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Transferable Development Rights TRPA and Takings: The Role of TDRs in the Constitutional Takings Analysis

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Transferable Development Rights, TRPA, and Takings: The Role of TDRs in the Constitutional Takings Analysis

William Hadley Littlewood*

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* J.D., University of the Pacific, McGeorge School of Law, to be conferred 1999; B.A., California State University, Fresno, 1996. I thank my wife, Michelle, for her love, support and encouragement. I thank my family for believing in me and motivating me to do my best. Lastly, I am grateful to Professor Ray Coletta for his guidance and suggestions regarding this Comment.

Solutions must be reached for the problems of modern zoning, urban and rural conservation. . . . [L]and planners are now only at the beginning of the path to solution. In the process of traversing that path further, new ideas and new standards of constitutional tolerance must and will evolve.¹

I. INTRODUCTION

Property law has evolved steadily throughout American jurisprudence. Although the judiciary has played a role in initiating productive utilization of land by ratifying the doctrine of adverse possession,² land-use planning via zoning and regulation suggests that the trend is turning toward preservation.³ To effect this preservation of land and the vital resources it contains, the Tahoe Regional Planning Agency has begun restricting land use in the Lake Tahoe region for the benefit of this greater good.⁴ This swing in the pendulum from productive utilization toward preservation has initiated many law suits that have combined to develop our takings jurisprudence.⁵

Transferable Development Rights (TDRs) have the potential of playing a major role in Fifth Amendment takings analysis.⁶ The United States Supreme Court,

1. Fred F. French Investing Co., Inc. v. City of New York, 350 N.E.2d 381, 389 (N.Y. 1976).

2. See John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. CHI. L. REV. 519, 537-38 (1996) (discussing the manipulation by the nineteenth-century American courts of the English common law doctrines in order to exalt productive utilizers of land over the idle owner). The doctrine of adverse possession was transformed in the United States to promote the development of the wilderness. See *id.* at 539 n.113.

3. See Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 138 (1978) (holding a New York historical landmark preservation law, which forbade the construction of a high-rise over the existing Penn Central Station, did not constitute a taking as per the Fifth Amendment of the United States Constitution); *Hadacheck v. Sebastian*, 239 U.S. 394, 409-10 (1915) (finding that the police power was properly used when advancing the common good of the community); *Mugler v. Kansas*, 123 U.S. 623, 669 (1887) (noting that the police power was appropriately used to forward and preserve the common good of the community).

4. See CAL. GOV'T CODE § 66801 (West Supp. 1998) (regulating the development of land in Lake Tahoe region in order to preserve the scenic beauty, natural resources and social and economic health in the area).

5. The sheer number of takings cases evidences the import placed on this single clause of our Constitution. See U.S. CONST. amend. V ("nor shall private property be taken, for public use, without just compensation."). For an overview of the Supreme Court's evolving treatment of takings cases, see generally *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), *Keystone Bituminous Coal Ass'n v. De Benedictis*, 480 U.S. 470 (1987), *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), *Goldblatt v. Hempstead*, 369 U.S. 590 (1962), *Griggs v. Allegheny County*, 369 U.S. 84 (1962), *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949), *Hurly v. Kincaid*, 285 U.S. 95 (1932), *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926), *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), *Mugler v. Kansas*, 123 U.S. 623 (1887).

6. See *Penn Cent.*, 438 U.S. at 137 (dictum) (stating that TDRs could be applied to the analysis under the Fifth Amendment's Takings Clause, but that the case at hand did not require such analysis). *But see* *Suitum v. Tahoe Reg'l Planning Agency*, 117 S. Ct. 1659, 1670-73 (1997) (Scalia, J., concurring) (arguing in his concurring opinion on the issue of ripeness, Justice Scalia posits in dictum that the relevance of TDRs should be "limited to the compensation side of the takings analysis").

however, has never ruled on the issue of using TDRs as a tool in determining whether a taking has occurred.⁷ A possible explanation for the Court not reaching this issue may be the inequitable results certain to occur if such an analysis were employed.⁸ One glaring inequity is the possibility of sham TDR schemes completely destroying the protections guaranteed by the Fifth Amendment.⁹

TDRs are a valuable resource if used properly.¹⁰ One commentator explains that "[t]he cornerstone of a successful TDR program is public confidence in the value of TDR credits."¹¹ Moreover, the implementation of a TDR scheme may only be feasible in "very specific conditions."¹² As such, determination of whether a TDR scheme is feasible should be made before any further analysis is undertaken because the viability of a TDR presents a threshold issue that must be decided before its application of the TDR to a Fifth Amendment takings analysis.¹³ This Comment concludes that the determination will have to be made on a case by case basis because assuming the TDR scheme is feasible, it should only be relevant to the issue of whether just compensation has been paid in the event a taking has occurred.¹⁴

Part II of this Comment briefly discusses current takings law in order to establish a foundation from which to determine where TDRs fit.¹⁵ Part III of this Comment explores the historical development and uses of TDRs.¹⁶ Moreover, Part III juxtaposes traditional uses of TDRs with the more contemporary uses articulated

7. See *Penn Cent.*, 438 U.S. at 137 (dictum) (suggesting that the presence of TDRs may effect a takings analysis); see also *supra* note 6 (citing the competing dicta between *Penn Central* and *Suitum*).

8. See *infra* note 206 and accompanying text (discussing potential implementation of sham TDR schemes to circumvent inverse condemnation claims); see also Steven R. Levine, *Environmental Interest Groups and Land Regulation: Avoiding the Clutches of Lucas v. South Carolina Coastal Council*, 48 U. MIAMI L. REV. 1179, 1209-10 (1994) (arguing that regulatory boards should implement TDRs as a means to circumvent regulatory takings claims).

9. See *infra* Part IV (noting the effects and potential abuses of using TDRs in Fifth Amendment takings analysis); see also Levine, *supra* note 8, at 1209-10 (encouraging land-use planners to implement TDR schemes to circumvent a Lucas categorical takings claim).

10. See, e.g., Joseph D. Stinson, Comment, *Transferring Development Rights: Purpose, Problems, and Prospects in New York*, 17 PACE L. REV. 319, 345-55 (1996) (analyzing the strengths and weaknesses of TDRs as well as suggesting criteria for implementing successful TDR programs).

11. See *id.* at 346-47 (explicating that public confidence in a TDR scheme is necessary for that scheme to be successful).

12. See *id.* (noting that TDR schemes require certain variables to be in place in order for the scheme to be effective).

13. See *infra* Part IV (discussing the importance of determining a TDR's value before reaching the issue of what role it plays in the Fifth Amendment takings analysis). Logic also dictates that a TDR's value must be assessed prior to making a determination of whether it mitigates the economic burden of the regulation or provides partial or total just compensation.

14. See *infra* Part IV.A.2 (suggesting that the logical solution is merely to look to the TDR for just compensation purposes rather than postulating the TDR value to determine if a taking has occurred).

15. See *infra* Part II (outlining the current state of takings law in order to establish a basis from which to analyze what role TDRs should play in the Fifth Amendment's takings analysis).

16. See *infra* Part III.B (exploring the historical development of TDRs).

in recent case law.¹⁷ Part IV focuses on the Constitutional issues surrounding TDRs.¹⁸ Specifically, Part IV examines the role of TDRs in Fifth Amendment takings¹⁹ and just compensation²⁰ analyses. Given the fact that no court has directly considered the issue, Part IV of this Comment suggests the proper use of TDRs in a Fifth Amendment analysis.²¹ Part V concludes that TDRs should only be considered when determining if just compensation has been paid.²² If courts follow the dictum of *Penn Central Transportation Co. v. New York City*, which suggests that TDRs can be considered in a takings analysis,²³ courts will effectively “read-out” the just compensation requirement expressed in the Constitution.²⁴

II. CURRENT TAKINGS LAW

The “Takings Clause” of the United States Constitution states, in pertinent part, “nor shall private property be taken for public use, without just compensation.”²⁵ From this clause arose an area of the law that has many facets, as evidenced by the continuing exploration and evaluation of the current status of takings law.²⁶ Over the decades, the United States Supreme Court has wrestled with the takings issue and has espoused principles, some easier in application than others, in hopes of guiding lower courts through the abyss created by the Takings Clause.²⁷

17. See *infra* Part III.C.1 (comparing the historical use of TDRs with contemporary application of TDRs, including the modern trend for land-use planners to use TDRs as part of a regulatory scheme in order to mitigate burdens placed on regulated landowners in environmentally sensitive areas in the context of the Tahoe Regional Planning Agency’s plan).

18. See *infra* Part IV (explaining the constitutional trade-offs of applying TDRs to the Fifth Amendment takings analysis vis-à-vis just compensation).

19. U.S. CONST. amend. V (stating in pertinent part, “nor shall private property be taken for public use, without just compensation”).

20. *Id.*

21. See *infra* Part IV.A.2 (suggesting that TDRs only be considered on the just compensation side of the Fifth Amendment analysis in order to promote equity, public confidence, and effective TDR schemes in general).

22. See *infra* Part V (concluding that in order to evolve with modern land use planning, TDRs must be considered as compensation rather than value for Fifth Amendment purposes).

23. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 137 (1978) (dictum) (stating that TDRs may be considered in determining the extent of the economic impact of the regulation in an ad hoc takings analysis).

24. U.S. CONST. amend. V (requiring the payment of just compensation in the event private property has been taken for public use).

25. *Id.*

26. The sheer number of articles concerning the law of takings signals the interest and import placed upon it by commentators and practitioners alike. See Richard J. Lazarus, *Litigating Suitum v. Tahoe Regional Planning Agency in the United States Supreme Court*, 12 J. LAND USE & ENVTL. L. 179, 180 n.1 (1997) (listing more than fifty articles concerning the issue of takings written in 1996 and early 1997, demonstrating both the interest and uncertainty that this area of the law brings). The author’s assertion is strengthened given that no major takings decision was handed down by the Supreme Court in either of these years. *Id.*

27. See *infra* text accompanying notes 31-37 (discussing the current status of the law of takings by looking at both the historical development and recent decisions of the Supreme Court); see also *infra* text accompanying notes 38-64 (covering current takings law).

The simplest form of a taking is the exercise of eminent domain. Eminent domain is the power of the government to force real property transfers to itself.²⁸ These forced sales of real property result in the payment of just compensation to the landowner.²⁹ Accordingly, a takings claim is not initiated in these situations because the landowner is paid just compensation in satisfaction of the Fifth Amendment requirement.³⁰

In 1922, *Pennsylvania Coal Co. v. Mahon*³¹ changed the general notion that the Takings Clause only protected private landowners against direct appropriations.³² *Penn Coal*, well known for Justice Holmes' oft cited "too far" test,³³ was the first in a line of Supreme Court decisions that set out to limit regulatory power exercised by the government and various states.³⁴ However, as noted by Justice Scalia, *Penn Coal* offered little guidance as to the application of the "too far" test.³⁵ The Court wrestled with this "too far" dilemma in the years following *Penn Coal*. As a result, takings jurisprudence gradually evolved over the years. Consequently, subsequent case law developed two categories in modern takings law: the ad hoc factual inquiry³⁶ and categorically per se takings.³⁷

28. See JULIUS L. SACKMAN & RUSSELL D. VAN BRUNT, NICHOLS ON EMINENT DOMAIN §§ 1.1-1.3 (3d ed. rev. 1992) (noting that eminent domain is in the nature of a forced transfer of real property to the government for fair market value).

29. An interesting issue arises in this area as well. Query as to what constitutes just compensation for the landowner forced to sell her land. Should just compensation be based on the value of the land to the individual landowner? Or should it depend solely on the fair market value of the land? See Clynn S. Lunney, Jr., *Compensation for Takings: How Much is Just?*, 42 CATH. U. L. REV. 721, 722-23 (1993) (arguing that the Court's interpretation of just compensation is about as solid as its determination of when a taking has been effected).

30. See U.S. CONST. amend. V (stating that property can be taken for public use as long as just compensation is paid). Eminent domain is essentially the government *purchasing* property for public use with or without the consent of the landowner. See SACKMAN & VAN BRUNT, *supra* note 28, §§ 1.1-1.3 (noting that eminent domain is a form of purchase).

31. 260 U.S. 393 (1922).

32. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992) (acknowledging the evolution of the Takings Clause while citing *Penn Coal* as the case which recognized that a regulation in and of itself may effect a taking of private property).

