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# Real Property/Land Use Law - Keeping Tahoe Blue: An Ecological Alternative to the Penn Central Test. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 122 S. Ct. 1465 (2002)

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**REAL PROPERTY/LAND USE LAW – Keeping Tahoe Blue: An Ecological Alternative to the *Penn Central* Test. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 122 S. Ct. 1465 (2002).**

## INTRODUCTION

In the early 1980s, the Tahoe Regional Planning Agency (TRPA), an agency whose mandate was to "coordinate and regulate development in the [Tahoe] Basin and to conserve its natural resources," issued two temporary regulations that prohibited development on certain sensitive lands.[1] In response, property owners of these sensitive parcels alleged that the regulations, which together resulted in a thirty-two month moratorium on development, constituted takings without just compensation.[2] After nearly twenty years of litigation in the lower courts, the Supreme Court's decision resolves this dispute, not by creating a new categorical rule as the property owners advocated, but by embracing the familiar regulatory takings balancing test.[3]

Lake Tahoe, a high alpine lake on the border of California and Nevada, is renowned for its unique characteristics.[4] Not only is it one of the world's largest and deepest lakes, but also its clear, blue water distinguishes it from most others.[5] The lake's clarity results from its historic lack of nutrients and the relative uniformity of its water temperature.[6] Unfortunately, its legendary clarity has been in a state of decline for over fifty years due to eutrophication, a process by which soil erosion into the lake creates an increase in nutrients such as nitrogen and phosphorus.[7] These nutrients cause

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1. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S. Ct. 1465, 1471 (2002) (quoting Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency, 440 U.S. 391, 394 (1979)). The California and Nevada legislatures created the Tahoe Regional Planning Agency through the passage of the Tahoe Regional Planning Compact of 1969, which Congress later approved. *Id.* For the statutes themselves, *see* 1968 Cal. Stats., ch. 998, p.1900, §1; 1968 Nev. Stats. 4. *Id.* Congress approved these statutes in 1969, Pub. L. 91-148, 83 Stat. 360. *Id.*

2. *Tahoe-Sierra*, 122 S. Ct. at 1473.

3. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978). The *Penn Central* analysis, the three-pronged balancing test the Court uses to determine whether a regulatory taking has occurred, is not a categorical rule, but a framework used to decide cases on an ad hoc factual basis. *Id.; see also infra* note 57 and accompanying text for the elements of the test.

4. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 216 F.3d 764, 766 (9th Cir. 2000).

5. *Tahoe-Sierra*, 122 S. Ct. at 1471 n.2 (citing S. Rep. No. 91-510, pp.3-4 (1969); explaining: "Only two other sizeable lakes in the world are of comparable quality—Crater Lake in Oregon, which is protected as part of the Crater Lake National Park, and Lake Baikal in the [former] Soviet Union.").

6. *Tahoe-Sierra*, 122 S. Ct. at 1471.

7. *Id. See* NEIL A. CAMPBELL, BIOLOGY 1064-65 (3d. ed. 1993). Oligotrophic lakes, like Lake Tahoe, are characteristically deep, clear, nutrient-poor, and contain high amounts of

algae overgrowth and oxygen depletion, which destroy the clarity of the water and threaten the viability of fish and other animals residing in and around the lake.[8] The initial cause of this increased erosion was rapid residential development around the popular lake, which necessitated a removal of vegetation to make way for the construction of roads and homes.[9] As the Court notes, "The Lake's unsurpassed beauty, it seems, is the wellspring of its undoing."[10]

In the early 1970s, TRPA devised a land classification system in an effort to address the reality that certain kinds of property, if developed, were more apt to contribute to nutrient loading than others.[11] In this system, tracts of land were assigned a "class" based on "levels of use that the land was capable of tolerating without sustaining such permanent damage as erosion and water degradation."[12] Extremely sensitive stream parcels were labeled "Stream Environment Zones" (SEZs).[13] Other tracts that were particularly susceptible to "hazards [such] as floods, landslides, high water tables, poorly drained soils, fragile flora and fauna and easily erodible soils" were given a number between 1 and 3, while less hazardous tracts received ratings between 4 and 7.[14] During this time, TRPA was largely unsuccessful in pro-

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oxygen all year. *Id.* They also have fairly non-productive phytoplankton, including algae and cyanobacteria. *Id.* Eutrophic lakes on the other hand, are typically shallower, murky, contain a greater amount of nutrients, possess productive phytoplankon, and are less oxygen-rich in the summer. *Id.* Eutrophication is the process by which a lake changes from oligotrophic to eutrophic conditions. *Id.* These changes can occur naturally over long periods of time as runoff increases a lake's mineral and nutrient content, or can be hastened by human activities. *Id.; see also* DOUGLAS H. STRONG, TAHOE: AN ENVIRONMENTAL HISTORY 112 (1984) ("[N]utrients did enter Tahoe, not only from sewage wastes, but from the runoff generated by increased disturbance of the mountain slopes, caused by land clearance for buildings and by cutting and filling for roads.").

8. *Tahoe-Sierra,* 216 F.3d at 767. *See* STRONG *supra* note 7, at 7. "More than three hundred species of wildlife still inhabit the basin, although several are now listed as rare or endangered. The peregrine falcon and the wolverine, among others, no longer reside in the basin because of the deterioration of their habitat." *Id.*

9. *Tahoe-Sierra,* 216 F.3d at 767.

10. *Tahoe-Sierra*, 122 S. Ct. at 1471.

11. *Id.* at 1472.

12. *Id.*

13. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F. Supp. 2d 1226, 1231 (D. Nev. 1999).

> [C]ertain areas near streams and other wetlands – as Stream Environment Zones ('SEZs') – act as filters for much of the debris that runoff carries. When SEZ lands are filled in and paved over, however, they cease to perform their natural function. Thus not only do the paved-over SEZ lands increase erosion due to the new impervious coverage, they also fail to mitigate erosion occurring at higher elevations farther from the lake. SEZ lands are therefore considered especially sensitive to the impact of development.

*Id.*

14. *See* STRONG *supra* note 7, at 151.

hibiting the development activities that threatened Lake Tahoe.[15] As a result, in 1980, the California and Nevada legislatures ultimately amended the 1969 Tahoe Regional Planning Compact that had created TRPA in order to redefine the agency's mandate.[16] The revised Compact required the agency, *inter alia*, to develop and adopt a regional land use plan in accordance with environmental threshold carrying capacities by June 1983.[17]

In 1981, TRPA enacted Ordinance 81-5, the first of the two regulations in dispute, which essentially forbade development on SEZ and class 1-3 lands until TRPA could develop this regional plan.[18] Failing to adopt the plan by its June 1983 deadline, TRPA then issued Resolution 83-21, basically an extension of the first regulation, which "completely suspended all project reviews and approvals, including the acceptance of new proposals" on SEZ and class 1-3 lands.[19] Together, Ordinance 85-1 and Resolution 83-

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> In this classification system, 76 percent of all land in the Tahoe Basin was listed 'high hazard,' 10 percent 'moderate hazard,' and 14 percent 'low hazard.' When applied to proposed development, this meant that little or no construction should take place on slopes that were subject to erosion or were in marsh or meadowland.

