

**Tahoe-Sierra Preservation Council, Inc., et al., Petitioners**

**v.**

**Tahoe Regional Planning Agency et al.**

Supreme Court of the United States  
535 U.S. 302 (2002)

[This case involves two moratoria ordered by respondent Tahoe Regional Planning Agency (TRPA) to maintain the status quo while studying the impact of development on Lake Tahoe and designing a strategy for environmentally sound growth. During the moratoria landowners were denied construction permits. This eliminated potential uses of land during these periods. Would the court view this as a partial taking, which did not require compensation, or as a total taking because it denied the landowners all economically viable use of their land during this limited period?]

JUDGES: STEVENS, J., delivered the opinion of the Court, in which O'CONNOR, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. REHNQUIST, C. J., filed a dissenting opinion, in which SCALIA, J., and THOMAS, J., joined. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined.

The question presented is whether a moratorium on development imposed during the process of devising a comprehensive land-use plan constitutes a *per se* taking of property requiring compensation under the Takings Clause of the United States Constitution. This case actually involves two moratoria ordered by respondent Tahoe Regional Planning Agency (TRPA) to maintain the status quo while studying the impact of development on Lake Tahoe and designing a strategy for environmentally sound growth. ...

I

[The District Court determined that the TRPA moratoria constituted a taking without just compensation.] The relevant facts are undisputed. The Court of Appeals, while reversing the District Court on a question of law, accepted all of its findings of fact, and no party challenges those findings. All agree that Lake Tahoe is "uniquely beautiful," ..., that President Clinton was right to call it a "national treasure that must be protected and preserved," .... and that Mark Twain aptly described the clarity of its waters as "not *merely* transparent, but dazzlingly, brilliantly so," ....

...

II

.... The petitioners include the Tahoe Sierra Preservation Council, a nonprofit membership corporation representing about 2,000 owners of both improved and unimproved parcels of real estate in the Lake Tahoe Basin, and a class of some 400 individual owners of vacant lots ... Those individuals purchased their properties prior to

the effective date of the 1980 Compact, ..., primarily for the purpose of constructing "at a time of their choosing" a single-family home "to serve as a permanent, retirement or vacation residence," .. When they made those purchases, they did so with the understanding that such construction was authorized provided that "they complied with all reasonable requirements for building." ... <sup>n5</sup>

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<sup>n5</sup> ... the petitioners who purchased land after the 1972 compact did so amidst a heavily regulated zoning scheme. ...

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...

The District Court began its constitutional analysis by identifying the distinction between a direct government appropriation of property without just compensation and a government regulation that imposes such a severe restriction on the owner's use of her property that it produces "nearly the same result as a direct appropriation." .. The court noted that all of the claims in this case "are of the 'regulatory takings' variety...., it then stated that a "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." .... The District Court rejected the first alternative based on its finding that "further development on high hazard lands such as [petitioners'] would lead to significant additional damage to the lake." ... With respect to the second alternative, the court first considered whether the analysis adopted in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, ... (1978), would lead to the conclusion that TRPA had effected a "partial taking," and then whether those actions had effected a "total taking."

Emphasizing the temporary nature of the regulations, the testimony that the "average holding time of a lot in the Tahoe area between lot purchase and home construction is twenty-five years," and the failure of petitioners to offer specific evidence of harm, the District Court concluded that "consideration of the *Penn Central* factors clearly leads to the conclusion that there was no taking." .... In the absence of evidence regarding any of the individual plaintiffs, the court evaluated the "average" purchasers' intent and found that such purchasers "did not have reasonable, investment-backed expectations that they would be able to build single-family homes on their land within the six-year period involved in this lawsuit." <sup>n11</sup>

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<sup>n11</sup> ... The court stated that petitioners "had plenty of time to build before the restrictions went into effect -- and almost everyone in the Tahoe Basin knew in the late 1970s that a crackdown on development was in the works." In addition, the court found "the fact that no evidence was introduced regarding the specific diminution in value of any of the plaintiffs' individual properties clearly weighs against a finding that there was a partial taking of the plaintiffs' property." *Ibid.*

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The District Court had more difficulty with the "total taking" issue. Although it was satisfied that petitioners' property did retain some value during the moratoria, <sup>n12</sup> it found

that they had been temporarily deprived of "all economically viable use of their land." ....  
... Accordingly, it ordered TRPA to pay damages to most petitioners for the 32-month period from August 24, 1981, to April 25, 1984, and to those owning ... property in Nevada for the 8-month period from August 27, 1983, to April 25, 1984. ...

