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"Fairness and Justice" After Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency: Subsequent Regulatory Takings Decisions Under the "Parcel as a Whole" Framework

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"FAIRNESS AND JUSTICE" AFTER *TAHOE-SIERRA PRESERVATION COUNCIL, INC. V. TAHOE REGIONAL PLANNING AGENCY*: SUBSEQUENT REGULATORY TAKINGS DECISIONS UNDER THE "PARCEL AS A WHOLE" FRAMEWORK

INTRODUCTION

Until the early twentieth century, the Fifth Amendment Takings Clause[1] afforded compensation only when the government physically appropriated property.[2] Over time, the Supreme Court recognized that fairness and justice demanded constitutional protection not only for physical takings, but also for regulatory takings.[3] There are two principal types of regulatory takings: (1) those resulting in the physical occupation of property[4] and (2) those stripping the owner of use of property.[5] Courts

1. The Takings Clause of the Fifth Amendment states, "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The Fourteenth Amendment makes the Fifth Amendment applicable to the states. U.S. CONST. amend. XIV; *see, e.g.*, First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 307 (1987).

2. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322 (2002) ("Our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves the straightforward application of *per se* rules."). In contrast to physical takings, which require compensation per se, regulatory takings did not historically receive any Fifth Amendment protection. John F. Hart, *Colonial Land Use Law and its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1292 (1996) ("[T]he Takings Clause means what it says about land use regulation: nothing. The reason the Framers did not address land use regulation in the Takings Clause is that they did not regard it as a taking."); *see also* Coast Range Conifers, L.L.C. v. State, 76 P.3d 1148, 1153–55 (Or. Ct. App. 2003) (detailing possible historical interpretations of the Takings Clause).

3. Armstrong v. United States, 364 U.S. 40, 49 (1960) (containing the oft-cited proposition that a taking occurs when the "[g]overnment . . . forc[es] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."). Regulatory takings are of a "recent vintage" in comparison to the physical appropriations and condemnations recognized prior to the *Pennsylvania Coal Co. v. Mahon* decision. *See Tahoe-Sierra*, 535 U.S. at 322; Penn. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922); *see also infra* notes 25–71 and accompanying text.

4. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (ritualistically cited for the proposition that a regulation that results in the physical occupation of property constitutes a per se taking); *see also* Brown v. Legal Found. of Wash., 538 U.S. 216, 240–41 (2003) (finding that Interest on Lawyers' Trust Accounts (IOLTA) programs, which require lawyers to deposit client-funds into interest-bearing accounts for the benefit of those who cannot afford legal services, does not constitute a regulatory taking under *Loretto*); *see also* Tuthill Ranch, Inc. v. United States, 381 F.3d 1132, 1135–39 (Fed. Cir. 2004) (recounting the history of per se physical takings before finding that the government's lease of excess fiber optic capacity on pre-existing easement was not a per se physical taking). Physical occupation-type regulatory takings are sometimes classified separately from

agree that the first category of takings, regulatory takings resulting in a physical invasion, are per se unconstitutional.[6] However, conflicting precedents govern the non-physical bulk of regulatory takings.[7]

In an attempt to standardize takings analysis, the Supreme Court's 1978 *Penn Central Transportation Co. v. New York City* decision established a multi-factor test for determining whether a regulatory taking has occurred.[8] The *Penn Central* test requires courts to evaluate (1) the regulation's interference with investment-backed expectations; (2) the regulation's impact on the property owner; and (3) the character of the government action.[9] Later, in 1991, the Supreme Court adopted the per se temporary regulatory takings rule, giving property owners an alternative to the multi-factor test.[10] However, in the 2002 *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*[11] decision, the Supreme Court effectively eliminated per se temporary takings by finding that two consecutive moratoria[12] did not constitute a temporary taking.[13]

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regulatory takings entirely. Justine W. Stemple, Note, *Take it or Leave it: The Supreme Court's Regulatory Takings Jurisprudence After* Tahoe-Sierra, 28 WM. & MARY ENVTL. L. & POL'Y REV. 163, 164 (2003).

5. *Penn. Coal*, 260 U.S. at 414–15.

6. *Loretto*, 458 U.S. at 426.

7. *See* Woodland Manor, III Assocs. v. Reisma, No. PC89-2447, 2003 R.I. Super. LEXIS 35, at *45 (R.I. Super. Ct. Feb. 24, 2003) ("The morass of takings law is replete with contradictions, complex rules, incompatible decisions, and divergent interpretations."); *see also* Sheffield Dev. Co. v. City of Glenn Heights, 140 S.W.3d 660, 671 (Tex. 2004) (likening takings jurisprudence to "a sophistic Miltonian Serbonian Bog") (citing City of Austin v. Teague, 570 S.W.2d 389, 391 (Tex. 1978)).

8. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); *see infra* notes 32–54 and accompanying text.

9. *Penn Cent.*, 438 U.S. at 124.

10. *See infra* notes 32–54 and accompanying text.

11. 535 U.S. 302 (2002).

12. Moratoria are useful government planning tools. *Tahoe-Sierra*, 535 U.S. at 337–38 (noting that "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"); *see also* DANIEL R. MANDELKER, LAND USE LAW § 6.06 (4th ed. 1997) [hereinafter MANDELKER, LAND USE LAW]. Governments typically use moratoria to delay particular activities during planning periods. Wendie L. Kellington, *Challenging and Defending Moratoria*, 2003 LAND USE INSTITUTE 913, 915. In addition to pausing development during planning periods, governments often use moratoria to halt development when the government lacks sufficient public facilities to service that development. MANDELKER, LAND USE LAW, *supra*, § 6.06.

Moratoria are also one potential cloak for regulatory takings. *Tahoe-Sierra*, 535 U.S. at 341 (cautioning that "any moratorium that lasts for more than one year should be viewed with special skepticism"). By definition, moratoria are temporary "delays" rather than permanent "takings." OXFORD ENGLISH DICTIONARY 1072 (2d ed. 1989) (defining "moratorium" as "[a] postponement, an agreed delay, a deliberate temporary suspension (of some activity, etc.)."). Despite their temporary nature, the Takings Clause governs moratoria. *See Tahoe-Sierra*, 535 U.S. at 325–26, 340–42 (evaluating the constitutionality of a thirty-two month moratorium under the Takings Clause). Accordingly, land use planners must recognize the constitutional bounds of these restrictions on land use under the Fifth Amendment.

There is little agreement among scholars about the impact of *Tahoe-Sierra*.[14] Many contend that *Tahoe-Sierra* was narrowly crafted to minimize its impact on regulatory takings jurisprudence.[15] Others argue the decision will have a broad impact on takings jurisprudence through its reaffirmation of the "parcel as a whole" approach to the denominator problem.[16] Additionally, environmentalists applaud the decision as an important victory.[17]

According to land use experts St. Amand and Merriam, the six requirements of a constitutionally defensible moratorium are: (1) the government must have the authority to enact the moratorium; (2) the moratorium must serve a legitimate public health or safety objective; (3) the moratorium must be limited to the shortest possible time period; (4) the moratorium must pertain to the smallest physical area possible; (5) the moratorium should limit the smallest number of uses of the property as possible, allowing for some alternate uses of the property during the moratorium if at all possible; and (6) the moratorium should provide alternatives and exceptions if possible. Matthew G. St. Amand & Dwight H. Merriam, *Defensible Moratoria*: *The Law Before and After the* Sierra-Tahoe *Decision*, 2003 LAND USE INSTITUTE 925, 958–59. With regard to the second requirement, aesthetics and tourism would not qualify as adequate public interests to justify moratoria. *Id*. With regard to the third requirement, there is no set time period for constitutionally defensible moratoria. *Id*. at 940. While *Tahoe-Sierra* has ramifications for all six qualities of a defensible moratorium, the holding particularly affects the duration of a defensible moratoria. *See infra* notes 91–96, 232–35 and accompanying text.

13. *Tahoe-Sierra*, 535 U.S. at 326; *see infra* notes 91–96 and accompanying text.

14. The only universally acceptable statement about *Tahoe-Sierra's* impact may be that it remains uncertain. *See* David M. Callies & Calvert G. Chipcase, *Moratoria and Musings on Regulatory Takings:* Tahoe–Sierra Preservation Council v. Tahoe Regional Planning Agency, 25 U. HAW. L. REV. 279, 281 (2003). Callies and Chipcase caution against making concrete predictions about *Tahoe-Sierra's* ramifications for moratoria: "Reading more into the case from a planning perspective is like looking into a crystal ball, and the proverbial 'ground glass' warning applies." *Id.*; *see also* Lise Johnson, Note, *After Tahoe Sierra, One Thing is Clearer: There Is Still a Fundamental Lack of Clarity*, 46 ARIZ. L. REV. 353, 375–77 (2004) (proposing deference to regulatory bodies as a resolution to the persisting subjectivity of takings jurisprudence after *Tahoe-Sierra*).

15. The majority notes three times that its decision in *Tahoe-Sierra* is a narrow one. *Tahoe-Sierra*, 535 U.S. at 307, 314, 318. Many agree with the Court's own statement of narrowness. *See, e.g.*, Michael M. Berger, Tahoe-Sierra: *Much Ado About-What?*, 25 U. HAW. L. REV. 295, 295–96 (2003); Callies & Chipcase, *supra* note 14, at 280; St. Amand & Merriam, *supra* note 12, at 928.

The petition for certiorari in *Tahoe-Sierra* asks: "[I]s 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?" Berger, *supra*, at 306. The narrower question before the Court as termed in the resulting grant of certiorari was "[w]hether 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?" Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 533 U.S. 948, 949 (2001). Berger notes that the grant of certiorari allowed the Supreme Court to answer a narrower question than the one actually posed by the appeal: "Notwithstanding the Ninth Circuit's absolutist negative analysis that moratoria are not takings, no matter how long they last, the Petitioners were tasked with arguing the absolutist opposite, for example, that *all* moratoria are *per se* takings, no matter how short." Berger, *supra*, at 306.

16. *See, e.g.*, Thomas E. Roberts, *Regulatory Takings in the Wake of* Tahoe-Sierra *and the* IOLTA *Decision*, 35 URB. LAW. 759, 759 (2003) (noting five significant effects of *Tahoe-Sierra*).

17. David G. Savage, *Hitting the Brakes: A Pro-Property Rights Juggernaut Stalls on the Shores of Lake Tahoe*, 88 A.B.A. J. 32, 32 (May 2002) ("The 6–3 ruling is an important victory for environmentalists and land-use planners. It reaffirms the government's broad authority to control development and regulate property."); Thomas J. Koffer, *What to "Take" from* Palazzolo *and* Tahoe-

This Note will examine the holding of *Tahoe-Sierra* and its effects on regulatory takings jurisprudence. Part I recounts some of the major pre-*Tahoe-Sierra* Supreme Court precedent governing regulatory takings.[18] Next, Part II details the Supreme Court's holding in *Tahoe-Sierra*.[19] Part III reviews federal and state court decisions that have applied the *Tahoe-Sierra* decision.[20] Part IV examines the effects of *Tahoe-Sierra* on regulatory takings law as demonstrated by subsequent judicial interpretation.[21] Part IV also predicts that strict application of the "parcel as a whole" rule may lead to inequitable results.[22] Part IV then details how some courts have already combated these potential inequities.[23] This Note concludes that courts may attempt to either avoid the "parcel as a whole" framework or remold the character of the government action factor as a means to offset the economic impact factor under the "parcel as a whole" rule.[24]

I. TEMPORARY REGULATORY TAKINGS PRE-*TAHOE-SIERRA*

A. The Foundations of Regulatory Takings Jurisprudence

In 1922, Justice Holmes set out the foundations of modern regulatory takings jurisprudence in *Pennsylvania Coal Co. v. Mahon*.[25] *Pennsylvania Coal* usurped *Mugler v. Kansas*,[26] which, for the preceding fifty years, had provided deference to the government's regulatory power.[27] Justice

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Sierra: *A Temporary Loss for Property Rights*, 21 VA. ENVTL. L.J. 503, 506–07 (2003) (recounting environmentalists reactions to *Tahoe-Sierra*); Richard J. Lazarus, Essay: *Celebrating* Tahoe-Sierra, 33 ENVTL. L. 1, 13–14 (2003) (detailing the benefits of *Tahoe-Sierra* from an environmentalist's perspective).

18. *See infra* notes 25–71 and accompanying text.

19. *See infra* notes 72–111 and accompanying text.

20. *See infra* notes 112–222 and accompanying text.

21. *See infra* notes 223–99 and accompanying text.

22. *See infra* notes 250–58 and accompanying text.

23. *See infra* notes 259–99 and accompanying text.

24. *See infra* notes 300–09 and accompanying text; *see also* Steven J. Eagle, *"Character" as "Worthiness": A New Meaning for* Penn Central's *Third Test?*, 27 NO. 6 ZONING & PLANNING L. REP. 1, 2–3 (2004).

25. Penn. Coal Co. v. Mahon, 260 U.S. 393 (1922); *see* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 325 (2002) ("[I]t was Justice Holmes' opinion in *Pennsylvania Coal Co. v. Mahon*, that gave birth to our regulatory takings jurisprudence." (internal citation omitted)); *see also* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 (1992).

26. 123 U.S. 623 (1887).

27. *Penn. Coal*, 260 U.S. at 418, 422 (Brandeis, J., dissenting) (citing Mugler v. Kansas, 123 U.S. 623, 668–69 (1887)); *see also* Pat A. Cerundolo, Note, *The Limited Impact of* Lucas v. South Carolina Coastal Council *on Massachusetts Regulatory Takings Jurisprudence*, 25 B.C. ENVTL. AFF. L. REV. 431, 433 (1998). Justice Brandeis cites to a long line of cases that followed *Mugler*. *See, e.g.*,

Holmes acknowledged the necessity of government regulation, but he also recognized that regulatory measures constitute takings when they go "too far," and have the effect of appropriating or destroying a property interest.[28] In 1960, the *Armstrong v. United States*[29] Court voiced the equally qualitative notions of fairness and justice as the underlying principles governing regulatory takings.[30] While the notions in these cases have framed regulatory takings jurisprudence, neither decision provides much guidance for determining when a regulation becomes a taking.[31]

B. Penn Central*: The Regulatory Taking "Defined" and the Birth of the "Parcel as a Whole" Approach to the Denominator Problem*

To fill the gaps left by *Pennsylvania Coal* and other early regulatory takings decisions, the Supreme Court developed three factors for identifying regulatory takings in *Penn Central*.[32] Courts must consider: (1) the regulation's interference with the property owner's investment-backed expectations;[33] (2) the regulation's economic impact on the property

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Pierce Oil Corp. v. City of Hope, 248 U.S. 498 (1919); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Powell v. Pennsylvania, 127 U.S. 678, 683 (1887). *Mugler* has resurfaced recently in takings jurisprudence. *See, e.g.*, Edmonson v. Pearce, 91 P.3d 605, 617–18 (Okla. 2004) (reaffirming *Mugler* as sound precedent for rejecting a takings claim against a statute outlawing cockfighting).

28. *Penn. Coal*, 260 U.S. at 415. Justice Holmes' famous statement for the majority reads, "while property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking." *Id*.

29. 364 U.S. 40 (1960).

30. *Id.* at 49; *see supra* note 3.

