

# The Ebbs and Flows in Takings Law: Reflections on the *Lake Tahoe* Case

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## **Introduction: A Change in the Winds of Fortune**

For the Framers of our Constitution, the principles of good government started with the protection of private property—that guardian of all other rights. The instinct behind their judgment is easy to grasp just by imagining how the world would look if governments could consistently disregard property rights. State bureaucrats could confiscate land at will, not just for public works, but to line their own pockets. Government officials could harvest with impunity crops planted by ordinary citizens, and systematically disrupt all private efforts at long-term planning. It takes little ingenuity to see the moral bankruptcy and economic ruination inherent in any regime devoid of property rights. Nor, ironically, would any of today's preferred freedoms be worth the paper they were written on. How could people pray if they could not keep government officials from snatching away their houses of worship? How could they criticize the government if not allowed to own printing presses and broadcast studios?

Fortunately, none of that has come to pass. One reason for our political stability is found in the Takings Clause of the Fifth Amendment: “nor shall private property be taken for public use without just compensation.”<sup>1</sup> By and large, that clause has been sensibly (not ideally, but sensibly) interpreted to block government from seizing and occupying property—the greatest peril to individual freedom—without compensating the owner. Regrettably, the public use

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<sup>1</sup>U.S. CONST. amend V. For my detailed analysis of the clause, see RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

requirement has been watered down, in the name of urban renewal or land reform, to allow takings for private benefit.<sup>2</sup> But in all cases of occupation, the courts have adhered to a well-nigh per se rule that requires compensation whenever government occupies land, including some tiny fraction of a larger holding.<sup>3</sup>

Cases of seizure and occupation are only half the story, however. Government officials (like private individuals) are often tempted to seek the indirect path when the direct route is blocked. If outright occupation of the land requires payment of compensation, why not leave the owner in possession of the land but strip him of his rights to use and dispose of it? Then some particular end, such as urban growth control or the elimination of potential competition, can be advanced without triggering the compensation requirement. To keep matters in perspective, such restrictions on land-use do not pose dangers equal to those arising from unlimited direct occupation. But they are not small potatoes either. In *Euclid v. Ambler Realty Co.*,<sup>4</sup> the seminal zoning case, the Supreme Court sustained an ordinance that reduced the value of the land almost 75 percent. (The ordinance required that a 68-acre plot slated for an automotive plant be devoted exclusively to single-family housing.) The power of regulation becomes still more dangerous when, as is the case with landmark preservation and wetland programs, administrative officials are given broad discretion to designate which lands will or will not be subject to an ordinance.

Given their pervasive use and powerful consequences, such regulations have become the focal point of intense judicial controversy. Over the past 15 years, the Supreme Court has grappled with multiple forms of land-use regulation.<sup>5</sup> But its treatment of the issues has

<sup>2</sup> See *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 226 (1984) (allowing forced state transfers to tenants of leased property in order to counter the land oligopoly of the Trustees of the Kamehameha Schools/Bishop Estate); *Berman v. Parker*, 348 U.S. 26 (1954) (allowing forced state takeovers of viable businesses for local blight removal).

<sup>3</sup> See, e.g., *Loretto v. TelePrompterManhattan CATIV Corp.*, 458 U.S. 419 (1982). Too often, however, the compensation tendered is usually lower than that needed to leave the owner indifferent as to his position before and after the taking. For discussion, see EPSTEIN, *TAKINGS*, at 182–215.

<sup>4</sup> 272 U.S. 365 (1926).

<sup>5</sup> See, e.g., *Dolan v. City of Tigard*, 512 U.S. 687 (1994); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

at best been halting and incomplete, even if owners have come out on top for the most part. It is no surprise that these decisions often reflect the now familiar right-left split on the Court, with the five conservative justices (Rehnquist, O'Connor, Scalia, Kennedy, and Thomas) arrayed against the four liberals (Stevens, Souter, Ginsburg, and Breyer). But as is equally apparent, that coalition of five contains a subcoalition, with Justices Kennedy and O'Connor precariously positioned midway between the three conservatives and the four liberals.

In the 2000 term, the five-justice coalition held as Justice Kennedy wrote *Palazzolo v. Rhode Island*,<sup>6</sup> one of the Court's stronger and more coherent decisions dealing with property rights. *Palazzolo*'s central holding was that the state could not immunize itself from takings challenges simply by passing a statute and then claiming that individuals who acquire property thereafter are barred from challenging it because they took title "with notice" that the statute was on the books. The Court's "per se" rule—the phrase quickly becomes a term of art—held that the subsequent owner is entitled to raise the same challenges the previous owner could raise. In *Palazzolo*, the subsequent owner was the sole shareholder of a corporation that had been involuntarily liquidated. If he were automatically bound by the new regulation, then it would have been just a matter of time before all owners were so bound: over time, after all, corporations are liquidated; partnerships dissolved; land transferred, by sale, lease or foreclosure, divorce or death. For the time being, *Palazzolo* put an end to the incipient uncertainty in land titles.

Yet the mood of the Court proved most unstable as the pendulum swung sharply in the opposite direction this past term in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*.<sup>7</sup> The case involved a series of temporary land-use ordinances that prohibited new construction on land near Lake Tahoe. Succeeding moratoria were imposed by the Tahoe Regional Planning Agency (TRPA)—a specialized agency created by California and Nevada—to buy time to develop a comprehensive plan to regulate new construction in the Tahoe basin to preserve the water quality of Lake Tahoe. All of the plaintiffs in *Tahoe* were landowners of undeveloped

<sup>6</sup>533 U.S. 606 (2001).

