Temporal Severance and the Exclusion of Time in Determining the Economic Value of Regulated Property

By Carla Boyd*

The right to own property and do with it as one chooses is a cherished right of every United States citizen. At the same time, this individual liberty must be tempered with protection of the environment and society as a whole. The law of regulatory takings sits in the balance of these often conflicting purposes. This Comment focuses on one specific area of regulatory takings jurisprudence—conceptual severance in general and temporal severance in particular. A regulatory taking occurs when the government regulates in such a way that it unduly interferes with the bundle of rights associated with a landowner’s property. A regulatory taking requires compensation when it goes “too far.” A critical question in determining whether this has occurred is what portion of the landowner’s property is considered. Should the courts consider the regulation’s impact on the entire parcel of land or only the land directly affected by the regulation? The latter approach, known as “conceptual severance,” severs the portions of land affected by the regulation from the unaffected portions.

The related approach of “temporal severance” involves a temporary rather than permanent regulation. In determining whether a regulation has gone “too far” in this instance, it is necessary to ask whether the courts should examine the impact of the regulation on

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2. Id.
5. See Meltz et al., supra note 3, at 150.
the property over a span of time, including before and after the regulation was in effect, or only the period of time that the regulation was in effect. To provide a simple illustration, assume that Zachary owns a piece of property. Assume further that the local government passes a land use regulation that completely bars all development and use of certain types of land. Also suppose that this land use regulation completely eliminates the value of the land to which it applies, and that it affects two-thirds of Zachary’s property.

In Figure 1, conceptual severance is not used. The court would determine whether the regulation went “too far” by considering the impact of the regulation on the entire parcel. The court would conclude that the value of the parcel had been reduced by 66.6%, since that is the portion affected by the land use regulation. This leaves 33.3% of Zachary’s property unaffected.

<table>
<thead>
<tr>
<th>Regulated Property</th>
<th>Property Considered</th>
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<tbody>
<tr>
<td>No Conceptual Severance</td>
<td></td>
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<tr>
<td>2/3 of Zachary’s property is regulated.</td>
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<tr>
<td>When looking at the property as a whole 66.6% is regulated.</td>
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<tr>
<td>This results in only a partial taking, which may or may not be considered a compensable taking.</td>
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**Figure 1**

In Figure 2, on the other hand, if conceptual severance is used, the court would only look at the section affected by the regulation. Since two out of two sections were rendered unusable and valueless, the court would conclude that Zachary had lost 100% of the value of his property.

As illustrated by Figures 1 and 2, the court is much more likely to find that a regulation has gone “too far” if it conceptually severs the property and only considers the portion of property affected by the regulation. If conceptual severance is not used, then only 66.6% of

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6. See id.
7. These examples are an extreme oversimplification of takings analysis; the author only hopes to illustrate the basic concepts.
Zachary's property is affected; if conceptual severance is used, then 100% of Zachary's property is affected.

To illustrate the concept of temporal severance, further assume Zachary purchased the property in 1998 and the regulation was in effect for the entire year of 1999. For the purposes of this example, assume the regulation affects Zachary's entire piece of property (instead of two-thirds, as in the previous illustrations).

Zachary brings suit in 2002. Assuming that a statute of limitations does not bar his claim, the court has the option of looking at either (1) the period between 1998 and 2002 (the entire time Zachary owns the property); or (2) the year of 1999 (the year the regulation was in effect).

Figure 3 illustrates the first option by considering the entire period of time that Zachary owns the property. In this example, it is less likely that a taking exists because only one out of the four years was impacted by the regulation.

Figure 4 illustrates the second option, the use of temporal severance. Under this analysis, the court would only look at the one year period between 1999 and 2000 that the regulation impacted the property. Since Zachary completely lost the use of his property in that one year, he would argue that the reduction in value of the property was 100%. Like the conceptual severance example in Figure 2, it is much more likely that a taking will be found when temporal severance is used in this simplistic illustration.

This Comment addresses the issue of whether temporal severance should be used to determine the existence of a taking. In so doing, this Comment examines whether the property owner has been deprived of all economically beneficial or productive use of her land.
Figure 3

Part I gives a brief background of constitutional takings law, describes regulatory takings generally, and introduces the issue of conceptual severance. Part I concludes by discussing conceptual and temporal

Figure 4

severance in the context of measuring the relevant parcel to determine whether there has been a taking.

Part II addresses the problem of whether the United States Supreme Court should allow temporal severance for purposes of determining whether there has been a total taking. It analyzes the Ninth
Circuit’s decision in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* 8 ("TSPC I"), as well as both the majority opinion and the opinion dissenting from the denial of rehearing en banc. 9 This Part also introduces *First English Evangelical Church of Glendale v. Los Angeles* 10 ("First English") and addresses the potential conflict between *TSPC I* and *First English*. Finally, Part II briefly addresses the Federal Circuit’s treatment of conceptual severance.

Part III examines conceptual severance and the applicability of *First English*. It suggests that there are three possible interpretations of *First English*, and argues that *First English* did not explicitly or implicitly endorse temporal severance.

Part IV of this Comment suggests that the Supreme Court should use its hearing of *TSPC* as an opportunity to clarify conceptual severance. This Part examines the feasibility of temporal severance in light of the fact that the future economic value of land is intertwined with the present value of land at any given time.

In Part V, this Comment concludes that looking at the value of land in a vacuum is impossible and proposes that the Supreme Court reject the use of temporal severance in regulatory takings analysis.

**I. Background: The Takings Clause**

The Fifth Amendment of the United States Constitution states, "private property [shall not] be taken for public use, without just compensation." 11 This provision was subsequently applied to the states via the Fourteenth Amendment, signifying the first time the Federal Constitution was implemented at the state level. 12 It was, however, traditionally limited to a physical taking of property. 13 The requirement that the property be physically taken was short lived, and in 1922, takings jurisprudence entered the realm of regulations. 14 Put simply, there are two kinds of takings: (1) possessory takings that essentially

8. 216 F.3d 764 (9th Cir. 2000), cert. granted, 121 S. Ct. 2589 (U.S. June 29, 2001) (No. 00-1167) [hereinafter *TSPC I*].
9. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 228 F.3d 998 (9th Cir. 2000), reh’g en banc denied [hereinafter *TSPC II*].
11. U.S. Const. amend. V.
12. See *Chi., Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 233–34 (1897) (ruling that the taking of private property for public use by the state without compensation is a violation of due process).
14. See generally *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922) (holding that if a property regulation goes “too far,” it will be considered a taking).
take the property from its owner; and (2) regulatory takings where the
regulation has such a significant impact on the property that a taking
has occurred.\footnote{15} There are two questions to be answered in the takings claim: (1) is there a taking? and (2) has just compensation been paid?\footnote{16} Both of these questions should be considered independently. This Comment deals primarily with the first question, which establishes the threshold issue of whether there has been a taking.\footnote{17}

