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

122 S.Ct. 1465 (2002)

JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether a moratorium on development imposed during the process of devising a comprehensive land-use plan constitutes a per se taking of property requiring compensation under the Takings Clause of the United States Constitution. This case actually involves two moratoria ordered by respondent Tahoe Regional Planning Agency (TRPA) to maintain the status quo while studying the impact of development on Lake Tahoe and designing a strategy for environmentally sound growth. The first, Ordinance 81-5, was effective from August 24, 1981, until August 26, 1983, whereas the second more restrictive Resolution 83-21 was in effect from August 27, 1983, until April 25, 1984. As a result of these two directives, virtually all development on a substantial portion of the property subject to TRPA's jurisdiction was prohibited for a period of 32 months. Although the question we decide relates only to that 32-month period, a brief description of the events leading up to the moratoria and a comment on the two permanent plans that TRPA adopted thereafter will clarify the narrow scope of our holding.

I

The relevant facts are undisputed. The Court of Appeals, while reversing the District Court on a question of law, accepted all of its findings of fact, and no party challenges those findings. All agree that Lake Tahoe is "uniquely beautiful," 34 F.Supp.2d 1226, 1230 (D.Nev.1999), that President Clinton was right to call it a " 'national treasure that must be protected and preserved,' " ibid., and that Mark Twain aptly described the clarity of its waters as " 'not merely transparent, but dazzlingly, brilliantly so,' " ibid.(emphasis added) (quoting M. Twain, Roughing It 174-175 (1872))...

Unfortunately, the lake's pristine state has deteriorated rapidly over the past 40 years; increased land development in the Lake Tahoe Basin (Basin) has threatened the " 'noble sheet of blue water' " beloved by Twain and countless others. 34 F.Supp.2d, at 1230. As the District Court found, "[d]ramatic decreases in clarity first began to be noted in the 1950's/early 1960's, shortly after development at the lake began in earnest." Id., at 1231. The lake's unsurpassed beauty, it seems, is the wellspring of its undoing.

The upsurge of development in the area has caused "increased nutrient loading of the lake largely because of the increase in impervious coverage of land in the Basin resulting from that development." Ibid. ... Given this trend, the District Court predicted that "unless the process is stopped, the lake will lose its clarity and its trademark blue color, becoming green and opaque for eternity." 34 F. Supp.2d at 1231.

Those areas in the Basin that have steeper slopes produce more runoff; therefore, they are usually considered "high hazard" lands. Moreover, certain areas near streams or wetlands known as "Stream Environment Zones" (SEZs) are especially vulnerable to the impact of development because, in their natural state, they act as filters for much of the debris that runoff carries. Because "[t]he most obvious response to this problem ... is to restrict development around the lake--especially in SEZ lands, as well as in areas already naturally prone to runoff," id., at 1232, conservation efforts have focused on controlling growth in these high hazard areas....

[The Court went on to explain that to address problems associated with burgeoning development in the Lake Tahoe area, a unique compact was entered into between the states of California and Nevada in 1968, and it was later approved by Congress in 1969. The Court further noted that by 1972, California was so dissatisfied with the work of the Tahoe Regional Planning Agency that it withdrew its support and involvement. Eventually, California and Nevada, along with the federal government, adopted extensive amendments to the compact in 1980.]

Among other things, the 1980 Tahoe Regional Planning Compact provided that TRPA "shall adopt" those standards within 18 months, and that "[w]ithin 1 year after" their adoption (i.e., by June 19, 1983), it "shall" adopt an amended regional plan that achieves and maintains those carrying capacities. The Compact also contained a finding by the Legislatures of California and Nevada "that in order to make effective the regional plan as revised by [TRPA], it is necessary to halt temporarily works of development in the region which might otherwise absorb the entire capability of the region for further development or direct it out of harmony with the ultimate plan." Accordingly, for the period prior to the adoption of the final plan ("or until May 1, 1983, whichever is earlier"), the Compact itself prohibited the development of new subdivisions, condominiums, and apartment buildings, and also prohibited each city and county in the Basin from granting any more permits in 1981, 1982, or 1983 than had been granted in 1978.