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n12 The pretrial order describes purchases by the United States Forest Service of private lots in environmentally sensitive areas during the periods when the two moratoria were in effect. During the 2-year period ending on August 26, 1983, it purchased 215 parcels in California at an average price of over \$ 19,000 and 45 parcels in Nevada at an average price of over \$ 39,000; during the ensuing 8-month period, it purchased 167 California parcels at an average price of over \$ 29,000 and 27 Nevada parcels at an average price of over \$ 41,000. .... Moreover, during those periods some owners sold sewer and building allocations to owners of higher capability lots "for between \$ 15,000 and \$ 30,000." ...

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Both parties appealed. ...

Contrary to the District Court, the Court of Appeals held that because the regulations had only a temporary impact on petitioners' fee interest in the properties, no categorical taking had occurred. It reasoned:

"Property interests may have many different dimensions. For example, the dimensions of a property interest may include a physical dimension (which describes the size and shape of the property in question), a functional dimension (which describes the extent to which an owner may use or dispose of the property in question), and a temporal dimension (which describes the duration of the property interest). At base, the plaintiffs' argument is that we should conceptually sever each plaintiff's fee interest into discrete segments in at least one of these dimensions -- the temporal one -- and treat each of those segments as separate and distinct property interests for purposes of takings analysis. Under this theory, they argue that there was a categorical taking of one of those temporal segments."

...

Putting to one side "cases of physical invasion or occupation," .... the court read our cases involving regulatory taking claims to focus on the impact of a regulation on the parcel as a whole. In its view a "planning regulation that prevents the development of a parcel for a temporary period of time is conceptually no different than a land-use restriction that permanently denies all use on a discrete portion of property, or that permanently restricts a type of use across all of the parcel." .... In each situation, a regulation that affects only a portion of the parcel -- whether limited by time, use, or space -- does not deprive the owner of all economically beneficial use.

...

...Because of the importance of the case, we granted certiorari limited to the question stated at the beginning of this opinion. ... We now affirm.

### III

Petitioners ... contend that the mere enactment of a temporary regulation that, while in effect, denies a property owner all viable economic use of her property gives rise to an unqualified constitutional obligation to compensate her for the value of its use during that period. Hence, they "face an uphill battle," ...that is made especially steep by their desire for a categorical rule requiring compensation whenever the government imposes such a moratorium on development. Under their proposed rule, there is no need to evaluate the landowners' investment-backed expectations, the actual impact of the regulation on any individual, the importance of the public interest served by the regulation, or the reasons for imposing the temporary restriction. For petitioners, it is enough that a regulation imposes a temporary deprivation -- no matter how brief -- of all economically viable use to trigger a *per se* rule that a taking has occurred. ...

... In our view the answer to the abstract question whether a temporary moratorium effects a taking is neither "yes, always" nor "no, never"; the answer depends upon the particular circumstances of the case. Resisting "the temptation to adopt what amount to *per se* rules in either direction," ... we conclude that the circumstances in this case are best analyzed within the *Penn Central* framework.

### IV

The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. But the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property. ...

When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner ... regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof. Thus, compensation is mandated when a leasehold is taken and the government occupies the property for its own purposes, even though that use is temporary. ..

... Land-use regulations are ubiquitous and most of them impact property values in some

tangential way -- often in completely unanticipated ways. Treating them all as *per se* takings would transform government regulation into a luxury few governments could afford. By contrast, physical appropriations are relatively rare, easily identified, and usually represent a greater affront to individual property rights. "...

As we noted in *Lucas*, it was Justice Holmes' opinion in *Pennsylvania Coal Co. v. Mahon*, ... (1922), that gave birth to our regulatory takings jurisprudence. ...