The government has the right to take private property for public
use through the theory of eminent domain.\footnote{18} It is defined as “[t]he
inherent power of a government entity to take privately owned prop-
erty, [especially] land, and convert it to public use, subject to reasona-
ble compensation for the taking.”\footnote{19} This power is not explicit in the
Constitution, but is implied from the Takings Clause itself: “The
Court has also noted that the [F]ifth [A]mendment’s limitation on
taking private property is a tacit recognition that the power to take
private property exists.”\footnote{20}

A. Regulatory Takings

In 1922, the United States Supreme Court extended takings law
to regulatory takings in \textit{Pennsylvania Coal Co. v. Mahon}.\footnote{21} There, the
Court established the general rule that “while property may be regu-
lated to a certain extent, if regulation goes too far it will be recognized
as a taking.”\footnote{22} At issue in \textit{Mahon} was an act prohibiting the mining of
coil if it would damage the structural support of “human habitations.”\footnote{23} The statute exempted property where the surface was owned
by the owners of the underlying coal.\footnote{24} The defendant coal company
had executed a deed to the plaintiff homeowners, stating that the coal
company reserved the right to mine the coal beneath the homeown-
ers’ property.\footnote{25} This deed released the coal company from any liability

\begin{itemize}
\item \footnote{15}{See Meltz et al., \textit{ supra} note 3, at 3.}
\item \footnote{16}{See id. at 4.}
\item \footnote{17}{See generally id. for a more in-depth analysis of the Takings Clause.}
\item \footnote{18}{See Black’s Law Dictionary 541 (7th ed. 1999).}
\item \footnote{19}{Black’s Law Dictionary 541 (7th ed. 1999).}
\item \footnote{20}{John E. Nowak & Ronald D. Rotunda, \textit{Constitutional Law} § 11.11, at 425 (4th
ed. 1991).}
\item \footnote{21}{260 U.S. 393 (1922).}
\item \footnote{22}{Id. at 415.}
\item \footnote{23}{Id. at 412-13.}
\item \footnote{24}{See id. at 413.}
\item \footnote{25}{See id. at 412.}
\end{itemize}
arising from the mining of coal beneath this property.\textsuperscript{26} The Supreme Court of Pennsylvania held that the act in question superseded the contract between the surface owners and the coal company because the statute was a proper exercise of police power.\textsuperscript{27} The United States Supreme Court reversed this decision, holding "that the act cannot be sustained as an exercise of the police power, so far as it affects the mining of coal under streets or cities in places where the right to mine such coal has been reserved."\textsuperscript{28}

The \textit{Mahon} opinion articulated one of the central conflicts in regulatory takings jurisprudence: "Government 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."\textsuperscript{29} However, in support of this extension of takings law to the regulation of property, Justice Holmes commented on the concern by stating 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."\textsuperscript{30} Justice Holmes questioned where and on whom the loss resulting from the desired change should fall.\textsuperscript{31} Emphasizing that a balance must be struck, it was necessary to determine when a regulation goes "too far."\textsuperscript{32} The Court stated that "[o]ne fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act."\textsuperscript{33} Referred to as the "diminution of value test," this analysis focuses on the "impact of the regulation on the private value of the property as the decisive factor for compensation."\textsuperscript{34} Ultimately the question of whether a regulation has gone "too far" depends on the particular facts of the case.\textsuperscript{35}

Additional cases were decided determining that not all regulation of property will result in a compensable taking.\textsuperscript{36} Reduction in the value of property is sometimes viewed as the expected incidents of

\begin{footnotesize}
\begin{enumerate}
\item See id.
\item See id.
\item \textit{Id.} at 414.
\item \textit{Id.} at 415.
\item \textit{Id.} at 416.
\item See id.
\item \textit{Id.} at 415.
\item \textit{Id.} at 413.
\item THOMAS J. MICELI, \textit{ECONOMICS OF THE LAW} 146 (Oxford University Press 1997).
\item See \textit{Mahon}, 260 U.S. at 413.
\item See, e.g., Danforth v. United States, 308 U.S. 271, 286 (1939) (holding that legislation approving the use of property owned by the petitioner to divert floods was not a tak-
ownership and therefore not a taking under the Fifth Amendment.\textsuperscript{37} This leaves open the question of what kind of regulation should be considered a taking \textit{not} incident to ownership.

In \textit{Penn Central Transportation Co. v. New York City},\textsuperscript{38} the United States Supreme Court explained the general rules of takings jurisprudence.\textsuperscript{39} In that case, the New York City Land Preservation Commission failed to approve plans for construction of a fifty story office building above the Grand Central Station terminal.\textsuperscript{40} Since Grand Central Station had been designated a landmark, the owners had to obtain permission from the Land Preservation Commission before the owner could "alter the exterior architectural features of the landmark or construct any exterior improvement on the landmark site."\textsuperscript{41} The Court admitted that determining whether a regulation constituted a taking depended largely on "ad hoc, factual inquiries."\textsuperscript{42} In these factual inquiries, the Court found a common thread between three balancing factors: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with investment backed expectations; and (3) the character of the governmental action.\textsuperscript{43} Ultimately, the Court held that a compensable taking had not taken place.\textsuperscript{44}

The Court reasoned that the regulation designating the parcel as a landmark site was "substantially related to the promotion of the general welfare"\textsuperscript{45} and still afforded the landowners the ability to develop the airspace in a limited manner.\textsuperscript{46} In determining whether to evaluate the entire parcel or just the airspace the appellants were unable to develop, the Court specifically stated that "'[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."\textsuperscript{47} Instead, courts are to focus on the "parcel as a whole."\textsuperscript{48}

\textsuperscript{37} \textit{See Danforth}, 308 U.S. at 285; \textit{Agins}, 447 U.S. at 262–63.
\textsuperscript{38} \textit{438 U.S. 104 (1978)}.
\textsuperscript{39} \textit{Id. at 123–24}.
\textsuperscript{40} \textit{Id. at 115–17}.
\textsuperscript{41} \textit{Id. at 112}.
\textsuperscript{42} \textit{Id. at 124}.
\textsuperscript{43} \textit{See id. See also MELTZ ET AL., supra note 3, at 130–43} (providing an analysis of the three factors).
\textsuperscript{44} \textit{See Penn Central}, 438 U.S. at 138.
\textsuperscript{45} \textit{Id. at 138}.
\textsuperscript{46} \textit{See generally id.} (citing to cases in which landowners' property rights were limited as a result of zoning laws which promoted the general welfare).
\textsuperscript{47} \textit{Id. at 130}.
In *Lucas v. South Carolina Coastal Council*, the United States Supreme Court summarized two categorical takings where the case by case inquiry articulated in *Penn Central* would not be necessary. At issue in *Lucas* was a South Carolina regulation that prohibited Lucas from developing two lots of beachfront property. The South Carolina Supreme Court held that the act in question did not require compensation under the takings clause because the regulation was for the public good. The United States Supreme Court, however, rejected this standard. Instead, the Court summarized the two categorical rules of takings jurisprudence and remanded the case to the South Carolina Supreme Court.