During this period TRPA was also working on the development of a regional water quality plan to comply with the Clean Water Act, 33 U.S.C. § 1288 (1994 ed.). Despite the fact that TRPA performed these obligations in "good faith and to the best of its ability," 34 F.Supp.2d, at 1233, after a few months it concluded that it could not meet the deadlines in the Compact. On June 25, 1981, it therefore enacted Ordinance 81-5 imposing the first of the two moratoria on development that petitioners challenge in this proceeding. The ordinance provided that it would become effective on August 24, 1981, and remain in effect pending the adoption of the permanent plan required by the Compact. It is undisputed, however, that Ordinance 81-5 prohibited the construction of any new residences on SEZ lands in either State and on class 1, 2, and 3 lands in California ...

[The Court further explained that the TRPA was unable to adopt a new regional plan by the August 26, 1983 deadline, and] they therefore adopted Resolution 83- 21, "which completely suspended all project reviews and approvals, including the acceptance of new

proposals," and which remained in effect until a new regional plan was adopted on April 26, 1984. Thus, Resolution 83-21 imposed an 8-month moratorium prohibiting all construction on high hazard lands in either State. In combination, Ordinance 81-5 and Resolution 83-21 effectively prohibited all construction on sensitive lands in California and on all SEZ lands in the entire Basin for 32 months, and on sensitive lands in Nevada (other than SEZ lands) for eight months. It is these two moratoria that are at issue in this case.

On the same day that the 1984 plan was adopted, the State of California filed an action seeking to enjoin its implementation on the ground that it failed to establish land-use controls sufficiently stringent to protect the Basin. The District Court entered an injunction that was upheld by the Court of Appeals and remained in effect until a completely revised plan was adopted in 1987. Both the 1984 injunction and the 1987 plan contained provisions that prohibited new construction on sensitive lands in the Basin. As the case comes to us, however, we have no occasion to consider the validity of those provisions.

II

Approximately two months after the adoption of the 1984 Plan, petitioners filed parallel actions against TRPA and other defendants in federal courts in Nevada and California that were ultimately consolidated for trial in the District of Nevada. The petitioners include the Tahoe Sierra Preservation Council, a nonprofit membership corporation representing about 2,000 owners of both improved and unimproved parcels of real estate in the Lake Tahoe Basin, and a class of some 400 individual owners of vacant lots located either on SEZ lands or in other parts of districts 1, 2, or 3. Those individuals purchased their properties prior to the effective date of the 1980 Compact, primarily for the purpose of constructing "at a time of their choosing" a single-family home "to serve as a permanent, retirement or vacation residence." When they made those purchases, they did so with the understanding that such construction was authorized provided that "they complied with all reasonable requirements for building." ...

[W]e limit our discussion to the lower courts' disposition of the claims based on the 2-year moratorium (Ordinance 81-5) and the ensuing 8- month moratorium (Resolution 83-21)...

[The Court then reviewed the findings of The District Court].... Emphasizing the temporary nature of the regulations, the testimony that the "average holding time of a lot in the Tahoe area between lot purchase and home construction is twenty-five years," and the failure of petitioners to offer specific evidence of harm, the District Court concluded that "consideration of the Penn Central factors clearly leads to the conclusion that there was no taking." [The District Court found that]...in the absence of evidence regarding any of the individual plaintiffs, the court evaluated the "average" purchasers' intent and found that such purchasers "did not have reasonable, investment- backed expectations that they would be able to build single-family homes on their land within the six-year period involved in this lawsuit." The District Court had more difficulty with the "total taking"

issue. Although it was satisfied that petitioners' property did retain some value during the moratoria, it found that they had been temporarily deprived of "all economically viable use of their land." The court concluded that those actions therefore constituted "categorical" takings under our decision in Lucas v. South Carolina Coastal Council. It rejected TRPA's response that Ordinance 81-5 and Resolution 83-21 were "reasonable temporary planning moratoria" that should be excluded from Lucas' categorical approach. The district court concluded that TRPA's actions were a taking partly because neither the ordinance nor the resolution, even though intended to be temporary from the beginning, contained an express termination date. ...

