

ELR

NEWS & ANALYSIS

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency: Is There a There There?

by Joel R. Burcat and Julia M. Glencer

On April 23, 2002, the U.S. Supreme Court released its decision in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,¹ ruling 6 to 3 that a temporary prohibition of the use of land does not effect a taking for which compensation is due under the Takings Clause of the U.S. Constitution. While it was widely anticipated that the Court would use *Tahoe-Sierra* to clarify some of the murkier areas of regulatory takings jurisprudence, the decision answers very few questions and obscures many others.

By adding *Tahoe-Sierra* to its lineup, the Court has only exacerbated the need for it to rule definitively on certain key issues, including the fate of partial takings claims under *Penn Central Transportation Co. v. City of New York*,² the true parameters of the total takings analysis under *Lucas v. South Carolina Coastal Council*,³ and how to define the property interest at issue. With the law of regulatory takings presently lacking any degree of predictability—typically a hallowed legal principle—only a property owner willing to risk substantial amounts on litigation expense can litigate a takings claim to conclusion. The critical nature of the right at stake, i.e., the interest in personal property explicitly protected by the Fifth Amendment, demands that the Court issue clear guidance on these persisting preliminary questions. The ruling, coming less than 10 months after the Court's ruling in *Palazzolo v. Rhode Island*,⁴ in which the Court appeared to foreshadow that it would be charting a clear course to finally explain the murkier parameters of regulatory takings law, suggests now that the answer to some of these questions is that “there is no there there.”⁵

Joel R. Burcat is a Partner with Saul Ewing LLP, resident in its Harrisburg, Pennsylvania, office, and Julia M. Glencer is an Associate with Kirkpatrick & Lockhart LLP, resident in its Pittsburgh, Pennsylvania, office. The authors, along with Carl A. Belin Jr., of Belin & Kubista, are counsel to the coal owners in *Machipongo Land & Coal Co. v. Commonwealth*, 799 A.2d 751 (Pa. 2002). This Dialogue is for informational purposes only. Nothing herein is intended or should be construed as legal advice or a legal opinion applicable to any particular set of facts or to any individual's or entity's general or specific circumstances. The opinions expressed in this Dialogue are the authors' and should not be attributed to any of the authors' or the firm's clients. For more information, go to <http://www.regulatorytaking.com>.

1. 122 S. Ct. 1465, 32 ELR at 20627 (2002). See U.S. CONST. amend. V (“nor shall private property be taken for public use, without just compensation”).

2. 438 U.S. 104, 8 ELR 20528 (1978).

3. 505 U.S. 1003, 22 ELR 21104 (1992).

4. 533 U.S. 606, 32 ELR 20516 (2001).

5. Gertrude Stein coined the phrase, “[t]here is no there there” in her book entitled EVERYBODY'S AUTOBIOGRAPHY (1936). The phrase captures Stein's reaction when, upon returning to California following a lecture tour to the United States in the 1930s, she desired to visit her childhood home in Oakland but was unable to find the house. The phrase, much to Oakland's dismay, has often been used to describe that city.

Just several months ago, in a recent Dialogue, we suggested that the Court's decision in *Palazzolo*, “is yet another sign of the general march of the Supreme Court toward stricter accountability for governmental land use decisions that adversely impact private property.”⁶ Now, we cannot be so certain. This Dialogue first examines the decision in *Tahoe-Sierra* and then explores three of the critical issues left open, and regrettably obscured, in its wake.

The *Tahoe-Sierra* Decision

Procedural History

Tahoe-Sierra presented a narrow issue for review by the Court: “[W]hether 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”⁷ As framed by the petitioner landowners, the case presented an all-or-nothing proposition.

At issue were two development moratoria imposed by the Tahoe Regional Planning Agency “to maintain the status quo while studying the impact of development on Lake Tahoe and designing a strategy for environmentally sound growth.”⁸ Ordinance 81-5 was effective for two years; Resolution 83-21 was effective for eight months.⁹ Under these two regulations, development on large portions of private property in the vicinity of Lake Tahoe was prohibited for 32 months.

A group of landowners¹⁰ brought suit, alleging that their property had been taken by the moratoria as well as by the agency's subsequently imposed regional plan and an injunction against that plan granted by a federal district court.¹¹

6. Joel R. Burcat & Julia M. Glencer, *Palazzolo v. Rhode Island and the U.S. Supreme Court's Increased Support of the Constitutional Protection of Private Property: A Response to Echeverria*, 32 ELR 10245, 10245 (Feb. 2002).

7. 122 S. Ct. 1465, 1470, 32 ELR 20627, 20627 (2002) (emphasis in original).

8. *Id.* As Justice Stevens noted in an elegant phrase, “[t]he lake's unsurpassed beauty, it seems, is the wellspring of its undoing.” *Id.* at 1471, 32 ELR at 20627.

9. *Id.* at 1470, 32 ELR at 20627.

10. The group included the Tahoe Sierra Preservation Council (representing approximately 2,000 owners of improved and unimproved land in the Lake Tahoe Basin) and a class of some 400 individuals owning land in the most ecologically sensitive areas of the basin. See *id.* at 1473, 32 ELR at 20628.

11. *Id.* at 1474, 32 ELR at 20628. The majority carefully pointed out, numerous times, that their review of the case was limited to the effect of the two moratoria. The landowners had challenged the two moratoria, the 1984 Regional Plan, and the federal district court injunction. The injunction had been entered after the state of California, on the same day the 1984 Regional Plan was adopted, successfully enjoined its implementation on the ground that it failed to establish land use controls stringent enough to protect the basin. See *id.* at 1473, 32 ELR at 20628.

