# SUPREME COURT OF THE UNITED STATES

No. 00–1167

TAHOE-SIERRA PRESERVATION COUNCIL, INC., ET AL., PETITIONERS *v.* TAHOE REGIONAL PLANNING AGENCY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[April 23, 2002]

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,* 505 U. S. 1003 (1992), and because a ban on all development lasting almost six years does not resemble any traditional land-use planning device, I dissent.

## I

"A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *MacDonald, Sommer & Frates* v. *Yolo County,* 477 U. S. 340, 348 (1986) (citing *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393, 415 (1922)).[1] In failing to undertake this

[1] We are not bound by the Court of Appeals' determination that petitioners' claim under 42 U. S. C §1983 (1994 ed., Supp. V) permitted only challenges to Ordinance 81–5 and Regulation 83–21. Petitioners sought certiorari on the Court of Appeals' ruling that respondent Tahoe Regional Planning Agency (hereinafter respondent) did not cause petitioners' injury from 1984 to 1987. Pet. for Cert. 27–30. We did not grant certiorari on any of the petition's specific questions presented, but

inquiry, the Court ignores much of the impact of respondent's conduct on petitioners. Instead, it relies on the flawed determination of the Court of Appeals that the relevant time period lasted only from August 1981 until April 1984. *Ante*, at 7, 9. During that period, Ordinance 81–5 and Regulation 83–21 prohibited development pending the adoption of a new regional land-use plan. The adoption of the 1984 Regional Plan (hereinafter Plan or 1984 Plan) did not, however, change anything from the petitioners' standpoint. After the adoption of the 1984 Plan, petitioners still could make no use of their land.

The Court of Appeals disregarded this post-April 1984 deprivation on the ground that respondent did not "cause" it. In a §1983 action, "the plaintiff must demonstrate that the defendant's conduct was the actionable cause of the claimed injury." 216 F. 3d 764, 783 (CA9 2000). Applying this principle, the Court of Appeals held that the 1984 Regional Plan did not amount to a taking because the Plan actually allowed permits to issue for the construction of single-family residences. Those permits were never issued because the District Court immediately issued a temporary restraining order, and later a permanent injunction that lasted until 1987, prohibiting the approval of any building projects under the 1984 Plan. Thus, the

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formulated 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?" 533 U. S. 948–949 (2001). This Court's Rule 14(1)(a) provides that a "question presented is deemed to comprise every subsidiary question fairly included therein." The question of how long the moratorium on land development lasted is necessarily subsumed within the question whether the moratorium constituted a taking. Petitioners did not assume otherwise. Their brief on the merits argues that respondent "effectively blocked all construction for the past two decades." Brief for Petitioners 7.

Court of Appeals concluded that the "1984 Plan itself could not have constituted a taking," because it was the injunction, not the Plan, that prohibited development during this period. 216 F. 3d, at 784. The Court of Appeals is correct that the 1984 Plan did not cause petitioners' injury. But that is the right answer to the wrong question. The causation question is not limited to whether the 1984 Plan caused petitioners' injury; the question is whether respondent caused petitioners' injury.

We have never addressed the §1983 causation requirement in the context of a regulatory takings claim, though language in *Penn Central Transp. Co.* v. *New York City,* 438 U. S. 104 (1978), suggests that ordinary principles of proximate cause govern the causation inquiry for takings claims. *Id.,* at 124. The causation standard does not require much elaboration in this case, because respondent was undoubtedly the "moving force" behind petitioners' inability to build on their land from August 1984 through 1987. *Monell* v. *New York City Dept. of Social Servs.,* 436 U. S. 658, 694 (1978) (§1983 causation established when government action is the "moving force" behind the alleged constitutional violation). The injunction in this case issued because the 1984 Plan did not comply with the 1980 Tahoe Regional Planning Compact (Compact) and regulations issued pursuant to the Compact. And, of course, respondent is responsible for the Compact and its regulations.