31. The "less than self-defining," *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001), nature of Justice Holmes' statements have been the subject of regulatory takings debate for the last seventy years. *Lucas*, 505 U.S. at 1015. In fact, if *Pennsylvania Coal* were to arise today it is unlikely that a taking would be found. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987) (finding no taking because the interest in the coal and the interest in the land in its entirety could not be considered separately); *see also* Machipongo Land & Coal Co. v. Commonwealth, 799 A.2d 751, 756, 770 (Pa. 2002) (holding that no taking occurred under similar circumstances because interest in land and coal could not be separated).

32. 438 U.S. 104 (1978).

33. Characterization of investment-backed expectations lends itself to circular reasoning. *Lucas*, 505 U.S. at 1034 (Kennedy, J., concurring). These expectations depend on how an owner will expect a court to react, which in turn depends on the owner's expectations. *Id*. ("[F]or if the owner's reasonable expectations are shaped by what the courts allow as a proper exercise of governmental authority, property tends to become what courts say it is."). In *Palazzolo v. Rhode Island*, the Supreme Court recently tackled the timing of a regulation's effect on "reasonable investment–backed expectations." *Palazzolo*, 533 U.S. at 626. The majority noted that a new property owner who has acquired title to property affected by a previously enacted restriction does not have "notice" such that the new property owner is barred from a takings claim. *Id*. However, the timing of regulations does affect the reasonable investment-backed expectations under the *Penn Central* analysis. *Id*. at 633 (O'Connor, J., concurring).

owner;[34] and (3) the character of the government action.[35] Although *Penn Central* purported to standardize regulatory takings jurisprudence by requiring consideration of these three factors,[36] the Supreme Court cautioned courts about the need for ad hoc factual inquiries regarding each factor.[37]

The *Penn Central* decision concentrates on the economic impact and character factors. The Court's analysis regarding the economic impact factor gave birth to the "parcel as a whole" approach.[38] Gauging the economic impact on the property owner due to a regulation requires courts to compare the property owner's loss (the numerator) to some other value (the denominator). The identity of this "other value" is the essence of the "denominator problem." [39] The *Penn Central* Court proposed a "parcel as a whole" solution to the denominator problem:[40] the owner's loss (the numerator) in relation to the value of the property as a whole (the denominator) constitutes the economic impact on a property owner in a regulatory takings case.[41]

The application of the "parcel as a whole" rule to the facts in *Penn Central* is illustrative. In *Penn Central*, the plaintiffs owned numerous properties in midtown Manhattan, including Grand Central Terminal (Terminal).[42] They were denied the right to build a fifty-five-story office tower atop the Terminal under the New York City Landmark Preservation Law.[43] The Court rejected the plaintiffs' characterization of the denominator as the "air rights" above the Terminal.[44] The loss suffered by

34. *Penn Cent.*, 438 U.S. at 124.

35. In *Penn Central*, the preservation of landmarks was for the "promotion of the general welfare." *Id.* at 138. This weighed in favor of the government's contention that no taking had occurred. *Id*.

36. *Id*. at 124–25.

37. *Id*. at 124 (noting that these criteria require "essentially ad hoc, factual inquiries").

38. *Id.* at 130–31.

39. Marc R. Lisker, *Regulatory Takings and the Denominator Problem*, 27 RUTGERS L.J. 663, 664–68 (1996). The denominator problem is as old as regulatory takings themselves; it can be traced back to Brandeis' dissent in *Pennsylvania Coal*. Penn. Coal v. Mahon, 260 U.S. 393, 419 (1922) (Brandeis, J., dissenting) ("If we are to consider the value of the coal kept in place by the restriction, we should compare it with the value of all other parts of the land. That is, with the value not of the coal alone, but with the value of the whole property.").

40. *Penn Cent.*, 438 U.S. at 130–31.

41. *See* John E. Fee, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. CHI. L. REV. 1535, 1536 (1994); *see generally* Lisker, *supra* note 39 (explaining and analyzing the denominator problem).

42. *Penn Cent.*, 438 U.S. at 115.

43. *Id*. at 116–17.

44. *Id*. at 130. Note that this characterization would undermine the claim of the plaintiffs in *Pennsylvania Coal* who had lost their "coal rights" under particular property. *See supra* note 31.

the owners through the deprivation of the right to build atop the Terminal (the numerator) could not be considered in relation to discrete segments of the property such as the "air rights."[45] Rather, the economic impact was determined by the loss in relation to the "parcel as a whole."[46] Furthermore, the Court noted that the "air rights" above the Terminal were transferable to Penn Central's other properties.[47] This meant that the value of the Terminal itself coupled with the value of the transferable development rights allocated to the Terminal must be considered the denominator, rendering the loss of "air rights" above the Terminal minute in comparison to the value of the Terminal as a whole.[48]

The *Penn Central* Court also extensively examined the character of the government action.[49] Justice Brennan initially noted that physical appropriations of property constitute the type of "bad" character, which might justify finding a taking.[50] The character factor did not weigh against the government because the New York City law did not physically appropriate the plaintiff's property.[51] In its analysis of the character factor, the Court also rejected the plaintiff's argument that the New York City law specifically targeted certain property to the detriment of particular landowners.[52] Instead, the law comprised a comprehensive plan to preserve historic developments[53] from which even the plaintiff benefited.[54]

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45. *Penn Cent.*, 438 U.S. at 130.

46. *Id*. at 130–31.

47. *Id*. at 137.

48. *Id*. at 136–37. Some scholars have suggested the "parcel as a whole" approach in this context produces a counterintuitive system where what really determines a taking is not the economic loss suffered by the plaintiff, but the extent of the plaintiff's property interest. Daniel R. Mandelker, *New Property Rights Under the Taking Clause*, 81 MARQ. L. REV. 9, 16–17 (1997) (*Penn Central* provides an example of this problem because "[t]he case might have come out differently had the plaintiff been the owner of a small railroad station in a rural area who had no other real property assets" rather than a major corporation owning several properties.); *see also infra* note 254.

49. *Penn Cent.*, 438 U.S. at 131–35.

50. *Id.* at 124 (discussing the character of the government action factor, Brennan notes, "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." (internal citation omitted)). The Court contrasts New York's purely regulatory historic preservation law with laws physically appropriating property. *Id.* at 135 (citing United States v. Causby, 328 U.S. 256 (1946)). Eagle argues that *Penn Central* relegated the character factor to a distinction between physical and regulatory takings. *See* Eagle, *supra* note 24, at 3.

51. *Penn Cent.*, 438 U.S. at 135 (citing *Causby*, 328 U.S. 256). Before embarking on the multi-factor analysis the *Penn Central* Court noted that New York City pursued the laudable goal of historic preservation. *Id.* at 129. Furthermore, the New York City law constituted a permissible means to reach this goal. *Id.* By so stating that the law's legitimacy was not in dispute, the *Penn Central* decision implicitly notes that the legitimacy inquiry is separate from the multi-factor *Penn Central* test. *See id.*

52. *Id.* at 131.

Stated baldly, appellants' position appears to be that the only means of ensuring that selected

C. First English*: Recognition of a "New" Type of Regulatory Taking, the Temporary Regulatory Taking*

Takings jurisprudence took another turn in *First English Evangelical Lutheran Church v. County of Los Angeles*[55] when the Supreme Court recognized that even temporary takings are compensable under the Fifth Amendment.[56] Although the ordinance in *First English* was in effect less than three years,[57] the Supreme Court held that the plaintiff could be entitled to compensation for economic loss suffered during the approximately three-year period.[58] Thus, compensation was possible in a

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> owners are not singled out to endure financial hardship for no reason is to hold that any restriction imposed on individual landmarks pursuant to the New York City scheme is a "taking" requiring the payment of "just compensation." Agreement with this argument would, of course, invalidate not just New York City's law, but all comparable landmark legislation in the Nation. We find no merit in it.

Id.

53. *Id.* at 132.

> In contrast to discriminatory zoning, which is the antithesis of land-use control as part of some comprehensive plan, the New York City law embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city, and as noted, over 400 landmarks and 31 historic districts have been designated pursuant to this plan.

Id.

54. *Id.* at 134–35.

> Unless we are to reject the judgment of the New York City Council that the preservation of landmarks benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole—which we are unwilling to do—we cannot conclude that the owners of the Terminal have in no sense been benefited by the Landmarks Law.

Id.

55. 482 U.S. 304 (1987).

56. *Id*. at 318–19. Los Angeles County Interim Ordinance No. 11,855 prohibited construction on the plaintiff's property after flooding destroyed the camp previously located on the site. *Id*. at 307. Under the California Supreme Court's decision in *Agins v. Tiburon*, 598 P.2d 25 (Cal. 1979), a plaintiff could only receive compensation for a regulatory taking if a court first found it unconstitutional and the government still chose to enforce the regulation. *First English*, 482 U.S. at 308–09. No compensation was required if the government chose to retract the unconstitutional ordinance. *Id*. at 311–12. Thus, under *Agins* no compensation was possible for "temporary" regulatory takings; they were either retracted or made permanent. *See id.*; *see also* Berger, *supra* note 15, at 303 (according to the Ninth Circuit Court of Appeals in *First English*, a regulation "is rendered temporary only when an ordinance that effects a taking is struck down by a court." The effect is such that "a moratorium—by definition, intended to be temporary—could *never* result in a taking that would require compensation."). In rejecting the *Agins* theory, the Supreme Court noted, "'temporary takings' which, as here, deny a landowner of all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." *First English*, 482 U.S. at 318.

57. *First English*, 482 U.S. at 322; *see also* Berger, *supra* note 15, at 322 n.146 (noting the *Tahoe-Sierra* majority erred in its characterization of the duration of the restriction in *First English* because California law limited its length).

58. *First English*, 482 U.S. at 321–22; First English Evangelical Lutheran Church v. County of

temporary context.[59] However, the lower court deferred the question of whether a taking had occurred.[60] The Supreme Court remanded for determination of whether a taking had in fact occurred under the *Penn Central* analysis.[61]

D. Temporary Regulatory Takings May Be Per Se Compensable Under the Lucas *Categorical Rule*

Relying on the Supreme Court's decision in *First English* for the proposition that temporary takings are compensable,[62] the Supreme Court in *Lucas v. South Carolina Coastal Council*[63] further determined that temporary takings are per se[64] entitled to Fifth Amendment compensation when they deprive a property owner of "all economically beneficial or productive use" of his property.[65]

In *Lucas*, the 1988 South Carolina Beachfront Management Act[66] eliminated the plaintiff's ability to build single-family homes on his two beachfront lots.[67] In 1990, after the plaintiff brought suit, the South Carolina legislature amended the Beachfront Management Act to allow the plaintiff to apply for "special permits" to build.[68] The Supreme Court found that even though the 1990 amendment provided an allowance for "special permits," which might exempt Lucas' property from the Act, the government had to pay compensation for past losses incurred during the three-year temporary taking when the absolute prohibitions set out in the

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Los Angeles, 210 Cal. App.3d 1353, 1373 (Cal. Ct. App. 1989) (noting length of restriction in *First English*).

59. *First English*, 482 U.S. at 322.

60. *Id*. at 321–22; *see also* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 328 (2002).

61. *First English*, 482 U.S. at 322. On remand, the district court found that a restriction on building lasting more than two years was not unreasonable, and therefore, not a taking. *First English*, 210 Cal. App.3d at 1373.

62. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030 n.17 (1992).

63. 505 U.S. 1003 (1992).

64. The Supreme Court later rejected a per se application of the *Lucas* categorical rule. *Tahoe-Sierra*, 535 U.S. at 342; Cooley v. United States, 324 F.3d 1297, 1306 (Fed. Cir. 2003) (noting that the *Tahoe-Sierra* court held that "no categorical per se taking rule applies to temporary moratoria on land development, even though such moratoria may deprive a landowner of all economically viable uses of a parcel for a period of time"); *see infra* notes 90–96 and accompanying text.

65. *Lucas*, 505 U.S. at 1019; *see also* Lucas v. S.C. Coastal Council, 404 S.E.2d 895, 900 (S.C. 1991), *rev'd*, 505 U.S. 1003 (1992) (noting the difference between the *Mugler* emphasis on the importance of the government action and the *Pennsylvania Coal* emphasis on limiting government action).

66. S.C. CODE ANN. § 48-39-10 et seq. (Law. Co-op. 1987).

67. *Lucas*, 505 U.S. at 1008–09.

68. S.C. CODE ANN. § 48-39-290 et seq. (Law. Co-op. 1991).

original 1988 Act were in effect.[69] It was unnecessary to consider the character of the government action or the reasonableness of the plaintiff's interest because the lower court found that the plaintiff's property lost all economic value under the 1988 Act.[70] Thus, the *Lucas* categorical rule provided a property owner with compensation without requiring an evaluation of the *Penn Central* ad hoc factual inquiries so long as the property owner instead showed that he had been deprived of "all economically beneficial or productive use" of the property.[71]

II. *TAHOE-SIERRA*

Even before the plaintiffs in *First English* and *Lucas* suffered from alleged takings, the litigation that would eventually undermine their holdings was already in motion.[72] Justice Stevens'[73] opinion in *Tahoe-Sierra* marked the culmination of almost twenty years of litigation[74] between the plaintiffs, approximately 700 property owners in the Lake Tahoe region,[75] and the Tahoe Regional Planning Agency (TRPA).[76]

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69. *See Lucas*, 505 U.S. at 1011, 1030.

70. *Id*. at 1016 n.7, 1017. Notably, the Supreme Court avoided an independent analysis of whether such a complete deprivation actually took place under the facts in *Lucas* by deferring to the trial court's judgment. *Tahoe-Sierra*, 535 U.S. at 330–31. The trial court found that the 1988 Act rendered the plaintiff's fee simple interest in his two beachfront lots "valueless." *Lucas*, 505 U.S. at 1007. Thus, the majority avoided the denominator problem entirely. In contrast, Justice Stevens' dissent labels the denominator problem as the dispositive question. *Id*. at 1054 (Stevens, J., dissenting) ("The same regulation can always be characterized as a mere 'partial' withdrawal from full, unencumbered ownership of the landholding affected by the regulation. . . ." (quoting Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1614 (1988))).

71. *Lucas*, 505 U.S. at 1015. Justice Stevens' dissent criticizes the equity of the *Lucas* categorical rule, which would allow a landowner losing 100% of the economic value of his property to recover per se, but denying a landowner who lost 95% of the economic value of his property to recover per se. *Id*. at 1064. This hypothetical analysis has largely come true. *See infra* notes 119, 193–95 and accompanying text.

72. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 808 F. Supp. 1484, 1486–87 (D. Nev. 1992) (outlining the timeline of the *Tahoe-Sierra* lower court decisions against the back drop of the Supreme Court's decisions in *First English* and *Lucas*). Before *First English* was decided in 1987, the *Tahoe-Sierra* plaintiffs' claims had already made their first run through the California and Nevada district courts. *Id*. Just after *Lucas* was decided in 1992, the District Court of Nevada granted the *Tahoe-Sierra* defendants' motion to dismiss all claims, finding even the *Lucas* categorical rule unpersuasive. *Id*. at 1491–92.

73. For an analysis of the changes in the Supreme Court that elevated Justice Stevens' views on takings from the dissent in *Lucas* to the majority in *Tahoe-Sierra* see generally Lazarus, *supra* note 17.

74. The *Tahoe-Sierra* plaintiffs originally brought suit in 1984 and made four trips to the U.S. Court of Appeals for the Ninth Circuit before *Tahoe-Sierra*. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 322 F.3d 1064, 1074–75 (9th Cir. 2003). Their efforts officially ended with the dismissal of their takings claim under the 1987 Plan on res judicata grounds in 2003. *Id*. at 1076–86.

