June 2001

Lake Tahoe's Temporary Development Moratorium: Why a Stitch in Time Should Not Define the Property Interest in a Takings Claim

Tedra Fox

Follow this and additional works at: https://scholarship.law.berkeley.edu/elq

Recommended Citation

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z38X85F

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Ecology Law Quarterly by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcea@law.berkeley.edu.
Lake Tahoe's Temporary Development Moratorium: Why a Stitch in Time Should Not Define the Property Interest in a Takings Claim

Tedra Fox*

Defining the "property interest" at stake in takings claims presents an ongoing challenge for the courts. Judicial outcomes may vary depending on whether a court adopts an expansive or fragmented view of the plaintiff's holdings. In Tahoe-Sierra, the Ninth Circuit soundly rejected the abstract splintering of property interests known as "conceptual severance." The court refused to allow the plaintiffs to characterize their fee parcels as limited "slices in time," thwarting their efforts to prove that a 32-month development moratorium had destroyed "all economically beneficial or productive use" of their land. This Note explores why the court's rejection of conceptual severance makes well-grounded contributions to takings law and public policy. It also sets forth rationale for why temporary development moratoriums should not be equated with the "temporary takings" found deserving of compensation by the Supreme Court in First English.

CONTENTS

Introduction .......................................................................... 400
I. Legal Backdrop ..................................................................... 403
   A. Conceptual Severance and the "Denominator" Dilemma ................................................................. 403
   B. The Supreme Court's Checkered Approach to Conceptual Severance ........................................ 406

Copyright © 2001 by The Regents of the University of California

* J.D. candidate, University of California at Berkeley School of Law (Boalt Hall), 2002; M.A., University of California at Los Angeles, 1992; B.A., University of Arizona, 1985. The author would like to thank Prof. Peter Menell, Hope Whitney, Sunny Knight, Cinnamon Gilbreath, and members of the ELQ staff for their helpful comments and editorial assistance.
Since the Bill of Rights gave birth to modern American "takings" law 200 years ago, the bundle of sticks that characterize a landowner's property interests has grown more cumbersome. Federal and state courts have, at various times,

---

1. Takings law arises from the Fifth and Fourteenth Amendments. The Fifth Amendment provides, in part: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. Historical documents by James Madison and others suggest that the Takings Clause was most likely narrowly tailored to prohibit the physical taking of private property without just compensation. William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 825-43 (1995). For the first century after the Bill of Rights was adopted, the Supreme Court generally construed "takings as the outright physical occupation of the whole unit of property—usually land—by the government" consistent with this historical intent. Courtney C. Tedrowe, *Conceptual Severance and Takings in the Federal Circuit*, 85 CORNELL L. REV. 586, 596 (2000). The Supreme Court has noted that "early constitutional theorists did not believe the Takings Clause embraced regulations of property at all." Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1028 n.15 (1992).
splintered property interests into spatial, functional, temporal, or economic units to determine whether a government action resulted in the taking of private property without just compensation. A recent decision by the Ninth Circuit Court of Appeals in Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency flatly rejects the "conceptual severance" of property interests in regulatory takings cases. The court refused to allow the plaintiffs to "fillet" their fee-owned land interests into convenient "slices" of time, thwarting their argument that they held distinct, temporal property interests

2. See generally Marc Lisky, Regulatory Takings and the Denominator Problem, 27 Rutgers L.J. 663, 677 (1996). Examples of functional severance include Hodel v. Irving, 481 U.S. 704 (1987) (finding a taking when a law eliminated the right to dispose of property via devise or descent) and Kaiser Aetna v. United States, 444 U.S. 164 (1979) (finding a taking when private marina owners were required to provide a public navigational easement, thereby eliminating their "right to exclude"). Examples of spatial severance include Corrigan v. City of Scottsdale, 720 F.2d 513 (Ariz. 1986), cert. denied, 479 U.S. 986 (1986) (finding that a hillside ordinance resulted in a taking because it prohibited development of eighty percent of a 4,800-acre parcel by delineating it as a "conservation area") and Burrows v. Keene, 432 A.2d 15 (N.H. 1981) (finding a taking when a zoning ordinance placed 88 percent of a 124-acre parcel in a "conservation zone," with the remainder designated as "rural"). Examples of temporal severance include Yuba Natural Resources, Inc. v. United States, 821 F.2d 638 (Fed. Cir. 1987) (finding a "temporary taking" of the plaintiff's mineral rights occurred during a six-year period when the government mistakenly asserted total fee ownership of the land); Corn v. City of Lauderdale Lakes, 95 F.3d 1066, 1073 (11th Cir. 1996), cert. denied, 522 U.S. 981 (1997) (allowing the plaintiff to divide his property into time shares and assert a temporary taking claim for a one-year development moratorium apart from his permanent taking claim); and Joint Ventures v. Dep't of Transp., 563 So.2d 622 (1990), explained in 640 So.2d 54 (1994), (finding a Florida statute that imposed up to a ten-year moratorium on new development permits in areas slated for future highway construction was unconstitutional and subjected the state to "as applied" takings challenges). The Federal Circuit's partial-takings doctrine arguably compensates landowners for economic increments in property. See Florida Rock Indus., Inc. v. United States, 18 F.3d 1560, 1575 (Fed. Cir. 1994) (Nies, C.J., dissenting). The Florida Rock majority observed, "Nothing in the language of the Fifth Amendment compels a court to find a taking only when the Government divests the total ownership of the property... Logically, the amount of just compensation should be proportional to the value of the interest taken as compared to the total value of the property..." Id. at 1568-69. See generally, Douglas W. Kmiec, The Original Understanding of the Taking Clause is Neither Weak Nor Obsolete, 88 Colum. L. Rev. 1630, 1643 (1988) ("No one disputes that pursuant to common and statutory law property can be, and has been, severed or packaged in a variety of ways. Divisions of both time and space are commonplace, and... identifiable and severable.").

3. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 216 F.3d 764 (9th Cir. 2000), petition for cert. filed (Jan. 18, 2001). Margaret J. Radin first coined the term "conceptual severance" in The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings, 88 Colum. L. Rev. 1667, 1676 (1988) ("It consists of delineating a property interest consisting of just what the government action has removed from the owner, and then asserting that that particular whole thing has been permanently taken.").
that had been rendered valueless by a 32-month development moratorium around Lake Tahoe.⁴

Conceptual severance has skirted around the periphery of takings law since the Supreme Court’s landmark decision in Pennsylvania Coal Co. v. Mahon nearly eighty years ago.⁵ Although the Supreme Court has summarily dismissed the severance of property interests in some landmark takings decisions, it has left the door slightly ajar in others.⁶ The Court breathed new life back into the debate in the late 1980s with its decision in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,⁷ offering promise to the plaintiffs in the Tahoe-Sierra case.⁸

---

⁴ Tahoe-Sierra, 216 F.3d 764.
⁵ 260 U.S. 393 (1922). See Radin, supra note 3, at 1674-79; see also Tedrowe, supra note 1, at 598.
⁷ First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987). This case involved a challenge to a development moratorium that continued in force indefinitely pending the adoption of new flood control measures. The Court held that if an ordinance violated the Takings Clause and denies a property owner "all uses of its property for a considerable period of years," then the government must compensate the plaintiff for the time the ordinance was in effect. Repeal of the ordinance, by itself, is an insufficient remedy. Id. at 322. The Court stated: "[Temporary takings which . . . deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." Id. at 321.
⁸ According to Frank Michelman, Takings, 1987, 88 COLUM. L. REV. 1600, 1619 (1988), Justice Stevens' dissenting opinion in First English suggests that he thought the "majority unambiguously bought into a general doctrine of conceptual severance by time shares." Stevens wrote: "Until today, we have repeatedly rejected the notion that all temporary diminutions in the value of property automatically activate the compensation requirement of the Takings Clause." First English, 482 U.S. at 332. However, Professor Michelman suggests that the Court was not applying temporal severance, given that at least three of the justices in the majority had rejected conceptual severance in previous decisions. See Michelman, supra, at 1619. Michel Berger, attorney for the property owner in First English, also appears to view First English as permitting temporal severance. Berger wrote:

The temporary moratorium in First English was in effect for less than three years. It would thus seem inescapable that moratoria of longer duration are automatically suspect, while even those which are shorter will have to be evaluated— as any other regulatory taking— based on their impact on the property owner.