*Id.* In reality, this classification system, which aimed to curb development in especially sensitive areas, actually "allowed numerous exceptions." *Tahoe-Sierra*, 34 F. Supp. 2d at 1233.

15. *Tahoe-Sierra*, 122 S. Ct. at 1472. *See* STRONG *supra* note 7, at 156 ("The Governing Body approved so many new developments during the period of preparation of the plan – reportedly 95 percent of the projects brought before it – that rapid growth was assured for years to come."). *See also Tahoe-Sierra*, 34 F. Supp. 2d at 1233 ("It became evident that the environment was continuing to decline, and that the 1969 Compact was not strong enough to fix the problem.").

16. *Tahoe-Sierra*, 121 S. Ct. at 1472; *Tahoe-Sierra*, 34 F. Supp. 2d at 1233 ("The 1980 Compact restructured TRPA and its voting procedures . . . .").

17. *Tahoe-Sierra*, 122 S. Ct. at 1472. *See* STRONG *supra* note 7, at 193 (explaining that TRPA adopted strict "threshold standards for water and air quality, soil conservation, vegetation, noise, wildlife, fisheries, recreation and scenic resources" as part of the regional plan in order to curb the kinds of "development [that] would produce undesirable and unacceptable environmental damage in the basin").

18. *Tahoe-Sierra*, 34 F. Supp. 2d at 1234 (stating that although sections 16 and 3 of Ordinance 85-1 are similarly worded, more exceptions existed for owners of class 1-3 parcel than for SEZ owners). TRPA Ordinance 85-1, §16.00 states:

> Except as otherwise provided by this ordinance, no person shall perform any construction, work, use or activity, including without limitation, grading, clearing, removal of vegetation, filling or creation of land coverage, upon land within land capability districts 1a, 1c, 2 and 3 without first obtaining a permit from the Agency.

TRPA Ordinance 85-1 §16.00 (June 25, 1981) (amending §12.00 of Ordinance 79-10). *See also* TRPA Ordinance 85-1, §3.00 (June 25, 1981) (amending §13.00 of Ordinance 79-10); *Tahoe-Sierra*, 34 F. Supp. 2d at 1234 ("[N]o person shall perform any construction, work, use or activity upon a lot or parcel containing an SEZ without first obtaining a permit from the Agency. . . .").

19. *Tahoe-Sierra*, 34 F. Supp. 2d at 1235.

21 disallowed all development on these sensitive parcels for 32 months.[20] TRPA adopted the regional plan in 1984.[21] On the same day of the plan's adoption, however, California sued TRPA to prevent the plan's implementation on the grounds that it "failed to establish land-use controls sufficiently stringent to protect the [Tahoe] Basin."[22] The District Court of California agreed and issued an injunction that remained in effect until TRPA implemented a new plan in 1987.[23]

Not long after TRPA adopted the 1984 plan, petitioners (property owners in the Tahoe Basin, some of whom were represented by a non-profit membership corporation, Tahoe-Sierra Preservation Council) filed suit in both the Nevada and California district courts claiming that the two regulations and the 1984 plan constituted takings, which required just compensation.[24] Eventually the cases were consolidated in the United States District Court for the District of Nevada.[25] The court dismissed all takings claims regarding the 1984 plan, finding that it was the injunction and not the plan itself that caused any injury after 1984.[26] Focusing on Ordinance 81-5 and Resolution 83-21, the court used the *Penn Central* and *Lucas* analyses to address whether the moratoria had effected a partial or total taking, depriving the owners of economically viable use of their land.[27] The district court concluded that no taking had occurred under a *Penn Central* analysis.[28] Under a *Lucas* analysis, however, the court found that petitioners had been temporarily deprived of "all economically viable use of their land," which amounted to a categorical taking.[29]

On appeal, petitioners opted to challenge only the court's dismissal of the claims regarding the 1984 plan, and did not refute the court's decision

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20. *Tahoe-Sierra*, 122 S. Ct. at 1473.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.; see also* DOUGLAS H. STRONG, TAHOE FROM TIMBER BARONS TO ECOLOGISTS 86 (1984) (explaining that the Tahoe-Sierra Preservation Council is a group that represented the private property interests of some of the basin's landowners). Property owners, frustrated by TRPA's restrictive regional plan, claimed that their land use was limited to such a degree as to amount to takings. *Tahoe-Sierra*, 122 S. Ct. at 1473.
25. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Sierra Reg'l Planning Agency, 34 F. Supp. 2d 1226 (D. Nev. 1999).
26. *Tahoe-Sierra*, 122 S. Ct. at 1473.
27. *Id.* at 1474 (citing Tahoe-Sierra, 34 F. Supp. 2d. at 1239). *See also* Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (the Nevada District Court cited this regulatory takings case to determine that a taking occurs when a regulation either does not "substantially advance legitimate state interests, or denies an owner economically viable use of his land") (citations omitted)).
28. *Tahoe-Sierra*, 122 S. Ct. at 1475. *See infra* note 57 and accompanying text for the elements of the *Penn Central* test.
29. *Id.* (quoting Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 (1992) (quoting *Agins*, 447 U.S. at 260)).

that no taking had occurred under a *Penn Central* analysis.[30] TRPA challenged the court's application of the *Lucas* analysis on cross-appeal.[31] A panel for the United States Court of Appeals for the Ninth Circuit affirmed the lower court's ruling that the 1984 plan was not at issue and was left only with the question: "[W]hether the mere enactment of the regulations constituted a taking" under a *Lucas* analysis.[32] On this issue it reversed, reasoning that property rights should be regarded in their entirety, not as temporal slices of a whole, and as such, the landowners were not denied all economic use of their property.[33]

The question before the Supreme Court was similarly narrow, as petitioners attacked the regulations on their face and advocated for a categorical rule.[34] The Court's decision to affirm, therefore, is not surprising because these facial challenges tend to "face an uphill battle."[35] A six-Justice majority declined to endorse a categorical rule, explaining that "the interest in 'fairness and justice' will be best served by relying on the familiar *Penn Central* approach when deciding cases like this . . . ."[36] The Court also noted, "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."[37]

This case note will explore the problematic law of regulatory takings. Specifically, it will argue that the first two prongs of the *Penn Central* test are contributing factors to the current uncertainty within regulatory takings jurisprudence and are inadequate standards with which to challenge an environmental or land use regulation. State legislation that would expand traditional common law nuisance principles to include harm to the environment coupled with a judicial focus on what is now the third prong of the *Penn Central* test (the character of the governmental regulation) provide an alternative test that is both practically and ecologically sound.

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30. *Id.* at 1476.
31. *Id.*
32. *Id.*
33. *Id.* at 1476-77.
34. *Id.* at 1477. Petitioners argued: "[T]he mere enactment of a temporary regulation that, while in effect, denies a property owner all viable use of her property gives rise to an unqualified constitutional obligation to compensate her for the value of its use during that period." *Id.*
35. *Id.* (citing Keystone Bituminous Coal Ass'n. v. DeBenedictis, 480 U.S. 470, 495 (1987)).
36. *Id.* at 1489.
37. *Id.* at 1486.

