

# NOTES

## EXPLOITING AMBIGUITY IN THE SUPREME COURT: CUTTING THROUGH THE FIFTH AMENDMENT WITH TRANSFERABLE DEVELOPMENT RIGHTS

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## INTRODUCTION

The language of the United States Constitution has weathered the centuries since its adoption in 1787,<sup>1</sup> but the world around it has changed, and continues to change, dramatically. Consequently, the Supreme Court, as the official interpreter of constitutional law,<sup>2</sup> must strive to develop workable frameworks and methodologies to deal with contemporary issues.<sup>3</sup> A brief study of Supreme Court history shows that these frameworks and methodologies rarely develop quickly and are often replete with uncertainty or ambiguity.<sup>4</sup> This is particularly evident regarding the ambiguous relationship between the Fifth Amendment Takings Clause and the relatively new zoning and land use tool known as transferable development rights (TDRs).<sup>5</sup>

TDRs are a “zoning technique used to permanently protect ... natural and cultural resources by redirecting development that would otherwise occur on these resource lands to areas planned to accommodate growth and development.”<sup>6</sup> In this context, “redirecting” means restricting a landowner’s development rights on her own property but allowing her to either sell or transfer those same rights

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1. See Aziz Z. Huq, *The Function of Article V*, 162 U. PA. L. REV. 1165, 1166-68 (2014).

2. See generally *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (establishing the doctrine of judicial review).

3. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992) (plurality opinion) (adopting an undue burden test to evaluate abortion restrictions before viability).

4. For example, the Supreme Court spent approximately twenty years developing an analytical test to evaluate the constitutionality of abortion restrictions. Compare *Roe v. Wade*, 410 U.S. 113, 164-65 (1973) (adopting a framework built around trimesters in 1973 to evaluate abortion restrictions before viability), with *Casey*, 505 U.S. at 878 (plurality opinion) (rejecting the “rigid trimester framework of *Roe v. Wade*” and adopting an undue burden test in 1992).

5. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 135-38 (1978) (holding that the regulations imposed by New York City on Penn Central did not rise to the level of a taking and declining to comment as to whether TDRs constitute just compensation); see also *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 728-29 (1997) (declining to address whether TDRs are directly relevant to the takings or just compensation analyses). Justice Scalia’s concurrence in *Suitum* acknowledges the possibility of TDRs being relevant to the just compensation analysis. *Id.* at 745-50 (Scalia, J., concurring). For further discussion of this ambiguity, see *infra* Part V.

6. *Transfer of Development Rights*, CONSERVATIONTOOLS.ORG, <http://conservationtools.org/guides/12-transfer-of-development-rights> [<https://perma.cc/K6ZZ-FRM7>].

to another area where she, or another landowner or developer, may use them.<sup>7</sup> TDRs are essentially an intangible commodity created to mitigate potential damages caused by protective zoning techniques. Although the Court has had the opportunity to establish an analytical test to clarify the relationship between such zoning techniques, corresponding TDR programs, and the Takings Clause on several occasions, the issue remains unsettled<sup>8</sup> and has inspired much debate.<sup>9</sup>

Fundamentally speaking, the Fifth Amendment guarantees “private property [shall not] be taken for public use, without just compensation.”<sup>10</sup> This language is applicable to the states through the Fourteenth Amendment.<sup>11</sup> Property rights, deeply rooted in American law and tradition, are often characterized as a “bundle of sticks”—meaning one may have various rights in relation to property and each right individually is a “stick.”<sup>12</sup> An important “stick” is undoubtedly the right to develop one’s property.<sup>13</sup> TDRs are potentially subject to Fifth Amendment scrutiny because they exist in circumstances where a government identifies a “public use” for which it must limit a landowner’s ability to develop her property.<sup>14</sup> Some argue such regulatory limitation is effectively a

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7. See *infra* Part I.A.

8. As of 1997, the Supreme Court has yet to settle the issue. See *Suitum*, 520 U.S. at 728-29 (declining to define the relationship between TDRs and the Takings Clause or to create a concrete framework to determine the constitutionality of TDRs).

9. Compare, e.g., Franklin G. Lee, Comment, *Transferable Development Rights and the Deprivation of All Economically Beneficial Use: Can TDRs Salvage Regulations that Would Otherwise Constitute a Taking?*, 34 IDAHO L. REV. 679, 707 (1998) (arguing TDRs are relevant to the takings analysis and not to the just compensation analysis), with William Hadley Littlewood, Comment, *Transferable Development Rights, TRPA, and Takings: The Role of TDRs in the Constitutional Takings Analysis*, 30 MCGEORGE L. REV. 201, 229 (1998) (arguing TDRs are relevant to the just compensation analysis and not to the takings analysis).

10. U.S. CONST. amend. V.

11. See *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 239 (1897).

12. See, e.g., ARTHUR C. NELSON ET AL., *THE TDR HANDBOOK* 3-4 (2012); Jerome G. Rose, *The Transfer of Development Rights: An Interim Review of an Evolving Concept*, Introduction to *THE TRANSFER OF DEVELOPMENT RIGHTS: A NEW TECHNIQUE OF LAND USE REGULATION* 3 (Jerome G. Rose ed., 1975); Julian Conrad Juergensmeyer et al., *Transferable Development Rights and Alternatives After Suitum*, 30 URB. LAW. 441, 457 (1998) (citing MARTIN A. GARRET, JR., *LAND USE REGULATION: THE IMPACTS OF ALTERNATIVE LAND USE RIGHTS* 76 (1987)).

13. See GEORGE H. NIESWAND ET AL., *TRANSFER OF DEVELOPMENT RIGHTS: A DEMONSTRATION* 5 (1976).

14. See, e.g., John J. Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574, 578-79 (1972) (discussing the ideal way to

taking of the landowner's property for which TDRs are inadequate compensation.<sup>15</sup> This conclusion is somewhat hasty, however, considering the possible saving grace of the constitutional phrase "public use."

"Public use" in this context historically relates to preservation of "such public goods as open space, agriculture and forestry[,] ... historic sites or buildings, and affordable housing."<sup>16</sup> After identifying a legitimate public interest for limiting a landowner's development rights,<sup>17</sup> the government issues TDRs to the landowner in order to mitigate actual or potential harms the restrictions cause.<sup>18</sup> In theory, this is done by allowing the landowner to sell, or transfer, her development rights rather than extinguishing them.<sup>19</sup> Ultimately, the goal of TDR programs is to keep development rights intact by transferring them "from a site or area to be preserved to an area targeted for development."<sup>20</sup> In effect, this is "a land use tool that enables government to restrict development without actually taking, and paying for, property."<sup>21</sup>

Executed as detailed above, TDR programs seem to sidestep, or even preempt, Takings Clause issues. Even so, such transactions have given rise to the question of whether the use of TDRs in these situations implicates constitutional concerns of taking property for public use without just compensation.<sup>22</sup> Furthermore, there is an utter lack of consensus as to which side of the Takings Clause such TDR programs are relevant. Some argue TDRs are more relevant to

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preserve landmarks in urban settings as issuing TDRs to private landmark owners, which they may sell to developers or utilize in an area designated for further development).

15. See R.S. Radford, *Takings and Transferable Development Rights in the Supreme Court: The Constitutional Status of TDRs in the Aftermath of Suitum*, 28 STETSON L. REV. 685, 697 (1999).

16. NELSON ET AL., *supra* note 12, at xxiii.

17. See Sarah J. Stevenson, Note, *Banking on TDRs: The Government's Role as Banker of Transferable Development Rights*, 73 N.Y.U. L. REV. 1329, 1368 (1998).

18. See NELSON ET AL., *supra* note 12, at 13.

19. See *id.* at 3.

20. *Id.* at xix.

21. Stevenson, *supra* note 17, at 1330; see also NELSON ET AL., *supra* note 12, at xix.

22. See, e.g., *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 115-20 (1978) (discussing the Fifth Amendment challenge that arose due to New York City's designation of Penn Central's property as a landmark, thereby restricting the development rights in relation to the landmark property).

determining whether a taking has occurred at all,<sup>23</sup> while others are convinced TDRs are relevant only as to whether a government has paid just compensation for a taking.<sup>24</sup>

The Supreme Court has declined to rule on this matter,<sup>25</sup> leaving this particular area of takings law in the relative darkness of doctrinal ambiguity. TDRs may not be constitutionally relevant to the takings analysis at all,<sup>26</sup> but the fair amount of litigation on this matter suggests that it would be foolish for a government to implement TDR programs without giving constitutional concerns careful and calculated consideration. Indeed, even if TDRs and corresponding regulations do not amount to takings for which the government must pay just compensation, considering common constitutional concerns *ex ante*, at a minimum, serves as a governmental insurance policy of sorts.

This Note concludes that TDRs are directly relevant to *both* sides of the takings analysis due to their hybrid nature. Although the use of TDRs has not been officially condoned or condemned by the Supreme Court,<sup>27</sup> there is a reason TDR programs have experienced increasing success and adoption in the last forty to fifty years.<sup>28</sup> Efficient TDR programs exploit the Court's doctrinal ambiguity by preventing regulation that would otherwise constitute a taking from rising to that level, while simultaneously offering landowners just compensation or something closely resembling just compensation. This Note argues further that TDR banks—usually government-sponsored tools designed to create trustworthy and sustainable exchange forums for TDRs<sup>29</sup>—are essential to the continued adoption and success of these programs. Such markets effectively

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23. See, e.g., Lee, *supra* note 9, at 707.

