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The Fairest Picture the Whole Earth Affords?[1]: Assessing the Effect of *Tahoe-Sierra* on the U.S. Supreme Court's Muddled Takings Jurisprudence

by David T. Jones

I. Introduction

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[2] the U.S. Supreme Court concluded that challenges under the U.S. Constitution's Fifth Amendment Takings Clause to temporary land use regulations are to be resolved by applying the flexible balancing test set forth in *Penn Central Transportation Co. v. New York City*.[3] In so holding, the Court, in a 6-3 decision, declined an invitation to adjudge such regulations under the per se rule enunciated in *Lucas v. South Carolina Coastal Council*.[4] Although there is little disagreement that the government scored a victory in *Tahoe-Sierra*, commentators have offered strikingly different assessments of the extent to which the decision will affect regulatory takings jurisprudence. To some disappointed scholars, *Tahoe-Sierra* offers few guideposts for navigating the morass of regulatory takings law.[5] Others maintain that the Court's pronouncements in *Tahoe-Sierra* will revolutionize regulatory takings doctrine, destining the decision for landmark status.[6]

This Article stakes out a position in the middle ground, concluding that *Tahoe-Sierra*'s pronouncements range from fairly unremarkable to considerably illuminating. After recounting the facts underlying *Tahoe-Sierra* and the procedural history that culminated with the Court's 2002 decision in Part II, Part III examines in detail *Tahoe-Sierra*'s position on a number of takings issues. Specifically, Part III.A. explores the "fundamental" distinction between physical takings and regulatory takings drawn by *Tahoe-Sierra* and considers its effect on the continuing integrity of *Lucas*, as well as *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,[7] the Court's seminal temporary takings decision.

Part III.B. examines *Tahoe-Sierra*'s discussion of the denominator problem. In particular, Part III.B.1. assesses the impact of the Court's endorsement of the "parcel-as-a-whole" rule on the takings analysis of various temporary restrictions, from development moratoria to "retrospectively temporary regulations." Part III.B.2. discusses the impact of the parcel-as-a-whole rule on the evaluation of regulatory takings claims in general, with particular attention paid to problems in defining the relevant whole.

Part III.C. delves into the practical application of *Penn Central* to temporary land use restrictions. In particular, Part III.C. contemplates whether *Tahoe-Sierra* creates a new factor to be balanced under the *Penn Central* test.

II. Overview of *Tahoe-Sierra*

A. Factual Background

The 1950s brought a development boom to the Lake Tahoe Basin in California, which resulted in increased nutrient runoff into a lake historically renowned for its unparalleled clarity.[8] By the late 1960s, the gradual decline in Lake

David Jones is a *magna cum laude* graduate of Temple University's School of Law and is currently serving as a law clerk for the Hon. John R. Padova, U.S. District Court for the Eastern District of Pennsylvania. The author wishes to extend special thanks to Prof. Mark F. Anderson for his instructive feedback on earlier drafts of this Article. The original version of this Article was awarded first place in the Fourth Annual Student Writing Competition sponsored by Pacific Legal Foundation's Program for Judicial Awareness. For more information, visit Pacific Legal Foundation's website at http://www.pacificlegal.org.

1. Mark Twain, Roughing It 169 (Hippocrene Books 1872). Upon visiting Lake Tahoe for the first time in the 1860s, Mark Twain proclaimed the lake to be the fairest picture the whole earth affords. *Id.*
2. 122 S. Ct. 1465, 32 ELR 20627 (2002) (Tahoe-Sierra III).
3. 438 U.S. 104, 8 ELR 20528 (1978). Under the *Penn Central* test, courts evaluate regulatory takings claims by inquiry into the economic impact of the regulation on the claimant, the extent to which the regulation has interfered with reasonable investment-backed expectations, and the character of the governmental action. *Id*. at 124.
4. 505 U.S. 1003, 22 ELR 21104 (1992). Under *Lucas*, a regulation that eliminates all economically beneficial use of property effects a categorical taking, except where the prohibited use is banned by common-law nuisance principles. *Id*. at 1019, 1027.
5. *See, e.g.*, J. David Breemer, *Temporary Insanity: The Long Tale of* Tahoe-Sierra Preservation Council *and Its Quiet Ending in the United States Supreme Court*, 71 Fordham L. Rev. 1, 19 (2002) (arguing that "as an elucidation of takings law in general, [*Tahoe-Sierra*] is something of a disappointment").
6. *See, e.g.*, John D. Echeverria, *A Turning of the Tide: The* Tahoe-Sierra *Regulatory Takings Decision*, 32 ELR 11235 (Oct. 2002) (contending that "*Tahoe-Sierra* appears to be a good candidate to become a landmark").
7. 482 U.S. 304, 17 ELR 20787 (1987).
8. *Tahoe-Sierra III*, 122 S. Ct. at 1471.

Tahoe's pristine condition had become a serious cause for concern, prompting the Nevada and California Legislatures[9] into action.[10] The product of their collaborative effort, the 1968 Tahoe Regional Planning Compact, authorized the creation of the Tahoe Regional Planning Agency (TRPA), which was charged with the responsibility of "coordinat[ing] and regulat[ing] development in the [b]asin and to conserve its natural resources."[11]

In response to dissatisfaction with the TRPA's ability to tame the ongoing surge of development over the course of the 1970s, Nevada and California amended the compact in 1980.[12] The amended compact gave the TRPA 18 months to develop environmental threshold carrying capacities, which entailed, inter alia, designation of water and air quality standards.[13] Within one year of developing the standards, the TRPA was to adopt a regional implementation plan (RIP).[14]

To facilitate completion of this task, the TRPA enacted Ordinance 81-5 on June 25, 1981, which effectively imposed a development moratorium on parts of the basin pending adoption of the final plan.[15] In particular, the ordinance prohibited any grading, clearing, removal of vegetation, filling, or creation of land coverage within stream environment zones (SEZs)[16] and areas classified as districts 1, 2, and 3.[17]

The TRPA failed to articulate environmental threshold carrying capacities until August 26, 1982, missing the 1980 compact deadline by approximately two months.[18] After it became apparent that the TRPA efforts to timely enact the RIP were going to fall short, the TRPA adopted Resolution 83-21, which effectively extended the development prohibition until April 26, 1984, when the plan was eventually adopted.[19]

Two months later, the Tahoe Sierra Preservation Council, which represented approximately 2,000 landowners in the Lake Tahoe Basin, along with a class of over 400 individual owners affected by the development moratoria, brought suit against the TRPA.[20] The parties asserted a facial claim alleging that the development moratoria effected by the TRPA's Ordinance 81-5 and Resolution 83-21 amounted to takings under the Fifth Amendment for which just compensation was due.[21] A number of thorny procedural issues delayed resolution of the takings challenges until 1999,[22] when the U.S. District Court for the District of Nevada finally issued a decision on the merits.[23]

B. Procedural History

1. *Tahoe-Sierra*: District Court Decision

The district court first analyzed the TRPA's actions under *Penn Central*'s three-pronged balancing test,[24] and concluded that the development moratoria did not amount to a partial taking.[25] The district court noted that the temporary regulations at issue did not unduly interfere with the landowners' reasonable investment-backed expectations given that the average purchaser in the Tahoe area "expects to hold a lot for [25] years before building on it."[26] With respect to the economic impact of the TRPA's actions on the regulated property, the district court observed that the landowners' failure to introduce any evidence of diminution of individual property values further militated against finding a *Penn Central* taking.[27] Finally, the district court found legitimate the character of the government action, recognizing that limitation of development in potentially hazardous areas was a reasonable way to combat pollution of Lake Tahoe.[28]

The district court, however, was satisfied that the enactment of Ordinance 81-5 and Resolution 83-21 deprived the landowners of all economically viable use of their land, each thereby effecting a categorical taking under *Lucas*.[29] In so concluding, the district court rejected what it described as the TRPA's excellent case for exempting reasonable temporary planning moratoria from *Lucas*' per se rule.[30] The district court believed that the Court would decline to exempt such moratoria in light of its pronouncements in *First English*.[31] In *First English*, the Court held that the government must pay just compensation for temporary takings of property.[32] Reading *First English* together with *Lucas*, the court was convinced that "it should not matter how reasonable the delay is when all economically viable use is taken away for a short time."[33]

Although the district court conceded that *First English* involved a moratorium that was enacted with no termination date and only turned out to be temporary in retrospect upon its invalidation,[34] the district court found it "hard to see that [the Court] would reach a different conclusion when faced with a 'prospectively' temporary regulatory taking."[35] In this regard, the district court noted that *First English* relied heavily on cases involving prospectively temporary physi-

9. The 501-square-mile lake straddles the Nevada-California border. *Id*.
10. *Tahoe-Sierra III*, 122 S. Ct. at 1471.
11. *Id*.
12. *Id*. at 1472.
13. *Id*.
14. *Id*.
15. *Id*.
16. SEZs encompassed areas near streams feeding into Lake Tahoe. *Id*.
17. *Tahoe-Sierra III*, 122 S. Ct. at 1473. District 1, 2, and 3, deemed high hazard areas, encompassed especially steep lands that naturally facilitate greater runoff. *Id*.
18. *Id*.
19. *Id*.
20. *Id*.
21. *Id*.
22. *See* Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F. Supp. 2d 1226, 1229, 29 ELR 21290 (D. Nev. 1999) (Tahoe-Sierra I) (noting that procedural history "consists, in part, of three published Ninth Circuit opinions, at least five published district court opinions, and numerous unpublished district court orders").
23. *Id*.
24. *See supra* note 3 for enumeration of the *Penn Central* factors.
25. *Tahoe-Sierra I*, 34 F. Supp. 2d at 1242.
26. *Id*. at 1240.
27. *Id*. at 1241.
28. *Id*.
29. *Id*. at 1245.
30. *Id*. at 1248.
31. *First English*, 482 U.S. at 304.
32. *Id*. at 319, 321.
33. *Tahoe-Sierra I*, 34 F. Supp. 2d at 1250.
34. *Id*. at 1249.
35. *Id*. at 1250.

cal appropriations of property, wherein the Court found categorical takings.[36]

2. *Tahoe-Sierra*: Circuit Court Decision

The U.S. Court of Appeals for the Ninth Circuit reversed the district court's holding that the TRPA's development moratoria effected a *Lucas* per se taking.[37] Viewing the plaintiffs' properties as fee interests rather than temporal slices covering the duration of the development moratoria,[38] the Ninth Circuit panel determined that the TRPA's regulations "preserved the bulk of the future developmental use of the property."[39] As such, the economic impact of the TRPA's actions fell far short of the *Lucas* threshold.[40]

The circuit court asserted that evaluation of the temporal whole of the landowners' property interests was dictated by Court precedent[41] and the practical need to preserve valuable land use planning devices.[42] Indeed, "[t]o not reject the concept of temporal severance," the circuit court opined, "would risk converting every temporary planning moratorium into a categorical taking," a result at odds with the *Lucas* Court's assertion that total takings are relatively rare.[43]

The Ninth Circuit panel found the landowners' assertion that *First English* endorsed temporal severance flatly incorrect.[44] The circuit court pointed out that *First English* dealt with the issue of available remedies once a taking had been proven, not the question of what constitutes a taking.[45] To the extent that *First English* addressed the takings question, it very carefully defined temporary regulatory takings to encompass only "those takings which are ultimately invalidated by the courts," not temporary moratoria designed to last for a finite period.[46]

The Ninth Circuit additionally found that the district court erred in concluding that the Court's physical appropriation cases supported application of *Lucas* to prospectively temporary regulations.[47] Because "physical occupations and appropriations have always received markedly different analytic treatment than other regulatory takings," the temporal severance that is the norm in physical takings cases does not logically extend to the regulatory takings domain,[48] wrote Judge Stephen Reinhardt for a unanimous panel.

