Surviving the View through the Lochner Looking Glass: Tahoe-Sierra and the Case for Upholding Development Moratoria

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INTRODUCTION

Around twenty-five million years ago, the Sierra Nevada Mountains thrust out of the earth and formed the Lake Tahoe Basin. The basin filled with melting snow, and lava flows locked the crystal clear waters in a 191 square mile lake at the lofty perch of 6225 feet above sea level. The natural resources found in the basin drew Native American tribes to spend sum-

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2. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F. Supp. 2d 1226, 1231 (D. Nev. 1999) (noting that the lake historically lacked "nitrogen and phosphorous, two of the nutrients algae requires" to grow). Observations made by University of California, Berkeley Professor John Le Conte on September 6, 1873 revealed that the "transparency of the water" exceeded 100 feet. JAMES, supra note 1, at 53.

3. Lane, supra note 1. Lake Tahoe is the tenth deepest lake in the world. Id. (noting that the lake’s "greatest depth is 1645 feet and it averages 1000 feet in depth"). About 501 square miles of land (including that under the Lake) lie within the Lake Tahoe Basin. Tahoe Reg'l Planning Agency Governing Bd., Regional Plan for Lake Tahoe Basin: Goals and Policies, at http://www.trpa.org/goals/preface.html (last visited March 29, 2002).
bers fishing at the lake.\textsuperscript{4} In the mid 1800s, the discovery of
gold and silver deposits brought an influx of new settlers to the
basin along with significant natural resource destruction.\textsuperscript{5}
Rapid population growth and land use around Lake Tahoe in
the 1950s and 1960s\textsuperscript{6} raised fears that increased development
might diminish the lake’s clarity\textsuperscript{7} and safety.\textsuperscript{8} As a conse-
quence, local residents, businesspersons, and planners from
California and Nevada (two-thirds of the lake lies within Cali-
ifornia, one-third within Nevada) began to call for more “orderly
development” of the basin.\textsuperscript{9}

In 1969, at the urging of the legislatures and governors of
both states,\textsuperscript{10} Congress created the Tahoe Regional Planning
Agency (TRPA) by ratifying the Tahoe Regional Planning Com-
pact.\textsuperscript{11} Despite significant study of the human impacts on the
lake, the 1969 Compact failed to stem the deterioration of the
lake’s health.\textsuperscript{12} Consequently, in 1980, Congress “restructured

\textsuperscript{5} Lane, supra note 1 (“Over a 40-year period [after the Comstock Lode
was discovered] nearly two-thirds of all of the basins [sic] forests were
removed, and only stumps and unwanted fir trees remained.”).
\textsuperscript{6} STRONG, supra note 4, at 148 (noting that “resident population had
doubled [during the 1960s] ... and state and federal recreation land use had
multiplied eightfold”).
\textsuperscript{7} See Tahoe-Sierra, 34 F. Supp. 2d at 1231 (“Dramatic decreases in clar-
ity first began to be noted in the late 1950s/early 1960s, shortly after develop-
ment at the lake began in earnest in the 1950s. Clarity has decreased steadily
since then.”). A 1966 report by the Federal Water Pollution Control Admini-
stration indicated “that the phosphorous level in the lake had reached a criti-
cal level, and that a substantial increase in nitrogen could destroy the clarity
of the lake.” STRONG, supra note 4, at 134.
\textsuperscript{8} STRONG, supra note 4, at 132 (noting that in “1961, some two million
gallons of sewage overflowed from the south shore treatment plant and into
the lake” and that “[t]he situation at the north shore was not much better”).
\textsuperscript{9} Id. at 126-29.
\textsuperscript{10} California Governor Ronald Reagan, criticized for his early silence on
the issue, did sign California’s bill and later praised the Compact. Id. at 142-
44, 148.
\textsuperscript{11} Id. President Nixon signed the bill creating the TRPA on December
18, 1969. Id. at 144. Only compacts approved by Congress have the force of
law. U.S. CONST. art. I, § 10, cl. 3. The TRPA did not represent the first con-
gressional involvement in the area; disputes over water control in the basin
led Congress in 1955 to establish the California-Nevada Interstate Compact
Commission. STRONG, supra note 4, at 108.
\textsuperscript{12} See H.R. REP. NO. 96-1023, at 2 (1980), reprinted in SUBCOMM. ON
NAT'L PARKS & INSULAR AFFAIRS, 96TH CONG., LEGISLATIVE HISTORY OF THE
LAKE TAHOE PRESERVATION ACT 11 (Comm. Print 1981) (“Testimony provided
has indicated a general consensus that the hope for [the 1969 Compact’s] ap-
proach to solve the environmental degradation problems in the basin has been
[the] TRPA and its voting procedures, and directed it to estab-
lish environmental threshold carrying capacities and a new re-
gional plan within a strict time table.\textsuperscript{13} For a period of thirty-
two months, the TRPA implemented moratoria\textsuperscript{14} on most resi-
dential and all commercial construction in many areas of the
basin during the creation of a comprehensive development plan
for the basin.\textsuperscript{15} A group of approximately 400 plaintiffs who
own land in the basin sued the TRPA claiming the agency de-
prived them, through various delays including the moratoria, of
all use of their respective properties while the delays and mora-
toria were in effect.\textsuperscript{16} Regardless of any future use or value of
their property, the property owners claim the TRPA's actions
violated the Fifth Amendment's Takings Clause.\textsuperscript{17}

The District Court of Nevada found that the moratoria on
development constituted takings subject to compensation under
the Fifth Amendment.\textsuperscript{18} The Ninth Circuit Court of Appeals, in
Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional
Planning Agency, reversed these district court takings hold-
ings.\textsuperscript{19} The Ninth Circuit declared that the loss of value caused
by a "temporary" taking must be offset by any future use of the
property.\textsuperscript{20} The court then found the property owners main-
tained future use value during the moratoria and therefore suf-
fered no taking.\textsuperscript{21} On June 29, 2001, the United States Su-
preme Court granted limited certiorari to consider "[w]hether
the Court of Appeals properly determined that a temporary
moratorium on land development does not constitute a taking

\textsuperscript{13} See Tahoe-Sierra, 34 F. Supp. 2d at 1233.
\textsuperscript{14} This Comment uses the term "moratoria" throughout to refer to a con-
tinuous development ban imposed by the TRPA through two legislative actions
(Ordinance 81-5, effective from August 24, 1981 through August 26, 1983 and
Resolution 83-21, effective from August 27, 1983 through April 25, 1984). See
id. at 1233-36.
\textsuperscript{15} See id. at 1234 (citing Defs.' Tr. Br. at 13). The restrictions on Cali-
ifornia landowners were greater than on those landowners in Nevada. Id. at
1235.
\textsuperscript{16} See id. at 1229. Note that a subset of the Nevada plaintiffs did not
have claims against Ordinance 81-5 before the court. Id. at 1245.
\textsuperscript{17} See id. at 1229.
\textsuperscript{18} Id. at 1245.
\textsuperscript{19} See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency,
216 F.3d 764, 782 (9th Cir. 2000).
\textsuperscript{20} Id.
\textsuperscript{21} Id.
of property requiring compensation under the Takings Clause of the United States Constitution.\(^2\)

This Comment will examine the leading cases governing temporary takings and will argue that moratoria, like the ones in *Tahoe-Sierra*, operate under state police powers, powers historically not subject to the Takings Clause. Part I examines the relevant scope of existing takings law with attention given to its common law origins. Part II inspects the Ninth Circuit's treatment of the relevant case law and its reliance on the policy implications of its decision in ruling against the landowners.

Part III analyzes the Rehnquist Court's unprecedented practice of diminishing the regulatory tools available to government entities to control private property developments that hurt the environment. It audits the Court's misinterpretation of a fact-specific 1922 case and scrutinizes its abandonment of almost two hundred years of takings law. Further, the section identifies the Court's distrust of legislative and agency actions as key to understanding the direction of the Rehnquist Court's heightened scrutiny of government regulations. In addition, the section identifies the Court's unsupported isolation of nuisance principles from their ancient origins and recent statutory embodiment. Finally, this Comment concludes in Part IV with an explanation of why the Ninth Circuit's opinion should stand despite the Rehnquist Court's heightened review of government actions in takings challenges.

I. THE COMPENSATION DUTY AND SOVEREIGN POWERS

A. THE FIFTH AMENDMENT'S ORIGINS AND EMINENT DOMAIN

The Constitution contains no specific grant of government power to take private property for public use. Instead, drawing

from the tradition in England, the Framers tacitly accepted the power of the sovereign to seize private property. The Framers' acceptance explains why the Fifth Amendment merely "confirms... 'a tacit recognition of a pre-existing power.'" In contrast to the English tradition, however, the Framers expressly mandated compensation in certain circumstances: "[N]or shall private property be taken for public use, without just compensation." In 1897, the Supreme Court held this clause, commonly called the Takings Clause, applied to the states through the Due Process Clause of the Fourteenth Amendment. Combined, the implicit power to take private property for public use and the duty to compensate define the concept known as eminent domain.

23. The actual origin of the concept of eminent domain is "lost in obscurity." JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 1.2[1], at 1-68 (rev. 3d ed. 2001). An early version of the eminent domain concept appeared as early as the Athenian Constitution in Greece. See id.

24. Differing rationales for this power exist: The sovereign retains an implied reservation to retake in the initial warrant of land; the power is a remnant of the feudal system established by William of Normandy in the eleventh century where all land was held subservient to the sovereign and subject to tenurial payments; and the inherent power of the state is "necessary to the very existence of government." JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 89, 187, 1102-03 (4th ed. 1998).

25. Id. at 1102 (quoting United States v. Carmack, 329 U.S. 230, 241 (1946)).

26. U.S. CONST. amend. V. The English tradition, followed to this day in England, requires no compensation for private land takings but in the eighteenth century, voluntary government compensation was common. Such voluntary compensation remains common. DUKEMINIER & KRIER, supra note 24, at 1102-03; see also id. at 1092 & n.47 (noting that the Town and Country Planning Act of 1947 paid landowners because the Act took away "their right to develop the land [in total]," but that "[p]ayments from the fund were not called 'compensation,' but rather 'ex gratia payments,' because the [English government]... would not admit that... any compensation at all was payable").

27. EDWARD H. ZIEGLER, JR. ET AL., 1 RATHKOPF'S THE LAW OF ZONING AND PLANNING § 6.02, at 6-4 & n.2 (West Group 4th ed. 2001) (1956) (citing Chi., Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226 (1897)). Note that "by the time the [Constitution] was held to require compensation by the states, they were already providing it on their own—through constitutional or judge-made law." DUKEMINIER & KRIER, supra note 24, at 1102.

28. See BLACK'S LAW DICTIONARY 541 (7th ed. 1999). The term is attributed to the seventeenth century legal scholar Grotius. Id. (citing JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.11, at 424-25 (4th ed. 1991)).
B. THE POLICE POWER

The Supreme Court also recognizes state police power.29 Police power antedates the Constitution and historically constituted regulatory power not subject to the Takings Clause's requirement of compensation.30 The power reflects “one of the most essential powers of government, one that is the least lim- itable.”31 A state's police power “aims directly to secure and promote the public welfare, and it does so by restraint or compul sion.”32 Through its police power a state may “regulate the relative rights and duties of all within its jurisdiction as to guard the public morals, the public safety, and the public health, as well as to promote the public convenience and the common good.”33 Under this power citizens are bound “to the rule of propriety, good neighbourhood, and good manners; and to be decent, industrious, and inoffensive in their respective stations.”34

Police powers and eminent domain differ in that “[e]minent domain takes property because it is useful to the public,” whereas the “police power regulates the use of property or im pairs the rights in property because the free exercise of these rights is detrimental to public interest.”35 In other words, emi-

29. The concept of the police power traces back to at least the year 1187. STEVEN J. EAGLE, REGULATORY TAKINGS § 3-2, at 218 (Lexis Publ’g 2d ed. 2001). Scholars, however, note evidence of state restrictions on property trace back at least to the fourth century B.C.E. DANIEL R. MANDELKER, LAND USE LAW § 1.01, at 1 (Lexis Law Publ’g 4th ed. 1997) (“The Roman Twelve Tables . . . included building site restrictions.”). This term was first used by the Supreme Court in Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 443 (1827). EAGLE, supra, § 3-4, at 221. Three years earlier, the Supreme Court had noted “[t]he acknowledged power of a State to regulate its police, its domestic trade, and to govern its own citizens.” Id. (quoting Chief Justice John Marshall in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 208 (1824)).


