December 2020

Twenty Years in Tahoe-Sierra - Why It's Right and Why It's Not a Satisfactory Solution

Damian Arguello

Follow this and additional works at: https://digitalcommons.du.edu/dlr

Recommended Citation

This Note is brought to you for free and open access by Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu,dig-commons@du.edu.
TWENTY YEARS IN TAHOE-SIERRA – WHY IT’S RIGHT AND WHY IT’S NOT A SATISFACTORY SOLUTION

INTRODUCTION

Regulatory takings have troubled courts and stakeholders for years. As environmental awareness grows, so does the complexity of regulation involved in developing large tracts of land sensitive to environmental damage. Take future home sites near Lake Tahoe. Literally.

In Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, the United States Supreme Court tried to settle the debate raised by its recent pro-property rights decisions favoring categorical, bright-line rules over ad hoc, factual inquiries. The Court’s decision, read in conjunction with the Ninth Circuit decision it affirmed, neatly fits recent categorical rules into the ad hoc framework by viewing them as exceptions to the ad hoc approach, which requires a balancing of government and private interests. The rationale behind the Court’s recent decisions employing categorical rules was that one factor weighed so dominantly that further analysis under an ad hoc framework became unnecessary. This approach is in the best interests of all stakeholders because it preserves the feasibility of the planning process, while still recognizing that some temporary regulatory actions result in takings. The categorical approach averred by landowners would make planning too expensive and encourage uncontrolled development at the expense of priceless natural resources.

1. A few definitions may help the reader understand this discussion. A regulatory taking is similar to physical taking of property by the government when it exercises eminent domain in situations such as purchasing land to construct a highway. Steven J. Eagle, Just Compensation for Permanent Takings of Temporal Interests, 10 Fed. Cir. B.J. 485, 489-90 (2001). A regulatory taking arises when governmental regulation so limits the owner’s use that the property is effectively taken. See id. The government must compensate the owner for a taking. See U.S. CONST. amend. V. A per se taking is a physical occupation of the property, while a categorical taking occurs when a property owner is deprived of all economically beneficial use of the property. Wendie L. Kellington, New Takes on Old Takes: A Takings Law Update, SG021 ALI-ABA 511, 513 (2001). A facial taking is a regulation so intrusive that its mere enactment creates a taking. Id. at 514. An as applied taking arises when a regulation as applied creates a taking. Id. An as applied taking requires a factual examination. Id. at 514-15. A facial taking does not—the court analyzes the regulation “on its face.” Id. at 514.

2. 122 S. Ct. 1465 (2002).

3. See, e.g., Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992) (holding that a categorical taking will be found where a property owner is deprived of all economically beneficial use of the property).


5. Tahoe-Sierra, 122 S. Ct. at 1483; Tahoe-Sierra, 216 F.3d at 772-73; see Lucas, 505 U.S. at 1017, 1019.
Still, despite its doctrinal soundness, the result for the landowners involved was hardly fair or just because the regulations at issue permanently deprived some of them of the opportunity to build "on land upon which . . . construction was authorized when purchased." Furthermore, the decision raises troubling issues for older or poorer landowners, who are faced with government regulations that keep them, however temporarily, from using their land as they intended. The time and cost spent litigating these disputes is draining for all stakeholders, and is a particular hardship for individual landowners, because the factual emphasis required by the ad hoc approach is inherently more expensive. All in all, the various stakeholders involved in land use controversies should strive for more proactive, cost-effective solutions, if only for the sake of avoiding the pain of litigation.

Part I of this comment looks at the pertinent facts of the case and the various moratoria enacted over the years that eventually gave rise to the taking claims presented by the Landowners. Part II discusses the Court’s regulatory takings jurisprudence and provides an in-depth look at the cases relied upon by the district court, the Ninth Circuit, and the Supreme Court as Tahoe-Sierra worked its way up the appellate ladder. Part III surveys the intricate procedural history of the case, which spanned well over a decade and a-half from the date of initial filing. Part IV of the comment addresses the Court’s decision in Tahoe-Sierra, and discusses the reasoning promulgated by the majority for its holding. This section also discusses the concerns raised by the two dissents filed in the case. Finally, Part V analyzes the effects the decision will have at both ends of the spectrum—for both landowners and government planners alike.

I. FACTS

The relevant facts of this case were undisputed. Lake Tahoe’s waters have historically been among the world’s clearest, exceeded only by Crater Lake in Oregon and Lake Baikal in the former Soviet Union. Mark Twain said of Lake Tahoe: "So singularly clear was the water, that where it was only twenty or thirty feet deep the bottom was so perfectly distinct that the boat seemed floating in the air! Yes, where it was even eighty feet deep." The lack of algae-nourishing nitrogen and phosphorous in the water discouraged algae growth, which in turn created the lake’s historic clarity.

6. Tahoe-Sierra, 122 S. Ct. at 1496 (Thomas, J., dissenting).
7. Id.
8. Id. at 1471 n.2 (citing S. REP. NO. 91-510, at 3-4 (1969)).
10. Tahoe-Sierra, 122 S. Ct. at 1471.
Unfortunately, as Justice Stevens observed, “[t]he lake’s unsurpassed beauty, it seems, is the wellspring of its undoing.” The beauty of the lake and its surroundings understandably attracted development, resulting in rapid deterioration of the lake’s waters from nutrient-rich runoff that reduced water clarity and promoted algae growth. Development has increasingly covered the area surrounding Lake Tahoe with impervious materials, such as buildings, asphalt, and concrete, which prevent precipitation from being absorbed by soil. Water flowing from driveways or roofs has more “erosive force” than rain or snow falling over a wide area covered with vegetation. Accordingly, the resulting heavier runoff carries more nutrient-rich topsoil into the lake.

The dramatic decrease in Lake Tahoe’s clarity first attracted notice when serious development began in the 1950s and early 1960s. And today, algae growth decreases the lake’s clarity by at least a foot per year; and if the lake turns green, its blue clarity could take over 700 hundred years to return, if ever. The obvious solution was to restrict development.

Development-exacerbated erosion particularly affects “high hazard” areas that include steeply sloped lands, as well as areas near streams and wetlands that ordinarily filter out nutrient-rich topsoil before it reaches the lake. Thus, development restrictions particularly targeted these “high hazard” areas.