75. J. David Breemer, *Temporary Insanity: The Long Tale of* Tahoe-Sierra Preservation Council

A. Factual and Procedural Background

To preserve the clarity and color of Lake Tahoe, California and Nevada entered into the 1980 Tahoe Regional Planning Compact (Compact).[77] The Compact set environmental standards and authorized the TRPA to adopt a permanent regional plan to meet those standards.[78]

In the course of TRPA's efforts to halt the erosive impact of development prior to the adoption of the permanent regional plan, TRPA enacted two consecutive moratoria beginning in 1981 and ending thirty-two months later.[79] Despite the fact that the prohibitions on development created by the moratoria continued beyond their 1984 termination, the *Tahoe-Sierra* majority[80] considered only the thirty-two month prohibition on building between 1981 and 1983.[81]

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and its Quiet Ending in the United States Supreme Court, 71 FORDHAM L. REV. 1, 8–17 (2002) (containing a detailed account of factual and procedural history of *Tahoe-Sierra*).

76. TRPA was created in 1968 under the Tahoe Regional Planning Compact in order to carry out California and Nevada's aspirations under that agreement. Tahoe Regional Planning Compact, Pub. L. No. 91–148, 83 Stat. 360 (1969).

77. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 308 (2002). The development of the Lake Tahoe region increased erosion, which in turn began diminishing the clarity of the unique blue lake. *Id*. In particular, impervious surfaces such as pavement collect rainfall, maximizing the erosive impact of the water. *Id*. at 308.

78. *Id*. at 310–11.

79. *Id*. at 311–12. The first of these moratoria, Ordinance 81-5, occurred in 1981 and was followed in 1983 by Resolution 83-21. *Id*. Ordinance 81-5 banned all construction in certain high-hazard areas in California for two years. *Id*. High hazard areas included those areas with steeper slopes that might produce more run-off and those areas around wetlands. *Id*. at 309. Ordinance 81-5 prohibited development in these high hazard areas for two years, the projected amount of time necessary for the adoption of a permanent plan. *Id*. However, TRPA failed to enact a permanent plan in that two-year period. *Id*. Resolution 83-21 banned all development in both California and Nevada until a permanent plan was adopted in 1984. *Id*.

80. Chief Justice Rehnquist's dissent proposes that the 1984 Plan should have been considered in the analysis of whether or not a taking had occurred. *Id*. at 345–46 (Rehnquist, C.J., dissenting). Thus, the period of time under consideration should have begun with the implementation of Resolution 81-3 in 1981 and ended six years later with the adoption of the 1987 Plan. *Id*. at 346; *see also* Berger, *supra* note 15, at 303 (noting that the 1984 and 1987 plans merely continued the prohibitions of earlier the moratoria). Chief Justice Rehnquist notes that the *Tahoe-Sierra* plaintiffs were denied just as much, if not more, of the economically beneficial use of their land as the *Lucas* plaintiff, considering the six year duration of the taking in *Tahoe-Sierra* as opposed to the two year duration in *Lucas*. *Tahoe-Sierra*, 535 U.S. at 347 (Rehnquist, C.J., dissenting).

81. *Tahoe-Sierra*, 535 U.S. at 312. The 1984 Plan itself did not result in the continuation of the stringent building restrictions imposed by Resolution 83-21 and Ordinance 81-5. *Id*. Rather, the relatively lax provisions of the 1984 Plan prompted the State of California to sue to enjoin the plan immediately upon implementation. *Id*. After the adoption of the 1984 Plan, the State of California filed suit to enjoin its implementation because the land-use restrictions of the 1984 Plan did not sufficiently protect Lake Tahoe. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F. Supp. 2d 1226, 1236 (D. Nev. 1999). The resulting injunction, which lasted until implementing the 1987 Plan, continued the restrictions set out in the earlier moratoria. *Tahoe-Sierra*, 535 U.S. at 312. The permanent plan adopted in 1987 contained the same restrictions against building found in Ordinance

The plaintiffs brought both as-applied and facial challenges[82] to the two moratoria alleging that they constituted takings under both the *Penn Central* and *Lucas* tests.[83] After weighing the *Penn Central* factors, the district court found that there was no taking under *Penn Central* due to the temporary nature of the regulations.[84] However, the district court did find that the thirty-two month prohibition on development constituted a categorical temporary taking under the *Lucas* analysis because the plaintiffs were effectively denied "all economically viable use" during the moratoria.[85]

81-5 and Resolution 83-21. *Id*. at 312.

The majority approved the Ninth Circuit's finding that TRPA did not "cause" the injunction, but rather the suit by the State of California caused the injunction. *Id*. at 313. In contrast, Chief Justice Rehnquist found that TRPA was the "moving force" behind the injunction; TRPA's construction of a 1984 Plan that did not comply with the 1980 Tahoe Regional Planning Compact "caused" the suit and ensuing injunction. *Id*. at 345 (Rehnquist, C.J., dissenting); *see supra* note 80.

82. When bringing a facial takings claim, a plaintiff proposes that the regulation or statute itself constitutes a taking. *E.g*., NJD, Ltd. v. City of San Dimas, 2 Cal. Rptr. 3d 818, 825–26 (Cal. Ct. App. 2003) (finding evidence of adverse economic impact on the plaintiff not admissible when the plaintiff brought a facial challenge because a facial taking occurs only when the mere enactment of the regulation constitutes a taking); *see also* St. Amand & Merriam, *supra* note 12, at 928 (stating when a facial taking exists, "no matter how the regulation is applied to any property, in every instance it would work a taking of that property . . ."). Facial challenges to land-use restrictions, like the one brought in *Tahoe-Sierra*, are "highly unusual—not totally a matter of fantasy, like a jackalope, but something akin to a nearly extinct species, such as an Asiatic cheetah." *Id*. (footnote omitted).

In contrast to facial takings claims, as-applied takings claims require the court to examine the ad hoc factual inquiries laid out in *Penn Central* as they apply to the plaintiff's particular property. *Id*. at 927–28.

83. *Tahoe-Sierra*, 535 U.S. at 317. Intuitively, the *Penn Central* and *Lucas* tests can be used in both as-applied and facial challenges. A plaintiff could prevail on an as-applied *Penn Central* basis by demonstrating that a balancing of the three criteria regarding a specific parcel constitutes a taking. *E.g.*, Friedenberg v. N.Y. State Dep't of Envtl. Conservation, 767 N.Y.S.2d 451, 461 (App. Div. 2003). A *Penn Central* facial claim would require that the plaintiff show that the regulation on its face constitutes a taking under the *Penn Central* criteria for any property. *E.g.*, Comm. for Reasonable Regulation v. Tahoe Reg'l Planning Agency, 311 F. Supp. 2d 972, 993 (D. Nev. 2004). An as-applied *Lucas* basis for recovery would require a plaintiff to show that under the particular circumstances a complete economic loss was suffered. A *Lucas* facial claim requires a showing that the regulation on its face strips a landowner of all economically beneficial use. *E.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992). Despite the theoretical possibility of all four approaches, the *Penn Central* factors are typically used in as-applied claims while *Lucas* is used for facial claims.

84. *Tahoe-Sierra*, 535 U.S. at 315; *Tahoe-Sierra*, 34 F. Supp. 2d at 1240 (finding that the landowner had no reasonable expectation to build on the lots during the moratoria because the average holding time of a lot in the area was twenty-five years).

85. *Tahoe-Sierra*, 34 F. Supp. 2d at 1245. The land retained some value despite the moratoria. *Tahoe-Sierra*, 535 U.S. at 316 n.12. Between the initiation of the moratoria and the enactment of the 1984 Plan, the United States Forest Service purchased over 382 parcels in California and 72 parcels in Nevada. *Id*. The average prices in California and Nevada before August 26, 1983 were over $19,000 and $39,000 respectively. *Id*.

The appeal concerned only the categorical takings finding.[86] The Ninth Circuit Court of Appeals reversed the district court's finding[87] that the plaintiffs had been denied "all economically viable use."[88] In a 6–3 decision, the Supreme Court upheld the Ninth Circuit.[89]

B. The Supreme Court Majority

1. Temporal Divisions of Property

In affirming the Ninth Circuit's application of the denominator problem, the Supreme Court majority[90] rejected temporal divisions of property.[91] The Court required that intense scrutiny be applied to moratoria of more than one year in length. Like the moratoria in *Tahoe-Sierra*, these moratoria could not be considered in temporal isolation.[92] Instead of temporally dividing the plaintiffs' property interests such that the value of the properties during the thirty-two month period of the moratoria comprised the denominator, the Court considered the value of the whole interminable fee simple estate as the denominator.[93] The loss in value over the thirty-two month moratoria (the numerator) was not significant in relation to the entirety of the fee simple estates (the denominator).[94] At the very least, the properties certainly did not lose all value.[95] The *Lucas* categorical takings test was inappropriately applied by the district court because the plaintiffs could not make the prerequisite showing that the

86. *Tahoe-Sierra*, 535 U.S. at 317 (noting "that petitioners had expressly disavowed an argument 'that the regulations constitute a taking under the ad hoc balancing approach described in *Penn Central*'" (quoting Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 216 F.3d 764, 773 (9th Cir. 2000), *aff'd*, *Tahoe-Sierra*, 535 U.S. 302 (2002))).

87. *Tahoe-Sierra*, 216 F.3d at 789.

88. *Tahoe-Sierra*, 34 F. Supp. 2d at 1245. The Ninth Circuit noted that the district court incorrectly determined that the denominator was the value of the properties during the thirty-two months of the moratoria. *Tahoe-Sierra*, 216 F.3d at 774. Rather, the denominator should have been the value of the property for the duration of the fee simple estates held by the plaintiffs. *See id*.

89. *Tahoe-Sierra*, 535 U.S. at 343.

90. Justices Thomas and Scalia joined in Chief Justice Rehnquist's dissent. *Tahoe-Sierra*, 535 U.S. at 343 (Rehnquist, C.J., dissenting). Justice Thomas also wrote separately to protest the majority's rejection of temporal divisions of property for the purpose of determining the denominator in takings claims. *Id*. at 355 (Thomas, J., dissenting); *see supra* note 80.

91. *Tahoe-Sierra*, 535 U.S. at 319, 331–32; *see also Tahoe-Sierra*, 216 F.3d at 776. Spatial and use-based divisions of property were also rejected. *Tahoe-Sierra*, 535 U.S. at 319, 331–32.

92. *Tahoe-Sierra*, 535 U.S. at 341.

93. *Id*. at 331–32. By definition, a fee simple estate lasts indefinitely. A fee simple interest in property is an absolute interest with infinite duration. 28 AM. JUR. 2D *Estates* § 13 (2004); *e.g.*, Scott v. Brunson, 569 S.E.2d 385, 387 (S.C. Ct. App. 2002).

94. *See Tahoe-Sierra*, 535 U.S. at 331–32.

95. *Id*.

thirty-two month moratoria deprived them of "all" beneficial use of their property.[96]

The Supreme Court majority[97] distinguished the facts in both *First English*[98] and *Lucas*[99] from those in *Tahoe-Sierra* because in both those cases the Court had not actually decided the merits of the takings claims.[100]

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96. *Id*. at 330.

97. In his dissent, Chief Justice Rehnquist argues that the majority's rationale for distinguishing the two former decisions establishes inequitable treatment of similar takings depending on whether the land use restriction is labeled "temporary" or "permanent." *Tahoe-Sierra*, 535 U.S. at 346–47 (Rehnquist, C.J., dissenting). A plaintiff could recover under the *Lucas* per se rule for a two year prohibition on land use so long as the regulation is labeled "permanent," but another landowner could not recover for a six year prohibition on land use if the regulation is labeled "temporary." *Id*. at 345, 347 (noting that the prohibition in *Tahoe-Sierra* really lasted six years); *see supra* note 80. Chief Justice Rehnquist notes that no land use regulations are irrevocable. *Tahoe-Sierra*, 535 U.S. at 345, 347. Thus, even a regulation labeled permanent, like the statutory prohibition in *Lucas*, can later be modified or repealed. *Id*.

Rather than granting compensation based on an artificial linguistic division between temporary and permanent land use restrictions, Chief Justice Rehnquist proposes granting compensation based on the nature of the regulation. *Id.* at 351–52. For example, those normal delays resulting from acquiring building permits and changing zoning ordinances, as first outlined in *First English*, would not be takings. *See* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 321 (1987); *Tahoe-Sierra*, 535 U.S. at 351 (Rehnquist, C.J., dissenting) ("When a regulation merely delays a final land-use decision, we have recognized that there are other background principles of state property law that prevent the delay from being deemed a taking."). The *Tahoe-Sierra* moratoria do not fall into this protected category for two reasons. First, the thirty-two month moratoria in *Tahoe-Sierra* stripped the landowners of all use rather than merely prohibiting use for particular activities. *Tahoe-Sierra*, 535 U.S. at 352–53 (Rehnquist, C.J., dissenting) (noting the permissibility of restrictions that prohibit certain categories of use, such as fast-food restaurants, adult stores, and commercial development). Second, unlike the typical permissible moratoria outlined in *First English*, the *Tahoe-Sierra* moratoria were of extraordinary length. *Id*. at 353–54; *see supra* note 80.

98. *Tahoe-Sierra*, 535 U.S. at 328 (distinguishing *First English*).

99. *Id*. at 330–31 (distinguishing *Lucas*).

100. *Id*. at 328. The court rejected the plaintiff's reliance on *First English* because the Supreme Court had considered only the merits of a remedial question and not whether a taking had occurred. *Id.*; *see supra* notes 55–61 and accompanying text.

In distinguishing *Lucas*, the Court noted that the *Lucas* plaintiff protested a permanent statute, unlike the *Tahoe-Sierra* plaintiffs who protested a pair of temporary moratoria. *See Tahoe-Sierra*, 535 U.S. at 330–31. In *Lucas*, it was not until after the suit was filed that the statute was amended. *Id*. Thus, the *Lucas* claim had been founded on a permanent, rather than a temporary takings theory. *Id*. In *Lucas*, like *First English*, the Supreme Court had not considered the merits of a temporary takings claim. *Id.*; *see also supra* notes 62–71 and accompanying text. Accordingly, the district court in *Tahoe-Sierra* incorrectly applied the categorical *Lucas* test, which requires a showing that the government deprived the property owner of "all" economically beneficial use. *See Tahoe-Sierra*, 535 U.S. at 330. Instead, the district court measured the thirty-two month loss in value against the value of the fee simple estates over time. *Id.*

2. The Penn Central *Factors Reaffirmed*

The Court noted a strong prejudice against per se rules[101] in regulatory takings jurisprudence: if regulatory takings required compensation per se, land use regulations would become an unaffordable luxury for governments.[102] To avoid costly compensation even for temporary regulations, governments would be prone to make hasty decisions regarding long-term land use questions.[103] Therefore, the Court limited the *Lucas* categorical rule to only those "relatively rare" situations in which the government strips a landowner of all economically beneficial use.[104] Because a temporary taking can never meet the prerequisite showing of a loss of "all economically beneficial or productive use" under the "parcel as a whole" approach,[105] the *Lucas* categorical rule never applies to non-physical temporary regulatory takings.[106] Rather, the Supreme Court reasoned that courts should look to the *Penn Central* factors to determine whether a temporary restriction on land use constitutes a taking.[107]

In dicta, the Supreme Court outlined six arguments that might provide grounds for finding a taking in *Tahoe-Sierra* based on fairness and justice.[108] One of these alternate approaches suggested that the series of

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101. *See generally* MANDELKER, LAND USE LAW, *supra* note 12, § 2.03 (explaining the *Lucas* per se rule).