3. *Tahoe-Sierra*: Court Decision

a. Majority Opinion

The Court answered the question, of whether a moratorium on development imposed during the process of devising a comprehensive land use plan constitutes a per se taking of property requiring compensation under the Takings Clause, in the negative,[49] thus affirming the Ninth Circuit's decision below.[50] The majority decision, authored by Justice John Paul Stevens, at the outset acknowledged the uphill battle faced by the claimants as a consequence of asserting only a facial challenge to the TRPA's regulations.[51] This task, the Court further observed, "is made especially steep by [the claimants'] desire for a categorical rule requiring compensation whenever the government imposes such a moratorium on development."[52]

The Court then proceeded to reject the claimants' reliance on temporary physical appropriations cases in support of categorical treatment of development moratoria under *Lucas*.[53] To this end, the Court embarked upon a lengthy discourse about what it deemed to be a fundamental distinction[54] between physical takings and regulatory takings. It noted that physical takings enjoy a textual basis in the Constitution, whereas there exists no comparable reference to regulatory takings.[55] The Court further observed that physical takings are typically obvious and undisputed and involve the straightforward application of per se rules.[56] By contrast, the Court asserted, in the regulatory arena "the predicate of a taking is not self-evident, and the analysis is more complex," consisting of intensive examination and balancing of case-specific circumstances under the *Penn Central* analysis.[57] In light of such distinctions, the Court found it inappropriate to treat physical takings cases as controlling precedents in the regulatory takings setting.[58]

The Court next endeavored to explain why its decision in *Lucas* did not support the categorical rule advocated by the claimants.[59] It began with a review of pre-*Lucas* decisions asserting that the regulatory takings inquiry focuses on the parcel as a whole, eschewing the division of "a single parcel into discrete segments [to] attempt to determine whether the rights in a particular segment have been entirely abrogated."[60] Consistent with the parcel-as-a-whole construct, the Court noted that *Lucas* fashioned a categorical rule based on the permanent obliteration of value of a landowner's entire fee simple estate.[61]

By contrast, the actions of the TRPA amounted to "a temporary restriction that merely cause[d] diminution in value," thus falling outside the scope of *Lucas*, according to

36. *Id*. (citing United States v. Petty Motor Co., 327 U.S. 372 (1946); United States v. General Motors Corp., 323 U.S. 373 (1945)).
37. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 216 F.3d 764, 789, 30 ELR 20638 (9th Cir. 2000) (Tahoe-Sierra II).
38. *Id*. at 774.
39. *Id*. at 781.
40. *Id*. at 782.
41. *See id*. at 774 (noting the Court's refusal to employ conceptual severance of property interests in regulatory takings cases).
42. *Id*. at 777.
43. *Id*.
44. *Id*.
45. *Id*. at 777-78.
46. *Id*. at 778.
47. *Id*. at 779.
48. *Id*.
49. *Tahoe-Sierra III*, 122 S. Ct. at 1470.
50. *Id*. at 1490.
51. *Id*. at 1477.
52. *Id*.
53. *Id*. at 1479.
54. *Id*. at 1480.
55. *Id*. at 1478.
56. *Id*. at 1478 n.17.
57. *Id*.
58. *Id*. at 1479.
59. *Id*. at 1480.
60. *Id*. at 1481 (quoting *Penn Central*, 438 U.S. at 130-31).
61. *Id*. at 1483.

the Court.[62] Crucial to this finding was the Court's conclusion that the parcel-as-a-whole rule applies to the temporal dimension of a landowner's interest.[63] Because the Court viewed the temporal whole as "the term of years that describes . . . the owner's interest," the claimants' attempt to temporally sever the 32-month moratoria period from each landowner's fee simple estate was unavailing.[64] The Court further criticized the claimants' "conceptual severance" argument, which attempted to define the property interest taken in terms of the regulation being challenged, as circular, and feared that "[w]ith property so divided, every delay would become a total ban."[65]

The Court found its *First English* decision equally unsupportive of the claimants' argument that temporary development moratoria constitute per se takings under *Lucas*.[66] The Court emphasized that *First English* resolved only the compensation question as applied to temporary takings, not "the quite different and logically prior question whether the temporary regulation at issue had in fact constituted a taking."[67] In any event, the Court believed that whatever references *First English* made to the antecedent takings question implicitly rejected the claimants' categorical rule.[68] In particular, the Court pointed out that *First English* both expressly limited its holding to the facts presented and acknowledged the quite different questions that would arise in the case of normal land use planning devices that temporarily eliminate property use.[69]

Having rejected the argument that *Lucas* and *First English* compelled application of a categorical rule to development moratoria, the Court next contemplated whether considerations of fairness and justice justified creation of a new rule to cover such temporary regulations.[70] To this end, the Court considered, and ultimately discarded, seven different theories supporting the finding that the TRPA's actions effected a taking of claimants' property.[71] In the process, the Court proclaimed that the *Penn Central* fact-intensive balancing approach best serves fairness and justice in context of temporary land use regulations.[72]

Four of the theories supporting a taking were unavailable for procedural reasons.[73] First, the theory that the TRPA's regulations operated as a series of rolling moratoria, which functionally amounted to a permanent taking, was not encompassed by the Court's order granting review.[74] Second, the argument that the TRPA deliberately stalled to avoid adopting an RIP was foreclosed by the district court's unchallenged findings that the TRPA acted with good-faith diligence.[75] Third, the district court's additional finding that the development moratoria represented a proportional response to a grave problem precluded the contention that the TRPA's actions did not substantially advance a legitimate state interest.[76] Fourth, the claimants' decision to solely press a facial challenge barred application of the *Penn Central* analysis to each individual parcel affected by the development moratoria.[77]

The first of the three fairness and justice theories available to the claimants' espoused a categorical rule requiring compensation whenever government temporarily eliminates all economically beneficial use of property.[78] The Court concluded that such an extreme rule could not be maintained without comprehensively frustrating valid exercises of police power.[79] Instead of giving exclusive weight to the temporary character of the restriction, the Court believed that fairness and justice would be better served by careful examination and weighing of all the relevant circumstances under the *Penn Central* analysis.[80]

The remaining two theories advocated a narrower per se rule either encompassing only land use restrictions lasting more than one year or otherwise excluding normal delays in land use planning.[81] While this narrower formulation would "certainly have a less severe impact on prevailing practices," the Court still feared that drawing such bright lines would nevertheless unduly hamper prevailing land use planning devices.[82] "[E]ven a weak version of petitioners' categorical rule," the Court contended, "would treat these interim measures as takings regardless of the good faith of the planners, the reasonable expectations of the landowners, or the actual impact of the moratorium on property values."[83] While the Court willingly conceded that the duration of the restriction is an important factor in the takings assessment, it refused to accord the duration inquiry per se status.[84] Instead, the Court reiterated that the flexible ad hoc, factual inquiries associated with the *Penn Central* test better achieved the goals of fairness and justice in cases involving temporary land use restrictions.[85]

b. Dissenting Opinions

Chief Justice William H. Rehnquist, joined by Justices Antonin Scalia and Clarence Thomas, dissented from the majority opinion.[86] In his view, the TRPA's actions effected a temporary taking under *First English* and *Lucas* by eliminating all economic development over the course of a six-year period.[87] Chief Justice Rehnquist complained that

62. *Id*. at 1484.
63. *Id*. at 1483.
64. *Id*. at 1483-84.
65. *Id*. at 1483.
66. *Id*. at 1482.
67. *Id*.
68. *Id*.
69. *Id*. (quoting *First English*, 482 U.S. at 321).
70. *Id*. at 1484.
71. *Id*. at 1484-89.
72. *Id*.
73. *Id*. at 1485.
74. *Id*.
75. *Id*.
76. *Id*.
77. *Id*.
78. *Id*. at 1484.
79. *Id*. at 1485.
80. *Id*. at 1486.
81. *Id*. at 1484.
82. *Id*. at 1486-87.
83. *Id*. at 1487.
84. *Id*. at 1489.
85. *Id*.
86. *Id*. at 1490 (Rehnquist, C.J., dissenting).
87. *Id*. In addition to the period of delay caused by the TRPA's actions, the Chief Justice believed that the relevant time frame for the takings analysis included a subsequent three-year period, during which the district court's injunction of the TRPA's 1984 RIP effectively prohibited development of the claimants' parcels. *Id*. at 1491. The majority's narrower reading stemmed from the fact that "[t]hroughout

the majority's reading of *Lucas* rested on a tenuous distinction between permanent and temporary takings, under which the permanent prohibition in *Lucas* that ultimately lasted less than two years amounted to a taking, while the six-year temporary restriction imposed by the TRPA did not.[88] By finding the regulation's initial label dispositive, the Chief Justice feared that the majority unduly provided the government with incentive to enact temporary restrictions, which are subsequently extended into long-term developmental bans.[89] "Apparently," he lamented, "the Court would not view even a 10-year moratorium as a taking under *Lucas* because the moratorium is not 'permanent.'"[90]

The Chief Justice further felt that distinguishing temporary and permanent deprivations for purposes of takings analysis was fundamentally inconsistent with the justification underlying the *Lucas* categorical rule.[91] Specifically, he observed that *Lucas* was grounded in the notion that elimination of all economically beneficial use is "from the landowner's point of view, the equivalent of a physical appropriation."[92] Equating a temporary prohibition of all economic use with a forced leasehold, the latter for which the Court has categorically required compensation, Chief Justice Rehnquist concluded that *Lucas*' principles were squarely invoked by the development moratoria imposed by the TRPA.[93]

Chief Justice Rehnquist believed that the Court's decision in *First English*, which he authored, also rejected any distinction between temporary and permanent takings that eliminate all beneficial use of land.[94] To this end, Chief Justice Rehnquist quoted *First English* for the proposition 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."[95]

The Chief Justice additionally argued that the majority's concerns about the adverse implications of a categorical takings rule on traditional land use planning devices were unfounded based on the circumstances of the case at bar.[96] He stressed that the lengthy six-year development prohibition imposed by the TRPA "bears no resemblance to the short-term nature of traditional moratoria."[97] As such, Chief Justice Rehnquist was convinced that finding that the TRPA's actions amounted to a taking would in no way frustrate the short-term delays associated with traditional land use planning devices, which are a long-standing feature of state property law and part of a landowner's reasonable investment-backed expectations.[98]

Finally, in passing, the Chief Justice complained that the Court incorrectly interpreted *Lucas* as being fundamentally concerned with value, rather than use, of property.[99] He emphasized that *Lucas* repeatedly confirmed that the threshold for its categorical rule is no productive or economically beneficial use of land.[100]

Justice Thomas authored a separate dissent, in which Justice Scalia joined, to address the majority's reliance on the parcel-as-a-whole rule in rejecting claimants' taking argument.[101] In Justice Thomas' view, *First English* rejected application of the parcel-as-a-whole rule to temporary restrictions, "put[ting] to rest the notion that the 'relevant denominator' is land's infinite life."[102] He also expressed puzzlement over the majority's decision to "embrace the 'parcel-as-a-whole' doctrine as *settled*"[103] in light of the Court's recent discomfort[104] with the rule, as expressed in *Lucas* and *Palazzolo v. Rhode Island*.[105]

Justice Thomas found unconvincing the Court's assertion that temporary restrictions cannot effect *Lucas* takings since the property will recover value as soon as the restriction is lifted. That temporary regulations merely diminish property value is "cold comfort to the property owners in this case or any other," Justice Thomas argued.[106] In Justice Thomas' view, potential future value of property should only affect the amount of compensation owed.[107]

III. Discussion

A. Fundamental Distinction Between Physical and Regulatory Takings

Some of the most significant inroads for landowners in the regulatory takings arena have been triggered by the Court's occasional willingness to analyze such claims by reference to physical takings jurisprudence. Indeed, the *First English* Court took substantial,[108] if not exclusive, guidance from the Court's physical temporary takings precedents to reach the groundbreaking conclusion that, in regulatory context, temporary takings which "deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation."[109]

The *Lucas* Court also turned to physical takings principles to buttress its categorical treatment of regulations that eliminate all economically beneficial use of land, observing that "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation."[110] If *First English* had roundly questioned the valid-

the [d]istrict [c]ourt and [c]ourt of [a]ppeals decisions the phrase 'temporary moratorium' refers to two things and two things only: Ordinance 81-5 and Resolution 83-21." *Id*. at 1474 n.8.

88. *Id*. at 1492.
89. *Id*.
90. *Id*.
91. *Id*. (Rehnquist, C.J., dissenting).
92. *Id*. (quoting *Lucas*, 505 U.S. at 1017).
93. *Id*. at 1492-93.
94. *Id*. at 1492.
95. *Id*. (quoting *First English*, 482 U.S. at 318).
96. *Id*. at 1494-96 (Rehnquist, C.J., dissenting).
97. *Id.* at 1496.
98. *Id*. at 1495.
99. *Id*. at 1493.
100. *Id*. (quoting *Lucas*, 505 U.S. at 1017) (emphasis omitted).
101. *Id*. at 1496 (Thomas, J., dissenting).
102. *Id*.
103. *Id*. at 1496 n.* (emphasis in original).
104. *Id*. (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 631, 32 ELR 20516 (2001)).
105. 533 U.S. 606, 32 ELR 20516 (2001).
106. *Tahoe-Sierra III*, 122 S. Ct. at 1497 (Thomas, J., dissenting).
107. *Id*.
108. *First English*, 482 U.S. at 318.
109. *Id*.
110. *Lucas*, 505 U.S. at 1017.

ity of any perceived rigid distinction between physical and regulatory takings claims,[111] *Lucas*' importation of categorical rules, theretofore reserved for physical takings cases, into the regulatory taking arena cast serious doubt upon the maintenance of such a distinction.

Nevertheless, the Court took pains to first establish a fundamental distinction[112] between physical and regulatory takings,[113] and thereafter flatly declare 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."[114] The Court asserted that its conclusion was supported by the "long[-]standing distinction between acquisitions of property for the public use . . . and regulations prohibiting private uses" reflected in its takings jurisprudence.[115] To say that the Court made short shrift of *First English* and *Lucas* would be an understatement; indeed, the Court mentioned nary a word regarding the apparent inconsistency of both cases with the purported long-standing distinction between physical takings and regulatory takings jurisprudence.[116]

In any event, *Tahoe-Sierra* unequivocally ensures that, at least under the current Court, landowners will no longer enjoy the luxury of dressing up regulatory takings claims in a more attractive[117] physical takings wardrobe. Given the success of such a strategy in *Lucas*, the *Tahoe-Sierra* decision doubtless removed a potent stick from the Lockean bundle.[118] That *Tahoe-Sierra* diminished the prospect of the Court handing down a groundbreaking, pro-landowner decision any time soon, therefore, seems reasonably clear, even in an area of the law mired in a perpetual state of confusion.[119] The effect of the fundamental distinction drawn by *Tahoe-Sierra* between physical and regulatory takings on past landmark decisions like *First English* and *Lucas*, however, cannot be forecast with equal confidence.