<sup>7</sup>122 S. Ct. 1465 (2002).

plots of land located on the edge of the Lake Tahoe basin. Starting in the early 1980s, they have fought a protracted but largely unsuccessful battle with TRPA to build homes on their lands. Of the 700 or so ordinary people who started on this journey, 55 have since died and many others have dropped out of the struggle—their land still unused—from sheer emotional and financial exhaustion. No litigation against government is ever easy. In this case, ordinary citizens, often of limited means, tried in vain to run the gauntlet of TPRA's multiple moratoria and procedural hurdles, which were introduced in the 1970s and have been refined and elaborated over the years.<sup>8</sup>

The legal struggle that reached the Supreme Court centered on two key ordinances that in the early '80s imposed a combined 32-month delay on new construction on key sites, mainly those with the steepest slopes. When TRPA finally produced a plan in 1984, California sought and obtained an injunction against its implementation on the ground that it was insufficiently protective of Lake Tahoe. If the injunction period were taken into account, the moratoria in question lasted some six years.<sup>9</sup> Yet even after that, construction still had to run a formidable gauntlet of permitting requirements.

These post-1980 moratoria were spurred on by consequences of the previous boom period of new construction in the Tahoe basin. As mentioned previously, TRPA's prime justification for refusing to permit development related to the preservation of the once pristine Lake Tahoe. Owing to its high altitude and location, the lake was "oligotrophic" in its natural state—it lacked nutrients to support the growth of plant life. In consequence, it enjoyed a matchless, cobalt blue clarity, long celebrated by Mark Twain and by citizens who lived and worked in the region. With development, however, Lake Tahoe had undergone a process of "eutrophication"—plant life was flourishing in the lake, undermining its clarity.

That eutrophication stemmed from a substantial increase in the level of nutrients in the lake as a result of the construction in the

<sup>8</sup>Their exact duration is in dispute because not all parcels were treated in the same fashion. In the post-1987 period, some new building has taken place, albeit under restrictive conditions. For a history of the enactments, see *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 34 F. Supp. 2d 1226 (D. Nev. 1999).

<sup>9</sup>See the dissent of Rehnquist, C.J., point I, for the argument that all three components should be counted in the temporary period. 122 S. Ct. at 1490.

surrounding basin. As natural soil gives way to asphalt and concrete, land in the basin becomes progressively less able to absorb water. The increased runoff sweeps along soil and the nutrients found in soil. These nutrients in turn allow plant life to flourish within the lake, reducing its overall clarity. In response, TRPA divided the land surrounding the lake into seven stream environment zones. The amount of impervious surface allowed in each zone related to the amount of anticipated runoff, such that the least new construction was allowed in those areas designated as most fragile. The restrictions on new construction were intended to prevent an acceleration of the earlier cycle of eutrophication, which everyone rightly regarded as a legitimate social purpose.

The new provisions applied both to owners who had already built up their sites and to those whose land was undeveloped. The impact in the two cases was quite different, however. Owners of existing structures were often barred from building additions, docks, driveways, and the like. Owners of undeveloped lands typically could not build anything at all. The record contains no evidence of measures introduced by TRPA to require modifying existing structures, which appeared to have been grandfathered, in line with common practice. As implemented, the building moratoria and the permit system that followed it have at most prevented an increase in the rate of runoff; they have done nothing to reduce any runoff attributable to prior construction. The onus of preventing further eutrophication of Lake Tahoe has thus been cast on those landowners who did not have the need, foresight, or luck to build on their properties before TRPA's adoption of its restrictive rules.

Clearly, *Tahoe* involves some form of regulatory taking, given that those owners were allowed to retain possession of land that they could not develop. As so often happens in such cases, however, the exact takings question raised is itself the source of some disagreement. In accepting the case for review, the Supreme Court phrased the question as follows: "Whether the Court of Appeals properly determined that a temporary moratorium on land development does not constitute a taking of property requiring compensation under the Takings Clause of the United States Constitution."<sup>10</sup>

<sup>10</sup>Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 533 U.S. 948 (granting cert.).

Justice Stevens evaluated that question with reference solely to the two ordinances, not the subsequent injunction of the 1984 plan. So limited, the Court did not consider the cumulative effect of the various delays. Nor, as it construed the question, was it permissible to ask whether some circumstances might excuse the payment of compensation. Instead, it opted to decide only whether a per se rule made all total but temporary restrictions on land-use development compensable. So framed, the six-member majority answered that question in the negative, backing off earlier Supreme Court decisions, such *Palazzolo* and *Suitum v. Lake Tahoe*,<sup>11</sup> which involved earlier disputes over building near Lake Tahoe.

In so deciding, the Court unleashed the factional political forces that strong property rights are meant to curtail. With Justice Stevens's blessing, an endless set of legal and planning maneuvers allowed the lucky earlier builders on the edge of Lake Tahoe to exclude or delay the latecomers the like use of their properties. The incumbent residents, as political insiders, used the rolling moratoria to gain the benefit of lower land densities. They parlayed their political power to cast the bulk of the costs of environmental protection not on themselves, who were responsible for the lake's deterioration, but on the latecomers, who bore no responsibility for the deterioration. *Tahoe* represents a dubious morality tale in which the insiders win and the outsiders lose. This is not really a case about property rights. Rather, one group of owners with political power has taken advantage of a second group of owners with less power. Clout counts.

An outcome that misguided does not arise by chance. Here, the causes are both motivational and intellectual. The Court simply does not see why protecting private property against regulation serves an important social function. Because it sees little if any real downside to regulation, it consciously refuses to articulate any consistent approach to takings problems, ranging from the simple occupation of an isolated plot to the complex regulation of many plots. To show the dire consequences of that attitude, and the confusions in current takings law, this essay first explores the relationship between cases of occupation and cases of regulation, comparing two key Supreme Court precedents, *Armstrong v. United States* and *Penn Central v. New*

<sup>11</sup> 520 U.S. 725 (1997).

