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Article

***429** PLANNING MORATORIA AND REGULATORY TAKINGS: THE SUPREME COURT'S FAIRNESS MANDATE BENEFITS LANDOWNERS

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***430** I. INTRODUCTION

Planning moratoria are freezes on land development imposed for land-use planning purposes. Recently, in Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, [FN1] the United States Supreme Court considered whether landowners subjected to such moratoria would be entitled to compensation under the Takings Clause of the U.S. Constitution. [FN2] The Court concluded that sometimes they might and sometimes they might not. [FN3]

The decision's overarching theme was the need for fairness, which the majority enshrined in the new term "Armstrong principles." [FN4] While it commended good planning, Tahoe-Sierra did not promise that planning moratoria would be exempt from meaningful judicial review. To the contrary, it expressed outright "skepticism" of extended moratoria and provided a roadmap for challenges to planning moratoria in future cases. The Court noted:

> It is worth emphasizing that we do not reject a categorical rule in this case because a 32-month moratorium is just not that harsh. Instead, we reject a categorical rule because we conclude that the Penn Central framework adequately directs the inquiry to the proper considerations--only one of which is the length of the delay. [FN5]

***431** This basic theme of Tahoe-Sierra has been obscured, partly because of dicta supporting regulation [FN6] but primarily because the Supreme Court reframed the issues when granting review. The Court inverted the first proposed certiorari question, which was most directly responsive to the decision below, and discarded the others. [FN7] The petitioner, Tahoe-Sierra Preservation Council, Inc. (TSPC), represented some 400 small landowners. [FN8] TSPC sought review of a decision by the U.S. Court of Appeals for the Ninth Circuit that seemed predicated on the theory that planning moratoria never constitute regulatory takings. [FN9] The Supreme Court granted certiorari, however, essentially to review whether planning moratoria always constitute regulatory takings. [FN10]

Not surprisingly, the Court responded in the negative. In rejecting petitioners' per se rule, Justice Stevens wrote for the six to three majority, [FN11] "[W]e do not hold that the temporary nature of a land-use restriction precludes finding that it effects a taking; we simply recognize that it should not be given exclusive significance one way or the other." [FN12]

The principal outcome of Tahoe-Sierra is a vindication

of the TSPC's fundamental premise: planning moratoria may constitute takings. Additionally, the Court explicitly confirmed that partial regulatory takings may require just compensation, which would benefit landowners. [FN13] Furthermore, it specified "seven theories" upon which landowners might prevail in future cases. [FN14]

The facts in Tahoe-Sierra are complex, and its procedural history is long and convoluted. [FN15] In retrospect, much of its outcome seems preordained by the iconic nature of Lake Tahoe, the practical constraints on the ability of the landowners to develop their case, and ***432** the procedural rulings below. Thus, the TSPC landowners were unable to utilize the potential advantages that Tahoe-Sierra now makes available to others. Tahoe-Sierra provides support for good planning and eschews bright-line rules. It also provides future plaintiffs a strong platform upon which landowners can mount regulatory takings challenges against unreasonable planning moratoria.

This Article discusses the Tahoe-Sierra decision [FN16] and analyzes the Supreme Court's reinvigorated fairness principle. [FN17] The heart of the Article, however, is a discussion of where Tahoe-Sierra is apt to take us. This takes the form of a theoretical and practical treatment of how landowners can use the case's seven theories roadmap to protect property rights. [FN18]

II. The Tahoe-Sierra Controversy and Decision

A. Complex Problems in a Beautiful Land

1. The Tahoe Basin--Beauty and Complexity

Lake Tahoe is an alpine lake located in the northern Sierra Nevada mountains of Northern California and Nevada. [FN19] It is renowned for the striking clarity of its depths and beautiful mountain surroundings. The U.S. district court referred to it as "almost indescribably beautiful." [FN20] The Nevada and California Supreme Courts have been equally effusive. [FN21] Mark Twain referred to the area as "the fairest picture the whole earth affords." [FN22] TSPC joined in this praise, [FN23] and the U.S. Supreme Court correctly concluded that "[a]ll agree that Lake Tahoe is 'uniquely beautiful,'" [FN24] and that it is a "'national treasure that must be protected and preserved.'" [FN25]

***433** There has been equal unanimity that, as the California Supreme Court observed in 1971, "the region's natural wealth contains the virus of its ultimate impoverishment." [FN26] TSPC shared that view, [FN27] as did the district court. [FN28] "Part of what makes Tahoe so special," the district court explained, "is the amazing clarity of its water, which, as a result of its clarity, is an unusually beautiful cobalt blue color." [FN29] Most lakes have lacked such clarity because of algae growing in their depths. The presence of algae, in turn, requires a nutrient-rich environment. Lake Tahoe, however, historically has been lacking in both nitrogen and phosphorous, both of which algae require. [FN30]

By the late 1950s, however, development had led to increased runoff and nutrient loading, causing erosion and a proliferation of algae that threatened Lake Tahoe's clarity. The inadequacy of local efforts to deal with these problems led, in 1968, to the enactment of the Tahoe Regional Planning Compact. [FN31] The Compact created the Tahoe Regional Planning Agency (TRPA), which was "to coordinate and regulate development in the Basin and to conserve its natural resources." [FN32] From the outset, landowners have complained that TRPA has acted in ways that "destroyed the economic value" of their property. [FN33]

TRPA was directed in 1980 to develop regional standards for air, water quality, soil conservation, and vegetation preservation within eighteen months. TRPA had a year thereafter to adopt an amended regional plan to achieve those standards. In order to prevent inconsistent development, the regional planning compact also provided for a moratorium on development until adoption of the final plan or, "[u]nder a liberal reading of the Compact, ... until August 26, 1983." [FN34] Realizing that it would be unable to meet this deadline, TRPA adopted Resolution 83-21, which suspended all project reviews and approvals until November 26, 1983. When even this time proved insufficient, the TRPA staff bridged the gap between this expiring moratorium and its contemplated replacement with nothing more ***434** than administrative fiat. The staff simply notified TRPA's board that, absent instructions to the contrary, they would refuse to process development applications as if the expired moratorium remained in effect. [FN35] The Supreme Court notes in the facts that "Resolution 83-21 was in effect from August 27, 1983, until April 25, 1984. As a result of these two directives, virtually all development on a substantial portion of the property subject to TRPA's jurisdiction was prohibited for a period of 32 months." [FN36]

On the day that the 1984 replacement plan was to go into effect, California challenged it as insufficiently restricting residential construction. An injunction against implementation was issued by the U.S. district court, which remained in effect until a new plan was adopted in 1987. [FN37] The revised 1987 plan remains in effect today. [FN38]

2. The Affected Landowners

In part because judicial consideration of development moratoria after Tahoe-Sierra will largely be concerned with considerations of fairness, [FN39] it is useful to consider the identity of the landowners comprising the petitioner, TSPC. Unlike the owners of large and expensive homes along the shore, the Tahoe-Sierra landowners were individuals of modest means who had purchased vacant lots in subdivisions in the hills above the lake prior to 1980, but who did not build or obtain vested rights before the effective date of the 1980 compact. [FN40]

The Petitioners--some 400 owners of individual, lawfully subdivided, single-family residential lots around Lake Tahoe--are mostly married couples who bought their lots years ago for individual retirement, vacation, or permanent homes for themselves and their families. The lots were all located in partially developed residential neighborhoods with paved roads, utility service, and ***435** homes built on many of the neighboring lots. All of the landowners bought their lots many years before the regulations challenged here were even being considered. [FN41]

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 [FN42] and others have sold to TRPA for low prices set by the agency. [FN43] TSPC agreed that construction led to the problem and that "[t]he solution, curbing development, was obvious." [FN44] The basis for the litigation, according to TSPC, was "not the regulatory ends" sought in curtailing growth, "but rather the unconstitutional means employed by TRPA." [FN45]

B. The Tahoe-Sierra Litigation

1. Convoluted Proceedings

The Tahoe-Sierra litigation was protracted over more than two decades. There were numerous published and unpublished district court decisions in California and Nevada, [FN46] and four published Ninth Circuit decisions. [FN47] The Supreme Court focused on one Nevada U.S. District Court holding, [FN48] and its reversal by a panel of the Ninth Circuit. [FN49] The Court also noted the Ninth Circuit's denial of review en banc, [FN50] from which Judge Alex Kozinski's stinging dissent was likely an important factor in the decision to grant certiorari.

The district court opinion began by considering whether the planning moratoria would constitute a taking under the traditional ***436** analysis set forth in Penn Central Transportation Co. v. New York City. [FN51] The Penn Central approach requires a 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." [FN52] Weighing these factors, the district court concluded that no taking occurred. [FN53] However, it added that, although the prohibition on development "was clearly intended to be temporary, ... there was no fixed date for when it would terminate." [FN54]

Therefore, the moratoria denied the plaintiffs all economically viable use of their properties. [FN55] This constituted a categorical taking under Lucas v. South Carolina Coastal Council. [FN56] Also requiring compensation was First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, [FN57] 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. [FN58]

The Ninth Circuit reversed, concluding that the district court had incorrectly applied Lucas and misinterpreted First English. [FN59] Judge Stephen Reinhardt, writing for the panel, declared that "First English is not even a case about what constitutes a taking." [FN60] He noted that the California appellate court had rejected the landowner's damages claim "on the ground that, 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." [FN61] The state appellate decision was based on the state supreme court's mandate in Agins v. City of Tiburon [FN62] that an injunction was the appropriate remedy in an inverse condemnation action of this type. The U.S. Supreme Court rejected the California Agins doctrine in First English, holding that subsequent invalidation of the regulation, "though converting the taking into a 'temporary' one, is not a sufficient remedy to meet the ***437** demands of the Just Compensation Clause." [FN63] Thus, if the regulation constituted a taking, the plaintiffs would be entitled to compensation for the period of time that the regulation remained in effect. [FN64]

Judge Reinhardt emphasized that First English "related only to the remedy available once a taking had been proven." [FN65] Although First English held that compensation is required even when a taking is temporary, he wrote, "the Court stated explicitly that it was not addressing whether the ordinance constituted a taking." [FN66] Turning to this latter question, Reinhardt stated that the moratorium did not render the plaintiffs' property valueless: "Given 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." [FN67] Because the moratoria did not deprive the property of all economically beneficial use, Lucas was inapplicable.

Judge Reinhardt did add one qualifier: "Of course, were a temporary moratorium designed to be in force so long as to eliminate all present value of a property's future use, we might be compelled to conclude that a categorical taking had occurred." [FN68] However, the present value of a parcel of land gradually decreases as the interval from the present until beneficial enjoyment is to be derived from it increases. For the present value to equal zero, the time until beneficial enjoyment is to start must equal infinity. In other words, the literal meaning of Reinhardt's statement is that a temporary moratorium is a categorical deprivation only when it lasts forever.

The Ninth Circuit denied review en banc. [FN69] However, Judge Alex Kozinski's dissenting opinion, in which four other judges joined, 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." [FN70] In First English, Stevens had argued that no taking had occurred because the regulation merely postponed development of the property for a fraction of its useful life, and that the economic impact of postponed development was no greater than the economic impact of a regulation permanently restricting ***438** the use of only part of the property. [FN71] Judge Kozinski noted that although the Ninth Circuit did not cite Justice Stevens's First English dissent, "the reasoning--and even the wording--bear an uncanny resemblance." [FN72] "By adopting Justice Stevens's dissent, the panel places itself in square conflict with the majority's opinion in First English." [FN73]

2. Factors Shaping the Court's Holding

The Supreme Court's Tahoe-Sierra opinion recounted the view of the dissenters from denial of rehearing en banc that the Ninth Circuit panel's holding was "not faithful" to the holdings of First English and Lucas and added that certiorari was granted because of "the importance of the case." [FN74] Using his prerogative as senior justice in the majority, Stevens assigned the opinion to himself.

Tahoe-Sierra's narrow ruling was affected, first and foremost, by the manner in which the Supreme Court shaped its grant of certiorari. The Court did not accept the proffered questions pertaining to sequential moratoria or to reciprocity in burden sharing. Most importantly, the Court inverted the question they accepted.

As submitted, the certiorari questions read:

1. In light of this Court's clear holding that a temporary moratorium on land use can require compensation for a temporary taking of property, 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?

2. Can a land use regulatory agency escape its constitutional duty to pay for land taken for public use by the expedient of enacting a series of rolling, back-to-back "temporary" moratoria/prohibitions extending over a period of 20 years, and then claiming that each of the individual prohibitions on all use must be viewed in isolation from the others and, when so viewed, none was severe enough by itself to cross the constitutional taking threshold?

In similar fashion, can such an agency escape the constitutional obligation of compensation because a court injunction issued in a different case barred issuing permits to other landowners, while the agency's own regulations precluded all use of the Petitioners' land?

3. Can a land use regulatory agency purport to "protect the environment" at a major regional location (here, Lake Tahoe) by compelling ***439** a selected group of individual landowners to forego all use of their individual home sites, and thereby compel a de facto donation of their land for public use without compensation? [FN75]

However, the Supreme Court's grant of certiorari was "limited to the following question":

Whether the Court of Appeals properly determined that a temporary moratorium on land development does not constitute a taking of property requiring compensation under the Takings Clause of the United States Constitution? [FN76]

Reframing the issue in this fashion permitted the Court to focus solely on whether the two moratoria that were considered by the Ninth Circuit fell within the Lucas per se test or, alternatively, the Penn Central ad hoc test. [FN77] This opened the way for Justice Stevens's extensive focus on the need for comprehensive review and fairness. He quoted from Justice O'Connor's earlier statement that "[t]he temptation to adopt what amount to per se rules in either direction must be resisted. The Takings Clause requires careful examination and weighing of all the relevant circumstances in this context." [FN78]

Somewhat at variance with these laudatory comments

about the need for comprehensive review in the context of the landowners' interests was the Court's discussion of the specifics of the individual moratoria:

This case actually involves two moratoria ordered by respondent Tahoe Regional Planning Agency (TRPA) to maintain the status quo while studying the impact of development on Lake Tahoe and designing a strategy for environmentally sound growth. The first, Ordinance 81-5, was effective from August 24, 1981, until August 26, 1983, whereas the second more restrictive Resolution 83-21 was in effect from August 27, 1983, until April 25, 1984. As a result of these two directives, virtually all development on a substantial portion of the property subject to TRPA's jurisdiction was prohibited for a period of 32 months. [FN79]

However, if Resolution 83-21 remained "in effect" until April 25, 1984, it did so only through extralegal means. By its terms, Resolution 83-21 expired on November 26, 1983. As the U.S. district court explained, "the ban was extended--although not by any affirmative ***440** action by TRPA, and not, contrary to what the defendants have implied, for any set period of time." [FN80]

TRPA staff members advised the Board that the end of the ninety-day period was approaching, and that absent an order by the Board to the contrary, the staff would continue to observe the moratorium. [FN81]

Since the Board never took any action in response to this "advice," the moratorium was, in fact, continued in effect by the staff.

Finally, however, on April 26, 1984, a new regional plan was adopted. TRPA Ordinance 84-1. The temporary moratorium initiated by Resolution 83-21 thus ended up lasting approximately eight months. [FN82]

On the day that TRPA Ordinance 84-1 was scheduled to take effect, implementation was enjoined at the behest of the State of California, which asserted that the new land-use controls were insufficiently stringent. [FN83] That injunction remained in place until TRPA adopted a revised plan in 1987, which prohibited construction on sensitive lands in the Tahoe Basin. [FN84]

The Court's decision did not address the constitutionality of TRPA's 1987 plan. Petitioners 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. [FN85]

In his dissent, Chief Justice Rehnquist attributed the pre-1987 ban on development to TRPA, since "the District Court enjoined the 1984 Plan because the Plan did not comply with the environmental requirements of respondent's regulations and of the Compact itself." [FN86] The majority concluded that this "novel theory of causation was not briefed, nor was it discussed during oral argument." [FN87] Furthermore, the Court asserted that the petitioners did not raise the issue "presumably because they understood ... we were only interested in the narrow question decided today [, i.e., Ordinance 81-5 and Resolution 83-21]." [FN88] Finally, the Court noted that petitioner's 1991 amendment to their complaint, challenging the 1987 plan as constituting a compensable ***441** taking, was barred by the California and Nevada statutes of limitations. [FN89]

While it might be reasonable to assume that the complexity of the litigation delaying a challenge to the 1987 plan and dereliction of TRPA in drafting its 1984 ordinance would constitute additional grounds for the Court to adopt a fairness-based "taking as a whole" approach, it merely concluded: "As the case comes to us, however, we have no occasion to consider the validity of those provisions." [FN90] Some ramifications of the Court's decision to exclude many important issues from its consideration of the case are treated in connection with the Court's emphasis on fairness. [FN91]

C. The Supreme Court's Narrow Holding

As Justice Stevens repeatedly emphasized, the Court's six to three holding was "narrow." It 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 while it is in effect--is a per se taking requiring payment of just compensation. Nothing in this holding was inconsistent with the answer sought by Petitioners' to their first certiorari question, which was that the Court reject the notion that temporary moratoria were never compensable.

Although the opinion contained broad dicta commending the virtues of planning and the role of fairness in takings adjudication, Justice Stevens specified that the Court merely was rejecting the application of Lucas's per se rule and reiterating the primacy of the "ad hoc" test adopted in Penn Central. "[W]e do not hold that the temporary nature of a land-use restriction precludes finding that it effects a taking[,]" he wrote, "we simply recognize that it should not be given exclusive significance one way or the other." [FN92] Furthermore, Justice Stevens added that "nothing that we say today qualifies [our First English] holding." [FN93]

Whatever Justice Stevens might have thought privately about the matter, these reassurances probably were necessary to prevent Justices Kennedy and O'Connor, who are the swing votes on takings issues, from writing concurring opinions.

D. The Supreme Court's Broad Dicta

While the holding in Tahoe-Sierra was narrow, the majority's dicta were quite extensive. The majority was greeted by supporters of ***442** land-use regulation as representing "a constitutional acceptance of the need for planning in our society." [FN94] The Court's "reticence about establishing formulaic rules for deciding land use cases" and recognition of "the pervasive nature of land use policy in modern society" were hailed as "significant victories for land use and environmental planning supporters, and setbacks for property rights proponents." [FN95] "The Court's opinion is, in short, a sweeping endorsement of the importance of comprehensive land use planning in areas, such as Lake Tahoe, dominated by fragile ecosystems." [FN96]

To be sure, victories in this passionately contested area of law are savored. [FN97] The fact that Tahoe-Sierra was the first clear-cut takings victory for planners and environmentalists since Keystone Bituminous Coal, [FN98] fifteen years earlier, undoubtedly added to the excitement. While this euphoria suggests that the Takings Clause has atrophied, wiser celebrants recognized that there is no reason to believe that Justices O'Connor and Kennedy have lost their basic commitment to protecting property rights. [FN99]

1. The Armstrong Principle and the Penn Central Polestar

Tahoe-Sierra celebrated and reinforced two basic doctrines of regulatory takings jurisprudence. The first is the observation, in Armstrong v. United States, [FN100] that "[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." [FN101] Tahoe-Sierra enshrined this dictum as the "Armstrong principle." [FN102] The second doctrine is the multifactor, ad hoc test of Penn Central Transportation Co. v. City of New York. [FN103]

***443** Justice O'Connor's concurring opinion in Palazzolo v. Rhode Island [FN104] melded fairness and ad hoc review even more seamlessly, as profusely quoted by Justice Stevens in Tahoe-Sierra:

> In her concurring opinion in Palazzolo, Justice O'Connor reaffirmed this approach: "Our polestar instead remains the principles set forth in Penn Central itself and our other cases that govern partial regulatory takings. Under these cases, interference with investment-backed expectations is one of a number of factors that a court must examine." [FN105]
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> More importantly, for reasons set out at some length by Justice O'Connor in her concurring opinion in Palazzolo v. Rhode Island, we are persuaded that the better approach to claims that a regulation has effected a temporary taking "requires careful examination and weighing of all the relevant circumstances." In that opinion, Justice O'Connor specifically considered the role that the "temporal relationship between regulatory enactment and title acquisition" should play in the analysis of a takings claim. [FN106]

2. Decoupling Physical and Regulatory Takings

It was undisputed that the moratoria in Tahoe-Sierra deprived the landowners of all economic beneficial use for the thirty-two month period of the Court's inquiry. [FN107] The Court earlier held the permanent physical occupation of private property to be compensable in Loretto, [FN108] the permanent deprivation of all economic use to be compensable as the equivalent of a physical occupation in Lucas, [FN109] and a temporal physical deprivation to be compensable in General Motors. [FN110] The only box in a type-of-deprivation by duration-of-deprivation matrix not determined to constitute a per se taking was the temporary deprivation of all economic use. The logical completion of the matrix, as Chief Justice Rehnquist put it, was to treat the temporary deprivation of economic use as a compensable "forced leasehold." [FN111]

The majority in Tahoe-Sierra set the stage for its contrary holding by decoupling physical and regulatory takings. Justice Stevens, extrapolating from the "longstanding distinction between acquisitions of property for public use ... and regulations prohibiting private uses," created a superficially similar dichotomy that would preclude ***444** "treat[ing] cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa." [FN112]

Furthermore, the Court made it clear that its holding in Lucas v. South Carolina Coastal Council [FN113] was limited to "the extraordinary circumstance when no productive or economically beneficial use of land is permitted." [FN114] The result, as described by the U.S. Court of Appeals for the Federal Circuit, is that "no categorical per se taking rule applies to temporary moratoria on land development." [FN115]

The combination of decoupling physical and regulatory takings and insistence that the Lucas per se test applies only when literally no remaining value is present

has the practical effect of removing Lucas as a factor in almost any planning moratorium that adversely affects a fee interest. [FN116]

3. Disposing of First English

The Court had declared in First English that temporary takings which "deny a landowner all use of his property are not different in kind from permanent takings." [FN117] In his dissent in Tahoe-Sierra, Justice Thomas drew upon this point and Lucas to assert that "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 property law prevent it from being deemed a taking." [FN118]

The majority opinion essentially denied that the "not different in kind" language possessed any significance. Justice Stevens simply asserted 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." [FN119] Judge Kozinski observed in his dissent from denial of en banc review that the Ninth Circuit panel had adopted Justice Stevens's ***445** First English dissent without citing it. [FN120] The observation might be equally applicable to the Supreme Court, which "avoided similarly overt references to the First English dissent, but the footprints are unmistakable." [FN121]

4. Parcel as a Whole: The Temporal Dimension

Having uncoupled temporary deprivations of economic use from Lucas and First English, Justice Stevens firmly hitched them to Justice William Brennan's "parcel as a whole" concept in Penn Central.

