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CASE COMMENT

CONSTITUTIONAL LAW: LIMITING THE SCOPE OF THE FIFTH AMENDMENT TAKINGS CLAUSE IN REGULATORY TAKINGS

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 122 S. Ct. 1465 (2002)

*Allison Landgraff**

The Respondent¹ imposed a moratorium² on development of the Petitioners' property³ during the process of formulating a comprehensive land-use plan for the preservation of Lake Tahoe and the Lake Tahoe Basin.⁴ Petitioners filed suit,⁵ alleging that the imposition of the moratoria constituted a taking under the Fifth Amendment Takings Clause.⁶ The district court ruled that the Petitioners were deprived of all economically viable use of their land and thus, the moratoria amounted to a categorical

* For my parents, Robert and Sheila Landgraff.

1. Respondent was the Tahoe Regional Planning Agency. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, Inc.*, 122 S. Ct. 1465, 1470, 1473 (2002). The Tahoe Regional Planning Compact created the agency to regulate development and ensure preservation of Lake Tahoe and the Lake Tahoe Basin. *Id.* at 1471.

2. The moratoria suspended development on environmentally sensitive land until the Respondent formulated a regional land-use plan to ensure the preservation of Lake Tahoe. *Id.* at 1472. The first moratorium, Ordinance 81-5, prohibited any construction or other activity that would remove vegetation on high hazard land until the regional plan was adopted. *Id.* at 1472-73. Delay in the adoption of a sufficient plan led to the imposition of the second moratorium, Resolution 83-21, which suspended all project reviews and new proposals for eight months. *Id.* Together, the two moratoria, in effect, prohibited development on environmentally sensitive land for thirty-two months. *Id.*

3. Petitioners were real estate owners in the Lake Tahoe Basin including the lead Petitioner, *Tahoe-Sierra Preservation Council, Inc.*, a non-profit association representing over 2,000 property owners. *Id.*

4. *Id.* at 1471-73.

5. Suit was filed in federal court under 42 U.S.C. § 1983 (2002). *Tahoe-Sierra Pres. Council, Inc., v. Tahoe Reg'l Planning Agency*, 34 F. Supp. 2d 1226, 1237 (D. Nev. 1999). 42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . .

42 U.S.C. § 1983 (2002).

6. *Tahoe-Sierra Pres. Council, Inc.*, 34 F. Supp. 2d at 1238.

taking.⁷ On appeal,⁸ the U.S. Court of Appeals for the Ninth Circuit reversed, reasoning that the moratoria only had a temporary impact on the fee interest; hence, a categorical taking had not occurred.⁹ After the U.S. Court of Appeals denied the petition for rehearing *en banc*, the U.S. Supreme Court granted certiorari.¹⁰ The U.S. Supreme Court affirmed and HELD, that the temporary deprivation of all economically viable use of land does not amount to a categorical taking requiring just compensation under the Fifth Amendment Takings Clause.¹¹

The Fifth Amendment Takings Clause provides a guarantee of just compensation to a private property owner whose property has been taken for public use.¹² Traditionally, the Takings Clause applied only to government condemnation of private property.¹³ However, in *Pennsylvania Coal Co. v. Mahon*,¹⁴ the U.S. Supreme Court recognized that a government regulation may constitute a taking of property if the regulation exceeds constitutional limitations.¹⁵

In *Mahon*, the U.S. Supreme Court addressed whether the Pennsylvania government exceeded constitutional boundaries when it limited the Petitioner's right to mine coal underneath the surface of the Respondent's property.¹⁶ The issue arose after the Pennsylvania legislature passed a

7. *Id.* at 1245. The U.S. district court for the District of Nevada based its ruling on evidence of the indefiniteness of the moratoria in that it lacked an express termination date. *Id.* at 1250-51. Just compensation was awarded to the Petitioners for the restrictions in Ordinance 81-5 and Resolution 83-21. *Id.* at 1245. However, the district court declined to award compensation for the period after the 1984 Plan was enacted as the Petitioners injury was not caused by the Respondent, but by the imposition of a court injunction. *Id.* at 1248.

8. The Petitioners did not challenge the conclusion of the U.S. district court for the District of Nevada that a taking had not occurred under an ad hoc factual analysis. *Tahoe-Sierra Pres. Council, Inc., v. Tahoe-Reg'l Planning Agency*, 216 F.3d 764, 773 (9th Cir. 2000). Thus, the sole issue on appeal was whether there had been a total categorical taking of the Petitioners' property.

