

3-9-2004

## The Metaphysics of Property: Looking Beneath the Surface of Regulatory Takings Law After Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency

Brian J. Nolan

Follow this and additional works at: <https://scholarship.law.slu.edu/lj>



Part of the [Law Commons](#)

---

### Recommended Citation

Brian J. Nolan, *The Metaphysics of Property: Looking Beneath the Surface of Regulatory Takings Law After Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 48 St. Louis U. L.J. (2004). Available at: <https://scholarship.law.slu.edu/lj/vol48/iss2/11>

This Note is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in Saint Louis University Law Journal by an authorized editor of Scholarship Commons. For more information, please contact [Susie Lee](#).

**THE METAPHYSICS OF PROPERTY: LOOKING BENEATH THE  
SURFACE OF REGULATORY TAKINGS LAW AFTER *TAHOE-  
SIERRA PRESERVATION COUNCIL v. TAHOE REGIONAL PLANNING  
AGENCY***<sup>†</sup>

“Where an excess of power prevails, property of no sort is duly respected. . . .  
Where there is an excess of liberty, the effect is the same, tho’ from an  
opposite cause.”<sup>1</sup>

I. INTRODUCTION

An opportunity to clarify the boundaries of regulatory takings law arose when the Supreme Court of the United States considered the alleged takings of property by the regional regulatory authority in the Lake Tahoe Basin in *Tahoe-Sierra Preservation Council Inc. v.*

*Tahoe Regional Planning Agency*.<sup>2</sup> For many years since its origin, the doctrine of regulatory takings has remained somewhat undefined. By the end of 2001, takings law had evolved into a nuanced and often convoluted judicial analysis as courts were challenged with determining the constitutionality of legislative approaches to limiting land use that have become more intrusive than ever before into the realm of private property ownership. Though such regulatory approaches are common responses to rapid growth and development that might have adverse impacts on a community, they deprive property owners of liberty and property rights in a way that the Constitution seems to expressly prohibit.

The Fifth Amendment to the Constitution of the United States provides that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”<sup>3</sup> The seemingly straightforward nature of the Takings Clause has given rise to jurisprudence over the past century that continues to generate intense discussion and debate.

For more than 200 years, property has existed as a boundary protecting individual rights from encroachment by local government and other citizens.

---

<sup>†</sup> This Comment was selected as the Best Student Work to be published in the *Saint Louis University Law Journal* for 2002-2003.

1. James Madison, *Property*, THE NAT’L GAZETTE, Mar. 29, 1792, reprinted in CLASSICAL FOUNDATIONS OF LIBERTY AND PROPERTY 185 (Richard A. Epstein ed., 2000).

2. 535 U.S. 302 (2002).

3. U.S. CONST. amend. V.

Embodied within the structure of the Constitution itself, private property maintains the essential character of the social compact—it defines the extent of the state’s police powers and establishes the frontier of the political landscape as a buffer between the majoritarian powers of democratic government and the American notions of liberty and personal independence.<sup>4</sup> But depending on who is asked, there are often competing characterizations of what “property” actually means. To many, private property is the bastion of liberty and the foundation of the values we hold sacred. To others, however, the nature of property is not so much concerned with individual significance as it is with the underlying relation that binds us together in society.<sup>5</sup>

The absence of a cogent scientific test for when a taking of property has occurred has led to inconsistent judicial decisions that do not provide an accurate guide for the decisions of both citizens and state government, property developers and land use planners, and property owners and advocates of sustainable development.<sup>6</sup> As a result, the Supreme Court accepted the opportunity to define just exactly what property the Constitution protects from being taken.<sup>7</sup> The Court would attempt the daunting task of defining the extent of property rights by trying, yet again, to differentiate between mere regulation and Constitutional taking.<sup>8</sup>

At the outset of the development of modern takings jurisprudence, there was some debate as to whether or not the Constitution was intended to require compensation for regulatory takings—where no physical property is actually

---

4. See, e.g., RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 15 (1985) (observing that the Lockean ideas of property from which our founders were largely influenced require “an explicit and rigorous theory of forced exchanges between the sovereign and the individual that can account both for the *monopoly of force* and for the *preservation of liberty and property*”) (emphasis added).

5. Myrl L. Duncan, *Property as a Public Conversation, Not a Lockean Soliloquy: A Role for Intellectual and Legal History in Takings Analysis*, 26 ENVTL. L. 1095, 1140 (1996) (noting that property was not viewed solely as an individualized end in the framework of Madisonian republicanism but as a means to achieve the public good). The author notes: “Thus the Revolutionaries did not intend to provide men with property so that they might flee from public responsibility into selfish privatism; property was rather the necessary basis for a committed republican citizenry.” *Id.* (quoting DREW R. MCCOY, *THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA* 68 (1980)).

6. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 216 F.3d 764, 771 (2000), *aff’d* 535 U.S. 302 (2002) (noting that “[c]ourts have had little success in devising any set formula for determining when government regulation of private property amounts to a regulatory taking”).

7. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 533 U.S. 948 (2001).

8. “The attempt to distinguish ‘regulation’ from ‘taking’ is the most haunting jurisprudential problem in the field of contemporary land-use law . . . one that may be the lawyer’s equivalent of the physicist’s hunt for the quark.” Charles M. Haar & Michael Allan Wolf, *Euclid Lives: The Survival of Progressive Jurisprudence*, 115 HARV. L. REV. 2158, 2170 (2002).

confiscated, but where some economically viable use is taken from a parcel of real property or where less than the whole value of the property in question is taken.<sup>9</sup> It is now well-established, however, that the government can “take” private property not only by the physical appropriation of a part or parcel of land but also by imposing substantial regulations upon private property.<sup>10</sup>

Justice Holmes pronounced, in *Pennsylvania Coal Co. v. Mahon* in 1922, that “[t]he 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.”<sup>11</sup> The murky question of when such government regulation of private property becomes too much, however, still haunts modern takings law. Since the vague regulatory takings principle was expressed, this Fifth Amendment protection of private property has given rise to an unclear body of law.<sup>12</sup> While the Takings Clause is designed to bar government from forcing some individuals to bear public burdens which, in all fairness and justice, should be borne by the public as a whole, the Supreme Court acknowledged that it “has been unable to develop any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action be compensated for by the

---

9. See, e.g., William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995) (contending that the evidence of original intent and early case law interpretations clearly indicate that the Takings Clause was intended to apply only to physical takings and not government regulations imposing limitations on property, and also that the limited scope of the takings clause reflects the fact that the founders believed that physical possession of property was particularly vulnerable to process failure). See also *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1055-60 (1992) (Blackmun, J., dissenting); Edward J. Sullivan & Nicholas Cropp, *Making It Up—“Original Intent” and Federal Takings Jurisprudence*, 35 URB. LAW. 203 (2003); John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099 (2000); William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 710, 711 (1985); Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 56-59 (1964-1965). But see Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis “Goes Too Far,”* 49 AM. U. L. REV. 181 (1999) (arguing contrary to most recent scholarship that the text and historical record of the Takings Clause support a just compensation requirement for so-called “regulatory takings”).

10. See, e.g., EPSTEIN, *supra* note 4, at 37-39; see also *Lucas*, 505 U.S. at 1019 n.8.

11. 260 U.S. 393, 415 (1922) (emphasis added).

12. Robert Brauneis, “*The Foundation of Our ‘Regulatory Takings’ Jurisprudence: The Myth and Meaning of Justice Holmes’s Opinion in Pennsylvania Coal Co. v. Mahon*,” 106 YALE L.J. 613, 679-80 (1996); Haar & Wolf, *supra* note 8, at 2169-70 (noting the “cacophony of opinions” in recent takings cases as “compris[ing] a cry for help by a badly divided Court”); James M. Reynolds, *Takings Jurisprudence and Complex Schemes of Land Use Regulation: What the Supreme Court Could Learn from the States*, 33 RUTGERS L.J. 457, 457 (2002) (observing that federal regulatory takings jurisprudence has “evolved into a *highly nuanced science* that defies easy categorization into bright-line rules or even readily ascertainable standards”) (emphasis added). See also Daniel J. Hulsebosch, *The Tools of Law and the Rule of Law: Teaching Regulatory Takings After Palazzolo*, 46 ST. LOUIS U. L.J. 713 (2002) (describing the difficulty of teaching this complex subject to first-year law students).

government, rather than allow such injuries to remain disproportionately concentrated on a few persons.<sup>13</sup>

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,<sup>14</sup> the Supreme Court was faced with the threshold question of whether or not a taking of private property had occurred because of government regulations that limited the use of such property. This Comment will briefly explore the nuances of the regulatory takings analysis that are rooted in the enduring conflict between private property rights and the ability of government to use the police power to regulate the use of real property to some degree in order to protect the general welfare, which includes the protection of public lands.<sup>15</sup> This Comment will attempt to show that the answer to an analysis of what kinds of government actions would actually constitute a taking necessarily hinges not only on how one characterizes the property interest allegedly taken by government regulation, but also on how we define the property that is actually protected by the Constitution and consequently the extent to which that property can be taken.<sup>16</sup>

In the context of the Supreme Court's recent decision in *Tahoe-Sierra*, this Comment illustrates the views of competing factions that fight over where the boundary between regulation and the free use of property exists. Ideas about the role property plays in our political economy serve as the foundation from which this Comment, and the Supreme Court, examines the question of when regulation crosses that line from accepted exercise of the police power to

---

13. See *Penn Cent. Transp. Co. v. New York*, 438 U.S. 104, 124 (1978) (citations omitted). See also Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1165 (1967).

14. 535 U.S. 302 (2002).

15. Lake Tahoe is owned by the States of California and Nevada, which hold it in trust for all residents, and it is also considered a navigable water of the United States. See NEV. REV. STAT. § 321.595 (2001) (enacted in 1979); *State of California v. Superior Court of Placer County*, 625 P.2d 256 (Cal. 1981).

16. See Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433, 1446 (observing that "[h]istorically, property definitions have continuously adjusted to reflect new economic and social structures"). "In determining whether government action affecting property is an unconstitutional deprivation of ownership rights under the Just Compensation Clause, a court must interpret the word 'taken.'" *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 n.17 (2002) [hereinafter *Tahoe-Sierra*] (noting also that in the regulatory takings question, "the predicate of a taking is not self-evident, . . . the analysis is more complex").

Professor Richard Epstein has reduced the analysis of the eminent domain clause to four essential questions that must be addressed, in sequence: Is there a taking of private property? Is there any justification for taking that private property? Is the taking for public use? Is there any compensation for the property so taken? See EPSTEIN, *supra* note 4, at 31. This Comment, like the case upon which it remarks, focuses on that threshold inquiry that must first be answered and the next question that logically follows from it: Is there a "taking" of some private "property"? And if so, is there any legitimate justification for the taking?

become an unconstitutional taking requiring compensation to aggrieved property owners. The regulatory takings analysis will hopefully become more clear and outcomes more predictable by internalizing the underlying assumptions and conceptualizations of property that structure the inquiry at its most fundamental level. In the end, this Comment does not attempt to formulate some new definition of property; rather, it suggests that the recent case law and academic literature reflecting the complexity of the property rights/land use planning conflict indicate that there might be no consistent characterization of property that can be applied in every situation. It is this recognition that will ultimately provide an opportunity for landowners and town planners—and invite judges and lawmakers—to more precisely define the metes and bounds of the private property that is protected by the Constitution.

This Comment will survey some of the approaches to conceptualizing the Constitutional definition of property that is protected from government interference, explore the role these models might play in influencing the direction of the ostensibly indefinite takings analysis, and endeavor to sketch an outline for a contemporary understanding of property that reflects traditional notions of fairness and justice and appreciates the political function that private property plays in maintaining the American republic. Part II of this Comment will investigate the utility that the idea of property has performed in American society, discuss the increasing power of government to regulate the use of private property, and provide a brief background of the law of takings before *Tahoe-Sierra*. Part III will discuss the factual circumstances leading to the *Tahoe-Sierra* litigation, the dueling approaches to the takings analysis advanced by the Court's three opinions, and the immediate legal consequences of the Supreme Court majority's 6–3 decision. Part IV provides an in-depth analysis of what the case represents in the evolution of takings jurisprudence, and it also considers the likely application of the holding for future property rights disputes. Finally, this Comment offers a brief conclusion concerning the inevitable political consequences of the *Tahoe-Sierra* decision and the possible effects it may have on the development of the doctrine of regulatory takings.

## II. LIFE, LIBERTY, AND THE PURSUIT OF PROPERTY

“When *I* use a word,” Humpty Dumpty said in a rather scornful tone, “it means just what I choose it to mean—neither more nor less.”

“The question is,” said Alice, “whether you *can* make words mean so many different things.”<sup>17</sup>

---

17. LEWIS CARROLL, THROUGH THE LOOKING-GLASS AND WHAT ALICE FOUND THERE 117 (1902), *quoted in* *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1356 n.12 (Fed. Cir.

Property plays an essential role in American society, however, nowhere in the Constitution is the term “property” actually defined.<sup>18</sup> The concept of private property is inexorably built into our ideal of individual freedom, and it holds a venerated position in the American dream.<sup>19</sup> The opportunity to acquire real property is an unassailable American right that is recognized by scholars as one of the philosophical foundations of our political system.<sup>20</sup> For government is instituted, according to James Madison, no less for the protection of property than for the protection of persons or individuals.<sup>21</sup>

Property rights hold a unique place in the American system, and the political philosophy of John Locke and other Enlightenment-era thinkers cultivated the belief that property was a “natural political right of individuals that preserved political liberty and fostered limited government.”<sup>22</sup> These ideas about property, based in emerging free market concepts of the relation of liberty and property, have been widely credited as influencing the beliefs of the

---

2002) (referencing Alice’s adventures to show the “creative use of language” in defining the words “permanent” and “temporary” that had previously been applied in Federal Circuit precedent extending the categorical taking analysis to “conclude that a permanent physical occupation, and therefore a taking, had occurred, without really requiring that the taking be permanent” in a temporal sense, but only permanent as an actual and direct physical occupation) (citations omitted).

18. Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1189-90 (1999) (noting that “in defining ‘private property,’ the Supreme Court . . . does not receive guidance from the text of the Constitution, a document that once mentions and nowhere defines the term”). “The text of the Takings Clause is ambiguous because the original understanding of the word ‘property’ is uncertain.” Gold, *supra* note 9, at 240. See also Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 996, 998 (2000) (labeling the four “incomplete and disconcertingly disconnected” visions of how courts should define property but believing that “an integrated understanding is still possible”).

19. See, e.g., VIRGINIA DECLARATION OF RIGHTS art. I (June 12, 1776) (listing as “inherent rights . . . the enjoyment of life and liberty, with the means of acquiring and possessing property”), <http://www.yale.edu/lawweb/avalon/virginia.htm> (last modified Dec. 18, 2003). See also JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 91 (1994) (noting Gouverneur Morris’s concept of property in the market economy as “the right to free use”).

20. See Frank Michelman, *Takings: 1987*, 88 COLUM. L. REV. 1600, 1626 (1988) (observing that “property [to the founders of American constitutionalism] was their inspiration for the idea of a private sphere of individual self-determination securely bounded off from politics by law”). Epstein’s version of takings doctrine is also embedded in a normative theory of constitutionalism that undertakes to treat both democracy and limited government as first principles. *Id.* See also Seán Patrick Donlan, *Virtue and Vigour: The Federalist and American Civic Republicanism*, 21 DUBLIN U. L.J. 90, 99 (1999) (noting that to early Americans, “[p]roperty was valorised not for its own sake . . . but for the sake of self-governance”).

21. THE FEDERALIST NO. 54, at 278 (James Madison) (Gary Wills ed., 1982).

22. DAVID A. SCHULTZ, PROPERTY, POWER, AND AMERICAN DEMOCRACY 169 (1992).

founders who organized the innovative social contract that created our nation.<sup>23</sup> Such influences can readily be seen in the proclamation of the self-evident truths expressed in the Declaration of Independence—that all men are born with certain unalienable rights such as “Life, Liberty and the pursuit of Happiness”<sup>24</sup>—and are also embodied within the structure of the Constitution itself.<sup>25</sup>

Over the past few decades, individual property rights have been more limited by government action.<sup>26</sup> Largely in response to the growth of the large regulatory state emerging in the 1970s, a political movement formed that advocated for stronger protection of private property rights from government interference by turning toward all three branches of government.<sup>27</sup> On the

---

23. See, e.g., JOHN LOCKE, *Second Treatise, in TWO TREATISES OF GOVERNMENT* 278 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690) (articulating the relation of government and private property in a civil society that comes out of the “state of nature”). Locke observed:

For the preservation of Property being the end of Government, and that for which Men enter into Society, it necessarily supposes and requires, that the People should *have property*, without which they must be suppos'd to lose that by entering into Society, which was the end for which they entered into it, too gross an absurdity for any Man to own.

*Id.* (emphasis in original). For a discussion of the transformation of property and its meaning in early America, see SCHULTZ, *supra* note 22, at 21-32 (attempting to describe how the meaning of property moved from the “level of political rhetoric, permeated political consciousness, and was translated into social reality” and specific social policies). See also LAURENCE H. TRIBE & MICHAEL C. DORF, *ON READING THE CONSTITUTION* 70-72 (1991) (pointing to the influence of the political philosophy of John Locke in giving content to the Takings Clause as understood by the Eighteenth Century American statesmen).

24. Compare THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men . . . are endowed . . . with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”), with LOCKE, *supra* note 23, at 406. Locke understood the protection of “Life, Liberty and Estate” as the state’s essential function. Richard A. Epstein, *History Lean: The Reconciliation of Private Property and Representative Government*, 95 COLUM. L. REV. 591, 593 (1995) (citing LOCKE, *supra* note 23, at 367).

25. See U.S. CONST. amend V; see also *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028 (1992). “[T]he notion . . . that title [to land] is somehow held subject to the ‘implied limitation’ that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our Constitutional culture.” *Lucas*, 505 U.S. at 1028.

