

CAMPING IN LAKE TAHOE: DOES A TEMPORARY DEPRIVATION OF ALL BENEFICIAL USE OF LAND JUSTIFY REJECTION OF THE CATEGORICAL *LUCAS* RULE?

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I. INTRODUCTION

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,¹ the Supreme Court faced the difficult question of whether a moratorium that temporarily deprived landowners of all use of their property effected a taking under the categorical *Lucas* rule. Ten years earlier, in a 1992 landmark decision, petitioner *Lucas* convinced the Supreme Court that the Beachfront Management Act amounted to a taking because the Act prohibited all construction on his beachfront property.² Ten years later, and leaning heavily upon the *Lucas* holding, hundreds of Lake Tahoe Basin landowners petitioned the Court for a similar holding in their case.³ Like *Lucas*, the Tahoe petitioners wanted to build a house in the vicinity of a body of water; and like *Lucas*, they were barred from developing their property due to regulations aimed at preventing erosion and preserving nature.⁴ Whereas *Lucas* was prohibited from developing his property for a period of two years,⁵ the ban imposed on the Tahoe petitioners had already lasted close to three years.⁶

Despite the strong similarities between the two cases, the *Tahoe-Sierra* Court held that a moratorium on development imposed during the process of formulating a comprehensive land-use plan did not constitute a *per se* taking of property requiring compensation under the Takings Clause.⁷ Unlike *Lucas*, the Tahoe petitioners were merely temporarily barred from developing their prop-

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¹ 535 U.S. 302 (2002).

² See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1020 (1992).

³ See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 320-21 (2002).

⁴ *Id.* at 312.

⁵ See *Lucas*, 505 U.S. at 1036 (Blackmun, J., dissenting).

⁶ See *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 314.

⁷ *Id.* at 321.

erty.⁸ The *Tahoe-Sierra* Court did not foreclose the possibility of a temporary taking, but held that temporary taking claims are to be decided under the *Penn Central* analysis, which consists of balancing a number of factors.⁹

This note examines the consequences of the *Tahoe-Sierra* holding for landowners who wish to challenge a temporary government regulation under a temporary takings claim. Specifically, it addresses whether the distinction made by the *Tahoe-Sierra* Court between temporary and permanent takings is valid, and whether the *Penn Central* test provides sufficient protection for landowners hindered by a temporary regulation.

Part II of this note will give an overview of the historical development of Takings jurisprudence and will attempt to reconcile the evolving progression in the Court's decisions. Part III discusses the *Tahoe-Sierra* case in detail. Part IV consists of an analysis of the holding in *Tahoe-Sierra*. Specifically, this part begins by focusing on how the Supreme Court distinguished *Tahoe-Sierra* from *First English*¹⁰ and *Lucas*, and how the Court added a new factor to the *Penn Central* framework. This part continues by posing the question of whether the distinction between temporary and (semi-) permanent regulations warrants a separate Takings analysis, and whether the *Penn Central* analysis adequately protects landowners who wish to attack temporary measures and other delays in governmental decision-making under the Takings Clause. Part V concludes by recognizing the difficulties that temporary takings pose, and the need for a clarification and definition of all *Penn Central* factors in order to protect landowners who claim a temporary taking.

II. HISTORICAL DEVELOPMENT

A. *The Takings Clause of the Fifth Amendment*

The Takings Clause of the Fifth Amendment to the Constitution states, “. . . nor shall private property be taken for public use, without just compensation.”¹¹ The Takings Clause is one of many provisions of the Constitution that protects the right to private property.¹² As one commentator noted, “[t]he protection of property ownership is a fundamental theme” in the Constitution.¹³

The Takings Clause does not necessarily prohibit government from interfering with property rights;¹⁴ rather, the purpose of the Clause is to ensure compensation for the property owner when government takes property for public use.¹⁵ Indeed, the Supreme Court has repeatedly held that the Takings Clause was “designed to bar government from forcing some people alone to

⁸ *Id.* at 330-31.

⁹ *Id.* at 321, 338, 342.

¹⁰ *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987).

¹¹ U.S. CONST. amend. V.

¹² *See, e.g.*, U.S. CONST. amend. IV; U.S. CONST. amend. XIV, § 1.

¹³ Kimberly Horsely, Comment, *The Abnormalcy of Normal Delay*, 28 PEPP. L. REV. 415, 415 (2001).

¹⁴ *See First English*, 482 U.S. at 314.

¹⁵ *Id.*

bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”¹⁶

Three questions have dominated Takings jurisprudence. First, how should “property” be defined? Does “property” merely refer to physical objects, or does it refer to what an owner can do with this physical object?¹⁷ Or, has the concept of property become so abstract that it now merely represents value?¹⁸

Second, when does government “take” property? Must the government have taken title, or is possession enough?¹⁹ Assuming that property consists of a bundle of rights, has a taking occurred when the government takes one full strand?²⁰ What about a situation in which a government regulation reduces or destroys all value in one’s property interest without ever taking possession or title?

Third, are “temporary” takings protected by the Takings Clause? Can a government measure temporarily blocking all development on a piece of property ever constitute a temporary taking?

These three questions and their sub-questions have not always been answered in the same manner over the last hundred years. Times have changed: intellectual property has its place next to physical property; the government plays a more active role due to industrialization, a more dense population, and increasing traffic; people no longer have only one house, leading to greater pollution and more need for government control. Although government control is needed, the questions are how much and for how long can the government regulate before it is required to compensate?

B. Early Interpretations of the Takings Clause

In accord with the plain language of the Takings Clause, the Supreme Court originally held that compensation was only due when the government had *physically taken* private property.²¹ A “taking” of property was viewed as dispossession of the owner while at the same time taking over legal owner-

¹⁶ *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123 (1978).

¹⁷ See generally William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995); Courtney C. Tedrowe, Note, *Conceptual Severance and Takings in the Federal Circuit*, 85 CORNELL L. REV. 586 (2000); Margaret J. Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667 (1988).

¹⁸ See Treanor, *supra* note 17, at 802 (contending that, according to Holmes, property is value).

¹⁹ See Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1081 (1993) (discussing the historical eminent domain power of the government).

²⁰ See, e.g., RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 57 (1985) (defending that each individual strand of the bundle of rights falls within the scope of the Takings Clause); Margaret J. Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1676-78 (1988) (introducing the term “conceptual severance” and warning for a “slippery slope” effect if every regulation affecting a strand of property amounts to a taking).

²¹ See, e.g., *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551 (1870); *Gibson v. United States*, 166 U.S. 269, 275-76 (1897).

ship.²² In short, landowners must have been deprived of all of the strands in their bundle of rights: their right to use, exclude, and possess.²³

In the Court's early interpretations of the Takings Clause, value was not even considered as a strand in the bundle of rights. In *Legal Tender Cases*, the Court specifically noted that government regulations, indirectly causing individuals to lose substantial value in their property, do not violate the Takings Clause.²⁴ The Court stressed that the Takings Clause only referred to "direct appropriation," and reasoned that many other circumstances, such as a war, may cause value in property to depreciate.²⁵

Regulations aimed at stopping a public nuisance also did not constitute a taking.²⁶ Again, no title or transfer of possession had taken place; the government would only stop a specific noxious use of the property, not all uses. Elimination of a noxious harm could not then, and cannot now, amount to a taking.²⁷ According to some commentators, only this narrow interpretation, embedded in the early Supreme Court jurisprudence, correctly reflects the original intent of the Takings Clause.²⁸ Nevertheless, the Supreme Court could not continue to resist a movement urging an expansion of takings law.²⁹ Before the end of the nineteenth century, the concept of property was about much more than physical possession and title: the concept encompassed (resale) value together with the owner's expectation at the time of purchase to maintain or increase its value.³⁰

C. *Regulations Can Amount to Takings*: *Pennsylvania Coal Co. v. Mahon*

*Pennsylvania Coal Co. v. Mahon*³¹ abandoned the rule that government regulations, no matter how harsh the results could be for the owner, do not require compensation. Delivering the opinion for the Court, Justice Holmes noted that property owners must expect that a valid exercise of police power may diminish their property value, but that if regulations went "too far," they could amount to a taking.³² While stating that a diminution of property value

²² Rubinfeld, *supra* note 19, at 1088.