Nevertheless, Part III.A.1. hazards an argument that the fundamental distinction between physical takings and regulatory takings forged by *Tahoe-Sierra* cast a dark shadow of doubt over the continuing vitality of the *Lucas* rule, while simultaneously highlighting the virtues of *Lucas*' theoretical antithesis, the *Penn Central* test. Because the physical regulatory distinction drawn by *Tahoe-Sierra* is confined to the takings question, Part III.A.2. concludes that *Tahoe-Sierra*'s pronouncements yield very little impact on *First English*'s remedial principles.

1. Potential Effects of Physical Regulatory Taking Distinction on *Lucas*' Per Se Rule

By drawing (or reinforcing, as *Tahoe-Sierra* itself suggests) a fundamental distinction between physical takings and regulatory takings, the *Tahoe-Sierra* Court virtually[120] amputated the equivalent of physical appropriation rationale, one of the theoretical legs on which the *Lucas* per se rule rested.[121] To this end, the Court observed that the application of per se rules in the physical takings context was justified by characteristics inherent in, and peculiar to, government condemnation or physical appropriation of private property. In particular, the Court noted that the explicit textual anchor of physical takings in the Constitution,[122] coupled with the notion that "a taking is typically obvious and undisputed" in the physical takings arena,[123] make the determination of whether government action is an unconstitutional deprivation of private property especially amenable to categorical treatment. Indeed, it is axiomatic that the Fifth Amendment's Takings Clause is violated as soon as the government appropriates any portion of the landowner's property, such as part of an apartment rooftop to install television cables.[124] Accordingly, it can be concluded that a taking occurred in the physical appropriation setting without further inquiry.

At bottom, therefore, the application of per se rules in the physical takings context is warranted by the straightforward

111. *See First English*, 482 U.S. at 329 (Stevens, J., dissenting) (criticizing majority's reliance on physical takings cases since "our cases make it clear that regulatory takings and physical takings are very different").

112. *Tahoe-Sierra III*, 122 S. Ct. at 1480.

113. *Id*. at 1478-80.

114. *Id*. at 1479.

115. *Id*.

116. As set forth below, the Court's silence as to *First English*'s importation of physical takings precedents into the domain of regulatory takings can perhaps be justified by the narrow scope of *Tahoe-Sierra*. *See infra* Part III.A.2.

117. *See Tahoe-Sierra III*, 122 S. Ct. at 1478 (noting that "when the government physically takes possession of an interest in property . . . 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").

118. Palazzolo v. Rhode Island, 533 U.S. 606, 627, 32 ELR 20516 (2001).

119. *See, e.g.*, Michael C. LeVine, *How Permanent Became Temporary in* Del Monte Dunes, 49 Duke L.J. 803, 803 (1999) (observing that regulatory takings jurisprudence has been so convoluted as to "resemble a car wreck or an impenetrable jungle rather than a discrete legal principle").

120. To contend that the *Tahoe-Sierra* Court *actually* rejected in full the "equivalent of physical appropriation" rationale from *Lucas* would be a slight overstatement in light of the Court's reaction to Chief Justice Rehnquist's dissent. Specifically, the Chief Justice contended that "[t]he 'practical equivalence,' from the landowner's point of view, of a 'temporary' ban on all economic use is a forced leasehold." *Tahoe-Sierra III*, 122 S. Ct. at 1493 (Rehnquist, C.J., dissenting). Instead of outright rejecting the "equivalence" rationale in response to Chief Justice Rehnquist's contention, the Court merely concluded that "[t]he Chief Justice *stretches Lucas' 'equivalence' language too far* . . . [f]or even a regulation that constitutes only a minor infringement on property may, from the landowner's perspective, be the functional equivalent of an appropriation." *Id*. at 1480 n.18 (emphasis added). Thus, aside from clearly rejecting *Lucas*' premise that the landowner's perception guides the equivalence determination (and thereby endorsing one of the complaints originally voiced in Justice Stevens' *Lucas* dissent, *see Lucas*, 505 U.S. at 1066), the Court arguably implied that the *Lucas* equivalence rationale has retained some effect, however small. Perhaps the *Tahoe-Sierra* Court was suggesting that total deprivation of economic use is the equivalent of physical appropriation of the entire property. Even so, there is "something of a logical embarrassment," Echeverria, *supra* note 6, in equating compensable regulatory takings with physical appropriations for, as *Tahoe-Sierra* itself explained in distinguishing physical and regulatory takings, "[w]hen the government physically takes possession of an interest in property . . . it has a categorical duty to compensate the former owner, regardless of whether interest that is taken constitutes an entire parcel or merely part thereof." *Tahoe-Sierra III*, 122 S. Ct. at 1478. Thus, while *Tahoe-Sierra* itself may have stopped a step short of altogether eliminating *Lucas*' equivalence rationale purely out of respect for precedent, that last step must be taken to faithfully carry out the Court's physical regulatory distinction to its logical end.

121. *Lucas*, 505 U.S. at 1017.

122. *Tahoe-Sierra III*, 122 S. Ct. at 1478.

123. *Id*. at 1478 n.17.

124. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (noting that "permanent physical occupation authorized by government is a taking without regard to the public interest that it may serve").

nature of such claims.[125] By contrast, "the predicate of a taking is not self-evident, and the analysis is more complex" in the regulatory taking setting.[126] Indeed, because "[g]overnment could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law,"[127] courts faced with regulatory takings claims must take pains to assess whether a regulation goes too far.[128] This reality applies even to regulations depriving the landowner of all economically beneficial use of land, for which the *Lucas* Court accorded categorical treatment. Indeed, whether a regulation eliminates all economically beneficial use of property is neither obvious nor undisputed. Rather, courts are placed in the unenviable position of wading through an extensive record that offers divergent accounts of a regulation's effect on the availability and value of remaining property uses.[129] Moreover, in jurisdictions that have read *Lucas* to require deprivation of all property value, rather than merely all economically beneficial use, the courts' task is arguably even more cumbersome, entailing review that centers even more directly on complex valuation analyses of the regulated property.[130]

Having utilized the physical regulatory distinction to advance a persuasive argument against applying categorical rules to the complex factual determinations inherent in any regulatory takings claim, the *Tahoe-Sierra* Court calculatedly segued into lauding *Penn Central* as the polestar[131] of regulatory takings analysis. Indeed, the Court's extolment of *Penn Central*'s ad hoc, factual inquiries, at the direct expense of *Lucas*' per se rule, resonates throughout the opinion,[132] deliberately begging the question of why or how the *Lucas* rule was ever able (or needed) to bridge the analytical gulf between regulatory takings claims and physical takings claims in the first place.[133]

Evaluation of the propriety of the *Lucas* Court's remaining justifications for its categorical rule does not yield much of an answer. Specifically, *Lucas*' argument that its categorical rule was necessary to address the heightened risk that private property is being singled out and pressed into some form of public service[134] covers nothing beyond that which was already adequately addressed under the character-of-government-interest prong of *Penn Central*. Indeed, in the Court's evaluation of the character-of-government-interest prong in *Keystone Bituminous Coal Ass'n v. DeBenedictis*,[135] it distinguished the Subsidence Act from the Kohler Act (which the Court found effected a taking in *Pennsylvania Coal Co. v. Mahon*[136]) by observing that the former affected all surface owners equally.[137] Moreover, in elucidating the physical regulatory distinction, *Tahoe-Sierra* observed that physical appropriations "usually represent a greater affront to individual property rights" than land use regulations.[138] This observation arguably bears out Justice Stevens' criticism of the singling out rationale in his *Lucas* dissent, wherein the future author of the *Tahoe-Sierra* majority opinion argued that although "[a] physical taking entails a certain amount of 'singling out'. . . [t]here is no necessary correlation between 'singling out' and total [regulatory] takings: [a] regulation may single out a property owner without depriving him of all of his property, and it may deprive him of all his property without singling him out."[139] Accordingly, *Lucas*' singling out concerns are not only suf-

125. *See Tahoe-Sierra III*, 122 S. Ct. at 1478 (noting that physical takings jurisprudence "involves the straightforward application of *per se* rules").

126. *Id*. at 1478 n.17.

127. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

128. *Id*. at 415.

129. *See Tahoe-Sierra I*, 34 F. Supp. 2d at 1243 (noting that "[a]t trial, a substantial amount of time was spent examining the potential uses to which the plaintiffs' land could or could not have been put" during the development moratoria period and providing a non-exhaustive list of 27 potential uses discussed by the parties); *id*. (noting that defendants offered expert testimony to demonstrate that potential uses were economically viable); Reahard v. Lee County, 968 F.2d 1131, 1136, 22 ELR 21455 (11th Cir. 1992) (enunciating eight different questions for the fact finder to consider in determination of whether landowner has been denied all economic use of land). Notably, *Lucas* avoided determining whether claimant Lucas was deprived of all economically beneficial use of his land by accepting the trial court's finding that the property had been rendered valueless. 505 U.S. at 1016 n.7.

130. *See* Walcek v. United States, 49 Fed. Cl. 248, 262 (Fed. Cl. 2001) (noting that courts rely on extensive expert testimony and reports introduced at trial to determine diminution in property value). *See infra* Part III.B.2 for further discussion of whether *Lucas* requires elimination of all property value, or merely deprivation of all property use.

131. *Tahoe-Sierra III*, 122 S. Ct. at 1486 (quoting *Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring)).

132. On four separate occasions the Court reiterated its concern, first expressed by Justice Sandra Day O'Connor's concurrence in *Palazzolo*, that the temptation to adopt what amount to per se rules be resisted. *See id*. at 1478; *id*. at 1481; *id*. at 1481 n.23; *id*. at 1489. The Court twice quoted Justice O'Connor's concurrence in *Palazzolo* for the proposition that *Penn Central* remains "[o]ur polestar" in regulatory takings cases, *see id.* at 1481 n.23, 1486, and for the observation that regulatory takings jurisprudence requires "careful examination and weighing of all the relevant circumstances." *Id*. at 1478, 1486.

133. *See* Echeverria, *supra* note 6 (arguing that "the rationale for maintaining . . . two separate tests is increasingly weak" after *Tahoe-Sierra*); Danaya C. Wright & Nissa Laughner, *Shaken, Not Stirred: Has* Tahoe-Sierra *Settled or Muddied the Regulatory Takings Waters?*, 32 ELR 11177 (Oct. 2002) (criticizing the *Lucas* rule since "[t]he same end can be achieved using *Penn Central*"). During oral argument, the following question was posed to petitioner's counsel: "Is it your position that the application of the *Penn Central* approach would not result in appropriate compensation determinations at the end of the day?" Oral Argument Transcript, *available at* 2002 WL 43288, at *24. Indeed, this question is no less applicable to permanent takings depriving all economic use of land. *See also id*. at *44 (observation by Solicitor General Theodore B. Olson that "[t]he colloquy so far today seems to me to illustrate the wisdom of Justice O'Connor's comment in her concurring opinion in the *Palazzolo* case last June that the Court should avoid per se rules in the area of regulatory taking").

134. *Id*.

135. 480 U.S. 470, 17 ELR 20440 (1987).

136. 260 U.S. 393 (1922).

137. *Keystone*, 480 U.S. at 486. *See also Lucas*, 505 U.S. at 1072-73 (Stevens, J., dissenting).

138. *Tahoe-Sierra III*, 122 S. Ct. at 1479.

139. *Lucas*, 505 U.S. at 1067 (Stevens, J., dissenting).

140. Even if the Court's elucidation of the physical regulatory distinction, coupled with its enthusiastic approval of *Penn Central*, did not completely undermine *Lucas*' singling out rationale, there is additional reason to believe that *Tahoe-Sierra* at least limited the reach of this justification for the per se rule. Specifically, in rejecting the creation of a categorical takings rule for temporary land use restrictions, *Tahoe-Sierra* noted that "the interest in protecting the decisional process is even stronger when an agency is developing a regional plan than when it is considering a permit for a single parcel," as was the case with the TRPA. *Tahoe-Sierra III*, 122 S. Ct. at 1488. Justice Stevens had made a similar, yet unavailing, argument in his *Lucas* dissent, where he contended that Lucas had not been singled out since the Beachfront Management Act "does not target particular

ficiently considered under *Penn Central*, but also better evaluated by a noncategorical approach.[140]

The *Lucas* rule was also justified in part by the notion that a categorical rule would not impair the government's ability to go on given the rarity of situations where a landowner is deprived of all economically beneficial uses of land by the government.[141] However, balancing the severe economic impact of the regulation against the modest character of the governmental interest under the *Penn Central* analysis would almost certainly yield the same finding in favor of the landowner.

In sum, while critics have assailed the necessity of the *Lucas* rule since its inception,[142] *Tahoe-Sierra* adds considerable force to these criticisms through its fortification of a fundamental distinction between the categorical rules that dominate in the realm of physical takings and the ad hoc, factual inquiries that reign supreme in the regulatory takings setting. And with only three staunch proponents of the categorical rule remaining on the Court,[143] *Lucas* now appears left to cling to whatever security stare decisis may provide.

landowners, but rather regulates the use of the coastline of the entire [s]tate." *Lucas*, 505 U.S. at 1074 (Stevens, J., dissenting). Thus, while the *Lucas* majority found the objectively heightened risk, *id*. at 1018, that private property is being singled out for public service sufficient to justify application of the per se rule, *Tahoe-Sierra* suggests that subjective proof that the landowner has actually been singled out is required to trigger *Lucas*.

