# Dramatic Decreases in Clarity: Using the *Penn Central* Analysis to Solve the *Tahoe-Sierra* Controversy*

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"*Private Property therefore is a Creature of Society, and is subject to the Calls of that Society, whenever its Necessities shall require it . . . .*"

Benjamin Franklin[1]

## I. INTRODUCTION

As with many of the deceptively simple phrases contained in the United States Constitution, the final clause of the Fifth Amendment contains only a handful of words. Popularly referred to as the Takings Clause, it states that private property shall not be taken for public use without just compensation being paid to the owner.[2] Nevertheless, regardless of its brevity, the Takings Clause has inspired a multitude of mystifying legal issues. Among the legal quandaries stirred by this clause is the thorny doctrine of regulatory takings.[3] A taking is a governmental appropriation of private land, either directly through a statute or indirectly through a limiting regulation.[4] The latter of these methods, termed a regulatory taking, occurs when the government does not physically appropriate a particular property interest, but regulates it in such a way as to excessively reduce its value.[5] However, most often the Takings Clause is associated with the government's power of eminent domain. Eminent domain involves a governmental taking that

1. FRED R. SHAPIRO, THE OXFORD DICTIONARY OF AMERICAN LEGAL QUOTATIONS 348 (1993) (quoting 1 The WRITINGS OF BENJAMIN FRANKLIN 59 (Albert Henry Smyth ed., 1907)).

2. U.S. CONST. art. V ("[N]or shall private property be taken for public use, without just compensation.").

3. Anthony Saul Alperin, *The "Takings" Clause: When Does Regulation "Go Too Far"?*, 31 SW. U. L. REV. 169, 169 (2002).

4. BRIAN W. BLAESSER ET AL., LAND USE AND THE CONSTITUTION: PRINCIPLES FOR PLANNING PRACTICE § 4.05, at 13 (Brian W. Blaesser & Alan C. Weinstein eds., 1989).

5. Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547, 550 (2001).

results in the acquisition of that property's title. The title is gained by the payment of an amount determined either through negotiation with the landowner or by the fair market value assessed through an objective judicial proceeding.[6] Eminent domain refers only to the actual physical appropriation of property by the government. The state may achieve this type of taking either by acquiring physical possession of the property[7] or by rendering it economically useless.[8] This Comment will not discuss the takings issue as it relates to the government's power of eminent domain;[9] rather, it will focus on eminent domain's little brother, the regulatory taking. Unlike eminent domain, a regulatory taking lays no formal claim to an owner's title[10] and may only temporarily deprive the owner of its beneficial use.[11]

In order to determine if a compensable regulatory taking has occurred, the courts have traditionally scorned any type of categorical or per se rule.[12] Instead, courts have favored a multifactor balancing approach that is to be applied on a case-by-case basis. Such a balancing approach often involves several factors, none of which has emerged as dispositive.[13] However, settling on this type of test has not alleviated the inherent confusion in applying it. This confusion has been exacerbated by a line of United States Supreme Court decisions that have ultimately failed to rely on a single "test" for determining when a regulatory taking becomes compensable.[14] To make matters worse, while none of these tests is identical, none of them expressly overrules the others. As a result, this area of the law has continuously suffered dramatic decreases in clarity.

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6. BLAESSER ET AL., *supra* note 4, at 67.

7. Alperin, *supra* note 3, at 169; *see also* BLAESSER ET AL., *supra* note 4, § 4.05, at 13 (defining "eminent domain" as "the power of government to condemn or take property for public use, an attribute of sovereignty").

8. Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 177–78 (1871) (finding a "taking" when a government-authorized dam flooded downstream land with water, thereby rendering the land useless).

9. While eminent domain itself will not be addressed, regulations that resemble eminent domain, in that they deny a property owner nearly all beneficial use of his land, will be discussed.

10. ROGER CLEGG ET AL., REGULATORY TAKINGS: RESTORING PRIVATE PROPERTY RIGHTS 3 (1994) (defining "regulatory takings" as cases in which the government is accused of taking property rights by regulation and not by physical seizure or occupation).

11. *Id.* at 22 (stating that "[p]roperty taken for a short period of time is still taken").

12. Palazzolo v. Rhode Island, 533 U.S. 606, 633–36 (2001) (O'Connor, J., concurring) (writing that the Court has chosen to avoid any "set formula" for deciding when compensation is due under the Takings Clause).

13. BLAESSER ET AL., *supra* note 4, § 6.01, at 68.

14. *See infra* Part II.C.5.

This Comment will argue that the three-factor test developed in *Penn Central Transportation Co. v. New York City*[15] forms the criteria that should be relied upon in all future regulatory takings cases. All subsequent tests have added nothing but confusion and inflexibility to an already perplexing and hazy area of the law and stand as a trap for unwary and uninformed landowners. While an ad hoc test may lack the stability and certainty of a per se rule, it has the advantage of shedding light on the sensitive human issues that inevitably arise in most regulatory takings cases. This Comment will argue that if an overregulated landowner hopes to secure compensation in the face of powerful governmental interests, those human issues must be heard.[16]

Part II of this Comment will begin by identifying the traditional ad hoc factors developed by the U.S. Supreme Court. These traditional factors form the stepping stones of the *Penn Central* analysis. It will begin by reviewing Justice Holmes's opinion in *Pennsylvania Coal Co. v. Mahon*,[17] which marked the birth of the Court's regulatory takings jurisprudence.[18] Once this historical foundation is laid, Part II will then analyze the *Penn Central* case, including the development of its three-factor test and how it resurrected the regulatory takings issue. Part II will then discuss the subsequent takings test established by the Court in *Agins v. City of Tiburon*,[19] and will demonstrate how that test amounts to little more than an unnecessary and confounding reflection of the *Penn Central* analysis. Finally, Part II will test the effectiveness of the *Penn Central* analysis by applying it to the controversial area of temporary development moratoria.

Once the temporary moratoria is defined and its significance as a regulatory takings device established, Part III will begin by examining how the State of California, and particularly the environmentally sensitive Lake Tahoe Basin, have dealt with such land use issues. It will

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15. 438 U.S. 104 (1978).

16. This Comment will not argue that the *Penn Central* analysis itself adds clarity in terms of predicting the outcome of regulatory takings cases. If anything, a fact-sensitive analysis serves to cloud the crystal ball and make any sort of forecast difficult. The main virtue of the *Penn Central* test is that it affords a plaintiff the opportunity to shine a light on the human side of a takings case. Under the *Penn Central* analysis, no longer will a court simply review the metes and bounds of a governmental interest or the mere economic impact on a regulated landowner. Rather, all of the facts will come into play, including the sometimes powerfully emotional stories of those whose best laid plans for the future have been thwarted by regulation—stories that cry out for justice. Under a per se rule, such stories never make it into the courtroom. Thus, stability and certainty must fall to the need for human clarity.

17. 260 U.S. 393 (1922).

18. WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 13 (1995) (stating that *Pennsylvania Coal* is the "original and most-cited Supreme Court decision on regulatory takings").

19. 447 U.S. 255 (1980).

then examine the recent U.S. Supreme Court case of *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*[20] and how the plaintiffs' choice to forego the *Penn Central* analysis proved to be a fatal error. Finally, Part III will apply the *Penn Central* test to the facts of *Tahoe-Sierra* in an effort to show that, under such an analysis, a different outcome was possible.

Like the plaintiffs in both *Penn Central* and *Tahoe-Sierra*, this Comment will not seek to question the legitimacy of the various governmental interests sought to be furthered in these cases by land use regulation. Rather, this Comment will argue that by application of the *Penn Central* test, the government may be required to pay just compensation to enjoy the furtherance of such interests. In particular, this Comment will show how the *Penn Central* test may help beleaguered landowners succeed where other tests have failed them and remind the courts that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[21]

## II. THE DEVELOPMENT OF THE *PENN CENTRAL* TEST

### *A. The Stepping Stones to Clarity*

It has been eighty years since Justice Holmes made his famous declaration in *Pennsylvania Coal Co. v. Mahon*[22] that "while property may be regulated to a certain extent, if regulation goes *too far* it will be recognized as a taking."[23] Regardless of other fluctuations in the law, this "too far" test remains the core of the regulatory takings analysis.[24] Nevertheless, since *Pennsylvania Coal*, regulatory takings jurisprudence has evolved significantly. Courts at every level have developed various criteria for determining which regulations may go too far and thereby require compensation.[25] Such determinations are necessary because, as Justice Holmes also pointed out in *Pennsylvania Coal*, property rights "are enjoyed under an implied limitation and must yield to the police

20. 535 U.S. 302 (2002).
21. *Pa. Coal*, 260 U.S. at 416.
22. *Id.*
23. *Id.* at 415 (emphasis added).
24. WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY § 9.4, at 529 (3d ed. 2000).
25. For further discussion of the various tests developed at all levels of the court system, see *infra* text accompanying notes 206–16.

power."[26] Echoing this sentiment, the U.S. Supreme Court continues to hold that the government need not pay for every regulatory deprivation.[27] Nevertheless, as *Pennsylvania Coal* makes clear, this qualification itself must have its own limits.[28]

Despite Justice Holmes's efforts, as Justice Scalia pointed out in *Lucas v. South Carolina Coastal Council*,[29] the *Pennsylvania Coal* decision "offered little insight into when, and under what circumstances, a given regulation would be seen as going 'too far' for purposes of the Fifth Amendment."[30] In fact, since *Pennsylvania Coal*, the Court has struggled to set workable parameters that may indicate when the government has gone "too far."[31] The only consistent holding by the Court is that there is no precise formula for determining when a regulation becomes a compensable taking.[32] Rather, the Court has developed, and continues to use, a fact-sensitive approach that involves a number of ad hoc factors, under which no single factor is dispositive.[33] These factors include the following:[34] (1) whether the land use regulation furthers a legitimate state interest,[35] (2) whether the regulation has an adverse economic effect on the property with no alternative or offsetting reciprocal benefits,[36] (3) whether reasonable investments were made prior to general notice of the regulatory program,[37] and (4) whether the character of the government action places a disproportionate burden upon a single landowner when it should more properly be borne by the community.[38] These factors protect landowners by ensuring that land use regulations (1) have constitutional *legitimacy*, (2) leave the property with economic *viability*, (3) provide investment *security*, and (4) ensure fairness through *proportionality*.[39] While these factors do not constitute an exhaustive list, they constantly reappear and form the basis of nearly all of the U.S. Supreme Court's key regulatory takings decisions.[40]

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26. *Pa. Coal*, 260 U.S. at 413.
27. Alperin, *supra* note 3, at 234.
28. *Pa. Coal*, 260 U.S. at 413.
29. 505 U.S. 1003 (1992).
30. *Id.* at 1015.
31. Alperin, *supra* note 3, at 170.
32. BLAESSER ET AL., *supra* note 4, § 6.01, at 68.
33. *Id.*
34. *Id.* § 6.02, at 70.
35. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).
36. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014–19 (1992).
37. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).
38. Armstrong v. United States, 364 U.S. 40, 49 (1960).
39. This Comment will refer to these factors simply as legitimacy, viability, security, and proportionality.
40. *See, e.g.*, Palazzolo v. Rhode Island, 533 U.S. 606, 633–36 (2001) (utilizing viability and security); *Lucas*, 505 U.S. at 1014–19 (utilizing viability); *Agins*, 447 U.S. at 260 (utilizing legitimacy and viability); *Penn Cent. Transp.*, 438 U.S. at 124 (utilizing

### *B. The Traditional Factors*

Modern regulatory takings law had its genesis in the 1922 case of *Pennsylvania Coal Co. v. Mahon*.[41] While many accept this case as the beginning of the U.S. Supreme Court's regulatory takings jurisprudence, this was not the first time that Justice Holmes had considered the takings issue.[42] His experiences on the Massachusetts Supreme Court made him aware that if police power was not restrained, private property might cease to exist.[43] Thus, through *Pennsylvania Coal*, Justice Holmes sought to place some limits on that power.[44] After eighty years, the basic tenets of the *Pennsylvania Coal* decision remain unchanged and are reflected throughout the subsequently developed *Penn Central* analysis.

In the deed to the land upon which the Mahons had built their family home, there was a clause specifically limiting their ownership to the surface estate.[45] Both the support and mineral estates were owned by the Pennsylvania Coal Company. The Mahon's purchased the home knowing that the coal company would eventually mine the property and that the risk of collapse would require them to vacate.[46] The State of Pennsylvania became concerned about the cave-in risks and passed the Kohler Act,[47] which made it unlawful to mine under residential

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legitimacy, viability, and security); *Armstrong*, 364 U.S. at 49 (utilizing proportionality).

41. 260 U.S. 393 (1922).

42. GEORGE SKOURAS, TAKINGS LAW AND THE SUPREME COURT: JUDICIAL OVERSIGHT OF THE REGULATORY STATE'S ACQUISITION, USE, AND CONTROL OF PRIVATE PROPERTY 29–30 (1998). Justice Holmes had considered the issue of regulatory takings as early as his time spent on the Massachusetts Supreme Court. *Id.*

43. *Pa. Coal*, 260 U.S. at 415. "When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears." *Id*.; *see also* SKOURAS, *supra* note 42, at 29–30.

44. Some commentators believe that *Pennsylvania Coal* was to property and takings law what *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), was to judicial review. SKOURAS, *supra* note 42, at 29–30. The opinion has been cited no less than 100,000 times in the past eighty years. *Id.* There are even those commentators who believe that Holmes rewrote the Constitution in *Pennsylvania Coal. Id.* at 30.

45. SKOURAS, *supra* note 42, at 30. Under Pennsylvania law at the time, there were three different and separate estates: surface, support, and mineral. Alperin, *supra* note 3, at 175.