32. BLACK'S LAW DICTIONARY, supra note 28, at 1178 (quoting ERNST FREUND, THE POLICE POWER § 3, at 3 (1904)).

33. 3 PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS § 16.02, at 16-39 n.1 (quoting House v. Mayes, 219 U.S. 270, 282 (1911)). A state must, however, “take[e] care always that the means devised [to implement its powers] do not go beyond the necessities of the case, have some real or substantial relation to the objects to be accomplished, and are not inconsistent with its own Constitution or the Constitution of the United States.” Id. (quoting Mayes, 219 U.S. at 282).

34. EAGLE, supra note 29, § 3-2, at 218-19 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *162).

35. 3 ROHAN, supra note 33, § 16.02[3], at 16-58 n.42 (emphasis added)
nent domain applies to press private property into public use whereas police regulatory power denies certain private uses to prevent or stop a public harm. Most courts broadly interpret public harms to include even those offending only aesthetic sensibilities. States employ two important related but distinct land use controls under the police power authority: public nuisance actions and statutory controls.

1. Common Law Nuisance Actions and Takings

A word of French derivation, the term “nuisance” means “literally annoyance; in law it signifies, according to Blackstone ‘anything that worketh hurt, inconvenience, or damage.’” Of common law origin, early English public nuisance cases show the action was initially used to remove public right of way encroachments and then extended to protect invasions of other public rights. The Restatement (Second) of Torts broadly construes a public nuisance as “an unreasonable interference with a right common to the general public.” If a land use constitutes a nuisance wherever it is located, it is a nuisance per se; if it is a nuisance in some locations but not others, it is a nuisance per accidens. Since courts are hesitant to label land uses nuisances before they commence, nuisance actions generally serve

(quotting Town of Windsor v. Whitney, 111 A. 354, 356 (Conn. 1920)); see also FREUND, supra note 32, § 511, at 546-47 (“[T]he state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful . . . .”).


37. 3 ROHAN, supra note 33, § 16.05, at 16-140 to 16-164. The Supreme Court adopts the majority view. See, e.g., Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 510 (1981) (“It is not speculative to recognize that billboards by their very nature, wherever located and however constructed, can be perceived as an ‘esthetic harm.’”).

38. See Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 387-88 (1926). One nineteenth century English nuisance scholar commented that “[t]he Crown cannot by grant entitle a person to commit a public nuisance, for the grant must be subject to the rights of the public” and that “a prescriptive title cannot be obtained to commit a public nuisance.” EDMUND W. GARRETT, THE LAW OF NUISANCES 18 (London, William Clowes & Sons, 2d ed. 1897).


40. 3 ROHAN, supra note 33, § 16.02[2], at 16-55 n.29 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *216).

41. See GARRETT, supra note 38, at 1; PROSSER, supra note 39, at 802.

42. PROSSER, supra note 39, at 802 (quoting RESTATEMENT (SECOND) OF TORTS § 821B (1978)).

43. See MANDELKER, supra note 29, § 4.02, at 99.
as reactive regulatory tools.44 Because of their reactive nature, common law nuisance actions have been supplanted in many areas by more proactive statutes, both at the state and federal levels.45 This is especially true in the regulation of environmental nuisances.46 Significantly, as derivative police powers, nuisance-based regulations and prohibitions historically have not been subject to the Fifth Amendment's compensation requirement.47

44. See id. § 4.03, at 100; see also J. Peter Byrne, Ten Arguments for the Abolition of the Regulatory Takings Doctrine, 22 ECOLOGY L.Q. 89, 113 (1995) ("Litigation may begin only after the use has begun and the harm felt.").

45. See ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, & POLICY 101, 106 (3d ed. 2000). Sovereign enactment of public nuisance laws is far from a new trend. See GARRETT, supra note 38, at 2 & n.1 (identifying a very early English public nuisance statute regulating air pollution "and dealing with the improper disposal of garbage in ditches and waters" (citing 12 Rich. II. c. 13 (Eng.))).


47. See Chi., Burlington & Quincy R.R. Co. v. City of Chicago, 186 U.S. 226, 252-54 (1897); BERNARD H. SIEGAN, PROPERTY AND FREEDOM 75-77.
2. Statutory Nuisance Controls and Takings

Deeply rooted in judge-made law, nuisance actions operate quite differently from state regulatory land use controls because all state regulations\(^48\) originate as legislative actions (or administrative actions within legislative parameters).\(^49\) The Framers were familiar with legislative land use regulations; many legislative land use controls were passed after our country's independence and before the adoption of the Fifth Amendment in 1791.\(^50\) In 1926, the Supreme Court recognized the broad scope of land use laws and held modern zoning laws constitutional.\(^51\) The Court used the analogy of the breadth of the nuisance action to devise the scope of zoning laws.\(^52\) Zoning laws act as a proactive police power tool to prevent harms before they occur by prohibiting nuisances \textit{per accidens} from locating near other land uses they would likely harm. Prior to 1922, statutory regulations, like nuisance actions before them, received great deference from courts.\(^53\) Early American courts generally held even those regulations that caused severe diminution in private property values exempt from the Takings Clause's compensation requirement.\(^54\)
C. THE SUPREME COURT'S TREATMENT OF LAND USE RESTRICTIONS: 1922 TO THE PRESENT

1. Justice Holmes and the Birth of Regulatory Takings

Before 1922 the Supreme Court required that compensation be paid to private property owners only when the government engaged in a permanent physical occupation or invasion.55 In 1922, the Supreme Court handed down Pennsylvania Coal Co. v. Mahon.57 The Court held unconstitutional a Pennsylvania law that required the mining company to leave a portion of the coal it owned in the ground to act as support for the land's surface.59 Justice Holmes, for

55. Physical occupation cases are a venerable class of takings. See, e.g., Pumpelly v. Green Bay Co., 80 U.S. 166, 177-78, 181 (1872) (construing constitutional takings to go beyond just "absolute conversion of real property" to cover situations "where real estate is actually invaded by [government imposed] superinduced additions of water, earth, sand, or other material"). One hundred ten years later, the Court affirmed Pumpelly and established physical occupations as per se takings. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434-35 (1982). In Loretto, New York law required a landlord to permit a cable television company to install its equipment on her building. Id. at 423. Despite the minimal (and arguably beneficial) alteration of the property's value, the Court declared that New York owed the owner compensation for a "permanent physical occupation" of her property. Id. at 441.

56. See EAGLE, supra note 29, § 1-1, at 3 ("[U]ntil 1922 the Supreme Court had observed a de facto bright line test: it had never found governmental activities short of a physical occupation to constitute a taking."); sources cited supra note 53. Before 1922, numerous claims failed to shake the Supreme Court's broad deference to police power regulations. See cases cited supra note 54.

57. 260 U.S. 393 (1922).

58. The defendant would have been required to leave "standing in pillars from one-fourth to one-third of the coal." Mahon v. Pa. Coal Co., 118 A. 491, 498 (Pa. 1922) (Kephart, J., dissenting).

59. The plaintiff in Pennsylvania Coal sought to enjoin a coal company from removing coal owned by the coal company that supported the plaintiff's land (and house), citing as support the state statute. 260 U.S. at 394. The Court focused on the unique support estate in land, recognized by Pennsylvania law, that gave the coal company the right to deprive the land surface of all support whether or not someone else held the surface estate. Id. at 414. The state enacted the Kohler Act in 1921, which required some coal be left underground to support the surface. Id. at 412. Holmes declared that the Kohler Act "purports to abolish what is recognized in Pennsylvania as an estate in
the Court, stated that a regulation that "make[s] it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it." While Justice Holmes weighed various factors in assessing the takings claim in Pennsylvania Coal, he articulated no specific test for determining when a police power restriction constitutes a taking. In the end, he simply noted "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." With these words, Holmes originated the concept of regulatory takings.

2. The Takings Tests

Despite Holmes's pronouncement, however, "[f]or the next [fifty-five] years the Court did little to elaborate on the concept of a regulatory taking." Not until 1978, in Penn Central Transportation Co. v. New York City, did the Court articulate a test for regulatory takings. In that case, the owners of Penn Central Station claimed the city's historic preservation ordinance prevented the use of their air rights above the station and thus constituted a taking. The owners acknowledged that the ordinance did not impinge on the use of the existing structure but asked the Court to consider the air rights as a separate interest that was destroyed by the ordinance. In rejecting the claim, the Court identified three primary factors to be considered while conducting an "ad hoc" evaluation of whether a police power regulation went "too far": (1) the regulation's economic consequences for the owner; (2) the regulation's interference with justifiable, "distinct investment-backed expectations"; and (3) the character of the governmental action.
Two years following *Penn Central*, and without abandoning the test elaborated in *Penn Central*, the Court articulated a two-part takings test in *Agins v. City of Tiburon*.\(^{68}\) The Court later affirmed the *Agins* test in *Keystone Bituminous Coal Ass'n v. DeBenedictis*.\(^{69}\) Under this test, a taking occurs if (1) the regulation "does not substantially advance legitimate state interests"; or (2) "denies an owner economically viable use of his land."\(^{70}\)

3. The Whole Parcel Rule

Notably, unlike Holmes's decision in *Pennsylvania Coal*, the *Penn Central* Court refused to limit its definition of "property" to merely the regulated portion or interest in property.\(^{71}\) The *Penn Central* Court instead declared that takings analysis "does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."\(^{72}\)

Some scholars refer to the concept of looking at all of the property involved in all of the interests owned as the "whole parcel rule."\(^{73}\) If the whole parcel rule lies on one end of a linear property interest spectrum, segmentation or "conceptual severance" lies at the opposite end.\(^{74}\) Conceptual severance describes the process of analyzing less than the entire property

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70. *Agins*, 447 U.S. at 260.
71. *Penn Cent. Transp. Co.*, 438 U.S. at 130-31 (noting that the Court's analysis "does not divide a single parcel into discrete segments" but instead evaluates "the nature and extent of the interference with rights in the parcel as a whole").
73. *Mandelker & Payne*, *supra* note 62, at 114 (noting that the whole parcel rule is also called the "denominator rule"); *See also Ziegler et al., supra* note 27, § 6.08[7], at 6-68 (noting that the concept is also the "so-called Hohfeldian theory of taking analysis").
74. The term "conceptual severance" as applied to takings law first appeared in 1988. Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1676 (1988) (explaining that the concept involves "delineating a property interest consisting of just what the government action has removed from the owner, and then asserting that that particular whole thing has been permanently taken").
holdings of the property owner—usually only one property interest or only a portion of an interest (e.g., the regulated portion). \(^7\)

Beginning early in the last century, legal thinkers metaphorically described a person's estate as a "bundle" of rights or a "bundle of sticks." \(^5\) The "bundle" represents multiple abstract "legal relations between persons with respect to a thing." \(^7\) Some of these rights, like the right to possess, to use, to exclude others from, or to transfer property, comprise "fundamental element[s]" \(^8\) or "sticks" within the estate bundle. \(^7\) The wholesale appropriation of one of the above "sticks" by the government may trigger the Fifth Amendment's compensation requirement. \(^8\) More recent theories of conceptual severance suggest that, besides the traditional property "sticks," an estate may be divided along at least three planes of property interests: vertical (e.g., mineral, surface, air rights), horizontal (e.g., individual contiguous parcels considered separately or one parcel broken into separate types of land such as wetlands or uplands), and temporal (e.g., January, February, March or 1999, 2000, 2001). \(^1\)

75. See id. Conceptual severance goes by other names as well. See, e.g., Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 216 F.3d 764, 774 (9th Cir. 2000) (using "denominator problem"); MANDELKER & PAYNE, supra note 62, at 149 (using the terms "denominator rule" and "segmentation"); cf. Brief Amici Curiae of Pacific Legal Foundation & California Association of Realtors, Tahoe-Sierra, No. 00-1167 (U.S. argued Jan. 7, 2002) (noting that "virtually any real-world property interest can be" transformed into a larger, more abstract concept through "conceptual merge[r]", "conceptual agglomeration," or "conceptual composition" (citations omitted)), 2001 WL 1082473 at *6 & n.4.

