Take It or Leave It: The Supreme Court's Regulatory Takings Jurisprudence After Tahoe-Sierra

Justin W. Stemple
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I. INTRODUCTION

Private property may not be taken for a public use without payment of just compensation.1 This Note involves the Supreme Court’s latest decision in regulatory takings, Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency.2 The case has an important place in regulatory takings jurisprudence, but the holding is narrow by the writ of certiorari granted which considered only “[w]hether the Court of Appeals properly determined that a temporary moratorium on land development does not constitute a taking of property requiring compensation under the Takings Clause of the United States Constitution.”3 This Note will discuss the possibility of greater application of the Tahoe-Sierra rationale to direct the litigation of regulatory takings claims for moratoria, permit delays, and permanent denials of use to be decided under a Penn Central Transportation Co. v. New York City4 analysis. The ripeness doctrine in regulatory takings jurisprudence has merely pre-decided a Penn Central balance, as has the Lucas v. South Carolina Coastal Council5 exception.6 Those rules create a cluttered jurisprudence that could be streamlined and simplified by the establishment of the Penn Central factors as the sole test in regulatory takings jurisprudence, and then undergoing an in-depth explanation of those factors.

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1 I would like to thank Professor Eric Kades for his helpful comments in preparing this Note, and my wife Kristel for her love and support. Mr. Stemple is a 2004 J.D. candidate attending the College of William and Mary School of Law. He received a B.A. from Alma College in 2001.
6 Lucas created an exception to the use of the Penn Central factors for those regulations that deny an owner all “economically productive or beneficial uses” of the regulated property. Id. at 1030.
to provide guidance for lower courts. The scope of this Note is limited to regulatory takings, and does not include those areas of takings jurisprudence covering physical occupation\(^7\) or the nuisance rule.\(^8\)

Part II provides suggestions for simplifying regulatory takings jurisprudence and describes how the \textit{Penn Central} factors alone are capable of addressing the concerns reflected in other cases and doctrines, including regulatory takings ripeness and the \textit{Lucas} exception. Part III.A. lays out the factual background of \textit{Tahoe-Sierra} and what created the dispute that led to litigation. Part III.B. summarizes the lengthy procedural history of \textit{Tahoe-Sierra}. Part III.C. addresses regulatory takings jurisprudence by summarizing major takings cases and by applying \textit{Tahoe-Sierra} where appropriate. Part IV analyzes subsequent lower court decisions for the effect of \textit{Tahoe-Sierra}, based on the assumption that the importance and impact of Supreme Court decisions can best be marked by their effect on how lower courts decide cases. Part V concludes by stating that \textit{Tahoe-Sierra} was important for its acknowledgment of \textit{Penn Central} as the appropriate test for regulatory takings claims. \textit{Tahoe-Sierra} was especially important for environmental planners because it affirmed, and did not abandon or weaken, the parcel as a whole rule. The Court in \textit{Tahoe-Sierra} affirmed rules that allow environmental protection to continue addressing fundamental environmental issues as wetlands regulation, protection of endangered species, and land use policies.

\section*{II. SIMPLIFYING AND SOLIDIFYING A SINGLE REGULATORY TAKINGS STANDARD}

The Supreme Court has identified many factors that are to be weighed in determining a regulatory takings claim, but those factors can all be accommodated through the exclusive application of the \textit{Penn Central} factors. Although the Court in \textit{Tahoe-Sierra} stated that \textit{Penn Central} was the proper test to resolve a regulatory takings claim, the Court should explicitly incorporate the concerns reflected in the myriad of factors available in regulatory takings jurisprudence into the \textit{Penn Central} factors, and provide clarification

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\footnotesize\textsuperscript{7} Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (holding that any physical occupation, regardless of duration or degree, is a per se taking).
\footnotesize\textsuperscript{8} Hadacheck v. Sebastian, 239 U.S. 394 (1915) (holding that a law barring the operation of a brick mill in residential areas is not a taking).
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on how the three factors adequately address the concerns reflected in the other factors.

A. Concerns Reflected by the Ripeness Requirement are Taken Into Account in a Penn Central Analysis

The initial issue a court hearing a regulatory takings claim addresses is ripeness, but a determination of ripeness can easily be incorporated into Penn Central's character of governmental action factor. The ripeness doctrine addresses the need to ensure that decision-making delays inherent in governmental action, such as permit delays and zoning changes, are finalized to prevent premature litigation. Doing so ensures a factually certain background from which the court may rule.

These concerns can be dealt with adequately under the character of governmental action factor. The character of a permit delay would merely be a regulation under the police power of the state. The concerns about extraordinary delay and bad faith on the part of government officials reflected in Wyatt v. United States can be addressed by analyzing the character of the government's action on a spectrum. At one end would be the typical permitting delay associated with any permitting regime. At the other end would be a finalized permit denial which has all the characteristics of a governmental action explicitly denying certain use for the property. Litigation brought while awaiting a final decision on a permit would fail to present a valid Penn Central claim during a reasonable delay. The length of delay, bad faith by the officials processing the permit, or any extenuating circumstances would allow the court to adjust the weight accorded to the character of governmental action factor appropriately to account for the particular circumstances of the case without creating categorical rules and exceptions which are inappropriate in the justice-based takings arena.

B. Agins v. City of Tiburon Factors

Agins v. City of Tiburon factors should never be applied by a court, because those concerns are taken into account under Penn Central. Applying

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9 See infra notes 95-98 and accompanying text.
10 See infra Part III.C.1.
11 271 F.3d 1090 (Fed. Cir. 2001); see infra Part III.C.1.c.
separate sets of factors in similar cases has the effect of causing confusion for lower courts attempting to synthesize Supreme Court decisions.

_Agins_ identified two situations in which the Court determined a regulatory taking had occurred, but those two prongs can be taken into account in a _Penn Central_ balance. The first prong, substantially advancing legitimate state interests, addresses the concern that government action could arbitrarily "take" property without a legitimate reason and without compensation to the property owner. Regardless of _Agins_, however, that concern must be weighed under _Penn Central_ if the character of governmental action is taken seriously. A court could not address a claim arising from an arbitrary government action that had no relation to a legitimate state interest and determine that the character of governmental action did not weigh so heavily in favor of the property owner that compensation was due. Any other decision would warp the scales balancing the private and public interests. The need for clarification in regulatory takings jurisprudence would be enhanced by directing lower courts to address the concerns reflected in _Agins_' first prong in the context of the _Penn Central_ balancing test. Doing so would streamline the jurisprudence while justly considering the legitimate concern reflected in _Agins_' first prong.

_Agins_' second prong is that compensation is due when a regulation "denies an owner economically viable use of his land." The obvious concern of the second prong is that when regulations destroy all economic benefits an owner can derive from the regulated property, the Fifth Amendment requires compensation as the value of the property has in effect been taken away. That concern was explicitly recognized in _Penn Central_'s first factor, the economic impact of the regulation on the property owner. When the _Penn Central_ analysis addresses a regulation that destroys all economic use of a property, the first factor must weigh strongly in favor of the property owner. Without the other factors weighing strongly against compensation, compensation is required.

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13 _Id._ at 260 ("The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests," quoting _Nectow v. Cambridge_, 277 U.S. 183, 188 (1928), "or denies an owner economically viable use of his land," quoting _Penn Central Transp. Co. v. New York City_, 438 U.S. at 138, n. 36 (1978)).
14 _Id._ at 267 U.S. at 260-63.
15 _Id._ at 260.
16 _Id._ at 262-63.
17 _Penn Central_, 438 U.S. at 131.
C. Abandoning the Lucas Exception

The Supreme Court in Lucas essentially created a predetermined Penn Central balance by ruling, on the basis of Agins' second prong, that a per se rule existed requiring compensation whenever a regulation denied an owner economically beneficial use. While it is questionable whether the regulation in Lucas actually denied the owner all economic use of the land, the Court identified a concern that when a regulation acts so strongly against individual property owners as to deny them the economic benefits of their property, the Fifth Amendment requires compensation. That concern can be, should be, and is reflected in a Penn Central balancing test. The identification of Lucas as a predetermined balancing test illuminates how its categorical rule is unnecessary. This is especially true when the facts in Lucas likely fail its own holding when applied based on a plain reading of the case. The economic impact of a regulation should be proportional to the economic use it denies the property owner, as the traditional Penn Central test requires. The failure of Lucas to even meet its own holding demonstrates that it is almost impossible to imagine a regulation which actually denies a property owner all economic use of his property without becoming essentially a physical appropriation. Penn Central's analysis can adequately address the legitimate concern reflected in Lucas without the need for a separate test.

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18 See infra Part III.C.2.e.
19 As noted by Justice Harry Blackmun in dissent, the property retained some value for use as a private beach and recreational area. Although the value would be extremely reduced from its value as developable property, it would still not fit within a plain meaning definition of the text of Lucas, which required all economically beneficial use to be denied. The "[p]etitioner still can enjoy other attributes of ownership, such as the right to exclude others, one of the most essential sticks in the bundle of rights that are commonly characterized as property." Lucas v. S. C. Coastal Council, 505 U.S. 1003, 1043-44 (1992) (Blackmun, J. dissenting) (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)). "Petitioner can picnic, swim, camp in a tent, or live on the property in a movable trailer. State courts frequently have recognized that land has economic value where the only residual economic uses are recreation or camping." Id. Blackmun cited state decisions reflecting that value. "Petitioner also retains the right to alienate the land, which would have value for neighbors and for those prepared to enjoy proximity to the ocean without a house." Id.
20 Id. at 1015.
21 Lucas essentially removes from the Penn Central analysis those cases in which the economic impact was so severe the Court determined a taking should always result. A Penn Central analysis of Lucas would give appropriate weight to the severe economic loss incurred in Lucas while also giving due respect to the character of the governmental action and the investment backed expectations of the property owner.
D. Penn Central Properly Considers and Weighs All Relevant Factors

*Penn Central's* test adequately addresses the concerns reflected in regulatory takings' ripeness doctrine, the *Lucas* categorical exception, and the *Agins* prongs. When two options are available and both are capable of resolving an issue with similar results, but only one option contains jurisprudential benefits such as clarifying and simplifying the jurisprudence and giving clear notice to potential litigants regarding what factors and concerns the court will address, the choice should be simple.

