Note

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Taking Shape: Temporary Takings and the *Lucas* Per Se Rule in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Authority*

> "A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change."[1]

Since Justice Holmes invented the concept of "regulatory takings" eighty years ago,[2] courts have struggled to find the dividing line between government actions that intrude "too far" on private property rights and so require compensation, and those that are benign or important enough to escape liability.[3] Lingering in the background is the concern that, if too many actions fall on the "takings" side, "government hardly could go on."[4] Line-drawing efforts have long been informed by the underlying tension between the public interest in orderly regulation and the private property owner's interest in unfettered use of her land. That tension is the basis for the Supreme Court's balancing test in *Penn Central Transportation Co. v. City of New York*.[5] In its simplest terms, *Penn Central* says: If the public interest outweighs

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1 Block v. Hirsh, 256 U.S. 135, 157 (1921).

2 ROBERT MELTZ ET AL., THE TAKINGS ISSUE 5 (1999).

3 *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

4 *Id.*

5 438 U.S. 104 (1978).

the private, no taking is found; if the private outweighs the public, courts should find a taking.[6]

Balancing tests are, however, maddeningly complicated. They require extensive factual analysis; precedents are difficult to analogize and distinguish; and outcomes are unpredictable.[7] Dissatisfied with the complexities and uncertainties of the *Penn Central* balancing test, the current Court has taken an interest in defining categories of "per se" takings, or government actions that are takings regardless of the public interest involved.[8] In effect, per se takings are pre-balanced. They are categories of government action so extreme and intrusive that they always outweigh the public interest.[9] In *Lucas v. South Carolina Coastal Council*, the Court identified a new group of per se takings as those "rare" regulations that deny a landowner "*all* economically beneficial or productive use of land."[10]

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* [hereinafter *TRPA*],[11] the Court considered another possible per se category. *TRPA* concerns temporary development moratoria,[12] including regulations that prohibit certain uses of land for a defined period of time.[13] Scholars have long viewed property as a "bundle of sticks," a combination of discrete property rights that owners can separate and sell.[14] Property can be splintered into spatial, functional, and temporal dimensions:[15] An owner can sell a portion of a larger parcel;

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[6] *Id.* at 123-31.

[7] *See* Nathaniel S. Lawrence, *Regulatory Takings: Beyond the Balancing Test*, *in* REGULATORY TAKING: THE LIMITS OF LAND USE CONTROLS 191 (G. Richard Hill ed., 1990).

[8] *See id. See also* MELTZ ET AL., *supra* note 2, at 9.

[9] Another way to phrase this is that the "categorical [per se] taking test is a special category of the general balancing test." Stuart Miller, *Triple Ways to Take: The Evolution and Meaning of the Supreme Court's Three Regulatory Taking Standards*, 71 TEMP. L. REV. 243, 279 (1998).

[10] 505 U.S. 1003, 1015 (1992) (emphasis added).

[11] 216 F.3d 764 (9th Cir. 2000), *aff'd*, 535 U.S. 302 (2002).

[12] *Id.* at 766.

[13] *See* Robert H. Freilich, *Interim Development Controls: Essential Tools for Implementing Flexible Planning and Zoning*, 49 J. URB. L. 65, 66 (1971).

[14] Courtney C. Tedrowe, Note, *Conceptual Severance and Takings in the Federal Circuit*, 85 CORNELL L. REV. 586, 586 (2000).

[15] Tedra Fox, *Lake Tahoe's Temporary Development Moratorium: Why a Stitch in Time Should Not Define the Property Interest in a Takings Claim*, 28 ECOLOGY L.Q. 399, 401 (2001). See also First English Evangelical Lutheran Church of Glendale v. County of Los Angeles [hereinafter *First English*], for a slightly different formulation:

grant an easement for limited use; or lease land for a limited period of time. In *Lucas*, the Court found that regulations that deny "all economically beneficial or productive use of land" are automatic per se takings.[16] But what does the Court in *Lucas* mean by "all"? If concerned with regulations that prohibit use of "all" property, then what is the "property" at issue?[17] Some courts embrace "conceptual severance"—the idea that each discrete strand of property should be considered its own whole.[18] For example, a regulation that prohibits use of one-tenth of a parcel is treated as a "total" prohibition for that discrete part. Similarly, a law that forbids use of land for one month is analyzed as a limit on "all" use for that month. With conceptual severance, "partial" prohibitions on use of a whole fee simple parcel become "total" prohibitions on use of the discrete strand—"some" becomes "all." *TRPA* forced the Court to confront conceptual severance in the temporal dimension. The stakes were high: If the Court allowed severance in the temporal dimension, it could open the door to severance in the "space" and "use" dimensions as well.

In the end, in a 6-3 decision, the Court soundly rejected extension of *Lucas'*s per se rule to temporary land use restrictions.[19] In so ruling, the Court clarified and reinforced the modern shape of takings jurisprudence. Fault lines between physical and regulatory takings, and between partial and total takings, were recognized and widened; conceptual severance was strongly criticized.[20]

In *TRPA*, the Court confronted two major issues: defining the

> Regulations are three dimensional; they have depth, width, and length. As for depth, regulations define the extent to which the owner may not use the property in question. With respect to width, regulations define the amount of property encompassed by the restrictions. Finally, . . . regulations set forth the duration of the restrictions.

482 U.S. 304, 330 (1987) (Stevens, J., dissenting).

[16] 505 U.S. 1003, 1015 (1992).

[17] *Lucas* itself dodged the "denominator" issue: "Regrettably, the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured." *Id.* at 1016 n.7.

[18] The term "conceptual severance" was invented and discussed by Margaret Jane Radin in her article, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1676 (1988). Many commentators refer to the same concept as "the denominator problem" or "the relevant parcel issue." *See*, *e.g.*, MELTZ ET AL., *supra* note 2, at 144-54.

[19] *TRPA*, 535 U.S. 302 (2002).

[20] *Id.* at 331.

contours of "temporary takings" as a species of land use restriction, and determining which takings test applies to temporary land use restrictions. This Note traces the Court's pre-*TRPA* jurisprudence on "temporary takings" in Section 1; reviews the lower court decisions in the *TRPA* case in Section 2; provides an analysis of the *TRPA* fact pattern according to the Court's precedents in Section 3; and, finally, reviews how the Court's *TRPA* decision comports with that precedent in Section 4.

I

LEGAL BACKDROP

A. Overview of Takings Tests

While observers describe the past two decades of Supreme Court takings jurisprudence as "open-ended and standardless,"[21] a "doctrinal and conceptual disarray,"[22] and an area of "great uncertainty,"[23] some broad outlines of a legal framework are discernible, particularly since the Supreme Court's decision in *Lucas*. *Physical* invasions of property by government have long been considered "per se" or "categorical" takings, i.e., automatic takings regardless of the public purpose involved.[24] *Regulatory* restrictions on property use, on the other hand, were not considered unconstitutional until Justice Holmes's famous pronouncement in *Pennsylvania Coal Co. v. Mahon* that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[25] The difficulty of defining how far is too far has haunted the Court's regulatory takings cases ever since. The most influential attempt at a resolution of the question has been Justice Brennan's opinion in *Penn Central Transportation Co. v. New York City*.[26] The *Penn Central* Court announced a balancing test for regulatory takings that considers "[t]he economic impact of the regulation[,] . . . the extent to which the regulation has interfered with distinct investment-backed expectations[,] . . . [and] the character of the government

[21] *First English*, 482 U.S. 304, 341 n.17 (Stevens, J., dissenting).

[22] Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part I—A Critique of Current Takings Clause Doctrine*, 77 CAL. L. REV. 1301, 1304 (1989).

[23] Nollan v. California Coastal Comm'n, 483 U.S. 825, 866 (1987) (Stevens, J., dissenting).

[24] MELTZ ET AL., *supra* note 2, at 117.

[25] 260 U.S. at 415.

[26] MELTZ ET AL., *supra* note 2, at 130.

action."[27] In broad terms, the test is an "essentially ad hoc, factual inquir[y]," [28] which balances public against private interests, and finds a taking where the private harm outweighs the public benefit.

