates the incentive for legislative bodies to label all regulations "temporary" and repeatedly extend them for long periods of time.[172]

IV. A DIFFERENT FRAMEWORK FOR REGULATORY TAKINGS ANALYSIS

Regulatory takings jurisprudence needs reevaluation. This important area of law has become muddled with confusing and conflicting concepts such as conceptual severance, temporary/permanent labeling, and the partial/total takings distinction. It is disconcerting when a landowner could have the majority of her land restricted by a regulation, suffer a significant economic loss,

165. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Ass'n, 535 U.S. 302, 331-33 ("Hence, a permanent deprivation of the owner's use of the entire area is a taking of 'the parcel as a whole,' whereas a temporary restriction that merely causes a dimunition in value is not.").

166. *Id.* at 346-48 (Renquist, C.J., dissenting).

167. *See* First English Lutheran Evangelical Church v. Los Angeles County, 482 U.S. 304, 318 (1987) ("Temporary takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation.").

168. *Tahoe-Sierra*, 535 U.S. at 332.

169. *Id.* at 346-48.

170. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1011-12 (1992).

171. *Tahoe-Sierra*, 535 U.S. at 346-48.

172. *Id.*

and yet still be unsure whether or not she will receive compensation under a Fifth Amendment takings claim. Unfortunately, this is often the case under currents takings law jurisprudence.

The Supreme Court's decision in *Tahoe* helped ease this concern by rejecting the doctrine of temporal severance, and endorsing the dismissal of conceptual severance from takings analysis.[173] Nevertheless, the Court's holding failed to extinguish the partial/total distinction that has made defining a landowner's property interest difficult, and may have introduced the permanent/temporary labeling of regulations to the takings framework.[174]

Instead of relying on this confusing approach, the Court should adopt a takings analysis that measures loss from the standpoint of the landowner. As noted, this partial/total distinction is flawed because it generally leads to uncompensated deprivation of property that is inconsistent with the purposes of the Fifth Amendment.[175] Eliminating this distinction, and determining value in accordance with what the landowner has actually given up, would prevent landowners from "bearing public burdens that should be borne by the public as a whole."[176] This distinction between total and partial takings should only be relevant when determining how much compensation is required, or when attempting to decipher the actual loss of the property owner. Thus, a just application of the Takings Clause requires the government to compensate property owners for what they have taken. After all, "[I]t should be the owner's loss, not the taker's gain, that is the measure of the value of property taken."[177]

Critics of this maxim point to Justice Holmes' statement in *Pennsylvania Coal*, where he warned that "government could hardly go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law."[178] It is possible, however, under the proposed takings analysis to protect the constitutional rights of property owners and prevent legislatures from facing the financial constraints of compensating property owners for every government regulation. First, petitioners must overcome the nuisance exception by showing that they are not using their property in a way contrary to the

173. *Id.* at 330.
174. *Id.* at 346-48.
175. *See supra* notes 155-163 and accompanying text.
176. Armstrong v. United States, 364 U.S. 40, 49 (1960).
177. United States v. Causby, 328 U.S. 256, 261 (1946).
178. Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

"background principles of the State's law of property and nuisance already placed upon land ownership."[179] Otherwise, the regulation is a permissible exercise of police power, and not compensable. Second, following Justice O'Connor's advice in *Palazzollo*, takings claims must be carefully examined by "weighing all of the relevant circumstances and particular facts of each case."[180] Courts would balance a number of factors in this analysis, such as those outlined in *Penn Central*.[181] Thus the plaintiff would have to show evidence of actual financial loss as a result of the regulation, and that no reciprocal benefit is created in their property that negates any loss they would have. This takes into account both the present and future value of the land, because these two concepts are clearly intertwined when measuring a landowner's loss.

Similarly, this temporary/permanent labeling suggested by the *Tahoe* court should be discarded, because it is inconsistent with the tenuous nature of land use regulations and can only lead to inequitable results.[182] From a landowner's standpoint, it is irrelevant whether he suffers severe economic loss at the hands of a "temporary" or "permanent" regulation. While the length of a regulation is a factor in determining its overall reasonableness, consistency with State property law, and effect upon the landowner, the labeling of such regulations only serves to create confusion and encourage the uncompensated deprivation of property.[183]

These factors discussed above provide an ample filter for takings claims. If plaintiffs are able to overcome these hurdles, it is likely they have been the victim of a taking compensable under the Fifth Amendment. As illustrated in examples throughout this Comment our takings jurisprudence is in need of some repair. By focusing on the nature and extent of the landowner's loss and evaluating takings on a case-by-case basis, courts can uphold the protection of private property set forth in the Bill of Rights.

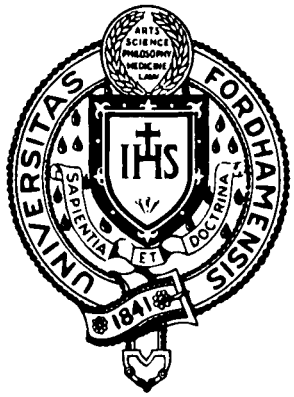
179. *Tahoe-Sierra*, 535 U.S. at 350-51.

180. Palazollo v. Rhode Island, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring).

181. The *Penn Central* factors include: 1) the economic impact of the regulation on the claimant, 2) the extent that the regulation interferes with the landowners "reasonable investment-backed expectations," and 3) the overall character of the government action. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

182. *See supra* notes 168-171 and accompanying text.

183. *Id.*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