

# Taking Leases

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## INTRODUCTION

Ever since Justice Oliver Wendell Holmes announced that a government regulation that went “too far” was a taking that required just compensation,<sup>1</sup> the Supreme Court has grappled with the appropriate analytical framework for determining when the government has effected a regulatory taking. In most cases, the question turns on whether the Court should apply a per se rule or a balancing test.

Generally, the Court chooses to follow the balancing test established in *Penn Central Transportation Co v New York City*.<sup>2</sup> Courts applying the *Penn Central* test analyze a few factors to determine whether the government action amounted to a taking.<sup>3</sup> Occasionally, however, the Court will determine that a certain regulatory action always leads to a taking. In *Lucas v South Carolina Coastal Council*,<sup>4</sup> the Supreme Court established a per se rule that any government regulation that completely eliminates the value of a person’s property is a taking.<sup>5</sup>

*Lucas* left many questions about the scope of its new rule unanswered.<sup>6</sup> The Court revisited this issue in *Tahoe-Sierra Preservation Council, Inc v Tahoe Regional Planning Agency*,<sup>7</sup> holding that a moratorium that eliminated the use of property for six years was not subject to the *Lucas* rule.<sup>8</sup> The Court ruled that the *Lucas* approach comes into play only when the deprivation of value is permanent.<sup>9</sup> Thus, in situations in which the

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<sup>1</sup> *Pennsylvania Coal Co v Mahon*, 260 US 393, 415 (1922).

<sup>2</sup> 438 US 104 (1978).

<sup>3</sup> See Part I.B.1.

<sup>4</sup> 505 US 1003 (1992).

<sup>5</sup> See id at 1019.

<sup>6</sup> See Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 Stan L Rev 1369, 1392 (1993).

<sup>7</sup> 535 US 302 (2002).

<sup>8</sup> See id at 332.

<sup>9</sup> See id.

government regulation only temporarily eliminates all beneficial value, courts are to apply the *Penn Central* balancing test to determine whether there has been a taking.<sup>10</sup>

While *Tahoe-Sierra* dramatically narrowed the *Lucas* rule,<sup>11</sup> it did not resolve whether *Lucas* applies only to the permanent economic devaluation of a *fee simple* or whether there are other scenarios in which a *Lucas* claim may arise. One unresolved question is whether a leaseholder may assert a *Lucas* per se takings claim because the lease expires during a moratorium.<sup>12</sup> This scenario has been mentioned numerous times in the academic literature,<sup>13</sup> and most scholars at least assume that a *Lucas* claim is possible.

The choice of whether to apply the *Lucas* per se rule or the *Penn Central* balancing test when a lease expires during a moratorium has real consequences. Choosing the *Lucas* rule would benefit leaseholders, who would need show only that their lease lost all value to prevail on their takings claims. However, this could make beneficial land-use regulations, such as building moratoria, very costly, as the government would need to compensate more leaseholders. Moreover, automatic compensation could encourage government officials to end a moratorium as quickly as possible in order to minimize the amount they would have to pay. This could damage the effectiveness of the moratorium, which would not be in the public interest. By contrast, the *Penn Central* test would allow courts to address the specific facts of a takings claim and to take the nature of the temporary taking into account. However, this would make it more difficult for leaseholders to receive just compensation.

The choice is also important to the future of the *Lucas* rule. While *Lucas* was originally seen as a potentially significant shift in regulatory-takings jurisprudence, the ruling in *Tahoe-Sierra* tempered *Lucas*'s significance and reinstalled the *Penn Central* balancing test as the dominant approach. If leases subsumed by moratoria are found to be amenable to the *Lucas* per se test, this could spur renewed interest in per se regulatory-takings rules. If the correct avenue is *Penn Central*, then the significance of *Lucas* is even more limited; it would exist merely as a minor exception

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<sup>10</sup> See id at 330–32.

<sup>11</sup> See Steven J. Eagle, *Planning Moratoria and Regulatory Takings: The Supreme Court's Fairness Mandate Benefits Landowners*, 31 Fla St U L Rev 429, 444 (2004).

<sup>12</sup> See id at 472–73.

<sup>13</sup> See Part II.B.

to the general regulatory-takings framework that favors the *Penn Central* balancing test to per se rules.<sup>14</sup>

This Comment proceeds in three parts. Part I provides an overview of the relevant takings jurisprudence, addressing the history of regulatory takings, the main regulatory-takings tests, the parcel-as-a-whole rule, and the unique features of takings jurisprudence that arise when the alleged taking is of a lease. Part II surveys the current discourse on the taking of leases during moratoria.

Part III argues that contrary to the current consensus, a lease that expires during a moratorium is best analyzed under the *Penn Central* balancing test. Two major arguments underlie this choice. First, using the *Penn Central* analysis for leases is most faithful to the opinion in *Tahoe-Sierra*, the Court's current lodestar for analyzing regulatory takings. This Comment specifically argues that, in light of the ruling in *Tahoe-Sierra*, the unique temporal character of leaseholds favors the inclusion of the period of use of the lease prior to the alleged taking as part of the parcel as a whole, and advocates for a bright-line rule that allows for a *Lucas* taking only if there is no prior use. Second, options that are common in leases, such as rights to renew or buy, cast into doubt whether a lease that is entirely subsumed by a moratorium is truly without "all economically beneficial use" as required under the *Lucas* per se rule. Taken together, these arguments counsel in favor of adopting *Penn Central* as the dominant test for leases expiring during a moratorium.

## I. THE FUNDAMENTALS OF REGULATORY-TAKINGS JURISPRUDENCE

This Part examines the relevant regulatory-takings doctrine. First, it sets forth a brief history of regulatory takings. Second, it discusses the two main regulatory-takings approaches: the *Lucas* per se rule and the *Penn Central* balancing test. Third, it looks in depth at an important piece of regulatory-takings doctrine, the parcel-as-a-whole rule. Finally, it addresses specific peculiarities that arise in takings jurisprudence when the potential taking is of a leasehold.

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<sup>14</sup> See Laura S. Underkuffler, *Tahoe's Requiem: The Death of the Scalian View of Property and Justice*, 21 Const Commen 727, 753 (2004).

### A. The Foundation of Regulatory Takings

Takings jurisprudence arises from the Fifth Amendment, which states in relevant part, “nor shall private property be taken for public use, without just compensation.”<sup>15</sup> This clause, often referred to as the “Takings Clause,”<sup>16</sup> is applicable to the states through the Fourteenth Amendment.<sup>17</sup> Until the early twentieth century, it was generally believed that the Takings Clause applied solely to physical appropriations or “the functional equivalent of a practical ouster” of an owner’s possession.<sup>18</sup>

Takings law radically shifted with Justice Holmes’s decision in *Pennsylvania Coal Co v Mahon*.<sup>19</sup> In this case, defendant Pennsylvania Coal had mineral rights on the plaintiff’s land.<sup>20</sup> The Pennsylvania government subsequently banned the type of mining necessary to enjoy the mineral rights, and the plaintiff sued to enjoin the activities of the defendant.<sup>21</sup> The Court invalidated the statute that banned the mining as an unconstitutional taking of the defendant’s property. In his majority opinion, Justice Holmes famously wrote, “The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”<sup>22</sup> This was the first time the Court had explicitly endorsed the idea of a “regulatory taking.”<sup>23</sup>

Problematically, *Mahon* offered little guidance for future practitioners.<sup>24</sup> On a broad level, the rule from *Mahon* is that a

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<sup>15</sup> US Const Amend V.

<sup>16</sup> See, for example, *Lucas*, 505 US at 1014.

<sup>17</sup> See *Chicago, Burlington and Quincy Railroad Co v Chicago*, 166 US 226, 241 (1897).

<sup>18</sup> *Lucas*, 505 US at 1014 (quotation mark omitted). The phrase “practical ouster” refers to situations like government-controlled flooding. See *Transportation Co v Chicago*, 99 US 635, 642 (1879) (distinguishing the case at hand from a “practical ouster” due to permanent flooding mandated by the government). See also Harry N. Scheiber, *Property Law, Expropriation, and Resource Allocation by Government: The United States, 1789-1910*, 33 J Econ Hist 232, 236 (1973) (surveying the early history of takings law and finding that it was confined to physical appropriations).

<sup>19</sup> 260 US 393 (1922).

<sup>20</sup> *Id.* at 412.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 415.

<sup>23</sup> See William Michael Treanor, *Jam for Justice Holmes: Reassessing the Significance of Mahon*, 86 Georgetown L J 813, 822–23 & n 55 (1998) (noting that a standard conception of *Mahon* is that it was the first case to find a taking from government regulation and listing other scholars who have made similar assertions).

<sup>24</sup> See *Lucas*, 505 US at 1015 (noting that the opinion in *Mahon* offered “little insight” into the standard for takings).

regulation is a taking when it goes “too far,” but a practical method for determining when such a situation arises is absent from the opinion.<sup>25</sup> Much of the development and discussion of takings law after *Mahon*, including the issue discussed in this Comment, is an attempt to elucidate a workable framework for determining what is “too far.”<sup>26</sup>

## B. The Regulatory-Takings Approaches

In the ninety years since *Mahon* was decided, the Supreme Court has continually grappled with the contours of regulatory-takings law. Two major approaches have arisen in this period that are relevant to this Comment—the three-factor balancing test in *Penn Central* and the per se rule in *Lucas*.<sup>27</sup>

### 1. The *Penn Central* balancing test.

The *Penn Central* balancing test is the most important test in regulatory-takings jurisprudence.<sup>28</sup> Aside from situations in

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<sup>25</sup> See *id.* See also Bruce A. Ackerman, *Private Property and the Constitution* 156 (Yale 1977) (describing *Mahon* as “both the most important and most mysterious writing in takings law”).

<sup>26</sup> See *Lucas*, 505 US at 1015 (discussing the development of law after *Mahon*). Even though regulatory takings have become an established and accepted area of takings law, there is some debate about whether regulatory takings are consistent with the Framers’ conception of takings law. See generally John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 Nw U L Rev 1099 (2000); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum L Rev 782 (1995).