York. Against that conceptual framework, the essay then critiques Justice Stevens's opinion in *Tahoe*. Finally, we address in preliminary form the larger question of the implications of Justice Stevens's ad hoc approach for the rule of law.

## **The Conceptual Framework**

### *Armstrong and Clear Principles*

Some sense of how the Takings Clause should work can be gained by working backward from Justice Black's oft-quoted statement of purpose in *Armstrong v. United States*: "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."<sup>12</sup>

The statement rings true in the context of that case. Armstrong was a Maine subcontractor who had a right to attach a lien for work and materials on boats manufactured by the Rice Shipbuilding Company for the United States Navy. Before all of the boats were completed, Rice defaulted on its government contract. In response, the Navy removed the boats from Maine, which made Armstrong's lien worthless. He had a huge loss, and the taxpayers of the United States gained a windfall of equal magnitude. Overall, however, the gains and losses do *not* cancel each other out. If the Navy's ploy had worked, then in the long run everyone would suffer from the resulting instability in contracting practices.

That tale of (large) public gain and (larger) private loss links up with the language of the Takings Clause in rigorous fashion.<sup>13</sup> Here is how. The first two questions in any takings case are (1) Was private property taken?, and (2) Was any compensation provided in return? In *Armstrong*, the lien was taken, but nothing was provided in exchange. In the simplest condemnation case, an isolated parcel of land is taken outright from one party and used by the government. Again, something has been taken, but in the absence of cash payment, nothing has been provided in return. Matters can become somewhat more complex, of course. The government need not take all of one's property. It can take only part, which it does when it takes a life

<sup>12</sup> *Armstrong v. United States*, 364 U.S. 40, 49 (1960), cited in *Tahoe*, at 61.

<sup>13</sup> See EPSTEIN, TAKINGS, chapters 8 & 14.

estate, uses business property for a term of years, takes an easement to walk over someone's land, or, most critically, takes a covenant that restricts an owner's right to use or develop his property.

In some cases, the government targets not a single parcel but tracts of land with several different ownerships. The increase in the scope of the government's efforts, however, does not turn a taking into something else. The government's actions are strictly additive. If restrictive covenants are imposed on 100 landowners, then the government has taken property from 100 landowners, each of whom is entitled to compensation. But with comprehensive regulation, the inquiry becomes more complex, for it is necessary to ask whether the restrictions imposed on one landowner count as the compensation to all others—just as when a private developer imposes voluntary and reciprocal restrictions on all plots within a subdivision. If so, then loss and gain may well come back into balance if all of the owners are left better off by the government's scheme than they were before. But there is no guarantee that that will happen. Equality in the *form* of regulation does not guarantee equality in its *impact*. Even if the restrictions in question have a formal equality across users, they could, in practice or by design, benefit people on one side of the railroad tracks at the expense of those on the other.

Just that happened in *Tahoe*: a uniform set of restrictions caused far greater hardship to people who had not built than to people who had. Takings on net do not have to be \$100 taken and zero returned, of course. They can be \$90 taken and \$10 returned, leaving an uncompensated balance of \$80. In some cases, moreover, the regulations may be diffuse in their impact so that it is hard to measure who has gained and who has lost. Such is true, for example, with a technical change in the recordation statutes, when it is better to let the matter slide than to try to figure out which millions of people should pay or receive some trivial amounts of money. But at Lake Tahoe the stakes were very high, and the disproportionate impact was the unmistakable sign of a large-scale taking with tiny compensation in exchange.

#### *Penn Central and Ad Hoc Principles*

The *Armstrong* principles speak strongly, then, toward compensation in *Tahoe*. Unfortunately, however, the case does not stand alone. In retrospect, the most important takings case of the past 50 years



is *Penn Central v. City of New York*.<sup>14</sup> In that case the question before the Supreme Court was whether the landmark preservation statute of New York, which was invoked to prevent the Penn Central Company from developing the air rights over its terminal, worked a taking of private property for which compensation was required. In finding no taking and hence no need for compensation, Justice Brennan punted on all questions of theory, reducing *Armstrong* to a mere parenthetical phrase in an unruly and overgrown takings universe. The following passage has exerted such power over the subsequent course of the law that it is best to set it out in full:

Before considering appellants' specific contentions, it will be useful to review the factors that have shaped the jurisprudence of the Fifth Amendment injunction "nor shall private property be taken for public use, without just compensation." The question of what constitutes a "taking" for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. While this Court has recognized that the "Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Armstrong v. United States*, 364 U.S. 40, 49 (1960), 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, rather than remain disproportionately concentrated on a few persons. Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case." *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958).

In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property

<sup>14</sup> 438 U.S. 104 (1978).

can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.<sup>15</sup>

Several features of this passage cry out for attention. *Armstrong's* clarion call, not to mention its deep linkage to the structure of the Takings Clause, is muffled in judicial confession of an incapacity to find any path through the Takings Clause thicket. There has "quite simply" been "no test" that allows one to reach coherent and predictable results in these cases. How then should one deal with these essentially "ad hoc" inquiries? Answer: by transforming the text. In isolating the relevant factors for analysis, we are told that the economic impact of the regulation—most particularly, "distinct investment-backed expectations"—are to count as relevant factors.

Here is where the trouble begins. Just what count as "distinct investment-backed expectations," which receive special emphasis in the analysis? This odd phrase appears *nowhere* in the Constitution; nor, unlike the disproportionate impact test, can it be derived by interpretive means either. By transforming the question from "whether private property has been taken" to "whether distinct investment-backed expectations have been interfered with," we move from language familiar to the Framers to catchy words that carry no discernible meaning at all. Most property is not held for investment purposes, of course; yet, it hardly follows that the government can take it without paying compensation. Nor does it make sense to say that property that has been purchased is entitled to one level of protection while property that has been received as a gift is entitled to a different, lower level of protection. It is doubtful that Brennan meant to capture either of those two senses.