102. *Tahoe-Sierra*, 535 U.S. at 324. This echoes the emphasis on the importance of regulation in Justice Harlan's 1878 opinion in *Mugler*. Mugler v. Kansas, 123 U.S. 623, 668 (1887); *see also supra* note 27 and accompanying text.

103. *Tahoe-Sierra*, 535 U.S. at 335. The Court noted that application of per se rules should be limited to those "extraordinary case[s]" in which the government physically appropriates property or in which a regulatory taking is so extreme, as in *Lucas*, that it deprives the owner of "all" beneficial use of the property. *Tahoe-Sierra*, 535 U.S. at 332; Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 422 (1982) (providing an example of a physical temporary taking when a per se rule would be appropriate).

104. *Tahoe-Sierra*, 535 U.S. at 319, 337–38. Even a 95% diminution in value cannot compel application of the *Lucas* rule. *Id*. at 330 (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019, n.8 (1992)); Friedenberg v. N.Y. State Dep't of Envtl. Conservation, 767 N.Y.S.2d 451, 458–59 (App. Div. 2003) (finding even a 95% diminution in the property value of the plaintiff's beachfront lot from $665,000 to $31,500 insufficient for the application of *Lucas* per se rule).

105. *See Tahoe-Sierra*, 535 U.S. at 332. Accordingly, the *Lucas* test was rejected for all temporary takings involving fee simple interests. *Id.* ("Hence, a permanent deprivation of the owner's use of the entire area is a taking of 'the parcel as a whole,' whereas a temporary restriction that merely causes a diminution in value is not.").

106. *See id.* at 335.

107. *Id*. The Court noted that the duration of the regulation is not immaterial; duration plays a role in determining the outcome under the *Penn Central* factors. *Id*. (citing Palazzolo v. Rhode Island, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring)).

108. *Tahoe-Sierra*, 535 U.S. at 333–34. In addition to declining to extend the *Lucas* per se rule to temporary takings, the Court also rejected two other possible per se rules that might provide bright line grounds for compensation based on the nature or the duration of regulations. *Id*. The second per se rule

moratoria in *Tahoe-Sierra* comprised "rolling moratoria" that were the functional equivalent of a permanent taking.[109] However, according to the Court in *Tahoe-Sierra*, fairness and justice[110] did not require the adoption of any of these rationales.[111]

III. REGULATORY TAKINGS JURISPRUDENCE AFTER *TAHOE-SIERRA*

A. General Takings Trends: The Failure of Categorical and Facial Takings Claims

Since *Tahoe-Sierra*, both federal and state courts have dealt with numerous takings claims. The spectrum ranges from regulatory claims involving land use restrictions[112] to physical appropriation claims

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declined by the Supreme Court would have made all land use regulations, even temporary ones, per se illegal. *Id.* However, there would be an exception for those regulations resulting in "normal delays" caused by common building and zoning measures. *Id*. (outlining "a narrower rule [than that in *Lucas*] that would cover all temporary land-use restrictions except those 'normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like'" (quoting First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 321 (1987))). In addition to the common pitfalls of per se rules in making land use restrictions an unaffordable luxury, this rule would require courts to distinguish between permissible "normal delays" and impermissible atypical delays. The distinction might make many formerly permissible exercises of police power compensable takings, thus crippling governments. *Tahoe-Sierra*, 535 U.S. at 335.

The Court also outlined four potential non-per se grounds for compensation. *Id*. at 333–34; *see infra* note 109 and accompanying text.

109. *Tahoe-Sierra*, 535 U.S. at 333–34. First, the Court declined to apply the "rolling moratoria" theory to the facts in *Tahoe-Sierra* because it had not been addressed by the district court or the court of appeals. *Id*. The "rolling moratoria" theory was not considered because the order granting certiorari did not encompass that issue. *Id*. at 334; *see also* Berger, *supra* note 15, at 303. Additionally, the Supreme Court noted that the Ninth Circuit Court of Appeals reviewed the moratoria as separate takings. *Tahoe-Sierra*, 535 U.S. at 334.

Second, a showing that the government acted in bad faith might entitle plaintiffs to compensation. *Id.* at 333. However, the Supreme Court deferred to the district court's finding that there was no bad faith involved in *Tahoe-Sierra*. *Id*.

Third, if the government regulations did not substantially promote a legitimate state interest, compensation would be required. *Id*. at 333–34. This theory of compensation, like the bad faith theory, was precluded by the undisputed factual findings of the district court. *Id*.

Fourth, rather than making a facial challenge, the individual plaintiffs might have alleged that a taking occurred with respect to the regulations "as applied" to their specific parcels under the *Penn Central* factors. *Id.* at 334. The Court speculated that at least some of the plaintiffs in *Tahoe-Sierra* would have prevailed had they brought an "as applied" takings claim in this case. *Id*.

Due to the scope of the Supreme Court's review and the uncontested factual findings of the district court, none of these four non-per se alternatives served as a possible justification for compensation in *Tahoe-Sierra*. *Id*.

110. *Tahoe-Sierra*, 535 U.S. at 333. The notion of fairness and justice as the overarching themes underlying takings jurisprudence comes from the serially cited *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *see also supra* notes 3, 30 and accompanying text.

111. *Tahoe-Sierra*, 535 U.S. at 334–35.

112. *E.g.*, D.A.B.E., Inc. v. City of Toledo, 393 F.3d 692, 695–96 (6th Cir. 2005) (rejecting facial

involving personal property.[113] Courts have uniformly rejected temporal segmentation in federal constitutional claims in all contexts.[114] Even in vertical (use-based) and horizontal (spatial) segmentation cases, the "parcel as a whole" method of resolving the denominator problem has played a prominent role in post-*Tahoe-Sierra* takings analysis.[115]

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takings challenge to city ordinance limiting smoking); NJD, Ltd. v. City of San Dimas, 2 Cal. Rptr. 3d 818, 834–35 (Cal. Ct. App. 2003) (evaluating the constitutionality of zoning restrictions); *see also* Machipongo Land & Coal Co. v. Commonwealth, 799 A.2d 751, 769 (Pa. 2002) (evaluating the constitutionality of regulations governing the use of certain property for coal mining).

113. *E.g.*, Brown v. Legal Found. of Wash., 538 U.S. 216, 240–41 (2003) (rejecting plaintiff's per se takings claim that the government physically appropriated interest on attorneys' trust accounts).

114. Santini v. Conn. Hazardous Waste Mgmt. Serv., 342 F.3d 118, 131 (2d Cir. 2003) (concluding a nuclear waste facility site proposal later withdrawn was temporary and due to the temporary nature of the site proposal, not all value was lost and no taking occurred); Maritrans, Inc. v. United States, 342 F.3d 1344, 1355 (Fed. Cir. 2003) (rejecting temporal segmentation of the post-regulation period and requiring that the pre-regulation profits derived from the plaintiffs' barges be included in the denominator); Berst v. Snohomish County, 57 P.3d 273, 279 (Wash. Ct. App. 2002) (finding six year moratorium on development not a *Lucas* per se taking because of its temporary nature).

115. Appolo Fuels, Inc. v. United States, 381 F.3d 1338, 1346 (Fed. Cir. 2004) (noting that the relevant parcel for purposes of a takings evaluation consists not merely of land affected by mining restrictions, but the entirety of the plaintiff's leaseholds); Norman v. United States, 63 Fed. Cl. 231, 257–58, 261 (Fed. Cl. 2004) (rejecting horizontal segmentation of 220.85 acres of wetlands from 2,280 acre development); Vellequette v. Town of Woodside, No. A091682, 2002 WL 1614358, at *1, **11–12 (Cal. Ct. App. July 23, 2002) (refusing to allow spatial segmentation of the plaintiffs' three lots for purposes of determining the denominator); LaSalle Nat'l Bank v. City of Highland Park, 799 N.E.2d 781, 791–94 (Ill. App. Ct. 2003) (considering three lots together under the *Penn Central* "parcel as a whole" rule); Zanghi v. Bd. of Appeals of Bedford, 807 N.E.2d 221, 224, 227–28 (Mass. App. Ct. 2004) (considering the values of lots 33 and 34 as part of the same parcel as non-continguous lot 36); *Machipongo*, 799 A.2d at 769 (declining both use-based and spatial segmentation of Machipongo and Naughton/Erickson properties even though the plaintiffs held only a coal interest in some of the properties and some properties were not entirely contiguous). *Contra* State *ex rel*. R.T.G., Inc. v. State, 780 N.E.2d 998, 1008–09 (Ohio 2002) (allowing vertical use-based segmentation such that coal rights alone comprise the denominator for coal property held in fee).

The Supreme Court of Pennsylvania's decision in *Machipongo Land & Coal Co. v. Commonwealth* demonstrates how *Tahoe-Sierra's* reaffirmation of the "parcel as a whole" has supported the rejection of segmentation in both vertical and horizontal contexts. *Machipongo*, 799 A.2d at 769. Portions of the Machipongo fee simple and coal estates were designated Unfit for Mining (UFM) in 1992 in order to prevent water pollution in the Goss Run Watershed. *Id*. at 755–56. The Naughton/Erickson property included coal estates declared UFM and fee simple estates outside the UFM area. *Id*. at 756. The Pennsylvania Supreme Court reaffirmed the importance of the denominator problem in the wake of *Tahoe-Sierra* by refusing to sever the coal estates from either the fee simple interests (use-based severance) or the noncontiguous properties (spatial severance) from one another. *Machipongo*, 799 A.2d at 768–69; *see generally*, Matthew J. Bauer, Note, *Absent Physical Invasion, Government Interference with Private Property Will not Likely Violate the Fifth Amendment's Takings Clause:* Machipongo Land and Coal Company, Inc. v. Commonwealth of Pennsylvania, 41 DUQ. L. REV. 619 (2003) (discussing *Machipongo* as illustrative of the obstacles to bringing a successful regulatory takings claim). Additionally, the Court of Federal Claims recently held that even non-contiguous properties sometimes compose part of the relevant parcel so long as they are part of "a common development plan." *See* Cane Tenn. Inc. v. United States, 60 Fed. Cl. 694, 703 (Fed. Cl. 2004).

Despite the Supreme Court's admonishments regarding the *Lucas* per se rule, many plaintiffs have continued to bring *Lucas* claims in the wake of *Tahoe-Sierra*.[116] After ritualistically citing *Tahoe-Sierra's* reaffirmation of *Penn Central*, the courts have typically found no *Lucas* taking.[117] In possibly the most extreme example, the Federal Circuit rejected a *Lucas* claim in *Cooley v. United States*[118] because wetland property that decreased in value 98.8% still had not lost all economically viable use.[119] Not only does post-*Tahoe-Sierra* jurisprudence abound with examples of failed *Lucas* claims, but there are also a plethora of examples of failed facial takings claims.[120] However, in a few cases since *Tahoe-Sierra* plaintiffs have prevailed on regulatory takings claims.[121]

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116. *See infra* notes 117–19 and accompanying text.

117. In most instances, the *Lucas* categorical claims have failed in the wake of *Tahoe-Sierra*. *Santini*, 342 F.3d at 131 (holding *Lucas* inapplicable when restriction temporary); *Maritrans*, 342 F.3d at 1354–55 (holding that a regulation requiring the plaintiff to retire or retrofit its existing single-hulled oil barges to make them double-hulled did not deprive the plaintiff of the entire useful life of the barges under *Lucas*); Cane Tenn. Inc. v. United States, 57 Fed. Cl. 115, 130 (Fed. Cl. 2003) (holding *Lucas* inapplicable in the absence of "total loss" of the value of Colton's property); Cane Tenn. Inc. v. United States, 54 Fed. Cl. 100, 108 (Fed. Cl. 2002) (determining that the *Lucas* test was inappropriate because the Cane property did not lose all value); *NJD*, 2 Cal. Rptr. 3d at 835 (finding plaintiff failed to make an adequate showing for a categorical claim); *Vellequette*, 2002 WL 1614358, at *10 (finding plaintiff failed to show a loss of all economic use under *Lucas* when sewer ordinance prevented separate development on each of three adjacent lots); Leon County v. Gluesenkamp, 873 So.2d 460, 461, 466–68 (Fla. Dist. Ct. App. 2004) (reversing the trial court's $130,000 judgment on the plaintiff's *Lucas* claim because plaintiff's sale of the lots for over $1 million showed that there was no depletion of all economic use); *Zanghi*, 807 N.E.2d at 224–25 (rejecting a *Lucas* claim because the plaintiff did not lose all economic use of the "entire parcel," which consisted of all the lots purchased by the plaintiff through a single deed rather than the sole lot on which construction was prohibited); *Machipongo*, 799 A.2d at 769 (finding *Lucas* inapplicable because plaintiffs did not suffer complete deprivation of economically beneficial use of their properties); *Berst*, 57 P.3d at 279 (holding *Lucas* and *First English* not applicable in takings claim after *Tahoe-Sierra*).

118. 324 F.3d 1297 (Fed. Cir. 2003).

119. *Id.* at 1304–06 (vacating and remanding the Court of Federal Claims' finding of a *Lucas* categorical taking when a wetland permit denial deprived plaintiff of 98.8% of the value of his property).

120. *E.g.*, Hotel & Motel Ass'n v. City of Oakland, 344 F.3d 959, 963, 966 (9th Cir. 2003) (rebuking facial taking claim against city regarding habitability ordinances for hotels); *see also* Lost Tree Vill. Corp. v. City of Vero Beach, 838 So.2d 561, 564, 572 (Fla. Dist. Ct. App. 2002) (finding no facial taking even though a city ordinance prohibiting certain locations for bridgeheads, coupled with a town ordinance prohibiting development without bridges, severely restricted potential development of plaintiff's island property); *see also Machipongo*, 799 A.2d at 758 (affirming lower court's finding that facial claim was invalid); *NJD*, 2 Cal. Rptr. 3d at 834–35 (finding insufficient showing that development moratorium comprised a facial taking).

121. *E.g.*, Cienega Gardens v. United States, 331 F.3d 1319 (Fed. Cir. 2003). In *Cienega Gardens*, the Federal Circuit found that the plaintiffs suffered a regulatory taking. *Id.* at 1353. The Emergency Low Income Housing Preservation Act (ELIHPA) and Low-Income Housing Preservation and Resident Homeownership Act (LIHPRHA) revoked the ability of the plaintiffs to pre-pay their mortgages after twenty years as formerly agreed. *Id.* at 1325–26. The Federal Circuit found that ELIHPA and LIHPRHA could constitute regulatory takings under the *Penn Central* factors. *Id.* at

B. The Penn Central *Factors After* Tahoe-Sierra

In *Tahoe-Sierra*, the Supreme Court mandated that courts look to the *Penn Central* factors for guidance.[122] Accordingly, courts consider the three *Penn Central* factors in turn: (1) the property-owner's reasonable investment-backed expectations; (2) the regulation's economic impact on the property owner; and (3) the character of the government action.[123] The following cases illustrate some of the post-*Tahoe-Sierra* trends in applying the *Penn Central* factors.[124]

1. The Economic Impact on the Property Owner

In the following two cases, the economic impact factor provided the focal point in the court's takings analysis.