<sup>27</sup> The Court has attempted to create other regulatory-takings analyses. In *Tahoe-Sierra*, the Court arguably created a third analytical framework, the “*Armstrong* principle,” based on the considerations of “fairness and justice” as discussed by the Court in *Armstrong v United States*, 364 US 40 (1960). See *Tahoe-Sierra*, 535 US at 321, 333–39. The actual status of this test is in dispute. Compare *Eagle*, 31 Fla St U L Rev at 430 (cited in note 11) (arguing that the opinion in *Tahoe-Sierra* announced an emphasis on fairness with the *Armstrong* principle), with Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 Ecol L Q 307, 345 (2007) (containing no mention of the *Armstrong* test in a survey of takings law).

The Court arguably created another approach, known as the “substantially advanced test,” in *Agins v City of Tiburon*, 447 US 255, 260 (1980) (holding that a zoning regulation “effects a taking if the ordinance does not substantially advance legitimate state interests”). Although this language was repeated in many post-*Agins* takings cases, see *Lingle v Chevron USA, Inc.*, 544 US 528, 540 (2005), the Court rejected this as a stand-alone test because it is doctrinally unsound and practically unworkable. See *id.* at 540–45.

<sup>28</sup> See Gary Lawson, Katharine Ferguson, and Guillermo A. Montero, “*Oh Lord, Please Don’t Let Me Be Misunderstood!*”: Rediscovering the *Mathews v. Eldridge* and *Penn Central* Frameworks, 81 Notre Dame L Rev 1, 3 (2005) (“[T]he *Penn Central* formulation . . . has dominated discussion of takings law for a quarter of a century and continues to serve as the canonical standard for regulatory takings analysis.”).

which there is a complete and permanent deprivation of the value of a parcel of land,<sup>29</sup> *Penn Central* is the default regulatory-takings test.<sup>30</sup>

The dispute in *Penn Central* arose after the city of New York denied a landowner's plan to build a skyscraper on top of Grand Central Terminal because it had been designated a "landmark site" by the city.<sup>31</sup> The owner of the terminal argued that the inability to build on its property was a taking.<sup>32</sup> The balancing-test analysis arose from the majority's admission that the "Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government."<sup>33</sup> The Court therefore ruled that a balancing test, based on "ad hoc, factual inquiries" that looked "upon the particular circumstances [in a] case," was the proper analysis.<sup>34</sup>

The Court in *Penn Central* put forth three factors that should be addressed as part of the balancing test.<sup>35</sup> These are (1) the economic impact on the property owner, (2) the degree of interference with the owner's distinct investment-backed expectations, and (3) the character of the government action.<sup>36</sup> Because these factors are not dispositive due to focus on the individual circumstances of each case, the test is perhaps better characterized as an "analytical framework."<sup>37</sup>

*Penn Central* is routinely criticized in academia.<sup>38</sup> Criticisms include arguments that the *Penn Central* analysis is substantively faulty, that the factors serve as bad predictors, and that the factors themselves are poorly defined and lack consistency

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<sup>29</sup> This situation gives rise to the *Lucas* per se rule. See Part I.B.2.

<sup>30</sup> See *Tahoe-Sierra*, 535 US at 331 (ruling that *Penn Central* is the proper framework if there is not a "total taking of the entire parcel").

<sup>31</sup> *Penn Central*, 438 US at 107–19.

<sup>32</sup> *Id.* at 122.

<sup>33</sup> *Id.* at 124.

<sup>34</sup> *Id.* (quotation marks omitted).

<sup>35</sup> For a thorough analysis of the *Penn Central* factors, see generally John D. Echeverria, *Making Sense of Penn Central*, 39 *Envir L Rep* 10471 (2009).

<sup>36</sup> See *Penn Central*, 438 US at 124 (listing the factors that are normally used in the Court's "ad hoc, factual inquiries"). The opinion does not explicitly break the factors into three, but this is the common description of the *Penn Central* balancing test. See, for example, Echeverria, 39 *Envir L Rep* at 10471 (cited in note 35) (listing the *Penn Central* factors); Meltz, 34 *Ecol L Q* at 329 (cited in note 27) (same).

<sup>37</sup> See Meltz, 34 *Ecol L Q* at 329–30 (cited in note 27) (describing why the phrase "analytical framework" may be a better description than "test").

<sup>38</sup> See Lawson, Ferguson, and Montero, 81 *Notre Dame L Rev* at 34–36 (cited in note 28) (noting the vast array of criticism prompted by *Penn Central*).

across opinions.<sup>39</sup> One article, however, argued that a random survey of cases citing *Penn Central* did not show evidence that the test led to unfair results for litigants.<sup>40</sup>

## 2. The *Lucas* per se rule.

While the Court generally resists “[t]he temptation to adopt what amount to *per se* rules in either direction,”<sup>41</sup> the Court ruled in *Lucas* that there is a per se taking “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.”<sup>42</sup> In *Lucas*, a developer of beach-front property sued after a regulation barred him from erecting any permanent structure on his property, effectively eliminating all viable uses of his land.<sup>43</sup> After this case, if a landowner can show that a regulation has left his or her land without any “economically viable” use, a taking has automatically occurred.<sup>44</sup>

It is unclear how strictly a court should interpret the requirement that land be deprived of *all* economic uses.<sup>45</sup> In his dissent in *Lucas*, Justice John Paul Stevens argued that the petitioner’s land was “far from valueless,” and listed various uses of the land that indicated it still had value.<sup>46</sup> In the years since, the Court has only partially answered this question. In *Palazzolo v Rhode Island*,<sup>47</sup> the Court concluded that leaving a “token interest” is not enough for a government to avoid a per se taking under *Lucas*.<sup>48</sup> Leaving more than a token interest, however,

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<sup>39</sup> See *id.*

<sup>40</sup> See F. Patrick Hubbard, et al, *Do Owners Have a Fair Chance of Prevailing under the Ad Hoc Regulatory Takings Test of Penn Central Transportation Company?*, 14 Duke Envir L & Pol F 121, 148–49 (2003) (analyzing whether the *Penn Central* balancing test routinely produces unfair or unjust results, and concluding that it does not).

<sup>41</sup> *Tahoe-Sierra*, 535 US at 321 (quotation marks omitted), quoting *Palazzolo v Rhode Island*, 533 US 606, 636 (2001) (O’Connor concurring).

<sup>42</sup> *Lucas*, 505 US at 1019. This is also referred to as a “total deprivation of beneficial use.” *Id.* at 1017. There is an exception for nuisances, see *id.* at 1022, but that is not relevant for this Comment.

<sup>43</sup> *Id.* at 1008–09.

<sup>44</sup> *Id.* at 1016 (emphasis omitted) (describing times when the Court has always held there to be a taking).

<sup>45</sup> See Meltz, 34 Ecol L Q at 331–32 (cited in note 27).

<sup>46</sup> *Lucas*, 505 US at 1065 n 3 (Stevens dissenting) (quotation marks omitted).

<sup>47</sup> 533 US 606 (2001).

<sup>48</sup> *Id.* at 631. The Court in *Palazzolo* did not define “token interest” and simply noted that a regulation permitting the landowner to build a substantial residence on an 18-acre parcel amounted to more than a token interest. See *id.* Professor Mark Cordes described the “token interest” standard as “indicating that retention of some de minimus

may foreclose a categorical taking. For example, a dramatic reduction in value is not enough to trigger *Lucas*.<sup>49</sup> As the Court wrote in *Tahoe-Sierra*, “Anything less than a ‘complete elimination of value,’ or a ‘total loss,’” would not be a *Lucas* taking.<sup>50</sup>

*Tahoe-Sierra* set the current relationship between *Penn Central* and *Lucas*. *Tahoe-Sierra* resulted from a building moratorium that was put in place by an interstate land-use planning agency so that the state governments of California and Nevada could determine the environmental impact of construction on Lake Tahoe.<sup>51</sup> The moratorium lasted six years, and during the period of the moratorium, properties on the lake were deprived of all economically viable use.<sup>52</sup> The Court wrote, “The starting point for the court’s analysis should have been to ask whether there was a total taking of the entire parcel; if not, then *Penn Central* was the proper framework.”<sup>53</sup>

*Tahoe-Sierra* also clarified the situation in which a *Lucas* taking could occur. Only a permanent deprivation of the value of a property interest can lead to a categorical taking; a taking that causes a complete, but temporary, deprivation of value is subject to the *Penn Central* test because it is not permanent.<sup>54</sup> A *Lucas* taking can occur only if a property interest is completely and permanently deprived of all economic value. Anything else is analyzed under *Penn Central*. The opinion in *Tahoe-Sierra* left open the possibility that any property interest that was permanently deprived of value could be a *Lucas* taking. That ambiguity is the source of the topic in this Comment.

### C. Conceptual Severance and the Parcel as a Whole

One of the most contentious issues in regulatory-takings law<sup>55</sup> is the question of how to define the property being taken.

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[sic] value alone does not insulate a restriction from being a categorical taking.” Mark W. Cordes, *The Effect of Palazzolo v. Rhode Island on Takings and Environmental Land Use Regulation*, 43 Santa Clara L Rev 337, 361 (2003).

<sup>49</sup> See *Tahoe-Sierra*, 535 US at 330 (holding that a 95 percent reduction in value is not a *Lucas* taking).

<sup>50</sup> Id.

<sup>51</sup> Id at 306–12.

<sup>52</sup> Id at 312–21.

<sup>53</sup> *Tahoe-Sierra*, 535 US at 331.

<sup>54</sup> See id at 330–32.

<sup>55</sup> Takings law is extraordinarily complex. This Part discusses only a few concepts in the regulatory-takings doctrine necessary to explore the issue in this Comment. For a detailed survey of takings jurisprudence, see generally Meltz, 34 Ecol L Q 307 (cited in note 27).