Lucas recognizes the existence of these separate tests—a per se test for physical invasions and a balancing test for regulatory actions[29]—and also carves out a per se category for regulatory actions that "den[y] [the landowner] *all* economically beneficial or productive use of land."[30] Thus, while the previous dividing line in takings analysis was between physical and regulatory takings, *Lucas* points to a new dividing line within the universe of regulatory takings namely between total and partial takings. Now *total* regulatory takings are subject to the per se test, and all other regulatory actions fall to balancing. Because the two tests pose such different hurdles for takings plaintiffs, the determination of which side of the line a government action falls on is often outcome-determinative.[31]

B. Temporary Development Moratoria

Temporary development moratoria, sometimes called interim development controls, are planning "time-outs" that freeze development, to varying degrees, while planners develop a comprehensive approach to a land-use problem.[32] Moratoria have three main aims: to freeze the status quo so that the problem at issue is not exacerbated during the planning period;[33] to prevent landowners from rushing to begin projects that they anticipate will be limited by new regulations;[34] and, to allow a legislative approach

[27] 438 U.S. at 124.

[28] *Id.*

[29] 505 U.S. at 1015.

[30] *Id.* (emphasis added). Whether the per se category for regulatory actions that deny all use is newly announced in *Lucas* or is a restatement of past precedent is hotly debated in the case. *See id.* at 1016 n.6.

Lucas includes an important exception to the per se rule for constraints that "inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id.* at 1029.

[31] *See TRPA*, 34 F. Supp. 2d 1226, 1240 (D. Nev. 1999) ("The question which remains to be answered—and which was hotly debated at trial—is whether the denial was total, or only partial. This question is important because the answer effectively decides the outcome of the case.").

[32] Freilich, *supra* note 13, at 66.

[33] *Id*. at 77.

[34] *Id.* "Such a race-to-development would permit property owners to evade the land-use plan and undermine its goals." *TRPA*, 216 F.3d 764, 777 (9th Cir. 2000).

to planning where the public as a whole can weigh in on a common problem.[35]

While moratoria are generally accepted as planning tools,[36] they do have their detractors. A common criticism is that if planners simply focused proper attention on long-term planning efforts, the disruptive solution of a moratorium would be unnecessary.[37] Planners often reply that time-outs are needed if careful planning efforts are to keep pace with explosive growth.[38] In addition, planners often must respond to unforeseeable development patterns or previously unknown environmental impacts.[39]

Until the Supreme Court decided *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, courts typically found moratoria constitutional under the Takings Clause.[40] *First English*, particularly when considered in combination with the Court's new per se rule in *Lucas*, muddied the waters considerably. Both commentators[41] and courts[42] have struggled to de-

[35] Freilich, *supra* note 13, at 79.

[36] MELTZ ET AL., *supra* note 2, at 264

[37] *See* Wendy U. Larsen & Marcella Larsen, *Moratoria as Takings Under* Lucas, LAND USE L. & ZONING DIG., June 1994, at 3; Roger K. Lewis, *Planning Is a More Sensible Choice*, URB. LAND, Sept. 1989, at 35.

[38] Elizabeth A. Garvin & Martin L. Leitner, *Drafting Interim Development Ordinances: Creating Time to Plan*, LAND USE L. & ZONING DIG., June 1996, at 3.

[39] *Id.*

[40] *See* Freilich, *supra* note 13, at 82; MELTZ ET AL., *supra* note 2, at 273; Robert H. Freilich & Elizabeth A. Garvin, *Takings After* Lucas: *Growth Management, Planning, and Regulatory Implementation Will Work Better Than Before*, *in* AFTER LUCAS 63 (David L. Callies ed., 1993). Challenged moratoria, like other partial takings, were generally analyzed under some version of the *Penn Central* balancing factors, even if the court did not explicitly refer to *Penn Central*. *See* MELTZ ET AL., *supra* note 2, at 272 ("[C]ourts will support moratoria when there is a clear public need and the period of the moratorium is no longer than necessary.").

[41] Commentators finding takings include: DANIEL R. MANDELKER ET AL., FEDERAL LAND USE LAW § 2A.05[2][c] (rev. Feb. 2002); Steven J. Eagle, *Temporary Regulatory Takings and Development Moratoria: The Murky View from Lake Tahoe*, 31 ENVTL. L. REP. 10224 (2001); Larsen & Larsen, *supra* note 37, at 3.

Those reaching the opposite conclusion include: Nathaniel S. Lawrence, *Regulatory Takings: Beyond the Balancing Test*, *in* REGULATORY TAKING: THE LIMITS OF LAND USE CONTROLS 191 (G. Richard Hill ed., 1990); Thomas E. Roberts, *Moratoriums Are Alive and Well*, URB. LAND, Sept. 1989, at 34; and Freilich & Garvin, *supra* note 40, at 63-65.

Some just note the uncertainty: 3 Patrick J. Rohan, Zoning and Land Use Controls § 22.03[3] (Lori A. Hauser & Nancy H. Greening eds., 1992); Meltz et al., *supra* note 2, at 279-80; Norman Williams, Jr. et al., *The White River Junction Manifesto*, 9 Vt. L. Rev. 193, 218 (1984) (while pre-dating the Court's decision in *First English*, the authors speculate that if Justice Brennan's dissent in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 636 (1981), were to become law, moratoria

cide whether moratoria (at least those that restricted all use) were *Lucas*-style categorical takings.

C. "Temporary Takings" in Supreme Court Jurisprudence

A first step in determining how to treat temporary takings under the law is defining exactly what a "temporary taking" is. Courts use the term interchangeably to refer to at least two distinct regulatory events.[43] First, an otherwise permanent taking could become temporary when authorities later invalidate it. Some courts call this "retrospectively temporary."[44] Second, a regulation could always contemplate a limited term. This category, which can be termed "prospectively temporary,"[45] could encompass both moratoria and permit delays. Whether this distinction does—or should—result in different analyses for the different events is uncertain, but it is useful to keep the difference in mind when examining the Court's "temporary takings" precedents.

The notion of a temporary *physical* invasion as a taking appeared in the Supreme Court's takings jurisprudence as early as 1945.[46] Physical takings cases award compensation for both retrospectively and prospectively temporary invasions of property.[47]

The concept of a temporary *regulatory* taking did not appear until 1981, when Justice Brennan used the term in his dissent in *San Diego Gas & Electric Co. v. City of San Diego*.[48] In *San Diego Gas*, the Court considered appropriate remedies for tak-

would be considered "temporary takings." Chief Justice Rehnquist's opinion in *First English* validates Justice Brennan's views on temporary takings. 482 U.S. at 314).

[42] Cases finding that, under *First English* and *Lucas*, a moratorium is a taking: Bass Enters. Prod. Co. v. United States, 133 F.3d 893 (Fed. Cir. 1998); Corn v. City of Lauderdale Lakes, 95 F.3d 1066, 1073 (11th Cir. 1996).

Cases reaching the opposite conclusion: *TRPA*, 216 F.3d 764 (9th Cir. 2000); Woodbury Place Partners v. City of Woodbury, 492 N.W.2d 258, 260-61 (Minn. Ct. App. 1992); Tocco v. New Jersey Council on Affordable Hous., 576 A.2d 328 (N.J. Sup. Ct. App. Div. 1990); S.E.W. Friel v. Triangle Oil Co., 543 A.2d 863, 867 (Md. Ct. Spec. App. 1988).

[43] *TRPA*, 34 F. Supp. 2d 1226, 1249 (D. Nev. 1999)

[44] *Id.*

[45] *Id.*

[46] United States v. Gen. Motors Corp., 323 U.S. 373 (1945).

[47] *See id.* (one-year taking of leasehold in office building); United States v. Petty Motor Co., 327 U.S. 372 (1946) (three-year taking of leasehold in industrial facility); Kimball Laundry Co. v. United States, 338 U.S. 1 (1949) (one-year taking of laundry and dry-cleaning establishment); United States v. Causby, 328 U.S. 256 (1946) (taking of airspace easement by frequent overflights).

[48] 450 U.S. 621, 657-60 (1981).

ings. At the time, it was uncertain whether plaintiffs claiming inverse condemnation could claim monetary damages, or only equitable relief in the form of invalidation of the offending regulation.[49] Brennan argued in favor of monetary damages and emphasized that the fact that a regulation could be invalidated, rendering the taking "temporary," did not alter the analysis.[50] Thus, Brennan's statements in *San Diego Gas* were in the context of "retrospectively temporary" regulations.