24. See, e.g., Littlewood, *supra* note 9, at 229.

25. E.g., *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 728-29 (1997).

26. For a discussion of this concept, see *infra* Part I.B.

27. See *Suitum*, 520 U.S. at 728-29.

28. TDR programs were in their infancy in the early 1970s, see John J. Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75, 95 (1973), and were adopted in fewer than forty communities by 1996, Lauren A. Beetle, Note, *Are Transferable Development Rights a Viable Solution to New Jersey's Land Use Problems?: An Evaluation of TDR Programs Within the Garden State*, 34 RUTGERS L.J. 513, 524 (2003). However, a thorough review identified 239 TDR programs in the United States in 2010. NELSON ET AL., *supra* note 12, at xxiv.

29. For a discussion on the concept and use of TDR banks, see *infra* Part III.

ensure the equivalent of just compensation.<sup>30</sup> TDR banks enable TDR programs to cut through Fifth Amendment concerns, as efficiently operated TDR programs remain under the Supreme Court's "radar." Intuitively speaking, if landowners and developers are satisfied with the ability to exchange development rights for a fair price in a reliable market, they will not engage in lawsuits, and no constitutional challenges will arise. This Note differs from existing scholarship in that it does not propose a new framework of laws, make suggestions as to the ideal judicial treatment of TDR programs, or critique the Supreme Court for failing to address this issue. Rather, this Note analyzes the law as it currently stands, identifies why existing law is sufficient to resolve constitutional concerns surrounding TDRs, and recommends how to effectively exploit the existing doctrinal ambiguities.

Part I discusses a brief history of the TDR, including the circumstances giving rise to its creation, the basic mechanics, and the basis of authority on which governments rely in implementing TDR programs. Part II addresses common concerns related to TDR programs in light of the Fifth Amendment. Part III discusses the rise and use of TDR banks and their relation to resolving constitutional concerns associated with TDR programs. Part IV provides a snapshot of relevant legal tests currently recognized by the Supreme Court to determine whether a taking has occurred, and if so, the calculation of just compensation for that taking. Part V follows with an analysis of the relationship of those recognized tests to TDRs. Part V then highlights the ambiguity currently existing in this Supreme Court doctrine, and it discusses the impact such ambiguity has on the practical use of TDR programs. This Part argues that when constitutional concerns arise, TDRs are directly relevant to both sides of the takings analysis—takings and just compensation. Part VI discusses the particular importance of the TDR banks to the widespread viability of TDR programs.<sup>31</sup> This Note identifies TDR banks as the key to prolonged success of current and future TDR

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30. See *infra* Part III.B.

31. For an in-depth discussion of the legal and financial issues TDR banks pose, and the corresponding solutions, see, for example, Stevenson, *supra* note 17, at 1358-76. While such a discussion is important, it is beyond the focus of this Note.

programs, as they ensure the equivalent of just compensation to landowners affected by preservation regulations.

## I. THE TDR

### A. *A Brief History of the TDR and Basic Mechanics of a TDR Program*

The innovation of TDR programs in American land use law arose largely in response to concerns that overdevelopment would result in the loss of historic buildings, agricultural spaces, and other public goods.<sup>32</sup> Professor John J. Costonis even argued that “[u]rban landmarks merit recognition as an imperiled species alongside the ocelot and the snow leopard.”<sup>33</sup> Costonis believed that if the trend of unfettered development “[were] not reversed, the nation ... [would] mourn the loss of an essential part of its architectural and cultural heritage.”<sup>34</sup> Many jurisdictions around the nation seem to have agreed: by 1978, “all 50 States and over 500 municipalities [had] enacted laws to encourage or require the preservation of buildings and areas with historic or aesthetic importance.”<sup>35</sup> Landmarks and other public goods were in danger because it had often been more profitable to redevelop property for business purposes than to preserve such goods.<sup>36</sup>

The basic premise of a TDR program is to preserve public goods by restricting development rights in designated preservation areas and transferring those development rights to areas designated for further development.<sup>37</sup> These areas are referred to as “sending” and “receiving” areas, or districts, respectively.<sup>38</sup> The mechanics of a

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32. See NELSON ET AL., *supra* note 12, at xix.

33. Costonis, *supra* note 14, at 574.

34. *Id.* at 575.

35. See Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 107 (1978).

36. See, e.g., Costonis, *supra* note 14, at 575 (“[L]andmark ownership in downtown areas of high land value is markedly less profitable than redevelopment of landmark sites.”).

37. See Littlewood, *supra* note 9, at 209-10.

38. See Beetle, *supra* note 28, at 515-16 (“TDR works as a mechanism for preserving certain parcels, designated as ‘sending areas,’ by transferring the right to develop that land to other parcels located in ‘receiving areas.’”); Joseph D. Stinson, Comment, *Transferring Development Rights: Purpose, Problems, and Prospects in New York*, 17 PACE L. REV. 319, 328 (1996) (“[TDRs] divert[] economic incentive away from critical areas through the use of

TDR program consist of four basic phases. First, the government must identify a landmark, or other public good, in need of regulatory preservation.<sup>39</sup> If the government found no public goods to be in need of preservation, then the government would not create and implement TDR programs.<sup>40</sup> This concept is not inherently complex, as the government must simply identify a notable public good within its jurisdiction.<sup>41</sup>

Second, the government must adopt regulations restricting development of the parcel identified in the first phase.<sup>42</sup> This regulation must specifically identify “sending areas” where development is to be restricted, as well as designated “receiving areas” where the restricted development rights may be transferred for full use.<sup>43</sup> Failure to complete this phase subjects the regulations to constitutional scrutiny. Granting a landowner the right to transfer her restricted development rights to another area would be essentially worthless if some sort of receiving area did not exist.<sup>44</sup> In that case, the landowner might have a colorable legal claim against the government for subjecting her property to a taking without just compensation.<sup>45</sup>

The third phase follows the demands of the second: the government must issue a TDR—sometimes referred to as a TDR

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‘sending’ and ‘receiving’ districts. The sending district is the area being protected. The receiving district is the area that has been determined to be suitable for development.” (footnotes omitted)).

39. See, e.g., Costonis, *supra* note 14, at 590 (noting that the first step of the Chicago Plan—before landowners became entitled to the transfer of development rights—was the designation of a parcel as a landmark).

40. For example, if New York City had never designated Grand Central Terminal as a landmark, then the litigation in *Penn Central* would likely have never occurred, and Penn Central Transportation Co. would have built the desired building above the Terminal. See *Penn Central*, 438 U.S. at 115-22.

41. See, e.g., *id.* at 115 (identifying Grand Central Terminal, which opened in New York City in 1913, as “an ingenious engineering solution to the problems presented by urban railroad stations, ... [and] a magnificent example of the French beaux-arts style”).

42. See *id.* at 110-11 (discussing the process by which New York City’s Landmarks Preservation Commission identifies and regulates landmark sites). For a discussion on the source of a government’s power to adopt these regulations, see *infra* Part I.B.

43. See NELSON ET AL., *supra* note 12, at 3; Beetle, *supra* note 28, at 515-16; Stinson, *supra* note 38, at 328.

44. See Juergensmeyer et al., *supra* note 12, at 455 (“Without receiving zones, the TDRs from the sending areas cannot be used, and with no use they will have no value.”).

45. For a discussion of the potential constitutional issues in relation to TDR programs, see *infra* Part II.



“credit”—to the landowner whose development rights the government has restricted.<sup>46</sup> The value of TDR credits varies depending on the economy of the local jurisdiction.<sup>47</sup> Some states and municipalities have even adopted statutes requiring a minimum or maximum value for TDR credits.<sup>48</sup> The basic principle in issuing TDR credits is to mitigate the landowner’s potential losses and inconveniences by offering compensation to the extent that the regulation has burdened the property.<sup>49</sup>

Finally, the government must remain dedicated to establishing and maintaining a reliable market exchange for the TDRs.<sup>50</sup> Though there are many potential ways a government can accomplish this goal,<sup>51</sup> this Note focuses on arguably the most successful option: the creation of a TDR bank.<sup>52</sup> Failure to create a market landowners and developers trust and are willing to utilize also potentially subjects preservation regulations to constitutional scrutiny. Were a government to restrict development rights and issue TDRs with

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46. *See, e.g.,* *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 729-32 (1997) (discussing a regional TDR program in which Suitum was issued TDR credits proportionate to the extent the preservation regulation restricted her development rights); NELSON ET AL., *supra* note 12, at 3 (“The severed right(s) are turned into a tradable commodity that can be bought and sold—essentially, a development credit.”).

47. *See* Costonis, *supra* note 14, at 595. (“[T]he marketability of development rights ... [is] governed ... by the general vigor of the construction and real estate markets in the particular municipality’s central commercial and service areas.”); Note, *The Unconstitutionality of Transferable Development Rights*, 84 YALE L.J. 1101, 1110 (1975) (“[T]he value of transferable development rights will always be determined by and fluctuate with the market for these rights.”).

48. *E.g.,* N.J. STAT. ANN. §§ 13:18A-34(g), -39 (West 2015) (requiring a minimum value of \$10,000 for a TDR credit).

49. *E.g.,* *Suitum*, 520 U.S. at 749-50 (Scalia, J., concurring); NELSON ET AL., *supra* note 12, at 3 (illustrating this concept hypothetically by assigning “one [TDR] per 10 acres”); Costonis, *supra* note 14, at 591.