Following a surge in attention to “developing environmental problems at the lake” during the 1960s, the legislatures of California and Nevada approved the bi-state Tahoe Regional Planning Compact in 1969 (“1969 Compact”). The 1969 Compact in turn led to the creation of the Tahoe Regional Planning Authority (“TRPA”), an administrative agency charged with coordinating the development and preservation of the area around the lake, including land under the jurisdiction of California, Nevada, and the U.S. Forest Service. Unfortunately, the failure of the 1969 Compact to substantially limit residential development or abate

11. Id.
12. Id.
13. Tahoe-Sierra, 34 F. Supp. 2d at 1231.
14. Id.
15. Id.
16. Id.
17. Id. at 1232.
18. Id.
19. Id.
20. Id.
21. Id.
22. Tahoe-Sierra, 122 S. Ct. at 1471-72.
environmental decline led to dissatisfaction with the TRPA's efforts. This dissatisfaction eventually prompted California and Nevada, with the approval of Congress and the President, to adopt the 1980 Tahoe Regional Planning Compact ("1980 Compact").

The 1980 Compact required the TRPA to create a comprehensive regional development plan by June 19, 1983. Specifically, the 1980 Compact required the TRPA to adopt "environmental threshold carrying capacities" by June 19, 1982, as a first stage, and a comprehensive development plan twelve months later. Furthermore, the 1980 Compact provided for temporary development restrictions until the enactment of the regional plan. Accordingly, effective August 24, 1981, the TRPA essentially prohibited development on high hazard areas until the TRPA created a new plan.

The TRPA failed to adopt carrying capacities until August 26, 1982, two months past the scheduled deadline. "Under a liberal reading of the Compact, TRPA then had one year from the adoption of the thresholds in which to adopt a new regional plan—or until August 26, 1983." However, the TRPA failed to meet the August 26, 1983 deadline, and, worried that this failure deprived it of jurisdiction to issue permits, suspended all permit issuance for ninety days. Unfortunately, on November 17, 1983, the TRPA still lacked a regional development plan, and therefore extended the moratorium indefinitely until it finalized a plan. The TRPA finally adopted a new regional development plan on April 26, 1984 ("1984 Plan"). Thus, the TRPA effectively prohibited all landowners from developing their holdings from August 26, 1983, through April 26, 1984 (approximately eight months), and prohibited development for owners of tracts in high hazard areas (the "Landowners") from August 24, 1981, through April 26, 1984 (approximately thirty-two months).

23. Id. at 1472 (commenting that California became so dissatisfied, it withdrew its funding of the TRPA and began its own regulatory efforts).
25. Tahoe-Sierra, 122 S. Ct. at 1472.
26. Id.
27. Id.
28. Tahoe-Sierra, 34 F. Supp. 2d at 1233-34.
29. Id. at 1235.
30. Id.
31. Id. at 1235-36 (emphasis added).
32. Id.
33. Id. at 1236.
34. Id.
Unfortunately, the story does not end here. The 1984 Plan extended the moratorium on building in high hazard areas until the TRPA finalized certain provisions of the plan. Furthermore, the TRPA failed to clarify whether the moratoria’s continuance would be temporary or permanent. Almost simultaneously, California filed suit to block implementation of the long awaited plan on the very day of its enactment. An injunction was issued against TRPA prohibiting the issuance of any permits, which lasted until the July 1, 1987 implementation of yet another plan (“1987 Plan”). Thus, as either a direct or indirect result of the TRPA’s actions, some Landowners could not build on their tracts for over six years. Moreover, the 1987 Plan permanently banned development of some high hazard areas.

II. BACKGROUND: REGULATORY TAKINGS JURISPRUDENCE

The Takings Clause of the Constitution has generated voluminous litigation as the courts have struggled to determine just when a regulatory taking requiring compensation arises. In recent years, the United States Supreme Court has adjudicated several regulatory takings claims that have generated considerable controversy. Recent cases appeared to have shifted the test from a fact-specific, ad hoc approach to categorical, “bright-line” rules.

The right to compensation for governmental taking of property originates in the Bill of Rights. The Fifth Amendment reads, in relevant part, “nor shall private property be taken for public use, without just compensation.” Early cases originally focused on property appropriation through physical seizure or through rendering it physically useless, and were generally associated with permanent takings for public works or infrastructure.

35. Id.
36. Id.
37. Id.
38. Id. at 1236-37.
40. See U.S. CONST. amend. V.; cases cited infra notes 47, 60, 67, 85, 91, 96.
41. See cases cited infra notes 47, 60, 67, 85, 91, 96.
43. See U.S. CONST. amend. V.
44. Id.
45. Alperin, supra note 42, at 169.
46. Eagle, supra note 1, at 487.
The concept of regulatory takings arose early this century in Pennsylvania Coal Co. v. Mahon. In Pennsylvania Coal, Mahon owned a home constructed upon land for which he held the surface rights. Pennsylvania Coal Company, however, held the mineral rights and wished to extract the underground coal. Mahon opposed the coal removal, claiming the extraction would cause his land and home to collapse. Mahon argued, and the Pennsylvania Supreme Court agreed, that a Pennsylvania statute prohibiting the coal removal was a legitimate exercise of the state's police power. The United States Supreme Court disagreed, holding that the statute was not a legitimate exercise of police power. The Court stated that the statute made it "commercially impracticable" to mine the coal under Mahon's property, effectively appropriating the coal and Pennsylvania Coal Company's property rights. The Court reversed the Pennsylvania Supreme Court, finding in favor of Pennsylvania Coal Company. Justice Holmes, writing for the Court, reasoned:

The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.

Thus, the doctrine of regulatory takings was born.

Conversely, the Court also recognized the existence and validity of situations justifying the diminution of property interests without compensation:

Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. . . . When [diminution] reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts.

---

47. 260 U.S. 393, 415 (1922) (holding that "if a regulation goes too far, it will be recognized as a taking").
49. Id.
50. Id.
51. Id.
52. Id. at 414.
53. Id.
54. Id. at 416 (requiring the State to compensate Pennsylvania Coal Co. for its inability to exercise its property rights).
55. Id. at 415-16.
56. Id. at 413.
These comments seemingly set the stage for the ad hoc rule ultimately endorsed by the Court in Tahoe-Sierra.\(^\text{57}\)

Before turning to Tahoe-Sierra, however, it is necessary to examine the major regulatory takings cases following Pennsylvania Coal. Pennsylvania Coal involved what was effectively a permanent regulatory taking of a mining company’s entire interest in a given property.\(^\text{58}\) While the Court recognized regulatory takings and implied an ad hoc approach to determine whether a taking had occurred,\(^\text{59}\) it did not prescribe a test to guide future regulatory takings cases. Such practical guidance did not come until 1978, in *Penn Central Transportation Co. v. New York*.\(^\text{60}\)

In *Penn Central*, the Court held that New York City’s Landmarks Preservation Law, which prevented construction of a building atop Grand Central Station, did not affect a taking.\(^\text{61}\) The Court outlined three factors to weigh in determining whether a regulatory taking occurs: (1) the economic impact of the regulation on the claimant; (2) the extent to which regulation has interfered with the claimant’s investment-backed expectations;\(^\text{62}\) and (3) the character of the government’s action.\(^\text{63}\) While the first factor is relatively self-explanatory, the other two require further examination.