Justice Stevens' support of utilizing *Penn Central* in all regulatory takings cases, despite his acknowledgment of the *Lucas* exception, laid the foundation for future Courts to solidify the *Penn Central* factors as the sole test for takings claims.22 *Penn Central* should be established as the sole determinative test in regulatory takings jurisprudence for its ability to address all of the concerns reflected in regulatory takings cases while simplifying the jurisprudence for future litigants and courts.

III. TAHOE-SIERRA

A. Factual Background

Lake Tahoe has been recognized as an American “national treasure.”23 Its exceptional clarity has been acknowledged by artist and politician alike.24

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24 See e.g., *MARK TWAIN, ROUGHING IT* 169 (Shelley Fisher Fishkin ed., Oxford University Press 1996) (1872). Lake Tahoe is a noble sheet of blue water lifted six thousand three hundred feet above the level of the sea, and walled in by a rim of snow-clad mountain peaks, that towered aloft full three thousand feet higher still! As it lay there with the shadows of the mountains brilliantly photographed upon its still surface I thought it must surely be the fairest picture the whole earth affords.

*Id; see also* Sean Whaley, *Clinton Pledges Tahoe Aid*, LAS VEGAS REV.-J., July 27, 1997, at 1A (President William Clinton said Lake Tahoe is “one of the crown jewels, unique among them all. It’s a national treasure that must be protected and preserved.”); Sean Whaley, *Gore Vows to Protect Lake*, LAS VEGAS REV.-J., July 26, 1997, at 1A (Vice President Al Gore said, “There is a peace that is associated with Lake Tahoe that is very, very special. . . . The beauty of this place is unique in all the world.”). Another important aspect is that: Only two other sizable lakes in the world are of comparable quality—Crater Lake in Oregon, which is protected as part of the Crater
The exceptional clarity that fostered Lake Tahoe's popularity has led to its potential destruction by increased development around the lake. Developments result in increased nutrient loading of the lake largely because of the increase in impervious coverage of land in the Basin resulting from that development. Impervious coverage—such as asphalt, concrete, buildings, and even packed dirt—prevents precipitation from being absorbed by the soil. Instead, the water is gathered and concentrated by such coverage. Larger amounts of water flowing off a driveway or a roof have more erosive force than scattered raindrops falling over a dispersed area—especially one covered with indigenous vegetation, which softens the impact of the raindrops themselves. Apparently, even the force of a raindrop falling on bare earth has some erosive power, which the presence of vegetation mitigates. Thus disruptions to the natural plant cover caused by development further exacerbate the problem. The increase in impervious coverage seems to be a larger problem than the loss of plant cover, however—perhaps because so much of the Basin's precipitation falls in the form of snow. One can only assume that a snowflake impacts the ground with less force than a raindrop. Yet runoff from the melting snow still produces erosion.

The concentrations of water running off areas of impervious coverage then flow rapidly over areas of uncovered earth, picking up nutrient-rich topsoil and bits of vegetation and debris as they go. The increase in runoff thus causes more debris and soil—and hence more nitrogen and phosphorous—to reach the lake than under natural conditions.\textsuperscript{25}

The addition of nitrogen and phosphorous spurs eutrophication, which the district court described as

the process of becoming more "eutrophic," which, at least as it relates to a lake, is defined as "rich in dissolved nutrients . . . ." [The District Court projected that] eventually, unless the process is stopped, the lake will lose its clarity and its trademark blue color, becoming green and opaque for eternity. Or at least, for a very, very long time. Estimates are that, should the lake turn green, it could take over 700 years for it to return to its natural state, if that were ever possible at all. 26

In response to the dangers posed to Lake Tahoe's clarity by increased development, the states of Nevada and California created the Tahoe Regional Planning Agency ("TRPA") in 1969. 27 On June 25, 1981, TRPA enacted Ordinance 81-5 to allow time to determine what amount of growth could be sustained without damaging Lake Tahoe's clarity. 28 No regional plan was developed by TRPAs original deadline, 29 so TRPA passed Resolution 83-21 out of concern that it no longer had authority to issue construction permits. 30 Resolution 87-21, together with Ordinance 81-5, prohibited construction on "sensitive lands in California and on all [Stream Environment Zone] lands 31

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26 Id. (citation omitted).
27 Id. at 1232.
28 Id. at 1233-34.
29 Id. at 1235.
30 Id.

"Stream Environment Zones" (SEZs) are especially vulnerable to the impact of development because, in their natural state, they act as filters for much of the debris that runoff carries. Because "[t]he most obvious response to this problem . . . is to restrict development around the lake—especially in SEZ lands, as well as in areas already naturally prone to runoff," . . . conservation efforts have focused on controlling growth in these high hazard areas.

in the entire Basin for 32 months, and on sensitive lands in Nevada . . . for eight months."\textsuperscript{32} The moratoria imposed by Ordinance 81-5 and Resolution 83-21 were the regulations challenged as takings in Tahoe-Sierra.\textsuperscript{33}

B. Procedural History

Land owners brought suit both individually and through the Tahoe Sierra Preservation Council, which represented about two thousand owners of improved or unimproved property in the Lake Tahoe Basin.\textsuperscript{34} The litigation was quite extensive. The Supreme Court noted that it "produced four opinions by the Court of Appeals for the Ninth Circuit and several published District Court opinions."\textsuperscript{35}

The district court recognized the petitioner's regulatory takings claims, and cited \textit{Agins} for the proposition that a "[g]overnment regulation will constitute a taking when either: (1) it does not substantially advance a legitimate state interest; or (2) it denies the owner economically viable use of her land."\textsuperscript{36} The court first held the moratoria were legitimate, based upon the natural beauty of the lake and the tourism industry it generated.\textsuperscript{37} It also found the moratoria substantially advanced that state interest by being proportional enough to the problem intended to be addressed. Indeed, the court found it "difficult to see how a more proportional response could have been adopted."\textsuperscript{38}

The district court then considered whether the moratoria denied the plaintiffs economically viable use of their property. To make that determination, the court addressed the key question of whether the moratoria

\textsuperscript{32} Id. at 312.  
\textsuperscript{33} Id. at 306.  
\textsuperscript{34} Id.  
\textsuperscript{35} Id. at 313 (prior opinions include 216 F.3d 764 (9th Cir. 2000) (holding the temporary moratorium did not amount to a taking); 34 F.3d 753 (9th Cir. 1994) (resolving issues regarding the date the claim accrued, relation back and statute of limitations issues); 938 F.2d 153 (9th Cir. 1991) (holding agency was not immune, claims were not mooted by regional plan, and the claims were ripe); 808 F. Supp. 1474 (D. Nev. 1992) (holding claims to be barred by the statute of limitations); 808 F. Supp. 1484 (D. Nev. 1992) (holding claim to be barred by the statute of limitations); 911 F.2d 1331 (9th Cir. 1990) (holding certain claims unripe, the regional planning agency was not immune from liability, and property owners had claim for reimbursement independent of the taking of the land itself); 611 F. Supp. 110 (D. Nev. 1985) (resolving immunity and condemnation authority issues).  
\textsuperscript{36} \textit{Tahoe-Sierra Pres. Council}, 34 F. Supp. 2d at 1239.  
\textsuperscript{37} Id.  
\textsuperscript{38} Id. at 1240.
denied the plaintiff’s total economic use or only partial economic use, and analyzed the facts under both theories. 39

When determining whether a regulatory taking exists, courts look to “essentially ad hoc, factual inquiry[ies]” regarding “(1) ‘the economic impact of the regulation on the claimant’; (2) ‘the extent to which the regulation has interfered with distinct, investment-backed expectations’; and (3) ‘the character of the governmental action.’” 40 The district court found weighing the Penn Central factors “clearly leads to the conclusion that there was no taking.” 41 The first factor weighed in favor of the regulation because the plaintiffs offered no evidence of the economic impact of the regulation on their property values. 42 The second factor was undermined by the temporary nature of the moratoria, which did not interfere with lot owners’ reasonable expectation of development when the average lot owner held the lot undeveloped for twenty-five years. 43 The court determined the third factor was in favor of the regulation because it was a “direct and reasonable” method of combating the degradation of Lake Tahoe’s clarity while the property owners retained property rights such as the right to exclude. 44 The court held no taking occurred under a Penn Central analysis as all three factors weighed against a taking, and the plaintiffs could only recover if the regulation denied all economically viable use of their property. 45

The District Court analyzed the takings claim under Lucas to determine if the moratoria fit within its categorical rule that “[a] statute regulating the uses that can be made of property effects a taking if it ‘denies an owner economically viable use of his land.’” 46 The court found both Ordinance 81-5 and Resolution 83-21 denied the plaintiffs economically viable use of their property; Ordinance 81-5 because it was “highly doubtful that any of [the

39 Id. at 1240-41.
40 Id. at 1240 (quoting Penn Central Transp. Co. v. New York City, 438 U.S. 104, at 124 (1978)).
41 Id.
43 Id. at 1240.
44 Id. at 1241.
45 Id. at 1241-42.
allowed] uses could ever be considered economically viable,"47 and Resolution 83-21 because "uses were even more restricted."48 Weighing into that decision was the Ninth Circuit’s requirement that an economically viable use of property exists "when a competitive market exists for the property."49 Despite the properties in question retaining some value, the lack of evidence showing a competitive market for the regulated properties allowed the court to find a categorical regulatory taking.