From the context, it looks like Brennan's test protects *existing* but not *prospective* uses—or, indeed, existing uses if done only prospectively. But that dichotomy clearly confounds any sensible or traditional definition of property, which is a bundle of rights that covers both present and future development. To say that taking future rights is not compensable is like saying that you can void a stock option when it is not in the money (for example, when the stock is

<sup>15</sup> *Id.* at 124 (citations omitted).

below the option price, with time yet to run), even when that option is trading at a positive value.

Unfortunately, Brennan's appeal to investment-backed expectations reduces the stability of property holdings, creating a perverse incentive to rush to build to perfect one's development rights. Indeed, one difficulty in dealing with moratoria stems from this simple question: Just what loss do they cause to any particular property owner? Many people in the Tahoe basin, for example, purchased property long before they intended to build on it. Some, with relatively short-term plans, were devastated by the moratoria; others, who were holding for the long term, were less hard hit. Do we give large compensation to the former group and little or none to the second; or do we just ignore the differences and award all owners a sum equal to the diminution of market value on the ground that the government faces the same overall liability either way?<sup>16</sup> The latter is the usual takings standard, which tends to undercompensate in most cases by ignoring subjective-use values in total takings situations. But either standard produces a hefty charge that should induce TRPA to rethink its regulatory strategy, for it cares more about how much it pays than it does about which claimants get which amounts. All such complexities of valuation, however, are swept under the carpet by speaking about investment-backed expectations instead of property rights. The upshot is that the terminological shift to "investment-backed expectations" works, *sub silentio*, to remove development rights from the protection of the Takings Clause.

The second problem is as deep as the first. Once we abandon some per se rule, how do we perform the balancing tests that *Penn Central* contemplates? It is certainly proper for a court to say that some form of balancing is needed to resolve difficult constitutional questions. Indeed, the Takings Clause *requires* that some explicit account be given of the justification the government puts forward to explain why the disproportionate effects disfavored in *Armstrong* should be allowed in some cases. On that score, the phrase "police power" has long been the preferred term of art to point to the set

<sup>16</sup> See *Dodd v. Hood River County*, 136 F.3d 1219, 1230 (9th Cir. 1998), in which delays in the intention to build were held to negate any losses from a temporary taking. For a perceptive discussion of the issue, see Judge Reed's opinion below in *Tahoe*, 34 F. Supp. 2d, at 1241–42.

of government interests that in principle justify some takings. In its usual formulation, the police power speaks about the government's role in promoting "health, safety, morals, and the general welfare." But, that comprehensive phrase was not crafted to insulate *every* government activity from the compensation requirement of the Takings Clause. The appeal to investment-backed expectations, however, gives us no guide about when no compensation is due, because the government is acting under the police power.

What, then, does the police power cover? In ordinary interactions between private individuals, the rights of property are never "absolute," if by that is meant that anyone can do with his property whatever he wants. That crude view is no better than equating liberty with the right of all individuals to do whatever they want whenever they want. In both cases, the law of tort, with its prohibitions on force and fraud, limit one's natural freedom of action. In the land-use case, the law of nuisance—which regulates noises, smells, pollution, and similar forms of nontrespassory invasions—hems in what one property owner can do to another. It would be odd in the extreme if government had no power to prevent one property owner from creating a nuisance to the detriment of another, or no power to act on behalf of many individuals who might not be able to coordinate a private suit against one or many polluters. Figuring out the proper limits of the police power is a large job because it requires an assessment of the legitimate purposes for government action, and some assessment of whether the means chosen are reasonably related to those purposes.

If *Penn Central* were trying to voice some reasoned view on the scope of the police power, then we might have some clue as to how its "ad hoc" balancing should proceed. But in fact the quoted passage makes no effort to address that question nor to show how the police power elements fit into the overall picture. Rather, it refers to only two points: the importance of economic impact, with those elusive investment-backed expectations; and the critical distinction between physical takings (e.g., the occupation of land) and regulatory takings (e.g., the restriction on land-use or disposition when the owner retains possession). Any theory of takings has to take both points into account to circumvent the intellectual tar pit created in *Penn Central*.

In a sustained attack on my argument in *Takings*, Margaret Radin praises *Penn Central*'s balancing act as a proper use of a "pragmatic"

approach—that is, one that self-consciously distances itself from my (barren) “conceptual approach.”<sup>17</sup> But her use of such epithets as “pragmatic” and “conceptual” rings hollow without any explanation of how that “pragmatic” system works. In this instance, it is easy to see that Brennan’s two factors cannot ground a coherent account of the Takings Clause. For, the “economic impact” of any regulation is surely a matter of degree, and that, generally speaking, does not lend itself to answering the yes/no question of whether one party has, or has not, an obligation to compensate another. No one would suggest, for example, that the dollar amount of Armstrong’s lien (the measure of its economic impact) had anything to do with Justice Black’s holding that its negation counted as a taking by the United States. Logically, economic impact goes to the number of dollars the government has to pay, conditioned on liability being found on independent grounds. The bigger the lien, the larger the obligation. But Brennan intends something different in *Penn Central*, yet no one knows precisely what. At the least, his rule complicates litigation because evidence of value is now relevant both to liability and to damages.

The situation gets no clearer when Brennan notes that a taking may be “more readily” found when the action counts as a physical invasion versus one designed to regulate the benefits and burdens of our common economic life in ways intended to promote the general good. On which side of that line does the *Armstrong* case lie? Here the government acted pursuant to a general policy on financing public improvements. Its removal of the boat from Maine waters could, with some verbal artistry, be characterized as a physical invasion of the would-be lien. But nothing in Black’s general proposition attaches any weight to this purported distinction. He would have found for the boat owner even if the government’s action were characterized as part of a policy for military financing.