141. *Lucas*, 505 U.S. at 1017.

142. *See, e.g.*, F. Patrick Hubbard, Palazzolo, Lucas, *and* Penn Central: *The Need for Pragmatism, Symbolism, and Ad Hoc Balancing*, 80 Neb. L. Rev. 465, 492 (2001) (observing that *Lucas* is "likely to have little impact because instances of total takings are probably rare and the results under the *Penn Central* balancing test in such cases would likely be the same" and is better read as merely "a symbolic opinion that strongly endorses property rights").

143. Of the six Justices that composed the *Lucas* majority, only Chief Justice Rehnquist, and Justices Scalia and Thomas, still clearly endorse both the *Lucas* rule and the conflation of physical takings and regulatory takings jurisprudence. Justice Anthony Kennedy, who concurred in the *Lucas* judgment but joined the *Tahoe-Sierra* majority, is at best an advocate for a weaker version of the *Lucas* rule. *See Lucas*, 505 U.S. at 1034 (Kennedy, J., concurring) (observing that "[t]he finding of no value must be considered under the Takings Clause by reference to the owner's reasonable, investment-backed expectations"); *id*. (Kennedy, J., concurring) (sharing the "reservations" of the dissenters that a beachfront lot loses all value because of a development restriction). Justice O'Connor, who joined the *Lucas* majority, distanced herself from the *Lucas* rule in her *Palazzolo* concurrence, wherein she extolled the *Penn Central* as the "polestar" of regulatory takings jurisprudence and cautioned that "[t]he temptation to adopt what amount to *per se* rules in either direction must be resisted." *Palazzolo*, 533 U.S. at 636 (O'Connor, J., concurring). Moreover, she joined Justice Stevens' majority opinion in *Tahoe-Sierra*, which drew the "fundamental distinction" between physical takings and regulatory takings. The late Justice White, the final member of the *Lucas* majority, has since been replaced by Justice Ginsburg, who not only voted with the *Tahoe-Sierra* majority, but also espoused an extremely narrow conceptualization of *Lucas* in her *Palazzolo* dissent that would render the per se rule virtually hollow. *See* 533 U.S. at 651 (Ginsburg, J., dissenting) (calling petitioner's assertion that total takings encompass regulations leaving property with only a "'few crumbs of value'" an "*expanded* rendition of *Lucas*") (emphasis added); *id*. (Ginsburg, J., dissenting) (noting that a "floor *value* was all the State needed to defeat Palazzolo's simple *Lucas* claim") (emphasis added).

Of the remaining three members of the Court, Justice Stevens dissented in *Lucas*; Justice Souter, who filed a separate statement in *Lucas* asserting that writ of certiorari was improvidently granted, called the total taking finding from *Lucas* highly questionable, 505 U.S. at 1076, joined Justice Ruth Bader Ginsburg's *Palazzolo* dissent, discussed *supra*, and joined the *Tahoe-Sierra* majority; Justice Stephen Breyer (a post-*Lucas* appointment) joined both Justice Ginsburg's *Palazzolo* dissent and the *Tahoe-Sierra* majority.

2. Potential Effects of Physical Regulatory Takings Distinction on *First English*

Although *First English* relied on physical takings jurisprudence more heavily than did *Lucas*, the fundamental distinction between physical takings and regulatory takings recognized by *Tahoe-Sierra* likely poses far less danger to the soundness of *First English*'s holding that temporary regulatory takings require just compensation. Indeed, the *Tahoe-Sierra* Court expressed no reservations about collapsing the physical regulatory distinction in the remedial phase of takings analysis, as evinced by its carefully limited conclusion that it is "inappropriate to treat cases involving physical takings as controlling precedents for the *evaluation of a claim that there has been a regulatory taking* . . . ."[144] That *Tahoe-Sierra* intended for the physical regulatory distinction to encompass only the liability phase of takings analysis was reinforced by the Court's disclaimer that "nothing we say today qualifies [*First English*'s] holding," and further confirmed by the Court's assurances of the decidedly narrow scope of its holding.[145]

Despite the enduring validity of *First English*'s holding that temporary regulatory takings require just compensation, courts have implicitly acknowledged that the physical regulatory distinction still has some relevance in the remedial phase of temporary takings analysis. Indeed, while compensation for temporary regulatory takings is commonly calculated by reference to the fair rental value of the property standard typically employed in the temporary physical takings context,[146] courts have not hesitated to craft new measures[147] where application of the general rule would not accurately reflect the reasonable value of the property's use.[148] Such measures are sensitive to the reality that, in contrast to the physical takings context, regulatory takings often do not involve the temporary denial of a preex-

144. *Tahoe-Sierra III*, 122 S. Ct. at 1479 (emphasis added).

145. To appreciate the full import of limiting the physical regulatory takings distinction to the liability phase, it is necessary to recall the syllogism underlying the *First English* holding. The major premise of *First English*'s reasoning was that the Court's physical takings jurisprudence permitted compensation for temporary deprivations of land. The implicit minor premise of the Court's argument was that physical takings are conceptually indistinct from regulatory takings. The Court's conclusion, therefore, was that temporary regulatory takings warrant just compensation. Thus, by explicitly leaving the *First English* holding untouched, *Tahoe-Sierra* not only left intact the convergence of *physical* takings and *regulatory* takings with respect to the remedial question, but also the equation of *permanent* and *temporary* takings for purposes of the remedial issue. Importantly, however, in addition to forging a sharp distinction between physical takings and regulatory takings with respect to the liability phase of takings analysis, *Tahoe-Sierra* made clear that temporary restrictions *are* different in kind from permanent restrictions with respect to assessing takings liability. *See infra* Part III.B. for a discussion of the Court's endorsement of the temporal parcel as a whole.

146. Bass Enters. Prod. Co. v. United States, 133 F.3d 893, 895, 28 ELR 20446 (Fed. Cir. 1998) (citing Yuba Natural Resources v. United States, 821 F.2d 638, 641 (Fed. Cir. 1987) (noting that "the recovery for a temporary taking is generally the rental value of the property").

147. SDDS, Inc. v. State, 650 N.W.2d 1, 14 (S.D. 2002).

148. *See, e.g.*, *id.* at 14-19 (assessing five different valuation methods). *See also* San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 660, 11 ELR 20345 (1981) (Brennan, J., dissenting) (stating that "[t]he [s]tates should be free to experiment in the implementation of this [just compensation] rule, provided that their chosen procedures and remedies comport with the fundamental constitutional command").

isting use of the land.[149] Because, as one commentator has observed, "regulatory takings challenges arise where an ordinance restricts future development of land that is either unused or underused at the time of enactment,"[150] calculation of just compensation based on fair rental value could yield a windfall for the landowner.[151]

Finally, it should be noted that, on a practical level, the *Tahoe-Sierra* Court's ringing endorsement of *Penn Central* as the appropriate methodology for determining liability, at the clear expense of *Lucas*' per se rule, should ensure that many fewer temporary regulatory takings claimants ultimately enjoy *First English*'s remedial fruits. As such, while Justice Stevens may have lost the *First English* battle over the issue of whether temporary regulatory takings require just compensation, he clearly won the temporary takings war in *Tahoe-Sierra*.

B. Tahoe-Sierra*'s Tackling of the Denominator Problem*

1. Temporal Severance

Although the Court had been called upon to address the denominator problem—and the concomitant conceptual severance[152] issue—on several occasions in the past,[153] *Tahoe-Sierra* represented its first direct encounter with the particular question of whether property interests can be temporally severed in evaluating regulatory takings claims. But while the issue may have been novel, the *Tahoe-Sierra* Court hardly felt constrained to fashion a new analytical framework in its emphatic rejection of the petitioners' attempt to "bring this case under the rule announced in *Lucas* by arguing that we can effectively sever a 32-month segment from the remainder of each landowner's fee simple estate, and then ask whether that segment has been taken in its [entirety] by the moratoria."[154] Instead, the Court imported into the temporary takings domain the parcel-as-a-whole rule, which had been previously invoked to rebuff attempts to vertically sever the airspace above Grand Central Terminal[155] and to vertically sever an underground support estate.[156]

To say, however, that the Court tackled the temporal severance issue head-on for the first time in *Tahoe-Sierra* is not to imply that the Court was writing on an immaculately clean slate. Fifteen years before, in *First English*, the Court observed that "'temporary takings' which . . . deny a landowner of all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation."[157] Although *First English* really addressed only the narrow question of whether compensation is the appropriate remedy for regulatory takings of temporary duration,[158] innovative takings claimants[159] (including, most notably, the *Tahoe-Sierra* petitioners) seized on the arguably imprecise language of *First English*, proclaiming that it, read in conjunction with *Lucas*' determination that deprivation of all economically beneficial use of property constitutes a per se taking, more broadly reflects the Court's endorsement of temporal severance and, therefore, application of a categorical rule to temporary land use restrictions.

Understandably, then, in rejecting temporal severance and the application of the *Lucas* per se rule to regulations imposing only temporary deprivations, *Tahoe-Sierra* felt obliged to clarify that *First English*'s scope was confined to the compensation question[160] and, furthermore, that *Lucas* encompassed only permanent deprivations of all use of property.[161] The section below assesses the impact of *Tahoe-Sierra*'s interpretation of *First English* and *Lucas* on the intervening decade of lower court jurisprudence developed in response to those cases. In particular, this section analyzes the effect of *Tahoe-Sierra*'s temporal whole pronouncement on three different types of temporary restrictions: development moratoria, retrospectively temporary regulations, and nuisance abatement closures. As set forth below, *Tahoe-Sierra* validated the prevailing view that non-rolling development moratoria are not subject to *Lucas* treatment, left intact the notion that retrospectively temporary regulations are properly analyzed under *Lucas*, and implicitly suggested that nuisance abatement closures have been improperly categorized as *Lucas* takings by some

149. J. Margaret Tretbar, *Calculating Compensation for Temporary Regulatory Takings*, 42 U. Kan. L. Rev. 201, 220 (1993).

150. *Id*. at 221.

151. *See* Bass Enters. Prod. Co. v. United States, 48 Fed. Cl. 621, 624 (2001) (rejecting fair rental value calculation of damages resulting from taking of right to develop and drill for natural resources since claimant only lost time, not any of the oil and gas).

152. The phrase conceptual severance was coined by Prof. Margaret Jane Radin in her article entitled, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 Colum. L. Rev. 1667, 1676 (1988). Professor Radin defines conceptual severance as a strategy that

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

Id.

153. *See, e.g.*, Palazzolo v. Rhode Island, 533 U.S. 606, 631, 32 ELR 20516 (2001) (declining "to examine the difficult persisting question of what is the denominator in the takings fraction" in response to petitioner's argument that his upland parcel was distinct from the wetlands portions); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497, 17 ELR 20440 (1987) (observing that denominator determination is critical regulatory takings question and endorsing parcel-as-a-whole rule).

154. *Tahoe-Sierra III*, 122 S. Ct. at 1483.

155. *See Penn Central*, 438 U.S. at 130-31 (noting that "[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," rather "this Court focuses both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole . . . .").

156. *See Keystone*, 480 U.S. at 497-98 (citing *Penn Central* for parcel-as-a-whole rule and holding that when the support estate "is viewed in the context of any reasonable unit of petitioners' coal mining operations . . . it is plain that petitioners have not come close to satisfying their burden of proving that they have been denied the economically viable use of that property").

157. *First English*, 482 U.S. at 318.

158. *See id*. at 311-13 (noting that "[t]he disposition of the case . . . isolates the remedial question for our consideration" and refusing to "independently evaluate the adequacy of the complaint and resolve the takings claim on the merits").

159. *See, e.g.*, Woodbury Place Partners v. City of Woodbury, 492 N.W.2d 258, 261 (Minn. Ct. App. 1992) (argument by claimants that, under *First English* and *Lucas*, two-year development moratorium effected a taking by temporarily eliminating all economically viable use of property).

160. *Tahoe-Sierra III*, 122 S. Ct. at 1482.