26. Joseph L. Sax, *Some Thoughts on the Decline of Private Property*, 58 WASH. L. REV. 481 (1983). Sax noted:

I believe that we have moved in recent years from a situation . . . in which we generally encourage developmental rights, though recognizing they must from time to time be restrained . . . . As a result, we are in the midst of a major transformation in which property rights are being fundamentally redefined to the disadvantage of property owners.

*Id.* at 481.

27. Among the numerous inverse condemnation lawsuits filed over the past quarter century, people have often pressured the Executive Branch to act and strengthen property rights against government action. See Exec. Order No. 12,630, 3 C.F.R. 554-59 (1989), *reprinted in* 5 U.S.C.A.



other hand, the emergence of comprehensive land use planning as a means for citizen groups and municipal, state, and regional levels of government to control the harmful environmental effects of intense, sprawling urban and suburban development has, to some extent, offset the movement for the increased protection of property rights.<sup>28</sup> Such planning has become an integral tool in the process of progress, as it allows Americans to design calculated growth strategies that attempt to avoid the strain placed upon land and economic resources that too often accompany development and that has contributed to the decline of overall environmental quality of the country.

It is generally accepted that “the widespread and secure ownership of property is the sine qua non of prosperity.”<sup>29</sup> However, the founders

---

§ 601 (1996) (President Ronald Reagan’s 1988 Executive Order for Property Rights Legislation entitled “Government Actions and Interference With Constitutionally Protected Property Rights”) (attempting to go beyond the Supreme Court’s takings rules pronounced in the famous 1987 takings cases by relaxing the threshold standard for finding a taking and stating that such a taking occurs if a regulation only “substantially affects” the value of property); *see also* James M. McElfish, Jr., *The Takings Executive Order: Constitutional Jurisprudence or Political Philosophy?*, 18 ENVTL. L. REP. 10474 (1988) (calling the order a “fundamental[] restatement of the Administration’s core political philosophy of minimizing the intrusiveness of federal regulation upon private interests”). Ironically, it was Ronald Reagan himself who, as Governor of California, signed California’s bill endorsing the creation of the Tahoe Regional Planning Agency and, after early silence on the issue, praised the compact that created the agency that was the defendant in *Tahoe-Sierra*. *See* Dan Herber, Comment, *Surviving the View Through the Lochner Looking Glass: Tahoe-Sierra and the Case for Upholding Developmental Moratoria*, 86 MINN. L. REV. 913, 914 n.10 (2002).

Also, people have increasingly turned to the legislative branches of state governments for relief. For an analysis of a recent innovative legislative approach to the “perceived inability of constitutional law to adequately protect property rights from environmental regulations that were themselves a reaction to rapid changes in population, technology, and knowledge,” *see* George E. Grimes, Jr., *Texas Private Real Property Rights Preservation Act: A Political Solution to the Regulatory Takings Problem*, 27 ST. MARY’S L.J. 557 (1996) (summarizing the Texas Real Property Rights Preservation Act of 1995 requiring compensation when a regulation reduces the value of property by more than twenty-five percent). By requiring takings-impact assessments and providing a statutory bright-line definition of regulatory takings at a twenty-five percent reduction in the value of real property, the Act favors property owners and should increase government regulators’ awareness of such property rights relative to other public interests. *Id.* at 612. *See also* Mark W. Cordes, *Leapfrogging the Constitution: The Rise of State Takings Legislation*, 24 ECOLOGY L.Q. 187 (1997).

In addition, the Supreme Court has “reconceptualized the Takings Clause, deploying it as a powerful new tool to neutralize a wide range of environmental and land-use regulation and to uphold personal liberty—the right to own and use private property—that some Justices feel has been severely devalued.” Haar & Wolf, *supra* note 8, at 2169.

28. *See* ROBERT H. FREILICH, FROM SPRAWL TO SMART GROWTH: SUCCESSFUL LEGAL, PLANNING, AND ENVIRONMENTAL SYSTEMS 107-66 (1999).

29. Jeffrey W. Porter, *Will Property Rights Legislation Endanger Smart Growth Efforts?*, 30 REAL ESTATE L.J. 275, 285 (2002) (quoting TOM BETHELL, THE NOBLEST TRIUMPH: PROPERTY AND PROSPERITY THROUGH THE AGES, 172, 341 (1998)).

recognized that the regulation of property could not be outside the sphere of governmental power because it is in the nature of property rights that they require government to recognize and defend them, for “property rights are . . . defined, determined, and regulated by society.”<sup>30</sup> “[L]aw is born of property, not the reverse.”<sup>31</sup> And as the law has attempted to balance the conflicting ideas about the role of property in the development of the regulatory taking analysis, the courts have produced a “dense thicket” of jurisprudence resulting in confusion and frustration for land-use planning and property owners alike.<sup>32</sup>

A. *Property: “Not merely transparent, but dazzlingly, brilliantly so”*<sup>33</sup>

While it may seem intuitive, “property” is a term of art that is difficult to grasp and can be even more difficult to articulate.<sup>34</sup> The conception of property held by the specialist (the attorney or the economist, for example) is quite different from that held by the ordinary citizen.<sup>35</sup> Though there are many theories of how property interests should be characterized, there is no clear consensus on their definition. The elusive nature of how exactly to define the property interest(s) at stake in the regulatory takings analysis is the

30. NEDELSKY, *supra* note 19, at 91 (noting also that when identified with freedom, the case for the “inviolability of property” was a powerful one). Nedelsky contends that “[w]hatever their intrinsic values, life and liberty were not the reasons men joined together in societies and formed governments. It was only for the sake of property that men gave up the greater freedom of the state of nature and submitted themselves to the constraints of society and government.” *Id.* at 68. See also Thomas W. Merrill, *Zero-Sum Madison*, 90 MICH. L. REV. 1392 (1992) (reviewing NEDELSKY, *supra* note 19.).

31. BETHELL, *supra* note 29. “Property and law are born and must die together. Before the laws there was no property; take away the laws, all property ceases.” RICHARD PIPES, *PROPERTY AND FREEDOM* 104 (1999) (quoting philosopher Jeremy Bentham).

32. See *W.R. Grace & Co. Conn. v. Cambridge City Council*, 779 N.E.2d 141, 145 (Mass. App. Ct. 2002) (noting the court’s entrance into “the dense thicket of court decisions that have sought to establish the boundary between private property rights and permissible governmental action limiting the value of those rights”).

33. MARK TWAIN, *ROUGHING IT* 175 (Oxford Univ. Press 1996) (1872) (describing the exceptional clarity of Lake Tahoe’s water), *quoted in Tahoe-Sierra*, 535 U.S. 302, 307 (2002).

34. See, e.g., L.T. Hobhouse, *The Historical Evolution of Property, in Fact and in Idea* 3 (1913), *reprinted in* CLASSICAL FOUNDATIONS OF LIBERTY AND PROPERTY 369 (Richard A. Epstein ed., 2000). The author noted: “The divergence between legal theory and economic fact, between written law and popular custom, between implied rights and actual enjoyment, enables one and the same institution to be painted . . . in very different colours.” *Id.* See also Hanoch Dagan, *The Craft of Property*, 91 CAL. L. REV. 1517, 1519-20 (2003).

35. Thomas C. Grey, *The Disintegration of Property, in* NOMOS XXII: PROPERTY 69, 69 (J. Ronald Pennock & John W. Chapman eds., 1980) (proclaiming the “death of property” as commonly understood). Grey noted that “specialists and theoreticians have no answer; or rather, they have a multiplicity of widely differing answers, related only in that they bear some association or analogy, more or less remote, to the common notion of property as ownership of things.” *Id.* at 71. For a thorough analysis of the many different views of property, see BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977).

fundamental problem with such an undertaking.<sup>36</sup> An initial survey of the views of the competing factions that fight about where that boundary line between regulation and free use of property should be drawn will be helpful to understanding the regulatory takings analysis.

The English jurist William Blackstone defined the traditional view of property as “that sole and despotic dominion which one man claims and exercises over the external things of the world.”<sup>37</sup> Thus, property in its liberal and traditional sense is the right to ownership of an external thing or material object.<sup>38</sup> Even checking the thesaurus on a word processor, the word property produces only two synonyms: possession and land. But while the vestiges of an archaic concept of property pervade modern thought, property is more than just a *thing* that is owned; rather, it is the rights or relationships to particular interests in that thing that can be alienated from the proprietor without losing the right to other interests in the same tangible property.<sup>39</sup> In a modern economy, “[p]roperty [has become] identified less and less with the rural domain and more and more with capital goods and consumers’ durables.”<sup>40</sup> In fact, the Twentieth Century saw the emergence of the metaphor of property as a “bundle of sticks.”<sup>41</sup> Each stick symbolizes a specific interest that might be associated with a piece of real property, including in no particular order the right to use, the right to enjoy, the right to exclude others, and the right to

---

36. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1065 (1992) (Stevens, J., dissenting) (noting the “elastic nature of property rights”).

37. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (1803), cited in ROBERT MELTZ ET AL., THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND-USE CONTROL AND ENVIRONMENTAL REGULATION 25 (1999).

38. See BLACK’S LAW DICTIONARY 1232 (7th ed. 1999). In fact, Black’s defines “property right” as “[a] right to specific property, whether tangible or intangible.” *Id.* at 1323 (emphasis added).

39. See ACKERMAN, *supra* note 35, at 26. “I think it fair to say,” Ackerman surmised, “that one of the main points of the first-year Property course is to disabuse entering law students of their primitive lay notions regarding ownership.” *Id.* See also Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) (recognizing the social or political function of property).

40. Jean Baechler, *Liberty, Property, and Equality*, in NOMOS XXII: PROPERTY, *supra* note 35, at 276. Observing that “the connection between the new forms of property and freedom is less evident” than in the view from which the founders conceived of the importance of property, the author notes that “the relation between private property and liberty, so clear to the thinkers of the seventeenth to the nineteenth centuries, should become obscure, and even inverted, . . . in the mind of the public today.” *Id.* at 276, 277.

41. See, e.g., Grey, *supra* note 35, at 81 n.40 (“The ‘bundle-of-rights’ conception of property appears in well-articulated form for the first time . . . in Wesley Hohfeld”). Interestingly, Grey also observed that the legal realists who developed the bundle notion were, on the whole, supporters of the regulatory and welfare state, and in the writing developing such a conception, a “purpose to remove the sanctity that had traditionally attached to the rights of property can often be discerned.” *Id.* at 81.

dispose of or transfer title. The idea of the bundle necessarily implies that these rights are held together—that there is a bundle and yet many sticks at the same time.

Regulatory takings jurisprudence has challenged the Supreme Court with the difficulty of determining whether the removal of one stick in the bundle is a compensable taking and also the burden of deciding to what degree the government can regulate those distinct property rights without offending the Constitution.<sup>42</sup> It is not easy for the Court to shape the legal limitations of the regulatory takings lexicon because there are many possible meanings of what it is to take property, and perhaps this quality of the word property dictates that it defy a distinct description. Understanding the transforming nature of property and its role in the constitutional structure is essential to understanding the regulatory takings analysis and why the Court has been unable to define exactly what property rights the Constitution protects. How property comes to be defined in the Twenty-first Century will shape the future of the regulatory takings analysis.

### B. *Giving and Taking*

The structure of what we label property rights “is such that the owner can claim they are respected by everybody in the society.”<sup>43</sup> Property rights would not exist were it not for the power and protection of government,<sup>44</sup> for it is underneath the power and protection of the federal government that property rights emanate, as the “title of the whole land is in the whole society.”<sup>45</sup> In effect, government exists to establish rules that protect the claim of right to

42. See, e.g., Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1695-96 (1988) (noting the tension in the constitutional property practice, the failed attempts to breakdown property into categories, and the possibility of a “post-liberal understanding of property”).

43. Ugo Mattei, *Property Rights in Civil Law*, in 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 157, 161 (Peter Newman ed., 2000).

44. PIPES, *supra* note 31, at 97. Private property in the legal sense came into existence with the emergence of public authority, i.e. the state.

45. See, e.g., *Johnson & Graham’s Lessee v. McIntosh*, 21 U.S. (8 Wheat) 543, 595 (1823); *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) (noting that the Supreme Court has indicated that property rights “are not created by the Constitution. Rather, they are *created* and their dimensions are *defined* by existing rules or *understandings* that stem from an independent source such as state law”) (emphasis added) (citations omitted). See also LOCKE, *supra* note 23, at § 139 (expounding a natural law theory for the existence of property rights and explaining that men form governments for the sake of protecting those natural rights). In his dissenting opinion in *Pennsylvania Coal v. Mahon*, Justice Brandeis argued that a “restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking . . . [as] [t]he state merely prevents the owner from making a use which interferes with paramount rights of the public.” *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 417 (1922) (Brandeis, J., dissenting) (arguing that there should be no taking where the restriction in question merely prohibits a noxious use and the property restricted still remains in the possession of its owner).

ownership. It follows that there are limitations on the rights of property. Each landowner is burdened somewhat by government restrictions on land use, but everyone also benefits from the restrictions placed on others.

Even those landowners whose use of property is restricted might in fact benefit from such regulations.<sup>46</sup> In the same way that the Fifth Amendment protects individuals from bearing public burdens, the opposite must be true—fairness concerns should bar the government from allowing some people alone to enjoy benefits that in “all fairness and justice” should be enjoyed by the public as a whole.<sup>47</sup> As opposed to the traditional view that government action “takes” some right from its citizens, the “givings” analysis observes that government not only gives protection to claims of property ownership but also guarantees economic value. There must be a balance between property rights and the government regulation of its use.

In lamenting the decline of property as a category of legal and political thought, Thomas Grey observed that “[t]he transformation of a preindustrial economy of private proprietors into an industrial economy . . . presupposes that the entrepreneurs, financiers, and lawyers who carry the process through have the imagination to liberate themselves from the imprisoning concept of property as the simple ownership of a thing by an individual person.”<sup>48</sup> A meaningful conception of property might escape any rigid definition, and maybe we are wrong to expect such an “imprisoning” thought. But Grey’s intellectual skepticism seems to deny the role that property performs in society by giving up on the capacity of language to capture and signify what it represents.<sup>49</sup> A conception that can reassign meaning to the term “property” must unite the sum of rights across multiple dimensions, fusing the sticks in the bundle into a spatial and temporal whole. At the same time, property must also be adaptable to our changing needs. As property gives us power and rights and government regulates property when liberty exceeds common reason, perhaps the concept of property is not quite disintegrating so much as it is transforming from some feudal or Hohfeldian existence into a robust political value reflecting the nature of the market and the role of property as a bulwark from the overreaching of the contrasting values of liberty and power.

---

46. *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 491 (1987).

47. *Abraham Bell & Gideon Parchomovsky*, *Givings*, 111 *YALE L.J.* 547, 578 (2001) (arguing that government actions also can “give” value to property, usually more often than they “take” property).

48. Grey, *supra* note 35, at 75 (noting the obsolete thing-ownership conception of property). Grey argued that the “phenomenon of the ‘death of property’ breaks the connection between simple thing-ownership and the legal entitlements that make up the framework of the capitalist organization of the economy.” *Id.* at 77. He also observed that “simple thing-ownership . . . has been justified in classical liberal theory, and . . . in popular consciousness, as having intrinsic worth.” *Id.*

49. *See* EPSTEIN, *supra* note 4, at 20-21.

### 1. The Emergence of “Smart Growth”

The concept of city planning is not a new idea,<sup>50</sup> but many novel ideas and creative strategies to arranging urban development have emerged in response to the environmental deterioration of America’s landscapes. Traditionally, local governments have attempted to control the use of property within their jurisdiction through the application of zoning laws.<sup>51</sup> While strategies to design and plan urban growth patterns have been based on efficiency grounds or were reactions to demographic changes, land-use planning has been implemented most recently to curb the effects of sprawling suburban regions and to protect environmentally sensitive areas in an era of rapidly expanding cities.<sup>52</sup> In recent years, comprehensive planning schemes, sometimes called smart growth initiatives, have been enacted in many states attempting to take a more conservative and controlled approach to development and to combat the devastating effects of what is labeled as suburban sprawl.<sup>53</sup> As a result of this

50. See Hart, *supra* note 9, 1109-31; see also THE PRACTICE OF LOCAL GOVERNMENT PLANNING 345-80 (3d ed. 2000) (noting the history of urban planning as a means to the creation of organized cities); Allison Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650 (1958).

51. One local government describes the process perfectly:

In a society such as ours, there is a constant struggle to protect people from the acts of someone else. In behavior issues, this is done by making some acts crimes. With the use of land, the method used to implement that protection is through land use controls. . . . All of these laws are designed to protect one party from the acts of another party. Yet, it is important to remember that protection for one party normally takes away what another party considers his “right”.

City of Brentwood, Mo., *What is Zoning All About?*, <http://www.brentwoodmo.org/index.asp?ID=11> (last visited Dec. 18, 2003).

52. Compare *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926) (recognizing the legitimacy of modern local zoning laws), and *S. Burlington County NAACP v. Township of Mount Laurel*, 456 A.2d 390 (N.J. 1975), with OR. REV. STAT. § 197.015(14)-(16) (2001) (defining Portland’s Metro council, the regional urban growth planning body), and MINN. STAT. ANN. § 15.75 (West 2001) (authorizing and encouraging regional planning); MINN. STAT. ANN. § 473.859 (West Supp. 2004) (calling for comprehensive plans to “contain an intergovernmental coordination element that describes how its planned land uses and urban services affect other communities, . . . the region, and the state . . .”).

