

TAKINGS AND TRANSFERABLE DEVELOPMENT RIGHTS IN THE SUPREME COURT: THE CONSTITUTIONAL STATUS OF TDRs IN THE AFTERMATH OF *SUITUM**

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I. INTRODUCTION

In *Suitum v. Tahoe Regional Planning Agency*,¹ the United States Supreme Court divided sharply over what role transferable development rights (TDRs) might play in mitigating a regulatory taking claim.² *Suitum* involved a landowner who had allegedly been deprived of all beneficial use of her property by stringent environmental controls enforced by the Tahoe Regional Planning Agency (TRPA).³ Under *Lucas v. South Carolina Coastal Council*,⁴ such severe land use restrictions by themselves would be categorical violations of the Fifth Amendment Takings Clause.⁵ TRPA argued, however, that whether Mrs. Suitum had suffered a taking could not be determined until she attempted to sell the development potential of her land, as evidenced by the agency's TDRs.⁶

Although the Court did not reach the merits of the takings claim,⁷ Justice Souter's majority opinion suggested that the ripeness of the claim for adjudication depended in part on whether the nature

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1. 117 S. Ct. 1659 (1997).

2. See *id.* at 1671; see also Julian Conrad Juergensmeyer et al., *Transferable Development Rights and Alternatives After Suitum*, 30 URB. LAW. 441, 462-63 (1998).

3. See *Suitum*, 117 S. Ct. at 1660.

4. 505 U.S. 1003 (1994).

5. See U.S. CONST. amend. V (“[P]rivate property [shall not] be taken for public use, without just compensation.”); see also *Lucas*, 505 U.S. at 1015.

6. See *Suitum*, 117 S. Ct. at 1663.

7. See *id.* at 1662.

and value of the TDRs available to Mrs. Suitum were known.⁸ Justice Scalia, together with Justices O'Connor and Thomas, did not join in this part of the opinion.⁹ Instead, the minority's concurrence held that nothing relating to the agency's TDRs could be relevant to the issue of whether Mrs. Suitum's takings claim was ripe for review.¹⁰ They reasoned that when a regulation has rendered the property owner's land completely useless, TDRs can serve only to compensate the landowner,¹¹ not to absolve an agency of liability for a categorical taking that would otherwise be found under *Lucas*.¹²

This exchange reopened an issue that had generally been considered settled since *Penn Central Transportation Co. v. New York City*,¹³ decided almost twenty years earlier. In *Penn Central*, the Court upheld New York's Landmarks Preservation Law against a takings challenge based on the denial of a permit to develop the air space above Grand Central Terminal.¹⁴ The City's landmark preservation program included TDRs that would allow the plaintiffs to transfer their development activity from the space above the terminal to other nearby properties.¹⁵ In dicta, Justice Brennan's majority opinion seemed to endorse this concept, noting that

[w]hile these [TDRs] may well not have constituted "just compensation" if a "taking" had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of the regulation.¹⁶

It is unfortunate that, having once again drawn the constitutional viability of TDRs into question, the *Suitum* Court did not resolve this issue. Although TDRs had commanded largely theoretical interest in the legal and planning literature prior to *Penn Central*,¹⁷ over the past two decades they have come to play a ma

8. *See id.* at 1667–69.

9. *See id.* at 1670 (Scalia, J., concurring in part and concurring in the judgment).

10. *See id.*

11. *See id.* at 1671.

12. *See Suitum*, 117 S. Ct. at 1671–72.

13. 438 U.S. 104 (1978).

14. *See id.* at 130.

15. *See id.* at 137.

16. *Id.*

17. *See, e.g.*, Frank Schnidman, *Transferable Development Rights (TDR)*, in WIND-

for, widespread role in land use planning.¹⁸ There are more than 100 TDR programs in the United States today,¹⁹ with at least twenty-seven in California alone.²⁰ However, the TDR concept is diffuse and flexible and — as was unfortunately demonstrated by the facts of *Suitum*²¹ — capable of serious abuse. Consequently, the Supreme Court's ultimate position on the constitutional status of TDRs may well depend on the specific program that next comes before the Court for review.

