Temporary Insanity: The Long Tale of Tahoe-Sierra Preservation Council and its Quiet Ending in the United States Supreme Court

J. David Breemer

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ARTICLES

TEMPORARY INSANITY: THE LONG TALE OF TAHOE-SIERRA PRESERVATION COUNCIL AND ITS QUIET ENDING IN THE UNITED STATES SUPREME COURT

J. David Breemer*

I. INTRODUCTION

On April 23, 2002, the United States Supreme Court issued its decision in Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,¹ a case involving the question whether a temporary building moratorium that prevents all economically beneficial uses of property during its effective period amounts to a taking of private property requiring just compensation.² In a narrow decision, the Court held that the balancing test of Penn Central Transportation Co. v. New York City,³ rather than a per se rule similar to that announced in Lucas v. South Carolina Coastal Council,⁴ determines whether compensation is required for land use regulations designed temporarily to freeze all property development.⁵ For the Tahoe area landowners who argued for application of Lucas’ categorical takings rule, the Court’s decision ends a battle that has raged in the courts for almost two decades.

¹ 122 S. Ct. 1465 (2002) [hereinafter Tahoe-Sierra].
² See id. at 1470-73. The Takings Clause of the Fifth Amendment to the U.S. Constitution provides, “[N]or shall private property be taken for public use, without just compensation.”
³ 438 U.S. 104 (1978). The Penn Central takings test considers such factors as “the regulation’s economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action.” (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001)).
⁴ 505 U.S. 1003, 1019 (1992) (holding that “when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking”).
⁵ See Tahoe-Sierra, 122 S. Ct. at 1489-90.
The dispute has its origins in the 1970s, when the Tahoe Regional Planning Agency ("TRPA") began implementing land use regulations in the Tahoe basin in an effort to halt the growth of algae in Lake Tahoe. The agency's efforts culminated in a 1981 "temporary" ban on development that, for many area property owners, has remained in place to this day, making it impossible for these owners to build vacation and retirement homes planned long before the agency took steps to preclude residential construction.

In 1984, TRPA's aggressive regulatory tactics prompted the owners of more than 450 single-family lots to file suit against the agency as Tahoe-Sierra Preservation Council ("The Council"), in an effort to establish that the agency owed compensation for taking private property pursuant to the Fifth Amendment to the United States Constitution. Since then, the case of Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency has produced five published federal district court opinions, almost an equal number of opinions from the Ninth Circuit, two denials of certiorari from the Supreme Court and now, a Supreme Court opinion. In TSPC IV, the last Ninth Circuit opinion, the Court of Appeals extinguished the only claims that had survived the courts' slow and systematic whittling

6. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency ("TSPC IV"), 216 F.3d 764, 768 (9th Cir. 2000). In order to distinguish the Supreme Court's opinion in the Tahoe dispute, it will be referred to as "Tahoe-Sierra." All of the Ninth Circuit's previous decisions in the case will be referred to as "TSPC" followed by a numeral to indicate the particular iteration of that court's review. District court decisions in the case will simply be referred to as "TSPC."

7. See Michael M. Berger, What's "Normal" About Planning Delay?, in Taking Sides on Takings Issues: Public and Private Perspectives 273, 279 (Thomas E. Roberts ed., 2002) [hereinafter Taking Sides] ("Through this series of rolling enactments, TRPA has effectively blocked construction of [some Tahoe landowners'] homes for the past two decades, and that prohibition has become permanent.").

8. See Tahoe-Sierra, 122 S. Ct. 1465, 1473 (2002) (noting that 400 members of the Council "purchased their properties prior to the effective date of the 1980 Compact... primarily for the purpose of constructing 'at a time of their choosing' a single-family home 'to serve as a permanent, retirement or vacation residence').

9. TSPC IV, 216 F.3d at 769.


away of the Council's action by concluding that a 1981-1984 moratorium on development did not take their property, even though it precluded all economically beneficial use of land during its effective period. It was this decision that prompted the High Court's intervention.

In granting certiorari in *Tahoe-Sierra*, the Court positioned itself to clarify the scope of *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, a case traditionally read to require compensation for excessive property restrictions, whether temporary or permanent in nature. More particularly, *Tahoe-Sierra* raised the question whether *First English* compelled courts to look solely at the effective period of a temporary restriction when engaging in takings analysis, or whether it allowed them to consider the impact of such regulations in the context of the entire temporal life of a parcel. Ultimately, the Court adopted the latter view and went on to conclude that, with respect to the temporal dimension of property, the relevant parcel is the "temporal whole." This determination effectively restricts *Lucas* to cases involving "permanent" land use restrictions and thus elevates the prominence of *Penn Central* in the temporary takings calculus. Unfortunately, since the Council's

16. See infra notes 145, 169 and accompanying text.
17. See *TSPC IV*, 216 F.3d at 778. This problem is traditionally called the "denominator" or "relevant parcel" question and is explained by the Court in *Keystone Bituminous Coal Ass'n v. DeBenedictus*:

> Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property "whose value is to furnish the denominator of the fraction." 480 U.S. 470, 497 (1987) (quoting Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1192 (1967)).

In practice, the relevant parcel issue typically involves a determination of whether a portion of the claimant's property can be isolated for takings analysis. As a result, some have taken to referring to the issue as the problem of "conceptual severance." See, e.g., Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 Colum. L. Rev. 1667, 1674 (1988). In *TSPC IV*, the Ninth Circuit utilizes the "conceptual severance" terminology. See *TSPC IV*, 216 F.3d at 774. This paper will generally refer to the overall issue as the "relevant parcel" problem. In any event, as the Court notes above, the issue is often of critical importance: if the relevant parcel is defined narrowly, there is a greater likelihood that the challenged regulation will prevent all economically viable use of property and therefore amount to a per se taking under *Lucas*. On the other hand, if the relevant parcel is defined more broadly, some beneficial use will typically be present, thus triggering application of *Penn Central*'s balancing test. See generally John E. Fee, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. Chi. L. Rev. 1535 (1994).

19. See id. at 1484 (noting that *Lucas* was "carved out" for the case where regulation "permanently" idles a piece of property).
20. See id. at 1486 (describing *Penn Central*'s ad-hoc factual approach as "the
claims proceeded solely under *Lucas*, the emergence of *Penn Central* as the governing standard required the dismissal of their case and, for many elderly property owners, the closing of any opportunity to receive some compensation for being forced to maintain their property as an ecological preserve for approximately two decades.

This article tells the story of the Council’s fight for just compensation under the Fifth Amendment, analyzes the legal issues raised by the Ninth Circuit’s decision and reviews the Supreme Court’s recent opinion. Part II reviews the facts and procedural history of *Tahoe-Sierra*. Part III summarizes the Ninth Circuit’s decision in *TSPC IV*, discusses the Court’s treatment of the difficult issues raised in *Tahoe-Sierra* and comments on the state of takings law after *Tahoe-Sierra*. Part IV explores the rationale underlying the Court’s decision and how it relates to the Supreme Court’s prior takings jurisprudence. Part V concludes that TRPA engaged in a taking under *Penn Central*, if not under the per se rule of *Lucas*.

II. THE ORIGINS OF *TAHOE-SIERRA*

A. Factual History of Tahoe-Sierra Preservation Council

In the late 1950s and early 1960s, it was noted that Lake Tahoe was losing some of its renowned transparency. Lake Tahoe’s declining clarity was subsequently associated with an ecological process in which water accumulates nutrients and begins to support the growth of algae and other organisms that cause clouding. Increased nutrient loading of the lake was in turn tied to higher rates of erosion and runoff in the areas around the lake, which was itself blamed on rapid development of the Tahoe area.
In 1968, California and Nevada set out to address and manage the perceived algae problems at Lake Tahoe by entering into a regional planning compact.25 Approved by the United States Congress a year later,26 the Tahoe Regional Planning Compact ("Compact") created a bi-state body, the Tahoe Regional Planning Agency ("TRPA"), to regulate development in and around the Tahoe Basin.27 In 1972, TRPA took the first major step in that direction by adopting an ordinance that classified all land in the Tahoe Basin into seven "land capability districts."28 Based largely on their susceptibility to runoff, the districts were assigned a "land coverage coefficient—a recommended limit on the percentage of such land that could be covered by an impervious surface."29 Considered to be "high hazard" areas, the steepest lands (designated districts 1, 2 and 3) and properties near streams (termed "stream environment zones" or "SEZs") were assigned the lowest allowable level of coverage.30 This classification system was accompanied by related recommendations for permissible development, but generally did not restrict basic single-family home construction.31

When the 1972 plan failed to produce sufficient improvement in the clarity of Lake Tahoe to satisfy the governments of California and Nevada,32 the states amended the Compact in 1980 to prod TRPA into taking a less generous stance toward residential property development.33 In particular, TRPA was given eighteen months to

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25. Id. at 1232
26. Id. Congressional approval was required because, as a bi-state agreement, the Compact was subject to Article I, section 10, cl. 3 of the Constitution, which provides, 
No state shall, without the Consent of Congress, lay any Duty of Tonnage, Keep Troops, or Ships of War in Time of Peace, enter into any agreement or Compact with another State, or with a foreign power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.
U.S. Const. art. I, § 10, cl. 3 (emphasis added).
27. TSPC, 34 F. Supp. 2d at 1232.
28. Id. Land was divided into districts "based largely on steepness, but also taking into account flood hazard, high water tables, poorly drained soils, landslides, fragile flora and fauna, and soil erodibility." Id.
29. Id. The adopted land capability system recommended that none of the lands in "SEZ" areas be covered by an impervious surface, that only 1% of the lands in "capability district" 1 and 2 be similarly altered and that lands in district 3 remain subject to a 5% limit. Districts 4, 5 and 6 were assigned values of 20%, 25% and 30% respectively.
30. Id.
31. Id. at 1233. ("[A]lthough Ordinance No. 4 adopted the [capability district] system, it allowed numerous exceptions to the coverage recommendations. The building of new residential housing was not particularly limited.")
32. Id. In fact, "California became so dissatisfied that it pulled its funding from TRPA, and its own agency, the California Tahoe Regional Planning Agency (formed in 1967, prior to adoption of the Compact), began to impose stricter regulations on that part of the basin lying within California." Id.
33. Id.
establish new “environmental threshold carrying capacities,” reflecting the level of environmental protection necessary to maintain the scenic and recreational value of the Basin. 34 Twelve months after that, TRPA was expected to enact a new regional plan in keeping with the carrying capacities. 35 Finally, and importantly, TRPA was directed to review all current projects and establish temporary restrictions on development in the basin “pending the adoption of the new regional plan.” 36

1. The 1981-1984 Development Ban

TRPA responded to the 1980 Compact by adopting Ordinance 81-5. Among other things, this ordinance made “grading, clearing, removal of vegetation, filling or creation of land coverage” in districts 1-3 subject to TRPA regulation and thus, to permitting requirements premised on the impervious surface recommendations. 37 While an exception raised the possibility of some residential construction on lands on the Nevada side of the basin in excess of the recommended limits, California properties in the same districts were bound by the impervious surface recommendations. 38 On the other hand, SEZ lands on both sides were strictly regulated, with grading and similar activities absolutely prohibited. 39 Indeed, Ordinance 81-5 provided in part that

Notwithstanding any other provision of this ordinance or of any other ordinance of the Agency, no person shall perform any grading, clearing, removal of vegetation, filling or creation of land coverage, within or upon a stream environment zone (“SEZ”), as described or depicted upon maps contained in the Plan. 40

The overall effect of Ordinance 81-5 was “temporarily [to] prohibit most residential and commercial construction on land capability

34. TSPC IV, 216 F.3d 764, 767-68 (9th Cir. 1994). The Compact specifically defined environmental threshold carrying capacity as an environmental standard necessary to maintain a significant scenic, recreational, educational, scientific or natural value of the region or to maintain public health and safety in the region. Such standards shall include but not be limited to standards for air quality, water quality, soil quality, soil conservation, vegetation preservation and noise.

Id. at 768 n.3.
35. Id. at 768.
36. Id.
38. Id. at 1235. Ordinance 81-5 provided that surface coverage in excess of the recommended limits, up to 20% of the lot, was possible, provided that special findings were made and a permit then obtained. However, this exception applied only to the Nevada side properties because the ordinance also kept water regulations in effect on the California side that called for absolute adherence to the strict surface coverage recommendations. Id. at 1234-35.
39. Id. at 1234.
40. TRPA Ordinance 81-5, § 3.00 (1984).
districts 1, 2 and 3 and SEZs until a new regional plan was developed."

With most development completely halted on both sides of the Basin under Ordinance 81-5, TRPA began to identify the "environmental threshold carrying capacities" required as the basis for a new regional plan by the 1980 compact. When the agency finally completed this process on August 26, 1982, two months past the deadline established by the 1980 Compact, it had about one year left in which to create and finalize the new regional plan contemplated by the amended Compact. As the deadline drew near without any plan in sight, TRPA enacted another temporary moratorium, Resolution 83-21, which suspended all permitting activities for an additional ninety days. This ninety-day period also came and went without completion of the Regional Plan, and the moratorium continued by default until the new plan was finally adopted on April 26, 1984.

2. The 1984 and 1987 Regional Plans

If Tahoe area landowners expected the 1984 Regional Plan to open the door to renewed construction, they were sorely disappointed. The 1984 Plan provided that "no projects proposing any land coverage at all in Class 1-3 and SEZ lands would be considered, with limited exceptions for 'regional public facilities, public outdoor recreation facilities and public works projects.'" In short, private improvements were just as forbidden under the 1984 Plan as under the temporary ordinances. Still, the new plan was not sufficiently restrictive for the State of California and an environmental group. They filed suit against TRPA on the same day the plan was adopted and ultimately succeeded in convincing a judge to issue a preliminary injunction barring implementation of the 1984 Plan. Under the injunction,

41. TSPC, 34 F. Supp. 2d at 1234.
42. Id. at 1235.
43. Id.
44. Id.
45. Id. at 1235-36. It is interesting to note that no official action was ever taken to extend the ban implemented by Resolution 83-21 after the ninety-day period had expired. As the district court explained, At the end of ninety days, the ban was extended—although not by any affirmative action by TRPA, and not, contrary to what the defendants have implied, for any set period of time. The Minutes of the TRPA Governing Board . . . indicate that TRPA staff members advised the Board that the end of the ninety day period was approaching, and that, absent an order by the Board to the contrary, the staff would continue to observe the moratorium, since the conditions that had led to its imposition in the first place still existed.
46. Id. at 1236.
47. Id.
TRPA was precluded from considering any permit applications, a restriction that, once upheld by the Ninth Circuit, remained in place until a completely new regional plan was adopted in 1987. For property owners in districts 1-3 and SEZs, the injunction simply continued TRPA’s 1981 moratorium on residential construction.

On July 2, 1987, TRPA adopted an entirely new Regional Plan, thus ending the injunction against the issuance of development permits. The 1987 Plan sought

- to accomplish three major objectives: (1) to place a ceiling on the total amount of residential development that may occur in the Basin; (2) to control the pace of development by limiting the number of building permits that may be issued each year; and (3) to limit the amount of impervious coverage resulting from permitted development.

To accomplish these goals, TRPA implemented a new system—the Individual Parcel Evaluation System (“IPES”)—for determining which residential lots were suitable for building. Under this scheme, residential lots were required to receive a minimum IPES score, reflecting “the predictable effect of the parcel’s development on the water quality of the Lake,” in order to qualify for construction. From the start, SEZ lands automatically received a score of zero and were thus “ineligible for residential development at any time.”

For the owners of these lands, the changes incorporated into the 1987 Plan failed to change the fact that they were prevented from putting their property to economically beneficial use.