Michael M. Berger, Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land Use Planning, 20 Urb. Law. 735, 746 (1988); see also Lisker,
In ruling that the temporary moratorium did not effect a regulatory taking because the affected parcels continued to have "substantial present value" based on their future development potential, the Ninth Circuit wisely cast aside conceptual severance, which has the potential to produce absurd results, in favor of a holistic conception of property that preserves the ability of communities to thoughtfully plan their futures.\(^9\) Equally important, the court articulated why interim development moratoriums should not be equated with the "temporary regulatory takings" addressed in First English.\(^10\)

However, it remains to be seen whether the Ninth Circuit's reasoned approach will gain support nationally. The Federal Circuit and Eleventh Circuit have recently engaged in conceptual severance,\(^11\) and there is a split within the Ninth Circuit itself over the meaning of First English and its application to the Tahoe-Sierra case.\(^12\) Five justices, in a strongly worded dissent to the Ninth Circuit's denial for an en banc rehearing, concluded that there is nothing special about a finite moratorium that alters the government's duty to compensate under the Takings Clause.\(^13\)


LEGAL BACKDROP

A. Conceptual Severance and the "Denominator" Dilemma

From early Roman times to the modern American state, the landowner's bundle of rights has traditionally been viewed as a

\(^{supra\ note\ 2,\ at\ 700\ (concluding\ the\ First\ English\ court\ engaged\ in\ conceptual\ severance).}\n
9. Tahoe-Sierra, 216 F.3d at 778.

10. As the Ninth Circuit explains, "[T]he Court's holding in First English was not that temporary moratoria are 'temporary takings.' In fact, the opposite is true . . . . What is temporary is the taking, which is rendered temporary only when a [permanent] ordinance that effects a taking is struck down by a court." Id. at 778 (internal citations omitted).

11. See Corn v. City of Lauderdale Lakes, 95 F.3d 1066, 1072 (11th Cir. 1996), cert. denied, 522 U.S. 981 (1997) (allowing the plaintiff to divide his taking claim into time periods to assess whether a year-long moratorium effected a taking apart from his permanent taking claim); see also Bass Enters. Prod. Co. v. United States, 133 F.3d 893 (Fed. Cir. 1998) (finding that the government may be potentially held liable for a "temporary taking" when it denies a permit for a period of years while it completes an ongoing regulatory effort). These cases are further discussed in Part III.E.


13. Id. at 999-1000.
“trinity of rights”—the rights to possession (including the right to exclude others14), use, and disposition.15 The Supreme Court has embraced the basic elements of this definition, stating that property rights are not limited to the “physical thing” but instead “denote the group of rights inhering in the citizen’s relation to the physical thing, as the right to possess, use and dispose of it.”16

Conceptual severance, by contrast, is an abstract treatment of property that allows any one of the classic property rights to be splintered into fragments, with each segment—no matter how small—held up by the owner as constituting its own distinct property right.17

The Ninth Circuit identifies three attributes of property susceptible to conceptual severance, also referred to as “segmentation.”18 The first is the physical dimension, which involves a parcel’s size or shape. The second is the functional dimension, which can encompass use, possession, or disposition. The third attribute—the one at issue in Tahoe Sierra—is the temporal dimension, which addresses the “duration of the property interest.”19

Conceptual severance ended up at the center of the Lake Tahoe controversy because, in order to prove a categorical

---

14. The right of possession includes the right to exclude others from one’s land. The Supreme Court has called the right to exclude “one of the most essential sticks in the bundle of rights that are commonly characterized as property.” Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979). The Court also indicated that the right to exclude is “universally held to be a fundamental element of the property right.” Id. at 179-80.

15. RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 59 (1985). This definition of property as “the exclusive right to possess, enjoy, and dispose of a thing” is one of the official definitions adopted by WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (unabridged ed. 1993).

16. United States v. Gen. Motors Corp., 323 U.S. 373, 378 (1945). However, the Supreme Court’s approach to property interests is more multi-dimensional than this fundamental definition might suggest. See Radin, supra note 3, at 1671 (“Unlike Richard Epstein, our Supreme Court has not fully constitutionalized . . . the classic liberal conception of property.”); see also Andrea Peterson, The Takings Clause: In Search of Underlying Principles Part I—A Critique of Current Takings Clause Doctrine, 77 CAL. L. REV. 1301 (1989).

17. See Radin, supra note 3, at 1676; see also Tedrowe, supra note 1, at 590-92 (“Conceptual severance for the purpose of Takings Clause cases views any conceptually distinct aspect of a person’s property as a separate strand within the bundle of rights— as property itself.” (internal citations omitted)).


taking, the plaintiffs needed to demonstrate that the 32-month development moratorium denied "all beneficial or productive use" of their land.\textsuperscript{20} To make this determination, the court calculates what proportion of the plaintiff's property the moratorium affects. This requires the court to compare the property's value after the regulation (the numerator) with its value before the regulation (the denominator).\textsuperscript{21} Courts routinely wrestle with this test because, as Justice Scalia observed in \textit{Lucas}:

the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave ninety percent of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole . . . .\textsuperscript{22}

If the denominator is defined broadly enough, a taking may never result; if defined narrowly, it almost always will.\textsuperscript{23}

The denominator dilemma arises frequently in regulatory takings cases since the diminution-in-value test has become one of the dominant takings touchstones of the twentieth century.\textsuperscript{24} A one-hundred percent diminution in value is the dispositive factor in a \textit{Lucas}\textsuperscript{25} categorical taking; the test also plays a leading role in the \textit{Penn Central}\textsuperscript{26} and \textit{Agins}\textsuperscript{27} balancing tests.

\textsuperscript{20} To prove a per se, categorical taking, the plaintiff must show: (1) he has suffered a permanent physical occupation of his property as the result of government action; or (2) he has been denied "all economically beneficial or productive use of his land." See \textit{Tahoe-Sierra}, 216 F.3d at 772; \textit{Lucas v. South Carolina Coastal Council}, 505 U.S. 1003, 1016 (1992); \textit{Loretto v. Teleprompter Manhattan CATV Corp.}, 458 U.S. 419, 427 (1982).

\textsuperscript{21} \textit{Lisker, supra note 2, at 666.}

\textsuperscript{22} \textit{Lucas, 505 U.S. at 1016.}


\textsuperscript{24} See \textit{Pennsylvania Coal Co. v. Mahon}, 260 U.S. 393 (1922); \textit{see also} Jed Rubenfeld, \textit{Usings}, 102 \textit{YALE L.J.} 1077, 1087 (1993) (\textit{Pennsylvania Coal} introduced diminution of value as a "decisive factor in determining the existence of a 'taking,' and where the economic impact on the regulated property was too severe, a taking would likely be found . . . . By the early 1980s, the Court had arrived at an economic-viability formulation in which the requisite diminution of value approached total loss. . . .)."

\textsuperscript{25} The \textit{Lucas} test compels the court to find a "categorical taking" when "all economically beneficial or productive use" of the property is denied. \textit{Lucas}, 505 U.S. at 1029-30.

\textsuperscript{26} The three-pronged \textit{Penn Central} test takes into account the "economic impact" of the regulation, the extent to which it interferes with investment-backed
The Supreme Court's *Pennsylvania Coal* and *Keystone Bituminous* decisions provide a vivid illustration of how the identity of the denominator can tilt the wheel of takings law toward a particular outcome. Both cases involved challenges to Pennsylvania laws that prohibited coal companies from removing coal from their underground "support estates" if the extraction would cause surface structures to subside. In *Pennsylvania Coal*, the Court appears to have viewed the support estate as both the numerator and denominator in the takings equation, and thus it declared a taking. In *Keystone*, the Court enlarged the denominator to include the company's mineral, surface and support estates, and found that no taking had occurred.

**B. The Supreme Court's Checkered Approach to Conceptual Severance**

The *Pennsylvania Coal* decision is credited with "opening the door" to the conceptual severance debate by finding that a government regulation affecting only a portion of a landowner's holding had resulted in a taking of the whole property. Although the Supreme Court has never endorsed conceptual

---

27. Under the *Agins* test, the landowner must establish that the challenged regulation (1) does not substantially advance a legitimate state interest; and (2) denies economically viable use of the land. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).


30. *Id.*

31. *Pennsylvania Coal*, 260 U.S. at 414 (The Court reasoned that the law abolished a valuable estate recognized by state law by making it "commercially impracticable" to mine the coal); see also Tedrowe, *supra* note 1, at 598.