The Court defined the second factor—a regulation’s interference with a landowner’s investment-backed expectations—as economic harm to the landowner’s interests to the extent that those interests no longer constitute “property” for Fifth Amendment purposes, taking into account the foreseeable limitations on the landowner’s use.\(^\text{64}\) Restated, the inquiry turns on the landowner’s reasonable expectations, including limitations, for using the property at the time of investment.\(^\text{65}\) As for the third factor—the character of government actions—the Court noted that regulations promoting “health, safety, morals or general welfare” generally do not constitute takings.\(^\text{66}\)

Two years later in *Agins v. City of Tiburon*,\(^\text{67}\) the Court again favored an ad hoc approach over a categorical rule for deciding what constituted a regulatory taking.\(^\text{68}\) In *Agins*, the purchasers of unimproved

\(^{59}\) *Id.* at 413.
\(^{60}\) 438 U.S. 104 (1978).
\(^{61}\) *Penn Central*, 438 U.S. at 116-17, 119, 138.
\(^{62}\) *Id.* at 124 (citing Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962)).
\(^{63}\) *Id.* (citing United States v. Causby, 328 U.S. 256 (1946)).
\(^{64}\) *Id.* at 124-25.
\(^{65}\) *Id.*
\(^{66}\) *Id.* at 125 (quoting Nectow v. Cambridge, 277 U.S. 183, 188 (1928)).
\(^{67}\) 447 U.S. 255 (1980).
\(^{68}\) *Agins*, 447 U.S. at 260-61 (citing Kaiser Aetna v. United States, 444 U.S. 164 (1979)).
tracts, intending to use them for residential development, claimed that the city effectively took their property when it rezoned the area to restrict use to primarily single-family homes and open space.\footnote{Id. at 257-58, 262.} Relying on \textit{Penn Central}, the Court found that the rezoning substantially advanced legitimate state interests,\footnote{Id. at 259-60 (citing \textit{Socialist Labor Party v. Gillian}, 406 U.S. 583, 588 (1972); \textit{Goldwater v. Carter}, 444 U.S. 996 (1979) (Powell, J., concurring)).} which pertains to the third \textit{Penn Central} factor—the character of the government regulation.\footnote{See \textit{Agins}, 447 U.S. at 262-63.} The Court, addressing the first \textit{Penn Central} factor—the economic impact on the landowner—\footnote{See \textit{Agins}, 447 U.S. at 262.} said that to qualify as a taking, the owner must lose all economic use of the land.\footnote{\textit{Pa. Coal}, 260 U.S. at 415.} The Court noted that the rezoning still allowed the landowners to build as many as five single-family residences on the tract, implying that only total elimination, rather than mere diminution, of value constituted a taking.\footnote{\textit{Tahoe-Sierra}, 122 S. Ct. at 1489.} Finally, the Court found that the landowners were “free to pursue their reasonable investment expectations by submitting a development plan to local officials.”\footnote{See \textit{Agins}, 447 U.S. at 262.}

\textit{Agins} introduced several issues that the \textit{Tahoe-Sierra} Court faced. First, \textit{Agins} involved a challenge to the mere enactment of a regulation, or a \textit{facial challenge}, rather than an \textit{as applied} challenge, because the landowners’ failure to seek a development permit prevented the Court from evaluating whether the rezoning, \textit{as applied}, worked a taking.\footnote{\textit{Id.} at 260, 262.} Second, the Court appeared to apply a strict, complete-elimination-of-value threshold to the economic impact factor.\footnote{See \textit{id.} at 260, 262.} Third, the Court implied that to effect a taking, the interference with an owner’s reasonable investment-backed expectations must be total and permanent.\footnote{\textit{See id.} at 262.} Fourth, \textit{Agins} reintroduced the concept of “reciprocity of advantage,”\footnote{See \textit{id.} at 260, 262.} first found in \textit{Pennsylvania Coal},\footnote{\textit{Id.} at 259-60 (citing \textit{Socialist Labor Party v. Gillian}, 406 U.S. 583, 588 (1972); \textit{Goldwater v. Carter}, 444 U.S. 996 (1979) (Powell, J., concurring)).} on which the \textit{Tahoe-Sierra} Court would rely in justifying a fact based inquiry.\footnote{\textit{Id.} at 260, 262.} “Reciprocity of advantage” occurs when all property owners affected by a regulation suffer the same ill effects, a fact weighing against finding a taking of a single property.\footnote{\textit{Id.} at 260, 262.}
Finally, the Agins Court cited the “justice and fairness” principles\(^8\) that served as a basis for the Tahoe-Sierra Court’s decision.\(^9\)

Whereas Agins involved a facial challenge to a permanent regulation resulting in diminution of land value, the Court’s decision in First English Evangelical Lutheran Church v. County of Los Angeles\(^5\) addressed the question of whether a subsequently invalidated permanent land use prohibition required compensation to landowners who were totally deprived of usage while the regulation was in force. In First English, Los Angeles County permanently prohibited a church from rebuilding its children’s camp after a flood.\(^6\) The church challenged the California Supreme Court’s earlier decision in Agins, which limited the regulatory taking remedy to mere invalidation of the regulation.\(^7\) The First English Court held that if the regulation deprived the landowner of all use of its property, resulting in a taking, mere invalidation of the regulation provided a constitutionally insufficient remedy—just compensation must be paid for the taking.\(^8\) Justice Stevens’ dissent challenged, among other things, the Court’s conclusion that regulations “which would constitute takings if allowed to remain in effect permanently, necessarily also constitute takings if they are in effect for only a limited period of time.”\(^9\)

The Court, having implied in First English that a permanent development moratorium effects a taking only if it totally deprives a landowner of all economic use,\(^9\) formalized this rule in Lucas v. South Carolina Coastal Council.\(^9\) The landowner, Lucas, paid $925,000 for two residential lots on the South Carolina coast, only to have South Carolina permanently ban construction of any structure on coastal land two years later.\(^9\) During the appeals process, South Carolina authorized exceptions to the ban, which would have effectively removed any regulatory bar to Lucas’ development plans, had he applied for a permit.\(^9\) The Court held that when a state enacts a regulation permanently depriving the landowner of all economically beneficial use, the state only avoids compen-

\(^8\) Id. at 262-63.
sation if the landowner’s title does not encompass the proscribed use. This ruling implicated the investment-backed expectation factor by referring to limitations on the owner’s title.