76. See ABI Real Estate Committee, A Round Table Discussion: Supreme Court Decision 203 N. LaSalle St. Partnership, 7 AM1. BANKR. INST. L. REV. 389, 399 n.26 (1999).

77. DUKEMINIER & KRIBER, supra note 24, at 201.


79. Id. at 179-80.

80. See, e.g., Hodel v. Irving, 481 U.S. 704, 716-17 (1987) (finding a taking where a regulation terminated the right to pass property to heirs); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982) (finding a taking where a regulation infringed on the right to exclude); Kaiser Aetna, 444 U.S. at 179-80 (requiring the government to compensate the landowner for regulation restricting the right to exclude). But cf. Andrus v. Allard, 444 U.S. 51, 65-66 (1979) (holding that regulations barring the sale of eagle feathers did not violate the Takings Clause because the owners could still possess, transport, donate or devise the feathers and the potential economic benefit of the feathers remained).

81. See First English Evangelical Lutheran Church v. County of Los An-
Commentators often identify Holmes's opinion in *Pennsylvania Coal* as adopting a conceptual severance analytical framework.\textsuperscript{82} Seemingly counter to the whole parcel rule, the idea of Holmes's conceptual severance in *Pennsylvania Coal* continues to be debated heavily in regulatory takings cases.\textsuperscript{83} Because *Penn Central* adopted Holmes's belief that regulatory actions that go "too far"\textsuperscript{84} are compensable, the "too far" determination in large part rests on whether the regulated property encompasses all or some of the severed property.\textsuperscript{85}

4. "Temporary" Regulatory Takings

The Court touched upon a temporal severance aspect of regulatory takings cases in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*.\textsuperscript{86} The question before the Court was whether the Takings Clause required compensation for the time period during which land was regulated (from the time the regulation began until the time at which the regulation was held unconstitutional).\textsuperscript{87} The Court also chose to discuss the validity of such "temporary" takings.\textsuperscript{88}
The Court stated, "[W]here the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." Finally, the Court noted, "We limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us."

5. The Categorical Regulatory Taking and Resurrection of the Common Law Nuisance Exception

In 1992, the Court followed First English with Lucas v. South Carolina Coastal Council, a case that raises the stakes for the government when a court allows the conceptual severance of the property in question. In Lucas, Justice Scalia established for the first time that a regulation that "deprives land of all economically beneficial use" constitutes a taking regardless of any other factors and is therefore a compensable government action. Consequently, if the land interest (the denominator) is defined as the portion of the land regulated by the statute (the numerator), the land will be deemed devoid of all use, and thus a taking.

The Lucas Court did, however, recognize the so-called nuisance exception as an affirmative government defense to the finding of an automatic taking by a court. The Court delimited the nuisance defense: "[W]e think [a state] may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.

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90. First English, 482 U.S. at 321.

91. 505 U.S. 1003, 1015-17 (1992) (reaffirming the per se takings rule of "physical invasion" and establishing a per se regulatory takings rule "where regulation denies all economically beneficial or productive use of land").

92. Id. at 1027.

93. See supra note 85.

94. See Lucas, 505 U.S. at 1029-30.

95. Id. at 1027 (emphasis added).
ment appears to hark back to the Court's 1897-1922 rulings that rested on the federalism based concept that the Fifth Amendment governs the states, but that states retain their immutable police powers to protect the public from harm.96

A number of state cases broadly interpreted Lucas as a notice rule essentially estopping landowner regulatory taking claims where the suspect statute was in effect when the owner gained title to the regulated property.97 One court stated that it could "discern no sound reason to isolate the [nuisance exception] inquiry to some arbitrary earlier time in the evolution of the common law" because to do so "would elevate common law over statutory law, and would represent a departure from the established understanding that statutory law may trump an inconsistent principle of the common law."98

6. The Nuisance Exception to Categorical Takings Narrows

Following Lucas, the Rhode Island Supreme Court adopted a variation of the statutory-nuisance-as-notice rule and used it to bar consideration of a "reasonable investment-backed expectation[]" claim under the Penn Central three-pronged test.99 The Rhode Island court stated that a property owner who received title to property after a regulation's enactment could not

96. See id. at 1027 (noting that "[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power" (alteration in original) (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922)); Douglas W. Kmiec, At Last, the Supreme Court Solves the Takings Puzzle, in TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER DOLAN AND LUCAS 110 (David L. Callies ed., 1996) ("With this one bold stroke, the Court . . . had seemingly returned the land-use power to its roots, as a reasonable codification of the . . . law of nuisance."); supra notes 29-38 and accompanying text.

97. See EAGLE, supra note 29, § 12-1(c)(1), at 951 ("[M]ost courts that have examined the matter have determined that a recently promulgated regulation both inheres in the title and affects the expectations of subsequent buyers."); MANDELKER & PAYNE, supra note 62, at 150 ("Several cases [since Lucas] held the exception includes other common law principles as well as statutes and local regulations . . . .").


find aid in the Takings Clause "because the landowner is constrained by those restrictions that background principles of the State's law of property and nuisance already place upon land ownership." The Supreme Court granted certiorari in the case and in Palazzolo v. Rhode Island addressed the Rhode Island Supreme Court's pre-existing-regulation bar to the takings claim. Justice Kennedy, for the Court, stated bluntly, "A law does not become a background principle for subsequent owners by enactment itself." Palazzolo appears to support the view that the nuisance exception to Lucas refers primarily to common law "background principles" recognized before Lucas was handed down.

D. CURRENT FRAMEWORK FOR ANALYZING A REGULATORY TAKING CLAIM

While takings law remains muddled, post-Palazzolo regulatory taking analysis contains an identifiable regimen. The Supreme Court always follows an ad-hoc evaluation process of the record. If the regulation results in permanent physical occupation or invasion of recognized property interests, the landowner must be compensated. If the regulation

100. Id. at 2464 (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992)).
101. See id.
102. Id.
104. See Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (noting that "this 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 by the government").
105. Palazzolo, 121 S. Ct. at 2466 (O'Connor, J., concurring) ("We have identified several factors that have particular significance in these 'essentially ad hoc, factual inquiries.'" (quoting Penn Cent., 438 U.S. at 124)).
106. See id.
107. Compensation must also be paid if the right to exclude is trammeled (although the distinction between the right to exclude and physical invasion seems blurred, either seems to implicate the other). See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435-36 (1982). The destruction of the right to pass property to heirs also requires compensation. See Hodel v. Irving, 481 U.S. 704, 716-18 (1987).
does not bear on the physical invasion or occupation of the property, then *Lucas* must be applied to determine whether the regulation creates an economic taking *per se*.\(^{108}\) Key to the analysis under *Lucas* will be whether a court accepts conceptual severance of the various property interests involved.\(^{109}\) Once a court identifies the relevant property interest (the denominator), the regulatory effect (the numerator) must be calculated.\(^{110}\) If the ratio created equals one, *Lucas* demands that a categorical taking be declared.\(^{111}\) For example, assume a legislature bans all use of fifty of one hundred acres of a landowner's land. The restricted property, here the fifty acres, comprises the numerator. If a court equates the fifty acres with the denominator, then a ratio of one results and a taking will be found. The government may then offer an affirmative nuisance defense.\(^{112}\) To succeed, any nuisance defense must rely on background principles traditionally found in common law.\(^{113}\)

If, on the other hand, a court determines the denominator to equal the total one hundred acres, a ratio of one half exists. In the hypothetical above, the regulation spares some use of the relevant property interest (the one hundred acres), so the *Penn Central*-Agins amalgam test must be applied to that interest.\(^{114}\) Consequently, a court will likely find a taking if (1) the regulation "does not substantially advance legitimate state interests," or (2) "denies an owner economically viable use of his land."\(^{115}\) This two-part test will be informed by at least three of the factors noted in *Penn Central*: (1) the economic impact on the property owner; (2) the owner's discrete investment-backed expectations; and (3) the nature of the government activity.\(^{116}\) A court should also consider the extent to which the regulation

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109. See supra note 85.
110. See supra note 85.
111. See supra note 85.
112. See supra note 85.
113. *Palazzolo* v. Rhode Island, 121 S. Ct. 2448, 2464 (2001) (referencing specific pages from *Lucas* that encapsulate the Court's concept of background principles as "those common, shared understandings of permissible limitations derived from a State's legal tradition").
resembles a nuisance action. If these factors weigh on the side of the government, no taking is found.

II. TAHOE-SIERRA PRESERVATION COUNCIL, INC. V. TAHOE REGIONAL PLANNING AGENCY

A. THE LANDOWNERS' CLAIMS AND DISTRICT COURT ACTION

Following the Tahoe Regional Planning Agency’s (TRPA) prohibition on development from 1981 through 1984, the TRPA adopted a comprehensive land use plan for the Lake Tahoe Basin. On the day of the 1984 plan’s adoption, however, the state of California sued the TRPA, claiming the plan did not go far enough to protect Lake Tahoe. Pursuant to that lawsuit, a federal judge immediately enjoined the TRPA from implementing the plan. The injunction decreed a total ban on development in the basin and remained in place until the adoption of the 1987 plan. Many of the plaintiffs essentially claim that they suffer under a continuing categorical taking of their property dating back to the enactment of the first development moratorium in 1981.

The district court in Tahoe-Sierra held the TRPA owed the plaintiffs compensation for the moratoria period during the years 1981-1984. Further, the district court held the landowners’ claims lacked the causal proof necessary to make the TRPA responsible for the court-imposed development injunction from 1984-1987. Finally, the lower court held the land-

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117. See id. at 125.
118. Id. at 123-28.
120. Id.
121. Id.
122. See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 216 F.3d 764, 768 (9th Cir. 2000) ("[T]he injunction remained in force until a completely revised land-use plan—the 1987 Regional Plan—was adopted.").
123. This Comment uses the term “claim” here in the common sense to mean that many of the plaintiffs believe they are owed money for this time period; some of the plaintiffs’ legal “claims” for portions of this time period no longer legally exist. See id. at 769-70 nn.5-7 (noting the dismissal of some of the plaintiffs’ claims for some of the time periods covered by the lawsuit).
124. Tahoe-Sierra, 34 F. Supp. 2d at 1255.
125. Id. at 1248 (“There is no evidence whatsoever to support the plaintiffs’ theory that TRPA secretly wanted an injunction . . . and deliberately passed a
owners' claims from 1987 to the day of the decision to be barred by the statute of limitations.126

B. NINTH CIRCUIT REVERSES DISTRICT COURT ON MORATORIA
TIME PERIOD

The Ninth Circuit agreed the 1984-present takings arguments were flawed and affirmed the district court's rejection of these claims.127 The Ninth Circuit rejected, however, the district court's holding that the 1981-1984 development moratoria amounted to takings under the Fifth Amendment.128

The lower court held the moratoria did not violate the Penn Central balancing test,129 but did constitute a categorical taking under the test laid out in Lucas.130 The Ninth Circuit noted that, on appeal, the plaintiffs did not "argue that [the moratoria] constitute[d] a taking under the ad hoc balancing approach described in Penn Central."131 In addition, the plaintiffs brought only a facial takings claim against the TRPA's moratoria.132 Therefore, the court considered neither whether the moratoria violated the three-prong Penn Central test nor whether, as applied, the regulations violated the Takings Clause.