32. *Keystone Bituminous*, 480 U.S. at 470. The petitioners in *Keystone* "sought to narrowly define certain segments of their property" by contending that the support estate had been taken. *Id.* at 496-97. The Court viewed the support estate as "merely a part of the entire bundle of rights" and concluded there was no taking because "petitioners retain the right to mine virtually all of the coal in their mineral estates." *Id.* at 501; see *Lisker*, *supra* note 2, at 687 (noting that the *Keystone* majority denied "vertical severance in a case where it had previously been permitted," adding to the confusion of the denominator inquiry).

33. Tedrowe, *supra* note 1, at 597-98; see *Lisker*, *supra* note 1, at 687. The *Pennsylvania Coal* decision is also noteworthy because it ushered in the regulatory takings doctrine. Writing for the *Pennsylvania Coal* majority, Justice Holmes laid down the rule that has spawned eighty years of growing pains for regulatory takings: "[t]he general rule at least is, that while property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking," *Pennsylvania Coal*, 260 U.S. at 393.
severance, its struggle with the denominator problem has led to mixed pronouncements. While conceptual severance generally has been rejected in cases where the diminution-in-value test figures prominently, it arguably creeps into the Court's analysis of physical takings. Lower courts are forced to weave a cohesive pattern from these mixed signals.

In the late 1970s, the Supreme Court rejected conceptual severance and set forth the principle that property interests should be viewed in their entirety when determining whether a government act has worked a taking. In *Penn Central Transportation Co. v. City of New York*, the Court found that the city of New York's denial of a proposed fifty-story building atop the historic Grand Central Station was not a taking because the airspace above the station was not a separate and divisible property interest. The majority opinion suggests that the takings equation consisted of the air rights as the numerator and the entire "city tax block designated as the 'landmark site'" as the denominator. In rejecting the takings claim, Justice Brennan wrote, "'Taking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated';

---

34. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 n.7 (1992). In *Lucas*, Justice Scalia observes that the "uncertainty regarding the composition of the denominator in our 'deprivation' fraction has produced inconsistent pronouncements by the Court," citing the *Pennsylvania Coal* and *Keystone Bituminous* decisions as examples of divergent takings decisions. For additional discussion about these cases, see *supra* notes 31-33.

35. Conceptual severance may have subtly influenced physical invasion cases. See *supra* note 3, at 1678-79 ("The Court engages in conceptual severance only for curtailments of property rights that can be characterized as affirmative easements or servitudes, not for those that are negative."); see also *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'1 Planning Agency*, 216 F.3d 764, 774 (9th Cir. 2000), *petition for cert. filed* (Jan. 18, 2001). The Supreme Court has found regulatory takings even when the physical invasion has been limited to a narrow swathe of the plaintiff's land—such as cable television, public trail, or boating easements. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982) (cable television easement); *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) (navigational easement); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 822 (1987) (coastal access easement). In *Nollan*, even though the owners still enjoyed non-exclusive use of the easement areas—and they maintained the right to possess, use, or dispose of the remainder of their properties—the court declared a taking. The most likely explanation for these exceptions to the general dismissal of conceptual severance is the Court's "zero-tolerance policy" for physical takings of any magnitude. "When faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking." *Loretto*, 458 U.S. at 427 (1982).


37. *Id.* at 131.
rather, it focuses on the "parcel as a whole."  However, Justice Rehnquist in his dissent, joined by Justice Stevens and Chief Justice Burger, suggest that the denominator in the takings equation should have been limited to the "air rights." The dissent observed that the "air rights" were "substantial property rights" that had been taken from the building owners.

The clarity of the Court's rejection of conceptual severance in *Penn Central* has been followed by less lucid and seemingly contradictory decisions, which have found a taking when the challenged regulation removed only a portion of a stick in the landowner's bundle or physically impinged on a tiny fraction of a land holding. In particular, the 1987 *First English* decision suggested to some that *temporal* severance may apply in cases involving regulatory takings.

*First English*, like the *Tahoe-Sierra* case, involved a challenge to a development moratorium. The *First English* plaintiffs operated a church retreat and recreational center in the Angeles National Forest. A major flood destroyed the structures on the plaintiff's property. In response to the disaster, Los Angeles County passed an ordinance that prohibited the plaintiffs and others in the flood zone from rebuilding their lost structures. The ordinance continued in force indefinitely until the enactment

---

38. Id. at 130-31.
39. Id. at 142-43.
40. Id. at 143.
41. See *Hodel v. Irving*, 481 U.S. 704 (1987) (finding that a federal regulation affecting the right to dispose of property via intestacy or devise violated the Takings Clause). Compare with *Andrus v. Allard*, 444 U.S. 51 (1979) (finding that a federal law prohibiting another aspect of the right to dispose—the right to sell (protected bird feathers)—did not effect a taking because the law only affected "one strand" of the plaintiff's bundle of rights. The Court explained, "[W]here an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."). See also *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) (finding that the government's imposition of a public boating easement connecting a private marina to the ocean was a taking based on the principle that it violated the "right to exclude," a fundamental stick in the landowner's bundle of rights). Compare with *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 84 (1980) (finding that a state constitutional provision requiring that a private shopping center accommodate a petition table set up by students was not a taking because the mall owner "failed to demonstrate that the 'right to exclude others' is so essential to the use or economic value of their property... that it amounted to a taking.
42. Lisker, *supra* note 2, at 700; see also *Michelman, supra* note 8, at 1619; Berger, *supra* note 8, at 746.
44. Id.
45. Id.
46. Id.
of new flood control measures. The Supreme Court never addressed the issue of whether the indefinite moratorium effected a taking, only whether the county's repeal of the ordinance would be a sufficient remedy if it was found to violate the Takings Clause. Writing for the majority, Chief Justice Rehnquist stated that "[Temporary takings which . . . deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." The majority, in a six to three decision, concluded that if the appellant is denied "all use of its property for a considerable period of years" then compensation comes due for the time the ordinance was in effect regardless of whether it is abandoned later. This language appears to have fueled the Tahoe-Sierra controversy by sending the signal that development moratoriums are fair game for "temporary taking" attacks. The Tahoe-Sierra plaintiffs believed the First English holding compelled the Ninth Circuit to utilize a denominator in the takings equation that consisted of something less than the full life of their fee parcels.

II
STATEMENT OF THE CASE

A. Saving Lake Tahoe: A Novel Regional Approach and A New Regional Plan Make Fertile Ground for a Lawsuit

Lake Tahoe, one of the most beautiful natural settings in the United States, was rapidly approaching an environmental breaking point in the 1960s. The land that had supported the

48. First English, 482 U.S. at 313.
49. Id. at 318.
50. Id. at 322 (emphasis added).
51. This is despite the fact that the Court stated that the state's authority to enact safety regulations may insulate the ordinance from a takings finding. On remand, the lower court found that the ordinance "advanced the preeminent state interest in public safety and did not deny the appellant all use of its property." The court reasoned that the pre-existing use of the land could continue because camping activities could still be conducted on the property. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 210 Cal. App. 3d 1353, 1356 (1989).
53. Id. at 767; see also Tahoe Regional Planning Agency, Planning for the Protection of our Lake and Land, at http://www.trpa.org/TRPABckg.html (last visited at Feb. 4, 2001).
Washoe Indians for 9,000 years continued to attract new residents eager to build vacation homes, residences, and resorts along the lake's scenic shores. The alpine lake, which had always been known for its spectacular color and clarity, began to experience a natural phenomenon called "eutrophication." The new homes, casinos, resorts, and parking lots dotting the lake's shores had replaced native vegetation with impervious surfaces. This, in turn, led to increased surface runoff and soil erosion. Lake Tahoe was fed a steady diet of nitrogen and phosphorus, which had a marked effect on the lake's famous clarity and depleted it of oxygen, endangering fish and other animal life.

Recognizing that a regional approach was needed to solve the environmental problems that were slowly choking the lake, California and Nevada signed a historic compact in 1969 creating the Tahoe Regional Planning Agency (TRPA). The TRPA developed a land use regulatory scheme that classified lands according to whether they had a "high" or "low" susceptibility to environmental hazards. After the plan's effectiveness came under increasing scrutiny, Nevada and California amended the original compact and directed the TRPA to develop a new regional plan based on revised environmental carrying capacities.