An example, using a simplified version of the facts in *Mahon*, shows how this issue plays out. Assume that Blackacre is divided into two estates: the surface estate, worth \$10,000, and the mineral estate, worth \$5,000. Thus Blackacre as a whole is worth \$15,000. The government passes a regulation, completely wiping out the \$5,000 value of the mineral estate. One view is that the government regulation caused the value of Blackacre to drop to \$10,000, eliminating one-third of its value.<sup>56</sup> Another view is that the value of the mineral estate plummeted to zero, and that estate is now valueless.<sup>57</sup> The latter view conceptually severs a part of the property (the mineral estate) and then finds that severed part completely valueless. This is known as “conceptual severance.”<sup>58</sup>

Described another way, both views agree on the numerator (the amount of damage done to the property), but disagree on the denominator (whether the damage should be compared against the conceptually severed estate or the property as a whole). How exactly this denominator should be chosen is not clear, and numerous scholars have attempted to provide a coherent framework for the “denominator problem.”<sup>59</sup>

Variations on conceptual severance and the denominator problem have played a large role in the analysis of regulatory takings. In *Penn Central*, the Court said that “[t]aking jurisprudence does not divide a single parcel into discrete segments” and focused on the “nature and extent of the interference with rights in the *parcel as a whole*.”<sup>60</sup> The Court’s answer to the denominator

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<sup>56</sup> This is Justice Louis Brandeis’s argument in his dissent in *Mahon*. See *Mahon*, 260 US at 416–22 (Brandeis dissenting).

<sup>57</sup> This is Justice Holmes’s argument in *Mahon*. See *id.* at 412–16.

<sup>58</sup> Professor Margaret Radin first coined the term “conceptual severance.” See Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 Colum L Rev 1667, 1676 (1988) (describing then-Justice William Rehnquist’s strategy in *First English Evangelical Lutheran Church of Glendale v County of Los Angeles, California*, 482 US 304 (1987), as “conceptual severance”).

<sup>59</sup> See generally, for example, Keith Woffinden, Comment, *The Parcel as a Whole: A Presumptive Structural Approach for Determining When the Government Has Gone Too Far*, 2008 BYU L Rev 623; Danaya C. Wright, *A New Time for Denominators: Toward a Dynamic Theory of Property in the Regulatory Takings Relevant Parcel Analysis*, 34 Envir L 175 (2004); Dwight H. Merriam, *Rules for the Relevant Parcel*, 25 U Hawaii L Rev 353 (2003); Marc R. Lisker, *Regulatory Takings and the Denominator Problem*, 27 Rutgers L J 663 (1996); John E. Fee, Comment, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U Chi L Rev 1535 (1994). See also Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation”* Law, 80 Harv L Rev 1165, 1192–93 (1967).

<sup>60</sup> *Penn Central*, 438 US at 130–31 (emphasis added) (quotation marks omitted).

problem was that the denominator is the entire parcel, called the parcel as a whole. A little under a decade later, the Court reaffirmed that the relevant unit of analysis is the entire parcel.<sup>61</sup>

The parcel-as-a-whole rule may sound like a clear answer to the denominator problem, but in practice, it is not always clear what the parcel as a whole should cover.<sup>62</sup> For example, in *Penn Central*, the Court ruled that the parcel as a whole was the entire city tax block but gave no explanation of why it deemed the block to be the whole parcel.<sup>63</sup> Discomfort with the lack of precision in defining the parcel as a whole led the Court to retreat from the rule. In *Lucas*, the Court mentioned in a footnote the inconsistencies that could result from an overly strict application of the parcel-as-a-whole rule and suggested that an alternative approach may occasionally make more sense.<sup>64</sup> This was echoed by the majority opinion in *Palazzolo*, which commented that “we have at times expressed discomfort with the logic of [the parcel-as-a-whole rule].”<sup>65</sup>

The Court “ultimately strongly reaffirmed” the parcel-as-a-whole rule in *Tahoe-Sierra*.<sup>66</sup> The petitioners in that case argued that the moratorium on building, which temporarily deprived their land of all economic use, was a per se taking under the rule in *Lucas*.<sup>67</sup> The Court rejected this argument: “Petitioners’ ‘conceptual severance’ argument is unavailing because it ignores *Penn Central*’s admonition that in regulatory takings cases we must focus on ‘the parcel as a whole.’ We have consistently rejected such an approach to the ‘denominator’ question.”<sup>68</sup> After

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<sup>61</sup> See *Keystone Bituminous Coal Assn. v DeBenedictis*, 480 US 470, 497–98 (1987) (finding that a mining company could not consider as a separate estate coal that could not be mined after a regulation).

<sup>62</sup> See Lisker, 27 Rutgers L J at 705 (cited in note 59) (“[T]he Court has not provided any type of formula for determining what constitutes the ‘parcel as a whole.’”).

<sup>63</sup> See Woffinden, Comment, 2008 BYU L Rev at 629 (cited in note 59) (questioning the Court’s choice of the city tax block as the “parcel as a whole”).

<sup>64</sup> See *Lucas*, 505 US at 1016–17 n 7 (noting the incongruities and confusion that can arise from trying to define the full parcel). For an alternative view of the famous *Lucas* footnote, see Wright, 34 Envir L at 192 & n 79 (cited in note 59) (postulating that this footnote may have been motivated by Justice Antonin Scalia’s concern that a taking of 100 percent of the property would be automatically compensable, while a 99 percent taking would not).

<sup>65</sup> *Palazzolo*, 533 US at 631 (noting that there is criticism in judicial and academic circles about the wisdom of having a strict parcel-as-a-whole rule).

<sup>66</sup> Wright, 34 Envir L at 192 (cited in note 59).

<sup>67</sup> See *Tahoe-Sierra*, 535 US at 307–20 (discussing the factual history of the case and the petitioners’ legal theory on appeal). See also Part I.B.2.

<sup>68</sup> *Tahoe-Sierra*, 535 US at 331 (citations omitted).

*Tahoe-Sierra*, a plaintiff cannot use conceptual severance to get around the rule that the denominator should be the parcel as a whole.<sup>69</sup>

The Court in *Tahoe-Sierra* further explained that, in determining what constitutes the parcel as a whole, an analysis of a person's interest in property should address the "metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner's interest."<sup>70</sup> Despite this description, it is still not always clear what constitutes the parcel as a whole.<sup>71</sup> This confusion manifests itself in three contexts—physical/spatial severance, functional severance, and temporal severance.<sup>72</sup> A thorough discussion of temporal severance will be undertaken in Part III.

#### D. Takings Jurisprudence and Leases

Fees simple and leaseholds are two types of property interests. Fees simple are the basic ownership interest in land. They are inheritable, alienable, devisable, and of infinite duration.<sup>73</sup> Leaseholds are the possessory interest in land or premises held by a tenant.<sup>74</sup> A tenant is a person who pays rent to temporarily use and occupy another's land.<sup>75</sup>

Like fees simple, leaseholds are compensable under the Fifth Amendment when the government takes land for public use.<sup>76</sup> This is true for physical takings<sup>77</sup> and for regulatory takings.<sup>78</sup>

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<sup>69</sup> For an analysis of the shifting views of the Supreme Court on the denominator issue, see Wright, 34 *Envir L* at 190–92 (cited in note 59).

<sup>70</sup> *Tahoe-Sierra*, 535 US at 331–32.

<sup>71</sup> See Daniel L. Siegel, *The Impact of Tahoe-Sierra on Temporary Regulatory Takings Law*, 23 *UCLA J Envir L & Pol* 273, 285 n 88 (2005).

<sup>72</sup> See, for example, Wright, 34 *Envir L* at 193–220 (cited in note 59) (giving an in-depth description of four types of severance—physical (horizontal and vertical), functional, and temporal); Meltz, 34 *Ecol L Q* at 346–52 (cited in note 27) (giving an in-depth analysis of three types of severance—spatial (encompassing horizontal, vertical, and sold-off land), functional, and temporal).

<sup>73</sup> See Richard R. Powell and Michael Allan Wolf, 1 *Powell on Real Property* § 13.03 at 13–12 (Bender 2012).

<sup>74</sup> See *Black's Law Dictionary* 973 (West 9th ed 2009).

<sup>75</sup> See *id* at 1506.

<sup>76</sup> See *Alamo Land & Cattle Co v Arizona*, 424 US 295, 303–04 (1976) ("It has long been established that the holder of an unexpired leasehold interest in land is entitled, under the Fifth Amendment, to just compensation for the value of that interest when it is taken upon condemnation by the United States."). See also Meltz, 34 *Ecol L Q* at 319 (cited in note 27) ("Almost all interests in land are recognized as 'property' under the Takings Clause.").

<sup>77</sup> See, for example, *United States v General Motors Corp*, 323 US 373, 375, 380–84 (1945).

Takings cases involving leases are generally treated the same as takings involving fees simple, but some notable issues are worth highlighting.

First, unlike a fee simple, a lease is not of infinite duration,<sup>79</sup> which means that the timing of the regulation in relation to the remaining duration of the lease is relevant. Two of the most famous leasehold cases, *United States v General Motors Corp*<sup>80</sup> and *United States v Petty Motor Co*,<sup>81</sup> illustrate this distinction. In *Petty Motor*, the leasehold expired during the physical occupation of the land,<sup>82</sup> while in *General Motors*, the plaintiff still had a leasehold interest in the property after the government relinquished the lease.<sup>83</sup> The plaintiff in *Petty Motor* received the “value of the interest taken,” which in that case was the market value of the leasehold.<sup>84</sup> By contrast, in *General Motors*, the plaintiff received extra compensation (beyond the market value) because, once the government left, the plaintiff had to either return to its leasehold interest or bear the responsibility for the leasehold.<sup>85</sup> This “continuing obligation” was a greater burden than just losing the lease, so the Government owed extra compensation.<sup>86</sup> Describing the difference in these two cases, the Court in *Petty Motor* wrote, “There is a fundamental difference between the taking of a part of a lease and the taking of the whole lease.”<sup>87</sup> This shows that the duration of a lease and the timing of a regulation, and the consequences that arise from their interaction, are important parts of the takings analysis.