46. *Pa. Coal*, 260 U.S. at 412. Because it normally took many years for the coal company to start such mining operations, the Mahons and their ancestors could have enjoyed the property for quite some time undisturbed. SKOURAS, *supra* note 42, at 30.

47. The statute forbade:

> the mining of anthracite coal in such a way as to cause the subsidence of,

areas.[48] The Act deprived the coal company of its ability to mine under the Mahon's home. As a result, the coal company challenged the constitutionality of the Act. Although the issues in the case were framed in terms of due process violations and interference with a contract, the coal company was in essence arguing that the government had taken its property without just compensation.[49] Justice Holmes agreed with the coal company. In finding that a compensable taking had occurred, he put into words the foundation of what would later become the *Penn Central* analysis.

The first factor established by *Pennsylvania Coal* was that such regulations must have constitutional legitimacy. Justice Holmes crystallized the legitimacy factor in two ways. First, he used the strength of the state's interest as a reference point against which to weigh the degree of interference with the property.[50] On this point, Justice Holmes found that the extent of the public interest was limited because it did not apply to those homeowners who also owned the structural and mineral estates.[51] Also, such a statute was not justified under the heading of personal safety because that goal could have been reached by giving public notice of the risk.[52] Thus, the public interest was weak as opposed to the extent of the taking, which was great.[53] Secondly, Holmes recognized that even if a legitimate state interest did exist and would warrant the exercise of eminent domain, it could not be justified as a regulatory taking *without compensation*.[54]

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among other things, any structure used as a human habitation, with certain exceptions, including among them land where the surface is owned by the owner of the underlying coal and is distant more than one hundred and fifty feet from any improved property belonging to any other person.

*Pa. Coal*, 260 U.S. at 412–13.

48. Because the deed conveying the surface estate expressly reserved the coal company's right to mine all the coal underneath it, the grantees can be assumed to have known that eventually they would be forced to vacate their home. The deed also released the coal company from any liability for damages that may have arisen from mining the coal. *Id.* at 412; *see also* SKOURAS, *supra* note 42, at 30 (noting that "[i]t can be assumed that the Mahon's or their ancestors contracted to buy the house, knowing full well that they were only buying the surface estate"). Justice Holmes criticized such a purchase as "short sighted." *Pa. Coal*, 260 U.S. at 415–16.

49. SKOURAS, *supra* note 42, at 31.

50. *Pa. Coal*, 260 U.S. at 413–14.

51. *Id.*

52. *Id.*

53. *Id.* Justice Holmes relied on the fact that this case involved a single private house, and even though the public interest could have reached that far, in ordinary private affairs it did not warrant the extent of interference that occurred in the case. *Id.* at 414. Therefore, Justice Holmes concluded that the statute did "not disclose a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights." *Id.*

54. *Id.* at 415–16.

The second factor established by *Pennsylvania Coal* was the protection of the property's economic viability. In weighing the extent of the interference against the state interest, Justice Holmes concluded that the entire economic viability of the coal company's property right had been extinguished by the act.[55] In making this evaluation, Holmes cited as a factor the extent of the diminution in value.[56] When such a diminution in value reaches a "certain magnitude," the regulation becomes an "exercise of eminent domain" that requires "compensation to sustain the act."[57] On this point, Holmes determined that the act rendered the property right worthless because, "[f]or practical purposes, the right to coal consists in the right to mine it."[58] In addition, Holmes stated that "[w]hat makes the right to mine coal valuable is that it can be exercised with profit" and that "[t]o make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it."[59] In other words, by eliminating the entire economic value of the property right, the government had, in essence, exercised its powers of eminent domain. As an act of eminent domain, compensation was required.[60]

The third factor established by *Pennsylvania Coal* was the interest landowners have in the security of their investment. In his opinion, Justice Holmes focused on the fact that the Mahons could not possibly have relied on their ability to live on their land indefinitely, because it was clearly a part of the deed that the coal company would eventually exercise its right to mine the support estate.[61] On this point, Justice Holmes stated that the risk taken by the Mahons in only acquiring the surface estate was not sufficient to warrant interference with the coal company's property rights; in essence, it would be giving the Mahons "greater rights than they bought."[62]

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55. *Id.* at 414.
56. *Id.* at 413.
57. *Id.*
58. *Id.* at 414 (quoting Commonwealth *ex rel.* Keator v. Clearview Coal Co., 100 A. 820, 820 (Pa. 1917)) (alteration in original).
59. *Id.*
60. *Id.* at 413 (stating that "[w]hen it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act").
61. *Id.* at 415. Once again, Justice Holmes even went so far as to criticize them for being "short sighted" by only acquiring the surface rights without the right of support and suggested that such short sightedness might prevent a landowner from securing compensation under different circumstances. *Id.*
62. *Id.* at 416.

The final factor that *Pennsylvania Coal* established was the necessity of fairness through proportionality. On this point, Holmes stated that in exceptional cases involving the "blowing up of a house to stop a conflagration" there may be no need for compensation because, in general, it was not plain that "a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders."[63] However, under the facts of *Pennsylvania Coal*, Justice Holmes found that the city sought to take an unfair shortcut by not paying for the improved public condition.

In the end, Justice Holmes stated that issues regarding regulatory takings could not be disposed of by "general propositions" or per se rules.[64] In fact, the regulation in *Pennsylvania Coal* had gone beyond any of the cases previously decided by the Court in formulating a fact-sensitive takings analysis.[65] Justice Holmes's opinion in *Pennsylvania Coal* marked the birth of the regulatory takings issue in American courts.[66] It is critical to note that, from the beginning, the core factors of legitimacy, viability, security, and proportionality formed the basis of regulatory takings analysis. Indeed, *Pennsylvania Coal* provided a strong base for the future refinement and adaptation of these factors.

### *C. The Revitalization of Takings Jurisprudence*

While *Pennsylvania Coal* stands for the general proposition that the government can "go too far" with land use regulation, the case did not set out a concrete test for determining when the government crosses that line. Despite his efforts to create a conceptual framework for dealing with such issues, Justice Holmes's "balancing of interests" approach could not match the ever-growing complexity of the regulatory takings problem.[67] As George Skouras points out, because Holmes's test lacked "precision and rigor," it became too open-ended and susceptible to unpredictable interpretations.[68] As a result, beyond establishing the core factors, *Pennsylvania Coal* provided almost no solid direction to courts as to how such factors should be applied to future regulatory takings claims.[69]

Despite this confusion and uncertainty in the law, soon after *Pennsylvania Coal*, the U.S. Supreme Court began to ignore land takings

63. *Id.* at 415–16.
64. *Id.* at 416.
65. *Id.*
66. Alperin, *supra* note 3, at 170, 174.
67. SKOURAS, *supra* note 42, at 39.
68. *Id.*
69. *Id.*

cases.[70] In fact, it would be nearly fifty years before the Court would once again make an attempt to determine when land use measures had gone too far. However, beginning with *Penn Central Transportation Co. v. New York City*,[71] the Court would begin to revisit the constitutional implications of such land use issues. Many accept *Penn Central* as the most important regulatory takings opinion ever handed down by the Supreme Court.[72] In his majority opinion, Justice Brennan confirmed that confusion had saturated this area of the law and admitted that the Court "quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated."[73]

The *Penn Central* decision marks the Supreme Court's best attempt to devise a consistent and workable set of factors for determining when a regulatory taking becomes compensable in the modern era.[74] In 1967, the Grand Central Terminal in New York City was designated a historic landmark pursuant to the city's preservation law.[75] In 1968, the plaintiffs proposed construction of an office tower that would soar fifty-five stories above the station.[76] Relying on the fact that their tower would be consistent with most other such developments in the terminal's vicinity, the plaintiffs sought permission from the Landmarks Preservation Commission of New York City to begin construction.[77] The commission denied the plan because it concluded that such a structure would be incompatible with the historic and visual tone of the existing building.[78] As a result, the plaintiffs filed suit against the city, complaining that the preservation law, when applied to their property, amounted to a taking without compensation.[79] While conceding that what defines a compensable regulatory taking under the Fifth Amendment had proven to be a

70. *Id.* at 40.
71. 438 U.S. 104 (1978).
72. *See, e.g.*, ROBERT MELTZ ET AL., THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND-USE CONTROL AND ENVIRONMENTAL REGULATION 130 (1999).
73. *Penn Cent. Transp.*, 438 U.S. at 124.
74. Alperin, *supra* note 3, at 176.
75. *Penn Cent. Transp.*, 438 U.S. at 115–16.
76. *Id.* at 116.
77. *Id.*; *see also* MELTZ ET AL., *supra* note 72, at 561 (noting that the terminal owners sought permission to build the tower atop the terminal "in keeping with similar properties in the area").
78. *Penn Cent. Transp.*, 438 U.S. at 117–18.
79. *Id.* at 119.

problem of "considerable difficultly,"[80] the Supreme Court disagreed with the plaintiffs and held that compensation was not required.[81]

In *Penn Central*, the plaintiffs did not seek judicial review of the denials directly, but rather brought suit seeking damages for a "temporary taking" of their property in violation of the Fifth Amendment.[82] The plaintiffs did not challenge the preservation of historical landmarks as a legitimate governmental interest or the means by which the city sought to vindicate its goals.[83] Instead, the plaintiffs claimed that the preservation laws deprived them of their property's value, for which they were entitled to compensation under the Constitution.[84] Essentially, they urged that "any substantial restriction imposed pursuant to a landmark law must be accompanied by just compensation if it is to be constitutional."[85]

### *1. Legitimacy and Beyond*

The first factor considered by the Court in *Penn Central* was the legitimacy of the state interest. Concerning legitimacy, the Court stated that a measure that is not "reasonably necessary to the effectuation of a substantial public purpose" or that inflicts a disproportionately ruthless effect on the owner may qualify as a compensable taking.[86] The Court then echoed the owner's concession that preserving structures and areas with special historic, architectural, or cultural significance is a permissible and legitimate public purpose.[87] However, beyond this, the Court established three factors that are of "particular significance" when conducting the "essentially *ad hoc*, factual inquiries" involved in such a takings case.[88] These factors find their foundation in the "Holmsian balancing test universe"[89] established in *Pennsylvania Coal*. However, they went a critical step further by specifically enumerating the fundamental points in the ad hoc inquiry. These three factors are (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the governmental action.[90] While the Court in *Penn Central* did not indicate that these factors compose an exclusive list, it has not

80. *Id.* at 123.
81. *Id.* at 138.
82. *Id.* at 119.
83. *Id.* at 129.
84. *Id.* at 119.
85. *Id.* at 129.
86. *Id.* at 127.
87. *Id.* at 108.
88. *Id.* at 124 (emphasis added).
89. SKOURAS, *supra* note 42, at 52.
90. Note that these factors correspond to what this Comment has dubbed (1) viability, (2) security, and (3) proportionality. *See supra* note 39.

expanded on them in any meaningful way since.[91] Also, throughout the decades following the decision, state and federal courts continue to use the *Penn Central* three-pronged test as binding precedent.[92]

### *2. Viability*

The first factor to be considered under the *Penn Central* "multi-factor balancing test"[93] seeks to protect economic viability by assessing a regulation's impact on the property's value.[94] Some consider this to be the most significant of the three *Penn Central* factors.[95] However, absent a "total taking" that resembles the exercise of eminent domain or condemnation, this factor is not dispositive.[96] It has been suggested that the viability analysis may be broken into three areas of impact: (1) the rate of reasonable return, (2) the economic uses of the property, and (3) fair market value.[97]

*Penn Central* itself stands as an illustration of the "reasonable-return" rule.[98] The Court in *Penn Central* found that the plaintiffs were not prevented from continued operation of their already profitable railroad, office space, and concession business at the terminal. Rather, they could expect to see a reasonable economic return from these investments. Such economic return was found by the Court to be the owner's true expectancy.[99]

A near unanimous sentiment in the area of regulatory takings law is that a per se taking has occurred only when a regulation extinguishes *all* beneficial uses of property.[100] This plays a crucial role in evaluating a regulation's impact on economic use. From this idea flows the conclusion that a categorical taking has not occurred if *only* the *most profitable* use

91. MELTZ ET AL., *supra* note 72, at 132.
92. *Id.*
93. SKOURAS, *supra* note 42, at 52.
94. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).
95. MELTZ ET AL., *supra* note 72, at 132.
96. *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 490 (1987) (holding that land use regulation is not the same as a physical appropriation, which invariably requires compensation); Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 384 (1926) (holding that a seventy-five percent diminution is not dispositive); Hadacheck v. Sebastian, 239 U.S. 394, 405 (1915) (holding that a 92.5% diminution is not dispositive).
97. MELTZ ET AL., *supra* note 72, at 132.
98. *Id.*
99. *Penn Cent. Transp.*, 438 U.S. at 136.
100. MELTZ ET AL., *supra* note 72, at 132.

is restricted.[101] Furthermore, barring a physical taking, future profits have been held too speculative for the Court to forecast and thus cannot be "taken" through regulation.[102]

Regulations that cause a property's fair market value to drop tend to implicate a more "fluid concept."[103] In *Penn Central*, Justice Brennan noted that the Court's past decisions had "uniformly reject[ed] the proposition that diminution in property value, standing alone, can establish a 'taking.'"[104] In fact, both the U.S. Supreme Court and lower courts have traditionally held that even regulatory measures that force a significant drop in a property's fair market value do not always create a compensable taking.[105] However, when put in combination with the other two economic impact factors, this element may tip the scales in favor of a compensable taking. Subsequent cases may indicate that this judicial view is changing.[106]

### *3. Security*

The second factor to be considered under the *Penn Central* test protects the interests that landowners have in the security of their investments. Under the *Penn Central* analysis, the degree to which a regulatory measure disrupts a landowner's "distinct investment-backed expectations" is a significant factor in evaluating the takings claim.[107] Nevertheless, the meaning of this factor continues to befuddle judges at all levels, causing federal and state courts to divide on its application. This confusion had made this factor's role in the takings analysis a puzzle.[108] In the more than twenty years since *Penn Central*, courts and commentators alike have been unable to agree on its meaning or application.[109] A description of this factor, how it has evolved, and its

101. Andrus v. Allard, 444 U.S. 51, 66 (1979).
102. *Id.*
103. MELTZ ET AL., *supra* note 72, at 133.
104. *Penn Cent. Transp.*, 438 U.S. at 131.
105. *See id.*; *see also* Hadacheck v. Sebastian, 239 U.S. 394, 405, 412 (1915) (holding that a 92.5% reduction is not a taking); Pace Res., Inc. v. Shrewsbury Township, 808 F.2d 1023, 1031 (3d Cir. 1987) (holding that an eighty-nine percent reduction is not a taking); William C. Haas & Co. v. City of San Francisco, 605 F.2d 1117, 1120 (9th Cir. 1979) (holding that a ninety-five percent reduction is not a taking).
106. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019–20 (1992) (holding that when a regulation extinguishes the entire economic viability of property, a compensable taking has occurred per se).
107. *Penn Cent. Transp.*, 438 U.S. at 124.
108. Daniel R. Mandelker, *Investment-Backed Expectations in Takings Law*, *in* TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS* 119, 119 (David L. Callies ed., 1996).
109. R.S. Radford & J. David Breemer, *Great Expectations: Will* Palazzolo v. Rhode Island *Clarify the Murky Doctrine of Investment-Backed Expectations in*

application to the *Penn Central* decision is necessary to better comprehend the intricacies of the regulatory takings question.