The takings claim was premised on two earlier Supreme Court decisions that, together, appeared to cover the temporary moratoria situation: *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,¹² and *Lucas*. *First English* held that a landowner must be compensated for a “temporary” taking,¹³ while *Lucas* established that deprivation of all economically viable use of land resulted in a “total” taking for which compensation was owed.¹⁴

The district court, addressing only the moratoria,¹⁵ first determined that the landowners had not suffered a “partial taking” under the three-factor analysis of *Penn Central*. The *Penn Central* analysis balances “a complex of factors including the regulation’s economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action.”¹⁶ Specifically, with respect to investment-backed expectations, the district court found that the landowners did not possess a reasonable expectation that they would be able to build single-family homes within the 32-month period at issue.¹⁷

Next, the district court evaluated whether the landowners had suffered a total taking under *Lucas*, specifically finding that they had been temporarily deprived of “all economically viable use of their land,” i.e., the critical *Lucas* finding.¹⁸ Although unwilling to hold that *First English* and *Lucas* dictated that every moratorium would automatically effect a taking, the district court willingly found such a taking under the circumstances in this case because neither of the challenged regulations contained an express termination date.¹⁹ Having found that the moratoria worked a categorical taking, the district court ordered the agency to pay damages to most of the landowners according to the land type held.²⁰

Both parties appealed. Critically, the landowners appealed *only* from the dismissal of their claims regarding the regional plan and the federal court injunction; they did not challenge the adverse *Penn Central* determination.²¹

A three-judge panel of the U.S. Court of Appeals for the Ninth Circuit reversed, reasoning that reliance on *First Eng-*

lish and *Lucas* was misplaced.²² *First English*, according to the panel, held only that damages could be assessed *once* a temporary taking had been shown; *First English* did not establish that a temporary deprivation of the use of property demands compensation.²³ *Lucas*, moreover, applies only to the extremely rare case in which a regulation works a total deprivation of the land’s value, a situation that the panel found had not occurred here.²⁴

Key to the appellate court’s analysis was its rejection of so-called conceptual severance. As the panel explained:

Property interests may have many different dimensions. For example, the dimensions of a property interest may include a physical dimension (which describes the size and shape of the property in question), a functional dimension (which describes the extent to which an owner may use or dispose of the property in question), and a temporal dimension (which describes the duration of the property interest). At base, the [landowners’] argument is that we should conceptually sever each [landowners’] fee interest into discrete segments in at least one of these dimensions—the temporal one—and treat each of those segments as separate and distinct property interests for purposes of takings analysis. Under this theory, they argue that there was a categorical taking of one of those temporal segments. . . .

[A] planning regulation that prevents the development of a parcel for a temporary period of time is conceptually no different than a land-use restriction that permanently denies all use on a discrete portion of property, or that permanently restricts a type of use across all the parcel.²⁵

In each situation, the Ninth Circuit concluded, “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” within the meaning of *Lucas*.²⁶

The appellate panel decision in *Tahoe-Sierra* was divisive. Five judges dissented from the Ninth Circuit’s subsequent decision to deny rehearing en banc, arguing, in a vitriolic dissent, that the panel decision violated both *Lucas* and *First English* and allowed the government to impose the burden of improving the public condition on a select few in violation of fundamental principles of fairness.²⁷ The Supreme Court granted certiorari on the question of whether the moratoria effected a taking.²⁸

12. 482 U.S. 304, 17 ELR 20787 (1987).

13. *Id.* at 319, 17 ELR at 20791.

14. 505 U.S. at 1019, 22 ELR at 21108.

15. Both the district court and the U.S. Court of Appeals for the Ninth Circuit held that it was the federal injunction against implementing the Regional Plan, as opposed to the Plan itself, that caused alleged injuries to the landowners post-1984. See *Tahoe-Sierra*, 122 S. Ct. at 1474, 32 ELR at 20629.

16. *Id.* at 1475 n.10, 32 ELR at 20629 n.10 (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 617, 32 ELR 20516, 20517 (2001)).

17. 122 S. Ct. at 1475, 32 ELR at 20629 (citing *Tahoe-Sierra Preservation Council v. Tahoe Reg’l Planning Agency*, 34 F. Supp. 2d 1226, 1240, 29 ELR 21290, 21295 (D. Nev. 1999)).

18. *Id.* at 1475, 32 ELR at 20629 (citing 34 F. Supp. 2d at 1245, 29 ELR at 21297).

19. *Id.* at 1475-76, 32 ELR at 20629 (citing 34 F. Supp. 2d at 1250-52, 29 ELR at 21300-301).

20. *Id.* at 1476, 32 ELR at 20629.

21. *Id.* See also *id.* at n.14 (“the plaintiffs have stated explicitly on this appeal that they do not argue that the regulations constitute a taking under the ad hoc balancing approach described in *Penn Central*” (quoting *Tahoe-Sierra Preservation Council v. Tahoe Reg’l Planning Agency*, 216 F.3d 764, 773, 30 ELR 20638, 20641 (9th Cir. 2000)).

22. 122 S. Ct. at 1477, 32 ELR at 20630.

23. *Id.*

24. *Id.*

25. *Id.* at 1476-77, 32 ELR at 20629 (quoting 216 F.3d at 774, 776, 30 ELR at 20641, 20642).

26. 122 S. Ct. at 1477, 32 ELR at 20630. See also *id.* at n.15, 32 ELR at 20630 n.15.

27. See *Tahoe-Sierra Preservation Council v. Tahoe Reg’l Planning Agency*, 228 F.3d 998 (9th Cir. 2000) (Kozinski, O’Scannlain, Trott, T.G. Nelson, and Kleinfeld, C.J., dissenting from order denying petition for rehearing en banc).

28. 533 U.S. 948 (2001). It is interesting to note that the issue on which the Court granted certiorari was actually broader than the issue it ultimately addressed. Compare *id.* (“Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit limited to the following question: ‘Whether the Court of Appeals properly determined that a temporary moratorium on land development does not constitute a taking of property requiring compensation under the Takings Clause of the United States Constitution’”) with 122 S. Ct. at 1470, 32 ELR at 20627 (“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 under the Takings Clause . . .”).