In its review of the moratoria, the court first noted that despite the categorical test set forth in Lucas, the balancing of "public and private interests" set forth in Penn Central remains the dominant test for a regulatory taking analysis.133 The court stressed that Lucas stands for the proposition "that it is rela-

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126. Id. at 1238 ("Subsequent to the most recent remand, we held that the plaintiffs' § 1983 claims as to the 1987 Plan ... were ... barred by the appropriate § 1983 statutes of limitations in both Nevada and California.").
127. Tahoe-Sierra, 216 F.3d at 789.
128. Id. at 782.
129. Tahoe-Sierra, 34 F. Supp. 2d at 1242 (noting that "with all three of the Penn Central factors, at least to some extent, weighing against a finding that TRPA's actions constituted a partial taking" only a total taking under the Lucas test will allow a taking to be found).
130. Id. at 1245.
131. Tahoe-Sierra, 216 F.3d at 773. At oral arguments before the Supreme Court, the counsel for the landowners conceded that they "did not present a Penn Central case." Transcript of Oral Argument, supra note 22, at 11 (italics added).
132. Tahoe-Sierra, 216 F.3d at 773.
133. Id. at 772 (noting that "the Supreme Court and lower courts have indicated that most regulatory takings cases should be resolved" using the Penn Central test).
tively rare’ that government ‘regulation denies all economically beneficial or productive use of land.”’

C. NINTH CIRCUIT REJECTS CONCEPTUAL SEVERANCE

Further, while the court recognized the birth of the conceptual severance concept in Pennsylvania Coal, it commented, "most modern case law rejects the invitation of property holders to engage in conceptual severance." In particular, the court cited the 1978 Penn Central and 1987 Keystone Bituminous Supreme Court decisions as representative of the abandonment of conceptual severance in favor of the whole parcel rule in reviewing land regulations. According to the Ninth Circuit, the landowners' claims relied on carving out (i.e., conceptually severing) the period of time of the moratoria's duration from the entire fee interest each held and thus ran counter to the Supreme Court's "general rule against conceptual severance."

For purposes of takings analysis, the court saw temporarily restricting the entire fee interest as "conceptually no different" from permanently restricting the development of a small portion of a whole parcel. Both restrictions diminished the time or land available for use, but some present land value remained for the portion of time or land not covered by the restriction. Additionally, the court found that requiring compensation for moratoria—widely used planning tools—ran counter to the Lucas Court's statement that only rarely would land use restrictions constitute categorical takings.

Finally, the court specifically addressed the plaintiffs' claim that, on the facts before the court, First English required conceptual severance along the temporal property plane. First English, the Ninth Circuit rebutted, stands for the limited proposition that after a regulation is found to be a taking, the

134. Id. at 777 (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015, 1018 (1992)).
135. Id. at 774.
136. Id. at 774-775 (identifying the Supreme Court's "general rule against conceptual severance").
137. Id.
138. Id. at 776.
139. See id. at 777 ("There is no plausible basis on which to distinguish" devaluation caused by vertical severance from "a similar diminution in value that results from a temporary suspension of development.").
140. Id.
141. Id.
landowner must be compensated for the retroactive period between the enactment of the regulation and the court decision. 142 The district court relied on First English to distinguish lengthy delays like the thirty-two month moratoria in Tahoe-Sierra from “normal delays” in receiving building permits and zoning changes, and thus held the moratoria to be takings. 143 The Ninth Circuit replied that First English’s brief discussion of normal delays represented dictum since only the remedial issue of damages was before the Supreme Court in that case. 144 Moreover, the Ninth Circuit stated that planners use land use moratoria to provide for orderly review of proposed zoning changes, and therefore First English’s normal delays language “appears to encompass temporary planning moratoria.” 145 Here, the court found the record reflected TRPA’s intent to keep the moratoria in place “only until a new regional land-use plan could be adopted,” 146 therefore the landowners, during the moratoria, maintained their interest in the future use (a use commencing with the adoption of the plan) of their property. 147 Because the Ninth Circuit found that no categorical taking occurred, the court did not address the district court’s treatment of the government’s affirmative nuisance defense set forth in Lucas.

III. TAHOE-SIERRA AND THE REHNQUIST COURT’S TAKE ON TAKINGS

Understanding Tahoe-Sierra’s probable fate before the Supreme Court requires an understanding of the dramatic changes in takings law adjudication leading up to and during Chief Justice Rehnquist’s reign. First, the Court revived and continues to transform Pennsylvania Coal’s holding beyond reasonable factual support. 148 Second, the Court resurrected

142. Id. at 778 ("In other words, a permanent regulation leads to a 'temporary' taking when a court invalidates the ordinance after the taking." (quoting First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 319 (1987))).
144. See Tahoe-Sierra, 216 F.3d at 778 & n.17.
145. Id. at 779 n.17.
146. Id. at 780.
147. See id. at 780-81.
148. See discussion infra Part III.A.
and persists in fusing with takings analysis an intense scrutiny of government actions akin to the much-maligned Lochner Court. This fusion allows for new review elements to enter into the Court's analysis of a case. Finally, the Court's treatment of common law nuisance demonstrates a narrowing of the police powers traditionally afforded states. Taken together, the three elements above reveal the Court's systematic attack on the types of environmental and land use controls involved in Tahoe-Sierra and inform the Court's review of the case.

A. Pennsylvania Coal and Conceptual Severance: Myth As Convenient "Reality"

In his famed dissent in Lochner v. New York, Justice Holmes stated, "General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise." Seventeen years after Lochner, under the power of Holmes's pen, the Supreme Court handed down Pennsylvania Coal, a case exemplifying just such a narrowly tailored opinion. Yet, despite Holmes's sagacious words, today a movement inadvertently begun in Penn Central to articulate Pennsylvania Coal's limited holding as a major premise remains afoot. In Tahoe-Sierra, for instance, the Ninth Circuit traced the lineage of the plaintiffs' temporal severance claim back to Pennsylvania Coal. This exercise fails to place Pennsylvania Coal in its proper place in judicial history. The peculiar facts of the case drew a peculiar response from Holmes and should be tucked safely away in the ephemera file of the Supreme Court Librarian.

1. A Peculiar Case

Indeed, the factual eccentricities of Pennsylvania Coal provide a weak foundation for conceptual severance in a takings

149. See discussion infra Part III.B.
150. See discussion infra Part III.C.
151. 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).
152. See Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) (stating that the distinction between eminent domain and police power "depends upon the particular facts").
153. See WILLIAM A. FISCHER, REGULATORY TAKINGS 49 (1995) ("Legal scholars... who claim[] that Holmes was engaging in 'conceptual severance,' have let the urgency of their causes... get in the way of a fair reading of the opinion.").
154. See Tahoe-Sierra, 216 F.3d at 774, 778.
claim action. First, the government was not even a named party in the suit. Second, the coal company, not Mahon, was the defendant. Third, the coal company defended against Mahon’s “bill in equity,” and the company appealed Pennsylvania’s grant of injunctive relief: No issue of damages presented itself, nor could any damages have been granted. Fourth, evidence of the defendant coal company’s collusion with the plaintiff in bringing the famed suit calls into question whether any justiciable issue was even before the Court. Fifth, even the courts of Pennsylvania recognize the “right to support” estate in land as “unique” to that state. Therefore, Holmes did not unilaterally sever the support estate from the fee interest; he merely deferred to Pennsylvania’s common law development of the estate. Sixth, Holmes made explicit his view that Pennsylvania Coal was “the case of a single private house” and damage to that house was “not common or public.”

2. Holmes’s Limited Holding

Because Holmes surmised that damage to the house was not public, he believed the Kohler Act clothed the state’s emi-

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155. Pa. Coal, 260 U.S. at 393. The State and the City of Scranton, Pennsylvania, did submit briefs, however. Id. at 414.
156. Id. at 412.
157. Id. at 412-13.
158. See FISCHEL, supra note 153, at 15 (“Monetary damages, the usual remedy for a taking, could not have been sought by the coal company because it had originally been sued by a private party.”).
159. See id. at 18.
161. See Pa. Coal, 260 U.S. at 414 (noting that the statute “purports to abolish what is recognized in Pennsylvania as an estate in land”).
162. Id. at 413 (emphasis added). Some question whether Holmes’s assessment of the facts accurately reflects the state of affairs in Pennsylvania in the 1920s, however. See FISCHEL, supra note 153, at 25-26. Still, for purposes of analyzing the opinion’s precedential value, what Holmes thought the facts were is more important than what they actually were. See id. at 46 (“[G]iven Holmes’s understanding of the facts, his opinion is a paradigm of judicial reasoning.”). Following this view, at least one member of the Rehnquist Court, Justice Stevens, reads Holmes’s treatment of the statute as dictum. See Dolan v. City of Tigard, 512 U.S. 374, 408-07 (1994) (Stevens, J., dissenting) (labeling as “dictum” Holmes’s “so-called ‘regulatory takings’ doctrine”); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 484 (1987) (calling Holmes's comments on the validity of the Kohler Act “an advisory opinion”).
nent domain power in police power garb. The Justice opposed allowing the broad police power—to protect the public from harm—to intermingle with the state's eminent domain authority to seize private property for public use, subject to compensation. When Holmes refers, then, to a "regulation" that "goes too far," the "regulation" is one that physically seizes—through eminent domain—private property for public use and not a regulation enacted to protect the public from harm.

Additionally, to the extent that Holmes's views did enter-

163. See Pa. Coal, 260 U.S. at 415 ("When [the duty to compensate] 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."). Preceding this quote Holmes analogized the Kohler Act to the state purchasing land for a street—a clear indication that he viewed the statute as an exercise not of the police power but of eminent domain. See id.

164. See id. Holmes's reversal opinion closely follows the logic of the dissent of the lower court that the statute transferred the coal company's property rights to a third private party for its use. Mahon v. Pa. Coal Co., 118 A. 491, 498 (Pa. 1922) (Kephart, J., dissenting) ("The Kohler Act takes [the] property right from [the] defendant and vests it in [the] plaintiff without compensation."). The lower court dissent criticized the Fowler Act, passed the same day as the Kohler Act, which allowed Pennsylvania Coal, now enjoined, to mine the coal under the plaintiff's house provided the company agreed to pay the legislature two percent of all the tonnage removed. Id. at 498-99 ("Payment to the [government] is not restricted to coal taken from under [plaintiff's property], nor does it matter how deep the coal or how unlikely subsidence would affect the surface."). In addition, the legislature singled out anthracite subsidence, but did nothing to regulate bituminous, fire clay, or other mineral mining subsidence. Id. at 500. Thus, the dissent concluded that no public harm was implicated by the Kohler Act, which served as a mere pretense for "the real purpose of the Legislature and the framers of the act . . . in the interest of property, and property alone—not to prevent the 'terrible menace to human life, public safety and morals.'" Id. at 499. The dissent called the legislature's separation of the Kohler Act from the Fowler Act "a mere subterfuge to create the Kohler law a valid act under [the police power]." Id.