Consideration of a property owner's investment-backed expectations was first proposed as a factor to be considered in the regulatory takings analysis by Professor Frank I. Michelman. In a seminal article penned in 1967,[110] Professor Michelman's takings test focused on the type of interest adversely affected by a given regulation, as opposed to the mere extent of purely economic impact.[111] In describing his test, Professor Michelman stated that "the test . . . does not ask 'how much,' but rather . . . asks 'whether or not': whether or not the measure in question can easily be seen to have practically deprived the claimant of some distinctly perceived, sharply crystallized, investment-backed expectation."[112]

Professor Michelman's test found its roots in the utilitarian tradition of Jeremy Bentham.[113] According to this view, placing an emphasis on an owner's expectations is necessary to encourage efficient investments in property. By encouraging such investments, property will be put to its most productive use, which benefits society as a whole.[114] However, beyond the utilitarian model, Professor Michelman argued that *fairness* is at the center of the takings problem.[115] In making this argument, Professor Michelman defined the concept of property as "people's reasonable expectations about what rights attach to property by virtue of ownership."[116] Nevertheless, even if some of these expectations are frustrated by regulation, property owners will still accept them as fair to the extent that all are treated equally, or as long as society, as a whole, will benefit more from the regulation than without it.[117]

In *Penn Central*, Justice Brennan referred to Michelman's article[118]

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*Regulatory Takings Law?*, 9 N.Y.U. ENVTL. L.J. 449, 449 (2001).

110. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

111. Radford & Breemer, *supra* note 109, at 453.

112. Michelman, *supra* note 110, at 1233.

113. *Id.* at 1211–13.

114. Radford & Breemer, *supra* note 109, at 453 (citing Michelman, *supra* note 110, at 1211–13).

115. Margaret V. Lang, Penn Central Transportation Co. v. New York City*: Fairness and Accommodation Show the Way Out of the Takings Corner*, *in* REGULATORY TAKING: THE LIMITS OF LAND USE CONTROLS 45, 49–50 (G. Richard Hill ed., 1990).

116. *Id.* at 50 (citing Michelman, *supra* note 110, at 1211–12).

117. *Id.*

118. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 128 (1978).

but ultimately failed either to define what is meant by "distinct investment-backed expectations"[119] or to fully address the fairness issue.[120] Rather, Justice Brennan cited Justice Holmes from *Pennsylvania Coal* to support the limited proposition that a compensable taking will occur if a regulation has "nearly the same effect as the complete destruction of [the property] rights."[121] Furthermore, Justice Brennan recognized that governmental regulations that upset a property owner's ability to use land for a "specific, clearly anticipated purpose"[122] may amount to a taking even though such a restriction also substantially furthers a valid public interest.[123] Thus, Justice Brennan chose to define property as Michelman had, as a "set of expectations."[124] However, Justice Brennan's opinion must also stand for the proposition that "if a regulation completely destroys the value of an interest in which a property owner has no reasonable expectation, there is no taking."[125] Justice Brennan acknowledged the plaintiffs' interest in the continued use of the terminal, but did not address what other reasonable expectations may have been unfairly trampled on by the preservations law.[126] Commentators suggest that the *Penn Central* Court's application of the preservation law failed to comport with Professor Michelman's fairness test in two other ways: The terminal owners were being treated unequally without any reciprocal benefit, and they were forced to provide a benefit for the public at their own expense, when such a cost should have been borne by the public as a whole.[127]

In essence, the *Penn Central* decision confronts the propriety of the state's forcing citizens to act in a way that is not in line with the citizens' expected best interests.[128] Justice Brennan's holding may be summarized as stating that if a buyer knows or has reason to know prior to purchase that the property may be subject to regulations that could potentially thwart development, the buyer should have no recourse when the state so regulates its use.[129] Conversely, if an investor has no reason to believe that the property being acquired may be so regulated, then the state

119. Radford & Breemer, *supra* note 109, at 455.
120. Lang, *supra* note 115, at 50.
121. *Penn Cent. Transp.*, 438 U.S. at 127.
122. Radford & Breemer, *supra* note 109, at 456.
123. *Penn Cent. Transp.*, 438 U.S. at 127 (citing Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922)). For this proposition, Justice Brennan stated that "a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking.'" *Id.*
124. Lang, *supra* note 115, at 50.
125. *Id.*
126. *Id.* at 50–51.
127. *Id.* at 52.
128. SKOURAS, *supra* note 42, at 53.
129. *Id.* at 53–54.

should compensate the owner for such a restriction.[130] While this may be a viable interpretation, Justice Brennan quickly qualified the doctrine:[131] "[T]he submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable."[132] He then went on to cite several cases in which the Court had held that a compensable taking had not occurred despite the thwarting of investment-backed expectations.[133] Some have argued that this doctrine reflects Professor Michelman's apparent distinction between regulatory interferences with interests based on mere speculation, which are not entitled to compensation if they fail to come to fruition, and finely crystallized investments which require compensation.[134] While this formulation seems to comport with basic notions of fairness, it does not flow naturally from a doctrine based on expectations which inevitably involve a landowner's future plans.[135] In the end, this holding stands for the idea that a subjective intent to use property in a certain way is not enough, by itself, to support a compensable takings claim.[136]

In response to the plaintiffs' argument that the *Penn Central* holding took their right to erect a structure in the airspace above the terminal, Justice Brennan found that "'taking[s]' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."[137] Thus, he refused to extend the expectations factor to a divisible property interest that was, like the property in *Pennsylvania Coal*, unprotected by formal reservation.[138] This "whole property" rule stands for the proposition that courts need not protect each and every twig in the property owner's bundle of rights.[139] Justice Brennan would eventually use this new analytical framework to hold that a compensable taking had not occurred in this case. Despite the fact that the plaintiffs had entered into a lease

130. *Id.* at 53.
131. Radford & Breemer, *supra* note 109, at 456.
132. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130 (1978).
133. *See id.* at 130 (citing Goldblatt v. Town of Hempstead, 369 U.S. 590, 596 (1962); Welch v. Swasey, 214 U.S. 91, 102 (1909)).
134. Radford & Breemer, *supra* note 109, at 456 n.43.
135. *Id.*
136. Mandelker, *supra* note 108, at 121.
137. *Penn Cent. Transp.*, 438 U.S. at 130.
138. Mandelker, *supra* note 108, at 120.
139. *Id.*

worth millions of dollars based on the expected erection of the office building,[140] had most likely spent considerable time and expense on producing architectural plans to carry out the expected construction,[141] and had even showed that the terminal had been originally designed in contemplation of such a structure,[142] the Court still refused to find a compensable taking. One commentator notes that "[i]t is hard to imagine a more 'distinct investment-backed expectation.'"[143] Nevertheless, Justice Brennan balanced these considerations against a finding that the terminal owner's expectation of development had not been totally destroyed.[144] In fact, while the commission had rejected proposals for two much larger buildings (fifty-five- and fifty-three-story towers), the commission gave no indication of an intention to prohibit any and all construction above the terminal.[145] The record did not foreclose the possibility that a structure more in line with the terminal's originally anticipated design (a twenty-story tower) might have been approved.[146] Furthermore, the terminal owners had available transferable development rights (TDRs), which would have allowed for construction above any one of eight other properties in the same area, all of which were owned by the plaintiffs. [147]

As mentioned above, Justice Brennan found that no compensable taking had occurred because the preservation law did not disrupt the plaintiffs' "primary expectation concerning the use of the parcel" as a railroad station.[148] However, this calls into doubt whether a landowner has a right to claim that his investment-backed expectations have been hampered if a regulation does in fact interfere with such primary expectations.[149] If so, then a landowner's subjective intentions as to what her primary expectations are may creep back into the analysis.[150]

In what may have been a response to the confusion over whether investment-backed expectations are to be judged by a subjective or objective standard, the Court in *Kaiser Aetna v. United States*[151] slightly

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140. *Penn Cent. Transp.*, 438 U.S. at 116.
141. *Id.*
142. *Id.*
143. William K. Jones, *Confiscation: A Rationale of the Law of Takings*, 24 HOFSTRA L. REV. 1, 50 (1995).
144. Radford & Breemer, *supra* note 109, at 457.
145. *Penn Cent. Transp.*, 438 U.S. at 115–17, 136–37.
146. Radford & Breemer, *supra* note 109, at 457–58 (citing *Penn Cent. Transp.*, 438 U.S. at 137 n.34).
147. The Court's mention of TDRs was not explicitly linked to the fairness issue. However, such a give-and-take consideration may fulfill Professor Michelman's avowal on fairness as a factor in the takings analysis. Lang, *supra* note 115, at 52–53.
148. *Penn Cent. Transp.*, 438 U.S. at 136.
149. Mandelker, *supra* note 108, at 121.
150. *Id.*
151. 444 U.S. 164 (1979).

altered the expectations analysis by replacing the term "distinct" with "reasonable." Based on *Aetna*'s formulation of the *Penn Central* factors, the Court has since sought to give security only to a landowner's "*reasonable* investment backed expectations."[152] Unfortunately, this shift makes it more difficult for a landowner to prevail on a regulatory takings claim and continues to represent a significant degradation from the fairness model advocated by Professor Michelman.[153] While once forced to examine the "impact of governmental restrictions in foreclosing distinctly identifiable planned uses of land,"[154] by shifting to an objective standard, courts may be prone to substituting their own subjective assessments as to whether a claimant's expectations are reasonable. Ultimately, as one commentator has put it, "[w]hile 'expectations' seem personal and subjective, 'reasonableness' seems rooted in the context of societal interaction and objective. In short, reasonable expectations are shaped by law—or shape the law."[155] What is reasonable in a particular judge's mind may operate as a hidden per se rule vitiating the critical fact-sensitive inquiry crucial to the *Penn Central* analysis.

Economists state that a "reasonableness" or "good faith" element of investment-backed expectations is necessary for takings compensation to be efficient.[156] They argue that there are two types of investors in the takings context: those who can demonstrate a bona fide intention to develop the property and would suffer a "true loss" from government regulation, and those who never truly intended to make such investments in development but who merely claim such an intention in an effort to be compensated for the taking.[157] These economists assert that the purpose of inserting a reasonableness factor into the investment-backed expectations analysis is to distinguish between these two types of investors.[158] Economists deem inefficient a system that grants compensation to all

152. *Id.* at 175 (emphasis added).
153. Radford & Breemer, *supra* note 109, at 460.
154. *Id.* at 460–61 (citing Presbytery of Seattle v. King County, 787 P.2d 907, 915 n.29 (Wash. 1990)) (holding that "distinct" means that the "expectation must have some concrete manifestation," whereas "reasonable" means only that the expectation "must be appropriate under the circumstances").
155. Steven J. Eagle, *The Rise and Rise of "Investment-Backed Expectations*,*"* 32 URB. LAW. 437, 442 (2000).
156. THOMAS J. MICELI & KATHLEEN SEGERSON, COMPENSATION FOR REGULATORY TAKINGS: AN ECONOMIC ANALYSIS WITH APPLICATIONS 108 (1996).
157. *Id.* at 107.
158. *Id.*

who make reliance expenditures, regardless of their reasonableness, but automatically denies compensation to those who make no expenditures at all.[159] Compensation rules should create an incentive for landowners to make expenditures in reliance on expected development only if it is efficient to do so.[160] A bare investment-backed expectations compensation rule will not ensure such an incentive. This is because some landowners will be induced to make inefficient investments based solely on a perverse incentive to be compensated in the event of regulation and not for the improvement or best use of the property.[161] Thus, a rule that affords compensation based only on the fact that a landowner has incurred reliance expenditures often leads to overinvestment.[162]

As Thomas J. Miceli and Kathleen Segerson point out, economists recognize that if the law reads a "reasonableness" or "good faith" factor into the investment-backed expectations analysis, such expenditures will most likely be efficient.[163] A rule that combines reliance with an element of reasonableness forces the courts to ensure that expenditures are made in good faith and in order to put the property to its most efficient economic use.[164] Under such a rule, those who make no reliance expenditures will receive no compensation for development prohibitions, while landowners who make such investments will receive compensation equal to their loss "if and only if" their investments are reasonable, or in economic terms, efficient.[165]