161. *Id*. at 1484.

lower courts. Finally, Part III.B.1.d. briefly explores the *Tahoe-Sierra* Court's consideration of rolling moratoria, a phenomenon in the temporary regulatory domain that had previously received little, if any, special attention by courts.

a. Non-Rolling Development Moratoria

In concluding that *First English* did not endorse temporal severance of property interests for purposes of invoking *Lucas*' categorical treatment, *Tahoe-Sierra* upheld the position previously staked out by numerous federal and state courts in evaluating takings claims prompted by development moratoria.[162] Indeed, the Court's takings analysis in *Tahoe-Sierra* basically mirrors analyses performed by several lower courts in such cases. In *Woodbury Place Partners v. City of Woodbury*,[163] for example, the Minnesota Court of Appeals declined to adopt the claimant's temporal severance argument, observing that "[w]hen measured against the value of the property as a whole, rather than against only a two-year time frame, the moratorium did not deny the partnership 'all economically viable use' of its property."[164] In the same vein, the court refused to read *First English* as broadly as urged by the claimant, concluding that "*First English* does not create a new liability standard to determine when a 'temporary' taking occurs, but clarifies the appropriate remedy after a taking is recognized."[165]

b. Retrospectively Temporary Regulations

While *Tahoe-Sierra* plainly confirmed the status quo with respect to development moratoria, the effect of its espousal of a temporal whole construct on the status of retrospectively temporary regulations,[166] is less certain. Prior to *Tahoe-Sierra*, courts generally presumed that, under *First English* and *Lucas*, retrospectively temporary regulations that, as enacted, deprived all use of property, fell into the category of per se takings.[167] The issue, however, was often only peripherally addressed in the analysis of prospectively temporary restrictions, the predominant form of temporary regulation.[168] Perhaps this explains why these courts never paused to consider whether categorical treatment of retrospectively temporary regulations embraced temporal severance of property interests, a strategy that had been squarely rejected by many of the same courts in the context of prospectively temporary takings.[169] Or maybe such courts were content to silently accept dictum from *First English* that obscurely defined, without any explanation, temporary regulatory takings as "those regulatory takings which are ultimately invalidated by the courts."[170]

Justice Stevens, however, refused to allow the *First English* majority's dictum, and the temporal severance he believed it contemplated, to pass unchallenged. Instead, Justice Stevens devoted a significant portion of his dissent in *First English* to advancing a forceful argument against application of a per se takings rule to retrospectively temporary regulations. Justice Stevens, joined by Justices Harry Blackmun and Sandra Day O'Connor, complained, "contrary to the Court's implications, the fact that a regulation would constitute a taking if allowed to remain in effect permanently is by no means dispositive of the question whether the effect that the regulation has already had on the property is so severe that a taking occurred during the period before the regulation was invalidated."[171] His dissenting opinion stressed the critical importance of the diminution of value inquiry as a dividing line between everyday regulatory inconveniences and regulations that go too far.[172] To establish a taking, therefore, Justice Stevens contended that the landowner must show that the temporary operation of the retrospectively temporary regulation caused a significant diminution in the property value, as measured against the temporal whole of the landowner's interest.[173] "For this ever to happen," he concluded, "the restriction on the use of 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."[174]

Given that the Justice Stevens-authored majority opinion in *Tahoe-Sierra* has been criticized as effectively adopting

162. *See, e.g.*, Santa Fe Village Venture v. Albuquerque, 914 F. Supp. 478, 483 (D.N.M. 1995) (holding that 30-month development moratorium to enable the U.S. Congress to consider national monument did not "amount to a compensable taking of the value of the *property as a whole*," given the restriction's limited scope and time) (emphasis added); Zilber v. Town of Moraga, 692 F. Supp. 1195, 1206, 1206 n.10 (N.D. Cal. 1988) (finding that a one and one-half year development moratorium was a normal delay which did not rise to the level of a taking and noting that "*First English* was concerned with the proper measure of compensation once a taking is established, not the proper method of determining if a taking has occurred"); Williams v. City of Central, 907 P.2d 701, 704 (Colo. Ct. App. 1995) (rejecting claim that 10-month moratoria should be analyzed under *Lucas*, noting that "the determination as to the nature and extent of the interference with the property in its entirety must take into consideration the value the property retains after the moratorium has been lifted"). *See also* Robert H. Freilich, *Time, Space, and Value in Inverse Condemnation: A Unified Theory for Partial Takings Analysis*, 24 U. Haw. L. Rev.. 589, 613 (2002) (noting that "[n]o court has yet held that a temporary moratorium can result in a *Lucas*-type taking").

163. 492 N.W.2d 258 (Minn. Ct. App. 1992).

164. *Id*. at 262.

165. *Id*.

166. For purposes of this discussion, retrospectively temporary regulations refers only to permanent regulations that, *once found to effect takings by the courts*, the government opted to rescind. Furthermore, it should be clarified that a court's determination that a permanent regulation effects a taking *does not* require invalidation of the regulation. *See First English*, 482 U.S. at 317 (noting that the "government *may* elect to abandon its intrusion or discontinue regulations" after taking is found by court) (emphasis added); *id*. at 321 (observing that "[o]nce a court determines that a taking has occurred, the government retains the whole range of options already available"); *id*. at 315 (asserting that the Fifth Amendment "is designed not to limit the government interference with the property rights *per se*"). Instead, it merely requires that government pay just compensation for the period during which the taking is in effect, *id*. at 321, thus providing an incentive for the government to rescind the permanent regulation.

167. *See, e.g.*, *Woodbury*, 492 N.W.2d at 262 (noting the apparent reach of *First English* and *Lucas* "is to retrospectively temporary takings (e.g., regulations subsequently rescinded or declared invalid)").

168. *See, e.g.*, Keshbro, Inc. v. City of Miami, 801 So. 2d 864, 873 (Fla. 2001) (finding no reason to limit application of *Lucas* to retrospectively temporary takings); *Woodbury*, 492 N.W.2d at 262 (refusing to extend *Lucas* treatment to prospectively temporary regulations because *First English* was limited to retrospectively temporary takings).

169. *See Woodbury*, 492 N.W.2d at 261 (refusing to measure claimant's economic deprivation by reference to the period during which the development moratorium was in effect).

170. *First English*, 482 U.S. at 310.

171. *Id*. at 328-29 (Stevens, J., dissenting).

172. *Id*. at 330.

173. *Id*. at 330-31.

174. *Id*. at 331.

his *First English* dissent,[175] such cynics must surely be concerned about the continuing vitality of the *First English* dictum addressing retrospectively temporary regulations. Indeed, at least at first blush, the language of *Tahoe-Sierra* strongly counsels against categorical treatment of retrospectively temporary regulations. *Tahoe-Sierra*'s statement that "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"[176] draws no distinction between prospectively and retrospectively temporary restrictions.[177] To the contrary, *Tahoe-Sierra*'s emphasis on the diminution of property value, rather than the character of the temporary restriction, strongly suggests that since property will recover value as soon as the permanent regulation is rescinded, application of *Lucas* is necessarily precluded. In the same vein, defining the relevant time period for the takings analysis as the duration of the rescinded permanent restriction, rather than "the term of years that describes the temporal aspect of the owner's interest,"[178] is ostensibly an act of conceptual severance, which *Tahoe-Sierra* squarely eschewed.

Nevertheless, despite *Tahoe-Sierra*'s broad, undiscriminating statements regarding temporary restrictions, there is better reason to believe that Court did not intend to sweep retrospectively temporary regulations within its holding. While *Tahoe-Sierra* narrowly read *First English* as addressing only the compensation question,[179] the Court conceded that *First English* did in fact "reference the antecedent takings question,"[180] however fleetingly. In this respect, *Tahoe-Sierra* concluded that by limiting its holding to the facts presented and recognizing "the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like," *First English* did not approve of petitioners' broad submission that *all* development moratoria "impos[ing] a temporary deprivation—no matter how brief—of all economically viable use" trigger *Lucas*' application.[181] In other words, in the eyes of the *Tahoe-Sierra* majority, *First English* endorsed categorical treatment of retrospectively temporary regulations, to the explicit exclusion of prospectively temporary land use restrictions, such as the development moratoria at issue in *Tahoe-Sierra*. This reading of the *Tahoe-Sierra* majority opinion is reinforced by Chief Justice Rehnquist's dissent, which protested that "[u]nder the Court's decision today, the takings question turns entirely on the *initial label* given a regulation," permanent or temporary.[182]

More significantly, to read *Tahoe-Sierra* as condemning per se treatment of retrospectively temporary regulations would undercut *First English*'s pronouncements on the compensation question and thus fly in the face of *Tahoe-Sierra*'s assurances that "nothing we say today qualifies [*First English*'s] holding."[183] This unintended outcome is made evident upon examination of retrospectively temporary regulations from a procedural standpoint. Specifically, if *Tahoe-Sierra* is interpreted as encompassing retrospectively temporary regulations, the government could always respond to a particular court's holding that a permanent regulation amounted to a *Lucas* taking by rescinding the regulation. As a result, the permanent taking would be converted into a mere temporary takings *claim* for the period that the regulation was in effect, to be assessed under *Penn Central*. Such legal alchemy, however, is at odds with *First English*'s determination that "where the government's activities have already worked a taking . . . *no subsequent action* by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."[184]

Furthermore, the basis for finding that a retrospectively temporary restriction effected a taking is that the government action at issue permanently deprived the landowner of all beneficial use of his property. As such, the temporal whole was indeed considered in the takings analysis.[185] To the extent that temporal severance occurs at all, it happens during the compensation phase, when the amount owed by the government is calculated by reference only to the period during which the taking was effective.[186] And, of course, temporal severance of the as-enacted permanent regulatory period to reflect the actual duration of the restriction is not only consistent with basic logic, but also dictated by the Constitution.[187] Indeed, once a permanent regulation is rescinded and just compensation is paid for the period during which the property was taken, the constitutional wrong has been fully redressed. In reality, therefore, while rescinded permanent regulations are, in effect, retrospective temporary takings, this label is, at least as an analytical matter, somewhat misleading. What amounted to the taking was, at the time, permanent in nature; the ultimate temporariness of the regulation only became relevant after the takings determination, in calculating the amount of compensation owed.

Unlike retrospectively temporary takings, prospectively temporary takings are not grounded in permanent deprivations of all property use. As set forth below, this critical distinction calls into question whether temporary nuisance abatement closures are amenable to *Lucas* treatment, as some pre-*Tahoe-Sierra* state courts have found.

c. Nuisance Abatement Closures

While lower federal and state courts have almost uniformly rejected application of *Lucas* to prospectively temporary restrictions such as development moratoria, a small contin-

175. *See, e.g.*, Breemer, *supra* note 5, at 36 (arguing that *Tahoe-Sierra* "adopted an analytical paradigm that had been previously rejected by the majority in *First English*").

176. *Tahoe-Sierra III*, 122 S. Ct. at 1484.

177. *See also id*. at 1486 (broadly stating that "the 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) (emphasis added).

178. *Id*. at 1484.

179. *Id*. at 1482.

180. *Id*.

181. *Id*.

182. *Id*. at 1492 (Rehnquist, C.J., dissenting) (emphasis added).

183. *Id*. at 1482.

184. *First English*, 482 U.S. at 321 (emphasis added).

185. *See Tahoe-Sierra III*, 122 S. Ct. at 1484 (noting that "a permanent deprivation of the owner's use of the entire area is a taking of 'the parcel as a whole'"). To the extent that negative inferences can be fairly drawn from judicial silence, it is significant that neither *Lucas* nor *Palazzolo* cited *First English* in observing that the Court has occasionally endorsed a takings denominator amounting to less than the "parcel as a whole."

186. *First English*, 482 U.S. at 321.

187. The Fifth Amendment provides "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

gent of state courts have carved out a narrow exception for nuisance abatement closures[188] that temporarily eliminate all beneficial use of property.[189] Most recently, in *Keshbro, Inc. v. City of Miami*,[190] the Florida Supreme Court unanimously held that a six-month closure of a motel pursuant to a nuisance abatement order worked a *Lucas* taking of the claimant's property.[191] Though conceding that *First English*'s discussion was limited to retrospectively temporary takings,[192] the *Keshbro* court was "unable to discern any meaningful distinction justifying the preclusion of prospectively temporary regulations from categorical treatment under *Lucas*."[193] Citing the district court's decision in *Tahoe-Sierra* as support, *Keshbro* went even farther, declaring its conclusion to be the only logical outgrowth of *First English*.[194]

Notwithstanding the Florida Supreme Court's musings to the contrary, there exists a meaningful distinction between retrospectively temporary regulations and prospectively temporary regulations that provides a principled justification for limiting *Lucas*' application to the former: temporal severance. As stated above, retrospective temporary takings under *Lucas* are founded on the determination that a regulation, as enacted, permanently eliminates all economic use of property. By contrast, prospectively temporary takings under *Lucas*, such as the one found in *Keshbro*, reflect a finding that government action temporarily eliminates all economic use of property. While the temporal parcel as a whole serves as the denominator in analysis of retrospectively temporary restrictions, a prospectively temporary taking under *Lucas* is necessarily the product of a takings fraction where the denominator constituted only the duration of the temporary regulation. As such, entitling prospectively temporary regulations to *Lucas* treatment raises the specter of temporal severance, in contravention of *Tahoe-Sierra*'s pronouncements on the denominator issue.

To be sure, *Tahoe-Sierra* involved a prospectively temporary land use planning restriction, which, as *Keshbro* asserted, implicates "an entirely different set of considerations . . . from those in the context of nuisance abatement."[195] And, indeed, *Tahoe-Sierra*'s rejection of petitioners' proposed categorical rule was driven in part by the Court's interest in protecting established land use planning devices.[196] Given the admittedly narrow scope[197] of *Tahoe-Sierra*'s holding, therefore, it could be hazardous to apply the Court's pronouncements in the nuisance abatement context. Nevertheless, *Tahoe-Sierra* hardly felt constrained to cite only land use planning cases for the parcel-as-a-whole proposition.[198] Indeed, as one scholar has observed, the Court's reliance on a broad range of regulatory takings cases confirmed that the parcel-as-a-whole rule "applies across the board to all takings claims . . . ."[199]

In sum, the categorical treatment accorded to nuisance abatement closures by various state courts conflates the essential distinction between retrospectively temporary restrictions and prospectively temporary restrictions, defying *Tahoe-Sierra*'s parcel-as-a-whole approach in the process.[200] Thus, while Chief Justice Rehnquist may well be correct that the initial label given a regulation is often without much meaning,[201] it will always retain significance in distinguishing a retrospectively temporary taking, which is based on *permanent* deprivation of economic use of property, from its prospective counterpart.