50. *See* Keith Aoki et al., *Trading Spaces: Measure 37*, MacPherson v. Department of Administrative Services, and *Transferable Development Rights as a Path Out of Deadlock*, 20 J. ENVTL. L. & LITIG. 273, 314 (2005) (“[T]he success of the TDR program depends on the trust that both buyers and sellers have in the system.”).

51. *See, e.g.,* Costonis, *supra* note 14, at 585-89 (discussing the New York Zoning Resolution, which, as of 1972, allowed transfers of development rights only between adjacent lots within the same designated district).

52. *See* Beetle, *supra* note 28, at 516. (“[M]ost successful TDR programs have established [TDR] banks.”); Stevenson, *supra* note 17, at 1331-32 (“[W]ithout a middleman to buy and hold the TDRs, mutually beneficial transactions can take place only if a seller and a buyer are simultaneously ready to sell and develop.... By acting as a middleman between buyer and seller, TDR banks fill a critical timing gap that could be the downfall of a TDR program.”).

essentially no value due to the lack of an established exchange forum, the landowner would have a strong argument against the government for effecting a taking of her property without providing just compensation.<sup>53</sup>

Government entities that are mindful of completing each phase of these basic mechanics can ensure the success and viability of TDR programs within their respective jurisdictions.<sup>54</sup> Adherence to these basic mechanics protects a TDR program from constitutional scrutiny.<sup>55</sup>

### *B. Basis of the Authority to Create TDR Programs*

Although some commentators disagree as to the actual constitutional basis for granting a government the authority to create TDR programs, most agree that this power is derived from either eminent domain or the states' general police power.<sup>56</sup> This analytical distinction is of pivotal importance because governmental use of eminent domain requires the payment of just compensation,<sup>57</sup> even though this is not necessarily the case for use of its police power.<sup>58</sup>

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53. See Dennis J. McEleney, *Using Transferable Development Rights to Preserve Vanishing Landscapes and Landmarks*, 83 LL. B.J. 634, 636 (1995) ("If the [buyers] decide not to purchase any TDRs, the [sellers] are left holding worthless rights."). For a discussion of the potential constitutional issues in relation to TDR programs, see *infra* Part II.

54. See, e.g., Stevenson, *supra* note 17, at 1347-50 (discussing the success of the TDR program in New Jersey's Pinelands).

55. See *generally id.* (discussing the success of the New Jersey Pinelands TDR program, which correctly and successfully executed each mechanical phase of its TDR program).

56. Compare, e.g., Note, *The Unconstitutionality of Transferable Development Rights*, *supra* note 47, at 1107 ("[W]here TDR is employed, restrictions on the landmark owner's right to use his property normally will involve a taking for which compensation is required, rather than a noncompensable regulation under the police power."), with McEleney, *supra* note 53, at 637 ("TDR programs are exercises of the police power under which the government regulates the use and enjoyment of private property to protect the general public health, safety, and welfare.").

57. See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) ("When [diminution in property value] reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and *compensation* to sustain the act." (emphasis added)).

58. See *id.* ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must *yield to the police power.*" (emphasis added)).

Eminent domain is the power to acquire private property for public use.<sup>59</sup> This power is typically used to acquire an individual's *entire* property, not just a portion of the property.<sup>60</sup> In *Kelo v. City of New London*, the Supreme Court defined "public purpose" very "broadly, reflecting [a] longstanding policy of deference to legislative judgments in this field."<sup>61</sup> The Court defers to legislative judgment unless (1) the public purpose is illegitimate or (2) the means of achieving a legitimate public purpose are irrational.<sup>62</sup> Ultimately, "[o]nce the question of the public purpose has been decided, the amount and character of land to be taken ... rests in the discretion of the legislative branch."<sup>63</sup>

The police power, on the other hand, "extends ... to all the great public needs,"<sup>64</sup> which include "the public health, safety, morals, and general welfare."<sup>65</sup> Regulations under the police power do not condemn an individual's *entire* property nor do they seize all her corresponding rights for a public use.<sup>66</sup> Rather, the police power serves the general public welfare by restricting, where necessary, only certain individual rights.<sup>67</sup> As with eminent domain, courts grant a substantial amount of deference to legislatures in

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59. Note, *The Police Power, Eminent Domain, and the Preservation of Historic Property*, 63 COLUM. L. REV. 708, 724 (1963) (citing *Kohl v. United States*, 91 U.S. 367, 371-74 (1875)).

60. *See, e.g., id.* at 727 ("Although the fee [simple] is the interest *usually acquired*, the power will also reach easements, leaseholds, options, contract rights, franchises, and riparian rights." (emphasis added) (footnotes omitted)).

61. 545 U.S. 469, 480 (2005).

62. *Id.* at 488 (quoting *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 242-43 (1984)). For the purpose of this Note, further clarification as to the meaning of "illegitimate" and "irrational" is unnecessary.

63. *Id.* at 489 (quoting *Berman v. Parker*, 348 U.S. 26, 35-36 (1954)).

64. *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 424 (1952) (citing *Noble State Bank v. Haskell*, 219 U.S. 104, 111 (1911)).

65. Note, *The Police Power, Eminent Domain, and the Preservation of Historic Property*, *supra* note 59, at 710 (footnotes omitted).

66. Lee, *supra* note 9, at 706 ("[R]easonable limitations on the pace of residential development as part of, and reasonably related to, a comprehensive plan to protect an environmentally sensitive public resource are well within the state's police power."). Note that the police power in this instance was only limiting rights to residential development, not all property rights. *See id.*

67. *See, e.g., Hadacheck v. Sebastian*, 239 U.S. 394, 412 (1915) ("[T]here is no prohibition of the removal of the brick clay; only a prohibition within the designated locality of its manufacture into bricks."). The Court in *Hadacheck* did not seize all the landowner's rights in relation to the property. *Id.* Rather, the Court disallowed the practice of making clay bricks on the property as that activity created a nuisance for the surrounding landowners. *Id.*

determining “what the public welfare demands.”<sup>68</sup> Furthermore, although the police power is still subject to judicial review, “the presumption [is] in favor of a proper exercise of [the police] power.”<sup>69</sup>

A government entity may still, however, effect a taking for which just compensation must be paid if the public need “is not sufficiently public or the means unreasonable.”<sup>70</sup> In fact, “[t]he general rule ... is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”<sup>71</sup> It is unclear when a regulation goes “too far,” but this analysis is a “question of degree—and therefore cannot be disposed of by general propositions.”<sup>72</sup> Rather, the “too far” analysis requires a fact-intensive inquiry,<sup>73</sup> and “[s]o long as the primary end sought is the protection of the public from an evil and the means are reasonable, a regulation will be constitutional even though the burden of obedience is great.”<sup>74</sup>

Without delving further into the meat of these doctrines, it is obvious they have certain similarities.<sup>75</sup> The crucial difference between eminent domain and the police power for purposes of TDR programs, however, is that eminent domain typically involves seizing *all* property rights for which just compensation *must* be paid.<sup>76</sup> Under the police power, it is possible to adopt regulations restricting *certain* rights, while leaving the rest intact.<sup>77</sup> Unless the adopted regulations go “too far,” the government is not necessarily required to pay just compensation.<sup>78</sup>

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68. Note, *The Police Power, Eminent Domain, and the Preservation of Historic Property*, *supra* note 59, at 710-11 (citing *Powell v. Pennsylvania*, 127 U.S. 678, 685 (1888)).

69. *Id.* at 711 (citing *Graves v. Minnesota*, 272 U.S. 425, 428 (1926)).

70. *Id.* at 711-12 (citing *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922)).

71. *See Mahon*, 260 U.S. at 415.

72. *Id.* at 415-16.

73. *See Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (indicating that the “too far” test effectively becomes a multi-factor, fact-intensive inquiry); *see also infra* Part IV.A.2.

74. Note, *The Police Power, Eminent Domain, and the Preservation of Historic Property*, *supra* note 59, at 712.

75. Both, for example, concern promoting public needs and welfare. *See supra* notes 59, 64-65 and accompanying text.

76. *See supra* note 57.

77. *See supra* note 66-67.

78. *See supra* note 58.

Despite what some may argue, it is difficult to imagine a scenario in which a state would use its eminent domain power to implement a TDR program. Somehow, the government would have to seize all of a landowner's property rights and grant her TDR credits allocable to a receiving zone.<sup>79</sup> This does not resemble the vast majority of TDR programs any local or state governments have implemented in the last forty to fifty years.<sup>80</sup> Furthermore, "[t]he high cost of land acquisition ... makes governments reluctant to use eminent domain to preserve landmarks and landscapes."<sup>81</sup>

TDR programs are much more at home under the police power. Under this approach, government entities are able to restrict a landowner's development rights while leaving other rights intact.<sup>82</sup> In recent Supreme Court cases concerning TDRs, the Court has declined to recognize a taking for which the government owes just compensation.<sup>83</sup> In fact, the Court arguably held that the regulatory scheme by which TDRs are granted is a legitimate exercise of the police power.<sup>84</sup>

This is not to say, however, that the Court could *never* determine that a TDR program constituted a taking for which the government must pay just compensation. Nor does this mean that the Court would *never* find an overbearing and improperly implemented TDR program to be a use of eminent domain, disguised as an exercise of the police power, to avoid paying just compensation. Certainly the

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79. One of the only cases that comes remotely close to this description is *Fred F. French Investing Co. v. City of New York*, 350 N.E.2d 381 (N.Y. 1976). In that case, the city precluded a landowner from developing land that used to be a park, instead requiring him to maintain the land for public use. *Id.* at 383-84. The New York Court of Appeals held that this was an illegitimate use of the police power because "it deprived the owner of 'any reasonable beneficial use of [his] property' and destroyed all but a small residue of the property's economic value." McEleney, *supra* note 53, at 638 (alterations in original) (quoting *Fred F. French Investing Co.*, 350 N.E.2d at 387). Even though the New York Court of Appeals found this regulation illegitimate, it still does not look like eminent domain; rather, it seems like an example of a regulation that went "too far." See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). It also looks more like a total regulatory taking. See *infra* Part IV.A.1.