## BACKGROUND

The takings clause of the Fifth Amendment, "nor shall private property be taken for public use, without just compensation," refers to the government's physical appropriation of private property.[38] Although no explicit language in this clause contemplates what are now known as regulatory takings, the Court has acknowledged that regulations barring property owners from using their property in certain ways can similarly amount to takings requiring compensation.[39] Courts can remedy physical takings claims by applying categorical rules; however, regulatory takings cases do not lend themselves to such a simple assessment and are almost always subject to an "ad hoc balancing test."[40] Inherent in this balancing test are factors the Court may consider, but by the Court's own admission, "Resolution of each case . . . ultimately calls as much for the exercise of judgment as for the application of logic."[41]

Five cases, spanning nearly eighty-five years of Supreme Court history, lay much of the foundation for regulatory takings jurisprudence today: 1) *Pennsylvania Coal Co. v. Mahon*; 2) *Penn Central Transportation Co. v. City of New York*; 3) *Keystone Bituminous Coal Ass'n v. DeBenedictis*; 4) *Lucas v. South Carolina Coastal Council*; and 5) *First English Evangelical Church of Glendale v. County of Los Angeles, California*.[42] The Court's continued reliance on these cases for precedent, and its reluctance to change what it contends is the best approach for regulatory takings claims, warrant discussion of each.[43] In *Tahoe-Sierra*, the Court clarified its holdings in *Lucas* and *First English*, the two cases petitioners relied on to support their argument, and reaffirmed the importance of the *Penn Central* analysis as the reigning test for regulatory takings today.[44]

The Court first established the concept of regulatory takings in *Pennsylvania Coal Co. v. Mahon*.[45] It would be a rare occurrence to read a regulatory takings opinion today without finding some mention of this semi-

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38. U.S. CONST. amend. V.

39. *Tahoe-Sierra*, 122 S. Ct. at 1478.

40. *Id.* Physical takings cases are easier to assess with categorical rules because property is actually appropriated by the government for its own use. In regulatory takings cases, the property is not usurped, but the uses of it are restricted by governmental legislation or regulation. *Id.* at 1478-80.

41. Andrus v. Allard, 444 U.S. 51, 65 (1979).

42. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); First English Evangelical Church v. County of Los Angeles, California, 482 U.S. 304 (1987).

43. *See* Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 122 S. Ct. 1465, 1477-89 (2002).

44. *Id.* at 1478.

45. 260 U.S. 393 (1922).

nal case.[46] Indeed, because of the indeterminate nature of the test that the Court created, this case has continued to fuel commentary for decades after its decision.[47]

In 1921, Pennsylvania passed the Kohler Act, which prohibited coal mining in areas where certain surrounding, developed, surface properties were at risk of subsidence.[48] At the time of this dispute, Pennsylvania recognized three distinct estates in property: Surface, mineral and support estates.[49] The Mahons, owners only of surface property rights, sought to prevent Pennsylvania Coal from mining under their home by calling upon the Kohler Act.[50] Pennsylvania Coal owned the mineral and support estates in question and challenged the Act on its face, claiming that if it were prohibited from mining, the regulation would amount to a taking of its property.[51]

The majority held the Kohler Act unconstitutional.[52] The Court first established the balancing test for regulatory takings with the "general rule" that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[53] The Court did not directly answer the obvious next question of what kind of regulation goes "too far." Instead, it explained that it is a "question of degree – and therefore cannot be disposed of by general propositions."[54] Thus, this case established the concept of regulatory takings, but left largely uncertain the question of what kind of future regulations would constitute takings.

Nearly sixty years after *Pennsylvania Coal*, the Court was faced again with a regulatory takings question. In *Penn Central Transportation Co. v. City of New York*, owners of the historic Grand Central Terminal challenged New York's Landmarks Preservation Law, which denied them the right to build offices above the terminal.[55] Terminal owners claimed that the city's regulation had "taken" their property without just compensation.[56] In holding that no taking had occurred, the Court acknowledged the current

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46. *Id.*
47. *See generally* Basil H. Mattingly, *Forum Over Substance: The Empty Ritual of Balancing in Regulatory Takings Jurisprudence*, 36 WILLAMETTE L. REV. 695, 712-15 (2000) (claiming that the vague language of *Pennsylvania Coal's* holding "undercuts" Takings Clause protections); J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 ECOLOGY L.Q. 89, 97-102 (1995) (positing that "*Pennsylvania Coal* is a poorly considered decision that ought to be overruled").
48. *Pennsylvania Coal*, 260 U.S. at 412-13.
49. *See* Byrne *supra* note 47, at 97 for an explanation of the three estates.
50. *Id.*
51. *Id.* at 414.
52. *Id.* at 416.
53. *Id.* at 415.
54. *Id.* at 416.
55. 438 U.S. 104, 108-14 (1978) (stating that the Landmarks Preservation Law was intended to preserve the character of historic buildings and neighborhoods in the city).
56. *Id.* at 119.

lack of any "set formula" for assessing regulatory takings and attempted to give teeth to the balancing test set out in *Pennsylvania Coal* by developing three factors.[57] These factors have become synonymous with what is now known as the *Penn Central* test: 1) the economic impact of the regulation on the property owner; 2) the extent to which the regulation has interfered with the owner's investment-backed expectations; and 3) the character of the government action.[58]

First, in considering the economic impact of the regulation on the property owner, the Court made clear that necessity often requires that the government's actions will have an adverse impact on its citizens.[59] Examples of this include the government's authority to tax or its right to enjoin certain individual uses of property in order to ensure the health and safety of a larger community.[60] In *Penn Central*, owners of the terminal claimed that the Landmarks Law disallowed them any economic use of their "air rights" above the Terminal.[61] The Court, however, flatly refuted this understanding of property rights, stating:

> 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. [T]his Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole . . . .[62]

Next, the Court addressed the issue of an owner's expectations at the time of purchase and explained that the potential uses of the property would influence its decision.[63] Here, the majority found that the regulation did not interfere with the owner's primary expectation or present property use.[64] The Court cited evidence that it was likely that the owners eventually would be permitted to build above the terminal with some restrictions.[65]

Last, with regard to the character of the regulation, the Court explained that takings often occur when regulations act as "acquisitions of re-

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57. *Id.* at 124.
58. *Id.*
59. *Id.*
60. *Id.* at 125.
61. *Id.* at 130.
62. *Id.* at 130-31.
63. *Id.* at 127-28; *but see* Palazzolo v. Rhode Island, 533 U.S. 606, 628 (2001) (stating that a property owner's notice of regulation is not an automatic bar to a takings claim: "A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken.").
64. *Penn Central*, 438 U.S. at 136.
65. *Id.* at 136-37.

sources to permit or facilitate uniquely public functions . . . ."[66] Petitioners claimed that unlike zoning laws, the Landmarks Law singled out specific structures for regulation, burdening the owners alone so that an entire community could benefit.[67] The majority, however, reasoned that though the regulation burdens some members of the community more than others, alone that is not enough to amount to a taking.[68] Today, these three factors remain the Court's preferred analysis when addressing regulatory takings cases.[69]

The *Keystone Bituminous Coal Ass'n v. DeBenedictis* decision ushers in the current era of regulatory takings jurisprudence.[70] In *Keystone*, a case based on strikingly similar facts to those of *Pennsylvania Coal*, the regulation at issue was the Pennsylvania Subsidence Act of 1966, which effectively required fifty percent of the coal to be left in the ground in order to guarantee stability for surface lands.[71] A narrow majority described the distinction between the Kohler Act and the 1966 Subsidence Act, explaining that "the Subsidence Act does not merely involve a balancing of the private economic interests of coal companies against the private interests of the surface owners," but also involves a valid exercise of the state's power to curb an injurious, noxious use of land that would endanger the community.[72] The Court recalled the fundamental notion that property rights are not without restrictions and that owners may not use their property in such a way as to harm others.[73] The Court further explained that "the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it."[74]

In *Keystone*, petitioners chose to attack the Subsidence Act on its face; however, they failed to show that it "denied [them] economically vi-

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66. *Id.* at 128.