In any event, Chief Justice Rehnquist's complaint that under the decision by the *Tahoe-Sierra* majority, "the takings question turns entirely on the initial label given a regulation,"[202] warrants additional discussion. Specifically, Rehnquist's *Tahoe-Sierra* dissent expressed a fear that by

188. State and local nuisance abatement laws authorize the government to order temporary closure of premises used for activity that constitutes a public nuisance, such as the sale of drugs. *See, e.g.*, Keshbro, Inc. v. City of Miami, 801 So. 2d 864, 868 n.6 (Fla. 2001) (noting that local ordinance empowers nuisance abatement board to declare premises a public nuisance and order temporary closure). Although *Lucas* recognized that its per se rule did not apply where the landowner's property use constituted a nuisance under state law, some state courts have found that blanket application of the nuisance exception unduly deprives innocent landowners of compensation. *See* City of Seattle v. McCoy, 4 P.3d 159, 171 (Wash. Ct. App. 2000) (refusing to apply nuisance abatement law to innocent landowner); Carmon M. Harvey, *Protecting the Innocent Property Owner: Takings Law in the Nuisance Abatement Context*, 75 TEMP. L. REV. 635, 636 (2002) (observing that, under the *Lucas* nuisance exception, "property owners stand to lose everything when a nuisance occurs on their property even though they took no part in creating the nuisance").

189. *See Keshbro*, 801 So. 2d at 876 (holding that six-month nuisance abatement order requiring closure of hotel effected taking under *Lucas*); State ex rel. Pizza v. Rezcallah, 702 N.E.2d 81, 88-89 (Ohio 1998) (finding that one-year nuisance abatement order requiring closure of restaurant constituted *Lucas* taking); *McCoy*, 4 P.3d at 166-67 (concluding that one-year nuisance abatement order requiring closure of restaurant worked *Lucas* taking). *But see* Frielich, *supra* note 162, at 617 (arguing that *Pizza* and *McCoy* did not actually find *Lucas* takings because "[t]hese decision turn not on whether there is loss of all use and value for the one-year closure period, but rather on whether the owner of the premises had knowledge of the occurrence of the drug transactions").

190. 801 So. 2d 864 (Fla. 2001).

191. *Id*. at 876.

192. *Id*. at 873.

193. *Id*.

194. *Id*. at 874.

195. *Id*.

196. *See Tahoe-Sierra III*, 122 S. Ct. at 1487 (observing that "[u]nlike 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").

197. *Id*. at 1470.

198. The Court also cited Andrus v. Allard, 444 U.S. 51, 9 ELR 20791 (1979) and Concrete Pipe & Prod. of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal., 508 U.S. 602 (1993). *Tahoe-Sierra III*, 122 S. Ct. at 1481, 1483. *Allard* involved a takings claim based on statutes prohibiting commercial transactions involving eagles feathers. 444 U.S. at 55-56. Viewing "the aggregate . . . in its entirety," the Court concluded that imposition of a significant restriction on only one means of disposing of the artifacts did not amount to a taking. *Id*. at 66.

Concrete Pipe involved a complex takings challenge to a pension statute's provisions addressing employer withdrawal liability. 508 U.S. at 641. In rejecting the claimant's assertion that the withdrawal liability effected a *total* taking of a *portion* of the employer's equity, the Court stressed that "[t]o the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question." *Id*. at 644.

199. Echeverria, *supra* note 6; *see also Tahoe-Sierra II*, 216 F.3d at 774 (noting that "modern case law rejects the invitation of property holders to engage in conceptual severance, *except* in cases of physical invasion or occupation") (emphasis added).

200. Because states have the authority to provide rights beyond the federal constitutional minimum, however, the tension between *Tahoe-Sierra* and *Keshbro* is not, as a practical matter, fatal to the latter or similar state court holdings.

201. *Tahoe-Sierra III*, 122 S. Ct. at 1492 (Rehnquist, C.J., dissenting).

202. *Id*.

simply labeling a development regulation as temporary at the outset, the government is thereafter free to "repeatedly extend the 'temporary' prohibition into a long-term ban on all development," without ever effecting a *Lucas* taking.[203] *Tahoe-Sierra*'s stance on such rolling moratoria is briefly taken up below.

d. Rolling Moratoria

Although the rolling moratoria theory advanced by Tahoe landowners was not encompassed by the Court's order granting review,[204] Justice Stevens' majority opinion hinted that "with the benefit of hindsight, we might characterize the successive actions of [the] TRPA as a 'series of rolling moratoria' that were the functional equivalent of a permanent taking" under *Lucas*.[205] That *Tahoe-Sierra* did not intend to foreclose the applicability of *Lucas* to rolling moratoria is further buttressed by the Court's repeated qualification that it was only rejecting petitioners' claim for categorical treatment of all development moratoria that temporarily eliminate all economic use of property for any period of time.[206]

Given the *Tahoe-Sierra* Court's sympathy for the land use planning process, its reluctance to adopt what amount to per se rules in the regulatory taking setting, and its adherence to the parcel-as-a-whole approach, however, it is difficult to imagine the Court ever fashioning a categorical rule for all rolling moratoria. Indeed, *Tahoe-Sierra*'s refusal, in dicta, to categorically apply *Lucas* to all moratoria that last for more than one year, is revealing. In particular, the Court expressed concern that such a general rule would "treat these interim measures as takings regardless of the good faith of the planners, the reasonable expectations of the landowners, or the actual impact of the moratorium on property values."[207] These concerns are no less applicable to a series of rolling moratoria, thus making it necessary to evaluate which measures go too far on a case-by-case, fact-sensitive basis. Therefore, although the Court might ultimately deem a series of rolling moratoria the functional equivalent of a *Lucas* taking, *Penn Central*'s ad hoc, factual inquiries would likely serve as the means to that end. As such, the window of *Lucas* opportunity left open at first blush by *Tahoe-Sierra*'s rolling moratoria dictum all but closes upon closer consideration, as the Court will very likely seek exclusive guidance from the regulatory takings polestar, *Penn Central*, when squarely confronted with such open-ended restrictions in the future.

2. Conceptual Severance Generally

While *Tahoe-Sierra* may not have launched "a missile to kill a mouse"[208] in its rejection of temporal severance, the Court doubtless employed more than a mousetrap. Indeed, as a number of courts and scholars have observed,[209] the Court in *Tahoe-Sierra* seized the opportunity to clarify its purportedly inconsistent pronouncements[210] on the denominator problem by wholeheartedly endorsing application of the parcel-as-a-whole approach to all regulatory takings claims, while simultaneously eschewing any form of conceptual severance. The starting point for regulatory takings analysis is, therefore, "whether there was a total taking of the entire parcel; if not, *Penn Central* [is] the proper framework."[211]

Despite *Tahoe-Sierra*'s unequivocal acclamation of the parcel-as-a-whole approach in the regulatory takings setting, the Court provided less insight into how to specifically define the whole parcel that constitutes the denominator of the takings fraction. As a result, the effect of *Tahoe-Sierra*'s parcel-as-a-whole pronouncement on the flexible approach[212] to the denominator problem, principally championed by the U.S. Court of Appeals for the Federal Circuit,[213] is unclear. Under the Federal Circuit approach, the relevant parcel as a whole is determined by considering factors designed to account for factual nuances,[214] which include "the timing of transfers in light of the developing regulatory environment,"[215] as well as "the degree of contiguity, the dates of acquisition, and the extent to which the parcel has been treated as a single unit,"[216] among others.

203. *Id*. *See also* Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 228 F.3d 998, 1001 (9th Cir. 2000) (Kozinski, J., dissenting from order denying petition for rehearing en banc) (querying "[w]hy would the government enact a permanent regulation—and risk incurring an obligation to compensate—when it can enact one moratorium after another, perhaps indefinitely?").

204. *Tahoe-Sierra III*, 122 S. Ct. at 1485.

205. *Id*.

206. *See, e.g.*, *id*. at 1478 (stating that "our cases do not support *[petitioner's] proposed categorical rule*") (emphasis added); *id*. at 1482 (asserting that "our decision in *First English* surely did not approve, and implicitly rejected, *the categorical submission that petitioners are now advocating*") (emphasis added).

207. *Id*. at 1487.

208. *Lucas*, 505 U.S. at 1036 (Blackmun, J., dissenting).

209. *See, e.g.*, Walcek v. United States, 303 F.3d 1349, 1356, 33 ELR 20045 (Fed. Cir. 2002) (generally noting that *Tahoe-Sierra* "reaffirmed that in regulatory takings analysis, the relevant parcel is the parcel as a whole"); Cane Tenn., Inc. v. United States, 54 Fed. Cl. 100, 105 (Fed. Cl. 2002) (noting that *Tahoe-Sierra* confirmed that the parcel-as-a-whole rule "remains the default analytical framework in regulatory takings cases" and applying rule in spatial context); Echeverria, *supra* note 6 (arguing that the significance of *Tahoe-Sierra* "lies less in the application of the parcel rule in the temporal dimension than in the Court's reaffirmation of the parcel rule itself"); Wright & Laughner, *supra* note 133 (opining that *Tahoe-Sierra* majority "did an excellent job of reaffirming the Court's commitment to the [parcel-as-a-whole rule]"). *But see* R.T.G., Inc. v. State, 780 N.E.2d 998, 1008 (Ohio 2002) (despite *Tahoe-Sierra*, cited *Lucas* in observing that "some members of the court have expressed misgivings about the [parcel-as-a-whole] rule"); Machipongo Land & Coal Co., Inc. v. Commonwealth, 799 A.2d 751, 768 (Pa. 2002) (arguing that while the Court has refused to allow vertical severance of mineral estates, vertical segmentation of air rights, or temporal division of property, it "has not instructed conclusively how the denominator problem should be resolved"). Significantly, *R.T.G.* and *Machipongo*, both of which advanced extremely narrow readings of *Tahoe-Sierra*, are state court cases. As *R.T.G.* itself noted in resolving the denominator issue, "states are free to interpret their constitutions independently of the [Constitution] so long as that interpretation affords, as a minimum, the same protection as its federal counterpart." *R.T.G.*, 780 N.E.2d at 1008. In any event, the extremely narrow reading of *Tahoe-Sierra* advanced by *Machipongo* is belied by *Tahoe-Sierra*'s reliance on a diverse selection of takings cases in espousing the parcel-as-a-whole rule. *See supra* Part III.B.1.c.

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

211. *Tahoe-Sierra III*, 122 S. Ct. at 1483-84.

212. Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1181, 24 ELR 21072 (Fed. Cir. 1994).

213. *See also* K&K Constr., Inc. v. Department of Natural Resources, 575 N.W.2d 531, 538 n.10, 28 ELR 21156 (Mich. 1998) (enumerating several factors relevant to determining the denominator parcel and citing *Loveladies*); *Machipongo*, 799 A.2d at 768-69 (same).

214. *Loveladies*, 28 F.3d at 1181.

215. *Id*.

Employing its fact-intensive denominator analysis in *Loveladies Harbor, Inc. v. United States*,[217] the Federal Circuit concluded that the relevant parcel encompassed only the 12.5 acres of the claimant's 250-acre property interest that were subject to the challenged federal regulation.[218] Specifically, the Federal Circuit affirmed the trial court's exclusion of 199 acres of claimant's property developed or sold before the regulatory environment existed.[219] Moreover, the Federal Circuit agreed with the trial court's exclusion of 38.5 acres which "for all practical purposes had been promised to New Jersey in exchange for a [state] permit."[220] Because the denial of a federal permit to develop the 12.5-acre parcel deprived the landowner of all economically feasible use of that particular portion of property, the *Loveladies* court concluded that a *Lucas* taking had been effected.[221]

On the one hand, because application of the Federal Circuit's flexible approach may result in defining the relevant parcel as a whole to encompass only the property subject to the regulation at issue,[222] as exemplified by *Loveladies*, it can be argued that such conceptual severance directly contravenes *Tahoe-Sierra*'s pronouncements on the denominator problem. On the other hand, by emphasizing substance over form, the Federal Circuit's denominator determination can be viewed not as the product of conceptual severance, but as representative of the functional parcel as a whole. At stake in the clash between formalism and functionalism is not only the continuing efficacy of the Federal Circuit's denominator analysis, but also, more importantly, the scope of the *Lucas* total takings rule. If *Tahoe-Sierra* is read as promoting a formal approach to delineation of the parcel as a whole, cases in which the Federal Circuit's multifactor analysis yielded a denominator corresponding to only the portion of property subject to regulation would be extricated from *Lucas*' domain.[223] By contrast, interpreting *Tahoe-Sierra* to endorse the Federal Circuit's functional approach to the parcel-as-a-whole determination would preserve such cases within the ambit of *Lucas*.