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole--here, the city tax block designated as the "landmark site." [FN122]

Justice Stevens embraced Judge Reinhardt's Ninth Circuit view that a "planning regulation that prevents the development of a parcel for a temporary period of time is conceptually no different than a land-use restriction that permanently denies all use on a discrete portion of property, or that permanently restricts a type of use across all of the parcel." [FN123] He added that "a regulation that affects only a portion of the parcel--whether limited by time, use, or space--does not deprive the owner of all economically beneficial use." [FN124]

5. Beneficial Use vs. Value

The Tahoe-Sierra majority opinion contains frequent references to "value" as well as to "use." [FN125] One commentator has noted that the Court "declined the landowners' invitation to distinguish use from value and, on that ground, to hold that the Lucas per se rule is triggered when all use is barred, even if some positive market value remains." [FN126] The question of use vs. value is important, in part, because ***446** market value may be derived not from permissible uses under a regulatory scheme, but perversely, because the regulatory scheme is so Draconian as to lead reasonable investors to speculate on its revocation. [FN127] In such a case, the parcel has value not under the use restriction but rather in contemplation of the removal of the use restriction.

In any event, Tahoe-Sierra does not reach this issue. The Court wrote:

> [A] permanent deprivation of the owner's use of the entire area is a taking of "the parcel as a whole," whereas a temporary restriction that merely causes a diminution in value is not. Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted. [FN128]

The gravamen of this analysis is that value is not eliminated by temporary restrictions because economic use is not eliminated. In more standard economics terminology, the value inhering in the parcel subject to the moratorium is the present discounted value of the anticipated future (post-moratorium) use of the parcel.

6. The Concept of Partial Regulatory Takings Reaffirmed

As the U.S. Court of Appeals for the Federal Circuit noted a decade ago: "Nothing in the language of the Fifth Amendment compels a court to find a taking only when the Government divests the total ownership of the property; the Fifth Amendment prohibits the uncompensated taking of private property without reference to the owner's remaining property interests." [FN129] The per se takings rule, adopted for instances of total deprivation of economic enjoyment in Lucas v. South Carolina Coastal Council, [FN130] was, as Tahoe-Sierra ex-

plains, "carved out" as an exception to the Penn Central multifactor test. [FN131]

In spite of Lucas being the exception and Penn Central being the general rule, some courts have opined that the absence of a total wipeout of owner rights and value means that there has been no violation of the Takings Clause. [FN132] The possibility that compensation ***447** would be due for a partial taking under Penn Central simply was dismissed. [FN133]

The Supreme Court intimated that partial takings indeed remain compensable in Palazzolo v. Rhode Island. [FN134] Tahoe-Sierra subsequently made this point explicit after acknowledging that Armstrong and Lucas involved total deprivations. "It is nevertheless perfectly clear that Justice Black's oft-quoted comment about the underlying purpose of the guarantee that private property shall not be taken for a public use without just compensation applies to partial takings as well as total takings." [FN135] In Cienega Gardens v. United States, [FN136] the Federal Circuit held that regulations that resulted in the loss of ninety-six percent in rate of return for a period of up to eight years constituted a compensable taking. "The holding of Tahoe- Sierra, thus, does not preclude recovery by plaintiffs who suffered less than a total loss but who do argue for recovery under a Penn Central analysis." [FN137]

Some proponents of increased regulation have found the Court's unequivocal affirmance of the compensability of partial regulatory takings to be "ominous." [FN138] Nevertheless, were compensation limited to cases where there is a total deprivation of use, sophisticated regulators could circumvent the Fifth Amendment simply by leaving little more than a token amount of beneficial enjoyment.

III. SOME COMMENTS ON "FAIRNESS"

A. "Fairness" and Property Rights in America

The Supreme Court's association of property rights jurisprudence with fairness is not new. Fifteen years before Armstrong v. United States, [FN139] the Court declared that just compensation law "undertakes to redistribute certain economic losses inflicted by public improvements***448** so that they will fall upon the public rather than wholly upon those who happen to lie in the path of the project." [FN140] Indeed, "[t]he constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness as it does from technical concepts of property law." [FN141]

It is not an exaggeration to say that the American republic was founded largely upon an appreciation of the role of property as a cornerstone of individual liberty and of organized society. [FN142] Property was the great focus of the Framers. [FN143] In every era since, the protection of property rights has gone hand-in-hand with the preservation of liberty. [FN144] What Tahoe-Sierra refers to as the "Armstrong principle" [FN145] has its analogues in a number of other cases of recent decades. Examples include: "[A] fundamental interdependence exists between the personal right to liberty and the personal right in property"; [FN146] "Individual freedom finds tangible expression in property rights." [FN147] "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances." [FN148]

B. Penn Central as Defining Taxonomy

Given the centrality of the three-factor Penn Central test, it is helpful to begin with the Supreme Court's dispositive language:

> While this Court has recognized that the "Fifth Amendment's guarantee ... [is] designed to bar Government from forcing some ***449** people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case."
>
> In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. [1] The economic impact of the regulation on the claimant and, particularly, [2] the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is [3] the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good. [FN149]

The brackets numbering the tests are added since it is not immediately obvious that investment-backed expec-

tations are anything more than a subset of economic impact. The character of the governmental action test might attempt to separate out physical invasions from all other types of regulations or attempt to distinguish one subset of permissible regulations from others.

In any event, the need to more readily characterize the physical invasion as a taking lasted only for four years, until the Court ruled in Loretto [FN150] that "a permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine." [FN151] The emphasis on investment-backed expectations apparently derives from a law review article in which Professor Frank Michelman intended to preclude compensation for speculators in land. [FN152] His view was based on "an argument that society may censure morally unacceptable behavior, ***450** and an argument that the taking clause need not recognize property losses discounted in land markets." [FN153]

In Tahoe-Sierra, the Court explains the test by quoting the language of Palazzolo: "The Penn Central analysis involves 'a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action.'" [FN154] In elucidating this "complex of factors," the California Supreme Court adopted a thirteen-factor test for regulatory takings in Kavanau v. Santa Monica Rent Control Board. [FN155] Its list comprised the three Penn Central factors and an additional ten:

Subsequent cases, as well as a close reading of Penn Central, indicate other relevant factors: (1) whether the regulation "interfere[s] with interests that [are] sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes"; (2) whether the regulation affects the existing or traditional use of the property and thus interferes with the property owner's "primary expectation"; (3) "the nature of the State's interest in the regulation" ...; (4) whether the property owner's holding is limited to the specific interest the regulation abrogates or is broader; (5) whether the government is acquiring "resources to permit or facilitate uniquely public functions" such as government's "entrepreneurial operations"; (6) whether the regulation "permit[s the property owner] ... to profit [and] ... to obtain a 'reasonable return' on ... investment"; (7) whether the regulation provides the property owner benefits or rights that "mitigate whatever financial burdens the law has imposed"; (8) whether the regulation "prevent[s] the best use of [the] land"; (9) whether the regulation "extinguish[es] a fundamental attribute of ownership"; and (10) whether the government is demanding the property as a condition for the granting of a permit. [FN156]

The California Supreme Court hastened to assure that this list is not comprehensive, and the factors should be applied as appropriate rather than used as a checklist. [FN157]

In addition to the Kavanau thirteen-factor test and the Penn Central three-factor test, Agins v. City of Tiburon [FN158] contains a two-factor ***451** test utilized in connection with facial takings claims. It might well be that the most comprehensive test is the one-factor test given by Justice Holmes in Pennsylvania Coal Co. v. Mahon--"if regulation goes too far it will be recognized as a taking." [FN159] In short, once the Court gave its broad imprimatur to comprehensive land-use regulation in Euclid, [FN160] taxonomies such as the three-factor test of Penn Central serve largely to rationalize decisions based on judges' unarticulated (and perhaps unarticulable) preferences.

In her concurring opinion in Palazzolo v. Rhode Island, [FN161] Justice O'Connor protested that reasonable investment-backed expectations should not be seen as "talismanic." [FN162] Nevertheless, she seemed to equate fairness largely with conformance to reasonable landowner expectations and with reasonable expectations to preacquisition notice of governmental regulations. [FN163] This approach, which Justice Stevens reached out to commend in Tahoe-Sierra, [FN164] may in large measure equate fairness with rules that are not ex post facto. [FN165]

While Justice Kennedy did not accept Justice Scalia's equivalence of complete deprivation of use with physical invasion in Lucas, his concurrence in the judgment in that case expressed concern about the very problem of lack of objective definitions that Scalia had addressed:

There is an inherent tendency towards circularity in this synthesis, of course; for if the owner's reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority, property tends to become what courts say it is. Some circularity must be tolerated in these matters, however, as it is in other spheres. [FN166]

***452** A decade later, Professor Richard Lazarus noted qualms that Penn Central is "unduly vague and ultimately incoherent." [FN167]

Be that as it may, Tahoe-Sierra has now made clear that Penn Central best expresses the Court's own uncertainty about takings analysis, and its ultimate conclusion that an analytical framework that promotes case-by-case adjudication is more likely to lead to sensible results than will any of the competing per se approaches advo-

cated by either property rights advocates or environmentalists. [FN168]

Obtaining sensible results might seem more like a legislative quest than a judicial one, but the emphasis on fairness in the Tahoe-Sierra dicta is suggestive that courts take on the role. Sensible results, however, flow from acts embodying both a specific intent to improve the public condition and a general intent to do so within a framework of the rule of law. As Justice Holmes reminded us, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." [FN169] By articulating the costs placed upon them by prolonged planning and other development moratoria, landowners in many cases may convince the courts that awarding just compensation is sensible and fair.

C. Physical, Permanent, and Police Power Regulations

The Supreme Court's takings jurisprudence provides that Penn Central's multifactor analysis [FN170] is not required in cases where there has been a permanent physical deprivation of property, [FN171] a temporary physical deprivation of property, [FN172] or a permanent regulatory deprivation of all economic use. [FN173] A subsequent opinion by Justice Stevens, in Brown v. Legal Foundation of Washington, [FN174] posits that per se analysis is also "more consistent" when private property is regulated to achieve a governmental benefit rather than to limit the owner's use of her property for police power purposes. [FN175]

***453** Tahoe-Sierra says that regulations which are regulatory, temporary, and promulgated to regulate land-use are subject to a Penn Central multifactor analysis. As the Court explains:

> 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 values in 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. [FN176]

The distinctions between physical and regulatory deprivations, permanent and temporary deprivations, and deprivations imposed to regulate the owner's use as opposed to imposed to achieve other government purposes all arise in Tahoe- Sierra and are important in dealing with growth moratoria claims that will arise in the future.

1. Physical vs. Regulatory Deprivation

It is perhaps curious that Tahoe-Sierra, a case noted for advocacy of balancing and nuance within a Penn Central framework, would draw such a strident and bright-line distinction between taking by physical occupation and taking by other displacements of landowner prerogatives. The majority justifies this result by asserting the plain meaning of the Fifth Amendment and by easily recognizable practical distinctions. Alas, however, the sharp distinctions look less clear when viewed critically, and the cost of imagined clarity is the loss of property rights--a more serious matter than the misidentification of species by amateur ornithologists.

The Court says that:

> In determining whether government action affecting property is an unconstitutional deprivation of ownership rights under the Just Compensation Clause, a court must interpret the word "taken." When the government condemns or physically appropriates the property, the fact of a taking is typically obvious and undisputed. ***454** When, however, the owner contends a taking has occurred because a law or regulation imposes restrictions so severe that they are tantamount to a condemnation or appropriation, the predicate of a taking is not self-evident, and the analysis is more complex. [FN177]

In asserting that "[w]hen the government physically takes possession ... it has a categorical duty to compensate," [FN178] the Court assumes that there are clear boundaries setting off the physical taking from the regulatory taking. Alas, there are not. Physical appropriations may be "typically" obvious, but not always. Consider a series of examples: the demolition of a private structure and erection of a fort; the commandeering of a building for government workers; [FN179] the flooding of private land behind a government dam; [FN180] the piloting of loud aircraft low and directly over private land; [FN181] the piloting of loud aircraft low and just outside the property line; the digging of a government pollution monitoring well; the regular parking of government vehicles on private land; the parking of government vehicles occasionally or episodically on private

land; the accidental demolition of a private building; and the government's construction of a high fence completely surrounding a private parcel. [FN182] Is a bright-line self-evident, separating what is a physical taking from what is not?

The Court acknowledged in Tahoe-Sierra that it had required compensation for the taking of leasehold interests, "even though that use is temporary." [FN183] It also acknowledged Chief Justice Rehnquist's argument in dissent that a temporary prohibition on all use should be treated as a per se taking under Lucas v. South Carolina Coastal Council. [FN184] According to Rehnquist:

The Lucas rule is derived from the fact that a "total deprivation of beneficial 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 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 ***455** a "temporary" ban on all economic use is a forced leasehold. For example, assume the following situation: Respondent is contemplating the creation of a National Park around Lake Tahoe to preserve its scenic beauty. Respondent decides to take a 6-year leasehold over petitioners' property, during which any human activity on the land would be prohibited, in order to prevent any further destruction to the area while it was deciding whether to request that the area be designated a National Park. [FN185]

Justice Stevens's majority opinion countered this argument with the assertion that condemnation of a leasehold would give the condemnor the right to use the property and to exclude others. "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." [FN186] The problem, of course, is that there is no difference beyond intent between the leasehold for preservation of scenic beauty and the temporary prohibition on disturbance of scenic beauty. Indeed, avoidance of the need to compensate owners through the casting of regulations in terms of harm prevention, rather than benefit creation, in large part led Justice Scalia to equate deprivation of all economic use with physical occupation in Lucas. [FN187]

In addition to the distinctions noted already, physical invasions might be both incidental and non-tortious, such as a seizure of contraband or instrumentalities or fruits of crimes. In that case, whatever recourse the owner might possess would be under the Fourth Amendment. [FN188] Also, there are physical aspects to the regulation of intangible property, such as rights in the process of transmitting information. It is not clear whether rules involving such relationships, such as those mandating connections to data networks, are physical or regulatory for Takings Clause purposes. [FN189]

Tahoe-Sierra probably is correct, in some generalized sense, when it asserts that the typical physical appropriation "usually represent[s] a greater affront to individual property rights." [FN190] But to say that physical invasions usually are more severe than regulations or for that matter, that physical invasions often could be distinguished from tortious incursions, or that permanent restrictions usually are more prolonged than temporary ones, hardly gives rise to confidence in an arbitrary rule stating that physical and regulatory takings claims are to be evaluated by different doctrines.

***456** 2. Permanent vs. Temporary Deprivation

The durational element of a permanent physical occupation is not necessarily to be taken literally. In Hendler v. United States, [FN191] the Court of Appeals for the Federal Circuit noted that "[a]ll takings are 'temporary,' in the sense that the government can always change its mind at a later time." [FN192] Later, in Skip Kirchdorfer, Inc. v. United States, [FN193] it explained that: "A 'permanent' physical occupation does not necessarily mean a taking unlimited in duration. A 'permanent' taking can have a limited term. In Hendler, this court concluded that the distinction between 'permanent' and 'temporary' takings refers to the nature of the intrusion, not its temporal duration." [FN194] Even here, however, the court runs together duration and intensity when it added that "[a] 'permanent' physical occupation, as distinguished from a mere temporary trespass, involves a substantial physical interference with property rights." [FN195]

In Tahoe-Sierra itself, TRPA first deprived the TSPC landowners of all economically beneficial use of their property in 1981--over twenty-two years ago. Given the posture in which the case reached the Supreme Court, the majority would not consider that the prohibition on development certainly seems permanent. Chief Justice Rehnquist argued in dissent that the Court consider a six-year period. [FN196] The majority took into account only a thirty-two month period. [FN197] Yet every one of these time periods, from longest to shortest, exceeds by a substantial margin the two-year period that constituted a permanent deprivation, which gave rise to the per se rule in Lucas v. South Carolina Coastal Council. [FN198]

3. Deprivations to Regulate Use Versus Regulations to Achieve Other Purposes

As was noted earlier, the decoupling of physical and regulatory takings doctrine was an important element of Tahoe-Sierra: [FN199]

[The] 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 ***457** physical takings as controlling precedents for the evaluation of a claim that there has been a "regulatory taking," and vice versa. [FN200]

There is a significant defect with the logic of this sentence. The Court here uses the term "acquisitions ... for public use" in the sense of physical acquisitions. [FN201] However, regulations may be "for public use" as well. The lack of a clear demarcation between regulations that take private property for public use and those that regulate the owner's own use of the property was the point of Justice Scalia's discussion in Lucas regarding the conceptual flaws of a jurisprudence based on the difference between a conferral of benefit and a prevention of harm. [FN202] Indeed, the ease by which all but "stupid" legislative staff could dress benefit-conferring regulations to look like harm- preventing regulations [FN203] led Justice Scalia's quest for discerning the more objective "restrictions that background principles of the State's law of property and nuisance already place upon land ownership." [FN204]

The Supreme Court's post-Tahoe-Sierra interest on lawyers' trust accounts (IOLTA) decision, Brown v. Legal Foundation of Washington, [FN205] again brings up the key element of whether the regulation is intended to regulate the owner, in his or her use of the property, or whether it is intended for another unrelated purpose. Brown considered the Washington state IOLTA plan, which mandated that law-yers place in special accounts funds belonging to clients that are expected to generate so little interest as to make it impractical to transmit that interest to the clients. [FN206] Lawyers further are required to transfer the accumulated interest in those accounts to legal services organizations designated by the court. [FN207] The petitioners claimed, under the doctrine that interest belongs to the owner of the principal, that the interest constituted their property. [FN208] In Phillips v. Washington Legal Foundation, [FN209] a case involving the similar Texas IOLTA program, the Court held "that the interest income generated by funds held in IOLTA accounts is the 'private property' of the owner of the principal." [FN210] Writing for the Court in Brown, Justice Stevens "agree[d] that a per se approach is more consistent with the reasoning in our Phillips opinion than Penn Central's ad hoc analysis." [FN211]

***458** Brown ultimately upheld the IOLTA program on the ground that the law clients suffered no pecuniary loss and that therefore there was no violation of the Just Compensation Clause. [FN212] Nevertheless, Brown apparently stands for the proposition that the commandeering of an intangible asset to achieve a governmental purpose unrelated to that asset constitutes a taking, even when no pecuniary loss results to its owner.

4. Consequentialist Arguments Favoring a Penn Central Approach

While Justice Stevens's Tahoe-Sierra opinion discussed theory, it also asserted that refraining from imposing a per se test for planning moratoria would have salutary consequences.

Unlike the "extraordinary circumstance" in which the government deprives a property owner of all economic use, moratoria ... are used widely among land- use planners to preserve the status quo while formulating a more permanent development strategy. In fact, the consensus in the planning community appears to be that moratoria, or "interim development controls" as they are often called, are an essential tool of successful development. [FN213]

Appended to this observation, the Court quoted:

With the planning so protected, there is no need for hasty adoption of permanent controls in order to avoid the establishment of non-conforming uses, or to respond in an ad hoc fashion to specific problems. Instead, the planning and implementation process may be permitted to run its full and natural course with widespread citizen input and involvement, public debate, and full consideration of all issues and points of view. [FN214]

The full and natural course of planning undoubtedly has great merit, especially in the esteem of professional planners. It also invokes the Progressive Era spirit of reform through the disinterested application of professional expertise that was the driving force behind Euclid. [FN215] But the neat notion that planning would establish a harmonious community with no further need for change has long ago faded. The everything-in-its-place homogeneity of Euclidean use zones was famously exposed for its sterility by Jane Jacobs over forty ***459** years ago, [FN216] and is now attacked by opponents of low density development as wasting natural resources by mandating "sprawl." [FN217] Planning and land development have an iterative relationship. Planning affects development, but development also affects planning. Given the dynamic nature of our society, planning cannot be a one- time cure for disorderly development.

In Tahoe-Sierra, Justice Stevens feared that a rule making moratoria compensable would unduly discourage planning. [FN218] In practice, however, that is apt not to be true. As Stevens recognized, most neighborhood zoning restrictions, such as mandatory setbacks of building from the sidewalk, create a "reciprocity of advantage." [FN219] Landowners constrained by these types of regulations receive offsetting benefit from the imposition of the same restrictions on all their neighbors, which explains consensual acceptance of the far more stringent mutual restrictions imposed by homeowners' associations. [FN220] The taking serves as its own compensation.

The sound principle of reciprocity of advantage can be abused, of course. Justice Stevens's observation that "there is reason to believe property values often will continue to increase despite a moratorium" [FN221] is a prime example of the post hoc, prompter hoc fallacy. Almost certainly, most of the rise in prices of land in areas of rapid growth is attributable to that growth itself, rather than faith that planners will manage growth better than investors. Stevens cited one case "noting that land values could be expected to increase 20% during ***460** a 5-year moratorium on development." [FN222] If planning moratoria truly have such wondrous effects, "why not sign up for a 10- year moratorium and glean a 40 percent return?" [FN223] Furthermore, most proper regulations that have an unreasonable impact on isolated landowners are ripe candidates for variances [FN224] or entail losses of such modest amounts as to make recourse to litigation exceedingly unlikely.

D. From Parcel as a Whole to Takings as a Whole

1. A Broader View of Parcel as a Whole

As discussed earlier, [FN225] Justice Stevens's Tahoe-Sierra opinion enthusiastically reiterated the doctrine developed by Justice Brennan in Penn Central that the Court must view regulatory takings claims in the context of the aggregate of the landowner's rights--"the parcel as a whole." [FN226] Yet, quite anomalously, Tahoe-Sierra did not deal with the whole of the issues fairly raised by the case. As Richard Lazarus noted in celebration of the Tahoe-Sierra decision, "[T]he narrowness of the slice of that litigation and the background facts before the Court in Tahoe-Sierra may well have played a significant role in securing an outcome favorable to the government." [FN227]

Justice Brennan's invocation of "parcel as a whole" gave no provenance for the term. Although he grounded the term in takings jurisprudence, [FN228] the Court's existing doctrine had required condemnation for partial takings. [FN229] Rather, the "parcel as a whole" doctrine arose because the need for determination of the relevant parcel was implicit and unavoidable given the Court's takings jurisprudence. In Keystone Bituminous Coal, [FN230] Justice Stevens stated for the majority that

> [b]ecause our test for regulatory taking requires us to compare the value that has been taken from the property with the value that ***461** remains in the property, one of the critical questions is determining how to define the unit of property "whose value is to furnish the denominator of the fraction." [FN231]

The opposite position, presented in Chief Justice Rehnquist's dissent in Keystone, is that a taking occurs whenever "the government by regulation extinguishes the whole bundle of rights in an identifiable segment of property." [FN232] The doctrine of "parcel as a whole" responds to the relevant parcel problem by maximizing the size of the relevant parcel.

While Justice Stevens maintained that the Court has "consistently rejected" approaches that would sever a parcel, [FN233] Justice Thomas asserted in dissent that the "majority's decision to embrace the 'parcel as a whole' doctrine as settled is puzzling." [FN234] He quoted from Lucas, [FN235] which had questioned the rule, and from Palazzolo, [FN236] which only a year prior to Tahoe-Sierra seemed to invite its reconsideration.

