University of Hawaii Law Review
Summer, 2003

SOME PERMANENT PROBLEMS WITH THE SUPREME COURT'S TEMPORARY REGULATORY TAKINGS JURISPRUDENCE

Steven J. Eagle [FNa1]

***325** I. Introduction

In Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, [FN1] the United States Supreme Court held that temporary moratoria on development imposed for purposes of comprehensive land-use planning do not constitute categorical takings. While this holding was unexceptional, it was accompanied by expansive dicta and consequently was hailed as a major victory for land-use regulators. [FN2]

It is too early to determine whether Tahoe-Sierra will be of lasting import. For now, the case, at best, might be viewed as a continuation of the Supreme Court's turn away from a rule-based regulatory takings jurisprudence signaled the year before in Palazzolo v. Rhode Island. [FN3] The pivotal concurring opinion in Palazzolo by Justice Sandra Day O'Connor declared: "Our polestar . . . remains the principles set forth in Penn Central itself and our other cases that govern partial regulatory takings." [FN4] This pronouncement was quoted with great approbation by Justice John Paul Stevens and is the leitmotiv of his 6 to 3 majority opinion in Tahoe-Sierra. [FN5]

The metaphor of the judge as navigator, plotting a course in regulatory takings cases by reference to the true north of Penn Central, [FN6] permeates the Stevens opinion in what otherwise would be a fairly pedestrian Tahoe-Sierra ***326** case. [FN7] This article suggests that a different metaphor would be better. Tahoe-Sierra posits no external (much less infallible) guide, but simply mandates that owners and regulators follow the yellow brick road to the courthouse.

In a sense, though, it is fitting that Justice O'Connor cites Justice William Brennan's Penn Central opinion in establishing the fixed polestar that would inform the judge as astronomer. After all, Brennan's well-known dissent in San Diego Gas & Electric Company v. City of San Diego [FN8] invoked a similar metaphor and borrowed the image of judge as scientist. The quest to distinguish "regulation" from "taking," as he put it, was the "equivalent of the physicist's hunt for the quark." [FN9]

However, whether the metaphor is the judge's quest for the Polestar, Dorothy in search of the Wizard, [FN10] or the Supreme Court Justice who thinks he is hunting the Quark when he is actually hunting the elusive (and imaginary) Snark, [FN11] the path chosen by Justice O'Connor's working majority in Palazzolo and the Court in Tahoe-Sierra ultimately is self-referential.

II. Tahoe-Sierra: A Short History

There are many aspects of the Tahoe-Sierra litigation that are worthy of note. One is how

it took over twenty years for a land use case to be decided. Another is how a Supreme Court holding that is totally consistent with the response preferred by petitioner's in its proffered certiorari question is deemed to be a victory for the respondent. Not the least in importance is that what appears to be the permanent prohibition on the economically viable use of hundreds of parcels was treated as two moratoria suspending development for a total of 32 months. These facets of Tahoe-Sierra should not surprise the ***327** experienced regulatory takings litigator or scholar. Nevertheless, their cumulative impact is ironic in light of the Court's explicit invocation of "fairness" as the touchstone of regulatory takings jurisprudence.

A. The Facts

Lake Tahoe is a pristine alpine lake nestled in the mountains between Northern California and Nevada. By the late 1950s, burgeoning development had led to increased runoff into the lake and nutrient loading, which resulted in erosion and a proliferation of algae that threatened the lake's clarity. The inadequacy of local efforts to deal with these problems led to the creation of a bi-state compact creating the Tahoe Regional Planning Agency ("TRPA") in order "to coordinate and regulate development in the Basin and to conserve its natural resources." [FN12]

In 1980, TRPA was directed to develop regional air, water quality, soil conservation, and vegetation preservation standards within 18 months. [FN13] Thereafter, the agency had a year to adopt an amended regional plan to achieve the set preservation standards. To prevent inconsistent development, the regional planning compact also provided for a moratorium on development until adoption of a final plan or May 1, 1983, "whichever is earlier." [FN14] However, TRPA did not adopt a new regional plan until April 26, 1984. TRPA also bridged the gap with an informal delay on processing applications and a second moratorium. [FN15] Together, this period, which the Court refers to collectively as "the two moratoria," prohibited all development for a total of 32 months. [FN16]

On the day the 1984 plan went into effect, California challenged it as insufficiently restricting residential construction. An injunction against implementation was issued by the district court and this injunction remained in effect until a new plan was adopted in 1987. [FN17] The revised 1987 plan remains in effect.

Those challenging the TRPA plan included both the Tahoe-Sierra Preservation Council, [FN18] and about 400 individual owners who had purchased vacant lots prior to 1980 but who did not build or obtain vested rights before ***328** the effective date of the 1980 compact. [FN19] These undeveloped lots were not along the lake shore, but were scattered within the Tahoe Basin in residential subdivisions that already had been largely developed. [FN20] From the imposition of the first moratorium in 1981 until the present day, many owners of vacant lots have not been permitted to build. Some owners have died and others have sold to TRPA for low prices set by that agency. [FN21]

B. The Developing Litigation

The Tahoe-Sierra litigation has been protracted, with four published court of appeals decisions and a number of published trial court decisions. [FN22] Ultimately, the Supreme Court's opinion focused on a 1999 Nevada district court opinion, [FN23] its reversal by the Ninth Circuit, [FN24] and the circuit's denial of review en banc. [FN25]

1. The district court opinion

The District Court first considered whether the moratoria would constitute a taking under the traditional analysis set forth in Penn Central Transportation Co. v. City of New York. [FN26] The Penn Central approach requires the court to consider "a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action." [FN27] Weighing these factors, the district court concluded that no taking occurred. [FN28]

The court noted, however, that the moratoria temporarily denied the plaintiffs all economically viable use of their properties. As a result, the court concluded that government's actions constituted a "categorical" taking under ***329** Lucas v. South Carolina Coastal Council, [FN29] which established the bright-line rule that compensation is required whenever a regulation deprives an owner of "all economically beneficial uses" of the land. [FN30]

The district court further found that although the prohibition on development "was clearly intended to be temporary," there was no fixed date for when it would terminate. [FN31] Therefore, compensation was required under First English, which held that a regulatory taking is compensable even if the taking proves to be only temporary because the regulation is later rescinded or invalidated. [FN32]

2. The Ninth Circuit opinion

The Ninth Circuit reversed the lower court decision, concluding that the district court had misinterpreted First English and incorrectly applied Lucas. Writing for the majority, Judge Reinhardt observed that the plaintiff in First English had sought "damages for the uncompensated taking of all use" of its property. The state court in First English dismissed the compensation claim, concluding that an injunction was the appropriate remedy in an inverse condemnation action of this type. Thus, "regardless of whether a taking occurred, the claimants could not recover damages during the period running from the time of enactment of the ordinance to the time when it was finally declared unconstitutional." [FN33] The Supreme Court disagreed, holding that subsequent invalidation of the regulation, "though converting the taking into a 'temporary' one, is not a sufficient remedy to meet the demands of the Just Compensation Clause." [FN34] Thus, the plaintiffs were entitled to compensation for the period of time that the regulation remained in effect.