²³ See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (noting that, in a case of physical appropriation, the right to use, possess, and exclude are all terminated); see also *Tedrowe*, *supra* note 17, at 590-91 (discussing that property relates to abstract rights an owner has vis-à-vis non-owners).

²⁴ 79 U.S. at 457, 551.

²⁵ *Id.*

²⁶ See, e.g., *Mugler v. Kansas*, 123 U.S. 623 (1887) (upholding a Kansas statute that declared places where liquor was manufactured to be common nuisances); see also WILLIAM A. FISCHER, *REGULATORY TAKINGS* 22 (1995) (discussing that regulations aimed at stopping a dangerous or noxious use do not require compensation).

²⁷ See, e.g., *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (upholding a law that prohibited the operation of a brickyard for interference with residential use of neighboring land); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1022-23 (1992).

²⁸ See, e.g., *Treanor*, *supra* note 17, at 798 (noting that the clause was intended to protect the liberal right of physical property ownership against unfair political process).

²⁹ *Treanor*, *supra* note 17, at 800.

³⁰ *Id.* at 799 (discussing Holmes' and Lewis' critique of the narrow view of property).

³¹ 260 U.S. 393 (1922).

³² *Mahon*, 260 U.S. at 415.

was one of the factors to be considered by a court, Justice Holmes did not give any clear guidelines as to how "far" regulations could go.³³

The Holmes rationale reflected the modern times: no longer was property only about the right to use, exclude, and possess. Like stocks, people bought property for investment purposes and expected its value to increase, or at least remain constant. One strand in the bundle of rights became, maybe, the right to make a profit or to keep the property profitable. At the same time, intellectual property arose; property became a less physical and more abstract concept.³⁴ The concept of property started to change.³⁵

In the jurisprudence following *Pennsylvania Coal*, the Supreme Court did not succeed in setting forth a set of rules to determine when a regulatory taking had occurred, instead evaluating regulations on a case-by-case basis.³⁶ Evident to the Court, however, was that the purpose of the Takings Clause was 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."³⁷ The question remained: *when* exactly does "fairness and justice" demand compensation?

D. The Three Penn Central Factors

In *Penn Central Transportation Co. v. City of New York*,³⁸ the Supreme Court attempted to provide courts with a structure for determining when regulations go "too far," thus amounting to a taking. The Court grouped together three distinct factors it had used in earlier decisions.³⁹

The first factor for courts to consider is the "economic impact of the regulation on the claimant."⁴⁰ This factor evaluates the effect of the regulation on the value of the landowner's land. In a footnote, the Court implied that a regulation denying landowners all economically viable use of their land would constitute a compensable taking.⁴¹

The second factor directs courts to consider the "extent to which the regulation has interfered with distinct investment-backed expectations" of the property owner.⁴² The interpretation of this factor has changed over time.⁴³ In *Penn Central*, the Court implied that the current and originally intended use of the land determined a landowner's investment-backed expectations.⁴⁴ By contrast, *Kirby Forest Industries, Inc. v. United States*⁴⁵ suggested that investment-

³³ *Id.* at 413.

³⁴ See Treanor, *supra* note 17, at 799 (discussing Lewis and Holmes).

³⁵ See Radin, *supra* note 20, at 1670.

³⁶ See, e.g., *United States v. Cent. Eureka Mining Co.*, 357 U.S. 155, 168 (1958); *United States v. Caltex, Inc.*, 344 U.S. 149, 156 (1952).

³⁷ *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

³⁸ 438 U.S. 104 (1978).

³⁹ *Penn Cent. Transp. Co.*, 438 U.S. at 124.

⁴⁰ *Id.*

⁴¹ *Id.* at 138 n.36 (this footnote became the holding in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).

⁴² *Id.* at 124.

⁴³ See TAKING SIDES ON TAKINGS ISSUES § 1.5, at 11 (Thomas E. Roberts ed., 2001) [hereinafter TAKING SIDES].

⁴⁴ *Penn Cent. Transp. Co.*, 438 U.S. at 136-37; TAKING SIDES, *supra* note 43, § 1.5, at 12.

⁴⁵ 467 U.S. 1 (1984).

backed expectations relate to whether a landowner had "notice" of the government regulation, or whether it was "foreseeable" that a regulation was forthcoming.⁴⁶ Recently, in *Palazzolo v. Rhode Island*,⁴⁷ the Court held that landowners who have notice of upcoming government regulations do not necessarily lack investment-backed expectations.⁴⁸ Thus, the precise meaning and scope of this factor is not entirely clear.⁴⁹

The third and final *Penn Central* factor is the "character of the government action."⁵⁰ This factor, too, is not entirely clear.⁵¹ The *Penn Central* Court suggested that courts must differentiate between physical appropriations and regulations affecting the use of land; a taking will be found more "readily" if the government *physically* appropriates land than when it *regulates* land for the good of all.⁵² However, because all "permanent physical occupation[s]" of land by the government are deemed takings,⁵³ the question becomes what significance the "character" factor still has as to regulatory takings.⁵⁴

Despite the relative ambiguity of the last two factors, the *Penn Central* Court emphasized that a diminution in value of property is only one of several factors to consider in the analysis.⁵⁵ Specifically, the Supreme Court rejected an analysis that would divide a property interest into separate segments;⁵⁶ instead, courts should look at the effect of the regulation on the property as a whole, and balance the three factors against each other.⁵⁷

E. The Agins Test

In *Agins v. City of Tiburon*,⁵⁸ the Supreme Court adopted yet another test to determine whether a regulation effected a taking under the Fifth Amendment. The *Agins* Court held that a taking is found if a regulation "does not substantially advance legitimate state interests . . . or [if the regulation] denies an owner economically viable use of his land."⁵⁹ Because the Supreme Court offered these two prongs in the alternative, only one of the two has to be satisfied: a taking can be found if a perfectly valid government regulation nevertheless deprives an owner of economically viable use of the land.⁶⁰

⁴⁶ TAKING SIDES, *supra* note 43, § 2.1, at 25.

⁴⁷ 533 U.S. 606 (2001).

⁴⁸ *Id.* at 627.

⁴⁹ See DANIEL R. MANDELKER, LAND USE LAW § 2.20, at 39 (4th ed. 1997).

⁵⁰ *Penn Cent. Transp. Co.*, 438 U.S. at 124.

⁵¹ TAKING SIDES, *supra* note 43, § 9.3(a), at 231.

⁵² *Penn Cent. Transp. Co.*, 438 U.S. at 124 (emphasis added).

⁵³ See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 419 (1982); *United States v. Pewee Coal Co.*, 341 U.S. 114, 115-17 (1951).

⁵⁴ TAKING SIDES, *supra* note 43, § 9.3(a), at 231.

⁵⁵ *Penn Cent. Transp. Co.*, 438 U.S. at 130-31.

⁵⁶ *Id.* at 130; see also Radin, *supra* note 20, at 1676 (baptizing the division of a property interest into separate segments; this is known as "conceptual severance").

⁵⁷ See generally *Penn Cent. Transp. Co.*, 438 U.S. 104.

⁵⁸ 447 U.S. 255 (1980).

⁵⁹ *Id.* at 260 (emphasis added).