53. Smart growth policies “control where the government chooses to spend its resources” and “repeal an ‘insidious form of entitlement—the idea that state government has an open-ended obligation, regardless of where you choose to build a house or open a business, to be there to build’” infrastructure. Bruce Katz, *Smart Growth: The Future of the American Metropolis?*, July 2002 (London School of Economics), available at <http://www.brook.edu/dybdocroot/urban/publications/20021104katzlse2.htm> (last visited Nov. 23, 2003). See Patricia E. Salkin, *The Smart Growth Agenda: A Snapshot of State Activity at the Turn of the Century*, 21 ST. LOUIS U. PUB. L. REV. 271 (2002) (canvassing state smart growth statutes and their effectiveness). See also Patrick Gallagher, *The Environmental, Social, and Cultural Impacts of Sprawl*, 15 NATURAL RESOURCES & ENV’T 219, 219 (2000) (noting that what causes sprawl derives from the demands of the citizenry that together generate “extensive and often uncontrollable development”); James

war on suburban sprawl, the term “smart growth” has acquired a negative connotation as critics of those who support more controlled development and slower urban expansion have associated the movement with hindering economic growth and progress.<sup>54</sup>

“Smart growth” has no exact definition, but it definitely cannot be characterized, like its opponents believe, as anti-growth; rather, it focuses on how growth occurs.<sup>55</sup> Advocates of smart growth recognize the strain that is placed upon urban infrastructure, such as roads and sewer systems, when metropolitan areas expand at a pace beyond the capacity of the existing infrastructure to accommodate the needs of a growing population. The idea is that such tendencies should be offset by policies that do not thwart new growth but rather promote responsible, measured development that conserves the limited resources of state and municipal governments.<sup>56</sup> As one observer has noted:

Smart growth involves a choice between areas in a locality that should be developed more intensely than applicable zoning allows and areas that should be developed far less intensely (if at all) than zoning allows. The smart growth concept is a disavowal of the traditional zoning process in favor of a zoning process that requires very close hands-on planning . . . [and] much more flexible planned development.<sup>57</sup>

Regional approaches, as opposed to action on a purely local scale, have been the most recent trends in government efforts to resolve the various problems faced by modern cities, including the lack of affordable housing, the

---

E. Holloway & Donald C. Guy, *Smart Growth and Limits on Government Powers: Effecting Nature, Markets and the Quality of Life Under the Takings and Other Provisions*, 9 DICK. J. ENVTL. L. & POL’Y 421 (2001) (dissecting approaches to and implications of smart growth).

54. Epstein has noted: “Zoning stands in stark contrast to a system of private property, which allows a single owner . . . to decide how to use his plot of land. Where property rights are enforced, owners can make choices on efficient land use without having to overcome the conundrums of collective choice.” EPSTEIN, *supra* note 4, at 265.

55. Brian W. Ohm, *Reforming Land Planning Legislation at the Dawn of the 21st Century: The Emerging Influence of Smart Growth and Livable Communities*, 32 URB. LAW. 181, 189 (2000) (recognizing smart growth as a reaction to the pattern of development in the United States since World War II and also as an evolving approach to development that balances economic expansion with environmental protection to produce a better quality of life overall).

56. Such a goal is absolutely necessary as the country attempts to avoid an even deeper recession in the wake of the September 11th tragedy and its effects on the economy. Many states, and in turn their cities, face severe budget crises as their limited resources are overextended. It is imperative that a more thoughtful approach to development that considers all of the region-wide consequences of expansion become a priority. See Douglas R. Porter, *State Growth Management: The Intergovernmental Experiment*, 13 PACE L. REV. 481 (1993).

57. John M. Armentano, *Zoning and Land Use Planning*, 30 REAL ESTATE L.J. 77, 78 (2001). The development philosophy of “‘Smart Growth’ has become the touchstone for virtually all of the parties involved in the development process, from civic groups to developers and from environmentalists to government officials.” *Id.* at 77.

decline of urban centers, transportation concerns, and the decreasing quality of the environment.<sup>58</sup> Planning strategies have emphasized a regional approach to comprehensive land use designs to account for all of the consequences that local land use regulations can cause among neighboring jurisdictions.<sup>59</sup> There has been a strong reaction, however, to sweeping land use controls that are used as tools for managing growth and curbing the spread of suburban cityscapes.<sup>60</sup> Nonetheless, the regulation of land use by local governments continues to be an essential tool in dealing with the social, environmental, and economic consequences that are the direct result of decisions about how to use

---

58. See Holloway & Guy, *supra* note 53, at 421. See also Porter, *supra* note 29. For an assessment of the problems faced by comprehensive planning as a guide to rational local decision-making and the objectives of planning legislation to deal with the concern regarding the “dynamic nature of community growth and change,” see Ohm, *supra* note 55, at 205. See also Gerald E. Frug, *Beyond Regional Government*, 115 HARV. L. REV. 1763 (2002) (stressing the need for regional government and proposing alternative approaches to deal with the problems of implementing and maintaining the conventional “two-tier” model of government that cannot fully address all of a region’s economic problems); Richard G. Lorenz, *Good Fences Make Bad Neighbors*, 33 URB. LAW. 45, 45 (2001) (arguing that states should “modify existing local government laws in order to facilitate principled inter-city negotiations for the purpose of building more effective regional communities”).

59. See James H. Wickersham, Note, *The Quiet Revolution Continues: The Emerging New Model for State Growth Management Statutes*, 18 HARV. ENVTL. L. REV. 489 (1994). See also *S. Burlington County NAACP v. Township of Mt. Laurel*, 456 A.2d 390 (N.J. 1975) (striking down a system that in practice leads to exclusionary zoning, when, for example, one locality refuses to build a fair share of affordable housing and, in effect, forces the burden of meeting the market demand upon neighboring municipalities). The current emphasis on regional concepts of planning and “comprehensive land use plans” results from the understanding that “[i]n reality, zoning at the local level has a decided impact upon the development of the region.” DAVID H. MOSKOWITZ, *EXCLUSIONARY ZONING LITIGATION* 11 (1977) (noting that “[t]he standard zoning enabling legislation grants to municipalities the power to zone”). The author observes that from the regional point of view it makes a big difference where “industries are located, where major transportation facilities are built, and where housing is provided.” *Id.* at 12.

60. This reaction to smart growth initiatives has been seen in the state legislatures and in the voting booths. See Nicole Stelle Garnett, *Trouble Preserving Paradise?*, 87 CORNELL L. REV. 158 (2001) (noting the failure of initiatives that proposed statewide growth management plans in Arizona and Colorado on election day 2000 and the ratification of a partial-takings measure in Oregon requiring compensation for all regulations that simply reduce the economic value of a parcel of land). The proposed amendment to the Oregon Constitution stated:

[I]f the government passes or enforces a regulation that restricts the use of private real property, and the restriction has the effect of *reducing the value of property* upon which the restriction is imposed, the property owner shall be paid *just compensation equal to the reduction in the fair market value* of the property.

Compare *id.* at 169-70 (quoting OR. CONST. art. I, § 18(a) (2000)) (emphasis added), with Gallagher, *supra* note 53, at 219 (noting “voters passed 70 percent of a record 240 ballot initiatives relating to sprawl control” as recently as 1998). See also Grimes, *supra* note 27 (outlining a legislative response to the uncertainty of the regulatory takings analysis).



land.<sup>61</sup> The extent to which such regulations might limit the use of private land raises questions about their validity; however, “economic development [might] ultimately depend[] on institutions that can protect and maintain the environment’s carrying capacity and resilience.”<sup>62</sup>

## 2. “Entitlement Chopping”<sup>63</sup>

In order to determine whether a regulatory taking has occurred, a court must determine the relevant property that is affected. As opposed to viewing a parcel of land in its entirety, entitlement chopping, or conceptual severance, is the theory that property interests in the bundle of existing property rights can be pulled apart when not all of the interests held by a landowner are affected by a regulation.<sup>64</sup> This model of understanding requires that each regulated interest, no matter how small, must be compensated for by the regulator.<sup>65</sup>

Property interests usually have many different dimensions: a physical dimension describing the size and shape of the property, a functional dimension describing the extent to which an owner may use or dispose of the property, and a temporal dimension that describes the duration of the property interest.<sup>66</sup> This doctrine therefore consists of separating, from the owner’s

---

61. See Amanda Siek, Comment, *Smart Cities: A Detailed Look at Land Use Planning Techniques that are Aimed at Promoting Both Energy and Environmental Conservation*, 7 ALB. L. ENVTL. OUTLOOK 45 (2002). See also FREILICH, *supra* note 28, at 209-52 (providing numerous examples of state statutes and policies aimed at curbing sprawl, and noting the “‘quiet revolution’ in land use controls”). Freilich notes the federal government’s long history of encouraging sprawl through housing policies and the development of the interstate highway system, but he also acknowledges movement in the direction of policies that allow the federal government to “provide guidance and strong incentives to the states” to solve these problems. *Id.* at 303-12. Freilich also points out that “[s]till, the United States is the only major Western nation that has failed to adopt an explicit national urban growth policy.” *Id.* at 303.

62. Susan Hanna & Mohan Munasinghe, *An Introduction to Property Rights and the Environment*, in PROPERTY RIGHTS AND THE ENVIRONMENT: SOCIAL AND ECOLOGICAL ISSUES 3 (Susan Hanna & Mohan Munasinghe eds., 1995) (citation omitted).

63. Michelman, *supra* note 20, at 1601 (referring to entitlement chopping as another name for conceptual severance).

64. See Herber, *supra* note 27, at 935-41 (making the case that *Penn. Coal* neither created any conceptual severance doctrine nor even argued the fact that if one stick in the bundle of property rights is extinguished, it alone is sufficient to effect a taking by noting that much of Holmes’s opinion was dictum considering the limited question before the Court in that case, and arguing that the case is important only because it affirmed the separation of the treatment of the eminent domain duty from the police power).

65. See Michelman, *supra* note 20, at 1614.

66. See *First English Evangelical Lutheran Church of Glendale v. Los Angeles*, 482 U.S. 304, 330 (1987) (Stevens, J., dissenting) (noting regulations are three-dimensional); Robert H. Freilich, *Time, Space, and Value in Inverse Condemnation: A Unified Theory for Partial Takings Analysis*, 24 U. HAW. L. REV. 589, 593 (2002). In *Tahoe-Sierra*, petitioners argued a novel theory of “temporal severance,” believing that a fee interest in land could be divided into distinct segments, measured by time, that can be accorded a value and compensated. Their argument

aggregate of rights in the property, a property interest that is comprised solely of just that right or interest the government action has regulated. Then the aggrieved landowner may assert that a particular “whole” thing has been permanently taken.<sup>67</sup> The conceptual severance theory has caused considerable problems in the regulatory takings context as it encourages property owners to focus on one stick in the bundle of property rights and to disregard the incidents of property ownership in society by seeking monetary relief from the government whenever any property right is affected.<sup>68</sup>

The problem with the notion of conceptual severance lies in the reality that “any land-use regulation can be characterized as the ‘total’ deprivation of an aptly defined entitlement.”<sup>69</sup> Because of this possibility, modern Supreme Court jurisprudence has produced mixed results, reflecting a hesitation to adopt a notion of property that allows a single parcel to be divided into discrete functional or temporal segments to determine whether rights in a particular segment have been entirely abrogated.<sup>70</sup> It is true that “[l]and-use regulations are ubiquitous and most of them impact property values in some tangential way . . . [thus treating] them all as per se takings would transform government regulation into a luxury few governments could afford.”<sup>71</sup> Therefore, the challenge for the future of regulatory takings jurisprudence must be to prioritize the protected sticks of property rights and the extent to which each is essentially limited.

---

ultimately failed. *Tahoe-Sierra*, 535 U.S. 302, 327 (2002). See also Herber, *supra* note 27, at 924-25 n.75 (noting that conceptual severance goes by other names, including the “denominator problem”).

67. Carla Boyd, Comment, *Temporal Severance and the Exclusion of Time in Determining the Economic Value of Regulated Property*, 36 U.S.F. L. REV. 793, 803 (2002).

68. This activity promotes the idea that people are somehow owed something by the government, or that one’s rights are more important than the rights of others. The faithful listeners of conservative champion Rush Limbaugh will understand that those who think this way are a part of the ever-expanding class of what he labels the “entitlement culture,” a dangerous faction of our society that believes the American public owes them something for every alleged “harm” they suffer.

69. Michelman, *supra* note 20, at 1614.

70. See Boyd, *supra* note 67, 803-04 (noting that “[d]efining the property in a regulatory takings analysis is a[] . . . contentious undertaking” and that the *Tahoe-Sierra* case will provide the Court the opportunity to clarify what the “relevant parcel” is for the purpose of the takings inquiry). Compare *Penn Cent. Transp. Co. v. New York*, 438 U.S. 104 (1978) and *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987) (rejecting conceptual severance), with *First English*, 482 U.S. 304 (requiring just compensation for a taking that was unchallenged before the Supreme Court, but was arguably based on a notion of temporal severance). See also *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001).

71. *Tahoe-Sierra*, 535 U.S. 302, 324 (2002). *Accord* *Penn. Coal Co. v. Mahon*, 260 U.S. 39, 413 (1922) (“Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”).

### C. A Brief History of Takings

As such, modern litigation involving the Takings Clause has produced a labyrinth of decisions often based on imprecise standards and vague interpretations. Many people are undoubtedly apprehensive upon entering this area of law. This Comment has emphasized the important function that property plays in balancing that boundary between the rights of property owners and other individuals as well as between the government and the governed. While the development of regulatory takings jurisprudence has been well documented, a brief outline of some of the major cases in the development of this puzzle might be helpful in understanding its complex nature.<sup>72</sup>

#### 1. The First Two Hundred Years

The framers were familiar with legislative land use regulations, for many land use controls were passed after our country's independence and before the adoption of the Bill of Rights in 1791.<sup>73</sup> The Court's regulatory takings jurisprudence has been based on the understanding that the takings clause prohibits "[g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."<sup>74</sup>

Takings jurisprudence has distinguished in kind its analysis of physical and regulatory takings. "[S]o long as these regulations do not require the [landowner] to suffer the physical occupation of a portion of his [property] by a third party, they will be analyzed under the multifactor inquiry generally

---

72. See Haar & Wolf, *supra* note 8, at 2162 n.13 (citing numerous examples among the plethora commentary about regulatory takings jurisprudence and categorizing five classes of the literature as the "classics" (exploring the tension between public need and private right), the "expansionists" (advocating the preclusion of a wide range of regulation), the "reactions" (to the most recent Supreme Court case), the "outside-the-boxes" (attempting to reconceptualize the entire notion), and the "muddlers" (exasperating the hopelessly confused state of takings law)). For a review of the development of the law of regulatory takings and the relevance of the *Tahoe-Sierra* decision, see Jordan C. Kahn, *Lake Tahoe Clarity Jurisprudence: The Supreme Court Advances Land Use Planning in Tahoe-Sierra*, ENVIRONS ENVTL. L. & POL'Y J., FALL 2002, at 33; Danaya C. Wright & Nissa Laughner, *Shaken, Not Stirred: Has Tahoe-Sierra Settled or Muddied the Regulatory Takings Waters?*, 32 ENVTL. LAW. REP. 11177 (2002); David L. Callies & Calvert G. Chipchase, *Moratoria and Musings on Regulatory Takings: Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 25 U. HAW. L. REV. 279 (2003).

73. See Herber, *supra* note 27, at 921 (observing that the notion of regulatory takings did not exist from 1791 to 1922). Also, scholars have noted that "[i]f someone as articulate as Madison had wanted to restrict the regulation of land use . . . he would have done so unmistakably." *Id.* at 944-45 (citations omitted) (alteration in original). See also John F. Hart, *Colonial Land Use Law and its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996).

74. *Penn Central*, 438 U.S. at 123 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

applicable to nonpossessory government activity.”<sup>75</sup> The rationale for this doctrine is justified by the widely held belief that though the total deprivation of beneficial use is, from the landowner’s perspective, the equivalent of a physical appropriation,<sup>76</sup> they are two separate kinds of takings, subject to a different approach—an idea that is fleshed out in *Tahoe-Sierra*.<sup>77</sup> In one case, the government uses its eminent domain authority to physically take property, while in the regulatory context, an allegedly injured property owner must assert his rights by instituting an inverse condemnation proceeding.<sup>78</sup> It is now well-established jurisprudence that government land use regulations might so severely overstep the bounds of the police power so as to effect a taking requiring compensation to the aggrieved landowner.<sup>79</sup>

The origin of the modern prohibition against certain regulations has been traced to the regulatory zoning approaches of the expanding urban areas of the World War I era and to Justice Holmes’s opinion in *Pennsylvania Coal v. Mahon*.<sup>80</sup> Justice Holmes stated that “if regulation goes too far it will be recognized as a taking.”<sup>81</sup> In 1978, the Supreme Court attempted to modernize the enigmatic statements inherited from Justice Holmes by fleshing out the law of regulatory takings into a list of factors to be considered in the takings

75. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982). *See also Tahoe-Sierra*, 535 U.S. at 322 (“jurisprudence involving . . . physical takings is as old as the Republic and, for the most part, involves the straightforward application of per se rules.”).

76. *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 652 (Brennan, J., dissenting). *See also Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1017 (1992).

77. 535 U.S. at 321-25 (2002). The Court observed that the Fifth Amendment itself provides a basis for drawing this distinction, distinguishing the plain language that requires the payment of compensation whenever the government acquires private property from the fact that the Constitution itself makes no reference to regulations that prohibit a property owner from making certain uses of her private property. *Id.*

78. “The phrase ‘inverse condemnation’ generally describes a cause of action against a government defendant in which a landowner may recover just compensation for a ‘taking’ of property under the Fifth Amendment, even though formal condemnation proceedings in exercise of the sovereign’s power of eminent domain have not been instituted by the government entity.” *San Diego Gas & Elec. Co.*, 450 U.S. at 638 n.2 (Brennan, J., dissenting) (citing *Agins v. City of Tiburon*, 447 U.S. 255, 258 n.2 (1980)).

79. Justice Scalia has observed, “We have never set forth the justification for this [regulatory takings] rule. Perhaps it is simply . . . that total deprivation of beneficial use is, from the landowner’s point of view, the equivalent of a physical appropriation.” *Lucas*, 505 U.S. at 1017 (citations omitted). Perhaps the justification can be seen when there is differential treatment among property owners, such that “the police power has become a cloak for illegitimate ends whose influence overwhelms the stated reasons” for regulation. EPSTEIN, *supra* note 4, at 133.