II. THE THEORY AND PRACTICE OF TDRs

Transferable development rights are deceptively simple in concept. They are based on the insight that the right to develop a parcel of land is something distinct from the land itself.²² Given the necessary administrative and legal framework, this right can be treated as an independent, marketable property interest.²³ Consequently, some or all of a parcel's development potential can be severed from its physical locus, memorialized in the form of a TDR, and sold or otherwise transferred to another parcel owner who can make use of that additional development potential.²⁴ This concept resulted in TDR programs that are designed to shift development activity from “sending” parcels or zones (areas where low development densities are encouraged or mandated) to “receiving” areas (those designated for more intense development).²⁵

Beyond these essential features, real-world TDR programs vary

FALLS FOR WIPEOUTS 532, 532–52 (Donald Hagman & Dean Misczynski eds., 1978); John J. Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75 (1973).

18. See Juergensmeyer, *supra* note 2, at 448–54.

19. See *id.* at 441, 443 n.5.

20. See RICK PRUETZ, PUTTING TRANSFER OF DEVELOPMENT RIGHTS TO WORK IN CALIFORNIA 41 (1993).

21. See *infra* text at notes 46–53.

22. See Juergensmeyer, *supra* note 2, at 446.

23. See Joseph D. Stinson, Comment, *Transferring Development Rights: Purpose, Problems, and Prospects in New York*, 17 PACE L. REV. 319, 329–30 (1996).

24. See, e.g., PRUETZ, *supra* note 20, at 1–2; Costonis, *supra* note 17, at 85–86; Michael D. Strugar, *TDRs: Robbing Peter to Pay Paul*, 62 U. DET. L. REV. 633, 633 (1985); Edward H. Ziegler, *The Transfer of Development Rights (Part 1)*, 18 ZONING & PLAN. L. REP. 61, 61–62 (1995); Stinson, *supra* note 23, at 322–23; Note, *The Unconstitutionality of Transferable Development Rights*, 84 YALE L.J. 1101, 1101–02 (1975).

25. See, e.g., PRUETZ, *supra* note 20, at 2–3; John J. Delaney et al., *TDR Redux: A Second Generation of Practical Legal Concerns*, 15 URB. LAW. 593, 595 (1983); Ziegler, *supra* note 24, at 61.

widely in both design and application. Some consist mainly of incentives for owners of undeveloped land to voluntarily divest their properties of any future development potential.²⁶ Others are intended to guide the highest density of development into certain parts of generally developing areas.²⁷ Some programs are carefully designed to ensure a liquid market for their TDRs through the creation and operation of a development “bank,”²⁸ while others leave it up to property owners in “sending” districts to attempt to find buyers for their rights.²⁹ In extreme cases, it is hard to avoid the impression that the TDR system functions primarily to enable the government to evade liability for the *de facto* taking of all beneficial use of regulated property.³⁰

III. TDRs AND TAKINGS: MITIGATION OR COMPENSATION?

The distinction raised by Justice Scalia's concurrence in *Suitum* — between *mitigation of liability* and *compensation* for a taking³¹ — is crucial to the constitutional status of TDRs. If land in a “sending” district is downzoned so severely as to constitute a taking under *Lucas* and the TDR program is viewed as *compensation*, the TDRs must meet the rigorous standard of providing a “full and perfect equivalent for the property taken.”³² On the other hand, if the avail-

26. See PRUETZ, *supra* note 20, at 96 (describing voluntary TDR programs in Brisbane and Santa Barbara, California).

27. See *id.* at 75–78 (describing growth-channeling TDR programs in Cupertino, Burbank, and Oakland, California).

28. See *id.* at 26–27, 104–06.

29. See *id.*

30. See John A. Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 COLUM. J. ENVTL. L. 1, 28 (1993) (“Perhaps the easiest way to inoculate land-use laws against *Lucas* will be to create limited systems of transferable development rights so that no property in land could ever be considered entirely without economically beneficial use.”); Steven R. Levine, Comment, *Environmental Interest Groups and Land Regulation: Avoiding the Clutches of Lucas v. South Carolina Coastal Council*, 48 U. MIAMI L. REV. 1179, 1182 (1994) (advocating “expansive” land use regulations that employ a TDR scheme as an “administrative option” to render *Lucas* “inapplicable”).