Bearing on the subject of reasonableness, the issue of notice is an important component of protecting the security of investment-backed expectations. Though not specifically considered in *Penn Central*, this factor is critical to the reasonableness analysis. In *Ruckelshaus v. Monsanto Co.*,[166] a federal environmental statute allowed agencies to disclose data otherwise protected by trade secret law that was obtained while reviewing applications for pesticide registration.[167] While confirming that the Fifth Amendment protects trade secrets as property, the Court held that the takings claim lacked the necessary "force" of investment-backed expectations required to prevail.[168] Because the statute informed Monsanto in advance that by filing an application it agreed to the disclosure of trade secrets, the Court held that Monsanto's investment-

159. *Id.*
160. *Id.*
161. *Id.* at 107–08.
162. *Id.* at 108.
163. *Id.*
164. *Id.*
165. *Id.* at 114.
166. 467 U.S. 986 (1984).
167. *Id.* at 993.
168. Mandelker, *supra* note 108, at 122.

backed expectations could not have been reasonable.[169]

According to Justice Blackmun's majority opinion, the statute put Monsanto on notice as to how the EPA was allowed to use and disclose data.[170] The Court found that Monsanto was cognizant of the consequences involved in submitting the application, that those conditions were rationally related to a legitimate public interest, and that Monsanto had voluntarily submitted the application in return for an economic advantage.[171] Thus, *Ruckelshaus* mixes in an important qualification to the investment-backed expectations analysis: that notice of a governmental regulation may limit the force of a landowner's reliance expenditures.[172]

More importantly, however, the Court held that Monsanto had no reasonable expectation of nondisclosure even if the regulations were not yet in effect. The Court found that the pesticide industry had long been the focus of public concern and heavy governmental regulation. Based on this fact, Monsanto was put on *constructive notice* that disclosure of health, safety, and environmental data concerning pesticides could become statutorily required as substantially furthering a public interest.[173] Thus, a general regulatory scheme that should cause reasonable landowners to anticipate future regulation may serve as constructive notice, making reliance expenditures unreasonable.[174] Under such circumstances, constructive notice could be used to cripple any regulatory takings claim. In the end, while *Ruckelshaus*'s constructive notice rule would be called into question by the Court a mere three years later,[175] many lower courts persist in holding that a landowner's expectations cannot be reasonable if they come in conflict with the government's reasonably foreseeable regulatory authority.[176]

Reasonable investment-backed expectations play an important role in any regulatory takings analysis.[177] However, despite its critical importance, the Supreme Court has done little to clarify what the term actually

169. *Ruckelshaus*, 467 U.S. at 987.
170. *Id*. at 1008.
171. Mandelker, *supra* note 108, at 122.
172. *Id.*
173. *Ruckelshaus*, 467 U.S. at 1008.
174. Radford & Breemer, *supra* note 109, at 464.
175. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 833 n.2 (1987).
176. Radford & Breemer, *supra* note 109, at 469 (citing Parkridge Investors Ltd. P'ship v. Farmers Home Admin., 13 F.3d 1192, 1199 (8th Cir. 1994); Ciampitti v. United States, 22 Cl. Ct. 310, 321 (1991)).
177. Mandelker, *supra* note 108, at 138.

means.[178] This has caused inevitable and sometimes hopeless confusion in the lower courts and has resulted in some abandoning this prong of the takings analysis completely.[179] These courts look beyond the balancing approach to investment-backed expectations set out in *Penn Central* and hold that such expectations are frustrated only when a regulation destroys all economically viable use of the land.[180] By doing so, courts effectively eliminate the ingredient of fairness that Professor Michelman argued for and which has been judicially espoused through the *Penn Central* analysis.

The Supreme Court should seek to resolve the confusion that hampers the use of investment-backed expectations as a factor in the regulatory takings analysis. As Daniel R. Mandelker suggests, this may be accomplished by linking the recognition of landowner expectations to the amount of risk involved in entering particular property markets.[181] A market that is full of regulatory uncertainty may require that landowner expectations be ignored, while markets that have seen little and have low potential for regulation may require that such expectations be recognized.[182] The key is a case-by-case analysis which affords courts an opportunity to determine what is fair and just under the circumstances.

### *4. Proportionality*

The character of the government action plays a role in determining proper proportionality by ensuring that the burdens imposed on a landowner are either offset by reciprocal benefits as mandated by *Pennsylvania Coal*,[183] or that landowners are left with enough of an interest in the property to defeat claims of eminent domain.[184] This factor is viewed as the most straightforward of the three *Penn Central* factors.[185] Obviously, a taking is much more likely to be held disproportionate and compensable if the government effects an actual

178. *Id.* at 138–39.
179. *Id.*
180. *Id.* at 139.
181. *Id.*
182. *Id.*
183. *See supra* Part II.B.
184. While Justice Brennan never explicitly links proportionality to his "character of the government action" factor, it is fair to assume that proportionality was part of his analysis. By determining the character of a given governmental action as a threshold issue, courts can determine whether the proportionality question should even be reached. If a taking may be categorized as categorical, then compensation is due under a per se rule. However, if something less than a categorical or physical taking has occurred, the fairness analysis must be conducted as part of the *Penn Central* test. Thus, it is this Comment's assertion that the character of the government action and proportionality are inexorably linked.
185. MELTZ ET AL., *supra* note 72, at 135.

physical occupation of private property rather than mere regulation of its use.[186] In such cases, compensation is almost always required, regardless of the state's interest in the regulation or the economic impact on the owner.[187] Nevertheless, even actions that are solely regulatory in nature have a hierarchy of deference when they come under a takings analysis.[188] Regulations that interfere with a property owner's right to devise property[189] or a landowner's right to exclude the public[190] raise particular constitutional doubt.[191] The same can be said for regulations meant to preserve private lands as open space in order to benefit the public.[192] On the other hand, government regulations aimed at abating nuisances are more likely to survive under a proportionality analysis.[193] Of course, problems arise with those regulations that fall in the middle of the two extremes. When analyzing these types of cases, economic impact and investment-backed expectations play a more significant role.[194]

In attempting to determine the nature of the government action and proportionality, it is important to recognize that there need not be complete parity between benefits and burdens. The mere disparity of economic impact is not enough to make a taking compensable.[195] Land use regulations "designed to promote the general welfare commonly

186. *Id.* at 135–36.

187. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434–35 (1982) (reiterating that when the character of the governmental action is a "permanent physical occupation," the Court has "uniformly . . . found a taking . . . without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner").

188. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 135–36 (1978).

189. *See* Hodel v. Irving, 481 U.S. 704, 716–18 (1987) (holding that regulations that totally abrogate the right to devise cannot be constitutionally upheld); *see also* Babbitt v. Youpee, 519 U.S. 234, 244–45 (1992) (upholding the decision in *Irving* while focusing on the "'extraordinary' character of the governmental regulation" in that it "severely restricts the right of an individual to direct the descent of his property").

190. *See, e.g.*, Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831–32 (1987) (holding that interference with the right to exclude amounts to a "permanent physical occupation" of land, which always requires compensation regardless of the state interest furthered by the regulation); Kaiser Aetna v. United States, 444 U.S. 164, 179–80 (1979) (holding that the right to exclude others is fundamental and "falls within [the] category of interests that the Government cannot take without compensation").

191. MELTZ ET AL., *supra* note 72, at 136.

192. *Id.* (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1024–25 (1992)).

193. *Id.* (citing Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) (holding that a regulation prohibiting mining that caused subsidence damage to structures on the surface was not a taking)).

194. MELTZ ET AL., *supra* note 72, at 136.

195. Alperin, *supra* note 3, at 182.

burden[] some more than others."[196] Nevertheless, these burdens and benefits may still be reciprocal if an owner who is burdened by one regulation, albeit more heavily than other groups, benefits from restrictions imposed on other people's property.[197]

### *5. If It Ain't Broke, Don't Fix It*

If the U.S. Supreme Court had simply ended its takings test formulation with *Penn Central*, the law would not be in the confused state it is today.[198] However, a mere two years after the *Penn Central* decision, the Court announced, in *Agins v. City of Tiburon*,[199] a different test, focusing the constitutional inquiry solely on protecting a landowner's interest in economic viability and the legitimacy of the state interest. It did so by requiring such land use regulations to substantially advance valid state interests and not deprive a landowner of all economically viable use of his property.[200] Under this two-part test, if either prong is violated, a compensable taking has usually occurred.[201]

However, it is questionable at best as to whether the two-prong test of *Agins* really adds anything to the analysis already set down in *Penn Central*. Before even reaching its trilogy of factors, the Court in *Penn Central* determined that if a regulation does not further a legitimate state interest, a compensable taking has probably occurred and an ad hoc inquiry may be unnecessary.[202] In *Penn Central*, the Court rested its decision on the fact that protecting historical landmarks was a legitimate state interest.[203] Also, in formulating the viability prong of its test, the *Agins* Court cited to *Penn Central*'s economic impact analysis.[204] Apparently, the Court saw this prong as "closely related" to the investment-backed expectations issue and sought to combine these two points into its "economically viable use" prong.[205] Nevertheless, just how the *Agins* test is meant to comport with the *Penn Central* analysis has created much uncertainty.[206] Some argue that the former is a

196. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 133 (1978).
197. *Id.* at 134–35.
198. MELTZ ET AL., *supra* note 72, at 136.
199. 447 U.S. 255 (1980).
200. *Id.* at 260.
201. *See generally* Valparaiso Assocs. v. City of Cotati, 65 Cal. Rptr. 2d 551 (Ct. App. 1997) (finding that the *Agins* test should be read in the disjunctive). *But see* Del Oro Hills v. City of Oceanside, 37 Cal. Rptr. 2d 677 (Ct. App. 1995) (finding that both prongs must be satisfied).
202. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 108 (1978).
203. *Id.* at 124.
204. *Agins*, 447 U.S. at 260.
205. Alperin, *supra* note 3, at 184.
206. MELTZ ET AL., *supra* note 72, at 138.

substitute for the latter, even though the Court in *Agins* neither overruled *Penn Central* nor stated that its test superceded it.[207] Still others hold that *Agins* incorporates the elements of *Penn Central*.[208]

Given these conflicting interpretations, it should come as no surprise that lower federal and state courts have little clarity as to which test to apply. Even the Supreme Court seems confused. This is evinced by the fact that some of the Court's regulatory takings cases apply the three-factor test of *Penn Central*, while others rely on the two-factor test of *Agins*.[209] More surprisingly, no Supreme Court decision since *Agins* has made any attempt to assimilate or resolve these two competing tests.[210] This not only has led to confusion in the courts, but has bred uncertainty for city planners, communities, and litigants.[211] As a result of this confusion, some state and federal courts attempt to formulate their own, often overcomplicated and bizarre, takings tests.[212] Others have simply abandoned takings claims altogether and choose to resolve such cases on alternative constitutional grounds.[213] Nevertheless, as reflected in the majority of cases, the *Penn Central* test has proven the most suitable and effective.[214] More importantly, its case-sensitive analysis affords litigants many additional arguments as to why they should be compensated for a regulatory taking. Many of these pleas would be foreclosed under other tests.[215] Indeed, as one commentator has put it, "The Supreme Court could do all affected groups a service by jettisoning the *Agins* and other regulatory takings criteria in favor of *Penn Central's* regulatory takings trilogy."[216] This is exactly what the trend appears to be,[217] and is exactly what the

207. *Id.* (citing J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 ECOLOGY L.Q. 89, 104 (1995); Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles, Part I—A Critique of Current Takings Clause Doctrine*, 77 CAL. L. REV. 1299, 1330–33 (1989)).
208. *Id.*
209. *Id.* at 138–39.
210. *Id.*
211. *Id.*
212. *Id.* (citing Fla. Rock Indus., Inc. v. United States, 18 F.3d 1560, 1571 (Fed. Cir. 1994) (using a test consisting of eight parts)).
213. *Id.* (citing Guimont v. Clarke, 854 P.2d 1, 19 (Wash. 1993) (using substantive due process principles in resolving the case)).
214. *Id.* at 139.
215. Examples of these tests include those based on an eminent domain claim, a categorical per se rule, or other due process analyses.
216. MELTZ ET AL., *supra* note 72, at 139.
217. *See, e.g.*, Palazzolo v. Rhode Island, 533 U.S. 606, 607 (2001) (applying the

Supreme Court is encouraging claimants in regulatory takings cases to do.[218]

## III. APPLICATION

### *A. The Temporary Moratoria and the Seeds of Controversy*

Assuming that in theory the *Penn Central* three-pronged test is the most comprehensive and effective takings analysis, that theory must now be tested. In the area of regulatory takings law, there is no hotter issue than that of the temporary development moratoria.[219] Thus, there is no better area to test the effectiveness of the *Penn Central* analysis in resolving such issues. Since the 1970s, considerable state regulation has been focused on preserving environmentally sensitive land.[220] The regulatory vehicle of choice to protect such land has been the development moratorium. Such a moratorium acts as an authorized delay in the provision of governmental services or developmental approval[221] and often results in a state imposed development ban.[222] The Supreme Court held in *First English Evangelical Lutheran Church v. County of Los Angeles*[223] that such a government land use restriction, although temporary, may require compensation under a regulatory takings analysis. In *First English*, the Court held that if such a temporary ban is amply harsh, it constitutes a compensable taking "not different in kind from permanent takings, for which the Constitution

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three-prong test of *Penn Central*).

218. For a discussion of the Court's favoring the *Penn Central* analysis and how it encourages claimants to use it, see *infra* Part III.E.

