Tahoe-Sierra, or How I Learned to Stop Worrying and Love the Moratorium

Property rights advocates eagerly anticipated the Court's ruling in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*¹ (Tahoe III). After a surprising victory in the District Court,² the Ninth Circuit's reversal derailed property rights advocates.³ While not citing it explicitly, the Ninth Circuit decision relied extensively on the reasoning and arguments contained in Justice Stevens' dissent in *First English Evangelical Lutheran Church v. Los Angeles County*⁴ (First English). If this dissent became law, the playing field would suddenly become more even for planning agencies in the face of the withering right wing assault on land use control. Property rights advocates however, took solace in the Supreme Court's decision to grant certiorari one day after handing down *Palazzolo v. Rhode Island*⁵ (Palazzolo). The Palazzolo decision was a victory of sorts for property rights advocates, and stood at the head of a long line of cases undermining the government's ability to use regulation in a way that would limit the rights of private property owners.⁶ This line of cases repudiated the logic of the Stevens dissent from First English and, once the Supreme Court looked at the issue, property rights advocates anticipated a similarly favorable ruling. It seemed quite likely the Court had granted cert to reaffirm what was widely understood to be the principle of First English—that even

temporary deprivations of all economically viable use of property may be compensable takings. The advocates of free use of private property were to be sorely disappointed when the Tahoe Court's ruling came down.

From the late 1950s, property development in the Lake Tahoe Basin (the Basin) has resulted in progressive degradation of the Lake's famously pristine, deep-blue waters. The Basin covers 501 square miles in California and Nevada, and is governed by both states under the 1968 Tahoe Regional Planning Compact (The Compact). The Compact set goals for the protection and preservation of the lake and created the respondent in the Tahoe case, the Tahoe Regional Planning Agency (TRPA). The Compact charges TRPA with coordination and regulation of development in the Basin, and conservation of the area's natural resources. A 1980 amendment to the Compact, directed TRPA to adopt detailed "environmental threshold carrying capacities," which required the promulgation of standards pertaining to air, water, soil conservation, flora preservation and noise reduction. Unable to meet the deadlines for the promulgation of such standards, TRPA enacted the temporary development moratoria at issue in this case. The two moratoria before the Court — Ordinance 81-5 and Resolution 83-21—essentially prevented any development on the landowner's property until a permanent regional plan could be enacted. The moratoria prevented development by preventing development on hills, slopes, and other "sensitive lands" owned by the named landowners.

The petitioner, Tahoe-Sierra Preservation Council, Inc. (TSPC), is a non-profit membership corporation representing about 2,400 owners of both improved and unimproved parcels of real estate in and around the Basin. In 1984, TSPC filed parallel actions against TRPA and other defendants in federal courts in Nevada and California. The instant suit is a consolidated action initially tried in the District of Nevada. TSPC mounted a facial challenge to the two development moratoria mentioned above, claiming they constituted a taking of the landowners' property without just compensation.

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10. Id. at 310.
12. Id. at 311-12. In total, the two regulations were in effect for thirty-two months. Id.
13. Id. at 312.
14. Tahoe I, supra note 2, at 1229.
The Nevada District Court first found that the moratoria did not fulfill \textit{Penn Central}'s requirements for a \textit{partial taking}.\textsuperscript{15} The court did, however, find that the moratoria deprived petitioners of \textit{all economically viable use of their land} for an indeterminate period-a deprivation that constituted a \textit{total taking} under the analysis formulated in \textit{Lucas v. South Carolina Coastal Council}.\textsuperscript{16} (\textit{Lucas}).\textsuperscript{17} Both parties appealed. TRPA challenged the district court's takings determination, while TSPC challenged the dismissal of other claims not taken up by the circuit court related to further development prohibitions. TSPC did not, however, challenge the district court's \textit{Penn Central} analysis, instead choosing to press its contention that the moratoria amounted to per se takings pursuant to \textit{Lucas} and its progeny. This reliance on the \textit{Lucas} prong of the takings test would come back to haunt property rights advocates.