B. The Long and Winding Legal Road

Tahoe area landowners did not wait for the enactment of the 1987 Plan to join the battle over TRPA’s actions in the Tahoe basin. Rather, a group of roughly 700 Tahoe area landowners (approximately 300 of whom have died while waiting in vain for the resolution of their claims) sued TRPA as Tahoe-Sierra Preservation Council soon after the 1984 Plan was proposed, alleging deprivation of all economically beneficial use of their land and violation of their rights to due process and equal protection. The plaintiffs initially

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48. Id.
50. Suitum, 520 U.S. at 729.
52. Id.
54. TSPC, 611 F. Supp. 110, 112 (D. Nev. 1985). The landowners sought injunctive and declaratory relief against TRPA and its directors for violating their rights to due process and equal protection and their rights under the Takings Clause by barring them from “making any reasonable or practical use of their property.” Id.
grouped themselves according to state, with the California landowners
suing in the federal district court for the Eastern District of California
and the Nevada plaintiffs filing a complaint in the Nevada District
Court. Following a Ninth Circuit reversal of adverse decisions in
these two district courts, the cases were consolidated in the Nevada
court. This forced California residents, whose attorney’s offices were
naturally in California, to prosecute their suit, which included claims
against California, in the state of Nevada. In addition to being
grouped by state (a division that continued to exist after
consolidation), the landowners were classed according to the nature of
their property. One group consisted of owners of land within land
capability districts 1-3; the other included owners of SEZ lands.55
Finally, the landowners’ claims were divided by time periods
Corresponding to the effective dates of the various ordinances and
plans challenged by the group.56

1. TSPC I and II: The Ninth Circuit Opens the Procedural Gates

When the landowners’ initial allegations came before them, the
United States District Courts for Nevada and the Eastern District
Court of California dismissed all of the Council’s claims on sovereign
immunity or ripeness grounds.57 More specifically, both courts...

The plaintiffs also sought money damages from TRPA, Nevada and California for
violations of the Takings Clause. TSPC additionally requested just compensation,
injunctive and declaratory relief because the 1984 Regional Plan deprived them of the
benefits of public improvements and therefore violated their rights under the due
process, contract, equal protection and takings clauses. Finally, TSPC alleged that
TRPA “inversely condemned” their property under 42 U.S.C. § 1983. On this theory,
it asked for injunctive relief and money damages against all defendants, including the
members of the governing board of TRPA. Id.

55. See TSPC IV, 216 F.3d 764, 769 (9th Cir. 1994).
56. See id. TSPC’s claims were initially divided into three time periods:
Period I covers August 24, 1981, to August 26, 1983, the time during which
Ordinance 81-5 was in effect; Period II covers August 27, 1983, to April 25,
1984, the time during which Resolution 83-21 was in operation; Period III
covers April 26, 1984, to July 1, 1987, the period that ran from the enactment
of the 1984 plan to the enactment of the 1987 Plan . . . .

Id.

Later, after TSPC was allowed to include a claim based on the 1987 Plan, a
Period IV was added that “covers July 2, 1987, to the present, the time during which
the 1987 Plan has been in effect.” Id. For the purposes of clarity, this article will refer
to the various period-claims by regulation and/or associated dates.

57. In the initial proceedings, the Nevada district court dismissed the SEZ
landowners’ takings claims against California and Nevada on the ground that the
states were immune from suit under the Eleventh Amendment to the U.S.
Constitution. TSPC, 611 F. Supp. 110, 115-16 (D. Nev. 1985). The court also held that
TRPA was immune from the takings claims asserted by SEZ landowners because the
agency did not have the power to condemn property and thus could not be forced into
such an act by an action for inverse condemnation under the Takings Clause. Id. at
116. This portion of the decision was based on Jacobson v. Tahoe Regional Planning
Agency, 566 F.2d 1353, 1358 (1977) aff’d in part, rev’d in part on other grounds sub
apparently rejected the takings claims on the ground that TRPA was immune from suit on such a basis because it had no formal power to take private property. On appeal in *TSPC I*, the Ninth Circuit reversed the Nevada district court’s judgment that the Nevada plaintiffs’ suit would not lie because the agency lacked formal authority to condemn property. In the same decision, the Ninth Circuit held that the Council’s takings claims were not rendered moot by the enactment of the 1987 Regional Plan. Citing the Supreme Court’s decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, the Ninth Circuit declared: “if Ordinance 81-5 or the 1984 Plan effected a taking, even for a short time, plaintiffs are entitled to just compensation for that temporary taking.” In sum, *TSPC I* allowed the Nevada SEZ plaintiffs’ claims for just compensation to go forward with respect to the planning moratorium in effect between August 29, 1983 and April 26, 1984, and permitted the class 1-3 landowners to assert the same claim for the eight month period in which Resolution 83-21 extended the 1981 moratorium.

In *TSPC II*, a different panel of the Ninth Circuit relied heavily on the decision in *TSPC I* to review the claims of the California plaintiffs. Although the *TSPC II* panel adopted most of the holdings in the Nevada case, its decision differed inasmuch as it determined that the takings claims of all the California landowners were ripe with respect to Ordinance 81-5. The court also rejected the conclusion

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(1979), an earlier case in which the Ninth Circuit rejected a takings claim against TRPA on the ground that it had no power to condemn property. As to the takings claims asserted by the class 1-3 landowners, the court granted summary judgment for TRPA and its directors on the ground that these plaintiffs had failed to avail themselves of the exceptions allowing for the possibility of construction by Nevada property owners. Their claims were, therefore, unripe. *TSPC*, 638 F. Supp. 126, 132-33 (D. Nev. 1986).


59. *TSPC I*, 911 F.2d 1331, 1341-42 (9th Cir. 1990).

60. Id. at 1335. The court also reinstated the plaintiffs’ claim for recovery of assessments levied against property owners, with the caveat that recovery could only be had against the agency that actually collected the assessments and that “any compensation the plaintiffs receive on their taking claim would have to be offset by any reimbursement” they received for assessments. Id. at 1342 n.10.

61. See id. at 1339.

62. Id. The *TSPC I* court affirmed the district court in all other respects. In particular, it held that claims for injunctive and declaratory relief stemming from TRPA’s actions prior to enactment of the 1987 regional plan were rendered moot by the adoption of that plan. Id. at 1335. In addition, the court affirmed that the takings claims of the class 1-3 plaintiffs for the period of the 1981-84 moratorium were unripe because they failed to submit applications for development to the agency under a case-by-case review that included a limited exception to Ordinance 81-5. Id. at 1339. Finally, the court held that any takings claims based on the 1984 plan were unripe because the Council did not seek to amend the plan. Id. at 1336-37.

63. *TSPC II*, 938 F.2d 153 (9th Cir. 1991).

64. Id. at 156. This conclusion was based on the fact that, unlike the Nevada
that the landowners’ claims against the 1984 Plan were unripe.65 The case was then remanded so that the district court could determine if the plaintiffs had suffered a temporary taking as a result of the enactment of the Ordinance and/or Plan.66 It was at this point that the Nevada and California cases were consolidated in the Nevada district court.

2. TSPC III: This Time, It’s a Statute of Limitations

Following the Ninth Circuit’s decisions in TSPC I and II, the landowners were permitted to amend their complaint against TRPA to include a takings claim arising from the 1987 plan, as well as from the 1981-84 moratoria and the 1984 plan.67 It mattered little; the district court rejected the new takings claims on the ground that they were barred by a statute of limitation in the Compact that required legal action against TRPA to be filed within 60 days.68 The same court also dismissed the takings claims pertaining to the 1984 Plan on ripeness grounds, favoring the reasoning of the Ninth Circuit panel in TSPC I over that expressed in TSPC II.69

In TSPC III, the Ninth Circuit reversed the Nevada district court once more, holding that none of the takings allegations were barred by the statute of limitations in the 1980 Compact, when brought under 42 U.S.C. § 1983.70 For good measure, the Ninth Circuit admonished the district court not to allow TRPA to raise any other potentially applicable statute of limitations defenses since it had asserted only the limitation in the Compact.71 The case was then remanded to the

plaintiffs, the California plaintiffs could not avail themselves of an exception in the ordinance allowing for the possibility of some use of property.

65. See id. at 157. Unlike the panel in TSPC I, the TSPC II panel held that “ripeness did not require the plaintiffs to ask TRPA to amend the 1984 Plan before bringing their claims.” Id. The TSPC II court declined to follow the contrary ruling in TSPC I because it was not accompanied by a “definitive rationale.” Id.
66. Id. at 156-57.
68. Id. at 1483.
69. See id. at 1481. The court dismissed the claims relating to the 1984 Plan because of the intervening injunction, which “prevented the 1984 plan from ever taking effect.” It explained, “TSPC’s taking challenge to the 1984 Regional Plan must fail because that plan was enjoined and never implemented, hence the requisite causation between the 1984 Plan and TSPC’s purported injury is lacking as a matter of law.” Id. Although the plaintiffs urged the court to follow the reasoning of TSPC II rather than TSPC I, the court declined to do so:

[T]his Court chooses to follow the law-of-the-case doctrine. Despite the inconsistency of the Appellate Court rulings, the per curium opinion in TSPC I dismissed the claims. This Court is not free to disregard the ruling in TSPC I that ripeness standards preclude the Nevada plaintiffs from pursuing a takings claim pertaining to the 1984 Regional Plan.

Id. at 1478.
70. TSPC III, 34 F.3d 753, 755-56 (1994).
71. Id. at 756.
district court, which now seemed bound to consider the substance of the Council’s takings claims.

3. TSPC IV: The District Court Finally Finds a Taking

Despite the Ninth Circuit’s reversal and remand, the Nevada district court was not quite ready to let a trial go forward. Instead, it decided to take another look at the Ninth Circuit’s conclusion that TRPA could raise no more statute of limitations defenses. In a decision that inverts the normal judicial hierarchy, the district court concluded that the Ninth Circuit’s preclusion of new limitations defenses was “clearly erroneous.” It therefore allowed TRPA to assert California’s and Nevada’s statutes of limitations for Section 1983 actions, which require such claims to be brought within one year and two years, respectively. The court was then able to dismiss the landowners’ takings claims with respect to the 1987 Plan, since the Council did not specifically challenge that plan until 1991.

Finally, the district court held an 11-day bench trial on the Council’s few remaining claims. Perhaps surprisingly, given its record up to this point, the court concluded that, under substantive takings law, the plaintiffs had indeed suffered a compensable confiscation of their property. Specifically, it held that the temporary development ban implemented by Ordinance 81-5 effected a taking of the SEZ and class 1-3 California land by preventing all economically viable use of these areas. It additionally held that “all plaintiffs, on both sides of the Basin, are entitled to compensation” for the period in which Resolution 83-21 was in effect because it too deprived the relevant landowners of all economically viable use of their property. Finally, it again rejected the takings claims arising from the 1984 Plan on the ground that the 1984 injunction prevented the Plan from ever going into effect. This decision prompted both parties to appeal to the Ninth Circuit for the fourth time.

III. THE LAST NINTH CIRCUIT COURT OPINION AND THE UNITED STATES SUPREME COURT’S RESPONSE

In TSPC IV, the Ninth Circuit affirmed the district court’s conclusion that the 1984 and 1987 Plan did not cause a taking, but
reversed the award of compensation arising from the moratoria. The latter issue is the focus of the opinion and the Supreme Court’s subsequent grant of certiorari. Writing for the unanimous panel, Judge Reinhardt agreed with the district court that the moratorium’s constitutionality hinged on the application of *Lucas v. South Carolina Coastal Council* and, more specifically, the rule that a taking occurs when a regulation denies a landowner “all economically beneficial and productive use of... land.” However, Reinhardt contended that the inquiry required an *a priori* and closer look into the nature and extent of the property interest to which the economically beneficial use standard would apply. His novel approach to the relevant parcel issue would ultimately cut the legs out from under the district court’s application of *Lucas* and, when affirmed by the Supreme Court, alter the constitutional and conceptual terrain surrounding takings challenges to temporary land use restrictions.

A. The Fundamentals of the Ninth Circuit’s Decision

1. The Ninth Circuit Extends the Relevant Temporal Framework

   In *TSPC IV*, Judge Reinhardt altered the focus of the Tahoe dispute from the impact of TRPA’s moratorium during its effective period to its impact over the entire useful life of the subject properties, proclaiming that

   “[P]laintiffs’ argument is that [the court] 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. Under this theory, they argue that there was a categorical taking of one of those temporal segments.”

   In Reinhardt’s view, this argument (which was never overtly advanced by the Council) led to the incorrect conclusion that the moratorium caused a compensable denial of all use of property. It did so by proposing too narrow a conception of the relevant time period in which to measure the impact of the moratorium, one that did not correspond to Supreme Court decisions admonishing courts to look to “the [claimant’s] parcel as a whole” when considering a regulatory takings claim. Stressing that property ownership has a “temporal,”

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79. *Id.* at 773 (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992)).

80. See *id.* at 774. The court stated, “[F]or purposes of determining whether a ‘taking’ of the plaintiff’s ‘property’ has occurred, the proper inquiry is what constitutes the relevant ‘property’? Is it the fee interest that must be ‘taken,’ or is it some lesser unit of property?” *Id.*

81. *Id.*

82. *Id.* at 775.

For example, the dimensions of a property interest may include a physical dimension (which describes the size and shape of the property in question), a
as well as spatial dimension, Reinhardt essentially concluded that the court should look at the "temporal whole," that is, the indefinite useful life of real property, when considering whether the moratorium denied all economic use of the Council's parcels. 83

To justify expansion of the temporal size of the Council's property, Reinhardt claimed that "[a] planning regulation that prevents the development of a parcel for a temporary period of time is conceptually no different than a land-use restriction that permanently denies all use on a discrete portion of property, or that permanently restricts a type of use across all of the parcel." 84 In each case, the landowner suffers a similar loss of overall property value and should therefore have a similar right to compensation. 85 Finally, he raised the specter that the court would convert all temporary moratoria into takings if it accepted the notion that temporary restrictions can be viewed in isolation for takings purposes. 86 In light of the many public benefits he associated with planning moratoria, 87 Reinhardt made it clear that he would interpret the law to avoid that result. 88

The TSPC IV decision quickly dismissed any suggestion that aggregation of temporal interests was contrary to established Supreme Court precedent. The first, and most important, potential barrier was

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Id. at 774.
83. Id. at 776-77.
84. Id. at 776 (citing Radin, supra note 17, at 1674-78).
85. Id. at 776-77.
86. Id. at 777.
87. Id. In a summary that could have come from a TRPA training manual, the court extolled the virtues of development moratoria:
Land-use planning is necessarily a complex, time-consuming undertaking for a community, especially in a situation as unique as this. In several ways, temporary development moratoria promote effective planning. First, by preserving the status quo during the planning process, temporary moratoria ensure that a community's problems are not exacerbated during the time it takes to formulate a regulatory scheme. Relatedly, temporary development moratoria prevent developers and landowners from racing to carry out development that is destructive of the community's interests before a new plan goes into effect. Such a race-to-development would permit property owners to evade the land-use plan and undermine its goals. Finally, the breathing room provided by temporary moratoria helps ensure that the planning process is responsive to the property owners and citizens who will be affected by the resulting land-use regulations. Absent the pressure of trying to out-speed developers who are attempting to circumvent the planning goals, the planning and implementation process may be permitted to run its full and natural course with widespread citizen input and involvement, public debate, and full consideration of all issues and points of view.
Id. (citations omitted).
88. Id. ("Given the importance and long-standing use [of] temporary moratoria, courts should be exceedingly reluctant to adopt rulings that would threaten the survival of this crucial planning mechanism.").
the Court’s decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles.* The district court had concluded that the reasoning in *First English* compelled it to treat temporary denials of all economic use in the same manner as permanent denials. This reading was, however, “flatly incorrect,” according to Judge Reinhardt. In Reinhardt’s view, *First English* merely required payment of compensation when an excessive permanent regulation is judicially “invalidated.” As a result, *First English* was inapplicable to development moratoria, “which from the outset are designed to last for only a limited period of time,” and did not support the Council’s attempt to isolate the three-year period during which they were denied all use of their property.