9. *Id.* at 782. The appellate court concluded that the temporary development moratoria did not deny the Petitioners of all use of their property since the Petitioners were only deprived of the right to develop for a small fraction of the property's useful life. *Id.*

10. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, Inc.*, 122 S. Ct. 1465, 1477 (2002).

11. *Id.* at 1489.

12. U.S. CONST. amend. V. The Fifth Amendment Takings Clause reads: "nor shall private property be taken for public use, without just compensation." *Id.*

13. *E.g., Tahoe-Sierra Pres. Council, Inc.*, 122 S. Ct. at 1481 n.21.

14. 260 U.S. 393, 415 (1922).

15. *Id.* Justice Holmes concluded that "while property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking." *Id.*

16. *Id.* at 413. The U.S. Supreme Court noted that the Respondent's deed conveyed only surface rights to the property and expressly waived all claims to damages that resulted from the mining of coal below their property. *Id.* at 412.

statute¹⁷ that prohibited methods of mining anthracite coal that would cause subsidence to the surface property of a homeowner.¹⁸ The analysis of the Court focused on the facts of the individual case and the extent of the diminution in property value for the Petitioner.¹⁹ Justice Holmes, writing for the Court, reasoned that because mining anthracite coal without causing surface subsidence was commercially impractical, the Petitioner suffered a substantial decrease in property value.²⁰ Most importantly, the Court noted that the property right to the coal was not meaningful unless it could be mined from underneath the ground.²¹ Hence, the Court held that the statute was not a valid exercise of police power because it destroyed the property right of the Petitioner to mine anthracite coal.²²

After *Mahon*, the U.S. Supreme Court continued to recognize that in order for the Takings Clause to have meaning, private property owners must be compensated when an exercise of police power has overreached constitutional boundaries.²³ However, the extent of the constitutional limitation on government police power had yet to be clearly defined.²⁴ The Court, in the following decades, attempted to define the scope of the Takings Clause using an ad hoc factual inquiry to analyze each individual case.²⁵ In *Penn Central Transportation Co. v. New York*,²⁶ the Court specifically identified multiple criteria applicable to a case-specific factual inquiry.²⁷ The Court focused on the reasonable investment-backed expectations of the party, the character of the governmental action, and the loss of economic value to the party.²⁸ This three-part balancing test was used to decide whether the New York City Landmark Preservation Law that prohibited the Petitioner from further development on its landmark property constituted a taking.²⁹ The Petitioners³⁰ filed suit after the city

17. The Kohler Act prohibited the mining of anthracite coal as to cause the subsidence of a habitable structure, unless the owner of the habitable structure also owned the coal underneath and was at least 150 feet from another parcel of improved property. *Id.* at 412-13.

18. *Id.*

19. *Mahon*, 260 U.S. at 413.

20. *Id.* at 414.

21. *Id.*

22. *Id.*

23. *See, e.g., Tahoe-Sierra Pres. Council, Inc., v. Tahoe Reg'l Planning Agency*, 122 S. Ct. 1465, 1481 (2002).

24. *See, e.g., id.*

25. *Id.*

26. 438 U.S. 104, 124 (1978).

27. *Id.*

28. *Id.*

29. *Id.* at 138

30. Petitioner, Penn Central Transportation Company, owned the Grand Central Terminal in midtown Manhattan. *Id.* at 115.

denied permission to build a fifty-story office tower over the landmark site.³¹ Despite the value of the existing building belonging to the Petitioner, the Petitioner argued that the Landmark Preservation Law took away any profitable use of the air space above the property.³²

The U.S. Supreme Court rejected the argument of the Petitioner that the deprivation of the airspace use amounted to a taking, stating that the character of the government action does not amount to a taking unless it interferes with rights in the parcel as whole.³³ Furthermore, the Court reasoned that the Landmark Preservation Law did not interfere with the Petitioner's reasonable investment-backed expectations.³⁴ The primary use of the property was not impeded and the Petitioner was given transferable rights to build the fifty-story office building in another vicinity.³⁵ The Court also noted that over four-hundred other properties in New York City faced similar landmark restrictions, thus the Petitioner was not singled out to bear a significant financial burden alone.³⁶ Accordingly, the Court held that the New York City Landmark Preservation Law did not amount to a taking of the private property of the Petitioner.³⁷

In *Mahon and Penn Central Transportation Co.*, the U.S. Supreme Court was reluctant to categorically define when the government had overstepped constitutional limitations.³⁸ However, in *Lucas v. South Carolina Coastal Council*,³⁹ the Court emphasized the necessity of a per se categorical rule when a private property owner has been denied all economically beneficial or productive use of property.⁴⁰ In *Lucas*, the trial court found that the enactment of a ban on coastal land development⁴¹

31. *Penn Cent. Transp. Co.*, 438 U.S. at 117.