219. At this point, it is important to reiterate that the Takings Clause comes into play in two procedurally different ways. As mentioned above, the first of these is the condemnation proceeding. Under these circumstances, the government admits that it has taken private property by exercising its sovereignty by way of eminent domain. In condemnation cases, the government functions as the plaintiff in a suit against the property or its owner. Condemnation involves cases where there is little or no doubt that a taking has occurred—for example, when the government takes property in order to build a public highway. In such cases the only real issue is how much compensation is just. On the other hand, takings cases involving regulatory measures such as the temporary moratoria are of a different and more recent type. In regulatory takings cases, the government intrudes on private property interests but categorically denies that a taking has occurred. In these cases, it is the property owner who must function as a plaintiff and proactively seek compensation for what the government denies is an act of eminent domain. Regulatory takings cases most often involve some type of restriction on a property owner's use of her property. The temporary moratoria is such a restriction. MELTZ ET AL., *supra* note 72, at 3–4.

220. BERNARD H. SIEGAN, PROPERTY AND FREEDOM: THE CONSTITUTION, THE COURTS, AND LAND-USE REGULATION 205 (1997).

221. MELTZ ET AL., *supra* note 72, at 266.

222. *Id.* (citing Joint Ventures Inc. v. Dep't of Transp., 563 So. 2d 622 (Fla. 1990)).

223. 482 U.S. 304 (1987).

clearly requires compensation."[224] However, in keeping with its vague holdings in the regulatory takings area, the Court has not sufficiently defined when a temporary moratorium becomes compensable.[225]

Courts have held that under the authority of a state's police power, local governments may enact reasonable moratoria in order to edge development for short periods without causing a compensable taking. However, these regulations must be enacted in keeping with the requirements of legitimacy and proportionality.[226] Short-term moratoria are more defensible because developers and owners are able to plan around such obstacles. Also, the economic impact will be slight because viability will rebound when the moratorium expires.[227] Absent some sort of extraordinary delay or fluctuation in value occurring during the life of the temporary moratorium, such obstacles are considered by the courts as incidents of ownership.[228] This should require that the government set well-defined and reasonable durations for such moratoria and that government agencies respect these durations for each moratorium enacted.

A type of moratorium that is particularly defensible is a well-defined "planning pause" moratorium.[229] This gives the government breathing room to consider a comprehensive zoning plan and to react to such problems as explosive development or the loss of a natural resource.[230] Cases involving this type of moratorium are particularly well suited for the fact-sensitive *Penn Central* takings analysis.[231] Nevertheless, courts should support such moratoria only when there is a legitimate public need and when the moratoria are no longer than necessary, when there is an economically viable use for the land both during and after the moratorium, when the moratorium does no substantial harm to the landowner's reasonable investment-backed expectation, and if the character of the government regulation adds proportionality to the list of

224. *Id.* at 318.
225. MELTZ ET AL., *supra* note 72, at 267.
226. *Id.*
227. *Id.* at 268–69.
228. *Id.* at 271.
229. *Id.* at 272.
230. 119 Dev. Assocs. v. Vill. of Irvington, 566 N.Y.S.2d 954, 955 (App. Div. 1991).
231. Schulz v. Lake George Park Comm'n, 579 N.Y.S.2d 761, 763 (App. Div. 1992) (holding that "while the use of emergency rules imposing construction moratoriums is likely to recur, whether such moratoriums are justified is a fact-sensitive inquiry to be evaluated on a case-by-case basis").

the moratorium's defensible characteristics.[232] Ultimately, defensible moratoria are the rule rather than the exception.[233]

### *B. California: A "Fertile Ground for Sprouting Land Use Controversies"*[234]

The implementation of particularly troublesome temporary development moratoria provided the spark for a landmark takings case involving the environmentally sensitive Lake Tahoe Basin area.[235] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*[236] involved two moratoria totaling thirty-two months on development while the Tahoe Regional Planning Agency (TRPA) formulated a comprehensive and environmentally sensitive plan in order to protect the lake from the development induced runoff that was destroying its clarity.[237] Hundreds of owners who had individually purchased subdivided, single family residential lots around Lake Tahoe claimed that, for two decades, the TRPA had prevented them from building their homes.[238] They claimed that this had been accomplished by a series of unconstitutional "rolling prohibitions" that had halted development since 1981.[239] Most of these landowners, who bought their lots years before the challenged regulations had even been considered, were married couples who invested in anticipation of retirement and family vacations or with the expectation of building permanent residences and not as part of a profit-driven real estate speculation scheme.[240]

The battle between those who seek to develop their property and those

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232. MELTZ ET AL., *supra* note 72, at 272.

233. *Id.* at 273.

234. DENNIS J. COYLE, PROPERTY RIGHTS AND THE CONSTITUTION: SHAPING SOCIETY THROUGH LAND USE REGULATION 112 (1993).

235. Lake Tahoe is an exceptionally pure and beautiful natural resource, the crown jewel of the Sierra Nevada mountain range. It is the largest alpine lake in the world based on all its dimensions, including a remarkable average depth of 1,027 feet and a maximum depth of 1,645 feet. At 6,229 feet above sea level the Lake stretches over 192 square miles, ringed by snow-capped peaks that soar thousands of feet higher. It contains enough water to flood the State of California to a depth of 14 inches.

Brief for Respondents at 4, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002) (No. 00-1167) (citing Carl R. Pagter & Cameron W. Wolfe, Jr., *Lake Tahoe: The Future of a National Asset*, 52 CAL. L. REV. 563, 564 (1964)).

236. 535 U.S. 302 (2002).

237. *Id.* at 306.

238. Brief for Petitioners at 2, *Tahoe-Sierra Pres. Council*, 535 U.S. 302 (No. 00-1167).

239. *Id.*

240. *Id.*; *see also Tahoe-Sierra Pres. Council*, 535 U.S. at 312–13 (noting that the primary purpose of the proposed construction was for permanent, retirement, or vacation residences).

who wish to preserve the area in its pristine natural condition has had an intensity and duration unmatched in the land use arena. In order to fully appreciate why this war has been fought with such tenacity on both sides, some background into the judicial tenor of takings law in California and the natural history of Lake Tahoe is necessary.

One commentator has remarked that "[t]he California soil has proved fertile ground for sprouting land use controversies."[241] Due to its perfect climate, natural beauty, top universities, and stable economy, California almost always tops the list of fastest growing residential and commercial communities.[242] Great growth pressures, coupled with opposition from current and long-time residents who seek to preserve their "place in the sun," have resulted in many regulatory proceedings that are often "packed with pressure and intrigue."[243] Due to the state's sympathetic laws and judges, land use regulations in California have been wielded as an effective tool for preserving the status quo. In fact, the California Supreme Court has been heralded as being tougher on the property rights of developers than any other tribunal in the nation.[244]

For example, in 1979, the court set the tone for many years to come by holding that the compensation provisions found in both the state and the Federal Constitution did not apply to regulatory takings.[245] In *Agins v. City of Tiburon*,[246] discussed above, the property owner purchased five acres in the city of Tiburon with the intent of developing housing that would overlook the city of San Francisco.[247] Subsequently, the property was allocated for open space by the city and thereafter rezoned to allow the construction of one to five houses on the land, contingent upon additional regulatory approvals.[248] The city initiated eminent domain procedures to purchase the land from the Aginses, but later abandoned the effort.[249] The Aginses claimed that the city was effecting a regulatory taking for which compensation was due under both the state and federal Constitution.[250]

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241. COYLE, *supra* note 234, at 112.
242. *Id.*
243. *Id.*
244. 1 NORMAN WILLIAMS, JR. & JOHN M. TAYLOR, AMERICAN PLANNING LAW: LAND USE AND THE POLICE POWER § 6.03, at 184 (rev. 1988).
245. COYLE, *supra* note 234, at 115. Note also that the Supreme Court did not repudiate this holding by another decision until 1987. *Id.*
246. 598 P.2d 25 (Cal. 1979), *aff'd*, 447 U.S. 255 (1980).
247. *Id.* at 26.
248. *Id.* at 27.
249. *Id.*
250. *Id.* at 28.

In a bold move, the California Supreme Court held that the Aginses did not have the ability to sue for compensation. The court found that "[c]ommunity planners must be permitted the flexibility that their work requires"[251] and that any chance of compensation as a result of their actions would "chill" necessary regulation.[252] Also, because the court held that compensation was not the proper remedy, the Aginses had no cause of action.[253] The only remedy for a regulatory taking, according to the court, was invalidation of the ordinance,[254] which would provide little more than a Pyrrhic victory for the Aginses and other landowners. In many ways, the California Supreme Court was providing for a reverse per se rule by holding that regulatory takings can *never* be compensable. Like arguing for a per se rule mandating compensation, such a rule forecloses the fairness analysis so critical to the *Penn Central* test and often leads to injustice.

Echoing this view, Justice Clark in dissent claimed that the holding would force developers to abandon their properties: "Today's decision effectively pronounces that henceforth in California title to real property will no longer be held in fee simple but rather in trust for whatever purposes and uses a governmental agency exercising legislative power elects, without compensation."[255] While Clark's claim may have seemed a bit extreme, it accurately characterizes the judicial climate towards private property owners in California. During the 1980s, private landowners won only twenty-one percent of the constitutional cases heard by the California Supreme Court and lost all but one of the thirteen cases that involved regulatory limits on property rights to use and develop land.[256]

Not surprisingly, neither the California Supreme Court nor the U.S. Supreme Court made any mention of such fairness factors as security or proportionality in their respective resolutions of the takings issue in *Agins*. As noted above, that case developed an alternative test based on furthering legitimate state interests and deprivation of economic value.[257] It could be argued that a strong fairness concern arose when the Aginses were forced to submit to an ordinance not in effect when they purchased their land. In order to vindicate the legitimate hopes of those who expend their limited monetary resources on land, at the very least investment-backed expectations should have been a consideration before these two tribunals. That these basic fairness considerations were

251. *Id.* at 30.
252. *Id*.
253. *Id.* at 28.
254. *Id.* at 30.
255. *Id.* at 34 (Clark, J., dissenting).
256. COYLE, *supra* note 234, at 117.
257. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

ignored further reflects the California court's antilandowner sentiments and how evolution beyond the *Penn Central* test may lead to injustice for landowners everywhere.

### *C. A "Short" Natural History of Lake Tahoe and the* Tahoe-Sierra *Controversy*

Nearly 500 million years ago, during the Paleozoic era, the Sierra Nevada Mountains laid deep beneath the sea.[258] Over a period of at least 270 million years, through continental drifting, incredible pressure, and erosion, the Tahoe Basin was formed.[259] During a 10,000 year period of glaciation, valleys were cut and then filled by ice dams that released walls of water and immense boulders downstream, forming what we know today as Lake Tahoe.[260] This majestic national history marked just the beginning of this singularly pristine and yet rugged area. Lake Tahoe's stunning beauty has and continues to impress politicians, naturalists, and famous writers alike.[261] The great American writer Mark Twain, although celebrated for his ability to spin tall tales, gave a universally accepted and accurate account of its beauty:

> [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 full three thousand feet higher still! . . . 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.[262]

Countless others have voiced similar descriptions regarding Lake Tahoe's splendor and its place as a natural treasure. Former President Bill Clinton referred to Lake Tahoe as "one of the crown jewels, unique among them all," and as a "national treasure that must be protected and preserved."[263] Indeed, according to one senate report, "[o]nly two other sizable lakes in the world are of comparable quality—Crater Lake in Oregon, which is protected as part of the Crater Lake National Park, and

258. California Environmental Resources Evaluation System, *Geology and Natural History of Lake Tahoe*, *at* http://ceres.ca.gov/tcsf/tahoe-local/geology.html (last updated June 10, 1997).
259. *Id.*
260. *Id.*
261. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F. Supp. 2d 1226, 1230 (D. Nev. 1999), *rev'd*, 228 F.3d 998 (9th Cir. 2000), *and aff'd*, 535 U.S. 302 (2002).
262. MARK TWAIN, ROUGHING IT 169 (Oxford Univ. Press 1996) (1872).
263. *Tahoe-Sierra Pres. Council*, 34 F. Supp. at 1230–31.

Lake Baikal in the [former] Soviet Union."[264]

A major part of what makes Lake Tahoe so special is the clarity of its water.[265] Twain vividly described the water's clarity as "not *merely* transparent, but dazzlingly, brilliantly so."[266] This clarity is due to the lack of algae that tends to obscure the waters of most other lakes.[267] This pristine beauty, combined with the fact that Lake Tahoe is so readily accessible from large metropolitan centers and so adaptable to urban growth,[268] has resulted in a marked increase in land development and a concomitant dramatic decrease in the clarity of its waters.[269] This decrease is attributed to runoff over impervious coverage from urban development that sends nitrogen and phosphorous into the lake, which nourishes the growth of algae.[270] It is estimated that if the lake loses its clarity, along with its "noble sheet of blue water,"[271] it could take "over 700 years for it to return to its natural state, if that were ever possible at all."[272] As Justice Stevens stated in *Tahoe-Sierra*, "The lake's unsurpassed beauty, it seems, is the wellspring of its undoing."[273]

Reflecting Justice Stevens's sentiments, the TRPA argued that "the region's natural wealth contains the virus of its ultimate impoverishment."[274] It was these well-warranted concerns, coupled with an effort to maintain the status quo, which promoted the development ban that sparked the controversy behind the *Tahoe-Sierra* case. During the life of the ban, a study concerning the impact of development was to be conducted and an environmentally sound growth strategy was to be devised.[275] In 1969,

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264. S. REP. NO. 91-510, at 4 (1969).

265. *Tahoe-Sierra Pres. Council*, 34 F. Supp. 2d at 1230.

266. TWAIN, *supra* note 262, at 175.

267. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 307 (2002).

268. S. REP. NO. 91-510, at 3–4.

269. *Tahoe-Sierra Pres. Council*, 34 F. Supp. 2d at 1231 (finding the clarity of the water to be decreasing one foot per year).