Judge Reinhardt emphasized, however, that the question presented to the Supreme Court in First English "related only to the remedy available once a taking had been proven." [FN35] Although First English held that compensation is required even when a taking is temporary, Reinhardt correctly noted that "the Court stated explicitly that it was not addressing whether the ordinance constituted a taking." [FN36]

***330** Turning to this latter question, the Ninth Circuit reversed the District Court's holding in Tahoe-Sierra that a categorical taking had occurred under Lucas. Contrary to the District Court's findings, Judge Reinhardt stated that the temporary moratorium did not render the plaintiffs' property valueless. Reinhardt reasoned that "[g]iven that the ordinance and resolution banned development for only a limited period, these regulations preserved the bulk of future developmental use of the property. This future use had a substantial present value." [FN37] Thus, since the moratoria did not deprive the property of all economically beneficial use, the panel concluded, Lucas was inapplicable. [FN38]

The Ninth Circuit denied review en banc. [FN39] However, a stinging dissent by Judge Alex Kozinski, [FN40] observed that "[t]he panel does not like the Supreme Court's Takings Clause jurisprudence very much, so it reverses First English Evangelical Lutheran Church v. County of Los Angeles . . . , and adopts Justice Stevens's First English dissent." [FN41] In his dissent, Justice Stevens argued that no taking had occurred because the regulation merely postponed development of the property for a fraction of its useful life. [FN42] Thus, the economic impact of postponed development was no greater than the economic impact of a regulation permanently restricting the use of only part of the property. [FN43] Judge Kozinski noted that although the Ninth Circuit did not cite ***331** Justice Stevens' First English dissent, "the reasoning-and even the wording-bear an uncanny resemblance." [FN44] Kozinski further argued that "[a]lthough claiming its opinion is fully consistent with First English, the panel plagiarizes Justice Stevens's dissent . . . . [T]he panel places itself in square conflict with the majority's opinion in First English." [FN45]

One might speculate that Kozinski's fiery dissent brought Tahoe-Sierra to the Supreme Court's attention. In any event, the Supreme Court's opinion recounted that "[i]n the dissenters' opinion, the panel's holding was not faithful" to First English and Lucas, and stated that certiorari was granted because of "the importance of the case." [FN46]

C. The Supreme Court's Holding and Dicta

As Justice Stevens repeatedly emphasized, the Court's 6-3 holding in Tahoe-Sierra was "narrow." The Court simply refused to adopt a bright-line rule that a temporary moratorium on development even one depriving the owner of all economic value of the--land whileit is in effect-is a per se taking requiring payment of just compensation. Although the opinion contained broad dicta commending the virtues of planning and the role of fairness in takings adjudication, Stevens made it clear that the Court was merely rejecting the application of Lucas's per se rule and reiterating the primacy of the "ad hoc" approach adopted in Penn Central. There, Stevens noted that "we do not hold that the temporary nature of a land-use restriction precludes finding that it effects a taking." [FN47] Stevens wrote, "we simply recognize that it should not be given exclusive significance one way or the other." [FN48]

***332** Although the decision is a victory for regulators, it does not signal a return to the Court's pre-1987 policy of almost unlimited deference to land- use regulation. Justice Stevens twice emphasized the narrowness of the opinion, adding that "nothing that we say today qualifies [our First English] holding." [FN49] Perhaps these reassurances played a role in the absence of concurring opinions from Justices Kennedy and O'Connor, who often write separately and who are the swing votes on takings issues.

1. Factors Shaping the Court's Decision

Two primary factors shaped Tahoe-Sierra's narrow ruling. The first is the limited question upon which the Court granted certiorari. The second factor consists of several strategic decisions made by trial counsel many years earlier.

Petitioners sought certiorari on the question of "is it permissible for the Ninth Circuit Court of Appeals to hold-as a matter of law-that a temporary moratorium can never require constitutional compensation?" [FN50] The Supreme Court, however, limited its analysis to "whether a moratorium on development imposed during the process of devising a comprehensive land-use plan constitutes a per se

taking of property." [FN51] Framing the issue this way allowed the Court to focus solely on whether the 32-month moratoria fell within Lucas's categorical test or the Penn Central analysis and to sidestep several other potential takings issues.

One of the issues sidestepped by the Supreme Court involved the District Court's grant of California's motion to enjoin implementation of TRPA's 1984 plan. [FN52] Although the injunction prohibited development from 1984 to 1987, the lower courts held that the delays were attributable to the court and not to the 1984 plan itself. [FN53] In his dissent, Chief Justice Rehnquist argued that the proximate cause of the development prohibition during this period was not the judicial injunction, but rather TRPA's failure to conform its 1984 Plan to the 1980 compact. [FN54] Justice Stevens and the majority declined to address this argument, however, because the petitioners had not challenged the lower courts' holding on this issue. Thus, Chief Justice Rehnquist's "novel ***333** theory of causation was not briefed, nor was it discussed during oral argument." [FN55]

The Court's decision also did not address the constitutionality of TRPA's 1987 plan. [FN56] The plaintiffs had attempted to amend their complaint to allege that adoption of the 1987 plan also constituted a takings, but the district court held that the claim was barred by both California and Nevada's statutes of limitations. [FN57] Accordingly, even though TRPA regulations have precluded development of some of the landowners' small parcels from 1981 to the present day, the Court limited its review to the moratoria in effect for a total of thirty-two months.

These and other tactical decisions greatly limited the petitioners' case. As discussed below, of the seven theories that "arguably" could have supported a takings claim, the Supreme Court noted that four were unavailable because of the procedural posture of the case. [FN58]

III. Penn Central as "Polestar"

Central to the Tahoe-Sierra decision was Penn Central's "essentially ad hoc" test for regulatory takings, which was "designed to allow 'careful examination and weighing of all the relevant circumstances.'" [FN59]

Prior to the Tahoe-Sierra decision, the Court had recognized categorical exceptions to Penn Central review in a handful of circumstances: permanent physical occupations, [FN60] regulatory deprivations of all economic value, [FN61] and the imposition of severe retroactive liability on a limited class of parties that could not have anticipated it. [FN62]

Justice Stevens stressed that a categorical rule is appropriate when the government physically takes possession of an interest in property for some public purpose-even if the government takes only part of the property or its use is only temporary. [FN63] Stevens stated that those cases are to be distinguished ***334** from those involving government regulations restricting property's use. Stevens reasoned that "[t]he first category of cases [physical occupations] requires courts to apply a clear rule; the second [regulatory actions] necessarily entails complex factual assessments of the purposes and economic effects of government actions." [FN64]

Stevens stressed that "we still resist the temptation to adopt per se rules in our cases involving partial regulatory takings, preferring to examine 'a number of factors' rather than a simple 'mathematically precise' formula." [FN65] This point, Stevens added, had been affirmed by Justice O'Connor's concurring opinion in Palazzolo. In her words, which Stevens

quoted, "[o]ur polestar instead remains the principles set forth in Penn Central itself and our other cases that govern partial regulatory takings." [FN66] Justice O'Connor, it should be noted, had joined in Stevens' dissent in First English.

Although Lucas endorsed a categorical rule in a regulatory takings scenario, Stevens said that rule applied only in "'the extraordinary circumstance when no productive or economically beneficial use of land is permitted.'" [FN67] Furthermore, according to Justice Stevens, "[a]nything less than a 'complete elimination of value,' or a 'total loss,' . . . would require the kind of analysis applied in Penn Central." [FN68]

The plaintiffs attempted to bring their case within the rule by arguing that the moratoria deprived them of all economically beneficial use of their property for a thirty-two month period. However, Justice Stevens found this argument unavailing because it "ignores Penn Central's admonition that in regulatory takings cases we must focus on 'the parcel as a whole.'" [FN69] To view property in its entirety, Justice Stevens said, courts must consider not only the geographic dimensions of the parcel, but also the temporal aspect of the property owner's interest. In addition Stevens argued that "[l]ogically, 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." [FN70]

Justice Thomas' dissent focused on the majority's analysis of the "parcel as a whole," citing the Court's discomfort with that concept in Palazzolo and ***335** Lucas. [FN71] Thomas noted that he "had thought that First English put to rest the notion that the 'relevant denominator' is land's infinite life." [FN72] From a landowner's standpoint, Thomas wrote, "total deprivation of use is . . . the equivalent of a physical appropriation." [FN73] Thus, "a regulation effecting a total deprivation of the use of a so-called 'temporal slice' of property is compensable under the Takings Clause unless background principles of state law prevent it from being deemed a taking." [FN74]

Justice Stevens rejected this interpretation of First English. Echoing Judge Reinhardt's Ninth Circuit opinion, he emphasized that First English addressed the "remedial question of how compensation is measured once a regulatory taking is established," but did not address "the quite different and logically prior question whether the temporary regulation at issue had in fact constituted a taking." [FN75] According to Stevens, "First English expressly disavowed any ruling on the merits of the takings issue because the California courts had decided the remedial question on the assumption that a taking had been alleged." [FN76] He noted that upon remand, the California courts concluded that there had not been a taking in First English, and the U.S. Supreme Court declined review of that decision.