In *First English*, the majority borrowed heavily from Brennan's *San Diego Gas* dissent for its holding that damages are an available remedy for takings claims, and that takings made temporary by invalidation require damages for the period during which the regulation is in effect.[51] The plaintiff in *First English* was a Lutheran Church that owned property—a retreat and youth camp—in a flood plain on Mill Creek in the Angeles National Forest.[52] A forest fire in 1977 created a serious flood hazard in the area, and a subsequent flood in 1978 caused substantial damage to the property.[53] The County of Los Angeles responded with an interim ordinance prohibiting construction of any buildings in a designated flood protection area that included the church's property.[54]

First English came to the Supreme Court as a narrow issue on appeal from a California Court of Appeals decision. The California trial court had struck the plaintiff's takings claim from its complaint.[55] Citing *Agins v. City of Tiburon*,[56] the trial court decided that the only possible remedy for regulatory takings was declaratory relief—a declaration that the regulation was excessively restrictive.[57] Only if the County insisted on maintaining the regulation in the face of this declaration was monetary relief due.[58] But if the County invalidated the ordinance, rendering the restriction temporary, it would be saved from any monetary lia-

[49] MELTZ ET AL., *supra* note 2, at 476-77.

[50] *San Diego Gas*, 450 U.S. at 657-59 (Brennan, J., dissenting). For extensive criticism of Brennan's dissent in *San Diego Gas*, see Williams et al., *supra* note 41.

[51] 482 U.S. at 319.

[52] *Id.* at 307.

[53] *Id.*

[54] *Id.*

[55] *Id.* at 309.

[56] 598 P.2d 25 (Cal. 1979), *aff'd on other grounds*, 447 U.S. 255 (1980).

[57] *First English*, 482 U.S. at 308-09.

[58] *Id.*

bility.[59] Because the plaintiff in *First English* sought *only* monetary relief, rather than declaratory relief, the trial court found its claim invalid.[60] Even if a taking had occurred, which was undecided, the court felt damages were an inappropriate remedy.[61] Facing this limited "compensation question," the Supreme Court reversed and found damages appropriate to compensate for the period of restriction, but specifically left the question of whether a taking occurred to the lower court on remand.[62] As in the *San Diego Gas* dissent, discussion of how to handle damages for "temporary takings" was limited to "those regulatory takings which are ultimately invalidated by the courts,"[63] i.e., retrospectively temporary takings. The Court also differentiated the category of compensable "temporary takings" from those "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like."[64]

First English left many questions unanswered. Did the *First English* court mean to include both retrospectively and prospectively temporary restrictions on land use as "temporary takings"? Was the *Penn Central* balancing test the proper test to apply to "temporary takings"? And what differentiated "temporary takings" from "normal delays" in permitting? Would development moratoria fall into the "takings" or the "normal delays" category?

Whether the *First English* court meant to limit their holding to retrospectively temporary takings is unclear. While *First English* did involve an "interim ordinance," that ordinance had no clear ending date.[65] Certainly the facts before the Court were those of a permanent restriction that could become a retrospectively temporary taking, but it is possible to read its holding more broadly to cover prospectively temporary limitations.

It is also difficult to decipher whether the *First English* Court

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[59] *Id.* at 310.

[60] *Id.*

[61] *Id.* at 309.

[62] *Id.* at 313. The lower court found no taking. Following the two-part test in Agins v. City of Tiburon, 447 U.S. 255 (1980), the California Court of Appeals found that the ordinance (1) did not deny the owner all use of the property and (2) substantially advanced the state's interest in public safety. *First English*, 258 Cal. Rptr. 893, 902 (Cal. Ct. App. 1989).

[63] *First English*, 482 U.S. at 310.

[64] *Id*. at 321.

[65] *Id.* at 307. The ordinance later became permanent. *First English*, 258 Cal. Rptr. at 904.

intended "temporary takings" of all use to fall under a per se test. *First English* was decided five years before *Lucas'* clear announcement of the per se rule for total regulatory takings. On remand, the California court appeared to use a balancing test and considered the public purpose involved.[66] This does not, however, answer the question. The *First English* Court's declaration that "'temporary' takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings"[67] suggests that as go permanent "all use" takings, so go temporary "all use" takings; in other words, that *Lucas* should impact both in the same way. It is also notable that "normal delays," like the great majority of land use regulations, are probably analyzed under the *Penn Central* balancing test.[68] Thus, it could be argued that the *First English* Court had no reason to differentiate "temporary takings" from "normal delays," unless they were treated differently under the law.

Assuming that *First English's* "temporary takings"—whatever those may be—are subject to *Lucas*'s per se test, then the more important question for *TRPA* is which camp moratoria fall into—"temporary takings" or "normal delays in obtaining permits." This issue is discussed further in section III.A.

While lower courts have struggled to make sense of *First English*'s pronouncements on "temporary takings,"[69] the Court itself left the issue open until deciding *TRPA* in April 2002.

II

TAHOE-SIERRA PRESERVATION COUNCIL V. TAHOE REGIONAL PLANNING AGENCY

A. Facts

The conflict in *TRPA* is just one skirmish in an epic battle between Lake Tahoe landowners and the Tahoe Regional Planning Agency (TRPA),[70] the unique interstate planning agency created

[66] *First English*, 258 Cal. Rptr. at 902.

[67] *First English*, 482 U.S. at 318.

[68] *See* MELTZ ET AL., *supra* note 2, at 139. Partial takings encompass a broad range of government actions including all "those situations in which government regulation is claimed to have *reduced* but not *eliminated* the economic value or use of private property." *Id.* (emphasis in original).

[69] *See supra* note 42.

[70] In addition to this case, the *TRPA* plaintiffs have made three trips to the Ninth Circuit, not to mention innumerable forays into district courts in Nevada and California. 216 F.3d at 769. The Supreme Court previously heard one Lake Tahoe land-

to protect the lake's aesthetic and ecological values. In all of these cases, the familiar story of development versus conservation plays out overlooking a spectacular alpine lake "famed for its scenic beauty and pristine clarity."[71] Lake Tahoe's unusual clarity and color results from a natural lack of nutrients that precludes algal growth. Over the last half-century, homes, resorts, roads, and parking lots have covered the land of the Tahoe basin, increasing the number of impervious surfaces, and consequently increasing the flow of nutrients into the lake. This process of "eutrophication" has dramatically decreased the lake's clarity and depleted its oxygen content; if left unchecked, it promises to seriously harm fish populations and leave the lake "green and opaque for eternity."[72]

In an attempt to halt eutrophication, the legislatures of California and Nevada, with approval from Congress, adopted the Tahoe Regional Planning Compact and created TRPA in 1969.[73] Pursuant to its mission, TRPA began identifying the classes of land most likely to contribute to the problem.[74] This process accelerated when Congress amended the Compact in 1980 and gave TRPA a strict timeline to develop "environmental threshold carrying capacities" (in eighteen months) and adopt a new regional plan (twelve months after that).[75] In the meantime, TRPA was to impose temporary development restrictions on land in the basin.[76] Two regulatory actions accomplished the last objective: Ordinance 81-5 and Resolution 83-21 temporarily prohibited most residential construction on lands classified as "high hazard."[77] The temporary prohibition lasted thirty-two months and ended when the 1984 Regional Plan was adopted.[78] The new plan had a short life—lawsuits over the plan resulted in a temporary restraining order and preliminary injunction that lasted until

owner's challenge to TRPA's 1987 Regional Plan in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997). *Suitum* was limited to questions of ripeness and the Court did not reach the substantive merits of the takings claim.

[71] S. REP. NO. 91-510, at 3-4 (1969).

[72] *TRPA*, 34 F. Supp. 2d 1226, 1231 (D. Nev. 1999); *TRPA*, 216 F.3d 764, 766-67 (9th Cir. 2000).

[73] *TRPA*, 216 F.3d at 767.

[74] *Id.*

[75] *Id.* at 767-68.

[76] *Id.*

[77] *TRPA*, 34 F. Supp. 2d at 1233-35.