The Ninth Circuit reversed the district court’s finding of a categorical taking but affirmed the district court’s Penn Central balance, which held the regulations did not effect a taking.50 The Supreme Court granted a limited writ of certiorari to claims of a temporary regulatory taking by the Ordinance 81-5 two-year moratorium, and the Ordinance 83-21 eight-month moratorium.51 Chief Justice William Rehnquist dissented, insisting that the proper time period was 1981 through 1987. This included the moratoria plus a district court’s injunction, which for three years prohibited the implementation of a development plan that would violate TRPA regulations and the 1980 Tahoe Regional Planning Compact.52 Despite Rehnquist’s argument that the Court “relie[d] on the flawed determination of the Court of Appeals that the relevant time period lasted only from August 1981 until April 1984,”53 the Court clearly granted certiorari on the narrow question of: “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.”54

48 Id. at 1245.
49 Id. at 1243 (citing Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 95 F.3d 1422, 1433 (9th Cir. 1996)).
52 Id. at 346 (Rehnquist, C.J., dissenting).
53 Id. at 344 (Rehnquist, C.J., dissenting).
54 Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency, 533 U.S. 948, 948-49 (2001) (granting certiorari) (emphasis added). Rehnquist would have included the time of the temporary restraining order and permanent injunction that the district court imposed until 1987 as “[t]he question of how long the moratorium on land development lasted is necessarily subsumed within the question whether the moratorium constituted a taking.” Tahoe-Sierra Pres. Council, 535 U.S. at 343 n.1 (Rehnquist, C.J., dissenting).
C. Tahoe-Sierra's Place in Regulatory Takings Jurisprudence

The Supreme Court has established a divergence in takings jurisprudence between physical invasions and regulations which may effect a taking, and held that it would be "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa." A preliminary finding of ripeness must be found before the Court will address a regulatory takings claim. This section will identify the primary characteristics of that requirement through three representative cases. This section will also describe the major decisions in regulatory takings jurisprudence that led up to the Tahoe-Sierra decision. The importance of "essentially ad hoc, factual inquiries" has been central to regulatory takings jurisprudence in contrast to the "for the most part . . . straightforward application of per se rules" used in physical appropriation takings jurisprudence.

1. Ripeness

a. Final Decision Requirement

In Williamson County Regional Planning Commission v. Hamilton Bank, the Court held that "[b]ecause respondent has not yet obtained a final decision regarding the application of . . . regulations to its property, nor utilized the procedures Tennessee provides for obtaining just compensation, respondent's claim is not ripe." The Court noted that until a claim ripens, analyzing the Penn Central factors would create uncertainty as to the true nature of the claim.

56 See infra Part III.C.1.
59 Id.
61 Id. at 186.
62 Id. at 191 ("Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.").
b. Permit Denial is Required for Ripeness

In *United States v. Riverside Bayview Homes, Inc.*, the Court held that a permit requirement alone “does not itself ‘take’ the property in any sense” by intrinsically allowing for the possibility of a permit being granted, and stated that “[o]nly when a permit is denied and the effect of the denial is to prevent ‘economically viable’ use of the land in question can it be said that a taking has occurred.” The Court held that ripeness resulting from the denial of a permit was a threshold issue to allow a property owner to claim a regulatory taking.

c. Permit Delays May Result in Ripeness

In *Wyatt v. United States*, the United States Court of Appeals for the Federal Circuit addressed the often “complex regulatory permitting schemes” which may cause extensive delays in the permitting process. The court held “that a taking may occur by reason of ‘extraordinary delay in governmental decisionmaking,’” but that it would be a “rare circumstance that [the court] will find a taking based on extraordinary delay without a showing of bad faith.” The combination of *Riverside Bayview Homes* and *Wyatt* allows for ripeness, through either the denial of a permit or through an extraordinary delay in the decision-making process. To satisfy the *Williamson* requirement, that some final decision regarding the application of a regulation prior to the adjudication of a regulatory takings claim, one of these must occur.


a. Establishing Regulatory Takings Jurisprudence

In *Pennsylvania Coal Co. v. Mahon* the Supreme Court held “that while property may be regulated to a certain extent, if regulation goes too far

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64 *Id.* at 127.
65 *Id.*
66 271 F.3d 1090 (Fed. Cir. 2001).
67 *Id.* at 1098.
68 *Id.*
70 260 U.S. 393 (1922).
it will be recognized as a taking."

Justice Holmes recognized the difficulty of creating firm and fast rules for regulations which inherently affect individual property owners in varying degrees. The opinion stated that regulatory takings claims are “a question of degree—and therefore cannot be disposed of by general propositions." Mahon, however, created more questions than it answered.

b. The Heart of Regulatory Takings Jurisprudence

In order for a court to analyze a regulatory takings claim, it must know the proper parcel of property that was affected by the regulation. Property law has typically been described as a “bundle of rights.” Although commentators have criticized the appropriateness of the metaphor, it remains the dominant model. In Penn Central Justice Brennan, writing for the Court, noted that “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 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 . . . .

The Court held in Andrus v. Allard that “where an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking, because the aggregate must be viewed in its entirety.” In recent years, however, the appropriate property denominator for a takings claim has

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71 Id. at 415.
72 Id. at 416.
74 See, e.g., Myrl L. Duncan, Reconceiving the Bundle of Sticks: Land as a Community-Based Resource, 32 ENVTL. L. 773 (2002) (acknowledging the usefulness of the “bundle of rights” as a teaching tool, but arguing it is incompatible with ecology and concluding a community-based resource metaphor better serves the modern understanding of property rights); J.E. Penner, The “Bundle of Rights” Picture of Property, 43 UCLA L. REV. 711 (1996) (arguing the term “bundle of rights” is a dominant method of understanding property rights for academics, practitioners and students but truly represents the absence of a clear theory of property).
77 Id. at 65-66.
been questioned. The Supreme Court has also recently moved to protect property owners from government regulation under the Clean Water Act and to limit what the Court sees as unwarranted federal regulation exercised under the Commerce Clause invading traditional state rights. It is possible that members of the Court supporting these movements would attempt to limit federal power in the takings context as well. In *Tahoe-Sierra*, Justice John Paul Stevens demonstrated how precedent had shown that one stick in the bundle could be destroyed without the action being regarded as a taking. Rehnquist however, joined by Scalia and Thomas in dissent, at the very least disagreed with the majority that the temporal right must be treated as a whole, while Thomas in a separate dissent continued to question the appropriateness of the parcel as a whole rule. The current Court affirmed the parcel as a whole rule by a 6-3 majority and mandated its application for lower courts.

In *Penn Central*, the Supreme Court identified a set of criteria by which regulatory takings claims should be analyzed. First, the Court identified two

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78 Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016-17 n.7 (1992) ("uncertainty regarding the composition of the denominator in our 'deprivation' fraction has produced inconsistent pronouncements by the Court"); Palazzolo v. Rhode Island, 533 U.S. 606, 631 (2001) (noting some cases support the parcel as a whole rule "but [the court] ha[s] at times expressed discomfort with the logic of the[e] rule").

79 See, e.g., Solid Waste Agency of N. Cook County v. United States Army Corps of Engineers, 531 U.S. 159, 159 (2001) (holding the Army Corps' assertion of jurisdiction over intrastate waters used as habitat for migratory birds exceeded the authority granted to the Army Corps by the Clean Water Act).


81 Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 327 (2002) (citing Keystone Butuminous Coal Ass'n v. De Benedictis, 480 U.S. 470 at 498 (1987) (requiring coal pillars be left in place is not a taking); Andrus v. Allard, 444 U.S. 51, 66 (1999) (regulation on commercial transactions in eagle feathers was not a taking when other uses were allowed); Gorieb v. Fox, 274 U.S. 603 (1927) (setback ordinances are not a taking)).


83 *Id.* at 355 (Thomas, J., dissenting) (the parcel as a whole rule was "questionable" and was "rejected in the context of temporal deprivations of property").

84 *Id.* at 331 ("Petitioners' 'conceptual severance' argument is unavailing because it ignores Penn Central's admonition that in regulatory takings cases we must focus on 'the parcel as a whole.'" (quoting Penn Central Transp. Co. v. New York City, 438 U.S. 104, 130-31 (1978))).
factors: "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations" as criteria. The other primary criterion was the "character of the governmental action," because the Court recognized that regulations were capable of affecting property owners in a spectrum of ways, from regulations analogous to a physical appropriation to regulations which merely "[adjust] the benefits and burdens of economic life to promote the common good." The Court went on to explain how it determined those factors were the foundation of regulatory takings decision making.

_Penn Central_ identified the economic impact of a regulation as a relevant criterion of a takings claim. The Court recognized the obvious instances where a _per se_ rule outlawing any negative economic impact would effect a taking, such as taxes. It also noted that to government "if to some extent values incident to property could not be diminished without paying for every such change in the general law," government would be crippled. The Court recognized the pragmatic value of allowing regulations to negatively affect economic interests as was inevitable from any significant amount of governmental regulation. The Court also recognized that governmental regulation can go too far by creating a test that will force the government to pay for regulations "which, in all fairness and justice, should be borne by the public as a whole."