In 2001, the Court delivered a complex decision in *Palazzolo v. Rhode Island*. Palazzolo owned property composed largely of coastal wetlands, to which he acquired title when the corporation that owned the property had its charter revoked in 1978. Palazzolo happened to be the corporation’s sole shareholder. Unfortunately for Palazzolo, Rhode Island proscribed development in coastal wetlands in 1971. Palazzolo did not begin his unsuccessful attempts to gain approval to develop the property until 1983.

The Court held that Palazzolo’s claim was not precluded, even though he gained title after Rhode Island passed the regulations and thus had constructive notice of the regulations. However, reasoning that the entire parcel of land was admittedly worth $200,000, the Court rejected Palazzolo’s claim that he had lost all economic use of his property and that his investment-backed expectations were frustrated. Thus, because a regulatory takings claim considers the parcel as a whole, the remaining usage and value of the uplands portion of the tract negated the diminution of value caused by the loss of economic use of the wetlands portion. Palazzolo asserted that the uplands and wetlands portions were distinct, arguing that he should be allowed to pursue a total deprivation claim of the wetlands portion. The Court, however, rejected this argument because Palazzolo did not present it in prior proceedings.

Against this checkerboard of cases came the *Tahoe-Sierra* case. Previously, the Court had distinguished regulatory takings from “normal delays” in the planning and governmental decision making process.

---

94. *Id.* at 1027.  
95. *Id.*  
98. *Id.*  
99. *Id.*  
100. *Id.*  
101. *Id.* at 628.  
102. *Id.* at 630-31.  
103. *Id.* at 631.  
104. *Id.* Palazzolo’s argument foreshadows the segmentation argument discussed later in this comment.  
105. *Id.* at 631-32.  
107. See, e.g., *First English*, 482 U.S. at 321 (“We limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits . . .”).
Tahoe-Sierra, however, the Court faced a thirty-two month delay resulting from the governmental decision making process.108

III. PROCEDURAL HISTORY OF TAHOE-SIERRA109

This section of the comment highlights only the procedural history of Tahoe-Sierra leading directly to the certified question addressed by the United States Supreme Court, though the case has a long and complex procedural history.110 One commentator remarked: "The full procedural history is more than any mortal can bear. If you study it, I recommend you do not attempt to operate any heavy machinery or drive a motor vehicle thereafter—it is too numbing."111

In 1984, the Landowners filed multiple suits in federal district courts in California and Nevada, with the United States District Court for the District of Nevada ultimately consolidating the cases.112 The lead plaintiff, Tahoe-Sierra Preservation Council, along with 448 other plaintiffs,113 asserted various claims, including violations of the Takings Clause, against numerous defendants, including the TRPA, California, and Nevada.114 After over fourteen years of litigation and several district court and Ninth Circuit opinions,115 the case finally went to trial in De-

---

108. Tahoe-Sierra, 122 S. Ct. at 1470.
109. Id.
113. Tahoe-Sierra, 34 F. Supp. 2d at 1229. The lead plaintiff, Tahoe-Sierra Preservation Council, Inc., is itself made up of over 2,000 separate landowners. Tahoe-Sierra, 122 S. Ct. at 1473.
114. Tahoe-Sierra, 34 F. Supp. 2d at 1236-37.
115. See cases cited supra note 110.
December 1998 on the narrow claim that the mere enactment of the TRPA ordinances under the 1984 Plan effected a taking.\textsuperscript{116}

At trial, the district court analyzed the case primarily against three United States Supreme Court precedents: \textit{Agins},\textsuperscript{117} \textit{Penn Central},\textsuperscript{118} and \textit{Lucas}.\textsuperscript{119} The district court found that the TRPA's actions substantially advanced a legitimate state interest, and thus did not constitute a taking under the first \textit{Agins} test.\textsuperscript{120} With respect to the second \textit{Agins} test, whether the TRPA's actions denied the Landowners economically viable use of their property, the district court said that either the \textit{Lucas} or \textit{Penn Central} test would apply, depending on the extent of the deprivation.\textsuperscript{121} That is, if the TRPA deprived the Landowners of all use, the \textit{Lucas} test applied; conversely, if the TRPA deprived the Landowners of partial use, the \textit{Penn Central} test applied.\textsuperscript{122}

The district court concluded that no taking took place under the \textit{Penn Central} test.\textsuperscript{123} The Landowners' failure to introduce evidence supporting diminution of value of individual tracts weighed against finding a partial taking on the basis of economic impact.\textsuperscript{124} The district court also found no unreasonable interference with the Landowners' reasonable investment-backed expectations.\textsuperscript{125} Specifically, since the Landowners presented no evidence of the moratoria's impact on individual Landowners, the district court evaluated only the impact on the Landowners as a group, finding that the average Landowner held a plot for twenty-five years before development and was aware of impending development restrictions at acquisition.\textsuperscript{126} Thus, a six-year delay in building could not unreasonably interfere with the reasonable investment-backed expectations of the Landowners as a group, though the district court noted that some individual Landowners might have held their land for almost twenty-five years when the government imposed the moratoria.\textsuperscript{127} With respect to the character of the regulation, because the Landowners retained some property rights, such as exclusion of others, the district court found the moratoria unequal to the virtual physical invasion necessary to work a taking.\textsuperscript{128}

\begin{itemize}
\item \textsuperscript{116} \textit{Tahoe-Sierra}, 34 F. Supp. 2d at 1229.
\item \textsuperscript{117} \textit{Agins} v. City of Tiburon, 447 U.S. 255 (1980).
\item \textsuperscript{120} \textit{Tahoe-Sierra}, 34 F. Supp. 2d at 1239-40.
\item \textsuperscript{121} \textit{Id.} at 1240.
\item \textsuperscript{122} \textit{Id.}
\item \textsuperscript{123} \textit{Id.}
\item \textsuperscript{124} \textit{Id.} at 1241.
\item \textsuperscript{125} \textit{Id.}
\item \textsuperscript{126} \textit{Id.} at 1240-41.
\item \textsuperscript{127} \textit{Id.}
\item \textsuperscript{128} \textit{Id.} at 1241-42.
\end{itemize}
The district court, however, did find that the Landowners suffered a categorical taking under the *Lucas* from the interim moratoria;\(^\text{129}\) though not from the three-year injunction imposed after approval of the 1984 Plan.\(^\text{130}\) The district court found that, despite the retention of limited actual use and value, as well as a few individual sales at greatly reduced prices, the Landowners as a group lost all economically viable use of their properties during the 1981-1984 moratoria.\(^\text{131}\) With respect to the loss of use after the 1984 Plan took effect, the district court found that, even if the new plan had allowed development of high hazard areas, the temporary restraining order and subsequent injunction still prevented development; thus, the TRPA’s actions were neither the factual nor proximate cause of loss of use from 1984 through 1987.\(^\text{132}\) Furthermore, the district court rejected the TRPA’s affirmative defense that the moratoria fell under the rule set forth in *First English*, excepting temporary planning moratoria as takings, because they lacked fixed termination dates.\(^\text{133}\)