The first category the Court discussed relates to physical takings and is described as “encompass[ing] regulations that compel the property owner to suffer a physical ‘invasion’ of his property.” The second categorical approach “is where regulation denies all economically beneficial or productive use of land.” If a plaintiff bringing a regulatory takings claim argues either of these two categorical exceptions, then the *Penn Central* balancing test is not required. If, however, there is not a categorical total taking, then a plaintiff must use the factors in *Penn Central* to establish a regulatory taking. The balancing factors are to be employed for a partial, rather than total, taking.

This Comment focuses only on the second categorical exception, whereby the “regulation denies all economically beneficial or productive use of land.” The Supreme Court indicated that the determina-
tion on remand of whether Lucas had been denied all economically beneficial use of his land depended on the state's laws regarding the "essential use." More importantly, the Court stated the rule that "[w]hen . . . a regulation that declares 'off-limits' all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it."

B. Ascertaining the Relevant Parcel

No matter what test or inquiry is used, in order to determine whether a regulatory taking has occurred, a court must determine the relevant property. The relevant property is crucial to the inquiry because the claim is that the government has taken the landowner's property without just compensation. However, as in the examples given at the beginning of this Comment, sometimes the regulation only affects portions of the property or only affects the property for a finite period of time. The question thus becomes whether the court should look at the entire piece of property and inquire whether the landowner has been deprived of all economically beneficial or productive use of that property as a whole, or, in the alternative, whether the court should only look at the property affected by the regulation. The latter option is conceptual severance.

1. Conceptual Severance

This determination is complicated and can involve a quasi-mathematical comparison of "the value that has been taken from the property with the value that remains in the property." Thus, the critical issue in determining whether a taking of the property has occurred is defining what constitutes the particular property. In other words, how is the "relevant parcel" defined?

63. Essential use seems to be the Court's recognition that certain activities are essential to a landowner's use of her property. See id. at 1031 (citing Curtin v. Benson, 222 U.S. 78, 86 (1911) (referring to a landowner's right to pasture cattle on his land and have access to his land as essential uses)).

64. See Lucas, 505 U.S. at 1031-32 (emphasizing that this analysis has to do with nuisance law).

65. Id. at 1030.

66. See Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 496-97 (1987); TSPC I, 216 F.3d 764, 774 (9th Cir. 2000), cert. granted, 121 S. Ct. 2589 (U.S. June 29, 2001) (No. 00-1167).

67. TSPC I, 216 F.3d at 774 (quoting Keystone, 480 U.S. at 497).

68. See id.

69. See MELTZ ET AL., supra note 3, at 144-54. See also TSPC I, 216 F.3d at 774.
Conceptual severance:

[C]onsists of delineating a property interest consisting of just what the government action has removed from the owner, and then asserting that that particular whole thing has been permanently taken. Thus, this strategy hypothetically or conceptually "severs" from the whole bundle of rights just those strands that are interfered with by the regulation, and then hypothetically or conceptually construes those strands in the aggregate as a separate whole thing.\(^70\)

Conceptual severance involves many dimensions, including "depth, width, and length."\(^71\) Depth refers to "the extent to which the owner may not use the property in question."\(^72\) Width refers to the "amount of property encompassed by the restrictions."\(^73\) Length describes the duration that the regulation will affect the given property.\(^74\) This final type of conceptual severance is referred to as "temporal severance."\(^75\)

Defining the property in a regulatory takings analysis is an important and contentious undertaking. Whether the United States Supreme Court eventually allows conceptual severance of the property in question is extremely influential in determining whether there has been a total taking. If it is allowed, then a court is much more likely to find a total taking than if it looks at the property as a whole. As the example given at the beginning of this Comment illustrates, if the entire piece of property is evaluated in the takings analysis, then the property still retains much of its value. On the other hand, if the evaluation is narrowed to the piece of property that is regulated, then that entire piece is affected and may have a much lower economic value.

The direction the current Supreme Court will take regarding its willingness to separate the property is not entirely clear. However, in *Penn Central*, the Court clearly rejected the idea of conceptual severance when it stated:

"Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular

\(^{70}\) Radin, *supra* note 4, at 1676.


\(^{72}\) *Id.* (Stevens, J., dissenting).

\(^{73}\) *Id.* (Stevens, J., dissenting).

\(^{74}\) *Id.* (Stevens, J., dissenting).

\(^{75}\) *See* *id.* (Stevens, J., dissenting).

\(^{76}\) *See, e.g.*, *TSPC I*, 216 F.3d 764, 774 (9th Cir. 2000), *cert. granted*, 121 S. Ct. 2589 (U.S. June 29, 2001) (No. 00-1167) (describing the plaintiffs' argument in favor of temporal severance such that the court "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.").
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.\textsuperscript{76}

In \textit{Penn Central}, the conflict involved only the airspace affected by the landmark designation. However, the Court still considered the relevant parcel to be both the terminal and the airspace above it.\textsuperscript{77} Central to the Court's reasoning was the fact that the owners still retained an economic benefit regardless of the landmark designation and were not deprived of all use of their property by the regulation.\textsuperscript{78}

The Supreme Court's rejection of conceptual severance was clear until Justice Scalia stated in a footnote of the majority opinion in \textit{Lucas} that "[r]egrettably, the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured."\textsuperscript{79} By pointing out, or perhaps creating, this ambiguity regarding the relevant parcel in the equation, Justice Scalia indicates a possible impetus to clear up the ambiguity in a future case. In addition, the Supreme Court case of \textit{Palazzolo v. Rhode Island}\textsuperscript{80} points out the conflicting views on this topic.\textsuperscript{81} In that case, the Court cited \textit{Keystone Bituminous Coal Ass'n v. DeBenedictis} for the rule against conceptual severance, and then Justice Scalia's footnote as "express[ing] discomfort with the logic of" this rule.\textsuperscript{82} Although raised by the petitioner in \textit{Palazzolo}, the Court chose not to address the relevant parcel conundrum because the petitioner failed to raise the argument in the lower courts.\textsuperscript{83}

\section{Temporal Severance}

Temporally severing a property interest requires looking at whether a regulation constituted a total taking of property in terms of a certain period of time.\textsuperscript{84} Property has various interests associated

\begin{itemize}
\item \textsuperscript{77} See \textit{Penn Cent.}, 438 U.S. at 130–31.
\item \textsuperscript{78} See \textit{id.} at 134–35, 137–38.
\item \textsuperscript{79} Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 n.7 (1992).
\item \textsuperscript{80} 533 U.S. 606 (2001).
\item \textsuperscript{81} See \textit{id.} at 616.
\item \textsuperscript{82} \textit{Id.}
\item \textsuperscript{83} See \textit{id.}
\item \textsuperscript{84} See generally \textit{Meltz ET AL., supra} note 3, at 150.
\end{itemize}
with it; temporal severance recognizes the interest of time and separates it from the other interests. Instead of looking at the effect the regulation had from the time it went into effect until the time it ceased or the time of the litigation, temporal severance looks at a certain amount of time when the regulation was in effect. The Ninth Circuit describes the temporal dimension as "the duration of the property interest."\(^8\)

This affects the finding of a total taking because the property may no longer be regulated at the time of litigation or at a future time. As in the example given at the beginning of this Comment, if a court looks at the entire length of the property as a whole, then it may not find a total taking because there might be time before and after where the regulation has no affect. However, if the court looks only at the time period that the regulation was in effect, then it is more likely to find a regulatory taking.