The Court recognized that regulations which interfere with distinct investment-backed expectations should be a criterion based upon the _Mahon_ decision. When a property owner invested in a property with expectations of development, and a regulation was promulgated which frustrated that expectation, the regulation "had nearly the same effect as the complete destruction of rights claimant had reserved."

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85 _Penn Central_, 438 U.S. at 124.
86 _Id._
87 _Id._
88 _Id._
89 _Id._
90 _Id._ (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, at 413 (1992)).
91 _Penn Central_, 438 U.S. at 124.
94 _Penn Central_, 438 U.S. at 127.
The character of the governmental action was the final criterion the Court identified. This criterion essentially requires courts to analogize governmental action to either a physical invasion or a regulation under the state’s police power. The Court must then determine the action’s level of destructive power along a spectrum to determine how the character of the governmental action should weigh in the balancing determination. Governmental action that, although not continuous, essentially invaded the property was analogous to a physical taking. Zoning laws exemplify the opposite end of the spectrum of governmental regulations, which are clearly within the police power of the state.

Thus, the factors which determine whether a taking has occurred are the balance of the economic impact on the property owner, the regulation’s interference with the property owner’s distinct investment-backed expectations, and the character of the governmental action.

c. Alternate Factors Used in Regulatory Takings Cases

The Agins decision upheld California zoning regulations while identifying a two-pronged standard for regulatory takings jurisprudence. The Court weighed private and public interests to determine whether zoning advanced a legitimate state interest, and found that it did. The zoning allowed the construction of five homes on the five acre parcel in question and the Court determined that while development was limited, the property owners’ “reasonable investment expectations” were not unconstitutionally
infringed upon.\textsuperscript{101} The Court used a balancing test, but did not explicitly apply the factors laid out in \textit{Penn Central}.

d. Remedies are Available for Temporary Takings

The Court addressed temporary takings in \textit{First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California}\textsuperscript{102} in the context of compensation. The lower court had determined that a temporary taking had occurred, and the Court limited the scope of its decision to compensation by leaving any questions as to the occurrence of a taking “open for decision on the [directed] remand.”\textsuperscript{103}

In his \textit{Tahoe-Sierra} dissent, Chief Justice Rehnquist cited his majority opinion in \textit{First English} as rejecting “any distinction between temporary and permanent takings when a landowner is deprived of all economically beneficial use of his land,”\textsuperscript{104} noting that “'temporary takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation.'”\textsuperscript{105}

Justice Stevens, writing for the majority in \textit{Tahoe-Sierra}, pointed out that “[i]n \textit{First English}, the Court unambiguously and repeatedly characterized the issue to be decided as a ‘compensation question’ or a ‘remedial question.’”\textsuperscript{106} \textit{First English} did not decide the “logically prior question whether the temporary regulation at issue had in fact constituted a taking” which was the question to be decided in \textit{Tahoe-Sierra}.\textsuperscript{107} Despite the Chief Justice’s argument in his \textit{Tahoe-Sierra} dissent, \textit{First English} clearly was limited to compensation for a temporary taking, and expressly denied any determination of how to identify when a temporary taking has occurred.

\textsuperscript{101} Id. at 262.
\textsuperscript{102} 482 U.S. 304 (1987).
\textsuperscript{103} Id. at 313.
\textsuperscript{105} Id. at 347-48 (quoting \textit{First English}, 482 U.S. at 318).
\textsuperscript{106} Id. at 328 (quoting \textit{First English}, 482 U.S. at 311).
\textsuperscript{107} Id.
e. The Exception that Proves the Rule

The Lucas opinion was the most significant regulatory takings opinion since Penn Central, because instead of finding a taking based upon a balancing of private and public interests, it created a *per se* rule "that when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good . . . he has suffered a taking."\(^{108}\) The Court based the bright line exception for denials of all economically beneficial use on the second prong of Agins.\(^{109}\) This categorical compensation requirement was the blueprint for the petition in Tahoe-Sierra asking the Court to create another categorical exception for takings which temporarily denied all economically beneficial use.\(^{110}\)

The Court in Tahoe-Sierra rejected the proposed new categorical rule in the mold of Lucas and reaffirmed the Penn Central balancing test as the crux of regulatory takings jurisprudence.\(^{111}\) The Court worried about the effect a categorical rule for temporary permanent deprivations of economic use would have on traditional governmental actions.\(^{112}\) Such a rule would conflict with the basic admonition by Justice Holmes that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."\(^{113}\) The fundamental question was how the Court should determine if a regulation falls within the police powers of the state, or whether the property was imposed upon so greatly that it was "taken" for a public use. The Court has always focused upon fairness and justice in takings jurisprudence in an


\(^{109}\) *Id.* at 1015-16; see Agins v. City of Tiburon, 447 U.S. 255, 261 (1980) ("The application of a general zoning law to particular property effects a taking if the ordinance . . . denies an owner economically viable use of his land."); *see also* Penn Central Transp. Co. v. New York City, 438 U.S. 104, 138 n.36 (1978).


\(^{111}\) *Id.* at 342.

\(^{112}\) *Id.* at 334-42 (stating that the categorical rule would affect "'normal delays in obtaining building permits, changes in zoning ordinances, variances,' . . . orders temporarily prohibiting access to crime scenes, businesses that violate health codes, fire-damaged buildings, or other areas that we cannot now foresee" (quoting First English v. County of Los Angeles, 482 U.S. 304, 321 (1987))).

\(^{113}\) Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).
attempt to insure that no one person would be forced to bear “public burdens which, in all fairness and justice, should be borne by the public as a whole.”\(^{114}\)

f. Setting the Stage for Tahoe-Sierra

_Palazzolo v. Rhode Island\(^{115}\) was the Supreme Court’s final opinion prior to Tahoe-Sierra that addressed regulatory takings. The Court held that a property owner, who acquired the regulated property after the regulation was imposed, retained standing to bring a takings claim based on the pre-purchase regulations.\(^{116}\)

Justice Kennedy, writing for the Court, noted that when a regulation denied an owner all economically beneficial use of his land, _Lucas_’ categorical rule requiring compensation applied, otherwise the multi-factored balancing test from _Penn Central_ determined if a taking had occurred.\(^{117}\) The Court noted that the determination of whether a taking had occurred should be conducted bearing in mind “the purpose of the Takings Clause, which is to prevent the 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.’”\(^{118}\)

The opinion found that the ripeness requirement had been met by the denial of the property owner’s permit, and affirmed the ripeness principle that “[w]here the state agency charged with enforcing a challenged land-use regulation entertains an application from an owner [and its denial of the application] makes clear the extent of development permitted” the issue was ripe, and no further futile applications were needed.\(^{119}\)

Justice Kennedy briefly addressed the parcel as a whole doctrine, but the issue of the proper denominator was not raised in the state courts, so the Court refused to consider it.\(^{120}\) The Court did note that the issue involved a “difficult, persisting question of what is the proper denominator in the

\(^{114}\) _Armstrong v. United States_, 364 U.S. 40, 49 (1960).

\(^{115}\) 533 U.S. 606 (2001).

\(^{116}\) _Id._ at 616.

\(^{117}\) _Id._ at 617.

\(^{118}\) _Id._ at 617-18 (quoting _Armstrong_, 364 U.S. at 49).

\(^{119}\) _Id._ at 625-26.

\(^{120}\) _Id._ at 630-31.
takings fraction,” thereby setting the stage for the Court to address the rule in *Tahoe-Sierra*.

IV. *TAHOE-SIERRA’S IMPORTANCE FOR ENVIRONMENTAL AND LAND USE POLICY*

The Supreme Court in *Tahoe-Sierra* gave guidance to lower courts which will greatly benefit environmental and land use planning, but left the lower courts to continue to apply the Court’s unclear regulatory takings jurisprudence. The primary effect *Tahoe-Sierra* has had on lower courts is the affirmation of the parcel as a whole doctrine. This section will show how necessary environmental regulations and traditional land-use devices were protected by the *Tahoe-Sierra* opinion through lower courts interpreting the decision. Interestingly, had the dissenters in *Tahoe-Sierra* prevailed, and a new categorical rule allowing the recovery of damages based upon a temporary deprivation of all economically beneficial use been created. Otherwise, many environmental regulations may have created a taking which the government would be forced to pay for, which could have caused the end of environmental regulation as it now exists. The extent to which government regulations would create a taking under the proposed categorical rule would potentially violate Justice Holmes’ admonition that “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”

Environmental and land use planners won a victory in *Tahoe-Sierra*, but subsequent lower court decisions make it clear that the decision did not definitively address the convoluted nature of regulatory takings jurisprudence.

A. *The Importance of Tahoe-Sierra’s Affirmation of the Parcel as a Whole Rule as Applied to Wetlands Regulation*

1. Facts

*Walcek v. United States* involves property owners’ regulatory takings challenge to the Army Corps of Engineers’ (“Corps”) denial of a permit under

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122 Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).
123 303 F.3d 1349 (Fed. Cir. 2002).
the Clean Water Act to develop the federal wetlands located on their property. The decision demonstrates how a differently decided Tahoe-Sierra could have crippled wetland regulations. In 1971, the Walceks purchased a 14.5 acre parcel, of which 13.2 acres were wetlands, and 11 acres on which development was prohibited. The wetlands located on the property became subject to the 1972 Clean Water Act permit requirements after the purchase of the parcel. In 1984, in an attempt to sell the parcel to a developer, the Corps, at Walcek’s request, delineated the exact contours of the 13.2 acres of regulated wetlands. By that time, the development deal had fallen through. Consequently, in 1987 the Walceks began to develop the property themselves for residential purposes by filling the regulated wetlands. Eventually, the Walceks complied with a cease and desist order from the Corps and filed for the necessary permits in 1988, which were denied.