The parcel as a whole rule finds its justification in preventing self-serving landowners from engaging in "conceptual severance" by defining the affected property right as exactly coextensive with the regulatory deprivation, thus always resulting in a total deprivation. [FN237] However, there are several problems with this approach. One is determining when the deprivation of a stick from the property's bundle of sticks is determinative and when it is not. [FN238] Another problem is that terms such as "parcel as a whole" and "conceptual severance" imply that there is the full parcel to start with and that manipulation ***462** can redound only to the landowner's favor. But clearly some definitions of property are too broad, [FN239] reflecting manipulation in the government's favor. I have termed such manipulation for the purpose of enlarging the relevant parcel "conceptual agglomeration." [FN240]

Although neither the landowner nor the state can be trusted to provide a definition free from self-interest, an objective test grounded in economic viability can lead to effective scrutiny of the landowner's asserted interest. [FN241] Alternatively, the landowner could satisfy an objectivity requirement by showing that the asserted property interest taken constitutes a "commercial unit"

that is traded in the vicinity. [FN242]

By insisting on "parcel as a whole," the Court is adhering to a doctrine bereft of the flexibility that market or similar forces might provide. This does not mean that cases under "parcel as a whole" determine that the relevant parcel always is the extent of land received under the deed that includes the area where the regulation purportedly works a taking. To the contrary, the area might be smaller, especially where the landowner can demonstrate that part of the land was sold off long before the regulation at issue was promulgated. [FN243] It might also be larger when other lands in the vicinity belonging to the owner have related uses. [FN244] As Judge Jay Plager of the U.S. Court of ***463** Appeals for the Federal Circuit put it, "Our precedent displays a flexible approach, designed to account for factual nuances." [FN245]

In spite of the difficulties in determining what is the relevant parcel under the "parcel as a whole" approach, Tahoe-Sierra seems to commit the Court to that framework. The tradeoff, presumably, is that the facially rigid, but in fact more subjective, test allows greater room for fairness considerations.

2. Fairness Requires Consideration of the Taking as a Whole

If fairness requires "that 'the aggregate must be viewed in its entirety'" [FN246] when examining the denominator of the takings fraction, [FN247] it should require a similar aggregation of restrictions constituting the numerator. Just as parcel as a whole focuses on the aggregate of the landowners benefit from ownership, taking as a whole similarly would focus on the aggregate of the landowner's deprivation from regulation of the parcel. [FN248]

The stark fact is that the TSPC landowners likely lost their case before it was briefed and argued.

The government won Tahoe-Sierra because of the narrowness of the legal issue considered by the Court: whether TRPA's 32-month moratorium on development amounted to a per se Lucas taking in a facial challenge. Entirely removed from the judicial equation were factors that could have depicted the petitioner landowners' claims in a more sympathetic and legally defensible light. In their stead was a legal issue that effectively compelled the petitioners to propound a legal theory that had virtually no chance of prevailing before the Court, which is why the petitioners' briefs on the merits repeatedly sought to rewrite the question presented before the Court. [FN249]

As noted earlier, the Court was adamant in considering the landowners' deprivation of all economically viable use of their land only in the context of the land's use for the entire future after the moratoria terminated. [FN250] On the other hand, the Court simply has not taken ***464** into account that many of the Tahoe-Sierra landowners were first precluded from all economically beneficial use of their land in 1981 and that they have remained unable to build the homes they had planned or to make other use of their property for twenty-two uninterrupted years. [FN251] Likewise, it was clear at the outset that preventing the eutrophication of Lake Tahoe would require severe restrictions in "sensitive environmental zones" along streams for an indefinite period. [FN252]

Justice Stevens acknowledged for the majority that "[t]he 'rolling moratoria' theory [i.e., the continuity of deprivation] was presented in the petition for certiorari, but our order granting review did not encompass that issue." [FN253] He also explained that "the case was tried in the district court and reviewed in the Court of Appeals on the theory that each of the two moratoria was a separate taking, one for a 2 year period and the other for an 8 month period." [FN254]

It is instructive to juxtapose Justice Stevens's response to the fact that the grant of certiorari did not encompass the last eighteen or nineteen years of the twenty-two year deprivation on use, with his action, one year later, in the Court's most recent property rights case, Brown v. Legal Foundation of Washington. [FN255] Brown, as previously noted, involved a rule imposed by the Supreme Court of Washington requiring that client trust funds that were not of sufficient size or duration to generate net interest if placed in separate accounts for the individual clients be deposited in an interest on lawyers trust accounts (IOLTA) account for the benefit of legal services programs designated by the state court. [FN256] The issues decided below and briefed and argued in the U.S. Supreme Court were whether the mandatory deposit of client funds into the IOLTA account or the disbursement of the interest on those funds to the legal services programs constituted compensable takings.

Nevertheless, Justice Stevens, writing for the majority, declared:

While it confirms the state's authority to confiscate private property, the text of the Fifth Amendment imposes two conditions on ***465** the exercise of such authority: the taking must be for a "public use" and "just compensation" must be paid to the owner. In this case, the first condition is unquestionably satisfied. If the State had imposed a special tax, or perhaps a system of user fees, to generate the funds to finance the legal services supported by the Foundation, there would be no

question as to the legitimacy of the use of the public's money. [FN257]

Justice Scalia noted in his dissent that these "ruminations ... come as a surprise, inasmuch as they address a nonjurisdictional constitutional issue raised by neither the parties nor their amici." [FN258] TSPC's attorney subsequently made the same point, albeit more colorfully:

"Ponder this: the same Justice Stevens who couldn't think of a way to deal with the rolling moratoria issue in Tahoe-Sierra because they hadn't granted cert on that issue had no trouble dealing with the public use issue in Brown when nobody raised the issue at all. Curiouser and curiouser." [FN259]

From the perspective of a traditional and prudential court, the discordance should have been resolved by forbearance in Brown from raising nonjurisdictional issues not briefed and argued. The public use issue also contributed nothing to shape the outcome. On the other hand, were the Court in Tahoe-Sierra to have confronted the fact that landowners of modest means have been deprived of all use of their property for an aggregate period of twenty-two years and running, its view of the nature of interim moratoria, its focus on fairness, and the "seven theories" it enunciated should have been profoundly affected. [FN260]

3. Highly-Segmented Takings

It is so commonplace as to appear unremarkable that eminent domain actions often are directed against small slivers of property. Typically, the condemnor will acquire only a physical part of the owner's parcel, a practice that has become familiar in part because of the acquisition of strips of rural land for highway expansion. [FN261] A sometimes more problematic example involves the condemnee that ***466** intends to acquire a larger set of rights, has been successful in negotiating purchases from the other owners, and utilizes eminent domain to acquire the interest of the holdout. [FN262]

An anti-segmentation rule applies to the partial condemnation of parcels. The condemnor must pay severance damages for injury to that part of the parcel not condemned. [FN263] The Supreme Court applied this principle to a temporary taking, which involved the condemnation of a leasehold interest in a building, in United States v. General Motors Corp. [FN264] The condemnation was a short-term leasehold in the middle of the condemnee's long-term leasehold. Just compensation was held to include severance damages to that part of the owner's interest not taken:

If the Government need only pay the long-term rental of an empty building for a temporary taking from the long-term tenant a way will have been found to defeat the Fifth Amendment's mandate for just compensation in all condemnations except those in which the contemplated public use requires the taking of the fee simple title. In any case where the Government may need private property, it can devise its condemnation so as to specify a term of a day, a month, or a year, with optional contingent renewal for indefinite periods, and with the certainty that it need pay the owner only the long-term rental rate of an unoccupied building for the short term period, if the premises are already under lease or, if not, then a market rental for whatever minimum term it may choose to select, fixed according to the usual modes of arriving at rental rates. And this, though the owner may be damaged by the ouster ten, a score, or perhaps a hundred times the amount found due him as "fair rental value." Whatever of property the citizen has the Government may take. When it takes the property ... terminating altogether his interest, under the established law it must pay him for what is taken, not more; and he must stand whatever indirect or remote injuries are properly comprehended within the meaning of "consequential damage" as that conception has been defined in such cases ....

It is altogether another matter when the Government does not take his entire interest, but by the form of its proceeding chops it into bits, of which it takes only what it wants, however few or minute, and leaves him holding the remainder, which may then be altogether useless to him, refusing to pay more than the "market rental value" for the use of the chips so cut off. This is neither the "taking" nor the "just compensation" the Fifth Amendment contemplates. ***467** The value of such an occupancy is to be ascertained, not by treating what is taken as an empty warehouse to be leased for a long term, but what would be the market rental value of such a building on a lease by the long-term tenant to the temporary occupier. [FN265]

According to Tahoe-Sierra, General Motors is, perhaps, not on point, since different rules apply to regulatory takings than to physical takings. [FN266] Nonetheless, it is difficult to square the application of Tahoe-Sierra's fairness-based jurisprudence to the denominator of the takings fraction while permitting abusive segmentation with respect to the numerator.

Another example of deprivation of severance damages is the North Carolina Supreme Court's recent decision in Department of Transportation v. Rowe. [FN267] Traditionally, severance damages with respect to the remainder of a parcel partially condemned have been offset by the "special benefits" that will rebound to the owner of the parcel from the project for which the condemnation is undertaken. [FN268] In Rowe, the court extended this

offset to "general benefits" received by the owner as well. [FN269] This means that severance damages are reduced for benefits received from the condemnation project, even though the condemnees received no greater general benefits than others in the vicinity who suffered no condemnation at all. Also, the landowner subjected to the condemnation probably contributed to the cost of the project through taxation, thus conferring general benefit upon the community.

E. Cumulative Actions of Multiple Government Entities

Another issue related to fairness is whether the deprivation of property should be treated differently for takings purposes if it results from the actions of one governmental entity or from the actions of two or more government entities. In Ciampetti v. United States, [FN270] the owner's lands, constituting a collection of 573 lots, were subject to federal and state wetland regulations applicable to irregularly-bounded and not entirely coextensive areas. [FN271] The owner's state takings claim was rejected on the grounds that there was federal preemption. [***468** FN272] The claims court subsequently rejected the Federal Government's assertion that the denial of state permits was the basis of the federal denial because the Army Corps of Engineers had made an independent merit-based determination under federal clean water regulations. [FN273] In effect, the claims court rejected an attempt to deflect responsibility to a state for what it determined to be a federal deprivation.

In Lost Tree Village Corp. v. City of Vero Beach, [FN274] an owner of island property brought an inverse condemnation action against a town with regulations precluding development unless there was a bridge and against a city with regulations precluding construction of the bridge. [FN275] The court reversed dismissal of the developer's suit, quoting from Ciampetti [FN276] and concluding: "Both Constitutional provisions emphasize the taking of the property, not the governmental unit responsible for the taking." [FN277] In a sense, both Ciampetti and Lost Tree Village mirror the result that occurs when a condemnor wishes to acquire a fee simple in land upon which multiple parties have ownership interests. The condemnor pays the fair market value of the fee simple, and the private claimants must provide or litigate how the proceeds are to be allocated. [FN278]

F. Fairness Requires Consideration of Who Will Bear the Burden

As noted earlier, the landowners represented by TSPC had modest lots in existing and largely developed subdivisions in the hills above Lake Tahoe. [FN279] While extremely expensive and large homes have been built on the lakeshore, [FN280] and resort districts catering to numerous tourists are thriving, [FN281] the TSPC owners have been bereft ***469** of all use and enjoyment of their land since 1981. [FN282] These considerations led the petitioners in Tahoe-Sierra to pose the following certiorari question, which the Court did not accept:

> 3. Can a land use regulatory agency purport to "protect the environment" at a major regional location (here, Lake Tahoe) by compelling a selected group of individual landowners to forego all use of their individual homesites, and thereby compel a de facto donation of their land for public use without compensation? [FN283]

While Justice Stevens's majority opinion did not comment on this issue as such, it contained an explanation that touched upon it:

> [W]ith a temporary ban on development there is a lesser risk that individual landowners will be "singled out" to bear a special burden that should be shared by the public as a whole. At least with a moratorium there is a clear "reciprocity of advantage," because it protects the interests of all affected landowners against immediate construction that might be inconsistent with the provisions of the plan that is ultimately adopted. "While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others." In fact, there is reason to believe property values often will continue to increase despite a moratorium. Such an increase makes sense in this context because property values throughout the Basin can be expected to reflect the added assurance that Lake Tahoe will remain in its pristine state. [FN284]

The notion of "reciprocity of advantage," which the Court borrows from Justice Holmes, [FN285] works so long as the category of landowners burdened by the restrictions individually is coextensive with the category of landowners and citizens who are benefited. There have been times when the Supreme Court has applied this concept accurately [FN286] and times when it has not. [FN287] In Tahoe-Sierra, however, it is ***470** clear that the beneficiaries of the planning moratoria are the wealthier shoreline landowners, the merchants who derive significant value from tourism, and the people throughout the nation and beyond who derive "existence value" from knowing that the Tahoe Basin is preserved. [FN288]

IV. SEVEN THEORIES FOR CHALLENGING UNREASONABLE PLANNING MORATORIA

For most attorneys, the study of leading Supreme Court cases is retrospective in nature but prospective in purpose. The object is to assist clients to conform future conduct to the law, to settle ambiguities in their clients' favor, and to resolve interstitial questions in their clients' interest. In Tahoe-Sierra, the practical and procedural constraints that prevented the landowners' case from being fully explored in the Supreme Court have been noted. In future controversies involving planning moratoria, such constraints might be avoided, and Tahoe-Sierra provides a roadmap in the form of its articulated "seven theories" of how landowners might prevail. [FN289]

Tahoe-Sierra rejected the argument that Lucas, First English, and the Court's other regulatory takings cases compel the use of a per se test for planning moratoria. [FN290] It raised up the Armstrong fairness principle [FN291] and reiterated the need for utilizing the "fact specific" inquiry that Penn Central mandates. [FN292] The Court's "seven theories" dialogue indicates its recognition of the need to curtail abusive growth moratoria, to make clear that fairness is the touchstone in this effort, and to create a taxonomy for categorizing Penn Central challenges to specific development moratoria.

Before parsing the individual provisions, it is instructive to view Justice Stevens's seven theories as a whole:

> Considerations of "fairness and justice" arguably could support the conclusion that TRPA's moratoria were takings of petitioners' property based on any of seven different theories. First, even ***471** though we have not previously done so, we might now announce a categorical rule that, in the interest of fairness and justice, compensation is required whenever government temporarily deprives an owner of all economically viable use of her property. Second, we 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" which were put to one side in our opinion in First English. Third, we could adopt a rule like the one suggested by an amicus supporting petitioners that would "allow a short fixed period for deliberations to take place without compensation--say maximum one year--after which the just compensation requirements" would "kick in." Fourth, with the benefit of hindsight, we might characterize the successive actions of TRPA as a "series of rolling moratoria" that were the functional equivalent of a permanent taking. Fifth, were it not for the findings of the District Court that TRPA acted diligently and in good faith, we might have concluded that the agency was stalling in order to avoid promulgating the environmental threshold carrying capacities and regional plan mandated by the 1980 Compact. Sixth, apart from the District Court's finding that TRPA's actions represented a proportional response to a serious risk of harm to the lake, petitioners might have argued that the moratoria did not substantially advance a legitimate state interest. Finally, if petitioners had challenged the application of the moratoria to their individual parcels, instead of making a facial challenge, some of them might have prevailed under a Penn Central analysis. [FN293]

A. Equating Temporary Moratoria to Temporary Physical Takings

> [E]ven though we have not previously done so, we might now announce a categorical rule that, in the interest of fairness and justice, compensation is required whenever government temporarily deprives an owner of all economically viable use of her property. [FN294]

Conceptually, the establishment of a rule that development moratoria are takings per se would put regulatory takings on the same footing as physical appropriations of land, which have long been held compensable, regardless of whether the appropriations are permanent or temporary. [FN295] After Tahoe-Sierra, this approach appears to be dead.

***472** Justice Stevens supported Tahoe-Sierra's result by citing practical concerns about the hindrance of various public functions that such a rule would entail. Some are mundane ("normal delays in obtaining building permits"), [FN296] and others are perhaps more quixotic ("orders temporarily prohibiting access to crime scenes, businesses that violate health codes, fire- damaged buildings"). [FN297] Perhaps most important, Stevens added that a strict per se rule would make "routine government processes prohibitively expensive." [FN298]

These practical reasons being disposed of, the Court rehearsed its "Penn Central as polestar" [FN299] approach:

> More importantly, for reasons set out at some length by Justice O'Connor in her concurring opinion in Palazzolo v. Rhode Island, we are persuaded that the better approach to claims that a regulation has effected a temporary taking "requires careful examination and weighing of all the relevant circumstances." In that opinion, Justice O'Connor specifically considered the role that the "temporal relationship between regulatory enactment and title acquisition" should play in the analysis of a takings claim. [FN300]

In fact, a strict per se approach to regulatory takings is inconsistent with any theory of land-use regulation beyond nuisance abatement. [FN301] The Court clearly

was not ready to entertain such an approach, and this first theory is a straw man serving as an admonishment that the Court supports planning and that per se arguments to the contrary will be rejected.

There is, however, one important caveat: Tahoe-Sierra carefully limits its application of the "parcel as a whole" rule to temporal segmentation only with respect to fee simple ownership. The majority declared that 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 aspects of the owner's interest." [FN302] Concomitantly, "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." [FN303] A lesser term than a fee simple might be rendered valueless because it might terminate before the planning moratorium is set to expire. This might ***473** result in a complete deprivation of value and a per se taking under Lucas. [FN304] Even if the moratorium would (or might) expire first, the owner's subsequent beneficial use of the parcel might be for only a short time. The upshot of this is that the shorter the duration of the owner's estate, the more likely it would be that the moratorium would be deemed a Penn Central taking. [FN305]

B. Moratoria in Excess of Normal Delays

[W]e 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" which were put to one side in our opinion in First English. [FN306]

Given the infeasibility of a strict rule denominating development moratoria as takings, [FN307] a categorical rule tempered by notions of reasonableness might protect private property rights while at the same time allowing for permissible governmental review of land development. "Normal delays," the term used in First English to describe a possible exception to the Court's holding that compensation is the appropriate remedy for a temporary taking, seems well suited to this task. [FN308]

The Court concedes that a "narrower rule that excluded the normal delays associated with processing permits ... would certainly have a less severe impact on prevailing practices." [FN309] Contravening this, it adds that a narrower rule "would still impose serious financial constraints on the planning process," which is important, since moratoria like those in Tahoe-Sierra are widely used and such interim growth controls "are an essential tool of successful development." [FN310]

Given the Court's recent aversion to bright-line rules regarding regulatory takings evidenced in Palazzolo [FN311] and Tahoe-Sierra, it is ***474** understandable that the Court would be hesitant to define "normal delay." The problem relates in part to the difficulty in defining delay, which seems like a fact-laden concept and therefore inauspicious in developing a per se rule. It also has to do with normal, which brings up the question of reciprocity of advantage. It is normal that delays in planning for residential neighborhoods might be relatively short, and that delays in planning for very complex and stressed areas such as the Tahoe Basin would extend much longer. There is an obvious tension between normal delay as it pertains to the TSPC landowner's modest residential home and normal delay as it pertains to planning for the conservation of large, complex, and nationally important environmental features. [FN312]

Justice Stevens adds that "even the weak version of petitioners' categorical rule would treat these interim measures as takings regardless of the good faith of the planners, the reasonable expectations of the landowners, or the actual impact of the moratorium on property values." [FN313] While good faith is expected of government officials, it is not a substitute for just compensation even under a jurisprudence based on fairness.

In short, "normal delay" is not a viable test for whether a planning moratorium constitutes a taking. However, the fact that the duration of a moratorium significantly exceeds the duration customary under similar circumstances would greatly enhance the possibility that the moratorium was compensable under the Tahoe-Sierra fairness test.

C. Moratoria in Excess of Specified Periods

[W]e could adopt a rule like the one suggested by an amicus supporting petitioners that would "allow a short fixed period for deliberations to take place without compensation--say maximum one year--after which the just compensation requirements" would "kick in." [FN314]

A rule shifting a burden or a presumption and employing a somewhat arbitrary trigger is a common judicial technique. The Supreme Court's Miranda rule is a prophylactic measure to prevent abuse. [FN315] The "individualized determination" and "rough proportionality" rules ***475** of Dolan v. City of Tigard [FN316] similarly try to prevent abuse, since they apply to discretionary exactions of property by administrators. Time limits on

planning moratoria would serve a similar prophylactic function. However, Justice Stevens, quoting the majority in Palazzolo, declared that specific time limits on moratoria are "simply 'too blunt an instrument' for identifying" cases of abuse. [FN317] The fact that many states have statutory time limits on planning moratoria was duly noted in Tahoe Sierra as well, [FN318] together with the observation that "[f]ormulating a general rule of this kind is a suitable task for state legislatures." [FN319]

After Tahoe-Sierra, the idea of imposition of an arbitrary limit on the duration of non-compensable development moratoria seems dead. Nonetheless, the Court issued a rather direct warning that length does matter: "It may well be true that any moratorium that lasts for more than one year should be viewed with special skepticism." [FN320] Although the Court in Tahoe-Sierra found that the complexity of the ecology of the Tahoe Basin resulted in the thirty-two month moratorium passing muster, [FN321] future excess duration claims are by no means precluded. In Eastern Minerals International, Inc. v. United States, the court of federal claims found that a six year delay by the Office of Surface Mining in considering a mining permit application stated a takings claim based on alleged extraordinary delay. [FN322] A year later it awarded plaintiffs some $20 million. [FN323]

In Tabb Lakes, Ltd. v. United States, the U.S. Court of Appeals for the Federal Circuit had earlier declared that unreasonable delay would constitute a taking, albeit from the date when the government's conduct became unreasonable. [FN324] As a continued expression of this more tempered view, the Federal Circuit reversed Eastern Minerals, under the name Wyatt v. United States. [FN325] The court found that if there were a delay, it was not "extraordinary." [FN326] "The length of the ***476** delay is not necessarily the primary factor to be considered when determining whether there is extraordinary government delay. Because delay is inherent in complex regulatory permitting schemes, we must examine the nature of the permitting process as well as the reasons for any delay." [FN327] Furthermore, the Federal Circuit's recent decision in Cooley v. United States [FN328] noted that, pursuant to Tahoe-Sierra, compensation based on an extraordinary delay claim would have to take into account the life of the property remaining after the regulation is lifted. [FN329]

The case law is quite tolerant of long delays in the issuance of permits, and landowners with larger projects are particularly susceptible to government's assertion that delay arises from the complex nature of the facts and policies to be evaluated. This suggests that landowners would have a very difficult time raising an extraordinary delay argument. However, unwarranted delays typically are associated with more than ineptitude. According to the Federal Circuit in Wyatt, "it is the rare circumstance that we will find a taking based on extraordinary delay without a showing of bad faith." [FN330] In Cooley, the Federal Circuit reaffirmed that takings based on extraordinary delay in the absence of bad faith are "rare creatures." [FN331]

The Court in Cooley added that, "[i]n conducting a Penn Central analysis, the trial court may weigh whether the [regulator's] conduct evinces elements of bad faith. A combination of extraordinary delay and intimated bad faith, under the third prong of the Penn Central analysis, influence the character of the governmental action." [FN332] Such an analysis might be the key to a landowner prevailing in a planning moratorium case. As it happens, an example of the genre of extraordinary delay coupled with bad faith might be found in Cooley itself. [FN333]

D. Rolling Moratoria

[W]ith the benefit of hindsight, we might characterize the successive actions of TRPA as a "series of rolling moratoria" that were the functional equivalent of a permanent taking. [FN334]

***477** When should a series of related but ostensibly separate moratoria on development be regarded as a single moratorium? This issue seems implicit in the facts of Tahoe-Sierra and was explicitly raised in TSPC's petition for certiorari. [FN335] The Supreme Court limited certiorari so as to exclude sequential moratoria and refused to discuss it on the ground that its grant of review did not encompass that issue. [FN336] Nonetheless, the Court did recite the finding below that "each of the two moratoria was a separate taking, one for a 2-year period and the other for an 8-month period." [FN337]

1. Discerning When Moratoria Are Related

It is difficult to understand how each moratorium in Tahoe-Sierra was a separate taking. As the Court acknowledged, "'no regional plan was in place as of that date' [when the first moratorium terminated]. TRPA therefore adopted [the second moratorium]". [FN338] Furthermore, as was not indicated in the Court's opinion, between the expiration of the first moratorium and the promulgation of the second was a gap. The district court found that during this period the first moratorium "was extended--although not by any affirmative action by TRPA, and not, contrary to what the defendants have

implied, for any set period of time." [FN339] These facts clearly indicate that TRPA did not consider the moratoria to be separate.