*Penn Central*’s articulation of this mushy framework was done, however, for a specific purpose—namely, to create a complete separation between the robust law of property that governs relations between private individuals and the feeble law of property that binds the state. If the private model were used, then *Penn Central*

<sup>17</sup> See, e.g., Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 Colum. L. Rev. 1667, 1668–78 (1988).

would have been decided for the landowner in a walk. Air rights are recognized interests in land that are freely bought and sold. In this case, those air rights were eliminated, at least for the duration of the regulation. More concretely, Brennan argued that the mere fact that the city of New York offered Penn Central air rights over other structures in the city helped the city under his pragmatic approach. But this maneuver only obfuscates a simple dilemma. Why offer any compensation at all if no property was taken? And if Penn Central's air rights were taken, then why should partial in-kind compensation discharge its obligation?

Perhaps, then, Penn Central's plans should be thwarted because their use would constitute a nuisance. That factor is not on Brennan's list, of course. If it were, then the air rights offered over another parcel would create a second nuisance as it removes the first. What is needed is some account of why certain high buildings should be regarded as nuisances when others (like the Pam Am building next door) are not. No private law precedent eases that burden, for the traditional view treats the ordinary use of air rights as perfectly legitimate.<sup>18</sup> Finally, there is no alternative source of in-kind compensation for the landowner who has been stripped of his development rights. The upshot is that the landmark designation board may take Penn Central's air rights, but only by paying for them, a conclusion that Brennan brushed aside as simply untenable.

Once the new pragmatic—read, “muddled”—framework is introduced, the landmark designation program goes through without a hitch. The questions of physical takings, just compensation, and nuisance all get mushed together. Out of this intellectual stew comes the wrong conceptual maneuver: *never* look at the rights that have been taken; *always* look at the larger holdings of the owner.

“Taking” jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In

<sup>18</sup>*Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So. 2d 357 (Fla. Dist. Ct. App. 1959), is right on principle as well as authority. If blocking the views of an existing building were to count as a nuisance, then no one could build after the first builder, for the first would be allowed to enjoin the second. That would also mean, of course, that the initial builder takes development rights from the second. And, it would encourage a race to develop. The correct rule says either both or neither can build. The former choice yields the higher output.

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deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the “landmark site.”<sup>19</sup>

That passage was meant to deal with the objection that the air rights could be regarded as a property interest distinct from the ground rights below them, a maneuver that Professor Radin denounces as a formalistic “conceptual severance.”<sup>20</sup> Brennan feared that if the air rights were considered as a separate unit of property, their elimination by the state would be seen as wiping out an owner’s “entire” interest in that property. At that point, even he would be hard-pressed to deny that some taking had occurred, given that the plaintiff had nothing left. But by linking the air rights to the ground rights, he could say that Penn Central was still able to use its existing facility as it had before. Because that current use was its only firm investment-backed expectation, in the odd sense noted previously, it followed that the partial loss—the loss of the air rights—did not rise to the dignity of a taking. This philosophical obfuscation has paid large dividends. It has shifted the balance of advantage to the government in individual taking cases that fall short of total dispossession.

### *Regulatory and Temporary Takings*

But these clever philosophical maneuvers render incoherent the entire body of takings law. Four years after the Supreme Court handed down *Penn Central*, it decided *Loretto v. Teleprompter Manhattan CATV Corporation*.<sup>21</sup> There the issue was whether New York had effected a taking by requiring the owner of an apartment complex to place its small cable box and wiring on the roof of her building.

<sup>19</sup> *Penn Cen.* 438 U.S. at 131.

<sup>20</sup> “‘Conceptual severance’ consists of 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. Thus, this strategy hypothetically or conceptually ‘severs’ from the whole bundle of rights just those strands that are interfered with by the regulation, and then hypothetically or conceptually construes those strands in the aggregate as a separate whole thing.” *Radin, supra* note 17, at 1676.

<sup>21</sup> 458 U.S. 419 (1982).

There was no restriction on land-use, just the physical occupation of a small fraction of the overall parcel. Did that piddling entry count as a taking? In *Loretto*, Justice Marshall took the opposite tack of Brennan: physical occupation cases, no matter how large or small, lent themselves to the application of a clear per se rule: pay for the space you have occupied.

What, then, of a regulation that leaves a person in possession of his land but refuses him permission to develop? The Court faced that question in *Lucas v. South Carolina Coastal Communication*,<sup>22</sup> and again it opted for a per se rule requiring compensation, but only in those cases in which the restriction in value amounted to a loss of *all* viable economic use. At this point the overall doctrine is able to provide answers for only two polar extremes. First, if there is some viable existing use, then the government can ban any new uses of the property: future development rights are not protected. That is the message of *Penn Central*. Second, if use of the property is allowed, the government must compensate for the total loss of the property. That is the message of *Lucas*.

The identification of those two endpoints, however, offers no clue about what should be done with the countless variations that fall in the middle. Most conspicuously, the Court has never addressed any case in which a landowner's future right to build is subject to manifold restrictions—setbacks, height restrictions, volume restrictions, density restrictions, grading restrictions—that may well eliminate all or most of the value of the land. But in *First English Lutheran Church v. Los Angeles*,<sup>23</sup> the most direct precedent for *Tahoe*, the Court did consider whether a party should receive compensation for the temporary loss of use of its property when a local interim flood control ordinance blocked it from constructing or reconstructing any building or structure within the boundaries of the flood plane area.

In *First English*, the Court came to the sensible conclusion that the temporary taking of property was *prima facie* compensable, even if the state removed its restrictions after they were challenged in court. It then noted, almost in passing, that the rule it announced would not apply to “normal delays in obtaining building permits, changes

<sup>22</sup> 505 U.S. 1003 (1992).

<sup>23</sup> 482 U.S. 304 (1987).



in zoning ordinances, variances, and the like.”<sup>24</sup> *First English* invites three comments.