80. See, e.g., Stevenson, *supra* note 17, at 1348 ("Landowners selling [TDRs] retain title to the land and may continue using it for authorized, nonresidential purposes.")

81. McEleney, *supra* note 53, at 634.

82. Property rights are inherently limited by the states' policing power to some extent. See Aoki et al., *supra* note 50, at 279 (discussing *Mahon*, 260 U.S. at 413).

83. See *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 728 (1997); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 138 (1978).

84. *Penn Central*, 438 U.S. at 119-22.

Court would have something to say about a government restricting development rights without having any sort of public interest justification for doing so. Rather, these Supreme Court cases suggest that there *may* be constitutional concerns when a government *misuses* its general police power in implementing TDR programs. The police power is most clearly the source of a government's authority to create a TDR program. It is the misuse of this power, then, which can give rise to constitutional concerns.

## II. FIFTH AMENDMENT ISSUES WITH THE TDR

Despite the fact that the authority to implement TDR programs has an evident basis in the police power,<sup>85</sup> this relatively new land use tool has given rise to constitutional concerns in relation to the Takings Clause.<sup>86</sup> Any government contemplating the use of a TDR program, then, should act under the assumption that the shield of the police power is not impenetrable. Proactively addressing these concerns can ensure the constitutional exercise of the police power. This Part highlights the primary concerns relating to governmental takings and the consequent requirement of just compensation.

As previously discussed, the Fifth Amendment guarantees the universal right that “private property [shall not] be taken for public use, without just compensation.”<sup>87</sup> Based on the “bundle of sticks” theory, each landowner possesses a variety of rights in relation to her property—among them the right to develop the property.<sup>88</sup> Critics of TDR programs argue that restricting development rights through preservation regulations effects a taking on that property.<sup>89</sup> This criticism is especially strong when the result of such preservation regulations is to decrease the property's economic value or its potential for gainful use.<sup>90</sup> Essentially, critics argue that

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85. See *supra* Part I.B.

86. See, e.g., Note, *The Unconstitutionality of Transferable Development Rights*, *supra* note 47, at 1121-22 (arguing that “[a] constitutional attack on TDR will probably succeed,” and that TDRs are “taking[s] for which just compensation is required”).

87. U.S. CONST. amend. V.

88. Littlewood, *supra* note 9, at 209; see also *supra* notes 12-13 and accompanying text.

89. E.g., Beetle, *supra* note 28, at 518; Note, *The Unconstitutionality of Transferable Development Rights*, *supra* note 47, at 1107.

90. See, e.g., *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 115-19 (1978) (discussing the appellant's argument that, because it had recently entered a contract “to

the government uses preservation regulations to seize a landowner's development rights.<sup>91</sup> Consequently, where the government adopts regulations to restrict development rights, some argue it must pay just compensation.<sup>92</sup>

As many commentators agree, TDRs' relationship to just compensation is complicated given that "a TDR's value is inherently speculative."<sup>93</sup> The Supreme Court may have exacerbated this concern by suggesting the possibility that TDRs may not be independently sufficient to constitute "just compensation."<sup>94</sup> This is due to the fluctuating value of, and the varying demand for, TDRs.<sup>95</sup> For example, suppose a city government restricts a landowner's ability to develop her empty lot downtown due to a public interest in preserving open space from overdevelopment. What result if no developers in the designated receiving area are interested in or willing to buy those rights?<sup>96</sup> Suppose the city allocates the TDRs to the space above other nearby buildings whose owners are not contemplating further development?<sup>97</sup> And what choice does a landowner have if a nearby developer decides to buy the TDRs, but does so at a price substantially below market value simply because the landowner has no other options? In these situations, are TDRs really worth much of anything? TDR critics respond to this query with a resounding "no."<sup>98</sup>

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increase its income," restricting its ability to construct an office building above Grand Central Terminal—which was part of the plan to increase its income—amounted to a taking without just compensation). The appellant's argument was essentially that the landmark preservation regulation seized property rights that would have increased the property's economic value and earning potential. *See id.*

91. *See id.*

92. *E.g.*, Note, *The Unconstitutionality of Transferable Development Rights*, *supra* note 47, at 1121-22. For a discussion on the definition of just compensation and the corresponding calculation methodology, see *infra* Part IV.B.

93. *E.g.*, Littlewood, *supra* note 9, at 229.

94. "[T]hese [TDRs] may well not have constituted 'just compensation' if a 'taking' had occurred." *Penn Central*, 438 U.S. at 137 (emphasis added).

95. *See supra* notes 46-53 and accompanying text.

96. *See, e.g.*, McEleney, *supra* note 53, at 636.

97. *Cf. Costonis*, *supra* note 14, at 587.

98. *See, e.g.*, McEleney, *supra* note 53, at 636 ("If the [buyers] decide not to purchase any TDRs, the [sellers] are left holding worthless rights."); Stevenson, *supra* note 17, at 1359 ("Without a market, TDRs are worthless and will not be acceptable as compensation for restricted property rights.").

To be sure, TDR programs can give rise to constitutional concerns when implemented improperly. Though these concerns are based in deeply rooted constitutional rights, they are certainly not insurmountable. Practically speaking, however, each government entity must be prepared to defend its TDR programs in the event of a constitutional challenge. Should a court find a taking, such a defense will only be strengthened by demonstrating that the jurisdiction's TDRs have equal, or nearly equal, value to an approximation of constitutional just compensation. Comprehending two fundamental concepts remains essential to overcoming these constitutional concerns: (1) how the use of TDR banks steers TDR programs away from constitutional roadblocks,<sup>99</sup> and (2) current relevant takings law, as recognized by the Supreme Court,<sup>100</sup> and its relation to TDRs.<sup>101</sup>

### III. TDR BANKS

The correct implementation of a government-run TDR bank resolves most, if not all, constitutional concerns as to the legitimacy of TDR programs. This Part addresses the concept and utility of the TDR bank and identifies the constitutional concerns such banks helps TDRs overcome.

#### A. *What Is a TDR Bank?*

Professor Costonis first conceptualized the idea of a TDR bank in his renowned "Chicago Plan."<sup>102</sup> Under this plan, the TDR bank, established and operated by the government, "[was] credited with development rights that [had] been condemned from recalcitrant owners, rights donated by owners of other landmarks, and rights transferred from publicly owned landmarks."<sup>103</sup> After pooling TDRs from various landowners into a TDR bank, the municipality was then able to sell them to developers in designated receiving zones.<sup>104</sup>

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99. *See infra* Part III.

100. *See infra* Part IV.

101. *See infra* Part V.

102. *See Costonis, supra* note 14, at 590-91.

103. *Id.* at 590.

104. *Id.* at 590-91.



The Chicago Plan still provided the option for the private sale and transfer of TDRs but offered the TDR bank as a method to “expedite ... development generally by easing the difficulties to land assembly.”<sup>105</sup> Modern iterations of the TDR bank follow the same format.<sup>106</sup> Some say “[t]he cornerstone of a successful TDR program is public confidence in the value [and transferability] of TDR credits.”<sup>107</sup> This Note contends that the cornerstone to successfully securing this public confidence, and by extension the cornerstone to a successful TDR program, is the proper implementation of a TDR bank.<sup>108</sup>

### *B. Utility of TDR Banks and the Issues They Help Resolve*

Although a TDR bank may take various forms,<sup>109</sup> as a tool it serves two basic functions: (1) as a middleman between buyers and sellers, ensuring the existence of a reliable TDR market,<sup>110</sup> and (2) as a market regulator, ensuring equitable pricing for TDRs.<sup>111</sup> These functions respond primarily to concerns of just compensation, but TDR banks are relevant to the general Fifth Amendment analysis, and they are crucial to the prolonged success and existence of TDR programs.<sup>112</sup>

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105. *Id.* at 591.

106. *See, e.g.,* Stevenson, *supra* note 17, at 1347-50 (discussing how the New Jersey legislature created a TDR bank to facilitate a market for the sale and transfer of TDRs in the Pinelands).

107. Stinson, *supra* note 38, at 346.

108. *See infra* Part VI. Of course, there are some constitutional concerns regarding TDR banks as well, but such an analysis is not the focus of this Note. For a detailed discussion of common constitutional concerns regarding TDR banks, see generally Stevenson, *supra* note 17, at 1341-44, 1358-75.

109. Compare Norman Marcus, *Air Rights in New York City: TDR, Zoning Lot Merger and the Well-Considered Plan*, 50 BROOK. L. REV. 867, 890-91 (1984) (discussing the TDR bank used in New York’s South Street Seaport District as a “consortium of commercial banks” rather than a government bank), with Stevenson, *supra* note 17, at 1351 (discussing the TDR bank used in Seattle’s downtown TDR program as one authorized, created, and operated by the government).