Both parties appealed. TRPA successfully challenged the District Court's takings determination, and petitioners unsuccessfully challenged the dismissal of their claims based on the 1984 and 1987 plans. Petitioners did not, however, challenge the District Court's findings or conclusions concerning its application of Penn Central. With respect to the two moratoria, the Ninth Circuit noted that petitioners had expressly disavowed an argument "that the regulations constitute a taking under the ad hoc balancing approach described in Penn Central" and that they did not "dispute that the restrictions imposed on their properties are appropriate means of securing the purpose set forth in the Compact." Accordingly, the only question before the court was "whether the rule set forth in Lucas applies--that is, whether a categorical taking occurred because Ordinance 81-5 and Resolution 83- 21 denied the plaintiffs' 'all economically beneficial or productive use of land.' " Moreover, because petitioners brought only a facial challenge, the narrow inquiry before the Court of Appeals was whether the mere enactment of the regulations constituted a taking....

Contrary to the District Court, the Court of Appeals held that because the regulations had only a temporary impact on petitioners' fee interest in the properties, no categorical taking had occurred. [It reasoned that property interests may have many different dimensions including physical (the size and shape of the property in question), functional (the extent to which an owner may use or dispose of the property in question), and temporal (the duration of the property interest). The Court of Appeals concluded that a regulation that affects only a portion of the parcel--whether limited by time, use, or space--does not deprive the owner of all economically beneficial use of the property. Noting that Lucas applies to the " 'relatively rare' " case in which a regulation denies all productive use of an entire parcel, whereas the moratoria involve only a "temporal 'slice' " of the fee interest and a form of regulation that is widespread and well established, the Court of Appeals also rejected petitioners' argument that First English was controlling. According to the Court of Appeals, First English concerned the question whether compensation is an appropriate remedy for a temporary taking and not whether or when such a taking has occurred. Faced squarely with the question whether a taking had occurred, the court held that Penn Central was the appropriate framework for analysis. Petitioners, however, had failed to challenge the District Court's conclusion that they could not make out a taking claim under the Penn Central factors.]

Over the dissent of five judges, the Ninth Circuit denied a petition for rehearing en banc. .. Because of the importance of the case, we granted certiorari limited to the question stated at the beginning of this opinion. We now affirm.

III

Petitioners make only a facial attack on Ordinance 81-5 and Resolution 83-21. They contend that the mere enactment of a temporary regulation that, while in effect, denies a property owner all viable economic use of her property gives rise to an unqualified constitutional obligation to compensate her for the value of its use during that period. Hence, they "face an uphill battle," Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 495 (1987), that is made especially steep by their desire for a categorical rule requiring compensation whenever the government imposes such a moratorium on development. Under their proposed rule, there is no need to evaluate the landowners' investment-backed expectations, the actual impact of the regulation on any individual, the importance of the public interest served by the regulation, or the reasons for imposing the temporary restriction. For petitioners, it is enough that a regulation imposes a temporary deprivation--no matter how brief--of all economically viable use to trigger a per se rule that a taking has occurred. Petitioners assert that our opinions in First English and Lucas have already endorsed their view, and that it is a logical application of the principle that the Takings Clause was "designed to bar Government from forcing some people alone to bear 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, 80 S.Ct. 1563 (1960).

We shall first explain why our cases do not support their proposed categorical rule--indeed, fairly read, they implicitly reject it. Next, we shall explain why the Armstrong principle requires rejection of that rule as well as the less extreme position advanced by petitioners at oral argument. In our view the answer to the abstract question whether a temporary moratorium effects a taking is neither "yes, always" nor "no, never"; the answer depends upon the particular circumstances of the case. Resisting "[t]he temptation to adopt what amount to per se rules in either direction," Palazzolo v. Rhode Island, 533 U.S. 606, 636 (2001) (O'CONNOR, J., concurring), we conclude that the circumstances in this case are best analyzed within the Penn Central framework.

IV

The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. But the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property. Our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves the straightforward application of per se rules. Our regulatory takings jurisprudence, in contrast, is of more recent vintage and is characterized by "essentially ad hoc, factual inquiries," Penn Central, designed to allow

"careful examination and weighing of all the relevant circumstances." Palazzolo (O'CONNOR, J., concurring).