⁶⁰ See TAKING SIDES, *supra* note 43, § 17.2(a), at 403-04.

The first prong of the new *Agins* test adds a flair of substantive Due Process to the Takings jurisprudence.⁶¹ Indeed, the Due Process Clause of the Fourteenth Amendment, too, requires that land regulations advance a legitimate state interest and not be arbitrary.⁶² The second prong seems to combine one or more *Penn Central* factors.⁶³ A deprivation of "economically viable use" could refer to the impact of the regulation on the owner as well as to reasonable "investment backed expectations."⁶⁴ The *Agins* test would play a pivotal role in *Lucas v. South Carolina Coastal Council*.⁶⁵

F. First English: Opening the Door for Temporary Takings

In *First English Evangelical Lutheran Church v. County of Los Angeles*, the Supreme Court was asked whether "temporary" regulatory takings are compensable under the Takings Clause of the Fifth Amendment.⁶⁶ After a severe flood, the County of Los Angeles enacted an interim ordinance forbidding construction in a flood protection area.⁶⁷ The church, which lost its buildings as a result of the flood and wanted to rebuild them, filed suit claiming that the ordinance deprived it of all use of its land.⁶⁸ The church did not claim that the ordinance was invalid, but instead asked for damages.⁶⁹

In adopting the dissenting opinion of Justice Brennan in *San Diego Gas & Electric Co. v. San Diego*,⁷⁰ the Supreme Court held 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."⁷¹ The *First English* Court went on to hold that "where the government's activities have already worked a taking . . . no subsequent action" – such as an amendment to, or an invalidation of the regulation – "can relieve it of the duty to provide compensation for the period during which the taking was effective."⁷² However, the Supreme Court specifically noted that its holding did not apply to "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like."⁷³

In short, *First English* appeared to say: normal delays aside, the government needs to compensate landowners who have lost all use of their property, whether it concerns a temporary or permanent deprivation. Nevertheless, this

⁶¹ For substantive due process and takings jurisprudence, see MANDELKER, *supra* note 49, at 55; see also TAKING SIDES, *supra* note 43, § 17.2(a), at 403.

⁶² See, e.g., *Nectow v. City of Cambridge*, 277 U.S. 183, 187-88 (1928); *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926); see also TAKING SIDES, *supra* note 43, § 17.1(c), at 396-97.

⁶³ See TAKING SIDES, *supra* note 43, § 17.2(a), at 403.

⁶⁴ *Id.*

⁶⁵ 505 U.S. 1003 (1992). See discussion *infra* Part I.G.

⁶⁶ 482 U.S. 304, 313 (1987).

⁶⁷ *Id.* at 307.

⁶⁸ *Id.* at 311.

⁶⁹ *Id.*

⁷⁰ 450 U.S. 621, 657 (1981) (Brennan, J., dissenting).

⁷¹ *First English Evangelical Lutheran Church*, 482 U.S. at 318.

⁷² *Id.* at 321.

⁷³ *Id.*

interpretation of *First English* has been challenged, not only by many commentators, but by the Supreme Court itself.⁷⁴

G. *The Categorical Lucas Rule*

In 1992, the Supreme Court decided a case that led to the adoption of a separate takings rule for cases in which a regulation has completely and permanently deprived landowners of "all economically beneficial" use of their property.⁷⁵ In *Lucas v. South Carolina Coastal Council*, the Beachfront Management Act destroyed Lucas' hope to develop his beachfront property.⁷⁶ Lucas admitted that the purpose of the regulation – preserving the beaches and dunes from erosion – was a noble one, but that from his perspective the property was rendered valueless.⁷⁷ The *Lucas* Court held that when owners have been deprived of *all* economically beneficial use of their property, they suffer a total taking requiring compensation.⁷⁸

Before *Lucas*, this categorical rule was reserved for physical takings: only when the government physically took a piece of land, no matter how small, the Court deemed the owner deprived of all beneficial use of that piece of land.⁷⁹ The *Lucas* Court justified this new categorical rule for regulations by drawing an analogy between regulations depriving property owners of all beneficial use of their property and situations in which government had physically taken that property.⁸⁰ In these rare situations, property owners do not get any benefit in return for giving up the restricted use set forth in the regulation.⁸¹ Or, in "*Pennsylvania Coal*" terms, in these situations there is no "reciprocity of advantage" for the landowner, as the landowner bears all the costs of preserving the coastal line, while not reaping any benefits of his landownership.⁸²

However, the Court made an exception to this new rule. If a regulation merely prohibits a use that has long been recognized as a common nuisance, the owner cannot claim a taking occurred.⁸³ The Court further clarified that anything less than a total taking was to be analyzed under a partial taking analysis, as set forth in *Penn Central*.⁸⁴ In other words, when a regulation has the effect of taking ninety-five percent of beneficial use by the owner, the *Lucas* framework does not apply: the *per se* rule is reserved for unusual cases in which a regulation deprives an owner of all beneficial use of the property.⁸⁵

⁷⁴ See discussion *infra* Part IV.C.

⁷⁵ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

⁷⁶ *Id.* at 1008-09.

⁷⁷ *Id.* at 1022.

⁷⁸ *Id.* at 1019.

⁷⁹ See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 438 (1982) (holding that compensation is due when the government takes part of a rooftop to provide cable TV for the tenants).

⁸⁰ *Lucas*, 505 U.S. at 1017.

⁸¹ *Id.* at 1017-18.

⁸² *Id.* at 1018 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

⁸³ *Id.* at 1029.

⁸⁴ *Id.* at 1019-20 n.8.

⁸⁵ *Id.*

III. *TAHOE-SIERRA PRESERVATION COUNCIL, INC. v. TAHOE REGIONAL PLANNING AGENCY*

In an effort to prevent erosion so as to preserve the exceptional clarity of Lake Tahoe, the legislatures of Nevada and California adopted the Tahoe Regional Planning Compact ("TRPC").⁸⁶ TRPC, in turn, created the Tahoe Regional Planning Agency ("TRPA").⁸⁷ TRPA was given the task of regulating development in the Tahoe Basin and, within eighteen months, adopting standards for air quality, water quality, and soil conservation. Additionally, the agency was to adopt a regional plan that would maintain those standards.⁸⁸

Unable to establish the standards and a regional plan in time, TRPA enacted Ordinance 81-5, which imposed a moratorium on development of new construction in high hazard areas.⁸⁹ By 1983, still unable to put a regional plan in place, the agency adopted Ordinance 83-21, suspending all project approvals until 1984.⁹⁰ As a result, the two ordinances halted construction on sensitive lands for thirty-two months in California, and for eight months in Nevada.⁹¹

When TRPA finally enacted a regional plan in 1984, the State of California sought and obtained an injunction for its implementation, which remained in effect until 1987.⁹² This added three more years to the thirty-two month moratorium that had been imposed earlier. However, these three extra years did not weigh in determining whether a temporary taking had occurred.⁹³ Consequently, hundreds of petitioners hindered by the two moratoria filed suit in federal court claiming they had been temporarily deprived of all economically beneficial use of their property.⁹⁴

In determining whether the two moratoria amounted to a taking, the District Court of Nevada evaluated the case both under the *Penn Central* analysis and the categorical *Lucas* rule.⁹⁵ Discussing the three *Penn Central* factors, the court held that no partial taking had occurred. Specifically, the court held that the moratoria did not interfere with petitioners' investment-backed expectations, because the average holding time between lot purchases and home construction was 25 years.⁹⁶ Since petitioners' right to build had only been delayed for a couple of years, it could not be said that their expectations of constructing their homes earlier had been shattered.⁹⁷ Under the *Lucas* total taking analysis, however, the district court found that owners had been tempo-

⁸⁶ *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 308-09 (2002).