270. *Id.* The unusual clarity of Lake Tahoe results from the fact that it, historically, was "oligotrophic," which means it was very low in nutrients and lacking a steep temperature gradient that would prevent deep circulation and mixing. *Id.* Since mid-century, however, the lake has been undergoing "eutrophication," a process by which the nutrient loading in the lake increases dramatically due to nitrogen and phosphorous (contained in the soil) being washed down into the lake. *Id.* The excessive enrichment of the lake by these nutrients encourages the growth of algae. *Id.* As algae growth in the lake increases, the lake loses its clarity and color, becoming green and opaque. *Id.*

271. *Id.* at 1230 (quoting 1 TWAIN, *supra* note 262, at 169).

272. *Id.* at 1231.

273. Tahoe-Sierra Pres. Council, Inc v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 307 (2002).

274. Brief for Respondents at 6, *Tahoe-Sierra Pres. Council*, 535 U.S. 302 (No. 00-1167) (quoting People *ex rel.* Younger v. County of El Dorado, 487 P.2d 1193, 1195 (Cal. 1971)).

275. *Tahoe-Sierra Pres. Council*, 535 U.S at 306.

under the concurrence of Congress and the President, California and Nevada formed the TRPA in an attempt to unify their land use planning goals and to control development in the 501 square mile portion of the Lake Tahoe Basin that they shared.[276] Early planning efforts divided the land into different zones categorized by steepness, geology, and water absorption.[277] Four of these zones were designated "high hazard" areas based on their contribution to the lake's deteriorating clarity.[278] Initially, development was restricted in these zones but not prohibited.[279]

During the period following the TRPA's formation, the lake's clarity continued to deteriorate. Soon after, California and Nevada began to disagree on how to best govern the area. Ultimately, California became so frustrated with the TRPA that it ceased to grant financial support and independently applied much more stringent regulations to the affected area within its borders.[280] As a result, Congress and the President amended the interstate compact that created the TRPA. The new Tahoe compact, formed in 1980, mandated a well-defined slowdown of development but not a halt.[281] During this slowdown, the TRPA was to conduct an eighteen month study regarding threshold carrying capacities, and then another year would be necessary to amend the plan in order to maintain those capacities.[282] In short, the TRPA was to determine the type and amount of development allowable in order to protect the region's scenic, recreational, and natural resources.

After a few months, the TRPA determined that it could not meet the deadlines imposed on it by the compact.[283] Therefore, it enacted Ordinance 81-5, which imposed the first of two moratoria on development that would eventually form the basis of the plaintiffs' takings claim. The ordinance prohibited the construction of all new residences on "high hazard" lands in California.[284] It became effective in 1981 and was to

276. *Id.* at 309.
277. *Id.*
278. *Id.*
279. *Id.*
280. *Id*.
281. Though it had statutory power to do more, during the planning period the legislation only imposed a cap on the number of residential permits that could be issued, not an outright ban on development. The legislation was quite specific in terms of duration and what would be regulated. Brief for Petitioner at 3, *Tahoe-Sierra Pres. Council*, 535 U.S. 302 (No. 00-1167).
282. *Tahoe-Sierra Pres. Council*, 535 U.S. at 310.
283. *Id.* at 310–11.
284. *Id.* at 311. According to a detailed analysis of the ordinance, it may have even

remain in effect until the adoption of a permanent plan required by the compact.[285] Given the complexity of defining environmental threshold carrying capacities, the TRPA was not able to adopt such measures until 1982, two months after the compact deadline, which still afforded the TRPA another year to amend and implement the plan.[286] Unfortunately, no regional plan was in place as of that date. Thus, the TRPA adopted Resolution 83-21, an eight month resolution completely suspending all project reviews and approvals, including the acceptance of new proposals.[287] This ban persisted until 1984, when a new regional plan was developed. These two ordinances sparked the controversies which lead to the *Tahoe-Sierra* case.

Complicating matters, on the day that the 1984 plan was adopted, the State of California filed an action seeking to enjoin implementation of the regional plan because it failed, in the State's view, to establish land use controls sufficiently stringent to protect the Lake Tahoe Basin.[288] This injunction was upheld by the court of appeals and remained in effect until a revised plan was adopted in 1987.[289] Both the 1984 injunction and the 1987 plan contained provisions prohibiting new construction on sensitive lands in the Lake Tahoe Basin.[290] This set the stage for a protracted litigation that would take over fourteen years before the first phase of the trial would begin.[291]

### *D. The Arguments*

For most courts, the issue of whether a temporary moratorium on development amounts to a compensable regulatory taking is a "significant constitutional question of first impression."[292] Prior to *First English v. Evangelical Lutheran Church v. County of Los Angeles*, it was fairly well established that temporary planning moratoria were not considered takings.[293] However, after that case it is unclear whether such moratoria without compensation remain legitimate planning

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prohibited hiking or picnicking on all high hazard land, but was eventually interpreted as a prohibition on any construction or other activity involving the removal of vegetation or the creation of land coverage on all high hazard lands in California. *Id.*

285. *Id.*
286. *Id.*
287. *Id.*
288. *Id.* at 312.
289. *Id.*
290. *Id.*
291. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F. Supp. 2d 1226, 1229 (D. Nev. 1999), *rev'd*, 228 F.3d 998 (9th Cir. 2000), *and aff'd*, 535 U.S. 302 (2002).
292. Corn v. City of Lauderdale Lakes, 95 F.3d 1066, 1073 (11th Cir. 1996).
293. *Tahoe-Sierra Pres. Council*, 34 F. Supp. 2d at 1248.

tools.[294] In *Tahoe-Sierra*, the defendants argued that "both Ordinance 81-5 and 83-21 were 'reasonable temporary planning moratoria,' and thus not takings."[295] In response, and relying in part on *First English*, the plaintiffs argued that *all* temporary moratoria on development must be regarded as takings per se.[296] As a result of arguing a per se rule as the basis for asserting their takings claim, the plaintiffs chose not to utilize *Penn Central*'s ad hoc analysis or multifactor test. Rather, and quite possibly to their peril, the plaintiffs chose to argue that the moratoria caused a categorical taking in the nature of eminent domain by denying them all economically viable use of their land.[297]

The plaintiffs' argument relied on *Lucas v. South Carolina Coastal Council*,[298] wherein the U.S. Supreme Court held that any regulation that completely eliminates the economically beneficial use of property amounts to a compensable taking per se.[299] As a consequence of relying on such a categorical rule, plaintiffs in regulatory takings cases deprive themselves of the fact-sensitive inquiry critical to a *Penn Central* analysis. While such an approach may at first blush appear stable, clear, and more efficient than the *Penn Central* test, in reality it is a nearly impossible case for plaintiffs to make. Thus, the plaintiffs in *Tahoe-Sierra* chose to fight an "uphill battle" by trying to fit their case into the "relatively rare" situation in which a regulation denies all productive use of an entire parcel.[300] This hill was made "particularly steep" by the very nature of such a categorical rule, which would require compensation, regardless of the governmental purpose, every time such a moratorium on development was to be imposed.[301]

Conversely, the plaintiffs may have had a method to their madness in arguing for a categorical taking under *Lucas*. Like the plaintiffs in *Penn Central*, the *Tahoe-Sierra* plaintiffs did not challenge the legitimacy of the state interest being furthered by the regulations.[302] The plaintiffs

294. *Id.* at 1249.
295. *Id.* at 1248.
296. *Id.*
297. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 317–18 (2002).
298. 505 U.S. 1003 (1992).
299. *Id.* at 1029.
300. *Tahoe-Sierra Pres. Council*, 535 U.S. at 319–20 (citing Keystone Bituminous Coal Ass'n v. DeBenedictus, 480 U.S. 470, 495 (1987)).
301. *Id.* at 320.
302. Brief for Petitioners at 3, *Tahoe-Sierra Pres. Council*, 535 U.S. 302 (No. 00-1167) (stating that "[t]he problem which has brought this case here is *not the regulatory*

agreed that Lake Tahoe was a beautiful national treasure worth preserving. The plaintiffs stressed that the case was about means, not ends.[303] What was at issue, they argued, was not whether the TRPA had a legitimate state interest in protecting the glory of Lake Tahoe by banning development, but whether it could do so without compensation. As in *Penn Central*, the landowners sought compensation, not invalidation of the protections.[304] Given this concession, the plaintiffs may have feared that their remaining viability, security, and proportionality arguments would be significantly weakened with a concomitant strengthening of the state's case against them. The *Tahoe-Sierra* plaintiffs may have been wary of meeting the same fate as those in *Penn Central* and thus sought, by arguing a completely different theory, to save their case from the doom of precedent. Under the *Lucas* test, which seeks to draw a direct analogy between regulatory takings and eminent domain, takings may be found compensable without an inquiry into the legitimacy of the state's interest.[305] Thus, by resting their claim on *Lucas*, the *Tahoe-Sierra* plaintiffs did not need to risk either weakening their own position or bringing themselves within the four corners of *Penn Central* by conceding the TRPA's legitimate state purpose.

Furthermore, as the Court pointed out, under the *Lucas* analysis and a per se rule, there is no need to evaluate either the landowners' investment-backed expectations or the reasonableness of such reliance expenditures.[306] Suggesting that this may have been a critical point, the district court pointed out that it was common knowledge in the Lake Tahoe Basin at the time of purchase that a "crackdown on development was in the works."[307] Such "common knowledge" may have served as constructive notice under the holding in *Ruckelshaus v. Monsanto*, thereby crippling the plaintiff's investment-backed expectations claim. Thus, by arguing for a per se rule, the plaintiffs in *Tahoe-Sierra* saved themselves from having their investment-backed expectations held unreasonable, which

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*ends*, but rather the *unconstitutional means* employed by TRPA") (emphasis added).

303. *Id.*

304. *Id.* at 2.

305. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1006–07, 1015 (1992) (stating that "[t]his case requires us to decide whether the Act's *dramatic effect on the economic value* of Lucas's lots accomplished a taking . . . requiring the payment of just compensation" (emphasis added)); *see also* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434–35 (1982) (stating that in cases based on eminent domain, a property owner is entitled to compensation regardless of the various state interests involved and regardless of the severity of the economic impact).

306. *Tahoe-Sierra Pres. Council*, 535 U.S at 539.

307. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F. Supp. 2d 1226, 1241 (D. Nev. 1999), *rev'd*, 228 F.3d 998 (9th Cir. 2000), *and aff'd*, 535 U.S. 302 (2002).

would have significantly weakened their otherwise effective and necessary fairness argument.

Initially, given the strength of the unchallenged governmental interest and the apparent weakness of the plaintiffs' security arguments, not relying on the *Penn Central* factors may have seemed like a legal necessity. Indeed, the district court held that under a *Penn Central* analysis, the plaintiffs' takings claim would have failed.[308] In addition to finding that the plaintiffs did not have *reasonable* investment-backed expectations, the court found it critical that the nature of the governmental action was temporary and that the plaintiffs failed to offer specific evidence of economic harm. However, under the *Lucas* per se analysis, the district court found that the plaintiffs had been temporarily deprived of all economically viable use of their land, thus effecting a per se taking requiring compensation.[309]

Nevertheless, on appeal, the TRPA successfully challenged the district court's holding by arguing that because the regulations had only a temporary impact on the plaintiffs' fee interest, no categorical taking had occurred. The Ninth Circuit reasoned that a regulation affecting only a portion of the parcel, whether limited by time, use, or space, does not deprive the owner of all economically beneficial use of his or her land.[310] Decisively, the plaintiffs did not bother to challenge the district court's possible misapplication of the *Penn Central* analysis in their appellate argument. This omission lead the Ninth Circuit to limit its analysis to the per se approach under *Lucas*.[311] This, coupled with the fact that the plaintiffs did not challenge the legitimacy of the state's interest, may have lead to their downfall.[312]

### *E. What Might Have Been: Arguing the* Penn Central *Analysis*

Following the Ninth Circuit's lead, Justice Stevens did not perform the *Penn Central* analysis in his majority opinion.[313] Rather, the Court

308. *Id.* at 1240.
309. *Id.* at 1245.
310. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 216 F.3d 764, 776–77 (9th Cir. 2000), *aff'd*, 535 U.S. 302 (2002).
311. *Id.* at 773.
312. *Id.*
313. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 334 (2002) (holding that "[r]ecovery under a *Penn Central* analysis is . . . foreclosed both because petitioners expressly disavowed that theory, and because they did not appeal from the District Court's conclusion that the evidence would not support it").

chose to deny the application of a per se rule because such a categorical mandate would render inoperable a necessary and proper exercise of police power.[314] Such a rule, the Court held, would interfere with "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like"[315] and, in an extreme case, compensation may be required due to orders "temporarily prohibiting access to crime scenes, businesses that violate health codes, fire-damaged buildings, or other areas that [the Court could not then] foresee."[316] This reference to unforeseeable consequences underscores the Court's desire to maintain control over what may or may not amount to a compensable taking in order to safeguard the state's exercise of legitimate police power. The categorical rule from *Lucas* does not afford the Court this flexibility. However, the *Penn Central* analysis provides a fact-sensitive and flexible balancing approach. As stated in *Pennsylvania Coal* and cited by Justice Stevens in *Tahoe-Sierra*, "[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."[317]

Despite the fact that the Court ruled against the plaintiffs based on its *Lucas* analysis, the Court hinted several times that under a flexible *Penn Central* approach, the outcome may have been different. In the Court's view, "the answer to the abstract question whether a temporary moratorium effects a taking is neither 'yes, always' nor 'no, never'; the answer depends upon the particular circumstances of the case."[318] This reference to the necessity of a fact-sensitive analysis is the first indication that the Court expected and desired to use the *Penn Central* approach. Indeed, the plaintiffs may have overestimated the strength of their position by resting their fate on so bold a claim as a categorical taking. The Court may have been taken aback at such an intrepid move. Evidence of this possible affront is reflected throughout the majority opinion. In many subtle ways, Justice Stevens seems to consistently bring up the fact that under a *Penn Central* analysis the plaintiffs may have prevailed.