The use of TDRs as a conscious device to evade liability for what would otherwise be regarded as categorical takings under *Lucas* has been expressly advocated by regulatory enthusiasts. See Juergensmeyer, *supra* note 2, at 463.

31. See *Suitum v. Tahoe Reg'l Planning Agency*, 117 S. Ct. 1659, 1670 (1997) (Scalia, J., concurring in part and concurring in the judgment).

32. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 150 (1978) (Rehnquist, J., dissenting) (quoting *Monogahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893)).

ability of TDRs is counted as an economically viable use of the regulated property, then the government may avoid liability for a taking altogether.³³ At least, a regulating agency employing TDRs would never be liable for a categorical taking under *Lucas*.³⁴

In *Penn Central*, the Supreme Court thoroughly conflated the concepts of takings liability and compensation in its one-sentence dictum concerning TDRs.³⁵ Analysts have been left to ponder what Justice Brennan had in mind by the rather opaque statement that New York City's TDRs “undoubtedly mitigated” the burden of the Landmark regulations.³⁶ Despite this notable imprecision, for the next nineteen years regulatory agencies throughout the country interpreted this sentence to mean that the mere existence of a TDR program should obviate any liability for a regulatory taking, even where the sending parcels themselves are deprived of all beneficial use.³⁷ However, the language of *Penn Central* could not plausibly be stretched that far.

The regulations at issue in *Penn Central* were upheld on grounds unrelated to the availability of TDRs.³⁸ Most tellingly, the *Penn Central* plaintiffs conceded that New York City's application of its Landmarks Preservation Law did not preclude their ability to earn a reasonable return on their property by operating a railway terminal, concessions, and office space on the site.³⁹ As the Court noted, this established that the regulations at issue did not interfere with the owners' “primary expectation concerning the use of the par-

33. Even if, as in *Suitum*, TDRs would allow regulated property owners to recoup only 10% of their losses, this would be enough to avoid a finding of a categorical taking if the TDRs were considered to comprise a use of the property. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 n.8 (1994).

34. See *id.*

35. See *Penn Central*, 438 U.S. at 137.

36. See, e.g., RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 188–90 (1985) (discussing the internal contradictions of the *Penn Central* dictum, noting that “[t]he opportunity to enhance the terminal or other neighboring properties only shows that some compensation has been tendered”).

37. See Brief of Respondent at 33, *Suitum* (No. 96-243) (“Hence, it is settled precedent that TDRs are relevant to the question [of] whether a ‘taking’ has occurred in the first instance.” (citing *Penn Central*, 438 U.S. at 137)). But see Edward H. Ziegler, *The Transfer of Development Rights (Part 2)*, 18 ZONING & PLAN. L. REP. 69, 71 (1995) (“Land use restrictions imposed on a tract of land designated as a TDR sending site are likely to be held a constitutional taking where the affected owner can demonstrate that the restrictions prohibit any economically viable use of the land.”).