67. *Id.* at 133; *see* Armstrong v. United States, 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee that private property shall not be taken for public use without just compensation 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.").

68. *Penn Central*, 438 U.S. at 133.

69. *See* Palazzolo v. Rhode Island, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring) ("The temptation to adopt what amount to *per se* rules in either direction must be resisted. The Takings Clause requires careful examination and weighing of all the relevant circumstances in this context. The court below therefore must consider on remand the array of relevant factors under *Penn Central* before deciding whether any compensation is due.").

70. 480 U.S. 470 (1987).

71. *Id.* at 476-80.

72. *Id.* at 485.

73. *Id.* at 491-92. Common law tenet "*sic utere tuo ut alienum non laedas:* Use your own property in such a manner as not to injure that of another." *Id.* at 492 n.22.

74. *Id.* at 491; *see also* Mugler v. Kansas, 123 U.S. 623 (1887); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Miller v. Schoene, 276 U.S. 272 (1928) (holding that operation of a brewery during prohibition, the production of a brickyard within city limits and the presence of rust-infected red cedar trees, respectively, constituted nuisances even though each activity was legal before the enactment of the disputed regulations).

able use of [their] land."[75] Petitioners did not prove that their mining operations had been unprofitable as a result of the new Act, but argued instead that certain segments of their property, namely the coal left in the ground, had been categorically taken.[76] The Court dismissed this interpretation of property rights, explaining again that property must be regarded "as a whole" and not as independent portions.[77] The Court reasoned, "[W]here an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety."[78] Four dissenting Justices, however, took issue with the majority's view that there should be no parceling of property rights, saying, "Unlike many property interests, the 'bundle' of rights in this coal is sparse. 'For practical purposes, the right to coal consists in the right to mine it.'"[79] These Justices would have held a taking had occurred.[80]

Until its decision in *Lucas v. South Carolina Coastal Council*, the Court had been reluctant to apply categorical rules to regulatory takings cases, opting for such application only in situations where physical intrusions occurred or where, as in the case of *Lucas*, a regulation denied "all economically beneficial or productive use of land."[81] In 1986, developer David Lucas purchased two lots with the intent to construct single-family homes, both 300 feet from the beach on a barrier island off the coast of South Carolina.[82] In 1988, South Carolina enacted the Beachfront Management Act, which effectively prohibited him from building "occupiable improvements" on those lots.[83] Lucas claimed that regardless of the Act's validity and lawfulness, it resulted in a taking of his property without just compensation.[84] The South Carolina Court of Common Pleas agreed, finding that the regulation rendered his property "valueless."[85] The South Carolina Supreme Court reversed, holding that since Lucas had not challenged the validity of the Act's purpose to protect the state's beaches, no compensation was required for nuisance prevention.[86]

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75. *Keystone*, 480 U.S. at 495 (citing Agins v. Tiburon, 447 U.S. 255, 260 (1980)).
76. *Keystone*, 480 U.S. at 496-97.
77. *Id.* at 497; *see* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130-31 (1978).
78. *Keystone*, 480 U.S. at 497 (quoting Andrus v. Allard, 444 U.S. 51, 65-66 (1979)).
79. *Keystone*, 480 U.S. at 517 (Rehnquist, C.J., dissenting) (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922)).
80. *Keystone*, 480 U.S. at 520 (Rehnquist, C.J., dissenting).
81. 505 U.S. 1003, 1015-16 (1992). *See generally* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (explaining that even small physical intrusions warrant compensation); Agins v. Tiburon, 447 U.S. 255, 260 (1980) (regarding a regulation's denial of an owner's economically viable use of her land).
82. *Lucas*, 505 U.S. at 1008.
83. *Id.* at 1008-09.
84. *Id.* at 1009.
85. *Id.*
86. *Id.* at 1010.

The United States Supreme Court reversed based on the lower court's finding that Lucas' property was indeed valueless and held: "[W]hen the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."[87] The Court rejected the South Carolina Supreme Court's finding that the state legislature was within its power to prevent noxious uses of land.[88] The Court explained that the distinction between regulations that confer benefits and those that prevent harm is often "in the eye of the beholder," and that if left unchecked, anything could be deemed a nuisance.[89] Therefore, the Court reasoned that the state must prove the existence of such previous common law nuisance restrictions in order to evade paying the requisite compensation.[90]

Dissenting Justices noted that the majority's categorical rule was to be applied only in "extraordinary circumstances" or in the "relatively rare situation" when a property owner has lost all economically viable use of her land.[91] As such, Justice Blackmun was critical of the need for a categorical rule at all, accusing the majority of "launching a missile to kill a mouse."[92] He took issue with the majority's attempt to prevent potentially biased nuisance laws (that would feign to prevent harm while actually conferring a benefit) by acknowledging only pre-existing common-law nuisance.[93] Justice Stevens, in a separate dissent, also criticized the majority's categorical rule as "unsupported by prior decisions, arbitrary and unsound in practice, and theoretically unjustified."[94] He emphasized that the majority's insistence on pre-existing nuisance laws "effectively freezes the State's common law, denying the legislature much of its traditional power to revise the law governing the rights and uses of property."[95]

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87. *Id.* at 1019.
88. *Id.* at 1020-32.
89. *Id.* at 1024.
90. *Id.* at 1029-32.
91. *Id.* at 1036 (Blackmun, J., dissenting).
92. *Id.* (Blackmun, J., dissenting).
93. *Id.* at 1054-55 (Blackmun, J., dissenting). Justice Blackmun explains:

> Common-law public and private nuisance law is simply a determination whether a particular use causes harm. . . . There is nothing magical in the reasoning of judges long dead. They determined a harm in the same way as state judges and legislatures today. If judges in the 18th and 19th centuries can distinguish a harm from a benefit, why not judges in the 20th century and if judges can, why not legislators? There simply is no reason to believe that new interpretations of the hoary common-law nuisance doctrine will be particularly 'objective' or 'value free.'