In analyzing other aspects of post-Tahoe-Sierra development moratoria, counsel are apt to focus on the facts as they existed at the time the moratoria first were imposed. [FN340] In considering whether sequential moratoria constitute one rolling moratorium, however, it is ***478** necessary to focus primarily on the facts as they exist at the time each moratorium subsequent to the first is promulgated. It is helpful to consider three hypothetical situations. In each, an initial moratorium is imposed so that planners could consider the implications of rapid residential development in an agricultural area. In each as well, a subsequent moratorium is imposed as the termination date of the original moratorium is approaching.

• An earthquake just caused extensive damage in the area, and the second moratorium was promulgated so that building code standards pertaining to construction of structures could be reconsidered.

• The subsequent moratorium is imposed because revision of the locality's comprehensive plan to deal with extraordinary growth will take longer than initially contemplated.

• The subsequent moratorium is imposed to consider the need for a new regional waste treatment plant. It provides that a few low-water intensive uses may be established in certain areas. At the same time, the locality announces that it would buy land in the area at what plausibly is their (low) fair market value, given that the development freeze remains in place.

In the first hypothetical, involving the earthquake, it is highly unlikely that a court would treat the moratoria as anything other than separate. The imposition of the second moratorium is responsive to the new condition, something that hardly could have been contemplated at the time the original moratorium was imposed. Put in traditional land-use planning terms, the situation is analogous to a changed condition. [FN341] The landowners should be advised that the validity of each moratorium would be judged on its own merits.

The second hypothetical involves what was, in retrospect, insufficient time for revision of the comprehensive plan. While there is no evidence of bad faith, it is clear that there is an essential continuity between the moratoria. The second moratorium truly is an extension of the first and is responsive to the police power concerns that gave rise to the first. From the perspective of an aggrieved landowner, the two separate moratoria correspond to one continuing deprivation of economic enjoyment. Justice Holmes admonished that "the question ***479** is what has the owner lost, not what has the taker gained," [FN342] and the Supreme Court recently has reaffirmed that sentiment. [FN343]

In the second hypothetical, the owner's loss results from the whole of the extended moratorium. Were a court to rule otherwise, the effect would be to encourage government regulators to devise initial moratorium expiration dates with the thought that needed extensions could be promulgated later without adverse consequence to the agency. In addition, of course, officials would be tempted to "low ball" their estimates to mislead landowners and to enhance the chances that subsequent courts would find each separate moratorium reasonable in duration.

The third hypothetical is the most difficult. On one hand, the need for a waste treatment plant results from the increased demands for water treatment that have been increasing up through the time the second moratorium is imposed. However, urbanization often entails the need for augmented sewage treatment. In the second hypothetical, the initial moratorium omitted sufficient time for the review. Here, the initial moratorium omitted a necessary component from the review. Once again there is a well-shaped property law rule that is analogous, the "scope of the project" doctrine. [FN344] It is quite likely that the landowner could demonstrate that the government entity foresaw, or reasonably should have foreseen, that water treatment planning was a necessary component of planning for the transformation of rural into more populated areas.

Thus, in the third hypothetical, the second moratorium would be responsive not to conditions that arose at the time of its promulgation, but rather to conditions that existed at the time of the implementation of the original moratorium. This process also has a sound grounding in traditional property law, in the doctrine of "relation back" of subsequent actions to the substantive matters to which they equitably are attached. [FN345]

In situations where the second moratorium is responsive to the facts as they existed in full at the time the first moratorium was imposed, the relation back doctrine seems fully satisfactory. However, it might be that the second moratorium plausibly relates to some extent to facts existing at the time the original moratorium was promulgated ***480** and to circumstances that reasonably should have been foreseen at that time, and partly to more recent events. Where the recent events play a minor role in the decision to impose the second moratorium, relation back should be imposed. However, where the recent events are the principal reason for imposition of the second moratorium, it might be more reasonable to ascribe the new moratorium to changed conditions.

The fact that the second moratorium is imposed as a result of events unforeseen at the time of the original moratorium does not necessarily mean that the events are unrelated. It might be that the first moratorium had both unintended, but foreseeable, consequences to which the second moratorium was responsive. In such a case the new circumstances relate to the acts of the regulator, and the regulator should not escape responsibility for its acts on the grounds that they were unintended. This is another way of making the point that the focus should be on what the owner has lost, not what the agency has gained. The traditional property doctrine that covers this point nicely is "tacking." [FN346] This point is similar to that underlying Chief Justice Rehnquist's attribution of the time period during which TRPA's 1984 Plan was enjoined to the agency. [FN347] While the Tahoe-Sierra majority declined to consider it, [FN348] the argument certainly remains viable when properly raised.

An additional feature of the third hypothetical is that the second moratorium does permit low-water intensity uses, perhaps synonymous with large lot residential development. Landowners in some areas will be eligible to apply for such development and landowners in other areas will not. That has implications for structuring litigation and for the reciprocity of advantage that might be associated with the second moratorium. Also, the fact that the locality has announced a buy-out plan could be viewed alternatively as proof that no individual landowner need regard the freeze on development as indefinitely locking up the value of his property, or as evidence of bad faith [FN349] akin to the deliberate creation of condemnation blight designed to further government's acquisition of land on the cheap. [FN350]

***481** The regulator's underlying intent to acquire the parcel, which it continually disapproved development plans for, played an important role in City of Monterey v. Del Monte Dunes at Monterey, Ltd. [FN351] The Supreme Court noted the landowner's submission of evidence that the city had earlier contemplated buying the parcel or inducing the state to do so, had put money aside for that purpose, but had abandoned its plan for financial reasons. [FN352] "The State of California's purchase of the property during the pendency of the litigation may have bolstered the credibility of Del Monte Dunes' position." [FN353] In an earlier case, Agins v. City of Tiburon, [FN354] the city had made an aborted attempt to acquire the owner's spectacular ridgeline land overlooking San Francisco through eminent domain before drastically cutting back on its permitted housing density. [FN355] The Supreme Court determined that there had not been a facial taking. [FN356]

2. Government Responses to Rolling Moratoria Claims

Governmental agencies might respond to a rolling moratoria claim in several ways. The fact that landowners might insist that sequential restrictions should be considered along with their challenges to the original moratorium might be asserted to be contrary to their argument that the first moratorium, in and of itself, constitutes a taking. [FN357] Another argument is that details of the scope and stringency of moratoria differ, so that subsequent moratoria "cannot remotely be described, in substance, as a simple extension of the earlier moratorium." [FN358] Also, in the absence of full adjudication of subsequent moratoria, "no record exists to assess such a challenge on the merits." [FN359]

It is important to recognize that one of TSPC's central premises went undisputed: temporary moratoria, standing alone or in combination, might be pretextual. If so, their substance might indicate compensable takings.

***482** Petitioners are entirely correct that an ostensibly temporary measure might, in fact, be so long lasting or indefinite in duration that it is a taking under Lucas. The courts are well equipped to look behind labels to find the substance of things. Thus, owners would certainly be entitled to allege, and courts might well find a taking, if a measure labeled as a "moratorium" actually were intended to last indefinitely, or if the government enacted a continuous series of short-term moratoria, effectively creating a single, permanent prohibition on development. [FN360]

As the oxymoron indicates, permanent moratoria are per se takings. [FN361] But moratoria of lesser durations may be compensable as well under the Penn Central analysis featured in Tahoe-Sierra. [FN362] The path is difficult, but not insurmountable. Furthermore, even the fact that individual ordinances that together comprise sequential moratoria expire before judicial review can be obtained does not prevent judicial condemnation of such conduct. [FN363]

E. Lack of Good Faith as Indicative of Takings

[W]ere it not for the findings of the District Court that TRPA acted diligently and in good faith, we might have concluded that the agency was stalling in order to avoid promulgating the environmental threshold carrying capacities and regional plan mandated by the 1980 Compact. Cf. Monterey v. Del Monte Dunes at Monterey, Ltd. [FN364]

"Good faith" occupies a rather amorphous position in American property rights law, implicating both due process and takings analysis. [FN365] The fact that a

regulator acts diligently and in good faith does not preclude the finding that there has been a taking. As Justice Kennedy noted a year prior to his opinion for the Court in City of Monterey v. Del Monte Dunes at Monterey, Ltd., [FN366] the Takings Clause "operates as a conditional limitation, permitting the [g]overnment to do what it wants so long as it pays the charge." [FN367] It "presupposes ***483** what the Government intends to do is otherwise constitutional." [FN368] Correspondingly, the general rule is that the presence of bad faith does not, in itself, invalidate an otherwise reasonable land-use regulation. [FN369] However, bad faith typically manifests itself through actions that make land-use decisions unreasonable. [FN370] Furthermore, as in other areas of property rights law, judges are apt to give good faith a larger role in practice than it is accorded in theory. [FN371]

The Court apparently was persuaded by the truth of the landowner's assertion in Del Monte Dunes that the city simply was not going to grant a development permit, even though the landowner complied with each of the steadily escalating demands imposed upon it. [FN372] Given Tahoe-Sierra's emphasis on fairness and citation of Del Monte Dunes in the good faith context, [FN373] it is important to distinguish legitimate governmental development decisions from those that treat like-situated individuals differently [FN374] or those that fail to substantially advance a legitimate governmental purpose. [FN375]

In Tahoe-Sierra, a lack of good faith may be evidenced by the fact that TRPA's 1981 plan marked not an interim regulation or a temporary freeze on development of lands belonging to TSPC members, but rather the beginning of a ban on development that has continued through this day. The need for a permanent ban seems to have been obvious from the outset. Indeed, Justice Stevens quoted the Nevada U.S. District Court to this effect:

***484** Those areas in the Basin that have steeper slopes produce more runoff; therefore, they are usually considered "high hazard" lands. Moreover, certain areas near streams or wetlands known as "Stream Environment Zones" (SEZs) are especially vulnerable to the impact of development because, in their natural state, they act as filters for much of the debris that runoff carries. Because "[t]he most obvious response to this problem ... is to restrict development around the lake--especially in SEZ lands, as well as in areas already naturally prone to runoff," conservation efforts have focused on controlling growth in these high hazard areas. [FN376]

The evidence is quite convincing that further development on high hazard lands such as the plaintiffs' would lead to significant additional damage to the lake. Thus, limiting such development unquestionably satisfies the "essential nexus" part of the test. There is a direct connection between the potential development of plaintiffs' lands and the harm the lake would suffer as a result thereof. Further, there has been no suggestion by the plaintiffs that any less severe response would have adequately addressed the problems the lake was facing. Thus it is difficult to see how a more proportional response could have been adopted. [FN377]

Of course, had TRPA asserted at the outset that preservation of Lake Tahoe required that the landowners permanently be deprived of their long-held and reasonable expectations of development, it almost certainly would have had to pay compensation. A jurisprudence requiring government agencies to pay when they are forthright and not to pay when they tell the truth slowly (or, more accurately, permit the truth to dawn slowly among the regulated) is pernicious. It also is a glaring example of the kind of conceptual severance that the parcel as a whole rule, freshly reasserted in Tahoe-Sierra, purports to prevent. [FN378]

The U.S. Court of Appeals for the Federal Circuit ruled, in Cooley v. United States, [FN379] that extraordinary delay, generally coupled with bad faith, could be considered by a court applying a Penn Central analysis with respect to the third Penn Central factor--the character of the governmental action. [FN380] Cooley presents a case study of that interplay.

The U.S. Army Corps of Engineers denied Cooley's application for a wetlands fill permit, with the result that his land lost 98.8% of its ***485** value. [FN381] The owner asserted a taking and filed an action for compensation in the U.S. Court of Federal Claims. In response, the Corps, sua sponte, issued what it styled a "provisional permit," although it was labeled "DO NOT BEGIN WORK." [FN382] Furthermore, in apparent violation of a federal regulation precluding the Corps from acting as "a proponent [or] opponent of any permit proposal," it "contacted and convinced the Minnesota Pollution Control Agency to waive Cooley's application for a § 401 Water Quality Certification." [FN383] The Federal Circuit observed:

In forming its litigation strategy, members of the Corps doubted whether the Corps could issue legally valid permits after the 1993 denial. Nevertheless, the Corps ignored its previous findings and analysis and issued the 1996 permits based on Mr. Lance Wood's "opinion" that the property consisted of degraded wetlands.

Mr. Wood was the Corps' Assistant Chief Counsel for Regulation. Unlike the Corps' engineers involved in the original evaluation of whether the land was wetland in 1990, Mr. Wood never visited the site in forming his

opinion. Mr. Wood's opinion was inconsistent with the Corps' 1993 denial letter, initial evaluation, and the "Evaluation and Decision Document." Mr. Wood's opinion did not change the facts explained in the Corps' thorough "Evaluation and Decision Document" that the site was almost entirely a valuable wetland resource and that development on the site would be contrary to public interest. [FN384]

The Federal Circuit recited other troubling facts as well. Cooley's application for a fill permit was denied by the Corps on the grounds that he had not submitted sufficient information. [FN385] However, only weeks earlier it had received a recommendation from a Tim Fell at the local Regulatory Functions Branch recommending that the Corps "'proceed with the decision based on the available information and not hold a meeting' to permit Cooley to submit additional information." [FN386] This was followed by an internal memorandum in which Mr. Fell wrote: "'I think Cooley has provided enough information so we can't deny based on failure to provide adequate info ....'" [FN387]

In its decision below, [FN388] the U.S. Court of Federal Claims had applied a Lucas per se test in considering the 98.8% diminution in the value of Cooley's land. The Federal Circuit ordered a remand, noting ***486** that the Supreme Court's intervening decision in Tahoe-Sierra required a Penn Central multi-factor analysis unless there were a "'complete elimination of value.'" [FN389] As part of its remand instruction, it declared:

> Here, the record indicates Cooley, after two years of disputing the characterization of its property as protected wetlands, applied for a wetlands fill permit under the Clean Water Act. The Corps requested additional information on alternative sites suitable for the proposed mixed development, information supplied by Cooley in 1992. Based upon the information provided by Cooley, the Corps denied the requested permit in 1993. The Corps continued to delay action even after consulting an outside expert in 1995, whose report confirmed Cooley's 1992 contention that suitable alternative sites were unavailable. The Corps ultimately agreed with Cooley in 1996 that the parcel in question is indeed a degraded wetland. The trial court should consider this sequence of events in determining whether the Corps' actions meet the criteria for a finding of extraordinary delay.
>
> In the context of making this finding, the trial court may weigh this court's guidance that governmental agencies are best suited to develop the technical information necessary to adequately process a permit application. Accordingly, those agencies receive appropriate deference in acquiring technical information. However, in the instant case the agency admits its requests for additional information were not necessary for issuing a permit. The trial court previously discounted the credibility of the Corps' argument that the permit denial letter requested additional information in an altruistic effort to issue a permit. In conducting a Penn Central analysis, the trial court may weigh whether the Corps' conduct evinces elements of bad faith. A combination of extraordinary delay and intimated bad faith, under the third prong of the Penn Central analysis, influence the character of the governmental action. [FN390]

As Cooley suggests, "extraordinary delay" and "bad faith" go hand in hand. [FN391] Among other indicia of them are:

- Requests for information previously supplied to the regulator.
- Requests for information that the regulator's own technical staff deem unnecessary.
- Failing to provide specific reasons why permit applications fail to meet applicable standards.
- Failure to provide specific criteria upon which subsequent amendments to submitted permit applications will be evaluated.
- Shifts in technical or procedural requirements during the time that the permit application is being considered.
- Escalation of requirements when submitted plan amendments satisfy the articulated list of initial application defects or suggested application modifications (failure to take "yes" for an answer).
- Shifts in substantive agency positions on requirements and procedures preliminary to litigation.
- Intercession with other regulators outside of normal practices in processing permit applications.
- Intercession with third parties (such as the applicant's tenants or lenders) outside of normal permit processing practices.
- Involvement of regulator's legal staff in the formulation of technical standards and policies or their application to the landowner.
- Regulatory denials or prolonged application processing where the regulator or another public body has tried to purchase the parcel or rights in the parcel, or where government agencies or private groups with whom they have a symbiotic relationship (e.g., environmental groups) are interested (or induced) to want to acquire rights. [FN392]

With respect to each of these possible indications of bad faith, full documentation is necessary. Landowners should request specific and detailed information at every stage of the permit application and review process.

F. Moratoria Not Substantially Advancing a Legitimate State Interest

[A]part from the District Court's finding that TRPA's actions represented a proportional response to a serious risk of harm to the ***488** lake, petitioners might have argued that the moratoria did not substantially advance a legitimate state interest. [FN393]

1. The Importance of Del Monte Dunes

The Supreme Court's decision in City of Monterey v. Del Monte Dunes at Monterey, Ltd. [FN394] is the first time that the Court has upheld the payment of regulatory takings damages. Justice Kennedy's opinion implicitly validated the landowner's conclusion that "[a]fter five years, five formal decisions, and 19 different site plans, ... the city would not permit development of the property under any circumstances." [FN395] The landowner sued in U.S. district court under 42 U.S.C. § 1983, alleging that the "denial of [its] final development proposal was a violation of the due process and equal protection provisions of the Fourteenth Amendment and an uncompensated, and so unconstitutional, regulatory taking." [FN396] Del Monte Dunes is important in part because its discussion of due process implicates the kind of meansends analysis implicit in judicial reviews of fairness--the leitmotif of Tahoe-Sierra.

2. Moratoria Must Be Related to Legitimate Government Interests

In Del Monte Dunes, the district court retained for its own consideration the broad issue of whether the city's development regulations substantially advance legitimate public interests, as opposed to submitting it to a jury. [FN397] Justice Kennedy approved, and asserted this inquiry "is probably best understood as a mixed question of fact and law." [FN398] More generally, the occurrence of a compensable taking "is a question of law based on factual underpinnings." [FN399] The Court rebuffed the demand [FN400] of the United States, which as amicus curiae, [FN401] was insistent that the Court explain why the substantial advancement ***489** test of Agins v. City of Tiburon [FN402] should be associated with the Takings Clause as opposed to the Due Process Clause.

3. Moratoria Must Be Related to Specific Ordinances or Regulations

The district court in Del Monte Dunes submitted to a jury the issues of whether the city's repeated rejections of development proposals had deprived the owner of all economically viable use of the land and whether its rejection of the landowner's development plans bore a reasonable relationship to the city's articulated justifications. The jury awarded the landowner a general verdict for damages. [FN403] Justice Kennedy emphasized that the jury had been "instructed, in unmistakable terms," that the city's purposes were legitimate, and that its province "was confined to ... the city's particular decision to deny Del Monte Dunes' final development proposal." [FN404]

[T]o the extent Del Monte Dunes' challenge was premised on unreasonable governmental action, the theory argued and tried to the jury was that the city's denial of the final development permit was inconsistent not only with the city's general ordinances and policies but even with the shifting ad hoc restrictions previously imposed by the city. Del Monte Dunes' argument, in short, was not that the city had followed its zoning ordinances and policies but rather that it had not done so. As is often true in § 1983 actions, the disputed questions were whether the government had denied a constitutional right in acting outside the bounds of its authority, and, if so, the extent of any resulting damages. These were questions for the jury. [FN405]

Having established that § 1983 claims sound in tort, [FN406] that just compensation is a compensatory remedy at law, [FN407] and that "Del Monte Dunes was denied not only its property but also just compensation or even an adequate forum for seeking it," [FN408] the Supreme Court upheld the district court's decision to refer the petitioner's claim to the jury. [FN409] Although a federal trial on a local land-use takings case is unusual, [FN410] attorneys representing landowners undoubtedly ***490** will want to try to convince federal courts, and state courts where permissible, to allow juries to hear issues relating to regulator adherence to its own rules in many cases.

4. Meeting the Landowner's Substantial Burden

Given Tahoe-Sierra's strong endorsement of planning, it is unlikely that a landowner successfully could challenge the police power justifications articulated for development moratoria. If the landowner is to prevail, it would be by convincing the finder of fact that the government's actions did not, in fact, comport with its articulated purposes.

The Supreme Court has not established definitive standards for determining when land-use regulations and determinations deprive owners of due process of law. Its cases do require that local land-use laws have a substantial relation to legitimate state interests and may not be arbitrary or capricious in their application to individual parcels. [FN411] "This standard reflects the consensus that a local government should enjoy wide-ranging lati-

tude in regulating land use for the public welfare, and reflects the truism that every land-use regulation, to some extent, chips away at property rights." [FN412] The various standards employed by the courts of appeals recently were analyzed by the U.S. Court of Appeals for the District of Columbia Circuit in George Washington University v. District of Columbia. [FN413] There, the District imposed stringent conditions on student housing when it approved a special exception to the zoning ordinance for expansion of the George Washington University (GW) campus. The court explained that "[i]n the land-use context courts have taken (at least) two different approaches for determining the existence of a property interest for substantive due process purposes." [FN414] While the Third Circuit held that an ownership interest in the land qualifies, [FN415] other circuits "have focused on the structure of the land-use regulatory process, ... looking to the degree of discretion to be exercised by state officials in granting or withholding the relevant permission." [FN416] ***491** The D.C. Circuit referred to this as a "'new property'" inquiry, along the lines suggested in Charles Reich's seminal article. [FN417]

The D.C. Circuit declined to rule on whether an ownership interest was sufficient because GW met the "new property" standard. [FN418] After outlining the "considerable variety in the courts' formulae for how severely official discretion must be constrained to establish a new property," [FN419] it found the Eighth Circuit test, which "inquires whether the 'statute or regulation places substantial limits on the government's exercise of its licensing discretion,'" [FN420] more in accord with Supreme Court precedent. [FN421]

The finding of a property interest gives the property owner the right to challenge a regulation. At that point, the D.C. Circuit continued,

> the doctrine of substantive due process constrains only egregious government misconduct. We have described the doctrine as preventing only "grave unfairness," and identified two ways in which such unfairness might be shown: "Only [1] a substantial infringement of state law prompted by personal or group animus, or [2] a deliberate flouting of the law that trammels significant personal or property rights, qualifies for relief under § 1983." [FN422]

The court found no substantive due process violation, holding that the regulation "merely requires the university to house its students in a way that is compatible with the preservation of surrounding neighborhoods." [FN423] In short, while GW might have had a good argument that the denial of its requested special exception was wrong, it failed to demonstrate that bad faith led to, or was manifested in, egregious misconduct by planning officials.