The Court reaffirmed this position by stating that it must resist "[t]he temptation to adopt what amount to per se rules in either direction,"[319] thereby concluding that the circumstances of the case were "best

314. *Id.* at 335.
315. *Id.* (quoting First English Evangelical Lutheran Church v. County of L.A., 482 U.S. 304, 321 (1987)).
316. *Id.*
317. *Id.* (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922)).
318. *Id.* at 321.
319. *Id.* (citing Palazzolo v. Rhode Island, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring) (writing that "[o]ur polestar instead remains the principles set forth in *Penn Central* itself")).

analyzed within the *Penn Central* framework."[320] In a footnote, Justice Stevens took another opportunity to hint that under a *Penn Central* analysis the outcome may have been different.[321] In response to the dissent's accusation that the majority had allowed the government to "take private property without paying for it,"[322] Justice Stevens pointed out that the Court had not said that a temporary moratorium could never effect a compensable taking.[323] Rather, he stated quite plainly the possibility that "under a *Penn Central* analysis petitioners' land *was* taken and compensation *would* be due."[324] Justice Stevens quoted *Penn Central* and other cases in order to categorize the Court's regulatory takings jurisprudence as "essentially ad hoc, factual inquiries"[325] that are designed to afford "careful examination and weighing of all the relevant circumstances."[326]

Ultimately, the Court categorized the *Tahoe-Sierra* case in *Penn Central* terms when it stated that the controversy had arisen from "some public program adjusting the benefits and burdens of economic life to promote the common good."[327] The Court even framed the issue by referring to *Penn Central* when it stated "the ultimate constitutional question is whether the concepts of 'fairness and justice' that underlie the Takings Clause will be better served by one of these categorical rules or by a *Penn Central* inquiry into all of the relevant circumstances in particular cases."[328] The Court answered that issue immediately by stating, "From that perspective, the extreme categorical rule that any deprivation of all economic use, no matter how brief, constitutes a compensable taking surely cannot be sustained."[329] This finding implicitly suggests that the converse may also be true: that under a *Penn Central* analysis, which eschews extreme categorical rules, such a claim could be sustained.

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320. *Id.*
321. *Id.* at 321 n.16 ("It may be true that under a *Penn Central* analysis petitioners' land was taken and compensation would be due.").
322. *Id.* (quoting *id.* at 349) (Rehnquist, C.J., dissenting).
323. *Id.*
324. *Id.* (emphasis added).
325. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).
326. Palazzolo v. Rhode Island, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring).
327. *Tahoe-Sierra Pres. Council*, 535 U.S. at 324–35 (quoting *Penn Cent. Transp.*, 438 U.S. at 124).
328. *Id.* at 334.
329. *Id.*

### *F. Unfinished Business: Applying the* Penn Central *Test in* Tahoe-Sierra

Unfortunately, it is too late for the plaintiffs in *Tahoe-Sierra*. They cannot now make the arguments that may have swayed the Court. Of course, the fact that the Court would not conduct a *Penn Central* analysis sua sponte as the district court had done suggests that the Court may have been predisposed to finding that no compensable taking had occurred in the case. Nevertheless, this section will apply the *Penn Central* analysis to the facts of *Tahoe-Sierra* and attempt to determine how the outcome may have been different had the plaintiffs not insisted on a per se rule.[330]

#### *1. Viability*

One of the benefits of arguing a regulatory takings case under the *Penn Central* analysis is that a plaintiff may force an evaluation of economic impact without demanding the use of per se rules. The primary beneficial difference is that under *Penn Central*, economic viability becomes just a single piece of ammunition in an arsenal of possible fairness weaponry, instead of the single dispositive issue. Ultimately, the economic impact analysis protects a landowner's interest in the continued economic viability of his property by evaluating a regulation's impact on its value. As suggested, this analysis may be broken down into three areas of economic impact.[331]

The first area of economic impact is the rate of reasonable return. The key element in this analysis is determining the property owner's true expectancy. People purchase property for a variety of reasons, which do not always include turning a profit through shrewd speculation. For example, some landowners will purchase property upon which to build a family dream home for long-term ownership and use, to preserve the land for public enjoyment, or to keep a particular parcel "in the family" with no thought of speculation or profit. On the other hand, property may be used to make a profit in a variety of ways. For instance, some may wish to operate a business on the land for many years or to build space for lease or rent. Of course, under certain circumstances, a property owner's true expectancy will be to immediately resell the property at a higher rate when the market reaches its peak. However, when profit is the true expectancy, property owners may have a difficult time arguing that a temporary ban on development will ultimately

330. Because the plaintiffs in *Tahoe-Sierra* did not challenge the legitimacy of the state purpose, that ad hoc factor will not be applied in this analysis.

331. *See supra* Part II.C.2.

deprive them of what they seek. This is because once the ban is lifted, the market will rebound and the landowner will realize the expected return on her investment. Any downturn in the market due to the development ban will most likely be viewed as incidental to this type of real estate speculation.

The plaintiffs in *Tahoe-Sierra* did not intend to turn their land for a profit. If they had, the realization of their true expectancy would have merely been delayed by the ban. Rather, many of them had purchased the property in order to build family homes immediately and for long-term use.[332] Given these goals, the plaintiffs could have argued that their true expectancy was the ability to build not only a residence, but a better life for themselves and their families. Without compensation for their loss, that goal would be permanently frustrated and not just temporarily delayed. Under such circumstances, delaying their compensation becomes a human issue, which not only demands a closer look at the mechanical aspects of the takings question, but also puts a face on the moratoria's impact. By conducting a fact-sensitive analysis, *Penn Central* appears to require the Court to identify a particular plaintiff's true expectancy and determine whether an inability to realize it would require the plaintiff to be compensated accordingly.[333]

Of course, the Court could have found that the *Tahoe-Sierra* plaintiffs were not deprived of their rate of reasonable return. Despite the preservation ordinance, the *Penn Central* plaintiffs were still able to realize what the Court considered to be their true expectancy, which was the use of the terminal for their primary business purposes.[334] The Court in *Tahoe-Sierra* used a similar interpretation when it stated that "a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted."[335] Nevertheless, this once again implies that the plaintiffs' true expectancy was the ability to maximize profits, which would arguably rebound once the moratoria ended. The plaintiffs in *Tahoe-Sierra* could distinguish *Penn Central* on the basis that in *Penn Central*, the terminal owners were allowed to realize a reasonable rate of

332. *Tahoe-Sierra Pres. Council*, 535 U.S. at 312–13.

333. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 136 (1978) (holding that because the plaintiffs were able to continue using the terminal as they had always done, the degree of interference was not severe enough to support compensation).

334. *Id.*

335. *Tahoe-Sierra Pres. Council*, 535 U.S. at 332.

return on their true expectancy without delay because their other business ventures were never regulated. In *Tahoe-Sierra*, the plaintiffs were not able to realize the expected rebound in economic value until the ban was lifted, thereby depriving them in the present of their true expectancy. This is true no matter what their true expectancy may have been: the speculative sale value of the land, the immediate development potential, or the prospect of present sale and building elsewhere. Under any of these expectancies, the *Tahoe-Sierra* plaintiffs would have been denied a reasonable rate of return. For this they should have been compensated accordingly.[336]

The next area of impact is the regulation's effect on possible economic uses of the property. By denying recovery under a per se rule, the Court in *Tahoe-Sierra* foreclosed the argument that all economically viable use of the property had been denied by the moratoria. If all such use had been denied, the case could have conceivably succeeded under *Lucas*. The *Tahoe-Sierra* Court relied on Justice Brennan's "indivisible property"[337] theory from *Penn Central* to hold that in order for a temporary ban to be considered a categorical taking, the ban must be analyzed in terms of its effect on the property as a whole.[338] If the property value would have rebounded once the ban was lifted, then all viable economic use could not have been denied. The Court refused to divide the plaintiffs' property into segments of time under the plaintiffs' "conceptual severance" theory.[339] The Court even held that *First English* was not on point because, unlike *Tahoe-Sierra*, *First English* entertained a purely remedial issue and not whether a compensable taking had ever occurred.[340] Indeed, the Court pointed out that if the plaintiffs wanted to succeed under *Lucas*, the starting point for their analysis was to determine whether a categorical taking had occurred within the framework of that case's "total taking" criteria.[341] However, under the indivisible property theory, the plaintiffs in *Tahoe-Sierra* could not show that a total taking had occurred. Under such circumstances, the Court suggested that it would be necessary to determine if a deprivation less

336. The plaintiffs in *Tahoe-Sierra* could also have distinguished *Penn Central* on other grounds. For example, they could have argued that the *Penn Central* plaintiffs had transferable development rights that allowed them to build elsewhere. They could have argued that this provided them with an alternative method of realizing their true expectancy. The *Tahoe-Sierra* plaintiffs had no such alternative means of reaching their true expectancy.

337. *Penn Cent. Transp.*, 438 U.S. at 130–31.

338. *Tahoe-Sierra Pres. Council,* 535 U.S. at 326–27.

339. *Id.* at 331.

340. *Id.* at 328.

341. *Id.* at 330–31.

than a total taking had transpired, which may also require compensation.[342]

Thus, once again, the *Tahoe-Sierra* Court demonstrated its preference for a *Penn Central* analysis. Under *Penn Central*, it is agreed that when all economic use is denied, a compensable taking has occurred.[343] From this idea flows the concept that no taking has occurred when *only* the *most profitable* use is restricted.[344] In *Tahoe-Sierra*, the Court may have focused on what it considered to be the plaintiffs' most profitable use, the ability to sell the property for a gain once the ban was lifted, and determined that this use had not been restricted. To develop the property now for uses beyond real estate speculation and sale may have been viewed as the most profitable use solely in the plaintiffs' subjective opinions. Furthermore, the Court has pointed out elsewhere that such future profits are far too speculative for it to forecast and thus cannot be "taken" through regulation.[345] Under this definition, profit speculation based on a future sale does not have the trappings of what the Court might define as "property." Therefore, the plaintiffs could have argued that what was restricted by the moratoria, the right to develop now, was the only interest in the case recognized by the Court at risk of being taken. As such, by restricting the plaintiffs' only recognized and compensable property right, the moratoria were inflicting the type of harsh economic impact ripe for compensation under the *Penn Central* test. This is so even if the regulations did not amount to a "total taking" under *Lucas*. Nevertheless, the right to develop presently is the only recognizable and compensable property interest that the plaintiffs held. Ironically, viewed in this way, it is arguable that a total taking may have occurred, which would have entitled the *Tahoe-Sierra* plaintiffs to compensation under either theory.

The final area of impact is a regulation's effect on the fair market value of the property. As stated earlier, the concept of fair market value is a more fluid concept than the rate of reasonable return or the impact on economic use.[346] While a diminution in property value standing alone cannot establish a compensable taking per se,[347] it may when combined

342. *See id.* at 330 (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 n.8 (1992)).
343. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 138 n.36 (1978) (stating that if circumstances were to change such that the terminal ceased to be "economically viable," the plaintiffs would be able to obtain the compensation sought).
344. Andrus v. Allard, 444 U.S. 51, 66 (1979).
345. *Id.*
346. MELTZ ET AL., *supra* note 72, at 133.
347. *Penn Cent. Transp. Co.*, 438 U.S at 131.

with the other areas of economic impact as analyzed under *Penn Central*. It is true that mere fluctuations in value during the process of governmental decisionmaking have been held "incidents of ownership" and considered insufficient to support a compensable takings claim.[348] However, a regulation that destroys nearly the entire fair market value during the life of the moratorium, thereby affecting an owner's ability to successfully alienate the land, should be considered a compensable taking. If the ban in *Tahoe-Sierra* had not all but destroyed the fair market value of the plaintiffs' land, then they could have conceivably sold their property in Lake Tahoe and pursued the development of their residences elsewhere. While inconvenient, this may not have amounted to a compensable taking because the plaintiffs' true expectancy would have been preserved. However, after institution of the ban, the only offers to purchase the plaintiffs' regulated property came from the U.S. Forest Service at prices amounting to a mere fraction of the value prior to the ban.[349] Such low offers most likely would not have allowed the plaintiffs to effectively relocate. These decreases in fair market value represent more than "mere fluctuations" in price. They are indicative of the type of harsh economic impact envisioned as compensable under the *Penn Central* test.

In support of its holding that no compensable taking had occurred, the Court in *Tahoe-Sierra* found that not only would property values stay constant, but that they would in fact increase during the life of the moratoria because of the added assurance that the Basin would "remain in its pristine state."[350] However, the plaintiffs could have challenged the relevance of this statement on several fronts. First, the Court did not focus itself on the plaintiffs' true expectancy, which was their ability to develop the property for domestic use and not to sell it for a profit once the ban was lifted. Profit was *not* their expectancy. The economic impact of the regulation took the plaintiffs' ability to fulfill their goals of settling down in the Lake Tahoe Basin according to their life plan—not for success in a speculative real estate venture. The potential rebound of property values some time from now most likely meant nothing to them. If this had been a case involving loss of fair market value based on real estate speculation, it almost certainly would never have made it out of the district court. In this case, fair market value is relevant only to the extent that under the moratoria, the plaintiffs could not sell their property for what it was truly worth at a time when it would have allowed them to

348. Agins v. City of Tiburon, 447 U.S. 255, 263 n.9 (1980).

349. David G. Savage, *Landowners Dealt a Blow by Justices*, L.A. TIMES, Apr. 24, 2002, at A1.

350. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 341 (2002).

pursue their true expectancy. This artificial loss of fair market value forecloses the plaintiffs' ability to achieve their lifelong goal of a lakefront retirement elsewhere. Furthermore, it could be argued that while property values may be tied to the Lake Tahoe Basin's pristine condition, such condition may only be maintained *during the moratoria*. The fear that the lake's clarity might further deteriorate once the ban is lifted, and as a result the institution of another ban affecting potential future developers, should keep the property value artificially low even after the ban is lifted. Indeed, the specter of *Ruckelshaus v. Monsonto*'s constructive notice rule would loom like a dark cloud over any future development plans, making any investment-backed expectations inevitably unreasonable even after the ban was lifted.[351] These factors nearly guarantee that the land's value would remain artificially depressed even after the ban. Such a permanent deprivation of fair market value would then require compensation. In the end, these partial deprivation arguments never see the light of day under a *Lucas* analysis, which requires a total taking. Such partial deprivations may only be argued under the *Penn Central* trilogy.