⁸⁷ *Id.* at 309-10.

⁸⁸ *Id.* at 310.

⁸⁹ *Id.* at 311.

⁹⁰ *Id.*

⁹¹ *Id.* at 312.

⁹² *Id.*

⁹³ *Id.* at 313-14 ("Thus, we limit our discussion to the lower courts' disposition of the claims based on the 2-year moratorium . . . and the ensuing 8-month moratorium . . .").

⁹⁴ *Id.* at 312.

⁹⁵ See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 34 F. Supp. 2d 1226, 1240-42 (D. Nev. 1999).

⁹⁶ *Id.* at 1240.

⁹⁷ *Id.* at 1241.

rarily deprived of all economically viable use of their property and were entitled to compensation.⁹⁸

The Court of Appeals for the Ninth Circuit reversed. While the Ninth Circuit recognized that, theoretically, a property interest could be divided into several dimensions, the court refused to consider each dimension as a separate property interest.⁹⁹ Regulations affecting only one (temporal) dimension of an owner's property interest do not deprive the owner of all beneficial use of property.¹⁰⁰ Therefore, the court held that the *First English* analysis did not apply, and that the proper analysis was to look at the effect of the regulation on the parcel as a whole under *Penn Central*.¹⁰¹

The Supreme Court affirmed. Delivering the opinion for the Court, Justice Stevens first discussed the distinction between physical and regulatory takings, noting that, because physical takings are more easily discernable than regulatory takings, the former warrant the application of a categorical rule.¹⁰² The Court emphasized that regulatory takings claims are usually determined on an "ad hoc" basis because there is no "set formula" to determine whether a regulatory taking took place.¹⁰³ Like the Ninth Circuit, the Court refused to divide a fee simple interest into segments and hold that severance of only one segment amounts to a taking.¹⁰⁴

Next, the Supreme Court rejected petitioners' argument that *First English*¹⁰⁵ provided the basis of a categorical rule for their temporary takings claims.¹⁰⁶ *First English* merely held that temporary takings must be compensated, but had not decided the "logically prior question" whether a temporary taking had in fact occurred.¹⁰⁷ Justice Stevens further noted that *First English* specifically distinguished between normal and abnormal delays.¹⁰⁸

Equally rejected was petitioners' claim that the categorical rule of *Lucas* was determinative for the case at bar.¹⁰⁹ The Court emphasized that the *Lucas* analysis is to be reserved for the rare case where landowners are *permanently* deprived of all economically beneficial use of their property; anything less than a total deprivation is to be considered under a *Penn Central* analysis.¹¹⁰ Noting that petitioners had only been *temporarily* barred from constructing on their property, Justice Stevens stated that petitioners erred by failing to challenge the

⁹⁸ *Id.* at 1245.

⁹⁹ *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 774 (9th Cir. 2000) (discussing that a property interest may include a physical dimension, a functional dimension, and a temporal dimension).

¹⁰⁰ *Id.* at 777.

¹⁰¹ *Id.* at 778.

¹⁰² *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321-22 (2002).

¹⁰³ *Id.* at 326.

¹⁰⁴ *Id.* at 331.

¹⁰⁵ 482 U.S. 304 (1987).

¹⁰⁶ *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 328-29.

¹⁰⁷ *Id.* at 328.

¹⁰⁸ *Id.* at 329.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 329-30.

District Court's determination that no partial taking occurred under the *Penn Central* analysis.¹¹¹

The Supreme Court then considered whether notions of "fairness and justice" could support the creation of a new rule.¹¹² Specifically, it considered seven scenarios that theoretically could warrant compensation.¹¹³ The Court considered whether compensation should be due: (1) every time a government regulation temporarily deprives landowners of all beneficial use of their property; (2) every time landowners suffer more than a normal delay; (3) after a certain fixed period of time; (4) every time "a series of rolling moratoria" starts to resemble a permanent taking; (5) in case of 'bad faith' stalling on behalf of the government; (6) in cases where the temporary measure does not advance a legitimate state interest; and finally, (7) in cases where the regulation works a taking in individual cases under the *Penn Central* framework.¹¹⁴

In refusing to adopt a new rule, the Supreme Court recognized that it is difficult, if not arbitrary, to set specific time limits on moratoria because this could frustrate the government's power to make thorough decisions.¹¹⁵ Furthermore, adoption of a separate bad faith theory was not necessary: the *Penn Central* framework could serve "fairness and justice concepts" just as well.¹¹⁶ Persistently proclaiming that anything less than a total taking should be considered under the *Penn Central* analysis,¹¹⁷ the Court was apprehensive to formulate yet another exception that could cause a floodgate of litigation every time there was some kind of delay.¹¹⁸ However, the Supreme Court specifically noted that the question of good faith on behalf of the government was one factor to consider under the established *Penn Central* analysis.¹¹⁹

IV. ANALYSIS

A. *Lucas Redefined*

Before *Tahoe-Sierra*, it was understood that the *per se* rule set forth in *Lucas* could be used for cases in which owners are deprived of *all* beneficial use of their property. Less clear was whether this *per se* rule could be applied to cases in which owners are only *temporarily* deprived of all beneficial use of their property.

The *Tahoe* petitioners argued that *Lucas* stood for temporary takings, and that *Lucas* was decided on the basis of a temporary taking.¹²⁰ Moreover, while

¹¹¹ *Id.* at 321 n.16.

¹¹² *Id.* at 332.

¹¹³ *Id.* at 333.

¹¹⁴ *Id.* at 333-35.

¹¹⁵ *Id.* at 334-35.

¹¹⁶ *Id.* at 335-38.

¹¹⁷ *See, e.g., id.* at 321 n.16, 325, 326, 330, 338 n.34, 342.

¹¹⁸ *Id.* at 331.

¹¹⁹ *See id.* at 338 (listing "good faith of the planners" as a separate factor next to "the reasonable expectations of the landowners" and "the actual impact of the moratorium on property values"); *see also id.* at 338 n.34 (concluding that the length of the delay is one of several factors to consider under *Penn Central*).

¹²⁰ *See id.* at 320-21.

Lucas was prohibited from developing his land for two years,¹²¹ the Tahoe petitioners had already been hindered in their development plans for nearly three years.¹²²

The *Tahoe-Sierra* Court rejected petitioner's argument by noting that *Lucas* was decided as if there were a permanent taking.¹²³ When Lucas filed suit, the Beachfront Management Act was in full effect and appeared to be an unconditional barrier for development.¹²⁴ The fact that the Beachfront Management Act was amended to allow for exceptions pending the litigation did not change that; originally, it looked like Lucas was permanently deprived of all use of his property.¹²⁵

Thus, the *Tahoe-Sierra* Court clarified that *Lucas* limits the application of a *per se* rule to those deprivations meant to be permanent; the fact that the regulation turns out to be temporary due to an amendment or retraction is irrelevant.¹²⁶ Additionally, the Court refused to take into consideration the factual resemblances between *Lucas* and *Tahoe-Sierra* in that both Lucas and the Tahoe petitioners were deprived of all economically viable use of their land for a number of years. The fact that petitioners' land development plans were stalled eight months longer than Lucas did not matter. What mattered was the permanent character of the Beachfront Management Act versus the temporary nature of the Tahoe moratorium.¹²⁷ As Justice Blackmun would have said, the Tahoe petitioners were not deprived of all beneficial use; they were still able to barbeque, "picnic," or "camp in a tent" on their property.¹²⁸

B. *Bad Faith as an Extra Element in the Penn Central Analysis*

The *Tahoe-Sierra* Court refused to adopt a new *per se* rule on the basis of abnormal delays,¹²⁹ recognizing that it is difficult to determine the time at which a delay becomes abnormal.¹³⁰ Indeed, the amount of time the government needs arguably depends on the circumstances and the reasons for which regulations are enacted. In *Tahoe-Sierra*, the Tahoe Regional Planning Agency faced a difficult and important environmental problem that could not be decided in a matter of weeks. Depending on the significance of the matter, governments may need less time.¹³¹

While refusing to adopt a *per se* rule for abnormal delays, the Supreme Court specifically mentioned the possibility of challenging the good faith of the

¹²¹ See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1036 (1992).