38. See Juergensmeyer, *supra* note 2, at 460.

39. See *Penn Central*, 438 U.S. at 130.

cel.”⁴⁰

The outcome in *Penn Central* would probably have been quite different if the Landmark regulations — independent of the TDRs — prevented the plaintiffs from making any beneficial use of their land. Justice Brennan's majority opinion cited approvingly to the following passage from *Hudson County Water Co. v. McCarter*:⁴¹

[T]he police power may limit the height of buildings in a city, without compensation. To that extent it cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as *to make an ordinary building lot wholly useless*, the rights of property would prevail over the other public interest, and the police power would fail. To set such a limit would need compensation and the power of eminent domain.⁴²

In other words, *Penn Central* anticipated *Lucas* by recognizing that such an extreme regulatory impact would constitute a per se categorical taking, *regardless* of the availability of TDRs.⁴³ Confirming this analysis, the *Penn Central* majority noted that “nothing the [Landmarks] Commission has said or done suggests an intention to prohibit *any* construction above the Terminal.”⁴⁴ Had all construction activity been banned, as was the case in *Suitum*, a reasonable inference is that the *Penn Central* Court would have found a taking — with or without TDRs.

Another key point in understanding the “mitigating” role the Supreme Court found for TDRs in *Penn Central* is that the plaintiffs in that case could use New York City's TDRs to literally transfer *their own* development activity to at least eight other parcels they owned in the Terminal's vicinity.⁴⁵ Thus, the development the City would not permit on one site could simply be shifted to another of the plaintiffs' properties located in the same part of Manhattan. The TDRs had direct utility to the Terminal's owners, offering them other development opportunities in exchange for those that had been denied.

40. *Id.* at 136.

41. 209 U.S. 349 (1908).

42. *Id.* at 355 (emphasis added); *see also Penn Central*, 438 U.S. at 128.

43. *See* Stinson, *supra* note 23, at 333.

44. *Penn Central*, 438 U.S. at 137 (emphasis added).

45. *See id.*

An entirely different sort of TDR regime came before the Court in *Suitum*. The defendant, Tahoe Regional Planning Agency, had admittedly prohibited *any permanent disturbance* of the soil on the land in question — an ordinary residential subdivision lot⁴⁶ — unlike the Landmarks Preservation Law in *Penn Central*.⁴⁷ Thus, TRPA's underlying regulations plainly violated *Hudson County Water's* proscription against “mak[ing] an ordinary building lot wholly useless.”⁴⁸

Moreover, the development credits TRPA offered Mrs. Suitum had only the most tenuous relationship to the property rights it had taken from her.⁴⁹ For example, TRPA flatly forbade any impervious ground coverage on Mrs. Suitum's 18,300 square foot lot, but allowed her to transfer the right to 183 square feet of coverage to a third party.⁵⁰ Another type of TDR, the one the agency claimed to be the most valuable, could only be acquired by entering and winning a lottery with odds of approximately five to one against the property owner.⁵¹ Finally, unlike many agencies, TRPA did not make a market for its development credits or attempt to imbue them with any semblance of economic value.⁵² In short, in return for depriving Mrs. Suitum of all beneficial use of a residential lot in the middle of a fully built-out subdivision, TRPA “conferred” upon her the right to attempt to sell the agency's credits to a scattered and unidentified pool of potentially eligible landowners in the Tahoe area.⁵³

It was in this context that Justice Scalia observed:

46. See *Suitum v. Tahoe Reg'l Planning Agency*, 117 S. Ct. 1659, 1663 (1997).

47. See Juergensmeyer, *supra* note 2, at 442.

48. *Hudson County Water*, 209 U.S. at 355.

49. See Juergensmeyer, *supra* note 2, at 461 n.191.

50. See *Suitum*, 117 S. Ct. at 1663.

51. See Joint Appendix at 146–47, *Suitum* (No. 96-243). In one of its many departures from facts in the record, the TRPA now alleges that the number of applicants has fallen in recent years to the point where these particular TDRs may now be had for the asking. See Transcript of Oral Argument at 39–40, *Suitum* (No. 96-243). If true, this would presumably reflect the fact that Tahoe residents have learned the allocations are worthless, no owner in Mrs. Suitum's position ever having managed to sell one. See Joint Appendix at 134–38, *Suitum* (No. 96-243).

52. See *Suitum*, 117 S. Ct. at 1668 (Scalia, J., concurring in part and concurring in the judgment) (discussing uncertainty in valuing the agency's TDRs without a market transaction).

