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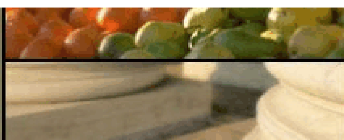

University of Arkansas
System Division of Agriculture
NatAgLaw@uark.edu • (479) 575-7646

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The Future of Transferable Development Rights in the Supreme Court

by

Linda A. Malone

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The Future of Transferable Development Rights in the Supreme Court

By Linda A. Malone*

Introduction

Despite growing utilization of transferable development rights (TDRs) to insulate land use measures from taking challenges,[1] the Supreme Court has yet to address the issue of whether TDRs can salvage government regulation that would otherwise constitute a taking of private property without just compensation. The saving grace of TDRs is that they may permit an owner of property that has been restrictively zoned to recoup any economic loss on the restricted property by selling the property's severed development rights to receiving properties authorized for increased density of development.[2] In theory at least, the use of

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* Assistant Professor of Law, University of Arkansas Law School, Fayetteville. B.A. 1975, Vassar College; J.D. 1978, Duke Law School; LL.M. 1984, University of Illinois College of Law.

[1] *See* Duncan, *Toward a Theory of Broad-based Planning for the Preservation of Agricultural Land*, 24 Nat. Resources J. 61, 121-22 (1984). For an overview of farmland preservation techniques, including TDRs, see National Agricultural Lands Study, Final Report (1981). *See generally* Keene, *A Review of Governmental Policies and Techniques for Keeping Farmers Farming*, 19 Nat. Resources J. 119 (1979); Myers, *Farmland Preservation in a Democratic Society: Looking to the Future*, 1981-82 Agric. L.J. 605.

For a thorough discussion of the taking clause, see F. Bosselman, D. Callies & J. Banta, The Taking Issue (1973).

[2] For an analysis of the mechanics of various TDR schemes, see Merriam, *Making TDR Work*, 56 N.C.L. Rev. 77 (1978); Torres, *Helping Farmers and Saving Farmland*, 37 Okla. L. Rev. 31, 38-45 (1984).

A preservation technique related to the transfer of development rights is the technique of purchase of development rights. In such a program the development rights are purchased by a local planning agency to hold in abeyance indefinitely (in what has been referred to as "land banking") or until a decision is made to release them for further development. E. Roberts, The Law and the Preservation of Agricultural

TDRs precludes taking clause objections. Restricted landowners cannot claim that the restrictive zoning has deprived them of the economic value of the restricted property, since any economic loss can be compensated through sale of the TDRs. In this way, TDRs have proven to be useful as a tool for preservation of properties—such as farmland, landmarks, historic sites and open space—which are threatened by approaching development.

The growing popularity of using TDRs as a farmland and historic site preservation device makes it quite likely that the Supreme Court soon will find it necessary to face the constitutional issues that TDRs pose. A likely factual scenario for the Court would be as follows: A landowner owns two or more contiguous parcels of property in an area of growing development, and the land has been zoned for commercial or residential use. One of the parcels of property is undeveloped—that is, the property has no commercial development and little or no residential development—and, in that state of undevelopment, the property provides agricultural, aesthetic or ecological benefit to the rapidly developing community. The county zoning board then rezones the landowner's property so that the undeveloped parcel must remain undeveloped, but the landowner's other contiguous parcels of property are to retain the same density of development as under the prior zoning ordinances. To compensate for the restrictions on the undeveloped parcel, the county zoning ordinances provide that the parcel's unused development rights may be transferred: (a) to the owner's other contiguous and noncontiguous property or (b) to other designated, contiguous or noncontiguous lots under different ownership. The landowner subsequently submits a development plan for the

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LAND 76-77 (1982). Ironically, in light of recent Supreme Court opinions which reflect unfavorably on the future of TDRs, the Supreme Court decided a case this term which substantiates claims of a public purpose justifying the use of eminent domain for purchase of development rights. In Hawaii Housing Auth. v. Midkiff, 104 S. Ct. 2321 (1984), the Court found a valid public use for state condemnation of private land in order to reduce concentration of ownership. The Court held that, where the exercise of the eminent domain power is rationally related to a conceivable public purpose, a compensated taking will not be prohibited by the public use clause of the fifth amendment. *Id.* at 2330.

For other legal challenges to TDRs in an agricultural context, see Appeal of John MacEachran, 438 A.2d 302 (N.H. 1981); Louthan v. King County, 617 P.2d 977 (Wash. 1980). *See generally* Peterson & McCarthy, *Farmland Preservation by Purchase of Development Rights: The Long Island Experiment*, 26 DE PAUL L. REV. 447 (1978).

undeveloped parcel to the zoning board, but the board disapproves the plan in accordance with the newly passed ordinances. The landowner then files suit in state court claiming damages for inverse condemnation and seeks a declaratory judgment that the ordinances have effectuated a taking of property without just compensation.

Assuming for purposes of the hypothetical that the restrictions imposed on the undeveloped parcel deprive it of all or almost all of its economic value,[3] a court faced with a challenge to the validity of the ordinance could take any one of several approaches. First, the court could compare the value of *all* of the landowner's contiguous property to the value of the TDRs and conclude that the restrictions on the one parcel do not constitute a taking because they do not sufficiently deprive the landowner of the economic return on the property as a whole. In reaching such a conclusion, the court might even take into consideration the owner's noncontiguous property on which the TDRs might be used. Secondly, the court could focus only upon the economic detriment to the restricted parcel, and conclude that the conferral of the TDRs salvages the constitutionality of the ordinance from a taking challenge even if the ordinance would otherwise be a taking of the restricted parcel. Alternatively, again focusing only on the restricted parcel, the court could find, without considering the value of the TDRs, that there had been a taking. The court then would have to determine whether the TDRs satisfy the constitutional requisites for just compensation.

The foregoing hypothetical would raise two as yet unresolved issues of fundamental importance to every TDR scheme: (1) What is the appropriate unit of property in relation to which a taking is to be evaluated? and (2) Is the value of TDRs relevant to whether a taking has occurred or relevant only to whether just compensation has been provided once a taking has been found?

A TDR scheme poses unique problems in defining the unit of property which is allegedly being taken. In the usual zoning situation, the unit or units of property for taking purposes will

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[3] This assumption is necessary in that otherwise there would be no taking without consideration of the TDRs, and, therefore, no need for a court to evaluate the legal effect of the TDRs on the taking or just compensation issues.

be determined to a large extent by the challenged action of the zoning authority. If the parcels are separately rezoned and/or treated as separate parcels by the zoning authority, the reviewing court is more likely to determine the taking issue separately with regard to each parcel, even if the landowner is claiming that both parcels have been taken.[4] If the landowner claims that only one of the contiguous parcels is being taken, however, the courts differ as to whether to consider the effect on the landowner's contiguous property as a whole or on the restricted parcel only.[5]

The TDR situation is further complicated by the fact that the restricted parcel is economically and administratively linked to the receiving area for the TDRs, which may be contiguous or noncontiguous parcels and which may be under the same or different ownership from that of the restricted parcel.[6] In evaluating the economic effect of the zoning on the landowner's "property," should contiguous nonreceiving parcels under the same ownership be part of the property? Further, should contiguous and/or noncontiguous receiving parcels under the same ownership be part of the property?

Another question is whether the value of the TDRs should be relevant initially in determining whether a taking has occurred, or if it should be relevant only in deciding whether just compensation has been provided if a taking is otherwise found.

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[4] *See, e.g.*, City of Hollywood v. Hollywood, Inc., 432 So. 2d 1332, 1338 (Fla. Dist. Ct. App.), *reviewed denied*, 441 So. 2d 632 (Fla. 1983); Sheerr v. Township of Evesham, 445 A.2d 46, 68-69 (N.J. Super. Ct. Law Div. 1982); Fifth Avenue Corp. v. Washington County, 581 P.2d 50, 61 (Or. 1978). *See also* American Savings & Loan Ass'n v. County of Marin, 653 F.2d 364, 371 (9th Cir. 1981) (until owner submitted plan, impossible to determine whether property was to be treated as one parcel or as two).