Both parties appealed.\(^\text{134}\) The Landowners appealed the district court’s rejection of a taking for the period after the adoption of the 1984 Plan,\(^\text{135}\) but not the district court’s rejection of a partial taking under its *Penn Central* analysis; in fact, the Landowners expressly disavowed that argument on appeal to the Ninth Circuit.\(^\text{136}\) In addition, the Landowners appealed the district court’s pre-trial order dismissing their claims under the 1987 Plan as barred by relevant California and Nevada statutes of limitation.\(^\text{137}\) For its part, the TRPA appealed the district court’s finding of a categorical taking under the *Lucas* test.\(^\text{138}\)

The United States Court of Appeals for the Ninth Circuit affirmed in part and reversed in part.\(^\text{139}\) The Ninth Circuit remarked that the absence of evidence concerning the impact of the moratoria on individual Landowners, stemming from the parties’ stipulation that no such evidence would be presented in this facial challenge,\(^\text{140}\) limited its examination to the narrow issue of whether the mere enactment of the 1980 Compact and its accompanying moratoria effected a taking.\(^\text{141}\) Consequently, the

---

129. *Id.* at 1245.
130. *Id.* at 1236, 1247.
131. *Id.* at 1243-45.
132. *Id.* at 1247.
133. *Id.* at 1250.
135. Tahoe-Sierra, 216 F.3d at 771.
136. *Id.* at 773.
137. *Id.* at 771; see Tahoe-Sierra, 992 F. Supp. at 1229.
138. Tahoe-Sierra, 216 F.3d at 773.
139. *Id.* at 789.
140. *Id.* at 781 n.24.
141. *Id.* at 773.
Ninth Circuit limited its evaluation to the moratoria's "general scope and dominant features," rather than its actual effects on the Landowners. 142

The Ninth Circuit held that regulatory takings should be decided in an ad hoc fashion, balancing the public and private interests involved according to the Penn Central criteria. 143 The Ninth Circuit implied that the Lucas categorical rule, requiring compensation when regulation eliminates all beneficial use, was a variation of the Penn Central analysis in which ad hoc balancing is unnecessary because one factor becomes dispositive. 144

Because the Landowners disavowed any arguments under a Penn Central analysis, the Ninth Circuit focused on the contention that the TRPA's moratoria deprived the Landowners of all economically viable use of their land. 145 In support of this contention, the Landowners proposed analyzing this alleged categorical taking by conceptually dividing the Landowners' interests into three slices—physical, functional, and temporal—and considering only the portion of the temporal slice falling within the moratoria period. 146 Restated, the Landowners' argued that a temporary development moratorium inhibits the temporal segment, effectively eliminating all economic use of the property for that period. 147 The Ninth Circuit rejected this argument, stating that a regulatory takings claim requires analysis of the regulation's impact on the parcel as a whole, compared to a physical takings analysis, which allows conceptual severance. 148 The Ninth Circuit commented that accepting temporal segmentation risked "converting every temporary planning moratorium into a categorical taking" and depriving governments of "an important land use planning tool." 149

The Ninth Circuit further rejected the Landowners' assertion that the Court's holding in First English required temporal segmentation. 150 The Ninth Circuit held that First English decided only a remedial question—whether invalidation of the moratorium, absent compensation, was a sufficient remedy for a regulatory taking—not whether a temporary moratorium, in and of itself, constitutes a regulatory taking. 151 The Ninth Circuit further commented that the temporary taking in First English reflected not a temporary regulation or moratorium, but a permanent

142. Id. (quoting Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 397 (1926)).
143. Id. at 772.
144. Id. at 773.
145. Id.
146. Id. at 774.
147. Id.
148. Id. at 774-77.
149. Id. at 777.
150. Id. at 777-78.
151. Id. at 778.
moratorium made temporary only because it was later invalidated.\textsuperscript{152} The Ninth Circuit concluded that \textit{First English} did not apply to temporary moratoria because such moratoria are intended to be impermanent from the beginning.\textsuperscript{153} Finally, the Ninth Circuit rejected the Landowners’ reliance on cases requiring compensation for temporary governmental condemnation of leasehold interests as supporting conceptual temporal severance.\textsuperscript{154} It held that leaseholds involved physical occupation of property by the government, and thus were inapplicable to regulatory takings cases.\textsuperscript{155}

The Ninth Circuit reversed the district court’s holding that the Landowners were due compensation because the moratoria effected categorical takings under \textit{Lucas}.\textsuperscript{156} The Ninth Circuit concluded that the mere adoption of the temporary moratoria did not deprive the Landowners of all value or use of their land.\textsuperscript{157} It distinguished \textit{Lucas}, stating that the temporary nature of the moratoria preserved the present value of the future use of the land, precluding the moratoria’s interference from rising to the level of a total deprivation of economic use under \textit{Lucas}.\textsuperscript{158} However, the Ninth Circuit conceded that a temporary moratorium, lengthy enough to eliminate the present value of the future use of a property, could result in a categorical taking.\textsuperscript{159}

With respect to the Landowners’ assertion that the additional moratoria from 1984 to 1987 resulted from the 1984 Plan, and not the injunction issued by the District Court for the Eastern District of California, the Ninth Circuit found that the injunction prevented the implementation of the 1984 Plan, and thus the Plan could not have caused the Landowners’ damages.\textsuperscript{160} Finally, the Ninth Circuit affirmed the district court’s dismissal of the Landowners’ claims concerning the 1987 Plan.\textsuperscript{161} And, over the dissent of five judges, the Ninth Circuit denied a petition for rehearing \textit{en banc}.\textsuperscript{162}