33. See *Penn Coal*, 260 U.S. at 415 (stating that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking"). *Penn Coal* gave birth to the oft cited maxim, "too far." *Lucas*, 505 U.S. at 1014.

34. See *Penn Coal*, 260 U.S. at 414-15 (recognizing that in order to maintain meaningful protection against physical appropriations of private property, the government's power to redefine the range of interests included in the ownership of property was necessarily subject to constitutional constraint).

35. See *Lucas*, 505 U.S. at 1014 (noting that "[*Penn Coal*] offered little insight into when, and under what circumstances, a given regulation would be seen as going 'too far' for purposes of the Fifth Amendment").

36. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123-24 (1978) (eschewing any set formula for determining how far is too far and placing a preference on an ad hoc factual inquiry to determine whether a regulatory scheme amounts to a taking).

37. As will be discussed in more detail below, there are two instances when a regulatory action is compensable without case-specific inquiry. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982) (holding that a New York law requiring landlords to allow a cable company to place cables on an apartment building constituted taking, even though physical invasion was only minor); *infra* notes 50-64 and accompanying text (discussing the two instances where the Supreme Court has given categorical treatment to a

A. *Ad Hoc Approach*: *Penn Central Transportation Co. v. New York City*

The ad hoc approach forwarded in *Penn Central Transportation Co. v. New York City*³⁸ was an attempt to confront and remedy the “too far” dilemma.³⁹ This fact sensitive approach incorporates a balancing of factors to determine if a regulatory taking occurs. In *Penn Central*, the Supreme Court confronted the “too far” dilemma by incorporating three factors in determining a taking.⁴⁰ First, a court must determine the economic impact of the regulation on the claimant.⁴¹ Economic impact in this context refers to the amount of money the landowner loses or fails to realize in light of the regulation.⁴² Furthermore, diminution in property value, standing alone, cannot establish a regulatory taking.⁴³ Second, a court shall assess whether the regulation interferes with the “distinct investment-backed expectations” of the landowner.⁴⁴ When making this assessment, a court considers those expectations of the individual landowner present at the time the land was acquired.⁴⁵ Finally, a court should review the character of the governmental action.⁴⁶

In *Penn Central*, the majority held that the investment-backed expectations of landowners were not abridged to the extent that a taking had occurred because Penn Central Station was profitable in its existing state.⁴⁷ Moreover, the character of the governmental action—preservation of city landmarks—advanced a legitimate

regulation affecting a landowner); see also *Lucas*, 505 U.S. at 1019 (holding that an owner of real property who is required “to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle[,] . . . has suffered a taking”).

38. 438 U.S. 104 (1978).

39. See *infra* notes 40-49 and accompanying text (setting forth the ad hoc approach and the considerations used in determining if a regulation goes “too far”).

40. See *Penn Cent.*, 438 U.S. at 124 (explicating that the three relevant factors are the economic impact of the regulation on the claimant, the extent to which the regulation interferes with the claimant’s investment-backed expectations, and the character of the governmental action).

41. *Id.*

42. *Id.*

43. See *id.* at 131 (rejecting the notion that diminution in property value alone constitutes a taking); see also *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384, 396-97 (1926) (noting that 75% diminution in value caused by a city ordinance validly executed under the state’s police power was not sufficient in and of itself to constitute a regulatory taking); *Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915) (noting that 87½% diminution in value alone did not constitute a taking).

44. *Penn Cent.*, 438 U.S. at 124.

45. *Id.*

46. *Id.*

47. See *id.* at 134-35 (noting that the owners of Grand Central Station actually derived some benefit out of having the station determined a landmark and that designation as a landmark contemplates that the landowner use the land as originally intended). For an interesting Article on the concept of average reciprocity of advantage, see Raymond R. Coletta, *Reciprocity of Advantage and Regulatory Takings: Toward A New Theory of Takings Jurisprudence*, 40 AM. U. L. REV. 297 (1990) (postulating that landowners burdened by regulatory schemes are benefitted by them as well given the increase in the value of the surrounding land resulting from the regulatory scheme as a whole).

public interest.⁴⁸ The ad hoc balancing approach espoused in *Penn Central* follows the view that no one factor is dispositive. More importantly, at least for the purposes of this Comment, the Court alluded to the presence of TDRs and their potential relevance to the ad hoc analysis.⁴⁹

B. Categorically Per Se Takings

In two specific situations courts will find a regulatory taking requiring just compensation without inquiring into the public interest advanced by the regulation.⁵⁰ The first instance concerns a regulation requiring a permanent physical invasion of the land.⁵¹ In *Loretto v. Teleprompter Manhattan CATV Corp.*,⁵² the Supreme Court reasoned that the right to exclude is the most essential right a property owner has within his or her bundle of rights.⁵³ Moreover, this right must not be taken from the landowner without just compensation no matter how important the public interest in the regulation.⁵⁴ The import placed upon this right is evidenced by the Court's willingness to invalidate regulations causing minor encroachments.⁵⁵

The second recognized that a per se taking occurs when a regulation denies all economically beneficial or productive use of the land.⁵⁶ Cognizant of the fact that

48. See *Penn Cent.*, 438 U.S. at 132 (noting that New York's landmark preservation law required singling out individual parcel owners which was not arbitrary; rather, it "embodie[d] a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city").

49. See *infra* Part IV.B (suggesting that the dicta posited by the *Penn Central* Court is either limited to its specific facts or that it was not fully considered at the time it was proposed).

50. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) (describing two categories of regulatory takings that don't require "case-specific inquiry into the public interest advanced" because they encroach upon the landowner's right to exclude or productively utilize his land).

51. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982) (holding that a permanent physical occupation of land constituted a per se taking no matter how small the invasion nor the importance of public interest involved).

52. 458 U.S. 419 (1982).

53. See *id.* at 433 (observing that a landowner's right to exclude is the most important stick in the bundle of rights).

54. See *id.* at 436 (noting that "the permanent physical occupation of the property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no non-possessory use of the property").

55. See *id.* at 436-37 (explicating that even minor physical invasions, such as a small cable running the length of a building, constitute a per se taking because the owner's right to exclude is a paramount right).

56. See generally *Lucas*, 505 U.S. at 1015 (noting that when a regulation deprives a landowner of all economically beneficial or productive use of his or her land, he or she has suffered a categorical taking); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987) (noting that requiring an uncompensated conveyance of an easement to the government is violative of the Fourteenth Amendment); *Keystone Bituminous Coal Ass'n v. De Benedictis*, 480 U.S. 470, 499 (1987) (stating that the coal required to remain in the ground, when viewed as a "reasonable unit," does not come close to proving that land has been deprived of all economically viable use); *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 295-96 (1981) (holding that the Surface Mining Act easily survives the denial of all economically beneficial use test); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (espousing the principle that a regulatory taking occurs either when the regulation or the

this rule was never followed by a justification, Justice Scalia noted in *Lucas v. South Carolina Coastal Council*⁵⁷ that the total deprivation of a beneficial use, at least from the landowner's perspective, was in fact equal to a physical occupation.⁵⁸ In *Lucas*, the petitioner purchased two residential coastal lots in 1986 for the purpose of erecting two single family homes.⁵⁹ These plans were halted two years later when the South Carolina Legislature passed the Beach Front Management Act.⁶⁰ This Act directed the South Carolina Coastal Council "to establish a 'baseline' connecting the landward-most 'point[s] of erosion . . . during the past forty years.'"⁶¹ The baseline's location is significant because land falling seaward of it is "flatly prohibited" from construction of "occupiable improvements."⁶² This baseline was fixed landward of petitioner's parcels, thus prohibiting the development of the residential units on either.⁶³ The Court held that South Carolina had effected a taking by requiring petitioner to sacrifice all economically beneficial use of his land for the common good.⁶⁴

The real question is whether land can ever be denied of all economically beneficial or productive use? This question is riddled with complexities given the fact that all real property retains some value.⁶⁵ Because of this uncertainty, several questions must still be addressed: Where do TDRs fit into this quagmire? Would or should the outcome in *Lucas* be different if the regulation that prevented the landowner from building on his property included several TDRs worth \$5000 a piece?⁶⁶ Does the existence of these TDRs foreclose a per se takings claim?⁶⁷ Should TDRs be included in the investment-backed expectations factor in the *Penn*

ordinance does not substantially further a legitimate state interest, or it denies an owner of all economically viable use of his or her land).

57. 505 U.S. 1003 (1992).

58. See *Lucas*, 505 U.S. at 1017 (positing this possible justification for the per se approach as suggested by Justice Brennan's dissent in *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting)).

59. *Lucas*, 505 U.S. at 1006-07.

60. See *id.* at 1007 (noting that this regulation "had the direct effect of barring petitioner from erecting any permanent habitable structures on his two parcels").

61. *Id.* at 1008 (citing S.C. CODE ANN. § 48-39-280(A)(2) (Law Co-Op. Supp. 1990)).

62. *Id.* at 1008-09.

63. *Id.*

64. See *id.* at 1019 (elucidating the notion that requiring an owner to leave his land economically idle is tantamount to sacrificing all economic beneficial use and as a result the owner has suffered a taking).

65. At least in a hypothetical sense, a landowner is hard pressed to prove that there is absolutely no economically beneficial or productive use. See *id.* at 1016-17 n.7 (discussing the difficulty surrounding the denial of all economically beneficial use test). Hypothetically, Mr. Lucas could have sold his parcels to neighbors interested in creating a buffer zone around their lot. However, the Court did not entertain this mode of argument. *Id.*

66. See *infra* Part IV (examining the differences, if any, when an arbitrary amount is awarded to a TDR scheme).

67. See *infra* Part IV (suggesting that a TDR's presence should not foreclose a takings claim).

Central ad hoc approach?⁶⁸ Or alternatively, for the sake of not further complicating an already complex legal doctrine, should TDRs be considered as a component of just compensation in the event a taking is found?⁶⁹ Part IV of this Comment seeks to answer these questions and offers a solution to the ultimate question: What do we do with TDRs in the Fifth Amendment Takings analysis?⁷⁰ However, in order to reach a conclusion, a general understanding of the TDR and its uses is helpful.⁷¹

III. TRANSFERABLE DEVELOPMENT RIGHTS

A. What is a TDR?

TDRs are a relatively new phenomena.⁷² The TDR, based on the well-accepted bundle of rights theory, is the transfer of a property owner's development right to another lot.⁷³ One of those rights within the bundle is the right to develop. The premise of TDRs is that the right to develop is a severable right and may be transferred to another lot or person.⁷⁴ The purpose of TDRs is to reduce "the regulatory disparity among otherwise similarly situated properties."⁷⁵ Proponents of TDRs contend that this disparity is curtailed because the landowner's burden is ameliorated by receiving value for the development right transferred.⁷⁶

The paradigmatic example is in the area of historical landmark preservation.⁷⁷ In essence, TDRs allow the owner of restricted land to transfer the land's unused zoning potential to other owners of property in the area.⁷⁸ Generally, the owner of

68. See *infra* Part IV.A (offering, as an alternative, the introduction of TDRs into the investment-backed expectation approach of *Penn Central*).

69. See *infra* Part IV.B (presenting the proposed solution of this Comment).

70. See *infra* Part IV (considering the above-mentioned solutions).

71. See *infra* Part III (analyzing the inception and evolution of the TDR to lay a foundation for discussing the role that TDRs should play in the Fifth Amendment Takings Analysis).

72. See Dennis J. McEleney, *Using Transferable Development Rights to Preserve Vanishing Landscapes and Landmarks*, 83 ILL. B.J. 634, 635 n.9 (1995) (observing that TDRs began receiving serious consideration by commentators in the early Seventies).

73. See RICHARD J. RODDEWIG & CHERYL A. INGRAM, *TRANSFERABLE DEVELOPMENT RIGHTS PROGRAMS: TDRS AND THE REAL ESTATE MARKETPLACE 2* (1987) (noting the concept of a property owner holding a "bundle of rights," one such right being the right to develop his or her property).

74. *Id.*

75. Norman Marcus, *Transferable Development Rights: A Current Appraisal*, PROB. & PROP., Mar.-Apr. 1987, at 40.

76. See Thomas E. Roberts, *Takings, Due Process, and Preemption*, 29 URB. LAW. 399, 399 (1997) (suggesting that TDRs can ameliorate the burden to a regulated landowner).