[78] *TRPA*, 216 F.3d at 768.

adoption of a new regional plan in 1987.[79]

Plaintiffs, owners of "high hazard" lands subject to building prohibitions, sued TRPA under various theories.[80] The claim at issue in *TRPA* was that the temporary restrictions imposed by Ordinance 81-5 and Resolution 83-21 amounted to "temporary takings" of the plaintiffs' land.[81]

B. District Court Decision

Uncertain whether a temporary taking should be classified as partial (so subject to the *Penn Central* balancing test), or total (so subject to *Lucas*'s per se test), the Nevada District Court ran the facts through both.[82] The court found no "partial" taking under *Penn Central*—perhaps not surprisingly because the plaintiffs made a tactical decision not to put on evidence for a *Penn Central* theory[83]—but did find a "total" taking under *Lucas*.[84]

Under the *Penn Central* test, the court considered the plaintiffs' "reasonable, investment-backed expectations," and found it unreasonable for the plaintiffs to expect to build during the moratorium since the average holding time before construction for Tahoe landowners is twenty-five years.[85] The court was unable to consider economic impact due to the lack of evidence.[86] Finally, the court found great merit in the "character of the government action"—an effort to protect Lake Tahoe by limiting development on "high hazard" lands in the basin.[87]

Turning to the *Lucas* test, the court pondered how to determine whether the plaintiffs had been "deprived of all economically viable use of their land."[88] This led to an analysis of the difference between "use" and "value," and consideration of whether *Lucas* requires finding a deprivation of "all value" or

[79] *Id.*

[80] *Id.* at 768-69.

[81] *Id.* at 766. While some landowners eventually were allowed to build on their lots, others were subject to permanent restrictions under subsequent plans. Some have since sold to private parties or government agencies. Oral Arguments, *TRPA*, 2002 WL 43288 (U.S. Jan. 7, 2002).

[82] *TRPA*, 34 F. Supp. 2d at 1240-43.

[83] *Id*. at 1242.

[84] *Id*. at 1245.

[85] *Id*. at 1240-41.

[86] *Id*. at 1241.

[87] *Id*. at 1241-42.

[88] *Id*. at 1242.

"all use."[89] Strangely, while the court considered value in terms of the entire fee simple parcel (the intuitive approach), "use" was considered only in terms of the period of the moratorium.[90] While finding value relevant and acknowledging that some value certainly remained in the properties, the court decided that the existence of some *value* did not answer *Lucas*'s question. Instead, reading the *Lucas* language narrowly, Judge Reed decided that "use" was the proper inquiry and found that the moratorium deprived the owners of "all use."[91]

Finally, the court considered TRPA's "defense" that moratoria cannot be takings.[92] Recognizing that courts are split on the issue of whether moratoria are included among the "temporary takings" of *First English*, the court sided with the landowners.[93] Moratoria, they decided, were not meant to fall under the *First English* exception for "normal delays."[94] Also, the *First English* Court used prospectively temporary *physical* takings as support for the proposition that temporary takings are compensable, suggesting the Supreme Court saw no difference between retrospectively temporary and prospectively temporary regulations.[95]

C. Ninth Circuit Decision

The Ninth Circuit reversed the trial court's decision. While agreeing that the moratorium did not constitute a taking under *Penn Central*,[96] the Ninth Circuit took issue with the lower court's use of conceptual severance to find a taking of "all" use for the period of the moratorium under the *Lucas* per se test.

The court noted that the Supreme Court has rejected conceptual severance in all three property use dimensions: space, function, and time.[97] In the spatial dimension, the court pointed out that both *Penn Central* and *Keystone Bituminous Coal Association v. DeBenedictis* counsel against dividing the relevant property into pieces: "'Taking' jurisprudence does not divide a single

[89] *Id.* at 1242-43.
[90] *Id.*
[91] *Id.* Confusingly, the court determined "economically viable use" by examining whether a competitive market existed for the properties—an inquiry that seems to refer back to an assessment of value. *See id*. at 1243.
[92] *Id*. at 1248.
[93] *Id*. at 1248-50.
[94] *Id*. at 1250.
[95] *Id*. at 1250.
[96] *TRPA*, 216 F.3d 764, 782 (9th Cir. 2000).
[97] *Id*. at 774-76.

parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."[98] With regard to function, the court referenced *Andrus v. Allard*,[99] a case concerning a prohibition on the sale of eagle feathers.[100] The *Andrus* court found no taking because the other uses of the property—the rights to possess, donate, and devise—were not abrogated: "[W]here an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety."[101]

For the temporal dimension, the Ninth Circuit countered *First English* by asserting that *Agins v. City of Tiburon*[102] already disapproved the notion of conceptual severance of time.[103] In *Agins*, the City of Tiburon began precondemnation activities on the plaintiff's property but later abandoned the effort.[104] One of plaintiff's takings theories was that the condemnation effort "so burdened [their] enjoyment of their property so as to constitute a taking."[105] The *Agins* court found that changes in value during government decision-making are "incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense."[106] Perhaps recognizing that *Agins* is less than clear in its applicability to temporary takings, the court insisted that time should be treated no differently from the other dimensions: "It would make little sense to accept temporal severance and reject spatial or functional severance."[107] The Ninth Circuit also found that *First English* did not mean to encompass moratoria, noting the distinction between prospectively temporary and retrospectively temporary regulations.[108] The fact that the *First English* court

[98] *Id.* at 774-75 (quoting Penn Cent. Trans. Co. v. New York City, 438 U.S. 104, 130 (1978)).

[99] 444 U.S. 51 (1979).

[100] *TRPA*, 216 F.3d at 775.

[101] *Id.* (quoting *Andrus*, 444 U.S. at 65-66).

[102] 447 U.S. 255 (1980).

[103] *TRPA*, 216 F.3d at 775-76.

[104] *Id.* at 776.

[105] *Id.* (quoting *Agins*, 447 U.S. at 263 n.9).

[106] *Id*. The quote in *TRPA* comes from *Agins*, which quoted *Danforth v. United States*, 308 U.S. 271, 285 (1939). In my view, *Danforth* says something slightly different: The fact that government activities reduce land value for a period of time does not mean that the owner can claim a "taking" of the difference between the original value and the reduced value. *See Danforth*, 308 U.S. at 285. The fact that the government action in *Agins* appears to be retrospectively temporary, rather than prospectively temporary, is also problematic.

[107] *TRPA*, 216 F.3d at 776.

[108] *Id.* at 777-78.

referred to prospectively temporary regulations was irrelevant, according to the Ninth Circuit, because all of the cases cited involved physical invasions: "[P]hysical occupations and appropriations have always received markedly different analytic treatment than other regulatory takings."[109]

The Ninth Circuit considered the district court's use/value distinction and took a different approach. Both use and value, the court decided, should be viewed from the perspective of permanent fee simple ownership.[110] While it was clear that the moratorium did not take "all value," the Ninth Circuit found it was equally clear the regulation did not take "all use" because potential post-moratorium uses remained.[111]

D. Dissent to Denial of Rehearing En Banc

The *TRPA* plaintiffs filed a petition for rehearing en banc that was later denied.[112] However, five Ninth Circuit judges strongly disagreed with the denial and the Ninth Circuit panel's opinion.[113] The judges asserted that moratoria certainly fall within *First English*'s definition of temporary takings and not within the case's exception for "normal delays."[114] The judges strenuously objected to the panel's rejection of conceptual severance, arguing that "temporary takings" should be treated exactly like "permanent takings"—as *total* deprivations for a discrete period of time.[115] They rejected any difference between physical takings and regulatory takings that involve a "total deprivation of beneficial use."[116] Finally, they revived the District Court's distinction between "use" and "value." Reading *Lucas*'s holding narrowly—that a taking occurs when there is a "total deprivation of beneficial use, from the landowner's point of view"—the dissenters found that, even if value remained and use was available after the moratorium, any prohibition on use *now*, during the morato-

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109 *Id.* at 779.

110 *Id.* at 780-82.

111 *Id.*

112 *TRPA*, 228 F.3d 998, 998-99 (9th Cir. 2000).

113 *Id.* at 999.

114 *Id*. at 1000. In what seems contrary to the *First English* court's intent, they even narrow the exception further by saying that such delays could be categorical takings if they "deprive the landowner of all economically beneficial uses of the property for their duration." *Id*. at 1003.

115 *Id*. at 1000.