After the Walceks filed a complaint in the Court of Federal Claims in 1996 challenging the Corps permit denial, the Corps approved a permit for a 28 lot development which allowed filling 2.2 acres of wetlands but was contingent upon restoring or creating 4.4 acres of wetlands. The Walceks challenged the permit as a taking, claiming the relevant parcel was the 13.2 acres of regulated wetlands. The court held that the relevant parcel was 14.5 acres and there was no categorical taking, as 2.2 acres were allowed to be developed. The court found that there was no regulatory taking either under the Penn Central factors because the plaintiffs were able to realize much of their reasonable expectations in the property. The Walceks appealed.

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124 Id. at 1349.
125 Id. at 1351-54.
126 Id. at 1351.
127 Id. at 1352.
128 Id.
129 Walcek, 303 F.3d at 1352.
130 Id. at 1352-53.
131 Id. at 1353.
132 Id.
133 Id. at 1353-54.
134 Id. at 1354.
2. Parcel as a Whole Determination

The Walceks challenged the trial court’s *Penn Central* balance for its determination that the 14.5 acre parcel was the relevant parcel for analysis.\textsuperscript{135} Citing *Tahoe-Sierra*, the Court of Appeals held the parcel as a whole must be the parcel addressed in a regulatory takings claim.\textsuperscript{136} The court noted “the Court reaffirmed that regulatory takings analysis properly analyzes the impact of the challenged regulation on the land owner’s entire parcel.”\textsuperscript{137} The court approvingly cited from the *Tahoe-Sierra* opinion, and recognized that “[w]ith property so divided, every delay would become a total ban; the moratorium and the normal permit process alike would constitute categorical takings.”\textsuperscript{138} The court of appeals affirmed the trial court’s finding that the relevant parcel was the 14.5 acre parcel as a whole.\textsuperscript{139}

3. The Parcel as a Whole Rule is Absolutely Vital to Continued Wetlands Regulation

The significance of a strong parcel as a whole doctrine is undeniable in the face of wetlands regulation. Without the parcel as a whole rule, landowners simply would be able to divide their holdings into separate parcels, some constituting the exact boundaries of the regulated wetlands and others the unregulated property. Each newly created parcel either would not be subject to regulation, or would be completely regulated and a taking would result, even if the regulated wetlands constituted a low percentage of the original contiguous parcel. Allowing the division of property into smaller divisions would create a situation where every wetland regulation would be a taking. During the 1980s, the United States had a surface area of 2,313,617,280 acres, 274,426,114 (11.9%) of which was wetlands.\textsuperscript{140} That represents a thirty percent decline since the 1780s.\textsuperscript{141} If the parcel as a whole doctrine were abandoned or modified to regard the relevant parcel as the

\textsuperscript{135} *Walcek*, 303 F.3d at 1354.
\textsuperscript{136} *Id.* at 1356.
\textsuperscript{137} *Id.*
\textsuperscript{138} *Id.*
\textsuperscript{139} *Id.* at 1357.
\textsuperscript{141} *Id.*
regulated parcel, the cost of wetland and other property regulations would be prohibitive, and accordingly the decline of wetlands would accelerate.\textsuperscript{142} Even if the value of wetlands were set at a mere one hundred dollars per acre, regulating wetlands would cost the United States over twenty-seven billion dollars in takings claims.\textsuperscript{143} Finding funding for such high costs would be nearly impossible both financially and politically. \textit{Tahoe-Sierra's} clear upholding of the parcel as a whole doctrine has undeniable importance for a continuing future of wetlands regulation, and a different outcome in \textit{Tahoe-Sierra} would have collapsed the federal wetlands regulatory scheme as it now exists.

B. \textit{Following the Leader I: Tahoe-Sierra's Guidance with the Parcel as a Whole Doctrine and Penn Central Analysis}

In \textit{Machipongo Land and Coal Co. v. Commonwealth}\textsuperscript{144} the Pennsylvania Supreme Court addressed a takings claim based on environmental protections from the mining industry. The federal government mandated that states designate certain areas as unfit for mining for the purpose of protecting the environment.\textsuperscript{145}

1. Parcel as a Whole is the Rule: What Exactly does it Mean?

\textit{Machipongo} initially analyzed the proper denominator for the takings claim, and while recognizing that \textit{Tahoe-Sierra} had reaffirmed the parcel as a whole doctrine, the opinion remanded the case for a determination of the appropriate parcel based upon a series of factors.\textsuperscript{146} The court noted that

\begin{enumerate}
\item \textsuperscript{142} Tahoe Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 324 (holding that treating all land-use regulations "as per se takings would transform government regulation into a luxury few governments could afford").
\item \textsuperscript{143} DAHL, supra note 140 (explaining that there were 274,426,114 acres of wetlands in the United States as of the 1980s).
\item \textsuperscript{144} 799 A.2d 751 (Pa. 2002).
\item \textsuperscript{145} See 30 U.S.C. § 1202(d) (2000).
\item \textsuperscript{146} Machipongo Land & Coal Co. v. Dep't of Envtl. Prot., 799 A.2d 751, 768-69 (Pa. 2002).
\end{enumerate}

The factors used in determining the relevant parcel would include, but would not be limited to: unity and contiguity of ownership, the dates of acquisition, the extent to which the proposed parcel has been treated as a single unit, the extent to which the regulated holding benefits the unregulated holdings; the timing of transfers, if any, in light of the developing regulatory environment; the owner's investment backed-expectations; and, the landowner's plans for development.
TAKE IT OR LEAVE IT

claimants had previously attempted to divide a parcel horizontally, vertically, and temporally.\textsuperscript{147} Although the court was able to cite to \textit{Tahoe-Sierra} for the temporal severance and \textit{Penn Central} for vertical severance, for horizontal severance the court resorted to a lesser authority by citing to the Second Circuit.\textsuperscript{148} The term “parcel as a whole” is not self-defining and \textit{Machipongo} reflected how the Supreme Court, although clearly placing the parcel as a whole as the appropriate denominator,\textsuperscript{149} had yet to clearly establish for lower courts what geographic boundaries and legal rights created a parcel as a whole. Although lower courts are clearly capable of creating tests to determine the appropriate horizontal parcel, the extensive federal regulation which results in regulatory takings claims and the Supreme Court’s duty as the final arbiter of the Constitution requires the Supreme Court to establish a national standard for clarifying the appropriate legal dimensions of a parcel.

2. The \textit{Penn Central} Factors Must be Applied

The Pennsylvania Supreme Court opinion reflected the Supreme Court’s attempt to install \textit{Penn Central} as the primary regulatory takings test, subject only to the \textit{Lucas} exception. The court conceptualized regulatory takings jurisprudence as initially a question of whether the \textit{Lucas} exception applies, while \textit{Penn Central} “becomes applicable if the regulation does not rise to the level of a \textit{Lucas} taking.”\textsuperscript{150} The court held the regulation applied to \textit{Machipongo} failed to meet the \textit{Lucas} exception, and that the lower court failed to fully analyze the \textit{Penn Central} factors.\textsuperscript{151} The importance of \textit{Tahoe-Sierra} was reflected when the Pennsylvania Supreme Court remanded for a \textit{Penn Central} analysis without addressing the multitude of factors that has become the trademark of regulatory takings jurisprudence. Justice Stevens’ opinion in \textit{Tahoe-Sierra} establishing \textit{Penn Central} as the sole test for regulatory takings claims only achieved its’ goals if lower courts acknowledge the Supreme Court’s direction and follow it. Although the \textit{Machipongo} court did reflect the Supreme Court’s move to establish \textit{Penn Central} as the sole test

\begin{thebibliography}{99}
\bibitem{Id.} (citing Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1180 (Fed. Cir. 1994)).
\bibitem{Id.} at 766.
\bibitem{Id.} at 766.
\bibitem{Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency, 535 U.S. 302, 327 (2002)} (“in [regulatory takings] cases we must focus on ‘the parcel as a whole’”).
\bibitem{Machipongo, 799 A.2d at 765.} at 770-71.
\end{thebibliography}
for a regulatory takings claims, other lower court cases established that Tahoe-Sierra’s direction was not as clear as Machipongo would make it seem.

C. Following the Leader II: Was Tahoe-Sierra’s Guidance Clear?

1. Facts

Seiber v. United States\textsuperscript{152} was a permanent takings challenge of Oregon Department of Forestry regulations designed to protect spotted owl habitat. The plight of the spotted owl and the movement supporting the preservation of spotted owl habitat has been well documented.\textsuperscript{153} Forty acres of the Seibers’ 185 to 190 acres of commercial timber property, located within the 200 acre contiguous parcel the Seibers owned, was deemed spotted owl habitat and an incidental take permit was required to log the forty acres.\textsuperscript{154} Subsequent to the filing of the suit, the permit requirement was dropped for the forty acres, and plaintiffs asserted a temporary takings claim rather than a permanent takings claim.\textsuperscript{155}

Initially the Seiber court determined that the takings claim was not ripe under Boise Cascade Corp. v. United States\textsuperscript{156} and Williamson,\textsuperscript{157} as no final decision had been reached by the Fish and Wildlife Service.\textsuperscript{158} Despite that determination the court decided to address the merits of the takings claim.