In the decades following that decision, we have "generally eschewed" any set formula for determining how far is too far, choosing instead to engage in "essentially ad hoc, factual inquiries." ... Indeed, we still resist the temptation to adopt *per se* rules in our cases involving partial regulatory takings, preferring to examine "a number of factors" rather than a simple "mathematically precise" formula. ...

...

The categorical rule that we applied in *Lucas* states that compensation is required when a regulation deprives an owner of "all economically beneficial uses" of his land. .... But our holding was limited to "the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted." ... The emphasis on the word "no" in the text of the opinion was, in effect, reiterated in a footnote explaining that the categorical rule would not apply if the diminution in value were 95% instead of 100%. ... Anything less than a "complete elimination of value," or a "total loss," the Court acknowledged, would require the kind of analysis applied in *Penn Central*. ....<sup>n25</sup>

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<sup>n25</sup> It is worth noting that *Lucas* underscores the difference between physical and regulatory takings. ... For under our physical takings cases it would be irrelevant whether a property owner maintained 5% of the value of her property so long as there was a physical appropriation of any of the parcel.

Certainly, our holding that the permanent "obliteration of the value" of a fee simple estate constitutes a categorical taking does not answer the question whether a regulation prohibiting any economic use of land for a 32-month period has the same legal effect. Petitioners seek to bring this case under the rule announced in *Lucas* by arguing that we can effectively sever a 32-month segment from the remainder of each landowner's fee simple estate, and then ask whether that segment has been taken in its entirety by the moratoria. Of course, defining the property interest taken in terms of the very regulation being challenged is circular. With property so divided, every delay would become a total ban; the moratorium and the normal permit process alike would constitute categorical takings. 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." ... Thus, the District Court erred when it disaggregated petitioners' property into temporal segments corresponding to the regulations at issue and then analyzed whether petitioners were deprived of all economically viable use during each period. ....

...

An interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner's interest. ... Both dimensions must be considered if the interest is to be viewed in its entirety. Hence, a permanent deprivation of the owner's use of the entire area is a taking of "the parcel as a whole," whereas a temporary restriction that merely causes a diminution in value is not. Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted. ...

...

V

... A rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decisionmaking. Such an important change in the law should be the product of legislative rulemaking rather than adjudication.

... we are persuaded that the better approach to claims that a regulation has effected a temporary taking "requires careful examination and weighing of all the relevant circumstances." ...

...

In rejecting petitioners' *per se* rule, we do not hold that the temporary nature of a land-use restriction precludes finding that it effects a taking; we simply recognize that it should not be given exclusive significance one way or the other.

A narrower rule that excluded the normal delays associated with processing permits, or that covered only delays of more than a year, would certainly have a less severe impact on prevailing practices, but it would still impose serious financial constraints on the planning process. .... In fact, the consensus in the planning community appears to be that moratoria, or "interim development controls" as they are often called, are an essential tool of successful development. Yet even the weak version of petitioners' categorical rule would treat these interim measures as takings regardless of the good faith of the planners, the reasonable expectations of the landowners, or the actual impact of the moratorium on property values.

The interest in facilitating informed decisionmaking by regulatory agencies counsels against adopting a *per se* rule that would impose such severe costs on their deliberations. Otherwise, the financial constraints of compensating property owners during a moratorium may force officials to rush through the planning process or to abandon the practice altogether. To the extent that communities are forced to abandon using moratoria, landowners will have incentives to develop their property quickly before a comprehensive plan can be enacted, thereby fostering inefficient and ill-conceived growth. ...

...

We would create a perverse system of incentives were we to hold that landowners must wait for a taking claim to ripen so that planners can make well-reasoned decisions while, at the same time, holding that those planners must compensate landowners for the delay.