While conceptual severance in terms of depth and width makes theoretical sense because it is at least possible to evaluate the value of pieces of property separately from each other, temporal severance in terms of time does not make sense. It is impossible to take time out of the evaluation of the value of property. In order to determine the present economic value of property, the future value is an essential element.\(^9\)

II. Temporal Severance for Purposes of Determining Whether There Has Been a Total Taking

The Supreme Court has never directly addressed whether temporal severance may be used to determine whether a taking has occurred. Thus, there has been considerable discourse regarding whether the Court implicitly condoned temporal severance in *First English*.\(^7\) In *TSPC I*, the Ninth Circuit clearly rejected temporal sever-

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85. *TSPC I*, 216 F.3d 764, 774 (9th Cir. 2000).
In his dissenting opinion, Judge Kozinski argued that by rejecting temporal severance and holding that a temporary development moratorium is not a taking, the Ninth Circuit failed to follow the authority of First English. Additional Federal Circuit cases may also shed light on the question of whether to allow temporal severance.

A. Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency

1. Temporary Development Moratoria

Temporary development moratoria are tools used for growth management. The rate, amount, type, location, and/or quality of future development are monitored and controlled by growth management. A development moratorium puts "an authorized delay in the provision of . . . development approval." Growth management tools benefit communities by promoting goals such as "protecting and enhancing aesthetic resources, protecting historic and cultural resources, preserving farmland and open space, protecting the natural environment (by reducing air pollution; preventing groundwater contamination; and protecting sensitive habitats such as wetlands, coastal beaches, and dunes), and providing affordable housing."

2. Parties and Facts

The plaintiffs in TSPC consisted of 450 people who owned property in the Lake Tahoe Basin. Each plaintiff alleged that various actions taken by the Tahoe Regional Planning Agency in the 1980s constituted compensable takings under the Fifth Amendment to the

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88. See TSPC I, 216 F.3d at 774–77.
89. See TSPC II, 228 F.3d 998, 999 (9th Cir. 2000) (Kozinski, J., dissenting).
90. See id. (Kozinski, J., dissenting).
92. See MELTZ ET AL., supra note 3, at 264.
93. See id.
94. Id. at 266.
95. Id. at 265.
96. See TSPC I, 216 F.3d at 766.
United States Constitution. The Ninth Circuit split the plaintiffs into groups according to time periods and land classifications.

The facts of TSPC are complicated and involve several ordinances, resolutions, regional land use plans, compacts, seven land classifications, an injunction, and four time periods. Lake Tahoe "has been undergoing 'eutrophication,' a process by which the nutrient loading in the lake increases dramatically, due to nitrogen and phosphorus (contained in soil) being washed into the lake." This process results in excessive algae in the lake, causing a loss of clarity as the lake becomes "green and opaque." The rapid development of environmentally sensitive land has caused this process of eutrophication. As a response, in 1969, the United States Congress approved the bi-state Tahoe Regional Planning Compact, which created the Tahoe Regional Planning Agency. The agency adopted Ordinance No. 4, which created eight different classifications of land, depending on each classification's environmental sensitivity. For each classification, Ordinance No. 4 recommended what development each classification of property could reasonably sustain. In 1980, an amendment to the Tahoe Regional Planning Compact refocused the Tahoe Regional Planning Agency because of dissatisfaction with its regulatory scheme and evidence that it was not strong enough to adequately remedy the problems the Lake Tahoe Basin faced. The amendment ordered the Tahoe Regional Planning Agency to make several changes in its way of dealing with the environmental damage inflicted on Lake Tahoe.

97. See id. at 768-69.
98. See id. at 769. The land at issue in TSPC was divided into seven land classifications based upon the level of the land's "susceptibility to environmental damage." Id. at 767. For purposes of litigation, the plaintiffs were then divided into two groups based upon their land classification. See id. at 769. They were then further divided into four time periods. See id.
99. See id. 766-71.
100. Id. at 766.
101. Id. at 767.
102. See id.
103. See id.
104. See id.
105. See id.
106. See id.
107. See id. The Tahoe Regional Planning Compact amendment in 1980 directed TRPA:
   (1) to adopt "environmental threshold carrying capacities" within eighteen months of the date on which the Compact became effective;[ ] (2) to adopt a new regional plan within twelve months of the adoption of the carrying capacities; and
The agency enacted Ordinance 81-5 in 1981, which created a development moratorium on the classified land. The ordinance included some exceptions whereby the agency could approve construction on specific portions of land. The Tahoe Regional Planning Agency subsequently enacted a regional land use plan, which was contested on the ground that it did not sufficiently protect Lake Tahoe. The United States District Court for the Eastern District of California responded to the suit by issuing a temporary restraining order prohibiting the Tahoe Regional Planning Agency from approving any development on the relevant land, and this order was upheld on appeal. This injunction was in force until another regional land use plan was enacted in 1987. The only claims that will be discussed in this Comment are those that involve the temporary development moratorium during the two earliest time periods before the Regional Land Use Plan was adopted in 1987. The 1987 land use plan was still in effect at the time the TSPC I opinion was written.

3. The Majority Opinion

In TSPC I, the United States Court of Appeals for the Ninth Circuit rejected the plaintiff’s argument that the court should conceptually sever the property interests at issue in the case. In respect to

(3) to review all projects and establish temporary restrictions on development in the basin pending the enactment of a new regional plan.

Id. at 767–68 (citation omitted).