*Id.* (Blackmun, J., dissenting) (citations omitted).
94. *Id.* at 1067 (Stevens, J., dissenting).
95. Id. at 1068-69 (Stevens, J. dissenting). Justice Stevens states:

In *First English Evangelical Church of Glendale v. County of Los Angeles, California*, the Supreme Court did not assess whether a taking had occurred.[96] Rather, its review of the case was based solely on the lower court's finding that "the remedy for a [regulatory] *taking* [is limited] to nonmonetary relief . . . ."[97] Petitioners in *First English* were landowners who, after a flood, were denied the right to rebuild the structures on their property due to a temporary ordinance that prohibited construction of buildings in "interim flood protection areas."[98] Their attempt to recover damages under inverse condemnation was denied due to the state's law at the time, which required the courts to find the regulation "excessive in an action for declaratory relief or a writ of mandamus" before an owner could be compensated for a regulatory taking.[99]

At the outset, the Court rejected the argument that it must first decide the issue of whether a taking had occurred in order to rule on the issue of compensation and left the former issue to the lower courts to determine on remand.[100] The holding was simply: "[W]here 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."[101] The Court reasoned that temporary takings do not differ in their nature from permanent takings, and therefore require compensation.[102] The Court limited its holding to the facts presented: "We . . . of course do not deal with 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 are not before us."[103] The holding in *First English*, therefore, rests only on the straightfor-

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> Legislatures . . . must often revise the definition of property and the rights of property owners. Thus, when the Nation came to understand that slavery was morally wrong and mandated the emancipation of all slaves, it, in effect, redefined 'property.' On a lesser scale, our ongoing self-education produces similar changes in the rights of property owners: New appreciation of the significance of endangered species, the importance of wetlands, and the vulnerability of coastal lands, shapes our evolving understanding of property rights.

*Id.* at 1069 (Stevens, J. dissenting) (citations omitted).

96. 482 U.S. 304 (1987).

97. *Id.* at 311.

98. *Id.* at 307 (explaining that County of Los Angeles Interim Ordinance No. 11,855 states: "A person shall not construct, reconstruct, place or enlarge any building or structure, any portion of which is, or will be, located within the outer boundary lines of the interim flood protection area located in Mill Creek Canyon.").

99. *Id.* at 308-09.

100. *Id.* at 312-13. On remand, the California court found no taking had occurred. First English Evangelical Church of Glendale v. County of Los Angeles, 210 Cal. App. 3d 1353 (1989).

101. *First English*, 482 U.S. at 321.

102. *Id.* at 318.

103. *Id.* at 321.

ward notion that once a taking has decidedly occurred, compensation is the proper remedy.[104]

## PRINCIPAL CASE

Although the Court's decision in *Tahoe-Sierra* was based on one limited question, the implications of its holding are far-reaching and, as the majority noted, important.[105] The question before the Court was this: Does the "mere enactment of a temporary regulation that, while in effect, denies a property owner all viable economic use of her property" require treatment as a categorical taking?[106] The Court's answer highlighted reasons for rejecting a categorical rule in favor of the *Penn Central* balancing test that supports "careful examination and weighing of all the relevant circumstances."[107]

The majority's analysis began with a clarification of its holdings in both *Lucas* and *First English*, the two cases upon which petitioners relied exclusively to bolster their position that application of a categorical rule was appropriate.[108] The Court first emphasized that categorical rules are generally reserved for physical takings cases; however, *Lucas* represents an exception to that principle.[109] The reason the Court applied a categorical rule in *Lucas* was that it had accepted the finding of the lower court that with the advent of the regulation, the fee simple estate in question was found to be completely without value.[110] Another point extrapolated from *Lucas* was that in order for a regulatory takings case to warrant a categorical rule, the property's resulting diminution in value must be 100%, whereas a 95% diminution would require the application of a *Penn Central* analysis.[111] The Court found no correlation between the facts in *Lucas* in which the value of property was wholly and permanently "obliterated," and those of *Tahoe-Sierra* in which any economic use was denied for a 32-month period.[112] Similarly, the Court made it clear that its decision in *First English* only addressed the "separate remedial question of how compensation is measured once a regulatory taking is established," not whether an actual taking had indeed occurred.[113] Ultimately, influenced by its readings of *Lucas* and *First English*, the Court dismissed petitioners' view that "a regulation [that] im-

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104. *Id. See* Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 122 S. Ct. 1465, 1482 (2002) (clarifying its holding in *First English*).
105. *Tahoe-Sierra*, 122 S. Ct. at 1477.
106. *Id.*
107. *Id.* at 1478 (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring)).
108. *Id.* at 1480-84.
109. *Id.* at 1480.
110. *Id.* at 1482-83; Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1007 (1992).
111. *Tahoe-Sierra*, 122 S. Ct. at 1483; *Lucas*, 505 U.S. at 1064 (Stevens, J., dissenting).
112. *Tahoe-Sierra*, 122 S. Ct. at 1483.
113. *Id.* at 1482.

poses a temporary deprivation – no matter how brief – of all economically viable use [is enough] to trigger a *per se* rule that a taking has occurred."[114]

The majority also rejected petitioners' argument of "conceptual severance," a notion that a segment of the fee simple estate (in this case a 32-month period) can be severed from the whole and "taken in its entirety."[115] "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."[116] The Court noted that it has "consistently rejected" the approach of considering parcels apart from the whole.[117] The "starting point," according to the Court, is "to ask whether there was a total taking of the entire parcel; if not, then *Penn Central* [is] the proper framework."[118]

The last portion of the Court's analysis is a response to petitioners' contention that the Takings Clause was "designed to bar Government from forcing some people to bear burdens alone, which, in all fairness and justice, should be borne by the public as a whole."[119] The Court responded by considering seven possible alternatives to its decision and explained why none of them would have been appropriate.[120] The first four of the seven theories were dismissed at the outset due to the procedural posture of the case.[121] The three remaining theories involved the application of some kind of categorical rule: 1) a rule that would compensate owners "whenever government temporarily deprives [them] of all economically viable use of [their] property;" 2) a "narrower rule" encompassing "all temporary land-use restrictions except those 'normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like;'" or 3) a compromise of sorts in which a fixed time period of perhaps one year could be established such that during that time no compensation would be required, but after that time had expired, compensation would be compulsory.[122]

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114. *Id.* at 1478.
115. *Id.* at 1483.
116. *Id.*
117. *Id.*
118. *Id.* at 1483-84.
119. *Id.* at 1486 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).
120. *Tahoe-Sierra*, 122 S. Ct. at 1484-85.
121. *Id.* The Court simply was not presented with any of these arguments and thus was unable to consider them: 1) the characterization of TRPA's consecutive regulations as a "series of rolling moratoria," the "functional equivalent of a permanent taking;" 2) the possibility that TRPA acted in bad faith, essentially "stalling" in order to avoid finishing the regional plan; 3) the argument that "the moratoria did not substantially advance a legitimate state interest;" and 4) petitioners' option to challenge the moratoria under the *Penn Central* test, not just on their face. *Id.*
122. *Tahoe-Sierra*, 122 S. Ct. at 1484-85.