80. 260 U.S. 393 (1922).

81. *Id.* at 415. In *Penn. Coal*, the Court acknowledged that a governmental body may take property by appropriating land and taking physical possession of it under the power of eminent domain, and it might also violate the Takings Clause by regulating property so much under the police power so as to effectively render it worthless to the owner. *See Herber, supra* note 27, at 935-41.

analysis to determine more precisely when a regulation has gone too far. The Court laid out three aspects of a fact-specific analysis that have particular significance when inquiring into the question of whether or not a compensable taking has occurred because of a government regulation: (1) the character of the government action; (2) the extent to which the regulation interferes with distinct, investment-backed expectations, and (3) the economic impact of the regulation.<sup>82</sup> After it outlined the factors to be considered in the regulatory takings analysis, the Supreme Court declared that a complete examination of whether a government regulation is a taking also requires a two-part test. Thus, the Fifth Amendment is violated when a regulation of land use “does not substantially advance legitimate state interests, or denies an owner economically viable use of his land.”<sup>83</sup>

The Court’s 1987 Term epitomized the reinvigorated support of individual property rights. The Court heard numerous takings cases in an attempt to more clearly define the law of regulatory takings for aggrieved landowners.<sup>84</sup> During that Term, the Court endeavored to define the denominator for

---

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

83. *Agins*, 447 U.S. at 260, 261-62 (citations omitted) (holding that a zoning ordinance was not a taking because, though it restricted the use of appellants’ five-acre tract of land with a view of the San Francisco Bay to allow the development of only one house per acre, the land was not deprived of all economically valid use, and noting the importance of the requirement that the government justification for the action must substantially advance a legitimate state interest); see also *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987). *Agins* held that mere fluctuations in market value during governmental decision-making, absent bad faith, do not constitute a taking. *Agins*, 447 U.S. at 263 n.9.

84. The “1987 Takings Trilogy” includes: *Keystone Bituminous*, 480 U.S. 470; *First English Evangelical Lutheran Church of Glendale v. Los Angeles*, 482 U.S. 304, 321 (1987) (holding that temporary takings are not different in kind from permanent takings and where such a taking is already found, compensation is required); and *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 841-42 (1987) (holding that a condition to building that required landowners to grant a public access easement across their property does not serve a “rational relation” to any government interest and constitutes a taking). See Peter W. Salsich, Jr., *Keystone Bituminous Coal, First English and Nollan: A Framework for Accommodation?*, 34 WASH U. J. URB. & CONTEMP. L. 173 (1988). See also Michelman, *supra* note 20. One author noted that while the Court did give more attention to landowner cases in the 1980s, property owners suffered “repeated defeats [that] may only serve to emphasize the inferior status of landowner rights.” DENNIS J. COYLE, *PROPERTY RIGHTS AND THE CONSTITUTION: SHAPING SOCIETY THROUGH LAND USE REGULATION* 175 (1993) (providing a table showing that landowners won only thirty percent of the time in Supreme Court decisions on constitutional rights of landowners).

Some have argued that *First English* established the use of the “temporal severance doctrine” in determining if a taking exists. In the words of the *First English* Court, however, it “merely [held] that where the government’s activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation.” *First English*, 482 U.S. at 321. See also Thomas E. Roberts, *Moratoria as Categorical Regulatory Takings: What First English and Lucas Say and Don’t Say*, 31 ENVTL. L. REP. 11037 (2001).

purposes of the so-called “deprivation fraction.”<sup>85</sup> The denominator problem arises in takings cases where the property owner’s entire parcel is not completely taken, though a distinct portion of his property rights, whether of actual land or some economic value that might be severable, might have been taken.<sup>86</sup> Because the test for regulatory takings requires the courts to compare the value that has been taken from the property with the value that remains in the property, the critical question is to determine how to define the unit of property “whose value is to furnish the denominator of the fraction.”<sup>87</sup> This critical question has led to a divide on the Court, and among scholars as well, between those who advocate looking at the “parcel as a whole,” and those who would view any deprivation of or limitation on any strand in the metaphorical “bundle of sticks” as the property right against which the allegedly unconstitutional regulation is to be measured.

## 2. Drawing a Line in the Sand: The Challenge to Develop Unequivocal Rules

The property rights movement reached its peak with a victory in the landmark decision *Lucas v. South Carolina Coastal Council*.<sup>88</sup> Justice Scalia’s

---

85. See Michelman, *supra* note 13, at 1192. Professor Michelman observed that *Penn. Coal’s* diminution in value test calls for a fractional comparison between the loss in value of the property affected by the regulation (the numerator) and the preexisting value of the property (the denominator) to determine the extent of the deprivation and a determination of whether the regulation has gone “too far.” He noted that such an analysis raised the problematic question of “how to define the ‘particular thing’ whose value is to furnish the denominator of the fraction.” *Id.* For an analysis of the benefits fraction, see Benjamin Allee, Note, *Drawing the Line in Regulatory Takings Law: How a Benefits Fraction Supports the Fee Simple Approach to the Denominator Problem*, 70 *FORDHAM L. REV.* 1957, 2013-14 (2002) (observing that segmenting an individual’s property funnels claims into the *Lucas* rule without considering the fairness principle that is the basis for regulatory takings law). See also John E. Fee, Comment, *Unearthing the Denominator in Regulatory Taking Claims*, 61 *U. CHI. L. REV.* 1535 (1994).

86. Marc R. Lisker, *Regulatory Takings and the Denominator Problem*, 27 *RUTGERS L.J.* 663, 679 n.79 (1996). The Court first confronted this problem in *Penn Central*, though it did not recognize any takings fraction. In that case, it measured the effect of a given regulation on a whole parcel of land, not on individual strands of affected property rights. See *Penn Central*, 438 U.S. 104. The *Penn Central* Court measured the effect of the regulation against the entire property interest of the property owner and refused to characterize New York’s Historic Preservation Act as taking the rights of an interest in the air above Grand Central Station that would have severed such right from the property parcel as a whole. *Id.* at 130. The Court also limited the characterization of the denominator by refusing to take into account the whole property owned by the landowner in the city, noncontiguous to the parcel at issue, when considering against what property to measure the regulation and determine if there had been a total taking. *Id.*

87. *Keystone Bituminous*, 480 U.S. at 497 (citing Michelman, *supra* note 13, at 1192).

88. 505 U.S. 1003 (1992). *Lucas* was significant in effecting “basic changes in . . . the constitutional definition of private property itself.” See Michael J. Davis, *Lucas and Takings*:

opinion for the Court articulated the “categorical taking” in the regulatory context—a per se rule establishing that a taking occurs whenever a regulation deprives the landowner of “all economically beneficial or productive use of land.”<sup>89</sup> A taking in the *Lucas* sense is categorical in that the courts will not balance the importance of the public interest advanced by the regulation against the regulation’s imposition on private property rights.<sup>90</sup> Rather, it is enough that the regulation has the effect of taking all of the economic use out of the property.<sup>91</sup> But determining when all of the potential economic use has been taken from the regulated property has proven difficult to establish, and the results of such an inquiry inevitably rest on the way the property interest is quantified.<sup>92</sup> Thus, whether or not an owner has been deprived of all economically beneficial or productive use of his property ultimately depends upon how the property is defined.<sup>93</sup>

Though the denominator problem does not arise in a case where the property owner’s entire parcel is deprived of *all* economically beneficial use because (even using the largest possible denominator, the regulation’s effect would be a 100% diminution in value) defining the property interest against which regulations are to be measured was still a central concern. Justice Scalia’s opinion in *Lucas* also made clear, though, that a regulation that deprives property of all economically viable use could be upheld where the economically viable use would have violated state nuisance law or background principles of state property law.<sup>94</sup> The uncompromising categorical rule

---

*Private Property Redefined*, 2 KAN. J.L. & PUB. POL’Y, Spring 1993, at 83 (noting the “brave new world of takings law” ushered in by the decision).

89. *Lucas*, 505 U.S. at 1015. Residential developer owner David Lucas was prohibited from developing any structures on two beachfront lots on the Isle of Palms, a barrier island near Charleston, South Carolina. The state’s Beachfront Management Act, which was enacted after Lucas purchased his property, prohibited development on certain lands to protect tidelands, beaches, and oceanfront sand dunes. See Jennifer Dick & Andrew Chandler, *Shifting Sands: The Implementation of Lucas on the Evolution of Takings Law and South Carolina’s Application of the Lucas Rule*, 37 REAL PROP. PROB. & TR. J. 637, 651-52 (2002); see also Paul Turner & Sam Kalen, *Takings and Beyond: Implications for Regulation*, 19 ENERGY L.J. 25, 30-32 (1998) (noting that Courts are being asked more than ever before to “resolve the balance between preserving effective regulatory control options and protecting private property”).

90. See *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1179 (Fed. Cir. 1994). “[C]ategorical” [means] those ‘categories of regulatory action [that are] compensable without case-specific inquiry into the public interest advanced in support of the restraint.’ *Good v. United States*, 189 F.3d 1355, 1361 (Fed. Cir. 1999) (emphasis added) (alteration in original) (quoting *Lucas*, 505 U.S. at 1015).

91. See *Lucas*, 505 U.S. at 1016 n.7.

92. See *id.* at 1015.

93. *Id.* at 1054 (Blackmun, J., dissenting) (noting that the “deprivation of all economically valuable use” of property cannot be determined objectively).

94. *Id.* at 1029-30. These are the two exceptions to the categorical rule. See, e.g., Todd D. Brody, Comment, *Examining the Nuisance Exception to the Takings Clause: Is There Life for*

championed in *Lucas* is an exception to the general rule and reveals a turning away from the multi-factor analysis toward developing a more unequivocal rule similar to the class of physical appropriation cases.

The fragmented decision in *Palazzolo v. Rhode Island* exemplified the divide on the Court between those who preferred the application of rules favoring property interests and those who stressed the importance of balancing all relevant interests in deciding a takings case.<sup>95</sup> The case emphasized the notion that *Lucas*' categorical rule is to be applied only in extreme circumstances, affirming that it is "[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" that should be used for determining whether a regulation goes "too far" when the "regulation places limitations on land that fall short of eliminating all economically beneficial use."<sup>96</sup> The divided *Palazzolo* Court upheld the ripeness of a landowner's takings claim,<sup>97</sup> allowing the courts to decide the question of whether the owner is deprived of all economic use of his property when a substantial reduction in value of only portions of the land occurs.<sup>98</sup> Because the contiguous parcel of property retained at least some economic use and value, the Supreme Court remanded the claim for further analysis, refusing to characterize the denominator of the deprivation fraction as solely the slice of the property that was affected by the government regulation.<sup>99</sup> The plurality held that the fact that a landowner took title to the land after the enactment of a regulation depriving the land of some

---

*Environmental Regulations After Lucas?*, 4 FORDHAM ENVTL. L. REP. 287 (1993); Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369 (1993).

95. 533 U.S. 606 (2001).

96. *Id.* at 617 (citing *Penn Cent. Transp. Co. v. New York*, 438 U.S. 104, 124 (1978)).

97. *Id.* at 632. Aside from determining when a taking has occurred, the Supreme Court has also been troubled with the ripeness of takings claims, often forcing landowners to exhaust all potentially effective procedural remedies before bringing a takings claim to court. The Court attempted to balance protection for landowners' constitutional rights with the avoidance of wasting judicial resources by encouraging negotiation in requiring landowners to pursue variances and submit multiple permit applications to regulatory bodies before their claims become ripe. See generally Thomas E. Roberts, *Facial Takings Claims Under Agins-Nectow: A Procedural Loose End*, 24 U. HAW. L. REV. 623 (2002). See also William M. Hof, Note, *Trying to Halt the Procedural Merry-Go-Round: The Ripeness of Regulatory Takings Claims After Palazzolo v. Rhode Island*, 46 ST. LOUIS U. L.J. 833 (2002).

98. *Palazzolo*, 533 U.S. at 616.

99. *Id.* The statute at issue authorized the State of Rhode Island to create the Rhode Island Coastal Resources Management Council and delegated to the Council the authority to promulgate regulations restricting the use of coastal lands. *Id.* at 640-41 (Stevens, J., concurring in part and dissenting in part). The Council's regulations effectively foreclosed the petitioner from filling his wetlands to develop the property. *Id.* In this case, the petitioner attempted to assert that, because he was restricted from development of some of his property, there was a taking. *Id.* at 616.



value would not automatically preclude the landowner from prevailing on a takings claim.<sup>100</sup>

The *Palazzolo* case is a significant precursor to *Tahoe-Sierra* as it outlined the intellectual struggle between those Justices who want to avoid “sweeping rule[s]”<sup>101</sup> and desire to “restore[] balance to that [takings] inquiry”<sup>102</sup> by realizing that the “outcome instead ‘depends largely on the particular circumstances’” of each case,<sup>103</sup> and those who want to avoid the “(unspecified) circumstances”<sup>104</sup> associated with an indeterminate “pursui[t] of abstract ‘fairness’”<sup>105</sup> by seeking more “mathematically precise variables.”<sup>106</sup> In fact, *Palazzolo* predicted battles to come as Justices Scalia and O’Connor provided separate concurrences that each advocated fundamentally different approaches to the takings inquiry.

While the *Lucas* decision outlined the Court’s uncompromising approach to the chaotic law of regulatory takings, *Palazzolo* represented the reluctance of some to avoid adoption of any hard line method for determining when a regulation goes “too far.”<sup>107</sup> It is at this point in the evolution of takings jurisprudence that the Supreme Court granted certiorari to the Ninth Circuit for the *Tahoe-Sierra* case in order to answer the question of whether a regulation imposing a temporary, though seemingly indefinite, moratorium on development constituted a per se taking of property.<sup>108</sup>

---

100. *Id.* at 630.

101. *Id.* at 632 (O’Connor, J., concurring).

102. *Id.* at 635.

103. *Id.* at 633 (noting the “less than fully determinate” nature of the concepts of “fairness and justice” that underlie the Takings Clause, and showing disdain for any “set formula” that determines when “justice and fairness” require that economic injuries caused by regulations be compensated by the government) (quoting *Penn Central*, 438 U.S. at 124).

104. *Palazzolo*, 533 U.S. at 636 (Scalia, J., concurring).

105. *Id.* at 636.

106. *Id.* at 634 (O’Connor, J., concurring).

107. *See id.* at 633, 636 (O’Connor, J., concurring) (noting that “[o]ur polestar . . . remains the principles set forth in *Penn Central* itself” and that “[t]he temptation to adopt what amount to per se rules in either direction must be resisted.”). *See also Tahoe-Sierra*, 535 U.S. 302, 326 (2002) (“‘generally eschew[ing]’ any set formula for determining how far is too far, choosing instead to engage in ‘essentially ad hoc, factual inquiries.’”) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992)).

108. *See* 533 U.S. 948, 948 (2001). The Court granted certiorari to the Ninth Circuit to answer 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?” *Id.*

III. TAHOE-SIERRA PRESERVATION COUNCIL V. TAHOE REGIONAL PLANNING AGENCY<sup>109</sup>

In April 2002, the Supreme Court handed down its opinion in the *Tahoe-Sierra* case, more than two decades after the first lawsuit was initiated by aggrieved landowners against Lake Tahoe's regional regulatory authority.<sup>110</sup> The majority specifically adopted the *Penn Central* approach that requires a balancing of multiple factors over the hard and fast per se rules as the controlling paradigm in the regulatory takings analysis.<sup>111</sup> The case also reinforces the importance of modern land-use planning. The majority upheld the use of moratoria as a legitimate tool to halt potentially harmful development while a more permanent and environmentally responsible strategy could be developed for the region.<sup>112</sup> In fact, in an era of cynicism concerning government regulations limiting land use, *Tahoe-Sierra* represented "the first clear-cut victory for the government side in a land use or environmental takings case before the [nation's highest] Court in [fifteen] years."<sup>113</sup>

Perhaps the most important outcome of the *Tahoe-Sierra* decision, however, is the characterization of property the majority implicitly adopted that underlies the framework of its analysis of regulatory takings. Ultimately, the Court defined property for the purposes of the Takings Clause as an idea that includes all aspects of the term and recognized its importance in the concept of ordered liberty.<sup>114</sup> The Court required that in applying the regulatory takings analysis, the property must be considered together, and

---

109. 535 U.S. 302 (2002).

110. The first opinion in the case history of *Tahoe-Sierra* was published almost two decades before the final decision was reached by the Supreme Court. See 611 F. Supp. 110 (D. Nev. 1985). In fact, the petitioners filed suit approximately two months after the adoption of the 1984 regional plan for the Basin, and their complaints gave rise to protracted litigation that produced four opinions by the Court of Appeals for the Ninth Circuit and several published District Court opinions. See *Tahoe-Sierra*, 535 U.S. at 313, 313 n.6. But the tale of this litigation continues. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064 (9th Cir. 2002).

For an analysis of the "Long and Winding Legal Road," see J. David Breemer, *Temporary Insanity: The Long Tale of Tahoe-Sierra Preservation Council and its Quiet Ending in the United States Supreme Court*, 71 FORDHAM L. REV. 1, 8-12, 54-55 (2002) (noting as "disconcerting" the "procedural quagmire" that allowed for barriers to relief, and also noting the missed opportunity by both the Court and the landowners to expand upon the *Penn Central* analysis). Breemer, sympathetic to the claims of the landowners, concludes that the "regulatory actions have destroyed the dreams of real people, whose lives encompass a small, but . . . meaningful, slice of the temporal whole." *Id.* at 55.

111. *Tahoe-Sierra*, 535 U.S. at 322.

112. See *id.* at 341-42.

113. John D. Echeverria, *A Turning of the Tide: The Tahoe-Sierra Regulatory Takings Decision*, 32 ENVTL. L. REP. 11235 (2002).