Majority Decision

The majority decision in *Tahoe-Sierra* was authored by Justice John Paul Stevens and joined by Justices Sandra Day O'Connor, Anthony M. Kennedy, David H. Souter, Ruth Bader Ginsburg, and Stephen Breyer. In its introductory paragraph, the majority stressed the narrowness of the landowners' position and the burden that that position alone imposed, foreshadowing the Court's final conclusion:

[The landowners] make only a facial attack on [the moratoria]. 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. . . . For [the landowners], 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. . . . 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 on the particular circumstances of the case.²⁹

Launching into its analysis, the majority first firmly distinguished physical and regulatory takings—the former explicitly recognized by the Takings Clause itself; the latter only through relatively recent judicial interpretation.³⁰ This distinction is critical, as it allowed the Court to justify application of the so-called parcel as a whole rule, which has no application in physical takings cases, to regulatory takings claims.³¹ The Court stressed that physical appropriation cases are not controlling when analyzing regulatory takings claims in view of the fundamentally different nature of the government activity involved.³²

Next, the Court traced the evolution of *Lucas* for the express purpose of showing why its total taking analysis was

inapplicable. The Court noted that it had "generally eschewed any set formula" for determining when a regulation had "gone too far," choosing instead to use "ad hoc, factual inquiries."³³ In partial takings cases, the Court had typically examined a number of factors. Even where multiple factors are applied, however, a partial regulatory taking claim was to be assessed in terms of the "parcel as a whole"—a concept derived from the following language in *Penn Central*:

"Takings" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this 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[].³⁴

The Court, apparently in an attempt to show its consistent application of the parcel as a whole rule, then cited cases in which it had affirmed that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle [i.e., a taking of something less than the 'parcel as a whole'] is not a taking."³⁵

As it traced the development of its regulatory taking jurisprudence, the Court noted that even after its decision in *Penn Central*, it had not yet decided the remedial question of how compensation is measured once a taking was established. That question (and *only* that question, according to the *Tahoe-Sierra* majority) was addressed in *First English*, where it had been *assumed* that a taking had occurred and, thus, only the appropriate compensation for the temporary taking was at issue.³⁶ The *Tahoe-Sierra* majority also found hints in the *First English* decision to suggest that, if asked to rule on whether a taking had occurred, the Court might have found in *First English* that it had not.³⁷ At any rate, in light of its narrow understanding of *First English*, the *Tahoe-Sierra* Court stressed emphatically that it was leaving that decision intact.³⁸

The Court next explained why *Lucas* did not govern. Critically, in reciting the facts of that case, the Court stressed that the statute at issue in *Lucas* "effected a taking that 'was unconditional and permanent.'"³⁹ This understanding of *Lucas* allowed the Court to conclude that its holding in that case had been extremely narrow, i.e., that "the *permanent* 'obliteration of the value'" of the property constitutes a categorical or total taking.⁴⁰ Armed with this interpretation of *Lucas*, the Court concluded that "[c]ertainly, our holding [in *Lucas*] . . . does not answer the question whether a regulation

29. *Tahoe-Sierra*, 122 S. Ct. at 1477-78, 32 ELR at 20630 (footnote omitted).

30. *Id.* at 1478, 32 ELR at 20630.

31. *Id.* at 1478-79, 32 ELR at 20630. The Court explicitly acknowledged that: "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." *Id.* at 1478, 32 ELR at 20630 (internal citation omitted).

32. *Id.* at 1479, 32 ELR at 20631 ("Land-use regulations are ubiquitous and most of them impact property values in some tangential way—often in completely unanticipated ways. . . . By contrast, physical appropriations are relatively rare, easily identified, and usually represent a greater affront to individual property rights"). The majority's characterization of the affront from a physical appropriation as "greater" than that posed by a regulatory taking appears to be tied to its understanding of the effect of both types of takings. In footnote 19, attempting to refute Chief Justice William H. Rehnquist's criticism of their hard distinction between physical and regulatory takings, the majority explained:

[A physical appropriation] gives the government possession of the property, the right to admit and exclude others, and the right to use it for a public purpose. A regulatory taking, by contrast, does not give the government any right to use the property, nor does it dispossess the owner or affect her right to exclude others.

Id. at n.19, 32 ELR at 20631 n.19.

33. *Id.* at 1481, 32 ELR at 20631.

34. *Id.* (quoting *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130-31, 8 ELR 20528, 20534-35 (1978)).

35. 122 S. Ct. at 1481, 32 ELR at 20631 (quoting *Andrus v. Allard*, 444 U.S. 51, 9 ELR 20791 (1979); and citing *Gorieb v. Fox*, 274 U.S. 603 (1927); and *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 17 ELR 20440 (1986)).

36. 122 S. Ct. at 1482, 32 ELR at 20632.

37. *Id.*

38. *Id.* ("*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 the quite different and logically prior question whether the temporary regulation at issue had in fact constituted a taking.")

39. *Id.* at 1483, 32 ELR at 20632.

40. *Id.* (emphasis added).

prohibiting any economic use of land for a 32-month period has the same legal effect.”⁴¹

Then, in reasoning at the heart of the *Tahoe-Sierra* decision, the Court, as had the Ninth Circuit panel, refused to “sever a 32-month segment from the remainder of each landowner’s fee simple estate” and ask whether *that* segment had been taken in its entirety under the framework of *Lucas*.⁴² The majority explained that “[d]efining the property interest taken in terms of the very regulation being challenged is circular,” and that “conceptual severance” such as that engaged in by the district court violates the parcel as a whole rule.⁴³ Thus:

[T]he District Court erred when it disaggregated [the] property into temporal segments corresponding to the regulations at issue and then analyzed whether [the landowners] 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.⁴⁴

The Court did not halt its analysis once it explained the district court’s error, however. In dicta destined to be the focal point of numerous future takings decisions, the majority explained its understanding of *how* an interest in property is to be defined for purposes of the takings inquiry:

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. 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.⁴⁵

The Court stressed (again) that the categorical rule recognized in *Lucas* applies only to the rare case in which “a regulation permanently deprives property of all value.”⁴⁶ *Penn Central*, as opposed to *Lucas*, provides the default rule for regulatory takings cases. Thus, most takings claims will be run through the *Penn Central* multi-factor balancing test.

Having found that its jurisprudence did not support the *per se* rule embraced by the landowners, the *Tahoe-Sierra* majority then addressed, in an entirely separate section of the opinion, whether “considerations of ‘fairness and justice’” known to underlie the Takings Clause justified the creation of a new rule for a temporary restriction on the use of land. The Court dealt with, and rejected, seven different theories under which it might:

(1) recognize “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[;]”

(2) recognize “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 . . . [.]”