First, it is not clear on which side of the physical invasion line the *First English* case falls. Was this a case in which there was only a total temporary restriction on use, and thus not a physical invasion, or was it a case in which the state had taken the disputed land for indefinite future use as a flood easement?<sup>25</sup> In my view, that difference is relevant only on the question of valuation, if at all. But under *Penn Central*, it must receive far greater weight.

Second, the police power issue, not mentioned in *Penn Central*, does place a strong crimp on the plaintiff’s claim. The protection of health and safety seems to offer a strong justification for preventing the church from rebuilding a camp for disabled children in the midst of a flood plain, as was held when the case was remanded.<sup>26</sup>

Third, the issue of normal delays requires some explication of why it is included and how it ought to be treated. Those questions are addressed below.

In principle, *First English* was correctly decided. A term of years is surely an interest in property, and numerous Supreme Court cases have made it clear that the government cannot just occupy someone’s premises for an indefinite time without paying compensation for the use.<sup>27</sup> But in *Tahoe*, we do not have a direct occupation by government, only a temporary (but total) restriction on use. Still, is there any reason to think that the government should be able to exclude me from my house for a period of years and then deny its obligation to pay on the ground that it never entered the premises itself? The logic of *First English* is, or at least should be, that *total* temporary restrictions on land-use count as takings even if the government does not enter the land. Why, then, don’t *partial* temporary restrictions count as takings for which compensation is required as well? The soft underbelly of *Penn Central* is exposed. There is simply no categorical distinction that separates a partial use restriction on one hand from a total occupation on the other. Of course, there are

<sup>24</sup> 482 U.S. 321, quoted in *Tahoe*, 122 S. Ct. 1484.

<sup>25</sup> See Frank Michelman, *Takings*, 1987, 88 COLUM. L. REV. 1600, 1619–21 (1988).

<sup>26</sup> 210 Cal. App. 3d 1353 (1989).

<sup>27</sup> See, e.g., *United States v. Petty Motor Co.*, 327 U.S. 372 (1946); *United States v. Gen. Motors Corp.*, 323 U.S. 373 (1945).

differences of degree between the two, but those go to the amount of compensation that is presumptively owed, not to whether any compensation is owed at all.

### *Numerators and Denominators*

How then does one wiggle out of this problem? The linchpin of *Penn Central* is commonly known as the numerator/denominator problem.<sup>28</sup> In any routine private suit, the amount of damages that a defendant owes the plaintiff depends on what the defendant took from the plaintiff, not what the plaintiff has left after the taking is completed. The more one takes, the more one pays. In *Penn Central* proper, the Court compared the amount that was taken with the total amount that was initially owned. The relevant denominator was the “parcel as a whole,” the numerator was the air rights. The easy configuration of the parcel gave this test an appearance of objectivity, but later cases have exposed the conceptual (or pragmatic) barrenness of the test. Thus, suppose that the landowner has acquired adjacent plots of land at different times (and perhaps through trusts or other entities), some of which have been sold off before the state imposes a moratorium on building. The question then arises, which acreage counts as “the parcel” that has been subjected to regulation. If all the lands ever owned by the plaintiff are included, then the sale of any one of them could be deemed to prevent the total wipeout of his investment-backed expectations. But if some fraction of that larger agglomeration counts as “the” parcel, then it increases the chance that compensation should be paid.

In *Tahoe*, Justice Stevens explains at great length why some balancing test should be used, and so it should for dealing with police power issues. But consider a person who owns uplands and wetlands, the latter subject to building restrictions, the former not. If the wetlands were considered separate from the uplands, the restriction on their use could be regarded as total. But if the two are considered together, then the restriction might be regarded as partial. What tells us, then, whether those lands should be regarded as a

<sup>28</sup> *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 497 (1987) (quoting Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of ‘Just Compensation’ Law*, 80 HARV. L. REV. 1165, 1192 (1967)). For my earlier criticism of this doctrine, see Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 SUP. CT. REV. 1, 14–15.

single parcel or as separate parcels? In some cases, as in *Palazzolo*, the uplands could be sold off before the time that the state restricts filling in the wetlands. Do we treat the two parcels as one, or separately? Does it make a difference that they were acquired at the same time? From the same seller? By the same deed? Does it matter whether they are held by the same family members, and in the same proportions? Those details sound like irrelevancies to any serious inquiry about when regulation requires compensation, but after the decision in *Penn Central* they are the stuff of everyday concern. They were evident in *Palazzolo* and in other cases as well.<sup>29</sup>

The denominator has no role *whatsoever* to play in *any* takings case. The correct answer is simple: Across the board, the loss from regulation is measured by the value of the interests taken. On one hand, the landowner should not be allowed or encouraged to sell off parts of his land to increase the odds of receiving compensation. But on the other hand, neither should the government be allowed to duck its obligation to compensate by showing the sale of some tract of land in a prior unrelated transaction. There are important issues to balance in wetlands cases—whether, for example, proposed development on sensitive waterfront lands constitutes a public nuisance. But those issues should be faced head-on, not by digressing into obscure discussions of numerators and denominators. Takings law does not have to be ad hoc.

### **Tahoe-Sierra Up Close**

We have now covered sufficient ground to address the *Tahoe* moratoria directly. In dealing with that issue, Justice Stevens was surely correct to insist that a per se approach was inappropriate. But here again, the right questions are these: Was private property taken? Was it taken for a public use? Was the taking justified under the police power to prevent nuisances? Was just compensation required? Stevens came out with the wrong answers on those questions because he refused to break the case down into its component parts.