77. See Stinson, *supra* note 10, at 330 (noting that certain buildings in the same historical landmark zoning district were subject to restrictions that others were not); see also *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 136 (1978) (recognizing that TDRs may be a viable mechanism for reducing the disparity of treatment via regulation of historical landmarks).

78. Marcus, *supra* note 75, at 40-41; see JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 1213 (3d ed. 1993) (explaining:

[T]he TDR approach severs development rights from other rights in land and treats them as a separate item. The right to develop is restricted at particular sites or in so-called restriction areas. But owners

the unused potential can do one of two things; he or she can either sell this unused potential to a third party or retain this potential for further development on other parcels owned within the municipality.⁷⁹ TDRs separate an owner's right to possess land from the owner's right to develop that land.⁸⁰ In theory, this appears to be a wonderful solution for landowners whose land has fallen victim to regulation. However, this Comment points to several issues that must be resolved in order to institute a viable TDR plan.⁸¹

B. Specific Uses of TDRs

TDRs were developed as regulatory tools intended to further the purposes of land-use planning by mitigating the burdens placed on regulated landowners.⁸² One commentator has noted that TDRs evolved due to changing priorities, and that three concerns are primarily responsible for their development.⁸³ Of these three concerns, historical landmarks and metropolitan congestion were the traditional purposes for which TDRs were created.⁸⁴

of the restricted land are given TDRs that can be used for development, beyond that which would be otherwise permitted, on receiving lots or in so-called transfer areas.).

79. TDR schemes vary; see, for example, *Penn Central*, 438 U.S. at 108-14, which reviewed the New York TDR scheme that allowed the transfer of the development rights to nearby or adjacent parcels of either third parties or to lots owned by the party being regulated if such lots were available. See, e.g., CAL. GOV'T CODE § 66801 (West Supp. 1998) (allowing for the sale of TDRs to willing third party purchasers approved by the Tahoe Regional Planning Agency).

80. See John J. Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75, 85-86 (1973) (describing that

[d]evelopment rights transfer breaks the linkage between particular land and its development potential by permitting the transfer of that potential, or "development rights," to land where greater density will not be objectionable. In freeing the bottled-up development rights for use elsewhere, the technique avoids the either/or dilemma because it both protects the threatened resource and enables the owner of the restricted site to recoup the economic value represented by the site's frozen potential.) (footnote omitted).

81. See *infra* note 206 and accompanying text (discussing the potential for implementing "sham" TDR schemes to create appearance that burdened owner retains some "economic value" of his or her restricted land); *infra* note 208 and accompanying text (recognizing the potential for abuses of TDRs through the implementation of sham schemes); see also Levine, note 8, at 1209-10 (suggesting that TDRs be used by regulatory agencies to circumvent *Lucas* and its progeny).

82. See Stinson, *supra* note 10, at 324 (postulating that these regulatory tools were intended to further the purposes of land-use planning); see also Roberts, *supra* note 76, at 399 (explaining that TDRs are used to mitigate the loss of value to individual landowners caused by regulatory programs that place sharp restrictions on the use of land).

83. See Stinson, *supra* note 10, at 327-28 (proposing that three concerns give rise to the implementation of TDR schemes). These concerns are: (1) historical landmarks do not fully utilize the density allocation permitted by zoning where competing interests to preserve those landmarks exist; (2) congestion in metropolitan and suburban areas has created a demand for open space; and (3) economic incentives to develop in ecologically sensitive areas are subject to competing interests to preserve natural resources. *Id.*

84. See *id.* (explicating that preservation of historical landmarks and emergence of metropolitan congestion gave rise to TDRs as a land use tool).

TDR schemes vary from size of receiving lots to percent limits on transferable rights, but several factors determine a strong TDR scheme. First, a TDR should be marketable because the value of that TDR is important to the burdened landowner.⁸⁵ A prevalent factor to consider when determining the marketability of a TDR is whether there is competition for those development rights.⁸⁶ As a counterpart to competition, allowance for a sufficient receiving area is another prevalent factor that leads to a successful TDR scheme.⁸⁷ Competition and sufficient receiving areas increase the value of TDRs to the burdened landowner and strengthen the TDR scheme.⁸⁸ A TDR scheme that creates marketable TDRs is less susceptible to attack and is more likely to pacify the landowners of the burdened property.

Second, a TDR scheme is strong when it is efficient.⁸⁹ Consequently, the presence of excessive red tape prevents the implementation of a sound TDR scheme.⁹⁰ Finally, a strong TDR scheme is embraced by the public.⁹¹ Public knowledge and confidence in the scheme fosters the goals of offsetting the burden to the landowner while preserving land that the public deems necessary. Furthermore, public knowledge is an added protection against a "sham" scheme being implemented to avoid takings claims.⁹² These factors combine to determine the marketability of a given TDR. In order for the TDR to have a place in the constitutional analysis it must first be marketable. Therefore, the need for marketable TDRs creates a threshold issue which must be considered prior to any analysis concerning takings and just compensation.

Given the need to preserve space and protect historical landmarks, it is not surprising that the earliest uses of TDR schemes occurred in large metropolitan cities such as New York and Chicago.⁹³ A brief description of these two schemes is a helpful tool to introduce TDRs in their traditional context because each scheme

85. See *id.* at 347 (noting the importance of the value of TDR to its ultimate marketability).

86. See *id.* (noting the importance of competition to a successful TDR scheme).

87. See *id.* at 347 (explaining that the major fault of most transferable development rights systems is the provision of an insufficient area to which the TDRs may be transferred). The receiving area is the land within the municipality which is available for development rights transfer. Generally, the receiving area is determined at the time the TDR scheme is implemented. One can see how the availability of receiving lots and competition for the TDRs interrelate and, in fact, are dependent upon one another.

88. See *id.* (stating that these factors increase the marketability of TDRs and, in turn, increase the value that the burdened owner receives for the TDR he or she holds).

89. See *id.* (noting that the more marketable a TDR is the less likely the burdened landowner will feel aggrieved).

90. See *id.* at 334 (noting that excessive red tape would discourage the transfer of development rights even with the "proper mix of supply and demand").

91. *Id.*

92. See *infra* Part IV (discussing possible abuses of TDR schemes in the event the Supreme Court holds that TDRs may be considered as value for purposes of regulatory takings claim); see also Levine, *supra* note 8, at 1209-10 (suggesting that TDRs be used by land regulators to circumvent the *Lucas* type categorical takings claims).

93. See generally Ellen M. Randle, *The National Reserve System and Transferable Development Rights: Is The New Jersey Pinelands Plan An Unconstitutional "Taking"?*, 10 B.C. ENVTL. AFF. L. REV. 183, 203-05 (1982) (noting the limited application of the TDR concept to historical landmarks in metropolitan cities such as New York, Chicago, Washington D.C., and San Francisco prior to the late seventies).

was developed when TDRs were relatively new.⁹⁴ Moreover, each plan has subtle differences which are useful in illustrating the ability of TDRs to be molded to surrounding circumstances in order to enhance their usefulness.⁹⁵

1. The New York Plan

The New York City Landmark ordinance was enacted in order to preserve well-known city landmarks.⁹⁶ It prevented buildings designated as landmarks from being destroyed or altered.⁹⁷ One commentator has noted that this regulation resulted in "substantial underdevelopment of the location sites."⁹⁸ However, this ordinance allowed the unused development potential of sites occupied by landmark structures to be sold and transferred to adjacent and nearby properties.⁹⁹ As a result, the receiving lot's floor area could, subject to a "wide array of controls,"¹⁰⁰ be increased by more than twenty percent over the zoning ceilings already in effect.¹⁰¹ The rationale of the TDR scheme was that—even though the burdened property owner lost the ability to develop further or destroy the landmark affected by the regulation—the owner retained some value by the sale of his or her development rights.¹⁰²

The Landmarks Preservation Law¹⁰³ led to the perennial United States Supreme Court takings case, *Penn Central Transportation Co. v. New York City*.¹⁰⁴ In *Penn Central*, the Court applied a three factor test¹⁰⁵ ultimately holding that New York's Landmark Preservation Law had not effected a regulatory taking by restricting plans for a fifty-five story high-rise expansion over Grand Central Terminal.¹⁰⁶ This pro-

94. See *infra* Part III.B.1-2 (discussing the New York and Chicago plans in order to illustrate various TDR schemes).

95. See *infra* Part III.B.1-2 (noting the differences between the New York and Chicago plans); see also *infra* Part III.B.2 (highlighting the differences between the New York and Chicago plans).

96. Landmarks Preservation Law, NEW YORK CITY, N.Y. CHARTER AND ADMIN. CODE ch. 8-A, §§ 205-1.0-207-21.0 (1976).

97. *Id.*

98. See Stinson, *supra* note 10, at 204 (noting that the regulated sites were left substantially underdeveloped).

99. See *id.* (discussing the limitations of the transfer of development rights in the New York scheme to nearby or adjacent parcels).

100. See *id.* (quoting J. COSTONIS, SPACE ADRIFT: LANDMARK PRESERVATION AND THE MARKETPLACE 115 (1974)).

101. *Id.*

102. *Id.*

103. Landmarks Preservation Law, NEW YORK CITY, N.Y. CHARTER AND ADMIN. CODE ch. 8-A, §§ 205-1.0-207-21.0 (1976).

104. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

105. See *supra* text accompanying notes 38-46 (enumerating the three factor approach espoused in *Penn Central*).

106. See *Penn Cent.*, 438 U.S. at 136-37 (utilizing the three factor test in ultimately holding that the regulation preventing the expansion plans did not constitute a taking). The Court's analysis hinged on the time that the owner's distinct investment-backed expectation was determined. *Id.* The inference drawn from the Court's

preservation standard, espoused by the majority of the Court, was an important stepping stone in takings jurisprudence because it demonstrated the Court's continued willingness to sacrifice a landowner's right to build for that of the general welfare—historical landmark preservation.¹⁰⁷ Moreover, in dictum, the Court suggested that TDRs should be figured into the effect of the regulation when determining if a taking had occurred.¹⁰⁸ This dictum leads to the gravamen of this Comment. Specifically, should TDRs be used in determining whether a taking has occurred or should it simply be a question of whether TDRs mitigate or fulfill the just compensation requirement of the Fifth Amendment?¹⁰⁹ In an effort to preserve historical landmarks, the City of Chicago proposed a TDR plan that is discussed in more detail below.¹¹⁰

2. The Chicago Plan

The Chicago plan, although never adopted,¹¹¹ is another TDR scheme that illustrates traditional TDR uses. The proposed Chicago plan differed from New York's plan in two important respects.¹¹² First, the transferee district in the proposed plan covered most of Chicago's central business district¹¹³ and the development

holding is that determination of an individual's investment-backed expectation is from the time of purchase rather than from the time the regulation takes effect. *Id.*

107. See *id.* at 134-35 (noting that historical landmark preservation does affect general welfare and that landowners must accept the burden for the benefit of the greater good). Landowners sacrificing for the greater good is an old tenet of takings law. *Mugler v. Kansas*, 123 U.S. 623 (1887). In *Mugler*, the Court upheld a law as to a takings claim, prohibiting a liquor business from forming because individual ownership rights must yield to the greater public good especially when the use is perceived as a public evil. *Id.* at 663-64.

108. See *Penn Cent.*, 438 U.S. at 137 (dictum) (positing that TDRs could have been relevant in determining whether a taking had occurred). However, the Court saw no need to reach the issue given that the facts did not support a takings claim without the TDRs being present. *Id.* Moreover, the Court noted that there were eight parcels in the vicinity suitable for such a transfer. *Id.*

109. See *infra* Part IV (discussing the constitutional future of TDRs and the role they should play in a court's "takings" and "just compensation" analyses).

110. See, e.g., John J. Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574, 578 n.18 (1974) (explaining the proposed Chicago plan which hoped to implement a TDR scheme to further its goal of historical landmark preservation); see also *infra* Part III.B.2 (outlining briefly the Chicago plan).

111. See Stinson, *supra* note 10, at 204 (finding support for the theory that Chicago is a developer's town and that the developers opposed the plan); see also American Society of Planning Officials, *Transferable Development Rights: Critique of the Chicago Plan*, 304 PLANNING ADVISORY SERVICE REPORT 9 (1975) (explaining that Chicago is a developer's town which sharply opposed the plan, and ultimately led to the plan's downfall).