114. See *Tahoe-Sierra*, 535 U.S. 302.

sticks in the bundle should not be severed from the whole property interest. Though the decision has drawn much criticism, it may yet prove to be the best outcome. In the end, the Court left room for modification, recognizing that in the exchange between power and liberty, the meaning of property for purposes of the Fifth Amendment transforms as the balance between liberty and authority requires in order to reflect fairness and justice.<sup>115</sup>

A. *Lake Tahoe: "A Noble Sheet of Blue Water"*<sup>116</sup>

Lake Tahoe is an ancient body of water some twenty-five million years old and is situated more than 6000 feet above sea level on the border of California and Nevada.<sup>117</sup> Lake Tahoe's exceptional clarity, because of the lack of nitrogen and phosphorous in the water, has created a rare natural beauty.<sup>118</sup> In fact, only two other sizable lakes in the world are of comparable quality to this high Sierran lake, but Lake Tahoe is the only one that is "so readily accessible from large metropolitan centers and is so adaptable to urban development."<sup>119</sup>

Rapid population growth and land use around Lake Tahoe in the 1950s and 1960s led to increased development that would ultimately begin to stress the

115. *See id.* at 342.

116. TWAIN, *supra* note 33, at 169, *cited in Tahoe-Sierra*, 34 F. Supp. 2d 1226, 1230-31 (D. Nev. 1999). Recounting his travels from a small Missouri town on the Mississippi River to the American West, Twain, upon reaching Lake Tahoe, observed:

[A]t last the lake burst upon us—a noble sheet of blue water lifted six thousand three hundred feet above the level of the sea, and walled in by a rim of snow-clad mountain peaks that towered aloft a full three thousand feet higher still! It was a vast oval . . . As it lay there with the shadows of the mountains brilliantly photographed upon its still surface I thought it must surely be the fairest picture the whole earth affords.

TWAIN, *supra* note 33, at 169.

117. *See Geography & History Overview*, Lake Tahoe Data Clearinghouse, Western Geographic Science Center, at <http://tahoe.usgs.gov/geography.html> (last modified January 16, 2003) [hereinafter *Geography and History Overview*]; *see also* Herber, *supra* note 27, at 913-14. It has been explained that:

The Lake Tahoe Basin was formed by geologic block faulting about 2 to 3 million years ago. The down-dropping of the Basin and the uplifting of the adjacent mountains resulted in a dramatic topographic relief in the region. The mountain peaks rise to more than 10,000 ft (3,048 m) above sea level, and the surface of Lake Tahoe has an average elevation of about 6,225 ft (1,897 m)."

*Geography and History Overview, supra.* For further information on the attributes of and history surrounding Lake Tahoe, *see* GEORGE WHARTON JAMES, *THE LAKE OF THE SKY: LAKE TAHOE IN THE HIGH SIERRAS OF CALIFORNIA AND NEVADA* (1928).

118. *Tahoe-Sierra*, 535 U.S. at 307. The lack of chemicals that nourish the growth of algae makes the lake oligotrophic. *Tahoe-Sierra*, 34 F. Supp. 2d at 1231.

119. *Tahoe-Sierra*, 535 U.S. at 307 n.2 (quoting S. REP. NO. 91-510, at 3-4 (1969)). Only Crater Lake in nearby southwest Oregon and Lake Baikal in Russia are of similar oligotrophic quality. *Id.*

lake environment.<sup>120</sup> Though development is often associated with progress, eventually the lake's clarity and beauty would be compromised because the upsurge in development, as in most urbanized regions, caused an increase in what is known as "impervious coverage" of the land.<sup>121</sup> Impervious coverage (which includes such common aspects of development like asphalt, concrete, buildings, and even packed dirt) prevents precipitation from being absorbed by the soil and subsequently creates large amounts of flowing water that can have more erosive force than individual raindrops scattered over a dispersed area.<sup>122</sup> The intensified runoff because of the earnest development of the Lake Tahoe Basin began to cause increased nutrient loading of the lake and its pristine condition began to deteriorate rapidly.<sup>123</sup> The District Court noted that "unless the process is stopped, the lake will lose its clarity and trademark blue color . . . [and] [e]stimates are that, should the lake turn green, it could take over 700 years for it to return to its natural state, if that were ever possible at all."<sup>124</sup>

The Lake Tahoe Basin occupies five hundred and one square miles and was shared by five counties, several municipalities, and the Forest Service of the Federal Government until the two state legislatures, subject to congressional approval, adopted the Tahoe Regional Planning Compact in 1969 (the Compact). The Compact created the Tahoe Regional Planning Agency (TRPA), appointing it "to coordinate and regulate development in the Basin and to conserve its natural resources."<sup>125</sup> Because there were numerous exceptions that did not significantly limit the construction of residential housing and in effect exacerbated the predicament, the two states eventually adopted an extensive amendment to the Compact in 1980.<sup>126</sup> The TRPA was

---

120. *Id.* "During the last half-century, increased human activity in the lake basin has caused the lake's clarity to decrease at a rate of about 1 foot per year (30 cm/yr)." *Geography and History Overview*, *supra* note 117.

121. Herber, *supra* note 27, at 914; *Tahoe-Sierra*, 535 U.S. at 308.

122. *See Tahoe-Sierra*, 535 U.S. at 308.

123. *Id.*

124. *Tahoe-Sierra*, 34 F. Supp. 2d 1226-31 (D. Nev. 1999).

125. *See Tahoe-Sierra*, 535 U.S. at 309 (quoting *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 394 (1979)). *See also* Pub. L. No. 91-148, 83 Stat. 360 (1969). This is the original Tahoe Regional Compact of 1969, a regional consortium of multiple jurisdictions formed to handle the severity of the problems caused because of the increase in growth in the area after World War II. It was considered a failure throughout the 1970s as the lake's clarity continued to decline and the rate of development, particularly the creation of subdivisions, continued to intensify. *Tahoe-Sierra*, 535 U.S. at 309.

126. Pub. L. No. 96-551, 94 Stat. 3233 (1980). *See also Tahoe-Sierra*, 535 U.S. at 309-10. The TRPA is an example of the emerging intergovernmental approach to land use planning and other region-wide problems. *See infra* notes 58-59 and accompanying text (highlighting emerging models of regional planning agencies created to confront widespread problems on a broader scale).

directed in the early 1980s to adopt a comprehensive regional plan that would achieve and maintain environmental threshold carrying capacities for sensitive lands throughout the multiple jurisdictions in which the Lake Tahoe Basin sits where development has caused the greatest harm to the surrounding environment.<sup>127</sup>

The 1980 amendments to the Compact, in an attempt to control the effects of irresponsible development, provided “that in order to make effective the regional plan as revised by [TRPA], it is necessary to halt temporarily works of development in the region which might otherwise absorb the entire capability of the region for further development or direct it out of harmony with the ultimate plan.”<sup>128</sup> The TRPA, realizing that the enormous task it was presented with could not be completed by the deadlines required in the Compact, enacted the infamous Ordinance 81-5, imposing the first moratoria on development that would be challenged in court.<sup>129</sup> The Ordinance prohibited the placement of impervious coverage within certain “land capability districts” that the TRPA had defined as “Stream Environmental Zones” (SEZs). These SEZs were areas already naturally prone to runoff and where conservation efforts had focused on controlling growth in order to curb the likelihood of erosion in those areas.<sup>130</sup>

The interim moratoria on development was to remain in effect until the adoption of the more permanent “ultimate plan” that was required by the Compact to achieve and maintain those carrying capacities within the region.<sup>131</sup> The Compact assigned the TRPA the complex task of defining the “environmental thresholds carrying capacities” of lands in the Basin within eighteen months. Within one year after the adoption of these standards, the TRPA was to adopt a new regional plan.<sup>132</sup> Having failed to adopt a regional plan within the time specified by the Compact, the TRPA approved another resolution in the late summer of 1983 that “completely suspended all project reviews and approvals” and would remain in effect until a new regional plan

---

127. *See Tahoe-Sierra*, 535 U.S. at 309.

128. Pub. L. No. 96-551, 94 Stat. at 3243. The 1980 Compact declared: “The waters of Lake Tahoe and other resources of the region are threatened with deterioration or degeneration, which endangers the natural beauty and economic productivity of the region.” Pub. L. No. 96-551, art. I § (a)(1), 94 Stat. 3233 (1980).

129. This is the first of two moratoria implemented in the region, and it became effective on August 21, 1981. Upon failing to define “environmental threshold carrying capacities” (because of a division of opinion within TRPA’s governing board and other political differences) for more than one year, by the terms of the Compact between the states, the TRPA was given one more year to adopt a new regional plan. *See* Pub. L. No. 96-551, 94 Stat. at 3240.

130. *See Tahoe-Sierra*, 535 U.S. at 308.

131. *Id.* at 310.

132. *Id.*

was adopted.<sup>133</sup> The new regional plan was finally approved in April 1984, but on that same day, the State of California was granted an injunction enjoining the regional plan from being implemented on the ground that it “failed to establish land-use controls sufficiently stringent to protect the Basin.”<sup>134</sup> This injunction remained effective until a revised plan was adopted in 1987.<sup>135</sup> Thus, many landowners were prohibited from developing on their property for six years.<sup>136</sup>

#### B. *The Majority Approves the Moratoria*

The Supreme Court in *Tahoe-Sierra* was asked by the petitioners to evaluate the 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.”<sup>137</sup> In *Tahoe-Sierra*, the majority refused to apply the *Lucas* per se rule to the developmental moratorium.<sup>138</sup> The Court noted that the categorical exception to the “parcel as a whole rule” adopted in *Lucas* is reserved for “the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted.”<sup>139</sup> A solid majority declared that the answer to whether the Takings Clause requires compensation when government enacts a temporary, though perhaps indefinite, regulation denying property owners all viable economic use of real property is to be decided by applying and balancing the multiple factors announced in *Penn Central*, *not* by

133. *Tahoe-Sierra*, 535 U.S. at 311. Because a new regional plan would not be adopted until April 26, 1984, Resolution 83-21 was a seemingly indefinite moratorium. It ended up being an additional eight-month suspension prohibiting development on high hazard lands in the Basin, thus resulting in a moratorium that lasted for thirty-two months. *See id.* at 311-12.

134. *Id.* at 312 (citing *Tahoe-Sierra*, 34 F. Supp. 2d at 1236).

135. *Tahoe-Sierra*, 34 F. Supp. 2d 1226, 1236 (D. Nev. 1999).

136. *Tahoe-Sierra*, 535 U.S. at 338 n.34. Arguably, the TRPA was responsible for only the first thirty-two months of the prohibition on development, as it was the authority that issued the moratoria. The majority in *Tahoe-Sierra* accepts this argument and disregards the final three years that allowed no development, noting that it was the District Court that issued the 1984 injunction and the Ninth Circuit Court of Appeals that upheld its validity. *See id.* at 346 (Rehnquist, C.J., dissenting).

137. 533 U.S. 948 (2001) (granting certiorari to the Supreme Court). The Supreme Court explained that throughout the earlier protracted litigation and decisions, the “temporary moratorium” referred to only two things: Ordinance 81-5 and Resolution 83-21. *See Tahoe-Sierra*, 535 U.S. at 313 n.8.

138. *Tahoe-Sierra*, 535 U.S. at 330. The *Lucas* rule states that any government action that renders property valueless—regardless of its fundamental character, but taking into account such amorphous common law concepts as the “background principles of [state property law]” and general principles of nuisance—is a taking under the Fifth Amendment. *Lucas v. S. C. Coastal Council*, 505 U.S. 1003, 1029-30 (1992).

139. *Tahoe-Sierra*, 535 U.S. at 330 (quoting *Lucas*, 505 U.S. at 1017); *see also* *Cane Tenn., Inc. v. United States*, 54 Fed. Cl. 100, 105 (2002).

applying any uncompromising, categorical rule.<sup>140</sup> So although the Court's physical takings jurisprudence involves the straightforward application of *per se* rules, the *Tahoe-Sierra* holding confirms that the regulatory takings analysis is to be characterized by "essentially ad hoc, factual inquiries"<sup>141</sup> that are designed to allow a "careful examination and weighing of all the relevant circumstances."<sup>142</sup>

As part of the rationale for the decision, Justice Stevens's majority opinion noted that "[a] rule [requiring] compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decisionmaking."<sup>143</sup> This view suggests a swing in the pendulum moving the Court's jurisprudence away from the view of an absolute right to use one's property towards the recognition that such use is necessarily limited to some extent. It also recognizes that a plot of land is not an island, a notion that is essential to any proper definition of property. With sufficient time, the land use planning process "may be permitted to run its full and natural course with widespread citizen input and involvement, public debate, and full consideration of all issues and points of view."<sup>144</sup> The Court's holding indicates that a proper analysis of whether a regulation effects a taking should involve a balancing between the interests of the property owner that are affected and the nature of the government action, rather than focusing solely on the economic effects of the regulation. Declining to adopt the proposed *per se* rule for temporary regulatory takings, the Court noted that it did not "hold that the temporary nature of a land-use restriction precludes finding that it effects a taking; [it] simply recognize[d] that it should not be given exclusive significance one way or the other."<sup>145</sup> Consequently, when a regulation does not deprive a landowner of *all* economically beneficial use of his land, the courts should perform a "more fact specific inquiry" to determine whether a

---

140. The majority stated:

[T]he answer to the abstract question whether a temporary moratorium effects a taking is neither 'yes, always' nor 'no, never;' the answer depends upon the particular circumstances of the case. Resisting '[t]he temptation to adopt what amount to *per se* rules in either direction,' . . . we conclude that the circumstances in this case are best analyzed within the *Penn Central* framework.

*Tahoe-Sierra*, 535 U.S. at 321 (alteration in original) (citations omitted).

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

142. *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring).

143. *Tahoe-Sierra*, 535 U.S. at 335. *See also* *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) (noting that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law").

144. *Tahoe-Sierra*, 535 U.S. at 338 n.33 (citations omitted). The Court in *Tahoe-Sierra* also noted that throughout the planning process for developing a workable strategy to save Lake Tahoe from environmental degradation, the landowners and TRPC had ample opportunity to be heard and in fact were heard either in person or in writing at every hearing. *Id.* at 340 n.35.

145. *Id.* at 337.

regulatory taking has occurred.<sup>146</sup> When done properly, such an analysis should include a *Penn Central* inquiry into all relevant circumstances of a particular case.<sup>147</sup>

*Tahoe-Sierra* is a clear victory for land-use planning advocates, signaling an unambiguous shift against the property rights ideology and the *Lucas* decision that represented its zenith. But although the Court affirms the use of the *Penn Central* factors as a guide to the takings inquiry, an opportunity was noticeably missed to break-down the intricate regulatory takings analysis and make such an examination more fully determinate.<sup>148</sup> For example, a factor analysis is the approach endorsed by the current Court, but the majority failed to state which, if any, of the factors is dispositive or even carries the most weight.<sup>149</sup> In failing to develop the balancing test, observers are free to speculate as to the reasons behind the majority's omission. Without any clarification on this matter, the Court might inadvertently encourage litigation because planners and property owners, not to mention lower court judges and attorneys, will be unable to accurately predict the manner in which the essentially ad hoc, factual inquiries will be made.<sup>150</sup>

---

146. *Id.* at 332.

147. *Id.* at 334.

148. See Echeverria, *supra* note 113, at 11245 (observing that the *Tahoe-Sierra* decision placed a new emphasis on the multi-factor framework, but it provides little guidance on what the *Penn Central* test actually is or how it would be applied).

149. See *Berst v. Snohomish County*, 57 P.3d 273, 279-80 (Wash. Ct. App. 2003) (under the authority of *Tahoe-Sierra* and *Penn Central*, though the landowners made a claim that regulations interfered with their investment-backed expectations and caused them to suffer detrimental economic impact, the court refused to adopt the "novel analyses" that the "imposition of a moratorium in the absence of due process rights constitutes an unconstitutional taking").

150. See Joel R. Burcat & Julia M. Glencer, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency: Is There a There There?*, 32 ENVTL. L. REP. 11212, 11217, 11220 (2002). The authors stated, "*Tahoe-Sierra* serves only to reinforce that it will still be some time before a regulated person can determine when a regulation has . . . '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." *Id.* at 11220 (citations omitted). The article notes also that the *Penn Central* "test itself is far from 'familiar'" and "defies predictability" because "no in-depth analysis of *Penn Central's* component parts has ever accompanied these recitations." *Id.* at 11217 (citations omitted). See also *Rose Acre Farms, Inc. v. United States*, 53 Fed. Cl. 504, 520 n.47 (2002) (not explicitly discussing the *Penn Central* factors in finding no taking because of a belief that "the facts and circumstances as a whole prove there was no taking," and basing its failure to do so on an in-depth analysis on *Tahoe-Sierra*). On the other hand, the notion that property interests are severable and subject to takings will arguably produce much more litigation.



C. *The Doomsday Dissent: "In the Long Run, We are all Dead"*<sup>151</sup>

The three justices who dissented fundamentally differed from the majority because they refused to adopt the "parcel as a whole" conception of property. Additionally, they would have found that the regulations effected a taking because a temporal slice of the owners property interests was taken when the moratoria was in place.<sup>152</sup> Noting that petitioners were prohibited from building any structures on their land for "over half a decade," the dissent by Chief Justice Rehnquist reflected his belief that the moratorium on development required the payment of compensation because it "deprive[d the land] owners of all economically viable use of their land," thus falling within the established categorical rule.<sup>153</sup> In his view, the moratorium lasted too long, and under the prior precedent established in *Lucas* and *First English*, the temporary development restrictions could not be considered a legitimate "traditional land-use planning device."<sup>154</sup> Also, the regulations could not properly be associated with the "short-term delays attendant to zoning and permit regimes [that] are a longstanding feature of state property law and part of a landowner's reasonable investment-backed expectations."<sup>155</sup>

The dissent acknowledged the nuisance exception to *Lucas's* categorical rule and the realization that "since the beginning of our regulatory takings jurisprudence, we have recognized that property rights 'are enjoyed under an

---

151. *Tahoe-Sierra*, 535 U.S. at 356 (Thomas, J., dissenting) (quoting JOHN MAYNARD KEYNES, *MONETARY REFORM* 88 (1924)). See also PIPES, *supra* note 31, at 250-51 (calling increased environmental protection the result of a Cold War-like "doomsday scenario" and observing that "[e]nvironmental hysteria . . . provides a powerful emotional rationale for encroachments on property rights" that "must be sacrificed for the sake of survival of life on earth.") The same emotional rationale might be seen in the ardor of the property rights movement, which has experienced an increased popularity based seemingly on the absurd notion that environmental quality must be unavoidably sacrificed for the sake of the absolute free use of land in the name of economic progress or "liberty." The movement appeals to emotion by perpetuating the idea that supporting even moderate government protection of the environment could cause the downfall of America.