¹²² See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 314 (2002).

¹²³ *Id.* at 329-30.

¹²⁴ See *id.*; see also *Lucas*, 505 U.S. at 1012.

¹²⁵ See *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 330.

¹²⁶ See *id.* at 329-30; see also Robert H. Freilich, *Time, Space, and Value in Inverse Condemnation: A Unified Theory for Partial Takings Analysis*, 24 U. HAW. L. REV. 589, 595 (2002).

¹²⁷ See *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 329-31.

¹²⁸ See *Lucas*, 505 U.S. at 1044 (Blackmun, J., dissenting).

¹²⁹ *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 332-34.

¹³⁰ *Id.* at 334-35.

¹³¹ See Freilich, *supra* note 126, at 601 (discussing that the "reasonableness of a moratorium" depends on the "length of its duration" and the need for further studies and analysis).

government under the *Penn Central* analysis.¹³² To be sure, the Court emphasized that moratoria could, under certain circumstances, amount to a taking if the government unnecessarily stalls in its decision-making process, thereby causing unreasonable delays.¹³³ It specifically listed “good faith” next to “reasonable expectations of the landowners” and “actual impact of the moratorium on property values.”¹³⁴ Finally, it concluded that “the *Penn Central* framework adequately directs the inquiry to the proper considerations – only one of which is the length of the delay.”¹³⁵

“Bad faith delay” is not a new concept in Takings jurisprudence. In *First English*, the Supreme Court indicated that extraordinary delays could amount to temporary takings.¹³⁶ In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,¹³⁷ the good faith of the city was challenged under the Takings Clause when the city systematically denied granting building permits, each time imposing harsher demands on the developer.¹³⁸ Lower courts, too, had already tested the good faith of local governments under the Takings Clause.¹³⁹ However, *Tahoe-Sierra* was the first time that the Supreme Court addressed bad faith stalling under the umbrella of the *Penn Central* factors.¹⁴⁰

The *Tahoe-Sierra* Court did not discuss whether the Tahoe Regional Planning Agency had acted in bad faith because the district court had already determined that there was no bad faith stalling on the government’s behalf.¹⁴¹ Moreover, the Tahoe petitioners had not challenged the district court’s determination that petitioners suffered no taking under the *Penn Central* test.¹⁴² However, the Supreme Court hinted that the two moratoria in question were normal delays: it noted that such moratoria “are used widely among land use planners,” thereby implying a justification for the delay.¹⁴³

C. First English Redefined

Before *Tahoe-Sierra*, a number of courts understood *First English* to mean that there is no difference between permanent and temporary takings:

¹³² *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 338 n.34.

¹³³ *Id.* at 333.

¹³⁴ *Id.* at 338.

¹³⁵ *Id.* at 338 n.34.

¹³⁶ *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 320 (1987).

¹³⁷ 526 U.S. 687 (1999).

¹³⁸ *Id.* at 695-697.

¹³⁹ See, e.g., *Dufau v. United States*, 22 Cl. Ct. 156, 163 n.11 (1990) (discussing that landowners bear the burden of proving that the government acted in bad faith); *Smereka v. Haid*, No. 97-CV-70151-DT, 1999 U.S. Dist. LEXIS 13356, at *5, 6 (E.D. Mich. Aug. 1999) (holding that if the government is actively deliberating on a land proposal and there is no bad faith, “the delay is not extraordinary”).

¹⁴⁰ See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 338 (2002); *First Evangelical Lutheran Church*, 482 U.S. at 304.

¹⁴¹ *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 334.

¹⁴² *Id.*

¹⁴³ *Id.* at 337.

both need to be treated alike, and both require compensation.¹⁴⁴ To be sure, the *First English* Court specifically noted that temporary takings “are not different in kind from permanent takings, for which the Constitution clearly requires compensation.”¹⁴⁵

The *Tahoe-Sierra* Court, however, stressed that *First English* only addressed whether compensation was due *if* a temporary taking had occurred; not *whether in fact* a temporary taking had occurred.¹⁴⁶ Thus, while not rejecting the argument that temporary takings require compensation, the Court rejected the argument that *First English* stood for the application of a *per se* rule to a temporary takings claim.¹⁴⁷

The interpretation of *First English* given by the *Tahoe-Sierra* Court is disputed.¹⁴⁸ If the focus of *First English* was solely the compensation issue, why did the Court elaborate on the similarity between permanent and temporary takings?¹⁴⁹ Why did the Court distinguish between normal delays and extraordinary delays?¹⁵⁰ Arguably, the *First English* Court was well aware that it was deciding a case involving a temporary, not a permanent measure.¹⁵¹ As one commentator noted, “the temporary use prohibition was always intended to be of finite duration . . . it would seem inescapable that the Court intended its decision to apply to planning moratoria that were designed to be in effect for only a limited period of time.”¹⁵²

Regardless of how *First English* could be interpreted, the *Tahoe-Sierra* Court closed the door to attack temporary regulations under the categorical *Lucas* rule.¹⁵³ It thus refused to recognize the fact that, from the landowner’s perspective, there is no difference between a permanent taking that becomes temporary as a result of a change or retraction of the law, and a “real” tempo-

¹⁴⁴ See, e.g., *Wyatt v. United States*, 271 F.3d 1090, 1097 n.6 (Fed. Cir. 2001); *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 800 (Fed. Cir. 1993); *Sintra, Inc. v. City of Seattle*, 829 P.2d 765, 774 (Wash. 1992).

¹⁴⁵ *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 318 (1987).

¹⁴⁶ See *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 328.

¹⁴⁷ *Id.* at 329.

¹⁴⁸ Compare TAKING SIDES, *supra* note 43, § 11.1, at 274-77 (defending that *First English* decided more than just the remedy question, and specifically noting that temporary takings are not different from permanent ones), with Carla Boyd, Comment, *Temporal Severance and the Exclusion of Time in Determining the Economic Value of Regulated Property*, 36 U.S.F. L. REV. 793, 820 (2002) (arguing that the holding in *First English* was limited to the remedy issue).

¹⁴⁹ See J. David Breemer, *Temporary Insanity: The Long Tale of Tahoe-Sierra Preservation Council and Its Quiet Ending in the United States Supreme Court*, 71 FORDHAM L. REV. 1, 24, 54 (2002) (stating that the language of *First English* implied there was no difference between permanent and temporary restrictions).

¹⁵⁰ See TAKING SIDES, *supra* note 43, § 11.1, at 275.

¹⁵¹ *Id.* at 274; but see Boyd, *supra* note 148, at 820 (arguing that *First English* concerned a regulation intended to be permanent).

¹⁵² See TAKING SIDES, *supra* note 43, § 11.1, at 274-75.