IV. The Indeterminacy of the Polestar Approach

The principal problem with the Court's "polestar" approach in temporary takings cases like Tahoe-Sierra is that it brings into play three vexing, and mutually exacerbating, doctrinal problems. The first is the circuity problem implicit in the Court's defining "property" in terms of "expectations" and "expectations" in terms of "property". The second problem is the Court's failure to define what constitutes a "temporary" taking. This includes the failure to determine whether the concept is grounded in the law of property or tort, as well as determining how "temporary" restrictions are to be interpreted in a society in which "permanent" ones are fleeting. Finally, there is the Court's insistence that doctrines pertaining to "physi-

cal" takings do not apply to "regulatory" takings, and that doctrines pertaining to "permanent" takings do not apply to "temporary" takings. Unfortunately, the meaning of the above terms, is neither self-evident nor fully defined by the Court.

***336** A. The Problem of "Reasonable Investment-Backed Expectations" Redux

In property law, the "expectations" of a person who sincerely hopes to acquire an interest in property some day are dismissed as "mere" expectations. [FN77] This is absolutely proper, since the hope of acquiring a right is not itself a right. [FN78] This is not to say, of course, that courses of dealing do not lead to the creation of contract rights among the contracting parties. [FN79] It also does not deny that even when dealing with government (or, perhaps, especially when dealing with government) enforceable property rights are created. [FN80]

However, property in land has an essential in rem aspect in that it is enforceable against all the world and not just against those with whom the owner is in privity. [FN81] Thus, the malleability by which expectations come to affect contract rights among specific persons is not present. Furthermore, a wholly different set of problems arise when the other person is the State, which often is the case when considering the constitutional dimensions of property. As the Supreme Court has noted, there is greater need for judicial review of State conduct when "the State's self-interest is at stake." [FN82]

In Palazzolo v. Rhode Island, [FN83] the Supreme Court unanimously rejected the positive form of the regulatory takings notice rule, [FN84] and recognized that the ***337** State is not free simply to redefine property. [FN85] However, Justice O'Connor's pivotal concurring opinion began with her statement that she joined the Court's opinion, "but with my understanding of how the [notice rule] must be considered on remand." [FN86] After agreeing with rejection of the positive notice rule, O'Connor added that the "more difficult" issue is the "role the temporal relationship between regulatory enactment and title acquisition plays in a proper Penn Central analysis." [FN87] Specifically,

> [i]f investment-backed expectations are given exclusive significance in the Penn Central analysis and existing regulations dictate the reasonableness of those expectations in every instance, then the State wields far too much power to redefine property rights upon passage of title. On the other hand, if existing regulations do nothing to inform the analysis, then some property owners may reap windfalls and an important indicium of fairness is lost. As I understand it, our decision today does not remove the regulatory backdrop against which an owner takes title to property from the purview of the Penn Central inquiry. It simply restores balance to that inquiry. Courts properly consider the effect of existing regulations under the rubric of investment-backed expectations in determining whether a compensable taking has occurred. As before, the salience of these facts cannot be reduced to any "set formula." [FN88]

Justice O'Connor's view that the expectations of someone purchasing subsequent to a regulation having the effect of redefining property rights results in a change in the purchaser's rights even if the regulation, might not, by itself, pass constitutional muster was shared by the four Palazzolo dissenters. [FN89] While the concurring opinion of Justice Scalia rebuked the notion that regulations leading to otherwise compensable takings should be the basis for a change in subsequent buyers' expectations under Penn Central at all, [FN90] the O'Connor approach was adopted by the Court in Tahoe-Sierra. [FN91]

***338** It is not necessary here to rehearse at length [FN92] the transformation of what is now known as "reasonable investment-backed expectations" from its apparent genesis in a well-known article by Professor Frank Michelman, [FN93] through its adoption by Justice Brennan in Penn Central, [FN94] and through its use in other cases. [FN95]

Almost a decade after Professor Richard Epstein made the following observation, it remains true that no one "offers any telling explanation of why this tantalizing notion of expectations is preferable to the words 'private property' (which are, after all, not mere gloss, but actual constitutional text)." [FN96]

B. The Provisional Definition of "Temporary" Takings

The assertion that a governmental taking of property is "temporary" ought to have as a referent a statement about the essential nature of the temporary taking, the duration of the temporary taking, or both. Unfortunately, both before and after Tahoe-Sierra, neither definitional aspect is clear.

1. What is "Taken" in a "Temporary Taking"?

The leading temporary takings case, First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, [FN97] consistently used the words "temporary taking" in quotation marks. While the Court in Tahoe-Sierra now expresses the view that the term encompasses truncated permanent takings and not most moratoria, it still does not resolve the concept's underlying nature. In particular, the acquisition of property by government through direct or inverse condemnation means that the State has prospective ownership, with ***339** compensation being computed as of the date of the taking. [FN98] First English held that once the State has promulgated a regulation constituting a taking, it is not free to terminate its action without payment of compensation. Yet the State has the right to terminate with payment and "the landowner has no right under the Just Compensation Clause to insist that a 'temporary' taking be deemed a permanent taking." [FN99]

This formulation presents a serious conceptual problem. If the State has acquired "property" as of the moment of the imposition of its regulation, how might it retroactively disclaim a part of its interest? Conversely, if the promulgation of the regulation had deprived the owner of property, for which subsequent just compensation would relate back, how could the State unilaterally avoid part of its compensation obligation by unilaterally putting ownership of a reversionary interest in the land to the individual who, under traditional property law, would be deemed its former owner? [FN100]

This difficulty is well illustrated in Yuba Natural Resources, Inc. v. United States, [FN101] where the government prohibited a mineral owner from exercising its rights, asserting its paramount title. [FN102] Six years later, after Yuba prevailed in its quiet title action, the government retracted its letter of prohibition. [FN103] The Claims Court ruled that

> "nothing in the record supports the notion that in 1976 the United States took such rights only for a temporary period . . . That 6 years later the government chose to return the property to Yuba rather than to pay just compensation . . . did not retroactively convert the government's absolute taking of Yuba's property into a temporary holding thereof." [FN104]

The U.S. Court of Appeals for the Federal Circuit reversed. [FN105] Its opinion did not respond to the Claims Court's reasoning, but merely quoted First English to the effect that the government was free to abandon its intru-

sion. [FN106] If it is the case that First English permits the conversion of a permanent taking ***340** into a taking for a limited period, perhaps that convertibility feature should be taken into account in valuation of just compensation. [FN107]

Judge Jay Plager of the Federal Circuit has suggested that the temporary taking has been treated as if akin to a common law trespass. [FN108] A significant problem with this approach, however, is that the Constitution implies a sharp line between the consequences of tort and eminent domain. While the duty to pay just compensation for takings is self-executing, [FN109] the duty to pay tort damages is dependent on waiver of sovereign immunity. [FN110]

2. In a society marked by impermanence, what is "temporary"?

The duration of a temporary taking is not clear, either. In his Tahoe-Sierra dissent, Chief Justice Rehnquist noted that while, in his view, the moratoria were in place for six years, [FN111] the absolute prohibition on development in Lucas, deemed "permanent" by the Court, was in place only for two years. [FN112] Rehnquist added "[t]here is every incentive for government to simply label any prohibition on development 'temporary,' or to fix a set number of years. As in this case, this initial designation does not preclude the government from repeatedly extending the 'temporary' prohibition into a long- term ban on all development." [FN113]

While talismanic definitions find broad favor in the law, what seems "permanent" might not be. Rules can have transitory and successive meanings. [FN114] Correspondingly, discrete policies might be formulated in sequence, but all might maintain a substantive continuity of result. [FN115] ***341** Furthermore, expert opinion on what is appropriate land use or regulation changes, sometimes fairly quickly. [FN116]

C. The Court's "Physical" vs. "Regulatory" and "Permanent" vs. "Temporary" Bifurcations are Illusions

When should the complete deprivation by the State of all economic use of private property constitute a compensable taking?