The second relevant issue is the relationship between the lessor and the lessee. In many leasing cases, the contract does not indemnify the lessee, nor is the lease voided in the event of a taking, so courts treat the lessee as the only aggrieved party. Indemnification and voiding clauses do exist, and it is important

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<sup>78</sup> See, for example, *Resource Investments, Inc v United States*, 85 Fed Cl 447, 478–79 (2009).

<sup>79</sup> See notes 73–75 and accompanying text.

<sup>80</sup> 323 US 373 (1945).

<sup>81</sup> 327 US 372 (1946).

<sup>82</sup> See *id* at 375.

<sup>83</sup> See *General Motors*, 323 US at 375.

<sup>84</sup> See *Petty Motor*, 327 US at 377–78.

<sup>85</sup> See *General Motors*, 323 US at 382–84. See also *Petty Motor*, 327 US at 379 (describing why the plaintiff in *General Motors* was owed more compensation than the plaintiff in *Petty Motor*).

<sup>86</sup> See *Petty Motor*, 327 US at 379–80.

<sup>87</sup> *Id* at 379.

to recognize that courts do not allow double recovery.<sup>88</sup> The lessor and lessee cannot recover for the same taking. When an alleged taking occurs, a lessee's only recourse is frequently a lawsuit against the government for a taking without just compensation.<sup>89</sup>

As discussed above, the normal takings rules do not always apply to leasehold-takings claims. Part II outlines and analyzes the current judicial and academic debate on one area of potential divergence—the analytical framework when a lease is subsumed by a temporary moratorium.

## II. CURRENT ANALYSIS OF THE LEASE-SUBSUMING MORATORIUM ISSUE

Judges and scholars have recognized that leasehold takings claims can diverge from the general doctrine when a lease ends in a moratorium. Justice Anthony Kennedy directly raised this issue during oral argument in *Tahoe-Sierra*. After the Court delivered the opinion in that case, various scholars noted that the lease issue remains an open question. This Part addresses these two periods of inquiry in turn.

### A. The *Tahoe-Sierra* Oral Argument

Even before *Tahoe-Sierra* was decided, it was apparent that a decision on the scope of the ruling in *Lucas* would have repercussions outside of *Tahoe-Sierra*'s specific fact pattern. During the oral argument in *Tahoe-Sierra*, Justice Kennedy specifically asked John Roberts, then the advocate for the Tahoe Regional Planning Agency,<sup>90</sup> what test the Court should apply if the moratorium had instead wiped out an entire leasehold.

Justice Kennedy described a hypothetical landowner affected by the moratorium, who leased his property to someone planning to put a mobile home on the land for one year. In this hypothetical scenario, the moratorium encompassed that lease, thus

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<sup>88</sup> See id at 375–76 (barring a lessee from recovering because the lease had a provision that it was void in the event of a taking); *Alamo Land & Cattle*, 424 US at 303–04 (barring a lessor from recovering for a taking if the lessee was allowed to recover).

<sup>89</sup> This is important because during the oral argument in *Tahoe-Sierra*, there was discussion about whether the lessor or lessee would bear the burden if a lease was permanently subsumed by a moratorium. See Part II.A.

<sup>90</sup> While Chief Justice Roberts has heard regulatory-takings cases during his time on the bench, see, for example, *Arkansas Game and Fish Commission v United States*, 133 S Ct 511, 522 (2012), he has not yet had to address the nature of the relationship between *Lucas* and *Penn Central* since the oral argument in *Tahoe-Sierra*.

denying the leaseholder the ability to use the property.<sup>91</sup> Justice Kennedy questioned Roberts about why his hypothetical was different than previous leasehold takings cases and not an automatic taking, as was the result in cases like *General Motors*.<sup>92</sup> Justice Kennedy also addressed the relationship between the lessee and the lessor. He assumed that after the regulation deprived the land of beneficial use, the lessee's claim would be against the lessor for the inability to use and enjoy the lease.<sup>93</sup> The lessor, in turn, would sue the government for effecting a taking without just compensation.<sup>94</sup>

Roberts believed that the proper analytical framework was *Penn Central*.<sup>95</sup> Roberts argued that in past takings cases in which the Court faced "a regulation that applie[d] to a discrete property interest," it did not then "redefine the effective property interest" as the "discrete property interest" affected by the regulation.<sup>96</sup> Those cases were also distinguishable because they were either about "a physical appropriation or, extended to Lucas, a ban on total economic use," while the case here involved a temporary regulation.<sup>97</sup> Roberts noted that in the case at hand, the properties were held by the petitioners as fees simple.<sup>98</sup> In response to Justice Kennedy's questions about lessees and lessors, Roberts said that "presumably the impact of regulation would be something that would be addressed in the lease agreement itself," and that the question of "who bears the responsibility . . . [is] between the lessor and the lessee."<sup>99</sup>

As *Tahoe-Sierra* changed much of the regulatory-takings landscape,<sup>100</sup> the analyses and arguments proffered by Justice Kennedy and Roberts are no longer totally up to date. Still, a few points are worth highlighting. First, Roberts anticipated

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<sup>91</sup> Transcript of Oral Argument, *Tahoe-Sierra Preservation Council, Inc v Tahoe Regional Planning Agency*, No 00-1167, \*26-27 (US Jan 7, 2002) (available on Westlaw at 2002 WL 43288) ("*Tahoe-Sierra* Argument").

<sup>92</sup> *Id.* at \*26-29.

<sup>93</sup> *Id.* at \*30.

<sup>94</sup> *Id.*

<sup>95</sup> See *Tahoe-Sierra* Argument at \*26-31 (cited in note 91).

<sup>96</sup> *Id.* at \*29 (noting the Court's approach in *Penn Central*, *Keystone Bituminous Coal Assn. v DeBenedictis*, 480 US 470 (1987), and *Concrete Pipe & Products of California, Inc v Construction Laborers Pension Trust for Southern California*, 508 US 602 (1993)).

<sup>97</sup> *Tahoe-Sierra* Argument at \*27-28 (cited in note 91).

<sup>98</sup> *Id.* at \*29.

<sup>99</sup> *Id.* at \*30.

<sup>100</sup> See Parts I.B and I.C.

many of the arguments for why a leasehold should be treated differently, including that the physical-leasehold-takings cases are distinguishable, that the property interest would still retain value due to the temporary nature of the regulation, and that the *Lucas* case was designed for “rare circumstances.”<sup>101</sup> Roberts was adamant that *Penn Central* was the proper test in this situation.<sup>102</sup>

Second, while Roberts and Justice Kennedy both discussed the lessor/lessee relationship,<sup>103</sup> their analyses were incomplete. Both Justice Kennedy and Roberts seemed satisfied with viewing the relationship as purely contractual, thereby concluding that a regulatory taking by the government would allow the lessee to recover from the lessor rather than from the government. The lessor would then try to recover from the government.<sup>104</sup> However, this presupposes the existence of an indemnification or voiding clause, which is not necessarily present in a lease.<sup>105</sup> By not addressing the scenario in which the leaseholder could only sue the government for a taking, the oral argument failed to provide an in-depth analysis of the heart of Justice Kennedy’s hypothetical—that is, the argument did not address what analytical framework should be used if a leasehold loses all beneficial value during the moratorium.

#### B. Commentary after *Tahoe-Sierra*

Since the decision in *Tahoe-Sierra*, many scholars have recognized that the opinion leaves open the possibility that a leasehold completely subsumed by a moratorium could qualify as a per se taking under *Lucas*.<sup>106</sup> While none of these scholars explored the issue in any depth, almost all of them assumed that a leasehold that terminates before the end of a moratorium—and

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<sup>101</sup> See *Tahoe-Sierra* Argument at \*26–31 (cited in note 91).

<sup>102</sup> See id at \*29 (“I am sure that it’s still evaluated under *Penn Central*.”).

<sup>103</sup> See id at \*26–31.

<sup>104</sup> See id at \*30.

<sup>105</sup> See notes 88–89 and accompanying text.

<sup>106</sup> See David W. Spohr, *Cleaning Up the Rest of Agins: Bringing Coherence to Temporary Takings Jurisprudence and Jettisoning “Extraordinary Delay”*, 41 *Envir L Rep* 10435, 10443 n 124 (2011); Daniel L. Siegel and Robert Meltz, *Temporary Takings: Settled Principles and Unresolved Questions*, 11 *Vt J Envir L* 479, 483–84 (2010); Lior Jacob Strahilevitz, *Information Asymmetries and the Rights to Exclude*, 104 *Mich L Rev* 1835, 1862 n 98 (2006); Eagle, 31 *Fla St U L Rev* at 472–73 (cited in note 11); Wright, 34 *Envir L* at 216–17 (cited in note 59); Richard J. Lazarus, *Celebrating Tahoe-Sierra*, 33 *Envir L* 1, 15–16 (2003); J. David Breemer, *Temporary Insanity: The Long Tale of Tahoe-Sierra Preservation Council and Its Quiet Ending in the United States Supreme Court*, 71 *Fordham L Rev* 1, 32–33 (2002).

is therefore rendered valueless—could potentially implicate the *Lucas* per se rule.<sup>107</sup> Two major reasons underlie this speculation. First, if leases are treated like fees simple, then a moratorium that fully engulfed a lease would deprive the property interest of all beneficial use, triggering the *Lucas* rule.<sup>108</sup> Second, the language in *Tahoe-Sierra* seems to limit the opinion to addressing fees simple,<sup>109</sup> so a *Lucas* claim is still potentially available for a lease.<sup>110</sup>

No commentator specifically says that this would be a *Lucas* taking, but all recognize that *Tahoe-Sierra* does not foreclose the possibility. In the next Part this Comment argues that, contrary to the academic trend, the initial presumption by Roberts of *Penn Central*'s superiority was correct.

### III. *PENN CENTRAL* IS THE PROPER ANALYTICAL FRAMEWORK

This Comment argues that the *Penn Central* balancing test is the proper approach to analyze whether a taking occurs when a lease expires during a moratorium. This approach best aligns with the current takings doctrine and takes into account options, present in many leases, that add value to the lease beyond just the enjoyment of the lease.