To be sure, however, there are governmental actions resulting in property deprivations that are egregious by any standard; the coercive statement found by the court to have been made by the government ***492** acquisition officer to obtain private land for a national park in Althaus v. United States is an example. [FN424]

Substantive due process challenges to arbitrary and capricious moratoria brought in state court have enjoyed more success. In Anderson v. City of Issaquah, [FN425] a case reminiscent of Del Monte Dunes in its implications that the city was toying with the landowner, a Washington state appellate court held that "[i]t is unreasonable to expect applicants to pay for repetitive revisions of plans in an effort to comply with the unarticulated, unpublished 'statements' a given community may wish to make." [FN426] A more recent Washington case amplified that "case-by-case policymaking" wrongfully gave unrestricted discretion to local officials and administrators, a practice judicially condemned in Anderson. [FN427] Similarly, courts have struck down moratoria with long and unjustified durations, [FN428] as well as indefiniteness of duration coupled with lack of action to solve problems ostensibly requiring the moratorium. [FN429]

G. Moratoria as Applied

> [I]f petitioners had challenged the application of the moratoria to their individual parcels, instead of making a facial challenge, some of them might have prevailed under a Penn Central analysis. [FN430]

As a final theory, Justice Stevens suggested that the plaintiffs might have attempted "as applied" challenges rather than "facial" challenges. Stevens noted that the plaintiffs had "expressly disavowed" ***493** 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. [FN431] Tahoe-Sierra requires that planning moratoria be evaluated through use of the Penn Central analysis, which "involves 'a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action.'" [FN432]

1. Calculating the Economic Impact of the Temporal Dimension

The first enumerated Penn Central partial takings test

is the economic impact of the regulation on the claimant. [FN433] Use of a takings fraction where the duration of the regulation is the numerator and the life of the property is the denominator clearly is absurd in the case of raw land, which has an indefinite life. Even in the case of structures, there must be recognition that economic use to be enjoyed in the future has a lower present value than equivalent economic use enjoyed now. [FN434]

A special problem in assessing the economic impact of temporal deprivations is that the fair market value of the deferred enjoyment takes into account the possibility that the restriction will be abrogated. While this market factor legitimately is taken into account by purchasers, [FN435] the factor should not be considered by courts. Patently ineffectual or unfair regulations are prime candidates for early abrogation--a fact that markets take into account. Therefore, lands subject to undesirable regulatory schemes are worth more than lands subject to good ones, where the extent of deprivation is the same while the regulation remains in force. The failure of judges to consider this would produce an anomalous understatement of the economic impact of bad regulations.

***494** 2. Planning Moratoria and Reasonable Investment-Backed Expectations

The nature and ascendancy of reasonable investment-backed expectations has been analyzed earlier, [FN436] so this discussion is limited to expectations and planning moratoria. In Tahoe-Sierra, Justice Stevens's opinion conveyed a whiff of the notion that the TSPC landowners got the treatment that they knew was coming, and therefore should have avoided or deserved: "[P]etitioners 'had plenty of time to build before the restrictions went into effect--and almost everyone in the Tahoe Basin knew in the late 1970s that a crackdown on development was in the works.'" [FN437]

In Good v. United States, [FN438] a panel of the U.S. Court of Appeals for the Federal Circuit held that the "[r]easonable, investment-backed expectations are an element of every regulatory takings case." [FN439] Furthermore, Good added, those expectations encompass not only the regulations in place at the time an owner acquires an interest, but also the "regulatory climate" at the time of purchase that might lead an owner to anticipate more stringent rules in the future. [FN440] In Palazzolo v. Rhode Island, [FN441] the Supreme Court rejected the strong form of the "notice rule" theory, under which purchasers could not assert takings challenges to preacquisition regulations. [FN442] However, Justice O'Connor's swing opinion on this point makes it clear that there is some undefined relationship between preexisting regulations and purchasers' expectations--that the timing is "not ... immaterial." [FN443] More recently, the Court of Federal Claim's opinion in Walcek v. United States [FN444] emphasized that "[w]hile the Penn Central analysis anticipates reasonably foreseeable developments, it does not require a property owner to be clairvoyant." [FN445]

Faced with this body of precedent, the landowner should strive to document both her intent to develop and also the unforeseeability at the time of purchase of regulatory constraints that might be imposed ***495** upon the parcel later. In the context of planning moratoria, such an argument would focus upon the extent to which the duration or scope of the moratorium exceeds that which reasonably could have been contemplated.

3. The Character of Planning Moratoria

When the Supreme Court promulgated the "character of the governmental action" test in Penn Central, it established a clear referent--the distinction between physical invasions and the imposition of police power regulations. [FN446] Only four years later, however, the viability of the distinction was vitiated when the Court held that all permanent physical invasions are per se takings. [FN447] As a result, character became a distinction in search of content. More recently, as Justice Holmes might have put it, the test has entered upon a "new career." [FN448]

In Eastern Enterprises v. Apfel, [FN449] the Supreme Court reviewed the constitutionality of applying a law, intended to rescue a coal industry retiree pension and medical benefit plan from insolvency, to a company that last engaged in the employment of miners, triggering the application of the statute, many years earlier. The Court's plurality suggested that two factors relevant in considering the character of a governmental action were the extent to which the action imposed retroactive liability and the extent to which it singles out individuals to bear burdens both substantial in amount and unrelated to promises they made or injuries they caused. [FN450]

The notion of targeting individuals to bear burdens was further developed by Judge Eric Bruggink of the U.S. Court of Federal Claims in American Pelagic Fishing Co. v. United States. [FN451] There, investors had constructed an extremely expensive, specialized, and ***496** efficient fishing vessel. Competitors rallied against it and, apparently at their behest; Congress enacted a modification of existing law that "retroactively cancelled plaintiff's existing permits and authorization letter and prospectively precluded re-issuance of such per-

mits. It is undisputed that the only immediate impact of the rider was to invalidate the Atlantic Star's current fishing permits. No other vessels were affected by the legislative revocation." [FN452] After analyzing Eastern Enterprises, Judge Bruggink concluded that

the plurality used the familiar Penn Central template to conclude that the medical benefits legislation at issue constituted a taking: the economic impact, while not confiscatory, was "substantial;" the plaintiff had good reason not to anticipate the imposition, thus it had a reasonable, investment-backed expectation that the retroactive legislation would not have been adopted; and finally, the targeted nature of the legislation made the character of the government action appear to be a taking. [FN453]

Applying this analysis to the legislative deprivation of economic use of the Atlantic Star, Judge Bruggink found that a severe economic loss resulted from the regulation; that the reasonable investment-backed expectations of the owners had been thwarted. [FN454] On the issue of character of the governmental action, he concluded that there had been no alleged problem for which the plaintiff was uniquely responsible and "[w]ithout this evidence of responsibility, retroactively making the regulatory scheme unavailable to plaintiff has no support. This retroactivity favors finding a taking." [FN455]

While the liability phase of American Pelagic preceded Tahoe-Sierra, the damages phase followed it. In his second opinion, Bruggink noted that Tahoe-Sierra required a determination of all "relevant circumstances:" [FN456]

In the present case, the "relevant circumstances" include the fact that the character of the government action here strongly tends toward a taking. Congress retroactively revoked plaintiff's permits in a targeted fashion. The Atlantic Star was the only vessel which fell within the ambit of the 1997, 1998, and 1999 Appropriation Acts. It is clear from the record that Congress' decision was not the result of a typical regulatory process. Instead, it was motivated by political considerations directly aimed at the Atlantic Star. Congress' action was far from being a routine delay in agency decision- making. There was no permit application pending. All permits had ***497** been granted. No decision was held in abeyance pending fact finding. Congress simply decided not to allow the Atlantic Star to fish using its previously issued permits. The character of the government action thus points to a taking. None of the Court's concerns in Tahoe about promoting deliberative regulatory consideration apply. [FN457]

As previously discussed, [FN458] the Federal Circuit's opinion in Cooley v. United States [FN459] declared that "[i]n conducting a Penn Central analysis, the trial court may weigh whether the [regulator's] conduct evinces elements of bad faith. A combination of extraordinary delay and intimated bad faith, under the third prong of the Penn Central analysis, influence the character of the governmental action." [FN460]

Even apart from the question of good faith as such, the combination of Eastern Enterprises, American Pelagic, and Cooley suggests that there is a continuum of situations in which the retroactivity, targeting, and the impression of arbitrary or unfair dealing have permeated the "character of the governmental action." [FN461] Landowners may wish to employ analyses using these building blocks in many types of factual situations. Assume, for instance, that a substantial planning moratorium is employed at the behest of a competitor who wishes to take over the landowner's business location, perhaps on the allegation of blight and through the intermediary of an urban redevelopment authority. [FN462] Alternatively, assume the planning moratorium resulted from a process of selling condemnation powers [FN463] or squeezing out owners not making the highest possible contribution to the municipal tax base. [FN464] In all of these instances, the landowner would have a viable argument that the character of the governmental action lends itself to a finding that there has been a compensable taking.

The owners of the fishing vessel in American Pelagic "could have reasonably anticipated a certain range of future governmental regulation, duly promulgated through the regulatory scheme Congress established. The targeted revocation of existing permits, however, and the targeted denial of future permits by Congress were not events ***498** any citizen in a constitutional republic could have reasonably expected." [FN465]

This analysis melds aspects of reasonable investment-backed expectations and permissible ways in which government could conduct itself. Rules change, and property owners must expect that. However, in a constitutional republic, rules do not change in ways that target the property of selected individuals to bear burdens unrelated to them. Where rules do act in such a fashion, their character augurs for the finding that there has been a taking under the Penn Central test. Landowners cannot rely upon the absence of planning and, Tahoe-Sierra, on the absence of reasonable planning moratoria. But they should be able to rely on the absence of targeted and disproportionate moratoria.

4. The Difficulty of Litigating "as Applied" Challenges to Planning Moratoria

Mounting "as applied" challenges to complex regulations where there are hundreds of affected landowners of modest means is a difficult and financially improbable undertaking. When the Tahoe-Sierra litigation commenced in 1981, regulatory takings law was in its infancy. Moreover, in cases alleging state or local deprivations of property rights, ripening an action for federal judicial review is very difficult. The Supreme Court's Williamson County requirements [FN466] are both Byzantine [FN467] and constitute "a special ripeness doctrine applicable only to constitutional property rights claims." [FN468] Whether the forum is a federal or state court, planning moratoria are especially difficult to challenge because moratoria might be extended, perhaps in somewhat different form.

V. ADDITIONAL STRATEGIC CONSIDERATIONS FOR LANDOWNERS

A. The Meaning of the Tahoe-Sierra Dicta Is Uncertain and Contestable

The holding of Tahoe-Sierra is narrow and the dicta are broad. Much of the dicta assert principles like "parcel as a whole," the importance ***499** of planning, and the dichotomy between physical and regulatory planning jurisprudence. It is by no means clear, however, how these abstract ways of looking at takings issues will be clarified when exposed to hard cases that test them. Those who see broad precepts in Tahoe-Sierra beyond the simple holding that sometimes moratoria are justified and sometimes they are not should remember how narrowly the Court read First English. Justice Stevens was able to write a majority opinion indirectly citing as controlling authority his own dissent in First English itself. [FN469] The author of First English, Chief Justice Rehnquist, was left to cite its (at the time) heady dicta that temporary takings "are not different in kind from permanent takings, for which the Constitution clearly requires compensation." [FN470] The present Court's view in Tahoe-Sierra may prove as evanescent as its dicta in First English.

The eminent contracts scholar Arthur Corbin long ago wrote:

> When a stated rule of law works [an] injustice ... the rule is pretty certain either to be denied outright or to be undermined by a fiction or a specious distinction. It is said that "hard cases make bad law;" but it can be said with at least as much truth that hard cases make good law .... When [common law judges'] stated rules developed hard cases, the rules were modified by the use of fiction, by exceptions and distinctions, and even by direct overruling. [FN471]

When confronted with the hard reality of specific cases, the broad and perhaps naive references in Tahoe-Sierra may well require modification or repudiation. [FN472] It thus is the task of the attorney representing the landowner to attempt to demonstrate that the Tahoe-Sierra dicta violate the Court's own fairness principles in the particular instance.

B. Selecting the Case and Framing the Issues

For institutional litigants such as large corporations or advocacy groups, cases may be selected carefully, with the purpose of advancing the litigant's desired outcome incrementally. Such litigants begin with cases with the most appealing facts and seeking the most modest changes in existing law. [FN473] For the private attorney retained by, or ***500** volunteering to assist, particular landowners, such cherry picking of cases is not an option.

In some Supreme Court property rights cases, the nature of the facts may well have influenced the Court's decision significantly. In City of Monterey v. Del Monte Dunes at Monterey, Ltd., [FN474] for instance, the city, which previously attempted to buy the petitioner's land, turned down five development plans. The first was well in conformity with the city's regulations, and each subsequent plan satisfied the city's objections to the previous plan.

The summary of the facts in Justice Kennedy's opinion fully incorporated Del Monte's view that it had been toyed with. [FN475] At the oral argument, the city's attorney asserted that the "case is not atypical in some respects. The city was faced with a complex decision it had to reconcile competing interests, sift through facts, and exercise its discretion and judgment, and it did so." [FN476] The Court was openly incredulous. Justice Scalia said: "The landowner here essentially thinks that it was getting jerked around .... [I]sn't there some point at which ... you begin to smell a rat, and at that point can't we say ... this is simply unreasonable." [FN477] Justice Kennedy asked: Even if the property has value, if the city is unreasonable and there is bad faith, "isn't the city still liable in damages for that unreasonable treatment of the landowner?" [FN478]

While the City of Monterey might have convinced the Court that its handling of the Del Monte Dunes project was not atypical, neither it, nor its amici, [FN479] benefited from the Justices' inferences. It was clear that the city that could not take yes for an answer made a poor decision in seeking certiorari.

***501** After Tahoe-Sierra, Richard Lazarus, a respected,

albeit not disinterested, commentator, [FN480] wrote that "[t]he property rights movement and its counsel simply overplayed their hand in Tahoe-Sierra." [FN481] Undoubtedly property rights groups had grown accustomed to their string of victories. Some might have forgotten that Justice Kennedy had not joined in Justice Scalia's majority opinion in Lucas, [FN482] and that Justice O'Connor had signaled her discomfort with per se rules in her concurring opinion in Palazzolo. [FN483] However, TSPC's counsel had crafted a certiorari petition responsive to Judge Reinhardt's Ninth Circuit opinion, which apparently decreed that a development moratorium never constituted a taking. [FN484] When the Court granted certiorari on the inverted question of whether a development moratorium always constituted a taking, it awarded the broad middle ground to the respondent. Most likely, that led Justices O'Connor and Kennedy to join with the liberal wing of the Court.

Both Tahoe-Sierra and the case it brought back to undisputed preeminence in the takings area, Penn Central, involved preservation of iconic American treasures. In both, the Court showed great solicitude for conservation plans. Justice Brennan's Penn Central opinion barely mentioned the separate ownership of the air right above Grand Central Terminal in the summary of facts and did not refer to that owner (and co-petitioner) in the analysis. [FN485] Perhaps the moral is clear--establishing favorable legal precedents is doubly difficult in cases where the object of regulation is beloved.

As noted earlier, the framing of the legal issues by the Court was an immeasurable obstacle to the landowners challenging the regulations in Tahoe-Sierra. According to Professor Lazarus, the regulators worked to achieve that result:

> Perhaps the most important decision made by government counsel at trial was to litigate, rather than stipulate, the factual issues pertaining to Penn Central. The resulting trial record prompted a series of favorable factual findings by the trial judge that both precluded any effective appeal of that judge's Penn Central ruling by the landowners and created a very sympathetic factual context for TRPA in the Supreme Court .... [O]ne factor was present in Tahoe-Sierra that had been missing in prior regulatory takings cases: an effective brief in opposition to the petition .... The government won Tahoe-Sierra because of the narrowness of the legal issue considered ***502** by the Court: whether TRPA's 32-month moratorium on development amounted to a per se Lucas taking in a facial challenge. [FN486]

Undoubtedly the government's victory in Tahoe-Sierra will make it more difficult for landowners to litigate unchallenged on broad and not well differentiated legal grounds. Given the Supreme Court's (selective) proclivity not to entertain issues not litigated below, and the reluctance of inferior courts to modify existing doctrines, laying the groundwork for extending property protection must begin early.

C. Building a Record

Landowners must anticipate the need for hindsight. It is, after all, only in retrospect that a court might discern that a single or aggregated moratorium of compensable duration has been put in place. [FN487]

This means that counsel must insist on making a proper record at every turn. The failure to do this can lead to disaster. In Lucas v. South Carolina Coastal Council, [FN488] the law of the case, all of the way through the U.S. Supreme Court's decision, was that the landowner had suffered a total deprivation of economic enjoyment of his land. It is not clear that a single Justice believed this to be true, but the State had waived the issue in the trial court. [FN489] Likewise, in Penn Central Transportation Co. v. City of New York, [FN490] counsel for the landowner failed to contest the city's (incorrect) contention that it derived a reasonable return from its operation of Grand Central Terminal, thus leading to erroneous conclusions when the Court applied the two economic factors of its new three-factor test. [FN491] Landowners cannot assume that regulators expecting to win on overarching theories will continue to give up practical points, as they had in Lucas.

This process can be very daunting, especially since new restrictions are implemented even while existing ones are being adjudicated. In Tahoe- Sierra, for instance, the fact that TSPC did not file new lawsuits within one or two years after TRPA promulgated its 1987 Plan was the basis for the district court and Ninth Circuit's holding that TSPC's suit could not be amended to include them because the statute of limitations had run. Therefore, the Supreme ***503** Court deemed petitioners to have waived objection to the 1987 Plan and did not consider its freeze on development since 1987 in considering whether TRPA had imposed a rolling moratorium. [FN492] As counsel subsequently retained for the Supreme Court proceedings put it, these rulings "required the lower courts to conclude that the landowners had a duty to file new suits against TRPA at the very time they were fighting for their litigational live [sic] pursuing two Ninth Circuit appeals in an effort to reinstate their initial suits." [FN493]

The Supreme Court could have heard claims relating to the 1987 plan under the theory that there was a continuing wrong. Indeed, that is precisely what the Court did in United States v. Dickinson. [FN494] There, thirteen

years before Armstrong, [FN495] Justice Frankfurter recognized that "[t]he Fifth Amendment expresses a principle of fairness." [FN496] He built upon this to uphold just compensation claims that would have been time-barred if the landowner had to file his action at the earliest possible moment:

The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding "causes of action"--when they are born, whether they proliferate, and when they die. We are not now called upon to decide whether in a situation like this [alleged taking by deliberate permanent flooding] a landowner might be allowed to bring suit as soon as inundation threatens. Assuming that such an action would be sustained, it is not a good enough reason why he must sue then or have, from that moment, the statute of limitations run against him. If suit must be brought, lest he jeopardize his rights, as soon as his land is invaded, other contingencies would be running against him--for instance, the uncertainty of the damage and the risk of res judicata against recovering later for damage as yet uncertain. The source of the entire claim--the overflow due to rises in the level of the river--is not a single event; it is continuous. And as there is nothing in reason, so there is nothing in legal doctrine, to preclude the law from meeting such a process by postponing suit until the situation becomes stabilized. [FN497]

Cases subsequent to Dickinson not only have included the case that gave what Tahoe-Sierra now deems the "Armstrong principle," [FN498] ***504** but also the Williamson County [FN499] line of cases emphasizing the need to determine the actual scope of land-use restrictions. Chief Justice Rehnquist quoted one of those cases, MacDonald, Sommer & Frates v. Yolo County, [FN500] in his Tahoe-Sierra dissent: "'A court cannot determine whether a regulation has gone "too far" unless it knows how far the regulation goes.'" [FN501] While Rehnquist was referring to the majority's refusal to consider TRPA's 1984 plan, [FN502] his point applies equally well to the 1987 plan.

The Supreme Court might have considered the 1987 plan in spite of the Ninth Circuit's holding to the contrary. The majority might have invoked the theory of continuing wrong in Dickinson, [FN503] or simply ignored its own limitation on its grant of certiorari. As noted earlier, in a property rights case decided a year after Tahoe-Sierra, Justice Stevens made a larger stretch than is implied here. [FN504]

As Tahoe-Sierra now leaves the matter, however, landowners are in a substantial bind. Where there is one definitive moratorium at issue, they may apply the Supreme Court's admonition in Suitum v. Tahoe Regional Planning Agency [FN505] and Williamson County [FN506] that "[a] taking challenge does not ripen 'until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.'" [FN507] Where the landowner's case is buttressed by the argument that sequential moratoria show either lack of good faith in the promulgation of the first moratorium or an aggregate moratorium of compensable duration, however, the landowner is in a quandary.

A suit filed too early, and therefore bereft of the augmented claims arising from the subsequent moratorium, might be rejected by the court as not rising to a compensable taking. A suit filed after subsequent moratoria are in place might be deemed to have waived the initial moratorium, now barred by a statute of limitations. Separate lawsuits filed subsequent to the imposition of each moratorium or similar act seem to be necessary. Each should recount that the deprivations suffered by the landowner that constitute the asserted taking ***505** should be considered jointly and severally with previous moratoria. Each also should explicitly reserve the right to seek to amend pleadings and to file future actions based on subsequent moratoria. Landowners should seek to join new lawsuits with existing suits where there is a continuity of governmental conduct and objectives. This holds true especially where subsequent moratoria might be demonstrated to be responsive to conditions in existence at the time the earlier moratoria were imposed, and not to changed conditions. [FN508]

D. Tahoe-Sierra Helps Landowners Subject to Unfair Deprivations of Property

Tahoe-Sierra mandates a jurisprudence of development moratoria based on principles of fairness and Penn Central analysis. In the process, it affirmed the compensability of partial takings. [FN509] The challenge for landowners will be to convince courts to apply fairness criteria consistently.