Like many regulatory takings decisions,[125] *Bass Enterprise Production Co. v. United States* has a complex procedural background.[126] The *Bass* plaintiffs held a lease for oil rights[127] in property that was located near the

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1337–53. Likewise, in *SDDS, Inc. v. State of South Dakota*, the Supreme Court of South Dakota declined to reconsider whether a temporary taking had in fact occurred after *Tahoe-Sierra*. 650 N.W.2d 1, 25 (S.D. 2002). While this suggests that the outcome might favor the defendant after *Tahoe-Sierra*, the plaintiff prevailed due to the court's refusal to reconsider the takings claim. *Id.* at 10 (taking occurred when regulation denied plaintiff the ability to build a solid waste treatment facility).

122. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 326–27 (2002).

123. Penn Cent. Transp. Co. v. New York, 438 U.S. 104, 124 (1978).

124. While *Tahoe-Sierra* redefined the perimeters of regulatory takings, it had little effect on the first *Penn Central* factor, the plaintiff's reasonable investment-backed expectations.

125. *See, e.g.*, *Tahoe-Sierra*, 535 U.S. 302; *see generally* Breemer, *supra* note 75 (detailing the long and complicated procedural history of the *Tahoe-Sierra* litigation).

126. In 1996, the Court of Federal Claims found that the government had permanently taken the plaintiff's leasehold interest. Bass Enters. Prod. Co. v. United States, 35 Fed. Cl. 615, 617, 620 (Fed. Cl. 1996). The Federal Circuit reversed, finding that no permanent taking had occurred and remanded for a determination as to whether a temporary taking had occurred. Bass Enters. Prod. Co. v. United States, 133 F.3d 893, 894 (Fed. Cir. 1998). In 1999, the Federal Claims Court found that a taking had occurred under *Penn Central* and then in 2002 granted the defendant's motion for rehearing after *Tahoe-Sierra.* Bass Enters. Prod. Co. v. United States, 381 F.3d 1360, 1363–64 (Fed. Cir. 2004) (detailing the history of the *Bass* litigation). In 2004, the Federal Circuit affirmed the Court of Federal Claims' post-*Tahoe-Sierra* decision. *Id.* at 1371.

127. Restrictions on mining and other mineral extraction activity continually find their way to courts. For example, the Kohler Act, which restricted mining, provided the catalyst for the first regulatory taking in *Pennsylvania Coal*. Penn. Coal Co. v. Mahon, 260 U.S. 393, 412–13 (1922). A similar restriction was unsuccessfully challenged in *Keystone Bituminous Coal Ass'n v. DeBenedictis* and even more recently in *Machipongo Land & Coal Co. v. Commonwealth of Pennsylvania*. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 476–77 (1987); Machipongo Land & Coal Co. v. Commonwealth, 799 A.2d 751, 769 (Pa. 2002). *Bass* and *Cane* provide further examples. *See infra* notes 128–63 and accompanying text; *see also* Michael Graf, *Application of Takings Law to the Regulation of Unpatented Mining Claims*, 24 ECOLOGY L.Q. 57, 77–78 (1997) (reviewing takings jurisprudence in the mining context).

future site of a nuclear waste storage facility.[128] They were denied a permit to drill for oil for four years because of the property's proximity to the site.[129] In 1999, after years of litigation, the Court of Federal Claims determined that a temporary taking had occurred under the *Lucas* per se rule.[130] In the wake of *Tahoe-Sierra* the court granted the government's motion for reconsideration and reversed the 1999 pre-*Tahoe-Sierra* finding.[131]

In 1999, the Court of Federal Claims found that the plaintiff suffered a *Lucas* categorical taking during the four-year period in which they could not drill oil on their leasehold.[132] In 2002, the same court found that the *Lucas* rule was inappropriately applied to the plaintiff's case.[133] In particular, the court noted that public policy considerations precluded the application of the *Lucas* test in both *Tahoe-Sierra* and *Bass*.[134]

In 1996, the Court of Federal Claims evaluated the facts of *Bass* under the *Penn Central* factors to determine whether a permanent taking had occurred.[135] The determinative *Penn Central* factor in *Bass* was the economic impact on the property owner.[136] With regard to the economic

128. *Bass Enters.*, 35 Fed. Cl. at 616.

129. *Id.*; *Bass Enters.*, 54 Fed. Cl. at 402. The plaintiff's lease would not be affected by the facility unless the Environmental Protection Agency (EPA) determined that it must acquire the lease to comply with a federal statute. *Bass Enters*., 35 Fed. Cl. at 616. Before the EPA set these standards, the Bureau of Land Management (BLM) denied plaintiff's applications to drill for oil for four years. *Id*.; *Bass Enters*., 54 Fed. Cl. at 402. Only after the plaintiff brought a takings claim did the BLM contend that the denial was merely a delay pending action from the EPA and the Department Of Energy. *Bass Enters*., 35 Fed. Cl. at 616–17.

130. Bass Enters. Prod. Co. v. United States, 45 Fed. Cl. 120, 123 (Fed. Cl. 1999), *reh'g granted and rev'd*, 54 Fed. Cl. 400, 401 (Fed. Cl. 2002).

131. *Bass Enters.*, 54 Fed. Cl. at 401, *aff'd, Bass Enters*., 381 F.3d at 1371.

132. *Bass Enters.*, 45 Fed. Cl. at 123, *reh'g granted and rev'd*, 54 Fed. Cl. at 402 (the BLM accepted plaintiffs applications to drill oil in May of 1998). In the 1999 decision the court noted that the denial of the plaintiff's applications for four years constituted an absolute loss to the plaintiff during that time. *Bass Enters.*, 45 Fed. Cl. at 124. The court reasoned that even the eventual capitulation of the BLM could not compensate the plaintiff for the lost years of use. *Id*. at 123. Relying on *First English*, the court noted that it was "well established" that temporary takings require compensation just as permanent takings require compensation. *Id*. (quoting Kennedy's concurrence in *Lucas*, which in turn cited *First English*).

133. *Bass Enters.*, 54 Fed. Cl. at 401.

134. *Id*. at 404. The court recognized that the application of the *Lucas* rule in either case might constrain government agencies by forcing them to rush through important planning decisions in order to avoid costly Fifth Amendment compensation. *Id*.

135. Bass Enters. Prod. Co. v. United States, 35 Fed. Cl. 615, 618–20 (Fed. Cl. 1996), *rev'd*, 133 F.3d 893, 894 (Fed. Cir. 1998).

136. The 1996 *Bass* court considered both the reasonable investment-backed expectations and the character of the government action. *Id*. at 619–20. In the 1996 case, the court noted that plaintiffs had reasonable investment-backed expectations although regulatory restrictions had restrained certain activities even in 1952 when the plaintiffs acquired the lease. *Id*. at 620. The court reasoned that the *Lucas* decision changed the inquiry as to the character of the government action. *Id.* Unless the

impact factor, the court noted that the denial of the right to mine stripped the plaintiffs of all the economically beneficial use of their leasehold interest.[137] Because the lease was for oil and gas rights only, a denial of these uses was a denial of 100% of the property's value.[138]

After considering the *Penn Central* factors again in 2002, the same court found that no temporary taking had occurred under the same facts.[139] As in 1996, the court considered the economic impact on the plaintiff.[140] The court previously determined that the economic impact of the four year permit denial was $1,137,808.[141] This was minor in relation to the $22.5 million value of the plaintiff's leasehold beyond the four year period.[142] Under the "parcel as a whole" framework set out in *Tahoe-Sierra*, this loss was just 5% of the total value.[143] The court found that the importance of the public welfare interest protected by the government's action,[144] combined with the minimal relative economic impact of the permit denial, outweighed the reasonable investment-backed expectations of the plaintiffs.[145] Accordingly, there was no temporary taking under *Penn Central*.[146]

In *Cane Tennessee v. United States*,[147] the plaintiffs, Cane and Colton, owned coal property.[148] Mining permit renewals for the Cane property were denied for several years.[149] Following the permit denials, a citizen's

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prohibited act was one already impermissible under state nuisance law, which the defendant had not alleged in *Bass*, this factor weighed against the government. *Id*. at 619–20.

137. *Id*. at 619–20.

138. *Id*. at 615, 619–20. Note that the 1996 court did not consider the temporary nature of the claim, but rather found that the denial was permanent. *Id.* at 617 n.2, 618, 620. The Federal Circuit reversed this permanent takings finding. *Bass Enters.*, 133 F.3d at 894.

139. *Bass Enters.*, 54 Fed. Cl. at 401. As in 1996, the court found that the plaintiff's investment-backed expectations were reasonable. *Id*. at 403. In direct opposition of their earlier rationale, the court adopted a balancing approach rather than a nuisance analysis when evaluating the character of the government action. *Id*. Under the balancing approach, the public health and welfare concerns surrounding the stability of the nuclear waste storage facility trumped the plaintiff's property interest. *Id*.

140. *Id*. at 403–04.

141. *Id*. at 404.

142. *Id*.

143. *Id*.

144. The *Bass* plaintiff's oil drilling activities threatened the stability of the new nuclear waste storage facility and thus the welfare of the public. *Id*. The Federal Circuit analyzed the character factor on appeal in 2004 as well. Bass Enters. Prod. Co. v. United States, 381 F.3d 1360, 1370 (Fed. Cir. 2004); *see infra* notes 156–63 and accompanying text.

145. *Bass Enters.*, 381 F.3d at 1370.

146. *Id*.

147. 57 Fed. Cl. 115 (Fed. Cl. 2003).

148. *Id.* at 119. Cane and Colton leased this property to Eastern Minerals and Van Buren respectively. *Id*.

149. *Id*. Pursuant to the Surface Mining Control and Reclamation Act (SMCRA), Eastern

group brought a petition in 1995 requesting that both the Cane and Colton properties be designated unsuitable for mining.[150] Although the process was originally scheduled to end in 1996, the government failed to reach a conclusion until 2000.[151] The property was later designated in 2000 by the federal government as unsuitable for coal mining.[152]

By using the "parcel as a whole" approach neither property suffered a loss in value sufficient to warrant finding a permanent taking when weighed against the compelling government interest served by the restrictions.[153]

In its analysis of the temporary takings claim, the court rejected the Cane plaintiff's "rolling moratoria" basis for recovery because the

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Minerals obtained permits to mine coal in 1980 and 1981. 30 U.S.C. §§ 1201–1328 (1986); *Cane Tenn.*, 57 Fed. Cl. at 119. Beginning in 1984 Eastern Minerals' permit renewal for the Cane property was denied. *Cane Tenn.*, 57 Fed. Cl. at 120. In 1991, Cane terminated the lease. *Id*. However, Eastern Minerals persisted in requesting a permit until a final decision was rendered in 1994 denying the right to mine coal. *Id*.

150. *Cane Tenn.*, 57 Fed. Cl. at 120.

151. *Id.* According to Cane, plaintiffs bringing delay-type regulatory takings must first establish an "extraordinary" delay in order to prevail under *Penn Central* on a temporary takings claim. *Id.* at 132 ("[A] finding of extraordinary delay is a condition precedent to undertaking a *Penn Central* analysis of whether a taking had occurred."); *see also* Spinell Homes, Inc. v. Municipality of Anchorage, 78 P.3d 692, 701 (Alaska 2003) (finding a ten to twenty-nine day delay in the permitting process insufficient for a successful takings claim); Loewenstein v. City of Lafayette, 127 Cal. Rptr.2d 79, 88, 90–91 (Cal. Ct. App. 2002) (ruling that a delay of over two years was not unreasonable without undertaking a full *Penn Central* analysis); Woodland Manor, III Assocs. v. Reisma, No. C.A. PC89-2447, 2003 WL 1224248, at *15 (R.I. Super. Ct. Feb. 24, 2003) (considering an eight-year delay akin to physical invasion and therefore compensable). In contrast, in *Cooley v. United States*, the Federal Circuit described the extraordinary delay inquiry in its overview of the third *Penn Central* factor, the character of the government action, rather than as a condition precedent to a *Penn Central* inquiry. Cooley v. United States, 324 F.3d 1297, 1306–07 (Fed. Cir. 2003).

In *Cane*, even though the petition process took over four years (between 1995 and 2000) there was no unreasonable delay. *Cane Tenn.*, 57 Fed. Cl. at 133. The defendant disputed this characterization of the length of the delay. *Id.* Cane and Colton argued that the delay in the use of their property was over three years: the time between the statutory deadline for the permit petition process and the actual evaluation made by the government. *Id.* The defendant argued that the delay consisted of little over a year. *Id*. at 134. The court determined that it totaled almost two years, but that this was not unreasonable in light of the government's good faith. *Id*. at 133–34 (citing Wyatt v. United States, 271 F.3d 1090, 1095 (Fed. Cir. 2001)). Specifically, the court found that the delay began on the projected date of the unsuitability petition result in 1996 and lasted until 1997 when it was statutorily required to be published. *Id*. at 134. At that time, the citizen's group requested an extension. *Id.* The court reasoned that "where any delay beyond 15 months resulted from the government's decision to allow additional citizen input concerning a petition of substantial public interest" there was no bad faith. *Id*. This led the court to the conclusion that there was no extraordinary delay and therefore, no temporary taking. *Id*.

152. *Cane Tenn.*, 57 Fed. Cl. at 133.

153. Under the "parcel as a whole" framework the Cane property suffered a 49.6% decline in value and the Colton property suffered at most a 28% decline in value. *Id*. at 125, 131. Under the *Penn Central* framework, both values were insufficient to establish a permanent taking of either property when coupled with the court's analysis of the two other *Penn Central* factors. *Id*. at 125, 131.

restrictions in *Cane* were not entirely sequential.[154] For example, the Cane plaintiff had taken no action to acquire a permit between the termination of the lease in February 1991 and the beginning of the petition for unsuitability process in October 1995.[155]

2. The Character of the Government Action

The next four cases discussed illustrate the multifarious interpretations of the role of the third *Penn Central* factor, the character of the government action in post-*Tahoe-Sierra* takings law. In 2004, the Federal Circuit affirmed the Federal Claims Court's 2002 post-*Tahoe-Sierra* decision in *Bass*.[156] In doing so, the Federal Circuit affirmed the denial of the plaintiff's *Lucas* claim because of the temporary nature of the alleged takings.[157]

With regard to the *Penn Central* claim in *Bass*, the plaintiff argued[158] that the character of the government action factor required that a taking be found so long as the plaintiff's activities were not a nuisance.[159] The Federal Circuit noted that the plaintiff erred by over-simplifying the character of the government action prong of the *Penn Central* test.[160] *Tahoe-Sierra* established the complexity of the determination of the character of the government action factor.[161] This factor requires more than analysis of nuisances, but rather an assessment of the "purpose and

154. *Id*. at 133. The *Cane* court is the first court to apply the "rolling moratoria" theory as espoused in *Tahoe-Sierra*.

155. *Id*. at 132–33. The same theory provided no relief for the Colton plaintiff because there had been no action to obtain a permit to mine on the Colton property for over twenty-six years, since the 1977 enactment of the federal statute. *Id*. at 133.

156. Bass Enters. Prod. Co. v. United States, 381 F.3d 1360, 1371 (Fed. Cir. 2004). For a discussion of the prior *Bass* litigation see *supra* notes 125–46 and accompanying text.

157. *Bass Enters.*, 381 F.3d at 1365–66.