Instead, he simply noted that a per se rule would cover not only permits, variances, and zoning changes, but

<sup>29</sup> See *K & K Construction, Inc. v. Mich. DNR*, 217 Mich. App. 56 (1996).

orders temporarily prohibiting access to crime scenes, businesses that violate health codes, fire-damaged buildings, and other areas that we cannot now foresee. Such a rule would undoubtedly require changes in numerous practices that have long been considered permissible exercises of the police power. As Justice Holmes warned in *Mahon*, “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.” 260 U.S., at 413. A rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decision-making. Such an important change in the law should be the product of legislative rulemaking rather than adjudication.<sup>30</sup>

That passage is equal parts of common sense and intellectual panic. Note his mixing of categories. The last examples involve clear police power restrictions pertaining to health and safety. With those, the nature of the necessity limits the duration of the intrusion, and the grounds for intrusion certainly do not favor those who have built over those who have not. Police power cases like those are a far cry from the 20-year-plus moratoria at issue in this case.

The sensible way to approach this case is to break it down into its constituent parts. First, there is little doubt that the moratoria count as a taking of property. Surely that would be the case if one landowner were able to prevent his neighbor from building for a like period of time: the state therefore stands in no better position. As a *prima facie* matter, we don’t have to ask whether 32 months is long enough to matter. That delay could easily eat up 10 to 15 percent of the total value of the property. But that figure is relevant only in setting damages, not in determining liability.

Second, we ask whether the taking is for a public use. Here, the protection of Lake Tahoe preserves a valuable public resource. Thus, the answer is yes.

Third, did the landowners who were shut out from development receive any compensation for their loss? In fact, TRPA offered them a set of transferable development rights. If accumulated in sufficient amounts, those rights would allow the aggrieved owner to build

<sup>30</sup> *Tahoe*, 122 S. Ct. 1465.

somewhere else.<sup>31</sup> But the rights were hedged in with so many limitations that they were largely worthless.<sup>32</sup> Thus, the answer on this question is easy: the owners received no compensation.

Fourth, and this is the only real point of dispute, did the Tahoe Planning Authority have a police power justification for preventing additional homes from being built? That question involves the subtle interaction between the *Armstrong* principle of disproportionate impact and the law of nuisance. To see how those two factors interact, begin with the obvious point that all of the eutrophication of Lake Tahoe is attributable to the actions of those who have already built along the lake. One obvious question, to which the district court rightly devoted extensive time, is whether those actions were tortious in themselves. In answering that question, it should be noted at the outset that if the lake damage were caused in any degree by leakage—say, from septic tanks or other storage facilities built on the lands—then the answer is an unequivocal yes.

The question of tortious responsibility is much more complex if we assume that the only source of eutrophication of Lake Tahoe is from the increased run-off of organic matter created by the extensive construction of homes, driveways, patios, and other hard surfaces that prevent ground absorption of the water. California tort law does not extend this far, so the owners' conduct could well be regarded as lawful.<sup>33</sup> To date, the law of nuisance has not covered cases of clearing one's own land and allowing weeds and other organic growth to take root, thereby causing damage to nearby lands.<sup>34</sup>

*Tahoe*, of course, presents a borderline case. Yet we do not have to resolve the nuisance question authoritatively to decide its outcome.

<sup>31</sup> See *Suitum v. TRPA*, 520 U.S. 725, 745–49 (1997) (Scalia, J. concurring).

<sup>32</sup> In *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), the Court held that a judicial challenge could take place only after a final agency determination of proper land use. In *Suitum*, the Court rejected TPRA's argument that the transferable development rights would suffice as compensation, for the final land use decision would be made only years later, when the value of the TDRs would be sorted out.

<sup>33</sup> See, e.g., *Rylands v. Fletcher* L.R. 3 H.L. 330 (House of Lords, England, 1868), affirming, *Fletcher v. Reynolds*, L.R. 1 Ex. 265 (1866).

<sup>34</sup> Such actions are generally allowed under common law. See, e.g., *Robinson v. Whitelaw*, 364 P.2d. 1085 (Utah 1961); *Giles v. Walker*, 24 Q.B.D. 656 (1890) (thistles). Statutes have imposed duties on railroads to keep down weeds. See *Chicago, T. H. & S. E. R. Co. v. Anderson*, 234 U.S. 283 (1916).

What we must do, however, is apply the tort law consistently to early and latecomers alike. Thus, suppose we decide that the run-off in question does not constitute tortious behavior even if it leads to eutrophication of the lake. Now the incumbent owners could not be required to pay for the cleanup of damage that had already occurred, which would be chalked up to an act of God. (I will not dwell on the irony of environmentalists adopting narrow definitions of pollution.) But once that step is taken, what is the justification for preventing later builders from building? The state cannot argue that their future actions would constitute a nuisance if the actions of the current owners of built-up plots did not. If the first group should be able to build, then the second group should be able to build as well. Lake Tahoe is a common resource. If the question were riparian use—that is, the limited rights vested in people who own waterfront property—then the earlier arrivals to the water’s edge would have to cut back on their use to make room for the subsequent riparians when and if they started to make the same demands on the water. The rule in question is doubtless motivated by the inability to decide which landowners along the water’s edge arrived there first,<sup>35</sup> and by the fear that a first-user rule would induce people to make premature development of their lands in order to preserve their fractional rights in the common.

The same principle applies to pollution of the lake as to the removal of water from it. It may well be more efficient to stop all new construction along the edge of Lake Tahoe; but if so, then the newcomers should be compensated because they have been denied the identical rights the earlier comers enjoyed. Once that compensation is required, moreover, it could easily lead planning officials to make a healthy reexamination of its damage-control policies for the lake. Suppose that much of the concrete and asphalt poured in the earlier days is of little value relative to that of building an additional house. Under Justice Stevens’s rule, the incentive to reconsider past investments is weak. But if the ability to build were worth say \$100,000 per plot, then the incumbents might decide to rip out some old hard surfaces if that would increase the level of absorption from built-up plots. The payment of compensation could thus introduce a responsible reexamination of dubious past practices.