The choice of approach is a question of which party should bear the burden, not a normative question of whether a regulation is a taking. Theoretically, a regulation that goes “too far” should be found to be a taking regardless of whether a court uses the *Lucas* rule or the *Penn Central* balancing test.<sup>111</sup> The reason that the choice matters arises from the tension between the rights of property owners and the ability of the government to

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<sup>107</sup> See note 106.

<sup>108</sup> See note 106.

<sup>109</sup> Examples of this language include: “An interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the *owner's interest*,” *Tahoe-Sierra*, 535 US at 331–32 (emphasis added), and “[l]ogically, a *fee simple estate* cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted.” *Id.* at 332 (emphasis added).

<sup>110</sup> See note 106. Professor Richard Lazarus found the specific choice of language to be especially noteworthy. See Lazarus, 33 *Envir L* at 15–16 (cited in note 106).

<sup>111</sup> See Echeverria, 39 *Envir L Rep* at 10474 (cited in note 35) (arguing that it is “possible to interpret the *Lucas* test as an application of the *Penn Central* analysis,” where “the economic impact is so substantial that this factor establishes a taking without regard to the other factors”).



implement regulations for the public good.<sup>112</sup> The *Lucas* per se rule favors landowners because it is cheaper than the more exhaustive *Penn Central* analysis,<sup>113</sup> and it is dispositive if the property owner can show that all beneficial use is permanently eliminated.<sup>114</sup> Conversely, the *Penn Central* balancing test favors the public interest because it allows an “inquiry into all of the relevant circumstances in particular cases” and does not automatically constrain potentially useful government actions like building moratoria.<sup>115</sup>

This tension between *Lucas* and *Penn Central* is at the heart of the difficulty in determining the proper approach to leases expiring during moratoria. From the perspective of protecting property rights, this scenario implicates the same concern that animated the ruling in *Lucas*—that the complete elimination of value implies that the regulation is unfairly burdensome.<sup>116</sup> However, the public interest also needs to be taken into account. The *Lucas* rule is reserved for “extraordinary circumstance[s],”<sup>117</sup> and unless such circumstances are present, the *Penn Central* balancing test best protects the government’s ability to act in the public interest while still compensating property owners who have suffered a taking.<sup>118</sup>

This Part contains two distinct arguments that point to *Penn Central* as the proper analytical framework. First, the *Penn Central* test is most compatible with *Tahoe-Sierra*, the Court’s most recent analysis of the relationship between the two regulatory-takings approaches, and with subsequent cases. This

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<sup>112</sup> See Underkuffler, 21 Const Commen at 747–52 (cited in note 14) (discussing how property rights and regulations in the public interest are an important part of the Supreme Court’s analysis of justice in regulatory takings).

<sup>113</sup> See *Tahoe-Sierra* Argument at \*26, 47–48 (cited in note 91).

<sup>114</sup> See Part I.B.2. When a plaintiff alleges a *Lucas* taking, the court first analyzes whether there is a complete and permanent deprivation of value. If there is not a complete deprivation, then the court next applies the *Penn Central* balancing test to see whether there is a taking. See Part I.B.

<sup>115</sup> See *Tahoe-Sierra*, 535 US at 334. The Court also noted that “[t]he interest in facilitating informed decisionmaking by regulatory agencies counsels against adopting a *per se* rule that would impose such severe costs on their deliberations.” *Id* at 339.

<sup>116</sup> See *Lucas*, 505 US at 1017–18:

[I]n the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption 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.

<sup>117</sup> *Id* at 1017. See also note 122 and accompanying text.

<sup>118</sup> See Part I.B.

Comment specifically argues that, consistent with the opinion in *Tahoe-Sierra*, the use of a lease prior to a regulation should be considered as part of the parcel as a whole, and advocates for a bright-line rule that a leasehold subsumed by a moratorium only qualifies for the *Lucas* per se rule if there is no prior use. Second, options like the right to renew or option to purchase, present in many leases, make it debatable that a lease could be considered completely valueless, which would render the *Lucas* test inapplicable. This Part concludes by acknowledging that, in rare cases, a lease expiring during a moratorium could implicate a per se taking under *Lucas*.

A. Employing the *Penn Central* Analysis Is the Best Doctrinal Fit with *Tahoe-Sierra*

The opinion in *Tahoe-Sierra* was a pivotal moment in takings jurisprudence<sup>119</sup> and is the Court's most recent major decision discussing the relationship between *Lucas* and *Penn Central*. Applying the *Penn Central* test when a lease is subsumed by a moratorium incorporates two of the important doctrinal elements of *Tahoe-Sierra*—the diminished role of the *Lucas* test and the reaffirmation of the parcel-as-a-whole rule.<sup>120</sup>

1. The Supreme Court favors *Penn Central*.

The diminution of the role of the *Lucas* test can be explained in two related ways. First, *Tahoe-Sierra* made clear that the primary approach in regulatory-takings cases is the *Penn Central* approach.<sup>121</sup> Second, courts should be hesitant to liberally extend the *Lucas* rule, since the Court has suggested that *Lucas* should be applied only in rare circumstances.

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<sup>119</sup> See Underkuffler, 21 Const Commen at 728 (cited in note 14); Lazarus, 33 Envir L at 3 (cited in note 106).

<sup>120</sup> See Lazarus, 33 Envir L at 10–12 (cited in note 106). Professor Lazarus included these two in a section on “Highlights” of the case. *Id.* at 7. The other two highlights were the “Severance of Physical from Regulatory Takings,” see *id.* at 9–10, which is relevant to the extent that physical-takings jurisprudence is not controlling on any regulatory-takings issues in this Comment, and “Potentially Favorable Future Applications of the *Penn Central* Test,” which discussed dicta in *Tahoe-Sierra* favoring land-use regulations. See *id.* at 13–14.

<sup>121</sup> See Part I.B. See also *Arkansas Game and Fish Commission v United States*, 133 S Ct 511, 518 (2012) (“[M]ost takings claims turn on situation-specific factual inquiries.”); Underkuffler, 21 Const Commen at 736 (cited in note 14) (“If there had been any prior doubt about the seriousness of the Court’s embrace of *Penn Central*’s ad hoc, balancing, broad-gauged approach in takings cases, there is no doubt now.”).

It is worth describing the second explanation in more depth. In *Tahoe-Sierra*, the Court wrote that the *Lucas* rule was reserved for “extraordinary circumstance[s].”<sup>122</sup> This means that “[i]n . . . almost all cases, ‘the concepts of “fairness and justice” that underlie the Takings Clause will be better served . . . by a *Penn Central* inquiry into all of the relevant circumstances.’”<sup>123</sup>

The implications of *Lucas*’s diminishment are subtle, but important. *Lucas* is still good law,<sup>124</sup> and at first glance it may seem like a lease subsumed by a moratorium should be analyzed no differently than a lease that loses all value due to a permanent regulation.<sup>125</sup> However, two considerations call this assumption into question.

First, the Court in *Tahoe-Sierra* limited the precedential scope of *First English Evangelical Lutheran Church of Glendale v County of Los Angeles, California*,<sup>126</sup> which had been viewed as supporting the application of the *Lucas* rule to both permanent and temporary regulations.<sup>127</sup> In *First English*, the Court ruled that even if a regulation found to be a taking was only temporary, just compensation was still owed under the Fifth Amendment.<sup>128</sup> The Court in *Tahoe-Sierra* concluded that *First English* established only that temporary regulatory takings were compensable and that it made no ruling on the antecedent question

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<sup>122</sup> *Tahoe-Sierra*, 535 US at 324 n 19, 330, 332, 337.

<sup>123</sup> Underkuffler, 21 Const Commen at 736 (cited in note 14), quoting *Tahoe-Sierra*, 535 US at 334.

<sup>124</sup> See Lazarus, 33 Envir L at 8 (cited in note 106).

<sup>125</sup> Recall that the *Lucas* analysis has been applied to leases under permanent regulations. See *Resource Investments, Inc v United States*, 85 Fed Cl 447, 481 (2009) (holding that a “prospectively permanent” regulation burdening a leasehold was a categorical taking) (emphasis omitted); *Vulcan Materials Co v City of Tehuacana*, 369 F3d 882, 888–92 (5th Cir 2004) (holding that an ordinance making a mining lease valueless was a categorical taking under the Texas Constitution, using a Texas case that extensively cited *Lucas* as support).

<sup>126</sup> 482 US 304 (1987).

<sup>127</sup> See *Tahoe-Sierra*, 535 US at 347–48 (Rehnquist dissenting) (“Our opinion in [*First English*] . . . rejects any distinction between temporary and permanent takings when a landowner is deprived of all economically beneficial use of his land.”).

<sup>128</sup> See *First English*, 482 US at 318–19:

These cases reflect the fact 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. . . . Where [a burden on property] results from governmental action that amounted to a taking, the Just Compensation Clause of the Fifth Amendment requires that the government pay the landowner for the value of the use of the land during this period.

of whether a taking had occurred.<sup>129</sup> *Tahoe-Sierra* thus nullified the major precedent for linking the takings rules for temporary and permanent regulations.<sup>130</sup>

Second, physical-takings jurisprudence treats temporary and permanent uses of property differently. Permanent physical occupations are per se takings, whereas temporary physical invasions are analyzed under *Penn Central*.<sup>131</sup> *Tahoe-Sierra*'s decoupling of permanent and temporary regulatory takings<sup>132</sup> thus brings regulatory-takings jurisprudence in line with other areas of takings law.

In sum, it is not a given that a court would automatically apply *Lucas*. The question thus becomes whether a lease subsumed by a moratorium is one of those "extraordinary" cases in which *Lucas* should be extended.