112. See Costonis, *supra* note 110, at 589-602 (providing an in-depth discussion of the proposed Chicago plan); Stinson, *supra* note 10, at 204 (noting the two differences between the Chicago and New York plans).

113. See Costonis, *supra* note 110, at 594-96 (reporting that the transferee district in the Chicago plan spanned most of the central business district in order to avoid the adjacency requirement found in the New York plan). Professor Costonis views the adjacency requirement as the "principle culprit" in the New York plan's failure. *Id.* at 594.

rights were capable of being transferred anywhere within that district.¹¹⁴ This difference would have made Chicago TDRs more marketable than New York TDRs because the TDR holder in New York was relegated to transferring to adjacent or nearby properties, thus limiting the pool of potential bidders.¹¹⁵ The more willing buyers for a product, the higher price the seller will eventually receive. In essence, the Chicago plan would have allowed for a much more marketable TDR because its expanded area would have produced more willing buyers, thus driving up the price that the TDR holder would receive.

The Chicago plan's second difference is that it intended to institute a "development rights bank."¹¹⁶ The development rights bank is yet another means to increase the marketability of the TDR. By acting as a transfer medium,¹¹⁷ the bank allows for a minimum price guarantee for the value of the TDR.¹¹⁸ Specifically, the bank poses as a willing buyer; thus guaranteeing a TDR holder the ability to sell that interest.¹¹⁹ The owner of the TDR, knowing that a guaranteed price awaits, has the choice of settling for the bank's price or marketing the TDR for the best possible value.¹²⁰

The New York and Chicago plans are excellent examples of TDR schemes that demonstrate how each may be adjusted to fit the circumstances surrounding its implementation. As TDRs gained acceptance, their use expanded outside the scope of historical landmark preservation.¹²¹ As this expansion continues, the TDR schemes must be continuously scrutinized in order to ensure that the original goals established are furthered.¹²²

114. *Id.* at 594.

115. See *supra* notes 87-88 and accompanying text (positing that the marketability of TDRs increases when the receiving area is larger given the increased pool of potential bidders).

116. See JOHN J. COSTONIS, *SPACE ADRIFT: LANDMARK PRESERVATION AND THE MARKETPLACE* 52 (1974) (detailing the intricacies of the development rights bank in the context of the proposed Chicago plan).

117. See *id.* (classifying the development rights bank as a medium for transfer).

118. See *id.* (recognizing that the bank allows for a minimum price guarantee for the seller of the TDR by insuring that at least one willing buyer, the bank, would purchase the development rights).

119. *Id.*

120. An argument can be made that the development rights bank may actually decrease competition for the TDRs. Willing buyers of TDRs may wait patiently for these banks to accumulate TDRs from "lazy" sellers at a lower price. If this were the case and the demand became "selective," the marketability aspect of a successful TDR scheme may well be defeated. However, there is no empirical data on this proposition, and in reality, most people try to sell their property whether real or personal for the best profit they can get.

121. See RODDEWIG & INGRAM, *supra* note 73, at 1-3 (noting that ecological concerns gave rise to TDR programs in such areas as the New Jersey Pinelands, Collier County, Florida, and Santa Monica, California).

122. See *supra* notes 77-80 and accompanying text (articulating the goals sought to be established through the use of TDRs as a regulatory tool).

C. Contemporary Uses

One consistent theme that resonated through much of the preceding section was that of preservation.¹²³ The focus was primarily on preservation of historical buildings. TDR schemes are now being implemented for a different type of preservation, namely preservation of the environment.¹²⁴ As environmental awareness grew, so did the need to preserve open space and environmentally sensitive areas.¹²⁵ With the growing acceptance of TDR schemes in the metropolitan areas, land use planners saw an opportunity to extend this regulatory mechanism to an area where preservation was duly needed.¹²⁶

1. Tahoe Regional Planning Agency's Plan

The Tahoe Regional Planning Agency (TRPA) is responsible for regulating property development in the Lake Tahoe Region.¹²⁷ Under TRPA's current regional plan,¹²⁸ the agency determines the density of land development it permits on all unbuilt residential lots in the region.¹²⁹ Any policy declaration of "maintenance of the social and economic health of the region depends on maintaining the significant scenic, recreational, educational, scientific, natural and public health values provided by the Lake Tahoe Basin"¹³⁰ is forwarded by TRPA in order to demonstrate the need for regulating land use in the area.

Given the increased concerns about environmental preservation, TRPA's regulation of construction density in the Lake Tahoe Basin is probably within its police power under the "rational basis" test espoused by the Supreme Court in

123. See *supra* Part III.A (noting that the original purpose for TDR schemes in metropolitan areas was for landmark preservation and growth control).

124. See *infra* Part III.C.1 (discussing the TDR scheme employed by the Tahoe Regional Planning Agency as an attempt to preserve the environment in the Lake Tahoe region).

125. See *infra* Part III.C.1 (highlighting TRPA's TDR program in order to demonstrate this growing awareness).

126. See generally Linda A. Malone, *The Future of Transferable Development Rights in the Supreme Court*, 73 KY. L.J. 759, 760 (1985) (explaining that there is a growing popularity of using TDRs in open space and farmland preservation).

127. TRPA was formed in 1969 by an interstate compact between California and Nevada which was ratified by Congress in the 1969 Tahoe Regional Planning Compact, Pub. L. No. 91-148, 83 Stat. 360 (1969), and amended in 1980, Pub. L. No. 96-51, 94 Stat. 3233 (1980); CAL. GOV'T CODE § 66801 (West Supp. 1998); NEVADA REV. STAT. § 277.200 (1997). See *California v. Tahoe Reg'l Planning Agency*, 766 F.2d 1308, 1310-12 (9th Cir. 1985) (detailing TRPA's background).

128. CAL. GOV'T CODE § 66801 (West Supp. 1998). See Brief for Petitioner at 2, *Suitum v. Tahoe Reg'l Planning Agency*, 117 S. Ct. 1659 (1997) (No. 96-243) available in 1996 WL 695505 (outlining TRPA's comprehensive plan).

129. See Petitioner's Brief at 2, *Suitum* (No. 96-243) (noting TRPA's regulatory powers to determine building density in the Lake Tahoe Basin).

130. CAL. GOV'T CODE § 66801 (West Supp. 1998).

*Village of Euclid v. Amber Realty Co.*¹³¹ After *Village of Euclid*, states are allowed to zone/regulate pursuant to their police power.¹³² This police power must be asserted for the public health, safety, morals or general welfare.¹³³ The standard of whether an ordinance is within the police power is that it must not be clearly arbitrary and unreasonable, having no substantial relation to the general welfare.¹³⁴

Previous case law involving TRPA and its several plans demonstrates that TRPA is acting within its police power under the current regulatory scheme.¹³⁵ However, the court analyzing this regulation must only give deferential treatment to the regulation's enactment, and as our takings jurisprudence demonstrates, courts are becoming more and more willing to find that facially valid police powers have effected a taking on an individual's property rights.¹³⁶

Cognizant of the potential for regulatory takings claims, TRPA created the following "marketable credit" scheme to lessen the impact on those who are burdened by the regulation. TRPA, as a part of its regulatory plan, implemented a scale called the Individual Parcel Evaluation System (IPES).¹³⁷ This scale establishes thresholds for impervious land cover using a seven-point system.¹³⁸ An IPES rating of class-seven signifies land most suitable for development, whereas a rating of zero represents land that should not be developed.¹³⁹ Land that falls within a Stream Environment Zone (SEZ)¹⁴⁰ is given an automatic IPES rating of zero,¹⁴¹ such that individuals with land falling within a SEZ can make no

131. See *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365, 395 (1926) (holding that the Village's zoning regulations separating multi-family residential from single-family residential uses were not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare").

132. *Id.*

133. *Id.*

134. *Id.*

135. See *California v. Tahoe Reg'l Planning Agency*, 766 F.2d 1308, 1316 (9th Cir. 1985), *amending* 755 F.2d 988 (9th Cir. 1985) (holding that TRPA's plan was a valid exercise of its police power).

136. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1989) (espousing the pro-landowner categorical takings test which finds a taking if the landowner has been deprived of all economically beneficial or productive use of his land); see also *Levine*, *supra* note 8, at 1188-92 (noting the Court's newly found concern for private landowners rights in the law of takings).

137. TRPA CODE OF ORDINANCES § 37 (1987); see also *Tahoe Reg'l Planning Agency*, 766 F.2d at 1315 (explaining TRPA's parcel evaluation system).

138. See TRPA CODE OF ORDINANCES § 37 (1987) (containing a seven-point scale for classifying whether a parcel is suitable for development in conjunction with TRPA's overall preservation scheme for the Lake Tahoe Basin); see also *Tahoe Reg'l Planning Agency*, 766 F.2d at 1315 (reviewing TRPA's seven-point scale).

139. See TRPA CODE OF ORDINANCES § 37 (1987) (detailing in complex language the seven-point scale employed by TRPA in determining the suitability of individual parcels for development); see also *Tahoe Reg'l Planning Agency*, 766 F.2d at 1315 (highlighting TRPA's seven-point scale in a succinct manner).

140. TRPA defines a Stream Environment Zone as "an area which owes its biological physical characteristics to the presence of surface or ground water." TRPA CODE OF ORDINANCES § 2.2 (1987).

141. TRPA CODE OF ORDINANCES § 37.4(A)(3) (1987); see *Suitum v. Tahoe Reg'l Planning Agency*, 117 S. Ct. 1659, 1662 (1997) ("[A]n undeveloped parcel in certain areas carrying run-off into the watershed (known as 'Stream Environment Zones' (SEZs)) receives an IPES score of zero. . . ."); Petitioner's Brief at 3, *Suitum* (No. 96-243) ("Under the TRPA Code and the 1987 Plan, all construction is forbidden on properties with a zero IPES rating. . . .").

improvements to their parcel. As a result, even inconsequential permanent improvements to the land are violative of the statute. Thus, placing a fire-pit on the land is a violation of TRPA's zoning statute because such action would constitute a permanent improvement of the parcel.¹⁴²

In an effort to mitigate the losses suffered by burdened landowners, TRPA established a scheme which it calls "marketable credits."¹⁴³ Under this scheme, property owners are required to possess certain administrative credits in order to build on their property.¹⁴⁴ The three administrative credits "are designated 'residential allocations,' 'residential development rights,' and 'land coverage.'"¹⁴⁵ Although a landowner with an IPES below the threshold is prevented from building on the lot, she may market these administrative credits (essentially TDRs) to other owners of parcels with IPES ratings above the cutoff level.¹⁴⁶ In order to determine if these credits are in fact marketable, a brief description of each is in order.

Residential allocations are distributed by TRPA "as a means of limiting the number of residences built in the region each year."¹⁴⁷ This number is set at three hundred.¹⁴⁸ Moreover, these residential allocations must be obtained through the county in which the undeveloped lot sits.¹⁴⁹ The scheme holds a certain number of these allocations for owners of parcels that were given an IPES rating below the cutoff,¹⁵⁰ so that they may sell this development right to owners of lots otherwise approved for building in the basin.¹⁵¹

142. One might query whether TRPA would prevent such a small infraction; however, the import of this hypothetical is to demonstrate that, minus TDRs, a SEZ landowner has been deprived of all economically beneficial use of the parcel in light of *Lucas*. *Lucas*, 505 U.S. at 1019. This becomes significant when undertaking the regulatory takings analysis in conjunction with TDRs. See *infra* Part IV.A.2 (noting the complexity that arises due to questionable valuation when TDRs are placed in the per se takings analysis).

143. See Petitioner's Brief at 4, *Suitum* (No. 96-243) (stating that the "process is generically—albeit misleadingly—described as a 'transfer of development'").

144. See TRPA CODE OF ORDINANCES §§ 20, 21, 33 (1987) (providing that three administrative credits must be obtained in order for a landowner to develop his or her land in the Lake Tahoe Basin).

145. Petitioner's Brief at 4, *Suitum* (No. 96-243); see TRPA CODE OF ORDINANCES §§ 20, 21, 33 (1987) (defining the three marketable credits required for development in the Lake Tahoe Basin).