The TRPA enacted two separate measures that temporarily prohibited development on "high hazard lands" during formulation of the new plan. The first resolution, enacted in 1981, temporarily prohibited most residential and all commercial construction on high hazard lands, but it allowed some exceptions for single-family home permits on the Nevada side of...
the lake. The second resolution, which took effect in August 1983, suspended all permitting activities on high hazard lands until a regional plan could be adopted.

Nearly three years after the first development moratorium took effect, the TRPA adopted a regional plan in compliance with its 1980 directive. Celebration of the plan's completion was short-lived. The agency was hit with lawsuits from all shores. The State of California and League to Save Lake Tahoe filed suit claiming that the new land use controls were too lenient to protect the lake's fragile environment. In addition, 450 private property owners, led by an association called the Tahoe-Sierra Preservation Council, Inc. (TSPC), filed suits in the district courts of both states claiming that the TRPA's land use regulations and development moratorium had violated several constitutional provisions, including the Takings and Due Process Clauses. Eventually, all the complaints in the latter suit filed by TSPC were dismissed with the exception of the Section 1983 takings claims, which were consolidated in the United States District Court for the District of Nevada.

B. District Court Decision

After a year-long settlement effort between the property owners and TRPA failed, the Nevada District Court held that the 32-month development moratorium had resulted in a taking of the plaintiffs' property.

The court applied three separate Supreme Court takings tests because it was vigorously disputed whether the ordinances

---

62. Id. at 769.
63. Id. at 768-69.
64. Id.
65. Id.
66. Id. The State of California and League to Save Lake Tahoe prevailed and a preliminary injunction was issued by the United States District Court for the Eastern District and later upheld by the Ninth Circuit Court of Appeals. The injunction prohibited the TRPA from issuing building permits until the planning document was completely overhauled and a revised regional plan was adopted. A revised plan was adopted, per the court order, in 1987. Id.
67. Id.
68. Id. at 770. The complicated procedural history of this case, which dates back to the mid-1980s, is summarized by the district court decision in Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 34 F. Supp. 2d 1226, 1236-38 (1999).
69. However, the district court ruled that the TRPA was not liable for any taking that may have occurred while a court-ordered injunction against the 1984 regional plan was in effect since TRPA's conduct would not have been the cause of the taking. Tahoe-Sierra, 216 F.3d at 770-71.
had partially or totally deprived the plaintiffs of the economically viable use of their land.\textsuperscript{70} The court began its inquiry with the \textit{Agins v. City of Tiburon} takings test, finding that the moratorium had advanced a legitimate state interest, but it had diminished economically viable use of the property.\textsuperscript{71} Because the court was unclear as to the magnitude of the deprivation, it applied two additional takings tests. Using the \textit{Penn Central}\textsuperscript{72} ad-hoc balancing test, the court found that no taking had occurred because the temporary nature of the regulations did not unduly interfere with investment expectations, the plaintiffs did not produce evidence to support a partial economic taking,\textsuperscript{73} and the government had acted reasonably to solve a difficult environmental problem.\textsuperscript{74}

The court then moved to the \textit{Lucas} test, which compels the court to find a "categorical taking" if an owner is denied "all economically beneficial or productive use" of her land, unless the regulation goes no further than enforcing pre-existing state property law and nuisance principles.\textsuperscript{75} Applying the \textit{Lucas} test, the court found that the moratorium constituted a facial taking by depriving plaintiffs of the total beneficial or productive use of their land for a set duration.\textsuperscript{76} Although the ordinances allowed

\begin{itemize}
\item \textsuperscript{70} Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F. Supp. 2d 1226, 1240 (1999). The plaintiffs could have prevailed if they satisfied any one of the three takings tests.
\item \textsuperscript{71} The \textit{Agins} takings test consists of two prongs. The landowner must establish that the challenged regulation: (1) does not substantially advance a legitimate state interest; and (2) denies economically viable use of the land. \textit{Agins v. City of Tiburon}, 447 U.S. 255, 260-61 (1980).
\item \textsuperscript{72} Under the \textit{Penn Central} takings test, the court makes an ad-hoc, factual inquiry into: (1) the economic impact of the regulation; (2) the extent to which the regulation interfered with investment-backed expectations; and (3) the character of the government action. The test is an attempt to balance both public and private interests. A taking is much more apt to be found if the government interference with property rights involves a physical invasion rather than "some public program adjusting the benefits and burdens of economic life to promote the common good." \textit{Penn Central Transp. Co. v. New York City}, 438 U.S. 104, 124 (1978).
\item \textsuperscript{73} This may be because, the court speculates, they were pursuing a "facial" rather than an "applied" challenge. A facial taking occurs when "the mere enactment of the challenged regulation does not advance a legitimate state interest or denies an owner economically viable use of his land. \textit{Agins}, 447 U.S. at 260. An "as applied" takings challenge requires that the plaintiff prove a specific injury to her property. Nancy J. Marzulla & Roger J. Marzulla, \textit{Property Rights: Understanding Government Takings and Environmental Regulation} 149 (1997).
\item \textsuperscript{74} Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F. Supp. 2d at 1240-42.
\item \textsuperscript{75} Tahoe-Sierra, 216 F.3d at 772. A caveat to the \textit{Lucas} rule is that the land use must have been previously permissible under relevant state property and nuisance laws. \textit{See Lucas v. South Carolina Coastal Council}, 505 U.S. 1003, 1029-30 (1992).
\item \textsuperscript{76} Tahoe-Sierra, 216 F.3d at 771.
\end{itemize}
some minor grading and outdoor recreation facilities on some
classified lands, the court doubted whether any of these uses
"could ever be considered economically viable."\(^7\) In addition, the
court found that the environmental harms the ordinances were
designed to prevent did not qualify as nuisance exceptions to the
Lucas categorical rule.\(^8\)

C. The Ninth Circuit Decision

1. Majority Decision

The Ninth Circuit reversed the lower court’s decision, finding
that no taking had occurred under the Lucas test because the
temporary nature of the development moratorium “preserved the
bulk of the future developmental use of the property,” which had
a “substantial present value.”\(^9\) The court concurred with the
lower court’s determination that no taking occurred under the
Penn Central test.\(^8\)

The pivotal decision facing the Ninth Circuit in the Tahoe-
Sierra case was whether to view the plaintiffs’ properties as fee-
simple parcels with full lives ahead of them or as limited
“temporal” interests divorced from any future years. The answer
to this question had the potential to sway the outcome either
way by setting the numerator/denominator framework for the
court’s takings calculus.

The Tahoe-Sierra plaintiffs argued that First English
compelled the court to view their property as discreet, temporal
segments, but the Ninth Circuit rejected this interpretation.\(^1\)
The court noted that “the holding in First English was not that
temporary moratoria are ‘temporary takings.’”\(^2\) Rather, the
Supreme Court’s decision addresses what the proper remedy is
after a permanent regulation is abandoned by the government or
struck down by the courts and is therefore converted into a
“temporary taking.”\(^3\)

The Ninth Circuit found much more relevant authority in
Agins v. City of Tiburon, which it cited for the proposition that
the Supreme Court had already quashed the notion of temporal

\(^7\) Tahoe-Sierra, 34 F. Supp. 2d at 1243.
\(^8\) Id. at 1252-53.
\(^9\) Tahoe-Sierra, 216 F.3d at 781.
\(^1\) Id. at 782.
\(^1\) Id. at 777.
\(^2\) Id. at 778.
\(^3\) Id.
In *Agins*, the city had initiated condemnation proceedings against the plaintiffs' five-acre parcel but abandoned the litigation one year later. The plaintiffs argued that the use of their land had been destroyed while the condemnation proceedings were pending. The Supreme Court noted that:

> [even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decision making, absent extraordinary delay, are “incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense.”]({#84})

Although the *Agins* decision never discusses the notion of conceptual severance, the Ninth Circuit cleverly points out that the plaintiffs' ability to sell or develop their property after the condemnation period ended was the basis for the Court's no-taking ruling. The future use of the parcels "would have been irrelevant to the Court's taking analysis" if the Court had accepted the "invitation to carve out, as a separate property interest, a temporal 'slice' of the parcel." The court noted that the "parcel as a whole" doctrine is not limited to the physical dimension of a parcel.

In addition, the Ninth Circuit drew guidance from the Supreme Court's general rejection of conceptual severance in non-physical takings cases, citing *Penn Central* and *Keystone* that "takings jurisprudence must consider the 'parcel as a whole.'" The court noted that the "parcel as a whole" doctrine is not limited to the physical dimension of a parcel.