## 2. The parcel as a whole and temporal severance.

*Tahoe-Sierra* reaffirmed the parcel-as-a-whole rule as a central focus of all takings claims.<sup>133</sup> How a court defines the relevant parcel affects the choice between the *Lucas* and *Penn Central* frameworks, because the *Lucas* rule is only available if the entire parcel is completely devalued.<sup>134</sup> As leasehold interests, unlike fees simple, are not of infinite duration,<sup>135</sup> the relevant parcel analysis for a leasehold subsumed by a moratorium should deviate from the general rules for the parcel as a whole based on this unique temporal character. This Comment argues that because leaseholds are different, the relevant parcel should include both the period after the regulation and the *period prior to the regulation*.<sup>136</sup> Ultimately, this Comment proposes a bright-line rule

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<sup>129</sup> See *Tahoe-Sierra*, 535 US at 328–30 ("[I]t is important to recognize that we did not address in [*First English*] the quite different and logically prior question whether the temporary regulation at issue had in fact constituted a taking.").

<sup>130</sup> See Breemer, 71 Fordham L Rev at 19 (cited in note 106) ("Perhaps the most remarkable statement [in the *Tahoe-Sierra* opinion] is that *First English* does not establish the constitutional equivalency of temporary and permanent regulations.").

<sup>131</sup> See *Loretto v Teleprompter Manhattan CATV Corp*, 458 US 419, 428–35 (1982) (holding that there is a "constitutional distinction between a permanent occupation and a temporary physical invasion"). See also Meltz, 34 Ecol L Q at 360–63 (cited in note 27).

<sup>132</sup> See note 120.

<sup>133</sup> See note 120 and accompanying text. See also Part I.C.

<sup>134</sup> See Part I.B.2.

<sup>135</sup> See Part I.D.

<sup>136</sup> Recall that the *Lucas* rule for fees simple examines economically beneficial use only prospectively, not retrospectively. See Part I.B.2. As applied to fees simple, *Lucas* defines the relevant parcel of land only prospectively. This is clear from the facts of the case—the Court found that South Carolina's land use statute deprived the relevant

that unless there is no prior enjoyment of the lease, *Penn Central* is the proper analytical framework when a lease is subsumed by a moratorium.

The current doctrinal relationship of the parcel as a whole to the temporal aspects of property comes from *Tahoe-Sierra*. There, the Court emphasized that temporal periods cannot be conceptually severed and that all temporal periods of an interest in property must be included in the denominator.<sup>137</sup> In *Tahoe-Sierra*, the petitioners' land was valueless for the duration of the moratorium but regained value once the moratorium was lifted. The Court ruled that the period during the moratorium could not be temporally severed from the entire temporal life of the property interest because the parcel as a whole includes a temporal dimension as well as a physical dimension.<sup>138</sup> The Court held that because the property was not made completely valueless by the moratorium, a *Lucas* claim was inapplicable.<sup>139</sup> A landowner could not artificially manufacture a *Lucas* per se taking by selecting only a certain temporal period of his or her property interest.

Before addressing how the rules for the parcel as a whole and temporal severance apply to a lease subsumed by a moratorium,

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parcel of "all economically beneficial use" even though the fee simple estate existed before the statute's enactment. *Lucas*, 505 US at 1019–20. For a discussion of *Lucas*, see Part I.B.2.

<sup>137</sup> See *Tahoe-Sierra*, 535 US at 330–31 (rejecting petitioner's suggestion that the relevant parcel was the thirty-two-month temporal segment of the estate coinciding with the construction moratorium). Issues of severance generally arise when a party tries to separate its property interest into artificial parts, like smaller tracts of land or temporal periods. See Meltz, 34 Ecol L Q at 346–53 (cited in note 27). For example, a court looking at the extent of damage done to a leasehold by a taking would include only the temporal period of the lease and would not consider a temporal period that existed before the leasehold as relevant. Some courts, however, will include property outside of the specific property interest in the parcel as a whole if the court believes that the nonartificial split (for example, a sale of land) was done to maximize a taking. See *id.* at 349–50.

<sup>138</sup> See *Tahoe-Sierra*, 535 US at 331–32 ("An interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner's interest.").

<sup>139</sup> See *id.* at 332 ("Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted."). Put another way, the land would continue to have value during the moratorium because the possibility of use after the moratorium would give the land value to potential buyers or investors. See Eagle, 31 Fla St U L Rev at 446 (cited in note 11) ("[T]he parcel has value not under the use restriction but rather in contemplation of the removal of the use restriction."). In *Lucas*, by contrast, a regulation left the land permanently without value—at no point after the regulation would the land be worth anything. See *Lucas*, 505 US at 1009.

it is worth examining a few examples involving fees simple to see how the doctrine normally functions.

Imagine that Julia buys Whiteacre in fee simple. Julia uses the property for five years before a permanent regulation removes all beneficial value from Whiteacre. This is a per se taking under *Lucas*.<sup>140</sup> Next, imagine that the permanent regulation was promulgated immediately after Julia bought Whiteacre, and the land was deprived of all beneficial value. As above, this is a *Lucas* taking. Nor does adding years alter the outcome. If Julia owned Whiteacre for twenty years prior to the permanent regulation, there would still be a *Lucas* taking if the land was permanently deprived of all beneficial value after the regulation.

Finally, imagine instead that five years after buying Whiteacre, a two-year temporary building moratorium was imposed on Whiteacre, and for those two years no beneficial value existed. This would not qualify as a per se taking under *Lucas* because Whiteacre would regain its value after the moratorium ended. Further, Julia could not temporally sever the two years to create a *Lucas* per se taking.<sup>141</sup>

These examples highlight an important aspect of the *Lucas* per se rule for fees simple—it is solely a prospective test. When analyzing a *Lucas* claim, a court measures the prospective value of the land after an alleged taking to determine whether there is any remaining beneficial value. The period prior to the alleged taking is unimportant. This makes sense when considering the above examples, because regardless of how long Julia held Whiteacre prior to the regulation, the regulation deprived her in all instances of the same thing, which is the ability to beneficially use Whiteacre in fee simple.<sup>142</sup>

When determining the relevant parcel for a lease subsumed by a moratorium, the temporal period prior to the taking should not be similarly ignored. Leases are not permanent, so the only relevant temporal period is the duration of the lease.<sup>143</sup> As discussed in Part I.D, this means that the impact of a regulation on a leasehold interest depends on the remaining duration of the

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<sup>140</sup> See Part I.B.2.

<sup>141</sup> See notes 137–39 and accompanying text.

<sup>142</sup> This does not mean that the prior use has no effect on property value. For example, a fee simple may have its primary value in something like minerals, and if the minerals are used up, the land would be less valuable. The *Lucas* test for fees simple, however, takes into account only whether the regulation permanently took away all future economically beneficial uses of the fee simple. See Part I.B.2.

<sup>143</sup> See Part I.D.

lease. Because leaseholds are different from fees simple, this Comment argues that the period prior to the regulation should be considered as part of the denominator when determining the relevant parcel.

Consider two leases held by Julia, Lease A and Lease B. Lease A is a five-year lease, signed on January 1st and having an effective start date of February 1st. On January 15th, a regulation is passed that enacts a six-year building moratorium, depriving Lease A of all beneficial value for the full five-year period.<sup>144</sup> Lease B is also a five-year lease. Four years into Julia's use of Lease B, a six-year building moratorium is enacted, depriving Julia of the full value of the lease for the remaining year.

In both scenarios, a temporary regulation eliminated all remaining value of the lease. But should both scenarios be analyzed similarly? In the case of Lease A, the regulation came into effect before Julia could enjoy the lease. This seems to implicate the concerns about unfair burden that underlie the rationale for the *Lucas* rule for fees simple.<sup>145</sup> Lease B is different. In Lease B, only one year of the five years of the lease is deprived of value. Unlike fees simple, in which the prior use did not alter the property interest that was ultimately deprived of beneficial value, prior use does matter with leases. This counsels in favor of including the temporal period prior to the regulation as part of the relevant parcel, which also means that the *Lucas* rule would only be applicable if all beneficial value was completely eliminated from the entirety of the lease.<sup>146</sup>

Case law in the Federal Circuit, which hears many cases in which the federal government is being sued for monetary relief,<sup>147</sup> implicitly supports this argument. In *Rith Energy, Inc v*

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<sup>144</sup> This does not include the potential value of options, which are discussed in Part III.B.

<sup>145</sup> See note 116.

<sup>146</sup> Another way to think about this is in accounting terms. Land, unlike most assets, does not depreciate in value over time. See Gary A. Porter and Curtis L. Norton, *Financial Accounting: The Impact on Decision Makers* 398 (South-Western 8th ed 2013) ("All property, plant, and equipment, except land, have a limited life and decline in usefulness over time."). This means that, in the abstract, the value of a fee simple is not affected by prior use of the property. By contrast, a lease's value correlates with the time it has been in effect. For example, if a lessee were trying to sublease her land, a sublessee would pay more for a six-year lease that had five years remaining than for a six-year lease that had four years remaining. When looking at the value of a lease, meaningful analysis can be gleaned from analyzing the period prior to the taking.

<sup>147</sup> The United States Court of Appeals for the Federal Circuit has jurisdiction over appeals from the United States Court of Federal Claims. 28 USC § 1295(a)(3). The Court of Federal Claims has jurisdiction over claims for monetary relief that arise from alleged

*United States*,<sup>148</sup> a coal company leased mineral rights from a private party and obtained the required mining permit from the government.<sup>149</sup> The mining permit was subsequently suspended because of safety concerns.<sup>150</sup> Although the coal company was initially allowed to do some mining during the suspension,<sup>151</sup> the government ultimately permanently suspended all mining. This meant that the coal company was no longer able to exercise its mineral rights.<sup>152</sup> The coal company argued that the mining suspension was a per se taking under *Lucas*.<sup>153</sup> The Federal Circuit responded that because the regulation, a mining permit, allowed the coal company to mine for a period of time before ultimately prohibiting the activity, it was “appropriate to look at the extent to which [the coal company] was able to exploit its leases throughout the permitting period.”<sup>154</sup> Because the regulation did not eliminate all beneficial value of land (it spared the value extracted before the regulation), *Penn Central* was the appropriate test.<sup>155</sup>

Later Federal Circuit cases have affirmed the ruling in *Rith Energy*. In *Maritrans Inc v United States*,<sup>156</sup> certain types of boats were deemed unsafe by the government.<sup>157</sup> The government passed a law setting retirement dates for those boats, after which they could no longer be used.<sup>158</sup> The Federal Circuit ruled that this was not a *Lucas* taking because the law allowed the boat owner to get some value from the boats prior to the date of retirement.<sup>159</sup> The court cited *Rith Energy* as the basis for its conclusion<sup>160</sup> and linked the *Rith Energy* rationale to the recent

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violations by the federal government of “the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.” 28 USC § 1491(a)(1). Recall that takings claims are government violations of the Fifth or Fourteenth Amendments. See Part I.A.