146. See TRPA CODE OF ORDINANCES §§ 20.3(B), 20.3(C), 34.1-3 (1987) (giving an administrative remedy to a landowner who has been burdened by the regulation promulgated by the Agency via TDRs); see also Petitioner's Brief at 4-5, *Suitum* (No. 96-243) (acknowledging that procedures have been created by TRPA through which the administrative credits can be distributed to owners of burdened parcels, who, in turn, may sell them to owners of "development-eligible lots").

147. Petitioner's Brief at 5, *Suitum* (No. 96-243).

148. TRPA CODE OF ORDINANCES § 33.2(A)(3) (1987); Petitioner's Brief at 5, *Suitum* (No. 96-243).

149. TRPA CODE OF ORDINANCES § 33.2(B)(2) (1987); Petitioner's Brief at 5, *Suitum* (No. 96-243).

150. See Petitioner's Brief at 5, *Suitum* (No. 96-243) (stating that 6 of the 60 residential allocations for Washoe County are to be held for owners of parcels that are deemed ineligible for development under the IPES).

151. See *id.* (noting, however, that in order to obtain one of these "scarce credits," the burdened landowner must enter a lottery). But see *Suitum v. Tahoe Reg'l Planning Agency*, 117 S. Ct. 1659, 1663 n.2 (1997) (observing that counsel for the agency argued that there were fewer applicants than allocations in Mrs. Suitum's county at that time). TRPA's counsel therefore argued that Mrs. Suitum had a 100% guarantee of obtaining that marketable credit. *Id.*

A hypothetical to explain the marketable credits might prove helpful at this point. Suppose that landowner

Residential Development Rights (RDRs) are the second marketable credit created by TRPA. The function of RDRs differs from that of residential allocations. RDRs limit the total amount of residential development ultimately allowed in the Lake Tahoe Region.¹⁵² An owner of a vacant lot in the Lake Tahoe Basin is automatically granted one RDR by TRPA.¹⁵³ However, owners of property located in SEZs are granted three bonus RDRs.¹⁵⁴ In essence, these three RDRs can be sold to property owners who plan to develop multi-unit projects because such projects by their nature require more residential development rights.¹⁵⁵

The third marketable credit under the TRPA scheme is entitled Land Coverage.¹⁵⁶ The purpose of this credit is to limit the coverage that occurs on individual lots and to cap the region's total land coverage.¹⁵⁷ TRPA assigns a base coverage to each lot determined by its IPES rating.¹⁵⁸ Moreover, the base credit assigned to lots classified within a SEZ equals one percent of the parcel size.¹⁵⁹ For example, a landowner whose lot is 183,000 square feet has a Land Coverage credit of 183 square feet (1% of 183,000 square feet). In the event that this landowner finds a willing purchaser, subject to the approval of TRPA,¹⁶⁰ he or she may sell this 183 square feet to a designated receiving parcel.

A has a parcel with an IPES rating of zero. Landowner B has a parcel with an IPES rating of seven (the most suitable for building) but did not obtain one of the 300 residential allocations granted this year. Without this allocation, landowner B may not build on his land. Although landowner A has land which may not be developed, she does have a residential allocation credit which she may sell to B for a profit. Upon approval by TRPA, landowner A may transfer those development rights to landowner B.

152. See Petitioner's Brief at 5-6, *Suitum* (No. 96-243) (explicating that possession of one RDR authorizes the landowner to build one residential unit assuming that the owner possesses the other two required credits).

153. See *id.* (noting that the development of a multi-unit building would require "aggregation of RDRs from the owners of other properties").

154. TRPA CODE OF ORDINANCES § 35.2(C)-(D) (1987); Petitioner's Brief at 6, *Suitum* (No. 96-243). The rationale for granting regulated owners three credits rather than one is to give monetary value to land that is unable to be developed.

155. Petitioner's Brief at 6-7, *Suitum* (No. 96-243). It should be noted that the sale of a marketable credit is subject to the approval of TRPA and existence of a precondition. TRPA CODE OF ORDINANCES § 34.2 (1987). In order to sell any of TRPA's marketable credits, the burdened landowner must permanently remove the development rights from the parcel by recording a deed restriction, or other covenants running with the land. *Id.* § 34.5; see also Petitioner's Brief at 7, *Suitum* (No. 96-243) (noting that in order for Mrs. Suitum to market her credits, she must deed away the right to develop her property or place a real covenant running with the land prohibiting such development).

156. TRPA CODE OF ORDINANCES § 20.3(A)-(C) (1987). See Petitioner's Brief at 7, *Suitum* (No. 96-243) (explicating the third and final marketable credit made available by TRPA).

157. See TRPA CODE OF ORDINANCES § 20.0 (West 1987) (delineating the land coverage allocable for each parcel to maintain a suitable land cover in the Lake Tahoe Basin); see also Petitioner's Brief at 7, *Suitum* (No. 96-243) (discussing the rationale behind the land cover credit under TRPA's land-use scheme).

158. See TRPA CODE OF ORDINANCES § 20.3(A)(4) (1987) (determining the amount of land cover allocable to an individual parcel by considering the parcel size and the IPES rating it received).

159. See *id.* § 20.3(A) (mandating that parcels with IPES ratings of zero are assigned a base credit of 1% of the parcel size which may be sold to landowners with land capable of development and who wish to develop beyond the threshold established by TRPA).

160. See *supra* note 155 (noting the administrative hurdles a landowner must endure in order to realize any benefit from the marketable credit scheme established by TRPA).

2. Suitum v. Tahoe Regional Planning Agency

a. Facts

In 1972, Mr. and Mrs. Suitum purchased a residential lot in a planned subdivision of Incline Village, Nevada.¹⁶¹ They planned to build their retirement home there,¹⁶² but this plan was delayed by a series of financial setbacks and the death of Mr. Suitum.¹⁶³ In 1989, Mrs. Suitum decided to proceed with the plan to build her retirement home only to find that her lot had been restricted by regulations implemented by TRPA.¹⁶⁴ The regulation classified her land as a SEZ and thus precluded any improvements from being made.¹⁶⁵ The logical result was that she was now unable to build her retirement home on the parcel purchased in 1972.

b. Procedural History

As a response to TRPA's regulations, Mrs. Suitum filed suit alleging that the agency had committed an unconstitutional regulatory taking by determining her lot ineligible for development.¹⁶⁶ The district court granted summary judgment, reasoning that Mrs. Suitum's claim was not ripe because no final decision was made as to the use of Mrs. Suitum's property.¹⁶⁷ The Court of Appeals for the Ninth Circuit affirmed and followed the lower court's rationale that the claim was not ripe for lack of a final decision by TRPA as to the use of Mrs. Suitum's land.¹⁶⁸

161. See Petitioner's Brief at 2, *Suitum* (No. 96-243) (discussing the factual background of *Suitum*).

162. *Id.*

163. *Id.*

164. *Id.* at 2-3; see *supra* Part III.C.1 (describing TRPA's regulatory scheme in conjunction with the marketable credits it offers to landowners burdened by the regulation).

165. See Petitioner's Brief at 3, *Suitum* (No. 96-243) (explaining:

In 1989, Mrs. Suitum submitted to TRPA plans to build a home on her subdivision lot. TRPA responded by classifying Mrs. Suitum's property as lying within a "Stream Environment Zone" (SEZ). . . . The significance of TRPA's classifying Mrs. Suitum's lot as part of a Stream Environment Zone is that "no new land coverage or other permanent land disturbance shall be permitted" on Mrs. Suitum's land.) (citation omitted);

see also TRPA CODE OF ORDINANCES § 20.4 (1987) (providing generally that land classified as falling within a SEZ may not be developed or improved).

166. See *Suitum v. Tahoe Reg'l Planning Agency*, 117 S. Ct. 1659, 1663 (1997) (observing that Mrs. Suitum filed a § 1983 action in federal district court).

167. See *id.* at 1664 (noting that the district court held that the claim was not ripe because, in the words of the lower court, "[a]s things now stand, there is no final decision as to how [Suitum] will be allowed to use her property").

168. See *id.* (quoting the similar rationale employed by the Ninth Circuit that

"[w]ithout an application for the transfer of development rights" there would be no way to "know the regulations' full economic impact or the degree of their interference with [Suitum's] reasonable investment-backed expectations[.]" and without action on a transfer application there would be no "final decision from [the agency] regarding the application of the regulation[s] to the property at issue") (quoting *Suitum v. Tahoe Reg'l Planning Agency*, 80 F.3d 359, 362-63 (9th Cir. 1996)).

Although TRPA's TDR scheme presented an interesting takings issue,¹⁶⁹ the United States Supreme Court granted certiorari to determine solely whether Mrs. Suitum's regulatory takings claim was ripe for judicial review.¹⁷⁰ The majority held that the takings claim was ripe, vacated the court of appeals' judgment and remanded for further proceedings.¹⁷¹ The Court's rationale in finding the claim ripe is significant given that TDRs are becoming more prevalent as regulatory tools.¹⁷²

c. Ripeness

In *Williamson County Regional Planning Commission v. Hamilton Bank*,¹⁷³ the United States Supreme Court held that two independent prudential limits must be met in order to bring an action against a state in federal court on the issue of regulatory takings.¹⁷⁴ This two-prong test first requires the plaintiff to demonstrate that a final decision has been made by the regulating entity.¹⁷⁵ Secondly, although compensation was irrelevant in *Suitum*,¹⁷⁶ the plaintiff must seek compensation through state procedures if available.¹⁷⁷

In *Suitum*, the Court reasoned that the petitioner's claim was ripe because the "demand for finality [was] satisfied."¹⁷⁸ The Court further articulated this reasoning by stating that "it is undisputed that the agency 'has finally determined that petitioner's land lies entirely within a SEZ.'"¹⁷⁹ This determination by TRPA precluded the petitioner from building on her land and constituted a final decision for ripeness considerations.¹⁸⁰ The first prong of the *Williamson* test "follows from

169. See *infra* Part IV (discussing the constitutional role that TDRs should play in the field of regulatory takings); see also *Suitum*, 117 S. Ct. at 1671-72 (Scalia, J., concurring) (raising the issue of where TDRs fit in the takings puzzle in his concurring opinion).

170. See *Suitum*, 117 S. Ct. at 1664 (specifying that the only issue that had been presented for review was that of the ripeness of Mrs. Suitum's claim, evidently in response to Justice Scalia's concurrence that had flavors of reaching the merits of the takings claim in conjunction with TRPA's TDR scheme).

171. *Id.* at 1670.

172. See *infra* notes 173-82 and accompanying text (discussing doctrine of ripeness as pertaining to TDRs).

173. 473 U.S. 172 (1985).

174. *Id.* at 186; see *id.* at 200 (holding that the rejection of the developer's plan by a local planning commission did not satisfy the finality requirement for ripeness); see also *id.* at 193 (noting that the developer must "resort to the procedure for obtaining variances . . . [and obtain] a conclusive determination by the Commission whether it would allow" the proposed development).

175. *Id.*

176. See *Suitum*, 117 S. Ct. at 1665 n.8 (acknowledging that a plaintiff ordinarily "must seek compensation through state inverse condemnation proceedings before initiating a taking suit in federal court, unless the State does not provide adequate remedies for obtaining compensation"). Here, Mrs. Suitum's counsel argued, without dispute from the Respondent, that the state did not have provisions for paying just compensation. As such, the Court focused on the first prong of the *Williamson* test. *Id.*

177. *Williamson County*, 473 U.S. at 194.

178. *Suitum*, 117 S. Ct. at 1667.

179. *Id.* (quoting Respondent's Brief at 21, *Suitum* (No. 96-243)).

180. See *id.* (determining that by classifying Mrs. Suitum's land as a SEZ, the Agency's action constituted a final decision for the purposes of the doctrine of ripeness).

the principle that only a regulation that 'goes too far' results in a taking under the Fifth Amendment."¹⁸¹ Essentially, by determining that petitioner's land lies within a SEZ, thus precluding her from building, the agency has given a court sufficient evidence to determine if the regulation has gone too far.