1. Background

One can approach this question through the use of a four-cell matrix, indicating the type of deprivation (physical or regulatory) as rows and the duration of the deprivation (permanent or temporary) as columns. [FN117]

As illustrated in the Table above, the Supreme Court's prior rulings have found compensable takings in Cells 1 through 3. Justice Stevens' opinion in Tahoe-Sierra [FN118] holds, however, that there is not a categorical taking in cell 4. [FN119]

The Court has long held that a permanent physical deprivation of all beneficial use constitutes a taking. [FN120] Likewise, regulations constituting ***342** permanent deprivation of all economic use are compensable takings under Lucas v. South Carolina Coastal Council. [FN121] In a group of post-World War II cases, the Court held that temporary physical occupations of private property by government also constitute takings of leasehold interests. [FN122]

One might think that the appropriate rule for Cell 4 in the table above (temporary regulatory deprivations) would be that established for total deprivations of use (Lucas) or for physical deprivations of use (General Motors).

Tahoe-Sierra concluded that neither rule applied.

2. "Physical" versus "regulatory" takings

In explaining his dichotomy between physical and regulatory takings, Justice Stevens explained:

Th[e] longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a "regulatory taking," and vice versa. For the same reason that we do not ask whether a physical appropriation advances a substantial government interest or whether it deprives the owner of all economically valuable use, we do not apply our precedent from the physical takings context to regulatory takings claims. Land-use regulations are ubiquitous and most of them impact property valuesin some tangential way-often in completely unanticipated ways. Treating them all as per se takings would transform government regulation into a luxury few governments could afford. By contrast, physical appropriations are relatively rare, easily identified, and usually represent a greater affront to individual property rights. [FN123]

This asserted distinction is not based on any essential formal proposition, but rather upon assumptions about the empirical outcomes that are apt to be produced.

As an initial matter, one might ask why, if physical takings rules were applied to regulatory takings, would land use regulation become a "luxury?" Most zoning and similar regulations affect substantial areas and provide, as do private covenants, that each owner enjoys the benefit of the imposition of restriction upon others. This "average reciprocity of advantage," as Justice ***343** Holmes put it in Pennsylvania Coal Co. v. Mahon, [FN124] can be viewed either as precluding a taking or as providing just compensation in kind. [FN125] Furthermore, the difficulty and expense attendant in commencing inverse condemnation litigation makes it very remote that small or far-fetched claims will be brought.

The fact that "physical appropriations are relatively rare" does not necessarily strengthen Justice Stevens' case. [FN126] In a world where government may impose physical seizure and pay just compensation, or may achieve most of its goals through ostensible regulation and pay no compensation, the rarity of physical seizures might bespeak opportunistic use or rule more than a light government hand. [FN127] It is true that physical seizures are "easily identified," but so would regulations that preclude all development. [FN128] Government's construction of a fence around (although not invading) private land that would preclude all use of it would be evident as well. [FN129]

Justice Stevens might be correct in asserting that physical seizures "represent a greater affront to individual property rights" than regulatory seizures. [FN130] This is not certain, however, since pride in ownership might be offset by outrage that the owner's only practical indicium of ownership would be the periodic receipt of a real estate tax bill.

3. "Permanent" versus "temporary" takings

While Justice Stevens makes much distinction between permanent and temporary deprivations in Tahoe-Sierra, two problems stand out. We do not know what "temporary takings" means, and we do not know when "temporary takings" are temporary.

As discussed earlier, the seminal case regard-

ing "temporary takings" is First English Evangelical Lutheran Church of Glendale v. County of Los Angeles. [FN131] The California Supreme Court had previously ruled in Agins v. City of Tiburon, [FN132] that a government entity could abrogate a regulation that ***344** was adjudicated to constitute a compensable taking in lieu of ratifying the regulation and paying just compensation. First English required compensation for the time the regulation was in effect, even if it subsequently was terminated. However, it was uncertain whether First English had a broader meaning. [FN133]

Some of the language in First English certainly suggested a broad reading. Chief Justice William Rehnquist's dissent in Tahoe-Sierra, [FN134] for instance, quoted what might have been First English's overarching theme: "[T]emporary takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." [FN135] Further supporting a broad interpretation was the First English analysis of the leasehold cases:

> Though the takings were in fact "temporary," there was no question that compensation would be required for the Government's interference with the use of the property; the Court was concerned in each case with determining the proper measure of the monetary relief to which the property holders were entitled. These cases reflect the fact that "temporary" takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation. [FN136]

Chief Justice Rehnquist tied the First English emphasis on deprivation of "use" to his view that the moratoria depriving petitioners of all economic use constituted a taking, just as the deprivation constituted a taking in Lucas:

> Because of First English's rule that "temporary deprivations of use are compensable under the Takings Clause," the Court in Lucas found nothing problematic about the later developments that potentially made the ban on development temporary. More fundamentally, even if a practical distinction between temporary and permanent deprivations were plausible, to treat the two differently in terms of takings law would be at odds with the justification for the Lucas rule. The Lucas rule is derived from the fact that a "total deprivation of use is, from the landowner's point of view, the equivalent of a physical appropriation." The regulation in Lucas was the "practical equivalence" of a ***345** long-term physical appropriation, i.e., a condemnation, so the Fifth Amendment required compensation. The "practical equivalence," from the landowner's point of view, of a "temporary" ban on all economic use is a forced leasehold. [FN137]

Justice Stevens' responsive enumeration of differences between a leasehold and a moratorium very much downplayed the First English and Lucas emphasis on deprivation of a landowner's use.

> Condemnation of a leasehold gives the government possession of the property, the right to admit and exclude others, and the right to use it for a public purpose. A regulatory taking, by contrast, does not give the government any right to use the property, nor does it dispossess the owner or affect her right to exclude others. [FN138]

Stevens also asserted in his opinion that the Lucas categorical rule was based only partially on an equivalence theory. It also resulted from the "less realistic" possibility that there was a reciprocity of advantage. [FN139]

Of course, it is not always easy to determine in practice when government "takes" and when it "regulates." The State might condemn land for preservation as virgin prairie grassland, for instance, but it might equally restrict the owner from any development. Its actions might not

affect the owner's right to exclude others but eliminate the right to include them. [FN140] Furthermore, even in many cases where the deprivation of use is far from total, the existence of the owner's reciprocity of advantage remains dubious. [FN141]

The heart of Justice Stevens' effort to distinguish Tahoe-Sierra from Lucas rests on the assertion that that while there was a complete deprivation of value in the latter case, the temporary nature of the moratoria in Tahoe-Sierra meant that the affected parcels retained a residual value.

An interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner's interest. Both dimensions must be considered if the interest is to be viewed in its entirety. Hence, a permanent deprivation of the owner's use of the entire area is a taking of "the parcel as a whole," whereas a temporary ***346** restriction that merely causes a diminution in value is not. Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted. [FN142]

The Court's analysis quoted extensively from Judge Reinhardt's Ninth Circuit panel opinion, which, in turn, referred to concepts earlier articulated by Justice Stevens. [FN143] This was facilitated when Stevens, using his prerogative as senior justice in the majority, assigned himself to write the opinion.

V. Seven Theories of "Fairness and Justice": A Roadmap for Future Litigation

Although neither Lucas nor First English compelled the use of a categorical takings test, Justice Stevens went on to consider whether the circumstances justified the creation of a new per se rule. He observed that "any of seven different theories" was "arguably" a basis for finding the moratoria to be takings. [FN144] Regarding each, "the ultimate constitutional question is whether the concepts of 'fairness and justice' that underlie the Takings Clause will be better served by one of these categorical rules or by a Penn Central inquiry into all of the relevant circumstances in particular cases." [FN145]

A. Equating Temporary Moratoria to Temporary Physical Takings

The first theory considered by the Court was whether to extend the Lucas categorical rule to government regulations that temporarily deprive an owner of all economically viable use of the property. Conceptually, this rule would put regulatory takings on the same ground as physical appropriations of land, which have long been held compensable, regardless of whether the appropriations are permanent or temporary. [FN146] It also was how the Court chose to recast petitioner's prayer for certiorari in Tahoe-Sierra. [FN147]

Justice Stevens suggested several policy reasons militating against adoption of a categorical rule for temporary deprivations in the regulatory arena. First, ***347** the rule "would render routine government processes prohibitively expensive or encourage hasty decisionmaking." [FN148] The rule would apply not only to normal delays in obtaining building permits and changes in zoning ordinances, but also to orders temporarily denying access to crime scenes or to buildings in violation of health or safety codes.