The Court rejected the possibility of creating a new, sweeping categorical rule (like that identified above as number one) for three reasons. On a functional level, it first was concerned that a rule requiring "compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decisionmaking."[123] Next, it explained that if a change in the law were appropriate, it would be the legislature's responsibility to do so.[124] Finally, the Court reiterated that regulations that deprive property owners of temporary use of their property are best analyzed under the *Penn Central* balancing test, and that the outcome will depend on "the particular circumstances [in each] case."[125]

The Court further abandoned any notion of adopting either of the more narrow rules (numbers two and three mentioned above) for similar functional reasons. Citing the fact that moratoria like the ones at issue in *Tahoe-Sierra* "are used widely among land-use planners to preserve the status quo while formulating a more permanent development strategy," the Court was not willing to impose a categorical rule, even a less harsh one, due to the financial burden it would impose on planning agencies acting in good faith.[126] Additionally, if moratoria are not protected as part of the community planning process, incentives would be created for landowners "to develop their property quickly before a comprehensive plan can be enacted, thereby fostering inefficient and ill-conceived growth."[127] Even though the Court acknowledged that moratoria that last for more than one-year may be "viewed with special skepticism," the creation of a rule specific to length of time appropriate for moratoria is a job more aptly reserved for state lawmakers.[128] Thus, the Court was steadfast in its decision to affirm the *Penn Central* balancing test as the appropriate analysis for regulatory takings cases.

In the dissenting opinion, Chief Justice Rehnquist, joined by Justices Scalia and Thomas, took issue with several fundamental points. First, the dissenting Justices contested the fact that the length of the moratorium was only 32-months, positing that because TRPA's 1984 Plan was the proximate cause of the later court injunction, the moratorium actually lasted six years.[129] While this "novel theory of causation was not briefed, nor was it discussed in oral argument," the new six-year figure played a central role in the dissent's next conclusion that there should be no distinction between

123. *Id.* at 1485.
124. *Id.* The Court explains: "Such an important change in the law should be the product of legislative rulemaking rather than adjudication." *Id.*
125. *Id.* at 1486 (quoting Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (quoting United States v. Central Eureka Mining Co., 357 U.S. 155,168 (1958))).
126. *Tahoe-Sierra*, 122 S. Ct. at 1487.
127. *Id.* at 1488.
128. *Id.* at 1489. *See Tahoe-Sierra*, 122 S. Ct. at 1489 n.37 (citing the list of state legislatures that have already enacted these laws).
129. *Id.* at 1490-91 (Rehnquist, C.J., dissenting).

temporary and permanent takings.[130] The dissent reasoned that the "*Lucas* rule is derived from the fact that a 'total deprivation of use is, from the landowner's point of view, the equivalent of a physical appropriation.'"[131] The final point of contention (acknowledged by Justices Thomas and Scalia in a separate, dissenting opinion) was a criticism of the majority's understanding of the "denominator" issue.[132] According to these Justices, the proper denominator should not be the "land's infinite life," but one that would allow for a taken "temporal slice" to be compensable.[133] In other words, private property owners should be able to claim that a taking occurs (requiring compensation) whenever a regulation prohibits them from temporarily developing their property.

## ANALYSIS

In the wake of *Tahoe-Sierra*, property rights advocates will lament that the Court missed another opportunity to adopt a more coherent body of law by eschewing a categorical rule in favor of the *Penn Central* balancing test. A categorical rule inevitably would have remedied some uncertainty within regulatory takings jurisprudence, but only at the expense of "fairness and justice" to the public at large, a cost that environmental advocates are thankful the Court was unwilling to assume.[134] In this difficult area of law, where advocates for both property rights and environmental issues are ill at ease with the current state of regulatory takings jurisprudence, only one thing is clear: The *Penn Central* balancing test is now firmly established as the Court's chosen method for assessing regulatory takings.

Many environmentalists undoubtedly are in a quandary about the *Penn Central* test. Certainly, it is preferable to a categorical rule in analyzing whether or not an environmental regulation constitutes a taking because

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130. *Id.* at 1492 (Rehnquist, C.J., dissenting); *Id.* at 1474 n.8 (stating the majority's assessment of the dissent's causation theory).

131. *Id.* at 1492 (Rehnquist, C.J., dissenting) (quoting Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1017 (1992)).

132. *Id.* at 1496 (Thomas, J., dissenting); *see also infra* notes 135-38 and accompanying text for a more detailed discussion of the denominator.

133. *Id.* (Thomas, J., dissenting). Justice Thomas argues:

> I write separately to address the majority's conclusion that the temporary moratorium at issue here was not a taking because it was not a 'taking of the parcel as a whole . . . .' I had thought that *First English* put to rest the notion that the 'relevant denominator' is the land's infinite life. Consequently, a regulation effecting a total deprivation of the use of a so-called 'temporal slice' of property is compensable . . . unless background principles of state property law prevent it from being deemed a taking . . . .

*Id.* (Thomas, J., dissenting).

134. *Id.* at 1489 ("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.").

the *Penn Central* test at least attempts to balance all the factors in the case at hand. Moreover, when the Court implements the *Penn Central* test, it will often focus on the third prong of the test (the character of the government regulation) and uphold the regulation, even if the property owner has shown investment backed expectations and substantial economic impact.[135] For some in the environmental community then, *Penn Central* is a sufficient test even with its shortcomings, and *Tahoe-Sierra* signifies a victory. Others would argue, as this author does, that given the new and increasing environmental threats facing the United States today, *Penn Central* is not the proper framework within which to analyze regulatory takings and a different approach is necessary.

*(a) Criticisms of the Penn Central Test Abound*

The *Penn Central* test has been criticized for the ambiguous nature of its first two prongs. The first prong (the economic impact of the regulation on the property owner) has two inherent problems. First, the Court continues to disagree about how to calculate the impact. The equation the Court uses is a simple fraction with the numerator being the value of the property right taken, but the Court remains split over the proper denominator to use.[136] The denominator is the value of the pre-taking property with which the taken portion will be compared.[137] The majority in *Tahoe-Sierra* affirmed the general rule that the value of the "parcel as a whole" should act as the denominator.[138] The dissent, however, would allow conceptual severance, which in

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135. *See generally* Basil H. Mattingly, *Forum Over Substance: The Empty Ritual of Balancing in Regulatory Takings Jurisprudence*, 36 WILLAMETTE L. REV. 695, 699 (2000) (explaining that "the property owner is unlikely to prevail under the 'balancing' test").

136. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987) (citing Frank I. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1192 (1967)). The Court states:

> Because our test for regulatory takings requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.'

*Id.*

137. The denominator problem is contentious because anything less than a total taking (with the fraction being 1/1) will be analyzed under the *Penn Central* test, whereas total takings qualify under the categorical rule of *Lucas*. For a more in depth treatment of the denominator problem, *see* Dwight H. Merriam, *What is the Relevant Parcel in Takings Litigation?*, SC43 ALI-ABA 505 (1998); John E. Fee, Comment, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. CHI. L. REV. 1535 (1994); Benjamin Allee, Note, *Drawing the Line in Regulatory Takings Law: How a Benefits Fraction Supports the Fee Simple Approach to the Denominator Problem*, 70 FORDHAM L. REV. 1957 (2002).