\textsuperscript{152} \textit{Id.} (citing \textit{First English Evangelical Lutheran Church v. County of L.A.}, 482 U.S. 304, 310 (1987)).
\textsuperscript{153} \textit{Id.} at 778.
\textsuperscript{154} \textit{Id.}
\textsuperscript{155} \textit{Id.} at 779.
\textsuperscript{156} \textit{Id.} at 782.
\textsuperscript{157} \textit{Id.} at 780-81.
\textsuperscript{158} \textit{Id.} at 781.
\textsuperscript{159} \textit{Id.}
\textsuperscript{160} \textit{Id.} at 784.
\textsuperscript{161} \textit{Id.} at 789.
IV. THE SUPREME COURT’S DECISION IN TAHOE-SIERRA

The Supreme Court affirmed the Ninth Circuit’s judgment. The Court certified the narrow question of “[w]hether 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.” Justice Stevens delivered the opinion, with Justices O’Connor, Kennedy, Souter, Ginsburg, and Breyer joining. Chief Justice Rehnquist, joined by Justices Scalia and Thomas, dissented. Justice Thomas filed a separate dissent, in which Justice Scalia joined.

At the Supreme Court, the Landowners again cited Lucas and First English as support for their argument for a per se, categorical rule. In addition, they relied on the Armstrong principle that the intent of the Takings Clause was “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.”

Early on, the Court referred to the principle underlying its differential treatment of physical and regulatory takings cases, namely that physical takings involve property acquisition for public use, while regulatory takings involve prohibition of certain private uses of property. The Court noted that most land use regulations impact property values in some way, and that “[t]reating them all as per se takings would transform government regulation into a luxury few governments could afford.”

The Court affirmed the Ninth Circuit’s finding that First English addressed only the question of how to remedy a temporary regulatory taking. The Court stated that the limited remedial issue and holding of First English was “unambiguous,” and pointed out that the California state courts decided the remedial issue after assuming a taking had been claimed. In support of this conclusion, the Court noted that, on re-
TWENTY YEARS IN TAHOE-SIERRA

mand, the California Court of Appeals found no taking occurred, a finding the Court declined to review. Finally, the Court said its First English decision "implicitly rejected" the categorical approach the Landowners proposed.

The Court then distinguished Lucas, stating, "Certainly, our holding that the permanent 'obliteration of the value' of a fee simple estate constitutes a categorical taking does not answer the question whether a regulation prohibiting any economic use of land for a 32-month period has the same legal effect." The Court upheld the Ninth Circuit's rejection of temporal segmentation as a means of bringing the moratoria within the Lucas rule:

[The District Court erred when it disaggregated petitioners' property into temporal segments corresponding to the regulations at issue and then analyzed whether petitioners were deprived of all economically viable use during each period . . . . The starting point for the court's analysis should have been to ask whether there was a total taking of the entire parcel; if not, then Penn Central was the proper framework.]

The Court went on to say, "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."

Turning to the Landowners' Armstrong "justice and fairness" argument that the public, not the Landowners, should bear the burden of the moratoria, the Court addressed seven different theories under which it might have found a categorical taking. First, compensation is required whenever government temporarily deprives an owner of all economic use. Second, land use restrictions beyond normal permitting and zoning delays are compensable. Third, delays beyond a fixed time limit should be compensable. Fourth, TRPA's actions constituted a "series of rolling moratoria" functionally equivalent to a permanent taking.

175. Id. (citing First English Evangelical Church v. County of L.A., 210 Cal. App. 3d 1353 (1989)).
176. Id. (citing First English Evangelical Church v. County of L.A., 493 U.S. 1056, 1056 (1990)).
177. Id.
178. Id. at 1483 (emphasis added).
179. Id. at 1483-84.
180. Id. at 1484.
181. Id. (citing Armstrong, 364 U.S. at 49).
182. Id.
183. Id.
184. Id.
185. Id. at 1484-85.
Fifth, TRPA acted in bad faith in intentionally delaying the plan development.\textsuperscript{186} Sixth, TRPA's moratoria did not "substantially advance a legitimate state interest."\textsuperscript{187} And seventh, some Landowners might have prevailed under a \textit{Penn Central} analysis had they made individual challenges to the application of the moratoria to their properties.\textsuperscript{188}

The Court rejected the first three theories because they were \textit{per se} theories already encompassed in the certified question.\textsuperscript{189} The Court found the last four theories unavailable for various reasons.\textsuperscript{190} The "rolling moratoria" theory was not within the Court's review order.\textsuperscript{191} The district court's findings of TRPA's good faith barred the bad faith theory.\textsuperscript{192} Similarly, the district court found that the moratoria advanced legitimate state interests.\textsuperscript{193} Finally, the Landowners specifically disavowed all \textit{Penn Central} arguments.\textsuperscript{194}

The Court also took into account the costs and effects that a categorical rule would impose on planning: "A rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decisionmaking [sic]. Such an important change in the law should be the product of legislative rulemaking rather than adjudication."\textsuperscript{195} Furthermore, the Court stated that the "interest in facilitating informed decisionmaking [sic] by regulatory agencies"\textsuperscript{196} weighed against a \textit{per se} rule because "the financial constraints of compensating property owners during a moratorium may force officials to rush through the planning process or to abandon the practice altogether."\textsuperscript{197} The Court reasoned that a reduction in planning would cause landowners to hurriedly develop their property before a final plan was ready, "thereby fostering inefficient and ill-conceived growth."\textsuperscript{198}

Though the Court rejected a \textit{per se} rule, it expressly stated that it was not the temporary nature of the moratoria that gravitated against a

\textsuperscript{186} Id. at 1485.
\textsuperscript{187} Id.
\textsuperscript{188} Id. (emphasis added).
\textsuperscript{189} Id.
\textsuperscript{190} Id.
\textsuperscript{191} Id.
\textsuperscript{192} Id.
\textsuperscript{193} Id.
\textsuperscript{194} Id.
\textsuperscript{195} Id.
\textsuperscript{196} Id. at 1487.
\textsuperscript{197} Id. at 1487-88.
\textsuperscript{198} Id. at 1488.
Rather, the Court concluded that the *Penn Central* ad hoc approach best served the interests of "fairness and justice." 200

Chief Justice Rehnquist's dissent, joined by Justices Scalia and Thomas, took issue with several assumptions and conclusions by the majority. First, the dissent believed that the 32-month period considered by the Court was inaccurate; the correct period was approximately six years, including the 1984-1987 injunction. 201 Second, the dissent challenged the Court's distinguishing of *Lucas*, stating that in *Lucas*, the "permanent" ban lasted nearly two years, while the instant case involved a "temporary" ban of nearly six years. 202 Third, the dissent worried that government would be tempted to enact "temporary" moratoria and extend them indefinitely without having to compensate landowners. 203 Finally, the dissent argued that the six-year moratoria clearly exceeded the normal delays inherent in zoning decisions, and required compensation as takings. 204