Reinhardt subsequently rejected the suggestion that temporal severance was supported by several World War II-era Supreme Court cases requiring compensation for the temporary confiscation of leaseholds. In contrast to the district court, the Ninth Circuit found those cases irrelevant to the Council’s claims against TRPA’s temporary building ban. The reason was simple. The property owners in the World War II decisions were forced to submit to a “physical invasion” of property by government, while the Council had merely suffered a deprivation of all use. Claiming (incorrectly) that physical invasion cases have always been treated differently than regulatory takings cases, the panel declared that World War II cases requiring compensation for a temporary occupation of property had “no bearing” on the Council’s situation. It therefore concluded that there was nothing to prevent it from looking to the “whole [temporal] parcels of property that the plaintiffs own” in determining if a taking occurred.

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91. *TSPC IV,* 216 F.3d 764, 777 (9th Cir. 2000).
92. *Id.* at 778.
93. *Id.*
94. *Id.* at 778-79. The World War II-era cases at issue were *United States v. Petty Motor Co.,* 327 U.S. 372 (1946) and *United States v. General Motors Corp.,* 323 U.S. 373 (1945).
95. *TSPC IV,* 216 F.3d at 779.
96. *Id.*
97. *Id.*
98. *Id.* In fact, the Supreme Court first drew a clear distinction between physical and regulatory takings in *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982), decided nearly forty years after the cases distinguished on this ground by Judge Reinhardt.
2. The Ninth Circuit Concludes that a Moratorium Cannot Cause a Categorical Taking

Once it determined that the impact of the moratorium must be weighed within an expansive temporal framework, the *TSPC IV* panel considered whether that impact amounted to a denial of all beneficial use of property within the meaning of *Lucas*.

Noting that the temporally limited construction ban "preserved the bulk of the future developmental use of the property," Judge Reinhardt first concluded that the moratorium did not eviscerate all of the present value of the property. For the same reason, the moratorium did not deny all "use" of the property. Consequently, the TSPC landowners were not deprived of "all economically beneficial or productive use of land," regardless of whether that standard was interpreted to mean that the government must allow property to retain some value or some use. Therefore, like the 1984 Plan and the 1987 plan, the moratorium did not cause a compensable taking of private property. The Ninth Circuit later refused, over a strong dissent by Judge

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99. *TSPC IV*, 216 F.3d at 779-82.
100. *Id.* at 781.
101. *Id.* at 782.

The "use" of the plaintiffs' property runs from the present to the future. (This is a simple corollary of our earlier conclusion that the plaintiffs' property interests may not be temporally severed.) By instituting a temporary development moratorium, TRPA denied the plaintiffs only a small portion of this future stream; the thirty-two months during which the moratorium was in effect represents a small fraction of the useful life of the Tahoe properties.

*Id.*

102. *Id.*
103. After snatching away the Council's brief victory on its 1981-84 takings claims, the Ninth Circuit moved on to consider whether the district court was correct in rejecting the claims (of the Californians) arising from the 1984 Regional Plan on the theory that the injunction precluded the Plan's implementation. *Id.* at 783-85. Upholding the rationale of the lower court, the Ninth Circuit dismissed the argument that the 1984 Plan was the legal cause of the Council's losses during 1984-87 by simply finding that plan had not gone into effect due to the injunction. *Id.* at 784. Additionally, the court held that TRPA was not liable for a taking under the 1984 Plan by causing the injunction to issue because it could have neither foreseen nor prevented that event. *Id.* at 785. In considering the 1987 Plan, the appellate panel was faced with the district court's decision to dismiss the Council's claims based on new statute of limitations defenses, in contravention of the Ninth Circuit's own command to deny all such defenses. Although the panel indicated that the district court may have been within its rights in refusing to follow the Ninth Circuit, it refused to decide when a lower court may substitute its judgment for that of a higher tribunal. *Id.* at 786-87. Instead, it invoked its own authority to refuse to follow the earlier Ninth Circuit ruling (barring new statute of limitations defenses) because such a bar was "clearly erroneous and its enforcement would work a manifest injustice." *Id.* The panel then simply adopted the district court's conclusion that the 1987 claims were barred by California's and Nevada's statutes of limitations for section 1983 actions. *Id.* at 787-88.
Kozinski, to rehear the case en banc. After 16 years of litigation, the landowners' only hope of receiving any compensation for their losses rested with the United States Supreme Court.

B. The Supreme Court Opinion and Its Impact on Regulatory Takings Law

In *Tahoe-Sierra*, the Court granted certiorari to determine whether a moratorium causes a categorical taking despite its temporary nature, a narrow issue that the Court raised on its own initiative. Writing for a 6-3 majority, Justice Stevens affirmed the Ninth Circuit's conclusion that *Lucas* does not apply to a moratorium. In so doing, the Court adopted much of the Ninth Circuit's rationale, while adding the important qualification that intentionally temporary restrictions may cause a taking under the standards set out in *Penn Central* as well as under other relevant federal takings standards.

1. The Court Affirms the Ninth Circuit's View of the Relevant Parcel and Its Effect on *Lucas*

The Court's decision in *Tahoe-Sierra* began, and to a large extent ended, when the Court decided that the "parcel as a whole" indeed applies in the temporal context, thus requiring future property uses to be taken into account when reviewing whether a moratorium causes a taking. As in the Ninth Circuit, this logic inexorably led the Court to the conclusion that a temporary moratorium on property use cannot cause a per se taking under *Lucas*' denial of *all* economically beneficial use rule. The Court put it this way:

> An interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner's interest. . . . Both dimensions must be considered if the interest is to be viewed in its

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104. *TSPC IV*, 228 F.3d 998 (9th Cir. 2000) (Kozinski, J., dissenting from denial of rehearing en banc).

105. 121 S. Ct. 2589, 2589-90 (2001). The precise issue on certiorari was, "Whether the Court of Appeals properly determined that a temporary moratorium on land development does not constitute a taking of property requiring compensation under the Takings Clause of the United States Constitution?"


107. See id. at 1483-84 (2002). The Court stated that petitioner’s argument against temporal aggregation is unavailing because it ignores *Penn Central*'s admonition that in regulatory takings cases we must focus on "the parcel as a whole." . . . Thus, the District Court erred when it disaggregated petitioners' property into temporal segments corresponding to the [moratoria] regulations at issue and then analyzed whether petitioners were deprived of all economically viable use during each period. The starting point for the Court's analysis should have been to ask whether there was a total taking of the entire parcel; if not, then *Penn Central* was the proper framework.

Id.
entirety. 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 diminution in value is not. Logically, a fee simple estate cannot be rendered valueless [within the meaning of Lucas] by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted.108

In so reasoning, the Court affirmed the Ninth Circuit’s conclusion that First English does not bar the aggregation of temporal interests. Instead, the Court agreed that First English addresses only the required remedy for a taking.109 Similarly, because the regulation at issue in Lucas was “permanent,” a feature necessary for a complete denial of all economically beneficial use of property,110 Lucas’ per se takings rule applied only to a “permanent” takings claim.111 Given this framework, the Court perceived the question in Tahoe-Sierra to be whether it should recognize a new per se rule for temporary deprivations of all economically beneficial uses of property.112

Invoking the image of ordinary building delays rendered constitutionally uncertain113 and the attendant burden on government planning,114 the Court refused to adopt a categorical rule for temporary use deprivations or a “narrower rule that excluded the normal delays associated with processing permits, or that covered only delays of more than a year.”115 Instead, the Court drew heavily from

108. Id. at 1484.
109. Id. at 1482 (“[O]ur decision in First English surely did not approve, and implicitly rejected, the categorical submission [that a temporary denial of all use is a taking without more] that petitioners are now advocating.”).
110. Id. at 1483-84.
111. Id. at 1483 (“[W]e decided the [Lucas] case on the permanent taking theory that both the trial court and the State Supreme Court had addressed.”).
112. See id. at 1478 (“For 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 . . . .”); id. at 1485 (“[T]he extreme categorical rule that any deprivation of all economic use, no matter how brief, constitutes a compensable taking surely cannot be sustained.”).
113. See id. at 1485 (“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.” (citation omitted)).
114. Id. (“A rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decision making.”).
115. Id. at 1486-87. The Court noted that while a narrower rule would certainly have a less severe impact on prevailing [government] practices, . . . it would still impose serious financial constraints on the planning process. Unlike the “extraordinary circumstance” in which the government deprives a property owner of all economic use, moratoria . . . are used widely among land-use planners to preserve the status quo while formulating a more permanent development strategy. . . . Yet even the weak version of petitioners’ categorical rule would treat these interim measures as
Justice O'Connor's concurring opinion in *Palazzolo v. Rhode Island* in holding that what is required is the more fact-specific inquiry inherent in the multi-factor approach of *Penn Central*. Elaborating on the contours of the *Penn Central* approach, the Court stressed that the temporary duration of a restriction is a single factor in the analysis and that if other factors—such as a landowner's reasonable investment-backed expectations—pointed toward a taking, a temporary moratorium can rise to the level of taking despite its short duration. In this regard, the court carefully noted that the temporary moratorium at issue in *Tahoe-Sierra* may have caused a taking under *Penn Central*. However, since the Council had failed to raise such a claim in its appeal to the Ninth Circuit, the Court refused definitively to resolve the question or to remand the case to the Court of Appeals for further consideration in light of *Penn Central*.

2. *Tahoe-Sierra*'s Impact Is as Narrow as the Scope of the Question

*Tahoe-Sierra* is significant for clarifying that *Lucas* does not reach temporary moratoria, but as an elucidation of takings law in general, the decision is something of a disappointment. Perhaps the most remarkable statement is that *First English* does not establish the constitutional equivalency of temporary and permanent regulations.

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* Id. (citations omitted).
117. *See* *Tahoe-Sierra*, 122 S. Ct. at 1486 ("[F]or reasons set out at some length by Justice O'CONNOR in her concurring opinion in *Palazzolo* . . . we are persuaded that the better approach to claims that a regulation has effected a temporary taking 'requires careful examination and weighing of all the relevant circumstances,'").
118. *Id.* at 1486 ("In rejecting petitioners' *per se* rule, we do not hold that the temporary nature of a land-use restriction precludes finding that it effects a taking; we simply recognize that it should not be given exclusive significance one way or the other.").
119. *Id.* at 1489.
120. *Id.* at 1478 n.16 ("It may be true that under a *Penn Central* analysis petitioners' land was taken and compensation would be due.").
121. *See id.* at 1485.
122. *See id.* at 1482, 1484 (discussing *First English* and concluding that it does not support the notion that all temporary deprivations of use are compensable).
But this clarification should have few ramifications beyond the context of avowedly temporary regulations such as moratoria. This is because the immediate result of the re-characterization of First English—the adoption of the “temporal whole” theory—has little relevance to a regulation that lacks an expressly finite duration.\(^{123}\) Without a sunset provision, regulations are considered permanent and, absent strategic and bad faith utilization of the “temporary” label on the part of regulators and legislatures,\(^{124}\) will continue to fall within the ambit of the economically beneficial use rule articulated in Lucas.\(^{125}\)

The Tahoe-Sierra opinion vacillates between discussing the Lucas rule in terms of a loss of physical property use and a complete elimination of property value.\(^{126}\) But none of the Court’s references to property value should be read as a groundbreaking holding that the “all economically beneficial... use” test is only satisfied by the elimination of all value.\(^{127}\) On the contrary, when read carefully, the Court’s opinion simply confirms the unremarkable proposition that an elimination of all value is one circumstance that triggers a taking under the use-based Lucas rule. As the Court explained,

> The categorical rule that we applied in Lucas states that compensation is required when a regulation deprives an owner of “all economically beneficial uses” of his land. Under that rule, a statute that “wholly eliminated the value” of Lucas’ fee simple title clearly qualified as a taking. But our holding was limited to “the extraordinary circumstance when no productive or economically beneficial use of land is permitted.”\(^{128}\)

Post-Tahoe-Sierra takings cases continue to describe the per se takings rule in terms of economic use, and therefore confirm that Tahoe-Sierra’s treatment of Lucas says nothing new about the character or reach of the “all economically beneficial use” rule, except

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123. See id. at 1482-84 (distinguishing regulatory challenges requiring temporal aggregation from the “permanent deprivation of the owner’s use” of property in Lucas).
124. See infra notes 297-98 and accompanying text.
125. See Tahoe-Sierra, 122 S. Ct. at 1482-83.
126. See id. at 1482-84, 1487.
127. Justice Rehnquist’s dissenting opinion in Tahoe-Sierra suggests that he read the majority opinion as having recast Lucas in terms of value. Id. at 1493 (Rehnquist, J., dissenting). However, the Tahoe-Sierra decision shows that courts should resist relying too much on dissenting opinions when trying to interpret unclear sections of a majority decision. After all, Justice Stevens’s dissenting opinion in First English reads as if the majority opinion in that case established the equivalency, for takings analysis, of permanent and temporary regulations. Michelman, Takings, 1987, 88 Colum. L. Rev. 1600, 1619 (1988) (“Stevens wrote as though the majority unambiguously bought into a general doctrine of conceptual severance by timeshares.”). Yet, Tahoe-Sierra clarified this was not a correct reading of First English.
128. Tahoe-Sierra, 122 S. Ct. at 1483 (italicized “no” in original; other italics added).
that it does not apply to moratoria.\footnote{See Blue Ribbon Props., Inc. v. Hardin County, No. 00-6345, 2002 U.S. App. LEXIS 16714, at *14 (6th Cir. Aug. 15, 2002) (rejecting takings claim under \textit{Lucas} because “Blue Ribbon has received an annual income from the property through agricultural and billboard leases, there is [saleable] timber on the property... and some of the land is suitable for farming”); Barefoot v. City of Wilmington, Nos. 01-1185, 01-2191, 2002 U.S. App. LEXIS 11106, at *20 (4th Cir. June 10, 2002) (citing \textit{Lucas} and \textit{Tahoe-Sierra} for the proposition that “regulations that deny all economically beneficial and productive use of land are compensable takings”); Currier Builders, Inc. v. Town of York, No. 01-68-PC, 2002 U.S. Dist. LEXIS 9942, at *28 (D. Me. May 30, 2002) (stating that “when the owner is deprived of any economically viable use of his property, no further inquiry is necessary” and holding that the ability to build residential homes satisfied this test); Mays v. Bd. of Trs. of Miami Township, No. 18997, 2002 Ohio App. LEXIS 3347, at *8-9 (Ohio Ct. App. June 28, 2002) (citing \textit{Tahoe-Sierra} for the propositions that: “A ‘taking’... may be accomplished through a regulation that prohibits a use of land. In order to [do so] the measure involved must be permanent in nature and of such a character and effect that the owner is deprived of all or substantially all economic use of his land that is feasible.”) (emphasis added) (citations omitted). But see McPherson Landfill, Inc. v. Shawnee County, No. 88-075, 2002 Kan. LEXIS 457, at *55 (Kan. July 12, 2002).} Therefore, to understand the scope of the economically beneficial use rule and more specifically, the role of property value in that rule, one must continue to look first and foremost to the opinion in \textit{Lucas} itself. And while \textit{Lucas} is not clear about the exact point at which retained property value takes a case out of the categorical rule’s orbit,\footnote{See infra notes 230-37 and accompanying text.} it is at least clear about when it does not; i.e., when that value flows from economically non-viable salvage uses, such as personal recreation uses,\footnote{See, e.g., Steel v. Cape Corp., 677 A.2d 634 (Md. Ct. Spec. App. 1996). There, the court considered whether property zoned “OS” (Open Space) retained economic viability. Permissible uses included “general recreational uses which preserve and protect the natural environment,” along with “temporary structures for boating, swimming, fishing, hunting,” and other recreational pursuits. \textit{Id.} at 637. Notwithstanding the availability of these recreational uses, the court concluded that “the uses permitted in OS-zoned districts do not include any viable economic uses” as that term is used in \textit{Lucas}. \textit{Id.} at 649. The key for the court was the fact that OS zoning “permits no development.” \textit{Id.}} or arises from a piece of property required to be left “substantially in its natural state.”\footnote{Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1018 (1992) (observing that the typical way that regulations leave a landowner without economically beneficial use is “by requiring land to be left substantially in its natural state”); \textit{Currier Builders}, 2002 U.S. Dist. LEXIS 9942 at *20.} Dicta\footnote{Any language appearing to stress the relevance of value in the context of \textit{Lucas} was unnecessary to the ultimate conclusion that \textit{Lucas} did not apply to a temporary moratorium. Once the “whole parcel” framework applies to the temporal dimension of property, a temporary property restriction escapes the per se takings rule under a traditional use-based interpretation because including the (regulation-free) future in the takings analysis necessarily leads to the determination that a temporary restriction does not deny \textit{all} property use and therefore leaves the property with some value. \textit{See TSPC IV}, 216 F.3d 764, 782 (1994).} in \textit{Tahoe-Sierra} pertaining to \textit{Lucas} does nothing to disturb this bottom line, especially in light of the Court’s careful admonition
about the "narrow scope of [its] holding" and Palazzolo's recent declaration that a "token interest" cannot satisfy Lucas.