\footnotesize{\textsuperscript{152} 53 Fed. Cl. 570 (2002).
\textsuperscript{154} Seiber, 53 Fed. Cl. at 572 n.1. The incidental take permit requirements are as follows: Under the Endangered Species Act, the “take” of an endangered species is prohibited unless authorized by regulation or permit. 16 U.S.C. § 1538(a)(1)(B). “Take” is defined under the Endangered Species Act as “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). “Harm” in the definition of ‘take’ means any act which actually kills or injures protected wildlife and “may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” 50 C.F.R. § 17.3.
\textsuperscript{155} Seiber, 53 Fed. Cl. at 572 n.1.
\textsuperscript{156} Id. at 573-74.
\textsuperscript{157} 296 F.3d 1339 (Fed. Cir. 2002).
\textsuperscript{158} 473 U.S. 172 (1985); see supra Part III C.1.a. and accompanying notes.
\textsuperscript{158} Seiber, 53 Fed. Cl. at 575.}
The court held the plaintiffs failed to meet either the physical invasion takings test,\textsuperscript{159} or the \textit{Lucas} exception.\textsuperscript{160}

2. Settling on the Relevant Factors for Regulatory Takings Analysis

The \textit{Seiber} court then began to analyze the temporary takings claim under a myriad of rules. The court identified relevant factors including the two-prong test from \textit{Agins}, the three factors from \textit{Penn Central}, and the length of delay in granting a permit from the ripeness decision \textit{Wyatt}.\textsuperscript{161} The court noted that the Supreme Court had been unclear as to the factors to be weighed in a balancing test, but acknowledged that \textit{Tahoe-Sierra} had determined “that regardless of the relevant factors, the parcel must be focused on as a whole.”\textsuperscript{162} After the \textit{Seiber} court resolved a balancing test—consisting of the factors it deemed relevant, as discussed above—in favor of the government regulation,\textsuperscript{163} it conducted another balancing test based solely on the \textit{Penn Central} factors.\textsuperscript{164}

The \textit{Seiber} court dealt rapidly with the \textit{Penn Central} analysis to find against the plaintiffs.\textsuperscript{165} The fact that the permit requirement was lifted ensured that the plaintiffs would be able to realize their investment-backed expectations, and although they suffered some adverse economic impact, after the permit was denied they were able to log and profit from the rest of the parcel.\textsuperscript{166} The court determined the permit requirement did not single the plaintiffs out as several properties have come within the plan's restrictions.\textsuperscript{167} The character of the government’s actions weighed in favor of the government.

\textsuperscript{159} Id. at 576 ("Plaintiffs, therefore, have failed to state a permanent physical taking claim.").

\textsuperscript{160} Id. at 577 ("Thus, because the 40 acres alleged to be taken were not 100\% of the timber interest, and therefore, plaintiffs’ land did not lose \textit{all} economically viable or beneficial use of that interest, plaintiffs’ \textit{Lucas} claim fails.").

\textsuperscript{161} Id. at 578.

\textsuperscript{162} Id. at 577 ("What [the balancing test] entails has not been delineated by the Supreme Court, but the Court has stated that regardless of the relevant factors, the parcel must be focused on as a whole.").

\textsuperscript{163} Id. at 579 ("This Court finds that the permit process in this case did not constitute a temporary taking of plaintiffs’ property.").

\textsuperscript{164} \textit{Seiber}, 53 Fed. Cl. at 579.

\textsuperscript{165} Id. at 579-80.

\textsuperscript{166} Id. at 579.

\textsuperscript{167} Id. at 580.
The *Seiber* decision clearly demonstrated the difficulties inherent in regulatory takings jurisprudence. The court recognized that ripeness issues in takings claims seem to be capable of being dealt with within the context of a balancing test. The lack of clarity inherent in regulatory takings was demonstrated by the court’s analysis of the temporary takings claim under a veritable smorgasbord of factors only five months after the Supreme Court in *Tahoe-Sierra* held that “the interest in ‘fairness and justice’ will be best served by relying on the familiar *Penn Central* approach when deciding” regulatory takings claims.

3. Expressly Establishing the *Penn Central* Factors for Analysis of Regulatory Takings Claims

The *Seiber* court’s initial analysis under the six factors could have been adequately dealt with by *Penn Central’s* three factors and still have addressed the concerns reflected in the six-factor analysis. The court analyzed the plaintiff’s claims that a taking had occurred when timber prices declined during the logging restriction under *Tahoe-Sierra* and *Agins*. The court held that the temporary nature of the restriction avoid a taking based on *Tahoe-Sierra*, because the fluctuation in timber value is something incidental to ownership that did not constitute a taking under *Agins*.

The concerns reflected in the six-factor analysis are directly in accordance with the concerns reflected in the *Penn Central* factor of economic impact on the plaintiff. The *Seiber* court held that because a permit

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168 Id. at 578 (using a ripeness case as a factor in the balancing test despite finding that the plaintiff’s claim was unripe).
169 Id. (explaining six factors in alleged regulatory takings: (1)“substantially advanc[ing] a legitimate government interest,” (2) “den[y]ing an owner economically viable use of his land,” (3) “the economic impact of the regulation on the property owners,” (4) “the extent to which the regulation has interfered with the property owners’ investment-backed expectations,” (5) “the character of the government action,” 6) “the length of delay in the regulatory process”).
171 *Seiber*, 53 Fed. Cl. at 578.
172 Id. (“A temporary restriction that merely causes a diminution in value does not constitute a taking of the ‘parcel as a whole.’”).
173 Id. (“Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are ‘incidents of ownership. They cannot be considered as a ‘taking’ in the constitutional sense.’” (quoting *Agins v. City of Tiburon*, 447 U.S. 225, 263 n.9 (1980))).
was no longer required, logging could provide the Seibers with economic gains and because the plaintiffs had been able to log and profit from portions of their property during the regulation, the economic impact on them was not especially great. The economic concerns reflected by the court’s analysis under the six-factor analysis were dealt with adequately by the court under the *Penn Central* analysis. The logical conclusion would be that one or more of the factors was unnecessary for the resolution of the takings claim. The court’s six-factor analysis addressed the plaintiffs’ arguments that the regulation was improper governmental action. The first allegation was that the government regulation violated the *Agins* requirement that regulations substantially advance a legitimate governmental interest. The court noted the plaintiffs’ argument that the preservation interest was not “sufficient to cause’ the government to designate private lands as critical habitat” which was not what *Agins* required. The second allegation by the plaintiffs challenged that the delay in denying or granting the permit amounted to a taking. The court held that the ripeness doctrine required a taking by delay to be the result of an “extraordinary delay” or bad faith on the part of the government. Without such a showing, the plaintiffs’ takings claim based on delay failed.

The six-factor analysis demonstrated that the governmental action was not arbitrary or done in a wrongful manner. Those concerns are addressed by the *Penn Central* factor requiring an analysis of the character of the governmental action. The *Seiber* court analyzed the plaintiffs’ claim that the regulation violated *Penn Central* by singling them out to bear a public burden, and determined that the Endangered Species Act regulations did not single the plaintiffs out. In a claim based solely upon *Penn Central*, the character of the governmental action factor must incorporate allegations that the government acted in bad faith, or acted in a manner that did not advance any legitimate state interest.

*Seiber* demonstrated both the importance of *Tahoe-Sierra*’s affirmation of the parcel as a whole doctrine and the failure—despite Justice Stevens’
approval of *Penn Central*—to clearly direct lower courts to analyze regulatory takings claims under *Penn Central*.

D. Following the Leader III: Tahoe-Sierra's Guidance was Clear After All

1. Facts

The Court of Federal Claims decision in *Bass Enterprises Production Co. v. United States* demonstrates the future direction of regulatory takings claims by application of Justice Stevens' *Tahoe-Sierra* dicta, which should be replicated throughout lower courts with the proper guidance from the Supreme Court. Bass Enterprises applied for permits to drill for oil and gas on land designated for nuclear waste disposal and experienced significant delays due to the sensitive nature of ensuring safe nuclear waste disposal.

Prior to the *Tahoe-Sierra* decision, the court found that the permit granting delay for Bass Enterprises' gas and oil leases denied it all economically beneficial use of its leases based on a per se temporary regulatory takings test formulated from *Lucas*. Following the *Tahoe-Sierra* decision, the court granted the government's motion for reconsideration to determine how *Tahoe-Sierra* affected the court's prior decision. The court recognized *Tahoe-Sierra* 's obvious application to the facts in *Bass Enterprises* and held the categorical rule it had imposed was improper and that a balancing of the *Penn Central* factors should govern *Bass Enterprises*.