116 *Id*. at 999.

rium, constituted a per se taking.[117]

E. A Note on Tactics

TRPA's significance to broader takings jurisprudence is largely a function of tactical choices the landowners made in bringing their claim. First, the plaintiffs brought a facial, rather than an "as-applied," takings claim.[118] This required the Court to focus on the regulation's "general scope and dominant features," rather than its on-the-ground effects on specific property owners.[119] This is a more difficult endeavor, described by courts as "an uphill battle."[120] This means that a decision for the landowners in *TRPA* would set a precedent that reaches far beyond the facts at issue in the case: All moratoria that restrict all use will be per se takings, whether they last a year or ten minutes.[121] Second, the plaintiffs hoped to place moratoria under the Court's per se rule, rather than the *Penn Central* balancing rule.[122] The limited scope of the issue before the Court was clear from the Question Presented in the Court's grant of certiorari: "Whether the Court of Appeals properly determined that a temporary moratorium on land development does not constitute a taking of property requiring compensation under the Taking Clause of the United States Constitution?"[123]

III

ANALYSIS

A. Are Moratoria "Temporary Takings" Under First English*?*

Are moratoria more like the retrospectively temporary takings at issue in *First English*, or the "normal delays in permitting" that *First English* specifically excludes? Conceptually, it makes sense that retrospectively temporary actions should be treated

117 *Id.* at 999-1001.

118 Respondent's Brief at *2, *TRPA*, 2001 WL 1480565 (U.S. Nov. 14, 2001).

119 *TRPA*, 216 F.3d 764, 773 (9th Cir. 2000).

120 *Id.* at 773-74 (quoting Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 736 n.10 (1997)).

121 The *TRPA* plaintiffs confirmed this result in oral arguments before the Court: "If there is a total prohibition of use . . . for 10 minutes . . . there is liability." Oral Arguments at *12, *TRPA*, 2002 WL 43288 (U.S. Jan. 7, 2002).

122 As noted above, while the District Court considered the claim under *Penn Central*, the plaintiffs put on no evidence for a *Penn Central* "partial taking" claim. *TRPA*, 34 F. Supp. 2d 1226, 1241 (D. Nev. 1999)

123 *TRPA*, 533 U.S. 948 (2001).

the same as permanent actions—after all, they were always intended to be permanent. If courts mean to deter government actions that permanently restrict all use, they will not want to give government the "out" of invalidation in case a taking is found. If compensation is not required for the period the regulation is in effect, there are no consequences to government for imposing an unconstitutional regulation—it may be found invalid, but no damages will be due.[124] In this sense, *First English*'s declaration (that "'temporary' takings which . . . deny a landowner all use of his property, are not different in kind from permanent takings")[125] makes sense. Retrospectively temporary takings are not really partial takings at all. As the Ninth Circuit phrased it, the *taking* is what is temporary, not the regulation.[126]

Moratoria are different in purpose and effect. Like permit delays, moratoria contemplate some use at the end of a finite period of government analysis. While a moratorium may ultimately result in limitations on land use, the overriding purpose is to reassess land use for the whole area for the benefit of all of its residents.[127] Such "reciprocity of advantage" (discussed further below in section III.A.1.) has long been viewed as justification sufficient to defeat a takings claim.[128] Any given landowner may ultimately benefit from the reasoned and deliberate planning made possible by the moratorium; the specific restrictions that may apply permanently to a piece of property are not known until planning is complete and the moratorium ends. If, at the end of the moratorium, some landowners are prohibited from all use

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124 *See* San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 661 n.26 (1981) ("Such liability might also encourage municipalities to err on the constitutional side of police power regulations."). For criticism of this view, see Williams et al., *supra* note 41, at 223-25 ("This rationale might be persuasive if, but only if, decisions on 'takings' were predictable according to rules which are clearly defined and well-settled on a nation-wide basis." *Id*. at 224.).

125 First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 318 (1987).

126 *TRPA*, 216 F.3d 764, 778 (9th Cir. 2000).

127 *See generally* Freilich, *supra* note 13.

128 The term "average reciprocity of advantage" was first coined by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). Justice Holmes found that the requirement that a mining company leave pillars of coal sufficient to provide support for the land above also served the company by protecting its workers from mine collapse, and thus "secured an average reciprocity of advantage that has been recognized as a justification of various laws." *Id*. at 415. For history and further discussion of the concept, see Raymond R. Coletta, *Reciprocity of Advantage and Regulatory Takings: Toward a New Theory of Takings Jurisprudence*, 40 Am. U. L. Rev. 297 (1990).

(as some Lake Tahoe landowners were),[129] nothing prevents them from pursuing a takings claim for permanent deprivation under *Lucas*.

Of course, a determination that moratoria are not *First English*-style "temporary takings" does not mean that moratoria could never be takings. As with other partial takings, the *Penn Central* test applies.[130] If there are questions about "the character of the government action"—the moratorium is longer than it needs to be or is not the appropriate response to the problem and the impact on the landowner is severe—then a moratorium could be a taking.[131]

The fact that moratoria do look more like "normal delays in permitting" than the retrospectively temporary takings in *First English* creates another problem. If moratoria are held to be *First English*-style "temporary takings," the Court will have to carefully distinguish "normal delays" to prevent dragging those actions under a per se rule as well. Formulating the distinction is not simple: The effect of both moratoria and permit delays on the owner is the same—a total prohibition on use for a period of government deliberation.[132] While the Court could simply say that "moratoria" are subject to the per se rule and "permit delays" are not, this may have the unfortunate effect of driving planners to simply re-characterize needed planning reviews as a series of "permit delays." Such a permit-by-permit process will have the same impact on landowners but will seriously hamper planners' ability to conduct thoughtful, comprehensive reviews in a legislative process that allows broad community input.[133]

B. Are Moratoria Per Se Takings Under Lucas*?*

The determination of which government actions fall under the

[129] Petitioners' Brief at *2, *TRPA*, 2001 WL 1692011 (U.S. Sept. 12, 2001).

[130] *See* MELTZ ET AL., *supra* note 2, at 139.

[131] *See* MELTZ ET AL., *supra* note 2, at 272: ("[C]ourts will support moratoria when there is a clear public need and the period of the moratorium is no longer than necessary.") For examples of courts applying *Penn Central* (or some form of balancing rule) to moratoria and finding takings, *see* Joint Ventures, Inc. v. Dep't of Transp., 563 So. 2d 622 (Fla. 1990); Westwood Forest Estates, Inc. v. Vill. of South Nyack, 244 N.E.2d 700 (N.Y. 1969); Q.C. Constr. Co. v. Gallo, 649 F. Supp. 1331 (D.R.I. 1986).

[132] The Supreme Court clearly struggled with how to express this distinction in oral arguments on *TRPA*. *See* Oral Arguments at *14-22, *TRPA*, 2002 WL 43288 (U.S. Jan. 7, 2002).

[133] *See id.* at *51.

per se rule and which are subject to a balancing test has over time been dictated by two persistent dichotomies in takings jurisprudence: physical and regulatory takings; and total and partial takings. Finding a per se taking in *TRPA* would to some extent require collapsing one or both of these dividing lines. There are three conceptual possibilities here: temporary regulatory takings are not different in kind from temporary physical takings (i.e., regulatory restrictions are like physical restrictions); partial regulatory takings deserve the same treatment as total regulatory takings (i.e., partial restrictions are like total restrictions); and, a conceptual severance, employing a variation on the second possibility, where temporary takings are not partial at all—they are total takings of the time period at issue (i.e., partial restrictions *are* total restrictions). For the final two possibilities, it is also necessary to consider whether the lines collapse only for restrictions in the "time" dimension, or if the same reasoning applies to "space" and "function" restrictions.

It is useful to review which categories of actions are currently subject to *Penn Central*'s balancing test and which are per se takings, with an eye to the three dimensions of space, function, and time. As mentioned above, actions under the per se rule are in a sense pre-balanced under *Penn Central*'s factors. Courts have looked at the possible public purposes and the impact on the owner and have in effect said, "In these special circumstances, we already know that the impact on the owner far outweighs any conceivable public purpose. We will lay a heavy and decisive hand on the landowner's side of the scales."

Per se takings include all physical invasions, whether total or partial.[134] Among the partial group, takings of limited space, function, and time are represented. The lead case of *Loretto v. Teleprompter Manhattan CATV Corp.* recognizes and emphasizes the principle that "even minimal physical occupations constitute takings which give rise to a duty to compensate."[135] In *Loretto*, the owner of a New York apartment building was awarded compensation because a state statute allowed cable companies to place cable boxes, each the size of a shoe box, on the roofs of apartment buildings.[136] In *United States v. Causby*,

[134] MELTZ ET AL., *supra* note 2, at 117-18.

[135] First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 329 (1987) (Stevens, J., dissenting).