### *2. Security*

As has been discussed, the protection of a property owner's reasonable investment-backed expectations is a powerful but often misapplied tool in the takings analysis.[352] As such, the Court in *Tahoe-Sierra* specifically mentioned and analyzed the prospect of arguing reasonable investment-backed expectations as a theory of compensation under the *Penn Central* test.[353] It had been proposed that a temporary ban of longer than one year without compensation should be viewed with particular constitutional skepticism.[354] In response, the Court found that bans lasting longer than one year may require compensation based on the interference with reasonable investment-backed expectations, but that the plaintiffs' per se rule was "too blunt an instrument" to identify such cases.[355] What the Court may be implying is that finding fairness and justice in any given

351. For a discussion of *Ruckelshaus* and the constructive notice rule, see *supra* Part II.C.3.
352. For a discussion of investment-backed expectations as a factor in the takings analysis, see *id.*
353. *Tahoe-Sierra Pres. Council*, 535 U.S. at 341–42.
354. *See id.* at 341.
355. *Id.* at 342 (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 636 (2001)).

case often requires the precision of a judicial scalpel which can best be provided by a flexible *Penn Central* analysis rather than the net cast by a categorical rule.[356]

By arguing the need to protect reasonable investment-backed expectations under the *Penn Central* analysis, the plaintiffs could have invited the Court to focus more on fairness and less on the cold economic impact of the moratoria. In keeping with Professor Michelman's test, the Court could have looked beyond the "how much" and concentrated instead on "whether or not" the plaintiffs' reasonable investment-backed expectations had been adversely affected.[357] By conducting a *Penn Central* analysis, the plaintiffs could have argued that fairness, and not merely economic impact, is at the heart of the takings problem.[358] Whereas Justice Brennan seemed to sidestep the fairness argument in *Penn Central*,[359] the *Tahoe-Sierra* Court could have been invited to succeed where Justice Brennan had failed by clarifying the role of investment-backed expectations in the takings analysis. By labeling the issues in *Tahoe-Sierra* as revolving around "fairness and justice,"[360] the Court may have been inviting future claimants to provide them with the tools of precision necessary to vindicate those elusive concepts. Such tools are not provided by a per se rule.

Once again, this analysis boils down to identifying what the plaintiffs' true expectancy was. If their true expectancy had been to realize a profit based on real estate speculation, then the security element of the *Penn Central* analysis may have lost much of its force as a fairness tool. As Professor Michelman dictated, such "speculation" is not entitled to recognition while crystallized "investments" require compensation.[361] What Professor Michelman may have meant by this distinction is that fairness boils down to protecting investments in something more than the mere realization of future profit. Rather, in the regulatory takings analysis, fairness means respecting the security that people are entitled to have in areas of life that go far beyond mere monetary concerns. In *Tahoe-Sierra*, many of the plaintiffs were retirees who had invested their life savings in land with hopes of fulfilling a lifelong goal of spending their hard earned golden years in a lakefront cottage.[362] Others were those who sought to build permanent homes or to have the property

356. *See id.*
357. Michelman, *supra* note 110, at 1233.
358. *See* Lang, *supra* note 115, at 49–50.
359. *Id.* at 50.
360. *Tahoe-Sierra Pres. Council*, 535 U.S. at 334.
361. Radford & Breemer, *supra* note 109, at 456 n.43 (citing Michelman, *supra* note 110, at 1233–34).
362. Brief for Petitioners at 2, *Tahoe-Sierra Pres. Council*, 535 U.S. 302 (No. 00-1167).

available for family vacations.[363] Their goals were not to simply turn their land for a profit soon after acquisition. The need to respect these nonmonetary and very human goals is so powerful that the *Penn Central* Court suggested that their vindication could even require compensation in the face of a legitimate state interest.[364] Given that the plaintiffs in *Tahoe-Sierra* conceded the legitimacy of the state interest in their case, this fairness factor becomes an even more critical counterweight. In fact, it may have been the key to securing compensation. In order to make the distinction between "speculation" and crystallized "investments" urged by Professor Michelman, the Court must be allowed to conduct a detailed inquiry into the facts of each case. However, such an analysis is not afforded under a per se test.

Of course, the defendants in the *Tahoe-Sierra* case could have called into question the reasonableness of the plaintiffs' investment-backed expectations. They could have argued, as the district court did, that the plaintiffs were under constructive notice of an imminent environmental crackdown in the Lake Tahoe area.[365] Had the property in question been purchased as a speculative real estate venture based on maximizing profit, such an atmosphere of investment risk may have been crippling to the plaintiffs' security analysis under *Penn Central*. However, this argument loses much of its weight in light of the plaintiffs' true expectancy, which was to maximize only the intrinsic human value of the land. Maximizing such human goals does not enter the same atmosphere of risk as real estate speculation. This is why the fact-sensitive fairness analysis afforded under *Penn Central* becomes so critical. Under a per se rule, only such cold hard facts as the economic impact in dollars and cents, or the physical duration of the regulation, are taken into account. Under such a rule, the Court may have felt backed into a corner and, by way of a knee-jerk reaction, ruled against the takings claim. To rule otherwise may have established a per se precedent effectuating future injustices under different factual circumstances. As Justice Stevens stated in *Tahoe-Sierra*, the solution cannot be found through such categorical rules that do not take into account the facts of each

363. *Id.*
364. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 127 (1978).
365. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F. Supp. 2d 1226, 1240 (D. Nev. 1999), *rev'd*, 228 F.3d 998 (9th Cir. 2000), *and aff'd*, 535 U.S. 302 (2002).

case.[366] In the end, the plaintiffs in *Tahoe-Sierra* deprived themselves of the entire security and fairness analysis by insisting on a per se rule.

### *3. Proportionality*

The fairness analysis that flows from providing security to reasonable investment-backed expectations naturally carries over to the proportionality factor. The Court's proportionality analysis in *Tahoe-Sierra* began as *Penn Central* dictates, by examining the character of the government action. First, the Court distinguished regulatory takings from physical occupations and stated, "This case does not present the 'classi[c] taking' in which the government directly appropriates private property for its own use."[367] Certainly, if *Tahoe-Sierra* would have involved an actual physical taking, the case would have required compensation on its face.[368] Under such circumstances there would be no proportionality of benefit and burden between the property owner and the public. However, the Court categorized the case as a regulatory taking that, in the words of *Penn Central*, arose from "some public program adjusting the benefits and burdens of economic life to promote the common good."[369] That the moratoria in *Tahoe-Sierra* sought to promote a public good is critical to the proportionality analysis under *Penn Central*. As Professor Michelman suggested, property owners will be more willing to accept some frustration of their reasonable investment-backed expectations if regulations are fair in treating all affected parties equally and as long as society will benefit more from the regulation than without it.[370]

Wisely, the plaintiffs in *Tahoe-Sierra* did not attempt to rely solely on physical takings cases.[371] Rather, they relied on the per se rule from *Lucas* in an attempt, by analogy, to have their taking treated as categorical. However, the Court refused to characterize the government action in *Lucas* terms either. Justice Stevens pointed out that the holding in *Lucas* was limited to the "extraordinary" case where "*no* productive or economically beneficial use of land is permitted."[372] The Court put an emphasis on the word "no" in the text of the *Lucas* opinion and reiterated that the categorical rule would not apply if even five percent of the property value remained.[373] In *Tahoe-Sierra*, because the property

366. *Tahoe-Sierra Pres. Council*, 535 U.S. at 321.
367. *Id.* at 324 (quoting E. Enters. v. Apfel, 524 U.S. 498, 522 (1998)) (alteration in original).
368. *Id.* at 321–22.
369. *Id*. at 324–25 (quoting *Penn Cent. Transp.*, 438 U.S. at 124).
370. Michelman, *supra* note 110, at 1211–12.
371. *Tahoe-Sierra Pres. Council*, 535 U.S. at 325.
372. *Id.* at 330.
373. *Id.*

value of the lots in question would rebound once the ban was lifted, the categorical rule from *Lucas* could not be used.[374] Rather, a *Penn Central* partial takings analysis would be required.[375]

Once the Court clearly established that the taking in *Tahoe-Sierra* was regulatory and not categorical in nature, Justice Stevens proceeded to address the proportionality issue. In doing so, the Court sought to determine whether the interests represented in the case warranted protecting individual property owners from bearing public burdens "which, in all fairness and justice, should be borne by the public as a whole."[376] Ultimately, the Court found that there was "reciprocity of advantage"[377] because the moratorium protected "the interests of all affected landowners against immediate construction that might be inconsistent with the provisions of the plan that is ultimately adopted."[378] Also, as mentioned above, the Court believed that property values would continue to increase during the ban.[379]

However, the tenacity of the Court's conclusion is once again couched in its aversion to a per se rule. The Court stated that it would not "adopt a rule that assumes moratoria *always* force individuals to bear a special burden that should be shared by the public as a whole."[380] By using the word "always," the Court suggested that it would not adopt a per se rule holding that temporary moratoria *never* afford "reciprocity of advantage." Nevertheless, this also suggested that fairness and justice may require a different outcome under a *Penn Central* fact-sensitive analysis.

Indeed, under a fact-sensitive *Penn Central* analysis, the Court's "reciprocity of advantage" conclusions may be challenged. First, the plaintiffs could have argued that under the facts of their case, the rebound of fair market value once the ban is lifted is not relevant to their true expectancy because they did not intend to sell the property at any time. Such "speculation" concerning property value is not likely to be recognized by the Court as a compensable property interest.[381] Also, the development ban imposed on the plaintiffs individually will, by externality, benefit those property owners in the Lake Tahoe Basin not

374. *Id.*
375. *Id.*
376. *Id.* at 332 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).
377. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).
378. *Tahoe-Sierra Pres. Council*, 535 U.S. at 341.
379. *Id.*
380. *Id.* (emphasis added).
381. For a discussion regarding speculatory expectations, see *supra* Part II.C.3.

under the ban because the lake's singular beauty will be preserved at the plaintiffs' expense.[382] While this benefits landowners lucky enough not to have purchased property in a high hazard zone, it has no reciprocal benefit for the plaintiffs who did. They are not able to enjoy the fruits of this increase because their regulated land is artificially undervalued due to the ban. This artificial market undervaluation makes the plaintiffs unable to sell their land now and move to an area only a few miles away in the basin where development might be allowed. In essence, the ban has put a restraint on the plaintiffs' ability to alienate their fee simple which, under a *Penn Central* analysis, should certainly raise constitutional skepticism. In the end, regardless of the amount of force that these or other arguments challenging the proportionality of the government action may have had, the issue is never reached under a *Lucas* categorical takings analysis.

### *4. A Possible Outcome*

Given the fact that the Court in *Tahoe-Sierra* hinted several times that under a *Penn Central* analysis the outcome may have been different,[383] it is only natural to speculate as to whether the Court meant what it implied. Making the state pay for the development ban on the plaintiffs' property in return for the restored clarity of the lake certainly would not be a terrible injustice nor, as the petitioner claimed, cause the sky to fall.[384] Awarding compensation to the plaintiffs in *Tahoe-Sierra* most likely would have been possible if they had not insisted on a per se rule. In essence, the Court is voicing, as it has consistently done, its displeasure over such categorical guidelines.[385] The Court does not like to be forced to cast a legal net in making its determinations. Rather, the Justices prefer to use a scalpel and dissect the facts of each controversy, which gives them power over both the case at hand and over the holding's future precedential effect. In the end, the *Penn Central* analysis allows a landowner to make several arguments that are never reached under a per se rule. Given these arguments, and the flexibility the *Penn Central* test would have provided, one could conclude that, had it been urged in *Tahoe-Sierra*, a plaintiffs' victory would have been likely.

382. This type of externality is not only unfair, it is inefficient.
383. *Tahoe-Sierra Pres. Council*, 535 U.S. at 334.
384. Reply Brief at 18, *Tahoe-Sierra Pres. Council*, 535 U.S. 302 (No. 00-1167).
385. Palazzolo v. Rhode Island, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring).

## IV. CONCLUSION

Like the once crystal clear waters of Lake Tahoe, in the years since *Penn Central* the courts have experienced a dramatic decrease in clarity regarding what should be the proper regulatory takings analysis. In *Penn Central*, Justice Brennan resurrected the importance of critically analyzing land use regulations, an issue that the Supreme Court had ignored for over fifty years since *Pennsylvania Coal*. While it is true that *Penn Central* does not supply clarity by way of "mathematically precise variables" in answering a takings question, it does provide "important guideposts that lead to the ultimate determination of whether just compensation is required."[386] These guideposts lead us down the path of human reality in search of justice and fairness. By taking the Supreme Court's invitation in *Tahoe-Sierra* to rely on *Penn Central* as the "polestar"[387] in future takings cases, courts may begin to build a more uniform and functional body of precedent. Urgency is necessary because until such issues are addressed, regulatory takings law, like the waters of Lake Tahoe, will continue to suffer dramatic decreases in clarity.

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386. *Id.* at 634.
387. *Id.* at 633.