53. The term is TRPA's counsel's. See Richard J. Lazarus, *Fairness in Environmental Law*, 27 ENVTL. L. 705, 731 (1997).

The right to use and develop one's own land is quite distinct from the right to confer upon someone else an increased power to use and develop his land. The latter is valuable, to be sure, but it is a new right conferred upon the landowner in exchange for the taking, rather than a reduction of the taking. . . . Just as a cash payment from the government would not relate to whether the regulation "goes too far" (i.e., restricts use of the land so severely as to constitute a taking), but rather to whether there has been adequate compensation for the taking; and just as a chit or coupon from the government, redeemable by and hence marketable to third parties, would relate not to the question of taking but to the question of compensation; so also the marketable TDR, a peculiar type of chit which enables a third party not to get cash from the government but to use his land in ways the government would otherwise not permit, relates not to taking but to compensation.⁵⁴

While it would be foolish to predict the outcome the next time the Court addresses the constitutional role of TDRs, some general considerations may be drawn from the majority and minority opinions in *Penn Central* and *Suitum*. Whether TDRs are ultimately determined to mitigate liability or merely comprise a form of compensation for a taking will depend largely on two factors: (1) the justices' view of the conceptual nature of the underlying development rights themselves, and (2) the equities of the particular TDR program that comes before the Court.

IV. WHOSE RIGHTS ARE THEY ANYWAY?

Conceptually, the question of whether TDRs should be seen as compensation or as mitigation of takings liability goes to the very nature of development rights: Where do they come from, and to whom do they belong? It has become commonplace to describe the right to develop land as one of the strands in the "bundle of rights" comprising ownership.⁵⁵ This proposition appears so self-evident that it is sometimes merely asserted on the way to making the more

54. *Suitum*, 117 S. Ct. at 1671 (Scalia, J., concurring in part and concurring in the judgment).

55. See, e.g., Stinson, *supra* note 23, at 324 & nn.17-18; Stanley D. Abrams, *Transferable Development Rights (TDRs) As an Economic Development Incentive*, SC10 ALI-ABA 491, 493 (Aug. 14, 1997), available in WESTLAW, Citation No. SC10 ALI-ABA 491 (commenting that "[t]he right to develop one's land is one of the bundle of rights implicit in the ownership of land").

important point that these rights, like any other strands in the bundle, may be separated and marketed in the form of TDRs.⁵⁶

Sound authority exists for viewing the right to develop as an inherent incident of land ownership. In *Nollan v. California Coastal Commission*,⁵⁷ the Supreme Court spoke of “the right to build on one's own property” as something inherent in the sense that it is not a benefit conferred by the state.⁵⁸ Likewise in *Lucas*, the High Court referred to building a home as an “essential use” of land.⁵⁹ But, if development rights are an inherent attribute of ownership, where does this lead with respect to TDRs? Certainly, it provides conceptual support for *voluntary* TDR transactions. If development rights are inherent in one's title, then there is no reason why they may not be severed and alienated from the fee ownership, just as is routinely done with other property rights such as mineral rights and water rights.⁶⁰ The issue becomes more problematic, however, when an owner is *forbidden* from developing the land he owns, but is permitted to sell the TDRs.⁶¹

The *Lucas* majority recognized that the complete extinguishment of an individual's right to make productive use of his land is, “from the landowner's point of view, the equivalent of a physical appropriation.”⁶² That comparison is especially apt in a case like *Suitum*, for the agency's regulations allowed the owner to make no more use of her land than if a company of troops had been permanently stationed there.⁶³ If that had literally been the case, no one would suggest that the government could escape liability for a taking by simply handing the owner a stack of credits that might reduce the number of troops that could be quartered on *other* people's land. The reason, of course, is that a forced physical occupation com-

56. See *Abrams*, *supra* note 55, at 493.

57. 483 U.S. 825 (1987).

58. *Id.* at 833 n.2.

59. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1031 (1994).