32. *Id.* at 130.

33. *Id.* at 130-31. The U.S. Supreme Court stated that when determining whether a governmental action has caused a taking of private property, the deciding court should focus on the "nature and extent of the interference with rights in the parcel as a whole." *Id.*

34. *Id.* at 131 n.27.

35. *Id.* at 136-37.

36. *Penn Cent. Transp. Co.*, 438 U.S. at 132.

37. *Id.* at 138.

38. *See id.* at 124; *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

39. 505 U.S. 1003, 1006 (1992).

40. *Id.* at 1019; *see also Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (holding that a land-use regulation violates the Takings Clause when the regulation does not substantially advance legitimate state interests or denies an owner economically viable use of the land).

41. The Beachfront Management Act prohibited construction of occupiable improvements on property seaward of the designated baseline. The Beachfront Management Act, S.C. CODE ANN. § 48-39-280(A)(2) (Law. Co-op. 1988). The Act fixed the designated baseline landward of the property of the Petitioner. *Lucas*, 505 U.S. at 1009. Thus, the Petitioner was prohibited from construction of any occupiable improvements on the property. *Id.*

rendered the Petitioner's beachfront property⁴² valueless.⁴³ On appeal, the South Carolina Supreme Court ruled that regardless of the economic loss to the Petitioner, the Petitioner was not entitled to compensation because there was no vested property right to use one's property to cause a nuisance.⁴⁴ However, the U.S. Supreme Court quickly rejected this rationale, reasoning that the distinction between mitigating a harmful use and securing a benefit to the public was minute.⁴⁵

Additionally, the U.S. Supreme Court reasoned that regulations prohibiting all economically beneficial use of land can only be sustained if the restriction was inherent in the original title.⁴⁶ The record illustrated that when the Petitioner purchased the property, there were no restrictions on development and the surrounding lots already contained single-family homes.⁴⁷ Furthermore, the Court noted that the construction of a home was a generally recognized property right.⁴⁸ Therefore, the Court ultimately held that the Petitioner was deprived of all economically beneficial or productive use of the property, which amounted to a categorical taking.⁴⁹ On remand, the Petitioner was entitled to compensation unless a principle of nuisance or property law prohibited the building of single-family homes on Petitioner's property.⁵⁰

In the instant case, the U.S. Supreme Court rejected the application of the categorical rule espoused in *Lucas*, reasoning that the Petitioner had only temporarily been deprived of all beneficial uses of the property.⁵¹ Instead, the Court affirmed the use of a fact-specific inquiry that focused on the *Penn Central Transportation Co.* balancing factors.⁵² In reaching its decision, the Court distinguished the categorical rule applied in *Lucas*,

42. The Petitioner purchased two residential lots on an island in South Carolina for the purpose of erecting single-family homes. *Lucas*, 505 U.S. at 1006.

43. *Id.* at 1009.

44. *Id.* at 1010.

45. *Id.* at 1026-27. The U.S. Supreme Court noted that implementing the analysis of the South Carolina Supreme Court would "essentially nullify Mahon's affirmation of limits to the noncompensable exercise of the police power." *Id.* at 1027.

46. *Id.* at 1027.

47. *Lucas*, 505 U.S. at 1008.

48. *Id.* at 1031.

49. *Id.* at 1030.

50. *Id.* at 1031.

51. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 122 S. Ct. 1465, 1489 (2002). The *Penn Central* analysis involves an evaluation of several factors including the extent to which the regulation interferes with reasonable investment-backed expectations, the character of the governmental action, and the regulation's economic effect on the landowner. *Id.* at 1475.

52. *Id.* at 1489. The district court found that the evidence did not support a finding that the Petitioners suffered a taking under a *Penn Central Transportation Co.* analysis. *Id.* at 1485. The Petitioners did not challenge this finding on subsequent appeal. *Id.*

as applicable only to the rare case when a property owner has been deprived of all economic value in the fee interest.⁵³ In the instant case, however, the Court noted that the Petitioners' fee interest, as a whole, was not rendered valueless because the property recovered value when the moratoria were lifted.⁵⁴ Furthermore, the Court noted that adoption of the per se rule would have broad ramifications on government police power.⁵⁵ Specifically, a requirement that the government compensate property owners for a moratorium on development would lead to an exceptionally expensive planning process, or force the government to make hasty decisions.⁵⁶

In a strong dissent, Justice Rehnquist warned that the majority's holding disregarded the constitutional guarantee of just compensation in the Fifth Amendment Takings Clause.⁵⁷ Primarily, Justice Rehnquist was concerned with the majority's conclusion that the temporal aspect of the moratorium did not require application of the per se rule from *Lucas*, even though the Petitioners had been deprived of all economically beneficial use of their land.⁵⁸ Furthermore, Justice Rehnquist noted that the moratoria imposed by the Respondent went beyond the duration of a normal land-use planning device.⁵⁹ He reasoned that there are implied limitations on title to property that the Petitioners could have expected; however, the Petitioners could not have anticipated a thirty-two month moratoria on property development.⁶⁰

By upholding the constitutionality of the Respondent's moratoria on the Petitioners' property, the U.S. Supreme Court limits the scope of the

53. *Id.* at 1484.