On August 26, 1982, respondent adopted Resolution 82–11. That resolution established "environmental thresholds for water quality, soil conservation, air quality, vegetation preservation, wildlife, fisheries, noise, recreation, and scenic resources." *California* v. *Tahoe Regional Planning Agency*, 766 F. 2d 1308, 1311 (CA9 1985). The District Court enjoined the 1984 Plan in part because the Plan would have allowed 42,000 metric tons of soil per year to erode from some of the single-family residences, in excess

of the Resolution 82–11 threshold for soil conservation. *Id.,* at 1315; see also *id.,* at 1312. Another reason the District Court enjoined the 1984 Plan was that it did not comply with article V(g) of the Compact, which requires a finding "with respect to each project, that the project will not cause the established [environmental] thresholds to be exceeded." *Id.,* at 1312. Thus, the District Court enjoined the 1984 Plan because the Plan did not comply with the environmental requirements of respondent's regulations and of the Compact itself.

Respondent is surely responsible for its own regulations, and it is also responsible for the Compact as it is the governmental agency charged with administering the Compact. Compact, Art. I(c), 94 Stat 3234. It follows that respondent was the "moving force" behind petitioners' inability to develop its land from April 1984 through the enactment of the 1987 plan. Without the environmental thresholds established by the Compact and Resolution 82–11, the 1984 Plan would have gone into effect and petitioners would have been able to build single-family residences. And it was certainly foreseeable that development projects exceeding the environmental thresholds would be prohibited; indeed, that was the very purpose of enacting the thresholds.

Because respondent caused petitioners' inability to use their land from 1981 through 1987, that is the appropriate period of time from which to consider their takings claim.

## 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." 505 U. S., at 1019.

See also *Agins* v. *City of Tiburon,* 447 U. S. 255, 258–259 (1980). The District Court in this case held that the ordinances and resolutions in effect between August 24, 1981, and April 25, 1984, "did in fact deny the plaintiffs all economically viable use of their land." 34 F. Supp. 2d 1226, 1245 (Nev. 1999). The Court of Appeals did not overturn this finding. And the 1984 injunction, issued because the environmental thresholds issued by respondent did not permit the development of single-family residences, forced petitioners to leave their land economically idle for at least another three years. The Court does not dispute that petitioners were forced to leave their land economically idle during this period. See *ante*, at 7. 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.[2] The "permanent" prohibition that the Court held to be a taking in *Lucas* lasted less than two years. See 505 U. S., at 1011–1012. The "permanent" prohibition in *Lucas* lasted less than two years because the law, as it often does, changed. The South Carolina Legislature in 1990 decided to amend the 1988 Beachfront Management Act to allow the issuance of "'special permits' for the construction or reconstruction of habitable structures seaward of the baseline." *Id.,* at 1011–1012. Land-use regulations are not irrevocable. And the government can even abandon condemned land. See *United States* v. *Dow,* 357 U. S. 17, 26 (1958). Under the Court's decision today, the takings question

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[2] Even under the Court's mistaken view that the ban on development lasted only 32 months, the ban in this case exceeded the ban in *Lucas*.

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."

Our opinion in *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles,* 482 U. S. 304 (1987), rejects any distinction between temporary and permanent takings when a landowner is deprived of all economically beneficial use of his land. *First English* stated that "'temporary takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." *Id.,* at 318. Because of *First English*'s rule that "temporary deprivations of use are compensable under the Takings Clause," the Court in *Lucas* found nothing problematic about the later developments that potentially made the ban on development temporary. 505 U. S., at 1011–1012 (citing *First English*, *supra*); see also 505 U. S., at 1033 (KENNEDY, J., concurring) ("It is well established that temporary takings are as protected by the Constitution as are permanent ones." (citing *First English*, *supra,* at 318)).