60. See *Abrams*, *supra* note 55, at 491.

61. See *Suitum*, 117 S. Ct. at 1662–63.

62. *Lucas*, 505 U.S. at 1017 (citing *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 652 (1987) (Brennan, J., dissenting)); see also *United States v. Causby*, 328 U.S. 256, 261 (1946) (“If, by reason of the frequency and altitude of the flights, respondents could not use this land for any purpose, their loss would be complete. It would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it.”).

63. See *generally Causby*, 328 U.S. at 261 (holding that the loss of productive land use was tantamount to a physical invasion of the property).

pletely deprives the owner of the right to exclude, which is an inherent attribute of ownership.⁶⁴ But what is true of one such attribute, in this case the right to exclude, should also be true of any other attribute, including the right to develop. If development rights are conceptualized as an inherent attribute of ownership, as was the case in *Nollan* and *Lucas*, advocates of TDRs will face an uphill battle in explaining how these rights can be extinguished without giving rise to takings liability — regardless of the availability of TDRs.

The paradigm of TDRs as a stand-in for inherent rights that can be simply peeled off the *res* and transferred elsewhere⁶⁵ breaks down when the transaction is not voluntarily undertaken by the rights holder. If rights are inherent, the government cannot decree that they may only be exercised if they are alienated and transferred to a third party. This approach to the question in *Suitum* leads inevitably to Justice Scalia's position: "TDRs . . . have nothing to do with the use or development of the land to which they are (by regulatory decree) attached."⁶⁶ If the owner's inherent right to develop *in situ* is extinguished, that ends the inquiry for purposes of establishing takings liability.

One way around this impasse is to deny that the rights represented by TDRs inhere in the ownership of the underlying land. For example, one of the earliest TDR adherents frankly asserted that these development rights do not originate as anything inherent in land ownership, but instead are imposed "from the top down."⁶⁷ From this perspective, the "right to develop" embodied in TDRs is "established by a community's general plan and zoning code."⁶⁸ In *Suitum*, the Tahoe Regional Planning Agency pushed this "top down" attitude to the limit by asserting that its regulatory scheme has "replace[d] . . . one property rights regime . . . with another more suitable regime."⁶⁹ At the same time, the Agency contended that the

64. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434–35 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979).

65. See Delaney, *supra* note 25, at 595.

66. *Suitum*, 117 S. Ct. at 1671 (Scalia, J., concurring in part and concurring in the judgment).

67. Schnidman, *supra* note 17, at 533; see also Costonis, *supra* note 17, at 103 (explaining that the imposition of TDR program is based on the principle that "the development potential of private property is in part a community asset").

68. PRUETZ, *supra* note 20, at 1.

69. Brief of Respondent at 38, *Suitum* (No. 96-243).

TDRs it offered to Mrs. Suitum “enhanced” her preexisting bundle of rights,⁷⁰ and were not a proxy for any inherent attributes of ownership.

This is a dangerous line for TDR advocates to take. It invites the response that development credits can only be a form of compensation since they were admittedly not part of the owner's original bundle of rights.⁷¹ This can only be rationalized by denying that the right to develop is an attribute of property ownership in the first place.⁷² If no *inherent* right has been taken away when the government denies permission to build, it is conceptually easier to equate what has been lost (a government entitlement) with what is offered in the form of TDRs (another entitlement). The *Suitum* majority did not expressly endorse this reasoning because it did not consider the merits of Mrs. Suitum's takings claim to be before the Court.⁷³ However, the Court did not reject it either.⁷⁴ Consequently, the next time TDRs come before the Court, the outcome will depend largely on resolving this conceptual dispute.

V. THE EQUITY ISSUE: HOW HEAVY IS THE BURDEN?

The second factor that will influence the Supreme Court's ultimate position on TDRs is the stringency of the particular TDR program that next comes before it. The Court has frequently stated that the purpose of the Takings Clause is “to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”⁷⁵ This fundamental equity concern will color any determination of whether a TDR regime can insulate government regulators from takings liabil-

70. *See id.* at 40–41.