Tahoe-Sierra reaffirmed the status quo in other aspects of takings law as well. In particular, the Court indicated that a landowner may still claim a taking under the theory that a regulation fails to "substantially advance a legitimate state interest," or that an agency has acted in bad faith so as to delay a development.

Additionally, the Court stressed the continuing relevance of "reasonable investment-backed expectations," and other Penn Central factors in cases where a landowner is not permanently deprived of all economically beneficial use of land. Finally, the Court exhorted lower courts to persist in considering basic issues of fairness when considering whether a landowner should alone bear the burden of a land use regulation. Unfortunately, the Court could not apply any of these criteria in Tahoe-Sierra because of the procedural posture in which the dispute over TRPA's actions came to the Court.

To the extent that Tahoe-Sierra sheds light on the direction of takings law in general, the big winner is Penn Central and, as discussed more fully in the following section, the loser is the conventional

134. Tahoe-Sierra, 122 S. Ct. 1465, 1470 (2002) ("Although the question we decide relates only to that 32-month period [of the moratoria], a brief description of the events leading up to the moratoria and a comment on the two permanent plans that TRPA adopted thereafter will clarify the narrow scope of our holding." (emphasis added)).

135. Palazzolo v. Rhode Island, 533 U.S. 606, 616 (2001) ("[A] State may not evade the duty to compensate on the premise that the landowner is left with a token interest.").

136. Tahoe-Sierra, 122 S. Ct. at 1485 ("[A]part from the District Court's finding that TRPA's actions represented a proportional response to a serious risk of harm to the lake, petitioners might have argued that the moratoria did not substantially advance a legitimate state interest . . . ."(citing Agins, 447 U.S. 255 (1980); Monterey v. Del Monte Dunes, 526 U.S. 687, 700-02 (1999))). In light of this statement, the suggestion by some commentators that Agins' substantial advancement test is not viable as an independent takings standard must be viewed with considerable skepticism. See, e.g., John D. Echeverria, Does Regulation that Fails to Advance a Legitimate Governmental Interest Result in a Regulatory Taking?, 29 Envtl. L. Rep. 853 (1999); Edward J. Sullivan, Emperors and Clothes: The Genealogy and Operation of the Agins Tests, in Taking Sides, supra note 7; Glen E. Summers, Private Property Without Lochner: Toward a Takings Jurisprudence Uncorrupted by Substantive Due Process, 142 U. Pa. L. Rev. 837 (1993). This is especially true given that state courts continue to find that a compensable taking results when government fails to meet the substantial advancement test. See, e.g., State ex. rel Shemo v. City of Mayfield Heights, 765 N.E.2d 345 (Ohio 2002).

137. See Tahoe-Sierra 122 S. Ct. at 1485. ("[W]here it not for the findings of the District Court that TRPA acted diligently and in good faith, we might have concluded that the agency was stalling in order to avoid promulgating the environmental threshold carrying capacities and regional plan mandated by the 1980 Compact." (citing Monterey, 526 U.S. at 698)).

138. Id. at 1489.
139. Id. at 1486.
140. Id. at 1485.
understanding of the majority opinion in First English. As a result, temporary takings continue to exist, but, if they are to arise from a temporary regulation such as a moratorium, must be found under the ad-hoc balancing approach, not the categorical formulation.\textsuperscript{141} This gives a boost to an expansive definition for the amorphous “parcel as a whole” construct, but only in temporal dimension; Tahoe-Sierra is silent with respect to the dimensions of the spatial “parcel as a whole,” a relevant parcel issue that is much more common to the ordinary permanent takings claim and which remains unresolved.\textsuperscript{142}

In the final analysis, Tahoe-Sierra will be remembered as a case that refused to push the Court’s recent preference for bright lines into the moratoria arena.\textsuperscript{143} Yet, because of its limited scope and the Court’s recognition that takings law affords a number of potential remedies, the decision tends to affirm a status quo that is generally attentive to the constitutional rights of property owners as a class, if not to the particular property owners who initiated and ultimately lost the case. Still, even within its narrow confines, the Court’s opinion is difficult to reconcile with previous takings cases, such as First English and Lucas, that seem to suggest that draconian restrictions must be viewed for what they are, not what they might be in the future and which, therefore, arguably point to a different result in Tahoe-Sierra.

IV. THE UNEASY FIT BETWEEN TAHOE-SIERRA AND THE SUPREME COURT’S PREVIOUS TAKINGS JURISPRUDENCE

In Tahoe-Sierra, both the Court of Appeals and the United States Supreme Court advanced an extremely narrow view of the majority opinion in First English, while simultaneously adhering to an expansive view of cases describing the relevant takings parcel as the “parcel as a whole.” This selective construction of case law led to the adoption of the “temporal whole” parcel theory which inevitably renders a per se rule in the vein of Lucas’ economically beneficial use rule inapplicable to moratoria and similarly temporary restrictions. In short, the Tahoe-Sierra decision rests within the Supreme Court’s prior takings jurisprudence only through an innovative and controversial interpretation of several of the Court’s most important takings decisions, a point emphatically made by Judge Kozinski’s dissent to denial of rehearing en banc in the Ninth Circuit decision.\textsuperscript{144}

\textsuperscript{141} See id. at 1486. ("[T]he better approach to claims that a regulation has effected a temporary taking requires careful examination and weighing of all the relevant circumstances." (quoting Palazzolo, 533 U.S. at 636 (O’Connor, J., concurring))).

\textsuperscript{142} See Palazzolo, 533 U.S. at 631 (noting the Court’s “discomfort” with an undefined “parcel as a whole” framework); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 n.7 (1992) (acknowledging “uncertainty regarding the composition of the denominator”).


\textsuperscript{144} See TSPC IV, 228 F.3d 998, 999 (9th Cir. 2000) (Kozinski, J., dissenting from
The idea that a temporary regulation, particularly one that denies all use, can cause a taking has been relatively uncontroversial ever since the Court’s 1987 decision in First English.\(^{145}\) However, in Tahoe-Sierra, Justice Stevens adopted an interpretation of First English that seems inconsistent with significant portions of the opinion of the majority.\(^{146}\) While some confusion over the scope of First English is understandable, given the imprecise language in the opinion, the construction advanced by the Supreme Court (and for that matter, the Ninth Circuit) is uncomfortably similar to Stevens’ own dissenting opinion in First English.

The dispute in First English arose when—after governmental cloud seeding—heavy rain and a resulting flood destroyed a church’s retreat center and a recreational area for handicapped children in a rural area of Los Angeles County.\(^{147}\) The episode prompted the county to enact denial of rehearing en banc) ("The panel does not like the Supreme Court’s Takings Clause jurisprudence very much, so it reverses First English . . . and adopts Justice Stevens’s First English dissent."); id. at 1002 ("[The panel] must pretend First English said nothing relevant to this case. And so the panel does, claiming that First English does not address whether a temporary moratorium is a taking, because it was ‘not even a case about what constitutes a taking.’" (citation omitted)).

145. See, e.g., Bernard H. Siegan, Property and Freedom 125 (1997) (noting that under First English, "[t]he owner is entitled to just compensation for a temporary taking from the date the offending ordinance is adopted until the date that the ordinance is either rescinded or altered so that it no longer affects a taking of the property"); Wendie L. Kellington, Temporary Takings/Moratoria at 5, ALI-ABA Course of Study Materials, Planning, Regulation, Litigation, Eminent Domain, and Compensation (Aug. 2001) (stating that the “lesson” from First English is that “[a]doption of temporary regulations that deprive a property owner of all economically beneficial use warrant compensation in the same manner that compensation would be owed if the regulations were permanent"); Joseph LaRusso, "Paying For the Change:" First English Evangelical Lutheran Church of Glendale v. County of Los Angeles and the Calculation of Interim Damages for Regulatory Takings, 17 B.C. Envtl. Aff. L. Rev. 551, 570 (1990) ("The First English holding confirmed that a majority of the Court still approved of Justice Brennan’s position regarding damages for temporary takings, including his definition of the compensable interim period as the interval during which the taking was effective."); Jon Lycett, Landgate, Inc. v. California Coastal Commission: Why Temporary Takings Law is "Screwed Up," 7 Hastings W.-N.W. J. Envtl. L. & Pol’y 55, 65 (2000) (noting that First English “means the government must pay a fair rental value for the interest taken for whatever time the regulation is in place"); Comment: Putting the Cart Before the Horse: Just Compensation For Regulatory Takings in First English Evangelical Lutheran Church v. County of Los Angeles, 54 Brooklyn L. Rev. 1413, 1415 (1989) (noting that the First English Court found that “permanent, physical takings were not different ‘in kind’ from temporary, regulatory takings, and the compensation was to be calculated in the same manner regardless of the character of the state’s action").

146. For a detailed comparison of the Ninth Circuit’s TSPC IV opinion and First English, see Berger, Taking Sides, supra note 7.

a temporary moratorium on all construction within the flood area.\textsuperscript{148} When the church realized it was prohibited from rebuilding, it sued the county, claiming that it was owed compensation for the period in which the regulation denied it all use of its property.\textsuperscript{149} The California courts rejected this claim, holding that the church’s only remedy was to have the regulation invalidated.\textsuperscript{150}

The Supreme Court subsequently heard the case to determine “whether the Just Compensation Clause requires the government to pay for ‘temporary’ regulatory takings.”\textsuperscript{151} The Court ultimately held “where the government’s activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.”\textsuperscript{152}

The only exceptions to this rule were in the case of “normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like.”\textsuperscript{153} Therefore, operating under the assumption that the Los Angeles County construction ban had indeed denied all use of the church’s property “for a considerable period of years,” the court concluded that “invalidation of the ordinance without payment of fair value for the use of the property during this period of time would be a constitutionally insufficient remedy.”\textsuperscript{154}

1. Understanding the Scope of First English

From the outset, let’s be clear that First English is not a case about what particular acts of government constitute a taking,\textsuperscript{155} and thus does not stand for the proposition that a temporary building moratorium is a taking.\textsuperscript{156} The church appealed to the Supreme Court not because a California appellate court had rejected their takings claim on the merits (it hadn’t), but because it held that compensation

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\textsuperscript{148} Id. at 307.
\textsuperscript{149} Id. at 308.
\textsuperscript{150} Id. at 308-09. The California trial court and Court of Appeals relied on \textit{Agins v. Tiburon}, 598 P.2d 25 (Ca. 1979), \textit{aff’d in part}, 447 U.S. 255 (1980), which held that “compensation [for a taking] is not required until the challenged regulation or ordinance has been held excessive in an action for declaratory relief or a writ of mandamus and the government has nevertheless decided to continue the regulation in effect.” First English, 482 U.S. at 308-09.
\textsuperscript{151} First English, 482 U.S. at 313.
\textsuperscript{152} Id. at 321.
\textsuperscript{153} Id.
\textsuperscript{154} Id. at 322.
\textsuperscript{155} Id. at 313 (“We accordingly have no occasion to decide whether the ordinance at issue actually denied appellant all use of its property or whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the State’s authority to enact safety regulations.”).
\textsuperscript{156} Id. at 311 (“The disposition of the case on these grounds isolates the remedial question for our consideration.”).
was unavailable as a remedy for a regulatory taking. This holding was based on Agins v. Tiburon, a case in which the California Supreme Court held that invalidation of an offending regulation, rather than compensation, was the only constitutional remedy for a regulatory deprivation of private property. In four previous cases, the Supreme Court flirted with the chance to address the Agins rule, but backed off each time for procedural reasons. The plaintiffs in First English were asking the Court to consider the Agins rule once more. Therefore, as the Tahoe-Sierra Court correctly noted, First English is largely about whether compensation is the proper remedy for a regulatory taking.

However, it is difficult to pigeonhole First English as a case that merely overrules Agins. This is because in answering the remedial question, the Court makes several points that seem relevant to takings analysis generally and to the scrutiny of temporary property restrictions in particular. The issue itself was broadly framed, at least at one point, as follows: "[W]hether abandonment [of a regulation] by the government requires payment of compensation for the period of time during which regulations deny a landowner all use of his land."

If this summarizes the question before the Court, First English logically encompasses the specific question of the timing of compensatory relief, as well as the underlying debate over whether compensation or invalidation is the constitutional remedy for a regulatory taking in general.
The majority later indicated that it had indeed intended to address the narrower Agins question by focusing on the broader timing issue. In particular it explained that “in considering this question [of whether abandonment of a regulation denying all use requires compensation],” the Court found “substantial guidance in cases where the government has only temporarily exercised its right to use private property,” but has nevertheless been required to provide just compensation.\textsuperscript{166} If the Court had simply wanted to resolve the compensation versus invalidation debate, it could have done so without the focus on the cases involving temporary property restrictions.\textsuperscript{167}

Much of the remainder of the \textit{First English} majority opinion also seems to answer affirmatively the question whether excessive temporary property restrictions require compensation. For instance, in stressing that the government has been required to pay just compensation when it abandons a physical occupation of property that was originally intended to be permanent, the Court stated “[t]hese cases reflect the fact that ‘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.”\textsuperscript{168}

Many lower courts have viewed this statement as a significant indicator of the Court’s thinking on temporary takings.\textsuperscript{169} In \textit{First English}, the Court reinforced the implication that excessive temporary and permanent restrictions are constitutionally equivalent by comparing the church’s regulatory takings claim to a claim for

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\item[\textsuperscript{166}] \textit{Id.} at 318.
\item[\textsuperscript{167}] For instance, the Court could have analogized solely to early permanent physical invasion decisions that established the government’s duty to compensate. \textit{See}, \textit{e.g.}, Monongahela Navigation Co. v. United States, 148 U.S. 312, 336 (1893).
\item[\textsuperscript{168}] \textit{First English}, 482 U.S. at 318.
\item[\textsuperscript{169}] \textit{See} Wyatt v. United States, 271 F.3d 1090, 1097 n.6 (Fed. Cir. 2001) (citing \textit{First English} for the proposition that “[t]emporary takings are not different in kind from permanent takings”); Poirier v. Grand Blanc Township, 423 N.W.2d 351, 353 (Mich. Ct. App. 1988) (“[T]emporary’ takings . . . are not different in kind from permanent takings, for which the Constitution clearly requires compensation”) (quoting \textit{First English}, 482 U.S. at 317); Sea Cabins on the Ocean IV Homeowners Ass’n v. City of N. Myrtle Beach, 548 S.E.2d 595, 603 (S.C. 2001) (citing \textit{First English} for the proposition that “[t]emporary [regulatory] takings which . . . deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires Compensation” (quoting \textit{First English}, 482 U.S. 318)); \textit{see also} Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1033 (1992) (Kennedy, J., concurring) (“It is well established that temporary takings are as protected by the Constitution as permanent ones.”); \textit{TSPC IV}, 228 F.3d 998, 1002 (9th Cir. 2000) (Kozinski, J., dissenting from denial of rehearing en banc) (“\textit{First English} did decide that a temporary regulation is ‘not different in kind’ from a permanent one: If either deprives the owner of all use of his property, the owner is entitled to compensation.” (citation omitted)).
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compensation due to government appropriation of a leasehold interest:

The value of a leasehold interest in property for a period of years may be substantial, and the burden on the property owner in extinguishing such an interest for a period of years may be great indeed. Where this burden results from governmental action that amounted to a taking, the Just Compensation Clause of the Fifth Amendment requires that the government pay the landowner for the value of the use of the land during this period. Invalidation of the ordinance or its successor ordinance after this period of time, though converting the taking into a 'temporary' one, is not a sufficient remedy to meet the demands of the Just Compensation Clause. 170

This passage suggests that a regulation may trigger the duty to compensate, without regard to any potential future use or value of the subject property. More specifically, by noting that compensation is the remedy for the challenged temporary "ordinance" as well as any "successor ordinance," it even implies that compensation is the appropriate remedy in the case of an initial development moratorium or, as in Tahoe-Sierra, in the case of a series of moratoria. 171

When viewed in light of First English's language and its analogies to temporary physical takings, the Court's holding—that "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to pay compensation for the period during which the taking was effective" 172—seems to mean that a temporary compensable taking results when a regulation that would otherwise amount to a taking if it were permanent turns out to be of limited duration. 173 This was the reading of the Lucas Court, which described First English as holding that "temporary deprivations of use are compensable under the Takings Clause." 174 It was also the understanding of the dissenting justices in First English, who complained that "the Court... concludes that all ordinances which would constitute takings if allowed to remain in effect permanently, necessarily also constitute takings if they are in effect for only a limited period of time." 175 Numerous post-First English state 176 and federal 177 courts have so read First English. 178

170. First English, 482 U.S. at 319 (citations omitted).
171. See Poirier, 423 N.W.2d at 353 (noting that, for the First English Court, the fact that "the regulation was an interim one... did not preclude an award for damages").
172. Id. at 353.
174. See id. at 1012 (citing First English for the proposition that "temporary deprivations of use are compensable under the Takings Clause").
175. First English, 482 U.S. at 322 (Stevens, J., dissenting).
176. See Steinbergh v. City of Cambridge, 604 N.E.2d 1269, 1274 n.6 (Mass. 1992)
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Therefore, if the First English opinion had ended with its holding, there would seem to be little reason to debate whether the case is useful for determining what type of land use restriction triggers a temporary taking. However, the Court did not stop with the strict holding; instead it went on to note that its decision addressed only the “facts presented” and not “the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like.”

While the Court’s qualification muddies the holding in First English, it does not necessarily, contrary to the opinion of some courts, swallow it whole. Certainly, the “normal delay” exception

(“The United States Supreme Court’s Fifth Amendment takings principles concerning permanent takings are applicable to regulatory conduct that temporarily denies a landowner all use of his property.”); Eberle v. Dane County Board of Adjustment, 595 N.W.2d 730, 737 (Wis. 1999) (citing First English for the proposition that “just compensation is constitutionally required for ‘temporary regulatory takings’ or regulatory takings which continue for only a temporary period of time”); see also Landgate, Inc. v. California Coastal Comm’n, 953 P.2d 1188, 1209 (Cal. 1998) (Brown, J., dissenting) (stating that “[t]he essential meaning of both Lucas and First Lutheran [sic]—is that a final decision by a regulatory agency that denies all economically beneficial use of property, even temporarily, is a per se compensable Fifth Amendment taking” (emphasis in original)).

177. See Villas of Lake Jackson, Ltd. v. Leon County, 121 F.3d 610, 613 (11th Cir. 1997) (“[I]f the regulation serves a valid public purpose, yet still goes so far in diminishing the landowner’s interests as to constitute a taking, just compensation may be awarded running from the regulation’s effective date.”); Tabb Lakes, Ltd. v. United States, 10 F.3d 796, 800 (Fed. Cir. 1993) (“[A] taking, even for a day, without compensation is prohibited by the Constitution.”); Callaway Community Hosp. v. Sullivan, 784 F. Supp. 693, 698 (W.D. Mo. 1992) (“[T]emporary, regulatory takings may require just compensation.”); Front Royal and Warren County Industrial Park Corp. v. Town of Front Royal, 708 F.Supp. 1477, 1483 n.6 (W.D. Va. 1989) (“This court notes that the opinion of the Supreme Court in First English Evangelical Lutheran Church effectively prevents defendants from relying on Agins to argue that the temporary nature of the interference with the use of property in question removes it from the category of a taking.” (citation omitted)).

178. But see Corn v. City of Lauderdale Lakes, 95 F.3d 1066, 1073 n.4 (11th Cir. 1996) (finding First English applicable only where the challenged regulation is indefinite in duration); Woodbury Place Partners v. City of Woodbury, 492 N.W.2d 258, 262 (Minn. Ct. App. 1992) (“The apparent reach of First English is to retrospectively temporary takings (e.g., regulations subsequently rescinded or declared invalid), not prospectively temporary regulations such as the ... moratorium.”).

179. First English, 482 U.S. at 321.

180. See, e.g., Landgate, 953 P.2d at 1203-04 (holding that the time it takes successfully to mount and conclude a legal challenge to a government agency's mistaken assertion of jurisdiction is a normal delay that could not amount to a temporary taking, even though all use of property was prohibited during the effective period of the illegal assertion); Pheasant Bridge Corp. v. Township of Warren, 777 A.2d 344 (N.J. 2001) (“[W]e see no distinction justifying the need to provide for interim monetary damages between regulatory delay in securing a change in, or variance from, a zoning ordinance and delay occasioned by resort to judicial processes to challenge application of a zoning ordinance to one’s property.”). By extending the “normal delay” exception to include the period of judicial challenge to regulations that deny all use of property, these decisions effectively reinstate the Agins rule that
suggests that some land use restrictions cannot be viewed in isolation for takings purposes. But, as Professor Eagle points out, this principle should be reserved for a relatively small class of regulations:

It is important to note that Chief Justice Rehnquist, writing for the Court in First English, did not refer to "questions that would arise in the case of normal delays in land use regulation," or "normal delays in the planning process." Instead, he used the phrase "normal delays in obtaining building permits, changes in zoning ordinances, variances and the like." The strong implication here is that the exception for "normal delays" is a narrow one. It implicitly seems to apply to (1) the attempt by an owner, (2) with respect to his or her parcel, to (3) obtain relief clearly contemplated by existing procedures for administrative discretion or ordinance modifications.\textsuperscript{182}

The limited "normal delay" exception implies, consistent with First English's underlying holding, that some temporary restrictions are amenable to a takings claim. The critical question is, of course, which ones? Here, it should be important that the First English opinion repeatedly highlights "interim Ordinance No. 11,855"—the moratorium that prohibited the church from rebuilding on its land—as the relevant regulatory fact, even though a permanent ordinance was enacted between the time the church sued and the Court's review of the case.\textsuperscript{183} This suggests that when the Court contrasts the "normal delay" exceptions to the "facts presented," it is implying that temporary regulations are subject to the same scrutiny as permanent restrictions. Unfortunately, the Court did not clearly specify its meaning in this regard.

Assuming that the "normal delay" exception refers to reasonable delays arising out of existing land use procedures,\textsuperscript{184} the Court's qualified holding could also be interpreted to apply to unreasonable delays occasioned by a breakdown of that process, of which extended and draconian moratoria are a prime example.\textsuperscript{185} There are good
practical reasons for so limiting the *First English* decision. Delays occasioned by a moratorium are qualitatively different from those arising from a permitting process since the initiation of a permit process often does not effect any land use other than that applied for and ultimately presumes that a permit will be granted if all the prerequisites are met. On the other hand, a moratorium completely halts the permitting process, foreclosing for a period, any chance for approval of specific uses, typically those related to construction. Additionally, as *Tahoe-Sierra* clearly shows, such a ban may indirectly preclude most or all other viable uses of property. A limited reading of the delay exception in *First English* would acknowledge that, from the landowner’s point of view, there is a great difference between a delay occasioned by negotiating permit procedures and one brought on by a temporary land use restriction that is prohibitive by its terms.

2. *Tahoe-Sierra* Is Anchored in the *First English* Dissent

In *Tahoe-Sierra*, the Supreme Court refused to recognize that the majority opinion in *First English* requires compensation when landowners are aggrieved by temporary regulations that impose an absolute ban on all economic uses of private property. Although the Court failed to explain adequately why the traditional understanding of *First English* is erroneous, the affirmed Ninth Circuit decision premised its own narrow understanding on the *First English* majority’s definition of temporary takings as “those regulatory takings which are ultimately invalidated by the courts.” In the Ninth Circuit’s view, this definition meant that “[w]hat is ‘temporary’ . . . is the taking, which is rendered temporary only when an ordinance that effects a taking is struck down by a court. In other words, a permanent regulation leads to a ‘temporary’ taking when a court invalidates the ordinance after the taking.” In short, the Ninth Circuit believed that a temporary restriction on private property is not a taking (requiring compensation) unless it is first a restriction that is

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186. See United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 127 (1985) (“The very existence of a permit system implies that permission may be granted.”).
187. See *TSPC IV*, 228 F.3d 998, 1002 (9th Cir. 2000) (Kozinski, J., dissenting from denial of rehearing en banc).
188. *First English* did decide that a temporary regulation is “not different in kind” from a permanent one: If either deprives the owner of all use of his property, the owner is entitled to compensation for the taking. The panel does not deny that the moratorium here, like the regulation in *Lucas*, deprived the owners of the use of their property for its duration. But it ignores *First English*’s requirement that the owners be compensated for a temporary taking.
189. *Id.*
intended to be permanent. This conclusion was, of course, explicitly adopted in the High Court’s *Tahoe-Sierra* opinion.°

It is hard to swallow this reinterpretation of the doctrine of “temporary takings.” *First English* says that these takings are “those regulatory takings” that are judicially “invalidated.” Regulatory takings are, of course, simply property restrictions that go too far.°

The term “invalidation” is more troublesome, but is correctly understood as referring to the finding and termination of an uncompensated taking.° Thus, *First English*’s definition could be interpreted as follows: “temporary takings are those restrictions on property that are found to violate substantive takings law and which come to an end.” This is vastly different than saying that “[t]he Court’s definition . . . does not comprehend temporary moratoria, which from the outset are designed to last for only a limited period of time.”° The former definition simply poses the question whether a temporary restriction can be one of those restrictions that goes so far as to cause a court to find that it requires compensation. As we have seen, *First English* gives a number of reasons for concluding that it can.°

One wonders whether the Supreme Court would have arrived at the same narrow definition of temporary takings—as invalidated permanent takings—if the property at issue in *Tahoe-Sierra* were in the nature of a leasehold interest that expired before the end of the moratorium, rather than a fee simple.° In such a case, there would

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190. See *Tahoe-Sierra*, 122 S. Ct. 1465, 1484 (2002) (“[A] permanent deprivation of the owner’s use of the entire area is a taking of the ‘parcel as a whole’ . . . .” (quoting *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304, 310 (1987)).

191. See *Palazzolo* v. *Rhode Island*, 533 U.S. 606, 617 (2001) (affirming that “while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking” (citing *Pennsylvania Coal* v. *Mahon*, 260 U.S. 393, 415 (1922))).

192. Cf. *Roberts*, supra note 162, at 11,039 (noting that “‘invalidated,’ in takings claims, means ‘converted into a taking because found to go too far’”).

193. *TSPC IV*, 216 F.3d at 778.

194. See supra notes 168-69 and accompanying text.

195. This same hypothetical was raised by the Supreme Court during oral arguments in *Tahoe-Sierra*:

QUESTION: Well, certainly if the respondent here had simply said, we’re going to need your property for 3 years, and so we’re going to take a leasehold interest for 3 years, the respondent would have had to compensate for that.

MR. BERGER: Chief Justice, I couldn’t agree with that more, and I believe that that is in fact what we’re dealing with here.

QUESTION: No, but you’re—it seems to me you’re not dealing with that here, because in that hypothetical the person, the third party in fact takes the property in the sense of using it for that party’s own benefit. Here, no one, the Tahoe Regional Planning Authority isn’t using the property for its benefit. It’s saying that during this period of time there are some things that you can’t do.

MR. BERGER: Absolutely true, but this Court’s jurisprudence has always
be no prospect for future uses of the leasehold to mitigate the impact of the deprivation of all present use. Consequently, one would expect (or at least hope) that the Court would be constrained to conclude that that moratorium was so severe as to cause a total taking. This is particularly true in light of earlier decisions holding that compensation must be paid when the government takes a leasehold interest196 and the language in First English indicating that the same principle is applicable in the context of a denial of all use.197

But, if the Court is willing to isolate a leasehold interest, temporary takings cannot rest upon the intended permanency of the regulation. Instead the critical factor must be the immediate impact of the government's action. Notably, the preeminence of this factor corresponds nicely with First English's repeated suggestions that the compensatory remedy is triggered by a denial of all use.198

In any case, if the Court had merely dismissed the majority opinion in First English, one might be tempted to attribute its refusal to apply the case in favor of the Council to a selective examination of the Court's language. However, the Court went further, and borrowed from the dissenting opinion in First English to construct a plausible rationale for the concept of a "temporal whole" parcel and thus, for its ultimate conclusion that the TRPA moratorium denied less than all use of the property in question. Judge Kozinski's dissent from a denial of rehearing en banc in TSPC IV199 accurately cataloged the "uncanny resemblance" between the temporal whole theory adopted by the Ninth Circuit and affirmed by the Supreme Court and Justice Stevens' dissenting opinion in First English.

Here's why Justice Stevens disagreed with First English:

Regulations are three dimensional; they have depth, width, and length. As for depth, regulations define the extent to which the owner may not use the property in question. With respect to width, regulations define the amount of property encompassed by the restrictions. Finally, and for purposes of this case, essentially, regulations set forth the duration of the restrictions. It is obvious that no one of these elements can be analyzed alone to evaluate the


197. See First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 318 (1987) ("[T]emporary' 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.").

198. See supra notes 168-69 and accompanying text.
199. 228 F.3d 998 (9th Cir. 2000) (Kozinski, J., dissenting from denial of rehearing en banc).
impact of a regulation, and hence to determine whether a taking has occurred. In assessing the economic effect of a regulation, one cannot conduct the inquiry without considering the duration of the restriction. Why should there be a constitutional distinction between a permanent restriction that only reduces the economic value of the property by a fraction—perhaps one-third—and a restriction that merely postpones the development of a property for a fraction of its useful life—presumably far less than a third? 200

And here is the key passage from the TSPC IV panel's opinion:

Property interests may have many different dimensions. For example, the dimensions of a property interest may include a physical dimension (which describes the size and shape of the property in question), a functional dimension (which describes the extent to which an owner may use or dispose of the property in question), and a temporal dimension (which describes the duration of the property interest). A planning regulation that prevents the development of a parcel for a temporary period of time is conceptually no different than a land-use restriction that permanently denies all use on a discrete portion of property, or that permanently restricts a type of use across all of the parcel. Each of these three types of regulation will have an impact on the parcel's value. There is no plausible basis on which to distinguish a similar diminution in value that results from a temporary suspension of development. 201

In affirming the above reasoning of the Ninth Circuit, the Tahoe-Sierra Court avoided similarly overt references to the First English dissent, but the footprints are unmistakable. 202 Indeed, much of the Tahoe-Sierra opinion reads like it was lifted from Stevens' First English dissent—from the Court's discussion in dicta about the relationship between physical and regulatory takings, 203 to its

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200. Id. at 1000 (quoting First English, 482 U.S. at 330, 332 (Stevens, J., dissenting)).
201. Id. (quoting TSPC IV, 216 F.3d 764, 774, 776, 777 (9th Cir. 2000)).
202. See Tahoe-Sierra, 122 S. Ct. 1465, 1484 (2002). The Supreme Court rationalized its adoption of the "temporal whole" parcel this way:

An interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner's interest. Both dimensions must be considered if the interest is to be viewed in its entirety. 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 diminution in value is not. Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted.