54. *Id.* The U.S. Supreme Court speculated that property values in the Lake Tahoe Basin were actually expected to increase with the adoption of the Lake Tahoe Regional Plan, which ensured protection of exceptional clarity of Lake Tahoe. *Id.* at 1489.

55. *Id.* at 1485.

56. *Tahoe-Sierra Pres. Council, Inc.*, 122 S. Ct. at 1485.

57. *Id.* at 1490 (Rehnquist, J., dissenting). The dissenting opinion of Justice Rehnquist was joined by Justices Scalia and Thomas. *Id.*

58. *Id.* at 1492. (Rehnquist, J., dissenting).

59. *Id.* at 1491. (Rehnquist, J., dissenting). In particular, Justice Rehnquist noted that the majority was mistaken to accept the determination of the lower court that Petitioners were deprived of developing their property for thirty-two months. *Id.* Instead, he urged that the U.S. Supreme Court should have found that development was prohibited on the Petitioners' property for six years. *Id.* This conclusion was based on the fact that after the moratoria were lifted and the 1984 Plan had been adopted, an outside suit was brought to challenge the sufficiency of the 1984 Plan. *Id.* Justice Rehnquist concluded that the failure of the regional planners to enact a sufficient plan caused the imposition of the injunction and therefore, caused the Petitioners prohibition on development to extend to approximately six years. *Id.*

60. *Id.* at 1495 (Rehnquist, J., dissenting).

Fifth Amendment Takings Clause.⁶¹ The instant Court narrowed the applicability of the categorical rule set forth in *Lucas*, and relied on the use of the *Penn Central Transportation Co.* ad hoc factual analysis to analyze temporary regulatory takings.⁶² The ultimate question is whether the holding of the instant Court creates sound public policy, while adequately protecting constitutional rights.

The instant Court interprets the *Lucas* per se rule as applicable only to the exceptional situation in which a property owner has permanently been deprived of all economically beneficial uses of the land.⁶³ However, the instant Court's interpretation of the *Lucas* rule is questionable considering that the U.S. Supreme Court in *Lucas* did not differentiate, as the instant Court has done, between temporary and permanent deprivations.⁶⁴ As Chief Justice Rehnquist points out in his dissent, the only significant distinction between the development restrictions in *Lucas* and the development restrictions in the instant case was the initial label given to the regulation.⁶⁵ Allowing the government to define the regulation as temporary, while in effect achieving the same result as a supposedly permanent law, may not effectively protect the constitutional rights of the private property owner.⁶⁶

Further, the decision of the instant Court may have overlooked the policy that first led the U.S. Supreme Court to adopt the *Lucas* per se rule.⁶⁷ The per se rule was premised on the theory that the effect on property owners who were denied of all beneficial uses of their property was equivalent to a government condemnation.⁶⁸ By allowing the Respondents to impose moratoria for a total of thirty-two months, without compensating the Petitioners, the instant Court allows Respondents to reach the same result using moratoria as would be prohibited by using government appropriation.⁶⁹ The Fifth Amendment Takings Clause should

61. See *Tahoe-Sierra Pres. Council, Inc.*, 122 S. Ct. at 1496 (Rehnquist, J., dissenting).

62. See *id.* at 1489.

63. *Id.* at 1483.

64. See *id.* at 1492 (Rehnquist, J., dissenting). "It is well established that temporary takings are as protected by the U.S. Constitution as are permanent ones." *Id.* (citing *First English Evangelical Lutheran Church of Glendale v. County of L.A.*, 482 U.S. 304, 318 (1987)).

65. *Id.* (Rehnquist, J., dissenting).

66. *Tahoe-Sierra Pres. Council, Inc., v. Tahoe Reg'l Planning Agency*, 34 F. Supp. 2d 1226, 1251 (D. Nev. 1999). As stated by the district court, in the instant case, "the indefiniteness of the ordinances at issue does suggest that this is not the right case in which to hold that temporary planning moratoria do not always effect takings." *Id.*

67. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1017 (1992).