[5] *Compare* American Dredging Co. v. New Jersey Dep't of Envtl. Protection, 404 A.2d 42, 42 (N.J. Super. Ct. App. Div. 1979) (restricted area held to comprise only 3% of total property *and* Multnomah County v. Howell, 496 P.2d 235, 238 (Or. Ct. App. 1972) (though 4 of plaintiff's 9 lots were subject to restriction, court considered them one piece of property) *with* Aptos Seascape Corp. v. County of Santa Cruz, 188 Cal. Rptr. 191, 200 (Cal. Ct. App. 1982) (beachfront and uplands of tract treated as two different tracts for purposes of allocating compensating densities), *appeal dismissed*, 104 S. Ct. 53 (1983). *See also* Deltona Corp. v. United States, 657 F.2d 1184, 1192 (Ct. Cl. 1981) (permitting requirements only covered portions of tracts), *cert. denied*, 455 U.S. 1017 (1982); Maple Leaf Investors, Inc. v. State Dep't of Ecology, 565 P.2d 1162, 1163 (Wash. 1977) (restrictions did not apply to 30% of property).

[6] *See* Carmichael, *Transferable Development Rights as a Basis for Land Use Control*, 2 FLA. ST. U.L. REV. 35, 50 (1974).

TDRs defy easy categorization as either regulation or compensation. TDRs' hybrid character is reflected in the disagreement within the Supreme Court as to which of the two prongs of the taking test triggers consideration of TDRs.[7] Compounding this disagreement, it appears that the Court is now less inclined than in the past to look at the landowner's economic situation as a whole in evaluating whether a taking has occurred. The focus may no longer be on how many "sticks" out of the bundle of rights known as property have been taken, but on which one or ones have been taken. Therefore, both the owner's vestigial rights following the governmental action and the extensiveness of the landowner's other property are less important to the analysis of taking. Instead, the result is concentration on the "nature" of the right invaded and its economic value to the landowner. Under the emerging view, the deprivation of one property right alone is more likely to result in a taking if that property right is economically significant, but the requisite degree of significance has yet to be delineated.[8] Thus far, the right to exclude others for competitive advantage has been of sufficient economic significance that its deprivation has twice been held by the Court to constitute a taking.[9] These cases cause one to wonder if the right to develop can be far behind.

This Article will examine the Supreme Court's recent taking decisions to determine, from a taking perspective, what guidance they might provide as to the redeeming features of TDRs.[10] The Article will then identify the most likely situation in which the Court will have to determine the ability of a TDR scheme to withstand a taking challenge.[11] After examining the problem of defining the appropriate property unit for a taking challenge, the analysis will turn to whether the Court will consider the

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[7] *See* text accompanying notes 18-38 *infra*.

[8] *See* text accompanying notes 52-54 *infra*.

[9] *See* text accompanying notes 39-43, 55-64 *infra*.

[10] *See* text accompanying notes 14-64 *infra*. Scholarly writings on the constitutionality of TDRs as a general matter are extensive. For a basic introduction to the debate, compare Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75 (1973-74) and Costonis, *Fair Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 COLUM. L. REV. 1021 (1975) with Berger, *The Accomodation Power in Land Use Controversies: A Reply to Professor Costonis*, 76 COLUM. L. REV. 799 (1976) and Note, *The Unconstitutionality of Transferable Development Rights*, 84 YALE L.J. 1101 (1974-75).

[11] *See* text accompanying notes 65-107 *infra*.

availability of TDRs to be relevant to the taking issue or to the issue of what constitutes just compensation for the taking.[12] Regardless of how these questions are answered, the overall taking issue will be determined by the economic viability of each individual TDR scheme. This Article suggests that, in its evaluation of economic viability, the Court should be deferential to the judgment of the planning entity under established constitutional doctrines of judicial review.[13]

I. *Penn Central* and its Progeny

In 1978 the Supreme Court upheld the application to the Grand Central Terminal of New York City's Landmarks Preservation Law, rejecting in the process claims that this application of the law had taken the owners' property without just compensation[14] and had arbitrarily deprived them of their property without due process of law.[15] To alleviate the economic burden placed on landmark owners, the preservation law permitted affected owners to transfer their unusable development rights in the landmark site to other proximate lots.[16] The *Penn Central* decision triggered an optimistic flurry of innovative zoning techniques that frequently employed the transferability of development rights to provide greater insulation against taking challenges. But *Penn Central* actually posited relatively limited reassurance for such zoning, and lower courts have had to grapple with the Court's repeated admission that taking challenges entail essentially ad hoc, factual inquiries.[17]

Without reaching the issue of whether a TDR could be just compensation, the Court in *Penn Central* did suggest that the availability of a TDR might be of some significance in determining whether a taking has occurred.[18] The Penn Central Ter-

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[12] *See* text accompanying notes 107-66 *infra*.

[13] *See* text accompanying notes 167-75 *infra*.

[14] The fifth amendment of the United States Constitution provides that private property shall not be "taken for public use without just compensation." U.S. CONST. amend. V. The fourteenth amendment has been held to impose the same restricton on states and municipalities. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 107 (1978).

[15] *See* 438 U.S. 104.

[16] *Id.* at 109.

[17] *See, e.g.*, Ruckelshaus v. Monsanto Co., 104 S. Ct. 2862 (1984).

[18] *See* 438 U.S. at 137.

minal had been designated a landmark by the New York City Landmarks Preservation Commission, and, at that time, Penn Central did not seek judicial review of the designation.[19] Penn Central subsequently leased the air rights above the building for construction of an office building.[20] The Commission, however, disapproved two submitted plans for an office building more than fifty stories high because of the plans' adverse effects on the Terminal's historic and aesthetic features.[21] Under New York City's zoning laws, owners of real property who had not developed their property to the full extent permitted under applicable zoning laws were allowed to petition for transfer of their development rights to other designated parcels of property.[22] The Court noted that this right "enhances the economic position of the landmark owner in one significant respect."[23]

Following the Commission's disapproval of the multistory office plans, the Terminal owners filed suit, claiming an unlawful taking and denial of due process, and seeking a declaratory judgment, injunctive relief and damages. The damages were for the "temporary taking" which allegedly occurred between the landmark designation date and the date when the restrictions from the landmark law would be lifted following the owners' success in court.[24] The New York Court of Appeals refused to recognize any "regulatory taking" claim,[25] and ultimately concluded that there was no due process violation because Penn Central had not been deprived of a "reasonable return on [its] investment in the [property]."[26]

On appeal, Justice Brennan acknowledged that the Supreme Court had been unable to develop any "set formula" for determining when economic injury caused by governmental action requires compensation, and that each case necessitates "ad hoc,

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[19] *Id.* at 115-16.

[20] *Id.* at 116.

[21] *Id.* at 117.

[22] *Id.* at 114-15.

[23] *Id.* at 113.

[24] *Id.* at 119.

[25] *Id.* at 121. In *Penn Central*, Justice Brennan noted that the Court does not "embrace the proposition that a 'taking' can never occur unless government has transferred physical control over a portion of a parcel." *Id.* at 123 n.25.

[26] *Id.* at 121.

factual inquiries."[27] The Court had little difficulty in determining that the diminution in value of the property did not constitute a taking within the meaning of the fifth and fourteenth amendments, particularly in light of Penn Central's concession that the property was still capable of earning a reasonable return.[28] In determining the diminution in value borne by Penn Central, the Court refused to define the affected property as "air rights;" it focused instead on the economic effects on the parcel as a whole, that is, the city tax block designated as the landmark site.[29] In reaching its holding, the Court addressed only briefly the relevance of the TDRs to the taking issue:

> [T]o the extent appellants have been denied the right to build above the Terminal, it is not literally accurate to say that they have been denied *all* use of even those pre-existing air rights. Their ability to use these rights has not been abrogated; they are made transferable to at least eight parcels in the vicinity of the Terminal, one or two of which have been found suitable for the construction of new office buildings. Although appellants and others have argued that New York City's transferable development-rights program is far from ideal, the New York courts here supportably found that, at least in the case of the Terminal, the rights afforded are valuable. 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 into account in considering the impact of regulation.[30]

Having concluded that there was not a taking, the Court had no need to address the issue of whether the TDRs would have provided "just compensation" had a taking occurred.

Although the majority seemed more inclined to consider the value of TDRs in relation to the taking issue, Justice Rehnquist in his dissent, joined by Chief Justice Burger and Justice Stevens, took a different approach. Justice Rehnquist concluded that the

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[27] *Id.* at 124.