[136] 458 U.S. 419 (1982). The language in *Loretto* seems to suggest that physical invasions must be "permanent" to be per se takings: "[W]hen the physical intrusion

frequent flights over a landowner's property, interfering with the owner's rights to the airspace, resulted in a taking.[137] In a series of World War II cases, the Supreme Court awarded compensation to individuals whose property was taken for finite periods of time to further the war effort.[138]

For regulatory restrictions, *Lucas* applies the per se rule to "the relatively rare situations where the government has deprived a landowner of all economically beneficial uses" of her land.[139] The *Penn Central* balancing test applies to anything left over, that is, partial regulatory limits on use of land.[140] The Court has so far resisted applying a per se test to partial takings in the "space" and "function" dimensions; with *TRPA*, the Court extended that resistance to the "time" dimension.[141]

1. The Regulatory/Physical Distinction

Application of a per se rule to moratoria would require a finding that the traditional distinction between physical and regulatory takings is no longer valid.[142] Indeed, this is the very

reaches the extreme form of a permanent physical occupation, a taking has occurred." *Id*. at 426. The *Loretto* court even finds a constitutional distinction between a permanent occupation and a temporary physical invasion, referring to *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), for support. *Loretto*, 458 U.S. at 434. Both *Pruneyard* and *National Board of YMCAs v. United States*, 395 U.S. 85 (1969), seem to suggest that temporary physical invasions are not per se takings. But the facts of both are so unusual that their precedential value is limited: In *Pruneyard* the Court found no taking where speech rights required a mall owner to allow leafletters on his property; in *YMCA*, United States soldiers occupied a building in the Panama Canal Zone to prevent intrusion by rioters and the Court found no taking. At most, they represent an unresolved conflict in the Supreme Court's physical takings jurisprudence, which also clearly endorses compensation for temporary physical invasions in its World War II cases, *see infra* note 138, and reaffirms that understanding in *First English*. *See First English*, 482 U.S. at 319. The Federal Circuit reconciled the conflict by simply deciding that "permanent" does not really mean *permanent*: "A 'permanent' physical occupation does not necessarily mean a taking unlimited in duration." Skip Kirchdorfer, Inc. v. United States, 6 F.3d 1573, 1582 (Fed. Cir. 1993).

137 328 U.S. 256 (1946).

138 *See* United States v. Gen. Motors Corp., 323 U.S. 373 (1945); United States v. Petty Motor Co., 327 U.S. 372 (1946); Kimball Laundry Co. v. United States, 338 U.S. 1 (1949).

139 505 U.S. at 1018.

140 MELTZ ET AL., *supra* note 2, at 139-41.

141 *See TRPA*, 535 U.S. at 330-31.

142 In *TRPA*, the Ninth Circuit panel and dissent to the motion for en banc rehearing clearly take opposite views on the existence of the physical/regulatory distinction. According to the panel, "physical occupations and appropriations have always received markedly different analytic treatment than other regulatory tak-

observation that gave birth to Justice Holmes' idea of "regulatory takings" in *Pennsylvania Coal*.[143] In his dissent in *San Diego Gas*, Justice Brennan emphasized the "essential similarity of regulatory 'takings' and other 'takings.'"[144] More recently, Justice Scalia based his *Lucas* holding on the observation that "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation."[145]

Despite this trend, the distinction between physical and regulatory actions persists.[146] One possible explanation is the existence of a "reciprocity of advantage" for landowners subject to regulatory actions. Another is the difference in the level and character of the intrusion.

Views of the meaning of "reciprocity of advantage" are diverse.[147] While in *Pennsylvania Coal* Justice Holmes seems to have intended the phrase to refer to situations where the burdened owner *directly* benefits in some sense from the regulation (as in the case of mine owners benefiting from a regulation that prevents mine collapse),[148] others on the Court have taken the idea further. In *Penn Central*, Justice Brennan found that New York City's building restrictions were not so burdensome to the plaintiffs because they ultimately benefited all New York City residents, including the plaintiffs, "by improving the quality of life in the city as a whole."[149] *Indirect* advantage was enough. While

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ings." *TRPA*, 216 F.3d at 779. According to the dissent, "*First English* rejected [the] distinction" between physical and regulatory takings. *TRPA*, 228 F.3d at 1002.

143 260 U.S. at 415-16.

144 450 U.S. at 651.

145 505 U.S. at 1017.

146 *See* Andrus v. Allard, 444 U.S. 51 (1979) (decision that the invasion was regulatory, not physical, is decisive in determination of no taking); *Lucas*, 505 U.S. at 1015 (describing the categories subject to per se analysis—physical takings and "total" regulatory takings—as "two discrete categories"); Yee v. City of Escondido, 503 U.S. 519 (1992) (decision that invasion is not physical is determinative); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 430 (1982) ("More recent cases confirm the distinction between a permanent physical occupation, a physical invasion short of an occupation, and a regulation that merely restricts the use of property.").

147 *See* MANDELKER ET AL., *supra* note 41, at § 2A.03[3].

148 This view seems similar to Justice Rehnquist's in his *Penn Central* dissent: "While zoning at times reduces *individual* property values, the burden is shared evenly and it is reasonable to conclude that on the whole an individual who is harmed by one aspect of the zoning will be benefited by another." 438 U.S. at 147 (emphasis in original). *See* MANDELKER ET AL., *supra* note 41, at § 2A.03[3].

149 *Penn Central*, 438 U.S. at 134. Justice Stevens earlier described regulatory restrictions as "part of the burden of common citizenship." Keystone Bituminous

Justice Scalia may not share Justice Brennan's broad view that reciprocity is present when the landowner indirectly shares in a benefit available to an entire community, he did recognize the force of the "reciprocity of advantage" concept in *Lucas*. In justifying per se treatment for total regulatory takings, Justice Scalia noted:

> Surely, at least, in the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply "adjusting the benefits and burdens of economic life" in a manner that secures an "average reciprocity of advantage" to everyone concerned.[150]

Whether courts take a broad or narrow view, they do recognize that regulatory restrictions, in contrast to physical invasions, more often benefit the landowners. In the case of moratoria, a "reciprocity of advantage" is present under either view: A landowner who is prevented from using her land during the term of a moratorium may ultimately both directly and indirectly benefit from the reasoned and deliberate planning process made possible by the moratorium.

The other major difference between physical and regulatory government restrictions on land is the basic character of the intrusion. As the *Loretto* court recognized, "[t]he power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights."[151] The court in *Loretto* also asserts that physical invasion is "qualitatively more severe than a regulation of the *use* of property."[152] But the physical/regulatory distinction has recently lost some of its force. Justice Scalia asserted in *Lucas* that "total deprivation of beneficial use is, from the landowner's point of view, the *equivalent* of a physical appropriation."[153] It must be remembered, though, that *Lucas* was decided in the context of a *permanent* restriction on use; it is not unreasonable for the landowner who is *permanently* prohibited from using his land to find that situation as burdensome as a physical invasion. Justice Scalia's "equivalence" argument has far less force in the context of temporary restrictions.

Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491 (1987) (quoting Kimball Laundry Co. v. United States, 338 U.S. 1, 5 (1949)).

[150] 505 U.S. at 1017 (emphasis in original) (citation omitted).

[151] 458 U.S. at 435.

[152] *Id.* at 436 (emphasis in original).

[153] 505 U.S. at 1017 (emphasis added).

In fact, that is because temporary limits are more likely to involve very direct reciprocities of advantage.

While the physical/regulatory distinction has lost some force in the case of total takings, the presence of significant reciprocities of advantage for partial use restrictions justifies the continued application of a balancing test in these situations.

2. The Partial/Total Distinction

The importance of the distinction between partial and total restrictions intensified with *Lucas*,[154] a case that placed total takings under a per se rule and left partial takings to *Penn Central*. The distinction is justified by both fairness and "functional" concerns.

The difference in severity of intrusion between a partial and total regulatory taking is obvious. Conceptual severance tends to confuse this by finding total takings of partial strands. But a look at the "landowner's point of view," important in *Lucas*, shows the inherent flaw with conceptual severance. A "total taking forever" is simply not the same as a "total taking for one year."[155] Treating both the same has significant consequences for the fairness of takings law. This is easily illustrated in the case of moratoria. If a per se rule is applied to moratoria, the landowner whose use was restricted during the moratorium may actually see an increase in her property's value as a consequence of the orderly planning made possible by the moratorium.[156] Because the restriction is temporary, the landowner has the opportunity to "collect" later on the dividends of the government action. Why should the landowner also be allowed to collect a windfall in the form of damages for a "temporary taking"? This fairness problem seems especially acute for partial takings in the "time" dimension. Partial takings of "space" or "function" are less likely to have such strong "reciprocities of advantage."