In a separate dissent, Justice Thomas, joined by Justice Scalia, argued that *First English* precluded the Court's apparent conclusion that the temporary moratoria were not takings because they did not take the parcel as a whole. 205 Justice Thomas argued that *First English* settled this matter by holding that a total deprivation of a "temporal slice" of the property was a taking. 206 Citing the Landowners' desire to build homes for permanent, vacation, or retirement use, Justice Thomas stated that the land's recovery of value after the moratoria were lifted was "cold comfort" to property owners. 207 Diminution of value, in his opinion, should not determine whether a taking has occurred; it should simply determine the extent of compensation. 208

In summary, the Court's limited holding is that a fact based, ad hoc *Penn Central* analysis is the appropriate measure for regulatory takings claims involving temporary development moratoria. Because applying this test to the Landowners claims required evidence not presented at trial, the Landowners effectively lost for procedural reasons. Notwithstanding the dissent, the effect of the Court's decision in *Tahoe-Sierra* is to preserve the ad hoc approach to regulatory takings actions laid down in *Penn Central*. In declining to create a categorical rule in favor of or

199. *Id.* at 1486.
200. *Id.* at 1489.
201. *Id.* at 1490-91.
202. *Id.* at 1492.
203. *Id.*
204. *Id.* at 1494-96.
205. *Id.* at 1496.
206. *Id.*
207. *Id.* at 1496-97.
208. *Id.* at 1497.
against temporary development moratoria, the Court left open the possibility that, at least in some cases, such moratoria constitute takings.

V. ANALYSIS

While the decision is arguably a victory for environmentalists and government planners, this author—torn between environmentalist leanings and his own interests as a property owner—finds the injustice to the Landowners indirectly wrought by the opinion appalling. Yet, despite its effects on the Landowners, the decision should cause government planners to take caution because it does not say that temporary moratoria are never takings. From a regulatory takings jurisprudential standpoint, the decision is consistent with the Court’s early decisions, as well as its recent pro-property decisions. The decision is probably the correct one, in that it safeguards the broader practical interests of environmental protection and effective planning. However, it raises two serious concerns. First, it raises troubling cost and time issues for landowners faced with potential regulatory takings, particularly older or poorer landowners. Second, given the uncertain outcomes and high cost of regulatory takings litigation for landowners, environmentalists, and government planners alike, the stakeholders would be wise to seek more proactive and efficient means of resolving land use disputes.

Some commentators assert that the case is an “important victory” for environmentalists, putting the brakes on a “pro-property rights juggernaut.” Clearly, protecting Lake Tahoe’s water clarity was a prevalent concern throughout the case. It would be easy, from one perspective, to cheer for environmental groups pitted against wealthy Lake Tahoe Landowners, whose greed and glutinous desire to hoard the Lake’s beauty for their exclusive enjoyment may someday ruin it. However, as demonstrated later in this analysis, this would be a simplistic view.

Others have characterized the case as a triumph for governmental planning. John Marshall, general counsel for TRPA in the case, said that the decision “validates sensible regional planning by implicitly rejecting the hyperbolic rhetoric of property rights advocates. . . [It] elevates the planner’s prize—community’s interests—over the demands of developers to realize quick profits.” Even the Landowners acknowledged the necessity of good planning; they only challenged the distribution of the costs involved.

For the Landowners involved, the decision forever crushed any hope of justice because the decision to pursue a facial instead of an as applied approach procedurally eliminated any chance of success.\textsuperscript{212} Attorney Michael Berger, counsel for the Landowners (and the landowners in \textit{First English}) criticized the Court’s decision, saying, “I dissent – and so should you. You could be the next target, as no one is safe so long as the Court insists on dealing with abstract propositions rather than flesh and blood human beings.”\textsuperscript{213}

If the Tahoe-Sierra Landowners were indeed everyday folks with small tracts of land as Mr. Berger claims,\textsuperscript{214} the continued building of huge lakeside homes by celebrities such as Michael Milken and Mike Love of the Beach Boys,\textsuperscript{215} as well as commercial development such as hotels,\textsuperscript{216} makes Mr. Berger’s ire at the lack of compensation for Tahoe-Sierra’s purported taking understandable.

Nothing in the opinion explains how people whose land has been de facto confiscated for more than two decades, while the Milkens of this world get to build palatial waterfront mansions, obtained any benefit whatever. For a decision by the so-called liberal, or progressive, wing of the Court, the opinion is curiously devoid of any concern for individuals. It is a lifeless, soulless bureaucratic screed, callously nullifying cherished constitutional rights of individuals who have done nothing wrong.\textsuperscript{217}

One might say that some of the Landowners died fighting for justice. Since filing of the original suit in 1984, more than 55 Landowners have died.\textsuperscript{218} Others, especially elderly Landowners who had already held their tracts for many years before TRPA imposed the moratoria, found their investment-backed expectations obliterated by the Court’s decision and “will never see justice in the form of either compensation or the construction of the[ir] long-sought homes.”\textsuperscript{219} For these Landowners, the 1987 Plan made the moratoria permanent.\textsuperscript{220} and the district court

\textsuperscript{212.} Thomas E. Roberts, \textit{A Takings Blockbuster and a Triumph for Planning}, \textsc{Land Use L. \\& Zoning} \textsc{Dkg.}, June 2002, at 4.5 (“The fact that Tahoe-Sierra was a facial, as opposed to an as-applied, claim determined the outcome.”).

\textsuperscript{213.} Berger, supra note 211, at 7.

\textsuperscript{214.} \textit{Id.} (“There were no major developers, either, just moms and pops who wanted a home for vacation and retirement.”).


\textsuperscript{216.} \textit{Id.}

\textsuperscript{217.} Berger, supra note 211, at 8.

\textsuperscript{218.} Merriam, supra note 111, at 41.

\textsuperscript{219.} \textit{Id.} at 48 (quoting David Breemer of the Pacific Legal Foundation).