More importantly, Justice Stevens said the majority was "persuaded that the better approach" to regulatory taking claims is to make a "careful examination and weighing of all the relevant circumstances." [FN149] In support

of this conclusion, Stevens looked to Justice O'Connor's concurring opinion in Palazzolo, where she observed:

The concepts of "fairness and justice" that underlie the Takings Clause, of course, are less than fully determinate. Accordingly, we have eschewed "any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government . . . . The outcome instead "depends largely 'upon the particular circumstances [in that] case.'" [FN150]

First English declared, however, that temporary takings are "not different in kind from permanent takings." [FN151] The Fifth Amendment does not on its face distinguish between physical, regulatory, permanent, temporary, complete, or partial takings. Accordingly, future litigants might suggest, in appropriate cases, that the segmentation of takings jurisprudence into physical and regulatory tracks leads to unjust results. Counsel may also argue that per se rules contain some flexibility that would offset the public policy concerns listed by Justice Stevens. Physical occupations, for instance, may be transient or tortuous, and permanent regulatory deprivations of all value are subject to a "background principles" exception. [FN152]

B. Moratoria in Excess of "Normal Delays"

The second theory discussed by Justice Stevens is a modifiedversion of the first. The Court could "craft a narrower rule that would cover all temporary land-use restrictions except those 'normal delays in obtaining building permits, changes in zoning ordinances, variances and the like.'" [FN153] Justice Stevens acknowledged that a categorical rule using these standards "would ***348** certainly have a less severe impact on prevailing practices." [FN154] However, it "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." [FN155] Also, a moratorium is not apt to result in individual owners being singled out unfairly, and the benefits of planning present a "clear 'reciprocity of advantage'" to all owners. [FN156]

One of the problems with this argument is that "good faith" does not preclude a taking. Proper planning for the extensive Tahoe Basin, with its unique environmental problems, takes much longer than review of a subdivision development application. Moreover, the benefits of the moratoria extend to the regional economy, the national interest in the environment, and, most intensely, to owners who built prior to the 1980 compact, especially on expensive lakefront lots. It is not clear how those owners of scattered lots, in mostly developed subdivisions, who are excluded from building their vacation or retirement homes enjoy a reciprocity of advantage.

C. Moratoria in Excess of Specified Periods

Third, the Court could announce a rule that would "allow a short fixed period for deliberations to take place without compensation" but find a takings after that period. [FN157] Justice Stevens rejected this on the same basis as the rule permitting reasonable delays only. [FN158]

The history of regulation in the Tahoe Basin exemplifies the problems with this approach. On one hand, it is uncontroverted that the environmental problems are so complex, and the stakes for this national treasure so high, that proper planning requires more time than a durational limitation contemplating more routine situations is likely to provide. On the other hand, it was just as obvious 21 years ago as it is today that the key to preventing eutoprification of Lake Tahoe is the precluding of devel-

opment in the "Stream Environment Zones" (i.e., the sloped uplands where the Tahoe-Sierra petitioners wished to develop their subdivision lots). As far as petitioners are concerned, a generic reasonable time for the promulgation of regulations is thus too short, but also too long.

Yet, limiting the noncompensable development moratorium to a fixed period has considerable merit for a different reason. Reciprocity of advantage is apt to accrue to owners where reasonable periods for planning are short, but not where the reasonable periods are long. The former situation is most likely ***349** in suburban areas where routine subdivisions are being built. Residents in each might protect themselves from internal detrimental development through restrictive covenants. They would benefit, however, from sound planning, in order to protect against conditions that mightreduce the value of their homes in nearby developments. The elaborate and expensive planning studies and procedures that require long periods of time, in contrast, are more apt to effect small groups of landowners and benefit many times that number of residents of surrounding areas. This was the case in the Tahoe Basin.

D. "Rolling Moratoria"

As a fourth theory, Justice Stevens noted that the Court could have characterized "the successive actions of TRPA as a 'series of rolling moratoria' that were the functional equivalent of a permanent taking." [FN159] Petitioner had presented the issue, but the Court's grant of certiorari did not encompass it because the case was tried in the district court and reviewed by the court of appeals on the theory that each of the two moratoria was a separate taking.

Given that a permanent prohibition on development was the obvious way of preserving Lake Tahoe from the outset, the "rolling moratorium" theory seems plausible. The Court's lack of interest on this point diverges sharply from the focus in its Penn Central analysis on the danger of "conceptual severance" of property rights and the need for treating the "parcel as a whole." [FN160] Future litigators might be expected to look for the imposition of sequential or extended moratoria without justification in events that could not have been foreseen earlier.

E. Bad Faith Moratoria as Takings

Tahoe-Sierra noted that, as a fifth theory, "we might have concluded that the agency was stalling in order to avoid promulgating the environmental threshold carrying capacities and regional plan mandated by the 1980 Compact." [FN161] In City of Monterey v. Del Monte Dunes at Monterey, Ltd., [FN162] the Court upheld the award of regulatory takings damages based on a pretextual refusal to accept one development plan after another, when each plan complied with the city's previous demands. The assertion of a "bad faith" argument in Tahoe- Sierra was precluded by the district court's findings ***350** that TRPA had acted diligently and in good faith, which were not challenged by the plaintiffs on appeal. However, future litigants undoubtedly will explore whether new or extended moratoria result from conditions unforeseen at the outset.

F. Moratoria Not Substantially Advancing a Legitimate State Interest

The sixth theory-"that the state interests were insubstantial"-also was foreclosed by the District Court's unchallenged findings of fact. [FN163] In Agins v. City of Tiburon, [FN164] the Court said that "[t]he application of a general zoning law to particular property effects a

taking if the ordinance does not substantially advance legitimate state interests." [FN165] The Court declined to explain "substantial advancement" in Del Monte Dunes. Litigators undoubtedly will continue to question it in cases in which the state interest is less clear than in Tahoe-Sierra.

G. Moratoria "as Applied"

As a final theory, Justice Stevens suggested that the plaintiffs might have attempted to challenge the application of the moratoria to their individual parcels, rather than making a facial challenge. In doing so, some of the landowners might have prevailed under a Penn Central analysis. However, he noted that the plaintiffs had "expressly disavowed" a Penn Central analysis and did not appeal from the district court's conclusion that the evidence would not support recovery under a Penn Central theory. [FN166]

Mounting an "as applied" challenge in a complex takings case is formidable. Moreover, in state cases, "ripening" an action for federal judicial review is very difficult. [FN167] When it is not clear whether a moratorium will be extended, as presented in Tahoe-Sierra, the "ripeness" problem is exacerbated. As a result, counsel's decision not to pursue this theory in Tahoe-Sierra is understandable, given the then-undeveloped state of regulatory takings law and the daunting logistical problems in mounting fact-intensive litigation on behalf of many small landowners against a powerful agency. Nevertheless, the result was to limit Supreme Court review to a ***351** narrowly tailored facial challenge, precluding review of the moratoria as applied to individual parcels.

VI. Conclusion

Justice Stevens' Tahoe-Sierra opinion emphasized what he referred to as the "Armstrong principle," [FN168] holding that "the Takings Clause was 'designed to bar Government from forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole.'" [FN169] Justice O'Connor's Palazzolo concurrence quoted the same words, citing to their use in Penn Central. [FN170]

For many, regulatory takings law is a quest for fairness. Among the thoughts on how to achieve this are recourse the "normal" behavior of landowners in a community, [FN171] ensuring that all members of the community have an effective right to participate in the political process, [FN172] or a synthesis of these ideas that would consider normal behavior yet avoid what often are biased local political processes. [FN173] Another approach might be what Carol Rose calls "regulatory property," [FN174] through which rules enunciated at the state level have the effect of guiding individual landowners towards consistent uses of their property. On the other hand, adherence to traditional Lockean property concepts might better preserve both fairness and liberty. [FN175]

***352** The Supreme Court's recent decisions in Palazzolo [FN176] and Tahoe-Sierra [FN177] preserve core principles of the Rule of Law. [FN178] Palazzolo rejects the positive notice rule, preserving stability and denying the State the right to change the law at will. [FN179] Tahoe-Sierra affirms that development moratoria are not per se permissible as the State's ipse dixit. [FN180] Beyond these basics, however, the cases do little to clarify either the law or even the Court's sense of substantive "fairness."