(3) recognize “a rule . . . 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[.]’”

(4) “characterize the successive actions of [the Agency] as a ‘series of rolling moratoria’ that were the functional equivalent of a permanent taking[.]”

(5) find that “the [A]gency was stalling in order to avoid promulgating the environmental threshold carrying capacities and regional plan mandated by the 1980 Compact[.]”

(6) find that “that the moratoria did not substantially advance a legitimate state interest[.]” and

(7) apply the *Penn Central* analysis.⁴⁷

Consideration of the last four theories was precluded on the record,⁴⁸ but the Court did address each of the proposed, and successively less encompassing, “rules” proposed by the landowners and their various supporting amici.

The categorical approach to temporary land use restrictions was rejected out of fear that it would turn “numerous ‘normal delays in obtaining building permits, changes in zoning ordinances, variances and the like’” into compensable takings.⁴⁹ Such a rule would “render routine government processes prohibitively expensive or encourage hasty decisionmaking,” and should be made, if at all, by a legislature as opposed to a court.⁵⁰ The Court was careful to point out, however, that “[i]n rejecting [the landowners’] *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.”⁵¹ The temporary nature of the restriction, in other words, would be weighed in the *Penn Central* balance.

The Court also rejected narrower rules that would exempt normal delays associated with permit processing or would apply only to delays in excess of one year. It was predicted that such rules would also impose serious financial constraints on the planning process.⁵² Moratoria, in particular, were characterized as “an essential tool of successful development,” allowing for maintenance of the status quo while permanent development strategies are being created.⁵³ The Court feared that tying a rule to the length of the delay would pressure government officials to “rush through the planning process or to abandon the practice altogether” and perversely encourage landowners to develop their property quickly, perhaps inefficiently and at odds with the final development plan.⁵⁴ Citing to Justice Kennedy’s opinion in

47. *Id.* at 1484-85, 32 ELR at 20632-33 (internal citations and footnotes omitted).

48. *Id.* at 1485, 32 ELR at 20633. First, the “rolling moratoria” theory had been briefed in the petition for writ of certiorari but not included in the grant of certiorari. Second, the district court’s unchallenged findings of fact defeated any argument that the agency had acted in bad faith or had not acted pursuant to a legitimate state purpose. Third, the landowners had expressly disavowed reliance on *Penn Central*. See *id.*

49. *Id.*

50. *Id.*

51. *Id.* at 1486, 32 ELR at 20633.

52. *Id.* at 1486-87, 32 ELR at 20633.

53. *Id.* at 1487, 32 ELR at 20634.

54. *Id.* at 1487-88, 32 ELR at 20634.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 1483-84, 32 ELR at 20632 (internal citation omitted).

45. *Id.* (internal citation omitted and emphasis added).

46. *Id.* (emphasis added).

Palazzolo, the Court emphasized its long-standing interest in preserving informed decisionmaking.⁵⁵ The Court also stressed the potential for “reciprocity” in that a moratoria can “protect[] the interests of all affected landowners against immediate construction that might be inconsistent with the provisions of the plan that is ultimately adopted” and potentially increase land values.⁵⁶

While the Court was willing to acknowledge that a moratorium lasting more than a year might be viewed with “special skepticism,” in *Tahoe-Sierra*, where the district court had specifically found that the 32-month delay was not unreasonable, the Court “could not possibly conclude that every delay of over one year is constitutionally unacceptable.”⁵⁷ Again, the Court stressed that duration will be an important factor to consider in a *Penn Central* balance. In the final analysis, the Court concluded that the interest in “fairness and justice” underlying the Takings Clause is “best served” in cases dealing with temporary restrictions on the use of property by the “familiar *Penn Central* approach,” as opposed to any newly created test.⁵⁸

In the final analysis, Justices O’Connor and Kennedy (who are the centrists in regulatory takings cases and who joined the majority in *Tahoe-Sierra*) were simply unable to accept the “all or nothing” proposition espoused by the landowners.

Dissenting Opinions

There were two dissenting opinions in *Tahoe-Sierra*: one by Chief Justice William H. Rehnquist, (joined by Justices Antonin Scalia and Clarence Thomas), the other by Justice Thomas (joined by Justice Scalia).

In his dissent, the Chief Justice first recharacterized the length of the restriction at issue. He viewed the ban on development as having lasted 6 years, not 32 months.⁵⁹ Thus, Chief Justice Rehnquist addressed a far different situation than the majority of the Court.⁶⁰

At the outset, he emphasized that the district court had found, in an unchallenged and intact finding of fact, that the land use restrictions had denied the landowners all economically viable use of their land—the key *Lucas* finding.⁶¹ The Chief Justice rejected the majority’s conclusion that *Lucas* was inapplicable simply because the taking was “temporary” in nature, urging that “[n]either the Taking Clause nor our case law supports such a distinction” between temporary and permanent restrictions.⁶² That distinction, he cautioned, was both tenuous and dangerous because “[u]nder the Court’s decision today, the takings question turns entirely on the initial label given a regulation There is every incentive for government to simply label any prohibition on development ‘temporary,’ or to fix a set number of years.”⁶³

The distinction, moreover, clashed with governing precedent. The Court had already stated in *First English* that “‘temporary takings which, as here, deny a landowner of all economically beneficial use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation.’”⁶⁴ And treating temporary and permanent takings differently also violated *Lucas* because the rule there established depended for its validity on the concept that “a ‘total deprivation of use is, from the landowner’s point of view, the equivalent of a physical appropriation.’”⁶⁵ To the Chief Justice, a temporary ban on development imposed via moratoria was akin to a leasehold taken by the government that, under established precedent, would require compensation for the limited time the property was under lease.⁶⁶

In the final analysis, Chief Justice Rehnquist rejected the majority’s position that *Lucas* applies only to permanent takings in favor of an unadorned and literal application of that decision to the facts at hand:

Lucas is implicated when the government deprives a landowner of “all economically beneficial or productive use of land.” The District Court found, and the Court agrees, that the moratorium “‘temporarily’” deprived [the landowners] of “all economically viable use of their land.” Because the rationale for the *Lucas* rule applies just as strongly in this case, the “temporary” denial of all viable use of land for six years is a taking.⁶⁷

Having found a taking, the Chief Justice then refuted the majority’s contention that applying the per se rule of *Lucas* would transform “an array of traditional, short-term, land-use planning devices” into takings.⁶⁸ Referencing the

55. *Id.* at 1488, 32 ELR at 20634 (citing *Palazzolo v. Rhode Island*, 533 U.S. 606, 620-21, 32 ELR 20516, 20518 (2001)).