When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof. Thus, compensation is mandated when a leasehold is taken and the government occupies the property for its own purposes, even though that use is temporary. Similarly, when the government appropriates part of a rooftop in order to provide cable TV access for apartment tenants, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); or when its planes use private airspace to approach a government airport, United States v. Causby, 328 U.S. 256 (1946), it is required to pay for that share no matter how small. But a government regulation that merely prohibits landlords from evicting tenants unwilling to pay a higher rent, Block v. Hirsh, 256 U.S. 135 (1921); that bans certain private uses of a portion of an owner's property, Village of Euclid v. Ambler Realty Co.; Keystone Bituminous Coal Assn. v. DeBenedictis,; or that forbids the private use of certain airspace, Penn Central, does not constitute a categorical taking. "The first category of cases requires courts to apply a clear rule; the second necessarily entails complex factual assessments of the purposes and economic effects of government actions." Yee v. Escondido, 503 U.S. 519, 523 (1992).

This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a "regulatory taking," (footnote omitted) and vice versa. For the same reason that we do not ask whether a physical appropriation advances a substantial government interest or whether it deprives the owner of all economically valuable use, we do not apply our precedent from the physical takings context to regulatory takings claims. Land-use regulations are ubiquitous and most of them impact property values in some tangential way-- often in completely unanticipated ways. Treating them all as per se takings would transform government regulation into a luxury few governments could afford. By contrast, physical appropriations are relatively rare, easily identified, and usually represent a greater affront to individual property rights. (footnote omitted) "This case does not present the 'classi[c] taking' in which the government directly appropriates private property for its own use," Eastern Enterprises v. Apfel, 524 U.S. 498, 522 (1998); instead the interference with property rights "arises from some public program adjusting the benefits and burdens of economic life to promote the common good," Penn Central.

As we noted in Lucas, it was Justice Holmes' opinion in Pennsylvania Coal Co. v. Mahon that gave birth to our regulatory takings jurisprudence. In subsequent opinions we have repeatedly and consistently endorsed Holmes' observation that "if regulation goes too far it will be recognized as a taking." Justice Holmes did not provide a standard for determining when a regulation goes "too far," but he did reject the view expressed in Justice Brandeis' dissent that there could not be a taking because the property remained in the possession of the owner and had not been appropriated or used by the public. After

Mahon, neither a physical appropriation nor a public use has ever been a necessary component of a "regulatory taking."

In the decades following that decision, we have "generally eschewed" any set formula for determining how far is too far, choosing instead to engage in " 'essentially ad hoc, factual inquiries.' " Lucas (quoting Penn Central). Indeed, we still resist the temptation to adopt per se rules in our cases involving partial regulatory takings, preferring to examine "a number of factors" rather than a simple "mathematically precise" formula. Justice Brennan's opinion for the Court in Penn Central did, however, make it clear that even though multiple factors are relevant in the analysis of regulatory takings claims, in such cases we must focus on "the parcel as a whole" [The Court quoted language from Penn Central stating that "'Taking' jurisprudence does not divide a single parcel into discrete segments.]

This requirement that "the aggregate must be viewed in its entirety" explains why, for example, a regulation that prohibited commercial transactions in eagle feathers, but did not bar other uses or impose any physical invasion or restraint upon them, was not a taking. Andrus v. Allard, 444 U.S. 51, 66 (1979). It also clarifies why restrictions on the use of only limited portions of the parcel, such as set-back ordinances, Gorieb v. Fox,274 U.S. 603 (1927), or a requirement that coal pillars be left in place to prevent mine subsidence, Keystone, were not considered regulatory takings. In each of these cases, we affirmed that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking." Andrus at 65-66.

While the foregoing cases considered whether particular regulations had "gone too far" and were therefore invalid, none of them addressed the separate remedial question of how compensation is measured once a regulatory taking is established. In his dissenting opinion in San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621, 636 (1981), Justice Brennan identified that question and explained how he would answer it:

"The constitutional rule I propose requires that, once a court finds that a police power regulation has effected a 'taking,' the government entity must pay just compensation for the period commencing on the date the regulation first effected the 'taking,' and ending on the date the government entity chooses to rescind or otherwise amend the regulation."