[28] *Id.* at 128-29. This strategic concession on the central issue in the case has been described by Professor Costonis as an inexplicable "boner of litigation strategy." Comment, 30 LAND USE LAW & ZONING DIG. 9, 428 (1978).

[29] *See* 438 U.S. at 130-31.

[30] *Id.* at 137 (footnote omitted).

landmark preservation ordinance had taken Penn Central property by restricting use of the property's air rights.[31] By singling out individual landowners, as opposed to the constitutionally acceptable zoning method of prohibiting certain uses over a broad cross section of land, the ordinance failed to guarantee landmark owners the " 'average reciprocity of advantage' " necessary to fall within the traditional "zoning" exception to the taking prohibition.[32] In a footnote, Justice Rehnquist sharply criticized the Court's vacillating suggestions that the restrictions must have " 'an unduly harsh impact upon the owner's use of the property,' " prevent " 'a reasonable return' " on the landowner's investment, or prohibit the property from being " 'economically viable' " to establish a taking.[33] The dissent was specifically critical of any requirement that the property owner be denied *all* reasonable return on the property. Rehnquist stressed that the Court would not only have to define "reasonable return" for a variety of types of property, but would have to define the particular property unit to be examined.[34] For example, the Court would have to distinguish the restricted parcel of property itself from the air rights to the parcel and from all contiguous parcels of property owned by the restricted landowner.

Nevertheless, Rehnquist would have remanded the case to the New York Court of Appeals "for a determination of whether TDRs constitute a 'full and perfect equivalent for the property taken'."[35] As to whether the TDRs are a "full and perfect equivalent for the property taken,"[36] he considered as negative factors the severely limited area to which transfer was permitted, the complex procedures required to obtain a transfer permit, the uncertain and contingent market value of the TDRs, and the failure of the TDRs to reflect the value lost.[37] As a factor

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[31] *See id.* at 143 (Rehnquist, J., dissenting).

[32] *Id.* at 147 (Rehnquist, J., dissenting) (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)). For a critique of Justice Rehnquist's dissent utilizing the Court's decisions prior to *Penn Central*, see Torres, *supra* note 2, at 56-61.

[33] *See* 438 U.S. at 149 n.13 (Rehnquist, J., dissenting) (quoting majority opinion).

[34] *See id.* (Rehnquist, J., dissenting).

[35] *Id.* at 152 (Rehnquist, J., dissenting) (quoting Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893)).

[36] *Id.* at 151-52 (Rehnquist, J., dissenting).

[37] *See id.* at 151 (Rehnquist, J., dissenting).

favoring the TDRs as just compensation, Rehnquist acknowledged that Penn Central had been offered "substantial amounts" for its TDRs.[38]

After *Penn Central* there followed a series of cases in which the character of the interference with the property right was outcome-determinative of the taking issue. In *Kaiser Aetna v. United States*,[39] the Corps of Engineers claimed the government had a navigational servitude[40] on what had been a private lagoon, which the owners had connected to the Pacific Ocean, with Corps approval, in order to build an exclusive marina-based community. Writing for the majority, Justice Rehnquist stated that the Court would decide the taking issue by examining "the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action."[41] The Court rejected the government's claim that a navigational servitude existed.[42] Finding that public access would result in an actual physical invasion of private property by the government, Justice Rehnquist stated that impairment of the property owners' right to exclude others would frustrate the owners' reasonable investment-backed expectations and, therefore, constitute a taking.[43]

In contrast, in *PruneYard Shopping Center v. Robins*,[44] the Court upheld a state constitutional requirement that shopping center owners permit individuals to exercise their free speech and petition rights in the shopping center despite the owners' argument that they were being deprived of their property without compensation.[45] In *PruneYard*, as in *Kaiser Aetna*, the character of the governmental action was a physical invasion of private property.[46] Justice Rehnquist, again speaking for the Court, suggested that deprivation of a right to exclude others by its

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[38] *See id.* at 151-52 (Rehnquist, J., dissenting).

[39] 444 U.S. 164 (1979).

[40] A navigational servitude is a navigational easement giving the public a right of free access. The majority opinion in *Kaiser Aetna v. United States* further outlines the history of this concept. *See id.* at 175-76.

[41] *Id.* at 175.

[42] *See id.* at 179.

[43] *Id.* at 179-80.

[44] 447 U.S. 74 (1980).

[45] *See id.* at 82-85.

[46] *See id.* at 77.

very nature is more likely to constitute a taking.[47] In *PruneYard*, however, the Court refused to find the physical invasion to be dispositive because, not surprisingly, there was no showing that the right to *exclude* others was important to the economic value of the shopping center.[48]

The Court's emphasis on the character of the governmental interference reached its peak in *Loretto v. Teleprompter Manhattan CATV Corp.*[49] In an opinion by Justice Marshall, from which Justices Blackmun, Brennan and White dissented, the physical invasion resulting from a television cable installed on an apartment owner's roof, as authorized under New York law, was held to constitute a taking of the apartment owner's property without compensation.[50] Despite the minimal interference by the cable in the owner's enjoyment of his property, the Court held the physical invasion to be a "per se" taking of private property.[51] Thus, the character of the governmental action has become, not merely a factor, but the only factor in finding a taking when the governmental action is a physical invasion of property.

This series of physical intrusion cases provides little direct guidance as to the direction the Court will take after *Penn Central* in evaluating TDR techniques. Indeed, the Court in *Loretto* took care to distinguish between land use regulations and physical intrusions in taking cases.[52] These cases are instructive, however, in tracing the apparent "wooing away" of Justices Stewart, White and Powell from the *Penn Central* majority to Justice Rehnquist's views as expressed in his dissent in that case.

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[47] *See id.* at 82.

[48] *See id.* at 83.

[49] 458 U.S. 419 (1982).

[50] *See id.* at 421.

[51] *See id.* at 434-35.

[52] As *Penn Central* affirms, the Court has often upheld substantial regulation of an owner's use of his own property where deemed necessary to promote the public interest. At the same time, we have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause. Our cases further establish that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such a case, "the character of the government action" not only is an important factor in resolving whether the action works a taking but is determinative.

Id. at 426.

In *Penn Central* Justice Rehnquist declined to determine whether a taking had occurred by applying some gradation of economic deprivation to some undefined unit of property as a whole.[53] Rehnquist thus refused to follow an approach in which the owner's property as a whole would be examined to determine whether the government action had an "unduly harsh" economic impact, prevented "a reasonable return" on the owner's investment or kept the property from being "economically viable."[54]

Rehnquist's approach, and the approach generally taken in *Kaiser Aetna* and the cases which followed, is to first determine which of the so-called "bundle of sticks" constituting property has been taken (for example, the right to exclude others), and then to determine how important that "stick" is to the use or economic value of the property. If that property right is of an as yet unspecified level of significance to the economic value or use of the property, then its deprivation alone may constitute a taking.

In contrast, the *Penn Central* majority would be more inclined to examine the entire bundle of sticks, (for example, the full fee interest or all the landowner's contiguous property) and refuse to find a taking unless some significant number of sticks had been destroyed by the governmental action. The implications for any land use regulation that severely restricts development cannot be ignored. Following Justice Rehnquist's approach, the denial of a right to develop one's property could be important to the economic value of the property for the landowner. Thus, the deprivation of a single important property right, one stick in the bundle, could be a taking. Under the approach of the *Penn Central* majority, deprivation of one property right alone would rarely constitute a taking. The landowner would still have use of all the property rights other than the right to develop, and the only question would be whether the economic value of the property as a whole had been destroyed. In sum, under Justice Rehnquist's approach the nature of the property right taken becomes more important than what property rights remain.

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[53] *See* text accompanying notes 31-32 *supra*.

[54] *See* text accompanying note 33 *supra*.