71. *See Suitum*, 117 S. Ct. at 1671 (Scalia, J., concurring in part and concurring in the judgment).

72. TRPA and its supporters saw the necessity of this line of argument in *Suitum*, but allowed their enthusiasm to run away with them. *See* Brief of Respondent at 35–36, *Suitum* (No. 96-243). The regulators' credibility was not enhanced by their portrayal of the building of a modest personal residence in an already developed subdivision as a menace, “harmful to the health, morals, or safety of the public” and “inflict[ing] injury upon the community.” Amicus Brief of the States, Nev., et al. at 13, *Suitum* (No. 96-243).

73. *See Suitum*, 117 S. Ct. at 1662 (noting the court only addressed whether the issue was ripe for adjudication).

74. *See id.*

75. *Armstrong v. United States*, 346 U.S. 40, 49 (1960).

ity.

A variety of specific TDR program features may combine to determine the severity of the burden a program places on regulated landowners. Three of the most important considerations will be the range of options the regulatory regime leaves open to owners, the agency's development of a well-functioning market for its TDRs, and the extent of development rights that can actually be transferred under the regime.

A. What Range of Options Does the Regulatory Program Leave Open to Property Owners?

It has been well noted that “[l]egal challenges and opposition to TDRs has arisen because governments have sought to impose the system as a control, rather than as an incentive.”⁷⁶ A taking will seldom be found when regulations merely restrict the range of options open to property owners.⁷⁷ Likewise, TDR programs that hold out incentives to channel development into preferred areas or induce owners of idle land to voluntarily exchange their development rights for the perceived benefits of TDRs are unlikely to face a serious challenge under the Takings Clause.⁷⁸ At the other extreme, programs like TRPA eliminate the entire range of choices previously open to landowners and leave them with the stark option of participating in the TDR program or being wiped out.⁷⁹

B. Is There a Well-Developed Market for the TDRs (Who Bears the Transaction Cost)?

It is more of a hardship to be required to participate in some TDR programs than others. One indicator of the burdens imposed is how easily the TDRs can be exercised or converted into cash — that is, how well developed is the market.⁸⁰ One primary factor leading to the success of the New Jersey Pinelands Development Credit system was that governmental agencies initially guaranteed a market for

76. Abrams, *supra* note 55, at 494.

77. *See, e.g.*, *Andrus v. Allard*, 444 U.S. 51, 65 (1979) (pointing out that there is no taking where the owner is prohibited from marketing feathers of endangered species, but other remunerative uses are allowed).

78. *See Juergensmeyer, supra* note 2, at 449–50.

79. *See Suitum*, 117 S. Ct. at 1663.

80. *See Abrams, supra* note 55, at 493–97.

the credits.⁸¹ In contrast, the *Suitum* Court expressed severe skepticism concerning the viability of the market for TRPA's credits.⁸² A regime like TRPA's, that does not make a market for its own TDRs, does not attempt to facilitate exchanges, and places tight restrictions on the eligibility of potential TDR buyers, will have a relatively harder time convincing the Court that it has given property owners anything of value in exchange for depriving them of the use of their land.⁸³

C. Does the TDR Program Provide for the Transfer of All or Only Part of the Property's Development Potential?

The Supreme Court is not blind to the fact that TDRs have sometimes been promoted solely on the grounds that they can provide the state with a way of taking property without paying for it.⁸⁴ Justice Scalia evidently believed this was the underlying reality of TRPA's program, which partly explains the sharpness of his concurrence in *Suitum*.⁸⁵

One good proxy for determining a TDR regime's legitimacy is the extent to which it provides for the transfer of the landowner's *entire* development potential. As described previously, the TRPA's program appears to be little more than a charade when viewed from

81. See, e.g., Juergensmeyer, *supra* note 2, at 449–50 (commenting that New Jersey set a floor price of \$2500 per TDR credit and created a bank to buy TDR credits). Indeed, after 25 years of operations, more development rights transactions in this program occur with banks than between private parties. See New Jersey Pinelands Commission, Pinelands Development Credits Summary Report Through December 31, 1995 (June 1996) (on file with author).