Justice Brennan's proposed rule was subsequently endorsed by the Court in First English. First English was certainly a significant decision, and nothing that we say today qualifies its holding. Nonetheless, it is important to recognize that we did not address in that case the quite different and logically prior question whether the temporary regulation at issue had in fact constituted a taking.

In First English, the Court unambiguously and repeatedly characterized the issue to be decided as a "compensation question" or a "remedial question." ("The disposition of the case on these grounds isolates the remedial question for our consideration"). And the Court's statement of its holding was equally unambiguous: "We merely hold that where the government's activities have already worked a taking of all use of property, no

subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." In fact, First English expressly disavowed any ruling on the merits of the takings issue because the California courts had decided the remedial question on the assumption that a taking had been alleged. ("We reject appellee's suggestion that ... we must independently evaluate the adequacy of the complaint and resolve the takings claim on the merits before we can reach the remedial question"). After our remand, the California courts concluded that there had not been a taking, First English Evangelical Church of Glendale v. County of Los Angeles, 258 Cal.Rptr. 893 (1989), and we declined review of that decision, 493 U.S. 1056 (1990).

To the extent that the Court in First English referenced the antecedent takings question, we identified two reasons why a regulation temporarily denying an owner all use of her property might not constitute a taking. First, we recognized that "the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the State's authority to enact safety regulations." Second, we limited our holding "to the facts presented" and recognized "the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which [were] not before us." Thus, our decision in First English surely did not approve, and implicitly rejected, the categorical submission that petitioners are now advocating.

Similarly, our decision in Lucas is not dispositive of the question presented. Although Lucas endorsed and applied a categorical rule, it was not the one that petitioners propose. Lucas purchased two residential lots in 1988 for $975,000. These lots were rendered "valueless" by a statute enacted two years later. The trial court found that a taking had occurred and ordered compensation of $1,232,387.50, representing the value of the fee simple estate, plus interest. As the statute read at the time of the trial, it effected a taking that "was unconditional and permanent." While the State's appeal was pending, the statute was amended to authorize exceptions that might have allowed Lucas to obtain a building permit. Despite the fact that the amendment gave the State Supreme Court the opportunity to dispose of the appeal on ripeness grounds, it resolved the merits of the permanent takings claim and reversed. Since "Lucas had no reason to proceed on a 'temporary taking' theory at trial," we decided the case on the permanent taking theory that both the trial court and the State Supreme Court had addressed.

The categorical rule that we applied in Lucas states that compensation is required when a regulation deprives an owner of "all economically beneficial uses" of his land. Under that rule, a statute that "wholly eliminated the value" of Lucas' fee simple title clearly qualified as a taking. But our holding was limited to "the extraordinary circumstance when no productive or economically beneficial use of land is permitted." The emphasis on the word "no" in the text of the opinion was, in effect, reiterated in a footnote explaining that the categorical rule would not apply if the diminution in value were 95% instead of 100%. Anything less than a "complete elimination of value," or a "total loss," the Court acknowledged, would require the kind of analysis applied in Penn Central.

Certainly, our holding that the permanent "obliteration of the value" of a fee simple estate constitutes a categorical taking does not answer the question whether a regulation prohibiting any economic use of land for a 32- month period has the same legal effect. Petitioners seek to bring this case under the rule announced in Lucas by arguing that we can effectively sever a 32-month segment from the remainder of each landowner's fee simple estate, and then ask whether that segment has been taken in its entirety by the moratoria. Of course, defining the property interest taken in terms of the very regulation being challenged is circular. With property so divided, every delay would become a total ban; the moratorium and the normal permit process alike would constitute categorical takings. Petitioners' "conceptual severance" argument is unavailing because it ignores Penn Central's admonition that in regulatory takings cases we must focus on "the parcel as a whole." We have consistently rejected such an approach to the "denominator" question. See Keystone, also Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal., 508 U.S. 602 (1993) ("To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question"). Thus, the District Court erred when it disaggregated petitioners' property into temporal segments corresponding to the regulations at issue and then analyzed whether petitioners were deprived of all economically viable use during each period. The starting point for the court's analysis should have been to ask whether there was a total taking of the entire parcel; if not, then Penn Central was the proper framework.

An interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner's interest. See Restatement of Property §§ 7-9 (1936). Both dimensions must be considered if the interest is to be viewed in its entirety. Hence, a permanent deprivation of the owner's use of the entire area is a taking of "the parcel as a whole," whereas a temporary restriction that merely causes a diminution in value is not. Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted. Cf. Agins, 447 U.S. , at 263, n. 9 ("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' ").

Neither Lucas, nor First English, nor any of our other regulatory takings cases compels us to accept petitioners' categorical submission. In fact, these cases make clear that the categorical rule in Lucas was carved out for the "extraordinary case" in which a regulation permanently deprives property of all value; the default rule remains that, in the regulatory taking context, we require a more fact specific inquiry. Nevertheless, we will consider whether the interest in protecting individual property owners from bearing public burdens "which, in all fairness and justice, should be borne by the public as a whole," Armstrong v. United States, justifies creating a new rule for these circumstances.

V

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

As the case comes to us, however, none of the last four theories is available. The "rolling moratoria" theory was presented in the petition for certiorari, but our order granting review did not encompass that issue, the case was tried in the District Court and reviewed in the Court of Appeals on the theory that each of the two moratoria was a separate taking, one for a 2-year period and the other for an 8-month period. And, as we have already noted, recovery on either a bad faith theory or a theory that the state interests were insubstantial is foreclosed by the District Court's unchallenged findings of fact. Recovery under a Penn Central analysis is also foreclosed both because petitioners expressly disavowed that theory, and because they did not appeal from the District Court's conclusion that the evidence would not support it. Nonetheless, each of the three per se theories is fairly encompassed within the question that we decided to answer.

With respect to these theories, the ultimate constitutional question is whether the concepts of "fairness and justice" that underlie the Takings Clause will be better served by one of these categorical rules or by a Penn Central inquiry into all of the relevant circumstances in particular cases. From that perspective, the extreme categorical rule that any deprivation of all economic use, no matter how brief, constitutes a compensable taking surely cannot be sustained. Petitioners' broad submission would apply to numerous "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like," as well as to orders temporarily prohibiting access to crime scenes, businesses that violate health codes, fire-damaged buildings, or other areas that we cannot

now foresee. Such a rule would undoubtedly require changes in numerous practices that have long been considered permissible exercises of the police power. As Justice Holmes warned in Mahon,"[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." A rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decision-making. Such an important change in the law should be the product of legislative rulemaking rather than adjudication.

More importantly, for reasons set out at some length by Justice O'CONNOR in her concurring opinion in Palazzolo v. Rhode Island, 533 U.S., at 636, we are persuaded that the better approach to claims that a regulation has effected a temporary taking "requires careful examination and weighing of all the relevant circumstances." In that opinion, Justice O'CONNOR specifically considered the role that the "temporal relationship between regulatory enactment and title acquisition" should play in the analysis of a takings claim. We have no occasion to address that particular issue in this case, because it involves a different temporal relationship--the distinction between a temporary restriction and one that is permanent. Her comments on the "fairness and justice" inquiry are, nevertheless, instructive: [The Court quoted from Justice O'Connor's opinion on Palazzolo....]

In rejecting petitioners' per se rule, we do not hold that the temporary nature of a land-use restriction precludes finding that it effects a taking; we simply recognize that it should not be given exclusive significance one way or the other.

A narrower rule that excluded the normal delays associated with processing permits, or that covered only delays of more than a year, would certainly have a less severe impact on prevailing practices, but it would still impose serious financial constraints on the planning process. Unlike the "extraordinary circumstance" in which the government deprives a property owner of all economic use, moratoria like Ordinance 81-5 and Resolution 83-21 are used widely among land-use planners to preserve the status quo while formulating a more permanent development strategy. (footnote omitted) In fact, the consensus in the planning community appears to be that moratoria, or "interim development controls" as they are often called, are an essential tool of successful development. Yet even the weak version of petitioners' categorical rule would treat these interim measures as takings regardless of the good faith of the planners, the reasonable expectations of the landowners, or the actual impact of the moratorium on property values.