\textsuperscript{220.} Berger, supra note 211, at 7. While TRPA’s 1987 Plan created “transferable development rights” to enable such affected Landowners to trade their property for developable property, there is suggestion that this attempted solution is lacking. \textit{See, e.g., Suitum v. Tahoe Reg’l Planning Agency}, 520 U.S. 725, 728-32 (1997).
dismissed their claims pertaining to the 1987 Plan.\textsuperscript{221} These Landowners surely take "cold comfort" in the Court's comment that, had they asserted an as applied rather than a facial challenge, they might have prevailed under a \textit{Penn Central} analysis.\textsuperscript{222}

Despite the apparent injustice to the Landowners and Mr. Berger's dire warning to other landowners, governmental planners should sit up and take note because the decision does not immunize them from paying compensation in temporary moratoria cases. The Court left open the door for as applied challenges to temporary moratoria under \textit{Penn Central}. In a footnote, Justice Stevens wrote, "It may be true that under a \textit{Penn Central} analysis petitioners' land was taken and compensation would be due."\textsuperscript{223} While the \textit{Tahoe-Sierra} Landowners fared poorly in this case, government planners should be aware that property rights advocates are unlikely to simply lick their wounds and go away. Thus, the ruling affords governments no room to be slothful in creating and implementing land use plans.

With respect to the Court's regulatory takings jurisprudence, the case can be viewed as a clarification consistent with earlier precedent. For example, the categorical approach suggested by \textit{First English}, \textit{Lucas}, and \textit{Palazzolo} can now be more easily characterized as mere applications of the \textit{Penn Central} balancing test. Loss of all use or all economic use of a property is arguably economic impact on the claimant or interference with the claimant's investment-backed expectations.\textsuperscript{224} Similarly, the \textit{Agins} criterion of substantially advancing state interests—never an issue in \textit{Tahoe-Sierra}\textsuperscript{225}—defines the character of the regulation relevant to a \textit{Penn Central} analysis. Thus, \textit{Tahoe-Sierra} reinforces and clarifies prior decisions in this area.

Moreover, and notwithstanding the apparent injustice done to the Landowners, the decision is probably doctrinally correct. As the Court commented, without the ability to temporarily suspend development, governments could not protect us from ourselves when we build without regard to what we destroy.\textsuperscript{226} A categorical rule making any moratorium

\textsuperscript{223} \textit{Tahoe-Sierra}, 122 S. Ct. at 1478 n.16.
\textsuperscript{224} Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 216 F.3d 764, 773 (9th Cir. 2000) (“[O]ne factor of the \textit{Penn Central} test becomes dispositive.”).
\textsuperscript{225} Berger, \textit{supra} note 211, at 7.
\textsuperscript{226} \textit{Tahoe-Sierra}, 122 S. Ct. at 1488.
outside of normal zoning-type delays a taking would harm all of us far too much both economically and environmentally. 227

For example, assume the government enacts a six-month moratorium on rebuilding homes destroyed by wildfires until it can develop an effective fire and erosion control plan. Should the government be required to compensate the homeowners for this delay? Would the government’s extension of the delay to six years effect a taking, or did the homeowners’ investment-backed expectations necessarily include the risk of fire and resulting safety-related rebuilding delays? There are countless scenarios wherein a government imposes development delays beyond the normal zoning and permitting delays. Justice Holmes’ implication that compensating every regulatory delay endangers effective government is a valid concern strongly weighing against a categorical rule. 228

Temporary moratoria, regardless of actual length, should rise to extraordinary invasiveness before they effect a taking. For that reason, the ad hoc analysis endorsed in Tahoe-Sierra is probably the best measure because it allows the courts to distinguish reasonable from unreasonable delays by analyzing specific facts.

Despite its apparent practical and doctrinal soundness, however, Tahoe-Sierra illustrates a problem older landowners face in pursuing regulatory takings litigation: the litigation can take so long and its outcome can be so uncertain that, by the time the dust settles, so do they—in their graves. In addition, landowners of any age may now face greater difficulty and expense in litigating regulatory takings claims because an ad hoc approach, with its emphasis on facts, discourages facial challenges.

The Tahoe-Sierra Landowners chose to mount a facial attack for simplicity because it alleviated the need to show the effects of the moratoria as applied and thus simplified their task by eliminating ripeness issues. 229 In addition, given the large number of Landowners involved, this approach avoided the difficulty of proving many similar claims under the complex Penn Central test. 230 Future landowners will have to prove facts and thus incur more expense. One commentator suggests that individual landowners suffering similar moratoria are now essentially deprived of due process and access to the courts:

227. Id. at 1487 ("The interest in facilitating informed decisionmaking [sic] by regulatory agencies counsels against adopting a per se rule that would impose such severe costs on their deliberations.").
229. Merriam, supra note 111, at 44.
230. Id. at 48.
More important is the immediate problem of hampering recourse to effective judicial procedures that are so costly, complex, burdensome, and time-consuming as to de facto deny the victims of constitutional violations any judicial relief at all. If an aggrieved land owner must first go through a decade of administrative proceedings, and then litigation in hostile state courts, before being able to assert a ripe federal constitutional compensation claim in federal court, then how many land owners will be able to carry the burdens of doing so? I am hardly the first one to suggest it, but there comes a point beyond which due process of law is denied, not by being curtailed, but rather by forcing plaintiffs to partake in too much of it.

Nor are landowners alone in facing high litigation costs. During all the years of litigation, the governments involved obviously expended substantial resources defending themselves. Given the relative closeness of the Court's 6-3 decision, the uncertainties involved transform these costs into an enormous gamble. Is this really the best way to resolve such disputes? Given that some Landowners, in reality, had their property taken from them permanently without compensation, the answer seems clear: the stakeholders need to explore more proactive, effective, cooperative, and cost-efficient planning dispute resolution approaches.

CONCLUSION

In summary, the Court's decision provides the correct test for weighing regulatory takings claims because it preserves the government's ability to effectively and efficiently plan, while providing compensation for extraordinary planning delays. It is also a doctrinally sound decision that should cheer environmentalists somewhat. Nevertheless, the decision slams the door on the Landowners involved, and raises troubling questions for other landowners, especially older and poorer ones. Landowners and government planners alike need to give serious thought about how they deal with complex planning dilemmas. Given the potential time and money involved in litigating these cases, stakeholders would be wise to find more creative and cost-effective ways to balance their competing interests, if only to avoid the kind of protracted and expensive litigation that gave birth to this decision.

Damian Arguello*


* The author is a JD candidate at the University of Denver College of Law. The author would like to express appreciation to Thomas J. Ragonetti, Adjunct Professor of Law at the University of Denver College of Law and partner at the law firm of Otten, Johnson, Robinson, Neff & Ragonetti; Edward H. Ziegler, Jr., Professor of Law at the University of Denver College of Law;
and J. Thomas MacDonald, partner at the law firm of Otten, Johnson, Robinson, Neff & Ragonetti, for their valuable assistance during the preparation of this comment.