Although the majority and the dissenters were unable to agree in *Penn Central* on the extent of economic deprivation necessary to constitute a taking, the Court was able to agree on some general guidelines in the recent case of *Ruckelshaus v. Monsanto Company.*[55] In *Monsanto*, the Court determined that under Missouri law trade secrets were property for purposes of the fifth amendment's taking clause.[56] In addition to disclosing some of the data to the public pursuant to the provisions of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA),[57] the Environmental Protecton Agency (EPA) had utilized trade secret information submitted to it for pesticide registration by Monsanto, a pesticide manufacturer, in order to evaluate other pesticide manufacturers' applications for registration.[58]

On behalf of a unanimous Court[59] Justice Blackmun stated that whether a governmental action has gone beyond "regulation" to a "taking" depends upon " 'the character of the governmental action, its economic impact, and its interference with reasonable investment backed expectations,' "[60] a test first formulated in *Penn Central.* The *Penn Central* Court focused only on the last factor as being so "overwhelming" under the facts of that case as to be dispositive of the taking question.[61] According to the *Monsanto* Court, the explicit governmental guarantee of confidentiality in the 1972 amendments to FIFRA was the basis for Monsanto's reasonable investment-backed expectation.[62] The EPA's disclosure and utilization of the data de-

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[55] 104 S. Ct. 2862 (1984).

[56] *See id.* at 2874.

[57] 7 U.S.C. § 136 (1982).

[58] 104 S. Ct. at 2866-67.

[59] Justice White took no part in the consideration or decision of the case. *Id.* at 2883. Justice O'Connor dissented only as to that portion of the Court's opinion which concluded that Monsanto did not have a reasonable investment-backed expectation that the EPA would maintain the confidentiality of data submitted prior to the 1972 amendments to the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). *Id.* at 2883-84.

[60] *Id.* at 2875 (quoting PruneYard Shopping Center v. Robbins, 447 U.S. at 83).

[61] *See* Penn Central Transp. Co. v. City of New York, 438 U.S. at 124.

[62] Justice O'Connor dissented as to that portion of the court's opinion that Monsanto had no expectation of confidentiality prior to the 1972 amendments to FIFRA. Noting that, prior to 1972, FIFRA essentially was silent as to confidentiality, Justice O'Connor concluded that agency practice, the Trade Secrets Act and the applicant's reasonable expectations also made any disclosure of data prior to 1972 a taking of the data. *See* 104 S. Ct. at 2883-84 (O'Connor, J., dissenting).

prived Monsanto of its "right to exclude others [which] is central to the very definition of the property interest" in a trade secret.[63] The essential economic value of the property right lay in the competitive advantage—an advantage destroyed by disclosure of the data; consequently, the remaining uses of the data were "irrelevant to the determination of the economic impact" of the EPA's action on Monsanto's property right.[64] For the first time in a case not involving a physical invasion, the Court found that the importance of the property interest invaded outweighed consideration of any remaining rights in the property.

II. THE MOST LIKELY SCENARIO FOR THE COURT: OPEN SPACE ZONING AND TDRs

A. *Judicial Dodgeball and TDRs*

In three cases, *Agins v. City of Tiburon*,[65] *San Diego Gas & Electric Co. v. City of San Diego*,[66] and *Aptos Seascape Corp. v. County of Santa Cruz*,[67] the Court skirted taking claims in which TDRs played pivotal roles. In each case, zoning to preserve open space was tempered by conferral of TDRs on the open space lots. The likelihood of such a case appearing before

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[63] *Id.* at 2878.

[64] *Id. Cf.* Andrus v. Allard, 444 U.S. 51 (1979). In *Andrus*, Justice Brennan (writing for all of the justices except Chief Justice Burger who concurred) held that the prohibition of the sale of eagle feathers as applied to traders in preexisting bird artifacts was not a taking. The Court stated:

> The regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them. . . . In this case, it is crucial that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds. . . . [L]oss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim.

Id. at 65-66. It is difficult to see how the complete destruction of the exploitation value of the bird artifacts for the traders is somehow less of an economic burden on them than the loss of competitive advantage in the otherwise useful data is on Monsanto. The *Andrus* opinion may be best explained as an opinion by Justice Brennan following the *Penn Central* approach of focusing on how many of the entire "bundle of sticks" are lost as opposed to Justice Rehnquist's approach of focusing on the economic significance of the individual stick lost.

[65] 447 U.S. 255 (1980).

[66] 450 U.S. 621 (1981).

[67] 188 Cal. Rptr. 191 (Ct. App. 1982), *appeal dismissed*, 104 S. Ct. 53 (1983).

the Court has increased in light of several decisions invalidating open space zoning on constitutional grounds.[68]

In *Agins v. City of Tiburon*,[69] the landowner had five acres of open land with a view of San Francisco Bay. The land was rezoned for a residential planned development and open space zone, permitting one to five single family residences on the five acre tract.[70] The owners, without seeking approval from the city for any development, brought an inverse condemnation suit[71] claiming that the *ordinance itself* prohibited development of the land and therefore gave rise to a taking.[72] A unanimous Court, speaking through Justice Powell, held there was no taking.[73] Powell noted that the ordinance on its face only limited development and neither prevented the best use of the land nor extinguished a fundamental attribute of ownership.[74] Significantly, the Court did not address the California Supreme Court's holding that an action for inverse condemnation could not be the basis for damages but only for mandamus or declaratory relief.[75] Because the Court held that no taking had occurred, it did not have to "consider whether a State may limit the remedies available to a person whose land has been taken without just compensation."[76]

In *San Diego Gas & Electric Co. v. City of San Diego*,[77] the Court again sidestepped the issue left open in *Agins*: whether a

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[68] *See, e.g.*, Sheerr v. Township of Evesham, 445 A.2d 46 (N.J. Super. Ct. Law Div. 1982); Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills, 193 A.2d 232 (N.J. 1963); Lemp v. Town Board of Islip, 394 N.Y.S.2d 517 (App. Div. 1977).

[69] 447 U.S. 255.

[70] *Id.* at 257.

[71] The phrase "inverse condemnation" generally describes a cause of action against a government defendant in which a landowner may recover just compensation for a "taking" of his property under the Fifth Amendment, even though formal condemnation proceedings in exercise of the sovereign's power of eminent domain have not been instituted by the government entity. . . . In an "inverse condemnation" action, the condemnation is "inverse" because it is the landowner, not the government entity, who institutes the proceeding.

San Diego Gas & Elec. Co., 450 U.S. at 638 n.2.

[72] 447 U.S. at 258.

[73] *See id.* at 263.

[74] *Id.* at 260.

[75] *See id.* at 259.

[76] *Id.* at 263.

[77] 450 U.S. 621.

monetary remedy must be provided to a landowner whose property is allegedly taken by a regulatory ordinance.[78] As a possible site for a nuclear power plant, the power company had purchased a 412-acre parcel, of which 214 acres were subsequently rezoned from industrial/agricultural use to open space.[79] Claiming that the only beneficial use of the property was as an industrial park that would be inconsistent with the open space zoning, the company sought damages in inverse condemnation.[80] Although both the trial court and the California Court of Appeals awarded damages for a taking, the California Supreme Court vacated the court of appeals' decision and remanded in light of its decision in *Agins* that monetary relief was unavailable for a regulatory taking.[81] On remand the California Court of Appeals concluded that monetary relief was unavailable, but also concluded that there were factual disputes yet to be resolved on the underlying taking issue.[82] As a result, after the California Supreme Court denied further review, the United States Supreme Court dismissed the appeal for lack of a final judgment.[83] The majority did, however, note that the constitutional issue, whether the company was entitled to a monetary remedy, was "not to be cast aside lightly."[84] In his concurrence as to the absence of a final judgment, Justice Rehnquist indicated that on the merits he would agree with the dissenting opinion of Justice Brennan, joined by Justices Stewart, Marshall and Powell, who had reached the merits of the case.[85] In a strong dissent, Justice Brennan stated that a government's exercise of its regulatory police power can create a taking within the meaning of the taking clause and that, in such circumstances, the Constitution would require just compensation for the period beginning on the date the regulation effected a taking and ending upon rescission or amendment of the offensive regulation by the government entity.[86]

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[78] *See id.* at 633.

[79] *Id.* at 624-25.

[80] *Id.* at 626.

[81] *See id.* at 627-28.

[82] *See id.* at 629-30.

[83] *See id.* at 630.

[84] *Id.* at 633.

[85] *See id.* at 633-34 (Rehnquist, J., concurring).

[86] *Id.* at 653 (Brennan, J., dissenting). *See generally* Wright, *Damages or Compensation for Unconstitutional Land Use Regulations*, 37 ARK. L. REV. 612 (1984); Note, *Inverse Condemnation: Valuation of Compensation in Land Use Regulatory Cases*, 17 SUFFOLK U.L. REV. 621 (1983).