The interest in facilitating informed decision-making by regulatory agencies counsels against adopting a per se rule that would impose such severe costs on their deliberations. Otherwise, the financial constraints of compensating property owners during a moratorium may force officials to rush through the planning process or to abandon the practice altogether. To the extent that communities are forced to abandon using moratoria, landowners will have incentives to develop their property quickly before a

comprehensive plan can be enacted, thereby fostering inefficient and ill-conceived growth.

As Justice KENNEDY explained in his opinion for the Court in Palazzolo, it is the interest in informed decision-making that underlies our decisions imposing a strict ripeness requirement on landowners asserting regulatory takings claims. [The Court quoted from his opinion].

We would create a perverse system of incentives were we to hold that landowners must wait for a taking claim to ripen so that planners can make well-reasoned decisions while, at the same time, holding that those planners must compensate landowners for the delay.

Indeed, the interest in protecting the decisional process is even stronger when an agency is developing a regional plan than when it is considering a permit for a single parcel. In the proceedings involving the Lake Tahoe Basin, for example, the moratoria enabled TRPA to obtain the benefit of comments and criticisms from interested parties, such as the petitioners, during its deliberations. Since a categorical rule tied to the length of deliberations would likely create added pressure on decision makers to reach a quick resolution of land-use questions, it would only serve to disadvantage those landowners and interest groups who are not as organized or familiar with the planning process. Moreover, with a temporary ban on development there is a lesser risk that individual landowners will be "singled out" to bear a special burden that should be shared by the public as a whole. At least with a moratorium there is a clear "reciprocity of advantage," because it protects the interests of all affected landowners against immediate construction that might be inconsistent with the provisions of the plan that is ultimately adopted. "While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others." Keystone, 480 U.S., at 491. In fact, there is reason to believe property values often will continue to increase despite a moratorium. Such an increase makes sense in this context because property values throughout the Basin can be expected to reflect the added assurance that Lake Tahoe will remain in its pristine state. Since in some cases a 1-year moratorium may not impose a burden at all, we should not adopt a rule that assumes moratoria always force individuals to bear a special burden that should be shared by the public as a whole.

It may well be true that any moratorium that lasts for more than one year should be viewed with special skepticism. But given the fact that the District Court found that the 32 months required by TRPA to formulate the 1984 Regional Plan was not unreasonable, we could not possibly conclude that every delay of over one year is constitutionally unacceptable. (footnote omitted) Formulating a general rule of this kind is a suitable task for state legislatures. (footnote omitted) In our view, the duration of the restriction is one of the important factors that a court must consider in the appraisal of a regulatory takings claim, but with respect to that factor as with respect to other factors, the "temptation to adopt what amount to per se rules in either direction must be resisted." Palazzolo, 533 U.S. at 636 (O'CONNOR, J., concurring). There may be moratoria that last longer than one year which interfere with reasonable investment-backed expectations, but as the District Court's opinion illustrates, petitioners' proposed rule is simply "too blunt an

instrument," for identifying those cases. We conclude, therefore, that the interest in "fairness and justice" will be best served by relying on the familiar Penn Central approach when deciding cases like this, rather than by attempting to craft a new categorical rule.

Accordingly, the judgment of the Court of Appeals is affirmed.

Chief Justice REHNQUIST, with whom Justice SCALIA and Justice THOMAS join, dissenting.

[The dissent argued that "A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes," and that because respondent caused petitioners' inability to use their land from 1981 through 1987, that is the appropriate period of time from which to consider their takings claim. The dissent asserted that even if a practical distinction between temporary and permanent deprivations were plausible, to treat the two differently in terms of takings law would be at odds with the justification for the Lucas rule. The dissent argued that Lucas repeatedly discussed its holding as applying where "no productive or economically beneficial use of land is permitted, and therefore they believe that the "temporary" denial of all viable use of land for six years is a taking.