Part III.B.2.a. below offers a number of arguments based on *Tahoe-Sierra* that support the formal parcel-as-a-whole construct. Part III.B.2.b. demonstrates that *Tahoe-Sierra* also provided a healthy amount of fodder for proponents of the functional approach to the parcel-as-a-whole rule. Finally, Part III.B.2.c. concludes that definitive resolution of the relevant parcel as a whole is better left for another day, when the Court is squarely confronted with this high-stakes issue.

a. Arguments That *Tahoe-Sierra* Endorses the Formal Approach[224]

Several arguments can be advanced in favor of a formal approach to the parcel-as-a-whole rule, under which any attempt to define the relevant parcel as that portion of the property subject to regulation constitutes conceptual severance in violation of *Tahoe-Sierra*'s denominator principles. Most significantly, *Tahoe-Sierra* explicitly rejected the definition of the property interest taken in terms of the very regulation being challenged as circular, and chastised the district court for "disaggregating petitioners' property into temporal segments corresponding to the regulations at issue and then analyz[ing] whether petitioners were deprived of all economically viable use for each period."[225] As such, these remarks on their face cast serious doubt on the methodology employed by *Loveladies* and other Federal Circuit decisions of the same ilk. Moreover, *Tahoe-Sierra*'s formalistic, technical view of the parcel-as-a-whole rule was emphatically reinforced by the Court's assertion that the landowner's entire property interest "is defined by *metes and bounds* that describe its geographic dimensions and the *term of years* that describes the temporal aspect of the owner's interest,"[226] as opposed to defining the parcel as a whole by reference to a variety of factual nuances affecting the property interest.[227] That *Tahoe-Sierra* should be read as endorsing the formal parcel-as-a-whole approach is further confirmed by the fact that Justice Stevens, the leading proponent of the contiguous fee simple approach,[228] authored the majority opinion.

Additionally, *Tahoe-Sierra*'s proclamation that "the permanent 'obliteration of the *value*' of a fee simple estate constitutes a categorical taking"[229] undercuts the theoretical basis for the Federal Circuit's denominator analysis. Indeed,

216. Ciampitti v. United States, 22 Cl. Ct. 310, 318, 21 ELR 20866 (Cl. Ct. 1991).

217. 28 F.3d 1171, 24 ELR 21072 (Fed. Cir. 1994).

218. *Id*. at 1181.

219. *Id*.

220. *Id*.

221. *Id*. at 1183.

222. The flexible nature of the Federal Circuit also allows for the determination that the claimant's entire parcel is the relevant parcel as a whole for takings analysis. *See, e.g.*, Forest Properties, Inc. v. United States, 177 F.3d 1360, 1365, 29 ELR 21174 (Fed. Cir. 1999) (concluding that relevant parcel was claimant's entire 62-acre project, not the 9.4 acres subject to regulation, in light of the economic expectations of the claimant with regard to the property).

223. *See Loveladies*, 28 F.3d at 1180 (observing that "if the tract of land is defined as some larger piece, one with substantial residuary value independent of the . . . regulation, then either a partial or no taking occurred," under *Penn Central*'s analysis).

224. Other commentators have labeled this view as the fee simple approach, under which "a court will use the landowner's entire contiguous parcel as the denominator in the takings equation." Benjamin Allee, *Drawing the Line in Regulatory Takings Law: How a Benefits Fraction Supports the Fee Simple Approach to the Denominator Problem*, 70 Fordham L. Rev. 1957, 1982 (2002).

225. *Tahoe-Sierra III*, 122 S. Ct. at 1483.

226. *Id*. at 1484 (emphasis added). This statement by the Court directly belies one commentator's assertion that *Tahoe-Sierra* "gave a boost to an expansive definition for the amorphous 'parcel-as-a-whole' construct, but only in the temporal dimension; *Tahoe-Sierra* is silent with respect to the dimensions of the spatial 'parcel as a whole' . . . ." Breemer, *supra* note 5, at 23.

227. *See also* Echeverria, *supra* note 6 (arguing that *Tahoe-Sierra*'s repeated reference to fee simple estates in connection with the *Lucas* rule could indicate that the *Lucas* "does not apply to the total destruction of a partial interest in real property").

228. Allee, *supra* note 224, at 1983. Benjamin Allee notes that Justice Stevens' advocacy of the fee simple approach is reflected in Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 17 ELR 20440 (1987) (majority opinion authored by Justice Stevens) and Concrete Pipe & Prod. of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal., 508 U.S. 602 (1993) (Justice Stevens joined the majority opinion), two of the leading cases for the parcel-as-a-whole rule, as well as in Justice Stevens' *First English* dissent, where he argued that the diminution in value caused by temporary restrictions should be measured against the affected property's useful life. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 331, 17 ELR 20787 (1987) (Stevens, J., dissenting).

229. *Tahoe-Sierra III*, 122 S. Ct. at 1483.

that the Federal Circuit's approach may result in defining the denominator as the portion of property affected by the regulation in issue reflects an assumption that the operative inquiry in regulatory takings analysis is whether the landowner has been deprived of all beneficial use of property.[230] However, by clarifying that value is the proper measure of a *Lucas* taking,[231] not use, *Tahoe-Sierra* necessarily rejected the Federal Circuit's definition of the relevant parcel as anything less than the formal whole since nondevelopable land always retains a modicum of value.[232] Thus, even though New Jersey permitted Loveladies to develop only 12.5 acres of its 51 undeveloped acres of property, the 38.5-acre balance retained its inherent value as land, and therefore must be considered to fairly reflect the parcel as a whole for purposes of assessing whether denial of a federal permit to develop the 12.5 acres constituted a taking.[233]

b. Arguments That *Tahoe-Sierra* Endorses the Functional Approach

Arguments that *Tahoe-Sierra* endorsed a functional approach to the parcel-as-a-whole rule, under which the relevant parcel in the takings fraction could conceivably embody only the portion of property subject to regulation, can be gleaned from *Tahoe-Sierra*'s language, its strong embrace of the *Penn Central* framework, and post-*Tahoe-Sierra* case law. In particular, the *Tahoe-Sierra* Court noted that "with the benefit of hindsight, we might characterize the successive actions of [the] TRPA as a 'series of rolling moratoria' that were the functional equivalent of a permanent taking" under *Lucas*.[234] To facilitate such a conclusion, the relevant parcel as a whole would necessarily reflect the duration of the series of rolling moratoria. This admission, therefore, reveals that *Tahoe-Sierra* did not intend to foreclose consideration of factual nuances in formulating the relevant parcel for regulatory takings analysis. Rather, the Court reinforced its general amenability to a functional approach to the parcel-as-a-whole rule, a position first staked out by the Court in *Lucas*.[235]

Tahoe-Sierra's wholehearted embrace of *Penn Central*'s fact-sensitive analysis in the regulatory taking setting further supports a functional approach to the parcel-as-a-whole issue. In particular, *Tahoe-Sierra*'s conclusion that temporary regulatory takings are to be analyzed under the flexible *Penn Central* framework reflected the Court's more general appreciation of the complex factual assessments necessary in any determination of whether a regulation goes too far. Because resolution of the threshold denominator issue is an essential component of the regulatory takings analysis,[236] it, too, should be assessed by reference to "'a number of factors' rather than a simple 'mathematically precise' formula."[237] Indeed, to *categorically* define the parcel as a whole as the landowner's entire contiguous parcel would inject per se rules in an area where the Court has been, and will continue to be—as *Tahoe-Sierra* makes pellucidly clear—steadfast in its resistance of such temptation.[238]

Furthermore, that *Tahoe-Sierra* endorsed a functional parcel-as-a-whole approach has been confirmed in subsequent lower court cases. As the Federal Claims Court recently remarked: "[The Court] consistently has refused to prescribe a rigid formula for determining the appropriate parcel in regulatory takings cases . . . ."[239] Indeed, a fair distillation of the applicable case law, the court continued, "requires the court to adhere to the factual inquiry warranted by the parcel-as-a-whole rule and to avoid any formalistic distinctions with respect to the property itself."[240]

c. Resolution

It should first be observed that the argument advanced by some commentators claiming that *Tahoe-Sierra* converted *Lucas*' denial of all economically beneficial use standard into a permanent obliteration of value rule[241] is misguided, reading much too far into the Court's imprecise word choices. Instead, the *Tahoe-Sierra* Court's utilization of the term value in reference to the *Lucas* rule reflects the regrettable sloppiness that has plagued the Court's attempts to

230. *See Loveladies*, 28 F.3d at 1180 (noting that "the question of whether there has been a partial or total loss of economic *use* depends on what is the specific property that was affected" by the regulation).

231. *See Tahoe-Sierra III*, 122 S. Ct. at 1494 (Rehnquist, C.J., dissenting) (decrying the majority's reading of *Lucas* "as being fundamentally concerned with value"); Echeverria, *supra* note 6 (asserting that *Tahoe-Sierra* endorsed "destruction of value [as] the key indicium of a *Lucas* taking").

232. Echeverria, *supra* note 6 (observing that "[e]ven when all building is prohibited, land has value, sometimes significant value, as private open space or at least as a speculative investment." *See also* David L. Callies & Calvert G. Chipcase, *Moratoria and Musing on Regulatory Takings:* Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 25 ALI-ABA 231, 238 (2002) (noting that "[l]and always has value, regardless of the degree of restriction").

233. The parcel as a whole is construed as the 51 undeveloped acres in order to illustrate the effect of the value-use distinction on the Federal Circuit's flexible denominator approach. However, a strict adherent to the formal parcel-as-a-whole construct would instead argue that the relevant parcel should reflect the technical metes and bounds of Loveladies' property interest, which would also include the 199 acres developed prior to passage of the federal regulation at issue. *See Loveladies*, 28 F.3d at 1180 (argument by government that proper denominator is original 250-acre parcel).

234. *Tahoe-Sierra III*, 122 S. Ct. at 1485. This argument was advanced by the petitioners in the petition for certiorari and their brief, but the Court's order granting review did not encompass the issue. *Id*. at 1485 n.29.

235. *See Lucas*, 505 U.S. at 1016 n.7, suggesting that resolution of the denominator issue

> may lie in how the owner's reasonable expectations have been shaped by the [s]tate's law of property—i.e., whether and to what degree the [s]tate's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges in a diminution in (or elimination of) value.

236. *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497, 17 ELR 20440 (1987) (acknowledging that "one of the critical questions [in regulatory takings analysis] is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction'") (quoting Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of Just Compensation Law*, 80 Harv. L. Rev. 1165, 1192 (1967)).

237. *Tahoe-Sierra III*, 122 S. Ct. at 1481 (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 633, 32 ELR 20516 (2001) (O'Connor, J., concurring)).

238. *See Tahoe-Sierra III*, 122 S. Ct. at 1489 (asserting that the "temptation to adopt what amount to *per se* rules in either direction must be resisted") (quoting *Palazzolo*, 533 U.S. at 636 (O'Connor, J., concurring)).

239. Appolo Fuels, Inc. v. United States, No. 00-1L, 2002 WL 31889325, at *6 (Fed. Cl. Dec. 18, 2002).

240. *Id*. at *10.

241. *See supra* note 231.

clarify the scope of *Lucas* ever since its inception. Indeed, the obliteration of value language of *Tahoe-Sierra* was lifted from *Lucas* itself.[242] Moreover, the *Tahoe-Sierra* Court on several occasions referred to the *Lucas* rule in terms of deprivation of property use.[243] The better reading of *Tahoe-Sierra*, as at least one commentator has observed, is that it leaves intact *Lucas*' denial of all economically beneficial use standard, while simply confirming that "an elimination of all value is one circumstance that triggers a taking under the use-based *Lucas* rule."[244] To read *Tahoe-Sierra* to the contrary would, in effect, render the per se rule a nullity,[245] a sweeping result unjustified by the Court's cryptical references.[246] In sum, therefore, no credible support for the formal parcel-as-a-whole construct can be gleaned from *Tahoe-Sierra*'s utilization of value in connection with the *Lucas* rule.

Notwithstanding the speciousness of the value argument, *Tahoe-Sierra* did provide a fair supply of powerful ammunition for both sides of the formal-functional parcel-as-a-whole debate. It should be recalled, however, that the Court was confronted with a set of facts quite distinct from those before the Federal Circuit in *Loveladies* or other cases in which the relevant parcel was ultimately defined as only the portion of property subject to the regulation at issue.[247] Indeed, the individual parcels at issue in *Tahoe-Sierra* had not been acquired or sold off in segments over a period of time or affected by other circumstances particularly amenable to the *Loveladies* resolution of the denominator issue under the Federal Circuit's multifactored approach.[248] Given the persuasiveness of arguments on both sides of the formal-functional parcel-as-a-whole debate, coupled with the magnitude of the denominator problem in the regulatory takings scheme, decisive resolution of this close question is better left for a future case before the Court in which the Federal Circuit determined below, under its flexible approach, that the relevant parcel embodied only the property interest subject to regulation.