Id.

203. Stevens' First English dissent had this to say about the distinction between physical and regulatory takings:

[Even minimal physical occupations constitute takings which give rise to a duty to compensate. But our cases also make it clear that regulatory takings and physical takings are very different in this, as well as other, respects.
observation that temporary restrictions can indeed cause a taking, provided the duration is taken into account.204

It seems clear that Tahoe-Sierra adopted and (as Judge Kozinski put it) the Ninth Circuit “plagiariz[ed]” the reasoning and language of the First English dissent,205 but one might argue that “[dissenting

While virtually all physical invasions are deemed takings, a regulatory program that adversely affects property values does not constitute a taking unless it destroys a major portion of the property’s value. This diminution of value inquiry is unique to regulatory takings. Unlike physical invasions, which are relatively rare and easily identifiable without making any economic analysis, regulatory programs constantly affect property values in countless ways, and only the most extreme regulations can constitute takings.

First English, 482 U.S. at 329 (Stevens, J., dissenting) (citations omitted).

And here is what the Tahoe-Sierra majority said:

When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely part thereof. . . . This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a “regulatory taking,” and vice versa. For the same reason that we do not ask whether a physical appropriation advances a substantial governmental interest or whether it deprives the owner of all economically valuable use, we do not apply our precedent from the physical takings context to regulatory takings claims. Land-use regulations are ubiquitous and most of them impact property values in some tangential way—often in completely unanticipated ways. . . . By contrast, physical appropriations are relatively rare, easily identified, and usually represent a greater affront to individual property rights.

Tahoe-Sierra, 122 S. Ct. at 1478-79 (citations omitted).

Stevens said this in his First English dissent:

I am willing to assume that some cases may arise in which a property owner can show that prospective invalidation of the regulation cannot cure the taking—that the temporary operation of a regulation has caused such a significant diminution in the property’s value that compensation must be afforded for the taking that has already occurred. For this ever to happen, the restriction on the use of the property would not only have to be a substantial one, but it would also have to remain in effect for a significant percentage of the property’s useful life. In such a case an application of our test for regulatory takings would obviously require an inquiry into the duration of the restriction, as well as its scope and severity.

482 U.S. at 331 (Stevens, J., dissenting) (citation omitted).

Stevens offered the following in Tahoe-Sierra:

[W]e do not hold that the temporary nature of a land-use restriction precludes finding that it effects a taking . . . . [T]he answer to the abstract question whether a temporary moratorium effects a taking is neither “yes, always” nor “no, never”; the answer depends upon the particular circumstances of the case . . . . [A] permanent deprivation of the owner’s use of the entire area is a taking . . . whereas a temporary restriction that merely causes a diminution in value is not . . . . In our view, the duration of the restriction is one of the important factors that a court must consider in the appraisal of a regulatory takings claim . . . .

122 S. Ct. at 1478-89.

205. First English, 482 U.S. at 331.
Justice Stevens’ broader statements about the temporal dimension of property were not rejected by the majority, and remain viable on the question of when a taking occurs. It is equally likely, however, that it was a decision on the part of the First English majority to act contrary to Stevens’ “broader statements about the temporal dimension of property” that prompted him to make those very statements in the first place. This is particularly true in light of the abundance of language in the majority opinion that is patently inconsistent with Stevens’ discussion of the temporal dimension and given that, although some commentators apparently think differently, the First English majority gave absolutely no indication that it was inclined, as a general matter, to aggregate all the elements of property ownership when evaluating the impact of a regulation.

All in all, it would not require much imagination to conclude that the Tahoe-Sierra Court adopted an analytical paradigm that had been previously rejected by the majority in First English. Interestingly, the Court justified its questionable take on First English as necessary to shield governments from financial liability and the planning moratoria from extinction. In this way, the Court resurrected the California Supreme Court’s opinion in Agins, which refused to grant monetary damages for a regulatory taking because of the “need for preserving a degree of freedom in the land-use planning function, and the inhibiting financial force which inheres in the inverse condemnation remedy.” This brings the sub rosa reversal of First English full circle, for in that case, the majority also had this to say:

We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and

206. Roberts, supra note 162, at 11,043.
207. See First English, 482 U.S. at 332 (Stevens, J., dissenting) (noting that “until today, we have repeatedly rejected the notion that all temporary diminutions in the value of property automatically activate the compensation requirement of the Takings Clause” (emphasis added)); See also, Michelman, supra note 127, at 1621 (“Stevens wrote as though the majority unambiguously bought into a general doctrine of conceptual severance by timeshares.”).
208. See supra notes 165-71 and accompanying text.
209. See, e.g., Robert Freilich, Regulatory Takings After Palazzolo: Interim Development Controls, Moratoria, and Economic Diminution Cases at 8, n.21, ALA-ABA Course of Study Materials, Planning, Regulation, Litigation, Eminent Domain, and Compensation (Aug. 2001). Freilich incorrectly suggests that the First English Court stated: “Regulations are three dimensional; they have depth, width, and length. . . . It is obvious that no one of these elements can be analyzed alone to evaluate the impact of a regulation, and hence to determine whether a taking has occurred.” Although this language did come from First English, it was not a part of the majority opinion. See First English, 482 U.S. at 330 (Stevens, J., dissenting).
210. See Kellington, supra note 145, at 14 (“The basis for the 9th Circuit majority opinion seems contrary to First English for the reason that the Supreme Court was clear that a total deprivation of all economically beneficial use is compensable and it makes no difference if the regulation is temporary or permanent.”).
governing bodies of municipal corporations when enacting land-use regulations. But such consequences necessarily flow from any decision upholding a claim of constitutional right; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them.\(^{213}\)

Putting aside precedential doubts, the fear animating the Court's creative reinterpretation of the temporary takings doctrine—that all moratoria are endangered by a decision equating permanent and temporary restrictions—is puzzling. The only moratoria that would conceivably be "at risk" are those that impose losses severe enough to warrant engaging in costly and time-consuming litigation. This factor alone would spare most short-term, good-faith moratoria enacted for legitimate planning purposes.\(^{214}\) Since the typical moratorium is reasonable in scope and duration,\(^{215}\) it is hard to get worked up by the suggestion that the moratorium will be destroyed as a planning tool if the conventional understanding of First English prevails.\(^{216}\) On the contrary, in this context as well as elsewhere, the more likely prognostication is that temporary takings would continue to be "relatively rare."

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\(^{213}\) First English, 482 U.S. at 321.

\(^{214}\) Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 19 n.29 (1984) (observing that landowners are unlikely to litigate unless the harm they are seeking to remedy is substantial).

\(^{215}\) See, e.g., Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); Schafer v. New Orleans, 743 F.2d 1086 (5th Cir. 1984); Arnold Bernhard & Co., Inc. v. Planning & Zoning Comm'n of Westport, 479 A.2d 801 (Conn. 1984). This point was also effectively made by a Supreme Court Justice during oral argument:

QUESTION: Well, that's extraordinary. You refer to it, General Olson, as just a traditional moratorium. I don't think this is a traditional moratorium at all. I think it's quite extraordinary to just say, you know, a time out, nobody does anything with this land. I just don't think that that's the normal kind of moratorium. Nobody does anything beyond the limited use that we anticipate we will ultimately impose. It's very rare that you impose a complete prohibition of use, because that's a condemnation.

GENERAL OLSON: It may be unusual, but it is not so rare. In fact, page 5 of the petitioners' brief refers to the two—


B. Tahoe-Sierra Avoids the Thrust of Lucas v. South Carolina Coastal Council

In Tahoe-Sierra, the Court faced the task of conforming its decision to the opinion in Lucas v. South Carolina Coastal Council as well as to that of the majority in First English. In Lucas, the Court declared that the Fifth Amendment to the U.S. Constitution requires compensation whenever a regulation deprives a landowner of “all economically beneficial or productive use of land.” However, as we have seen, the Court rejected this line of argument by superimposing the temporal whole theory, originally articulated in Stevens’ First English dissent, upon the per se rule established in Lucas. While the resulting limitation of Lucas to permanent regulations may not be as surprising as the narrow interpretation of First English, the Tahoe-Sierra Court’s treatment of Lucas is difficult to reconcile with the thrust of that decision.

1. A Brief Overview of Lucas v. South Carolina Coastal Council

The dispute in Lucas arose in 1986, when David Lucas purchased two South Carolina beachfront lots with the intent of building a single-family residence. His plans were thwarted two years later when the South Carolina legislature adopted the Beachfront Management Act and directed the South Carolina Coastal Council to establish a coastal baseline, seaward of which “occupyable improvements” were prohibited. The Council subsequently placed the line landward of Lucas’ lots, thus preventing him from proceeding with the planned development. This prompted Lucas to file suit on the ground that the Council’s actions had effected an unconstitutional taking by depriving him of all use of his land.

When the United States Supreme Court reviewed the dispute, it agreed with Lucas that the denial of all economically beneficial use of his land was sufficient to establish a regulatory taking. Writing for the majority, Justice Scalia reviewed the Court’s previous takings cases and concluded that two categories of regulatory action had been identified as resulting in a taking without regard to the “public interest advanced in support of the restraint.” The first of these per se takings categories included cases where the government used its regulatory power physically to invade or occupy private property or

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218. Id. at 1006-07.
220. Lucas, 505 U.S. at 1008-09.
221. Id.
222. Id. at 1009.
223. Id. at 1015.
224. Id.
authorized third parties to do so.\textsuperscript{225} The second consisted of regulations that “deny[d] all economically beneficial or productive use of land.”\textsuperscript{226} Suggesting that a regulatory deprivation of productive use is the equivalent, from the landowner’s point of view, of a physical occupation, Scalia concluded that “when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.”\textsuperscript{227} Under this categorical rule, compensation is owed when a regulation deprives a landowner of all economically viable use of property without respect to the public purposes behind the regulation or whether the landowner had notice that he would be so regulated at the time of purchase.\textsuperscript{228} A limited exception for regulations enacted pursuant to “background principles of [a] State’s law of property.”\textsuperscript{229}

2. \textit{Tahoe-Sierra} Finesses the Meaning of “Economically Beneficial Use”

Since the \textit{Lucas} decision, courts and commentators have struggled to understand the scope of the categorical rule.\textsuperscript{230} The confusion stems in large measure from the Court’s failure to articulate precisely what constitutes a denial of all “economically beneficial or productive use.”\textsuperscript{231} At times the Court has suggested that the rule requires the government to refrain from regulating away all available physical uses of land,\textsuperscript{232} a perspective supported by other cases\textsuperscript{233} and some

\textsuperscript{225} Id.
\textsuperscript{226} Id.
\textsuperscript{227} Id. at 1019.
\textsuperscript{229} See Lucas, 505 U.S. at 1029. In order to avoid a taking where all productive use is denied, land use restrictions “must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.” Id. For discussion of the scope of this exception, see David L. Callies & J. David Breemer, \textit{Background Principles: Custom Public Trust, and Preexisting Statutes as Exceptions to Regulatory Takings}, in \textit{Taking Sides}, supra note 7.
\textsuperscript{231} See TSPC IV, 216 F.3d 764, 780 (9th Cir. 2000) (“The central confusion over its meaning centers on the relationship between the ‘use’ of property and its ‘value.’”).
\textsuperscript{232} See Lucas, 505 U.S. at 1031 (suggesting that the economically beneficial use
commentators. However, at other times, and sometimes in the same breath, the Court has indicated that the categorical test simply requires regulations to leave property with some residual "value." This vacillation has understandably led to an ongoing and unresolved debate about the factual circumstances, and particularly, the level of remaining value or use, sufficient to satisfy the Lucas test.

In TSPC IV, the Ninth Circuit acknowledged the use versus value debate, but declined to take sides, even though the district court had relied on a previous Ninth Circuit decision suggesting that the critical rule is violated if landowners are prohibited from making "habitable or productive improvements"; id. at 1017 ("[F]or what is land, but the profits thereof?[?"); id. at 1018 (stating that "regulations that leave the owner of land without economically beneficial or productive options for its use—typically, as here, by requiring land to be left substantially in its natural state—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm"); id. at 1025 n.12 (referring to "all developmental or economically beneficial land uses").

233. See, e.g., Nollan v. California Coastal Comm'n, 483 U.S. 825, 833-34 n.2 (1987) (emphasizing the "right" to build on private property); MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 352-53 (1986) (suggesting that the ability to engage in "some development" is a critical factor in takings inquiry).

234. See Molly S. McUsic, The Ghost Of Lochner: Modern Takings Doctrine and Its Impact on Economic Legislation, 76 B.U. L. Rev. 605, 629 (1996) ("The right to various uses of land is the Court's newest source of core property rights."); David L. Callies, Taking the Taking Issue into the Twenty-first Century, in After Lucas: Land Use Regulation and the Taking of Property Without Compensation 5 (David L. Callies ed., 1993) (stating that "the [Lucas] Court did not say the regulation had to render the property valueless, but only devoid of economically beneficial use"); Burling, supra note 230, at 452-53 (arguing that the Supreme Court's takings decisions are anchored in fundamental conceptions of property rights, including the right to use land); Lycett, supra note 145, at 65 (noting that the Lucas "rule applies even though a property with no economically viable use may still hold substantial market value").

235. See Lucas, 505 U.S. at 1028 ("In the case of land, however, we think the notion pressed by the Council that title is somehow held subject to the 'implied limitation' that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.") (emphasis added).

236. Id. at 1016 n.7 ("Regrettably, the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured.") (emphasis added); id. at 1019-20 n.8 (noting that in "some cases the landowner with 95% loss [of value] will get nothing, while the landowner with total loss will recover in full" under the economically beneficial use rule); id. at 1026 (noting that no previous cases that "employed the logic of 'harmful use' prevention to sustain a regulation involved an allegation that the regulation wholly eliminated the value of the claimant's land.") (emphasis added)).

237. Compare Freilich, supra note 209, at 6 n.17 ("[A]ll value' as used in Lucas means that the regulation has permanently destroyed all value, both in a physical nature and temporal sense."); with David L. Callies, After Lucas and Dolan: An Introductory Essay, in Takings: Land-Development Conditions and Regulatory Takings after Dolan and Lucas 8 (David L. Callies ed., 1996) ("The property interest need not be valueless (of the majority, only Justice Kennedy regularly uses the term 'value' in analysis) to qualify for compensation [under Lucas].").

238. See TSPC IV, 216 F.3d 764, 780-81 (9th Cir. 2000).
focus is use. Instead, the Court of Appeals sidestepped the issue by concluding that the moratorium neither denied the Tahoe landowners all physical use of land nor rendered their properties valueless. The Ninth Circuit held that “[g]iven that the [TRPA] ordinance and resolution banned development for only a limited period, these regulations preserved the bulk of the future developmental use of the property. This future use had a substantial present value.” The court subsequently stressed that the moratorium did not deprive the landowners of all physical use of land because “[t]he ‘use’ of [their] property runs from the present to the future” in light of the adopted theory of the temporal whole. In its decision, the United States Supreme Court bought into the same framework and reached the same results.

The Court’s treatment of Lucas thus hinges on the “future developmental uses” of Tahoe-area properties. This formulation begs the question of what future uses the Court has in mind. After all, during the moratorium period, and throughout the Tahoe-Sierra litigation, TRPA gave no indication that area landowners would be allowed to develop at any point in the future. Even today, the ability to develop around Tahoe is largely based on a lottery system that assures no particular properties of future developmental uses. Therefore, any future uses were and are potential and undetermined. Consequently, we must understand that any value left in the Tahoe properties is the minimal value that derives from speculation premised on the possible rescission of regulation.