56. *Tahoe-Sierra*, 122 S. Ct. at 1489, 32 ELR at 20634.

57. *Id.*

58. *Id.*

59. The Chief Justice noted that “[a] court cannot determine whether a regulation has gone ‘too far’ unless it knows how far a regulation goes.” 122 S. Ct. at 1490, 32 ELR at 20635 (Rehnquist, C.J., dissenting) (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)). Reading the grant of certiorari to encompass the issue of how long the ban on development lasted, the Chief Justice faulted the majority for simply accepting the Court of Appeals’ determination that the ban lasted 32 months and not engaging itself in this preliminary inquiry. 122 S. Ct. at 1490 n.1, 32 ELR at 20635 n.1. He went on to address the issue, reasoning that under ordinary principles of proximate cause applicable to this takings claim premised on 42 U.S.C. §1983, the agency “caused” not only the moratoria, but also the plan and the subsequent federal district court injunction that, taken together, restricted the landowners’ ability to use their property for six years. *See id.* at 1490-91, 32 ELR at 20635. Thus, “[b]ecause [the agency] caused [the landowners’] inability to use their land from 1981 through 1987, that is the appropriate period of time from which to consider their takings claim.” *Id.* at 1491, 32 ELR at 20635.

60. It would appear that even had he considered a ban of only 32 months, Chief Justice Rehnquist still would have found a categorical taking under *Lucas* in the first instance. The length of the ban may have made a difference only in his analysis regarding the affirmative defense under *Lucas*, i.e., he may have characterized a 32-month ban as something inherent in background principles of state law, whereas he refused to so characterize the 6-year ban. *See infra* notes 67-71 and accompanying text.

61. 122 S. Ct. at 1491-92, 32 ELR at 20635 (Rehnquist, C.J., dissenting).

62. *Id.* at 1492, 32 ELR at 20635.

63. *Id.*

64. *Id.* (quoting *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318, 17 ELR 20787, 20791 (1987)) (emphasis added).

65. *Id.* (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017, 22 ELR 21104, 21108 (1992)).

66. 122 S. Ct. at 1493, 32 ELR at 20636 (citing *United States v. Petty Motor Co.*, 327 U.S. 372 (1946); *United States v. General Motors Corp.*, 323 U.S. 373 (1945)). The Chief Justice also faulted the majority for reading *Lucas* as though it was concerned with value as opposed to the ability to use land. *See* 122 S. Ct. at 1494, 32 ELR at 20636.

67. *Id.* at 1494, 32 ELR at 20636 (quoting *Lucas*, 505 U.S. at 1015, 22 ELR at 21107).

68. 122 S. Ct. at 1494, 32 ELR at 20636 (citing 122 S. Ct. at 1485, 1486-87).

affirmative defense to categorical takings recognized in *Lucas*, he reminded the majority that “background principles of state law” could be used by the government to defeat a categorical takings claim if the restriction at issue “inhere[d] in the title [to the property] itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.”⁶⁹ A mere delay, such as may normally be associated with obtaining building permits or changes in zoning, would not amount to a categorical taking because such delays “are a longstanding feature of state property law and part of a landowner’s reasonable investment-backed expectations.”⁷⁰ The Court need not have decided whether a traditional moratoria would be a similar feature of state law because the moratoria at issue here—lasting six years—“far exceed[ed] that of ordinary moratoria” and could not “be said to resemble any ‘implied limitation’ of state property law.”⁷¹

In his separate opinion, Justice Thomas first took issue with the majority’s reliance on the parcel as a whole rule—a concept whose validity, Justice Thomas noted, had been questioned as recently as last term in *Palazzolo* and earlier rejected in *First English*.⁷² Second, unlike the majority, Justice Thomas refused to consider whether the property retained value once the moratoria was lifted, stating “[t]o my mind, such potential future value bears on the amount of compensation due and has nothing to do with the question whether there was a taking in the first place.”⁷³

Analysis

The decision in *Tahoe-Sierra*, as the majority itself stressed, offers only a narrow holding—that a land use restriction that deprives a property owner of all economically viable and beneficial use of land for a temporary period of time does not constitute a per se taking under *Lucas*.⁷⁴ This is an important limitation inherent in the decision itself. The determination, despite the effort by Justice Stevens to broaden it through dicta, is limited both by the original grant of certiorari and the Court’s own repeated description of the narrow issue before it.⁷⁵ Yet lower courts, attorneys, and commentators alike will surely spend considerable time and effort deciphering the decision’s abundant dicta for guidance in future, factually distinct situations. It would not be much of a bet to say that the determination in *Tahoe-Sierra* will be examined and parsed more for what it says about permanent takings than about temporary takings.

Three main doctrinal issues were reopened and/or remain open after *Tahoe-Sierra*: First, to what extent is a partial takings claim actually viable under *Penn-Central*? Second, what is the continued viability of a *Lucas* total taking claim

in the wake of the dicta in *Tahoe-Sierra*? And third, how is the so-called parcel as a whole rule to be applied in light of the sweeping dicta of the *Tahoe-Sierra* majority’s opinion?

Penn-Central and the Fate of Partial Takings Claims—Is “There a There There?”

The Court in *Tahoe-Sierra* reinvigorated the *Penn Central* balancing test for the vast majority of takings cases that do not fit within the narrowed confines of *Lucas*. While the Court has frequently listed the three main factors to be considered under *Penn Central*, the test itself is far from “familiar.” The analysis, by virtue of its very ad hoc nature, defies predictability. Although the language of the test may be “familiar” in that it has been repeated by the Court on many occasions, no in-depth analysis of *Penn Central*’s component parts has ever accompanied these recitations. The void is particularly problematic for parties attempting to assess the potential outcome of a partial takings claim.