Had Tahoe-Sierra adopted a per se approach, landowners would have to focus on bright-line rules. However, Tahoe-Sierra adopted an ad hoc approach that considers the "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." [FN510] This orientation, plus the impossibility of treating some of Tahoe-Sierra's dicta completely literally, gives landowners considerable latitude. Stressing the notion of fairness to raise the connection between parcel as a whole, and taking as a whole [FN511] is a key example.

E. Measuring Success

The tools suggested by Tahoe-Sierra's seven theories can be employed to prevail in litigation under the Penn Central ad hoc test in federal court, should the Williamson County ripeness criteria be met, [FN512] and especially in state court. While it would be difficult for landowners to establish the egregious violations of substantive due ***506** process that federal courts require, [FN513] similar criteria for arbitrary and capricious behavior may be employed in actions brought in state court under the Federal Constitution or the state's constitution.

While hard-fought victories in appellate courts greatly satisfy lawyers, clients are usually better off with negotiated settlements that permit viable projects with minimal delays. Since Tahoe-Sierra provides landowners viable causes of action, there is an incentive for planning officials to compromise. The outcome of negotiations with regulators is not a zero-sum game. "Just as American companies have become more competitive through increased efficiencies and productivity, improvements in how government regulates can greatly diminish the damage to private property and the potential for takings." [FN514] The most basic goal is to ensure that state statutory or case law has provided a foundation that protects owners' rights when moratoria are imposed and interprets it reasonably. [FN515] Planning moratoria should specifically identify their objectives. [FN516] They also should encourage reasonable interim use of the affected property. Interim development ordinances (IDOs) promote this end. As distinct from planning moratoria, IDOs permit land-uses in developing areas while permanent regulations are developed. They also may permit discretionary approvals for projects that are not inconsistent with the goals of the long-term plans under development. When coupled with a vested rights ordinance, they can provide the landowner with assurance that in appropriate situations the undertaking of projects during the interim period give rise to vested rights. [FN517] Ensuring that planning and other officials actually are working on providing the infrastructure and solving the problems upon which the moratoria were predicated is also important.

VI. CONCLUSION

Planning moratoria are a valuable tool for planners and local governments. They give government the power to deal with impending ***507** growth, which genuinely and reasonably is unexpected, and which, therefore, it would have been inefficient to anticipate. On the other hand, moratoria may reflect lack of planning or bad planning. In any event, the moratorium is inevitably a departure from the ideal of the rule of law being the enunciation of clear rules, announced in advance. [FN518] Since moratoria and subsequent land-use planning occur in the context of specific types of projects, sponsored by specific individuals or groups, opportunities for favoritism and extortion are rife.

Our post-Tahoe-Sierra jurisprudence of planning moratoria gives less security to landowners than one based on bright doctrinal lines intended to protect property rights. However, Tahoe-Sierra is based on fairness, and that framework promises landowners the possibility of redress to those who have suffered an arbitrary deprivation of development rights.

More importantly, the availability of effective mechanisms to challenge arbitrary deprivations gives some pause to officials who might be tempted to engage in them. By refusing to uphold the Ninth Circuit's endorsement of the per se constitutionality of temporary development freezes, [FN519] the Supreme Court in Tahoe-Sierra confirmed that there is no bifurcation of individual rights dependent upon whether possible infringements of those rights are labeled permanent government policy or temporary government policy. [FN520]

Tahoe-Sierra should be read as an admonishment that land-use regulators act in heavy-handed fashion only at their peril. Affirmative use of the "seven theories" roadmap that Tahoe-Sierra itself establishes provides a vehicle for vindication of landowner rights threatened with unreasonable planning moratoria.

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[FN1]. 535 U.S. 302 (2002).

[FN2]. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

[FN3]. 535 U.S. at 337.

[FN4]. Id. at 321 (citing Armstrong v. United States, 364 U.S. 40, 49 (1960)). For a treatment of fairness in

Armstrong and other Supreme Court cases, see infra Part III.A.

[FN5]. Id. at 338 n.34.

[FN6]. See infra Part II.D.

[FN7]. See infra Part II.B.2 and text accompanying note 75.

[FN8]. Tahoe-Sierra, 535 U.S. at 312.

[FN9]. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency (TSPC IV), 216 F.3d 764, 778 (9th Cir. 2000), aff'd, 535 U.S. 302 (2002). For clarity, references to the various Ninth Circuit opinions, all styled Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, will be cited hereinafter as TSPC followed by a Roman numeral designating its sequence number. District court opinions will be designated simply TSPC.

[FN10]. See infra Part II.B.2. and text accompanying note 76.

[FN11]. Tahoe-Sierra, 535 U.S. at 337. The opinion was joined by O'Connor, Kennedy, Souter, Ginsburg, and Breyer, JJ. Id. at 302. The principal dissenting opinion was written by Rehnquist, C.J., joined by Scalia and Thomas, JJ. Id. at 343. Justice Thomas filed a short dissenting opinion, in which Scalia, J., joined. Id. at 355.

[FN12]. Id. at 337.

[FN13]. See infra Part II.D.6.

[FN14]. See infra Part IV.

[FN15]. For an excellent exposition, see J. David Breemer, Temporary Insanity: The Long Tale of Tahoe-Sierra Preservation Council and Its Quiet Ending in the United States Supreme Court, 71 FORDHAM L. REV. 1 (2002).

[FN16]. See infra Part II.

[FN17]. See infra Part III.

[FN18]. See infra Part IV.

[FN19]. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency (TSPC), 34 F. Supp. 2d 1226, 1230 (D. Nev. 1999), rev'd in part, remanded, 216 F.3d 764 (9th Cir. 2000), aff'd, 535 U.S. 302 (2002).

[FN20]. Id.

[FN21]. Kelly v. Tahoe Reg'l Planning Agency, 855 P.2d 1027, 1034 (Nev. 1993) (describing the lake as a national treasure); People ex rel. Younger v. County of El Dorado, 487 P.2d 1193, 1194 (Cal. 1971) (describing the Tahoe Basin as "an area of unique and unsurpassed beauty").

[FN22]. MARK TWAIN, ROUGHING IT 187 (Hamlin Hill ed., Penguin Books 1981) (1872). The district court opinion collects similar Twain quotes. See TSPC, 34 F. Supp. 2d at 1230.

[FN23]. Brief for Petitioners, Tahoe Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002) (No. 00-1167), 2001 WL 1692011, at *3 ("Lake Tahoe is a unique treasure.").

[FN24]. Tahoe-Sierra, 535 U.S. at 307 (quoting TSPC, 34 F. Supp. 2d at 1230).

[FN25]. Id. (quoting TSPC, 34 F. Supp. 2d at 1230).

[FN26]. Younger, 487 P.2d at 1195.

[FN27]. See Brief for Petitioners, Tahoe-Sierra, 535 U.S. at 302 (No. 00- 1167), 2001 WL 1692011, at *3.

[FN28]. TSPC, 34 F. Supp. 2d 1226. "Ironically, the more Lake Tahoe comes to be appreciated for its beauty, the more that beauty is threatened." Id. at 1230.

[FN29]. Id. at 1230.

[FN30]. Id. at 1231.

[FN31]. Tahoe-Sierra, 535 U.S. at 309 (citing 1968 Cal. Stat. 998, p.1900, § 1; Nev. Rev. Stat. 277.200 (1968) p. 4, and Congressional approval in 1969, Pub. L. No. 91-148, 83 Stat. 360 (1969)).

[FN32]. Id. (quoting Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency, 440 U.S. 391, 394 (1979)).

[FN33]. See Lake Country Estates, 440 U.S. at 394 (holding agency amenable to suit under 42 U.S.C. § 1983).

[FN34]. TSPC, 34 F. Supp. 2d at 1235.

[FN35]. Id. at 1236.

[FN36]. Tahoe-Sierra, 535 U.S. 306.

[FN37]. Id. at 312.

[FN38]. While not adjudicating the 1987 plan here, the Court considered it in Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997). There, another owner of a small parcel in a mostly-developed upland zone was denied the right to build, although the landowners were given some transferable development rights. The Court ruled that, after a decade of litigation, the landowner could assert a takings claim without selling the rights first. Id. at 725-26. Rather than continue litigating, the elderly owner settled.

[FN39]. See infra Part III.F.

[FN40]. See, e.g., Eric Bailey, The State Lake Stays Blue but Critics of Panel See Red Environment, L.A. TIMES, May 13, 2002, at B5. The article states that:

[H]omes in excess of 10,000 square feet have continued to sprout on the shoreline .... "We're seeing nothing but these monster mega homes," said [an area resident], who worries that the huge structures--and the floating piers, docks and storage buildings that go along with them--threaten to trample what remains of the lake's rocky shoreline. Affordable housing, meanwhile, is virtually nonexistent.

Id.

[FN41]. Brief for Petitioners, Tahoe-Sierra, 535 U.S. at 302 (No. 00- 1167), 2001 WL 1692011, at *2.

[FN42]. Gideon Kanner, Temporary Takings, NAT'L L.J., Nov. 12, 2001, at A21 (noting that the case originally was brought by "some 700 individual lot owners (now whittled down by death to some 400)").

[FN43]. Brief for Petitioners, Tahoe-Sierra, 535 U.S. 302 (No. 00-1167), 2001 WL 1692001, at *7 n.8 (asserting that "the majority of the landowners succumbed and were forced to sell there [sic] parcels for a fraction of their fair market value to one of these scavenging agencies which paid only the bare residual value of unusable land").

[FN44]. Id. at 3.

[FN45]. Id.

[FN46]. See Breemer, supra note 15, at 7 n.45, 8-9.

[FN47]. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency (TSPC I), 911 F.2d 1331 (9th Cir. 1990), later proceeding, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency (TSPC II), 938 F.2d 153 (9th Cir. 1991), aff'd in part and rev'd in part, remanded, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency (TSPC III), 34 F.3d 753 (9th Cir. 1994), rev'd in part, remanded, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency (TSPC IV), 216 F.3d 764 (9th Cir. 2000), aff'd, 535 U.S. 302 (2002).

[FN48]. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency (TSPC), 34 F. Supp. 2d 1226 (D. Nev. 1999), rev'd in part, remanded, 216 F.3d 764 (9th Cir. 2000), aff'd, 535 U.S. 302 (2002).

[FN49]. TSPC IV, 216 F.3d 764.

[FN50]. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency (TSPC V), 228 F.3d 998 (9th Cir. 2000) (reh'g en banc denied).

[FN51]. 438 U.S. 104 (1978).

[FN52]. Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001) (citing Penn Central, 438 U.S. at 124).

[FN53]. TSPC, 34 F. Supp. 2d at 1250.

[FN54]. Id.

[FN55]. Id. at 1245.

[FN56]. Id. at 1242-45 (citing Lucas, 505 U.S. 1003 (1992)) (establishing the bright-line rule that compensation is required whenever a regulation deprives an owner of all economically beneficial uses of the land).

[FN57]. 482 U.S. 304 (1987).

[FN58]. Id. at 318-19.

[FN59]. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency (TSPC IV), 216 F.3d 764 (9th Cir. 2000), aff'd, 535 U.S. 302 (2002).

[FN60]. Id. at 777.

[FN61]. Id. at 777-78 (citing First English, 482 U.S. at 309).

[FN62]. 598 P.2d 25 (Cal. 1979), aff'd, 447 U.S. 255 (1980).

[FN63]. First English, 482 U.S. at 319.

[FN64]. Id. at 321.

[FN65]. TSPC IV, 216 F.3d at 778.

[FN66]. Id.

[FN67]. Id. at 781.

[FN68]. Id. (emphasis added).

[FN69]. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency (TSPC V), 228 F.3d 998 (9th Cir. 2000) (reh'g en banc denied).

[FN70]. Id. at 999 (Kozinski, J., dissenting from a denial of a reh'g en banc, joined by O'Scannlain, Trott, T.G. Nelson, and Kleinfeld, JJ.) (citations omitted).

[FN71]. First English, 482 U.S. at 332 (Stevens, J., dissenting).

[FN72]. TSPC V, 228 F.3d at 1000 (Kozinski, J., dissenting from denial of reh'g en banc).

[FN73]. Id. at 1002.

[FN74]. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 320 (2002).

[FN75]. Petition for a Writ of Certiorari at i, Tahoe-Sierra, 535 U.S. 302 (2002) (No. 00-1167) (citation to First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) omitted) (emphasis in original).

[FN76]. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 533 U.S. 948 (2001) (granting certiorari in part for 216 F.3d 764 (9th Cir. 2000)).

[FN77]. Lucas, 505 U.S. 1003; Penn Central, 438 U.S. 104; see infra Part II.D.6.

[FN78]. Tahoe-Sierra, 535 U.S. at 327 n.23 (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring)) (second emphasis added).

[FN79]. Id. at 306.

[FN80]. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency (TSPC), 34 F. Supp. 2d 1226, 1235 (D. Nev. 1999) (emphasis added), rev'd in part, remanded, 216 F.3d 764 (9th Cir. 2000), aff'd, 535 U.S. 302 (2002).

[FN81]. Id. at 1235-36.

[FN82]. Id. at 1236 (citation ommited).

[FN83]. Tahoe-Sierra, 535 U.S. at 312.

[FN84]. Id.

[FN85]. TSPC, 34 F. Supp. 2d at 1237.

[FN86]. Tahoe-Sierra, 535 U.S. at 345 (Rehnquist, C.J., dissenting).

[FN87]. Id. at 314 n.8.

[FN88]. Id.

[FN89]. Id. at 313 n.7.

[FN90]. Id. at 312.

[FN91]. See infra Part III.C.

[FN92]. Tahoe-Sierra, 535 U.S. at 337.

[FN93]. Id. at 328.

[FN94]. Bob Egelko, Property Owners Lose Key Tahoe Case, SAN FRAN. CHRON., Apr. 24, 2002, at A1 (quoting Robert Freilich, who filed an amicus brief for the American Planning Association).

[FN95]. Harvey M. Jacobs, The Politics of Property Rights at the National Level: Signals and Trends, 69:2 J. AM. PLAN. ASS'N 181, 186-87 (2003).

[FN96]. Richard J. Lazarus, Celebrating Tahoe-Sierra, 33 ENVTL. L. 1, 14 (2003).

[FN97]. See Mark W. Cordes, The Effect of Palazzolo v. Rhode Island on Takings and Environmental Land Use Regulation, 43 SANTA CLARA L. REV. 337, 338 (2003) (summarizing that "some initial responses to Palazzolo from the property rights movement have been near ecstatic").

[FN98]. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).

[FN99]. See Lazarus, supra note 96, at 15 (observing that O'Connor and Kennedy merely "concluded that per se rules sweep too broadly in this particular constitutional context").

[FN100]. 364 U.S. 40 (1960).

[FN101]. Id. at 49.

[FN102]. Tahoe-Sierra, 535 U.S. 302, 321 (2002). The Court had never previously used this phrase.

[FN103]. 438 U.S. 104 (1978); see infra Part III.B. and text accompanying note 149.

[FN104]. 533 U.S. 606, 632 (2001) (O'Connor, J., concurring).

[FN105]. Tahoe-Sierra, 535 U.S. at 326 n.23 (quoting Palazzolo, 533 U.S. at 633).

[FN106]. Id. at 335 (quoting Palazzolo, 533 U.S. at 636, 632).

[FN107]. Id. at 312 (noting that the ordinances "effec-

tively prohibited all construction").

[FN108]. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982).

[FN109]. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1031 (1992).

[FN110]. United States v. Gen. Motors Corp., 323 U.S. 373, 382 (1945).

[FN111]. Tahoe-Sierra, 535 U.S. at 348 (Rehnquist, C.J., dissenting); see infra note 184.

[FN112]. Id. at 323 (footnote omitted).

[FN113]. 505 U.S. 1003.

[FN114]. Tahoe-Sierra, 535 U.S. at 330 (quoting Lucas, 505 U.S. at 1017). The Court added that this "emphasis on the word 'no' in the text" was "reiterated" by the Lucas footnote "explaining that the categorical rule would not apply if the diminution in value were 95% instead of 100%." Id. (citing Lucas, 505 U.S. at 1019 n.8).

[FN115]. Cooley v. United States, 324 F.3d 1297, 1306 (Fed. Cir. 2003).

[FN116]. The Lucas per se test still seems viable with respect to moratoria applied against leasehold interests. See infra Part IV.A.

[FN117]. First English, 482 U.S. at 318.

[FN118]. Tahoe-Sierra, 535 U.S. at 355 (Thomas, J., dissenting) (citing Lucas, 505 U.S. at 1017).

[FN119]. Id. at 328.

[FN120]. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency (TSPC V), 228 F.3d 998, 1000 (9th Cir. 2000) (Kozinski, J., dissenting from denial of reh'g en banc).

[FN121]. Breemer, supra note 15, at 34.

[FN122]. Tahoe-Sierra, 535 U.S. at 327 (quoting Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130-31 (1978)).

[FN123]. Id. at 318-19 (quoting Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency (TSPC IV), 216 F.3d 764, 776 (9th Cir. 2000), aff'd, 535 U.S. 302 (2002)).

[FN124]. Id. at 318-19.

[FN125]. See id.

[FN126]. Lazarus, supra note 96, at 13, 127. See, e.g., Fla. Rock Indus., Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994). "A speculative market may exist in land that is regulated as well as in land that is not, and the precise content of regulations at any given time may not be particularly important to those active in the market." Id. at 1566.

[FN128]. Tahoe-Sierra, 535 U.S. at 332.

[FN129]. Fla. Rock, 18 F.3d at 1568.

[FN130]. 505 U.S. 1003 (1992).

[FN131]. See Tahoe-Sierra, 535 U.S. at 325.

[FN132]. See, e.g., City of Tucson v. Grezaffi, 23 P.3d 675, 684 (Ariz. Ct. App. 2001) (finding plaintiff "did not establish that the ordinance deprived her of any reasonable use for which [her] property is adapted and thus destroys its economic value, or all but a bare residue of its value.") (alteration in original) (citations omitted); cf. City of Glenn Heights v. Sheffield Dev. Co., Inc., 61 S.W.3d 634 (Tex. App. 2001) (upholding a taking claim based on a thirty-eight percent diminution in value).

[FN133]. See, e.g., Deupree v. State ex rel. Dep't of Transp., 22 P.3d 773 (Or. Ct. App. 2001) (holding that

an allegation of diminution in value, as opposed to complete deprivation of all economically viable use, was insufficient to sustain a takings claim). In Covington v. Jefferson County, the Idaho Supreme Court rejected a taking claim where a decision to allow the adjacent property to be utilized as a landfill reduced the plaintiff's property values by twenty-five percent. 53 P.3d 828 (Idaho 2002). The court held that where no physical invasion had occurred, Lucas was controlling and requires a complete and permanent deprivation of all economically viable use. Id. at 832.

[FN134]. 533 U.S. 606 (2001). "Our polestar ... remains the principles set forth in Penn Central itself and our other cases that govern partial regulatory takings." Id. at 633.

[FN135]. Tahoe-Sierra, 535 U.S. at 332-33 n.27 (citing Lucas and Armstrong v. United States, 364 U.S. 40, 48-49 (1960)).

[FN136]. 331 F.3d 1319, 1343 (Fed. Cir. 2003).

[FN137]. Id. at 1345.

[FN138]. See John D. Echeverria, The Once and Future Penn Central Test, LAND USE L. & ZONING DIG., June 2002, at 19, 21.

[FN139]. 364 U.S. 40 (1960).

[FN140]. United States v. Willow River Power Co., 324 U.S. 499, 502 (1945).

[FN141]. United States v. Fuller, 409 U.S. 488, 490 (1973) (citing United States v. Commodities Trading Corp., 339 U.S. 121, 124 (1950)).

[FN142]. See, e.g., Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 310 (C.C.D. Pa. 1795).

[I]t is evident; that the right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man. Men have a sense of property: Property is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects, that induced them to unite in society .... The preservation of property then is a primary object of the social compact.

Id; see also Steven J. Eagle, The Development of Property Rights in America and the Property Rights Movement, 1 GEO. J. L. & PUB. POL'Y 77 (2002).

[FN143]. JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY 92 (1990) ("The great focus of the Framers was the security of basic rights, property in particular, not the implementation of political liberty.").

[FN144]. See generally JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (1992).

[FN145]. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 321 (2002).

[FN146]. Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972).

[FN147]. United States v. James Daniel Good Real Prop., 510 U.S. 43, 61 (1993).

[FN148]. Dolan v. City of Tigard, 512 U.S. 374, 392 (1994).

[FN149]. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123- 24 (1978) (citations omitted) (emphasis added) (alterations in first paragraph in original, and alterations in second paragraph added).

[FN150]. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

[FN151]. Id. at 432.

[FN152]. See Frank I. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 HARV. L. REV. 1165 (1967). For elaboration, see Steven J. Eagle, The Rise and Rise of "Investment-Backed Expectations", 32 URB. LAW. 437, 437-40 (2000).

[FN153]. Daniel R. Mandelker, Investment-Backed Expectations: Is There a Taking?, 31 WASH. U. J. URB. & CONTEMP. L. 3, 13 (1987).

[FN154]. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 315 n.10 (2002) (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001)).

[FN155]. See 941 P.2d 851, 860 (Cal. 1997).

[FN156]. Id. at 860 (internal citations omitted).

[FN157]. Id.

[FN158]. 447 U.S. 255, 260 (1980) (holding that the "application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests or denies an owner economically viable use of his land") (citation omitted).

[FN159]. 260 U.S. 393, 415 (1922).

[FN160]. See Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); cf. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985) (advocating generally that constitutional regulation of property is limited to vindication of neighbors' property rights through application of principles such as nuisance, with schemes of mutually advantageous regulation constituting takings with compensation in kind).

[FN161]. 533 U.S. 606, 634 (2001) (O'Connor, J., concurring).

[FN162]. Id.

[FN163]. See id. at 634-36.

[FN164]. 535 U.S. at 327 n.23.

[FN165]. In her plurality opinion in Eastern Enters. v. Apfel, 524 U.S. 498 (1998), Justice O'Connor declared that, when a legislative act "singles out certain employers to bear a burden that is substantial in amount, based on the employers' conduct far in the past, and unrelated to any commitment that the employers made or to any injury they caused, the governmental action implicates fundamental principles of fairness underlying the Takings Clause." Id. at 537.

[FN166]. Lucas, 505 U.S. at 1034 (Kennedy, J., concurring in the judgment).

[FN167]. Lazarus, supra note 96, at 13.

[FN168]. Id.

[FN169]. Pa. Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

[FN170]. Penn Central, 438 U.S. at 124.

[FN171]. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (evaluating third-party installation of cable box and lines under government mandate); Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871) (discussing permanent flooding of private land behind a public dam).

[FN172]. See United States v. Gen. Motors Corp., 323 U.S. 373 (1945) (discussing government occupation for term of years).

[FN173]. See Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992) (evaluating a regulation prohibiting permanent inhabitable structures).

[FN174]. 123 S. Ct. 1406 (2003).

[FN175]. Id. at 1419.

[FN176]. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 323-24 (2002).