After establishing that the plaintiffs' entire, fee-owned interests should serve as the denominator in the takings equation, the Ninth Circuit then grappled with the meaning of the poorly defined Lucas takings test. The court noted that the main confusion "centers on the relationship between the 'use' of

---

84. *Id.* at 775-76.
85. *Id.* at 776. Note that there were two takings claims in *Agins*: one involved the city's pre-condemnation activities and the other involved the downzoning of the subject parcel. Neither challenge was successful. *See Agins v. City of Tiburon*, 447 U.S. 255 (1980).
86. *Tahoe-Sierra*, 216 F.3d at 776.
87. *Id.* (quoting Danforth v. United States, 308 U.S. 271, 285 (1939)).
88. *Id.* at 776.
89. *Id.*
90. *Id.*
91. *Id.* at 774-75. The "parcel as a whole" rule was used in *Andrus v. Allard* to explain why a regulation impacting a "functional" strand (the right to sell eagle feathers) would not be viewed as a taking in its entirety. *Andrus v. Allard*, 444 U.S. 51 (1979).
92. *Tahoe-Sierra*, 216 F.3d at 780.
property and its 'value.' However, it escaped the riddle by finding that no matter how the test is interpreted, the TRPA moratorium did not deprive the plaintiffs of either all use or all value. Consistent with its view that the property interests at stake were whole fee interests, it viewed the use of the property across a continuum running from present to future. The court found that the 32-month moratorium preserved the "bulk of the future developmental use of the property," which in turn had "substantial present value." With the numerator and denominator well in hand, the Ninth Circuit ran the math and concluded that no taking had occurred.

The court did not, however, shut the door on the question of whether a temporary development moratorium could ever constitute a categorical taking. The court cautioned that if a temporary moratorium was "in force so long as to eliminate all present value of a property's future use, we might be compelled to conclude that a categorical taking had occurred."

2. Dissenting Opinion

After the Ninth Circuit denied the plaintiffs' petitions for rehearing, five justices joined in a strongly-worded dissent that accused the panel of turning its back on Supreme Court takings jurisprudence by overruling the First English decision. Judge Kozinski, who authored the dissent, asserted that the panel's decision was in direct conflict with the majority opinion in First English, which found that "a temporary regulation is 'not different in kind' from a permanent one: If either deprives the

93. Id.
94. Id. at 781.
95. Id. at 782.
96. Id. at 781.
97. The court's application of the Lucas test is not without its critics, most notably Judge Kozinski, who penned the rehearing en banc dissent. Judge Kozinski accuses the court of inappropriately focusing its analysis on the question of value instead of use. He notes, the "government can deprive the owner all use, but the property might retain value." See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 228 F.3d 998 (9th Cir. 2000) (Kozinski, J., dissenting). His argument, however, walks the court back into the labyrinth of conceptual severance. Under his formulation of the test, denial of all use would only have occurred if both numerator and denominator were identified as a 32-month life span. But as soon as the parcels are recognized as having a longer useful life (which mortgage companies certainly bank on), the diminution in use arguably falls short of the much more than "mere diminution" that the Supreme Court requires to find a taking. Id.
98. Tahoe-Sierra, 216 F.3d at 781.
99. Tahoe-Sierra, 228 F.3d at 999 (Kozinski, J., dissenting).
owner of all use of his property, then the owner is entitled to compensation for the taking.”

Furthermore, the dissent could find no rational basis for differentiating temporary development moratoria from temporary physical takings (which have always required compensation) since both deny the landowner the beneficial use of his property for a given duration. Justice Kozinski also observed that the majority’s decision creates a conflict with the Federal Circuit, which has recognized that “a taking, even for a day, without compensation is prohibited by the Constitution.”

III
ANALYSIS

This analysis begins by focusing on the unique nature of temporary development moratoriums and why they should not be equated with temporary takings. It then turns to the larger policy implications of a takings jurisprudence based on conceptual severance. Part A critiques the dissent’s equation of temporary moratoriums with temporary takings by showing the different impacts of each on the landowner. Part B argues that interim development moratoriums should be shielded from takings claims as “normal delays” and “preliminary activities” in a city’s legislative process. Part C suggests a possible balancing test that courts can apply to ensure that contested development moratoriums are deployed with reasonableness, good faith, and efficiency. Part D discusses why conceptual severance frustrates the very goals of fairness and efficiency it strives to achieve, and why it would encourage developers to strategically piecemeal their properties in an effort to fashion the most desirable takings denominator. Finally, Part E contrasts the Federal Circuit and Eleventh Circuit’s treatment of conceptual severance with that of the Ninth Circuit because it may help inform future Supreme Court deliberations on the issue.

100. Id. at 1002.
101. Id. at 1000-02.
102. Id. at 1001. Judge Kozinski cites Tabb Lakes, Ltd. v. United States, 10 F.3d 796 (Fed. Cir. 1993), which expressly rejected conceptual severance and the “temporary takings” claim of a plaintiff who was ordered to stop filling wetlands for a three-year period, after the Army Corps of Engineers mistakenly exercised jurisdiction over the property. The court found that the Corps had not acted in bad faith nor had it deprived the owner of substantially all economically viable use because there was some continued development and sales activity on the land.
A. Takings Law Should Distinguish Between Temporary Development Moratoriums and Temporary Takings

If a temporary development moratorium and a temporary physical taking both deny landowners use of their property, why should the latter action be compensable under settled constitutional principles while the former is not?\textsuperscript{103} This is essentially the question posed by the five dissenting Ninth Circuit justices who voted to rehear the Tahoe-Sierra case. And it goes to the heart of whether the Ninth Circuit's approach to the Tahoe-Sierra controversy (conceptual severance debate aside) consistently and fairly treats landowners who appear—upon first glance—to have suffered similar injuries. Judge Kozinski, who authored the dissent, concludes that there really is no difference.\textsuperscript{104} He compares a government regulation that denies a landowner the use of his house for three years with the government's use of the house as a warehouse for three years. He asks, "[w]hy should the case be any different if the government simply prohibits you from using your house for three years, but never does get around to using it as a warehouse?"\textsuperscript{105}

Substantial and measurable differences affecting the landowner's bundle of rights do exist among: (1) a temporary physical taking; (2) a temporary regulatory taking (as the Ninth Circuit interpreted the First English decision); and (3) a temporary development moratorium. Because so much confusion surrounds this point, it may be helpful to illustrate the impacts of all three actions by allowing a hypothetical government official to walk up to a landowner on her vacant lakeside parcel, and what remains when he walks away.

In the case of the temporary physical taking, the government official walks up to the landowner and explains that her vacant parcel will be converted to a government warehouse for three years. The landowner is immediately denied all three classic property rights—use, possession, and disposition. She will be forced to leave the property; she will lose her right to exclude others from her land; she will have to find another location to

\textsuperscript{103} It is well-settled that the government must compensate citizens when it physically occupies private land, whether the occupation is temporary or permanent. See United States v. Gen. Motors Corp., 323 U.S. 373 (1945) (finding the government's temporary occupancy of a leased building during World War II was a compensable taking.)

\textsuperscript{104} Tahoe-Sierra, 228 F.3d at 999-1000, 1002 (Kozinski, J., dissenting).

\textsuperscript{105} Id. at 1001-02.
accommodate her own activities; and she will not be able to sublease or perhaps sell her property during the three years it is occupied by the government. In this case, the government is not objecting to use of the parcel, only her use of it.

Under the First English temporary regulatory takings scenario, the government official walks up to the landowner and explains that a new ordinance has been enacted that permanently, or for some indefinite period, prohibits her from building a home on her property. If she goes to court and the ordinance is found invalid, the First English decision requires that she be compensated for the time the ordinance was in effect, even though she may have also gained relief when the ordinance was repealed. During the taking period, the landowner retained her rights of possession (including the right-to-exclude others) and disposition, but she was denied use of her land. In addition, it is likely that the land did not retain competitive market value since the ordinance was enacted as a permanent measure and any future use was purely speculative.