82. See *Suitum*, 117 S. Ct. at 1664, 1668–69.

83. See generally Juergensmeyer, *supra* note 2, at 449–50 (noting that the New Jersey TDR system withstood constitutional scrutiny). Part of TRPA's litigation strategy was the introduction of a paid “expert's” affidavit that the credits the agency offered Mrs. Suitum were worth up to \$35,000. See *Suitum*, 117 S. Ct. at 1664. Getting its money's worth for this testimony, the agency continues to cite to this supposed “fact” whenever possible. See, e.g., Lazarus, *supra* note 53, at 731 (discussing saleability of *Suitum*'s development rights). What is not usually revealed is that the record shows no sales of the credits in question have ever been successfully consummated, and a former TRPA staffer who actually administered the TDR program testified that the agency's credits are in fact worthless. See Joint Appendix at 134–38, *Suitum* (No. 96-243).

84. See sources cited *supra* note 30 and accompanying text.

85. See *Suitum*, 117 S. Ct. at 1672 (Scalia, J., concurring in part and concurring in the judgment) (citing to a law review comment advocating the use of TDRs to evade the “clutches” of the Constitution).

this perspective.⁸⁶ A system that permits landowners to sell no more than one percent of their land coverage (assuming they can somehow locate and make contact with a qualified buyer) cannot be a good faith attempt to preserve the rights of regulated property owners.⁸⁷ TRPA's scheme once again stands in sharp contrast to the TDRs at issue in *Penn Central*, which at least, in theory, allowed regulated owners to recoup all or most of the development potential they lost by operation of the Landmarks Preservation Law.⁸⁸

From the viewpoint of equity, *Penn Central*-like TDRs, because they embody an effort to preserve the affected property's full development potential, are more likely to be held to mitigate the government's liability for a taking.⁸⁹ Somewhat ironically however, *Suitum*-style TDRs, which seem designed primarily to evade compensating owners, are more likely to be held to comprise a form of compensation — albeit grossly inadequate compensation.⁹⁰

VI. CONCLUSION

The only Supreme Court analysis of the role of TDRs in the context of a categorical taking is Justice Scalia's concurrence in *Suitum*. The majority's failure to join in this exegesis is not surprising, given the Court's normal reluctance to go beyond the questions presented by the case before it. Nevertheless, *Suitum* calls into question the continued vitality of Justice Brennan's generally sanguine evaluation of TDRs in *Penn Central*.

In the *Suitum* concurrence, Justices Scalia, O'Connor, and Thomas strongly contend that to consider TDRs as a mitigation of liability for a categorical taking defeats the purpose of the Takings Clause. When government action strips private property of all beneficial use, the Constitution mandates compensation that will leave the owner "in as good a position pecuniarily as if his property had not been taken."⁹¹ If instead, the government could give the land-

86. See *supra* notes 46–53 and accompanying text.

87. See, e.g., *Suitum*, 117 S. Ct. at 1663.

88. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 137 (1978).

89. See *id.*

90. See *Suitum*, 117 S. Ct. at 1672 (Scalia, J., concurring in part and concurring in the judgment).

91. *Id.* at 1671 (quoting *United States v. 564.54 Acres of Land*, 441 U.S. 506, 510 (1979)).

owner a lesser value of TDRs regarded not as compensation but as “mitigation,” thereby evading liability altogether, the plain mandate of the Takings Clause would be thwarted.

Property owners and planners can only speculate whether, in a future case that properly presents the issue to the Court, two members of the *Suitum* majority will embrace the views of the concurring justices and reject any “mitigating” role for TDRs. As this Essay points out, the answer will depend on the justices' views of the nature of the development rights coupled with the perceived equities of the specific TDR regime that comes before the Court.