Further, the Court distinguished *Suitum* from *Williamson* by holding that an application to sell TDRs was not "the type of 'final decision' required" by *Williamson* and its progeny.¹⁸² This is an important distinction given that many regulatory takings claims are never heard because they are stricken on ripeness grounds.¹⁸³ Requiring a party to apply to sell his or her TDRs in order for their regulatory takings claim to ripen is counterintuitive because in many instances the party seeking just compensation feels that the TDR scheme is a sham.¹⁸⁴

In light of this holding, the stage has been set for a court to determine what role TDRs should play in a Fifth Amendment takings analysis. Mrs. Suitum's case may answer that very question on remand. Given that no court has definitively settled this issue,¹⁸⁵ the following section of this Comment focuses primarily on where TDRs fall within a Fifth Amendment takings analysis.¹⁸⁶ Specifically, should TDRs be considered solely in determining whether just compensation has been paid in the event of a taking? Or should TDRs be viewed in the aggregate as substantial value, if they in fact do have substantial value, for purposes of determining whether a taking has occurred? A decision either way will have important repercussions on modern takings law. To illustrate TDRs' impact on the takings analysis, this Comment reviews Mrs. Suitum's takings claim with and without its application.

181. *Suitum*, 117 S. Ct. at 1665 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

182. *See id.* at 1667 (arguing that "[t]hose precedents addressed the virtual impossibility of determining what development will be permitted on a particular lot of land when its use is subject to the decision of a regulatory body invested with great discretion, which it has not yet even been asked to exercise").

183. R.S. Raddiford, Speech at the *McGeorge School of Law Federalist Society Meeting* (Oct. 14, 1997) (notes on file with the *McGeorge Law Review*) (discussing his recent victory in arguing successfully before the Supreme Court on Mrs. Suitum's ripeness claim in *Suitum v. Tahoe Regional Planning Agency*).

184. *See supra* note 155 (noting that TRPA's plan requires the individual selling the TDR to deed away the development rights). Consequently, requiring the individual to follow this action in order for the claim to be ripe leaves nothing to be litigated concerning the takings issue because the owner no longer has the development potential. Petitioner's Brief at 27-28, *Suitum* (96-243).

185. *See supra* note 6 and accompanying text (observing that the Supreme Court has not directly dealt with the issue of where TDRs fall within the Fifth Amendment takings analysis). *But see City of Hollywood v. Hollywood, Inc.*, 432 So. 2d 1332, 1338 (Fla. Dist. Ct. App. 1983) (considering the presence of TDRs as to the economic impact of the regulation in finding that a taking had not occurred).

186. *See infra* Part IV (identifying the often avoided question of where TDRs should fall in the Fifth Amendment analysis and offering the solution that TDRs should be viewed merely as compensation due to their inherent compensatory nature).

d. Possible Takings Analysis in Suitum Absent TDRs

Absent TDRs,¹⁸⁷ the regulation of Mrs. Suitum's land is a categorical taking.¹⁸⁸ The facts in *Suitum* are strikingly similar to *Lucas*.¹⁸⁹ In 1972, Mrs. Suitum purchased the land—subject to no regulations—with the intent of building a retirement home.¹⁹⁰ TRPA denied her the right to build her home by classifying her land as falling within a SEZ.¹⁹¹ This denial, absent TDRs, renders her property economically idle, thus denying her all economically beneficial use of the land.¹⁹² In effect, Mrs. Suitum's land is stripped of all value because she may neither build on it, or sell it for a reasonable economic value given that imposing the regulation most probably decreases the land's fair market value.

Skeptics of the categorical takings analysis will argue that Mrs. Suitum is not deprived of *all* economically beneficial or productive use of her land.¹⁹³ For example, she may place a tent on the lot or have friends over for a barbeque.¹⁹⁴ However, the Supreme Court could not have intended such an interpretation because that same argument would have applied in *Lucas*.¹⁹⁵ Because the Supreme Court found a taking in *Lucas* on the basis of a categorical taking, it should follow that Mrs. Suitum's analogous situation be deemed a taking as well.

Does the presence of TDRs in *Suitum* make her case distinguishable from *Lucas*? In *Lucas* there is no mention of TDRs,¹⁹⁶ however, in *Suitum* they are a

187. The expert witness for TRPA appraised Mrs. Suitum's marketable credit package at \$30,000 to \$35,000. *Suitum v. Tahoe Reg'l Planning Agency*, 117 S. Ct. 1659, 1664 (1997). However, at the trial level, Mrs. Suitum argued that the scheme was a sham and offered an affidavit from one of TRPA's former employees that stated, in pertinent part, that "there is little to no value to [Suitum's TDRs] at the present time as . . . either [there is] no market for them or the procedure for transferring one particular right would restrict the opportunity to transfer a remaining right." *Id.* (alteration in original).

188. See *infra* Part III.C.2.d (arguing that TRPA's scheme had deprived Mrs. Suitum of all economically beneficial or productive use of her land).

189. See Petitioner's Brief at 30-31, *Suitum* (96-243) (arguing that the eerie similarity between the two cases supports the contention that Mrs. Suitum's claim is a categorical taking requiring payment of just compensation).

190. See *id.* at 2-4 (noting that when Mrs. Suitum and her husband bought the parcel, at that time unregulated, they had expectations of building their retirement home).

191. See *supra* note 141 and accompanying text (declaring that Mrs. Suitum's land falls within a SEZ and as a result must be given an IPES rating of zero).

192. See *supra* notes 56-64 and accompanying text (discussing *Lucas*' categorical taking analysis).

193. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992) (holding that a regulation depriving a landowner of *all* economically beneficial or productive use of his land by completely preventing the development of his beach-front homes effects a categorical taking).

194. See *id.* at 1064 (Stevens, J. dissenting) (noting that the all or nothing approach espoused by the majority creates inequitable results between individuals who retain 5% of the value of their land while others enjoy full constitutional protection if their land is deemed to be deprived of all economically viable use).

195. *Id.* at 1064-65.

196. See generally *Lucas*, 505 U.S. 1003 (1992) (expounding a categorical takings analysis without considering the effects that regulatory tools such as TDRs and exactions may have on the analysis).

crucial part of TRPA's regulatory scheme.¹⁹⁷ Because Mrs. Suitum has the potential for economic benefit on a successful sale of the TDRs—although what amount she receives is questionable¹⁹⁸—should she be prevented from a categorical takings analysis?¹⁹⁹ By allowing TDRs into the Fifth Amendment takings analysis, the logical answer is yes. She is no longer being denied all economically beneficial or productive use of her land, thus failing to meet the *Lucas* test.²⁰⁰ However, the pressing question is whether allowing TDRs in the Fifth Amendment takings analysis is logical in the first place. Lastly, assuming such analysis is logical, what role should TDRs play in the ad hoc *Penn Central* test? The final Part of this Comment considers these questions and posits a simple solution. TDRs do have a place in the Fifth Amendment analysis, however their role is merely that of just compensation.

IV. THE ROLE OF TDRS IN THE CONSTITUTIONAL TAKINGS ANALYSIS

Justice Scalia states the proper approach in his concurrence in *Suitum* as to where TDRs fit in the Fifth Amendment puzzle.²⁰¹ Justice Scalia explains that TDRs can “serve a commendable purpose.”²⁰² However, this purpose is limited to mitigating financial loss suffered by regulated landowners, and in fully compensating a landowner for such a loss.²⁰³ Scalia posits that TDRs' relevance in a Fifth Amendment analysis concerns only that of just compensation.²⁰⁴ If TDRs are used in determining whether a taking has occurred, then serious abuses of the system could arise.²⁰⁵

For instance, implementation of sham schemes to avoid regulatory takings litigation is one possible abuse.²⁰⁶ Policy dictates that TDR schemes be valid and

197. See generally TRPA CODE OF ORDINANCES (1987) (establishing the regulatory scheme that has prevented Mrs. Suitum from building her retirement home); *Suitum v. Tahoe Reg'l Planning Agency*, 117 S. Ct. 1659, 1662-63 (1997) (outlining TRPA's regulatory scheme); *supra* Part III.C.1 (discussing TRPA's regulatory scheme and the marketable credits available to regulated landowners).

198. Both parties to the litigation have differing estimations as to the amount the TDRs in question will demand. See *supra* note 187 (demonstrating the differing views of valuing TDRs).

199. See *infra* Part IV (arguing that the presence of TDRs should not effect the *Lucas* categorical takings analysis and should be relegated to the role of just compensation for simplicity and equity).

200. See *supra* notes 56-64 and accompanying text (outlining the *Lucas* test).

201. See *Suitum*, 117 S. Ct. at 1670-73 (Scalia, J., concurring) (opining that the TDR's role in the Fifth Amendment analysis is merely that of just compensation because the TDR compensates and is not a part of the land being regulated).

202. *Id.* at 1672 (Scalia, J., concurring).

203. *Id.*

204. See *id.* (reasoning that using TDRs in the takings analysis “will render much of our regulatory takings jurisprudence a nullity”).

205. See *infra* notes 222-27 and accompanying text (discussing the windfalls that regulators will receive, as well as the potential for abuse, by including TDRs on the taking side of the analysis).

206. See Levine, *supra* note 8, at 1212 (noting that implementing TDR plans is an effective way to avoid litigation because the TDR can be viewed as substantial value, and, as such, the courts would be required to decide the claim under the more deferential balancing of interests standard rather than the pro-property owner *Lucas* test).

for the benefit of the restricted landowner. In the instance of a sham scheme the only party benefitted is the regulator. Moreover, the existence of a sham scheme tends to negate the public confidence necessary for successful implementation of TDRs.²⁰⁷ Justice Scalia views placing TDRs on the takings side of the analysis as an artifice that “seeks to take advantage of . . . our [T]akings [C]ause jurisprudence.”²⁰⁸

The crux of Scalia’s analysis adheres to the concept that TDRs have no relation in the use or development of land to which they are attached by the specific regulation.²⁰⁹ Hence, the value attributable to TDRs comes in exchange for a taking and not in its place.²¹⁰ According to Scalia, TDRs are nothing more than compensation.²¹¹ Furthermore, the fact that payment comes from a third party in TRPA’s TDR scheme has no bearing on whether the payment is viewed as compensation.²¹² This is sensible given that some TDR schemes involve transfers to third parties while others allow for transfers to lots owned by the burdened party;²¹³ drawing a distinction between the two would result in disparate treatment in otherwise similar situations.²¹⁴

In order to follow this analysis, the Court must deal with the dicta posited in *Penn Central*.²¹⁵ Although it was not necessary to deal with the TDR issue as it applied to the owners of the historical landmark, the Court stated TDRs had value to mitigate the financial burdens wrought by regulations and that they “are to be

207. See *supra* note 91 and accompanying text (discussing the need for public confidence in a TDR scheme in order for it to be successful).

208. *Suitum*, 117 S. Ct. at 1671 (Scalia, J., concurring); see *id.* (alluding to a TDR as a “clever, albeit transparent device” for the avoidance of a takings claim).

209. See *id.* (recognizing the distinction between the right to use and develop one’s own land and the right to confer on another “an increased power to use and develop *his* land”).

210. See *id.* (reasoning, “[i]n essence, the TDR permits the landowner whose right to use and develop his property has been restricted or extinguished to extract money from others”).

211. See *id.* (noting that a cash payment from the government would not be considered when determining whether a regulation has gone too far, rather it would only be used to determine whether just compensation had been paid).

212. See *id.* at 1672 (Scalia, J., concurring) (emphasizing that the payment coming from a third party “looks too much like compensation”).

213. See *supra* note 79 and accompanying text (illustrating that TDR schemes vary in form from transfers to third parties as well as transfers to nearby or adjacent property owned by the burdened landowner).

214. For instance, suppose regulation *A* involved a TDR scheme that only allowed transfers to parcels owned by the regulated party, while regulation *B* allows for the transfer of development rights to approved third parties. The benefit conferred upon the regulated owner in *A* comes directly from the regulatory body, thus resembling compensation. While under *B*, the benefit conferred upon the burdened landowner (i.e., essentially money from the TDR exchange) comes from a third party resembling value for property sold. The distinction between these two regulations is illusory at best. In both scenarios the landowner is given a TDR with different administrative hurdles, but, more importantly, with the same goal of mitigating the adverse effects of the regulation. Furthermore, differential treatment simply creates a loophole resulting in TDR schemes intentionally created to run to third parties to avoid inverse condemnation claims.

215. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 137 (1978) (dictum) (noting in a paragraph of dicta that TDRs could be taken into account when determining the “impact of the regulation”).

taken into account in considering the impact of the regulation.”²¹⁶ Was this dictum thoroughly considered at the time of this opinion? If so, should it be narrowly applied on the facts of *Penn Central*? If not, given that the Court stated that TDRs are relevant to the regulatory impact,²¹⁷ does that mean that their relevance is limited to the ad hoc *Penn Central* test, thus precluding consideration of TDRs in the *Lucas* context?