Finally, in the case of the temporary development moratorium, the government official walks up to the landowner on her lakeside parcel and says, “We don’t know if you are planning to develop here in the next few years, but you should know that we’re suspending the issuance of permits for a finite period while we evaluate solutions to development-induced environmental problems.” When the government official walks away, the landowner is left with the rights of possession and disposition. She can still exclude others from her land. She also retains some market value based on the future use of her land since only a fraction of the property’s lifetime is affected. Potential buyers may still be available because they understand the ordinance is temporary, although they may pay less because of the uncertainties raised by the moratorium.106 In fact, in the Tahoe-Sierra case, an appraiser testified that some lots had sold despite the moratorium.107 Most importantly, the Tahoe property owner may actually benefit from the moratorium if a sustainable land use plan is created that preserves the ecological integrity and aesthetic beauty of her community. In the long run, the enjoyment and market value she derives from her property may increase. This “average reciprocity of advantage” is one of the

balancing factors the courts use when applying regulatory takings tests.\textsuperscript{108}

As can be seen, the character of the government action and its impact on the landowner is different in all three scenarios and is most pronounced when contrasting a temporary development moratorium with a temporary physical taking. When Judge Kozinski asks whether there really is "something special about a finite moratorium," both the owner who had her land occupied for three years—and the owner who was told she would never develop—would probably answer "yes."\textsuperscript{109} The disparate nature of these actions and their impact on landowners warrants differentiation under the law, which the Ninth Circuit's decision recognizes. While a taking even for a day is a taking, as the Federal Circuit notes, a valid moratorium for a day is not.\textsuperscript{110}

\textit{B. Reasonable Development Moratoriums Should Be Insulated Against Takings Claims}

The Ninth Circuit suggests in a footnote that "temporary development moratoria" may fall under the list of "normal delays" the Supreme Court acknowledges in \textit{First English}.\textsuperscript{111} Changes in zoning ordinances are included on that list, and the Ninth Circuit points out that temporary development moratoriums are often enacted as part of the creation of new zoning schemes.\textsuperscript{112} The Supreme Court did not address "normal delays" in its holding because these delays raised "quite different questions."\textsuperscript{113}

\begin{footnotes}
\footnotetext[108]{The concept of "average reciprocity of advantage" was advanced by Justice Holmes in the \textit{Pennsylvania Coal} decision to explain how restrictions may both burden and benefit a landowner. With respect to zoning restrictions, he explains, "Each property owner in the zone is both benefitted and restricted from exploitation . . . . The restrictions may be designed to maintain the general character of the area, or to assure orderly development, objectives inuring to the benefit of all, which property owners acting individually would find difficult or impossible to achieve." See \textit{Pennsylvania Coal Co. v. Mahon}, 260 U.S. 393, 415 (1922); \textit{First English v. County of Los Angeles}, 210 Cal. App. 3d 1353, 1371 (1989); \textit{Florida Rock Indus., Inc. v. United States}, 18 F.3d 1560, 1570-71 (Fed. Cir. 1994).}
\footnotetext[109]{\textit{Tahoe-Sierra}, 228 F.3d at 999-1000 (Kozinski, J., dissenting).}
\footnotetext[110]{\textit{Tabb Lakes, Ltd. v. United States}, 10 F.3d 796, 800 (Fed. Cir. 1993) (stating that the court agrees "in theory with plaintiff that a taking, even for a day, without compensation is prohibited by the Constitution.").}
\footnotetext[111]{\textit{Tahoe-Sierra}, 216 F.3d at 778 n.17.}
\footnotetext[112]{\textit{Id.}}
\footnotetext[113]{\textit{First English Evangelical Lutheran Church of Glendale v. County of Los Angeles}, 482 U.S. 304, 321 (1987).}
\end{footnotes}
The Ninth Circuit should have gone even further and characterized temporary moratoriums as "preliminary" government activities, which the Supreme Court has shielded from takings challenges in *Agins* and *Danforth*. These cases involved claims that the government's pre-condemnation activities, although later modified or terminated, had worked a taking on the plaintiffs' land by diminishing their property values. Although the Ninth Circuit cited *Agins* for its implicit rejection of temporal severance, the case arguably has a much broader reach. Both *Agins* and *Danforth* recognize that good-faith preparatory and planning activities should be protected from takings claims not simply because their impact is *limited in time*, but because they are part and parcel of—and help advance—a larger governmental decisionmaking effort. Both cases stand for the proposition that "government is not responsible for diminution in value caused by preliminary activity."

Temporary development moratoriums are inherently preliminary in nature when public agencies adopt them at the outset of a legislative process with the intent that they will be supplanted by the final product of that process. When used in this manner, development moratoriums serve as a procedural mechanism used to "promote effective planning," as the Ninth Circuit points out. If cities and counties are unable to use this traditional planning tool, the community planning process can be undermined by what the Ninth Circuit describes as the "race to development" before the new general plan or zoning ordinance.

---

114. In *Danforth v. United States*, the Supreme Court noted that "a reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership. They cannot be considered a "taking" in the constitutional sense. 308 U.S. 271, 285 (1939). In *Agins*, the Court noted that the "State Supreme Court correctly rejected the contention that the municipality's good-faith planning activities, which did not result in successful prosecution of an eminent domain claim, so burdened the appellants' enjoyment of their property as to constitute a taking." 447 U.S. 255, 263 n. 9 (1980).

115. *Agins*, 447 U.S. at 263 n. 9; *Danforth*, 308 U.S. at 283.

116. The Ninth Circuit, referring to the *Agins* holding, said, "In rejecting the takings claim, the Court relied only on the fact that the plaintiffs were able to sell or develop their property after the city abandoned its condemnation claim. By relying on the temporary nature of the restriction, the Court rejected the invitation to carve out, as a separate property interest, a temporal "slice" of the parcel that existed for the time period during which the condemnation proceedings were in progress." *Tahoe-Sierra*, 216 F.3d at 776 (emphasis added).


118. *Tahoe-Sierra*, 216 F.3d at 777.
LAKE TAHOE'S MORATORIUM

takes effect.\textsuperscript{119} By preserving the status quo, the court notes, the "temporary moratoria ensure that a community's problems are not exacerbated during the time it takes to formulate a regulatory scheme."\textsuperscript{120} Temporary moratoriums also provide valuable "breathing room" that allows the planning process to "run its full and natural course" so that public input can be sought and considered.\textsuperscript{121}

\textbf{C. The Courts Should Devise a Balancing Test for Determining When Temporary Development Moratoriums Go Too Far}

To say that development moratoriums should be inoculated from takings suits under the umbrella of preliminary government activities is not to leave property owners without protection from moratoriums that are unreasonable in length, application, or purpose. Although the Supreme Court has not faced the question of when "normal land use planning delays" become "extraordinary" and violate the Takings Clause,\textsuperscript{122} the courts should respond to future litigation in this area by crafting a balancing test that borrows from existing takings tests. The Ninth Circuit has already suggested one possible element of this test: does the moratorium eliminate all present value of a property's future use?\textsuperscript{123}

A comprehensive test could borrow critical elements from the Agins, Nollan nexus, and Lucas takings tests:\textsuperscript{124} (1) Does the development moratoria further a legitimate state goal?; (2) Is there a substantial nexus between the enactment of the moratorium and the community land use issues it purports to address?; (3) Is the duration of a reasonable nature, as measured by (a) the property's future land use and value (that is, not so speculative or uncertain as to destroy all of the property's

\textsuperscript{119} Id.
\textsuperscript{120} Id. (citing Elizabeth A. Garvin & Martin L. Leitner, Drafting Interim Development Ordinances: Creating Time to Plan, LAND USE LAW AND ZONING DIGEST, June 1996, at 3); Schafer v. City of New Orleans, 743 F.2d 1086, 1090 (5th Cir. 1984).
\textsuperscript{121} Id. (citing Garvin & Leitner, supra note 120, at 3).
\textsuperscript{122} First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 321 (1987); Tabb Lakes, 10 F.3d at 803.
\textsuperscript{123} Tahoe-Sierra, 216 F.3d at 781.
\textsuperscript{124} The first prong of the Agins inquiry looks to whether the regulation serves a legitimate public purpose. 447 U.S. 255, 260 (1980). Under the Supreme Court's takings test in Nollan, a government-imposed land use condition must demonstrate an "essential nexus" with the legitimate state interests it purports to advance. 483 U.S. 825 (1987). Lucas requires that complete deprivations of "all economically beneficial or productive use" be compensated. 505 U.S. 1003, 1029-30 (1992).
present value); and (b) the amount of time required to complete the planning process in a diligent fashion?\textsuperscript{125}

The TRPA moratorium would pass the first prong of this test because the plaintiffs:

do not contest that California and Nevada's objective of preserving the environmental health and aesthetic beauty of Lake Tahoe is an entirely permissible governmental goal. Nor do they dispute that the restrictions imposed on their properties are appropriate means of securing the purpose set forth in the Compact [between the states of Nevada and California].\textsuperscript{126}

Secondly, there was a direct relationship between the community land use goals (preserve the lake's ecological and aesthetic integrity) and the effect of the moratorium (halt run-off from sensitive lands). The ordinance would also satisfy the third prong of the test because it was limited to thirty-two months, including one extension. The court notes that while the temporary moratorium "surely had a negative impact on property values in the basin, we cannot conclude that the interim suspension of development wiped out the value of the plaintiff's properties."\textsuperscript{127} In addition, the district court found that the "TRPA worked diligently to complete the regional plan as quickly as possible."\textsuperscript{128}

Property owners still have the ability to pursue takings claims once the preliminary activity has ceased and the resulting product of the legislative process is enacted. The end products of the legislative process—such as an approved general plan, zoning ordinance, or environmental mitigation program—are the more appropriate targets for litigation when landowners feel they are bearing a disproportionate public burden.