110. *See, e.g.,* Stevenson, *supra* note 17, at 1337 (“Valuation and marketability remain the two most significant obstacles facing TDR programs.”).

111. *See, e.g.,* Beetle, *supra* note 28, at 523 (“TDR banks have been established to create a market price for development credits so landowners can be assured their credits have value and that they have realized the equity of their land.”).

112. For an in-depth discussion of how current takings law applies to TDRs and the role TDR banks play in that analysis, see *infra* Parts V, VI.

As previously discussed, without a reliable market in which landowners can sell and transfer TDRs, TDR credits are essentially worthless.<sup>113</sup> TDR banks resolve this concern by ensuring the creation and continued existence of a market where landowners may either sell TDRs to developers or directly to the government,<sup>114</sup> which will later sell the TDRs to developers as opportunities arise.<sup>115</sup> Due to its inherent versatility, the TDR bank can create the type of market the circumstances require, offering assurance that, even if a private transaction falls through the option to sell, the TDR is not lost.<sup>116</sup> Ideally, the ultimate purpose of the TDR bank is to create a trustworthy market from which the government can eventually remove itself.<sup>117</sup>

Part IV.B discusses current just compensation law, but the role of TDR banks to just compensation is worth mentioning here. Given that the police power grants authority to adopt the regulations giving rise to the creation of TDR programs,<sup>118</sup> governments technically need not pay just compensation for restricting certain development rights<sup>119</sup>—of course, that is unless those regulations go “too far” so as to be “unreasonable” and leave the parcel without any sort of economic benefit.<sup>120</sup> The task, therefore, of the TDR bank is not necessarily to secure “just compensation” in a constitutional sense, but rather to secure something that looks and feels like just compensation—a price that is market driven.<sup>121</sup> Whether this be

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113. See *supra* notes 93-98 and accompanying text.

114. See, e.g., Costonis, *supra* note 14, at 590.

115. See, e.g., *id.* at 590-91.

116. See, e.g., Stevenson, *supra* note 17, at 1340.

117. Cf. *id.* at 1350 (discussing how the New Jersey legislature set an expiration for 2005 on its Pinelands TDR bank, at which point it would no longer be permitted to “buy, sell, and guarantee [TDRs]”). This indicates that the New Jersey government expected the TDR bank to develop a market that would eventually be able to sustain itself. See *id.*

118. See *supra* Part I.B.

119. See *supra* notes 57-58 and accompanying text.

120. See *supra* notes 70-74 and accompanying text; see also, e.g., *Fred F. French Investing Co. v. City of New York*, 350 N.E.2d 381, 383 (N.Y. 1976) (holding that a regulation restricting a landowner's property, to the extent that it had little reasonable use or economic value, was a taking).

121. Cf. *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 741-42 (1997) (discussing “private market demand” but not just compensation); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 104 (1978) (“While these rights 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

adopting statutory requirements of minimum or maximum allowable prices for TDR credits,<sup>122</sup> or paying close attention to the going rate of TDRs in private transactions,<sup>123</sup> TDR banks address valuation concerns by mitigating potential or actual losses resulting from the restriction of development rights.<sup>124</sup>

#### IV. A SNAPSHOT OF CURRENT TAKINGS LAW

##### A. *Two Types of Relevant Takings*

American takings law dates back to the teachings of Coke, Blackstone, Locke, and other Enlightenment philosophers.<sup>125</sup> Over the centuries, the Supreme Court has distilled this doctrine down to four analytical tests: (1) physical takings, (2) total regulatory takings, (3) *Penn Central* takings (takings that go “too far”), and (4) land use exaction takings.<sup>126</sup> Although some may argue that these tests are not incredibly helpful because the Court’s decisions are not always entirely consistent,<sup>127</sup> these tests provide the only legal framework upon which governments can assess potential takings issues with any sense of accuracy.<sup>128</sup> Ultimately, the physical takings and land use exactions tests are inapplicable to the constitutional

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into account in considering the impact of regulation.”); Costonis, *supra* note 14, at 591 (“[T]he Chicago Plan[, which is built on the use of a TDR bank,] is designed to compensate the landmark owner for the actual losses that he suffers.”).

122. See, e.g., N.J. STAT. ANN. §§ 13:18A-34(g), -39 (West 2015).

123. See Beetle, *supra* note 28, at 547.

124. Cf., e.g., *Penn Central*, 438 U.S. at 137 (discussing TDRs but the logic extends easily to TDR banks); Stinson, *supra* note 38, at 356 (discussing the possible formation of a corporation to sell TDRs from sending districts as a way to mitigate inequity).

125. Edward J. Sullivan, *A Brief History of the Takings Clause*, WASH. U. ST. LOUIS: LAND USE L., [http://landuselaw.wustl.edu/articles/brief\\_hx\\_taking.htm](http://landuselaw.wustl.edu/articles/brief_hx_taking.htm) [<https://perma.cc/W2G7-5QWP>].

126. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 548 (2005).

127. See, e.g., Rachel A. Rubin, Note, *Taking the Courts: A Brief History of Takings Jurisprudence and the Relationship Between State, Federal, and the United States Supreme Courts*, 35 HASTINGS CONST. L.Q. 897, 897-98 (2008) (discussing the criticism that “takings law today is ... a confused muddle, intractable, [and] an ambiguous area in which the United States Supreme Court complicates its own jurisprudence with each new decision” (footnotes omitted)).

128. See *Lingle*, 544 U.S. at 548 (holding that “a plaintiff seeking to challenge a government regulation as an uncompensated taking of private property” only has four recognized options).

analysis of TDRs.<sup>129</sup> As discussed in more detail below, the total regulatory takings and *Penn Central* takings analyses bear more relevance to TDRs in this analytical context.<sup>130</sup> The following Part briefly outlines these two tests to provide context for a more complete analysis of their relation to TDR programs.

### 1. Total Regulatory Takings

The Supreme Court has held that “when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, ... he has suffered a taking.”<sup>131</sup> In *Lucas*, the plaintiff purchased two residential lots to construct single-family homes.<sup>132</sup> However, two years after the purchase South Carolina passed a law “which had the direct effect of barring [Lucas] from erecting any permanent habitable structures on his two parcels.”<sup>133</sup> On remand from the Supreme Court, the Supreme Court of South Carolina held that “Lucas ha[d] suffered a temporary taking deserving of compensation.”<sup>134</sup>

Central to this test is that a government regulation must deprive the landowner’s property of *all* economically beneficial use,<sup>135</sup> because a state “may, consistent with the Takings Clause, affect property values by regulation without incurring an obligation to compensate” through use of the state’s police power.<sup>136</sup> A total

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129. The physical takings and land use exaction analyses are inapplicable here as the takings TDRs are designed to compensate do not correspond to those tests. *Cf., e.g.,* *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 827, 841-42 (1987) (finding a taking where the California Coastal Commission conditioned permission to rebuild plaintiffs’ house on the “transfer to the public of an easement across [plaintiffs’] beachfront property” because the condition failed to further the end advanced as its justification); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982) (finding a physical taking where defendant had installed physical cables on plaintiff’s building).

130. *See infra* Part V.A.

131. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

132. *Id.* at 1006-07.

133. *Id.* at 1007.

134. *Lucas v. S.C. Coastal Council*, 424 S.E.2d 484, 486 (S.C. 1992). The Supreme Court of South Carolina found a “temporary taking” because it ordered that Lucas be given a special permit for future construction. *Id.*

135. *See Lucas*, 505 U.S. at 1019.

136. *Id.* at 1022-23. For a discussion of the definition of the police power, see *supra* Part I.B.

regulatory taking, then, occurs only when such regulations leave a landowner's property "economically idle."<sup>137</sup>

## 2. *Penn Central Takings: Regulations That Go "Too Far"*

The *Penn Central* analysis traverses a multi-factor, fact-intensive inquiry.<sup>138</sup> These factors include "[t]he economic impact of the regulation on the claimant[,] ... the extent to which the regulation has interfered with distinct investment-backed expectations[,] ... [and] the character of the governmental action."<sup>139</sup> To date, the Supreme Court has been unable to develop any set formula for determining which factors carry the most weight.<sup>140</sup> Consequently, it is unclear at which point the scale tips in favor of, or against, finding a taking.<sup>141</sup> Ultimately, "[t]he balance of these factors rests in judicial discretion."<sup>142</sup> This multi-factor test is built on the foundation of the Supreme Court's "too far" test in *Pennsylvania Coal Co. v. Mahon*.<sup>143</sup> The Court now applies the *Penn Central* factors to determine whether a regulation goes "too far."<sup>144</sup>

### B. *Just Compensation*

The Supreme Court has defined "just compensation" as "fair market value."<sup>145</sup> The Court has further defined "fair market value" as "what a willing buyer would pay in cash to a willing seller."<sup>146</sup> The dilemma here is how to determine the formula for calculating fair market value. Some argue this should be a subjective standard, taking into consideration personal and intrinsic valuations of property, while others argue an objective standard would be more

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137. *Lucas*, 505 U.S. at 1019.

138. *See Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123-24 (1978).

139. *Id.* at 124.

140. *See id.*

141. *See id.*

142. Rubin, *supra* note 127, at 908.

143. Juergensmeyer et al., *supra* note 12, at 459-60.

144. *See id.*

145. *United States v. 50 Acres of Land*, 469 U.S. 24, 25 (1984). The Court also uses the phrase "market value," but the meaning is the same. *See United States v. Miller*, 317 U.S. 369, 374 (1943) (using the phrase "market value" instead of "fair market value").