[FN177]. Id. at 322 n.17.

[FN178]. Id. at 322.

[FN179]. United States v. Gen. Motors Corp., 323 U.S. 373 (1945).

[FN180]. Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871).

[FN181]. Compare, for example, Moore v. United States, 185 F. Supp. 399, 401 (N.D. Tex. 1960), and Freeman v. United States, 167 F. Supp. 541, 544- 45 (W.D. Okla. 1958), both holding that disturbance by low-flying aircraft not directly over the property did not sound in tort, with Jackson v. Metropolitan Knoxville Airport Authority, 922 S.W.2d 860 (Tenn. 1996), holding that disturbance by low-flying aircraft not directly over property can constitute a taking.

[FN182]. See Stephen E. Abraham, Landgate--Taken But Not Used, 31 URB. LAW. 81, 95 (1999).

[FN183]. 535 U.S. at 322 (citing General Motors, 323 U.S. 373; United States v. Petty Motor Co., 327 U.S. 372 (1946)).

[FN184]. Id. at 324 n.19 (citing Lucas, 505 U.S. at 1017).

[FN185]. Id. at 348 (Rehnquist, C.J., dissenting) (citation omitted).

[FN186]. Id. at 324 n.19.

[FN187]. See 505 U.S. at 1025 n.12.

[FN188]. See Graham v. Connor, 490 U.S. 386 (1989).

[FN189]. See Daniel F. Spulber & Christopher S. Yoo, Access to Networks: Economic and Constitutional Connections, 88 CORNELL L. REV. 885, 946-49 (2003).

[FN190]. 535 U.S. at 324 (emphasis added).

[FN191]. 952 F.2d 1364 (Fed. Cir. 1991).

[FN192]. Id. at 1376.

[FN193]. 6 F.3d 1573 (Fed. Cir. 1993).

[FN194]. Id. at 1582 (citations omitted).

[FN195]. Id.

[FN196]. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 346-47 (2002) (Rehnquist, C.J., dissenting).

[FN197]. Id. at 306.

[FN198]. Id. at 347 (Rehnquist, C.J., dissenting).

[FN199]. See supra Part II.D.2.

[FN200]. 535 U.S. at 323.

[FN201]. Id.

[FN202]. 505 U.S. at 1024-26.

[FN203]. Id. at 1025 n. 12.

[FN204]. Id. at 1029.

[FN205]. Brown, 123 S. Ct. 1406 (2003).

[FN206]. See id. at 1413.

[FN207]. Id.

[FN208]. Id. at 1415.

[FN209]. 524 U.S. 156 (1998).

[FN210]. Id. at 172.

[FN211]. Brown, 123 S. Ct. at 1419.

[FN212]. Id. at 1421. This is a highly contestable result. See Steven J. Eagle, Regulatory Takings, Public Use, and Just Compensation After Brown, 33 ENVTL. L. REP. 10807 (2003).

[FN213]. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 337-38 (2002) (citations omitted).

[FN214]. Id. at 338 n.33 (emphasis added) (quoting Elizabeth A. Garvin & Martin L. Leitner, Drafting Interim Development Ordinances: Creating Time to Plan, LAND USE L. & ZONING DIG., June 1996, at 3, 3).

[FN215]. See Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[FN216]. JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES (Vintage Books 1992) (1961).

[FN217]. The literature is extensive. See, e.g., Robert W. Burchell & Naveed A. Shad, The Evolution of the Sprawl Debate in the United States, 5 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 137, 140 (1999) (noting that "Euclidean zoning of segregated land uses and the emergence of the automobile began to establish the first distant 'suburbs' throughout the United States"); Francesca Ortiz, Biodiversity, the City, and Sprawl, 82 B.U. L. REV. 145, 179 (2002) (stating "traditional Euclidean zoning encourages sprawl by separating different land uses according to intensity of use; thus, a city subject to this type of zoning will generally have different areas set aside for single-family residential uses, multiple-family residential uses, commercial uses, and industrial uses"); Patricia E. Salkin, From Euclid to Growing Smart: The Transformation of the American Local Land Use Ethic into Local Land Use and Environmental Controls, 20 PACE ENVTL. L. REV. 109, 118 (2002) (asserting that "smart growth legislation advocates local flexibility and promotes mixed-use development, in contrast to Euclidean zoning that promotes a more rigid separation of uses").

[FN218]. 535 U.S. at 339 (asserting that adopting a per se rule would impose severe costs on planning deliberations and "may force officials to rush through the planning process or to abandon the practice altogether").

[FN219]. See id. at 324 n.19.

[FN220]. See, e.g., Nahrstedt v. Lakeside Vill. Condo. Ass'n, Inc., 878 P.2d 1275 (Cal. 1994); Robert G. Natelson, Consent, Coercion, and "Reasonableness" in Private Law: The Special Case of the Property Owners Association, 51 OHIO ST. L.J. 41, 49-50 (1990) (advocating judicial deference to private decision making in residential communities).

[FN221]. Tahoe-Sierra, 535 U.S. at 341.

[FN222]. Id. (describing Growth Props., Inc. v. Klingbeil Holding Co., 419 F. Supp. 212, 218 (D. Md. 1976)).

[FN223]. John J. Delaney, Tahoe-Sierra: The Great Terrain Robbery, or Simply a Bridge Too Far for Landowners?, LAND USE L. & ZONING DIG., June 2002, at 15, 16.

[FN224]. Variances are authorized departures from zoning requirements "where, owing to special conditions, a literal enforcement ... will result in unnecessary hardship." A STANDARD ZONING ENABLING ACT § 7 (U.S. Dep't Commerce, rev. ed. 1926).

[FN225]. See supra Part II.D.4.

[FN226]. Tahoe-Sierra, 535 U.S. at 326-27 (quoting Penn Central, 438 U.S. at 130-31).

[FN227]. Lazarus, supra note 96, at 4.

[FN228]. Penn Central, 438 U.S. at 130.

[FN229]. See, e.g., United States v. Grizzard, 219 U.S. 180, 185-86 (1911) (awarding severance damages to the untaken remainder of plaintiff's land in an inverse condemnation action).

[FN230]. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).

[FN231]. Id. at 497 (quoting Michelman, supra note 152, at 1192).

[FN232]. Id. at 517 (Rehnquist, C.J., dissenting) (emphasis added).

[FN233]. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 331 (2002).

[FN234]. Id. at 355 n.* (Thomas, J., dissenting) (emphasis in original).

[FN235]. Id. (Thomas, J., dissenting) (quoting Lucas, 505 U.S. at 1017 n.7 (1992) ("recognizing that 'uncertainty regarding the composition of the denominator in [the Court's] "deprivation" fraction has produced inconsistent pronouncements by the Court,' and that the relevant calculus is a 'difficult question'") (alteration in original).

[FN236]. Id. (Thomas, J., dissenting) (quoting Palazzolo, 533 U.S. at 631) ("noting that the Court has 'at times expressed discomfort with the logic of [the parcel as a whole] rule'") (alteration in original).

[FN237]. See Margaret Jane Radin, The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings, 88 COLUM. L. REV. 1667, 1678 (1988) ("[E]very regulation of any portion of an owner's 'bundle of sticks,' is a taking of the whole of that particular portion considered separately. Price regulations 'take' that particular servitude curtailing free alienability, building restrictions 'take' a particular negative easement curtailing control over development, and so on.") (footnote omitted).

[FN238]. Compare, e.g., Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) (describing "the right to exclude others" as one of the "most essential sticks in the bundle of rights that are commonly characterized as property"), with PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 84 (1980) ("[H]ere appellants have failed to demonstrate that the 'right to exclude others' is so essential to the use or economic value of their property that the state- authorized limitation of it amounted to a 'taking.'").

[FN239]. A classic illustration is the finding by the New York Court of Appeals that the relevant parcel encompassing Grand Central Terminal should include "plaintiffs' heavy real estate holdings in the Grand Central area, including hotels and office buildings." Penn Cent. Transp. Co. v. City of New York, 366 N.E.2d 1271, 1276 (N.Y. 1977). The U.S. Supreme Court subsequently deemed the relevant parcel to be the city tax block on which the terminal was located. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130-31 (1978). Later, in Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), the Court deemed what it termed the New York Court of Appeals' approach of including the "total value of the taking claimant's other holdings in the vicinity" to be an "extreme--and we think, unsupportable--view of the relevant calculus." Id. at 1016 n.7.

[FN240]. STEVEN J. EAGLE, REGULATORY TAKINGS § 11-7(b)(2), at 789 (2d ed. 2001); see also John E. Fee, Of Parcels and Property, in TAKING SIDES ON TAKINGS ISSUES: PUBLIC AND PRIVATE PERSPECTIVES 101, 104-06 (Thomas E. Roberts ed., 2002).

[FN241]. See John E. Fee, Comment, Unearthing the Denominator in Regulatory Taking Claims, 61 U. CHI. L. REV. 1535, 1537 (1994) (proposing that "a taking has occurred when any horizontally definable parcel, containing at least one economically viable use independent of the immediately surrounding land segments, loses all economic use due to government regulation").

[FN242]. See EAGLE, supra note 240, § 11-7(e)(5), at 813-14. (analogizing commercial unit of real property to the commercial unit of goods under U.C.C. § 2-105(6) (2002)).

[FN243]. See, e.g., Palm Beach Isles Assocs. v. United States, 208 F.3d 1374 (Fed. Cir. 2000).

[FN244]. See, e.g., Forest Props., Inc. v. United States, 177 F.3d 1360, 1365 (Fed. Cir. 1999) "Where the developer treats legally separate parcels as a single economic unit, together they may constitute the relevant parcel." Id. at 1365.

[FN245]. Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1181 (Fed. Cir. 1994).

[FN246]. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 327 (2002) (quoting Andrus v. Allard, 444 U.S. 51, 66 (1979) (holding that prohibition on commercial transactions in eagle feathers did not bar other uses or impose physical invasion or restraint and was not a taking)).

[FN247]. See Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987).

[FN248]. The numerator of the takings fraction is the property owner's loss rather than the regulator's gain, since as Justice Stevens recently reiterated, that is the Constitutional standard. Brown v. Legal Found. of Wash., 123 S. Ct. 1406, 1419 (2003). "'[T]he question is what has the owner lost, not what has the taker gained.'" Id. (quoting Boston Chamber of Commerce v. City of Boston, 217 U.S. 189, 195 (1910)).

[FN249]. Lazarus, supra note 96, at 17.

[FN250]. See supra Part II.B.2.

[FN251]. See Michael M. Berger, The Shame of Planners, LAND USE L. & ZONING DIG., June 2002, at 6, 7 (noting that the freeze on development contained in TRPA's 1981, 1984, and 1987 plans "continues to prohibit the use of virtually all of the lots that were involved in the Tahoe-Sierra litigation").

[FN252]. See Tahoe-Sierra, 535 U.S. at 308-09; infra text accompanying notes 376-78.

[FN253]. Tahoe-Sierra, 535 U.S. at 334 (emphasis added) (citing the Court's grant of certiorari, 533 U.S. 948 (2001)).

[FN254]. Id. (citing Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency (TSPC IV), 216 F.3d 764, 769 (9th Cir. 2000), aff'd, 535 U.S. 302 (2002)). Should the Court have considered the totality of what is currently a twenty-two year moratorium? Of course, the Court could have remanded with directions that the court of appeals consider that issue.

[FN255]. 123 S. Ct. 1406 (2003).

[FN256]. See supra text accompanying notes 205-12.

[FN257]. Brown, 123 S. Ct. at 1417 (emphasis added) (footnote omitted).

[FN258]. Id. at 1422 n.2 (Scalia, J., dissenting) (citation omitted).

[FN259]. Dwight H. Merriam, Panning for Gold in the Trickle of Supreme Court Cases This Term: What Can We Learn from the IOLTA and Referendum Cases?, ZONING & PLAN. L. REP., June 2003, at 1, 6 (quoting Michael M. Berger).

[FN260]. See infra Part IV for a discussion of the seven theories.

[FN261]. See, e.g., Thomas W. Merrill, Incomplete Compensation for Takings, 11 N.Y.U. ENVTL. L.J. 110, 121 (2002) (observing that "[m]any (perhaps most) condemnations are partial takings; that is, the taker acquires only a fraction of the owner's property and leaves the balance in the owner's hands. This will often occur, for example, when the taking is for a highway or a utility right- of-way").

[FN262]. See, e.g., County of Sussex v. Merrill Lynch Pierce Fenner & Smith, Inc., 796 A.2d 958 (N.J. Super. Ct. Law Div. 2001) (holding that county originally planning condemnation of a building could settle with the owner and other tenants and condemn the lease of a single nonconsenting tenant only), aff'd, 796 A.2d 913 (N.J. Super. Ct. App. Div. 2002).

[FN263]. See, e.g., State v. Pahl, 95 N.W.2d 85, 90 (Minn. 1959).

[FN264]. 323 U.S. 373 (1945).

[FN265]. Id. at 381-82.

[FN266]. See supra Part II.D.2.

[FN267]. 549 S.E.2d 203 (N.C. 2001), cert. denied, 534 U.S. 1130 (2002).

[FN268]. See 3 NICHOLS ON EMINENT DOMAIN § 8A.02 (Julius L. Sackman ed., rev. 3d ed. 2003) (concluding that "most jurisdictions agree that only 'special' benefits may be offset against severance damages and neither special benefits nor general benefits may be offset against the part taken").

[FN269]. Rowe, 549 S.E.2d at 209.

[FN270]. 18 Cl. Ct. 548 (Cl. Ct. 1989).

[FN271]. Id. at 550.

[FN272]. Id. at 556.

[FN273]. Id. at 555-56.

[FN274]. 838 So. 2d 561 (Fla. 4th DCA 2002).

[FN275]. Id. at 565.

[FN276]. Id. at 568 (quoting Ciampetti, 18 Cl. Ct. at 556).

[FN277]. Id.

[FN278]. See, e.g., Redevelopment Agency of Fresno v. Penzner, 87 Cal. Rptr. 183 (Ct. App. 1970).

[FN279]. See supra Part II.A.2.

[FN280]. See, e.g., Tom Gorman, The Nation Along Lake Tahoe, Planning for a Throwback to the 1980s Officials Say Building of Luxurious Homes on Waterfront Is Out of Control. Some Disagree., L.A. TIMES, Nov. 24, 2002, at A20 (noting that "luxurious waterfront building has gone overboard," and that at Incline Village, "half-acre lots with 100 feet of shoreline frontage are worth $3 million; a five-acre lot with 200 feet of lake frontage is valued upward of $20 million").

[FN281]. See, e.g., Jim Carlton, Tahoe Aims for Change: From Seedy to Sleek, WALL ST. J., May 7, 2003, at B1 (reporting that the "bustling south shore of Lake Tahoe, unlike the more open and upscale north-shore area, is undergoing an estimated $500 million make-over to replace most of its 1950s and 1960s-era budget motels with sleeker, more environment[ally-]friendly buildings").

[FN282]. Kanner, supra note 42.

[FN283]. Petition for Writ of Certiorari at i, Tahoe-Sierra, 535 U.S. at 302 (No. 00-1167) (emphasis in original).

[FN284]. Tahoe-Sierra, 535 U.S. at 341 (citations omitted).

[FN285]. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[FN286]. See, e.g., City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam) (upholding the New Orleans Vieux Carre planning regulations and finding "abundantly clear that the amended ordinance ... is solely an economic regulation aimed at enhancing the vital role of the French Quarter's tourist-oriented charm in the economy of New Orleans).

[FN287]. See, e.g., Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 138-39 (1978) (Rehnquist, J., dissenting). Justice Rehnquist took notice that:

Of the over one million buildings and structures in the city of New York, appellees have singled out 400 for designation as official landmarks. The owner of a building might initially be pleased that his property has been chosen by a distinguished committee of architects,

historians, and city planners for such a singular distinction. But he may well discover ... that the landmark designation imposes upon him a substantial cost, with little or no offsetting benefit except for the honor of the designation.
Id. (footnote omitted).

[FN288]. "Existence value" is the value individuals place upon the continued existence of a resource apart from the value of its use. See, e.g., Katharine K. Baker, Consorting with Forests: Rethinking Our Relationship to Natural Resources and How We Should Value Their Loss, 22 ECOLOGY L.Q. 677, 1680 (1995) (asserting harm "when humans destroy natural resources involving damage to a subjective, emotional connection that many people feel toward the environment"). But see Donald J. Boudreaux et al., Talk is Cheap: The Existence Value Fallacy, 29 ENVTL. L. 765, 767 (1999) (asserting that the concept of existence value is conceptually flawed).

[FN289]. 535 U.S. at 333-34.

[FN290]. Id. at 332 (asserting that "the categorical rule in Lucas was carved out for the 'extraordinary case' in which a regulation permanently deprives property of all value").

[FN291]. Id. (quoting Armstrong, 364 U.S. at 49).

[FN292]. Id.

[FN293]. Tahoe-Sierra, 535 U.S. at 333-34 (citations and footnotes omitted).

[FN294]. Id. at 333.

[FN295]. See, e.g., United States v. Gen. Motors Corp., 323 U.S. 373 (1945) (holding temporary occupancy of an office building by government employees is a compensable taking); Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 181 (1871) (holding permanent flooding of private land upstream from a public dam is a compensable taking).

[FN296]. Tahoe-Sierra, 535 U.S. at 334-35 (quoting First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 321 (1987)).

[FN297]. Id. at 335.

[FN298]. Id.

[FN299]. See supra Part II.D.1.

[FN300]. Tahoe-Sierra, 535 U.S. at 335 (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 632, 636 (O'Connor, J., concurring)) (emphasis omitted).

[FN301]. Compare id., with EPSTEIN, supra note 160 (advocating a strict per se approach to regulatory takings).

[FN302]. Tahoe-Sierra, 535 U.S. at 331-32.

[FN303]. Id. at 332.

[FN304]. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992).

[FN305]. Penn Central, 438 U.S. 104.

[FN306]. Tahoe-Sierra, 535 U.S. at 333 (citing First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 321 (1987)).

[FN307]. See supra Part IV.A.

[FN308]. First English, 482 U.S. at 321.
We also point out that the allegation of the complaint which we treat as true for purposes of our decision was that the ordinance in question denied appellant all use of its property. We limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us.
Id.

[FN309]. Tahoe-Sierra, 535 U.S. at 337.

[FN310]. Id. at 337-38.

[FN311]. Palazzolo, 533 U.S. 606.

[FN312]. For further discussion of reciprocity of advantage in this context, see supra Parts III.C.4 and III.F.

[FN313]. Tahoe-Sierra, 535 U.S. at 338.

[FN314]. Id. at 333 (citing Brief for the Institute for Justice as Amicus Curiae 30) (citations omitted). "Although amicus describes the 1-year cutoff proposal as the 'better approach by far,' its primary argument is that Penn Central should be overruled." Tahoe-Sierra, 535 U.S. at 333 n.28.

[FN315]. See Miranda v. Arizona, 384 U.S. 436, 469 (1966) (limiting admissibility of confessions).

[FN316]. 512 U.S. 374, 391 (1994) (limiting scope of exactions as condition of development permits).

[FN317]. Tahoe-Sierra, 535 U.S. at 342 (quoting Palazzolo, 533 U.S. at 628).

[FN318]. Id. at 342 n.37.

[FN319]. Id. at 342.

[FN320]. Id. at 341.

[FN321]. Id.

[FN322]. 36 Fed. Cl. 541, 550-52 (Fed. Cl. 1996).

[FN323]. E. Minerals Int'l, Inc. v. United States, 39 Fed. Cl. 621, 631 (Fed. Cl. 1997) (assessing takings damages).

[FN324]. 10 F.3d 796, 803 (Fed. Cir. 1993).

[FN325]. 271 F.3d 1090 (Fed. Cir. 2001).

[FN326]. Id. at 1097-98 (noting that courts have "recognized that extraordinary delay must be 'substantial' and that the Supreme Court has condoned delays up to 'approximately eight years'"). The court cited Kawaoka v. City of Arroyo Grande, 17 F.3d 1227, 1233 (9th Cir. 1994); Judge Reinhardt's Ninth Circuit panel opinion in Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency (TSPC IV), 216 F.3d 764, 781-82 (9th Cir. 2000), concerning temporary development moratorium of up to forty months; and Dufau v. United States, 22 Cl. Ct. 156, 163 (Cl. Ct. 1990), concerning permit delay of sixteen months. See also Walcek v. United States, 303 F.3d 1349, 1352-53 (Fed. Cir. 2002) (addressing a seven year delay).

[FN327]. Wyatt, 271 F.3d at 1098.

[FN328]. 324 F.3d 1297 (Fed. Cir. 2003).

[FN329]. Id. at 1306-07.

[FN330]. Wyatt, 271 F.3d at 1098.

[FN331]. Cooley, 324 F.3d at 1307.

[FN332]. Id.

[FN333]. See infra text accompanying notes 379-92.

[FN334]. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 333 (2002) (citing Briefs for Petitioners and Petition for Writ of Certiorari).

[FN335]. Petition for Writ of Certiorari at i, Tahoe-Sierra, 535 U.S. at 302 (No. 00-1167).

2. Can a land use regulatory agency escape its constitutional duty to pay for land taken for public use by the expedient of enacting a series of rolling, back-to-back "temporary" moratoria/prohibitions extending over a period of 20 years, and then claiming that each of the individual prohibitions on all use must be viewed in isolation from the others and, when so viewed, none

was severe enough by itself to cross the constitutional taking threshold?

In similar fashion, can such an agency escape the constitutional obligation of compensation because a court injunction issued in a different case barred issuing permits to other landowners, while the agency's own regulations precluded all use of the Petitioners' land?
Id.

[FN336]. Tahoe-Sierra, 535 U.S. at 334 (citing the grant of certiorari, 533 U.S. 948 (2001)).

[FN337]. Id. (citing Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency (TSPC IV), 216 F.3d 764, 769 (9th Cir. 2000), aff'd, 535 U.S. 302 (2002)).

[FN338]. Id. at 311 (citing Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency (TSPC), 34 F. Supp. 2d 1226, 1235 (D. Nev. 1999), rev'd in part, remanded, 216 F.3d 764 (9th Cir. 2000), aff'd, 535 U.S. 302 (2002)).

[FN339]. TSPC, 34 F. Supp. 2d at 1235.

[FN340]. The issue of "good faith," for instance, would encompass the issue of whether regulators decided on a prolonged or indefinite moratorium at the outset that would be promulgated in stages for the purpose of misleading landowners and others. In such an event, there would be one moratorium in substance although several moratoria in form.

[FN341]. See, e.g., City of Virgina Beach v. Va. Land Inv. Ass'n No. 1, 389 S.E.2d 312, 314 (Va. 1990) (striking down "piecemeal downzoning which was not justified by a change in circumstances or prior mistake").

[FN342]. Boston Chamber of Commerce v. City of Boston, 217 U.S. 189, 195 (1910).