108. See id. at 768.
109. See id.
110. Challenges were brought by the State of California and the League to Save Lake Tahoe. See id.
111. See California ex rel. Van de Kamp v. Tahoe Reg’l Planning Agency, 766 F.2d 1308, 1312, 1316 (9th Cir. 1985). See also TSPC I, 216 F.3d at 768.
112. See TSPC I, 216 F.3d at 768.
113. This temporary development moratorium consisted of Ordinance 81-5, in effect from August 24, 1981, to August 26, 1983 (Period I), and Resolution 83-21, in effect from August 27, 1983 through April 25, 1984 (Period II). See id. at 769.
114. This is the claim relevant to this Comment because it deals with the issue on which the Court has granted certiorari, whereas the other two claims in TSPC I deal with (1) whether TRPA is responsible for the injunction issued in 1984; and (2) whether the plaintiff’s claims regarding the final regional land use plan of 1987 are time-barred. The Ninth Circuit resolved both claims, holding that (1) TRPA was not responsible for the injunction issued by the court in 1987 and thus that injunction does not spark a taking inquiry; and (2) the plaintiff’s claims regarding the final regional land use plan of 1987 are time-barred. See id. at 785, 789.
115. See id. at 769.
116. See id. at 779.
the time periods relevant to this Comment, the court framed the issue in terms of the *Lucas* categorical taking:117 "[T]he only question before us is whether the rule set forth in *Lucas* applies—that is, whether a categorical taking occurred because Ordinance 81-5 and Resolution 83-21 denied the plaintiffs 'all economically beneficial or productive use of land.'"118 The court explained that the plaintiffs limited the questions on appeal by not arguing a takings claim under *Penn Central*'s ad hoc balancing test.119 Additionally, the inquiry was limited to a facial takings claim, whereby the court only looks to the "mere enactment of the [regulation]" and not its application to the particular plaintiff.120

The plaintiffs argued that the court should temporally sever the property when determining what the relevant parcel is.

The plaintiffs contend that, for purposes of determining whether the regulations constitute a categorical taking under *Lucas*, we should not treat the plaintiffs' properties as the fee interests that they are. Instead, they argue, we should define narrowly, as a separate property interest, the temporal "slice" of each fee that covers the time span during which Ordinance 81-5 and Resolution 83-21 were in effect. It is this carved-out piece of each plaintiff's property interest, the plaintiffs assert, that has been "taken" by the regulations.121

Had the court chosen to follow this line of reasoning, it might have found a total loss. However, it rejected the plaintiffs' proposal to conceptually sever the property interests: "In short, we reject the plaintiffs' contentions that *First English* applies to temporary moratoria and that it works a radical change to takings law by requiring that property interests be carved up into finite temporal segments."122 The court held "[t]he relevant property interests in the present case are the whole parcels of property that the plaintiffs own."123 It reasoned that modern case law has rejected conceptual severance unless the takings claim was one of "physical invasion or occupation."124 The opinion cited cases from the United States Supreme Court,125 as well

118. *TSPC I*, 216 F.3d at 773 (quoting *Lucas*, 505 U.S. at 1015).
120. *TSPC I*, 216 F.3d at 773 (quoting *Lucas*, 505 U.S. 1003, 1015 (1992)).
121. *Id.* at 774.
122. *Id.* at 778.
123. *Id.* at 779.
124. *Id.* at 774.
as the Ninth Circuit case of *MacLeod v. County of Santa Clara,*\(^{126}\) to support its rejection of conceptual severance.\(^{127}\)

In addition, the court gave three policy reasons why it would be detrimental to the government's ability to use temporary development moratoria as an effective land use planning tool.\(^ {128}\) The court found that temporary moratoria ensure that a community's problems will not be compounded while the local planning agencies develop a regulatory scheme.\(^ {129}\) Second, these moratoria stop developers and landowners from developing before a new plan is adopted.\(^ {130}\) Third, temporary development moratoria allow a thorough evaluation of issues brought up by the community and landowners, who are ultimately the ones affected by the new plans.\(^ {131}\)

4. *TSPC II and First English*

In the dissent from an order denying the petition for rehearing en banc of *TSPC I,* Judge Kozinski vehemently argued that the Ninth Circuit's panel decision was wrong because it sought to reverse the Supreme Court's holding in *First English.*\(^ {132}\) His primary argument was that the Ninth Circuit panel decision in *TSPC I* adopts Justice Stevens's dissent in *First English* instead of following the majority opinion.\(^ {133}\) Judge Kozinski argued that in *First English,* the Court held that a temporary regulatory taking is still a compensable taking.\(^ {134}\) He pointed out the Federal Circuit case of *Tabb Lakes, Ltd. v. United States*\(^ {135}\) that, according to him, was similar to *TSPC I,* but followed his or Justice Stevens's reasoning and interpretation of *First English.*\(^ {136}\)


126. 749 F.2d 541 (9th Cir. 1984) (rejecting temporal severance and holding that denial of a permit to harvest timber did not deprive the owner of all economic benefit when the owner still had the right to ranch and graze cattle on his land).

127. See *TSPC I,* 216 F.3d at 774 (citing *MacLeod,* 749 F.2d at 547).

128. See *TSPC I,* 216 F.3d at 777.

129. See id.

130. See id.

131. See id.

132. See *TSPC II,* 228 F.3d 998, 999 (9th Cir. 2000) (Kozinski, J., dissenting).

133. See id. (Kozinski, J., dissenting).

134. See id. at 1000 (Kozinski, J., dissenting).

135. 10 F.3d 796 (Fed. Cir. 1993).

136. See *TSPC II,* 228 F.3d at 1001 (Kozinski, J., dissenting).
a. *First English*

In order to effectively evaluate Judge Kozinski's dissent, it is necessary to first analyze *First English*. In *First English*, the appellant, First English Evangelical Lutheran Church, argued that a temporary regulation prohibiting construction on its land in response to flooding of the canyon where the land was located constituted a regulatory taking for which the government must compensate.\(^{137}\) The lower court decided part of the case based on the remedy for a taking, which led the Supreme Court to point out that "[t]he disposition of the case on these grounds isolates the remedial question for our consideration."\(^{138}\) The Court held that once the government's actions are considered a taking, the government must compensate the property owner, even if the regulation is no longer in place.\(^{139}\) The Court was careful, however, to limit its opinion to the facts of the case.\(^{140}\) The issue of whether First English Evangelical Church had been denied all economically beneficial value or use of its land, and consequently whether a total taking had occurred, was remanded to the lower court.\(^{141}\) Therefore, the only issue decided in *First English* was that if a total taking had taken place, it was irrelevant whether that total taking was temporary.\(^{142}\) Additionally, the Court was careful to point out that it was not deciding whether situations of "normal delays in obtaining building permits, changes in zoning ordinance, variances, and the like" constituted takings.\(^{143}\) The Court cautiously limited its opinion to the facts of the case, stressing that the temporary nature of the regulation resulted from its invalidation by the court.\(^{144}\)

b. Judge Kozinski's Interpretation of *First English*

In his opinion dissenting from an order denying the petition for rehearing en banc, Judge Kozinski incorrectly interpreted *First English* to have held that a temporary regulatory taking that has deprived landowners use of their property is a taking that must be compensated.\(^{145}\) He pointed to the language of the *First English* opinion that

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\(^{137}\) See First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 303, 308, 311 (1987).

\(^{138}\) Id. at 311.

\(^{139}\) See id. at 321.

\(^{140}\) See id.

\(^{141}\) See id. at 313.

\(^{142}\) See id. at 321.

\(^{143}\) Id.

\(^{144}\) See id.