138. *Tahoe-Sierra*, 122 S. Ct. at 1481. A criticism of the "parcel as a whole" approach is that with the denominator so broadly defined, the taken portion of the property will rarely

turn would provide for compensation whenever a segment is "taken" (even temporarily) in its entirety.[139] After the Court determines the proper denominator to use and attempts to quantify a "value lost," the second problem arises: Economic impact alone is not controlling.[140] The Court will not necessarily find a taking has occurred simply upon a showing of a certain amount of monetary loss.[141] Past cases have shown that even if the owner stands to lose millions, a taking does not automatically result.[142] In fact, economic impact may be somewhat misleading due to the importance the Court places on the property rights that remain in the entire parcel after enactment of a regulation. These traditional rights, such as the right to exclude others and to devise the property (both difficult to quantify in monetary terms) have proven to be equally important to show that "strands in the bundle" remain and all rights have not been abrogated.[143]

The investment-backed expectations prong of the test is similarly problematic.[144] At times, this prong has stood for a property owner's expectation of some kind of profit or reasonable return on her investment.[145] An-

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equal the entire fee simple. Total takings do not occur if some value or rights remain in the property.

139. *Id.* at 1496. (Thomas, J., dissenting). A problem with conceptual severance is that when the denominator is so narrowly construed, any regulation restricting a property right theoretically results in a taking.

140. *See* Andrus v. Allard, 444 U.S. 51, 66 (1979) ("It is, to be sure, undeniable that the regulations here prevent the most profitable use of appellees' property. Again, however, that is not dispositive. When we review [a] regulation, a reduction in the value of property is not necessarily equated with a taking."). *See also* Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 645 (1993). "[M]ere diminution in the value of property, however serious, is insufficient to demonstrate a taking." *Id.*

141. *See* Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 116 (1978) (explaining that owners stood to make three million dollars a year in rent from the proposed 55-story office building development).

142. *Id.*

143. *See Andrus,* 444 U.S. at 65-66.

> At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety. In this case, it is crucial that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds.

*Id.* (citations omitted). *See also* Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979) (explaining that "[i]n this case, we hold that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation").

144. *See* Lynda J. Oswald, *Cornering the Quark: Investment-Backed Expectations and Economically Viable Uses in Takings Analysis*, 70 WASH. L. REV. 91, 107 (1995) ("The net outcome of all the Court's efforts [to expound on what actually constitutes an 'investment-backed expectation'] is that the meaning of the phrase remains uncertain, rendering its effectiveness as a legal doctrine questionable at best.").

145. *Id.* at 106-07.

other way the Court has defined these expectations is to explain that a property owner might reasonably expect that her property would be subject to some government-imposed limitations.[146] The problem with this line of thinking, however, is:

> The expectations of the property owner that a change in legislation might or might not occur . . . are utterly irrelevant to takings law. Provided it stays within the constraints of the police power, the government clearly has the power and the right to amend a regulation if it so wishes, regardless of whether the amendment is . . . expected by the affected property owner. On the other hand, even a completely foreseeable regulatory change, if it exceeds the bounds of police power, is impermissible.[147]

A scholar who would compel the Court to use concrete economic theory rather than legal theory to interpret this prong acknowledges that the current descriptive "investment-backed expectations" is "analytically impoverished and must be subjected to quantitative economic analysis to infuse clarity into otherwise jumbled strings of words."[148] Thus, for a number of reasons, critics have called for a reformation of this prong.

From the position of a property rights advocate, the Court's attention to the first two prongs is often just an "empty ritual" before it utilizes its true test, *Penn Central*'s third prong: An evaluation of the character of the government regulation.[149] Even for proponents of an environmental regulation who are not unhappy with the result of a typical *Penn Central* analysis (such that the government regulation is upheld and the Court finds that no taking has occurred) it would seem that a new test is warranted. Indeed, if only one prong is to be dispositive, then pretending that the entire test is truly valuable leaves little faith in the Court's chosen analysis.

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146. *Id.* at 111-12.

147. *Id.* at 114-15.

148. William W. Wade, *Penn Central's Economic Failings Confounded Takings Jurisprudence*, 31 URB. LAW. 277, 298 (1999).

> Economists have characterized investments in terms of expectations regarding the timing, magnitude, and riskiness of outflows and inflows . . . . Therefore, the economic value of an investment is the present worth of the flow of future returns discounted at the investor's opportunity cost of capital, i.e., what he would expect to earn from the investment someplace else.

*Id.* at 298-99.

149. *See* Basil H. Mattingly, *Forum Over Substance: The Empty Ritual of Balancing in Regulatory Takings Jurisprudence*, 36 WILLAMETTE L. REV. 695 (2000).

*An Ecological Alternative: Expanding Nuisance Law to Encompass Harm to the Environment*

The *Penn Central* test is not the only avenue by which courts can assess takings claims that challenge environmentally protective regulations. A better analysis inheres in the doctrine of public nuisance, defined as "an unreasonable interference with a right common to the general public."[150] The Court's current focus on the third prong of the *Penn Central* balancing test makes this leap from a balancing test to a nuisance paradigm a small one. As the Court assesses the nature of the government regulation, it is effectively examining the validity of the state's police power. Environmental or land use planning regulations that are proven to prevent harm to publicly shared natural resources simply should fall under a common law nuisance analysis. This concept is not without precedent. Property has always been held under the caveat that its use must not threaten the health, safety, and welfare of the public.[151]

Rights to property exist only if recognized by law.[152] The Court has explained: "[N]ot all economic interests are 'property rights'; only those economic advantages are 'rights' which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion."[153] Consequently, as property rights change in response to society's values, so, too, should common law nuisance adapt to reflect the acceptable limitation on one's property use.[154]

While the framework of public nuisance is not new, an ecological nuisance paradigm would require progressive thought and legislative action. Given the Court's holding in *Lucas*, it is imperative that nuisance laws encompassing environmental degradation be in existence before the land use planning regulation is challenged on takings grounds.[155] Ecological nuisance

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150. RESTATEMENT (SECOND) OF TORTS §821B (1977).

151. *See* David S. Wilgus, Comment, *The Nature of Nuisance: Judicial Environmental Ethics and Landowner Stewardship in the Age of Ecology*, 33 MCGEORGE L. REV. 99, 120 (2001).

152. J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 ECOLOGY L. Q. 89, 116-17 (1995) (explaining that the emancipation of slaves, the abolition of a husband's property right over his wife's estate and the destruction of riparian water rights in the west are examples of how property rights have changed over time).

153. *Id.* at 115 (quoting United States v. Willow River Power Co., 324 U.S. 499, 502 (1945)).