C. Applying Penn Central *to Temporary Land Use Restrictions*

Despite the *Tahoe-Sierra* Court's emphasis on the virtues of *Penn Central*'s test as an analytical framework for resolving regulatory takings claims, the three-pronged balancing approach has received its fair share of criticism over its 25-year existence. Frustrated courts and commentators have complained that the indeterminacy[249] of *Penn Central*'s three prongs renders the balancing test nearly vacuous.[250]

As if the task of construing and applying the three existing *Penn Central* factors were not cumbersome enough, the *Tahoe-Sierra* Court may have fashioned a fourth factor to be applied by courts in assessing temporary land use restrictions under *Penn Central*. On several occasions throughout the opinion, the *Tahoe-Sierra* Court explicitly acknowledged that the duration of the restriction should be considered under the *Penn Central* analysis of temporary regulatory takings claims.[251] The Court, however, failed to specify whether its intention was to add a new, independent factor to be balanced with the other three prongs of the *Penn Central* test or for the duration inquiry to be subsumed under one of the existing prongs of the analysis. Section C.1 below wrestles with this question and ultimately concludes that the duration of the restriction inquiry must be given independent effect as a fourth *Penn Central* factor to ensure that the temporary takings claims are not cursorily rejected.

1. Did *Tahoe-Sierra* Create a New *Penn Central* Factor?

On the one hand, it can be argued that the duration inquiry is logically subsumed under the reasonable investment-backed expectations prong. Evaluation of the reasonableness of the landowner's investment-backed expectations should include inquiry into whether the actual duration of the temporary restriction exceeded the time period originally designated by the government. Indeed, where a landowner purchases property with the expectation of developing the land upon expiration of a one-year development moratorium, the government's subsequent decision to extend the moratorium beyond the pre-designated one-year period may well frustrate the landowner's reasonable investment-backed expectations. By the same token, the landowner's investment-backed expectations would not have been thwarted if the government lifted the moratorium after one year, as anticipated by the landowner upon original purchase of the property. Perhaps cognizant of the relevance of the duration inquiry to the investment-backed expectations analysis, *Tahoe-Sierra* acknowledged that the takings claims at issue in that case would have been stronger had the landowners characterized "the successive actions of [the] TRPA as a 'series of rolling moratoria'" in the lower courts.[252]

The duration of the restriction inquiry could, alternatively, be subsumed under either the economic-impact prong or the character-of-government-interest prong of the *Penn Central* approach. Put simply, the duration of the tem-

242. *See Lucas*, 505 U.S. at 1010.

243. *See, e.g.*, *Tahoe-Sierra III*, 122 S. Ct. at 1483 (observing that the *Lucas* holding turned on deprivation of all "productive or economically beneficial use of land") (quoting *Lucas*, 505 U.S. at 1017).

244. Breemer, *supra* note 5, at 20. *See also Tahoe-Sierra III*, 122 S. Ct. at 1483 (observing that the total elimination of value of Lucas' fee simple estate "*clearly* qualified as a taking" under *Lucas* per se rule that compensation is required when a regulation deprives all economic use of property) (emphasis added).

245. Callies & Chipcase, *supra* note 232, at 238.

246. Short of explicitly overruling past precedent, the seeds of change are better planted in a much less mysterious, yet still modestly subtle, fashion, as exemplified by Justice O'Connor's concurrence to *Palazzolo*. Indeed, her glowing endorsement of *Penn Central* was explicitly incorporated into the *Tahoe-Sierra* majority opinion, which quoted her *Palazzolo* concurrence on at least five separate occasions. *See Tahoe-Sierra III*, 122 S. Ct. at 1478, 1481 n.23, 1486, 1489.

247. *See* Echeverria, *supra* note 6 (observing that "*Tahoe-Sierra* does not resolve all of the issues that will arise in applying the parcel rule").

248. Not to mention, of course, that the *Tahoe-Sierra* case was not even before the Federal Circuit.

249. *See, e.g.*, Hubbard, *supra* note 142, at 472 (assailing vagueness of *Penn Central* factors).

250. District Intown Properties Ltd. Partnership v. District of Columbia, 198 F.3d 874, 886 (D.C. Cir. 1999) (Williams, J., concurring).

251. *See Tahoe-Sierra III*, 122 S. Ct. at 1489 (observing that "the duration of the restriction is one of the important factors that a court must consider in the appraisal of a regulatory takings claim"); *id*. at 1487 n.34 (concluding that "the *Penn Central* framework adequately directs the inquiry to the proper considerations—only one of which is the length of delay").

252. *Id*. at 1485.

porary land use restriction will factor prominently into the economic-impact calculation, as the diminution in property value caused by the restriction will logically increase over time. Indeed, *Tahoe-Sierra*'s observation that "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,"[253] implicitly reflects the fact that the duration of deprivation of the owner's use bears directly on the economic impact of the temporary regulation. Similarly, the duration inquiry figures into the character-of-government-interest prong, as length of delay can serve as an indicium of good or bad faith. As the *Tahoe-Sierra* Court noted: "[W]ere it not for the findings of the [d]istrict [c]ourt that [the] TRPA acted diligently and in good faith, we might have concluded that the agency was stalling . . . ."[254]

However, when considered in light of the insufficient economic impact that lengthy moratoriums will have on the fee simple value of the restricted property, treating the duration inquiry as a separate factor is necessary to avoid reduction of *Penn Central* to a perfunctory exercise in rejecting temporary regulatory takings claims. According to one expert's hypothetical calculations, the imposition of a 10-year development moratorium would diminish property value by approximately 73%.[255] Notwithstanding the significance of such a diminution from the aggrieved landowner's perspective, courts have often required diminutions "well in excess of 85[%] before finding a regulatory taking."[256] Thus, whatever the hazards of drawing bright lines in an area of law driven by ad hoc, factual inquiries, decisional authority suggests that the economic impact of moratoria lasting as long as 10 years would rarely, if ever, be sufficient to trigger a *Penn Central* taking.[257]

By giving separate effect to the duration inquiry, according it equal weight to the other *Penn Central* prongs, the temporary regulatory takings analysis would provide a more meaningful check against potentially decade-long developmental moratoria or other land use restrictions. Indeed, treating the duration inquiry as a separate prong under the *Penn Central* analysis comports with *Tahoe-Sierra*'s conceptualization of reasonable land use restrictions. Specifically, the Court's approving citation of several cases in which development moratoria were imposed for periods ranging from 10 months to 3 years,[258] coupled with its concession that "[i]t may well be true that any moratorium that lasts for more than [1] year should be viewed with special skepticism,"[259] strongly suggests that *Tahoe-Sierra* did not anticipate, much less constitutionally endorse, the 10-or-more-year moratoria that would likely withstand a takings challenge if the duration inquiry were not given separate effect under *Penn Central*.[260]

IV. Conclusion

Before *Tahoe-Sierra*, the Court's regulatory takings jurisprudence was arguably as muddled as Lake Tahoe was transparent, "dazzlingly, brilliantly so,"[261] when visited by Mark Twain in the 1870s. By concluding that development moratoria do not constitute *Lucas* takings, the Court's decision in *Tahoe-Sierra* indirectly assisted in the continuing efforts to stringently protect Lake Tahoe from being clouded by runoff pollution. Whether *Tahoe-Sierra* similarly helped curb the discharge of muddled pronouncements by the Court into the body of regulatory takings law is a closer call.

253. *Id*. at 1484.

254. *Id*. at 1485.

255. The above calculation was performed, at the author's request, by Ronald Ames, a certified general real estate appraiser and founder of Ames Appraisal Services in Boca Raton, Florida. Mr. Ames' calculation of the diminution of value caused by the imposition of a 10-year development moratorium was based on property with an unimpaired present value of $1 million. Mr. Ames estimated a 10% discount rate to account for the loss of the alternative opportunity cost of capital invested in another investment of similar risk. He also presumed certain investment costs, including annual real estate taxes, annual property care, legal fees (in year 1 and year 10) and engineering fees (in year 2 and year 9). He then projected the value of the property at the end of 10 years under a presumed inflation rate of 3%. He finally discounted the annual cash flows to present value at the 10% rate.

256. Walcek v. United States, 49 Fed. Cl. 248, 262 (Fed. Cl. 2001), *aff'd*, 303 F.3d 1349, 33 ELR 20045 (Fed. Cir. 2002). *See also* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 n.8, 22 ELR 21104 (1992) (noting that "in at least *some* cases the landowner with 95% loss will get nothing") (emphasis in original).

257. Callies & Chipcase, *supra* note 232, at 244 (finding it difficult to imagine when a moratorium would ever amount to a taking under *Penn Central*, "given that the 'parcel as a whole' is likely to be the infinite duration of a fee simple absolute").

258. *Tahoe-Sierra III*, 122 S. Ct. at 1487 n.32. While *Tahoe-Sierra* also approvingly noted that the temporary restriction ultimately upheld in *First English* lasted for more than six years, the Court plainly viewed the *First English* restriction as an extreme example, as it was cited to support the proposition that "we could not possibly conclude that *every* delay of over one year is constitutionally unacceptable." *Id*. at 1489 (emphasis added).

259. *Id*.

260. To be sure, the Federal Circuit's stance on temporary regulatory takings, as articulated by post-*Tahoe-Sierra* case law from that jurisdiction, arguably militates against reading *Tahoe-Sierra* as endorsing independent treatment of the length of delay inquiry under *Penn Central*. The Federal Circuit has long assessed temporary takings claims in part by reference to whether the temporary land use restriction constituted extraordinary government delay. *See, e.g.*, Wyatt v. United States, 271 F.3d 1090, 1098, 32 ELR 20345 (Fed. Cir. 2001). According to the Federal Circuit, factors to be considered in evaluating government delay include the length of the delay, the nature of the regulatory process, and whether the government acted in good faith. *Id*. In response to *Tahoe-Sierra*'s holding that temporary regulatory takings claims must be analyzed under *Penn Central*, the Federal Circuit case of *Boise Cascade* noted that "[t]his does not affect the longstanding rule that . . . only extraordinary delays . . . ripen into a compensable taking." Boise Cascade Corp. v. United States, 296 F.3d 1339, 1352, 32 ELR 20797 (Fed. Cir. 2002).

The Federal Claims Court has read this statement to signify that "the Federal Circuit, in addition to the *Penn Central* criteria, requires plaintiff to show 'extraordinary delay.'" Appolo Fuels, Inc. v. United States, No. 00-1L, 2002 WL 31889325, at *22 (Fed. Cl. Dec. 18, 2002). Accordingly, retention of the extraordinary delay analysis by Federal Circuit can be read to imply that the *Penn Central* analysis, as envisioned by the *Tahoe-Sierra* Court, does not separately consider the length of delay caused by the temporary restriction. Otherwise, the Federal Circuit's decision to preserve the "extraordinary delay" inquiry after *Tahoe-Sierra* would have entailed performance of superfluous analysis, given that the other "extraordinary delay" factors, e.g., the nature of the regulatory process, good-faith inquiry, are clearly encompassed by the *Penn Central* approach.

However, a less strained reading of the statement from *Boise Cascade* is that the Federal Circuit therein acknowledged that the factors comprising its "extraordinary delay" analysis are each addressed under the *Penn Central* test, as conceptualized by *Tahoe-Sierra*. As such, the *Boise Cascade* court was simply concluding that, under *Penn Central*, as applied to temporary land use restrictions, only extraordinary delays amount to takings, thereby leaving the Federal Circuit's long-standing rule unaffected.

261. *Tahoe-Sierra III*, 122 S. Ct. at 1471 (quoting TWAIN, *supra* note 1, at 174-75).

In some respects, *Tahoe-Sierra* arguably further muddied regulatory takings jurisprudence. For example, by implicitly expressing doubts as to the continuing vitality of the *Lucas* per se rule,[262] by suggesting that rolling moratoria might functionally amount to permanent takings,[263] by vacillating between value and use in its characterization of the *Lucas* threshold,[264] and by vaguely adopting a fourth *Penn Central* factor,[265] *Tahoe-Sierra* leaves lower courts, litigants, and commentators with a host of perplexing questions to resolve. In other respects, *Tahoe-Sierra* added much-needed clarity to regulatory takings law. For instance, by confirming the primacy of the *Penn Central* test,[266] by resolving "inconsistent pronouncements"[267] on the denominator problem in favor of the parcel-as-a-whole rule,[268] and by endorsing the majority view that development moratoria do not amount to *Lucas* takings,[269] *Tahoe-Sierra* provided definitive answers to pressing regulatory takings questions. And in still other respects, *Tahoe-Sierra* neither added to, nor subtracted from, the tangle of regulatory takings jurisprudence, as exemplified by the Court's silence on the issue of defining the relevant parcel as a whole.[270]

All things considered, therefore, *Tahoe-Sierra* is hardly analogous to Twain's Lake Tahoe as the fairest picture the whole earth affords[271] of regulatory takings jurisprudence. Nevertheless, *Tahoe-Sierra* is an important decision, whose citation will find its way into countless briefs, opinions, and articles for years to come.

262. *See supra* Part III.A.1 for a discussion of the potential effects of the physical regulatory distinction on *Lucas*.

263. *See supra* Part III.B.1.d. for a discussion of rolling moratoria.

264. *See supra* Part III.B.2 for a discussion of the use versus value debate.

265. *See supra* Part III.C.1 for a discussion of the potential fourth *Penn Central* factor.

266. *See supra* Part III.A.1 for a discussion of the Court's endorsement of *Penn Central*.

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

268. *See supra* Part III.B.2 for a discussion of the parcel-as-a-whole rule.

269. *See supra* Part III.B.1 for a discussion of the majority view regarding development moratoria.

270. *See supra* Part III.B.2 for a discussion of defining the relevant parcel as a whole.

271. TWAIN, *supra* note 1, at 169.