Because the *Lucas* decision was not rendered until 1992, it is reasonable to assume that every regulatory takings case decided by the lower courts between 1978 (the year *Penn Central* was decided) and 1992 was analyzed using the *Penn Central* three-part test.⁷⁶ Successful challenges to regulatory takings such as *Nollan v. California Coastal Commission*⁷⁷ and *First English* in the Supreme Court, *Whitney Benefits, Inc. v. United States*⁷⁸ in the U.S. Court of Appeals for the Federal Circuit, and *Loveladies Harbor, Inc. v. United States*⁷⁹ in the U.S. Court of Federal Claims, all of which pre-date *Lucas*, must be understood under the *Penn-Central* construct.⁸⁰ The *Penn-Central* test, however, has not recently yielded a compensable taking in any of the factual circumstances addressed by the Supreme Court. And unlike the situation in *Palazzolo* (where the Court remanded for a *Penn Central* determination), because the property owners in *Tahoe-Sierra* did not appeal the adverse partial taking decision, remand was unnecessary. Thus, the fate of a temporary taking claim under *Penn Central* remains a mystery.

Despite all of the advances in regulatory takings law, there is still no precedent exploring the parameters of the test used to analyze partial takings claims. Thus, even

69. 122 S. Ct. at 1494, 32 ELR at 20636 (quoting *Lucas*, 505 U.S. at 1029, 22 ELR at 21111).

70. 122 S. Ct. at 1495, 32 ELR at 20637.

71. *Id.* at 1495-96, 32 ELR at 20637.

72. *Id.* at 1496, 32 ELR at 20637 (Thomas, J., dissenting).

73. *Id.* at 1497, 32 ELR at 20637 (Thomas, J., dissenting).

74. *Id.* at 1470, 1486, 32 ELR at 20629, 20633.

75. *Id.* at 1470, 32 ELR at 20629. See also *supra* note 28 (quoting the grant of certiorari). At least one court—the Supreme Court of Pennsylvania—appears to have recognized that *Tahoe-Sierra* was limited to the question of “the temporal division of property—can the property be viewed in discrete temporal units.” *Machipongo Land & Coal Co. v. Commonwealth*, 799 A.2d 751, 766 (Pa. 2002).

76. Under *Penn Central*, courts are to consider the following three factors: (1) “[t]he economic impact of the regulation on the claimant”; (2) “the extent to which the regulation has interfered with distinct investment backed expectations”; and (3) “the character of the government action.” *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 125, 8 ELR 20528, 20533 (1978).

77. 483 U.S. 825, 17 ELR 20918 (1987).

78. 926 F.2d 1169, 21 ELR 20806 (Fed. Cir. 1991).

79. 21 Cl. Ct. 153, 20 ELR 21207 (Fed. Cl. 1990), *aff’d*, 28 F.3d 1171, 24 ELR 21072 (Fed. Cir. 1994).

80. There are only a handful of recent lower court decisions finding a taking under *Penn Central*. In *American Pelagic Fishing Co., L.P. v. United States*, for example, the Court of Federal Claims found a taking in favor of the owner of a large commercial fishing trawler that was prevented by recently enacted and extremely targeted federal legislation from fishing for Atlantic mackerel and herring in the exclusive economic zone of the United States. 49 Fed. Cl. 36 (Fed. Cl. 2001). The facts of the *American Pelagic* case were rather extreme and, thus, it is difficult to predict how helpful the decision would be to other partial takings situations. The Court of Federal Claims has attempted to elucidate the *Penn Central* factors in other cases as well. See, e.g., *Walcek v. United States*, 49 Fed. Cl. 248 (Fed. Cl. 2001) (finding no taking); *Brace v. United States*, 51 Fed. Cl. 649 (Fed. Cl. 2002) (denying summary judgment for defendants and allowing case to go forward under *Penn Central*).

though the Court has, in recent years, removed barriers to such claims, it has not yet focused on the thorniest issue of them all, i.e., does a partial takings claim truly exist? It has, for example, honed the ripeness rules, warning governmental agencies against imposing ever-escalating demands for land use applications and holding that a landowner need not pursue further and futile applications with other agencies.⁸¹ The Court also recently refused to categorically bar takings claims by landowners who acquired property after the enactment of regulations.⁸² Yet, if the Court does not define the *Penn Central* test with greater precision, the removal of these barriers will be for naught. While a regulatory takings claimant may be able to frame the issue for decision, there may be “no there there” if the Court ultimately rules that a true partial taking does not exist under *Penn Central*. As it stands, the test is so amorphous and subjective that skepticism in the concept itself is ever growing. The Justices seem to be espousing a variant on Justice Potter Stewart’s famous standard for identifying pornography—a “we’ll know it when we see it” approach to partial takings.⁸³

There is, however, a very practical reason why the Court needs to address the fate of a *Penn Central* claim—a reason that ironically seems to have been lost while the doctrinal nuances of regulatory takings law were being developed. Parties, whether owners of private property or government agencies attempting to exercise their police power, need to know the limits of that power. While it is clear that the government may not exercise unlimited police power, it is not at all clear where the line has been placed, which, once crossed, converts government action from a legitimate exercise of police power to a taking of private property for which compensation is owed. The partial takings analysis was announced in 1978—almost a quarter century ago. It is time that the Court both define the limitation on police power inherent in the *Penn Central* test and clearly establish the extent of the police power authority of government. Failure to do so leaves all affected parties at sea.

Defining the Parameters of Lucas

By interpreting the *Lucas* principle to apply only to “permanent” takings, the Court appears to have narrowed the circumstances when a *Lucas* total taking claim may be successfully asserted. Prior to *Tahoe-Sierra*, it would have appeared that a categorical taking occurred whenever “all economically viable use” of property was restricted, either forever or for a temporary period of time. Other than this limitation on the time frame of the deprivation, however, the Supreme Court in *Tahoe-Sierra* has not instructed what the full parameters of a *Lucas* take might be, other than advising that *Lucas* applies only in extraordinary circumstances—a caveat it had already made in *Lucas* itself.