In a recent case wherein the constitutionality of the land use regulation turned on the availability of TDRs, the Court once again dismissed the appeal for want of a final judgment.[87] In the dismissed case, *Aptos Seascape Corp. v. County of Santa Cruz*,[88] Seascape owned 110 acres, including forty acres of benchlands and seventy acres of beachfront property.[89] The property at the time of purchase was zoned residential with a commercial hotel use allowed on one section of the benchlands. The county, after Seascape's unsuccessful attempts to obtain development approval, rezoned the property so that all of the beachfront property was open space with development prohibited, and so that the benchlands were permitted one family residence per 6000 square feet.[90] Seascape brought an action for damages, inverse condemnation and declaratory relief against the county, alleging that the rezoning had deprived it of all reasonable use of its property.[91]

The California Court of Appeals, relying on *Agins*, reversed the trial court's award of inverse condemnation damages for a regulatory taking.[92] Because the trial court had concluded that there was a taking of property without just compensation, the California Court of Appeals was left with Seascape's cross-appeal to have the zoning ordinance declared unconstitutional as a taking without just compensation. To resolve this issue, the court was faced with one of the issues foreseen by Rehnquist in his *Penn Central* dissent: defining the particular property unit to be examined for determining the economic return left after the purported taking. The alternatives posed to the Court as the property unit were the seventy-acre beachfront parcel and the 110-acre parcel of beachfront and benchland.[93]

The court accepted the seventy-acre parcel as the appropriate unit, noting that some courts considered the regulatory effect on the whole of the owner's property, while others considered only the restricted acreage but also took into consideration the

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[87] *See* Aptos Seascape Corp. v. County of Santa Cruz, 104 S. Ct. 53.

[88] 188 Cal. Rptr. 191.

[89] *Id.* at 193.

[90] *Id.* at 194.

[91] *Id.* at 196-97.

[92] *See id.* at 196.

[93] *Id.* at 196-97.

availability of transferable development rights.[94] In support of their position that the entire 110-acre parcel had to be considered, the county quoted *Penn Central's* statement that

> "[t]aking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has been [sic] effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole. . . .[95]

The California Court of Appeals correctly concluded, however, that the *Penn Central* language suggested only that deprivation of one property right did not necessarily entail a taking of the property in which the right was asserted.[96] To return to the "bundle of sticks" analogy, Justice Brennan in *Penn Central* looked at how many sticks of one bundle had been appropriated, not at how many sticks of all or some of the bundles owned by the landowner had been appropriated.[97] It should also be pointed out that Penn Central owned other neighboring properties, including the adjacent Pan-American Building and Commodore Hotel, which were eligible to receive the terminal's unused development rights.[98] Yet the *Penn Central* opinion did not consider using as the appropriate unit of property any unit other than the city tax block designated the landmark site.[99] In that sense, *Penn Central* actually runs counter to the county's argument in *Aptos Seascape* that all of the landowner's contiguous holdings must be considered.

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[94] *See id.* at 197 (*comparing* American Dredging v. State Dep't of Envtl. Protection, 404 A.2d 42 (N.J. Super. Ct. App. Div. 1979) *and* Multnomah County v. Howell, 496 P.2d 235 (Or. Ct. App. 1972) *with* American Savings & Loan Ass'n v. County of Marin, 653 F.2d 364 (9th Cir. 1981) *and* Fifth Avenue Corp. v. Washington County, 581 P.2d 50 (Or. 1978)).

[95] *Id.* at 198 (quoting Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130 (1978)).

[96] *See id.*

[97] *See* 438 U.S. at 130-31.

[98] Penn. Cent. Transp. Co. v. City of New York, 366 N.E.2d 1271, 1277 (N.Y. 1977), *aff'd*, 438 U.S. at 104, 115. *See also* Costonis, *The Disparity Issue: A Context for the Grand Central Terminal Decision*, 91 HARV. L. REV. 402, 419-20 (1977-78).

[99] *See* 438 U.S. at 115-16.

The California Court of Appeals found the "most equitable accommodation of the conflicting public and private interests at stake in a 'takings challenge' " to be consideration of only the restricted acreage together with any compensating development rights.[100] The court concluded that "when governmental action has divided contiguous property under single ownership into separate zones, and has restricted development in one of those zones, a *provision allowing some transfer of development rights from the restricted property* or awarding compensating densities elsewhere may preclude a finding that an unconstitutional taking has occurred."[101] The key language here is the court's statement that the mere existence of a provision ostensibly permitting transfer of development rights from the restricted property may save the governmental regulation from being a taking. Although the trial court had concluded that the county's zoning ordinances did not permit transfer of compensatory development rights from the beachfront to the benchlands, the court of appeals construed the county ordinances to permit the county to grant Seascape compensatory densities on both its uplands and benchlands.[102] The court of appeals construed the ordinances to give the county authority to approve a planned unit development (PUD)[103] on the benchland with a density greater than one single family dwelling per 6,000 square feet.[104] Based on the potential for compensating densities, the court upheld the validity of the open space ordinance[105] and refused to find a taking resulting from the ordinance.[106] To ensure the county's compliance with its decision, Seascape's taking cause of action was dismissed on condition that the county grant Seascape compensatory densities or bear the burden in subsequent proceedings that it had made provision for compensating densities or some other transfer of

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[100] *See* Aptos Seascape Corp. v. County of Santa Cruz, 188 Cal. Rptr. at 197.

[101] *Id.* at 198 (emphasis added).

[102] *See id.*

[103] "A [Planned Unit Development] allows the construction of buildings on a tract free of conventional zoning so as to permit a cluster of structures and some increased density on some portions of a tract, leaving the remainder as open space." *Id.* at 199. *See also* Dupont Circle Citizens Ass'n. v. District of Columbia Zoning Comm'n., 355 A.2d 550 (D.C.), *cert. denied*, 429 U.S. 966 (1976).

[104] *See* 188 Cal. Rptr. at 200.

[105] *See id.* at 199.

[106] *See id.* at 200.

development rights in exchange for the prohibition against building on the beachfront parcel.[107]

B. *Defining the Unit of "Property" in Relation to TDRs*

Agins, *San Diego Gas*, and *Aptos Seascape* indicate that the hypothetical posed in the introduction to this Article is destined to reach the Supreme Court. When it does, the unanswered questions from *Penn Central* will have to be addressed: (1) What is the appropriate property unit? and (2) Are TDRs relevant to the taking determination or to the just compensation determination? Both issues have already begun to perplex the lower courts.

In a Ninth Circuit case, *America Savings & Loan Association v. County of Marin*,[108] relied upon by the California Court of Appeals in *Aptos Seascape*,[109] the owner of differently zoned, but contiguous, twenty-acre and forty-eight-acre lots claimed that the twenty-acre lot had been taken by zoning which allowed only one multiple residential unit per five acres.[110] The county argued that the two parcels were the unit of property by which the taking was to be measured; the landowner claimed the twenty-acre parcel was the appropriate unit.[111] The determinative factor in defining the unit of property for the *Marin* court appears to have been the treatment of the parcels by the zoning authority:

> The ordinance isolates the Spit [the forty-eight-acre parcel] in a unique zone. Appellant has presented affidavits that there were economically viable uses for the Spit which were extinguished by the ordinance. Appellant has also presented evidence that the Spit was treated differently for zoning purposes than other property, including the Point [the twenty-six-acre parcel]. In sum, appellant alleges a deprivation by a non-uniform ordinance of a portion of its property which is substantial and otherwise economically viable. This tends to require that the zoning of the Spit be evaluated separately from that of the Point for taking purposes. Yet because appellant did not submit a development plan, it is unclear whether the

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[107] *See id.*

[108] 653 F.2d 364 (9th Cir. 1981).

[109] Aptos Seascape Corp. v. County of Santa Cruz, 188 Cal. Rptr. at 197.

[110] 653 F.2d at 367-68.

[111] *Id.* at 368.