152. *Tahoe-Sierra*, 535 U.S. at 343-44 (Rehnquist, C.J., dissenting).

153. *Id.* at 343.

154. *Id.* But see Roberts, *supra* note 84, at 11037 (arguing that land use moratoria are an integral and rational part of land-use planning and permitting, "[p]roperly conducted planning activities take time" and "rational planning often requires a temporary restraint on land uses" such that the "mere fact of a delay cannot on its face be found to be a taking without eliminating the entire permitting process").

155. *Tahoe-Sierra*, 535 U.S. at 352 (Rehnquist, C.J., dissenting) (citations omitted). In fact, the dissent noted that "California, where much of the land . . . is located, provides that a moratorium 'shall be of no further force and effect 45 days from its date of adoption,' and caps extension of the moratorium so that the total duration cannot exceed two years." *Id.* at 353 (citations omitted). Arguably, however, the state gave up much of its authority over the land in the Basin when it entered into the congressionally approved Tahoe Regional Planning Compact.

implied limitation.”<sup>156</sup> As such, regulatory takings are not found “in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like.”<sup>157</sup> Arguably, the moratoria imposed by the Tahoe Regional Planning Agency were but changes in the existing zoning ordinances, or perhaps a temporary freeze on development that could even be an implied limitation of property ownership.<sup>158</sup> Nevertheless, the question remains as to how long the government can restrict development before it becomes a taking. The Chief Justice argued:

[A] moratorium prohibiting *all* economic use . . . is not one of the longstanding, implied limitations of state property law. Moratoria are “‘*interim*’ controls on the use of . . . land development in an area by either ‘*freezing*’ existing land uses or by allowing the issuance of building permits for only certain land uses that would not be inconsistent with a contemplated zoning plan or zoning change.”<sup>159</sup>

Besides taking issue with the length of the moratorium,<sup>160</sup> the dissent criticized the majority’s refusal to apply the categorical rule of *Lucas* on the

156. *Id.* at 351 (quoting *Penn. Coal*, 260 U.S. at 413).

157. *Id.* at 351-52.

158. *Id.* “A property owner cannot reasonably rely on an assumption that zoning will forever remain the same, and that the government will refrain indefinitely from valid changes in zoning to enhance the public interest (including interim periods of cessation in development in order to prepare for such changes.)” *W.R. Grace & Co.-Conn. v. Cambridge City Council*, 779 N.E.2d 141, 155 (Mass. App. Ct. 2002). *Accord Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992) (stating a “property owner necessarily expects the uses of his property to be restricted, *from time to time*, by various measures newly enacted . . . in legitimate exercise of [the] police powers.”) (emphasis added). *See also Avenal v. United States*, 100 F.3d 933, 937 (Fed. Cir. 1996) (noting property owners “cannot . . . insist on a guarantee of non-interference by government when they well knew or should have known that, in response to widely-shared public concerns, . . . government actions were being planned and executed that would directly affect their new economic investments”).

159. *Tahoe-Sierra*, 535 U.S. at 352 (Rehnquist, C.J., dissenting) (emphasis added). Rehnquist noted that traditional moratoria “prohibit only certain categories of development . . . [and] do not implicate *Lucas* [because] they do not deprive landowners of *all* economically beneficial use of their land.” *Id.* (emphasis added).

160. *See id.* at 343-44. The Chief Justice believed that the Court should not have limited itself to determining only whether the thirty-two month moratorium on development brought about by the TRPA was a taking of property, but rather, the Court should have inquired more generally into the nature of the harm and whether the respondent TRPA caused the harm. The majority inexplicably dismissed this possibility, arguing that the 1984 injunction, issued by the District Court, was the cause of further delay after the TRPA’s adoption of the regional plan. This followed a lengthy freeze on development and was adjudged “reasonable” in the majority’s opinion. The majority noted that the plan allowed for the development of single family residences. The Chief Justice observed, however, that the Tahoe Regional Planning Agency was the “moving force” behind the injury because the injunction enjoining the 1984 plan was only authorized because the plan itself, approved by the TRPA, “did not comply with the

ground that the deprivation was “temporary.”<sup>161</sup> Because the TRPA in effect denied landowners of all economically viable use of their land, the dissent believed that where “the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave property economically idle, he has suffered a taking.”<sup>162</sup> In fact, Rehnquist characterized the regulations imposing the temporary ban on all economic use as a forced leasehold.<sup>163</sup> He was also worried about creating an “incentive for government to simply label any prohibition on development ‘temporary’ or to fix a set number of years,”<sup>164</sup> no matter how long a moratorium lasts in reality, in order to avoid the just compensation requirement. The dissent argued strongly for the application of the categorical rule and would have opted not to differentiate between physical appropriation and regulations that deny all productive use of land, no matter however brief.<sup>165</sup>

Justice Thomas, in a separate dissent joined by Justice Scalia, argued the alleged fact that the property would “logically . . . recover [its] value as soon as the [moratorium was] lifted” must have been a very small consolation to one who had purchased land with reasonable expectations of development and who

---

environmental requirements of [the Agency’s] regulations” and thus violated the Compact for which the TRPA was directed to act! *See id.* at 345-46.

161. *Id.* at 347. The Chief Justice pointed out, “[U]nder the Court’s decision today, the takings question turns entirely on the initial label given a regulation, a label that is often without much meaning.” *Id.*

162. *Id.* at 346 (quoting *Lucas*, 505 U.S. at 1019) (emphasis in original). The dissent noted that the District Court found it to be a fact that the petitioners were forced to leave their land economically idle, and neither the Court of Appeals nor the Supreme Court disputed that the landowners could not develop during this period. *Id.* at 346. In *Lucas*, Justice Scalia noted:

We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.

*Lucas*, 505 U.S. at 1019. Though the categorical rule of *Lucas* is still good law and there are very good reasons for the rule, this statement by Justice Scalia appears to be overruled in part by the holding in *Tahoe-Sierra* because there was no categorical rule applied where “the owner of real property [was] called upon to . . . leave his property economically idle” for a time. *Id.* The wisdom of this implication will no doubt continue to be disputed.

163. *Tahoe-Sierra*, 535 U.S. at 348 (Rehnquist, C.J., dissenting).

164. *Id.* at 347. The district court found that a taking occurred because no permanent date was set for the end of the moratorium, and thus, its length was indefinite. *See id.* at 316-17.

165. *Id.* at 349-50. The Chief Justice observed:

In “the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted,” it is less likely that “the legislature is simply ‘adjusting the benefits and burdens of economic life’ . . . in a manner that secures an ‘average reciprocity of advantage’ to everyone concerned” . . . and more likely that the property “is being pressed into some form of public service under the guise of mitigating serious public harm.”

*Id.* (citations omitted).

had been unable to develop for six years.<sup>166</sup> Instead of applying a loose factor analysis where a landowner has admittedly been deprived of all productive uses of property, the dissent desired to formulate a hard and fast rule for regulatory takings that would characterize property merely as any interest in the bundle of sticks.<sup>167</sup> Noting that calculating the composition of the denominator in the deprivation fraction is a difficult and uncertain question, Justice Thomas took the position that “*First English* put to rest the notion that the ‘relevant denominator’ [could be] land’s infinite life,”<sup>168</sup> and would measure the regulated property right against the same property interest, therefore appearing to find a taking when any stick in the bundle of property rights is removed. He believed that a regulation effecting a total deprivation of a temporal slice of a property right should be a taking under the Fifth Amendment “regardless of whether the property so burdened retains [some] theoretical useful life and value if . . . the ‘temporary’ moratorium is lifted.”<sup>169</sup>

It appears that applying the rigid *Lucas* rule under these circumstances, where the deprivation of property is by its terms temporary, would effectively deny the fact that the *Lucas* opinion itself emphasized at least “eighteen times that there is no categorical tak[ing] unless *all value and use* has been permanently deprived.”<sup>170</sup> The dissenting justices focus only a small, albeit valuable, temporal portion of the property owners’ interest in their land to find a taking. Looking to the archaic way they characterize property rights, this result was inevitable. The dissenting justices look only toward what the land owners have lost instead of looking at the bigger picture and balancing the interests of all involved. By adhering to a strict bundle of sticks notion of property, the dissent fails to acknowledge that bundles of property rights must

166. *Id.* at 356 (citations omitted). *But see* Echeverria, *supra* note 113, at 11237 (“evidence showed that owners in the basin typically held their property for 25 years before seeking development approval”).

167. *See Tahoe-Sierra*, 535 U.S. at 356 (Thomas, J., dissenting). Justice Thomas ended his discussion with the statement that “in the long run, we are all dead.” *Id.* (citing KEYNES, *supra* note 151). He noted that “individuals and families were deprived of the opportunity to build single-family homes as permanent, retirement, or vacation residences on land upon which such construction was authorized when purchased.” *Id.* However, such an analysis, while refusing to look to the long term economic value of the property, also fails to take account of the Court’s holding in *Palazzolo*, namely that a landowner taking title to land after the enactment of a regulation depriving his land of economic value is not automatically deprived from bringing a takings claim. *Palazzolo v. Rhode Island*, 533 U.S. 606, 628 (2001). The holding in *Tahoe-Sierra* appears to be the converse—just because development was authorized when a landowner took title does not automatically preclude the regulatory body from exercising its authority to limit the land use without being subject to a takings claim.

168. *Tahoe-Sierra*, 535 U.S. at 355 (Thomas, J., dissenting).

169. *Id.* at 356.

170. FREILICH, *supra* note 28, at 61. *See also* Paul Barta, *It’s About Time: The United States Supreme Court Correctly Rejects Temporal Severance in Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 36 CREIGHTON L. REV. 479 (2003).

emanate from a thing.<sup>171</sup> Thus, the definition of property through which they approach the regulatory takings analysis is incomplete.

*D. The Parcel As A Whole*

The “parcel as a whole” theory is the opposite of the conceptual severance approach, for it does not allow landowners to segment their property interests in such a way so that the loss of one interest could be viewed as a total taking requiring compensation. As commonly defined, the term “property” means “[p]ossessions considered as a group.”<sup>172</sup> Looking at the property rights or interests of landowners in the aggregate, the Supreme Court in *Tahoe-Sierra* adopted the theory of property articulated in *Penn Central*.<sup>173</sup> There, the Court refused to limit its definition of the relevant property for the purpose of the Fifth Amendment takings analysis solely to the regulated interest and rejected dividing a single parcel into discrete segments.<sup>174</sup> The lingering effect of *Penn Central* combined with the rationale of the *Tahoe-Sierra* majority is that the Court should view *all* of the property interest as the denominator in the so-called takings equation, rather than characterizing only the regulated interest of the property as the guidepost against which to measure the amount of the property interest that has allegedly been taken.<sup>175</sup>

The *Tahoe-Sierra* opinion noted that in *Andrus v. Allard* and *Keystone Bituminous Coal Association v. DeBenedictis*, the Supreme Court affirmed that “where an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking.”<sup>176</sup> The majority declared that “[a]n 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

---

171. See Myrl L. Duncan, *Reconceiving the Bundle of Sticks: Land as a Community-Based Resource*, 32 ENVTL L. 733, 789 (2002) (noting that the “single-minded” metaphor of the bundle of sticks “amounts to a new kind of absolutist monolith that is seriously out of touch with alterations that have occurred and continue to occur in the law”). Duncan observes that “the conception of ownership embodied in the bundle metaphor cannot be squared with contemporary knowledge and values.” *Id.* at 783.

172. THE AMERICAN HERITAGE COLLEGE DICTIONARY 1097 (3d ed. 2000). The dictionary also defines real property as something owned, tangible or intangible, to which the owner has legal title. *Id.*

173. *Tahoe-Sierra*, 535 U.S. at 334.

174. See *Penn Cent. Transp. Co. v. New York*, 438 U.S. 104, 130-131 (1978).

175. See generally *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994); see also *Tahoe-Sierra*, 535 U.S. at 331 (stating that “the starting point for the [District] 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”).

176. *Tahoe-Sierra*, 535 U.S. at 327. See also *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) (holding that “the denial of one traditional property right does not always amount to a taking”); *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 480 (1987).

aspect . . . .”<sup>177</sup> By viewing property interests in the aggregate, the Supreme Court attempted, perhaps unintentionally, to integrate the traditional pre-Hohfeldian conception of property as a distinctive right in a thing that is good against the world back into the working definition of property.

The approach to the denominator problem taken by the majority in *Tahoe-Sierra* was necessary to make whole an idea of property that is “good against the world” and that could be balanced against the police power of the state. The perspective of the parcel as a whole allows the Court to weigh the regulated property interests against the property interests retained by the owner in determining if a taking has occurred. “[W]e need the parcel-as-a-whole rule to preserve the essential character of balancing: the fact that balancing looks to more than one factor. Value alone should not predominate.”<sup>178</sup> Viewing the parcel as a whole does not allow the property owner to divide the interests into discrete segments, whether they be horizontal (parceling the geographic metes and bounds of the land), vertical (dividing property rights into air rights or mineral rights, unless by statutory authorization), or temporal (separating interests according to present or future fragments of the term of years contained in the claim of right to the property in the first place). To the extent that the categorical rule expressed in *Lucas* requires that the landowner be deprived of *all* economically viable use of a property interest, the parcel as a whole doctrine precludes the use of only one aspect of the bundle of property rights when measuring it against the prohibitions or limitations set upon the property by regulation.

#### IV. THE ENDGAME: FAIRNESS AND JUSTICE

Imagine two potential developers possessing title to real property in the Lake Tahoe Basin. Each prospective developer is given a choice. One can build a lavish home with no limitation in respect to the land area used, the capacity of infrastructure needed, or the amount of resources damaged as a result of building. On the other hand, a landowner could choose to build a more humble abode that consumes less space and causes little, if any, damage to the surrounding environment. Using the Prisoner’s Dilemma analysis, the economically rational outcome is that both “prisoners” would refuse to “cooperate” and would not choose to develop modestly but would instead build the most luxurious structure they could afford. This attitude generates resource-intensive development built over large amounts of land because each homeowner stands to gain more, both financially and in other aspects like

---

177. *Tahoe-Sierra*, 535 U.S. at 331-32 (emphasis added).

178. Wright & Laughner, *supra* note 72, at 11188 (arguing that the “distinction [is] clear” between a temporary moratorium and its analogy by Chief Justice Rehnquist to a leasehold, which is a temporal interest in land, such that “[a]bsent physical invasion, all dimensions of the property must be viewed in their entirety”).

personal luxury, than the other choice presented.<sup>179</sup> If both landowners cooperated with each other and engaged in responsible development, neither would realize a lavish dream house, although both may experience moderate gains.<sup>180</sup> However, if one landowner builds a small home in a more environmentally sensitive manner while the neighbor opts to build a mansion or develop in a way that substantially escalates the amount of impervious coverage, the latter may be said to win by acquiring the goodwill of the former who sacrifices in order to preserve the lake by developing in a more environmentally accountable manner.<sup>181</sup>

This dilemma exemplifies the predicament faced in the Lake Tahoe Basin and in other development hotspots around the country. The reality is that in an era of mushrooming land development, especially during economic boom times, to maximize the intake of capital, each man is locked into a system that compels him to increase his land use without limit—in a world that is by its

---

179. See Susan Hallatt, *The Smart Growth Debate: A Prisoner's Dilemma—Who Wins and Who Loses After Selfish Development Decisions are Tallied?*, Planetizen: The Planning & Development Network, at <http://www.planetizen.com/oped/item.php?id=71> (Nov. 4, 2002) (concluding that “the Prisoner’s Dilemma illustrates unequivocally the benefits of cooperation over ‘selfishness’”).

Under the Prisoner’s Dilemma analysis, this situation is termed the zero-sum result with no benefit because each economic individual’s gain, though not insignificant, will be offset by the other developer’s failure to cooperate. The Prisoner’s Dilemma “captures the net benefit of choice.” *Id.* The typical example involves a situation where a crime was committed and there are no witnesses. If two suspects, or prisoners, separated and interrogated, choose to cooperate with each other by not confessing, they will both benefit by obtaining lighter sentences. If one cooperates but the other does not and tells on the other in exchange for a plea, the latter wins and the cooperator gets hit with the stiffer penalty. In our example, the cooperator is the modest, responsible homebuilder who loses because the other gains much more financially because of his disregard of the consequences of his actions, not to mention he has a bigger house. If both prisoners confess, each gets a medium sentence and no one wins. The logic of this brief article seems to imply by analogy that if both developers seek their own short-term interest and refuse to cooperate, such environmentally taxing development might have the effect of sending both to “jail” because over time, their selfish actions will produce a benefit for no one. A zero-sum result will occur. The prison in this metaphor is a completely short-term, market-driven basis for action as opposed to the benefits to property value that could be realized from long-term planning and ecologically conscious development. For a better explanation of the case of the prisoner’s dilemma, see JOHN RAWLS, *A THEORY OF JUSTICE* 269 n.9 (1971).

180. Each homeowner, for example, could still have a home in the Lake Tahoe Basin and would also help ensure the region maintains the environmental quality that attracted people to the area in the first place.