[FN343]. Brown v. Legal Found. of Wash., 123 S. Ct. 1406, 1419 (2003) (stating that "[t]his conclusion is supported by consistent and unambiguous holdings in our cases" and quoting Holmes in Boston Chamber of Commerce, 217 U.S. at 195).

[FN344]. E.g., Piedmont Triad Reg'l Water Auth. v. Unger, 572 S.E.2d 832, 835 (N.C. Ct. App. 2002) (noting condemnee not entitled to compensation for value created in scope of condemnor's project).

[FN345]. See, e.g., BLACK'S LAW DICTIONARY 1291 (7th ed. 1999) (defining "relation back [as] [t]he doctrine that an act done at a later time is considered to have occurred at an earlier time").

[FN346]. See, e.g., Catawba Indian Tribe v. South Carolina, 978 F.2d 1334, 1342-43 (4th Cir. 1992) (noting that tacking is a doctrine allowing an adverse possessor to include the occupancy of his predecessor with his own for purposes of the prescriptive period).

[FN347]. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 345 (2002) (Rehnquist, C.J., dissenting).

[FN348]. Id. at 313-14 n.8.

[FN349]. See discussion infra Part IV.E; see also City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999).

[FN350]. See, e.g., Klopping v. City of Whittier, 500 P.2d 1345, 1349-50 (Cal. 1972) (requiring compensation for damage resulting from precondemnation announcements when the condemnor acts unreasonably by excessively delaying eminent domain action or by other oppressive conduct).

[FN351]. 526 U.S. 687 (1999).

[FN352]. Id. at 699-700.

[FN353]. Id. at 700.

[FN354]. 447 U.S. 255 (1980).

[FN355]. Id. at 258 nn. 1 & 3.

[FN356]. Id. at 262-63.

[FN357]. Brief for Respondents, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002) (No. 00-1167), 2001 WL 1480565, at *27 n.9.

[FN358]. E.g., Brief of Amicus Curiae National Audubon Society, Natural Resources Defense Council, National Wildlife Federation and Sierra Club in Support of Respondents, Tahoe-Sierra, 535 U.S. 302 (No. 00-1167), 2001 WL 1597737, at *13-*14 (articulating this description of Tahoe-Sierra, given the replacement of "the prior, flat prohibition on development" by a new plan providing "a series of flexible alternatives for landowners, including the opportunity to develop certain lots; to sell transferable development rights; and to sell the fee to the government") (citations omitted).

[FN359]. Brief for Respondents, Tahoe-Sierra, 535 U.S. 302 (No. 00- 1167), 2001 WL 1480565, at *27 n.9.

[FN360]. Brief of Amicus Curiae National Audubon Society, Natural Resources Defense Council, National Wildlife Federation and Sierra Club in Support of Respondents, Tahoe-Sierra, 535 U.S. 302 (No. 00-1167), 2001 WL 1597737, at *13 (emphasis added).

[FN361]. See Tahoe-Sierra, 535 U.S. at 322.

[FN362]. Id. at 321-25, 342.

[FN363]. See Mitchell v. Kemp, 575 N.Y.S.2d 337, 338 (App. Div. 1991) (noting a recurring controversy amenable to review, since the town "has replaced one moratorium law with another and has been doing so for nearly five years").

[FN364]. Tahoe-Sierra, 535 U.S. at 333-34 (citing Del Monte Dunes, 526 U.S. 687, 698 (1999)).

[FN365]. See infra Part IV.F.

[FN366]. 526 U.S. 687 (1999).

[FN367]. E. Enters. v. Apfel, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring in the judgment).

[FN368]. Id.

[FN369]. See, e.g., Friedman v. City of Fairfax, 146 Cal. Rptr. 687, 684 (Ct. App. 1978) (stating that the wrongfulness of a state action is not relevant in an inverse condemnation action).

[FN370]. See, e.g., Sameric Corp. v. City of Philadelphia, 142 F.3d 582, 590 (3rd Cir. 1998) ((noting that a landowner had a substantial property interest and that a "substantive due process violation is established if 'the government's actions were not rationally related to a legitimate government interest' or 'were in fact motivated by bias, bad faith or improper motive.'") (quoting Parkway Garage, Inc. v. City of Philadelphia, 5 F.3d 685, 692 (3d Cir. 1993) (quoting Midnight Sessions, Ltd. v. City of Philadelphia, 945 F.2d 667, 683 (3d Cir. 1991))).

[FN371]. The classic study is R.H. Helmholz, Adverse Possession and Subjective Intent, 61 WASH. U. L.Q. 331, 337 (1983) (examining a large number of cases and determining that the good faith of an adverse possessor is often determinative in deciding ownership).

[FN372]. See infra text accompanying notes 394-402.

[FN373]. Tahoe-Sierra, 535 U.S. at 333-34.

[FN374]. See Vill. of Willowbrook v. Olech, 528 U.S. 562, 564-65 (2000) (validating "class of one" deprivation of equal protection arising from unusual demand for a very wide municipal utility easement).

[FN375]. See Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (holding 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 or denies an owner economically viable use of his land") (citation omitted); see also Chevron USA, Inc. v. Cayetano, 224 F.3d 1030, 1042 (9th Cir. 2000) (asserting that state scheme of regulating contracts between gasoline refiners and retail dealers did not substantially advance a legitimate state interest).

[FN376]. Tahoe-Sierra, 535 U.S. at 308 (quoting Tahoe-

Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency (TSPC), 34 F. Supp. 2d 1226, 1232 (D. Nev. 1999) (emphasis added), rev'd in part, remanded, 216 F.3d 764 (9th Cir. 2000), aff'd, 535 U.S. 302 (2002)).

[FN377]. TSPC, 34 F. Supp. 2d at 1240 (emphasis added).

[FN378]. 535 U.S. at 326-27; see also supra Part III.D.

[FN379]. 324 F.3d 1297 (Fed. Cir. 2003).

[FN380]. Id. at 1306 (citing Tabb Lakes, Ltd. v. United States, 10 F.3d 796, 799 (Fed. Cir. 1993)).

[FN381]. Id. at 1300.

[FN382]. Id. at 1301.

[FN383]. Id. at 1303 (citing 33 C.F.R. § 320.1(a)(4) (1996)).

[FN384]. Id.

[FN385]. Id. at 1300.

[FN386]. Id.

[FN387]. Id.

[FN388]. 46 Fed. Cl. 538 (Fed. Cl. 2000), aff'd in part, vacated in part by Cooley v. United States, 324 F.3d 1297 (Fed. Cir. 2003).

[FN389]. Cooley, 324 F.3d at 1305 (quoting Tahoe-Sierra, 535 U.S. at 330) (citation omitted).

[FN390]. Id. at 1307 (citation omitted) (emphasis added).

[FN391]. See id. at 1306-07 (noting the rarity of cases where the court will base a taking on extraordinary delay and not couple it with a finding of bad faith).

[FN392]. See, e.g., Robert H. Freilich, Time, Space, and Value in Inverse Condemnation: A Unified Theory for Partial Takings Analysis, 24 U. HAW. L. REV. 589, 601 (2002) (noting that needed studies must be diligently pursued and that moratoria for purposes of conducting studies unreasonable in scope have been set aside on substantive due process grounds).

[FN393]. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 334 (2002).

[FN394]. 526 U.S. 687 (1999).

[FN395]. Id. at 698 (citation omitted).

[FN396]. Id.

[FN397]. Id. at 699.

[FN398]. Id. at 721.

[FN399]. Cooley v. United States, 324 F.3d 1297, 1301 (Fed. Cir. 2003).

[FN400]. Del Monte Dunes, 526 U.S. at 704; see also Steven J. Eagle, Substantive Due Process and Regulatory Takings: A Reappraisal, 51 ALA. L. REV. 977, 1023-24 (2000).

[FN401]. While the city's petition for certiorari did not refer to the first prong of Agins, the Solicitor General's amicus brief, in support of the city, proffered the following additional question: "Whether a land-use restriction that does not substantially advance a legitimate public purpose can be deemed, on that basis alone, to effect a taking of property requiring the payment of just compensation." Brief for the United States as Amicus Curiae Supporting Petitioner, Del Monte Dunes, 526 U.S. 687 (No. 97-1235), 1998 WL 308006, at Part *I.

[FN402]. 447 U.S. 255, 260 (1980) ("The application of a general zoning law to particular property effects a

taking if the ordinance does not substantially advance legitimate state interests ....").

[FN403]. Del Monte Dunes, 526 U.S. at 701.

[FN404]. Id. at 706.

[FN405]. Id. at 722 (emphasis added).

[FN406]. Id. at 709.

[FN407]. Id. at 710-11.

[FN408]. Id. at 715.

[FN409]. Id. at 721.

[FN410]. In Del Monte Dunes, the taking arose prior to the Supreme Court's determination that states must provide a compensation remedy for temporary takings, and here the taking was temporary since the landowner sold the parcel to the state. Id. at 699-700 (citing First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987)).

[FN411]. See, e.g., Nectow v. City of Cambridge, 277 U.S. 183, 187-88 (1928); Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

[FN412]. Kenneth B. Bley & Tina R. Axelrod, The Search for Constitutionally Protected "Property" in Land-Use Law, 29 URB. LAW 251, 257 (1997).

[FN413]. 318 F.3d 203 (D.C. Cir. 2003).

[FN414]. Id. at 206-07.

[FN415]. Id. at 207 (citing DeBlasio v. Zoning Bd. of Adjustment, 53 F.3d 592, 601 (3d Cir. 1995)).

[FN416]. Id. (citing Bituminous Materials v. Rice County, 126 F.3d 1068, 1070 (8th Cir. 1997); Gardner v. Baltimore, 969 F.2d 63, 68 (4th Cir. 1992); Jacobs, Visconsi & Jacobs Co. v. City of Lawrence, 927 F.2d 1111 (10th Cir. 1991); Spence v. Zimmerman, 873 F.2d 256, 258 (11th Cir. 1989); RRI Realty Corp. v. Vill. of Southampton, 870 F.2d 911, 917 (2d Cir. 1989)).

[FN417]. Id.; see also Charles A. Reich, The New Property, 73 YALE L.J. 733 (1964) (advocating property-like protections for social entitlements on which recipients justifiably could form reliance interests).

[FN418]. George Washington University, 318 F.3d at 207.

[FN419]. Id.

[FN420]. Id. (quoting Bituminous Materials, 126 F.3d at 1070).

[FN421]. Id. (referencing Kentucky Dep't of Corrs. v. Thompson, 490 U.S. 454, 463 (1989)). Thompson found discretion to be constrained by "substantive predicates," such as an instruction that prison visitation may be denied when "the visitor's presence ... would constitute a clear and probable danger." Thompson, 490 U.S. at 463.

[FN422]. Id. at 209 (quoting Silverman v. Barry, 845 F.2d 1072, 1080 (D.C. Cir. 1988)).

[FN423]. Id. at 212.

[FN424]. 7 Cl. Ct. 688 (Cl. Ct. 1985).

I am in charge of acquiring lands for the National Park Service. Even though we know what your lands are worth, we are going to try and get them for 30 cents on every dollar that we feel they are worth. Of course, you don't have to accept this 30 cents on the dollar. We will let you wait for a couple of years. If you don't take 30 cents on the dollar right now, you wait for a couple of years. After a couple of years if you won't take 30 cents on the dollar, we are going to condemn it. We will condemn your property. You know what that is going to mean? That means that you are going to have to hire an expensive lawyer from the city and he is going to take one-third of what you get. Plus, you know who is going to have to pay the court costs. You are. That is in addition to these expensive lawyers.

Id. at 691-92.

[FN425]. 851 P.2d 744 (Wash. Ct. App. 1993).

[FN426]. Id. at 755.

[FN427]. Pinecrest Homeowners Ass'n v. Glen A. Cloninger Assocs., 62 P.3d 938, 943 (Wash. Ct. App. 2003).

[FN428]. See, e.g., Mitchell v. Kemp, 575 N.Y.S.2d 337, 338 (App. Div. 1991) (addressing a variance application delayed for unexplained sequential moratoria extending over five years).

[FN429]. Q.C. Constr. Co. v. Gallo, 649 F. Supp. 1331, 1338 (D.R.I. 1986), aff'd, 836 F.2d 1340 (1st Cir. 1987).

[FN430]. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 334 (2002).

[FN431]. Id.

[FN432]. Id. at 315 n.10 (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2002)), 321-22 (indicating rule).

[FN433]. 438 U.S. at 124.

[FN434]. For discussion of appropriate measures of regulatory takings damages, see A.A. Profiles, Inc. v. City of Fort Lauderdale, 253 F.3d 576 (11th Cir. 2001), and Wheeler v. City of Pleasant Grove, 833 F.2d 267 (11th Cir. 1987). See also Cynthia J. Barnes, Comment, Just Compensation or Just Damages: The Measure of Damages for Temporary Regulatory Takings in Wheeler v. City of Pleasant Grove, 74 IOWA L. REV. 1243 (1989); Gideon Kanner, Measure of Damages in Non-physical Inverse Condemnation Cases, in 1989 INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN ch. 12 (Carol J. Holgren ed., 1989).

[FN435]. See, e.g., Fla. Rock Indus., Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994). "A speculative market may exist in land that is regulated as well as in land that is not, and the precise content of regulations at any given time may not be particularly important to those active in the market." Id. at 1566.

[FN436]. See supra Part III.B.

[FN437]. Tahoe-Sierra, 535 U.S. at 315 n.11 (quoting Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency (TSPC), 34 F. Supp. 2d 1226, 1241 (D. Nev. 1999), rev'd in part, remanded, 216 F.3d 764 (9th Cir. 2000), aff'd, 535 U.S. 302 (2002)).

[FN438]. 189 F.3d 1355 (Fed. Cir. 1999).

[FN439]. Id. at 1361. This assertion is contested with respect to per se takings. Another panel of the Federal Circuit subsequently disagreed and the full court did not grant review en banc to settle the conflict. See Palm Beach Isles Assocs. v. United States, 208 F.3d 1374 (Fed. Cir. 2000).

[FN440]. 189 F.3d at 1361-62.

[FN441]. 533 U.S. 606 (2001).

[FN442]. Id. at 626-27; see Steven J. Eagle, The Regulatory Takings Notice Rule, 24 U. HAW. L. REV. 533 (2002).

[FN443]. Palazzolo, 533 U.S. at 633 (O'Connor, J., concurring).

[FN444]. 49 Fed. Cl. 248 (Fed. Cl. 2001), aff'd, 303 F.3d 1349 (Fed. Cir. 2002).

[FN445]. Id. at 269.

[FN446]. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978). "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." Id. at 124.

[FN447]. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982).

[FN448]. OLIVER WENDELL HOLMES, JR., THE COMMON LAW (1881).

The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries, the custom, belief, or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career.

Id. at 5.

[FN449]. 524 U.S. 498 (1998).

[FN450]. Id. at 532-37.

[FN451]. 49 Fed. Cl. 36 (Fed. Cl. 2001).

[FN452]. Id. at 42.

[FN453]. Id. at 46.

[FN454]. Id. at 49-50.

[FN455]. Id. at 51.

[FN456]. Am. Pelagic Fishing Co. v. United States, 55 Fed. Cl. 575, 591 (Fed. Cl. 2003) (awarding damages) (citing Tahoe-Sierra, 535 U.S. at 335).

[FN457]. Id. at 591.

[FN458]. See supra text accompanying notes 379-92.

[FN459]. 324 F.3d 1297 (Fed. Cir. 2003).

[FN460]. Id. at 1307.

[FN461]. Id.

[FN462]. Cf. 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123 (C.D. Cal. 2001).

[FN463]. Cf. Southwestern Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C., 768 N.E.2d 1 (Ill. 2002), cert. denied, 537 U.S. 880 (2002).

[FN464]. Cf. Cottonwood Christian Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203 (C.D. Cal. 2002).

[FN465]. 49 Fed. Cl. at 49-50.

[FN466]. Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) (holding that 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).

[FN467]. See generally, John J. Delaney & Duane J. Desiderio, Who Will Clean Up the "Ripeness Mess"? A Call for Reform so Takings Plaintiffs Can Enter the Federal Courthouse, 31 URB. LAW. 195, 200-01 (1999).

[FN468]. Timothy V. Kassouni, The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights, 29 CAL. W. L. REV. 1, 2 (1992).

[FN469]. See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency (TSPC V), 228 F.3d 998, 1000 (9th Cir. 2000) (Kozinski, J., dissenting from a denial of reh'g en banc).

[FN470]. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 318 (1987).

[FN471]. Arthur L. Corbin, Hard Cases Make Good Law, 33 YALE L.J. 78, 78 (1923).

[FN472]. Examples might include unthinking application of the "parcel as a whole" doctrine and indulgence in the assumption that planning moratoria always carry with them reciprocity of advantage.

[FN473]. A famous and highly successful example is that of the NAACP's "'litigation strategy' against state-supported racially segregated schools, which it pursued 'from the inception of the campaign in the mid-1920s to its culmination in the early 1950s.'" Steven H. Wilson, Brown Over "Other White": Mexican Americans' Legal Arguments and Litigation Strategy in School Desegregation Lawsuits, 21 LAW & HIST. REV. 145, 147 (2003) (quoting MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950 at xi (1987)). The use of such strategies to preserve property rights has met with vociferous objection. See Douglas T. Kendall & Charles P. Lord, The Takings Project: A Critical Analysis and Assessment of the Progress So Far, 25 B.C. ENVTL. AFF. L. REV. 509, 510 (1998) (complaining of "a large and increasingly successful campaign by conservatives and libertarians to use the federal judiciary to achieve an anti-regulatory, anti-environmental agenda").

[FN474]. 526 U.S. 687 (1999).

[FN475]. Id. at 695-700.

[FN476]. United States Supreme Court Official Transcript, Del Monte, 526 U.S. 687 (1999) (No. 97-1235), 1998 WL 721087, at *4.

[FN477]. Id. at * 16-17.

[FN478]. Id. at * 19.

[FN479]. The list includes the National League of Cities, the American Planning Association, and many states.

[FN480]. Professor Lazarus had argued for TRPA in Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725 (1997), and was on brief for TRPA in Tahoe- Sierra, 535 U.S. 302 (2002).

[FN481]. Lazarus, supra note 96, at 15.

[FN482]. See 505 U.S. at 1032 (Kennedy, J., concurring in the judgment).

[FN483]. 533 U.S. at 632 (O'Connor, J., concurring).

[FN484]. For discussion of the petition for certiorari and its inversion, see supra Part II.

[FN485]. Penn Central, 438 U.S. at 116 (referring to UGP Properties, Inc.).

[FN486]. Lazarus, supra note 96, at 17.

[FN487]. See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 333 (2002) (observing that "with the benefit of hindsight, we might characterize the successive actions of TRPA as a 'series of rolling moratoria'").

[FN488]. 505 U.S. 1003 (1992).

[FN489]. See id. at 1009 (stating the finding), 1036 (Blackmun, J., dissenting) (asserting that the Court was "[r]elying on an unreviewed (and implausible) state trial court finding that this restriction left Lucas' property valueless").

[FN490]. 438 U.S. 104 (1978).

[FN491]. See William W. Wade, Penn Central's Economic Failings Confounded Takings Jurisprudence, 31 URB. LAW. 277, 286-87 (1999).

[FN492]. Tahoe-Sierra, 535 U.S. at 313 n.7 (noting that "this claim was barred by California's 1-year statute of limitations and Nevada's 2-year statute of limitations" and that "the validity of the 1987 plan is not before us"). For a treatment of rolling moratoria, see supra Part IV.D.

[FN493]. Brief for Petitioners, Tahoe-Sierra, 535 U.S. at 302 (No. 00- 1167), 2001 WL 1692011, at *9 n.11.

[FN494]. 331 U.S. 745 (1947).

[FN495]. 364 U.S. 40 (1960).

[FN496]. Dickinson, 331 U.S. at 748.

[FN497]. Id. at 748-49 (emphasis added).

[FN498]. Tahoe-Sierra, 535 U.S. at 321.

[FN499]. Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).

[FN500]. 477 U.S. 340 (1986).

[FN501]. Tahoe-Sierra, 535 U.S. at 343 (Rehnquist, C.J., dissenting) (quoting MacDonald, 477 U.S. at 348 and citing Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

[FN502]. See id. at 343-44.

[FN503]. 331 U.S. at 745; see supra text accompanying notes 494-97.

[FN504]. Brown v. Legal Found. of Wash., 123 S. Ct. 1406, 1417 (2003); see supra text accompanying notes 255-59.

[FN505]. Suitum, 520 U.S. 725 (1997).

[FN506]. Williamson County, 473 U.S. 172 (1985).

[FN507]. Beekwilder v. United States, 55 Fed. Cl. 54, 60 (Fed. Cl. 2002) (quoting Suitum, 520 U.S. at 737, which quoted, in turn, Williamson County, 473 U.S. at 191).

[FN508]. See supra Part II.A.1.

[FN509]. See supra Part II.D.6.

[FN510]. Tahoe-Sierra, 535 U.S. at 315 n.10 (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001)).

[FN511]. See supra Part III.D.

[FN512]. See Williamson County, 473 U.S. at 172; see also Stephen E. Abraham, Williamson County Fifteen Years Later: When Is a Takings Claim (Ever) Ripe?, 36 REAL PROP. PROB. & TR. J. 101 (2001) (suggesting strategies for transcending ripeness problem); cf. Kathryn E. Kovacs, Accepting the Relegation of Takings Claims to State Courts: The Federal Courts' Misguided Attempts to Avoid Preclusion Under Williamson County, 26 ECOLOGY L.Q. 1 (1999).

[FN513]. See supra Part IV for a discussion on why it is not impossible for landowners to establish the egregious violations of substantive due process that federal courts require.

[FN514]. Dwight H. Merriam, Reengineering Regulation to Avoid Takings, 33 URB. LAW. 1, 2 (2001).

[FN515]. See, e.g., Almquist v. Town of Marshan, 245 N.W.2d 819 (Minn. 1976).

A property owner does not have an absolute right to obtain from a town board a permit to use his land in the manner contemplated by an existing zoning ordinance. A moratorium on the issuance of such permits is valid if (a) it is adopted by the town board in good faith; (b) it is not discriminatory; (c) it is of limited duration; (d) it has for its purpose the development of a comprehensive zoning plan; and (e) the town board acts promptly to adopt such plan.

Id. at 820 (quoting from the syllabus by the court).

[FN516]. See Dwight H. Merriam & Gurdon H. Buck, Smart Growth, Dumb Takings, 29 ENVTL. L. REP. 10,746, 10,756 (1999).

[FN517]. Id.

[FN518]. See, e.g., Richard H. Fallon, Jr., "The Rule of Law" as a Concept in Constitutional Discourse, 97

COLUM. L. REV. 1, 8-9 (1997) (elucidating five basic elements of the rule of law: (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)).

[FN519]. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 328 (2002); see supra Part II.C.

[FN520]. See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency (TSPC V), 228 F.3d 998, 1001 n.1 (9th Cir. 2000) (Kozinski, J., dissenting from a denial of reh'g en banc) ("Governmental policy is inherently temporary while land is timeless.").

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