¹⁵³ *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 342 (2002) (noting that “*per se* rules” should be resisted).

rary taking as a result of an interim measure that is in effect for the same amount of time or longer.¹⁵⁴

D. *Permanent, Semi-Permanent, and Temporary Takings*

When the *Tahoe-Sierra* Court's analysis of *Lucas* and *First English* is combined, three categories of regulations are revealed, each warranting separate taking rules. First, there is the "unconditional and permanent" government regulation that permanently deprives landowners of all beneficial use of their property.¹⁵⁵ In this case, landowners can claim a permanent taking under the categorical *Lucas* rule.¹⁵⁶

Second is the category encompassing "semi-permanent" regulations. Here, a regulation initially deprives owners of all beneficial use of their property, but this regulation is later amended or rescinded. During the time the regulation is in effect, the deprivation is permanent and only becomes temporary when the regulation is no longer in effect.¹⁵⁷ In this case, landowners can claim a "semi-permanent" taking under the *per se Lucas* rule for the time the regulation was in effect and appeared to have a permanent character.¹⁵⁸

Third, there is the "true" temporary regulation, where a more-than-normal delay in the governmental decision-making process temporarily deprives the landowner of all beneficial use of property.¹⁵⁹ Landowners who claim they have suffered a temporary taking must proceed under the *Penn Central* framework.¹⁶⁰

These three categories raise two central questions. The first question is whether the distinction between the second category (semi-permanent regulations) and the third category (temporary regulations) justifies a separate Taking analysis. The second question is whether the *Penn Central* framework adequately protects landowners who claim a temporary taking.

E. *Does the Distinction Between Semi-Permanent and Temporary Regulations Justify a Separate Takings Rule?*

1. *There Is a Difference Between Semi-Permanent and Temporary Regulations*

Those who contend there is a difference between semi-permanent and temporary regulations offer several arguments. The first argument is simply that landowners claiming a temporary taking only suffer a temporary depriva-

¹⁵⁴ Compare *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1010-11 (1992) (discussing the amendment of the Beachfront Management Act), with *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 306-12 (discussing the two moratoria).

¹⁵⁵ *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 329.

¹⁵⁶ See *id.*

¹⁵⁷ *Id.* at 330 (discussing that *Lucas* had been decided on a permanent taking theory despite the fact that the Beachfront Management Act was later amended to allow for exceptions).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 332, 341-42.

¹⁶⁰ *Id.* at 342.

tion.¹⁶¹ When looking at the property as a whole, only a temporal slice of the bundle of rights has been taken.¹⁶² While landowners are deprived of the current use of their land, they still have the prospect of "future use."¹⁶³ Landowners faced with semi-permanent regulations, by contrast, do not have the prospect of ever being able to develop their land.¹⁶⁴ "Any future use" is merely "speculative."¹⁶⁵

The second argument is that, in the case of temporary regulations, landowners retain more value in their land than landowners who face a "semi-permanent" regulation.¹⁶⁶ As the *Tahoe-Sierra* Court stated, "the property will recover value as soon as the prohibition is lifted."¹⁶⁷ In fact, the value of property is likely to increase during the moratorium as this moratorium preserves Lake Tahoe's "pristine state."¹⁶⁸ Regulations meant to permanently ban land development, on the other hand, will severely affect the market value of the land, since few or no buyers would be interested in investing in land that is undevelopable.¹⁶⁹

A third argument is that "government hardly could go on" if it had to compensate landowners every time they have to wait for a building permit or a change in zoning.¹⁷⁰ Moreover, it would be difficult to assess the damages to be awarded for a temporary deprivation.¹⁷¹ Landowners who are permanently deprived of all land use receive the fair market value of their land.¹⁷² Landowners who are only temporarily deprived from using their land may receive the rental value of their land.¹⁷³ If, as the *Tahoe-Sierra* Court noted, the property value recovers or increases after the moratorium is lifted,¹⁷⁴ landowners who claimed they suffered a temporary taking appear to have received a windfall.

In sum, the temporary nature of the regulation, the remaining value of the property during the moratorium, the burden on the government if it had to compensate all extraordinary delays, and the difficulty in assessing damages make temporary and semi-permanent regulations distinguishable.

¹⁶¹ See, e.g., Tedra Fox, *Lake Tahoe's Temporary Development Moratorium: Why a Stitch in Time Should Not Define the Property Interest in a Takings Claim*, 28 *ECOLOGY L.Q.* 399, 418 (2001).

¹⁶² See *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 331.

¹⁶³ See Fox, *supra* note 161, at 418.

¹⁶⁴ *Id.*; see also Boyd, *supra* note 148, at 820-21 (2002) (arguing that, in case of a temporary moratorium, any impact on the value of land is merely temporary).

¹⁶⁵ Fox, *supra* note 161, at 418.

¹⁶⁶ See *id.*

¹⁶⁷ *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 332.

¹⁶⁸ *Id.* at 341.

¹⁶⁹ See Fox, *supra* note 161, at 418.

¹⁷⁰ *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 335 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)).

¹⁷¹ See David Schultz, *The Price Is Right! Property Valuation for Temporary Takings*, 22 *HAMLIN L. REV.* 281, 299-301 (1998) (discussing various methods of valuation, and concluding that damages for temporary takings are especially difficult to calculate).

¹⁷² *Id.* at 300.

¹⁷³ *Id.*

¹⁷⁴ See *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 332.

2. *There Is No Difference Between Temporary and Semi-Permanent Regulations*

A number of arguments have been set forth to defend the notion that there is no difference between temporary and semi-permanent regulations. First, as the dissenters noted in *Tahoe-Sierra*, the temporary nature of the regulation does not console landowners, as “*in the long run, we are all dead.*”¹⁷⁵ In other words, the amount of time a landowner is deprived of all beneficial use of his property does and should matter; not just the temporary nature of the regulation. Although there is a theoretical distinction between the semi-permanent regulation in *Lucas* and the temporary moratorium in *Tahoe-Sierra*, functionally this does not make a difference from the landowner’s perspective.¹⁷⁶ The fact remains that the temporary moratorium in *Tahoe-Sierra* has already lasted longer than the semi-permanent regulation in *Lucas*.¹⁷⁷ Logically, it does not make sense that the Tahoe petitioners do not receive compensation after two years and eight months, while Lucas was compensated for a semi-permanent regulation that lasted only two years.¹⁷⁸

A second argument is that there is no real distinction between permanent and temporary regulations, since no regulations are ever truly permanent: the very nature of regulations is that they can be amended or retracted.¹⁷⁹ This is exactly what happened in *Lucas*. The Beachfront Management Act that permanently banned development was amended two years later to allow for exceptions.¹⁸⁰

Third, as Justice Brennan suggested, the Constitution does not differentiate between permanent and temporary takings.¹⁸¹ The Fifth Amendment requires compensation “[a]s soon as property has been taken, whether through formal condemnation proceedings, occupancy, physical invasion, or regulation.”¹⁸² The only difference between a temporary and a permanent taking should be the amount of compensation that is due.¹⁸³

Fourth, while it is true that “government hardly could go on” if it had to compensate all landowners who claim a temporary taking, there is a danger that government will simply circumvent its obligation to compensate property owners by classifying all prohibitions on development as “temporary” measurements.¹⁸⁴ It is possible that, in some cases, government has already decided to refrain from developing property, but does not like the idea of compensating hundreds of landowners.¹⁸⁵

¹⁷⁵ *Id.* at 356 (Thomas & Scalia, JJ., dissenting).

¹⁷⁶ See *TAKING SIDES*, *supra* note 43, § 11.4, at 289.

¹⁷⁷ See Breemer, *supra* note 149, at 51.

¹⁷⁸ *Id.*

¹⁷⁹ See *TAKING SIDES*, *supra* note 43, § 11.3, at 285 (quoting *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 657 (1981) (Brennan, J., dissenting)).

¹⁸⁰ See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1010-11 (1992).

¹⁸¹ *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 653, 655 (1981) (Brennan, J., dissenting)).

¹⁸² *Id.* at 654.

¹⁸³ See *id.* at 658-59; see also *TAKING SIDES*, *supra* note 43, § 11.3, at 284-85.

¹⁸⁴ See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 347 (Rehnquist, Scalia & Thomas, JJ., dissenting).

¹⁸⁵ See *TAKING SIDES*, *supra* note 43, § 11.4(a), at 290.