165. See Pa. Coal, 260 U.S. at 415. Because Holmes viewed the injunctive relief sought by the plaintiff as an individualized application of the statute, he saw the statute as protecting only one individual from harm, not the public at large. See id. at 414. Therefore, the state's police power could not be used and left only eminent domain power. See generally supra Part I.A-B. Importantly, Holmes cites as an example of an exception to the duty to compensate a law that allows blowing up (i.e., physically occupying) a house to stop the spread of fire (i.e., harm). See Pa. Coal, 260 U.S. at 415-16. In other words, he cites a possessory taking (commonly understood to be a taking since Pumpelly v. Green Bay Co., 80 U.S. 166, 178, 182 (1871)) as an exception to the obligation to compensate for private property taken for public use (eminent domain). See id. Thus, suggesting that Holmes used the word "regulation" to include statutes affecting non-possessory interests renders his possessory taking exception meaningless.
tain the idea of the government as a real party, they confirm he intended only to distinguish qualified regulations for public use (eminent domain) from unqualified regulations protecting the public from harm (police power). This interpretation fits comfortably with his vote four years later recognizing the broad scope of zoning laws established under the police power.

This understanding of Holmes's fact-sensitive, eighty-year-old judgment places the opinion squarely within the Framers' intent that only private property seized for public use required compensation. Pennsylvania Coal served as Holmes's tool to remind the states not to forget the contemporary understanding of the difference between statutes transferring possessory property rights to the government or to third parties and those protecting the public from harm—the former required compensation, the latter none. Therefore, the opinion affirmed (albeit on atypical facts) the separation of the treatment of the eminent domain duty from the police power.

3. A Revisionist View of Holmes's Holding

More bizarre factual adaptation of contemporary law than revered progenitor of conceptual severance, one wonders why

166. The Supreme Court of Pennsylvania, in upholding the Kohler Act, found the bill in equity "may be viewed as moving the court to enforce a general rule of public policy, intended for the protection of the whole community, rather than as acting simply for their own protection." Mahon, 118 A. at 495. In a letter to a friend dated just twenty days after Pennsylvania Coal was decided, Holmes wrote,

My ground is that the public only got on to this land by paying for it and that if they saw fit to pay only for a surface right they can't enlarge it because they need it now any more than they could have taken the right of being there in the first place. Perhaps it would have been well if I had emphasized more the distinction between the rights of the public in places where their right to be there is unqualified and their right where they only get any locus standi by a transaction that renounced what they now claim.

2 HOLMES-POLLOCK LETTERS 109 (Mark DeWolfe Howe ed., 2d ed. 1961). Holmes writes as if the government, standing in the shoes of the plaintiff, sold land underneath its building, then "renounced" that land sale contract and claimed ownership of the sold land. See id.


168. See supra note 35 and accompanying text.

169. See supra note 56. This reading recognizes Holmes's reliance on the facts as laid out in the lower court's dissenting opinion. See supra note 164.
the Supreme Court allows Pennsylvania Coal to haunt its hallowed chambers.\textsuperscript{170} One reason might be that Holmes holds a special place in American legal history.\textsuperscript{171}

A more likely answer lies in the misinterpretation of his opinion. Some confusion exists as to what Holmes actually said about conceptual severance versus what the dissent says Holmes said.\textsuperscript{172} At least one Supreme Court opinion subsequent to Pennsylvania Coal equates Holmes's majority view to the opposite of Justice Brandeis's dissent.\textsuperscript{173} This is simply incorrect; for instance, Holmes did not "anywhere in his opinion argue[ that] if one stick in the bundle of property is extinguished that fact alone makes it a taking."\textsuperscript{174} In fact, given the question before the Court, most of the opinion exists only as dictum.\textsuperscript{175}

Further, the opinion of Holmes as retold by Brandeis's dissent serves the Rehnquist Court's takings adjudication much like the opinion in Church of the Holy Trinity v. United

\begin{itemize}
  \item \textsuperscript{171} See RICHARD A. POSNER, THE ESSENTIAL HOLMES, at ix (1992) ("Oliver Wendell Holmes is the most illustrious figure in the history of American law." (footnote omitted)).
  \item \textsuperscript{172} See FISCHEL, supra note 153, at 49 ("Brandeis was swinging pretty wildly at Holmes . . . .").
  \item \textsuperscript{173} Justice Brennan in Penn Central appears to have initiated this belief. See Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130 & n.27 (1978) (listing three cases letting stand laws regulating portions of fee interests and noting "[t]hese cases dispose of any contention that might be based on [Pennsylvania Coal], that full use of air rights . . . irrespective of the impact of the restriction on the value of the parcel as a whole—constitutes a 'taking'"). But blame lies equally with the dissent in Penn Central. See id. at 149 n.13 (Rehnquist, J., dissenting) (citing Pennsylvania Coal as supporting the proposition that "[n]ot only must the Court define 'reasonable return' for a variety of types of property . . . but the Court must define the particular property unit that should be examined").
  \item \textsuperscript{174} FISCHEL, supra note 153, at 49.
\end{itemize}
States serves more purposivist-orientated Courts’ statutory interpretation: as an impenetrable trump card. Each case invokes vague notions of fairness in law as tools to save private contractual relationships from statutory control. In Holy Trinity, Justice Brewer invoked the “spirit” of law to save the church from an immigration statute’s perceived misinterpretation; in Pennsylvania Coal, Holmes denounced regulations that “go[ ] too far” to save the coal company’s support estate, secured through a contract, from a statute’s perceived harshness. Both cases share the growing focus on “the subjective, 

176. 143 U.S. 457 (1892).
177. See William N. Eskridge, Jr. et al., Legislation and Statutory Interpretation 224 (2000) (noting that “Justice Brennan’s majority opinion [in United Steelworkers v. Weber, 443 U.S. 193, 201 (1979)]... trumped [plain meaning] with Holy Trinity’s” spirit of the law rhetoric); Yarbrough, supra note 175, at 118 (“Building on the Holmes dictum in Mahon, the [Rehnquist] Court has concluded that a variety of zoning controls have imposed such a severe economic hardship on property that the regulation at issue amounted to a taking for which compensation was required.”). This comparison is not meant to imply the Rehnquist Court uses Pennsylvania Coal to trump plain meaning of text—just that the Court uses it to trump well-settled notions of takings jurisprudence. See id. Further, unlike Holy Trinity, the retold Pennsylvania Coal fits well the Court’s bent on property rights because the trump card always trumps the government, never the private property owner. See Stephen E. Gottlieb, Morality Imposed: The Rehnquist Court and Liberty in America 61 (2000). Thus, Pennsylvania Coal resembles less a Hail Mary pass that can be used for any (non-textual) economic perspective and more a home field advantage tailored to the Rehnquist Court’s property rights views. See William N. Eskridge, Jr. & Philip P. Frickey, Cases and Materials on Legislation 530 (2d ed. 1995) (noting that the imaginative reconstruction allowed by Holy Trinity can be used to “bend[ ] statutes” to fit conservative or liberal viewpoints); Philip P. Frickey, Wisdom on Weber, 74 Tul. L. Rev. 1169, 1178 (2000) (describing Holy Trinity as “sort of like the Hail Mary pass in football”).
178. See Pa. Coal, 260 U.S. at 413 (“[U]sually in ordinary private affairs the public interest does not warrant much of this kind of interference.”); Holy Trinity, 143 U.S. at 471 (asking the rhetorical question, “In the face of [evidence that America is a Christian nation], shall it be believed that [Congress] intended to make it a misdemeanor for a church of this country to contract for the services of a Christian minister residing in another nation?”).
179. See 143 U.S. at 459.
180. See Pa. Coal, 260 U.S. at 415. Others suggest that Holmes may have also acted out of concern for the low supply of cleaner burning coal. See Fischel, supra note 153, at 25, 35 (noting the Supreme Court “must surely have been aware of” the shortage of anthracite coal (the target of the Kohler Act) caused by long unionized workforce strikes that ended about three months before the opinion issued). Still others suggest Holmes merely misread the legislative purpose of the statute, felt it reflected a private dispute, and “tacked on” broader language at the urging of Chief Justice Taft. See Byrne, supra note 44, at 99.
mental intent of legal actors" that characterized the late nineteenth and early twentieth centuries in American law.\footnote{ESKRIDGE & FRICKEY, supra note 177, at 523 (noting the birth of "meeting of the minds" in contract law, \textit{mens rea} in criminal law, tort law's "gradations of liability (including punitive liability) based upon the actor's state of mind" and the use of legislative records to evaluate legislative intent).}

B. \textbf{LOCHNER INCognito? DISTRUST OF GOVERNMENT AND THE ABANDONMENT OF ECONOMIC ISSUE DEFERENCE}

1. Distrust and Its Implications

The inspection of the legislature's motives behind its economic regulations in \textit{Lochner v. New York} caused Justice Holmes to write, "[A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of \textit{laissez faire}."\footnote{198 U.S. 45, 75 (1905) (Holmes, J., dissenting).} Holmes's dissenting view ultimately won out; \textit{Lochner} is "a now widely vilified case."\footnote{RANDY E. BARNETT, CONTRACTS 272 (2d ed. 1999).} In denouncing the \textit{Lochner} era, one Court stated, "[W]e do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare."\footnote{Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952); see also Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 393 (1926) ("We have nothing to do with the question of the wisdom or good policy of municipal ordinances. If they are not satisfying to a majority of the citizens, their recourse is to the ballot—not the courts." (quoting State v. City of New Orleans, 97 So. 440, 444 (La. 1923))).}

Yet, some argue that "the broad conception of the Takings Clause that Justice Scalia and a majority of the current Court have adopted embodies a strict form of substantive due process" reminiscent of the \textit{Lochner} era.\footnote{YARBROUGH, supra note 175, at 120. Indeed, the substantive due process filter on the Court's takings jurisprudence has not gone unnoticed by members of Congress. \textit{Id.} at 35 ("Senator Biden could see little difference between the current Court's approach to regulatory takings and the decisions of the \textit{Lochner} era . . . "). Justice Stevens agrees. Dolan v. City of Tigard, 512 U.S. 374, 406 (1994) (Stevens, J., dissenting) (noting that the majority "applied the same kind of substantive due process analysis more frequently identified with \textit{Lochner}"); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1069 (1992) (Stevens, J., dissenting) (using the words of Justice Marshall to suggest the majority opinion harkened back to \textit{Lochner}). Yet, one frequent member of the majority expresses some concern toward this trend. See \textit{E. Enters. v. Apfel}, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring) ("The imprecision of our regulatory takings doctrine does open the door to normative considerations about the wisdom of government decisions."); see also John D. Echeverria, A}
one must recognize that the *Lochner* Court possessed a distrust of government that fueled its views on regulations.\textsuperscript{186} This view appears to be shared by at least some members of the Rehnquist Court, especially in the area of property regulation.\textsuperscript{187} If the Court follows the lead of some members of the Ninth Circuit, this distrust may influence its decision in *Tahoe-Sierra*.\textsuperscript{188}

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\textsuperscript{186} *Lochner*, 198 U.S. at 64 (“[M]any of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives.”).

\textsuperscript{187} See, e.g., Palazzolo v. Rhode Island, 121 S. Ct. 2448, 2468 (2001) (Scalia, J., concurring) (likening a government agency of Rhode Island to a “thief clothed with the indicia of title”); *Lucas*, 505 U.S. at 1025 n.12 (“[T]he legislature has recited a harm-preventing justification for its action.... We think the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations.”).