> Spit and Point would be treated separately at the development stage. This fact could be crucial. The County might make some provision for density transfers or otherwise permit shifting of benefits and burdens between the two. . . . Administrative procedures governed by local ordinances play a key role in defining the nature of these benefits and burdens. Until appellant submits a development plan, and the County has an opportunity to pass on it, it is impossible to determine whether the Point and Spit ought to be treated as one parcel or as two.[112]

The inherent difficulty caused by TDR schemes in attempting to characterize the zoning authority's treatment of separate parcels is that the use of TDRs inextricably links together several parcels of property which may or may not be contiguous or under the same ownership. By their very nature, TDRs coordinate densities between separate parcels of property, thus in a sense making such parcels a unit for planning purposes.

Penn Central triggered the dilemma of definition, but did nothing to resolve it. Its broad suggestion that " 'taking' jurisprudence does not divide a single parcel into discrete segments"[113] is easily circumscribed by the facts of the case, as *Aptos Seascape* demonstrates.[114] The Court's reasoning in this context was addressed to Penn Central's argument that the property in question was air rights, which in turn was a segment of a single parcel—the city tax block designated as the landmark site. *Penn Central* is perhaps more instructive for what it did not do: It did not define the property to encompass other contiguous or noncontiguous property owned by Penn Central to which the development rights could be transferred.

Economic considerations should be the underlying predicate for all taking claims. From an economic perspective, the true impact of the governmental action on the claimant's restricted property cannot be measured without reference to the claimant's other unrestricted property, the presence of which may alleviate

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[112] *Id.* at 371 (footnotes omitted).

[113] Penn Cent. Transp. Co. v. City of New York, 438 U.S. at 130.

[114] *See* text accompanying note 96 *supra*. New York Court of Appeals Judge Breitel in *Penn Central* found that, relative to the question of "reasonable return" under due process, it was important that there were receiving parcels in common ownership with the landmark site on which the TDRs could be used. *See* Penn Cent. Transp. Co. v. City of New York, 366 N.E.2d at 1277.

or conceivably intensify the economic burden borne by the claimant. As the taking question "necessarily requires a weighing of private and public interests,"[115] the balance cannot be accurately and efficiently struck when the value of the claimant's remaining interest is determined in an artificial economic vacuum that fails to reflect the marketplace. The *Penn Central* majority decision is conducive to a broad-based economic approach to defining the property unit. Under *Penn Central*'s approach, restrictive land use measures are more likely to withstand taking challenges than when the subject property is more narrowly defined. The willingness of the majority to consider the value of TDRs in relation to the taking question itself reflects a willingness to take all relevant economic factors into consideration *ab initio* in determining whether a taking has occurred.

Rehnquist's dissent in *Penn Central* and the Court's subsequent decisions in *Kaiser Aetna*, *PruneYard* and *Monsanto* suggest a different outcome, however. In order to avoid the definitional dilemma, the taking issue is determined without reference to a permissible/impermissible percentage of economic return, which in turn obviates the need for defining the property unit on which the return is based. The factors which still must be taken into account to evaluate when a regulation effects a taking are " 'the character of the governmental action, its economic impact, and its interference with reasonable investment backed expectations.' "[116] Thus far, most of the Court's elaboration of this standard has focused on the character of the governmental action. *Kaiser Aetna* and particularly *Loretto* have established that a physical invasion, no matter how limited, is per se a taking.[117] Within this category, Justice Rehnquist might add from his *Penn Central* dissent that nuisance regulation and zoning which applies over a broad section of land, thereby "secur[ing] an average reciprocity of advantage," are governmental actions of a character that constitute an *exception* to the taking prohibition.[118]

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[115] Agins v. City of Tiburon, 447 U.S. at 261.

[116] Ruckelshaus v. Monsanto Co., 104 S. Ct. 2862, 2875 (1984) (quoting PruneYard Shopping Center v. Robbins, 447 U.S. 74, 83 (1980)).

[117] *See* Costonis, *Presumptive and Per Se Takings: A Decisional Model for the Taking Issue*, 58 N.Y.U. L. REV. 465 (1983).

[118] 438 U.S. at 147 (Rehnquist, J., dissenting).

It is clear from Rehnquist's *Penn Central* dissent that he views deprivation of property, for purposes of the taking clause, as the deprivation of a property right or rights, not as the deprivation of a degree of economic return on some undefined physical unit of real property:

> The term [property] is not used in the "vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. [Instead, it] . . . denotes[s] the *group of rights* inhering in the citizen's relation to the physical thing, *as the right to possess, use and dispose of it*. . . . The constitutional provision is addressed to *every sort of interest* the citizen may possess."[119]

Monsanto extends this reasoning to the conclusion that deprivation of a single property right, the right to exclude others, may be a taking without regard to the economic value of any remaining rights in the property.[120]

Ostensibly, then, under Justice Rehnquist's approach there is no need for definition of the property unit. Yet the problem resurfaces in another context: the two unexplored factors of "economic impact" and "interference with reasonable investment backed expectation."[121] As first formulated in *Penn Central* these were not separate and distinct factors; rather, interference with investment-backed expectations was the most significant aspect of economic impact.[122] Indeed, the two factors are inextricably linked in *Monsanto*. Having concluded that the FIFRA conferred a reasonable investment-backed expectation of confidentiality in the submitted data, the Court reasoned that the right to exclude others was so central to a trade secret and its economic value that destruction of this right alone was tantamount to a taking of the trade secret.[123] The remaining uses for

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[119] *Id.* at 142-43 (Rehnquist, J., dissenting) (quoting United States v. General Motors Corp., 323 U.S. 373, 377-78 (1945) (emphasis in original)). Not surprisingly, *General Motors* is again quoted in *Ruckelshaus v. Monsanto Co.*: " 'Governmental action short of acquistion of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his *interest* in the subject matter, to amount to a taking.' " 104 S. Ct. at 2874 (quoting 323 U.S. at 378 (emphasis added)).

[120] *See* text accompanying notes 63-64 *supra*.

[121] *See* 438 U.S. at 124.

[122] *Id.*

[123] *See* Ruckelshaus v. Monsanto Co., 104 S. Ct. at 2878.

the trade data were deemed "irrelevant" to the "economic impact of the EPA action on Monsanto's property *right*."[124]

Monsanto holds less hope for the future of TDR schemes than did *Penn Central*. Under Justice Brennan's approach in *Penn Central*, Monsanto's loss of competitive advantage and potential profits probably would have been insufficient for a taking because the data did have vestigial uses of some value. Those remaining uses would not have been irrelevant, but would have been determinative of whether a taking had occurred. *Monsanto's* more stringent approach toward regulation, if applied in the land use context, comes very close to contradicting the axiom that regulatory deprivation of property's most beneficial use does not render the regulation unconstitutional.[125] Given the impermanence of zoning, the requirement that there be interference with a reasonable investment-backed expectation could be viewed as militating against a proliferation of successful taking challenges. Yet, in *Kaiser Aetna* the Corps of Engineers' approval for a dredging permit was viewed by Justice Rehnquist as leading to "fruition" of a right to exclude others from the property.[126] In any event, the "property right" approach leaves little room for TDRs to redeem the zoning measure. This approach focuses narrowly on the right which has been taken, without regard either to remaining rights in the property or to what benefits might be conferred in return for the restrictions.

In short, *Penn Central* poses no immediate barriers to TDR land planning techniques that impose severe restrictions on a single parcel of property in a planning area. The opinion on its face supports looking at the restricted parcel in conjunction with the value of the TDRs to determine the extent of economic interference. Even if the ordinance were to deprive the landowner of all reasonable return on the property, therefore, it is conceivable that the TDRs might redeem the ordinance from a taking perspective. Moreover, in its underlying receptiveness to a broad-based economic analysis of the impact of the regulation, *Penn Central* leaves open the economically sound possibility that the regulatory impact could be determined with reference to all of the landowner's contiguous property that functions as an eco-

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[124] *Id.* (emphasis added).

[125] *See, e.g.*, Goldblatt v. Town of Hempstead, 369 U.S. 590, 592 (1962).