There are other significant aspects of *Tahoe-Sierra* that appear to undercut the reasoning that supports the rule devised in *Lucas*. The majority’s interpretation of *Lucas* itself, while based on the fundamental legal principle that holdings are fact-specific, appears to be quite strained. There was no

discussion in *Lucas* that the rule for categorical takings was limited to permanent takings. The rule was very simple:

[C]ategorical treatment [is] appropriate where regulation denies all economically beneficial or productive use of land. As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation “does not substantially advance legitimate state interests or denies an owner economically viable use of his land.”⁸⁴

The *Tahoe-Sierra* majority also stressed that physical takings and regulatory takings could not be analogized, explaining that

[t]his 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,” and vice versa.⁸⁵

This statement, however, is in clear conflict with the reasoning in *Lucas*, which was grounded in the reality that “total deprivation of beneficial use is, from the landowner’s point of view, the equivalent of a physical appropriation.”⁸⁶

An examination of *Tahoe-Sierra*’s comments about *Lucas* may tempt one to wonder about the continued validity of the doctrinal underpinnings of the categorical takings rule. As the Court’s latest decision appears to obscure what was once thought clear, litigants and courts must examine again the parameters of *Lucas*, even in a clear categorical taking case. Lower courts are certain to struggle anew with the meaning of *Lucas* in the wake of *Tahoe-Sierra*.

The “Parcel as a Whole” Rule

The reliance in *Tahoe-Sierra* on the “parcel as a whole” language from *Penn Central* is, as Justice Thomas suggested, quite puzzling. Just 10 months earlier, in *Palazzolo*, five Justices expressed a healthy skepticism for the continued validity of the concept itself:

This contention [raised by the landowner] asks us to examine the difficult, persisting question of what is the proper denominator in the takings fraction. See Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation Law,”* 80 HARV. L. REV. 1165, 1192 (1967). Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole, see, e.g., *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 497 . . . (1987); but we have at times expressed discomfort with the logic of this rule, see *Lucas, supra*, at 1016-1017, n.7, a sentiment echoed by some commentators, see, e.g., Epstein, *Takings: Descent and Resurrection*, 1987 SUP. CT. REV. 1, 16-17 (1987); Fee, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. CHI. L. REV. 1535 (1994). Whatever the merits of these criticisms, we will not explore the point here. [The landowner] did not press the argument in the state courts, and the issue was not presented in the petition for certiorari. The case comes to

81. See, e.g., *Palazzolo v. Rhode Island*, 533 U.S. 606, 32 ELR 20516 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 29 ELR 21133 (1999).

82. *Palazzolo*, 533 U.S. at 626-30, 32 ELR at 20519-20.

83. “[] I know it when I see it.” *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

84. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015-16, 22 ELR 21104, 21107 (1992) (internal citations and footnote omitted) (emphasis in the original).

85. *Tahoe-Sierra Preservation Council v. Tahoe Reg’l Planning Agency*, 122 S. Ct. 1465, 1480, 32 ELR at 20629, 20631 (2002) (footnote omitted).

86. *Lucas*, 505 U.S. at 1017, 22 ELR at 21108.

us on the premise that [the landowner's] entire parcel serves as the basis for his takings claim, and, so framed, the total deprivation argument fails.⁸⁷

Yet, the decision in *Tahoe-Sierra* turns on application of the parcel as a whole rule, at least insofar as the Court held that the parcel must be defined to include the *temporal* dimension of a property interest.⁸⁸ While the Court suggested that the *geographic* dimensions of the property must also be considered in defining the parcel,⁸⁹ because *Tahoe-Sierra* did not involve the geographic dimension, the Court's discussion is dicta on that point.⁹⁰

Future litigation, however, is certain to center on this critical threshold issue. In fact, just one month after the Supreme Court's determination in *Tahoe-Sierra*, the Supreme Court of Pennsylvania released its determination in *Machipongo Land & Coal Co. v. Commonwealth*.⁹¹ Much of the state court's decision in *Machipongo* rests on its interpretation of federal takings law on the issue of how to define the regulated parcel, i.e., the denominator of the takings fraction. The *Machipongo* decision, discussed briefly below, provides a unique and early glance into how *Tahoe-Sierra* may affect the landscape of regulatory takings jurisprudence.

Machipongo began its trek through the Pennsylvania state courts in 1992 after the Pennsylvania Environmental Quality Board, upon the recommendation of the Department of Environmental Resources, issued a regulation declaring the Goss Run Watershed located in Clearfield County, Pennsylvania, unsuitable for mining. Litigants owning coal reserves in the watershed (coal owners), filed a petition for review in the Commonwealth Court of Pennsylvania, claiming that the declaration constituted a taking of their property in violation of the Fifth Amendment. After much procedural skirmishing in the state courts as a result of the commonwealth's attempts to have the case dismissed, a trial was held before the Commonwealth Court of Pennsylvania.⁹² In 2000, the commonwealth court determined that portions of the coal owners' property had indeed been taken.

In a prior decision on summary judgment (subsequently used by the court and the parties as a road map for trial), the commonwealth court had devised a test (based upon the same legal criticism that the Supreme Court in *Palazzolo* seemed to endorse)⁹³ for determining the parcel to be reviewed in the takings analysis:

[T]he property interest by regulation approach is the best one to determine the denominator, but with some

important modifications . . . while the regulated land would first be considered under this approach, to determine whether it actually would be the denominator would depend on the answers the courts received to the following questions:

- whether the regulated land had value prior to the regulation;
- whether the regulated land has a separate use from the non-regulated contiguous parcel(s), i.e., whether it may be profitably used if it is the only parcel; and
- if the regulated land has value separate from the contiguous land, whether all of its economic benefit is gone.