Indeed, the interest in protecting the decisional process is even stronger when an agency is developing a regional plan than when it is considering a permit for a single parcel. ... Since a categorical rule tied to the length of deliberations would likely create added pressure on decisionmakers to reach a quick resolution of land-use questions, it would only serve to disadvantage those landowners and interest groups who are not as organized or familiar with the planning process. Moreover, with a temporary ban on development there is a lesser risk that individual landowners will be "singled out" to bear a special burden that should be shared by the public as a whole. ... At least with a moratorium there is a clear "reciprocity of advantage," ..., because it protects the interests of all affected landowners against immediate construction that might be inconsistent with the provisions of the plan that is ultimately adopted. ... In fact, there is reason to believe property values often will continue to increase despite a moratorium. ... Such an increase makes sense in this context because property values throughout the Basin can be expected to reflect the added assurance that Lake Tahoe will remain in its pristine state. Since in some cases a 1-year moratorium may not impose a burden at all, we should not adopt a rule that assumes moratoria always force individuals to bear a special burden that should be shared by the public as a whole.

... We conclude, therefore, that the interest in "fairness and justice" will be best served by relying on the familiar *Penn Central* approach when deciding cases like this, rather than by attempting to craft a new categorical rule.

Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

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DISSENT: CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

For over half a decade petitioners were prohibited from building homes, or any other structures, on their land. Because the Takings Clause requires the government to pay compensation when it deprives owners of all economically viable use of their land, see *Lucas v. South Carolina Coastal Council*, ... (1992), and because a ban on all development lasting almost six years does not resemble any traditional land-use planning device, I dissent.

I

...

## II

I now turn to determining whether a ban on all economic development lasting almost six years is a taking. *Lucas* reaffirmed our "frequently expressed" view that "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." ... The Court does not dispute that petitioners were forced to leave their land economically idle during this period. ... But the Court refuses to apply *Lucas* on the ground that the deprivation was "temporary."

Neither the Takings Clause nor our case law supports such a distinction. For one thing, a distinction between "temporary" and "permanent" prohibitions is tenuous. The "temporary" prohibition in this case that the Court finds is not a taking lasted almost six years. ... Under the Court's decision today, the takings question turns entirely on the initial label given a regulation, a label that is often without much meaning. There is every incentive for government to simply label any prohibition on development "temporary," or to fix a set number of years. As in this case, this initial designation does not preclude the government from repeatedly extending the "temporary" prohibition into a long-term ban on all development. The Court now holds that such a designation by the government is conclusive even though in fact the moratorium greatly exceeds the time initially specified. Apparently, the Court would not view even a 10-year moratorium as a taking under *Lucas* because the moratorium is not "permanent."

...

More fundamentally, even if a practical distinction between temporary and permanent deprivations were plausible, to treat the two differently in terms of takings law would be at odds with the justification for the *Lucas* rule. The *Lucas* rule is derived from the fact that a "total deprivation of use is, from the landowner's point of view, the equivalent of a physical appropriation." ... The regulation in *Lucas* was the "practical equivalence" of a long-term physical appropriation, *i.e.*, a condemnation, so the Fifth Amendment required compensation. The "practical equivalence," from the landowner's point of view, of a "temporary" ban on all economic use is forced leasehold. For example, assume the following situation: Respondent is contemplating the creation of a National Park around Lake Tahoe to preserve its scenic beauty. Respondent decides to take a 6-year leasehold over petitioners' property, during which any human activity on the land would be prohibited, in order to prevent any further destruction to the area while it was deciding whether to request that the area be designated a National Park.

Surely that leasehold would require compensation. In a series of World War II-era cases in which the Government had condemned leasehold interests in order to support the war effort, the Government conceded that it was required to pay compensation for the leasehold interest. ... From petitioners' standpoint, what happened in this case is no different than if the government had taken a 6-year lease of their property. The Court

ignores this "practical equivalence" between respondent's deprivation and the deprivation resulting from a leasehold. In so doing, the Court allows the government to "do by regulation what it cannot do through eminent domain -- i.e., take private property without paying for it." ...

...

### III

The Court worries that applying *Lucas* here compels finding that an array of traditional, short-term, land-use planning devices are takings. ... But since the beginning of our regulatory takings jurisprudence, we have recognized that property rights "are enjoyed under an implied limitation." ...

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." ... We reiterated this last Term: "The right to improve property, of course, is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions." ... Thus, the short-term delays attendant to zoning and permit regimes are a longstanding feature of state property law and part of a landowner's reasonable investment-backed expectations. ...