\(^{145}\) See TSPC II, 228 F.3d 998, 1000 (9th Cir. 2000) (Kozinski, J., dissenting).
states: "[W]here the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." Judge Kozinski apparently understood the Court to have held that a temporary regulation can be a taking, despite its temporary nature. Following from his interpretation of First English, Judge Kozinski found that the Ninth Circuit panel "reverses First English Evangelical Lutheran Church v. County of Los Angeles . . . , and adopts Justice Stevens's First English dissent." Judge Kozinski opined that "Justice Stevens would have held that a temporary regulation cannot be a taking, even though it deprives the owner of all present uses, because the property retains value based upon its future uses." Putting Judge Kozinski's dissent aside for a moment, it is important to comment on the fact that the majority opinion in First English is not necessarily inconsistent with Justice Stevens's argument against temporal severance. Since the present value of property at any given moment is intertwined with the future value of property, it is impossible to view the property in a vacuum. The majority in First English found that in the limited situation presented there, where a permanent regulation was invalidated by the courts, compensation must be made if the courts find a permanent regulation constitutes a taking. Although the Court only addressed the remedial stage, it is possible to infer that when one evaluates the time period that the permanent regulation was in place, one is still able to take the future value of the property into consideration and engage in a legal fiction that the permanent regulation is still in place. In the situation of a temporary development moratorium, the future tells us that the moratorium is temporary and therefore the future value of the property is still intact, thus rendering First English inapplicable. Whether this is temporal severance or not is another question taken up in Part IV.B.

146. Id. (Kozinski, J., dissenting) (quoting First English, 482 U.S. at 321).
147. Id. at 999 (Kozinski, J., dissenting) (citations omitted).
148. Id. at 1000 (Kozinski, J., dissenting).
149. See discussion infra Part IV.B.
150. See First English, 482 U.S. at 321.
151. See TSPC I, 216 F.3d 764, 778 (9th Cir. 2000). See also discussion infra Part IV.B.
c. Judge Kozinski's Misplaced Reliance on the Federal Circuit

Judge Kozinski also pointed out *Tabb Lakes, Ltd. v. United States*, which he claimed followed the majority's reasoning in *First English*. In *Tabb Lakes*, the plaintiffs appealed the dismissal of their Fifth Amendment takings claim. The plaintiffs claimed that the government owed them compensation for a period of time when the United States Army Corps of Engineers ("Army Corps") delayed residential development on parts of the plaintiffs' property. This delay resulted because the property contained wetlands and in order to develop and fill them, the plaintiffs had to obtain a permit from the Army Corps. The United States Court of Appeals for the Federal Circuit affirmed the lower court's dismissal of the plaintiffs' claim. The Federal Circuit reasoned that the cease and desist order, which stopped the filling of the wetlands until the plaintiffs obtained a permit from the Army Corps, was precisely the kind of governmental action that does not constitute a taking. Only when regulation goes too far is it to be recognized as a taking. The regulation at issue in *Tabb Lakes* did not go too far because it was just a preliminary step taken toward obtaining a permit.

Interestingly, Judge Kozinski claimed that the Ninth Circuit's opinion in *TSPC I* "creates a conflict with *Tabb Lakes*..." which followed the majority's reasoning in *First English*. He explained that, in so doing, *Tabb Lakes* recognized that "a taking, even for a day, without compensation is prohibited by the Constitution." Under the panel's ruling in our case, a taking for a day could never require compensation, because despite the temporary deprivation, the property would retain almost all of its value based upon its expected future uses.

While Judge Kozinski is correct that *Tabb Lakes* may have followed *First English*, he is incorrect that *Tabb Lakes* creates a conflict with *TSPC I*. The portion of the opinion Judge Kozinski quoted from *Tabb Lakes*,

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152. 10 F.3d 796 (Fed. Cir. 1993).
153. See *TSPC II*, 228 F.3d 998, 1001 (9th Cir. 2000) (Kozinski, J., dissenting).
154. See *Tabb Lakes, Ltd.*, 10 F.3d at 798.
155. See id. at 799.
156. See id.
157. See id. at 804.
158. See id. at 800-01.
159. See id. at 800.
160. See id. at 800-01.
161. *TSPC II*, 228 F.3d 998, 1001 (9th Cir. 2000) (Kozinski, J., dissenting) (citations omitted).
162. Id. (Kozinski, J., dissenting) (quoting *Tabb Lakes, Ltd.*, 10 F.3d at 800).
163. Id. (Kozinski, J. dissenting) (citations omitted).
that "a taking, even for a day, without compensation is prohibited by the Constitution,"\textsuperscript{164} is simply the court’s recognition of the theoretical validity of the plaintiffs’ claims. However, when a regulatory taking is at issue the question is one of degree. A taking for a day requires compensation only if the court had found that there was a taking for that day. The words surrounding the portion of the opinion that Judge Kozinski quoted are relevant to the meaning:

We agree in theory with plaintiff that a taking, even for a day, without compensation is prohibited by the Constitution. However, the question here is, “Was there a taking?” Or more specifically, “Did a taking occur on [the date the cease and desist order took affect]?”

To answer that question, we must give the same effect to the cease and desist order regardless of whether the order ultimately had a permanent effect or only one limited in time. . . . Plaintiff is correct that on October 8, 1986, the Corps’ cease and desist order effectively stopped its development of its property as it had planned. However, plaintiff is incorrect that this interference or restriction on the use of its land by government regulatory action necessarily constituted a taking.\textsuperscript{165}

When put in this context, Judge Kozinski’s comment that 

Tabb Lakes

conflicts with \n
TSPC I

does not make sense. Rather, \n
TSPC I

and \n
Tabb Lakes

are completely consistent with each other.

The \n
Tabb Lakes

decision does not support conceptual severance. The opinion quotes from a relevant portion of \n
Penn Central,

which clearly states that

[t]aking 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.\textsuperscript{166}

In fact, the Federal Circuit in \n
Tabb Lakes

chose not to engage in much discussion regarding conceptual severance because of its finding that “[e]ven if only [the parcels that the cease and desist order applied to] are considered, the permit system brings the facts of this case within the ambit of the holdings that preliminary regulatory activity does not effect a taking in the constitutional sense.”\textsuperscript{167} It is interesting that

\textsuperscript{164} \textit{Tabb Lakes, Ltd.}, 10 F.3d at 800.
\textsuperscript{165} \textit{Id.}
\textsuperscript{167} \textit{Id.}
Judge Kozinski chose to rely on a case that so clearly goes against his stated opinion.

d. Loophole for the Government

One aspect of Judge Kozinski’s opinion that should not be hastily disregarded is the possible effect of a rule that exempts temporary development moratoria from takings claims. He appropriately pointed out that “[i]f local government can evade its constitutional obligations by describing a regulation as ‘temporary,’ we create a sizable loophole to the Takings Clause.”\textsuperscript{168} This possibility of a loophole should be considered when devising a rule regarding temporary development moratoria. \textit{TSPC I} presents this concern more strongly than \textit{Tabb Lakes}. \textit{TSPC I} involves a series of regulations that have prohibited the owner from developing for two decades, whereas in \textit{Tabb Lakes} the permitting process actually has the effect of leaving open the possibility of development, contingent on the permit being approved, while maintaining the preservation of wetlands.