In an era in which the Supreme Court displays no fealty to a Lockean (or other) doctrine of property rights, its recent emphasis on bal-

ancing tests gives judges great power, but gives no one much predictability. [FN181] In a society in which the notions of many about appropriate land uses change, standardless discourse about "permanent" and "temporary" regulatory simply magnifies the confusion. As Judge Kozinski stated in his dissent from denial of en banc review in Tahoe-Sierra, "[g]overnmental policy is inherently temporary while land is timeless." [FN182]

[FNa1]. Professor of Law, George Mason University School of Law, Arlington, Virginia (seagle@gmu.edu).

[FN1]. 535 U.S. 302, 122 S. Ct. 1465 (2002).

[FN2]. Robert Freilich, who filed an amicus brief for the American Planning Association, hailed the decision as "a constitutional acceptance of the need for planning in our society." Bob Egelko, Property Owners Lose Key Tahoe Case, San Francisco Chronicle, April 24, 2002 A1. Lora Lucero, an attorney for the American Planning Association, "called the ruling 'the best victory for planning in more than a decade' and said it reaffirmed 'the value of planning' in development." Jan Crawford Greenburg, Court Rejects Blanket Compensation for Halted Building, Chicago Tribune, April 24, 2002 at 8.

[FN3]. 533 U.S. 606 (2001). The Court split 5-4 in Palazzolo.

[FN4]. Id. at 633 (O'Connor, J., concurring) (citing Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978)).

[FN5]. Tahoe-Sierra, 535 U.S. at ___, 122 S. Ct. at 1481, n.23.

[FN6]. Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978).

[FN7]. The regulatory takings implications inherent in the facts of Tahoe- Sierra are not pedestrian at all. Had the Court ruled that all moratoria constituted takings or had it considered all of the relevant facts, the effect on regulatory takings law would be profound. However, as the matter came before the Court, given the law of the case and the very limited grant of certiorari, Tahoe-Sierra is of intrinsic little importance. While its holding, that not all moratoria constitute regulation takings, favors the respondent, is in no way inconsistent with the holding sought in petitioner's petition for certiorari. See infra text accompanying notes 50-51.

[FN8]. 450 U.S. 621 (1981).

[FN9]. Id. at 650, n.15 (Brennan, J., dissenting).

[FN10]. The "yellow brick road," as the reader might recall, was the path upon which the Munchkins set Dorothy and her dog Toto in order to see the Great Wizard of Oz, whom everyone assured her had the power to return her from the beautiful, if sometimes dangerous, Land of Oz (located somewhere over the rainbow) to Kansas. The Wizard of Oz (Metro-Goldwyn-Mayer 1939). See H. Lee Hetherington, The Wizard and Dorothy, Patton and Rommel: Negotiation Parables in Fiction and Fact, 28 Pepp. L. Rev. 289, 291 (2001).

[FN11]. See Gideon Kanner, Hunting the

Snark, Not the Quark: Has the U.S. Supreme Court Been Competent in Its Effort to Formulate Coherent Regulatory Takings Law?, 30 Urb. Law. 307 (1998) (citing Lewis Carroll, The Annotated Snark 51 (1962)).

[FN12]. Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 203, ___, 122 S. Ct. 1465, 1471 (2002).

[FN13]. Id. at ___, 122 S. Ct. at 1472.

[FN14]. Id.

[FN15]. Id. at ___, 122 S. Ct. at 1473.

[FN16]. Id.

[FN17]. Id.

[FN18]. The Council comprises about 2,000 owners of improved and unimproved lots in the Lake Tahoe Basin. Tahoe-Sierra, 535 U.S. at ___, 122 S. Ct. at 1473.

[FN19]. Id.

[FN20]. See Michael M. Berger, Tahoe-Sierra: Much Ado About-What?, 25 u. Haw. l. rev. ___, (2003).

[FN21]. See id.

[FN22]. Tahoe-Sierra, 535 U.S. at ___, 122 S.Ct. at 1474.

[FN23]. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F. Supp. 2d 1226 (D. Nev. 1999).

[FN24]. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 216 F.3d 764 (9th Cir. 2000).

[FN25]. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 228 F.3d 998 (9th Cir. 2000)(denying reh'g en banc).

[FN26]. 438 U.S. 104 (1978).

[FN27]. Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001) (citing Penn Central, 438 U.S. at 124).

[FN28]. Tahoe-Sierra, 34 F. Supp. 2d at 1240-42.

[FN29]. 505 U.S. 1003 (1992).

[FN30]. Tahoe-Sierra, 34 F. Supp. 2d at 1242-45.

[FN31]. Id. at 1250.

[FN32]. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987).

[FN33]. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 216 F.3d 764,

778 (9th Cir. 2000).

[FN34]. First English, 482 U.S. at 319.

[FN35]. Tahoe-Sierra, 216 F.3d at 778 (emphasis in original).

[FN36]. Id.

[FN37]. Id. at 781.

[FN38]. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, ___, 122 S. Ct. 1465, 1476-77.

[FN39]. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 228 F.3d 998 (9th Cir. 2000) (denying reh'g en banc).

[FN40]. Id. at 998 (Kozinski, J., dissenting from denial of reh'g en banc, joined by O'Scannlain, Trott, T.G. Nelson, and Kleinfeld, JJ.).

[FN41]. Id. at 999.

[FN42]. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 330, 332 (1987) (Stevens, J., dissenting). Stevens argued that the:

> [r]egulations are three dimensional; they have depth, width, and length. As for depth, regulations define the extent to which the owner may not use the property in question. With respect to width, regulations define the amount of property encompassed by the restrictions. Finally, and for the purposes of this case, essentially, regulations set forth the duration of the restrictions. It is obvious that no one of these elements can be analyzed alone to evaluate the impact of a regulation, and hence to determine whether a taking has occurred. . . . [I]n assessing the economic effect of a regulation, one cannot conduct the inquiry without considering the duration of the restriction between permanent restriction that only reduces the economic value of the property by a fraction-perhaps one-third-and a restriction that merely postpones the development of a property for a fraction of its usual life-presumably far less than a third?

Id.

[FN43]. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 216 F.3d 764 (9th Cir. 2000). The court noted that:

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

Id. at 776-77 (citations omitted).

[FN44]. Tahoe-Sierra, 228 F.3d at 1000. Judge Kozinski quoted the key language from the

Stevens' First English dissent, see supra note 42, immediately followed by the key language from the Ninth Circuit panel, see supra note 43. Id. at 1000-01.

[FN45]. Id. at 1001-02.

[FN46]. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, ___, 122 S. Ct. 1465, 1477 (2002).

[FN47]. Tahoe-Sierra, 535 U.S. at ___, 122 S. Ct. at 1486.

[FN48]. Id.

[FN49]. Id. at ___, 122 S. Ct. at 1482.

[FN50]. Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, Petition for Certiorari, Page i (emphasis in original).

[FN51]. Tahoe-Sierra, 535 U.S. at ___, (2001), 122 S. Ct. at 1470 (granting certiorari).

[FN52]. Id. at ___, 122 S. Ct. at 1473.

[FN53]. Id. at ___, 122 S. Ct. at 1490-91 (Rehnquist, C.J., dissenting).

[FN54]. Id. at ___, 122 S. Ct. at 1491 (Rehnquist, C.J., dissenting).

[FN55]. Id. at 1474, n.8.

[FN56]. The Court did entertain a challenge to the 1987 plan in Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725 (1997). However, its holding was limited to the determination that petitioner's takings claim was ripe even though she had not attempted to sell the transfer of development rights that she received in an effort to mitigate the deprivation of her right to develop her lot in a largely built-out subdivision in the hills overlooking Lake Tahoe.

[FN57]. Tahoe-Sierra, 535 U.S. at ___, 122 S. Ct. at 1474, n.7.

[FN58]. Id. at ___, 122 S.Ct. at 1485. See infra Part V.

[FN59]. Id. at ___, 122 S. Ct. at 1478 (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 636 (2001)).