68. *Id.*

69. See *Tahoe-Sierra Pres. Council, Inc.*, 122 S. Ct. at 1493 (Rehnquist, J., dissenting). In his dissent, Justice Rehnquist points out that, "the Court allows the government to do by regulation what it cannot do through eminent domain." *Id.*

provide compensation to the Petitioner who, in all fairness and justice, has made an unfair sacrifice for the well-being of all.⁷⁰

Furthermore, the instant Court's reliance on the *Penn Central Transportation Co.* balancing factors may not sufficiently define a private property owner's constitutional rights. In the instant case, regulation of the Respondent went so far as to deprive the Petitioners of all beneficial use of their land for at least thirty-two months, yet under the instant Court's application of the *Penn Central Transportation Co.* factors, the Petitioners were not entitled to compensation.⁷¹ Notably, if the Court in *Penn Central Transportation Co.* had decided facts similar to the instant case, that Court likely would have reached a different result.⁷² In *Penn Central Transportation Co.*, the Court noted that its holding was limited to the present record and that if at some point in the future the Grand Central Terminal lost all economic viability, the Petitioners would have been entitled to recovery.⁷³

The instant Court's decision to limit the applicability of the *Lucas* per se rule was partly based on its desire to create sound public policy.⁷⁴ While the instant Court's holding may allow for a lengthier and less expensive land-use planning process, this arguably may not be a strong enough justification for limiting the scope of a landowner's constitutional rights.⁷⁵ Particularly, as a matter of policy, the instant Court resisted applying the *Lucas* per se rule to temporary takings in fear that the per se rule would extend to situations involving normal land-use planning devices including zoning, permit delays, and variances.⁷⁶ However, in *Lucas*, the Court carved out an exception to the per se rule for reasonable regulations that are traditionally recognized as inherent in a property owner's title and grounded in concepts of property law.⁷⁷ Such regulations as zoning, ordinances, and normal delays in the permit process are concepts of property law that would not trigger application of the per se rule.⁷⁸ Thus,

70. *Id.* at 1486. The instant Court noted that the Fifth Amendment Takings Clause was "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Id.* (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

71. See *Tahoe-Sierra Pres. Council, Inc.*, 34 F. Supp. 2d at 1240. "[C]onsideration of the *Penn Central* factors clearly leads to the conclusion that there was no taking." *Id.*

72. See *Penn Cent. Transp. Co. v. New York*, 438 U.S. 104, 138 n.36 (1978).

73. See *id.*

74. See *Tahoe-Sierra Pres. Council, Inc.*, 122 S. Ct. at 1487-88.

75. See *id.* "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

76. See *Tahoe-Sierra Pres. Council, Inc.*, 122 S. Ct. at 1485.

77. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1031 (1992).

78. See *Tahoe-Sierra Pres. Council, Inc.*, 122 S. Ct. at 1494 (Rehnquist, J., dissenting).

the instant Court could have applied the *Lucas* rule, with little concern that the rule would extend to inhibit regular land-use planning.

Alternatively, the instant Court noted that it could have crafted a rule that specifically defined a time limit on the moratoria, after which the government must pay the landowner compensation.⁷⁹ However, this approach continues to neglect that defining the point at which a regulation ceases to be temporary would be problematic.⁸⁰ As Justice Holmes warned in *Mahon*, the tendency would be to expand the protection given to government regulation progressively until eventually the constitutional protection of just compensation would be meaningless.⁸¹

In an effort to create sound public policy, the instant Court has redefined the scope of the Fifth Amendment constitutional rights of private property owners.⁸² The instant Court's holding effectively grants the government the power to deprive a landowner of all beneficial or productive uses of the land without compensation for a period of time that the Court determines is sufficiently temporary.⁸³ It is arguable whether the public policy justifications put forth by the Court warranted such an extensive limit to the constitutional rights of private property owners.⁸⁴

When a regulation merely delays a final land use decision, we have recognized that there are other background principles of state property law that prevent the delay from being deemed a taking. We thus noted in *First English* that our discussion of temporary takings did not apply in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like.

Id. (citing *First English Evangelical Lutheran Church of Glendale v. County of L.A.*, 482 U.S. 304, 321 (1987)).

79. *See id.* at 1484.

80. *See supra* text accompanying notes 64-66.

81. *See Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). "When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears." *Id.*

82. *See supra* text accompanying notes 61-81.

83. *Tahoe-Sierra Pres. Council, Inc.*, 122 S. Ct. at 1492 (Rehnquist, J., dissenting).

84. *See id.* at 1496 (Rehnquist, J., dissenting).