158. The plaintiffs actually made two arguments on appeal with regard to the *Penn Central* claim. First, the plaintiffs argued that the lower court had erred in finding that there was no extraordinary delay. *Id.* at 1365–66. The second argument concerned the character of the government action. *Id.* at 1369. In rejecting the plaintiff's first argument, the Federal Circuit noted that the reasons for the government's delay in granting the permits were justified. *Id.* at 1367. Therefore, there was no extraordinary delay. *Id.* at 1366–68; see discussion of second argument *infra* notes 160–63 and accompanying text.

159. *Bass Enters.*, 381 F.3d at 1369.

160. *Id.* at 1370.

161. *Id*. For a criticism of this type of interpretation of the character factor, see Schwartz, *infra* note 288, at 20–21 (critiquing courts for transforming the character factor from a distinction between physical and non-physical government action into "a completely different inquiry" that requires "balancing the importance of the public purpose of the regulation against the private purpose to be served by the owner's proposed use.").

economic effect" of government action.[162] The Court of Federal Claims had correctly determined that the underlying public purpose and benefit of the government's actions weighed against finding a taking.[163]

In *Appolo Fuels, Inc. v. United States*,[164] the plaintiff received notice that its application for mining was "administratively complete" in March 1994.[165] Almost two years later, in January 1996, most of the land was declared unsuitable for mining.[166] The plaintiff claimed the permit denial and ultimate bar on mining constituted (1) a *Lucas* categorical taking,[167] and (2) a *Penn Central* partial regulatory taking.[168]

The *Appolo* court found the relevant parcel included portions of the plaintiff's leased parcels not in the area declared unsuitable for mining.[169] When the entirety of each leased parcel was considered, one parcel lost 92% of its value and the other 78% of its value.[170] Because the land did not lose all of its value, the Federal Circuit affirmed that no *Lucas* categorical taking occurred.[171]

The *Appolo* plaintiff also did not suffer from a partial regulatory taking under *Penn Central*.[172] The economic impact factor weighed in favor of finding a taking because of the 92% and 78% decline in the leaseholds' value.[173] However, the 1977 enactment of the Surface Mining and Coal Reclamation Act provided the plaintiff with ample warning that its land might be declared unsuitable for mining.[174] Thus, the investment-backed

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162. *Bass Enters*., 381 F.3d at 1370 (quoting Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 323 (2002)).

163. *Id.* at 1370. This analysis required the Court of Federal Claims to consider "the relative benefits and burdens associated with the regulatory action." *Id.*

164. 381 F.3d 1338 (Fed. Cir. 2004).

165. *Id.* at 1343.

166. *Id*. The City of Middlesboro and the National Parks and Conservation Association filed a LUM (Lands Unsuitable for Mining) petition shortly after the plaintiff filed its SMCRA permit application. *Id*. Although the law mandates that LUM decisions be reached within one year, the Office of Surface Mining Reclamation and Enforcement (OSM) took eighteen months to come to its decision. *Id.* at 1351.

167. *Id*. at 1347.

168. *Id.* at 1347–51. The plaintiff also claimed that the six month delay in issuing the LUM decision constituted a temporary taking under the extraordinary delay theory. *Id.* at 1351.

169. *Id.* at 1346. The plaintiff held several leases in the area. *Id.* at 1343. The plaintiff's suit concerned two of these leases: lease 5A and 14A. *Id.* at 1346. The court's consideration of the entirety of each lease as the relevant parcel provides a good recent example of the rejection of horizontal (spatial) segmentation.

170. *Id.* at 1347.

171. *Id*.

172. *Id.* at 1351.

173. *Id.* at 1348, 1351.

174. *Id.* at 1348.

expectations factor weighed against finding a taking.[175] Finally, the court considered the character of the government's action.[176] The government's action served to protect the water quality of Fern Lake, which provided water for a nearby town.[177] Therefore, the government acted pursuant to its police power in order to protect the public health and safety.[178] The court concluded that no taking occurred because together the lack of reasonable investment-backed expectations and the character of the government action outweighed the economic impact factor.[179]

Although *Santini v. Connecticut Hazardous Waste Management Service*[180] involved pre-condemnation activities rather than regulations, it provides a recent example of the historical interpretation of the character factor applied in regulatory takings cases. In Santini, the plaintiff spent $5 million purchasing and developing some Connecticut property for single-family residences before the state declared the property one of three possible sites for a nuclear waste disposal facility.[181] Due to the announcement and the associated stigma, Santini was unable to sell homes for over two years.[182] Despite Santini's loss, the Second Circuit found no taking occurred.[183] The court noted that pre-condemnation activities never form the basis of viable takings claims.[184]

Although it summarily dismissed Santini's takings claim on this ground, the court noted that Santini lacked a viable *Lucas* claim because of the temporary nature of the alleged takings.[185] The Second Circuit also

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175. *Id.* at 1348–50.
176. *Id.* at 1350–51.
177. *Id*.
178. *Id.*
179. *Id.* at 1351.
180. 342 F.3d 118 (2d Cir. 2003).
181. *Id.* at 121–22.
182. *Id.* at 123. About one year after plaintiff's property was announced as a finalist for the proposed facility, the designation was revoked. *Id.* at 122. Santini claimed that the stigma surrounding the announcement prevented sales for thirteen months after the revocation of the site designation. *Id.* at 123.
183. *Id.* at 130–33.
184. *Id.* at 130 ("The fact that Santini's takings claim is based on nothing more than the Service's 1991 siting announcement—perhaps the prototypical precondemnation governmental activity—dooms the claim on its merits, as the Supreme Court has explicitly held that precondemnation activities do not constitute takings."). In his petition for certiorari to the Supreme Court, Santini argues that the Second Circuit's quick dismissal of his takings claim based on this categorization of the government's activities amounts to a per se rule. Santini v. Conn. Hazardous Waste Mgmt. Servs., 342 F.3d 118 (2d Cir. 2003), *petition for cert. filed*, 2004 WL 1697994, at *19, **26–27 (U.S. July 27, 2004) (No. 04–142). Santini argues that this "violates the *Penn Central* three-factor balancing analysis by regarding the 'character of the action' as dispositive and by disregarding economic impact and interference with investment backed expectations." *Id.* at **26–27.
185. *Santini*, 342 F.3d at 131. Due to the temporary nature of the effect of the site designation,

postulated that Santini's *Penn Central* claim would fail despite the arguably large economic impact on Santini and the proposal's interference with his reasonable investment-backed expectations.[186] The court focused instead on the character of the government action.[187] Because the site designation did not amount to physical appropriation of Santini's property,[188] the court reasoned that the character of the government action weighed in favor of the state.[189]

In *Friedenberg v. New York State Department of Conservation*,[190] the Department of Conservation denied the plaintiff a permit to construct a single-family residence on property[191] designated as tidal wetlands.[192] Although Friedenberg's property suffered a 95% decrease in value,[193] this

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Santini did not lose all economically viable use of his property. *Id.* (citing Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 332 (2002)).

186. *Id.* at 132.

187. *Id.*

188. Steven J. Eagle notes that *Loretto* eliminated much of the bite of the character of the government action factor of the *Penn Central* test. *See* Eagle, *supra* note 24, at 3. Four years after *Penn Central*, *Loretto* made physical invasions per se takings. *Id.* at 2. Under *Agins v. City of Tiburon*, any regulations that do not promote "legitimate state interests" are takings as well. *Id.* at 3. Thus, physical invasions and regulations that do not promote legitimate state interests are weeded out as takings before courts even consider the *Penn Central* test. *Id.* Eagle argues that this leaves little ground for the character of the government action. *Id.* He proposes giving the character prong new meaning. *Id.* at 4. Specifically, government regulations that operate on a severely retroactive basis or government actions that target specific individuals should fail the character prong. *Id.* at 4–5. *Contra* Schwartz, *infra* note 288, at 20–21 (condemning reinterpretation of the character factor).

189. *Santini*, 342 F.3d at 132. The court noted:

> Though the siting announcement no doubt had an economic impact on Santini's property, and interfered with his investment-backed expectations to some extent, the character of the governmental action is of principal importance here. The Service's siting announcement obviously cannot be characterized as a "physical invasion" of Santini's property, but, rather, merely one step along a path that might have led—but ultimately did not lead—to the government's acquisition of his property.

Id. (internal citation omitted).

Similarly, in *Grenier v. Zoning Board of Appeals of Chatham*, the Massachusetts Appeals Court's analysis of the character factor consisted of a simple statement that the government's zoning regulations did not amount to a physical appropriation of the plaintiff's property. Grenier v. Zoning Bd. of Appeals of Chatham, 814 N.E.2d 1154, 1161 (Mass. App. Ct. 2004) ("As for the third and final factor . . . we need say no more than that [the plaintiff's] allegations concern only economic considerations rather than any physical invasion of lot 93 by the government.").

190. 767 N.Y.S.2d 451 (N.Y. App. Div. 2003).

191. The 2.5 acre property was zoned residential. *Id.* at 453.

192. *Id.* Like mining regulations, restrictions on wetlands constitute another recurring impetus for takings claims. Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding* Lucas v. South Carolina Coastal Council, 45 STAN. L. REV. 1433, 1439 n.37 (1993) (outlining the long history of takings litigation involving wetlands regulations).

193. The plaintiff's property value dropped from $665,000 to $31,500. *Friedenberg*, 767 N.Y.S.2d at 455–56.

decline in value did not amount to a loss of all economically beneficial use.[194] Therefore, there was no *Lucas* categorical taking.[195]

Despite the failure of Friedenberg's *Lucas* claim, Friedenberg prevailed under *Penn Central*.[196] The significant reduction of economic value[197] outweighed the important public interest served by the restrictions.[198] The court reasoned that the outcome of the character factor did not depend on the legitimacy of the government's action.[199] Instead, the character of the government action was determined by the distribution of the benefits and burdens of regulatory action.[200] Although the protection of the tidal waters was important, the court found that the plaintiff alone should not have to bear that burden.[201] Specifically, the plaintiff did not benefit from any "reciprocity of advantage or shared benefit" by giving up the right to develop the property.[202] The lack of "reciprocity of advantage" coupled with the severe economic impact led the court to find a partial regulatory taking under *Penn Central*.[203]

C. Avoiding the "Parcel as a Whole"

Several state courts have continued the pre-*Tahoe-Sierra* trend of divergence between state and federal takings jurisprudence. These courts have ruled in favor of takings plaintiffs without utilizing the "parcel as a whole" framework established in *Tahoe-Sierra*.[204] For example, in *State* ex

194. *Id*. at 458.

195. *Id.*

196. *Id.*

197. *Id*. at 460 (finding the permit denial eliminated "all but a bare residue of the economic value of the property").

198. *Id*. at 453, 460 (reciting government's legitimate interest in protecting tidal wetlands); *see also* Norman v. United States, 63 Fed. Cl. 231, 282–83 (Fed. Cl. 2004) (listing four functions of wetlands regulations).

199. *Id.*; *see supra* notes 49–54 and accompanying text.

200. *Friedenberg*, 767 N.Y.S.2d at 460–61; *see supra* notes 49–54 and accompanying text.

201. *Friedenberg*, 767 N.Y.S.2d. at 461.

202. *Id.* In contrast, in *Norman v. United States*, the Court of Federal Claims found that the character factor weighed in favor of the government. *Norman*, 63 Fed. C1. at 286–87.

In *Norman*, the plaintiff could still build on his 220.85 acres of wetlands so long as he mitigated by setting aside an equivalent amount of property. *Id.* The character factor weighed against finding a taking because mitigation regulation benefited the plaintiff as well as the public by allowing development while preserving wetlands. *Id.*

203. *Friedenberg*, 767 N.Y.S.2d at 460–61.

204. *See* James E. Holloway & Donald C. Guy, *The Impact of a Federal Takings Norm on Fashioning a Means-Ends Fit Under Takings Provisions of State Constitutions*, 8 DICK. J. ENVTL. L. & POL'Y 143, 239 (1999) (noting that state takings law did not exactly adhere to federal takings jurisprudence even before *Tahoe-Sierra*).

rel. *R.T.G., Inc. v. State*,[205] the plaintiff's 833-acre mining property was designated unsuitable for mining because mining operations threatened a town's water supply.[206] The Ohio Supreme Court noted that states retain the power to define property within their bounds.[207] Accordingly, the court recognized mineral rights as a separate property right from surface rights.[208] The mineral rights alone were the denominator.[209] Using this approach to the denominator problem, the plaintiffs suffered a complete loss in the value of their coal property and were afforded compensation for their loss under *Lucas*.[210]

Similarly, the Oregon Court of Appeals found for takings plaintiffs in *Coast Range Conifers, L.L.C. v. State*.[211] The court found that when a state agency denied the plaintiffs of the right to log within 400 feet of an unoccupied bald eagle nest,[212] the state was not entitled to summary judgment on a takings claim under the Oregon Constitution.[213] In coming to this conclusion, the court explicitly rejected the applicability of the "parcel as a whole" rule under the Oregon Constitution[214] despite its similar wording to the United States Constitution.[215]

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205. 780 N.E.2d 998 (Ohio 2002).

206. *Id.* at 1001.

207. *Id.* at 1008.

208. *Id*. at 1008–09. The Ohio Supreme Court found that the Ohio Constitution, Article I, Section 19 provides that coal rights are a severable property interest when the owner originally purchased the property solely for purposes of mining coal. *Id.* The Ohio Supreme Court's application of Ohio law seems at odds with the United States Supreme Court and Pennsylvania Supreme Court's application of similar Pennsylvania law in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1986), and *Machipongo Land and Coal Co. v. Commonwealth*, 799 A.2d 751 (Pa. 2002). In *Keystone*, the Supreme Court expressly declined severing interests in land and coal despite Pennsylvania's recognition of three separate estates in land, including a mineral estate. *Keystone*, 480 U.S. at 478, 496–501; *see also Machipongo*, 799 A.2d at 760, 765–68 (using a similar application of takings analysis under Pennsylvania law).

209. *See R.T.G.*, 780 N.E.2d at 1008–09.

210. *Id.* at 1009–10. *R.T.G.* provides a nice contrast to *Appolo*; in both cases the government sought to protect municipal water supplies by denying mining permits. *Id.* at 1001; Appolo Fuels, Inc. v. United States, 381 F.3d 1338, 1350 (Fed. Cir. 2004). The courts reached different outcomes on the *Lucas* claims through their treatment of the economic impact factor. *See R.T.G.*, 780 N.E.2d at 1009–10; *Appolo*, 381 F.3d at 1347.

211. 76 P.3d 1148, 1158 (Or. Ct. App. 2003).

212. *Id*. at 1149.

213. *Id*. at 1158.

214. *Id*.

215. *Id*. at 1156. The Oregon Takings Clause states that "Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation. . . ." OR. CONST. art. I, § 18; *compare* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

Johnson v. City of Minneapolis, 667 N.W.2d 109 (Minn. 2003), involved pre-condemnation activities rather than regulatory restrictions. *Id.* at 111. However, it also illustrates courts' reluctance to strictly apply the "parcel as a whole" rule. *See id.* at 115. In *Johnson*, the plaintiffs were lessors who

In *Woodland Manor, III Associates v. Reisma*,[216] the plaintiff's property had received development approval in 1974.[217] However, in 1985, the government required the plaintiff to file a new application.[218] It then denied the application for twenty acres of the eighty-nine acre property because of wetlands located thereon.[219] After detailing the contradictory history of federal takings analysis,[220] the Superior Court of Rhode Island determined that under *Penn Central* there was a temporary taking of the twenty acres.[221] Rather than relying on the strict language of

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found their properties unmarketable after the defendant City announced condemnation plans for the area. *Id.* at 112. The City initially failed to notify the plaintiffs of the possibility that the properties might not be condemned. *Id*. Even after it became apparent that the proposed mall would not be built, the City took no action to remove the cloud over plaintiffs' titles. *Id*. at 113. Accordingly, the court weighed the fact that "the City specifically targeted appellants' properties and acted in bad faith" in its takings analysis. *Id*. at 116. The plaintiffs lost rental income from tenants who moved in anticipation of the condemnation. *Id.* at 113.