Another way of approaching the fairness issue is to examine the factors not considered under a per se test that are captured in

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[154] MANDELKER ET AL., *supra* note 41, at § 2A.03[5].

[155] *See* Woodbury Place Partners v. City of Woodbury, 492 N.W.2d 258, 261 (Minn. Ct. App. 1992) ("We interpret the phrase 'all economically viable use for two years' as significantly different from 'all economically viable use' as applied in *Lucas*. . . . [E]conomic viability exists at the moratorium's expiration.").

[156] This scenario is not far-fetched. Some *TRPA* plaintiffs were allowed to build on their land after the moratorium but still pursued damages for the period of the moratorium. *See* Oral Arguments at *23, *TRPA*, 2002 WL 43288 (U.S. Jan. 7, 2002).

the *Penn Central* analysis—in particular, the owner's "distinct investment-backed expectations" and the "economic impact" on the landowner.[157] A landowner's "reasonable investment-backed expectations" probably do not include the right to build at any time on their property, due to the extensive permitting requirements for construction. The "economic impact" of the moratorium depends entirely on the likelihood that uses will be allowed after the moratorium. The fact that some Tahoe landowners did sell their properties during the moratorium indicates that there was some expectation in the market of post-moratorium use.[158] So even ignoring the strong support for the "government action" involved in *TRPA*, the other two *Penn Central* factors offer a more complete picture of the true "intrusion" imposed on the *TRPA* landowners. Indeed, because the per se test is intended to apply to only the most severe regulatory takings,[159] any invasion that fails to meet the *Penn Central* test should logically fail the per se test as well.[160] The *Penn Central* test does a much better job of capturing the true impacts of partial regulatory restrictions.

Some Justices recognize this inherent problem with the per se rule. In the recent case of *Palazzolo v. Rhode Island*, Justice O'Connor's concurrence noted the advantage of a balancing test in allowing courts to see all of the factors relevant to a takings case and to prevent windfalls.[161] The court considered whether there was a per se rule that a taking *not* be found in cases where the landowner purchased the property *after* notice of the regulatory restriction (so-called "postregulation acquisition").[162] Arguing against application of a per se rule "in either direction" and in favor of considering the notice issue under the *Penn Central* balancing test, Justice O'Connor stated in her concurrence that if notice is not allowed "to inform the analysis, then some property owners may reap windfalls and an important indicium of fairness is lost."[163]

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157 *See* 438 U.S. at 124.

158 *See TRPA*, 34 F. Supp. 2d 1226, 1242-43 (D. Nev. 1999).

159 In *Lucas*, Justice Scalia refers to the situations calling for per se treatment as "extraordinary circumstances." 505 U.S. at 1017.

160 As noted above, the trial court in *TRPA* found a taking under the *Lucas* per se test but no taking under the *Penn Central* balancing test. *See TRPA*, 34 F. Supp. 2d at 1242, 1245.

161 535 U.S. 606, 635-36 (2001).

162 *Id.* at 2462.

163 *Id.* at 2467.

An additional fairness issue arises if temporary takings, as a subgroup of partial takings, are analyzed under the per se rule, but other partial takings are not. As Justice Stevens pointed out in his *First English* dissent, it is patently unfair to award compensation to one owner who is prohibited from "all use" of his land for two years, but not to another owner who is permanently subject to a regulation that reduces her property's value by eighty percent.[164]

Finally, the distinction between partial and total takings has a purely "functional" basis. In *Lucas*, Justice Scalia predicted the per se rule would only apply in "relatively rare situations."[165] Justice Scalia further noted:

> [T]he *functional* basis for permitting the government, by regulation, to affect property values without compensation—that "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law"—does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses.[166]

If we hope that government will not just "go on," but will also function in an efficient, deliberate, and productive way, we must make way for sensible government restrictions on land, such as moratoria. Drawing a line between partial and total regulatory takings, as Justice Scalia suggests, may be essential to that effort.

While the conceptual history of the partial/total distinction suggests that moratoria should not fit under the *Lucas* per se rule, the question remains: Does the *language* of *Lucas* mandate per se treatment for moratoria? At the heart of this question is the use/value distinction described by all of the *TRPA* courts.[167] Both the district court and Ninth Circuit dissent to the motion for en banc rehearing asserted that the phrase "economically beneficial or productive use"[168] requires a focus on short-term "use" rather than on long-term "value."[169] The Ninth Circuit resolved the problem by asserting that both "use" and "value" are properly viewed "from the present to the future."[170] Which side has

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164 *See* 482 U.S. at 332.

165 505 U.S. at 1018.

166 *Id.* (emphasis in original) (citation omitted).

167 *See* 34 F. Supp. 2d at 1242-43; 216 F.3d at 780-82; 228 F.3d at 1001.

168 *Lucas*, 505 U.S. at 1015.

169 34 F. Supp. 2d at 1242-43; 228 F.3d at 1001.

170 216 F.3d at 782.

the better grasp of *Lucas*'s intended meaning is unclear. Certainly *Lucas* was decided in the context of a case where the land had lost all of its value due to the permanent prohibition on building.[171] The district court and the dissent's readings would also pull under the *Lucas* rule the "normal delays" in permitting specifically exempted under *First English*,[172] a result the Ninth Circuit dissent endorses.[173] A long-term view of "use" would be consistent with Justice Scalia's insistence that the *Lucas* rule only applies in "rare" situations; application of the "all use" definition to permitting delays means *Lucas* would apply in untold numbers of cases. The choice of language also makes sense in light of the fact that regulations will rarely if ever render land totally "valueless," even if use is severely even totally restricted. Whatever Justice Scalia's intended meaning, *TRPA* presented an opportunity for the Court to resolve long-standing confusion over *Lucas*'s "use" language.[174]

IV

Supreme Court Decision

TRPA arose soon after the Court expressed a new antipathy toward per se rules in the takings realm in *Palazzolo v. Rhode Island*.[175] *Palazzolo* addressed a proposed per se rule in the other direction—a rule that, under some circumstances, a government restriction could *never* be a taking.[176] In her concurrence, Justice O'Connor cautioned that "[t]he temptation to adopt what amount to *per se* rules in either direction must be resisted."[177] This discomfort with expansion of per se categories clearly colored the *TRPA* decision.[178]

In *TRPA*, the Court tackled the issue from two angles. First, the Court reviewed modern takings cases (particularly *Lucas* and *First English*) to determine whether they already compel a per se

171 505 U.S. at 1020 ("The trial court found Lucas's two beachfront lots to have been rendered valueless by respondent's enforcement of the coastal-zone construction ban.").

172 *See* 482 U.S. at 321.

173 228 F.3d at 1002.

174 *TRPA*, 216 F.3d at 780 ("The phrase's precise meaning is elusive, and has not been clarified by the Supreme Court.").

175 533 U.S. 606 (2001).

176 *Id*. at 626.

177 *Id*. at 636 (emphasis in original).

178 *See* 535 U.S. at 320-22, 341-42.

rule for moratoria.[179] Then the Court stepped back and took a broader view to determine whether the Fifth Amendment's overriding interest in "fairness and justice" called for a new per se rule.[180] Under both analyses, the Court rejected a categorical rule for moratoria.