<sup>35</sup> See RESTATEMENT (SECOND) OF TORTS, § etc.

But what if the asphalt and concrete do constitute a tort? Now the existing owners are in a worse position than the owners of unbuilt plots because only they should be fined for the harm that their building alone has caused the lake. That money could then be used to clean up the lake. The holders of unbuilt plots of land have done nothing wrong and hence should not be required to contribute to this pool.

Moving forward, however, raises different considerations. Here all landowners should be subject to parallel regulations to the extent that they choose to maintain their old construction or add new construction. If the incumbents are allowed to continue with their activities, without any payment, then newcomers who are in the same relative position should be allowed to build to the same extent. Stated otherwise, the principle in *Armstrong* should prevent a disparate impact whereby heavier sanctions are applied to latecomers to the lakefront than to the established arrivals, without compensation. Either way, the same regime has to be applied going forward to early and latecomers. What is striking about Stevens's opinion is that he never once addresses such issues: his rejection of a per se rule is followed by a narrow view of what issues are relevant to the disposition of the case.

But what of the one issue that he did discuss: the question of normal delays for permits and the like. One approach is to adopt a general rule that would allow all local governments one year to consider routine applications before starting the clock. That approach would have several effects.<sup>36</sup> First, it would rid the dockets of minor takings suits. Second, it would favor neither incumbents nor outsiders because the individuals who are inconvenienced by the delays in one case are benefited from the delays imposed on other individuals in the next. Third, this position conforms with the moratoria rules of most states. California, for example, allows moratoria to go into effect for an initial period for 45 days, with extensions of up to 2 years.<sup>37</sup> Minnesota allows for an initial 6-month period with extensions of up to 8 months. Oregon allows for a 120-day period with one 6-month extension. Colorado and New Jersey

<sup>36</sup>See the Amicus Curiae Brief of the Institute for Justice in *Tahoe*, <http://www.ij.org/index.shtml>.

<sup>37</sup>See the dissent of Rehnquist, C.J., in *Tahoe*, 122 S. Ct. at 1490.

allow for single 6-month periods. The 1-year automatic pass is certainly within the range of common practice. Fourth, that 1-year period could be extended to cover cases that fall within the traditional scope of the police power, such as Stevens's horror stories relating to public health and crime prevention measures.

Given this modest alternative, Stevens has failed to make out any case for rolling moratoria without compensation. His ultimate claim is that local governments have to be given wide discretion to avoid "rushing through" the planning process. Unfortunately, his failure to impose any limitation on local government dawdling creates larger error in the opposite direction. TPRA can now take forever to decide how to plan for future development. At root, Stevens's opinion immunizes every land-use planning decision from constitutional review under the Takings Clause.

### **Beyond the Rule of Law?**

*Tahoe* has not left us with a pretty picture. Until this decision, a fragile majority of the Supreme Court was prepared to make cautious inroads on the unlimited ad hoc approach of *Penn Central*. The results of that effort were mixed. *First English* treated temporary occupations of indefinite duration by the same standards as permanent occupations. *Lucas* meant that at least some regulatory takings required payment of compensation. *Palazzolo* stood for the important proposition that an owner who takes title after the passage of some land-use regulation does not lose his right to compensation merely because he had "notice" of the regulation. Yet that rule is now in doubt. The point of the rule in *Palazzolo* was not that the transfer of title from a corporation to its sole stockholder immunized his development plans from public review. Rather, the rule was meant only to ensure that a transfer of title did not upset the balance of power one way or the other. On that narrow question, a per se rule makes perfectly good sense, even if many takings cases, such as *Tahoe*, require balancing property interests against environmental claims.

The numbing ad hoc nature of *Penn Central* and its progeny is in fact symptomatic of a larger problem that has afflicted the Court in recent years—its refusal to think that rules of law are capable of articulation in any of today's countless regulatory settings. Instead, the Court has offered a full-throated endorsement of various kinds of procedural devices and balancing tests. These sound learned,



even pragmatic, in the abstract, but in practice they introduce endless confusions and uncertainty. This trend manifested itself in *Tahoe* on at least four critical points.

First, the narrow interpretation of the question presented on the writ of certiorari allowed Stevens to fragment the set of relevant issues presented for analysis. Second, the ringing endorsement of the ad hoc balancing approach of *Penn Central* perpetuated the numerator/denominator problem when what is needed is the rejection of any categorical distinction between physical and regulatory takings. Third, *Tahoe* undermined *Palazzolo*'s firm conclusion that allows the subsequent owner of property to stand in the shoes of his predecessor in takings cases. Finally, *Tahoe* adhered to the proposition that "it is the interest in informed decisionmaking that underlies our decisions imposing a strict ripeness requirement on landowners asserting regulatory takings claims."<sup>38</sup>

That approach might make sense in a legal universe in which all government agencies act with dispatch and in good faith, and all landowners seeking development act in bad faith. But that division of good and evil does not remotely square with the realities of land-use planning in which all parties, public and private, have strong political agendas. The legal rules have to take into account the risk of misbehavior from both sides. They can do so only if they cabin administrative discretion and allow for prompt and effective judicial review on all matters of principle. Procedural dodges and substantive ad hoc tests always increase deference to administrative bodies. Holding back judicial review until final judgment is an open invitation for savvy administrators to stall by choking landowners with endless procedural hurdles. It is no accident that 20-year delays are the norm in cases like *Tahoe*, *Suitum*, and *Palazzolo*. The more planning bodies back and fill, the longer they delay judicial review. The cumulative effect of these strategies is to choke off all takings claims, even in cases of egregious imbalance, such as *Tahoe*. Justice delayed is justice denied is an old theme that has found a new home in the *Tahoe* view of the Takings Clause.

<sup>38</sup>*Tahoe*, 122 S. Ct. 1488 (citing *Palazzolo*, 533 U. S. 620–21).