Rather than working through the federal takings analysis, the Minnesota Supreme Court relied on Minnesota statutory law and the Minnesota Constitution's Takings Clause, which is worded similarly to the federal Takings Clause, to find a compensable taking. *Id.* at 115–16. The Minnesota Constitution provides, "[p]rivate property shall not be taken, destroyed or damaged for public use without just compensation." MINN. CONST. art. I, § 13; *compare* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."). Despite the similarity in the wording of both takings clauses, the Minnesota Supreme Court interpreted them differently. *Johnson*, 667 N.W.2d at 114–16; *see also* Holloway & Guy, *supra* note 204, at 152–56 (containing an analysis of the basic differences between state takings clauses and the federal Takings Clause and the potential for greater protection under state constitutions). Minnesota statutory law defines a taking as including "every interference, under the right of eminent domain, with the possession, enjoyment, or value of private property." MINN. STAT. § 117.025, subd. 2 (2002). Accordingly, the Minnesota Supreme Court found that the City's activities constituted a compensable taking under Minnesota, rather than federal, law. *Johnson*, 667 N.W.2d at 116.

Unlike the Minnesota and Oregon courts, the Texas Supreme Court in *Sheffield Development Company, Inc. v. City of Glenn Heights*, 140 S.W.3d 660, 669 (Tex. 2004), relied on federal takings jurisprudence when interpreting a takings claim under the Texas Constitution. The Texas takings clause reads "[n]o person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made. . . ." TEX. CONST. art. I, § 17. Prior to *Sheffield*, at least one Texas court had interpreted the two takings clauses as having different meanings based on the additional language in the Texas Constitution. Trinity & S. Ry. Co. v. Meadows, 11 S.W. 145, 146 (Tex. 1889).

216. No. C.A. PC89-2447, 2003 WL 1224248 (R.I. Super. Ct. Feb. 24, 2003).

217. *Id*. at **1–2. Specifically, the *Woodland Manor* plaintiff received a favorable determination from the United States Department of Housing and Urban Development in response to his Request for Freshwater Wetlands Applicability Determination. *Id*.

218. *Id.* at *2.

219. *Id*. at **2–3, **7–8.

220. *Id*. at *7 (describing the "[t]angled [w]eb of [t]akings [a]nalysis").

221. *Id*. at *8, **14–15. In determining that the relevant parcel was twenty rather than all eighty-nine acres, the court considered: (1) that the plaintiff need not show that every portion of his property was taken under *Penn Central*; (2) that the twenty acre parcel had been deeded separately in the past; and (3) that the Rhode Island Supreme Court had issued an order regarding only the twenty acre parcel. *Id*. at *8.

Tahoe-Sierra, the court concluded that its decision for the plaintiff embodied the "spirit of the Takings Clause."[222]

IV. THE EFFECTS OF *TAHOE-SIERRA* ON REGULATORY TAKINGS

There are several trends emerging as a result of *Tahoe-Sierra*. First, *Tahoe-Sierra* severely limits the application of the *Lucas* categorical rule.[223] Second, the rejection of temporal segmentation and the reciprocal reaffirmation of *Penn Central's* "parcel as a whole" approach degenerates takings plaintiffs' ability to show an economic loss sufficient to prevail under *Penn Central*.[224] Third, in response to potential injustices resulting under the "parcel as a whole" framework, some state courts may attempt to avoid the "parcel as a whole" analysis entirely.[225] Other courts may attempt to place new checks on government action by remolding the character factor of the *Penn Central* test or adopting one of the alternate rationales outlined in *Tahoe-Sierra's* dicta.[226]

A. *The Limited Role of* Lucas *in Regulatory Takings Jurisprudence After* Tahoe-Sierra

The per se rule that emerged from *First English*[227] and *Lucas*[228] provided property owners a potential means for recovery for temporary takings without requiring a full *Penn Central* analysis.[229] This means of recovery proved only temporary.[230] Although property owners continue to bring *Lucas* claims in the temporary takings context after *Tahoe-Sierra*, these claims are uniformly rejected by courts.[231]

Lucas owes its demise to *Tahoe-Sierra's* affirmation of the "parcel as a whole" approach and rejection of temporal segmentation.[232] Without

222. *Id*. at *15.
223. *See infra* notes 227–40 and accompanying text.
224. *See infra* notes 241–49 and accompanying text.
225. *See infra* notes 250–58 and accompanying text.
226. *See infra* notes 259–99 and accompanying text.
227. *See supra* notes 55–61 and accompanying text.
228. *See supra* notes 62–71 and accompanying text.
229. *See supra* notes 62–71 and accompanying text.
230. *Tahoe-Sierra's* rejection of temporal segmentation makes it impossible for a temporary takings plaintiff to show the loss of *all* value as required for a recovery under *Lucas*. *See supra* notes 91–96 and accompanying text.
231. *See supra* notes 117–19 and accompanying text. Even in the permanent taking context, a 98.8% loss in value is insufficient. *See also supra* notes 119, 193–94 and accompanying text.
232. Under *Tahoe-Sierra*, a loss of all value requires a permanent loss. *See supra* notes 91–103 and accompanying text.

temporal segmentation, a temporary takings plaintiff can never "solve" the denominator problem in a way that will produce a value of 1.[233] The value of the loss over a temporary period will never be equal to the value of the property over the infinite duration of a fee simple estate.[234] *Bass* illustrates that for the purposes of the denominator question, even leasehold interests cannot be severed from the fee simple for purposes of evaluating the denominator after *Tahoe-Sierra*.[235] Thus, it is virtually impossible to suffer the 100% decline in value necessary for a temporary *Lucas* claim.

A plaintiff will never succeed in showing that a temporary restriction comprised a *Lucas*-type loss of all economically productive or beneficial use after *Tahoe-Sierra*.[236] Even in the permanent takings context, plaintiffs have failed to show this type of complete loss as illustrated by *Friedenberg* and *Cooley* where even 95% and 98.8% respective diminutions in value were insufficient for a *Lucas* claim.[237] In the temporary takings context, both the *Bass* and *Cane* courts rejected temporal segmentation as mandated by the *Tahoe-Sierra* majority.[238] The Supreme Court's evaluation of the denominator problem has effectively eliminated per se temporary takings.[239] Furthermore, *Tahoe-Sierra* makes it exceedingly difficult to prevail with a permanent takings claim under *Lucas*.[240]

B. Increased Difficulty for Plaintiffs Under Penn Central

The "parcel as a whole" approach also makes it more difficult to demonstrate an adverse economic impact severe enough to prevail under a *Penn Central* rationale.[241] *Bass* illustrates well the new obstacle created by

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233. *See supra* notes 91–96, 101–07 and accompanying text.

234. *See supra* notes 91–96, 101–07 and accompanying text.

235. While the facts in *Bass* supported a finding of a *Lucas* claim before *Tahoe-Sierra*, the facts were not sufficient to support a *Lucas* claim after *Tahoe-Sierra*. *Compare supra* note 132 and accompanying text *with* notes 133–34 and accompanying text. Furthermore, in the *Penn Central* analysis, the court did not consider the leasehold nature of the interest in its resolution of the denominator problem. *See supra* notes 139–46 and accompanying text.

236. *See supra* notes 91–96 and accompanying text.

237. *See supra* notes 119, 189–203 and accompanying text.

238. *See supra* notes 132–34, 141–43, 148–53 and accompanying text.

239. In *Friedenberg*, even a 95% loss in value was insufficient to support a *Lucas* permanent takings claim. *See supra* notes 189–203 and accompanying text. Similarly, in *Cooley*, a 98.8% diminution did not suffice. *See supra* note 119 and accompanying text. It seems Justice Stevens fulfilled the prophecy he first set out in his dissent in *Lucas*; the *Lucas* holding was effectively eclipsed by the dispositive denominator question. *See* discussion *supra* note 70.

240. *See supra* notes 115, 135–46 and accompanying text.

241. *See supra* notes 135–46, 172–79, 181–89 and accompanying text.

Tahoe-Sierra in the temporary takings context.[242] While the pre-*Tahoe-Sierra* court found a taking under *Penn Central*,[243] after *Tahoe-Sierra* even a loss of over $1 million caused by the inability to mine for four years did not warrant compensation because the total value of the plaintiff's interest was over $20 million.[244] Weighed against the important government interest involved, the plaintiff's mere 5% loss in *Bass* could not support a successful takings claim.[245] By using the "parcel as a whole" rationale to nullify *Lucas* per se temporary takings, the Supreme Court also made it more difficult for temporary takings plaintiffs to prevail under *Penn Central*.

Although the Supreme Court's holding was arguably narrow in *Tahoe-Sierra*,[246] the Court's reaffirmation of the "parcel as a whole" approach in order to eliminate temporal segmentation has also affected horizontal (spatial) and vertical (use-based) segmentation.[247] For example, the relevant parcel in *Appolo* consisted of the entirety of the plaintiff's leaseholds rather than merely the areas designated unsuitable for mining.[248] Even the 92% decline in value of one of the *Appolo* plaintiff's leaseholds was insufficient for a regulatory taking under *Penn Central*.[249]

C. "Fairness and Justice" After Tahoe-Sierra

In one respect *Tahoe-Sierra* represents a return to the theory underlying *Mugler*: the balance between the interests of land use planners and landowners has tipped in favor of the land use planners.[250] This tipping comes at the expense of landowners and may result in unfairness in some situations.[251]

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242. Bass Enters. Prod. Co. v. United States, 54 Fed. Cl. 400, 404 (Fed. Cl. 2002); *see supra* notes 125–46 and accompanying text.

243. *See supra* notes 135–38 and accompanying text.

244. *Bass Enters.*, 54 Fed. Cl. at 404; *see supra* notes 139–46 and accompanying text; *see also* Mandelker, *supra* note 48, at 16–17.

245. *See supra* notes 125–46 and accompanying text.

246. *See supra* notes 15, 19 and accompanying text.

247. *Tahoe-Sierra's* reaffirmation of the "parcel as a whole" approach provides support for the rejection of vertical (use-based) and horizontal (spatial) segmentation as well. *See supra* notes 115, 165–179 and accompanying text.

248. *See supra* notes 115, 165–79 and accompanying text; *see also* cases cited *supra* note 115.

249. *See* discussion *supra* notes 165–79; *see* cases cited *supra* note 115.

250. Mugler v. Kansas, 123 U.S. 623, 668–69 (1887) (deferring to the regulatory power of the states); *see also supra* notes 25–31 and accompanying text. *Tahoe-Sierra* echoes this need for land use regulations by cautioning that per se rules could cripple governments by making them unaffordable luxuries. *Tahoe-Sierra*, 535 U.S. at 335; *see* Savage, *supra* note 17, at 32; *see also supra* notes 101–03 and accompanying text.

251. Chief Justice Rehnquist's dissent in *Tahoe-Sierra* describes such an instance of unfairness to

Tahoe-Sierra's focus on the denominator problem shifts the underlying emphasis of takings jurisprudence from the qualitative judicial determinations of the relative interests of the parties, to the quantitative assessments of the value of the plaintiff's property.[252] In *Pennsylvania Coal*, Holmes advocated making a qualitative determination when a regulation goes "too far," allowing courts to evaluate the underlying fairness.[253] *Tahoe-Sierra* discourages this flexibility in evaluating qualitative notions of fairness by reaffirming the more quantitative "parcel as a whole" approach.[254] The "parcel as a whole" framework stands in opposition to horizontal (spatial), vertical (use-based), and temporal severance of property interests. Many courts adhering to the "parcel as a whole" framework have been reluctant to allow severance in even the horizontal (spatial) and vertical (use-based) contexts.[255] And without severance, the outcome of the denominator problem and accordingly, the economic impact factor of the *Penn Central* balancing test, is almost a foregone conclusion.[256] Under the *Penn Central* analysis courts typically

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property owners. *See* discussion *supra* note 97.

252. *See supra* notes 32–54, 91–96 and accompanying text.

253. *See supra* notes 25–31 and accompanying text.

254. *See supra* notes 112–21 and accompanying text. The denominator problem provides a deceptively easy solution to a difficult question, but at the cost of the overall fairness of takings jurisprudence. Dayana C. Wright recently outlined three pitfalls of the "parcel as a whole" approach: (1) it makes landowners more vulnerable to takings when they have sold noncontiguous property prior to the regulation; (2) economic value is a poor tool for measuring the relevant property interest; and (3) it ignores the "dynamic use of property over time and the snapshot evaluation that occurs in the takings calculation when determining the regulatory moment." Dayana C. Wright, *A New Time for Denominators: Toward a Dynamic Theory of Property in the Regulatory Takings Relevant Parcel Analysis*, 34 ENVTL. L. 175, 219–20 (2004).

In addition to the problems outlined by Wright, by denouncing severance in favor of the "parcel as a whole" approach, courts are left evaluating the value of the plaintiff's property. The more property the plaintiff owns, the greater the denominator. Thus, the result of a takings analysis under the "parcel as a whole" approach depends not on the relative strength of the property owner and government's interests or overall fairness, but on the extent of the plaintiff's property interests. For example, imagine that the plaintiff in *Woodland Manor* possessed only twenty acres rather than eighty-nine; the restriction on the twenty acres would have denied the plaintiff of all beneficial use. *See supra* notes 216–22 and accompanying text. Had this hypothetical plaintiff been unable to afford a larger parcel of property, the plaintiff might have prevailed on a *Lucas* claim (presuming the regulation was permanent) even under strict adherence to the "parcel as a whole" approach. *See id.*; *see also* Mandelker, *supra* note 48, at 16–17 (using the facts in *Penn Central* as a demonstration of this problem with the "parcel as a whole" rationale).

255. *See supra* note 115 (detailing post-*Tahoe-Sierra* cases in which horizontal and vertical severance were rejected).

256. *See supra* note 115. In contrast, in *R.T.G.* the Ohio Court of Appeals rejected the "parcel as a whole" approach and found that a mining restriction comprised a taking precisely because coal estates were severable under Ohio law. *See supra* notes 204–10 and accompanying text. In contrast, the Pennsylvania Supreme Court in *Machipongo* was restrained from finding a taking of a coal estate because it obeyed *Tahoe-Sierra's* reaffirmation of the "parcel as a whole" approach. *See* discussion

weigh the character of the government action heavily against finding a taking.[257] When the importance of the government action is coupled with courts' reluctance to freely mold the economic impact factor through severance, it is not surprising that many temporary and permanent takings claims have failed since *Tahoe-Sierra*.[258]

D. Working With and Around the "Parcel as a Whole" Framework After Tahoe-Sierra

The perception of unfairness resulting from strict application of the "parcel as a whole" rule may also account for the fact that several state courts have relied on state constitutional law or vague notions of the "spirit of the Takings Clause" in post-*Tahoe-Sierra* takings cases rather than *Tahoe-Sierra's* "parcel as a whole" rule.[259] In the future, other courts may take a less drastic approach to avoiding the occasionally harsh outcome of the "parcel as a whole" rule; by reinterpreting the character factor of the *Penn Central* test, at least one court has offset the "parcel as a whole" rule's impact on the economic impact factor.[260] Finally, the Supreme Court itself may have recognized the implicit dangers of overemphasis on the "parcel as a whole" resolution of the denominator problem when it provided dicta suggesting alternate rationales, such as the "rolling moratoria" theory, that might apply under other factual scenarios.[261] Future courts may turn to some of these alternate rationales.