[FN60]. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

[FN61]. See Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

[FN62]. See Eastern Enter. v. Apfel, 524 U.S. 498 (1998).

[FN63]. Tahoe-Sierra, 535 U.S. at ___, 122 S. Ct. at 1478.

[FN64]. Id. at ___, 122 S. Ct. at 1479 (quoting Yee v Escondido, 503 U.S. 519, 523 (1992)).

[FN65]. Id. at ___, 122 S. Ct. at 1481.

[FN66]. Id. at ___, 122 S. Ct. at 1481, n.23 (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 633 (2001)).

[FN67]. Id. at ___, 122 S. Ct. at 1483 (quoting Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1017 (1992)).

[FN68]. Id. (quoting Lucas, 505 U.S. at 1019-20, n.8).

[FN69]. Id. (quoting Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 130-31(1978)).

[FN70]. Id. at ___, 122 S. Ct. at 1483.

[FN71]. Id. at ___, 122 S. Ct. at 1465, 1496 n.5 (2002).

[FN72]. Id. at ___, 122 S. Ct. at 1496.

[FN73]. Id.

[FN74]. Id.

[FN75]. Id. at ___, 122 S. Ct. at 1482.

[FN76]. Id.

[FN77]. See, e.g., Rest. Prop. Div. III Pt. IV (Introductory Note) (1940). Specifically, "[a]n expectancy, as the name indicates, is not an interest in any specific thing (see § 315, Comment a) but is merely the hope of receiving some of the assets which still are the property of a living person, but are likely to be left by such owner at the time of his death." Id; see also In re Tantillo's Trust Estate, 127 N.W.2d 798, 800 (Wis. 1964) (noting that "[v]ested or contingent, a future interest, as distinguished from a mere expectancy, is assignable).

[FN78]. This seems self-evident, albeit perhaps not in accord with the tenor of the times, which is reflected in the Supreme Court's observation that the essence of American citizenship is "the right to have rights." Trop v. Dulles, 356 U.S. 86, 102 (1958) (holding expatriation of wartime military deserter beyond war powers of Congress).

[FN79]. See, e.g., Rest. 2d Contr. § 4 Comment a (1981) (stating that "[j]ust as assent may be manifested by words or other conduct, sometimes including silence, so intention to make a promise may be manifested in language or by implication from other circumstances, including course of dealing or usage of trade or course of performance."). Id.

[FN80]. See, e.g., Board of Regents v. Roth, 408 U.S. 564 (1972) (noting that "[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.") Id. at 577.

[FN81]. See generally Thomas W. Merrill & Henry E. Smith, The Property/Contract Interface, 101 Colum. L. Rev. 773 (2001).

[FN82]. United States Trust Co. v. New Jersey, 431 U.S. 1, 26 (1977).

[FN83]. 533 U.S. 606 (2001).

[FN84]. See Steven J. Eagle, The Regulatory Takings Notice Rule, 24 U. Haw. L. Rev. 533 (2002).

[FN85]. Palazzolo, 533 at 626-27. It is important to note that "[t]he State may not put so potent a Hobbesian stick into the Lockean bundle." Id. at 627.

[FN86]. Id. at 632 (O'Connor, J., concurring).

[FN87]. Id. at 632-33 (O'Connor, J., concurring).

[FN88]. Id. at 635-36 (O'Connor, J., concurring) (emphasis added) (citation omitted).

[FN89]. Id. at 655 (Breyer, J., dissenting); id. at 654, n.3 (Ginsburg, J., dissenting) (joined by Justices Souter and Breyer); id. at 643, n.6 (Stevens, J., concurring in part and dissenting in part).

[FN90]. Id. at 637 (Scalia, J., concurring). The "'investment-backed expectations' that the law will take into account do not include the assumed validity of a restriction that in fact deprives property of so much of its value as to be unconstitutional. Which is to say that a Penn Central taking, no less than a total taking, is not absolved by the transfer of title.Id. (citations omitted).

[FN91]. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, ___, 122 S.Ct. 1465, 1478 (2002). The majority stated

"[i]n our view the answer to the abstract question whether a temporary moratorium effects a taking is neither 'yes, always' nor 'no, never,' the answer depends upon the particular circumstances of the case. Resisting '[t]he temptation to adopt what amount to per se rules in either direction,' we conclude that the circumstances in this case are best analyzed within the Penn Central framework."

Id. (internal citation omitted) (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring)).

[FN92]. For a more detailed treatment of this issue, see Steven J. Eagle, The Rise and Rise of "Investment-Backed Expectations," 32 Urb. Law. 437 (2000).

[FN93]. Frank I. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165 (1967).

[FN94]. Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978).

[FN95]. See, e.g., Kaiser Aetna v. United States, 444 U.S. 164 (1979); Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984).

[FN96]. Richard A. Epstein, Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations, 45 Stan. L. Rev. 1369, 1370 (1993).

[FN97]. 482 U.S. 304 (1987).

[FN98]. See id. at 320.

[FN99]. Id. at 317.

[FN100]. The courts have not dealt with this issue. For a discussion of this issue, see Steven J. Eagle, Just Compensation for Permanent Takings of Temporal Interests, 10 Fed. Circuit B.J. 485 (2001).

[FN101]. 10 Cl. Ct. 486 (1986), rev'd, 821 F.2d 638 (Fed. Cir. 1987).

[FN102]. Id. at 487.

[FN103]. Id.

[FN104]. Id. at 499.

[FN105]. Yuba Natural Res., Inc. v. United States, 821 F.2d 638 (Fed. Cir. 1987).

[FN106]. Id. at 641-42 (quoting First English Evangelical Church of Glendale v. County of Los Angeles, 482 U.S. 304, 317 (1987). The court stated the action "merely results in 'an alteration in the property interest taken- from [one of] full ownership to one of temporary use and occupation. . ..In such cases compensation would be measured by the principles normally governing the taking of a right to use property temporarily.'" Id.

[FN107]. For advocacy of this approach, with the interest taken being deemed a fee simple determinable on the will of the State no longer to possess it, see Eagle, supra note 100, at 508-09.

[FN108]. Hendler v. United States, 952 F.2d 1364, 1376-77 (Fed. Cir. 1991). See also Skip Kirchdorfer, Inc. v. United States, 6 F.3d 1573, 1582 (Fed. Cir. 1993).

[FN109]. United States v. Clarke, 445 U.S. 253, 257 (1980).

[FN110]. United States v. Sherwood, 312 U.S. 584, 586 (1941).

[FN111]. See supra notes 54-55 and accompanying text.

[FN112]. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, ___, 122 S. Ct. 1465, 1492 (2002) (Rehnquist, C.J., dissenting).

[FN113]. Id.

[FN114]. See, e.g., Oliver Wendell Holmes, Jr., The Common Law 5 (1881) (referring to the ancient rule which "adapts itself to the new reasons which have been found for it, and enters on a new career.").

[FN115]. This might well be the case respecting regulation in the Lake Tahoe Basin, where successive agencies have imposed successive comprehensive regulatory schemes each aimed to protect eutrophication of the lake through

the prevention of development in upland stream environment zones.

[FN116]. See, e.g., Florida Rock Indus., Inc. v. United States, 18 F.3d 1560, 1566 (Fed. Cir. 1994) (noting that "yesterday's Everglades swamp to be drained as a mosquito haven is today's wetland to be preserved for wildlife and aquifer recharge; who knows what tomorrow's view of public policy will bring") (internal citation omitted).

[FN117]. For the moment, the issue of whether the categories are internally coherent is ignored.

[FN118]. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, ___, 122 S. Ct. 1465 (2002).

[FN119]. This analysis concentrates on per se takings and thus gives little attention to partial regulatory takings under Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978). Nevertheless, a very significant element of Tahoe-Sierra is that is does recognize the viability and importance of the partial regulatory takings doctrine. Tahoe-Sierra, 535 U.S. at ___, 122 S. Ct. at 1481.

[FN120]. See, e.g., Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871) (private land permanently inundated by water backed up from downstream government dam). See also Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (state-mandated cable TV box and wires on private apartment building).

[FN121]. 505 U.S. 1003 (1992).