D. Public Policy Implications of Conceptual Severance

Several public policy considerations beg consideration when evaluating the desirability of a takings test based on conceptual

\textsuperscript{125} It is interesting to note that the state of California has attempted to address the reasonableness of interim moratoria by statute. \textsc{Cal. Gov. Code} § 65858 (Deering 2001) permits public agencies to adopt interim ordinances as urgency measures while the agency is contemplating a general plan, specific plan, or zoning proposal, providing specific findings are made that "there is a current and immediate threat to the public health, safety, or welfare..." The statute, which was not at issue in the \textit{Tahoe-Sierra} case, also imposes limitations on time extensions and procedural requirements.

\textsuperscript{126} \textit{Tahoe-Sierra}, 216 F.3d at 773.

\textsuperscript{127} \textit{Id}. at 782.

\textsuperscript{128} \textit{Id}.
severance: (1) Does it provide the most fair and accurate measure of the impact of a regulation on the property owner's "bundle of rights"; (2) Will it promote efficient distribution of private and public costs and benefits; and (3) Is it consistent with the treatment of real property under our existing body of environmental and land use laws?

The Ninth Circuit's rejection of conceptual severance makes sound public policy because, as elaborated below, conceptual severance actually frustrates the goals embodied in these questions. Conceptual severance is too susceptible to manipulation to achieve fairness consistently, can actually thwart efficient distribution of resources, and is incompatible with the evolution of sustainable and sound land use practices.

1. Fairness Concerns

Advocates of conceptual severance argue that government infringement on all, or any part, of a person's ownership rights should be deemed a compensable taking. "[W]hat is decisive," observes Professor Richard Epstein, "is that which is taken, not that which is retained." This argument has strong appeal on basic fairness grounds. Yet, if conceptual severance prevails, judicial outcomes will actually have less to do with "fairness" and more to do with "cleverness," as property owners strategically manipulate their properties to create smaller interests, and thus, smaller denominators for the takings equation.

In addition, conceptual severance used in combination with the Lucas categorical test will result in the disparate treatment of property owners. Owners who hold smaller interests will be more

129. Epstein, supra note 15, at 58; see also James L. Huffman, Judge Plager's "Sea Change" in Regulatory Takings Law, 6 Fordham Envtl. L.J. 597, 615 (1995) (concluding that a "taking is a taking, whether of a portion or of all of a person's property.").

130. As many commentators have noted, conceptual severance provides incentives for owners to behave opportunistically and "structure specialized property interests so that compensation could rarely be avoided. This elaborate and socially useless structuring of property interest would eventually force courts to redefine the deprivation denominator to view the property as a whole." Frillich, Garvin & Martin, supra note 23, at 173; see also Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1181 (Fed. Cir. 1994) (the government argues that a "bright-line rule" accepting the parcel for which the owner seeks a permit as the denominator in the takings equation "would encourage strategic behavior on the part of developers"); Michael C. Blumm, Colloquium on Dolan v. City of Tigard: The Takings Clause Doctrine of the Supreme Court and the Federal Circuit: The End of Environmental Law? Libertarian Property, Natural Law, and the Just Compensation Clause in the Federal Circuit, 25 Envtl. L. 171, 189 (1995).
apt to receive remuneration than larger owners, who will have more difficulty demonstrating total deprivation of value.\textsuperscript{131}

The Takings Clause should, above all else, provide a constitutional framework of fairness that guarantees private citizens are justly compensated if a government regulation imposes an unfair public burden.\textsuperscript{132} Conceptual severance's susceptibility to strategic manipulation and its bias toward small interest holders makes it a poor measure of the true impact of government regulations on landowners and thus does not satisfy this most fundamental goal.

2. Efficiency Concerns

Adherents of conceptual severance would argue that compensating landowners for every increment of lost value will lead to increased efficiency.\textsuperscript{133} Public agencies will be less likely to "externalize" their costs and to treat private property as a free commodity.\textsuperscript{134} But temporary development moratoriums, like the one at issue in Lake Tahoe, actually further efficiency goals by recognizing that the true costs of development to the community are unascertainable—or too high without mitigating conditions in place—and therefore should not be momentarily pursued. In addition, with "facial" rather than "applied" challenges, there is the chance that landowners, who never contemplated building during the moratorium period, will receive a windfall since they will not have to demonstrate how the regulation specifically impacted their properties.\textsuperscript{135} According to an appraiser who testified at trial on behalf of the TRPA, the average Lake Tahoe

\textsuperscript{131} See Carol M. Rose, \textit{Mahon Reconstructed: Why the Takings Issue Is Still A Muddle}, 57 S. Cal. L. Rev. 561, 568 (1984) ("When a court expands the relevant property to which the "taken" portion is compared, the diminution in value test emerges as a deep pocket rule, as holders of extensive property must suffer a greater diminution in value in order to establish a takings claim. Conversely contracting the relevant property interest . . . may turn every regulation into a taking.").

\textsuperscript{132} The Fifth Amendment is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40, 49 (1960).

\textsuperscript{133} Tedrowe, \textit{supra} note 1, at 593.


\textsuperscript{135} Takings claims that arise in the context of facial challenges need not demonstrate the effects of the challenged regulation on a specific parcel of land—only that the "mere enactment" of the regulation denies the owners economically viable use. Keystone Bituminous Coal Ass'n. v. DeBenedictis, 480 U.S. 470, 495 (1987).
property is held vacant for twenty-five years before it is developed.¹³⁶

Conceptual severance will also lead to an inefficient distribution of resources when the challenged regulation provides the landowner with an "average reciprocity of advantage."¹³⁷ Using the Lake Tahoe moratorium as an example, some landowners may have experienced an incremental loss of property value. But, if the loss is offset in the future by improved lakeside views, a cleaner environment, and a stronger tourism economy, providing incremental compensation will create an institutionalized form of "double-dipping" from the public trough. The landowner will be receiving economic remuneration for the moratorium impact, plus he will be recouping his loss once again as he accrues the benefits and amenities that the moratorium brings to his parcel and community.

3. Integration with Other Land Use Laws and Policies

Conceptual severance—especially in the physical dimension—runs counter to the growing societal trend toward sustainable communities. Good land use planning requires seeing parcels and natural processes as integrated, not segregated as a result of some abstractly constructed property right. Conceptual severance would frustrate good project design by encouraging some developers to carve up interests—especially sensitive lands seen as posing regulatory constraints—rather than look at the whole of a parcel and its suitability for a given use based on environmental attributes and community goals.

In addition, conceptual severance could have an absurd effect on environmental regulations such as Section 404 of the Clean Water Act, as the U.S. Court of Appeals for the Federal Circuit points out in its Tabb Lakes decision.¹³⁸ The court refused a developer's attempts to sever its wetland parcels from its residential lots for the purposes of the takings inquiry. The court said:

Clearly the quantum of land to be considered is not each individual lot containing wetlands or even the combined area of wetlands. If that were true, the Corps' protection of

¹³⁷ Pennsylvania Coal Co. v. Mahon, 260 U.S. 415 (1922); see also supra note 108.
¹³⁸ Tabb Lakes, Ltd. v. United States, 10 F.3d 796 (Fed. Cir. 1993).
wetlands via a permit system would, ipso facto, constitute a
taking in every case where it exercises its statutory
authority.139

The strategic piecemealing of development that could grow
out of a takings doctrine that embraced conceptual severance
would also frustrate the spirit of the National Environmental
Policy Act and the California Environmental Quality Act, which
are designed to foster informed decisionmaking and long-range
planning by assessing the totality of a project's specific,
cumulative and long-range impacts.140

E. The Future of Conceptual Severance: Will Varied Treatments
by the Circuit Courts Lead to a Showdown in the Supreme Court?