A. *Lucas* Has No “Category” for TDRs

Allowing TDRs in a *Lucas* categorical takings analysis will render *Lucas* obsolete.²¹⁸ Although many commentators would not be concerned with this outcome,²¹⁹ they fail to recognize the underlying rationale of the *Lucas* decision.²²⁰ The underpinning of *Lucas* is that regulatory schemes seeking to keep land in its natural state place such a burden on the landowner that even the most compelling state interest will not suffice absent just compensation.²²¹ Inverse condemnation claims based on the reasoning in *Lucas* will become obsolete if we allow TDRs into the “takings” side of the analysis.²²² This will result because every regulatory scheme concerned with approaching the level of a taking will contain a provision allocating TDRs to the burdened landowners, thus circumventing *Lucas*.²²³

216. *Id.*

217. *Id.*

218. See *infra* notes 222-23 and accompanying text (asserting that land use regulators will be inclined to circumvent *Lucas* by implementing TDR schemes in order to create the appearance that the land has retained some economically beneficial value). If this type of circumvention is allowed, it will only be a matter of time before all regulations approaching a categorically taking find TDR schemes attached.

219. See, e.g., Robert Brauneis, “The Founding of Our ‘Regulatory Takings’ Jurisprudence”: The Myth and Meaning of Justice Holmes’s Opinion in *Pennsylvania Coal Co. v. Mahon*, 106 YALE L.J. 613, 693 (1996) (explicating that the Court in *Lucas* misses the complexity of *Mahon* and “leaves Justice Holmes’s opinion representing little more than the single dimension of diminution in value”); Barton H. Thompson, Jr., *The Endangered Species Act: A Case Study in Takings & Incentives*, 49 STAN. L. REV. 305, 308 (1997) (noting that commentators were split as to their predictions of *Lucas*’ potential impact on habitat modification, and that, to date, those predicting that there would be little effect are correct); A. Dan Tarlock, *Local Government Protection of Biodiversity: What is Its Niche?*, 60 U. CHI. L. REV. 555, 587 (1993) (arguing that the Court in *Lucas* strays from the Framers’ intent).

220. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015-18 (1992) (explaining that certain regulations place such an onerous burden on landowners that the societal interest promoted by the regulation will not be considered as a countervailing balance).

221. See generally *id.* at 1015-19 (indicating that a regulation will effect a per se taking without consideration of the public’s interest when the burdened landowner has been deprived of all economically beneficial or productive use of his land).

222. See *id.* at 1017 (noting that denial of all beneficial use is tantamount to a permanent physical occupation); see also *Suitum v. Tahoe Reg’l Planning Agency*, 117 S. Ct. 1659, 1672 (1997) (Scalia, J., concurring) (noting that *Lucas* and its progeny will become a nullity if TDRs are considered on the takings side of the analysis).

223. See Levine, *supra* note 8, at 1209-12 (suggesting as a strategy for environmental groups and lobby legislatures to enact statutes that utilize TDRs to circumvent the holding of *Lucas*).

Of course, some notion of de minimis value will be required by the courts.²²⁴ However, the value of the TDR will not have to reach the fair market value of the land to prevent the taking.²²⁵ Under this application, the government receives a windfall because they are implementing a scheme that resembles compensation²²⁶ while avoiding the just compensation strictures.²²⁷ Namely, just compensation requires giving full and fair compensation for a taking under the Fifth Amendment.²²⁸ By satisfying the de minimis requirement, whatever level that may be, the regulator is relieved of paying the aggrieved landowner the fair market value of the land. This windfall bestowed upon land-use planners is a license to regulate indiscriminately.

The *Penn Central* dicta concerning TDRs supports an argument against considering TDRs in the *Lucas* context. The Court's limiting of TDRs' application to the economic impact factor of the ad hoc analysis²²⁹ permits an inference as to the relevance of TDRs in the categorical takings analysis. Given their exclusion from the investment-backed expectations factor,²³⁰ it is reasonable to infer that TDRs are not applicable to the *Lucas* analysis. By completely preventing a landowner from developing his land, a regulation is wholly denying the individual's investment-backed expectations. Since *Penn Central* did not place import on the TDR's relation to the owner's investment-backed expectations,²³¹ the analogy suggests that TDRs are not applicable in the *Lucas* context, at least when relying on *Penn Central* as the authority.

It would be presumptuous to ignore the flaw in the analysis just stated. Categorical takings were but a sparkle in the Supreme Court's eye at the time *Penn*

224. Surely a court would not allow a TDR worth \$100 to be considered as an economically viable use to an owner of a parcel originally worth \$30,000. However the issue becomes more difficult as the value of the TDR rises. For instance, what if the value of the TDR was determined to be \$5,000 or \$15,000?

225. See *Lucas*, 505 U.S. at 1019 (explicating that denial of all economically beneficial use of land is a per se taking). The logical corollary from this holding is that some economically beneficial use left in the land will prevent a per se taking claim. *Id.*

226. See *Suitum v. Tahoe Reg'l Planning Agency*, 117 S. Ct. 1659, 1672 (1997) (Scalia, J., concurring) (positing that payment from a third party looked too much like compensation).

227. See *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 322 (1987) (holding that fair compensation is due when a regulation effects a taking even if that taking is temporary).

228. *Id.* at 319 (stating: "Where this burden results from government 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.").

229. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 137 (1978) (dictum) (acknowledging that TDRs may be considered when determining the economic impact of the regulation in an ad hoc inquiry).

230. See *supra* notes 41-46 and accompanying text (discussing the factors relevant in the ad hoc takings analysis espoused in *Penn Central*).

231. See generally *Penn Cent.*, 438 U.S. at 137 (positing the possible importance of TDRs in considering the impact of the regulation while completely omitting the other two factors espoused earlier in the opinion).

Central was decided.²³² How could the Court preclude the application of TDRs in an area of the law not yet created? That is where the analogy of the investment-backed expectation to the notion of economically beneficial use comes into play. The development of land, in some fashion, is the primary reason for individuals buying that land.²³³ It is rare that an individual would purchase a parcel with expectations of letting it lie idle. After *Lucas*, if a regulation forces the landowner to leave his land in its natural state, he is denied his expectation to develop, or in other words, he "is deprived of all economically beneficial or productive use of the land."²³⁴

1. Exactions?: *Nollan v. California Coastal Commission as a Predictive Tool*

Exactions are another tool utilized by regulators to further their regulatory schemes.²³⁵ An exaction is a concession required of a landowner who wishes to change the nature or use of her land.²³⁶ The Supreme Court's treatment of exactions may add insight as to how TDRs will be treated if and when the issue reaches our country's highest court.²³⁷

In 1987, the Supreme Court decided *Nollan v. California Coastal Commission*.²³⁸ In *Nollan*, the landowners leased, with the option to purchase, a beach front lot which maintained a haggard bungalow.²³⁹ As required by the purchase option, the owners planned to tear this edifice down and replace it with a three bedroom house in conformity with the surrounding neighborhood.²⁴⁰ In order to build a replacement home, the Nollan's were required to obtain a "coastal development permit" from the California Coastal Commission.²⁴¹ The Coastal Commission conditioned the granting of the permit upon the dedication of an

232. *Penn Central* was decided in 1978, followed by *Loretto* in 1982 and *Lucas* in 1992. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1303 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

233. Mrs. Suitum and Mr. Lucas are just two examples of the many who partake in this investment.

234. *Lucas*, 505 U.S. at 1015; *see id.* (espousing the second situation in which a categorical taking will be found).

235. *See Douglas T. Kendall & James E. Ryan, "Paying" For the Change: Using Eminent Domain to Secure Exactions and Sidestep Nollan and Dolan*, 81 VA. L. REV. 1801, 1802 (1995) (noting that the purpose behind exactions is to mitigate the harm that the development will impose on the municipality).

236. *Id.* Exactions come in various forms, such as impact fees, provision of services, restrictions on land use, and dedications. *Id.*

237. *See infra* notes 238-48 and accompanying text (discussing the Court's takings analysis when confronted with a regulatory tool such as an exaction).

238. 483 U.S. 825 (1987); *see id.* at 838-39 (holding that the conditioning of a permit to build on the granting of an easement is a taking without just compensation because the easement does not substantially advance legitimate state interests).

239. *See Nollan*, 483 U.S. at 827 (noting the relevant facts of the case pertaining to the issue of whether the condition placed upon the landowner constituted a taking requiring just compensation).

240. *Id.* at 827-28.

241. *Id.* at 828.

easement for public use across the Nollan's property.²⁴² In protest of the Commission's actions, the Nollan's filed suit arguing that the access condition violated the Fifth Amendment, as incorporated against the states by the Fourteenth Amendment.²⁴³

For the purpose of determining where TDRs fit in the Fifth Amendment analysis, the *Nollan* Court's analytical steps prove more important than the general holding. First, the Court determined that, absent the condition to rebuild, a taking had occurred.²⁴⁴ Requiring a landowner to convey an easement across his or her property to the government is a paradigmatic exercise of eminent domain.²⁴⁵ Second, the Court asked whether requiring this conveyance "as a condition for issuing a land-use permit alters the outcome."²⁴⁶ Third, the Court required that the exaction substantially advance legitimate state interests, which must be shown by demonstrating a causal nexus between the exaction and the regulatory scheme.²⁴⁷ Fourth, absent the requisite nexus, the condition appears to be "an out-and-out plan of extortion"²⁴⁸ by the regulator, which constitutionally requires payment of just compensation.

This piecemeal analysis forwarded by the *Nollan* majority²⁴⁹ works when applied to TDRs as well. The first analytical step in *Nollan* asks whether a taking had occurred minus the permit condition.²⁵⁰ This step is critical in the TDR context because separation of the TDR from the land being regulated will allow a court to determine if the regulation has effected a taking. Looking back to Mrs. Suitum's situation, the Court's takings analysis is simplified by following this segmented approach. Essentially, a court must ask itself whether a taking has occurred while completely disregarding the presence of any TDRs. If, in fact, a taking is effected, then the TDRs may be marketed to supply just compensation to the burdened

242. See *id.* (noting that the Coastal Commission believed that this easement "would make it easier for the public to get to Faria County Park and the Cove").

243. *Id.* at 829.

244. *Id.* at 831. The Court explains:

Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking.

Id.

245. *Id.*

246. *Id.* at 834.

247. See *id.* at 837-38 (requiring that an essential nexus exist between the condition placed upon the landowner and the regulatory scheme forwarded by the commission). The Court eventually held that this nexus was not shown by the commission resulting in a taking of the Nollan's property for the use of a public easement. *Id.* at 837.

248. *Id.* at 837.

249. See *id.* at 828-34 (setting forth a segmented approach when dealing with exactions in the context of a takings claim); see also Kendall & Ryan, *supra* note 235, at 1809 (recounting that the Court in *Nollan* used four analytical steps to reach its holding).

250. See *Nollan*, 483 U.S. at 831 (explicating that minus the permit condition, a regulation requiring the granting of an easement for public access is doubtlessly a taking).

owner. If the TDRs do not command an amount equal to the fair market value of the burdened land, then the regulator must supply the missing amount.

2. Policy Considerations

Several policy considerations counsel that TDRs should be removed from the takings analysis as well. First, TDRs can be an effective regulatory tool if they are marketable.²⁵¹ By relegating the TDRs to the compensation side of the analysis, regulators will have a vested interest in making the schemes as marketable as possible.²⁵² This interest stems from the fact that any difference between the fair market value of the land burdened and the amount the TDR commands is paid by the regulatory agency to fulfill the just compensation requirement.²⁵³ Hence, if the TDR commands an amount equal to the fair market value, then the regulator owes nothing. This economic incentive has the potential of preventing sham schemes, and, more importantly, producing schemes that are effective. Conversely, by placing the TDR on the takings side of the analysis this incentive is stripped away. In fact, regulators will be enticed to limit the TDR's value to something more than *de minimis* but far from fair market value. Surely TDRs were not created with this manipulative intent.²⁵⁴ Mitigation, not manipulation, is the underpinning of a TDR.²⁵⁵ Treating TDRs as compensation will give teeth to an effective land-use planning tool by encouraging viable schemes that mitigate the harms suffered by burdened landowners.