Finally, although it is difficult to determine how much to award landowners who claim a temporary taking, it is fair to compensate landowners for the time they are deprived of "all economically beneficial or productive use of their land."¹⁸⁶ To be sure, it is doubtful that the Tahoe petitioners – especially those who intended to build a retirement home – consider camping and barbequing to be a "beneficial and productive use" of their land.¹⁸⁷ If landowners receive the rental value of their property for the time the regulation was in effect,¹⁸⁸ at least they could temporarily vacation or retire elsewhere. At the same time, Lake Tahoe tourists and the public at large would bear the burden of keeping the Lake Tahoe water clear, leading to the "reciprocity of advantage" of the moratorium.¹⁸⁹

F. Does the Penn Central Analysis Protect Landowners Who Claim a Temporary Taking?

1. The Penn Central Analysis Adequately Protects Landowners Who Claim a Temporary Taking.

Arguably, the *Penn Central* framework offers sufficient protection for landowners who claim to have suffered a temporary taking, especially since the *Tahoe-Sierra* Court noted that landowners could challenge bad faith delays under this analysis.¹⁹⁰ While the district court did not find a temporary taking under the *Penn Central* analysis,¹⁹¹ in different circumstances a taking may be found.

In *Tahoe-Sierra*, the first *Penn Central* factor – the economic impact of the regulation on the landowner – was not met: the value of the land did not diminish during the two years that the moratorium was in effect.¹⁹² However, it is likely that the value of land will decrease the longer the delay lasts. Investors will become less motivated to take a risk to invest in land that cannot be developed for a considerable amount of time. Landowners will, of course, have to prove that the change in value to their land was the direct result of the government measure or lack thereof, and not caused by economic factors¹⁹³ that independently affect the market price.

The second *Penn Central* factor examines reasonable investment-backed expectations.¹⁹⁴ In *Tahoe-Sierra*, the district court found it especially relevant that the average holding time between the time landowners bought their property and the time they could develop it was twenty-five years.¹⁹⁵ The district court could not consider the investment-backed expectations of the petitioners

¹⁸⁶ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992).

¹⁸⁷ *Cf. Lucas*, 505 U.S. at 1044 (Blackmun, J., dissenting) ("Petitioner can picnic, swim, camp in a tent, or live on the property in a movable trailer.").

¹⁸⁸ *See Schultz, supra* note 171, at 300.

¹⁸⁹ *Cf. id.* at 341 (contending that the moratorium benefits petitioners).

¹⁹⁰ *Id.* at 338.

¹⁹¹ *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 34 F. Supp. 2d 1226, 1240 (D. Nev. 1999).

¹⁹² *Id.* at 1242-43.

¹⁹³ Such as an overall pessimistic market for land or a sharp increase in interest rates.

¹⁹⁴ *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

¹⁹⁵ *Tahoe-Sierra Pres. Council, Inc.*, 34 F. Supp. 2d at 1240-41.

individually, because no argument was made to counter the average holding time.¹⁹⁶ Landowners who reasonably expected to be able to develop their land sooner should voice this and attack temporary regulations under this factor.¹⁹⁷ Moreover, landowners who had notice of a development ban at the time of purchase are not precluded from advancing a takings argument.¹⁹⁸ However, landowners must be careful not to postpone their plans to develop their property. In *Dodd v. Hood River County*,¹⁹⁹ buyers could not claim a taking because, after buying the land, they waited six years before applying for a building permit.²⁰⁰ The Ninth Circuit held that the landowners therefore did not have reasonable investment-backed expectations.²⁰¹

The *Tahoe-Sierra* Court seems to have given new meaning to the last *Penn Central* factor – the character of the government action. The Court repeatedly stressed that bad faith stalling by the government was one factor to consider under the *Penn Central* analysis.²⁰² “Bad faith” fits within the last *Penn Central* factor: when courts determine whether a government agency unjustifiably stalls in making a decision, courts look at the nature of the government action in determining the legitimacy of the delay.²⁰³

For example, in *Mitchell v. Kemp*,²⁰⁴ the court found an unreasonable delay in taking the Town five years to enact a zoning ordinance.²⁰⁵ The court held that, while interim legislation is proper during the preparation of a comprehensive zoning ordinance, the life of such legislation must not be unlimited.²⁰⁶ Because the Town did not offer any reasons for the delay, the court held that the delay was arbitrary and capricious.²⁰⁷

Consequently, if the temporary regulation has a significant impact on the value of the land,²⁰⁸ if landowners do not wait to apply for building permits when they buy their land, and if the government is unable to justify the delay for the specific regulation or lack thereof, landowners may be able to successfully attack temporary measures under the *Penn Central* framework.

¹⁹⁶ *Id.* at 1241.

¹⁹⁷ See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 334 (2002) (pointing to the failure of petitioners to challenge the district court's findings under the *Penn Central* analysis).

¹⁹⁸ See *Palazzolo v. Rhode Island*, 533 U.S. 606, 628 (2001).

¹⁹⁹ 136 F.3d 1219 (9th Cir. 1998).

²⁰⁰ *Id.* at 1230.

²⁰¹ *Id.*

²⁰² See *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 336, 337, 338 n.34.

²⁰³ See generally Freilich, *supra* note 126, at 601 (discussing that “the reasonableness of a moratorium” depends on the need for “studies, analysis, public participation, and the drafting of the legislation”).

²⁰⁴ 575 N.Y.S.2d 337 (1991).

²⁰⁵ *Id.* at 338.

²⁰⁶ See *id.*

²⁰⁷ *Id.*

²⁰⁸ See *Agins v. Tiburon*, 447 U.S. 255, 263 n.9 (1980) (“Mere fluctuations in value during the process of governmental decisionmaking . . . are incidents of ownership.”).

2. *The Penn Central Analysis Does Not Adequately Protect Landowners Who Claim a Temporary Taking*

Despite the addition of the "bad faith" factor to the *Penn Central* framework,²⁰⁹ there are several arguments that the *Penn Central* test does not adequately protect landowners who claim a temporary taking. First, it has been argued that two, if not all three, *Penn Central* factors are too vague to give courts the necessary guidance as to how to apply them.²¹⁰ Specifically, the "investment-backed expectations" factor has been given several inconsistent meanings over the years.²¹¹ At first, landowners could not have reasonable investment-backed expectations if they had notice of a government regulation that limited or banned development on their property.²¹² Then, in *Palazzolo v. Rhode Island*,²¹³ the Supreme Court held that notice of a moratorium does not foreclose the finding of a temporary taking.²¹⁴ However, even if notice of the regulation is not determinative, the question remains: under what circumstances are investment-backed expectations unreasonable?²¹⁵ Indeed, without more specific guidelines from the Supreme Court, there is a danger that investment-backed expectations are unreasonable whenever the reviewing court thinks they are.²¹⁶

The "character of the government action" factor is equally "opaque and confusing."²¹⁷ The *Penn Central* Court suggested that the character of the government action depends on whether the government physically takes property or regulates the use of property.²¹⁸ However, if all physical appropriations by the government are considered *per se* takings, what meaning does this factor still have after *Loretto v. Teleprompter Manhattan CATV Corp.*?²¹⁹ According to some commentators, the "character" factor refers to whether there is a justification for the regulation, or whether the regulation benefits the public.²²⁰ However, the legitimacy of a regulation does not preclude a taking.²²¹ a regula-

²⁰⁹ See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 320-21 (2002).