But a moratorium prohibiting all economic use for a period of six years is not one of the longstanding, implied limitations of state property law. Moratoria are "interim controls on the use of land that seek to maintain the status quo with respect to land development in an area by either 'freezing' existing land uses or by allowing the issuance of building permits for only certain land uses that would not be inconsistent with a contemplated zoning plan or zoning change." ..

...

But this case does not require us to decide as a categorical matter whether moratoria prohibiting all economic use are an implied limitation of state property law, because the duration of this "moratorium" far exceeds that of ordinary moratoria. As the Court recognizes ... state statutes authorizing the issuance of moratoria often limit the moratoria's duration. ...

...

Because the prohibition on development of nearly six years in this case cannot be said to resemble any "implied limitation" of state property law, it is a taking that requires compensation.

...

Lake Tahoe is a national treasure and I do not doubt that respondent's efforts at preventing further degradation of the lake were made in good faith in furtherance of the public interest. But, as is the case with most governmental action that furthers the public interest, the Constitution requires that the costs and burdens be borne by the public at large, not by a few targeted citizens. Justice Holmes' admonition of 80 years ago again rings true: "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." *Mahon*, 260 U.S. at 416.

\* \* \*

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

I join the CHIEF JUSTICE'S dissent. I write separately to address the majority's conclusion that the temporary moratorium at issue here was not a taking because it was not a "taking of 'the parcel as a whole.'" ....

A taking is exactly what occurred in this case. No one seriously doubts that the land use regulations at issue rendered petitioners' land unsusceptible of *any* economically beneficial use. This was true at the inception of the moratorium, and it remains true today. These individuals and families were deprived of the opportunity to build single-family homes as permanent, retirement, or vacation residences on land upon which such construction was authorized when purchased. The Court assures them that "a temporary prohibition on economic use" cannot be a taking because "logically . . . the property will recover value as soon as the prohibition is lifted." .... But the "logical" assurance that a "temporary restriction . . . merely causes a diminution in value," ..., is cold comfort to the property owners in this case or any other. After all, "*in the long run we are all dead.*" John Maynard Keynes, *Monetary Reform* 88 (1924).

I would hold that regulations prohibiting all productive uses of property are subject to *Lucas' per se* rule, regardless of whether the property so burdened retains theoretical useful life and value if, and when, the "temporary" moratorium is lifted. To my mind, such potential future value bears on the amount of compensation due and has nothing to do with the question whether there was a taking in the first place. It is regrettable that the Court has charted a markedly different path today.

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## Questions

1. The planning authority was supposedly created because the private market did not produce an optimal result. Why didn't the private market produce an optimal result?
2. If the purpose of the planning authority was to maximize the value of the lake's resources why was it in conflict with the surrounding landowners? Aren't zoning regulations meant to enhance property values? Whose welfare should the planning authority attempt to maximize? Did the planning authority redistribute wealth between landowners and recreational interests?
3. Is there an economic difference between a physical taking and a regulatory taking? Can both be analyzed in term of a diminution in the value of a property right?
4. The majority indicates that several years before the actual regulations were passed it was clear that the land would be heavily regulated. How does this affect the significance of the taking?
5. If the court decided that compensation was required, how would the compensation be calculated?
6. If property values increased during the moratorium would that indicate that the landowners had not suffered an economic loss? If a regulation does not lower the market value of the property, can there still be a regulatory taking?
7. The court recognizes that the parcel that encompasses the right to be eliminated will determine whether there is a partial or a total taken. The proportionate size of the taking will depend on the size of the parcel. Therefore, the definition of the parcel is significant. If the parcel is defined as only including the right to be eliminated then there must be a total taking when the right is abolished. Is there an objective standard for defining a property "parcel?" Might it be defined as the most efficient package of component rights?
8. Suppose you owned a share of stock and decided to sell an option to purchase the stock at some future date. If the government appropriated the option, but didn't exercise it would there be a partial or total taking?
9. The District Court found that there was no harm from the temporary ban on construction because the average time between lot purchase and construction is 25 years. The court also noted that the landowners had plenty of notice that restrictions would be applied and that they could have built before the restrictions went into effect. They provided no evidence that that individual landowners had expected to build during the six-year period involved in the lawsuit. On the basis of the argument, is it correct to assume that the landowners did not suffer any loss?
10. Does the fact that the moratoria did not have an express termination date play a role in affecting the size of the loss experienced by the landowners?
11. Suppose an investment is expected to pay out \$10,000 a year forever and that the required market rate of return on this investment is 10 percent.
  - a. What is the market value of this investment?