181. Not just homeowners, however, cause the problem. “Development activities such as ski areas and golf courses have contributed greatly to the nutrient loading of the lake.” E. Clement Shute, Jr., *Interim Development Controls & Moratoria Under the Ninth Circuit Decision in Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, in *PROCEEDINGS OF THE INSTITUTE ON PLANNING, ZONING, & EMINENT DOMAIN* at § 15.02 (2001).

nature limited.<sup>182</sup> There is seemingly no incentive, fiscal or otherwise, for one to develop in a manner that is not resource-intensive, especially when the burdens associated with development are not likely borne by the developer, but rather are shifted to the public resource in such a way that is not immediately noticeable. Thus the question remains as to how the scales of justice may properly be balanced to ensure that the government, while managing the spread of humankind's urban footprint, refrains from going "too far" in regulating private land use.

What is needed in this land use puzzle is a rule that protects the integrity of private property, the foundation upon which our nation was founded, as opposed to policy that merely seeks to protect potential economic injuries. A democratic process, with adequate checks to ensure there is no tyranny of the majority,<sup>183</sup> could perhaps provide for adequate safeguards for planners and landowners alike. Epstein has rightly observed that the moratorium caused landowners with undeveloped land to bear the burdens caused by those who already had developed.<sup>184</sup> It is clearly "inequitable to bestow a benefit upon some people" while taking rights from others, so to balance the effects of such regulation, a possible solution could be to evaluate the extent to which the regulation enhanced the economic value of the developed parcels of land (especially those whose impervious coverage contributed to the problem in the first place) and redistribute the benefits they received across the universe of landowners who have borne the costs of the regulation that effected a "taking" of their property.<sup>185</sup> Such a situation could properly balance the scales of justice—the government could prepare a plan to confront the regional problem, taking some time to develop an effective solution, the adversely affected landowners may take comfort in the fact that the costs they bear will be redistributed, and the owners of currently developed land would give back any

---

182. See Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243, 1244 (1968) (observing that the economically rational herdsman will conclude that in the short term the sensible course is to add more animals to his herd grazing on common land, thus each herdsman seeks to maximize his profit without regard to the devastating effects that over-consumption of resources will have on the common land in the long run and that each herdsman pursues his own interests by acting in ways that realize an immediate utility to each at the expense of the whole commons).

183. NEDELSKY, *supra* note 19, at 18 (noting that to the founders, the propertied class must necessarily be the minority and that the property-less majority would have no direct interest in protecting the rights of private property). Perhaps government has its most legitimate role out of the necessity for the protection of land and its capacity to protect the interests of another minority—the environmentally conscious—against the seeming majority of private property owners.

184. Richard A. Epstein, *Taking By Slivers: Ruling Shows How Factional Politics can Survive Despite Constitutional Efforts to Limit Government Abuse by Protecting Property Rights*, 169 *N.J. L.J.*, July 29, 2002, at S-9.

185. See Bell & Parchmovsky, *supra* note 47, at 554.



windfall they received while not being held responsible for any problem their previously developed land might have caused.

A. The Citizen's Responsibility: *Sic utere tuo ut alienum non laedas*<sup>186</sup>

Justice Holmes's statement in *Pennsylvania Coal* regarding the reciprocity of advantage of a regulation reminds us that property ownership exists in a society.<sup>187</sup> Society by its nature is built upon a system of laws as opposed to the war of all against all, or what Eighteenth Century philosophers called the state of nature.<sup>188</sup> Thus, our rights, even to property, must be subject to certain inherent limitations in exchange for the guarantee that these rights exist. But does this idea of an intrinsic constraint conflict with traditional American ideals?<sup>189</sup>

While there is a strong argument for individual liberty and the absolute right to use one's property, such use must necessarily be limited to some extent. Almost one hundred years ago, "new conceptions of the relations of property to human welfare" were recognized, maintaining "that every man holds his property subject to the general right of the community to regulate its use to whatever degree the public welfare may require."<sup>190</sup> The more significant question though, is to what extent the use of land can be limited. The use of one's property, however beneficial to the individual or to the society at large that recognizes the importance on personal freedom, cannot be allowed to injure the rights of other citizens in their respective properties or in

---

186. "So use your own as not to injure another's property."

187. See *Tahoe-Sierra*, 535 U.S. at 341 (noting that "with a moratorium there is a clear 'reciprocity of advantage' because it protects the interests of all affected landowners against immediate construction that might be inconsistent with the provisions of the plan that is ultimately adopted").

188. See Charles K. Rowley, *State of Nature and Civil Society*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 514, 516-17 (Peter Newman ed., 1998) (clarifying and commenting about the supposed dichotomy between the state of nature and civil society). Later in the passage, the author expands upon the political philosophy of Thomas Hobbes and explains the "war of all against all." *Id.* at 517-18.

189. See NEDELSKY, *supra* note 19, at 65-95 (discussing the philosophies of Pennsylvania's Gouverneur Morris concerning the market economy). See also Paul Turner & Sam Kalen, *Takings and Beyond: Implications for Regulation*, 19 ENERGY L.J. 25 (1998).

190. BETHELL, *supra* note 29, at 175 (quoting Theodore Roosevelt). In 1910, Theodore Roosevelt stated:

We are face to face with new conceptions of the relations of property to human welfare, chiefly because certain advocates of the rights of property as against the rights of men have been pushing their claims too far. The man who wrongly holds that every human right is secondary to his profit must now give way to the advocate of human welfare, who rightly maintains that every man holds his property subject to the general right of the community to regulate its use to whatever degree the public welfare may require.

*Id.* at 174-75.

the rights of the public in commonly held pieces of property.<sup>191</sup> We must avoid the temptation to define property and property rights as merely functional means to the end of wealth maximization or strictly economic gain, or even as existing solely because of their innate utility to the greater good of free enterprise. Property serves a more important role in the American story.<sup>192</sup> For it is in the labor that man exerts that creates that connection between a human being and his or her parcel of land that was believed to inculcate virtue and foster the development of republican ideals.<sup>193</sup> It was once not only in its marketability that property had value. Thus, the land should not be viewed as simply an asset. Property is more than the alienability of a parcel of land; it is a collective mass of rights that brings liberty and social responsibility. It is dangerous to view the property interests the Constitution was created to protect as purely economic. As Justice Holmes observed, the “Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*.”<sup>194</sup>

The rational economic person in today’s world likely cares more about the rights in property owned individually than with the long-term effects that some of his activities might have on a nearby public resource.<sup>195</sup> The nature of our economic system seems to take for granted any part of the natural world that is

---

191. See David S. Wilgus, Comment, *The Nature of Nuisance: Judicial Environmental Ethics and Landowner Stewardship in the Age of Ecology*, 33 MCGEORGE L. REV. 99, 102 (2001). The author presents a thoughtful comment on our age, noting:

[T]raditional notions of property law must contend with new scientific discoveries about our environment . . . [and] . . . [c]onsistent with our new understanding of the environment, courts should adjust modern property law to include a condition of stewardship within the common law notions of what it means to be a property owner in the twenty-first century.

*Id.* at 100-02. See also Lynda L. Butler, *The Pathology of Property Norms: Living Within Nature’s Boundaries*, 73 S. CAL. L. REV. 927 (2000) (advocating for a reconciliation of property rights and ecological consciousness that focuses less on individual freedom and more on the environmental effects of property use).

192. Justice Philip A. Talmadge, *The Myth of Property Absolutism and Modern Government: The Interaction of Police Power and Property Rights*, 75 WASH. L. REV. 857, 858 (2000) (noting that “[p]roperty rights are, of course, important in the American view of ordered liberty”).

193. See MCCOY, *supra* note 5, at 65.

194. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

195. However, while he may never actually “use” the lake, the landowner who develops on lakefront property certainly benefits from its existence, and, in the case of Lake Tahoe, its uniqueness. But to the extent that his property will not lose value in the reasonably foreseeable future, for example, if the lake’s clarity is not significantly diminished until sometime late in the Twenty-first Century or even later, what economic incentive does the landowner have to care? Perhaps one solution to the problems in Lake Tahoe would be to privatize the surface of the lake itself, giving adjacent landowners a concrete legal interest in the property that could support an action in nuisance or trespass.

not reducible to economic quantification and fails to recognize the value of nature's assets, causing us to seriously underappreciate the ecosystems that provide vital services.<sup>196</sup> Richard Epstein has observed that a "primary goal of a system of property is to provide islands of independence that allow all individuals to pursue their own projects without interference from others."<sup>197</sup> While it is true that individuals may pursue their ends without interference from others to a certain extent, when is it that an island in pursuance of these projects has gone "too far"? A proper theory of property will be able to answer this question. Epstein also adds that the difficult part is to ensure that "rights created in the *long run* are worth more than the correlative duties that are necessarily imposed."<sup>198</sup> From this perspective, how can the duty to forestall development for some period of time—three months or three years—be considered a taking when one realizes that, *in the long run*, the property rights protected will undoubtedly be "worth more" than the imposed duty to postpone development or to develop one's property in an environmentally sensitive manner?<sup>199</sup>

In *Takings: Private Property and the Power of Eminent Domain*, Epstein represents the model property rights advocate who wants the court to adopt the conceptual severance theory, with the view that all takings of any part of an

---

196. Katherine Ellison & Gretchen C. Daily, *Natural Assets*, NATURE CONSERVANCY, Fall 2002, at 88. "We don't watch Earth's assets in the same way we dog our investments." *Id.* The authors of this essay argue for the pressing need for a full accounting of nature's services and a realization that engineered substitutes can be more costly than preserving earthly assets in the first place. *Id.*

For example, the cost to preserve Lake Tahoe by treating it with massive amounts of chemicals while continuing to allow erosion and damage to the chemical balance of the lake caused by the impervious coverage of development could be enormous in terms of money, not to mention the unknown adverse environmental impact of the chemicals. From that perspective, a delay in further development might not seem such a bad idea. In fact, after an assessment is done by a scientific authority, then, with proper citizen and government participation, it may even be concluded that it would be more cost effective to continue the rate of development while curing the lake through alternative remedial strategies.

197. Richard A. Epstein, *Property as a Fundamental Civil Right*, 29 CAL. W. L. REV. 187, 190 (1992).

198. *Id.* (emphasis added).

199. This is true especially considering the fact that most people hold property in the Lake Tahoe basin for an average of twenty-five years before they begin to develop, a fact that may allow one to argue that even a six-year waiting period is not excessive. Those who do not properly look to the "long run" are effectively trying to beat the system. Those landowners that rushed to development before the enactment of use restrictions in a heavily regulated "industry" were trying to place burdens disproportionately on the public so that they could realize economic gain.

To make certain that rights created are worth more than the duties imposed should perhaps lead us to create more rules for developmental moratoria. A system that limits moratoria to certain circumstances and precise time limitations might properly balance the interests of all involved and reflect the ideals embodied in the Constitutional structure.

individual's property interest require compensation from the state.<sup>200</sup> His proposed notion of the proper relationship between the individual and the state argues that requiring compensation for every regulation that diminishes property value would properly balance the "monopoly of force [by the sovereign] and . . . the preservation of liberty and property."<sup>201</sup> Though seeming to echo the framers' intent, this statement reflects a *Lochner*-era distrust in the power of the sovereign that has become an essential element of the property rights movement.<sup>202</sup> Attempting to strike the appropriate balance between individual landowners and regulatory authority, Epstein believes the exclusion from the use of one's own property is a taking regardless of how long it lasts.<sup>203</sup> In fact, Epstein disagreed with Justice Stevens who, in writing for the majority in *Tahoe-Sierra*, seemed to assume that the test for whether property is taken is directed more toward what the owner retains than what he has lost.<sup>204</sup> However, as it is true that justice is intimately related to the idea of property,<sup>205</sup> a fair and just inquiry into the takings question must necessarily focus on *both* what the regulation takes away from the property owner as well as what rights the property owner retains.

#### B. *The Planner's Responsibility*

In 1980, Justice Brennan inquired into an apparent double standard in the law when he noted that "[a]fter all, a policeman must know the Constitution, then why not a planner?"<sup>206</sup> The *Tahoe-Sierra* decision, while a victory for land-use planning, squarely places upon the planners the duty to stay within the Constitution—within the parameters of developed takings law and to carefully consider the Fifth Amendment when forming land-use regulations and using planning tools like moratoria. The *Tahoe-Sierra* decision seems to give planning officials faced with significant growth pressures some breathing room to more thoroughly consider how best to manage the modifications to their community's land use. The sharp criticism from the dissent and some of the

---

200. EPSTEIN, *supra* note 4, at 15.

201. *Id.*

202. *See generally* Herber, *supra* note 27. *See also* Talmadge, *supra* note 192, at 858 (noting that "[t]he ideologically driven views of the modern-day property-rights advocates, however, would effectively undercut the police power by elevating policy disputes to constitutional dimensions, thereby transferring the decision-making process from the people acting through their elected representatives to the courts").

203. Epstein, *supra* note 184, at S-11.

204. *Id.* Epstein inferred that such a conception of property might inspire the government to "take" property piece by piece. *Id.*

205. Tom Bethell, *Introduction: Property and Justice*, HARV. J.L. & PUB. POL'Y, Winter 1990, at 1 (noting "without private property there can be no justice" and "an important reason for studying law . . . should be to inquire into the relationship between property and justice").

206. *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 661 n.26 (1981) (Brennan, J., dissenting).

nation's most preeminent legal scholars, as well the majority's emphasis on "considerations of fairness and justice," however, should give planners a note of caution to take the utmost care when formulating a planning regime. *Tahoe-Sierra* reinforces the notion that delay is an inevitable part of the land-use planning and regulatory process, perhaps even one of the normal incidents to property ownership.<sup>207</sup> But moratoria should only be used as a last resort.

Local, state, or regional government planners run the risk that the upholding of temporary development moratoria will become nothing more than a temporary victory for the land-use planning movement. For a government entity to avoid liability, an allegedly taken property right must first inhere in the title itself, in the restrictions that background principles of the state's law of property and nuisance already place upon land ownership.<sup>208</sup> Justice Stevens's review of "fairness and justice" concerns in his analysis indicates that the options for governments to regulate land use are expanding. Planners still have a very serious responsibility to review the regulatory decision-making processes and to ensure that land-use regulations not only foster previously articulated goals but also permit individual landowners to use their property in some reasonable economic manner during the adoption of land use guidelines. The majority in *Tahoe-Sierra* did make it clear, though, that the planners' task to protect and represent the public in fostering strategic growth while also refraining from interfering with individual property rights plays such an essential role in society that a hard and fast categorical rule cannot encompass all of the intricacies associated with such a fundamental responsibility.<sup>209</sup> Thus, public policy is best served by approaching the regulatory takings question with a set of standards (albeit a set that is as of yet undeveloped) based upon the foundation of considerations of fairness and justice.

The land-use planning process can effectively serve those goals by adhering to its self-imposed guidelines. Allowing for public involvement in the development of regional growth strategies might also be desirable, though it is not without its own flaws. Professor Epstein has observed "the unjustified loss" in which he notes that the actual rolling moratorium in *Tahoe-Sierra* had the "intended consequence" of shutting out outsiders indefinitely from the land

---

207. See *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 321 (1987) (noting that reasonable landowners must expect those "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like").

208. See *Esplanade Properties, L.L.C. v. City of Seattle*, 307 F.3d 978, 984-85 (9th Cir. 2002) (noting that the lawmaker accused of the taking cannot be liable if the interests allegedly taken were not part of the original title in accordance with background principles of the property law of the jurisdiction) (citing *Lucas*, 505 U.S. at 1029 (1992)). See also *Lucas*, 505 U.S. at 1027 (noting a state may resist paying compensation only if the "logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with").

209. *Tahoe-Sierra*, 535 U.S. at 323-25.

use decision-making process. He argued that honoring the Fifth Amendment requirement would force the “planning agency to reconsider its hands-off attitude to the current uses that initially created the land-use problem.”<sup>210</sup> Epstein points out a flaw in Justice Stevens’s economic analysis that assumes that the behavior of planners and of incumbent homeowners would remain the same even if the compensation requirement was imposed.<sup>211</sup> He has identified a real problem in land-use planning with focusing restrictions and regulations solely on future development instead of attempting to address the pre-existing land uses that may be short of actionable nuisance but that have caused the problems and created the need for the intense regulation to remedy the situation.<sup>212</sup> Owners of already developed property might have been involved in the political process, but they surely had a motive to encourage the TRPA to preclude further residential development on undeveloped land. However, if the use of vast amounts of impervious coverage in development is the culprit causing the Lake Tahoe crisis, absent any specific legislative authorization, a common law nuisance action, or any violation of a background principal of state property law, it would be difficult to find any legal remedy for the government or the public to protect Lake Tahoe from property owners who develop their property without considering whether such development would be good for the Lake. Instead of the all-or-nothing approach, the challenge is to find a just balance of power and liberty.<sup>213</sup>

C. *Property: The Guardian of Every Other Right*<sup>214</sup>

“Because property rights are no longer significant protections against [seemingly] arbitrary state power, those on both the political left and right have made efforts to rethink what property is and what role it should play in our society.”<sup>215</sup> It is apparent that clear lines cannot be drawn. Only a balancing of expectations can internalize a more fluid concept of property. But the

210. Epstein, *supra* note 184, at S-11. *But see* Penn. Coal Co. v. Mahon, 260 U.S. at 393, 417-18 (1922) (Brandeis, J., dissenting) (stating that “the purpose of a restriction does not cease to be public, because incidentally some private persons may thereby receive gratuitously valuable special benefits”).

211. Epstein, *supra* note 184.

212. *See generally* Robert Innes, *Takings, Compensation, an Equal Treatment for Owners of Developed and Undeveloped Property*, 40 J. L. & ECON. 403 (1997).

213. PETER W. SALSICH JR. & TIMOTHY TRYNIECKI, *LAND USE REGULATION: A LEGAL ANALYSIS & PRACTICAL APPLICATION OF LAND USE LAW* 116 (2d ed. 2003) (noting the “importance of establishing policies before regulations are enacted”).

214. *See* JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 26 (1998). “The right of property . . . is the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty.” *Id.* (quoting ARTHUR LEE, *AN APPEAL TO THE JUSTICE AND INTERESTS OF THE PEOPLE OF GREAT BRITAIN, IN THE PRESENT DISPUTE WITH AMERICA* 14 (1775)).