\textsuperscript{188} See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 228 F.3d 998, 1001 (9th Cir. 2000) (Kozinski, J., dissenting from denial for rehearing en banc) (“I emphasize [plaintiff's land] ‘might’ [have future value], because so-called temporary moratoria have a habit of living beyond their purported termination dates.”). Judge Kozinski further implied that adopting consecutive moratoria constituted a “scheme” that allows government to “evade” paying landowners compensation for takings. See id. California may be a particular target of the Court: Despite the limited, remedial question before the Court in *First English*, Justice O'Connor queried in oral arguments, "[T]here are some horror stories out there of local governments intentionally running [building permits] through the mill indefinitely in a jurisdiction like California, with full recognition that if they lose on one they can make a minor modification of the requirement and go again and effectively deprive people forever of any use.

Now, what's an owner to do?"

2. The Melding of Substantive Due Process and Takings Analysis

Oddly, the Rehnquist Court’s authority for greater scrutiny of local land use decisions traces back to a 1980 case, *Agins v. City of Tiburon*, a case in which the Court held the governmental regulation at issue did not take private property.\(^{189}\) As discussed in Part I.C.2., one of the two prongs of the takings test established in *Agins* argues that a taking should be found if the law “does not substantially advance legitimate state interests.”\(^{190}\) The *Agins* Court cited as support for this takings test a 1928 substantive due process case in which no takings issue was even before the Court.\(^{191}\)

Stranger still, Justice Stevens, a leading critic of the Court’s mingling of substantive due process and takings analysis, affirmed the *Agins* substantive due process prong in *Keystone Bituminous*.\(^{192}\) In an effort to save a subsidence statute similar to that attacked by Holmes in *Pennsylvania Coal*, Justice Stevens conducted a review of the purpose of the statute using the *Agins* test and found the statute passed muster.\(^{193}\) In saving the statute, Stevens used the substantive due process prong of the *Agins* test to announce the public purpose of the law outweighed the private loss.\(^{194}\) He also, however, opened the door for other members of the Court, less deferential to local regulators, to apply heightened review to land use regulations under the guise of the Takings Clause.\(^{195}\)

3. Private Property Rights and Revisionist History

The infiltration of substantive due process into the Court’s takings analysis allows the Court to engage its “particular economic theory” in determining whether compensation is due landowners, like those in *Tahoe-Sierra*.\(^{196}\) This allowance may

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190. *Id.* at 260.
191. *Id.* (citing Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928)).
193. *See id.* at 485-93.
194. *See id.; see also Mandelker, supra* note 29, § 2.15, at 33 (noting that the *Keystone* “test protects land use regulation from taking attacks by injecting an emphasis on governmental purpose that is also required by substantive due process doctrine”).
explain why “the Rehnquist Court has been activist in defining when government has ‘taken’ private property and owes its owner compensation.”

Beginning with *Lucas*, the Rehnquist Court’s activism has been one-sided: The government defendants have lost every takings case brought before the Court. This phenomenon largely reflects the Court’s conservative bloc’s “[treatment of] property rights as beyond state control.”

The unprecedented theory embraced in *Lucas* suggests that the “right” to some valuable use of land preempts government regulation; therefore, a landowner’s claim that government violated this “right” must undergo scrutiny redolent of *Lochner*. To secure this new theory in the foothold of time, Justice Scalia wrote in *Lucas* that to not impose such scrutiny would be “inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.”

This statement revises constitutional history beyond support. It is said that to those who framed the United States Constitution “[g]overnment was thought to be by its nature hostile to human liberty and happiness, and especially susceptible to corruption and despotism” and needed to be “confined to serving those needs of the people that could not otherwise be satisfied.” Yet, from the time James Madison drafted the Fifth Amendment to 1922, the idea of a non-possessory regulatory taking did not exist. Further, as one scholar notes, “If someone as articulate as Madison had wanted to restrict the regulation of land use . . . he would have done so un-

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197. GOTTLIEB, supra note 177, at 61 (noting also that the Court “appears to follow . . . wealth maximization” as its economic theory).


199. GOTTLIEB, supra note 177, at 144. Some proponents of greater private property rights openly gloat over the Rehnquist Court’s “trend of rulings strengthening the position of property owners under the takings clause . . . particularly in the area of environmental protection.” Brief Amici Curiae of the American Farm Bureau Federation et al., *Tahoe-Sierra*, No. 00-1167 (U.S. argued Jan. 7, 2002), 2001 WL 1077926, at *4. They further note that this “trend began in 1987 with [the Rehnquist] Court’s decision in First English.” Id.

200. See YARBROUGH, supra note 175, at 120.


202. SIEGAN, supra note 47, at 51 (emphasis added).

203. This Comment argues it did not exist in 1922 either—except in Justice Brandeis’s view of *Pennsylvania Coal’s* holding. See supra notes 165-74 and accompanying text.
mistakably.” In fact, Congress rejected an earlier proposal by Madison to proclaim “[t]hat government is instituted and ought to be exercised for the benefit of the people . . . with the right of . . . using property.”

4. Recent Contradictory Case Law

In fact, Lucas’s elevation of non-possessory property right devaluations to categorical takings belies contemporary treatment of takings law as well. For example, in Loretto v. Teleprompter Manhattan CATV Corp., Justice Marshall suggested that had New York’s law merely required landlords to provide, and thus own, cable television equipment, the law might have survived a constitutional challenge. Instead the law authorized “permanent occupation of the landlord’s property by a third party.” The Court noted that if the landlord had owned the cable, she “need not incur the burden of obtaining the [cable] company’s cooperation in moving the cable.” Thus, the Fifth Amendment mandated compensation for Loretto because New York’s law imposed a “burden” on the landlord’s right to exclude third parties. In other words, the Court considered the regulation a possessory “governmental activity.” The Court viewed most regulations (those not physically occupying property) as “nonpossessory governmental activities” that remained valid until proven otherwise under the Penn Central test.

Justice Marshall’s note foreshadowed the Rehnquist Court’s position in Yee v. City of Escondido, in which Justice O’Connor stated that government-imposed rent control did not constitute a burden on a landlord’s possessory interests because the decision to rent was voluntary. That is, the landlord’s

204. Hart, supra note 48, at 114.
205. SIEGAN, supra note 47, at 28 (emphasis added) (quoting James Madison from 1 ANNALS OF CONG. 433 (Joseph Gales ed., 1834)).
206. 458 U.S. 419 (1982). The facts of this case are discussed elsewhere in this Comment. See supra note 55.
207. Id. at 440 n.19.
208. Id. at 440.
209. Id. at 440 n.19.
210. Id.
211. Id. at 440.
212. Id.
214. See id. Noted land use scholars seem to differ on whether the Justice’s comments represented the holding of the Court or merely dictum. See
right to exclude remained intact and therefore no physical invasion occurred.\footnote{215} The Yee opinion drew no dissents. Further, at times the right to exclude itself seems malleable.\footnote{216} Before ascending to Chief Justice, even Justice Rehnquist appeared willing to allow state infringement on the right to exclude if the burden imposed on the property owner was temporary.\footnote{217} He reflected a long held view of a dynamic police power that responds to "the growing complexity of our civilization" by "limit[ing] individual activities . . . within reasonable bounds, to meet the changing conditions."\footnote{218}

C. THE CIRCUMSCRIPTION OF THE NUISANCE EXCEPTION IN TAKINGS LAW AND THE CONSEQUENCES

At first glance, the Rehnquist Court’s heightened scrutiny of governmental actions affecting economic interests in property appears to be offset by its allowance of an affirmative defense for restrictions similar to public nuisance actions.\footnote{219} Some attribute the Court’s exception to the economic categorical taking as consistent with a strong belief in state authority under federalism.\footnote{220} As Palazzolo demonstrates, however, the

\begin{footnotes}
\item EAGLE, supra note 29, § 12-2(c)(1), at 984 (“Justice O’Connor wrote some interesting and perhaps prophetic dicta.”); MANDELKER, supra note 29, § 2.14, at 31 (“The Court held a taking by physical occupation had not occurred, and that a claim of regulatory taking was not properly before the Court.”).
\item 215. See Yee, 503 U.S. at 539.
\item 216. See ROTUNDA, supra note 167, at 530 (noting that the Court, in PruneYard Shopping Center v. Robins, 447 U.S. 74, 83-84 (1980), affirmed a California Supreme Court ruling that the California Constitution protected speech and petitioning in private commercial shopping centers against a takings challenge). In PruneYard, Justice Rehnquist commented, “[T]he fact that they may have ‘physically invaded’ appellants’ property cannot be viewed as determinative.” 447 U.S. at 84. The Court relied on the state supreme court’s allowance for the private property owner to set up “time, place, and manner regulations that will minimize any interference with its commercial functions.” Id. at 83. Thus, the Supreme Court held valid a state constitutional provision that authorized occupation of private property, subject to the property owner being able to limit the burden imposed, without just compensation. See id. at 83-84.
\item 217. See PruneYard, 447 U.S. at 83-84.
\item 218. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 392 (1926) (quoting City of Aurora v. Burns, 149 N.E. 784, 788 (Ill. 1925)).
\item 219. See Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1031 (1992) (noting the government “identif[ies] background principles of nuisance and property law” that support the restriction); supra text accompanying note 112.
\item 220. See Douglas W. Kmiec, At Last, the Supreme Court Solves the Takings Puzzle, in TAKINGS 107, 110-11 (David L. Callies ed., 1996).
\end{footnotes}
Court intends to narrowly construe this defense.\textsuperscript{221} Palazzolo rejects many post-
Lucas lower court rulings that held state statutes regulating environmental and land use harms consti-
tute "background principles."\textsuperscript{222}

Concomitant with limiting non-compensable nuisance-prevention statutes, Supreme Court decisions also show a trend toward limiting common law nuisance actions filed against re-
gional pollution sources.\textsuperscript{223} For instance, in \textit{City of Milwaukee v. Illinois}, then Justice Rehnquist announced that the Clean Water Act "supplant[ed]" Illinois's federal common nuisance law claim to stop pollution of Lake Michigan by Wisconsin cit-
ties.\textsuperscript{224} Six years later, the Court held the Act also preempted a Vermont landowner's state nuisance law claim (on behalf of himself and other property owners) to stop pollution in Lake Champlain by a New York pollution source.\textsuperscript{225} These cases ef-
fectively "slam[med] the door on most federal common law ac-
tions."\textsuperscript{226}

In part, the Court's rulings reflect the failure of common
law nuisance actions to adequately address the regional effects
of localized pollution, such as the aggregate pollution effect on
Lake Tahoe of particularized private development.\textsuperscript{227} As a re-
result, federal environmental laws largely supplanted the envi-
ronmental nuisance action.\textsuperscript{228}

\textsuperscript{221} See supra text accompanying notes 99-102.

\textsuperscript{222} See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F. Supp. 2d 1226, 1251-52 (D. Nev. 1999) (noting that before Lucas "most courts . . . appear to have accepted . . . that 'newly legislated or decreed' restric-
tions on land use can also constitute 'background principles' of state law
for this purpose" (quoting Lucas, 505 U.S. at 1029)). The district court in Ta-
hoe-Sierra listed seven cases supporting this view. Id.

\textsuperscript{223} See, e.g., \textit{Intl Paper Co. v. Ouellette}, 479 U.S. 481, 500 (1987) (pre-

\textsuperscript{224} 451 U.S. at 329.

\textsuperscript{225} \textit{Intl Paper Co.}, 479 U.S. at 493-94 (noting that "if affected States were
allowed to impose separate discharge standards on a single point source, the
inevitable result would be a serious interference with the . . . 'full purposes
and objectives of Congress'" (quoting Hillsborough County v. Automated Med.
Lab., Inc., 471 U.S. 707, 713 (1985))).

\textsuperscript{226} \textit{PERCIVAL ET AL.}, supra note 45, at 101. But see New England Legal
Found. v. Costle, 666 F.2d 30, 32-33 (2d Cir. 1981) (per curiam) (distinguishing
the Clean Air Act (not necessarily preemptive of common law) from the Clean
Water Act (preemptive)).