[FN122]. Tahoe-Sierra, 535 U.S. at ___, 122 S.Ct. at 1478-79 (citing, inter alia, United States v. Gen. Motors Corp., 323 U.S. 373 (1945) and United States v. Petty Motor Co., 327 U.S. 372 (1946)).

[FN123]. Tahoe-Sierra, 535 U.S. at ___, 122 S. Ct. at 1479.

[FN124]. 260 U.S. 393, 415 (1922).

[FN125]. See generally, Richard Epstein, Takings: Private Property And the power of eminent domain 195-99 Harvard University Press (1985).

[FN126]. Tahoe-Sierra, 535 U.S. at ___, 122 S. Ct. at 1479.

[FN127]. This analysis neglects the availability of the partial takings remedy, which was confirmed in Tahoe-Sierra, but which has truly been rare in its application. See supra note 119.

[FN128]. Cf. Just v. Marinette County, 201 N.W.2d 761 (Wis. 1972); Zealy v. City of Waukesha, 548 N.W.2d 528 (Wis. 1996).

[FN129]. See Stephen E. Abraham, Landgate-Taken But Not Used, 31 Urb. Law. 81, 95 (1999) (setting forth this hypothetical).

[FN130]. Tahoe-Sierra, 535 U.S. at ___, 122 S. Ct. at 1479.

[FN131]. 482 U.S. 304 (1987).

[FN132]. 598 P.2d 25 (Cal. 1979), aff'd on other grounds, 447 U.S. 255 (1980).

[FN133]. See Thomas E. Roberts, Moratoria as Categorical Regulatory Takings: What First English and Lucas Say and Don't Say, 31 Envtl. L. Rep. 11037 (2001). "First English did not contain principles that address when a taking occurs. It only says what remedy is provided once a taking is found." Id. at 11044; cf. Steven J. Eagle, Development Moratoria, First English Principles, and Regulatory Takings, 31 Envtl. L. Rep. 11232 (2001) (asserting broader principles implicit in the case).

[FN134]. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, ___, 122 S. Ct. 1465, 1490 (2002) (Rehnquist, C.J., dissenting).

[FN135]. Id. at ___, 122 S. Ct. at 1492 (Rehnquist, C.J., dissenting) (quoting First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 318 (1987)).

[FN136]. First English, 482 U.S. at 318-19 (emphasis added) (citations omitted).

[FN137]. Tahoe-Sierra, 535 U.S. at ___, 122 S. Ct. at 1492-93 (citations omitted) (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1011-12, 1033 (Kennedy, J., concurring)). "It is well established that temporary takings are as protected by the Constitution as are permanent ones." Id. at 1492-93 (quoting First English, 482 U.S. at 318).

[FN138]. Id. at 1480 n.19.

[FN139]. Id. (adding that, from a landowner's perspective, even a "minor infringement" might be deemed an appropriation).

[FN140]. See, e.g., the fence illustration in supra note 129.

[FN141]. A classic illustration is the "polestar" case itself, Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) (Rehnquist, J. dissenting) (Justice Stevens joined in the dissent)(noting that "[o]f the over one million buildings and structures in the city of New York, appellees have singled out 400 for designation as official landmarks.") Id. at 138.

[FN142]. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 305, ___, 122 S. Ct. 1465, 1484 (2002) (citations ommitted).

[FN143]. The relationship of the Stevens Tahoe-Sierra opinion, the Reinhardt Ninth Circuit opinion, and the Stevens dissenting opinion in First English is discussed in supra notes 39-45 and accompanying text.

[FN144]. Tahoe-Sierra, 535 U.S. at ___, 122 S. Ct. at 1484.

[FN145]. Id. at 1485.

[FN146]. See, e.g., Pumpelly v. Green Bay

Co., 80 U.S. 166 (1871) (facing a situation with permanent flooding of land upstream from a dam); U.S. v. Gen. Motors Corp., 323 U.S. 373 (1945) (ruling on the temporary occupancy of an office building by government employees).

[FN147]. See supra notes 50-51 and accompanying text.

[FN148]. Tahoe-Sierra, 535 U.S. at ___, 122 S. Ct. at 1485.

[FN149]. Id. at ___, 122 S. Ct. at 1486.

[FN150]. Palazzolo v. Rhode Island, 533 U.S. 606, 633 (O'Connor, J., concurring).

[FN151]. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 318 (1987).

[FN152]. See Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992).

[FN153]. Tahoe-Sierra, 535 U.S. at ___, 122 S. Ct. at 1484.

[FN154]. Id. at ___, 122 S. Ct. at 1486.

[FN155]. Id. at ___, 122 S. Ct. at 1487.

[FN156]. Id. at 1488-89 (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

[FN157]. Id. at 1484.

[FN158]. See id.

[FN159]. Id. at ___, 122 S. Ct. at 1485.

[FN160]. Id. at ___, 122 S. Ct. at 1483-84.

[FN161]. Id. at ___, 122 S. Ct. at 1485.

[FN162]. 526 U.S. 687, 698 (1999).

[FN163]. Tahoe-Sierra, 535 U.S. at ___, 122 S. Ct. at 1485.

[FN164]. 447 U.S. 255 (1980).

[FN165]. Id. at 260 (citations omitted).

[FN166]. Tahoe-Sierra, 535 U.S. at ___, 122 S. Ct. at 1485.

[FN167]. See Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, (1985) (holding that a landowner's claim was not ripe because it had not yet obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to the property). Id.

[FN168]. Tahoe-Sierra, 535 U.S. at ___, 122 S Ct. at 1478.

[FN169]. Id. (quoting Armstrong v. United

States, 364 U.S. 40, 49 (1960)).

[FN170]. Palazzolo v. Rhode Island, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring) (citing Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123-24 (1978)).

[FN171]. See Robert C. Ellickson, Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls, 40 U. Chi. L. Rev. 681, 729-31 (1973).

[FN172]. See, e.g., John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 87 Harvard University Press (1980).

[FN173]. See, e.g., William Fischel, Regulatory Takings: Law, Economics, and Politics, Harvard University Press (1995) (stressing the need for recourse to state government, controlled by shifting alliances, to ensure that owners of undeveloped land are not penalized by land use decisions of local governments, controlled by the stable and mests of existing homeowners).

[FN174]. Carol M. Rose, Takings, Federalism, Norms Regulatory Takings: Law, Economics, and Politics, 105 Yale L.J. 1121, 1151 (1996) (citing Richard B. Stewart, Madison's Nightmare, 57 U. Chi. L. Rev. 335, 352-56 (1990)). Rose also asserts that "takings jurisprudence is not and cannot be aimed simply at fairness to individuals. . . . [I]t must also be aimed at allowing communities to alter their regulatory practices to confront changing patterns of resource use." Id. at 1149.

[FN175]. See generally, Richard Epstein, Takings: Private property and the power of eminent domain, Harvard University Press (1985).

[FN176]. Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

[FN177]. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 122 S. Ct. 1465 (2002).

[FN178]. See Richard H. Fallon, Jr., "The Rule of Law" as a Concept in Constitutional Discourse, 97 Colum. L. Rev. 1, 8-9 (1997) (noting that the Rule of Law generally is understood to emphasize (1) capacity (rules must be able to guide people in their affairs), (2) efficacy (rules actually do serve to guide people), (3) stability (the rule must be reasonably stable so that people can plan and coordinate their actions over time), (4) supremacy of legal authority (the law should rule officials, including judges, as well as ordinary citizens), and (5) impartiality (courts should enforce the law and use fair procedures)).

[FN179]. Palazzolo, 533 U.S. at 626-27. See supra text accompanying notes 83-85.

[FN180]. See supra text accomanying note 48.

[FN181]. See e.g., Raymond R. Coletta, The Measuring Stick of Regulatory Takings: A Biological and Cultural Analysis, 1 U. Pa. J. Const. L. 20 (1998). "There is no yellow brick road leading the conscientious jurist to the 'correct' denominator. In reality, the multifactor case-by-case approach increases uncertainty by allowing courts to manipulate the factors toward their own predetermined conclusion." Id. at 67.

[FN182]. 228 F.3d 998, 1001 n.1 (9th Cir. 2000) (Kozinski, J., dissenting from denial of review en banc).

# # #