The Ninth Circuit overturned the district court's determination that the moratoria should be analyzed under the rule set forth in \textit{Lucas},\textsuperscript{18} reasoning that the moratoria could not have affected a total taking because they represented only non-permanent impositions on the landowner's development rights.\textsuperscript{19} That is, no \textit{total} taking occurred because the landowners had only been deprived of their fee simple interests for time.\textsuperscript{20} The court of appeals also rejected the landowner's contention that \textit{First English} was controlling, holding that \textit{First English} only dealt with whether compensation is an appropriate remedy for a temporary taking and not whether such a temporary taking had in fact occurred. The court held that the analytic framework for determining whether a temporary taking had occurred can be found in the four part test in \textit{Penn Central}.\textsuperscript{21} Over the dissent of five judges, the Ninth Circuit denied a petition for rehearing en banc,\textsuperscript{22} and the Supreme Court granted the writ of certiorari.\textsuperscript{23}

Justice Stevens, writing for a six-justice majority, affirmed the Ninth Circuit's rejection of TSPC's claim that a temporary development moratorium was, on its face, a taking for which just compensation was due. The Court refused to adopt an approach under which any temporary

\textsuperscript{17} \textit{Tahoe I, supra} note 2, at 1250-51.
\textsuperscript{18} \textit{Tahoe I, supra} note 2.
\textsuperscript{19} \textit{Tahoe II, supra} note 3.
\textsuperscript{20} \textit{Id.} at 774.
\textsuperscript{21} \textit{Id.} at 773.
\textsuperscript{22} \textit{Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Auth.}, 228 F. 3d 998, 998 (9th Cir. 2000).
delay or imposition on landowners' property interests would require governmental compensation.\textsuperscript{24} The Court further reaffirmed the ad hoc approach taken in \textit{Penn Central}, stating that such an analysis is best suited to evaluate temporary takings such as the land use regulations involved here.\textsuperscript{25}

The Court began its analysis by emphasizing the distinction between physical appropriation or condemnation actions and regulatory actions. Distinguishing the physical occupation case law from the more recent development of regulatory takings jurisprudence, the Court rejected petitioner's attempts to mix the two areas of law by using physical appropriations cases as support for a regulatory takings claim.\textsuperscript{26}

Having rejected TSPC's contention that the moratoria amounted to physical takings, or should even be viewed under such a rubric, the Court went on to reject TSPC's claims under \textit{Lucas}. Analyzing the history of regulatory takings jurisprudence, Stevens invoked Justice Holmes oft-quoted remark that, "if regulation goes too far it will be recognized as a taking."\textsuperscript{27} And, as the Court noted, with the exception of \textit{Lucas}, regulatory takings jurisprudence is replete with refusals to establish bright line rules for determining how far is "too far" with respect to land use controls. Instead, Stevens wrote approvingly of the development of ad hoc, factual inquiries in the regulatory takings arena, building a bridge from \textit{Penn Central} to \textit{Palazzolo}.\textsuperscript{28}

\textit{Lucas}'s holding, according to Stevens, was limited to "the 'extraordinary case' in which a regulation permanently deprives property of all value."\textsuperscript{29} But Stevens specifically distinguished \textit{Lucas} by noting that the use prohibitions involved in this case were only "temporary." And he rejected petitioners' assertion that a complete deprivation of economically viable use, even though only temporary, could be construed as a \textit{per se} taking for which compensation would always be due.\textsuperscript{30} Referring to \textit{Penn Central}, the Court reiterated the necessity of focusing