It is difficult to believe that when the Lucas Court required the retention of “economically beneficial uses” to avoid a taking, it was thinking about potential uses in the distant future. Although the trial court characterized the challenged Beachfront Management Act as “permanent,” this distinction does not necessarily account for the Lucas decision since the possibility existed that Lucas could make use of his property sometime in the distant future, regardless of the purported duration of the regulation.

It is important to recall that South Carolina had prevented David Lucas from engaging in what had, up to the enactment of the challenged law, been a presently available physical use of his land—

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239. See TSPC, 34 F. Supp. 2d 1226, 1242 (D. Nev. 1999) (relying on Del Monte Dunes v. City of Monterey, 95 F.3d 1422, 1432-33 (9th Cir. 1996), aff’d, 526 U.S. 687 (1999)).
240. TSPC IV, 216 F.3d at 780-81.
241. Id. at 781 (emphasis added).
242. Id. at 782.
244. Lucas v. South Carolina Coastal Council, 505 U.S 1003, 1009 (1992) (noting that “[t]he trial court further found that the Beachfront Management Act decreed a permanent ban on construction insofar as Lucas’ lots were concerned”).
the construction of single-family homes. Lucas' suit was, therefore, based on his inability to proceed with plans to use his land in this economically beneficial manner. It was this present context, not concerns about what might be allowed thirty years from the enactment of the Act, that gave rise to the economically beneficial use rule.

The Lucas Court's discussion of the situation that would exist if Lucas had been returned to the status quo ante suggests that it was responding to, and thinking of, the government's impact on previously allowable uses when it framed the "economically beneficial use" standard. Noting that the Act had been altered after Lucas' suit was rejected by the South Carolina Supreme Court to provide for the possibility of a special permit for building seaward of the setback line, the Court stated that the state court's rejection of the suit does not preclude Lucas from applying for a permit... for future construction, and challenging, on takings grounds, any denial. But it does preclude, both practically and legally, any takings claim with respect to Lucas' past deprivation, i.e., for his having been denied construction rights during the period before the 1990 amendment.

The Court then cited First English for the proposition that "temporary deprivations of use are compensable under the Takings Clause." This section fuels the idea that the availability of present uses is the locus of the Lucas test since it suggests that Lucas had a legitimate takings claim for a denial of all beneficial use for a finite period, even though he might enjoy such uses in the future.

To the extent that Lucas equates the required "economically beneficial uses" with positive economic value, it is highly doubtful that the Court was thinking of speculative value. One should recognize that during the time the Act prevented the use of Lucas' lots, the possibility clearly existed that this law would be repealed or altered some time in the future, or that some other event would occur, making it possible for Lucas or his successors to build once again.

245. See id. at 1008.
246. Id. Immediately after purchasing his lots in 1986, Lucas "commissioned architectural drawings" for the purpose of building single-family residences on the lots. It was the inability to proceed with these plans that prompted Lucas to file suit soon after the 1988 enactment of the Beachfront Management Act.
247. Id. at 1011.
248. Id. (emphasis added).
249. Id. at 1012.
250. Ironically, the Ninth Circuit provides implicit support for this reasoning when it states in TSPC IV that "had we engaged in conceptual severance, we would have read into the Takings Clause a requirement that the government never interfere with a property owner's wish to put his property to immediate use." TSPC IV, 216 F.3d 764, 782 n.28 (9th Cir. 2000). Since the Lucas Court viewed First English as requiring compensation for temporally limited denials of all property use, it follows, under the Ninth Circuit's reasoning, that it was establishing a general rule requiring the retention of some immediately foreseeable uses.
That this prospect would have created some speculative present value in the lots is undeniable from an economic point of view. Therefore, when the trial court found that Lucas' lots were rendered "valueless," a conclusion accepted by the Lucas majority, it is reasonable to believe that it was referring to the value of permitted present uses under the terms of the Act. The lots retained, in other words, the same type of value as that which the Court saw in the Tahoe properties, but in Lucas, this was not sufficient to shield the government from liability for a regulatory taking. In Palazzolo, the Court reaffirmed this reading, declaring that "a State may not evade the duty to compensate on the premise that the landowner is left with a token interest." There is an important reason for finding a focus for the "economically beneficial use" rule in previously allowable uses, rather than in speculative value and hypothetical future uses, namely, that the latter approach tends to render the categorical rule meaningless. After all, land will always have minimal value, even under a draconian permanent regulation, since there will always be someone willing to gamble that restrictions will be rescinded at some point in the future. If the categorical rule is satisfied by this type of value, it will always be satisfied, and there can be no taking under Lucas. Indeed, under such a framework, there could have been no taking in Lucas itself since the salvage uses that remained in Lucas' lots after the enactment of the Beachfront Management Act must have given rise to value greater than zero. Similar reasoning applies with respect to future speculative uses. As the Court of Claims has recognized, "[i]f passively holding land against the possibility that restrictions on its use will be lifted were deemed a productive economic use, property would never be rendered useless by regulation." Again, there could be no taking under Lucas. On the other hand, if categorical takings may be defeated only by the retention of some viable present use, Lucas takings will be "relatively rare," but they will occur when a landowner is, like Lucas and members of the Tahoe Council, required to leave property substantially in its natural state.

In light of the foregoing, it is easy to understand why the Tahoe landowners relied heavily on Lucas. The use restrictions imposed on the Tahoe-area landowners were as drastic as those that Lucas

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251. See Lucas, 505 U.S. at 1020.
252. Id. at 1020 n.9.
254. See Florida Rock Indus., Inc. v. United States, 791 F.2d 893, 902 (Fed. Cir. 1986).
255. Florida Rock Indus., Inc. v. United States, 8 Cl. Ct. 160, 166 n.6 (1985).
256. Lucas, 505 U.S. at 1018 (noting that regulations "typically" leave the property owners without economically beneficial use when "requiring land to be left substantially in its natural state").
As a result only a handful of the 8000-9000 undeveloped Tahoe basin lots were sold between 1981 and 1990, and these fetched “relatively low prices.” All of which tends to support the sense that TRPA merely left the Tahoe landowners with the residual value associated with the possibility that someone would someday be permitted to build a home on the subject lots. The only obvious difference between Lucas and Tahoe-Sierra is that the regulation in the latter case had a foreseeable end when it was enacted. In retrospect, this turns out to be a critical distinction, but only because the Court refused to give weight to First English’s suggestion that temporary denials of all use are compensable.

257. In Lucas, “[t]he Act [at issue] did allow the construction of certain nonhabitable improvements, e.g., ‘wooden walkways no larger in width than six feet,’ and ‘small wooden decks no larger than one hundred forty-four square feet.’” Lucas, 505 U.S. at 1009 n.2. On the other hand, the moratorium imposed by TRPA prevented SEZ landowners from engaging in any “grading, clearing, removal of vegetation, filling or creation of land coverage.” TSPC, 34 F. Supp. 2d 1226, 1243 (D. Nev.).

258. TSPC, 34 F. Supp. 2d at 1244.

259. Id. at 1244.

260. See TSPC IV, 228 F.3d 998, 999 (9th Cir. 2000) (Kozinski, J., dissenting from denial of rehearing en banc) (“The only difference between this case and Lucas is that the regulation here had a finite duration.”).

261. Id. at 999-1000 (Kozinski, J., dissenting from denial of rehearing en banc). [T]he question [in TSPC] is whether there is something special about a finite moratorium that relieves the government from its duty to compensate [under Lucas]. The Supreme Court answered this question in First English when it said that ‘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.

Id. (quoting First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 305 (1987)); see also Kellington, supra note 145, at 1 (stating that together, Lucas and First English “state that temporary development regulations that forbid all economically viable use of property are compensable under the Fifth Amendment to the United States Constitution”). Significantly, if Lucas governed temporary restrictions, the public purposes served by the regulation would be irrelevant in considering whether a taking has actually occurred. See Lucas, 505 U.S. at 1015. In Florida Rock Industries, Inc. v. United States the court observed that Lucas teaches that the economic impact factor alone may be determinative; in some circumstances, no balancing of factors is required. If a regulation categorically prohibits all economically beneficial use of land—destroying its economic value for private ownership—the regulation has an effect equivalent to a physical occupation. There is, without more, a compensable taking.

18 F.3d 1560, 1564-65 (Fed. Cir. 1994).

The government could avoid compensation only if it could show that the imposed use restrictions are consistent with “background principles” of property law. Lucas, 505 U.S. at 1004; see generally David L. Callies & J. David Breemer, Background Principles: Custom, Public Trust, and Preexisting Statutes as Exceptions to Regulatory Takings, in TakingSides, supra note 7. Although the Court did not reach the background principles issue in Tahoe-Sierra, it is unlikely that TRPA could have made the necessary showing, given that such principles “rarely support prohibition of
The Supreme Court was able to avoid *Lucas* primarily by applying the “all economically beneficial use” rule within a “temporal whole” framework in which future property uses become relevant. This framework is troubling on its own terms as well as for its roots in the *First English* dissent. To be specific, despite the Court’s declarations to the contrary, it is hard to view the “temporal whole” theory as a manifestation of the relevant parcel analysis. Admittedly, there is little agreement as to what constitutes the relevant parcel in regulatory takings law. Often described as the “parcel as a whole,” this definition simply begs the question of what is the “whole parcel” and opens the door to shifting and inconsistent determinations of the property interest to which takings analysis is to be applied. However, the Court’s answer, that the “whole” or relevant parcel encompasses the entire “useful life” of real property, represents a surprising expansion.

As an initial matter, it is notable that courts typically engage in the relevant parcel inquiry in cases involving two or more spatially or functionally defined property interests. Perhaps the most well-known example of the relevant parcel problem arises from the 1978 case of *Penn Central Transportation Co. v. New York City*. The question there was whether denial of an application to construct an office building on top of New York City’s famous Grand Central Terminal constituted a taking. The proposed addition to the Terminal was rejected pursuant to a Landmarks Preservation Law under which the Terminal was designated a landmark and the “city tax block” it occupied was designated a “landmark site.” Appellant owners of the Terminal also owned other property in the same area of midtown Manhattan.
The *Penn Central* majority noted that takings cases examine the character of the government action and the nature of interference with rights in the “parcel as a whole,” stating “‘[t]aking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.’” The interference with appellants’ property rights in *Penn Central* was insufficient to effect a taking because the restrictions “afford appellants opportunities further to enhance not only the Terminal site proper [the city tax block] but also other properties.” Thus, the relevant parcel for takings analysis included not only the air space above the Terminal, but the Terminal itself, the land on which it sits, and appellant’s other properties in the area.

Since the decision in *Penn Central*, courts have continued to struggle with the “parcel as a whole” principle in cases involving the appropriation of a spatially defined property interest, while rarely applying it to expand the “temporal dimension” of property in temporary takings cases. When the time-frame of a taking is implicated, courts typically limit the examination to discrete time periods that are immediately relevant to the factual basis of the case. This holds true in the regulatory takings context as well as

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269. Id. at 130-31.
270. Id. at 130.
271. Id. at 138.
272. Id. at 137-38. In dissent, then-Justice Rehnquist argued that the air rights themselves should be the analytical focus and on that basis, there was a taking. Id. at 143 (Rehnquist, J., dissenting).
273. See Dolan v. City of Tigard, 512 U.S. 374, 400-02 (1994) (Stevens, J., dissenting) (arguing that a governmental demand that a landowner dedicate an easement in return for development permission did not cause a taking because the Court’s cases “require the analysis to focus on the impact of the city’s actions on the entire parcel of private property”); Keystone Bituminous Coal Ass’n v. DeBenedictus, 480 U.S. 470, 497-99 (1987) (affirming that courts must look to the “parcel as a whole” in concluding that a law that required coal companies to leave a portion of their coal in place as surface support did not rise to the level of a taking); see also Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 644 (1993) (declaring that a company subject to monetary liability could not divide its interests into “what was taken and what was left” in order to establish a taking).
275. See, e.g., City of Monterey v. Del Monte Dunes, 526 U.S. 687 (1999). In *Del Monte Dunes*, a jury found the city liable for a taking after it repeatedly denied a landowner’s applications (each one scaled down to meet the city’s concerns) for a development permit during a seven-year period that ended when the state of California purchased the property. Id. at 701. The situation that confronted the landowner and the courts was analogous to that arising from application of a temporary moratorium; given the city’s continued assurances, the landowner had reason to believe that the city’s reticence would end and the landowner would be granted a permit in the foreseeable future. Accordingly, the property must have retained some present value and some prospect for future use during the permit
in cases involving a physical invasion of property. This is not really surprising since the very notion of a temporary regulatory taking, which is well-established in federal and state court jurisprudence, implies a limit on the temporal framework under which the underlying takings claim is to be analyzed.

The courts' refusal to aggregate temporally defined interests in the tradition of Penn Central reflects an understanding of the relevant parcel inquiry as one that is at least confined by a common sense interpretation of the property interests and individuals that are impacted by a particular regulation. In Lucas, the Court made it

negotiations. Still, none of the tribunals that reviewed the case, including the Court, contemplated reversing the jury's instructions and its findings under those instructions based on these grounds. In fact, the Court upheld the jury's resolution of what it described as a "claim for a temporary regulatory taking." Id. at 704; Eberle v. Dane County Bd. of Adjustment, 595 N.W.2d 730, 742 n.25 (Wis. 1999) (describing Del Monte Dunes as "holding that the question of whether a city's repeated refusals to approve development plans deprived a landowner of all economically viable use of the land, and thereby amounted to a temporary regulatory taking, was properly submitted to a jury, and citing First English with approval"); see generally Michael C. LeVine, Note, How Permanent Became Temporary in Del Monte Dunes, 49 Duke L. J. 803 (1999). It is also instructive to compare the Tahoe-Sierra approach to that followed in Tabb Lakes, Ltd., v. United States, 10 F.3d 796 (Fed. Cir. 1993). In Tabb Lakes, the U.S. Army Corps of Engineers ("Corps") issued an illegal order preventing a development company from proceeding with plans to build residential units on three sections of the company's property. Id. at 798-99. After the order was struck down, the company sued for a temporary taking, claiming that it was denied all beneficial use of the regulated property for the ten-month period during which the order was in effect. Id. at 799. While agreeing that "a taking, even for a day, without compensation is prohibited by the Constitution," id. at 800, the Federal Circuit rejected the takings claim on the ground that the claimant could have applied for and received a permit overcoming the order and thus had suffered only a fluctuation in property value. Id. at 800-01. The court suggested, however, that the claim would also fail on application of the "parcel as a whole" principle. Id. at 802. Specifically, it implied that application of this principle would extend the spatial boundaries of the claimant's land and thus lessen the effect of the order on the company's property value. Id. At the same time, while the factual circumstances in Tabb Lakes were quite similar to those in Tahoe-Sierra, and the relevant authorities in both cases identical, the Federal Circuit failed to give any indication that it was possible to employ the "whole parcel" principle to examine the temporal size of the claimant's parcel in order to defeat the claim.

See, e.g., Corrigan v. City of Scottsdale, 720 P.2d 513, 515-16 (Ariz. 1986) (holding that a zoning ordinance that denied a landowner substantially all use of property effected a temporary taking under Arizona Constitution during its effective period); Keshbro, Inc. v. City of Miami, 801 So. 2d 864, 875 (Fla. 2001) (holding that a one-year closure of a business pursuant to a nuisance abatement law amounted to a taking under Lucas); Alexander v. Town of Jupiter, 640 So. 2d 79, 82 (Fla. Dist. Ct. App. 1994) (finding that a temporary denial of a permit to clear trees "amounted to a temporary taking of all use of property... and as such was ripe for adjudication of the compensation claim raised"); Eberle, 595 N.W.2d at 740-41 (holding that temporary denial of a permit facilitating access to private property resulted in a temporary taking under the Wisconsin Constitution).