215. SCHULTZ, *supra* note 22, at 127.

question remains as to how the law should properly balance the interests of liberty and property in a modern democratic society.

In commenting upon the general structure of the takings problem, Bruce Ackerman has identified the following essential question: “[I]s it fair to say that the state has taken one of [the property owner’s] things away from him?”<sup>216</sup> The petitioners in *Tahoe-Sierra* included the Tahoe-Sierra Preservation Council—a nonprofit membership corporation representing approximately two thousand owners of both improved and unimproved parcels of real estate in the Lake Tahoe Basin—as well as a class of some four hundred individual owners of vacant lots located on lands where conservation efforts focused on restricting development around the lake.<sup>217</sup> The “wellspring of their undoing” lies in the fact that they asked the Court to apply a categorical rule whenever a temporary moratoria or other regulation denies all economically viable use of land for any period of time. In terms familiar to the regulatory takings analysis, the landowners perhaps went “too far.” The Court of Appeals in *Tahoe-Sierra* explicitly refused the temptation to apply the hard and fast *Lucas* rule to the category of temporary restrictions imposed on development. Agreeing, the Supreme Court asserted that the multiple standards of *Penn Central* are “the appropriate framework for analysis.”<sup>218</sup>

The costs of litigating would impose serious burdens both upon the individual property owner and on the judicial system itself if each landowner was forced to bring his case individually, especially when compared to a broad rule that might be applied categorically.<sup>219</sup> Also, the district court held that the moratoria did not violate the *Penn Central* balancing test, but rather was a categorical taking under *Lucas*,<sup>220</sup> even though the Ninth Circuit reversed and found there to be no taking whatsoever.<sup>221</sup> Although individual landowners generally might have a better chance of prevailing under the multi-factor test and ad hoc judicial inquiries by bringing as-applied challenges to regulations, substantial procedural barriers tend to push objectors toward facial challenges

---

216. ACKERMAN, *supra* note 35, at 101. While this is the role of the courts, the “Policymaker is obliged to determine the best way in which the costs involved in moving to a better world are to be distributed among the citizenry . . . .” *Id.* at 30. Ackerman also presents a discussion of a more complex question—should the property owner be left bearing the entire loss associated with the legal change or should this loss be spread among his fellow citizens? *See id.* at 29-40.

217. *Tahoe-Sierra*, 535 U.S. at 312.

218. *Id.* at 319.

219. This concern for cost and the preservation of judicial resources does not seem to be of any specific importance to the majority. If it was, the cost to society and environmental protection of applying a broad categorical taking rule to temporary restrictions on development must have outweighed this concern.

220. *Tahoe-Sierra*, 34 F. Supp. 2d 1226, 1242 (D. Nev. 1999).

221. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 782 (9th Cir. 2000). The court noted that the plaintiffs did not even “argue that [the moratoria was] a taking under the ad hoc balancing approach described in *Penn Central*.” *Id.* at 773.

instead.<sup>222</sup> The petitioners seemed to appeal only the ruling that there was no categorical taking, and their failure to specifically disapprove of the lower courts' finding that there was no taking under the *Penn Central* framework served as part of the rationale used by the majority to completely avoid applying the *Penn Central* factor analysis it approved in *Tahoe-Sierra*.<sup>223</sup>

The effect of the *Tahoe-Sierra* decision will remain to be seen as lower courts flesh out the majority's affirmation that the "essentially ad hoc" approach to the takings inquiry is the appropriate method of analysis.<sup>224</sup> The majority in *Tahoe-Sierra* admitted that considerations of "fairness and justice" must play a more central role in the takings analysis and that they could even arguably support the conclusion that TRPA's moratoria constituted takings of property.<sup>225</sup> Fairness and justice might suggest that the individual claim of right should be protected to the utmost extent as the foundation upon which the American system is built. But while land-use planning becomes more

---

222. See SALSICH & TRYNIECKI, *supra* note 213, at 114-17 (noting the practical considerations of dealing with moratoria that both landowners and planners must bear in mind and that contribute to the development of regulatory takings doctrine). Whether or not landowners do have a better chance of prevailing under the *Penn Central* test is debatable, however, landowners certainly "'face an uphill battle' that is made especially steep by [a] desire for a categorical rule." *Tahoe-Sierra*, 535 U.S. 302, 320 (2002) (citations omitted).

223. See *Tahoe-Sierra Pres Council, Inc. v. Tahoe Reg'l Planning Agency*, 533 U.S. 948 (2001) (granting certiorari to the Ninth Circuit). The "[p]etition for writ of certiorari is granted 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?'" *Id.* The Chief Justice disagreed, however, noting that the certiorari granted was not limited to any of the "petition's specific questions," and he would have instead characterized the question as the broader one of whether or not a taking was effected by the temporary moratorium. Compare *Tahoe-Sierra*, 535 U.S. at 307 n.1, with Transcript of Oral Argument *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 2002 WL 43288, \*11 (Jan. 7, 2002) (revealing that Mr. Berger, on behalf of petitioners, in response to questioning from the Justices stated, "We did not present a *Penn Central* case, that's correct.")

224. See, e.g., *W.R. Grace & Co.-Conn. v. Cambridge City Council*, 779 N.E.2d 141, 154 (Mass. App. Ct. 2002) ("[T]he considerations defined in this fashion invite idiosyncratic decision making"); *Machipongo Land & Coal Co., Inc. v. Commonwealth of Pa.*, 799 A.2d 751, 765, 768 (Pa. 2002) ("This fairness and justice standard, although amorphous, necessarily guides our analysis . . . ." *State ex rel. Shemo v. City of Mayfield Heights*, 775 N.E.2d 493, 495-97 (Ohio 2002) (reconsidering the case under the *Penn Central* test and still finding a taking). See also *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003) (5-4 decision) (finding a technical taking of private property but not requiring compensation because the Court focused on what the property owners lost and not what the government gained). For a review of *Tahoe-Sierra* and commentary on its role in the regulatory takings context, see TAKING SIDES ON TAKINGS ISSUE: THE IMPACT OF *TAHOE-SIERRA* (Thomas E. Roberts ed., 2003); Benson R. Cohen, *Tahoe-Sierra, or How I Learned to Stop Worrying and Love the Moratorium*, 30 *ECOLOGY L. Q.* 741 (2003).

225. *Tahoe-Sierra*, 535 U.S. at 304.



important in modern society, the desire for a practical arrangement and a conception of property that will work efficiently, and promote fairness and justice, must be the desired end of the Court. Only a fact-sensitive balancing test can achieve such a result.

Of course, notions of fairness advise that there ought to be certain limits to the moratorium power, lest government power be exercised so arbitrarily or exist completely beyond the reach of public involvement. More precise limits will help avoid what Chief Justice Rehnquist noted as the “incentive for government to simply label any prohibition on development ‘temporary,’ or to fix a set number of years” to a regulation, no matter how long, in order to allow it pass Constitutional muster.<sup>226</sup> In the end, however, only by balancing the individual’s rights to property and liberty with the society’s legitimate interests in protecting the general welfare can the Court produce a just outcome.<sup>227</sup> Hard and fast rules are the equivalent of drawing judicial lines in the sand—they will eventually wash away with the ebb of the tide of new factual circumstances and evolving American jurisprudence and conceptions of property.

## V. CONCLUSION

The framework of the American social contract protects individual private property rights from actual and constructive appropriation by government entities or other citizens, but the judicial approval of zoning and other land-use regulations for many years has favored the police power to restrict land use to a greater extent. In approximately the past twenty years, property rights advocates have reacted against the restriction of liberty by taking a strong stand against regulation. Though the conservative minority led by the Chief Justice lost the battle over Lake Tahoe and the proposed expansion of *Lucas’s* categorical Takings rule, the war for property is not over.<sup>228</sup> It is now clear that the Takings inquiry depends on more than just the way in which the denominator of some “mythical fraction” is characterized.<sup>229</sup> The analysis

---

226. *Id.* at 347 (Rehnquist, C.J., dissenting).

227. The pertinent scrutiny must be that “[i]f individual losses are found to be ‘outweighed by’ social gains, the measure is deemed legitimate.” Michelman, *supra* note 13, at 1193. In 1967, Michelman pointed out the dangers and traps of the reliance upon a balancing test. *Id.* at 1193-96.

228. This holds true especially when one realizes that the most “static” Court in history (unchanged in composition for a period longer than any other Supreme Court configuration) is soon due for a change in membership and that Justice Stevens, the author of the majority opinion in *Tahoe-Sierra*, is the oldest current member. See generally Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569 (2003). See also COYLE, *supra* note 84, at 262 (noting that the “courts are on a journey of discovery, rethinking the limits of governmental power over the landowner”).

229. See Freilich, *supra* note 66, at 591.

turns not only on the property interest which may be affected by the regulation, but on how one defines the underlying meaning actually given to property as embodied in the Constitution.<sup>230</sup>

The new understanding of property must embrace the totality of the concept—encompassing the theoretical collection of sticks, the more tangible nature of the physical relation that the lay person associates with it, *and* an explicit awareness of its role as the buffer between power and liberty in order to give a wholeness and integrity to the expression.<sup>231</sup> “Without an accurate understanding of the base [of the pyramid of property rights that is formed by the security of the rights of property], our conceptions of what happens in the refined atmosphere of the apex will often be distorted, or at least incomplete.”<sup>232</sup> The problem with the older conception of property is that it is an unrefined view that denies the essential function of our legal relationships and interests to things and the numerous property rights we possess that might be separate and distinct from one another.<sup>233</sup> The problem with the strict bundle of sticks notion, on the other hand, lies in separating rights from the corpus that substantiates them. Realizing that the bundle is often lost amongst those sticks is disconcerting because it makes it difficult to collect all the sticks at once and tie them into a neat package we can label “property” that has a constitutional meaning. While undoubtedly a person’s rights in property can lack certain interests for various reasons, the glue that holds the bundle

230. See *Lucas*, 505 U.S. at 1054 (Blackmun, J., dissenting).

231. See Cécile Fabre, *Justice, Fairness, and World Ownership*, 21 LAW AND PHILOSOPHY 249, 271 (2002) (articulating a new conception of property ownership borrowing some features from private ownership standardly understood and some from collective ownership, which the author suggests would more directly satisfy concerns of justice and fairness); Lawrence G. Sager, *Property Rights and the Constitution*, in NOMOS XXII: PROPERTY, *supra* note 35, at 381. “[T]he link between property rights and the human personality consists of the role of property as a buffer between the individual and the state. . . . [and] the new property must consist of legally secured claims against the largesse of the state”). See also Hobhouse, *supra* note 34, at 397. His essay concludes:

What we have to aim at would seem to be an analogous relation between the individual and the community, adapted to the complexity of modern conditions, combining the security of the old regime with the flexibility and freedom of the new, . . . [a]nd for these purposes we have to restore to society a direct ownership of some things, but an eminent ownership of all things material to the production of wealth, securing “property for use” to the individual, and retaining “property for power” for the democratic state.

*Id.*

232. Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 398 (2001).

233. See generally JOHN CHRISTMAN, *THE MYTH OF PROPERTY* (1994). The author states his intention from the outset: “[P]roperty’ in its traditional sense, which I call the liberal conception of ownership, is truly a myth that ought to be exposed and abandoned.” *Id.* at 3. He continues with a discussion of the evolving concept of ownership. See *id.* at 15-27.

together should never go without notice. Only this conception can cultivate the proper respect, from both individuals and society, for property.<sup>234</sup>

The *Tahoe-Sierra* opinion provided an approach to the takings analysis that offers the potential for cultivating a characterization of property that balances the interests of government, of society, and of property owners, all while realizing the legal system's ultimate goal of furthering "fairness and justice." The opinion, however, leaves much room for debate, and the question remains open as to the exact method to structure an analysis of an inverse condemnation claim. Perhaps the Court could have articulated a form of rational basis approach or an acknowledgment of substantive due process rights concerning deprivation of property.<sup>235</sup> The Court clearly missed an opportunity to create a set formula to determine the boundaries of regulatory takings law. The Court could have set limits on the length of time before moratoria effect a taking. The Court could also have developed a more creative test adopting a rebuttable presumption of a taking when certain factors are met, thus shifting the burden to the regulatory authority to prove the constitutionality of its actions. Only time will tell if *Tahoe-Sierra* is an anomaly or just the first step towards the development of a more coherent and reasoned approach to the question of regulatory takings. But perhaps there is some reason for the vagueness of this doctrine.<sup>236</sup>

On its face, it appears the Court's takings jurisprudence does not concern itself with finding some exact definition of property or with addressing any of the other metaphysical inquiries of academic circles. The Supreme Court in the end is not the appropriate location for such nebulous examinations, just as the courts are not the proper place for deciding the environmental threshold carrying capacities of an oligotrophic lake basin. Rather, the Court is a forum for the resolution of concrete disputes affecting true adversaries. If we look beneath the surface and delve into the muddy waters of takings law, we can understand why the Court must focus on these fact-intensive disputes if it

---

234. In his influential work, Thomas Grey noted:

The capitalist process, by substituting a mere parcel of shares for the walls of and the machines in a factory, takes the life out of the idea of property. It loosens the grip that once was so strong—the grip in the sense of the legal right and the actual ability to do as one pleases with one's own.

Grey, *supra* note 35, at 78 n.30 (citation omitted). To promote at least some sense of environmental stewardship, a modern concept of property should not completely conceive of land as nothing but a thing to be exploited.

235. See generally SCHULTZ, *supra* note 22, at 183-98. See also Henry A. Span, *Public Choice Theory and the Political Utility of the Takings Clause*, 40 IDAHO L. REV. 107-08 (2003) (arguing that property "owners' recourse should be equal protection review" where a moratorium that is not a pretext for permanent prohibition has been enacted).

236. See Mark R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93 (1996) (commenting on the "vagueness in takings doctrine [that] may well reflect a deeply ingrained societal disagreement about the nature of private property and the role of government").

hopes to make good law. The definition of property the Court adopts understands it as a negotiated term, its meaning bargained for in some middle ground between the inviolability of property rights and the power of governments to regulate land use. By understanding that the functional role of private property is by its nature flexible, the *Tahoe-Sierra* majority implied an operational definition that reflects the role of property in the economy and applied this notion to maintain an appropriate margin between power and liberty under the circumstances before the bench. In the end, the Court's decision might reflect a reaffirmation of the jurisprudence discrediting the due process protection of purely economic rights that was established during the *Lochner* era.<sup>237</sup>

In avoiding a categorical rule, the Supreme Court in effect has said to the planners and property owners of America that the Constitution does not embody a definite thing-oriented or bundle-of-sticks theory of property. Instead, the Court, for better or worse, is agnostic as to any absolute meaning of property, approving what amounts to a negotiated concept of the term and only giving guidelines to the parties in order to encourage compromise.<sup>238</sup> The Supreme Court adopted the multi-factor analysis approach that can account for the nuances of each case and provide a mechanism to ensure a result embodying notions of fairness and justice. Such an approach recognizes that it is in the interaction between often competing characterizations of property that this evolving idea is continually defined and its role woven into the fabric of American society. Only in this way can the Court protect the interests of individuals, majoritarian factions, and government regulators from the abuses of others.

Justice Holmes seemed to contend in 1922 that the police power and eminent domain exist on opposite ends of the spectrum of government authority, and that a line can be drawn somewhere in between in order for courts to clearly recognize the difference between a regulation and a taking.

---

237. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937) (“Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process”).

238. *Tahoe-Sierra*, 535 U.S. 302, 334-36 (2002) (admitting “the concepts of ‘fairness and justice’ that underlie the Takings Clause” are less than fully determinate). See also Erin Ryan, *Zoning, Taking, and Dealing: The Problems and Promise of Bargaining in Land Use Planning Conflicts*, 7 HARV. NEGOT. L. REV. 337 (2002). For a further description of the way the “meaning of property [evolves] concurrently with changes in community values,” see Duncan, *supra* note 5, at 1095. See also Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93 (2002). Perhaps this is the Court's way of staying out of this complicated debate, leaving it to ordinary citizens to define the parameters of our system. As Learned Hand noted: “For myself, it would be most irksome to be ruled by a bevy of Platonic Guardians . . . .” LEARNED HAND, *THE BILL OF RIGHTS* 73 (1960).

But the difference is one of degree and not of kind.<sup>239</sup> The line in the sand representing when government regulation goes “too far” will continue to shift with the changing political tides, but it will always remain the divide between liberty and the demands of organized society—protecting each one from the excesses of the other. Therefore, land-use planners should use their time more efficiently and wisely when imposing development moratoria to control the effects of untamed urban growth before the takings pendulum inevitably swings back in the other direction and a more robust, meaning for the notion of property emerges. On the other hand, property owners cannot reasonably expect absolute land use rights and must yield to the incidents of property ownership in a society as well as the checks and balances that majoritarian power places upon libertarian principles when government, from time to time, adjusts the benefits and burdens of economic life.

Though not flawless, the majority decision in *Tahoe-Sierra* provides an approach to achieving the proper balance of the interests of government and the interests of property owners in the regulatory takings analysis. It is thus somewhere in the organic nature of the Constitution that exists the precise definition of property as a function of this balancing between the excesses of power and liberty. Until the law recognizes a rule where both the interests of liberty and power can be incorporated into the meaning of property, a balancing test is the only way to ensure that all property is “duly respected.”

BRIAN J. NOLAN\*

---

239. FREILICH, *supra* note 28, at 70.

\* J.D. Candidate, Saint Louis University School of Law, 2004; B.A., University of Missouri–Columbia, 2001. This Comment has benefited greatly from the valuable insight and direction of Professor Daniel Hulsebosch and Professor Peter W. Salsich, Jr., who both inspired me to engage in this debate. I must also thank the members of the *Law Journal*, both past and present, for their assistance, dedication and hard work in the publication process. I would also like to thank my wife Anne, to whom this Comment is indebted for her encouragement, her love, and her patience.