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  \item \textbf{24.} \textit{Tahoe III}, supra note 7, at 334-35.
  \item \textbf{25.} \textit{Id.} at 342.
  \item \textbf{26.} \textit{Id.} at 323-24. This rejection of the analogy between regulatory and physical takings doctrine is a critical shift in the Court's approach to takings cases, and virtually repudiates the Court's assertion in \textit{Lucas} that government regulation denying "all economically beneficial or productive use of land" is akin to a physical appropriation, and will be considered a \textit{per se} taking. \textit{Lucas} v. S.C. Coastal Council, 505 U.S. 1003, 1015-16 (1992).
  \item \textbf{27.} \textit{Tahoe III}, supra note 7, at 326 (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).
  \item \textbf{29.} \textit{Tahoe III}, supra note 7, at 332 (emphasis added).
  \item \textbf{30.} \textit{Id.} at 331-32.
\end{itemize}
on the "parcel as a whole," and reaffirmed its earlier holding that there is no taking where government, through regulation, takes but one stick from the property owner's bundle. Tahoe III was, therefore, not a taking because TRPA took only the one stick representing a finite temporal period covered by the Resolution and the Ordinance from the fee owners. Or, in the words of the Ninth Circuit, the temporary moratoria deprived the landowners of only a "temporal slice" of their fee interests.

Prior to Tahoe, First English was largely understood to require compensation for regulatory takings that deprive landowners of all beneficial use. It had been read by many as foreclosing the application of the "whole parcel rule" to cases of temporal severance. In Tahoe, Justice Stevens noted that First English, relied upon by petitioners to support their claim for compensation, only dealt with whether compensation was valid once a court recognized a taking. As the instant appeal dealt with a facial challenge to the moratoria and not to whether and how TRPA should compensate TSPC's members, the majority found that First English was not relevant. This holding significantly limits the ability of property owners to invoke First English as support for takings challenges to temporary, regulatory, property-use prohibitions.

The Court then reviewed, and dismissed, seven theories of fairness and justice that could have supported petitioner's takings claims. The Court found four of these theories unavailing due to a lack of pleading and/or reviewability at the trial, appellate, or certiorari level.


33. Tahoe II, supra note 3, at 773-74.

34. See, e.g., Fox, supra note 3 at 408.

35. Id., see also Maureen Straub Kordesh, "I Will Build My House With Sticks": The Splintering of Property Interests Under the Fifth Amendment May Be Hazardous to Private Property, 20 HARV. ENVTL. L. REV 397, 457 (1996); Douglas W. Kmiec, The Original Understanding of the Takings Clause is Neither Weak Nor Obsolete, 88 COLUM. L. REV. 1630, 1654 (1988).

36. Tahoe III, supra note 7, at 328.

37. Id. at 328.

38. Id. at 334-36.

39. These theories included: (1) that the successive actions of TRPA acted as a series of rolling moratoria that were the functional equivalent of a permanent taking; (2) that TRPA was stalling in order to avoid promulgating the environmental threshold carrying capacities and regional plan mandated by the 1980 Compact; (3) that the moratoria did not substantially advance a legitimate state interest under the Agins/Monterey test; and (4) that the moratoria had effected as-applied takings to individual owners' parcels. Id. at 333-34.
compensation for any temporary deprivation of property value in favor of legislative action.\textsuperscript{40}

The Court did not have the opportunity to reach the question of whether the moratoria constituted takings under the ad hoc inquiry laid out in \textit{Penn Central} because TSPC had abandoned this claim on appeal. However, in many places throughout the ruling, Justice Stevens offered strong dicta indicating a shift in regulatory takings jurisprudence away from per se rules towards a multifactor analysis equivalent to the \textit{Penn Central} test.\textsuperscript{41} For example, Stevens seemed to invoke the "reasonable investment backed expectations" prong of \textit{Penn Central} when he emphasized that "the petitioners who purchased land [after implementation of the Compact] did so amidst a heavily regulated zoning scheme."\textsuperscript{42} Justice Stevens also offered hope to land-use planners by his recognition of the necessity of regulation, and his seeming approval of land-use planning in general.\textsuperscript{43} The Chief Justice, in a dissent joined by Justices Scalia and Thomas, refused to limit his analysis to the moratoria discussed by the majority. He argued instead that later development restrictions imposed by an injunction ordered pursuant to TRPA’s 1984 enactment of a comprehensive plan were within the scope of the appeal.\textsuperscript{44} Although the Chief Justice conceded that the 1984 Plan did not itself cause petitioner’s injury, he believed that the moratoria were a “proximate cause” of the injunction and therefore should be considered in the takings analysis.\textsuperscript{45} And because “a ban on all development lasting almost six years does not resemble any traditional land-use planning device,” he dissented.\textsuperscript{46}

\textsuperscript{40} \textit{Id.} at 334-35. The Court later noted that a number of states have in fact passed statutes setting a time limit on interim ordinances. \textit{Id.} at 342, n. 37.