<sup>148</sup> 247 F3d 1355 (Fed Cir 2001).

<sup>149</sup> *Id.* at 1358.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Rith Energy*, 247 F3d at 1358.

<sup>153</sup> *Id.* 1361–62 (explaining that the coal company argued that the government regulation constituted a taking because it “deprived [the company] of all economic value in the coal leases”).

<sup>154</sup> *Id.* at 1362.

<sup>155</sup> See *id.* at 1363.

<sup>156</sup> 342 F3d 1344 (Fed Cir 2003).

<sup>157</sup> *Id.* at 1348.

<sup>158</sup> *Id.* at 1348–49.

<sup>159</sup> *Id.* at 1353–55.

<sup>160</sup> *Maritrans*, 342 F3d at 1353–55.



ruling in *Tahoe-Sierra*.<sup>161</sup> The Federal Circuit instead held that the *Penn Central* analysis was the proper approach to determine whether a taking occurred.<sup>162</sup>

The reasoning behind the rule in *Rith Energy* arises in large part from the idea that the government permitted some use of the property interest before permanently denying any future use. This is similar to the zoning idea that an amortization period mitigates a taking.<sup>163</sup> The regulation could not be said to have denied all economically beneficial use because the regulation guaranteed that some use, albeit limited, would be available.

Notice, however, that the Federal Circuit in *Rith Energy* analyzed the amount of coal extracted prior to the suspension along with the amount of coal extracted during the suspension.<sup>164</sup> The examination of the coal extracted during the suspension follows from the amortization-like logic discussed above. But this does not explain why the Federal Circuit also looked at the amount of coal extracted *prior to the suspension*, and the court did not explicitly elucidate why it applied *Lucas* retrospectively.<sup>165</sup>

This aspect of the opinion in *Rith Energy* can be explained by recognizing that the Federal Circuit implicitly included prior use as part of the parcel as a whole. A factor that seems to be driving the Federal Circuit's analysis is that a significant portion of the coal company's property interest was extracted prior

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<sup>161</sup> Id at 1355 n 6.

<sup>162</sup> See id at 1355–56 (“When a court determines that a categorical taking has not occurred, it must embark on a fact-based inquiry in which it applies the standard promulgated by the Supreme Court in *Penn Central* to evaluate whether the governmental action at issue nevertheless resulted in a regulatory taking.”).

<sup>163</sup> See Meltz, 34 Ecol L Q at 351 (cited in note 27). An amortization period is a “period of time granted to the owners of nonconforming uses during which they may phase out their operations as they see fit and make other arrangements, that is, a grace period putting the owners on fair notice of the law and giving them a fair opportunity to recoup their investments.” 12 NY Jur 2d Buildings § 350. For an example of an amortization case, see *801 Conklin Street Ltd v Town of Babylon*, 38 F Supp 2d 228, 249 (EDNY 1999) (“The Code’s amortization provision . . . envelops and eliminates Plaintiff’s adverse condemnation ‘takings’ claim.”).

<sup>164</sup> See *Rith Energy*, 247 F3d at 1360. Recall that in *Rith Energy* two distinct governmental actions occurred. First, the government issued a mining permit to the coal company. Second, after determining that the mining was not safe, the government allowed some mining before permanently suspending the permit and ending all activity. Id at 1359–61. See also text accompanying notes 149–55.

<sup>165</sup> The court in *Rith Energy* determined that these actions were all part of the same “regulatory program.” See *Rith Energy*, 247 F3d at 1363. If that argument were to be taken seriously, it would lead to an absurd result, because the government would be able to get around all *Lucas* claims by issuing a permit for any activity they might later decide to deprive of all benefit.

to the permanent suspension. The court wrote that the amount of coal extracted, “although only about 14 percent of the amount Rith hoped to extract under its permit, cannot be regarded as merely a ‘nominal’ recovery . . . reflecting the ‘total wipe-out’ that accompanies a categorical taking.”<sup>166</sup> This analysis was only possible because the lease encompassed a finite amount of coal. Had the coal company owned the land in fee simple, and had there been an unlimited supply of coal, the court would not have been able to make the same argument, because the prior actions of the coal company would have had no effect on the value or use of the land going forward. Discomfort with the idea that this could be a categorical taking when the coal company had already received a fair amount of the total possible value from the property interest caused the Federal Circuit to include the prior use in its calculations. This supports this Comment’s argument that use prior to the taking of a lease is a relevant part of the denominator.

If the use prior to a regulation should be part of the relevant parcel for a lease subsumed by a moratorium, an essential second question is the effect that the inclusion of prior use should have on the choice between *Lucas* or *Penn Central* as the proper analytical framework. This Comment offers a bright-line rule—if no use or enjoyment of the lease exists prior to the temporary regulation, then the proper analysis is *Lucas*, but if there is any existing prior use, the correct framework is *Penn Central*. Recall the leasehold examples discussed previously. Lease A, which was deprived of all value before the start date of the lease, would be analyzed under *Lucas*. Lease B, which was deprived of all value after Julia enjoyed the lease for four years, would be analyzed under *Penn Central*.

The aim of this bright-line rule is to create a simple, workable standard that can be easily applied. There is a lot of doctrinal arbitrariness in determining when a regulation has gone “too far.”<sup>167</sup> This rule seeks to combat this unpredictability by clearly delineating the circumstances necessary to move from the *Lucas* rule to the *Penn Central* rule. Any period of prior use of a lease means that the proper analytical framework is *Penn Central*. This operationalizes what was implicitly recognized in

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<sup>166</sup> Id.

<sup>167</sup> See, for example, Part I.B.2 (noting that the *Lucas* rule applies for only a 100 percent taking, but does not apply for a 95 percent taking); Part I.C (discussing the challenge in determining what makes up the parcel as a whole).

cases like *Rith Energy*—that prior use of a lease should (a) be part of the parcel as a whole and (b) foreclose the *Lucas* test as the proper analytic framework.

This bright-line rule for leases subsumed by a moratorium furthers the objectives of *Tahoe-Sierra* and subsequent decisions. First, the rule would mean that the parcel as a whole includes all temporal periods. While *Tahoe-Sierra* dealt only with temporal periods after a regulation, the analysis of the use prior to a regulation is a worthy addition to the parcel-as-a-whole rule for leaseholds. As discussed above, the period prior to the alleged taking of a leasehold offers valuable information about the effect a moratorium had on a specific lease. Second, a rule that stipulates that *Lucas* applies only if no prior use exists advances the principle in *Tahoe-Sierra* that *Lucas* cases be reserved for “extraordinary circumstances.”<sup>168</sup> Barring the rare situations in which there is no prior use, the balancing test in *Penn Central* thus offers the best framework of analysis for the parcel as a whole after *Tahoe-Sierra* when the property interest is a leasehold.

#### B. Leaseholds and the Deprivation of All Economically Beneficial Use

If a lease is found to have no prior use, a second question emerges—whether a leasehold that is completely subsumed by a moratorium would satisfy the *Lucas* test. In order for a regulation to qualify as a *Lucas* taking, the lease would need to be completely and permanently deprived of all economic value.<sup>169</sup> How should courts determine whether that has happened?

Depriving a property interest of all economically viable use entails two things. First, the regulation needs to wipe out the entire use and value of the land.<sup>170</sup> Second, the regulation needs to be permanent, meaning that the land has no future value.<sup>171</sup> For a fee simple, this would mean that the land would be unable to be used in an economically beneficial way and that the regulation would be intended to be permanent—no value would exist in the future, and no buyer would be interested in purchasing the property.<sup>172</sup>

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<sup>168</sup> See Part III.A.1.

<sup>169</sup> See Part I.B.2.

<sup>170</sup> See *Tahoe-Sierra*, 535 US at 329–30.

<sup>171</sup> See *id.* at 330–32.

<sup>172</sup> See Meltz, 34 Ecol L Q at 328 (cited in note 27) (“The fact that a restriction is thought at the outset to be permanent, but is later rescinded or otherwise becomes temporary,

What would it mean for a lease to be completely deprived of all economic value? Intuitively, a regulation depriving property of all economically beneficial use would have the same effect on both a leaseholder and a landowner with respect to the present use of the land.<sup>173</sup> A regulation permanently depriving land of economically beneficial use would cause a lease, like a fee simple, to lose all future value. Moreover, it would seem that a regulation that was only temporary, but that completely covered a lease, could also be thought of as permanently depriving the lease of all future value, because the lease would be unusable for the entirety of its remaining period.

This analysis, however, does not take into account options, such as the right to renew or extend the lease or an option to purchase the landlord's interest,<sup>174</sup> which are common in leases.<sup>175</sup> These types of options would allow the leaseholder to exercise the option to continue the lease after the agreed upon duration has expired.<sup>176</sup> Critically, they may also allow the leaseholder to outlast a temporary moratorium.

Further, lease options are generally considered to be property interests under the Takings Clause.<sup>177</sup> These options add value to the lease. In *Alamo Land & Cattle Co v Arizona*,<sup>178</sup> the

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affects only the nature of the property interest allegedly taken, not the applicable takings test.”).

<sup>173</sup> This assumes that the lease does not contain an indemnification clause or a clause cancelling the lease in the event of a taking.

<sup>174</sup> See Richard R. Powell and Michael Allan Wolf, 2 *Powell on Real Property* §§ 16B.05[4]–[5] at 16B–98–119 (Bender 2012). Even though renewals, extensions, and similar lease extenders have slightly different common law consequences, see *id.* at §§ 16B.05[4][a]–[c] at 16B–98–111, for this analysis I lump them all under the category of renewals.