2. *Penn Central*: Past and the Future of Regulatory Takings

The importance of the *Bass Enterprises* decision was not that it applied *Tahoe-Sierra* correctly and recognized the repudiation of a per se rule for temporary takings, but rather that it applied only the three *Penn Central* factors in its subsequent analysis to determine if a taking had occurred. Although Justice Stevens wrote in dicta that *Penn Central* was the appropriate test for regulatory takings claims, it was not explicit enough direction

179 54 Fed. Cl. 400 (2002).
180 *Id.* at 401.
181 *Id.* at 401-02.
182 *Id.* at 402.
183 *Id.*
for some courts to disregard the myriad of other factors utilized throughout regulatory takings cases. Bass Enterprises recognized the recent trend of the Supreme Court, with Justice Stevens’ explicit recommendation in Tahoe-Sierra, to address the balancing act of private versus public interests exclusively in the terms of the Penn Central factors.

a. Character of the Governmental Action

The Bass Enterprises application of the Penn Central factors demonstrated how those three factors were fully capable of addressing the concerns reflected in other regulatory takings cases. Under the character of governmental action, the court weighed the public and private interests while acknowledging that private property owners may lose “some potential for the use or economic exploitation of private property” to accommodate the public welfare. The court noted the “serious public health and welfare concern” related to nuclear waste disposal and found it reasonable that the government delay drilling until the potential dangers of drilling could be determined. The Bass Enterprises opinion incorporated the concerns of Agins first prong, by ensuring that the governmental action was not arbitrary and substantially advanced a legitimate state interest by analyzing the public interests involved, and came to a determination in line with an Agins analysis.

b. Distinct Investment-Backed Expectations

The plaintiff’s investment-backed expectations supported a finding of a taking because the sole purpose of entering into the lease was to remove the oil and gas for profit. Although the federal government retained ownership of the surface rights, the court held the plaintiff’s expectations of drilling were reasonable under the regulations and lease provisions governing mining at that time. Under this factor, the court recognized the concern that Bass

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184 See supra Part V.C.
187 Id.
188 Id. at 403-04.
189 Id. at 403.
Enterprises had individually been deprived of its investment-backed expectations and that weighed in favor of a taking.

c. Economic Impact

The final *Penn Central* factor addressed the fundamental concern of takings claims by determining how badly the plaintiff was economically injured by the government action. *Agins* second prong, concerning the denial of all economically viable use of property, was incorporated into this factor.\(^{190}\) The court determined the economic impact of the forty-five month delay to be $1,137,808.\(^{191}\) The court recognized the concern reflected in *Mahon* that “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”\(^{192}\) The court determined the final economic impact of the permit delay by creating a percentage with the economic impact on the plaintiff, $1,137,808, as the numerator, and then divided by the value of the property without the encumbrance, $22,000,000, making the plaintiff’s economic impact roughly five percent of the property value.\(^{193}\) The court’s analysis ensures that the government action did not dramatically injure an individual property owner while realistically allowing for government actions to negatively effect that owner economically as a side effect of government regulation. The economic concern reflected in *Agins*’ second prong and the categorical rule in *Lucas* were adequately addressed by the *Bass Enterprises* court without requiring it to determine what amounts to a denial of all economically viable use.


*Bass Enterprises* analyzed the regulatory takings claim in a simple, direct and thoughtful manner. In doing so, the opinion was a model for other courts when dealing with regulatory takings claims. The Supreme Court’s previous decisions failed to explicitly direct lower courts to use *Penn Central*

\(^{190}\) *Id.* (explaining that economic impact “is more commonly referred to as a denial of ‘economically viable use of land.’” (quoting *Agins v. City of Tiburon*, 447 U.S. 225, 260 (1980)).

\(^{191}\) *Id.* at 404.

\(^{192}\) *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

\(^{193}\) *Bass Enterprises*, 54 Fed. Cl. at 404.
as the sole means of analyzing regulatory takings claims. Yet, *Bass Enterprises* demonstrated that, with adequate direction, potential parties and lower courts will have a more structured and explicitly defined balancing test to be applied in every regulatory takings situation. This approach would create certainty for the parties on what information the courts would address and how to properly argue their claims, and would create uniformity in lower courts' applications of the Fifth Amendment.

E. **Following the Leader IV: Justice Brennan on Track in Penn Central**

*Rose Acres Farm, Inc. v. United States*\(^{194}\) explicitly applied *Penn Central*’s factors in its analysis of federal regulations on chicken farms suspected of selling eggs containing salmonella. The case also addressed a temporary takings claim when plaintiff's hen houses were required to remain unused while being cleaned prior to inspection.\(^{195}\) *Tahoe-Sierra*’s recent affirmation of *Penn Central* as the appropriate test surely weighed in the decision to apply the *Penn Central* test. *Rose Acres* demonstrated how vital government regulations, such as health protections, are protected under *Tahoe-Sierra*. Yet, it is also evident from the *Rose Acres* opinion that takings jurisprudence is fully capable of compensating for legitimate claims where the government has regulated property to the point it should be considered taken.

1. **Facts**

Rose Acres produced large quantities of eggs for markets in the Midwest.\(^{196}\) Its system of operation was vertically integrated, highly structured, and any disruption in the process affected the entire facility.\(^{197}\) Salmonella regulations were imposed by the Secretary of Agriculture.\(^{198}\) The regulations limited where and for what purposes facilities suspected of contamination could sell eggs, and also imposed quarantine, testing, cleaning, and possible retesting requirements.\(^{199}\) After salmonella outbreaks in the early

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\(^{195}\) *Id.* at 660.
\(^{196}\) *Id.* at 646.
\(^{197}\) *Id.* at 647.
\(^{198}\) *Id.* at 648.
\(^{199}\) *Id.* at 648-50.
1990s were traced back to Rose Acres, it was subjected to the regulations. The plaintiff attempted to meet the regulatory requirements by testing chickens; most failed to test positive in two consecutive organ tests, resulting in a total of 6,741 hens being killed for testing, of which only 147 tested positive. The cleaning of the hen houses required wet cleaning, which was more expensive than the dry cleaning typically done, and resulted in some electrical damage that partially burned a hen house. The regulations were imposed on the plaintiff for over twenty-one months.

As a result of the regulations, Rose Acres suffered significant losses. The company was forced to sell its eggs in the less profitable, but safer for human consumption, breaker egg market, whereas prior to the regulations it sold ninety-seven percent of its eggs in the more profitable table egg market. The forced sale of eggs in the breaker market resulted in a 13.5 cent loss in profit per dozen eggs for the 57.5 million dozens diverted to the breaker egg market. The plaintiff also built a six million dollar facility to process eggs for the breaker egg market and to minimize its losses in the breaker market.

Rose Acres asserted that the Secretary of Agriculture's actions constituted a regulatory taking of its healthy eggs and hen houses, and a categorical taking of its hens. The court recognized that the Supreme Court "identified significant factors for consideration" in Penn Central and referred to the Penn Central factors as "the best method for determining plaintiff's egg-related claim." The court separated its analysis of the regulatory takings claims into discussions regarding the eggs and hen houses.

2. *Penn Central* Contemplated all the Appropriate Considerations

a. Economic Impact

The court addressed each *Penn Central* factor explicitly in its analysis of the regulatory taking of Rose Acres' eggs. The economic impact of the

200 Rose Acres, 55 Fed. Cl. at 650-51.
201 Id. at 651.
202 Id.
203 Id.
204 Id. at 651-52.
205 Id. at 652.
206 Rose Acres, 55 Fed. Cl. at 652.
207 Id. at 653.
208 Id. at 657.
regulation was designed to allow for government regulation while placing limits on the government when regulations essentially remove all value from property through those regulations. The court recognized this balance when it said the "[p]laintiff must show a serious financial loss from the regulatory imposition."209 The government’s expert witness stated that the breaker egg market was less profitable than the table egg market, and estimated the loss from the diversion into the breaker market at $9.2 million.210 The regulations substantially impacted the plaintiff’s profits, accordingly the economic impact of the regulation weighed in favor of finding a taking.211

b. Distinct Investment-Backed Expectations

The court next addressed Rose Acres’ investment-backed expectations. This factor holds plaintiffs accountable for any regulations they should have reasonably expected when they began business. Rose Acres contended they expected to be able to sell healthy eggs in the table egg market;212 the government responded by arguing that the plaintiff knew the poultry industry was heavily regulated and that Rose Acres knew it could be subjected to more stringent regulations in the future.213 The court summarized the history of egg regulations and found that although the industry was heavily regulated prior to 1990, the regulations did not address salmonella in eggs.214 The court held that the plaintiff reasonably expected to sell healthy eggs in the table egg market, and that the history of government regulation deciding a grading system provided a solution to the problem of salmonella in eggs made any change in the regulatory scheme unforeseeable.215 Thus, the investment-backed expectations also weighed in favor of the plaintiff.216

c. Character of the Governmental Action

Finally, the court addressed the character of the government action to identify the policy of the regulation and to determine if exercising that policy

209 Id. (citing Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1177 (1994)).
210 Id. at 658.
211 See id.
212 Rose Acres, 55 Fed. Cl. at 658-59.
213 Id. at 659.
214 Id.
215 Id.
216 Id.
could be characterized as exercising a legitimate police power of the state, or if the policy was simply singling out certain individuals without sufficient justification.\footnote{Id.} The court determined that the regulations were not based on sound science and that the science failed to link the regulations to the strong public policy concern that food be safe for consumption.\footnote{Id.} The regulation also appeared to single out certain egg producers. The court found over one thousand large flocks nationwide contained salmonella, of which thirty-eight were restricted and 1.3 billion eggs diverted to the breaker market.\footnote{Id.} Of the eggs diverted to the breaker market, over half were from the plaintiff.\footnote{Id.}

Based upon these facts, the court determined that the government action was not sufficiently linked to a legitimate public policy goal and thus, the third factor weighed in favor of the plaintiff.\footnote{Id.} All three factors acknowledge that the plaintiff was hit especially hard by these regulations and the court found that the regulation amounted to a taking of the plaintiff’s healthy eggs, for which just compensation was due in the amount of $7,376,050.77 after offsetting the revenue received in the breaker market.\footnote{Id.}