- b. Suppose the government was expected to appropriate the payout from this investment for the next five years. Consequently, the after-tax return over the next five years is zero. Thereafter, it will again begin to payout \$10,000 a year.
- How has the decline in expected payout affected the market value of the investment in the current period?
  - What is the market value of the investment at the end of year five?
  - Has there been a taking of private property?

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## Analysis

The justices fail to distinguish the difference between the income generated by an asset and the market value of the asset which should be equal to the capitalized value of the future income generated by the asset. For example, if an asset has a fixed dollar return of  $R$  each period and the going market return on assets with a similar degree of risk is  $i$ , then the capitalized value of the asset is  $(R/i)$ . Now suppose the government indicates it will appropriate the return from this asset for the next  $n$  periods. Then the capitalized value of the asset will decrease by the present value of the expected appropriation or  $\sum_{j=1}^{j=n} R/(1+i)^j$ . Consequently, the percentage reduction in the capitalized value of the asset

in the initial period is simply  $\left[ \sum_{j=1}^{j=n} R/(1+i)^j \right] / [R/i] = i \sum_{j=1}^{j=n} 1/(1+i)^j$ . Only the interest rate

and the length of the appropriation determined the fractional taking. The longer the appropriation and the higher the interest rate, the larger is the proportional taking. The following table lists the fractional reduction in the market value of the asset for various periods and interest rates.

Interest rate					
Years	6%	8%	10%	12%	14%
1	6%	7%	9%	11%	12%
2	11%	14%	17%	20%	23%
3	16%	21%	25%	29%	33%
4	21%	26%	32%	36%	41%
5	25%	32%	38%	43%	48%
6	30%	37%	44%	49%	54%
7	33%	42%	49%	55%	60%
8	37%	46%	53%	60%	65%
9	41%	50%	58%	64%	69%

10	44%	54%	61%	68%	73%
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Justice Scalia states that a regulatory taking that eliminates all income from an asset for 6 years would be a taking that warrants compensation. Assuming a 10% interest rate this would decrease the capitalized value of the asset by about 44%. Most of us would probably consider this a significant reduction in market value and would feel unjustly put upon were the state to appropriate this percentage of a significant asset we happen to own.

Why not just set a standard that compensates owners whenever a regulatory taking reduced the market value of an asset by a given percentage? The problem as the majority denotes is that the percentage reduction will depend upon how the property is parceled. Suppose the right to use the land for the next  $n$  years (the first asset) is sold separately from the right to use it after  $n$  years (the second asset). Then a regulatory taking that eliminates income for the first  $n$  years appropriates the entire value of the first asset, while leaving untouched the value of the second asset. Thus by restructuring the bundle of rights a regulatory taking can always be shown to entirely eliminate the market value of an asset. Alternatively, a restructuring of rights can also be used to reduce the size of the regulatory taking relative to the market value of the asset. Without an objective standard for a parcel of property, the relative impact of the regulatory taking losses all operational value.

The majority indicates that once the ban on construction is lifted the property will return to its pre-ban value. Consequently, the owners have not suffered a loss. It is true that, *ceteris paribus*, the market value of the land should return to its pre-ban price. However, there is still a loss equal to the value in use that the land could have generated during the moratorium. The majority suggests that most did not plan to build during this period and therefore there was no loss. To support their view they cite statistics on the average time between purchasing a piece of land and building on that land.

The distinction between a physical taking and a regulatory taking is a difference without economic significance. With a physical taking the owner loses all interest in the property; whereas, with a regulatory taking there may be a partial taking. From a financial perspective, whether there is a full or partial taking is not important. The size of the taking is what is significant. Does the taking impose an undue hardship on an individual or group of individuals? Undue hardship is, of course, a normative judgment that the court would like to avoid, but cannot.