<sup>175</sup> See Mark S. Dennison, *Lessee's Right to Enforce Option to Renew or Purchase as Affected by Breach of Lease*, 88 Am Jur Trials 63 §§ 1–2 (2003) (noting that “[m]ost leases of real property contain some type of provision granting the lessee the option to renew or extend the lease at the end of the term” and that “[l]eases [ ] frequently contain provisions conferring upon the lessee the option to purchase the leased premises”); Alvin L. Arnold and Jeanne O'Neill, 1 *Real Estate Leasing Practice Manual* § 3:1 (West 2013) (“The option to renew is a common feature in commercial leases.”); William A. Hancock, ed, *Special Study for Corporate Counsel on Commercial Leases* § 1:25 (Business Laws 2000) (“Many commercial leases contain a renewal option.”).

<sup>176</sup> See Powell and Wolf, 2 *Powell on Real Property* § 16B.05[4][a] at 16B–98–99, § 16B.05[5] at 16B–111–19 (cited in note 174).

<sup>177</sup> See, for example, *Forest Properties, Inc v United States*, 39 Fed Cl 56, 70 (1997) (“The United States Supreme Court [ ] has confirmed that contract rights are a form of property within the purview of the Fifth Amendment.”). See also Meltz, 34 Ecol L Q at 319 (cited in note 27) (noting that “the recent trend favors property status” for “some of the more insubstantial interests in land, such as options to purchase”).

<sup>178</sup> 424 US 295 (1976).

Court included the right to renew as part of the valuation of the lease.<sup>179</sup> Similarly, in *United States v 53 1/4 Acres of Land, More or Less, in Borough of Brooklyn, Kings County, NY*,<sup>180</sup> the Second Circuit noted that a right to renewal was a compensable interest in a condemnation proceeding.<sup>181</sup> In *Petty Motor*, the Court noted that “[t]he value of the remainder of the term of the Petty Motor Company’s lease includes the value of the right to a renewal.”<sup>182</sup> As leases with these sorts of options have value, the question thus becomes whether this value is the “token interest” in *Palazzolo*,<sup>183</sup> in which case *Lucas* still applies, or if there is only a substantial devaluation as discussed in *Tahoe-Sierra*, which requires the *Penn Central* balancing test.<sup>184</sup>

There should be little question that an option to purchase is more than a token interest. An option to purchase gives the leaseholder the right to become an owner in fee simple, and *Tahoe-Sierra* has made clear that the *Penn Central* test is the required approach when a moratorium burdens a fee simple. Even if the leaseholder was not interested in exercising the purchase option, sufficient value would still exist because the leaseholder could sell the land to someone else.<sup>185</sup>

Rights to renew are more difficult, because the facts in a specific case are more variable.<sup>186</sup> Assuming that the leaseholder could use the right to renew, the question becomes whether, in the abstract, this would be a token interest or something more. Although it is difficult to articulate a clear distinction between the two, an examination of the case law is instructive.

When courts hold that there is a *Lucas* taking, it is because all possible uses of land are nonviable. For example, in *Resource Investments, Inc v United States*,<sup>187</sup> the court found that there was a complete deprivation when owners were denied the ability

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<sup>179</sup> See id at 304.

<sup>180</sup> 139 F2d 244 (2d Cir 1943).

<sup>181</sup> See id at 247.

<sup>182</sup> *Petty Motor*, 327 US at 380–81.

<sup>183</sup> For a description of the use of “token interest” in *Palazzolo*, see note 48 and accompanying text.

<sup>184</sup> See Part I.B.

<sup>185</sup> See note 139.

<sup>186</sup> For example, the renewal period itself may not extend past the moratorium or the lessee may have had to move to another location, with the transaction costs being so high that returning is not a feasible option. In these scenarios, the right to renew is basically worthless.

<sup>187</sup> 85 Fed Cl 447 (2009).

to build a landfill.<sup>188</sup> Looking at the other possible uses of the land, the court said that other possible uses theoretically existed, but would be so expensive to implement as to not be economically feasible.<sup>189</sup> The court wrote that even though “a parcel will typical [sic] retain some quantum of value even without economically viable use,” this “scintilla of value” is not enough to avoid a *Lucas* takings claim.<sup>190</sup> In these instances, possessors of property interests are left just with a “token interest” and can therefore still be compensated under the *Lucas* rule.<sup>191</sup>

However, courts do not find a complete deprivation of beneficial value when the deprivation is “one step short of complete.”<sup>192</sup> In other words, if there is some viable use for the land, *Lucas* doesn’t apply. For example, in *Palazzolo*, the Court did not find a *Lucas* taking when a landowner was able to build only a single-family residence on an eighteen-acre parcel.<sup>193</sup> The Court did not believe that the regulation at issue left the land “economically idle.”<sup>194</sup> Even if land value undergoes a substantial devaluation, as long as that devaluation is one step short of complete, the *Lucas* per se rule is inapplicable.<sup>195</sup>

Rights to renew are more like the situation in *Palazzolo* than the situation in *Resource Investments* for two reasons. First, the ability of a leaseholder to use his or her land once the moratorium ends is a viable option, even if the lease itself suffers a substantial devaluation. This use is more than the token interest left over in *Lucas* cases, in which any value left is impractical and unworkable.<sup>196</sup> Second, rights to renewal have

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<sup>188</sup> Id at 493.

<sup>189</sup> Id at 489.

<sup>190</sup> Id at 488.

<sup>191</sup> *Resource Investments*, 85 Fed Cl at 488, citing *Palazzolo*, 533 US at 631.

<sup>192</sup> *Lucas*, 505 US at 1019 n 8. See also Meltz, 34 Ecol L Q at 331–32 (cited in note 27).

<sup>193</sup> See *Palazzolo*, 533 US at 631.

<sup>194</sup> Id (quotation marks omitted), quoting *Lucas*, 505 US at 1019.

<sup>195</sup> See *Lucas*, 505 US at 1019 n 8. The amount of devaluation necessary to move from a substantial devaluation to leaving only a token interest is very high. See id (using the term “one step short of complete” in reference to a 95 percent devaluation of value of a parcel). However, a court’s finding that the devaluation is “one step short of complete” does not preclude a finding that the government regulation was a taking. The Court in *Lucas* criticized the dissent’s assumption “that the landowner whose deprivation is one step short of complete is not entitled to compensation,” because even though the “owner might not be able to claim the benefit of [the] categorical formulation,” this would be taken into account in the *Penn Central* balancing test. Id. See also note 111 and accompanying text.

<sup>196</sup> See Arnold and O’Neill, 1 *Real Estate Leasing Practice Manual* at § 3:1 (cited in note 175) (explaining that the “option to renew” is “a valuable right to the lessee,” for which a lessee may even make concessions).

been found by the courts to be valuable in and of themselves. While rights to renew have not been analyzed as adding value in the context of a *Lucas* claim, a tenant who is improperly denied rights to renew can generally get expectation damages or specific performance in court, as with any other breach of contract.<sup>197</sup>

A lease that expires during a moratorium likely will be unable to satisfy the *Lucas* test because options present in the lease mean that the moratorium did not eliminate all beneficial value from the lease. As the presence of some beneficial value would make the *Lucas* test inapplicable, the *Penn Central* test is the best approach for most leases subsumed by moratoria.

### C. The Outliers and the *Lucas* Rule

This Comment argues that, in most instances, the nature of leases means that the *Penn Central* balancing test is the best approach when a lease expires during a moratorium. However, the bright-line rule introduced in Part III.A.2 posits that when no prior use exists, the proper analytical framework is the *Lucas* per se rule. The discussion in Part III.B adds a second layer, that options need to be either nonexistent or insufficient to add more than a token interest. While a scenario like this would rarely occur, this would be the “extraordinary circumstance” that would trigger the *Lucas* rule.<sup>198</sup>

## CONCLUSION

Takings law is a complex field, and it is often unclear which theory or precedent a court should apply for a specific factual scenario. This Comment addresses one open question in takings jurisprudence. When a lease is entirely subsumed by a moratorium, the proper approach a court should employ is the *Penn Central* balancing test.

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<sup>197</sup> See 49 Am Jur 2d Landlord and Tenant § 190 (2013).

<sup>198</sup> Commentators have argued that applying the *Lucas* rule for leases subsumed by temporary moratoria could lead to negative strategic behavior by landowners. See, for example, Strahilevitz, 104 Mich L Rev at 1862 n 98 (cited in note 106) (noting that the ruling in *Tahoe-Sierra* could allow landowners to manufacture a takings claim). However, while dissenting opinions have worried about strategic behavior arising from *Lucas*, see, for example, *Palazzolo*, 533 US at 655 (Breyer dissenting) (arguing that a takings rule should not be created that encourages strategic behavior); *Lucas*, 505 US at 1065 (Stevens dissenting) (“[D]evelopers and investors may market specialized estates to take advantage of the [*Lucas*] rule.”), no majority opinion has ever endorsed the idea that the *Lucas* rule should be limited in light of strategic behavior concerns.

While this view is potentially contrary to the initial reactions of many scholars in the field, the *Penn Central* test is superior on numerous levels. It offers the best fit with the language and doctrine of *Tahoe-Sierra*, and in most instances a lease will have options that will cause the value to extend beyond the moratorium, making *Lucas* inapplicable at the outset.

On a broader level, applying *Penn Central* when a leasehold is completely consumed by a moratorium further calls into doubt the impact of the test in *Lucas*.<sup>199</sup> *Lucas* is now almost completely confined to its facts. Even in the context of leases, a *Lucas* taking will be found, as the Court has said, only in an “extraordinary case.”<sup>200</sup>

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<sup>199</sup> Underkuffler, 21 Const Comm at 753 (cited in note 14) (“In the past few years, the hegemony enjoyed by [the *Lucas* view] has crumbled. After *Palazzolo* and *Tahoe*, no longer will the idea of property . . . mark, with certainty, where protected individual interests end and collective power begins.”).

<sup>200</sup> *Tahoe-Sierra*, 535 US at 332.