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." 505 U. S., at 1017. 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 a 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.[3] See *United States* v. *Petty Motor Co.,* 327 U. S. 372 (1946); *United States* v. *General Motors Corp.,* 323 U. S. 373, 376 (1945). 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

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[3]There was no dispute that just compensation was required in those cases. The disagreement involved how to calculate that compensation. In *United States* v. *General Motors Corp.*, 323 U. S. 373 (1945), for example, the issues before the Court were how to value the leasehold interest (*i.e.*, whether the "long-term rental value [should be] the sole measure of the value of such short-term occupancy," *id.,* at 380), whether the Government had to pay for the respondent's removal of personal property from the condemned warehouse, and whether the Government had to pay for the reduction in value of the respondent's equipment and fixtures left in the warehouse. *Id.,* at 380–381.

"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." 228 F. 3d 998, 999 (CA9 2000) (Kozinski, J., dissenting from denial of rehearing en banc).

Instead of acknowledging the "practical equivalence" of this case and a condemned leasehold, the Court analogizes to other areas of takings law in which we have distinguished between regulations and physical appropriations, see *ante*, at 17–19. But whatever basis there is for such distinctions in those contexts does not apply when a regulation deprives a landowner of all economically beneficial use of his land. In addition to the "practical equivalence" from the landowner's perspective of such a regulation and a physical appropriation, we have held that a regulation denying all productive use of land does not implicate the traditional justification for differentiating between regulations and physical appropriations. In "the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted," it is less likely that "the legislature is simply 'adjusting the benefits and burdens of economic life' in a manner that secures an 'average reciprocity of advantage' to everyone concerned," *Lucas*, *supra,* at 1017–1018 (quoting *Penn Central Transp. Co.* v. *New York City,* 438 U. S. 104, 124 (1978), and *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S., at 415), and more likely that the property "is being pressed into some form of public service under the guise of mitigating serious public harm," *Lucas supra,* at 1018.

The Court also reads *Lucas* as being fundamentally concerned with value, *ante,* at 25–27, rather than with the denial of "all economically beneficial or productive use of land," 505 U. S., at 1015. But *Lucas* repeatedly discusses its holding as applying where "*no* productive or economi-

cally beneficial use of land is permitted." *Id.,* at 1017; see also *ibid.* ("[T]otal deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation"); *id.,* at 1016 ("[T]he Fifth Amendment is violated when land-use regulation . . . *denies an owner economically viable use of his land"); id.,* at 1018 ("[T]he *functional* basis for permitting the government, by regulation, to affect property values without compensation . . . does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses"); *ibid.* ("[T]he fact that regulations that leave the owner of land without economically beneficial or productive options for its use . . . carry with them a heightened risk that private property is being pressed into some form of public service"); *id.,* at 1019 ("[W]hen 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"). Moreover, the Court's position that value is the *sine qua non* of the *Lucas* rule proves too much. Surely, the land at issue in *Lucas* retained some market value based on the contingency, which soon came to fruition (see *supra,* at 5), that the development ban would be amended.

*Lucas* is implicated when the government deprives a landowner of "all economically beneficial or productive use of land." *Id.,* at 1015. The District Court found, and the Court agrees, that the moratorium "temporarily" deprived petitioners of "'all economically viable use of their land.'" *Ante*, at 11. Because the rationale for the *Lucas* rule applies just as strongly in this case, the "temporary" denial of all viable use of land for six years is a taking.

## III

The Court worries that applying *Lucas* here compels finding that an array of traditional, short-term, land-use

planning devices are takings. *Ante*, at 31, 33-34. But since the beginning of our regulatory takings jurisprudence, we have recognized that property rights "are enjoyed under an implied limitation." *Mahon*, *supra,* at 413. Thus, in *Lucas*, after holding that the regulation prohibiting all economically beneficial use of the coastal land came within our categorical takings rule, we nonetheless inquired into whether such a result "inhere[d] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." 505 U. S., at 1029. Because the regulation at issue in *Lucas* purported to be permanent, or at least long term, we concluded that the only implied limitation of state property law that could achieve a similar long-term deprivation of all economic use would be something "achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise." *Ibid.*