146. *Miller*, 317 U.S. at 374.

appropriate.<sup>147</sup> The Supreme Court undoubtedly agrees with the latter, as subjective factors tend to overcomplicate the calculations.<sup>148</sup> Although a subjective calculation may appeal more to individuals with increased levels of emotional attachment to their property, in the interest of establishing an administrable test, the focus must remain on objective valuation factors.<sup>149</sup> Consequently, market factors such as supply, demand, and the state of local economies objectively determine the amount constituting just compensation.

## V. TAKINGS LAW APPLIED TO TDRS

### A. *The Two Relevant Tests' Relation to TDRs*

As previously established, not all takings doctrines are applicable in the context of TDRs.<sup>150</sup> Neither the physical takings nor land use exaction analyses are helpful here.<sup>151</sup> The total regulatory takings and *Penn Central* takings tests, however, bear some relevance.

The Supreme Court has struggled to delineate its takings doctrines.<sup>152</sup> This is particularly true when distinguishing between a total regulatory taking and a *Penn Central* taking, as one might argue that a total regulatory taking is simply a regulation that has

147. Compare, e.g., Richard Craswell, *Instrumental Theories of Compensation: A Survey*, 40 SAN DIEGO L. REV. 1135, 1149 (2003) (discussing proposals that compensation be set "at a level that would make [takees] subjectively indifferent to whether the [taking] took place or not"), with Katrina Miriam Wyman, *The Measure of Just Compensation*, 41 U.C. DAVIS L. REV. 239, 244 (2007) (arguing that "takings compensation should aim to leave takees objectively, rather than subjectively, indifferent to takings").

148. See, e.g., *50 Acres of Land*, 469 U.S. at 35-36 (holding that "subjective elements ... would enhance the risk of error and prejudice," and that such elements would create "sophisticated and abstruse formulas ... that are too elusive" for juries (footnotes omitted) (quoting *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5, 20 (1949))).

149. See *id.*

150. See *supra* note 129 and accompanying text.

151. See *supra* note 129 and accompanying text.

152. See, e.g., Rubin, *supra* note 127, at 897. ("Regulatory takings law today is criticized as a confused muddle, intractable, as an ambiguous area in which the United States Supreme Court complicates its own jurisprudence with each new decision, and as an area in which the Court fails to 'revisit its regulatory takings precedent in order to clarify the current standard.'" (footnotes omitted) (quoting Keri Ann Kilcommons, Note, *A Survey of Supreme Court Takings Jurisprudence: The Impact of Del Monte Dunes on Nollan, Dolan, Agins, and Lucas*, 9 N.Y.U. ENVTL. L.J. 532, 533 (2001))).

gone “too far” under the *Penn Central* analysis.<sup>153</sup> For this reason, the analysis under both approaches may seem quite similar, but they differ in the degree of the landowner’s harm. Under a total regulatory taking, the regulation will have “destroy[ed] all but a bare residue of its economic value.”<sup>154</sup> The multi-factor analysis under *Penn Central*, however, will amount to something less, though the Court has not identified exactly what this might be.<sup>155</sup> *Fred F. French Investing Co. v. City of New York* and *Penn Central* are useful in illustrating the relationship between these takings tests and TDR programs.

In *Fred F. French Investing Co.*, the City of New York precluded a landowner from developing land previously used as a park, requiring him instead to maintain the land for public use.<sup>156</sup> In an effort to mitigate the harms and losses resulting from this restriction, the city granted the landowner TDRs “usable elsewhere.”<sup>157</sup> Despite the existence of a TDR program,<sup>158</sup> the Court of Appeals of New York held that the restriction “render[ed] the property unsuitable for any reasonable income productive or other private use for which it [was] adapted and thus destroy[ed] its economic value.”<sup>159</sup> This case proves the mere existence of a TDR program alone is insufficient to avoid successful constitutional challenges.<sup>160</sup> If a court considers preservation regulations an extreme deprivation, perhaps they are unsalvageable by a TDR program.<sup>161</sup> Of course, this would depend on the structure and efficiency of the TDR program.<sup>162</sup>

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153. Compare *supra* Part IV.A.1 (discussing total regulatory takings), with *supra* Part IV.A.2 (discussing *Penn Central* takings).

154. *Fred F. French Investing Co. v. City of New York*, 350 N.E.2d 381, 383 (N.Y. 1976).

155. The Supreme Court “has been unable to develop any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.” *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

156. *Fred F. French Investing Co.*, 350 N.E.2d at 383-84.

157. *Id.* at 382.

158. It may not have been a good one, however. In fact, Professor Costonis was highly critical of this breed of TDR program. Costonis, *supra* note 14, at 586-89. Professor Costonis drafted his Chicago Plan to remedy the problems with this New York program. *Id.* at 589-91.

159. *Fred F. French Investing Co.*, 350 N.E.2d at 387.

160. *See id.* at 387-88.

161. *Cf. id.*

162. The TDRs, in this case,

were ... made transferable to another section of mid-Manhattan in the city, but not to any particular parcel or place. There was thus created floating develop-

Perhaps the court would not have found a total regulatory taking here had the TDRs been readily sellable or transferable.<sup>163</sup> Although the Supreme Court did not decide this case, it is indicative of how the Court *might* deal with a total regulatory taking case involving a TDR program.

As discussed in Part IV, TDR programs can certainly be relevant to the *Penn Central* multi-factor takings analysis as well. In *Penn Central*, New York City designated Penn Central's Grand Central Terminal as a landmark.<sup>164</sup> This hindered Penn Central's plan to build an office building above the Terminal.<sup>165</sup> Although Penn Central would still be able to operate the Terminal at a profit, the city also issued TDR credits to mitigate possible losses.<sup>166</sup> Even though the Court did not find a taking in this case, it did consider New York's TDR program to some extent.<sup>167</sup> Consequently, TDRs are relevant in some way to the takings analysis in the context of total regulatory and *Penn Central* takings, but the Court has declined to definitively clarify this relationship.<sup>168</sup>

### *B. Ambiguity in the Supreme Court*

Despite having multiple opportunities to definitively rule TDR programs as unconstitutional or constitutional, the Supreme Court has declined to do so.<sup>169</sup> This would not be so problematic had the Court never entertained a case concerning TDR programs, but as the case law now stands, the Court has left many questions unanswered. For example, do TDRs belong to the takings or just compensation side of the Fifth Amendment analysis? To the extent

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ment rights, utterly unusable until they could be attached to some accommodating real property, available by happenstance of prior ownership, or by grant, purchase, or devise, and subject to the contingent approvals of administrative agencies.

*Id.*

163. *See id.*

164. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 115-16 (1978).

165. *Id.* at 116.

166. *Id.* at 136-37.

167. *Id.* at 137-38.

168. *See id.*

169. *See, e.g., Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 728 (1997); *Penn Central*, 438 U.S. at 137-38.



TDRs are subject to the Takings Clause at all, this Note argues the answer to this question is that TDRs belong to both.<sup>170</sup> The result is an ambiguous relationship between TDR programs and the Takings Clause.<sup>171</sup> The following discussion addresses the Supreme Court's approach to this analysis—in relation to takings and just compensation—as it *currently stands*, and not how it ideally should be.

To be fair, it is understandable why the Court and many legal commentators disagree due to the hybrid character of TDRs.<sup>172</sup> Depending on the eye of the beholder, a TDR may seem more like a use of a property right,<sup>173</sup> or it may seem more like a form of compensation.<sup>174</sup> Once again, as this Note focuses primarily on what the current case law holds, the Justices' most recent arguments in *Penn Central* and *Suitum* are the primary sources of analysis. Portions of the Justices' arguments are, of course, dicta, but they are informative, nonetheless.<sup>175</sup>

As established above, in *Penn Central* the Court did not find a taking for which New York must pay just compensation.<sup>176</sup> The majority opinion stated that “the New York City law ... permit[ted] Penn Central not only to profit from the Terminal but also to obtain a ‘reasonable return’ on its investment.”<sup>177</sup> Furthermore, the Court found that Penn Central “exaggerate[d] the effect of the law on their ability to make use of the air rights above the Terminal.”<sup>178</sup> The restriction did not prohibit Penn Central from “occupying *any* portion of the airspace above the Terminal,” and “it [was] not literally accurate to say that they ha[d] been denied *all* use of even those pre-existing air rights.”<sup>179</sup> The Court seems to have treated

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170. See *infra* Part V.C.

171. See *infra* Part V.C.

172. “[T]he pleadings raise issues about the significance of the TDR’s [sic] both to the claim that a taking has occurred and to the constitutional requirement of just compensation.” *Suitum*, 520 U.S. at 728; see also, e.g., *supra* note 9.

173. E.g., Lee, *supra* note 9, at 701-02.

174. E.g., Littlewood, *supra* note 9, at 231-32.

175. Although dicta may not be controlling precedent, it is insightful as to how the Court may rule in the future. See Foster Calhoun Johnson, *Judicial Magic: The Use of Dicta as Equitable Remedy*, 46 U.S.F. L. REV. 883, 897 n.78 (2012) (explaining that legal scholars view dicta as a predictive guide to courts and litigators regarding future rulings in similar cases).

176. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 138 (1978).

177. *Id.* at 136.

178. *Id.*

179. *Id.* at 136-37.