1. State Courts: Alternatives to the "Parcel as a Whole"

Before the Supreme Court's decision in *Tahoe-Sierra*, state takings jurisprudence diverged from federal takings jurisprudence; *Tahoe-Sierra* did not stop this trend. Perhaps as a result of unfairness, several state courts have attempted to avoid the "parcel as a whole" rule entirely.[262] This has the effect of allowing plaintiffs to avoid a *Penn Central* inquiry,

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supra note 115.

257. *See supra* notes 112–14 and accompanying text. For background on the application of the *Penn Central* test, see *supra* notes 32–54 and accompanying text.

258. *See* cases cited *supra* notes 112–20.

259. *See supra* notes 204–22 and accompanying text.

260. *See supra* notes 189–203 and accompanying text.

261. *See supra* notes 108–11, 148–55 and accompanying text.

262. *See supra* notes 189–203 and accompanying text; *see also* Rebecca Nowak-Doubek, Comment, *A Victory for Property Rights: How State Courts Have Interpreted and Applied the Decision from* Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 36 U. TOL. L. REV. 405, 422 (2005) (arguing state courts have been reluctant to follow the parcel as whole rule from *Tahoe-Sierra*).

not unlike the *Lucas* categorical test.[263] For example, Ohio, Oregon, and Rhode Island courts have all taken this route in the regulatory takings context.[264]

State constitutional law provides one means for state courts to circumvent *Tahoe-Sierra*.[265] In *Coast Range* and *R.T.G*, Oregon and Ohio courts respectively took this approach by interpreting the takings clauses in their state constitutions differently from their federal counterpart, despite similar language.[266] The Oregon court may have felt that the "parcel as a whole" rule would have led to unjust results considering that the bald eagle nest the government sought to protect was unoccupied.[267]

Woodland Manor presents another potential means of avoiding *Tahoe-Sierra*.[268] The Rhode Island Superior Court cited the "spirit of the Takings Clause" in its discussion.[269] The court's subsequent horizontal (spatial) severance of twenty of the plaintiff's eighty-nine acres for the purposes of evaluating the denominator directly contradicts the "parcel as a whole"

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263. *See supra* notes 189–203 and accompanying text.

264. State *ex rel*. R.T.G., Inc. v. State, 780 N.E.2d 998, 1008–09 (Ohio 2002); Coast Range Conifers, L.L.C. v. State, 76 P.3d 1148, 1156 (Or. Ct. App. 2003); Woodland Manor, III Assocs. v. Reisma, No. C.A. PC89-2447, 2003 WL 1224248, at *15 (R.I. Super. Ct. Feb. 24, 2003); *see supra* notes 204–22 and accompanying text.

265. *See supra* notes 204–15 and accompanying text.

266. *See supra* notes 204–15 and accompanying text. The *Johnson* court in particular was motivated to find a temporary taking by the bad faith of the defendant, revealing that state constitutional claims may emerge as a means to avoid the potential injustice served by strict adherence to the "parcel as a whole" approach. Johnson v. City of Minneapolis, 667 N.W.2d 109, 112–13 (Minn. 2003). Specifically, the City's neglect made the pre-condemnation process needlessly burdensome on the plaintiffs in *Johnson*. *See id.*; *see* discussion *supra* note 215.

Likewise, the eagle nest protected by the restriction in *Coast Range* was unoccupied. *Coast Range*, 76 P.3d at 1149. Thus, the *Coast Range* court may have been motivated to seek alternate authorities to *Tahoe-Sierra* because of the apparent uselessness of the restriction against logging. *See id*. However, at least one commentator disagrees with this conclusion. *See* Derek O. Teaney, Note, *Originalism as a Shot in the Arm for Land-Use Regulation: Regulatory "Takings" are Not Compensable Under a Traditional Originalist View of Article I, Section 18 of the Oregon Constitution*, 40 WILLAMETTE L. REV. 529, 532 n.14 (2004) (arguing that the *Coast Range* interpretation "empower[s] state and local governments to continue land-use regulation without concern for having to compensate landowners for 'partial' takings").

In contrast to *Johnson* and *Coast Range*, in *Sheffield*, the Texas Supreme Court found that no taking had occurred despite abundant evidence of bad faith on the part of the City of Glenn Heights. Sheffield Dev. Co. v. City of Glenn Heights, 140 S.W.3d 660, 664–65, 679–80 (Tex. 2004). The City assured the plaintiff that no zoning changes would be made without notice when he purchased his property in 1996. *Id.* at 664. Even as the City made these assurances, they were meeting to discuss rezoning and in early 1997, and without prior notice, the City imposed a moratorium. *Id.* at 664–65; *see also* discussion *supra* note 215.

267. *See supra* notes 211–15 and accompanying text.

268. *See supra* notes 216–22 and accompanying text.

269. *Woodland Manor*, 2003 WL 1224248, at *15; *see supra* notes 216–22 and accompanying text.

approach.[270] Although the Supreme Court has espoused its strong support of land use planning through its reaffirmation of the "parcel as a whole" approach,[271] some state courts are resisting when fairness and justice seem to call for severing property interests.[272]

2. Characterizing the Character of Government Action

The character factor of the *Penn Central* test has been historically interpreted as drawing a distinction between physical and regulatory government action.[273] Shortly after *Penn Central*, the Supreme Court declared physical appropriations per se unconstitutional.[274] Few, if any, regulations failed the *Penn Central* test on account of the character factor in courts that adhered to this original interpretation.[275]

Since *Tahoe-Sierra*, courts have interpreted the character factor in a variety of ways. In *Santini*, the Second Circuit utilized the historical approach and found that because the government's nuclear waste site proposal did not amount to a physical appropriation, the character factor weighed against finding a taking.[276] While the court labeled this analysis as part of its *Penn Central* assessment, the Second Circuit arguably interpreted the character factor quite differently.[277] Before embarking on a *Penn Central* analysis, the Second Circuit quickly dismissed the claims after characterizing the government action as a pre-condemnation activity.[278] Under this second interpretation of the character factor, the Second Circuit actually designated certain government actions, such as pre-condemnations activities, as per se constitutional.[279]

While the Second Circuit's interpretation of the character factor contains internal inconsistencies, the Federal Circuit has taken a more uniform approach to the character factor.[280] In *Bass*, the Federal Circuit rejected the notion that the character factor weighed in favor of finding a taking so long as the regulated activity did not amount to a nuisance.[281]

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270. *See supra* notes 216–22 and accompanying text.
271. *See supra* notes 91–96 and accompanying text.
272. *See, e.g.*, *Johnson*, 667 N.W.2d at 115; *see also Coast Range*, 76 P.3d at 1156; *Woodland Manor*, 2003 WL 1224248, at *15. *But see Sheffield*, 140 S.W.3d at 664–65, 669.
273. *See* Eagle, *supra* note 24, at 3.
274. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435–36, 441 (1982).
275. *See* Eagle, *supra* note 24, at 3.
276. *See supra* notes 181–89 and accompanying text.
277. *See supra* notes 181–89 and accompanying text.
278. *See supra* notes 181–89 and accompanying text.
279. *See supra* notes 181–89 and accompanying text.
280. *See supra* notes 156–68, 172–79 and accompanying text.
281. *See supra* notes 156–63 and accompanying text.

Instead, the court looked to the underlying public benefit and purpose of the regulation.[282] Similarly, in *Appolo* the court noted that the public health and safety served by mining restrictions justified the government's action.[283]

In contrast to the Federal Circuit, the New York Appellate Division's approach in *Friedenberg* requires an examination of the "reciprocity of advantage."[284] Instead of looking to the worthy public cause served by the tidal wetlands restrictions, the court examined whether the plaintiff and the community at large shared relatively equally in the benefits and burdens of those restrictions.[285] Under the *Friedenberg* approach, even the most worthy causes might still result in takings.[286] This interpretation of the character factor finds some support in *Penn Central* itself.[287] The *Penn Central* court considered at length whether the plaintiff shared in the benefits of the historical preservation law.[288]

More so than the approaches of the Second Circuit and the Federal Circuit, the *Friedenberg* approach opens the door for takings plaintiffs.[289] Few plaintiffs could argue that wetlands regulations or mining regulations either constitute physical appropriations or do not serve public benefit.[290] However, many plaintiffs may be able to successfully argue that the benefits and burdens of regulations allotted to them as opposed to the public at large are grossly disproportionate.[291] The *Friedenberg* approach harkens back to the language of *Pennsylvania Coal* itself by acknowledging that regulations serving even the most laudable goals may

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282. *See supra* notes 156–63 and accompanying text.
283. *See supra* notes 172–79 and accompanying text.
284. *See supra* notes 197–203 and accompanying text.
285. *See supra* notes 197–203 and accompanying text.
286. *See supra* notes 197–203 and accompanying text.
287. *See supra* notes 49–54 and accompanying text.
288. *See supra* notes 49–54 and accompanying text. While *Penn Central's* analysis of the character factor is best remembered for its distinction between physical and regulatory appropriations, *Friedenberg's* revival of the "reciprocity of advantage" analysis is similarly well-founded. The "reciprocity of advantage" language has appeared in the case law since *Penn Central*, but *Friedenberg* has given it a place, possibly for the first time, within the *Penn Central* balancing test. *See, e.g.*, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 341, 350 (2002) (utilizing the "reciprocity of advantage" principle as an over-arching theme rather than as an inquiry within the *Penn Central* balancing test); *see also* Andrew W. Schwartz, *Reciprocity of Advantage: The Antidote to the Antidemocratic Trend in Regulatory Takings*, 22 U.C.L.A. J. ENVTL. L. & POL'Y 1, 61–62 (2003/2004) (proposing the "reciprocity of advantage" as a doctrine to guide regulatory takings jurisprudence in lieu of the *Penn Central* test).
289. *See* discussion *supra* note 288.
290. *See supra* notes 156–68, 172–79 and accompanying text.
291. *See supra* notes 197–203 and accompanying text.

go "too far."[292] Thus, the character factor may emerge as a new tool for takings plaintiffs to combat the effects of the "parcel as a whole."

3. A New Basis for Liability: "Rolling Moratoria"

The rationale in *Tahoe-Sierra* could be interpreted to allow land use planners to evade the most intense possible scrutiny under the Takings Clause by implementing a series of short "rolling moratoria."[293] For example, in *Tahoe-Sierra*, the Supreme Court cautioned that special scrutiny should be used when dealing with any moratorium[294] over one year in length.[295] By negative implication, moratoria under one year in length are not scrutinized as intensely. A series of short consecutive moratoria could thus avoid the most intense level of scrutiny while having the same effect on property owners as a single longer moratorium.

The Supreme Court found that principles of fairness and justice under the facts presented did not require the Court to evaluate the moratoria in *Tahoe-Sierra* as "rolling moratoria."[296] This statement implies that other factual scenarios might require adherence to one of the Court's alternate grounds for liability such as the "rolling moratoria" basis. *Cane* reveals that lower courts will consider a "rolling moratoria" theory of takings in the wake of *Tahoe-Sierra*.[297] However, the plaintiff must show that the moratoria are entirely sequential to prevail under this theory.[298] Although neither the *Tahoe-Sierra* plaintiffs nor the *Cane* plaintiffs benefited from

292. *See supra* notes 197–203 and accompanying text.

293. *See supra* notes 108–11 and accompanying text; *see also* background discussion *supra* notes 91–96.

294. *Tahoe-Sierra's* rejection of temporal segmentation principally affects the temporal aspects of moratoria. A constitutionally defensible moratorium must be limited to the shortest possible time. *See* St. Amand & Merriam, *supra* note 12, at 958–59. The question remains: how long is the "shortest possible time?" In *Tahoe-Sierra*, thirty-two months was not too long, but this by no means vindicates all similarly long moratoria from scrutiny. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 331–32, 341–42 (2002).

295. *See supra* note 11 and accompanying text.

296. *See supra* notes 108–11 and accompanying text.

297. Cane Tenn. v. United States, 57 Fed. Cl. 115, 132–33 (Fed. Cl. 2003); *see supra* notes 148–55 and accompanying text.

298. *See supra* notes 148–55 and accompanying text. Notably, the "rolling moratoria" as interpreted in *Cane* strictly requires sequential moratoria. *Cane Tenn.*, 57 Fed. Cl. at 133. Any gap may preclude recovery. *Id*. Furthermore, the *Cane* court weighed the fact that it was not "bad faith" of the defendant, but a concerned citizens' group, that brought about the extended delay when rejecting the "rolling moratoria" theory. *Id*. at 134. Thus, "rolling moratoria" must be sequential or accompanied by bad faith to afford recovery. *See id*. at 133–34. This "rolling moratoria" safeguard provides a check on the potential of an artificial linguistic division between temporary and permanent regulations feared by Chief Justice Rehnquist. *See* discussion *supra* note 97.

this "rolling moratoria" theory, it may serve as a safeguard from potential abuse by land use planners.[299]

CONCLUSION: FAIRNESS AND JUSTICE AFTER *TAHOE-SIERRA*

Regulatory takings jurisprudence was founded on the notion that land use restrictions sometimes go "too far" resulting in injustice.[300] The constitutional protections of property owners against takings were highest before *Tahoe-Sierra's* rejection of temporal segmentation effectively ended the short lifespan of *Lucas*[301] per se temporary takings.[302] Recent case law suggests that the Supreme Court's rejection of segmentation in favor of the "parcel as a whole" approach also diminished both temporary and permanent takings plaintiffs' potential for success under the *Penn Central* rationale.[303] Strict adherence to the "parcel as a whole" approach may also have the unfortunate result of compromising the rights of property owners against unconstitutional takings in some situations.[304] This danger may have prompted some courts to turn to the alternate remedies listed in the *Tahoe-Sierra* dicta[305] or to fashion their own remedies under state law.[306] Other courts may attempt to reshape the character factor of the *Penn Central* test to the advantage of property owners.[307] This emergence of alternate rationales reflects the notion that the strict adherence to the "parcel as a whole" solution to the denominator problem as set forth in *Tahoe-Sierra* may result in unfairness and injustice in certain situations.[308] The future may hold more divergent interpretations of takings principles as courts consider these notions in addition to the "parcel as a whole" analysis in an attempt to preserve the foundations of fairness and justice of takings jurisprudence.[309]

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299. *Cane Tenn.*, 57 Fed. Cl. at 133.
300. *See supra* notes 25–31 and accompanying text.
301. *See supra* notes 91–96 and accompanying text.
302. *See supra* notes 112–21 and accompanying text.
303. *See supra* notes 112–21, 227–49 and accompanying text.
304. *See supra* notes 250–58 and accompanying text.
305. *See supra* notes 108, 148–55, 293–99 and accompanying text.
306. *See supra* notes 204–22, 262–72 and accompanying text.
307. *See supra* notes 189–203, 284–92 and accompanying text.
308. *See supra* notes 250–58 and accompanying text.
309. *See supra* notes 250–58 and accompanying text.

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