The Supreme Court has not clarified its First English
decision or provided the lower courts with much additional
guidance regarding what qualifies as a compensable property
interest under the Takings Clause.141 If the Court revisits this
issue in the future, the Ninth Circuit's decision in Tahoe-Sierra
can help add clarity and common sense to the conceptual
severance debate with its finding that a property owner cannot
be categorically deprived of a partial property interest that retains
substantial present value. However, the Ninth Circuit's approach
stands in contrast to two recent Federal Circuit and Eleventh
Circuit opinions, which engaged in "temporal severance" to
varying degrees. In addition, the Federal Circuit, which hears
more takings cases than any other federal court, has dabbled in
the arena of "physical severance," according to some
commentators.142

139. Id. at 802. However, the court specifically said it was not resolving the
dispute over how to define the relevant property interests at stake because the
challenged permit did not affect a temporary taking irregardless.

California Environmental Quality Act, CAL. PUB. RES. CODE §§ 21001-21002.1
(Deering 2001).

141. Tedrowe, supra note 1, at 588, 595 ("In recent years, the Supreme Court has
seized few opportunities to clarify its position on conceptual severance and takings
law. Many commentators feel that the Courts' definition of property is ill-defined.").

142. See Tedrowe, supra note 1, at 602, 623; Lisker, supra note 2, at 714;
Blumm, supra note 130, at 189.

The Federal Circuit has both rejected and employed conceptual severance by
some accounts. In Broadwater Farms Joint Venture v. United States, the Federal
Circuit clearly rejects physical severance. The government's denial of a wetlands
permit had deprived the landowner of the ability to develop twelve of its twenty-seven
lots in its phase three development. The court included all twenty-seven lots as the
denominator in the takings equation and found that only a "mere diminution in
value" had resulted from the government's action since use of the other fifteen lots
In *Bass Enterprises Prod. Co. v. United States*, the Federal Circuit remanded a case to the Federal Claims Court to determine if the government caused a "temporary taking" when it denied an oil and gas drilling permit because it needed more time to assess whether the oil and gas leases should be condemned due to their proximity to a federal nuclear waste storage site. Even without a final regulatory decision, the Federal Circuit concluded that a "temporary taking," lasting for a period of years, could exist. On remand, the Federal Claims Court found that a "temporary taking" had occurred because the plaintiffs were "denied all economically beneficial use of their leases" during a four-year period. The court noted that the

was retained. The case was remanded to the lower court for further proceedings and inquiries under the *Penn Central* balancing test. 1997 U.S. App. LEXIS 19859 (Fed. Cir. 1997). Compare with *Florida Rock Industries v. United States*, 791 F.2d 893 (Fed. Cir. 1986), which one commentator interprets as finding that the government could be liable "for interference with less than all the value of less than all the property owner's holdings." Michael M. Berger, *Lucas v. South Carolina Coastal Council: Yes, Virginia, There Can Be Partial Takings*, in *Takings*, supra note 23, at 161 (emphasis added).

When the Federal Circuit has appeared to engage in conceptual severance, it has typically involved the physical dimensions of a parcel and has been accompanied by an explanation of why the denominator was selected based on the "factual nuances." For example, when a developer challenged the denial of a wetlands permit in *Palm Beach Isles Associates v. United States*, the court selected the 50-acre permit area rather than the original size of the land acquisition (300 acres) urged by the government. 208 F.3d 1374 (Fed. Cir. 2000). Most of the 300 acres had been sold off by the plaintiffs twenty years prior to the denial of their contested permit application. Responding to the government's argument, the court said the timing of the acquisition and development of a parcel was only one factor to be considered. The court explained its approach by saying that the development of the fifty-acre parcel was "physically and temporally remote from, and legally unconnected to," the previously-owned 261 acres. *Id.* at 1381.

144. *Id.* at 894. The Bureau of Land Management's letter stated that the permits were being denied "at this time" due to the inability of the Environmental Protection Agency to assess whether condemnation of the leases would be required (under the Water Isolation Pilot Plant (WIPP) Land Withdrawal Act). The BLM's letter also characterized the decision as final, but after the plaintiffs filed suit, the BLM issued a supplemental decision explaining that the denial was merely a "delay" pending a final regulatory decision. *Id.* at 894-95.
145. *Id.* at 893. However, the court found that a permanent taking could not have occurred and reversed the lower court's decision on this issue, since the statutorily-mandated regulatory process had not yet run its course and culminated in a final determination.
146. *Bass Enters. Prod. Co. v. United States*, 45 Fed. Cl. 120, 123 (1999). The four-year temporary taking period ended when the EPA issued a final determination that condemnation of the leases would not be necessary and the BLM was prepared to revisit the applications. Key to the Federal Claims Court's decision was the fact that it viewed the BLM and the EPA's regulatory processes as being distinct from one another. Thus, when the BLM "denied" the permits "at this time," the court considered that a final regulatory decision since the EPA had no decisionmaking
“[p]laintiffs may be able to develop the land now, but that does not compensate them for the lost years.”147

The Bass case can be distinguished from Tahoe-Sierra on several grounds: the oil and gas leases were essentially pre-existing entitlements, the denial of use was for an indefinite period, and the government’s decision was initially called “final” before it was later clarified as a “delay.” The decision is still informative, however, in that it signals the Federal Circuit’s willingness to view property interests in temporal segments and to entertain takings claims when a categorical deprivation of only one segment occurs, even when a Congressionally-mandated regulatory process has not culminated in a final decision.

In Corn v. City of Lauderdale Lakes,148 the Eleventh Circuit fully embraced temporal severance. Corn involved a challenge to a development moratorium that prohibited the issuance of building permits on C-1 zoned properties for nearly a year.149 After the moratorium ended, the city adopted a new zoning plan, which eliminated some previously permitted commercial uses, but allowed many others.150 The plaintiff filed suit alleging that both the moratorium and the new zoning plan effected a taking.151 The Eleventh Circuit allowed the plaintiff to divide his property into time shares for the purpose of applying the takings test.152 The court noted that the plaintiff “divides his claim into several time periods, arguing that there was a temporary taking during the moratorium... and that the temporary taking ultimately matured into a permanent taking. We follow a similar approach, analyzing whether there was a temporary taking separately from Corn’s permanent taking claim.”153 While the Eleventh Circuit found the new zoning plan did not create a permanent taking, it remanded the case back to the lower court for further findings about whether the “parcel could be put to economically viable use during the moratorium.”154 By treating a year-long slice of the parcel as a distinct property interest, the

---

147. Id. at 122. In addition, the court concluded that the plaintiff’s oil and gas lease was exempt from the WIPP Land Withdrawal Act (see supra note 144). Id. at 123.
149. Id. at 1068.
150. Id.
151. Id.
152. Id. at 1072.
153. Id. (emphasis added).
154. Id. at 1073.
Eleventh Circuit's takings jurisprudence squarely conflicts with the opinion of the Ninth Circuit in *Tahoe-Sierra*.

The above cases demonstrate that, even if the High Court denies certiorari to the *Tahoe-Sierra* plaintiffs, there is a growing likelihood that the Court may someday decide to resolve the conflicts over conceptual severance that are slowly percolating in the Circuit Courts.

CONCLUSION

Conceptual severance, regulatory takings, and the diminution-in-value test create a potentially volatile legal mixture, since the takings equation can be so easily manipulated by the way the property interest in the denominator is defined. The Ninth Circuit's rejection of the abstract splintering of property interests for the purpose of running the takings calculus makes a well-grounded contribution to both takings law and public policy. Temporary development moratoriums that are administered efficiently, fairly, and reasonably have a distinctly different impact on the landowner's bundle of rights than temporary physical takings or the temporary regulatory takings addressed in *First English*. Perhaps, in the future, the Supreme Court's takings doctrine will evolve to formally recognize them as "normal delays" and "preliminary activities" vital to community planning processes.