\textsuperscript{227} See Tahoe-Sierra, 34 F. Supp. 2d at 1231-33.

\textsuperscript{228} See supra note 46 and accompanying text.
statutory tools available to legislatures to protect regional waters and the people they support from what would otherwise constitute public nuisances.\(^2\)\(^2\)\(^9\) In addition, *Palazzolo* may also call into question the very legitimacy of the nuisance *per accidens*.\(^2\)\(^3\)\(^0\) *Palazzolo* also indicates that the Court views the nuisance defense as frozen in time.\(^2\)\(^3\)\(^1\) In fact, a majority of the Court appears to engage in a little temporal severance of its own, chopping from the venerable and evolving continuum of takings law a particular set of "background principles."\(^2\)\(^3\)\(^2\)

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229. This trend forgets why statutory controls supplanted common nuisance actions:

"The practical effect of [Lucas] ... is to transfer authority from legislatures to courts. Essentially, it implies that legislative judgments of harm are not legitimate, but judge-made judgments are. This transfer is a concern because serious environmental harms, such as the ozone hole or degradation of the Chesapeake Bay, often arise from many small, seemingly safe uses of property that only together cause great harm. Environmental protection began with judge-made law, but shifted to legislative statutes long ago precisely because courts have difficulty recognizing and regulating such diffuse sources of harm."


230. *See* *Palazzolo v. Rhode Island*, 121 S. Ct. 2448, 2464 (2001) (noting that "[a] regulation or common-law rule cannot be a background principle for some owners but not for others"). This appears to call into question the Euclidean "pig in the parlor instead of the barnyard" concept. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926) ("A nuisance may be merely a right thing in the wrong place ... "). Euclidean zoning recognizes that some activities, not offensive in some places, may be harmful in other places. *See id.* at 387-88. Thus, one owner may build a factory on industrial zoned land while another owner wishing to build the same factory on residential zoned land will be prohibited. *See Glossary of Zoning, Development, and Planning Terms, supra* note 22, at 94 (defining "Euclidean zoning" to require segregated uses).

231. *See supra* notes 103, 113 and accompanying text.

232. *See Palazzolo*, 121 S. Ct. at 2463-64 (rejecting the idea that a 1971 coastal protection statute—in effect twelve years at the time the landowner filed the complaint—could, standing alone, serve as a "background principle"); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028 n.15 (1992) (dismissing abruptly Justice Blackmun’s notion that the majority misunderstands the original intent of the Takings Clause and noting "[t]hat is largely true, but entirely irrelevant" because the understanding of the clause as applied to the states dates back only to 1922 (*Pennsylvania Coal*) or 1897 (*Chicago, Burlington and Quincy*). Thus, the Court’s "background principles" might be those existing between 1922 and 1971. One respected dictionary falling between these dates, however, merely adopts a broad definition of nuisance: "An offensive, annoying, unpleasant, or obnoxious thing or practice; a cause or source of annoyance, especially a continuing or repeating invasion or disturbance of another’s right" including Blackstone’s "Anything that worketh hurt, inconvenience, or damage." *Webster’s New International Dictionary* 1672 (2d ed.}
As part of a broader movement to reduce state control over private property, Lucas, as informed by Palazzolo, actually represents a private rights crusade clothed as support for state common law. In reality, the Court's current takings analysis undermines majoritarian will as expressed through state and local land use controls. As such, it reflects the Madisonian fear of the egalitarian redistribution of landed gentry wealth. Other Framers shared this view, but, as noted above, even the Framers rejected Madison's preferred Takings Clause language guaranteeing "the right" of "using property."235

IV. THE NINTH CIRCUIT'S DECISION IN TAHOE-SIERRA SHOULD BE AFFIRMED

As Part III explains, the landowners' suit in Tahoe-Sierra faces a more favorable takings terrain today than when they filed their suit against the TRPA in 1984. The Supreme Court looks and acts much different now than in 1984; the U.S. Senate confirmed six of the nine Justices currently on the Court subsequent to the initiation of the suit. In the intervening seventeen years since the filing of the suit the Court crafted a number of decisions favoring property owners in takings analyses including those in First English, Lucas, and Palazzolo. In addition, as discussed in Part III, the Court in-
creasingly views government land use regulations with distrust, reviews such actions with greater scrutiny, and suggests compensation is due for harm-preventing restrictions not based on narrowly construed "background principles." The Ninth Circuit properly placed moratoria within the letter of the Supreme Court's holdings in First English and Lucas, but did not address the high court's likely Lochneresque approach to Tahoe-Sierra. This flaw may lead to its reversal.

A. THE NINTH CIRCUIT PROPERLY HELD THE MORATORIA IN TAHOE-SIERRA DID NOT CONSTITUTE TAKINGS BASED ON THE REHNQUIST COURT'S HOLDINGS IN FIRST ENGLISH AND LUCAS

Five members of the Ninth Circuit claim the panel in Tahoe-Sierra lifted its opinion in large part from Justice Stevens's dissent in First English. The accusers slyly juxtapose seven sentences from three pages of Stevens's dissent with five sentences from four pages of the panel's decision and proclaim foul. As explained above, however, the remedial question before the Court in First English makes much of that opinion dictum. Indeed, the accusers edit a portion of the First English dissent where Justice Stevens addresses the error of the Court's dictum concerning conceptual severance. That several sentences plucked out of several pages of two opinions dealing with the same general topic bear similarities seems of little consequence.

One scholar argues that Tahoe-Sierra skews the "principles


239. See supra Part III.


241. See id. at 1000-01.

242. See MANDELKER, supra note 29, § 8.24, at 362 ("The Court's holding in First English is limited to the compensation remedy."); supra text accompanying note 142.

243. Tahoe-Sierra, 228 F.3d at 1000.

underlying" *First English*’s dictum and thus represents flawed reasoning by the Ninth Circuit.245 He suggests these principles include the "vindication of temporal segmentation."246 On remand in *First English*, however, the California Court of Appeals held no taking occurred, and the United States Supreme Court denied certiorari.247 This denial calls into question the theory that the Supreme Court found temporal segmentation a legitimate exercise in takings analysis. In fact, the first sentence of *First English* states and limits its holding to "the time" while the law is in effect and "before it is finally determined that the regulation constitutes a ‘taking.’"248 Thus the *First English* Court does not sever or take a slice out of the fee interest pie, but simply recognizes the "wholeness" of the pie by "replacing" legally a part of the pie that was never cut into pieces in the first place. Thus, to suggest *First English* vindicates temporal severance is at best a misuse of the temporal severance concept and at worst inapposite to the case's holding.

Moreover, just seventeen days after deciding *First English*, the Court handed down another takings case in which the Court appears to affirm that temporary burdens placed on the revered right to exclude do not constitute takings.249 This opinion comports with the final case of the 1987 takings triad, *Keystone Bituminous Coal v. DeBenedictis*, where the Court reaffirmed its rejection of conceptual severance.250 *First English* adds (or subtracts) little or nothing to the whole parcel rule set forth in *Penn Central*. Therefore, the Ninth Circuit properly rejected the landowners’ claim that *First English* mandated

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245. See Eagle, supra note 72, at 11232 ("In the course of framing the appropriate remedy, *First English* said much about what constitutes a temporary taking.").

246. See id. at 11232-33 (listing four such principles under the heading "First English Principles").

247. MANDELKER, supra note 29, § 12.06 & n.51, at 488.


249. See Nollan v. Cal. Coastal Comm’n, 483 U.S. 825, 832 n.1 (1987) (noting that a 1980 case was "not inconsistent with" per se physical occupation takings “since there the owner had already opened his property to the general public, and in addition permanent access was not required”); supra notes 216-18 and accompanying text.

conceptual severance.\textsuperscript{251}

As discussed above, the landowners did not seek review under the \textit{Penn Central} test; they claimed a total economic taking under the standard set forth in \textit{Lucas}.\textsuperscript{252} Having dismissed \textit{First English} as varying the whole parcel rule, the Ninth Circuit proceeded to set the numerator and denominator as applied to the landowners’ claim during the moratoria.\textsuperscript{253} The court properly set the numerator as the unrestricted value of the parcel during the moratoria.\textsuperscript{254} The court adjudged the denominator as encompassing the numerator value plus coincident future use value.\textsuperscript{255}

This approach seems reasonable given that the court found an absence of any “evidence that [the landowners] anticipated that the [moratoria] would continue indefinitely.”\textsuperscript{256} Further, a thirty-two month delay in the use of one’s property (with the future use of the entire parcel remaining) seems less harsh an economic burden than those resulting from previous Supreme Court cases upholding restrictions that permanently and significantly devalued land without compensation.\textsuperscript{257} The finding of the district court that “the average holding time of a lot in the Tahoe area between lot purchase and home construction is twenty-five years” bolsters the claim that much value remains subsequent to the thirty-two month moratoria.\textsuperscript{258} Finally, the evidence at the district court supports that this future use gave

\begin{itemize}
\item \textsuperscript{251} Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency, 216 F.3d 764, 777 (9th Cir. 2000).
\item \textsuperscript{252} See supra Part II.B.
\item \textsuperscript{253} See Tahoe-Sierra, 216 F.3d at 781.
\item \textsuperscript{254} See id.
\item \textsuperscript{255} See id.
\item \textsuperscript{256} Id. at 782.
\item \textsuperscript{257} Assume, arguendo, that following the lifting of the moratoria, the average landowner retained her property for another seventy-six months. The thirty-two month period would have restricted the value of her land use interest by 30\%. Moreover, this does not include the present value of future use exceeding the nine years of ownership. By contrast, the permanent devaluations upheld by the Court in the past include a higher percentage loss. See, e.g., Keystone Bituminous Coal Ass’n v. DeBenedictis, 480 U.S. 470, 515 (1987) (Rehnquist, C.J., dissenting) (noting the parties stipulated a 50\% loss); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 117, 138 (1978) (supporting a bar on fifty-three of fifty-five stories of use and about 75\% of potential value); Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 384, 397 (1928) (upholding a 75\% loss); Hadacheck v. Sebastian, 239 U.S. 394, 405, 414 (1915) (upholding a 92.5\% loss).
\end{itemize}
the owners present value: The government’s appraiser testified that during the moratoria, some sales of similarly restricted properties did take place.

The Ninth Circuit grounded its opinion in the whole parcel rule because *First English* did not require otherwise and because the economic devaluation of the present value of the land was no greater than that allowed in many past Supreme Court cases. As such the Ninth Circuit properly held the moratoria in *Tahoe-Sierra* did not constitute takings. The Supreme Court, however, may impose a stricter review than that justified under *First English* and *Lucas*, one involving substantive due process.

B. **EVEN UNDER A STRICTER REVIEW INFLUENCED BY DUE PROCESS CONCERNS, THE MORATORIA IN TAHOE-SIERRA DO NOT CONSTITUTE TAKINGS**

The trend, identified in Part III, in the Rehnquist Court’s takings decisions of greater scrutiny of laws restricting land uses may be attributed in part to the heavy reliance on regulatory measures, versus incentives, to diminish environmentally harmful private landowner behavior. The Tahoe Regional Planning Compact provides an example of Congressional reliance on regulatory measures. Congress granted the TRPA broad regulatory powers and duties when it enacted the Compact. Still, Congress, just four days after enacting the Compact, passed a companion incentive bill, the Santini-Burton Act, that appropriated thirty million dollars for land purchases in the Tahoe Basin and established a mechanism for funding future purchases. This legislative history calls into question

259. *Id.* at 1242.
260. *See supra* text accompanying notes 242-44.
261. *See supra* Part III.
262. *See Dukeminier & Krier, supra* note 24, at 777 (“To date, virtually all legislative-administrative efforts to control environmental problems—at any level of government—have taken the form of regulation.”).
263. *See Tahoe Regional Planning Compact, Pub. L. No. 96-551, art. VI(a), 94 Stat. 3242 (1980) (mandating that the agency develop regulation standards “including but not limited to” seventeen land uses and their effects).*
264. *See id.* at art. VI.
the characterization, by some members of the Ninth Circuit, of the government activity under the Compact as a "scheme" where government "evade[s]" paying landowners for bona fide takings.\(^2\)\(^6\)\(^6\)

The Ninth Circuit opinion, however, gave little attention to the "intent" behind the TRPA imposed moratoria and thus leaves only the monologue of the property rights movement to fill the awaiting ears extended by a number of the Justices of the Court.\(^2\)\(^6\)\(^7\) The Ninth Circuit's failure does not reflect a lack of good will or rational behavior on the part of the TRPA.