5. The United States Supreme Court Grants Certiorari

In June of 2001, the United States Supreme Court granted certiorari in \textit{TSPC}.\textsuperscript{169} The Court limited its review to the following question: “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?”\textsuperscript{170} Although the question does not explicitly address the question of conceptual severance, this case will provide an opportunity for the Supreme Court to clarify what the “relevant parcel” is for purposes of determining whether there has been a total taking.

B. Conceptual Severance and the Federal Circuit

Other circuits, particularly the Federal Circuit, give guidance in developing a workable solution to the problem of whether the Court should permit conceptual severance and the effect this would have on regulations such as temporary development moratoria. The Federal Circuit is a particularly good place to look to understand conceptual

\textsuperscript{168} \textit{TSPC II}, 228 F.3d 998, 1001 (9th Cir. 2000) (Kozinski, J., dissenting).

\textsuperscript{169} See \textit{TSPC III}, 121 S. Ct. 2589 (2001) (oral arguments heard January 7, 2002) (the Supreme Court issued its decision on April 23, 2002, as this Comment went to print, \textit{TSPC III}, No. 00-1167, slip op. (U.S. Apr. 23, 2002)).

\textsuperscript{170} Id. at 2589–90.
severance because it hears more federal takings claims than any other circuit.  

The Federal Circuit has not employed conceptual severance outright.  In *Tabb Lakes*, the Federal Circuit did not conceptually sever the plaintiffs' land in order to determine the relevant parcel of the property. Additionally, in *Loveladies Harbors, Inc. v. United States*, the court did not use conceptual severance to arrive at its holding that a partial taking had not occurred.

III. Conceptual Severance and the Potential Conflict with *First English*

Whether *First English* even addresses conceptual severance generally and temporal severance in particular is a highly contested issue. This Comment argues that there are three ways of interpreting *First English*’s relationship to temporal severance: (1) *First English* is limited to the remedial stage of takings analysis and is not relevant in any way to determining whether a taking occurred; (2) *First English* is limited to the remedial stage of takings analysis, but is relevant to the determination of whether there was a taking; and (3) *First English* is not limited to the remedial stage and held that a court may temporally sever the property in order to determine whether there was a taking.

A. Is *First English* Limited to the Remedial Stage?

Implicit in the first two options above is the question of whether *First English* is limited to the remedial stage of the takings analysis. This Comment argues that it is limited to this stage because the Supreme Court very clearly limited its holding to the point when a taking has already been established. The Court specifically stated that

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171. The Federal Circuit was created in 1982, partially for the purpose of creating a court with exclusive subject matter jurisdiction. See Courtney C. Tedrowe, *Conceptual Severance and Takings in the Federal Circuit*, 85 CORNELL L. REV. 586, 588 n.13 (2000). One area for which the Federal Circuit has exclusive appellate jurisdiction is Fifth Amendment takings claims against the United States. See id. This has resulted in the Federal Circuit hearing the majority of appeals from the district courts on federal takings claims. See id. In addition to its exclusive subject matter jurisdiction, the geographic origin of a case is not relevant to the Federal Circuit’s jurisdiction over it. See id.

172. See generally id. at 602-25 (analyzing the relevant Federal Circuit cases that deal with conceptual severance).

173. See Tabb Lakes, Ltd. v. United States, 10 F.3d 796, 802 (Fed. Cir. 1993).

174. 28 F.3d 1171 (Fed. Cir. 1994).

175. See id. See also Tedrowe, supra note 171, at 614.

it was only dealing with the remedial stage of the takings analysis, explaining, "[w]e merely hold that where the government’s activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." In addition, the Court stated that the holding was limited to the facts of the case presented. This limitation is important because the facts of *First English* involved a permanent regulation that was subsequently invalidated. This situation is inherently different from a temporary regulation, the very nature of which is the finite length of time the regulation is in effect. This distinction is highlighted by the language that follows the Court’s limitation on the holding regarding “obtaining building permits, changes in zoning ordinances, variances, and the like . . .”. By distinguishing the facts of *First English* from these situations, the Court, albeit unclearly, implies that its holding only applies to the remedial stage. Whether this influences the existence of a taking—the first stage of the takings inquiry—is another issue.

Interpreting *First English* to address the remedial stage, and not the threshold question of establishing a taking, leaves open two options: (1) *First English* did not carve out the ability of the courts to temporally sever property interests and this should not be permitted; or (2) that implicit in addressing the remedies issue, the Court assumed that the underlying substantive claim was valid.

**B. Option One: *First English* Did Not Endorse Temporal Severance**

The first option, that *First English* only addressed the remedial stage and did not imply any acceptance of temporal severance, leaves the Court to decide the issue of whether a temporary development moratorium constitutes a taking independent of *First English*. In adopting this interpretation, the Court must completely distinguish the factual backgrounds of *First English* and *TSPC*. Simply because the Court held in *First English* that the government must provide compensation for the period of time that a permanent regulation deprived the land owner of all economic benefit (even if the government later invalidates the law), this does not mean that the government must provide compensation for the period of time that a temporary regulation

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177. See id. at 311.
178. Id. at 321 (emphasis added).
179. See id.
180. Id.
was in place, unless that temporary regulation deprived the land owner of all economic value of their land. This, however, would be an unlikely situation, since the present and future values of land are deeply intertwined.\textsuperscript{181}

C. Option Two: \textit{First English} Implicitly Endorsed Temporal Severance

The second interpretation is that \textit{First English} only addressed the remedial stage, but that implicit within that, it accepted temporally severing the land when determining the existence of a taking. By holding that “no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective,”\textsuperscript{182} the opinion implies that in determining whether a taking occurred, there are times when the property must be divided into time periods and looked at separately. As counsel for Tahoe-Sierra Preservation Council suggested in his brief to the Supreme Court, “[s]urely, the Court would not have addressed the issue in \textit{First English} if it believed that the underlying substantive claim \textit{could not} result in a [Fifth] Amendment taking as a matter of law.”\textsuperscript{183}

In addition, Justice Scalia pointed out in \textit{Lucas} that if a regulation deprives the owner of “all economically beneficial or productive uses of land” the government must compensate.\textsuperscript{184} He then stated in a footnote that the government “may elect to rescind its regulation and thereby avoid having to pay compensation for a permanent deprivation.”\textsuperscript{185} He went on to quote \textit{Lucas}’s holding: “But ‘where the [regulation has] already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.’”\textsuperscript{186} By putting these two statements in juxtaposition, Justice Scalia implied that for purposes of a takings claim, the property may be divided into periods of time. Whether this makes any difference in the conclusion of whether there has been a taking is an entirely differ-

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\textsuperscript{181.} See generally Wade, \textit{supra} note 86.  \\
\textsuperscript{182.} \textit{First English}, 482 U.S. at 321.  \\
\textsuperscript{183.} Brief for Petitioner, Tahoe Sierra Preservation Council, at 29, \textit{TSPC III}, 121 S. Ct. 2589 (2001) (No. 00–1167).  \\
\textsuperscript{184.} \textit{Lucas} v. S.C. Coastal Council, 505 U.S. 1003, 1030 (1992).  \\
\textsuperscript{185.} \textit{Id.} at 1030 n.17. This implies that while the government may be liable for the temporary deprivation, they can get out of paying the greater amount of compensation for a permanent deprivation by electing to rescind the regulation at issue.  \\
\textsuperscript{186.} \textit{Id.}
\end{flushleft}
ent matter which depends on the test used to determine whether a taking has occurred.