²¹⁰ See, e.g., MANDELKER, *supra* note 49, § 220, at 39 (1997) (noting that the Supreme Court has not given lower courts guidance as to how to apply the "reasonable investment-backed expectations" factor); TAKING SIDES, *supra* note 43, § 9.2, at 226-30 (relating the lack of clarity on how to interpret the *Penn Central* test); see also Note, *Leading Cases: I. Constitutional Law: H. Takings Clause*, 116 HARV. L. REV. 321, 329 (2002) [hereinafter *Leading Cases*] (noting the vagueness of the *Penn Central* factors).

²¹¹ Compare *Ruckelshaus v. Montesanto Co.*, 467 U.S. 986, 1006 (1984) (holding that notice of the regulation precludes reasonable investment-backed expectations), with *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001) (holding that notice of the regulation does not preclude a takings claim).

²¹² See, e.g., *Ruckelshaus*, 467 U.S. at 1006; *Leonard v. Town of Brimfield*, 423 Mass. 152, 155 (1996).

²¹³ 533 U.S. 606 (2001).

²¹⁴ *Palazzolo*, 533 U.S. at 628.

²¹⁵ See *Leading Cases*, *supra* note 210, at 329.

²¹⁶ *Id.*

²¹⁷ TAKING SIDES, *supra* note 43, § 9.3 (a), at 231.

²¹⁸ *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

²¹⁹ 458 U.S. 419 (1982); See TAKING SIDES, *supra* note 43, § 9.3 (a), at 231.

²²⁰ See, e.g., Jan G. Laitos, *The Takings Clause in America's Industrial States after Lucas*, 24 TOL. L. REV. 281, 296 (1993).

²²¹ See TAKING SIDES, *supra* note 43, § 11.4 (c), at 294-95.

tion deemed beneficial to the public may nevertheless necessitate compensation under the Takings Clause.²²²

Moreover, attacking temporary regulations on the basis of “bad faith stalling” is difficult, because it is typically the landowner who has the burden to prove that the government acted in bad faith.²²³ Because “courts give extreme deference” to temporary regulations,²²⁴ it is very difficult to overcome the presumption that the government acted in good faith.²²⁵

If two of the three *Penn Central* factors are unworkable, the risk is that too much emphasis will be put on the last factor – the impact of the regulation on the landowner. Not only will it be difficult to prove that a regulation has a significant impact on the value of property during a moratorium,²²⁶ the impact of a temporary regulation on value is not necessarily the primary concern of landowners. Unless landowners buy land solely for investment purposes, it is what they temporarily cannot do with their land that matters to most landowners. As Justice Brennan noted, from the perspective of a landowner, a taking is not determined “by what a state says, or by what it intends, but by what it does.”²²⁷ This was especially true for a number of Tahoe petitioners. The moratorium hindered them from building a retirement or vacation home on their Lake Tahoe land.²²⁸

Thus, unless the Supreme Court gives lower courts more specific direction on interpreting the three *Penn Central* factors and how much weight each factor is to be accorded, the *Penn Central* test fails to be an adequate test, and especially fails to meet the needs of the landowners.

G. No Clear Answers – Just Important Questions

All arguments considered, and as frustrating as this may be, there are no clear answers to the difficult question of what to do with temporary takings. As this discussion has demonstrated, there are valid arguments on both sides.²²⁹

On one hand, there may be too much emphasis on the legal distinction between temporary, semi-permanent, and permanent regulations. Maybe courts

²²² See *Ruckelshaus v. Montesanto Co.*, 467 U.S. 986, 1004-05 (1984); *Agins v. Tiburon*, 447 U.S. 255, 260 (1980) (holding that a regulation can effect a taking despite its legitimate purpose).

²²³ See *Dufau v. United States*, 22 Cl. Ct. 156, 164 (1990) (stating that government acts are awarded a presumption of good faith); MANDELKER, *supra* note 49, § 2.37, at 53; see also *Williams v. City of Central*, 907 P.2d 701, 704-05 (Colo. Ct. App. 1995) (stressing that, without a showing of bad faith, a temporary moratorium that is in effect for a period of time is not unreasonable as a matter of law).

²²⁴ See MANDELKER, *supra* note 49, § 2.37, at 53.

²²⁵ See, e.g., *Dufau*, 22 Cl. Ct. at 164 (finding no support for the assertion that the Army Corps of Engineers had acted in bad faith); *Smereka v. Haid*, No. 97-CV-70151-DT, 1999 U.S. Dist. LEXIS 13356, at *10 (E.D. Mich. Aug. 1999) (finding that appellant failed to make a showing that the delay was unreasonable).

²²⁶ See *Agins v. Tiburon*, 447 U.S. 255, 263 n.9 (1980) (“Mere fluctuations in value during the process of governmental decision making . . . are incidents of ownership.”).

²²⁷ *San Diego Gas & Elect. Co. v. San Diego*, 450 U.S. 621, 652-53 (1981) (Brennan, J., dissenting).

²²⁸ See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 312-13 (2002).

²²⁹ See discussion *supra* Parts IV.E-F.

are failing to look at the effect of the regulation from the landowners' perspective.²³⁰ Instinctively, it seems arbitrary to distinguish between regulations that temporarily deprive landowners of all use of their property, and "permanent" regulations that are subsequently amended or rescinded. To be sure, the distinction does not have any significance to landowners: in both cases, landowners temporarily miss the ability to make productive use of their land.²³¹

On the other hand, it seems unthinkable to require that the government – the tax payers – compensate landowners every time there is a more-than-normal delay that temporarily deprives landowners of all use of their property.²³² Where draw the line? At one year? Sixteen months? Moreover, how much compensation is due? How do we avoid windfalls or unfair losses?²³³

Although the Supreme Court held that compensation is due if landowners are forced "to bear public burdens which in all fairness and justice should be borne by the public as a whole,"²³⁴ the factors given by the *Penn Central* Court fail to give lower courts guidance.²³⁵ Maybe, in "all fairness and justice," the Supreme Court ought to reconsider its Takings jurisprudence, develop factors that recognize the needs of both the government and the landowners, and make an effort to truly define each determinative factor so that lower courts have guidance in considering temporary takings claims.

V. CONCLUSION

The *Tahoe-Sierra* Court faced the difficult question of whether a moratorium, temporarily depriving landowners of all use of their property, effected a taking under the categorical *Lucas* rule. The Court held that it did not, and clarified that the *Lucas* analysis is to be reserved for the rare cases where regulations are intended to *permanently* deprive owners of all economically viable use of their property.²³⁶ In all other cases, the *Penn Central* analysis applies.²³⁷ However, the Court specifically noted that bad faith stalling by the government had a place in this analysis.²³⁸ The Court's holding therefore does not foreclose the possibility that temporary regulations may amount to takings.²³⁹

The question is whether the difference between temporary regulations and "permanent" regulations that are later altered or rescinded warrants a different takings analysis. Moreover, assuming the distinction is valid, the question remains whether the *Penn Central* test effectively protects landowners who wish to claim a temporary taking.

²³⁰ See *TAKING SIDES*, *supra* note 43, § 11.4, at 289.

²³¹ See discussion *supra* Part IV.E.2.

²³² See *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 335.

²³³ See discussion *supra* Part IV.E.1.

²³⁴ *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

²³⁵ *TAKING SIDES*, *supra* note 43, § 9.2, at 226-30.

²³⁶ See discussion *supra* Part IV.A.

²³⁷ See *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 337-38.

²³⁸ See discussion *supra* Part IV.B.

²³⁹ *Id.*

While there are valid arguments on both sides,²⁴⁰ the fact remains that if the Supreme Court wants courts to use the *Penn Central* factors, it needs to clarify and define all factors so as to give courts guidance on how to approach temporary takings claims. Specifically, in defining all of the important factors, the Court ought to recognize the needs of both the government and the land-owners, so that the burden will truly be borne by those who, in all fairness and justice, deserve to bear it.

²⁴⁰ See discussion *supra* Parts IV.E-F.