TDRs as a legitimate and vested property right, relevant in determining whether a taking had occurred: “While 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 ... *are to be taken into account in considering the impact of regulation.*”<sup>180</sup> Justice Rehnquist disagreed, arguing that a taking had occurred, and that the Court should have remanded to determine whether the TDRs’ value equated to just compensation.<sup>181</sup>

When presented with the opportunity to reevaluate the constitutionality of TDRs in *Suitum*, the Court declined to comment.<sup>182</sup> In fact, the only mention of TDRs’ relevancy to the Takings Clause was in Justice Scalia’s concurrence.<sup>183</sup> Adopting Justice Rehnquist’s view, Justice Scalia argued that “[p]utting TDRs on the taking rather than the just-compensation side of the equation ... is a clever, albeit transparent, device that seeks to take advantage of ... our Takings-Clause jurisprudence.”<sup>184</sup> Justice Scalia’s main concern was that applying TDRs only to the takings side of the analysis would allow the government to effect a taking and “get away with paying much less.”<sup>185</sup> While it might be easy to say Justice Rehnquist’s and Justice Scalia’s opinions are irrelevant because they were in the minority, it is important to remember that their opinions may one day become, at least in part, the majority view.<sup>186</sup> Furthermore, because neither the majority in *Penn Central* nor the majority in *Suitum* explicitly stated that TDRs are relevant in determining whether a taking has occurred in the first place, one cannot rest so

180. *See id.* at 137 (emphasis added) (citing *Goldbatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962)).

181. *Id.* at 143, 152 (Rehnquist, J., dissenting).

182. *See Suitum v. Tahoe Reg’l Planning Agency*, 520 U.S. 725, 728 (1997).

183. *See generally id.* at 745-50 (Scalia, J., concurring).

184. *Id.* at 747-48.

185. *Id.* at 748.

186. As Justice Ginsburg wrote:

On occasion—not more than four times per term I would estimate—a dissent will be so persuasive that it attracts the votes necessary to become the opinion of the Court. I had the heady experience once of writing a dissent for myself and just one other Justice; in time, it became the opinion of the Court from which only three of my colleagues dissented.

Ruth Bader Ginsburg, Lecture, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 4 (2010).

assured that this is settled law either.<sup>187</sup> Rather, the result is this ambiguous reality: TDRs may be relevant to finding a taking, the calculation of just compensation, or both.<sup>188</sup> The “clearest” way through this conundrum is to take advantage of TDRs’ hybrid nature and to exploit the Court’s ambiguity. That is, take the arguments and concerns from both the majority and the minority opinions in *Penn Central* and *Suitum* to create a “hybrid test” for a hybrid tool.<sup>189</sup>

### C. *Exploiting the Ambiguity*

Perhaps the most challenging question here is *why* the Supreme Court has yet to offer clarity to the constitutionality of TDR programs. The Court’s critics may argue that the Justices are just being inattentive and are failing to fulfill their duties.<sup>190</sup> That proposition seems more like a convenient argument to avoid confronting reality.<sup>191</sup> It seems much more consistent with reality that the Court repeatedly approaches this issue with an “if it ain’t broke, don’t fix it” mentality. If TDR programs efficiently and effectively solve zoning and land use problems when implemented correctly, then it logically follows that there is no need to issue an official opinion. Furthermore, if the Court’s “muddled” holdings in general takings law are any indication, perhaps legal practitioners and scholars should not want a “clarifying” opinion on this matter.<sup>192</sup>

It is important to avoid conflating this concept with justiciability doctrines such as “ripeness” and “standing.” The “ripeness” doctrine

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187. See *supra* Part V.A.

188. See *Suitum*, 520 U.S. at 745-50 (Scalia, J., concurring); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 137 (1978); *id.* at 141-52 (Rehnquist, J., dissenting).

189. Professor Malone briefly hinted at this possibility in 1984. Linda A. Malone, *The Future of Transferable Development Rights in the Supreme Court*, 73 KY. L.J. 759, 790 (1984).

190. See, e.g., Adam Liptak, *Clarence Thomas, a Supreme Court Justice of Few Words, Some Not His Own*, N.Y. TIMES (Aug. 27, 2015), <http://www.nytimes.com/2015/08/28/us/justice-clarence-thomas-rulings-studies.html> [<https://perma.cc/8AVD-UY8B>].

191. Cf. Tamara Tabo, *A Supreme Court Justice Who Does His Job Well, But Bores The New York Times While Doing It*, ABOVE LAW (Aug. 31, 2015, 10:47 AM), <http://abovethelaw.com/2015/08/a-supreme-court-justice-who-does-his-job-well-but-bores-the-new-york-times-while-doing-it/> [<https://perma.cc/M26T-FKWW>] (criticizing Liptak for “lack[ing] substance, offering up only arguments, half-arguments, and snark masquerading as arguments to the extent necessary to help his readers feel justified in patting themselves on their backs”).

192. See *supra* notes 127, 152 and accompanying text.

aims at “separat[ing] matters that are premature for review, because the injury is speculative and never may occur, from those cases that are appropriate for federal court action.”<sup>193</sup> In the context of regulatory takings—and, by extension, TDRs—a landowner’s claim is ripe from the moment the government adopts the regulations.<sup>194</sup> Importantly, however, this is an “uphill battle”<sup>195</sup> because “it is difficult to demonstrate that ‘mere enactment’ of a piece of legislation ‘deprived [the owner] of economically viable use of [his] property.’”<sup>196</sup> Nonetheless, by adopting regulations restricting development rights and corresponding TDR programs, any affected landowners’ claims are ripe for judicial review.<sup>197</sup>

“Standing,” easily confused with “ripeness” at times,<sup>198</sup> requires “that a plaintiff allege (1) an injury that is (2) ‘fairly traceable to the defendant’s allegedly unlawful conduct’ and that is (3) ‘likely to be redressed by the requested relief.’”<sup>199</sup> A landowner whose development rights the government restricted has certainly suffered an injury.<sup>200</sup> That injury is traceable to the government, as the government adopted the regulation causing the restriction in the first place.<sup>201</sup> Finally, a favorable ruling would undoubtedly redress the injury, as the landowner would be able to utilize her development rights as originally planned.<sup>202</sup> Clearly, landowners whose property is subject to preservation regulations have standing, otherwise *Penn Central*, *Suitum*, and any other cases concerning TDRs never would have reached litigation.

There must be an alternative explanation, then, as to why the Supreme Court has refused to clarify this ambiguity. Absent a ruling to the contrary, the logical conclusion is that current law

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193. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 107-08 (5th ed. 2015) (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967)).

194. *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 736 n.10 (1997) (citing *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987)).

195. *Id.* (quoting *DeBenedictis*, 480 U.S. at 495).

196. *Id.* (alterations in original) (quoting *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 (1981)).

197. *See id.*

198. *See* CHERMERINSKY, *supra* note 193, at 107-09.

199. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 590 (1992) (Blackmun, J., dissenting) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

200. *See, e.g., Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 115-17 (1978).

201. *See, e.g., id.*

202. *See, e.g., id.*

already addresses this issue to a satisfactory extent, and there is no need for further clarification.<sup>203</sup> The fact that there is compelling evidence that Congress endorses the TDR as a viable land use tool is conducive to this conclusion.<sup>204</sup>

As previously established, preservation regulations and TDR programs are legitimately adoptable and enforceable under the police power.<sup>205</sup> Furthermore, the government need not necessarily satisfy the constitutional requirement for just compensation when utilizing that police power.<sup>206</sup> It follows, then, that a TDR program, implemented legitimately under the police power, does not inherently rise to the level of a taking,<sup>207</sup> nor is just compensation a required operational cost.<sup>208</sup> Practically speaking, however, a government would be setting itself up for endless litigation were it to arbitrarily and capriciously restrict development rights without doing enough, or anything at all, to mitigate landowners' potential losses.<sup>209</sup> Therefore, any government entity implementing preservation regulations and a corresponding TDR program must operate with the mindset that it is effecting a "taking," even though this may not necessarily be the case.<sup>210</sup> By doing so, efficiently operated TDR programs will prevent regulations from rising to the level of total regulatory takings,<sup>211</sup> and will "tip the scales" of the *Penn*

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203. *Cf. Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 728 (1997) ("While the pleadings raise issues about the significance of the TDR's both to the claim that a taking has occurred and to the constitutional requirement of just compensation, *we have no occasion to decide, and we do not decide*, whether or not these TDR's may be considered in deciding the issue whether there has been a taking in this case, as opposed to the issue whether just compensation has been afforded for such a taking." (emphasis added)).

204. *See Stevenson*, *supra* note 17, at 1347-48 (noting that Congress declared the New Jersey Pinelands a national interest, giving New Jersey detailed instructions regarding preservation, including the establishment of a TDR bank).

205. *See supra* Part I.B.

206. *See supra* notes 56-58 and accompanying text.

207. *See supra* notes 64-74 and accompanying text.

208. *See supra* note 58 and accompanying text.

209. This would yield results similar to those in *Fred F. French Investing Co. v. City of New York*. *See generally* 350 N.E.2d 381 (N.Y. 1976).

210. The phrase "operate with the mindset" is meant to communicate the idea that the government must essentially "pretend" (though it is certainly not make believe) that its actions are the equivalent of takings. With this mindset, the government will be more aware of constitutional concerns of what constitutes a taking, and, consequently, will be more mindful of seeking something that resembles just compensation.