\textsuperscript{41} \textit{Id.} at 335 (“we are persuaded that the better approach to claims that a regulation has effected a temporary taking ‘requires careful examination and weighing of all the relevant circumstances.’” (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 636 (2001)). Indeed, the Court even noted that “if petitioners had challenged the application of the moratoria to their individual parcels, instead of making a facial challenge, some of them might have prevailed under a \textit{Penn Central} analysis.” \textit{Id.} at 334.

\textsuperscript{42} \textit{Id.} at 313, n.5.

\textsuperscript{43} “[T]he 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.” \textit{Id.} at 337-38. And, “[t]o the extent that communities are forced to abandon using moratoria, landowners will have incentives to develop their property quickly before a comprehensive plan can be enacted, thereby fostering inefficient and ill-conceived growth.” \textit{Id.} at 339.

\textsuperscript{44} \textit{Id.} at 344. TRPA finally enacted its Comprehensive Plan in 1984, but the State of California, on the day the Plan was issued, challenged it as failing to establish controls sufficiently protective of the Basin. A district court then entered an injunction, upheld by the Ninth Circuit, which remained in effect until a completely revised Plan was adopted in 1987. \textit{Id.} at 312.

\textsuperscript{45} \textit{Id.} at 343-445

\textsuperscript{46} \textit{Id.} at 343.
The Chief Justice pointed out the illusory nature of the Court's distinction between temporary and permanent takings, noting that the development restriction ruled "permanent" in *Lucas* in fact was repealed after two years, while the "temporary" restrictions at issue in this case had been in place nearly six. according to Rehnquist, under the majority's approach, "the takings question turns entirely on the initial label given a regulation," and a government will be able to avoid a *Lucas*-type takings review simply by calling a land-use restriction "temporary," regardless of its actual duration. But from the perspective of property rights owners, a total indefinite deprivation of use is the "practical equivalent" of a total permanent deprivation of use. This was the rationale for *First English*, and was also the justification underlying *Lucas*.

Although the *Lucas* Court recognized that long-term development regulations may be appropriate where "long-standing, implied limitations of state property law" support them, "a moratorium prohibiting all economic use for a period of six years" is not what the Court had in mind.

Justice Thomas, in a separate dissent joined by Justice Scalia, took issue with the Court's blithe treatment of the "parcel as a whole" theory of property rights, which assumes that the entire length, breadth, depth, and timeline of the parcel is the correct denominator for determining whether a compensable taking had occurred. Thomas, referring to rule as "questionable", argued that the "parcel as a whole" doctrine is far from settled in terms of what should be included. Thomas maintains that *First English* established that the entire fee simple is an inappropriate denominator "in the context of temporal deprivations" of property. In Thomas' view, *First English* did in fact establish that temporary regulations denying all economically viable use of land are cognizable as per se takings, and that the relevant property interest is not "land's infinite life." As noted in *Lucas*, "'total deprivation of use is, from the landowner's point of view, the equivalent of a physical appropriation.'" The majority's assurance to the property owners in this case that they have suffered no taking because the "temporary" moratorium will

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47. *Id.* at 346-47.
48. *Id.* at 347.
49. *Id.* at 348.
50. *Id.* at 351-52 (citing *Lucas* v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992)).
51. *Id.* at 355, n.2 (Thomas, J. and Scalia, J., dissenting).
52. *Id.* at 355.
53. *Id.*
54. *Id.* (quoting *Lucas*, 505 U.S. 1003, 1017 (1992)).
someday be lifted is, in Thomas’ words, “cold comfort;” for “in the long run we are all dead.”

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55. _Id._ at 356 (quoting _JOHN MAYNARD KEYNES, MONETARY REFORM_ 88 (1924)).