Second, a TDR's value is inherently speculative. Given the relative unpredictability of the amount a TDR will command,²⁵⁶ it must be placed on the compensation side of the analysis for two reasons. First, Takings Clause jurisprudence is already complex.²⁵⁷ Adding the speculative-value TDR to the

251. See *supra* notes 83-91 and accompanying text (discussing the factors that lead to marketable TDRs).

252. See *supra* notes 83-91 and accompanying text (noting that regulators have the capacity to establish marketable schemes).

253. See *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 656-57 (1981) (Brennan, J., dissenting) (explicating in a dissent soon to be widely accepted:

When one person is asked to assume more than a fair share of the public burden, the payment of just compensation operates to redistribute that economic cost from the individual to the public at large. . . .

The payment of just compensation serves to place the landowner in the same position monetarily as he would have occupied if his property had not been taken.) (citations omitted).

254. See *Roberts*, *supra* note 76, at 399 (explaining that TDRs are used to mitigate the loss of value to individual landowners caused by regulatory programs that place sharp restrictions of the use of land).

255. See *id.* (arguing that "restricting an individual's ability to alter the natural characteristics of her land may impose significant economic loss, which can be mitigated by granting her a transferable development right"); see also *Stinson*, *supra* note 10, at 353 (postulating that TDR programs can be undermined when property owners fear that developers may manipulate the credits to their advantage).

256. See *Kendall & Ryan*, *supra* note 235, at 1875 (discussing the speculative value of TDRs); see also *supra* note 187 (demonstrating that disagreement as to the amount the TDR will command is not uncommon).

257. See *Lazarus*, *supra* note 26, at 181 (recognizing the attempts by scholars to harness the doctrinal incoherence of the Fifth Amendment's takings jurisprudence).

puzzle will impugn complexity to this already complex doctrine. As in *Suitum*, both parties will offer experts, with surprisingly different findings as to the value of the TDR in question.²⁵⁸ Inequities running to both parties are certain to occur when courts are left to rely on this type of speculation.²⁵⁹ The solution to this dilemma is consistent and simple: let the market be the final arbitrator. Once the TDR is sold, there is no question as to the amount it commanded.²⁶⁰ If the cash received does not equal the fair market value of the burdened property then the regulator must pay the difference.²⁶¹

Moreover, considerations of judicial economy are relevant. Litigation concerning the alleged value of TDRs may very well flood the courts.²⁶² Allowing TDRs to be considered as value on the takings side of the analysis will encourage abusive sham schemes.²⁶³ As a result, courts will be inundated with time consuming litigation concerning the scheme's validity and the TDRs' value. Judicial economy will be achieved by relegating the TDR to the compensation side of the analysis. For instance, regulators will be encouraged to promote viable schemes which receive fair market value, thus lessening the disputes reaching litigation.²⁶⁴ Furthermore, the problem with speculative valuation will no longer exist since the market is the ultimate evaluator.²⁶⁵ Consequently, courts will be relieved of the onerous task of determining a TDR scheme's viability, thus saving judicial time and energy.

258. See *Suitum v. Tahoe Reg'l Planning Agency*, 117 S. Ct. 1659, 1664 (1997) (explicating that both parties had serious disagreement as to the value that the TDRs would command once marketed).

259. For instance, if the Court in *Suitum* agreed with the speculation of TRPA's expert, thus finding that the TDRs had value, Mrs. Suitum's takings claim would be prevented. *Id.* Hypothetically speaking, Mrs. Suitum tries to sell her TDRs but fails to find a willing buyer thereby making her TDRs valueless. By adopting the approach suggested by this Comment, this inequity is avoided. The market, not a paid expert, determines the amount the TDRs are worth and the regulator picks up the difference, if any, to satisfy the just compensation requirement of the Fifth Amendment.

260. After the sale of the TDR there is no longer room to speculate. The amount of the cash received will be what the market was willing to pay and in turn will signify the value of the TDR. If that value does not reach the fair market value of the burdened land then the regulator should fulfill the just compensation requirement out of its own funds.

261. See *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 656-57 (1981) (Brennan, J., dissenting) (noting that the individual who suffers a taking must be made monetarily whole with society shouldering the burden).

262. See *Suitum*, 117 S. Ct. at 1664 (noting the disagreement as to the amount the TDRs will command when Mrs. Suitum attempts to market them). Logic dictates that disagreements of this magnitude inevitably end up being litigated. *Id.*

263. See Levine, *supra* note 8, at 1209-10 (encouraging lobbyists and regulators to implement TDR schemes to circumvent categorical takings claims by aggrieved landowners).

264. See *supra* notes 83-91 and accompanying text (arguing that regulators have the ability to promote marketable TDR schemes). By placing the TDR on the compensation side of the analysis the regulator would be inclined to promote more marketable TDR schemes. The more value that the TDR commands on the market the less the regulator is required to pay to fulfill the just compensation requirement. In sum, the regulator's (hence society's) self interest will promote the interest of the burdened landowner as well.

265. See *supra* notes 259-61 and accompanying text (noting that the market is the best place to determine the value of a TDR given the TDR's speculative nature).

B. Is There Still a Place for TDRs in the Ad Hoc Test?

By concluding that TDRs should not be considered in the categorical analysis, the question remains as to their application in an ad hoc test. In the twenty years following *Penn Central* only one court has ventured into the TDR-takings quagmire.²⁶⁶ In *City of Hollywood v. Hollywood, Inc.*,²⁶⁷ the Florida District Court of Appeal added TDRs to the ad hoc test when considering the economic impact of a regulation.²⁶⁸ Looking to the "economics of the exchange," the court found that the TDRs actually benefitted the landowner being regulated.²⁶⁹

The problem with this court's analysis is that it blurs the line between a taking and just compensation.²⁷⁰ The very nature of the TDR creates this result because of its separate character from the actual development of the burdened land.²⁷¹ When a landowner is burdened by a regulation, the TDR seeks to compensate rather than refurbish the owner's ability to develop.²⁷²

The *Hollywood* court found ease in applying TDRs to the taking analysis for several reasons. First, as in *Penn Central*, the burdened owner owned a contiguous parcel which directly benefitted from the transfer of development.²⁷³ The direct benefit softened the blow of the regulation in this instance because the landowner owned the receiving lot.²⁷⁴ Second, the court characterized the TDR transaction as

266. In fact, only three courts have dealt with this issue. See, e.g., *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 137-38 (1978) (dictum) (expressing that TDRs may be considered as value in determining whether a regulatory taking has occurred); *City of Hollywood v. Hollywood, Inc.*, 432 So. 2d 1332 (Fla. Dist. Ct. App. 1983) (recognizing the TDRs as value attributable to the land in holding that the landowner had not experienced a taking); *Fred F. French Investing Co., Inc. v. City of New York*, 350 N.E.2d 381, 386 (N.Y. 1976) (explaining that the TDR scheme did not supply substantial value to prevent the landowner's takings claim).

267. 432 So. 2d 1332 (Fla. Dist. Ct. App. 1983) (holding that a regulation restricting the development of single family units did not effectuate a taking, adding that TDRs available to the landowner lessened the economic impact of the regulation when applying the ad hoc takings inquiry).

268. See *Hollywood*, 432 So. 2d at 1336-38 (holding that the presence of TDRs limited economic impact of regulation and thus landowner's property had not been taken without just compensation).

269. See *id.* at 1338 (noting that the transfer involved the loss of the right to build 79 single family units in exchange for the added right to 368 more multi-family units on adjoining land already owned by the landowner).

270. See *id.* at 1337 (stating that TDRs are an alternative to give the burdened landowner "fair compensation" for land being preserved).

271. See *Suitum v. Tahoe Reg'l Planning Agency*, 117 S. Ct. 1659, 1671 (1997) (Scalia, J., concurring) (recognizing that there is a difference between a TDR and one's own right to develop property that has been burdened).

272. For instance, Mrs. Suitum must permanently encumber her land when she sells her TDRs, thus TRPA fails to enhance her development rights by merely compensating her for the property being regulated. See Petitioner's Brief at 8, *Suitum* (96-243) (explaining that in order for Mrs. Suitum to sell her TDRs she would have to encumber her land by deed or other covenant running with the land).

273. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 137 (1978) (noting that the owners had the ability to transfer the development rights to eight parcels in the nearby vicinity); *Hollywood*, 432 So.2d at 1338 (recognizing that the owner's contiguous parcel is directly benefitted by the transfer).

274. Using Mrs. Suitum as an example, this direct benefit is rare. She is being regulated and does not own a lot in the vicinity in order to directly benefit from the TDRs. This distinguishing factor lends to the argument that the presence of TDRs should be seen as compensation if they indeed have value rather than preventing an otherwise

a “quid pro quo.”²⁷⁵ The even-handed nature of the exchange convinced the court of the correctness of applying TDRs to the analysis.²⁷⁶ However, the mere fact that the court employed this Latin term, meaning “one for the other,” suggests that TDRs are being viewed as compensation.²⁷⁷ As evidenced by *Suitum*, a quid pro quo exchange in the TDR arena is the exception and not the rule.²⁷⁸ The solution to this dilemma is achieved by relegating the issue of a TDR’s value to the question of whether just compensation is paid.²⁷⁹ If, indeed, a quid pro quo exchange is found, there is no takings claim because just compensation has been paid.²⁸⁰ In order to promote uniformity, this proposal must be applied to both categorical and ad hoc takings analyses.²⁸¹

V. CONCLUSION

This Comment opens with a citation recognizing the need for new ideas and constitutional tolerance as land use develops.²⁸² As the law of zoning and regulation modernizes, so must the takings jurisprudence effected by it. Applying TDRs to the takings side of the Fifth Amendment’s protections will prove both unworkable and inequitable.²⁸³ The swinging pendulum between productive utilization of land and all out preservation must be allowed to stop at a point of equilibrium. Using TDRs to determine whether a taking has occurred will unnaturally reverse this pendulum

viable takings claim.

275. See *Hollywood*, 432 So. 2d at 1338 (stating, “[T]o us, the quid pro quo is what should control.”).

276. See *id.* at 1338 (refusing to “quarrel with the economics of the exchange” because the burdened landowner is being greatly benefitted by the TDR scheme).

277. Webster’s dictionary defines “quid pro quo” as “[a]n equal exchange or substitution.” WEBSTER’S II: NEW RIVERSIDE DICTIONARY 573 (Berkeley ed. 1984). A direct translation from Latin to English is “one for the other.”

278. Questions inherent in the valuation of the TDRs in *Mrs. Suitum*’s situation still remain. *Suitum v. Tahoe Reg’l Planning Agency*, 117 S. Ct. 1659, 1664 (1997). Uncertainty as to the TDR’s value cannot ensure a quid pro quo exchange. Nevertheless, allowing the market to determine the actual value of the TDR will initiate the move towards a quid pro quo exchange, and any amount less than such an exchange can be supplemented by the regulator under this proposed solution.

279. See *supra* Part IV.A.2 (discussing the policy rationale for relegating the TDR to the compensation side of the takings analysis).

280. See U.S. CONST. amend. V (allowing for private property to be taken for public use so long as just compensation is paid).

281. See *supra* Part IV.A.2 (arguing that abuses such as sham TDR schemes and questions as to the value of TDR schemes in general make their application to a takings analysis both tools of circumvention and confusion).

282. See *supra* note 1 and accompanying text (quoting *Fred F. French Investing Co., Inc. v. City of New York*, 350 N.E.2d 381, 389 (N.Y. 1976)).

283. See *supra* Part IV.A.2 (discussing the policy rationale, namely equity, simplicity and judicial economy, for relegating TDRs to the just compensation side of the Fifth Amendment analysis).

and erase much of our recent takings jurisprudence.²⁸⁴ We cannot allow an artifice to serve this function.²⁸⁵

284. See *Suitum v. Tahoe Reg'l Planning Agency*, 117 S. Ct. 1659, 1672 (1997) (Scalia, J., concurring) (expressing the fear that placing TDRs on the takings side of the Fifth Amendment analysis will render much of the recent takings jurisprudence a nullity).

285. This is a reference to the hypothetical posed by Justice Scalia in *Suitum* in which regulators under a land use scheme attach TDRs with a value of \$1,000 to each lot being regulated. In theory, this could preclude a takings analysis, however, Scalia concludes that this "looks too much like compensation." *Id.*