211. *See generally* Lee, *supra* note 9 (discussing how TDRs salvage regulations that would otherwise constitute takings).

*Central* multi-factor test in favor of finding that no taking has occurred.<sup>212</sup> Simultaneously, properly implemented TDR programs will offer a market-driven substitute for just compensation, thereby avoiding further constitutional scrutiny.<sup>213</sup> Crucial to ensuring this market-driven alternative is the creation and proper maintenance of a TDR bank.<sup>214</sup>

## VI. HOW TO KEEP THE MAGIC ROLLING: TDR BANKS

TDR banks are vital to the continued adoption and longevity of TDR programs.<sup>215</sup> Given recent scrutiny in *Suitum*, it is quite possible that if another case questioning TDRs' constitutionality rose to Supreme Court review, TDR programs would be subject to increased scrutiny as to whether they constitute just compensation for a taking.<sup>216</sup> In light of this possibility, the best chance of TDR programs surviving a barrage of constitutional challenges is to ensure TDRs have a value that bears close resemblance to just compensation.<sup>217</sup> TDR banks, when used properly, accomplish this task.<sup>218</sup>

Intuitively speaking, a landowner will only bring suit against the government when she feels as though the government has unjustly infringed upon her rights.<sup>219</sup> Following this common-sense logic, if the government prevents the landowner from feeling abused, she will not file a complaint.<sup>220</sup> In order to prevent those feelings, the

212. See generally *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123-38 (1978) (discussing a TDR program that survived the multi-factor analysis).

213. See Aoki et al., *supra* note 50, at 315.

214. *Cf. id.* at 316 ("TDR banks are the most obvious way to provide the logistical and price support required to guarantee value.").

215. See Beetle, *supra* note 28, at 516-17 ("[M]ost successful TDR programs have established [TDR] banks.").

216. See *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 745-50 (1997) (Scalia, J., concurring); see also *supra* note 186 and accompanying text.

217. This is due to the fact that the most significant problem TDR programs face is valuation and marketability, which are both problems TDR banks directly address and resolve. See Stevenson, *supra* note 17, at 1330, 1341-44.

218. See Aoki et al., *supra* note 50, at 315.

219. *Cf. Note, The Unconstitutionality of Transferable Development Rights, supra* note 47, at 1121 ("TDR is likely to be challenged by landmark owners *unless* the market for development rights accurately reflects the value of their condemned development potential." (emphasis added)).

220. See *id.*

government must gain the landowner's trust.<sup>221</sup> The TDR bank gains the landowner's trust by establishing a reliable market, ensuring equitable pricing, and by resolving the would-be crippling timing issue of not being able to find a buyer for her TDRs.<sup>222</sup>

Ultimately, TDR banks ensure that efficiently run TDR programs stay under the radar of the Supreme Court's judicial purview. This is likely a primary reason why there have been so few cases at the Supreme Court level in the first place. The TDR bank encapsulates a TDR program, aiding it to cut straight through the Fifth Amendment takings analysis without hitting any substantial roadblocks or obstacles.

Consider, by analogy, Odysseus's feat of firing an arrow through twelve axe handles.<sup>223</sup> In order to accomplish this task, Odysseus needed a proper bow and arrow.<sup>224</sup> Furthermore, the arrow must have had a straight shaft, a sharpened point, and perfectly placed feathers to guide the arrow.<sup>225</sup> In this matter, the police power is the bow, the preservation regulation is the shaft, the TDR credit is the arrow's point, and the TDR bank is the arrow's feathers. The axes are, of course, the Fifth Amendment Takings Clause. When a government entity adopts legitimate preservation regulations under the police power, it may then adopt a TDR program, or fire the arrow. The TDR credits are the arrow's point in that they fine-tune the preservation regulations so as to pass swiftly through the axe handles.<sup>226</sup>

Imagine the result had Odysseus fired an arrow with no feathers. Undoubtedly, it would have fallen short of its target. Although it is highly unlikely, perhaps there is a slight possibility that the arrow would pass all the way through.<sup>227</sup> Similarly, without a TDR bank, it is possible a TDR program will succeed to some degree and avoid

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221. Stinson, *supra* note 38, at 346-47.

222. See Stevenson, *supra* note 17, at 1341-44.

223. HOMER, ODYSSEY 315-41 (A.T. Murray trans., Harvard Univ. Press 2004).

224. See *id.*

225. See *id.*

226. TDR credits effectively mitigate the impact of the preservation regulations. Penn. Cent. Transp. Co. v. New York City, 438 U.S. 104, 137 (1978) (“[TDRs] undoubtedly mitigate whatever financial burdens the law has imposed ... and, for that reason, are to be taken into account in considering the impact of regulation.” (citing Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962))).

227. This, however, did not happen. HOMER, *supra* note 223, at 321-41.

constitutional invalidation.<sup>228</sup> However, with a TDR bank in place TDR programs have an exponentially higher chance of surviving Fifth Amendment scrutiny unscathed.<sup>229</sup> This is true especially in today's political climate, in which there seems to be increased criticism and distrust of governmental action, particularly where personal rights are at stake.<sup>230</sup> In order to survive constitutional scrutiny under the Takings Clause, each jurisdiction currently using, or planning to use, a TDR program should also implement a TDR bank.<sup>231</sup>

### CONCLUSION

Over the past fifty years, TDR programs have become one of the most efficient land use tools.<sup>232</sup> Through proper implementation and operation of these programs, state and local governments can preserve public goods—landmarks, open space, low-income housing, etc.—while maximizing the efficiency and concentration of development potential.<sup>233</sup> Critical to the continued adoption and prolonged success of these programs, however, is careful and calculated avoidance of potential constitutional issues, for “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power.”<sup>234</sup> If governments do

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228. See, e.g., Costonis, *supra* note 14, at 585-89 (describing the relative success of a former TDR program in New York that did not make use of a TDR bank, and that program's corresponding issues).

229. See *supra* notes 216-18 and accompanying text; cf., e.g., Beetle, *supra* note 28, at 516-17 (“[M]ost successful TDR programs have established [TDR] banks.”).

230. See, e.g., Marc Hetherington & Thomas Rudolph, *Why Don't Americans Trust the Government? Because the Other Party Is in Power*, WASH. POST (Jan. 30, 2014), <https://www.washingtonpost.com/news/monkey-cage/wp/2014/01/30/why-dont-americans-trust-the-government-because-the-other-party-is-in-power/> [<https://perma.cc/G7E2-R6TN>].

231. There are some common legal and financial concerns relating to TDR banks, but they are easily surmountable. For a detailed discussion of these common concerns, see Stevenson, *supra* note 17, at 1358-75.

232. See, e.g., Juergensmeyer et al., *supra* note 12, at 444; Beetle, *supra* note 28, at 558.

233. See, e.g., Stevenson, *supra* note 17, at 1344-47 (discussing the success of New York's TDR program in the South Street Seaport Historic District in “preserv[ing] several blocks of small, two-hundred-year-old buildings”).

234. Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).



not construct TDR programs correctly, they may begin to rise to the level of a taking for which just compensation must be paid.<sup>235</sup> In that case, it is unlikely many governments would be able to fund just compensation for each “taking” resulting from preservation regulations.<sup>236</sup>

Although the Supreme Court has yet to rule a TDR program unconstitutional as a taking without just compensation, it only takes one bad apple to spoil the bunch.<sup>237</sup> To avoid these constitutional issues, it is essential for each jurisdiction currently utilizing or considering the implementation of a TDR program to operate under the assumption that TDRs are relevant to both the initial takings and just compensation analyses.<sup>238</sup> Critical to ensuring the equivalent of just compensation is the authorization and efficient operation of a TDR bank.<sup>239</sup>

As previously discussed, TDR banks resolve most, if not all, constitutional concerns and keep TDR programs “flying under the radar” of the Supreme Court’s judicial purview.<sup>240</sup> TDR banks create a stable and reliable market in which landowners and developers can sell, transfer, and buy TDRs.<sup>241</sup> Furthermore, if implemented correctly, TDR banks help establish a market-driven price for TDRs, which is encouraging to skeptical potential market participants.<sup>242</sup>

The ambiguity in the Supreme Court’s doctrine relating to the constitutionality of TDRs and TDR programs is by no means a death sentence. To the contrary, proactive government entities can use this ambiguity to their advantage in ensuring the continued use and adoption of this useful land use tool. The TDR has proven to be

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235. *Cf. id.* (explaining that government power must have its limits).

236. *See id.*

237. Supreme Court rulings, when interpreting matters of constitutional law, have precedent and controlling effect on all other courts in the United States. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803) (establishing the doctrine of judicial review). One Supreme Court ruling against the legitimacy of TDR programs could potentially do away with TDRs altogether, unless overturned by the Court at a later date. *Cf., e.g., Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992) (overturning the “rigid trimester framework of *Roe v. Wade*” and adopting an undue burden test in determining the constitutionality of abortions).

238. *See supra* Part V.C.

239. *See supra* Part VI.

240. *See supra* Parts III and VI.

241. *See supra* notes 114-17 and accompanying text.

242. *See supra* notes 121-24 and accompanying text.

an incredibly efficient tool—one that allows for simultaneous preservation of public goods and advancement of development interests. Crucial to the continued success of TDR programs is an efficiently operated TDR bank. In order to exploit the Supreme Court’s doctrinal ambiguity and insulate TDRs from further constitutional skepticism, governments should include TDR banks in the fundamental blueprints of each TDR program.

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