If the regulated land had no value prior to the regulation because it had no viable use, it could not serve as the denominator . . . if the regulated land had an economically viable use separate and apart from any other contiguous land that was owned and became valueless after the regulation, it would become the denominator This approach is best because it fosters predictability, focuses on the effect of the governmental regulation on the property and not on the circumstances of the property owner, and results in fairness because it treats all property owners the same.⁹⁴

The Supreme Court of Pennsylvania (*Machipongo* court) rejected this thoughtful test, however, as "overly restrictive."⁹⁵ It also rejected the test proposed by the coal owners (consideration of only the regulated land) for the same reason and rejected the test proposed by the commonwealth (consideration of *all* of the coal owners' land in Clearfield County) as "overly inclusive."⁹⁶ The *Machipongo* court favored instead a so-called flexible approach, designed to account for factual nuances purportedly espoused by the Federal Circuit in *Loveladies Harbor*.⁹⁷ That test includes consideration of "a variety of factors . . . without making one factor more important than the other," including, but not limited to:

unity and contiguity of ownership, the dates of acquisition, the extent to which the proposed parcel has been treated as a single unit, the extent to which the regulated holding benefits the unregulated holdings; the timing of transfers, in any, in lights of the developing regulatory environment; the owner's investment-backed expectations; and, the landowner's plans for development.⁹⁸

Thus, the *Machipongo* court rejected a view that last year had the support of five Justices of the Supreme Court, in favor of a view espoused by a court of appeals in 1994.

In addition, the *Machipongo* court, relying on its interpretation of the Supreme Court's 1987 decision in *Keystone Bituminous Coal Ass'n v. DeBenedictis*,⁹⁹ viewed the relevant parcel as the entire vertical extent of the property, including the coal, support, and surface estates, which the Court defined as the "parcel as a whole." It believed that the Supreme Court had in *Keystone* (at least with respect to regulatory

87. *Palazzolo*, 533 U.S. at 631, 32 ELR at 20520.

88. 122 S. Ct. at 1483, 32 ELR at 20632.

89. *See id.* at 1484, 32 ELR at 20632.

90. Again, it is critical to note that the Supreme Court explicitly limited the question it was reviewing to "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 . . ." *Id.* at 1470, 32 ELR at 20627.

91. 799 A.2d 751 (Pa. 2002).

92. *See Machipongo Land & Coal Co. v. Commonwealth*, Department of Environmental Resources, 155 Pa. Commw. 72, 624 A.2d 742 (1993) (*Machipongo I*), *rev'd in part*, 538 Pa. 361, 648 A.2d 767 (1994) (*Machipongo II*), *modified*, 544 Pa. 271, 676 A.2d 199 (1996) (*Machipongo III*), *on remand*, 719 A.2d 19 (Pa. Commw. 1998) (*Machipongo IV*).

93. *Compare Palazzolo v. Rhode Island*, 533 U.S. 606, 631, 32 ELR 20516, 20520 (2001) *with Machipongo IV*, 719 A.2d at 28 n.22.

94. 719 A.2d at 28 (footnotes omitted), *rev'd*, 799 A.2d 751 (Pa. 2002).

95. *Machipongo*, 799 A.2d at 768.

96. *Id.*

97. 28 F.3d 1171, 1181, 24 ELR 21072, 21076 (Fed. Cir. 1994).

98. *Machipongo*, 799 A.2d at 768.

99. 480 U.S. 470, 17 ELR 20440 (1987); 799 A.2d at 767 (referring to "the clear rejection by the federal high court of Pennsylvania's division of estates").

takings) overruled Pennsylvania property law explicitly recognizing the segmentation of these estates. The *Machipongo* court, relying on its interpretation of *Keystone*, *Penn Central*, and *Tahoe-Sierra*, concluded that “the relevant parcel cannot be vertically segmented and must be defined to include both the surface and mineral rights.”¹⁰⁰

The *Machipongo* court also expressed concern with the horizontal extent of the parcel to be considered in the takings analysis. It remanded portions of the case for a determination based on the multi-factor test it had adopted.¹⁰¹ The lower court was instructed to identify additional facts to obtain an “appropriate horizontal conceptualization of the property to use in both the *Lucas* and *Penn Central* analyses.”¹⁰²

It was the repeated failure of the Court to identify an appropriate test for determining the extent of the parcel to be considered in the regulatory takings analysis that allowed the *Machipongo* court to reject the position of the coal owners, the government, and the lower court—all of which attempted to set forth an appropriate method for defining the denominator. The Supreme Court, having dealt with a plethora of procedural issues such as ripeness and the right to a jury trial, the existence of a *Penn Central* test versus a *Lucas* test, and other substantive issues, must once and for all face the most significant threshold question—namely, identification of the parcel subject to the takings analysis. If the code word in regulatory takings is “fairness” (and we believe it is), then the only way for property owners to be

treated fairly is to be advised by the highest court in the land concerning the parcel of property that will form the basis for the regulatory takings analysis.

Conclusion

Tahoe-Sierra should be viewed narrowly and as confined to its facts. Much of the decision was dicta, although six of the Justices appear to have indicated their present willingness to circumscribe the number of government actions resulting in compensable takings. At the same time, the release of *Palazzolo* (a decision that appeared to have favored property owners) just last term undercuts any ability to predict the Justices’ future leanings. Overall, the Court’s approach to regulatory takings jurisprudence is as variable as ever.

The Court must, however, deal squarely with two remaining issues—namely, the fate of a partial takings claim under the *Penn Central* analysis, and the determination of the denominator. It has been 80 years since the seminal regulatory takings decision in *Pennsylvania Coal Co. v. Mahon*¹⁰³ and 25 years since the announcement of the partial takings test in *Penn Central*. The Court must now address these critical issues, otherwise regulatory takings cases will forever remain moving targets, leading the regulated community and the government to continue to wonder whether “there is a there there.”

In all likelihood, however, *Tahoe-Sierra* serves only to reinforce that it will still be some time before a regulated person can determine when a regulation has—in the words of Justice Oliver Wendell Holmes—“gone too far” and effected a taking of private property. If anything, the Court’s emphasis in *Tahoe-Sierra* on the case-by-case evaluation to be made under *Penn Central* leaves the fate of takings claims more uncertain than ever.

100. *Id.* at 768.

101. See *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 24 ELR 21072 (Fed. Cir. 1994); *Florida Rock Indus. v. United States*, 791 F.2d 893, 16 ELR 20671 (Fed. Cir. 1986); *District Intown Props. Ltd. Partnership v. District of Columbia*, 198 F.3d 874 (D.C. Cir. 1999).

102. *Machipongo*, 799 A.2d at 769.

103. 260 U.S. 393 (1922).