D. Option Three: First English Explicitly Endorsed Temporal Severance

The third option is to interpret First English's holding as endorsing temporal severance of property for purposes of determining the threshold question of whether a total taking has occurred. This is a stretch since the Court specifically limited its holding to a situation where a taking had already been established. Even counsel for Tahoe-Sierra Preservation Council admitted that the Court in First English decided only the "remedy" question. Judge Kozinski, in his opinion dissenting to the denial of rehearing en banc, is the only steadfast adherent to this interpretation.

IV. Solution: The Supreme Court Should Reject Temporal Severance

A. Tahoe-Sierra Preservation Council as an Opportunity to Address Temporal Severance

The United States Supreme Court has not issued an opinion on whether conceptual severance should be utilized in order to determine whether a taking of property occurred. Divergent opinions have been offered on what should be inferred from the Court's prior opinions that come close to answering this question. Since the Court has granted certiorari on TSPC I (and TSPC I implicates the use of conceptual severance), this case is the perfect opportunity for the Court to establish a clear and precise rule regarding conceptual severance.

Should the Court look at the property as a whole to determine whether there has been a total taking, or should it allow conceptual severance of the property? One of the main issues the Court faces in hearing TSPC I is the issue of temporal severance and the potential conflicts between TSPC and First English. The ambiguous nature of what constitutes a total regulatory taking makes it difficult to evenly apply the categorical rules or ad hoc determinations involved in the regulatory takings analysis. Whether a plaintiff has been denied all use of her land hinges on whether the court looks at the land as a whole or only at the piece of the land directly affected by the regulation. As Justice Scalia pointed out in a footnote to Lucas, "this uncertainty re-

garding the composition of the denominator in our 'deprivation' fraction has produced inconsistent pronouncements by the Court.”

B. Temporal Severance Looks at Property in a Vacuum

This Comment argues that First English is clearly limited to the remedial stage of a takings inquiry. However, it is not as clear what effect, if any, that should have on the resolution of the first stage of a takings claim. A good argument is that First English would not have found a remedy for a substantive claim that would fail. It does not necessarily follow that First English endorsed conceptual severance, or that First English endorsed the kind of temporal severance that would look at the property in a vacuum. The distinction between the regulation in First English and the temporary development moratorium in TSPC is that the former was permanent, while the latter temporary. Allowing temporal severance and looking at the property in a vacuum could have serious implications.

The future economic value of the property is relevant in determining whether the property owner has been deprived of all economic value or use of her property (and thus, whether a taking has occurred). When looking at the future value in First English during the period of time that the permanent regulation was in effect, the future economic value was probably minimal. This was so because the regulation was intended to be permanent. The regulation became temporary only because it was later invalidated. Therefore, in First English, the future economic value was determined by the permanence of the regulation at the time the regulation was in place. This would likely result in minimal future economic value. Even if the property is not temporally severed and includes the time after the court invalidated the regulation, the fact that during that point in time the property owners were denied a significant right to economic use of their land may serve as a factor leading to a finding of a taking.

On the other hand, when looking to the future value of land in the case of a temporary development moratorium, the future indicates that the moratorium will no longer be there and that the land still has future economic value. Since the moratorium is temporary, the only time the land is affected by it is the time that the moratorium is in

190. See generally id. at 312–13 (addressing the issue of the temporary nature of a takings claim).
place. When looking at that period of time which is affected by the moratoria, the future tells us the land will only temporarily be impacted by the regulation. In this context, when determining whether there is a taking under the Lucas categorical approach, one would look to the present economic value of the land as well as the future economic value of land. While the present economic value may be minimal depending on the facts of the moratoria, the future value of the land might be great. Temporally severing the property in this situation becomes impossible because the theory of conceptual severance takes the property and pretends that the present is the only thing that exists for that piece of property. It takes the future out of the equation. Allowing temporal severance for temporary development moratoria does not work unless the equation for determining the economic value of the land no longer includes the future value. This would be untenable since it is well established in property law that the future value of land is relevant to the present value.

The United States Supreme Court should reject temporal severance in regulatory taking cases that are based on the Lucas categorical rule.\textsuperscript{191} This rule finds a taking if the landowner has been deprived of all economically beneficial or productive use of her property.\textsuperscript{192} In order to determine the economic value of property, the future value is relevant.\textsuperscript{193} Therefore, temporal severance is not consistent with the Lucas categorical rule. If the relevant parcel considered is the whole piece of property and is not severed, that does not preclude a finding of a taking in a situation such as TSPC or First English. The Lucas categorical approach becomes inappropriate in this situation. Other approaches, however, may be appropriate.\textsuperscript{194} This merely makes it more difficult to establish that there has been a taking requiring compensation. Since the standard is whether the regulation has gone "too far," as determined by various factors,\textsuperscript{195} it is possible to find that a regulation which only affects spatial or temporal portions of the property has done just that—gone too far.

\textsuperscript{191} See Lucas, 505 U.S. at 1015.
\textsuperscript{192} See id.
\textsuperscript{193} See Wade, supra note 86, at 289--99.
\textsuperscript{194} See Palazzolo v. Rhode Island, 533 U.S. 606, 616 (2001) (affirming the lower court's conclusion that the owner was not deprived of all economic use of property, but remanding for further evaluation under Penn Central's balancing test).
\textsuperscript{195} See discussion supra Part I.A.
Conclusion

In conclusion, this Comment urges the Court to use TSPC as a vehicle to clarify whether conceptual severance is permissible in determining whether there has been a taking. The Court can reject conceptual severance in general and temporal severance in particular consistently with First English, because First English only dealt with the remedial stage of a takings inquiry and is not applicable in terms of conceptual severance. Rejecting conceptual severance does not mean that a taking will never be established in situations where something less than the whole property is impacted. Other factors may still establish a taking. The future economic value of land is intertwined with the present value. Thus, temporal severance wrongly views property in a vacuum, ignoring future use of the property when determining whether there was a compensable taking.