The plaintiff also claimed the hen houses were taken while being quarantined and cleaned.\footnote{Id.} The houses were eventually reopened so the court addressed the claim as a temporary takings claim under \textit{Tahoe-Sierra}.\footnote{Id.} The court had dismissed the regulations as being scientifically “misguided,” but recognized that waiting in general does not “constitute a valid claim for the taking of plaintiff’s houses.”\footnote{Id.} Even though the court acknowledged the basis for the delays was unfounded, the delay itself was not compensable under \textit{Tahoe-Sierra} because of the enormous impact that classifying delays as takings would have on government regulations of all types.\footnote{Id.} Decisions of this type demonstrate the fundamental premise that government must work, and without the ability to cause delays, government would be crippled.

\begin{thebibliography}{1}
\bibitem{1} Id.
\bibitem{2} Rose Acres, 55 Fed. Cl. at 660.
\bibitem{3} Id.
\bibitem{4} Id.
\bibitem{5} Id.
\bibitem{6} Id. at 663-64.
\bibitem{7} Id. at 660.
\bibitem{8} Rose Acres, 55 Fed. Cl. at 660.
\bibitem{9} Id. at 661.
\bibitem{10} Id.
\end{thebibliography}
3. *Penn Central*: Better Than Per Se Rules

*Rose Acres* demonstrated a proper analysis of *Penn Central* and the importance of *Tahoe-Sierra* in affirming temporary delays as an unfortunate but necessary part of government regulation. Government regulations based on inaccurate premises, inadequate science, or poor implementing schemes, like the ones at issue in *Rose Acres*, are properly addressed in the structure of the *Penn Central* balancing test. Concerns reflected in the governmental regulation’s goal of public health and in the Fifth Amendment’s goal of protecting property owners can be weighed, and a determination made, as to which goal should prevail in any one particular circumstance to reach a just result.

F. **Following the Leader V: More Steps Needed After Tahoe-Sierra**

1. Facts

*Currier Builders, Inc. v. Town of York*\(^{227}\) addressed a local town decision to impose regulations to limit its growth, and demonstrated how *Tahoe-Sierra*’s refusal to temporally divide property interests has enabled local land use policies to be successfully implemented. York, a town of approximately 13,000, experienced significant growth in the 1990s.\(^{228}\) To manage this growth, York implemented a permit program to limit the number of residential building permits approved to seven per month.\(^{229}\) The program also limited permit approval to two per month within any single subdivision and only one permit application for any person outside a subdivision.\(^{230}\) York limited the permit ordinance terms to a three-year existence unless an extension was approved by a vote at a special or general referendum election.\(^{231}\) The court determined the approximate wait for a non-subdivision permit was almost two years, while a permit for a multi-family building was six months to a year, but no construction could begin before a party obtained permit approval.\(^{232}\) Both parties moved for summary judgment.

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\(^{228}\) *Id.* at *2*.
\(^{229}\) *Id.*
\(^{230}\) *Id.*
\(^{231}\) *Id.* at *3*.
\(^{232}\) *Id.* at *4*.
2. *Tahoe-Sierra: Deemed Many Regulations not Takings*

The *Currier* court held that a facial takings claim fails due to *Tahoe-Sierra*.\(^{233}\) The court compared the thirty-two month moratorium in *Tahoe-Sierra* which was held to not be a taking, and concluded that the ordinance in York was much less restrictive of property owners than the moratorium in *Tahoe-Sierra*.\(^{234}\) The ordinance allowed eighty-four permits to be issued each year, which was much more development than the complete ban on development in *Tahoe-Sierra*.\(^{235}\) Additionally, the ordinance expired in three years if not renewed.\(^{236}\) In comparing the restrictions placed on property owners in *Tahoe-Sierra* and those in *Currier*, the court determined “the more restrictive moratorium in *Tahoe-Sierra* compels the conclusion that the defendant is entitled to summary judgment on the facial” regulatory takings claim.\(^{237}\)

*Currier* Builders’ motion for summary judgment against the ordinance as applied to the builder failed. The court appropriately held that the “*Penn Central* analysis must be applied” in regulatory challenges.\(^{238}\) Due to the nature of summary judgment, the court noted that the economic impact on *Currier* Builders, and the ordinances interference with *Currier* Builders’ distinct investment-backed expectations, were ardently disputed by the parties with evidence supporting both sides, and that “[t]he court may not reach a conclusion under *Penn Central* by applying only one of the three factors.”\(^{239}\) The court correctly denied the motion for summary judgment and held that evaluation of the *Penn Central* factors is the proper method of analysis in trial for the regulatory takings claim made by the plaintiff.

In *Currier*, the court addressed a situation where local government implemented the land use controls that its constituents deemed best for the town. Unlike state and federal governments who have the wealth to pay for takings, when local ordinances restricting property owners’ rights are held to be taking such ordinances would be prohibited by the prohibitively high cost to local governments of paying for regulatory takings. *Tahoe-Sierra*’s reaffirmation of *Penn Central* as the test for regulatory takings ensures that

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\(^{233}\) *Currier*, 2002 WL 1146773 at *9.
\(^{234}\) *Id.* at *9.
\(^{235}\) *Id.*
\(^{236}\) *Id.*
\(^{237}\) *Id.*
\(^{238}\) *Id.* at *10.
\(^{239}\) *Currier*, 2002 WL 1146773 at *10.
proper attention to both the impact on property owners and the means used by the government to implement its goals will be taken into account. Although in certain instances local land use policies may go too far in their regulations, the officials responsible for such local plans can easily be held politically accountable for their actions if disapproved of by the locality. The Supreme Court’s guidance in this area could be clearer. As the Currier court noted, the Court has given “some, but not too specific, guidance to courts confronted with deciding whether a particular government action goes too far and effects a regulatory taking.” The Currier court appropriately applied the Penn Central factors for its resolution of the motion for summary judgment.

V. CONCLUSION

Tahoe-Sierra’s significance lies in noting the jurisprudence it affirmed, rather than focusing on its lack of groundbreaking Constitutional interpretation. Although limited by the narrow grant of certiorari, the decision affirmed the parcel as a whole doctrine and the Penn Central factors as the foundation of regulatory takings challenges. Justice Stevens did not forge new ground, but instead refocused on the appropriate existing legal rules that should be used to adjudicate regulatory takings challenges to clarify the area’s jurisprudence for future litigants and lower courts.

The history of the Supreme Court’s regulatory takings jurisprudence was at best composed of many factors, at worst a jumbled mass of opinions with seemingly little common thread except for an attempt to find a balance between private rights and public power. Tahoe-Sierra’s place in that jurisprudence is one of simplification. The appropriate piece of property at issue for the taking is the parcel as a whole, undivided temporally, horizontally, vertically, or any other way it could be divided. The appropriate factors to be considered were laid out in Penn Central and should govern all regulatory takings challenges. Tahoe-Sierra provided clarification for lower courts on what framework should be used when balancing the public and private interests inherent in regulatory takings cases.

The importance of Tahoe-Sierra for environmental law and land use policy can best be understood through an examination of lower court opinions following Tahoe-Sierra and analyzing how an alternative decision

\[\text{\textsuperscript{240} Id. at *7.}\]
in *Tahoe-Sierra* could have affected important environmental legislation. The Court’s affirmation of the parcel as a whole doctrine was needed for environmental regulation to continue, and a decision which allowed division of a parcel into smaller pieces, either geographically or temporally, would have created a situation where implementing federal environmental programs would effect a taking in almost all situations. That potential for erosion of environmental protection was demonstrated in *Seiber* for protection of spotted owl habitat and in *Walcek* for wetlands regulation under the Clean Water Act.\(^4\) Even after the facially clear mandate from *Tahoe-Sierra* that “in the analysis of regulatory takings claim . . . we must focus on ‘the parcel as a whole,’”\(^2\) the *Machipongo* decision addressed the difficulty some fact patterns create for courts deciding what the parcel was, and remanded its’ case with instructions to consider a number of factors in determining the parcel as a whole.\(^3\)

The difficulty the *Machipongo* court had in determining the parcel as a whole demonstrated the intrinsic problem of creating clear tests in an amorphous area such as regulatory takings, and also demonstrated the need for continued clarification from the Supreme Court to determine what constitutes a parcel as a whole. Clearly, allowing separate legal title under one person of adjacent property would undermine the parcel as a whole doctrine, but what about circumstances in which husband and wife, or parent and subsidiary corporations have separate title to adjacent or nearby property? What lines are to be drawn to define the limits of the parcel? The factors considered by the *Machipongo* court raise questions the Supreme Court should address to help further delineate what constitutes a parcel as a whole for Fifth Amendment purposes.

*Tahoe-Sierra*’s affirmation of *Penn Central* as the appropriate test for regulatory takings appears to have influenced lower courts, but some courts continue to utilize additional factors that represent interests that are taken into account under *Penn Central*. *Bass Enterprises* and *Rose Acres* are examples of courts strictly following the Supreme Court’s decision and explicitly applying the three *Penn Central* factors in its analysis. However, in *Seiber* we saw a court continue to address factors outside of *Penn Central*, which

\(^{241}\) See supra Part IV.A. & IV.C.


demonstrates that Tahoe-Sierra's influence in establishing the Penn Central factors as the sole regulatory takings test is limited.

Tahoe-Sierra's decision was also vital for its clear acknowledgment that government cannot be forced to pay for limitations and delays on development. Currier addressed local land use policies implemented by a town that allowed development, but limited it and created delays for many potential builders. The Currier court noted that the restrictions it was considering were less restrictive than those in question in Tahoe-Sierra and therefore could not be found to be a taking. City planners and environmental development planners, such as in Tahoe-Sierra, can make plans knowing that delays or prohibitions up to thirty-two months are not regulatory takings and plan accordingly.