While the dissent agreed that the short-term delays attendant to zoning and permit regimes are a longstanding feature of state property law and part of a landowner's reasonable investment-backed expectations, it asserted that moratoria that prohibit all development do not have the lineage of permit and zoning requirements, and thus it is less certain that property is acquired under the "implied limitation" of a moratorium prohibiting all development.]

Justice THOMAS, with whom Justice SCALIA joins, dissenting.

[Justice Thomas asserted that a taking occurred because the landowners were deprived for some temporary period of time of the opportunity to build single-family homes as permanent, retirement, or vacation residences on land upon which such construction was authorized when purchased. He argued that the "logical" assurance that a "temporary restriction ... merely causes a diminution in value," is cold comfort to the property owners in this case or any other.]

NOTES AND QUESTIONS

1. *Understanding Tahoe*. The Court articulates a number of important ideas in Tahoe: 1) good planning (and regional planning) is a good idea; 2) moratoria can be useful tools to planners; 3) moratoria are not a per se taking; 4) *First English* is a remedy case, 5) the parcel as a whole approach that may have been put into question in *Palazzo* was reaffirmed; 6) the principles applicable to physical takings are not the same as those applicable to regulations; 7) elimination of all value, not use, is key to the economic

analysis; and 8) zoning and planning law may be part of the background principles of property law.

The narrow question the Court took made it almost certain the Court would rule against the property owners. (It rephrased the question presented after it accepted the case). Their argument was based on a merger of the taking per se rule in *Lucas* and the temporary taking remedy in *First English*. Do you see how the Court avoided this evolution in takings law? By rejecting this rule, what has the Court said about how it plans to apply takings law in the future? Consider that the Court held that *Penn Central* is the "default" rule. This word comes from computer lingo. It apparently means that *Penn Central* is the starting place for takings analysis, but what of *Lucas*? Has that case been effectively overruled? The Court also says there are different rules for a physical taking and for a regulatory taking. How does this holding affect takings law as applied to land use regulation?

In W.R. Grace & Co. v. Cambridge City Council, 779 N.E.2d 141 (Mass. App. 2002), the court referred to the Supreme Court's takings tests as "idiosyncratic" and developed its own "objective" test. The court held that a showing of "economic impact" was not sufficient. Is this contrary to *Lake Tahoe*, which suggests that courts should recognize a partial takings claim under *Penn Central*? For discussion of *Lake Tahoe* see the chapters in Taking Sides on Takings Issues: The Impact of Tahoe-Sierra (T. Roberts ed., American Bar Association 2003). For a variety of views on Lake Tahoe see articles by David L. Callies, Calvert G. Chipchase, Michael M. Berger, Steven J. Eagle, Dwight H. Merriam and Thomas E. Roberts in. 25 U. Hawaii L. Rev. 279-448 (2003).

2. *The Whole Parcel Rule.* The whole parcel rule has come to play a dominant role in takings law because a narrowing of a parcel subject to regulation could well trigger a *Lucas* per se taking. Do you see why? The Court holds that a period of time is not a "parcel" for purposes of the takings clause, yet it says that not all moratoria are constitutional, and that the inquiry into constitutionality is fact-intensive. The Court also notes that property will "recover value" when a moratorium is lifted, but if the moratorium is in effect for a lengthy period, the present discounted value of that future value may be minimal. The Court does not provide guidance on how to solve this problem. Nor does it consider the problem of geographic segmentation, except for its reference to zoning setbacks.

3. *Justice and Fairness*. This old takings maxim is suddenly resurrected in this case. What are we to make of this? Is it a new and independent takings factor? And if it is, how should courts apply it? The focus on fairness seems to suggest a "shadow equal protection" concern.

4. *Statutory proposals*. What are the appropriate factors that a municipality should consider when adopting or extending a moratorium so that it may withstand legal challenge? The Court in *Tahoe* suggested that moratoria are an issue that should be addressed by legislature. See, American Planning Association, Growing Smart Legislative Guidebook, Chap. 8 (2002), available on this site in the statutes section,

which offers three options for model state statutes to address moratoria, ranging from narrow to broad statutory authority. Should the states regulate the use of moratoria or should such regulation be left to local governments? What are the pros and cons of each approach?