[126] Kaiser Aetna v. United States, 444 U.S. 164, 179 (1979).

nomic unit in response to the regulation. Under either analysis, a taking is unlikely to occur unless the landowner is deprived of all or almost all of the defined property's reasonable use and the TDRs fail to have a reasonable, ascertainable value. However, if *Kaiser Aetna*, *PruneYard* and *Monsanto* are seen as a reformulation of taking jurisprudence along the lines of the *Penn Central* dissent, the property right, not the property unit, is determinative of a taking challenge. If the right itself is central to the *type* of property at issue, its deprivation may be enough to constitute a taking, without regard to any remaining uses, to other economically related property, or to the availability of TDRs. Given *Monsanto's* recent emphasis on loss of profit potential, deprivation of the right to develop property stands a better chance of protection under the taking clause. With TDRs relegated to the issue of just compensation, zoning prohibitions against any development may not withstand a taking challenge under this approach.

C. *The Second Issue: Are TDRs a Panacea for a Taking, or (Un)just Compensation?*

Transferable development rights can be viewed as a hybrid of the police power and eminent domain, a synthesis of regulation and compensation.[127] By granting TDRs, has the zoning authority avoided a taking or has it obviated the issue by providing remuneration for lost rights? In *Penn Central*, Justice Brennan assumed that the value of the TDRs was relevant to determining whether a taking had occurred; Justice Rehnquist found a taking without reference to the TDRs and would have remanded for a determination of their value as just compensation.[128] Neither Justice explained his underlying assumption as to the relevance of the TDRs to the two-part inquiry of "taking" and "just compensation." The question is certainly not academic. TDRs appear much less likely to be an effective barrier to a taking challenge under the rubric of just compensation than under the multifactor concept of "reasonable use." Although much has been written on regulatory schemes which may best

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[127] *See* M. GITELMAN, LAND USE 465-69 (3d ed. 1982).

[128] *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. at 152 (Rehnquist, J., dissenting).

insure the economic viability of TDRs,[129] the fact remains that even the most carefully tailored TDR scheme provides no direct monetary compensation and depends upon market factors beyond a zoning authority's control. The Supreme Court's analysis in *Agins* and *San Diego* demonstrates that nonmonetary remedies for a taking will be closely scrutinized.[130]

Few cases other than *Penn Central* have grappled with constitutional challenges to TDRs, and these decisions provide little, if any, insight into the taking/compensation dichotomy. The two lower court cases from New York on the constitutionality of TDRs, the New York Court of Appeals' decision in *Penn Central*[131] and that court's pre-*Penn Central* decision in *Fred F. French Investing Co. v. City of New York*,[132] are confined to a due process analysis. In *French*, the New York Court of Appeals refused to recognize an action for compensation predicated on a regulatory taking.[133] The proper due process inquiry, according to the court, was whether the zoning ordinance was unreasonable in that it destroyed the economic value of the property.[134] In this regard, the court stated that the TDRs "may not be disregarded in determining whether the ordinance has destroyed the economic value of the underlying property."[135] The court never had to confront the eminent domain issue of whether the value of the TDRs became relevant initially to the existence of a taking, or secondarily as compensation. Chief Judge Breitel found that the city's downzoning of the parks to zero density, coupled with "floating development rights, utterly unusable until they could be attached to some accommodating real property," was a deprivation of property without due process of law.[136] The Chief Judge contrasted with approval the "development bank" or so-

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[129] *See, e.g.*, Delaney, Kominers & Gordon, *TDR Redux: A Second Generation of Practical Legal Courses*, 15 URB. LAW. 593 (1983); Richman & Kendeg, *Transfer Development Rights—A Pragmatic View*, 9 URB. LAW. 571 (1977).

[130] *See* Agins v. City of Tiburon, 447 U.S. 255; Aptos Seascape Corp. v. County of Santa Cruz, 188 Cal. Rptr. 191.

[131] Penn Cent. Transp. Co. v. City of New York, 366 N.E.2d 1271.

[132] 350 N.E.2d 381 (N.Y.), *cert. denied*, 429 U.S. 998 (1976).

[133] *See* 350 N.E.2d at 385.

[134] *See id.* at 387.

[135] *Id.*

[136] *Id.* at 388.

called "Chicago Plan"[137] by which a State is able to condemn development rights and pay directly for them in exercising its eminent domain power.[138]

In the New York Court of Appeals decision in *Penn Central*,[139] Chief Judge Breitel reaffirmed the *French* holding that due process, not the taking clause, provided the framework for evaluating a claim of inverse condemnation.[140] In an innovative opinion, the court upheld the landmark preservation ordinance and its TDR program.[141] Ostensibly distinguishing the *French* case, Chief Judge Breitel noted that the "transferable above-the-surface development rights which, because they may be attached to specific parcels of property, some already owned by Penn Central or its affiliates, may be considered as part of the owner's return on the terminal property."[142] One commentator has pointed out that the ownership of recipient parcels by a landowner with TDRs is a slender reed upon which to turn a due process clause.[143] Under this analysis, one rationale for the differing results in *French* and *Penn Central* is that in *French* no residual return was possible after the downzoning to zero density of the parks, so that the TDRs were the only possibility of return.[144] The most innovative section of the *French* opinion attempts to define the "reasonable return" necessary to save the regulation from a due process claim. The opinion concluded that the base for computing a reasonable return should exclude the "social increment" of value attributable to the government's activities rather than to private investment.[145]

One recent lower court case has squarely confronted the issue of whether TDRs should be categorized as economic return relevant to the taking question or, assuming a taking is found without reference to the TDRs' value, as just compensation. In

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[137] This approach to preserving landmarks in "high development" areas was developed in Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574 (1971-72).

[138] *See* 350 N.E.2d at 388.

[139] 366 N.E.2d 1271.

[140] *See id.* at 1274.

[141] *See id.* at 1271.

[142] *Id.* at 1273.

[143] *See* Costonis, *supra* note 98, at 421.

[144] *Id.* at 420.

[145] *See* 366 N.E.2d at 1276.

Dufour v. Montgomery County Council,[146] a county ordinance rezoned much of the agricultural land as "agricultural reserve," downzoning the reserve from one dwelling per five acres to one dwelling per twenty-five acres.[147] Each landowner in the agricultural reserve, the sending zone, was assigned transferable development rights of one residential unit per five acres which could be sold to developers in designated receiving areas.[148] The county established a development rights bank[149] to purchase and sell development rights until sufficient receiving areas are designated to establish a strong private market.[150] Holding that an exercise of police power could effectuate a taking for which compensation must be provided, the Montgomery County Circuit Court concluded, even without consideration of the TDRs, that the downzoning was not tantamount to denial of "all reasonable use" of the property.[151]

In an alternative finding, the *Dufour* court determined that the TDRs buttressed its holding that a taking had not occurred, even though at the time of the downzoning no receiving areas had been designated,[152] no interim development rights bank had been established and the value of the TDRs was in all likelihood "substantially below 'just compensation' for the diminution in value."[153] Noting the apparent controversy over whether TDRs should be evaluated as an alleviation of the property owner's burden or as just compensation,[154] the court accepted without

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[146] Dufour v. Montgomery County Council, No. 56964, slip op. at 15 (Montgomery County Cir. Ct. Md. Jan. 20, 1983).

[147] For a description of the Montgomery County ordinance, see U.S.D.A., 5 *Farmline* 6 (May 1984). *See also* Duncan, *supra* note 1, at 122.

[148] For a more detailed analysis of the Montgomery County plan, see Duncan, *supra* note 1, at 122-24.

[149] *See* Costonis, *supra* note 137, at 620-31.

[150] Duncan, *supra* note 1, at 123.

[151] *See* No. 56964, slip op. at 15.

[152] The court, however, did not entirely rule out the possibility that it might be necessary to have a fact finding hearing on whether a temporary taking had occurred before designation of the receiving areas. *See id.* slip op. at 19.

[153] *Id.* slip op. at 17-18.

[154] The court, in addition to noting Justice Rehnquist's position in the *Penn Central* dissent, erroneously cited *French* for the proposition that TDRs were relevant to the threshold taking issue. *See id.* The *French* decision utilized a due process analysis and explicitly refused to hold that overregulation could be framed as a taking claim. *See* text accompanying notes 133-38 *supra*.

further analysis Justice Brennan's reasoning in *Penn Central* that TDRs were relevant to the impact of the regulation.[155] Relying on its other holding that even without reference to the TDRs no taking had occurred, the court decided not to receive evidence on the fair market value of the TDRs.[156] Clearly, the court felt a need for further guidance from the appellate courts in computing the value of TDRs. If, indeed, recent Supreme Court cases demonstrate a movement toward Justice Rehnquist's approach to the taking issue, a more troublesome prospect is that TDRs would be deemed irrelevant to the threshold issue of whether a taking has occurred. As discussed earlier,[157] even the most carefully planned TDR ordinance may run afoul of the strictly interpreted mandate of just compensation. From an economic, legal and public policy perspective, the value of TDRs fits much less comfortably within the rubric of "just compensation" than within that of a "taking."