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." 482 U. S., at 321. 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." *Palazzolo* v. *Rhode Island,* 533 U. S. 606, 627, (2001). Zoning regulations existed as far back as colonial Boston, see Treanor, The Original Understanding of the Takings Clause and the Political Process, 95 Colum. L. Rev. 782, 789 (1995), and New York City enacted the first comprehensive zoning

ordinance in 1916, see 1 Anderson's American Law of Zoning §3.07, p. 92 (K. Young rev. 4th ed. 1995). 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. See *Lucas, supra,* at 1034 (KENNEDY, J., concurring in judgment).

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.[4] 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." 1 E. Ziegler, Rathkopf's The Law of Zoning and Planning §13:3, p. 13–6 (4th ed. 2001). Typical moratoria thus prohibit only certain categories of development, such as fast-food restaurants, see *Schafer* v. *New Orleans*, 743 F. 2d 1086 (CA5 1984), or adult businesses, see *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41 (1986), or all commercial development, see *Arnold Bernhard & Co.* v. *Planning & Zoning Comm'n*, 194 Conn. 152, 479 A. 2d 801 (1984). Such moratoria do not implicate *Lucas* because they do not deprive landowners of all economically beneficial use of their land. As for moratoria

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[4] Six years is not a "cut-off point," *ante*, at 35, n. 34; it is the length involved in this case. And the "explanation" for the conclusion that there is a taking in this case is the fact that a 6-year moratorium far exceeds any moratorium authorized under background principles of state property law. See *infra,* at 12-13. This case does not require us to undertake a more exacting study of state property law and discern exactly how long a moratorium must last before it no longer can be considered an implied limitation of property ownership (assuming, that is, that a moratorium on all development is a background principle of state property law, see *infra,* at 12).

that prohibit all development, these do not have the lineage of permit and zoning requirements and thus it is less certain that property is acquired under the "implied limitation" of a moratorium prohibiting all development. Moreover, unlike a permit system in which it is expected that a project will be approved so long as certain conditions are satisfied, a moratorium that prohibits all uses is by definition contemplating a new land-use plan that would prohibit all uses.

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, *ante,* at 38, n. 37, state statutes authorizing the issuance of moratoria often limit the moratoria's duration. California, where much of the land at issue in this case is located, provides that a moratorium "shall be of no further force and effect 45 days from its date of adoption," and caps extension of the moratorium so that the total duration cannot exceed two years. Cal. Govt. Code Ann. §65858(a) (West Supp. 2002); see also Minn. Stat. §462.355, subd. 4 (2000) (limiting moratoria to 18 months, with one permissible extension, for a total of two years). Another State limits moratoria to 120 days, with the possibility of a single 6-month extension. Ore. Rev. Stat. Ann. §197.520(4) (1997). Others limit moratoria to six months without any possibility of an extension. See Colo. Rev. Stat. §30–28–121 (2001); N. J. Stat. Ann. §40:55D–90(b) (1991).[5] Indeed, it has long been

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[5] These are just some examples of the state laws limiting the duration of moratoria. There are others. See, *e.g.,* Utah Code Ann. §§17–27–404(3)(b)(i)–(ii) (1995) (temporary prohibitions on development "may not exceed six months in duration," with the possibility of extensions for no more than "two additional six-month periods"). See also *ante,* at 36, n. 31.

understood that moratoria on development exceeding these short time periods are not a legitimate planning device. See, *e.g.*, *Holdsworth* v. *Hague*, 9 N. J. Misc. 715, 155 A. 892 (1931).

Resolution 83–21 reflected this understanding of the limited duration of moratoria in initially limiting the moratorium in this case to 90 days. But what resulted—a "moratorium" lasting nearly six years—bears no resemblance to the short-term nature of traditional moratoria as understood from these background examples of state property law.

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.

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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.