See supra note 94 and accompanying text.

See Eagle, supra note 164, at 11,237.

See Steven J. Eagle, Regulatory Takings 793 (2nd ed. 2001) (noting that the
clear that the relevant parcel inquiry should be guided by an interpretation that reflects basic notions of common-sense and fairness when it stated "[f]or an extreme—and we think, unsupportable—view of the relevant calculus, see [the state court opinion] in *Penn Central Transportation Co. v. New York City*, where the state court examined the diminution in... value... in light of total value of the takings claimant's other holdings in the vicinity." In *TSPC*, the Nevada district court applied similar reasoning, declaring that the fact that some Tahoe lot owners might own several non-contiguous parcels was irrelevant to its consideration of the impact of the moratorium on each independent piece of property.

The same concern for the viewpoint of the landowner shows up in lower federal and state court decisions resolving the relevant parcel question by an ad hoc approach that involves consideration of numerous factors. These courts have held, for instance, that a portion of a larger parcel should be viewed in isolation if there is little chance the government will allow development of other sections, that a lot zoned differently from another alleged to have been taken is not relevant, that two adjacent parcels should be considered separately if the owner so treats them and that an undeveloped portion of a larger developed parcel should be considered separately in large part because the government did not regulate it until after the owner submitted an application for development. Even in cases that ultimately propose a more expansive view of the relevant parcel, the expectations of the affected landowner are usually considered as part of the analysis.

Lucas Court's rejection of the expansive relevant parcel in *Penn Central* "suggests that the Court will take a commonsense approach to the takings denominator, perhaps through extending a presumption of validity to estates commonly employed in the vicinity of similar projects where specific regulatory concerns were not an issue").


282. *TSPC*, 34 F. Supp. 2d 1226, 1244 (D. Nev. 1999) ("The fact that a plaintiff may own two or more non-contiguous lots is irrelevant—each lot is considered separately.").

283. See Lisker, *supra* note 265, at 720 ("[H]istorically the Takings Clause was designed to protect private citizens from governmental interference with property rights. Therefore, it makes sense... to tip the scales slightly in the plaintiff's favor.").


287. See, e.g., *Ciampitti v. United States*, 22 Cl. Ct. 310, 318-20 (1991) (considering factors such as extent to which parcel treated as a single unit, degree of contiguity
What makes the “temporal whole” theory embraced in *Tahoe-Sierra* so problematic is that it is completely disconnected from the common sense calculations that have traditionally, if not overtly, characterized the relevant parcel inquiry. Requiring courts to take into account a non-existent future parcel, in fact, amounts to the functional equivalent of the approach rejected in *Lucas*; it too injects interests into the calculus that are clearly tangential to the regulatory action at issue. Indeed, the inclusion of speculative future interests is even more suspect; not only are such interests totally unrelated to the challenged regulation, but they may have little connection to the plaintiffs who must shoulder the resulting regulatory burdens. This is the most glaring difference between the “temporal whole” concept and traditional applications of the “parcel as a whole” principle: the former theory permits the aggregation of interests that a landowner does not even own to create the relevant parcel. In short, it can limit the landowner’s right to compensation because someone else may get to use the property at some point in the future. This might be appropriate if the Fifth Amendment was intended to protect “tracts of land” rather than people. But as Justice Miller made clear in *Pumpelly v. Green Bay Co.*, the Court’s primary concern is the impact of government activity on the individual:

It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provisions into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.

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288. See *Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1910) (noting that the Just Compensation Clause “deals with persons, not with tracts of land”); *see also* *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972) (“Property does not have rights. People have rights.”).
289. 80 U.S. 166 (1871).
290. *Id.* at 177-78.
In opposition to the purpose of the Takings Clause, common sense, and language in the First English majority opinion, the Tahoe-Sierra Court points to language in Agins v. Tiburon to support its decision to adopt an expansive temporal framework. Specifically, the Court pointed to the statement that: "[m]ere fluctuations in value during the process of governmental decision making, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as a "taking" in the constitutional sense.'"

The Agins Court made these comments while holding that an aborted condemnation proceeding, lasting only about a year and for which the landowners' costs were reimbursed, did not rise to the level of a taking.

While the Agins language may be relevant in limited cases to the question of whether a temporary restriction can cause a taking, holding that the good-faith termination of eminent domain proceedings does not require compensation is quite different than saying that a temporary regulation can never diminish uses of property enough to cause a taking on that basis alone. Indeed, the Agins language seems more akin to an early manifestation of the "normal delay" exception in First English, rather than to an extension of the "parcel as a whole" principle to temporally defined interests. This is especially true in light of the fact that the Agins language acknowledges the propriety of compensation for temporary restrictions at least in cases of "extraordinary delay." More importantly, the subsequent discussion of temporary takings in First English seems to preclude lower courts from "relying on Agins to argue that the temporary nature of the interference with the use of the property in question removes it from the category of a taking."
In any case, the “temporal whole” theory has little overt support in the Supreme Court’s previous takings jurisprudence and is inconsistent with the manner in which courts have traditionally approached the relevant parcel problem in general. The theory’s conspicuous absence in takings jurisprudence may owe to the fact that it tempts the government to abuse property rights by engaging in the successive enactment of one temporary moratorium after another,\textsuperscript{297} strategic planning behavior that the Court has rejected in a different context.\textsuperscript{298} Or it may be because the theory creates unsupportable distinctions in application of the Takings Clause: the landowner who is denied all use of property for five years under a temporary restriction is entitled to nothing, while the owner restricted under a permanent regulation that is invalidated after five years has a right to full compensation. In \textit{Palazzolo}, the Supreme Court acknowledged that the notice rule, which hinges the viability of a takings claim on whether the challenged regulation pre-dates the acquisition of property,\textsuperscript{299} is contrary to the \textit{Lucas} per se rule for similar reasons.\textsuperscript{300}

In sum, when the Supreme Court granted certiorari in \textit{Tahoe-Sierra}, a logical and precedential basis existed for refusing suddenly to expand the temporal boundaries of a takings parcel. From there, a fairly straightforward application of \textit{Lucas} and \textit{First English} would confirm that a 32-month moratorium on all economically beneficial uses of property is compensable in the same manner as a permanent deprivation of all use. However, as the Court’s opinion revealed, the strong foundations for such a holding were undermined by the visceral fear that it would endanger ordinary building delays and impose prohibitive financial burdens on land use planners.\textsuperscript{301}

As we have seen, there are good reasons for believing that this fear

\textsuperscript{297} See \textit{TSPC IV}, 228 F.3d 998, 1001 (9th Cir. 2000) (Kozinski, J., dissenting from denial of rehearing en banc). Kozinski argued, If a local government can evade its constitutional obligations by describing regulations as “temporary,” we create a sizable loophole to the Takings Clause. Why would a government enact a permanent regulation—and risk incurring an obligation to compensate—when it can enact one moratorium after another, perhaps indefinitely? Under the theory adopted by the (TSPC IV) panel, it’s hard to see when a property owner would ever state a takings claim against such a scheme.

\textsuperscript{298} See \textit{City of Monterey v. Del Monte Dunes}, 526 U.S. 687 (1999) (upholding taking where city delayed development for five years by rejecting five successive planning submissions and 19 site plans).


\textsuperscript{300} \textit{Palazzolo}, 533 U.S. at 628 (“The proposed rule [that a post-regulatory enactment transfer of property precludes a taking] is... capricious in effect. The young owner contrasted with the older owner, the owner with the resources to hold contrasted with the owner with the need to sell, would be in different positions.”).

\textsuperscript{301} See \textit{Tahoe-Sierra}, 122 S. Ct. 1465, 1485 (2002).
is exaggerated, not the least of which is the existence of First English's exception for "normal delays," and for recognizing that it should not be sufficient to support restrictions that would otherwise amount to a taking under a literal reading of the Court's precedent. But in Tahoe-Sierra, these points failed to carry the day. The Court's response—to reject a per se rule while recognizing that temporary restrictions can result in a taking under ad hoc Penn Central framework—is probably intended to mollify governmental fears while deterring the most extreme moratoria and bad-faith usage of that device to stall reasonable development indefinitely. Time will determine whether the Tahoe-Sierra decision actually functions in this manner or whether it is misread to insulate moratoria as a whole from takings challenges.

VI. CONCLUSION: THE UNDISCOVERED TAKING

For almost twenty years, property owners in the Tahoe Basin have sought to vindicate a simple but important constitutional precept: when the government puts private property to public use, it must pay just compensation. There is no question that the Council's properties have been so used—their lands remain undeveloped solely so that the public at large can enjoy an algae-free Lake Tahoe and their rights have been reduced to "paying taxes, suffering foreclosure or selling their lots at bargain-basement prices." Nevertheless, the Ninth Circuit has applied one procedural bar after another to the landowners' attempts to obtain some compensation for being forced to commit their land to benefit the general public. It has done so despite the fact that in two pre-Tahoe-Sierra cases, the Court forced the Ninth Circuit to modify its protective view of the TRPA to allow takings suits against the agency to go forward.

302. See supra notes 177-86 and accompanying text.
303. See supra note 213 and accompanying text.
304. See Tahoe-Sierra, 122 S. Ct. at 1492 (Rehnquist, J., dissenting) (arguing that First English's "normal delay" exception mitigated the risk that holding draconian moratoria to be a per se taking would endanger typical permitting delays).
305. See id. at 1484 (recognizing that a moratorium like that in Tahoe-Sierra could rise to a taking under several theories grounded in "fairness and justice"); id. at 1489 ("It may well be true that any moratorium that lasts for more than one year should be viewed with special skepticism.").
306. See Michael M. Berger, Clear Need: Keeping Lake Tahoe Pure Doesn't Preclude Honoring Our Duty to Property Owners, L.A. Daily J., Aug. 3, 2001, A21 ("the [TSPC] litigation seeks only compensation for the use of land that has been plainly, openly and deliberately taken from its titular owners. Frankly, they don't understand why anyone would contest that.").
307. See Kanner, supra note 53.
308. See supra notes 67-77 and accompanying text.
309. See Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725 (1997) (vacating the Ninth Circuit's judgment that a takings claim against TRPA arising from the 1987 Regional Plan was unripe because the landowner had not attempted to benefit from "Transferable Development Rights" which were assigned to her lot by the agency);
The Ninth Circuit's innovative interpretation of *First English* and the temporal parcel concept undoubtedly compelled the Court to intervene in the Lake Tahoe dispute once more in *Tahoe-Sierra*. As the Court's opinion makes clear, such intervention was apparently required to affirm that a case-by-case balancing test, that takes into account the temporary duration of a regulation, rather than a per se rule, governs takings challenges to moratoria. Although we may never know for sure, the Court was probably correct in raising the possibility that an application of the relevant test would have resulted in compensation for many of the aggrieved *Tahoe-Sierra* landowners. The economic impact of the moratorium was certainly severe in denying the owners all economically beneficial use of their property, for an extended period of years. Similarly, the character of the governmental action weighs in favor of a taking because TRPA's extraordinary actions singled out certain landowners to shoulder a substantial public burden unrelated to "any commitment [they] made or to any injury they caused."

The more difficult question is whether TRPA's regulatory actions frustrated the owner's reasonable investment-backed expectations. After *Palazzolo* and *Tahoe-Sierra*, it appears more than ever that, like the *Penn Central* test in general, the expectations factor cannot be reduced to a formula, such as whether the landowner purchased property prior to the enactment of the regulations, or whether the landowner seeks to engage in development similar to that allowed in the area prior to the challenged restriction. These and other

Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency, 440 U.S. 391 (1979) (reversing the Ninth Circuit's judgment that TRPA was immune from takings suits under the Eleventh Amendment).

310. The *Penn Central* test, confirmed by *Tahoe-Sierra* as the standard for takings claims against temporary land use restrictions, "involves a 'complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the governmental action.'" *Tahoe-Sierra*, 122 S. Ct. 1465, 1475 (2002) (quoting *Palazzolo* v. Rhode Island, 533 U.S. 606, 617 (2001)).

311. *Id.* at 1478 n.16.

312. *Eastern Enterprises* v. Apfel, 524 U.S. 498, 537 (1998) (plurality opinion) (finding a taking in part under "character of the governmental action" prong where legislation creating monetary liability "singles out certain employers to bear a burden that is substantial in amount ... and unrelated to any commitment that the employers made or to any injury they caused").

313. *See Palazzolo*, 533 U.S. at 634-35 (O'Connor, J., concurring), the state of regulatory affairs at the time of acquisition is not the only factor that may determine the extent of investment-backed expectations. For example, the nature and extent of permitted development under the regulatory regime vis-a-vis the development sought by the claimant may also shape legitimate expectations without vesting any kind of development right in the property owner. We also have never held that a takings claim is defeated simply on account of the lack of a personal financial investment by a postacquisition acquirer of property, such as a donee, heir, or devisee.

*Id.* (O'Connor, J., concurring).
considerations are undoubtedly important, but are to be balanced against each other with the goal of answering the underlying question: Did the aggrieved owners have reason to anticipate engaging in the desired property use prior to the government’s intervention and were they taking steps toward that goal?

In Tahoe-Sierra, most of the Council members can make a strong case that they had valid, objective reasons for believing that they would be able to build in the early 1980s. In particular, the vast majority of these owners purchased property zoned for residential use long before the 1980s crackdown, at a time when TRPA still considered and often approved development applications. Significantly, most of the purchased lots were “located in partially developed residential neighborhoods with paved roads, utility service, and homes built on many of the neighboring lots.” On the other hand, it is possible that some of the owners failed to take steps to receive development approval before enactment of the moratorium, a fact that might diminish the otherwise reasonable development expectations of those who purchased land long before the moratorium went into effect. But this limiting factor would not diminish the reasonableness of the expectations of the many landowners that did move to build prior to the enactment of the moratoria. Moreover, for the ultimate purpose of finding a taking, the extent of the owners’ expectations must be balanced against the economic impact and character of the governmental actions, both of which point toward compensation with respect to the Tahoe landowners.

In hindsight, it is easy to fault the landowners for not pursuing their valid Penn Central claims. But the strategic decision to proceed under Lucas was sound at the time it was taken. Again, First English’s language has long been viewed as establishing the equivalency of permanent and temporary restrictions, especially when all economic use of property is denied, and case-by-case Penn Central litigation is an impracticable and unwieldy method for litigating over 400 similar claims. Still, the quiet end to Tahoe-Sierra is disconcerting,

314. See Tahoe-Sierra, 122 S. Ct. at 1472 (noting that 400 members of the Council with SEZ lands, “purchased their properties prior to the effective date of the 1980 Compact”); Appellee Tahoe-Sierra Preservation Council’s Answering Brief at 1, n.2, TSPC IV, 216 F.3d 764 (9th Cir. 2000) (Nos. 99-15641, 99-15771) (on file with author) (“The vast majority of the Plaintiffs are senior citizens, most of whom acquired their properties at least 25 years ago.”).

315. See Tahoe-Sierra 122 S. Ct. at 1472 (stating that “the 1972 ordinance [which existed until the 1980 Compact was enacted] allowed numerous exceptions and did not significantly limit the construction of new residential housing”).


317. See TSPC, 34 F. Supp. 2d 1226, 1241 (D. Nev. 1999) (“[T]he fact that some plaintiffs may have already held their property for a long period of time would not exactly weigh in their favor. It would certainly show that they did not intend to build immediately upon purchase.”).
particularly because it means that many of the Council's elderly members will never see justice in the form of either compensation or the construction of their long-sought homes. Hopefully, younger landowners and future courts will have the opportunity to reveal the taking that was concealed in *Tahoe-Sierra*'s procedural quagmire. At that time, courts would do well to consider that TRPA's regulatory actions have destroyed the dreams of real people, whose lives encompass a small, but ultimately the only meaningful, slice of the temporal whole.
Notes & Observations