To the contrary, significant evidence suggests that the moratoria should withstand even \textit{Lochner}-like review by the Court. First, the TRPA would not exist if not for the continued demand of the property owners in the Lake Tahoe Basin, dat-

\begin{itemize}
  \item \textit{See} Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 228 F.3d 998, 1001 (9th Cir. 2000) (Kozinski, J., dissenting from denial for rehearing en banc); \textit{supra} note 188 and accompanying text. Further, if Congress members acted in the Lake Tahoe Basin as "thief[es] clothed with the indicia of title" (Justice Scalia's portrayal of the Rhode Island government in \textit{Palazzolo}), at least their actions resemble honorable thieves, stealing from the rich (who buy land around booming Las Vegas) and giving to the "poor" (those owning land with diminished value around Lake Tahoe). \textit{See} \textit{Palazzolo} v. Rhode Island, 121 S. Ct. 2448, 2468 (2001) (Scalia, J., concurring).
  \item \textit{See}, \textit{e.g.}, Brief Amici Curiae of Pacific Legal Foundation & California Association of Realtors, \textit{Tahoe-Sierra}, No. 00-1167 (U.S. argued Jan. 7, 2002) (noting the "oftentimes misguided, or in some cases even hostile, actions that local governmental entities and courts have taken with regard to landowners' constitutional rights"), 2001 WL 1082473 at *2; Brief Amicus Curiae of the Institute for Justice, \textit{Tahoe-Sierra}, No. 00-1167 (U.S. argued Jan. 7, 2002) (calling the treatment of the landowners a "modern version of Bleak House, in which the actions of regional planning commissioners made the nineteenth-century English Probate Court appear the model of dispatch"), 2001 WL 1082466 at *2; Brief Amicus Curiae of the Washington Legal Foundation, \textit{Tahoe-Sierra}, No. 00-1167 (U.S argued Jan. 7, 2002) ("It is an unfortunate fact that land use agencies often abuse their powers... ."), 2001 WL 1077936 at *6; Brief Amicus Curiae of the National Association of Home Builders, \textit{Tahoe-Sierra}, No. 00-1167 (U.S. argued Jan. 7, 2002) (noting that "moratoria are often a political tool rather than one used selectively by planners" and are "nakedly political efforts to strip away the property rights of the few for the satisfaction of the many"), 2001 WL 1077932 at *5-6; Brief Amici Curiae of the American Farm Bureau Federation et al., \textit{Tahoe-Sierra}, No. 00-1167 (U.S. argued Jan. 7, 2002) ("[T]he Ninth Circuit engaged in a rescue operation to shield regulators from shouldering the financial consequences of their actions."), 2001 WL 1077926 at *9. Before the Court, the landowners' counsel distinguished permit application delays and building moratoria; he characterized the "purpose" of the permit process as one that "enable[s] use" whereas the "intent" of moratoria "is a conscious and total prohibition on use." Transcript of Oral Argument, \textit{supra} note 22, at 16-17.
\end{itemize}
ing at least back to 1956, for regional planning efforts. In fact, the teeth of the TRPA’s powers would not exist today without the failure of toothless predecessor powers to save Lake Tahoe from hasty, unplanned development. Decades of efforts to balance unregulated human development and the lake’s survival came and went without success before Nevada and California asked Congress to intervene in 1969. When it did intervene, Congress established a weak coordinating agency and waited ten years for positive results. None came—the lake’s health deteriorated. Only upon findings by the California and Nevada legislatures that it was “necessary to halt temporarily works of development in the region” did Congress give the TRPA more powers to restrict land use. Consequently, the TRPA as it exists today reflects not irresponsible legislative activity, but reasoned, responsive law-making.

Second, the record shows that the TRPA knew that in the absence of the moratoria, Congress’s aim to protect Lake Tahoe would be subverted by landowners rushing to build before proper development controls could be put in place. Thus, the TRPA, faced with temporarily restricting the landowners’ use of the land or ignoring a congressional mandate, chose the former path. Third, even the district court, in finding takings

268. See STRONG, supra note 4, at 126.
270. See supra notes 10-11 and accompanying text.
271. See supra notes 12-13 and accompanying text.
272. See Strong, supra note 4, at 187 (noting that during the 1970s traffic increased 80%, water clarity decreased 6-13%, and urban development increased 78%, while algal concentrations in the lake increased by 150% in the period between 1969-75).
274. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency, 34 F. Supp. 2d 1226, 1241 (D. Nev. 1999). According to the court, (Almost everyone in the Tahoe Basin knew in the late 1970s that a crackdown on development was in the works. The Tahoe area experienced a glut of construction in the years just before the Compact was amended in 1980, as worried property owners attempted to build while they still could.

Id.
275. See id. at 1233. But cf. Transcript of Oral Argument, supra note 22, at 51 (recording Chief Justice Rehnquist as noting, “the fact that [the TRPA Board Members] were instructed to do it by Congress doesn’t make it any more or less of a taking” (name of Justice added)).
occurred, questioned whether the moratoria could have been lifted any sooner considering Congress's directive.276

C. EVEN IF THE REHNQUIST COURT DETERMINES THE MORATORIA CONSTITUTE TAKINGS, THE COURT SHOULD FIND THE MORATORIA WITHIN THE NUISANCE EXCEPTION

Despite their stunted growth, and further, despite the Rehnquist Court's apparent denial of their august history, nuisance "background principles" support the moratoria imposed by the TRPA and should be held an exception to any takings found by the Court.277 As mentioned in Parts I.B.1 and III.C, the complexity of environmental problems explains why statutory nuisance law supplanted many common law nuisance actions.278 Statutory nuisance law, in practice, truncated common law nuisance development; it did not, however, bar the possibility of future application of old principles to modern cases of first impression.279

Moratoria, however, need not be viewed as substantive responses to nuisances; moratoria simply serve as the procedural tools of a government agency and act much like a judge's preliminary injunction pending a ruling on a public nuisance ac-

276. See id. at 1235-36; Tahoe Regional Planning Compact, Pub. L. No. 96-551, art. VI(a), 94 Stat. 3242 (1980).

277. The district court in Tahoe-Sierra noted that "pollution of water" generally constitutes a nuisance, but that the case law did not support finding a nuisance on the facts presented because of the small amount of pollution each landowner contributed to the overall deterioration of the lake. See 34 F. Supp. 2d at 1252-54. Importantly, the district court cited cases from 1884-1961, all before the general rise in environmental awareness and subsequent legislative enactments. See id. at 1253; supra note 46; discussion supra Part III.C. This provides an example of how common nuisance law ends where statutory law begins—however, this does not mean that the background principles associated would have nothing to say about nuisance-like activity after 1961. See Garrett, supra note 38, at 112 (construing English nuisance law in the late 1800s as allowing a public nuisance "proceeding[]" even in the absence of damages "on the broad ground that the nuisance is an infringement of the law, which tends to injure the public by interfering with the exercise of common rights" (footnote omitted)).

278. See supra note 46; discussion supra Part III.C.

279. See, e.g., Keshbro, Inc. v. City of Miami, 801 So. 2d 864, 868 (Fla. 2001) (using the Lucas nuisance exception to affirm the lower court's ruling denying a takings challenge brought by a hotel owner after the City of Miami declared his hotel a nuisance because of drug and prostitution related activity occurring at the hotel); see also Prosser, supra note 39, at 808 (noting "a number of cases" applying public nuisance law to enjoin "urban street gangs and gun manufacturers and distributors").
tion. Understanding the legislative moratoria as analogous to the judicial preliminary injunction necessarily removes both from the takings analysis: Each stops private activity only until a proper balancing of harms can be conducted. In the case of modern nuisance-like activities, the delay necessarily takes longer than early nuisance cases. In fact, a judge enjoined the TRPA in the Tahoe-Sierra dispute for over three years pending more detailed environmental analysis, underscoring the difficulty in quickly assessing the proper balance between human development of land and the complex environmental problems such activities create.

Finally, if a belief in wealth maximization provides the basis for the Rehnquist Court's takings direction, as some suggest, the Court should uphold moratoria because they allow governments the time to allocate scarce resources efficiently in cases like Tahoe-Sierra. That is, without moratoria, legislatures would be forced to enact more sweeping legislation and attempt complex, fact-specific evaluations better left to the expertise of agencies. The result of challenges to these broader

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280. See GARRETT, supra note 38, at 363 (noting the preliminary injunction should be granted only "when there is irreparable, or at least serious, mischief to which the property may be exposed before the question of legal right can be determined").

281. See BLACK'S LAW DICTIONARY, supra note 28, at 788 (defining a "preliminary injunction" as "[a] temporary injunction issued before or during trial to prevent an irreparable injury from occurring before the court has a chance to decide the case").

282. See, e.g., Tahoe-Sierra, 34 F. Supp. 2d at 1236-37 (noting the 1984 TRPA plan was delayed by a court-ordered injunction for over three years).

283. See id. In this case, due to the complexities of the issues, the judge essentially utilized the TRPA staff to assist him in balancing the harms that more traditionally would be conducted solely by the court, by requiring TRPA to prove its plan met the law's goals. See id.

284. GOTTLIEB, supra note 177, at 61 (noting also that the Court "appears to follow... wealth maximization" as its economic theory).


286. See City of Milwaukee v. Illinois, 451 U.S. 304, 325 (1981) (Milwaukee II) (noting that the use of common law "in the face of congressional legislation supplanting it is peculiarly inappropriate in areas as complex as water pollution control... doubtless the reason Congress vested authority to administer the [Clean Water] Act in administrative agencies possessing the necessary expertise"). Agencies also possess more expertise than the judiciary. See ESKRIDGE ET AL., supra note 177, at 313 (noting that agencies are "better informed about the statutory history and the practicality of competing policies than courts are").
statutes might be greater invalidation (under substantive due process actions) of necessary protections for the environments that support human existence. Such a result would be contrary to the power of the sovereign to protect its citizens from harm, a power the Framers imbedded in the Fifth Amendment. 287

The Ninth Circuit's decision correctly interprets this venerable body of law and should be affirmed.

CONCLUSION

For most of the history of this nation, the Supreme Court contained its review of government restrictions of private land within the bounds of the Takings Clause. It interpreted the scope of the clause in light of original intent and consistency with ancient principles of property. In recent decades, the rise of environmental pollution concerns brought a commensurate increase in government regulations. In an unprecedented response, the Rehnquist Court has revamped a bygone era of intense government scrutiny by the courts and carefully shrouded this scrutiny in its takings analysis.

Despite the Court's increasingly cynical view of government actions, however, the Ninth Circuit's denial of temporal severance and its denial of the landowners' takings claims deserve the Court's affirmation for the reasons set forth in Part IV. The Tahoe Regional Planning Agency should not be required to compensate landowners for the moratoria periods. The Supreme Court's past precedent and the nuisance exception to takings, even under a Lochneresque heightened review of government intent, cry out for affirmation of Tahoe-Sierra. Let justice be done.

287. See supra notes 29-34 and accompanying text.