154. BLACK'S LAW DICTIONARY 1095 (7th ed. 1999). Public nuisance is defined as "[a]n unreasonable interference with a right common to the general public, such as a condition dangerous to health, offensive to community moral standards, or unlawfully obstructing the public in the free use of public property." *Id.*

155. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1031 (1992). The Court explained:

laws would regard long-term land use planning as an appropriate vehicle for protecting the environmental health of communities. These laws inevitably would take precedence over short-term, individual economic gain and would limit certain property uses. The strength of a nuisance paradigm is its potential for flexibility and local control. This flexibility would allow legislatures to "set standards of right and wrong" and could be "easily tailored to the peculiarities of a given place."[156] Thus, building a vacation home would not usually constitute a nuisance unless the development was prohibited in cases such as Lake Tahoe, where it threatened the health of a community's shared natural resource.[157]

An inevitable criticism of the public nuisance doctrine is the malleable nature of the so-called "harm/benefit test."[158] The traditional understanding is that "[g]overnmental actions intended to confer benefits are exercises of the eminent domain power; governmental actions intended to prevent harm are exercises of the police power."[159] Arguably, any environmental regulation simultaneously confers benefits and prevents harm, and the point at which the scales tip to one side or the other is based on a court's subjective value judgment.[160] One commentator has suggested that this problem can be resolved and a property owner's rights can be safeguarded by the addition of a substantive due process analysis.[161] This analysis would examine: 1) the legitimacy of the government interest; 2) whether the regu-

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> We emphasize that to win its case South Carolina must do more than proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim such as [use your own property in such a manner as not to injure that of another] . . . . Instead, as it would be required to do if it sought to restrain Lucas in a common-law action for public nuisance, South Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found.

*Id.*

156. Eric T. Freyfogle, *Ethics, Community, and Private Land*, 23 ECOLOGY L.Q. 631, 656 (1996).

157. If a property owner was left with a 100% diminution in property value, it is still possible he or she could claim a categorical taking under a *Lucas* analysis. Since this is a relatively rare occurrence, however, it would be more likely that the challenged regulation (now addressed by the *Penn Central* test) could be considered using ecological nuisance laws.

158. *See* Oswald, *supra* note 143, at 139-43 (advocating for "resurrecting the correct regulatory takings analysis").

159. *Id.* at 139-40.

160. *See Lucas*, 505 U.S. at 1024 ("One could say that imposing a servitude on Lucas' land is necessary in order to prevent his use of it from 'harming' South Carolina's ecological resources; or, instead, in order to achieve the 'benefits' of an ecological preserve.").

161. Oswald, *supra* note 143, at 143-44 (explaining the means-ends test for police power set out in Lawton v. Steele, 152 U.S. 133, 137 (1894), which includes a consideration of the interests of the public, analysis of whether the means to accomplish that end are reasonable and a determination of whether individuals are unduly oppressed).

lation is a reasonable means by which to further the government's interest; and 3) whether this interest outweighs the property owner's burden.[162] In cases where the interests proffered by the government regulation fall short of overcoming the burden to a property owner, or are proven not to be a reasonable means to the governmental end, the regulation would be struck down. Alternatively, if the regulation passes this balancing test, then property owners would receive no compensation.

*Two Theories Support a Nuisance Framework: Reciprocity of Advantage and Land Stewardship*

Reciprocity of advantage is a theory founded on the "presumption that mutual restrictions on property use can enhance the total welfare of the affected landowners. Governmental regulation of land use is thereby justified by the reciprocal benefits that accrue to the burdened individuals."[163] Writing for the majority, Justice Holmes mentioned reciprocity of advantage in *Pennsylvania Coal*, and this concept has appeared in numerous regulatory takings cases ever since.[164] This theory supports the contention that on its face the *Penn Central* test weighs too heavily on the side of the property owner's economic impact, while not focusing enough on the fact that the regulation also might confer a benefit, thus eliminating the need for compensation.[165] It also favors a broader interpretation of common law nuisance because "[r]egulation of an owner's nuisance-like activities . . . produces direct, in-kind reciprocal advantages."[166]

Belief in a land stewardship model also compels environmentalists and progressively minded property scholars to support an expanded nuisance

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162. *Id.* at 144.

163. Raymond R. Coletta, *Reciprocity of Advantage and Regulatory Takings: Toward a New Theory of Takings Jurisprudence*, 40 AM. U. L. REV. 297, 302 (1990).

164. *Id. See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (distinguishing a previous holding in Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531 (1914) in which the Court upheld the legislature's decision to allow coal to be left in the ground. The Court explains that in *Plymouth*: "[It] was a requirement for the safety of employees . . . and secured an average reciprocity of advantage that has been recognized as a justification of various laws."). *See also* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491 (1987) ("Under our system of government, one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by restrictions, we, in turn, benefit greatly from the restrictions that are placed on others.").

165. Coletta, *supra* note 162, at 302. As Mr. Coletta explains:

> [These regulations] do not give rise to a takings challenge either because it is thought that benefits outweigh burdens and the regulations are, therefore, within the penumbra of substantive due process, or, alternatively, that the benefits that accrue from the regulations provide the necessary compensation to satisfy fifth amendment guarantees.

*Id.*

166. Coletta, *supra* note 162, at 356-57.

framework. The land stewardship theory is founded on Aldo Leopold's envisioned land ethic, which, although described over fifty years ago, is even more relevant today. Leopold urged people to regard land less as a thing to be owned and more as part of a community to be treated responsibly and carefully.[167] A stewardship model does not seek to eliminate private land ownership, but simply strives to acknowledge that property owners should accept the limitations on their property rights and use their land within those ecological and social parameters that benefit the public as a whole.

The brief mention of these two theories is important in order to give some philosophical context to the notion of an ecological nuisance framework. For a majority of citizens to support what some might call radical legislation, a change in thinking is necessary.[168] The reciprocity of advantage theory and a land stewardship model support an expansion of nuisance law as a legal alternative to regulatory takings challenges now addressed under the *Penn Central* test. Physical takings and regulations that deny owners all economically viable use of their property could still be challenged using a categorical rule. Ecological nuisance laws, however, would be the preferred standard for addressing environmental and land use regulations that simply limited private property use. The presence of state laws describing ecological nuisance would give agencies the freedom to regulate uses of land and the ability to better respond to the threats facing this country's natural resources. Equally important, such laws would provide the backdrop against which government infringement of private property rights could equitably be measured.

## CONCLUSION

The use of a nuisance analysis to determine the validity of the police power in promulgating environmental regulations has several strengths over the *Penn Central* test. First, it draws on existing common law nuisance principles, which offer continuity within regulatory takings jurisprudence. Second, like *Penn Central*, it incorporates the beneficial aspect of balancing by using a substantive due process analysis so that unique situations are given an opportunity for exception. This framework would not preclude a consideration of economic impact on the owner as a court could consider that impact along with the other "burdens." Third, it would honestly and

167. ALDO LEOPOLD, A SAND COUNTY ALMANAC 201-26 (Oxford University Press 1989) (1949). "We abuse land because we regard it as a commodity belonging to us. When we see land as a community to which we belong, we may begin to use it with love and respect." *Id.* at viii.

168. Property rights advocates will likely challenge the notion of an ecological nuisance paradigm on the grounds that constitutionally protected property rights will be lost. Undoubtedly, property rights will change, as they have done throughout the course of this country's history. It has been the role of the states to define the limits of those rights. *See* Byrne *supra* note 151, at 116-17 (citing examples in which certain property rights were abolished by force of law).

clearly apprise landowners of the limitations on their property rights without instilling hope that economic impact or investment-backed expectations would be weighed equally with the character of the government regulation. Finally, and as this case note suggests, most importantly, a nuisance analysis benefits the environment by allowing agencies the freedom to regulate on behalf of the environment without the threat of takings claims litigation.

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