In reviewing precedent, the Court explained why *First English* and *Lucas* do not require a per se rule for moratoria. The Court began by noting the long-standing distinction between physical and regulatory restrictions on the use of land.[181] The plain language of the Fifth Amendment itself, the Court argued, only clearly addresses physical appropriations; the Amendment says nothing about mere *use* restrictions.[182] While physical invasions are obvious and always compensated, courts must use complex analyses to determine whether mere use restrictions approach the severity of physical appropriations, and so also fall under the Takings Clause.[183] For this reason, the Court argued, it is inappropriate to use precedent applying a per se rule to temporary *physical* appropriations to situations involving temporary *regulatory* limits on use.[184] The distinction is justified, according to the Court, by functional concerns: If the vast assortment of land use regulations were treated as per se takings, this "would transform government regulation into a luxury few governments could afford."[185]

Next, the court addressed the obvious exception to the physical/regulatory distinction, namely *Lucas*. Here the Court turned to the total/partial distinction. Recalling *Penn Central*'s admonition to focus on "the parcel as a whole," the Court found that its precedents clearly reject conceptual severance: "[W]here an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking."[186] *Lucas* was distinguished as applying to a restriction that "was unconditional and permanent," encompassing "*all* economically beneficial uses."[187] The per se rule in *Lucas* applied to the "extraordinary

[179] *Id.* at 320-32.
[180] *Id.* at 331-42.
[181] *Id.* at 320-22.
[182] *Id.*
[183] *Id.* at 322 n.17.
[184] *Id.* at 322-24.
[185] *Id.* at 324.
[186] *Id.* at 327 (citing Andrus v. Allard, 444 U.S. 51, 65-66 (1979)).
[187] *Id.* at 329-30 (emphasis in original).

case" of a total prohibition,[188] not the everyday occurrence of a partial use restriction.

On the question of whether *Lucas* applies when "use" is taken, or only when all "value" is taken, the Court followed the Ninth Circuit. *Lucas*'s per se rule, the Court implied, only applies to a total elimination of "value." In reviewing *Lucas*'s holding, the Court carefully framed the *Lucas* rule in terms of "value."[189] The Court pointed to the particular facts of the *Lucas* case, which involved a regulation that "wholly eliminated the value" of Mr. Lucas's land.[190] It also pointed to language in a *Lucas* footnote that uses the term "value" to explain that *Lucas* applies only to a one-hundred percent, but not to a ninety-five percent deprivation.[191] While they did not confront the issue head-on, the Court quietly asserted that "value" is the relevant variable.

Turning to *First English*, the Court distinguished it as a case about remedies, not temporary takings.[192] Whether a taking had occurred in that case was explicitly left to the lower court on remand.[193] Interestingly, the Court was silent on the distinction between retrospectively temporary and prospectively temporary land use restrictions. The Ninth Circuit relied heavily on this distinction to find *First English*, a case about retrospectively temporary takings, inapplicable to prospectively temporary moratoria.[194] The Supreme Court instead asserted that, whatever *First English* did say about temporary takings, it did not say a per se rule should apply.[195] The *First English* Court suggested that the restriction might not be a taking if it was a safety regulation; the Court also expressly distinguished "normal delays" in permitting.[196] For the *TRPA* court, these exceptions indicate an implicit rejection of a categorical rule for temporary takings.[197]

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188 *Id.* at 332.

189 *Id.* at 329-30.

190 *Id.* at 330 (quoting *Lucas*, 505 at 1026).

191 *Id.* (citing *Lucas*, 505 at 1019 n.8).

192 *Id.* at 328-29.

193 *Id.* at 329.

194 *See TRPA*, 216 F.3d 764, 778 (9th Cir. 2000). A possible explanation for the Supreme Court's reluctance to rely on the prospective/retrospective distinction is the fact that the land-use restriction in *First English* was an "interim" measure, arguably intended as prospectively temporary. *See* 482 U.S. at 307.

195 *TRPA*, 535 U.S. at 329.

196 *Id.*

197 *Id.*

In its broader analysis, the Court considered whether a per se rule for temporary takings is necessary for "fairness and justice," regardless of the fact that *Lucas* and *First English* do not demand such a rule.[198] Applying what they call the "Armstrong principle,"[199] (apparently based on the Court's determination in *Armstrong v. United States* that the Fifth Amendment was "designed to bar Government from forcing some people to bear burdens which, in all fairness and justice, should be borne by the public as a whole"),[200] the Court found a new per se rule inappropriate.[201] The Court began by offering seven possible rules they could craft to dispose of the case.[202] Four were immediately rejected as unavailable due to the limited issue before the Court.[203] The three remaining options were: (1) create a new per se rule for temporary deprivations of all economically viable use; (2) create a narrower version of the first that would exempt "normal delays" in permitting; or (3) create a new rule which requires compensation for moratoria that last beyond a certain specified time.[204]

The Court found the first rule far too broad to achieve "fairness and justice."[205] As they have presented the options, this rule would make "normal delays" in permitting compensable on a per se basis. Taking this even further, the Court found that compensation would also be required for "orders temporarily prohibiting access to crime scenes, businesses that violate health codes, fire-damaged buildings, or other areas that we cannot now foresee."[206] A rule of such breadth, according to the Court, would mean "government hardly could go on."[207]

The Court found a second rule, which exempts "normal delays," impracticable.[208] This rule would still encompass moratoria, "an essential tool of successful development."[209] Without balancing the other interests, all moratoria would be compensa-

198 *Id.* at 333.
199 *Id.* at 321.
200 *Id.* at 336 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).
201 *Id.* at 332.
202 *Id.* at 333-34.
203 *Id.* at 334.
204 *Id.* at 333.
205 *Id.* at 334-35.
206 *Id.*
207 *Id.* (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922)).
208 *Id.* at 337-38.
209 *Id.*

ble no matter how strong the good faith of planners, the expectations of owners, or the length of the restriction.[210] The Court also found untenable any distinction between moratoria and "normal delays." The two are not easily distinguished, and planners would be tempted to turn compensable moratoria into not-necessarily-compensable delays to avoid high costs.[211]

Finally, the third option, creating a permissible period for moratoria, was rejected as beyond the Court's competence. While the Court recognized that perhaps moratoria "that last for more than one year should be viewed with special skepticism," it noted that certain circumstances can excuse even lengthy moratoria.[212] The *TRPA* trial court specifically found a thirty-two-month moratorium reasonable under the circumstances of this case.[213] The Court found that time limits on moratoria are best left to state legislatures.[214]

Throughout its discussion of these possible rules, the Court contrasted the effects of per se and balancing rules. Recalling its revived respect for balancing in *Palazzolo*, the Court pointed to the advantages of the *Penn Central* approach.[215] A per se rule for temporary restrictions would create unfairness by compensating owners who lose all use for five days, but denying compensation to owners who permanently lose only ninety-five percent of the use of their land.[216] In contrast, a *Penn Central* approach would take into account the length of the moratorium in determining whether compensation is due.[217] A balancing rule would also take into consideration the strong "interest in facilitating informed decisionmaking by regulatory agencies."[218] Such consideration recognizes the value of moratoria to planning efforts and requires compensation only where planning delays go too far. Finally, the Court found balancing more appropriate where strong reciprocities of advantage exist. For some owners, they noted, moratoria actually raises property values; those owners should not automatically receive compensation under a per se rule

210 *Id.* at 338.
211 *Id.* at 337 n.31.
212 *Id.* at 341-42.
213 *Id.*
214 *Id.* at 342 & n.37.
215 *Id.* at 335-36.
216 *Id.* at 335 n.30.
217 *See id.* at 338 n.34.
218 *Id.* at 339.

based on the assumption that they have been forced "to bear a special burden."[219]

The Supreme Court's *TRPA* decision tracks and reinforces evolving fault-lines in takings jurisprudence between physical and regulatory restrictions and total and partial restrictions. Distinctions between physical invasions and regulatory restrictions are traced back to the text of the Fifth Amendment itself, and justified by the difference in severity of the government intrusion. Distinctions between total and partial regulatory restrictions are supported by concerns of fairness (including "reciprocity of advantage" considerations) and functional concerns about government's ability to "go on." *TRPA*'s strong rejection of conceptual severance, at least in the temporal dimension, puts the brakes on expansion of *Lucas*'s per se rule. Along with *Palazzolo*, the Court's *TRPA* decision demonstrates a new appreciation for the flexibility and fairness of *Penn Central*'s balancing test.

Conclusion

While no one would argue that the lines between physical and regulatory takings and partial and total takings are the product of a unified, deliberate process, they are also certainly not arbitrary. As the Supreme Court affirmed in *TRPA*, the lines reflect important differences in the severity of the invasion and the impact on the landowner. Furthermore, in an area where lines must surely be drawn "if government is to go on," the Court offers rational and fair places to draw those lines. It should always be remembered that, while plaintiffs who can use a per se rule are automatic winners, plaintiffs left with a balancing rule are not automatic losers. While landowners surely would prefer to use the per se test, they can and do prove takings under the *Penn Central* test for a broad range of regulatory actions. In the case of moratoria, the per se test removes important considerations from the analysis and fails to make critical distinctions between regulatory actions with significantly different impacts on landowners.

[219] *Id.* at 340-41.