An economic analysis of Justice Rehnquist's position in *Penn Central* is particularly appropriate since his criticism of the majority's approach echoes Professor Michelman's economics-based critique of traditional taking jurisprudence:

> [T]o determine compensability one is expected to focus on the particular "thing" injuriously affected and to inquire *what proportion* of *its* value is destroyed by the measure in question. If this proportion is so large as to approach totality, compensation is due; otherwise, not. It is not easy to see the relevance of this particular inquiry to just decision.
>
> The difficulty is aggravated when the question is raised of how to define the "particular thing" whose value is to furnish the denominator of the fraction. Let us suppose that I own a tract of unimproved land. Is the land necessarily one "thing" for this purpose, or might it be several? Can it, for example, ever be regarded as geographically divided into more than one thing? Evidently, it can be; for, if we imagine government's practically forbidding me any use of a geographically determined quarter of my farm, it is not likely that the obligation to compensate can

[155] No. 56964, slip op. at 16.
[156] *See id.* slip op. at 18.
[157] *See* text accompanying notes 35-38 *supra*.

be escaped by the argument that only a quarter of the value of the "thing" has been destroyed.[158]

Reformulating the traditional diminution of value test to better reflect its purpose in fairly distributing the benefits and burdens within society, Michelman states:

> All this suggests that the common way of stating the test under discussion—in terms of a vaguely located critical point on a sliding scale—is misleading (though certainly a true representation of the language repeatedly used by Holmes). The customary labels—magnitude of the harm test, or diminution of value test—obscure the test's foundations by conveying the idea that it calls for an arbitrary pinpointing of a critical proportion (probably lying somewhere between fifty and one hundred percent). More sympathetically perceived, however, the test poses not nearly so loose a question of degree; it does not ask "how much," but rather (like the physical-occupation test) it asks "whether or not": whether or not the measure in question can easily be seen to have practically deprived the claimant of some distinctly perceived, sharply crystallized, investment-backed expectation.[159]

In *Monsanto*, *PruneYard*, *Kaiser Aetna* and *Penn Central*, the Court has stated that three factors are relevant to a taking: "the character of the governmental action, its economic impact,

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[158] Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1192-93 (1967) (emphasis in original) (footnotes omitted). Justice Rehnquist's approach is criticized by Professor Michelman:

> It might thus appear that the scope of the "thing" subject to devaluation is to be defined by the incidence of the measure itself. But if that is so, will it not begin to seem as though *all* use restrictions are totally destructive of value? Suppose I am forbidden to remove gravel from my land, or to use my land for a foundry. Inasmuch as mining rights are well recognized, divisible interests in land, and inasmuch as "rights" to particular surface uses have come to be recognized as species of "property" under the label of "easement" or "servitude," why not say that my land consists of two "things"—mining rights and surface rights, or foundry rights and residue—and that the relevant denominator in testing a regulation which impinges only on mining rights or foundry rights is the value of *those* rights—which the regulation totally destroys? Why, in other words, should a regulation's own scope sometimes define the geographical, but not the functional, extent of the "thing" said to be regulated?

Id. at 1193 (emphasis added) (footnote omitted).

[159] *Id.* at 1233.

and its interference with reasonable investment-backed expectations."[160] Any evaluation of the economic impact of the regulation is necessarily incomplete without inclusion of the value of TDRs in the taking computation. Whatever might be the economic wisdom or lack thereof in excluding the value of postregulation vestigial rights from the economic tally, it is unjustifiably myopic to exclude the economic value of TDRs that relate directly to the economic value of the specific property right allegedly being taken. For example, even if the Rehnquist approach would exclude the economic value of remaining uses of the restricted property (e.g., recreational, agricultural) from the economic impact computation, why exclude the market value of TDRs in relation to the economic loss which the TDRs are designed to offset?

With reference to the relatively unexplored element of "interference with reasonable investment-backed expectation," the Court will be confronted with a traditional zoning analysis. Under such analysis, absent perhaps some governmental action which reasonably induced good faith reliance either on a right to continued development as in *Kaiser Aetna*[161] or on utilization of profit potential as existed in *Monsanto*,[162] there are no vested rights to develop based on reliance on any preexisting zoning scheme.[163] Whether as a general rule there exists a reasonable investment-backed expectation of some development, no matter how minimal, remains to be seen. Implicit in the concept of land use regulation is the premise that property rights are not absolute. Of all the so-called property rights, a right to develop one's property is the most likely source of conflict and, concomitantly, the right most likely to necessitate compromise. It is no longer reasonable to expect one's property rights to extend "from the center usque ad coelum."[164] A theory of taking jurisprudence which reinstates the right to develop as fundamental or para-

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[160] Ruckelshaus v. Monsanto Co., 104 S. Ct. at 2875 (quoting 447 U.S. at 83).

[161] *See* 444 U.S. 164.

[162] *See* 104 S. Ct. at 2877-79.

[163] *See, e.g.*, Avco Community Developers, Inc. v. South Coast Regional Comm'n, 553 P.2d 546 (Cal. 1976), *cert. denied*, 429 U.S. 1083 (1977); HFH, Ltd. v. Superior Court, 542 P.2d 237 (Cal. 1975), *cert. denied*, 425 U.S. 904 (1976); Fox v. Treasure Coast Regional Planning Council, 442 So. 2d 221 (Fla. Dist. Ct. App. 1983).

[164] Hay v. Cahoes Co., 2 N.Y. 159 (1849).

mount fails to reflect the modern realities of land use regulation or the expectations of the property owner.

From a legal perspective, the better analysis is to consider TDRs in relation to both the taking issue and the just compensation issue. In a regulatory taking two related constitutional challenges may be made—deprivation of due process and taking without just compensation.[165] The second challenge consists of two distinct components—"taking" and "just compensation." Relegating TDRs to the just compensation evaluation leads to an anomalous result. The question common to both challenges—whether the landowner may still make a reasonable return on the property[166]—would include consideration of the TDRs' value under the due process analysis but not under a taking analysis. For purposes of due process analysis there is only a one-part inquiry—whether there is a reasonable return—to which the value of TDRs is either relevant or irrelevant. There is no second inquiry under which the TDRs may be considered. To totally exclude the value of TDRs from a due process analysis appears unjustifiable, yet inclusion of this value would result in a more expansive due process analysis of economic impact than permitted under the taking clause.

Justice Rehnquist's criticism of Justice Brennan's approach remains: If a taking is judged by the diminution in value of the property as a whole, what is the appropriate property unit in any given case? A solution to this issue may be found in the Court's formulation of the "*Ben Avon* doctrine" of judicial review for constitutional facts. This doctrine was developed in *Ohio Valley Water Co. v. Ben Avon Borough*,[167] where a water company claimed that the Pennsylvania Public Service Commission's valuation of company property was so low as to be confiscatory.[168] The Pennsylvania Supreme Court utilized the usual substantial evidence standard for review of the facts relevant to the confiscation issue.[169] The United States Supreme Court, however, held that this scope of review was too narrow:

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[165] *See* text accompanying notes 14-15 *supra.*

[166] *See* text accompanying notes 26, 33 *supra.*

[167] 253 U.S. 287 (1920).

[168] *See id.* at 288.

[169] *Id.*

> In all such cases, if the owner claims a confiscation of his property will result, the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment.[170]

The *Ben Avon* holding that agencies cannot finally determine constitutional facts has not been followed since 1936 and, in some cases, may even have been contradicted.[171] Although the doctrine has never been overruled, the Supreme Court has declared "it is now settled that a utility has no right to relitigate factual questions on the ground that constitutional rights are involved."[172] To the extent that the *Ben Avon* doctrine of judicial review is still alive, it mandates full review of constitutional facts only where deprivation of *personal*, rather than property, rights is at issue.[173] As Justice Brandeis has stated, "when dealing with property a much more liberal rule [of review in favor of the agency] applies."[174]

Drawing upon the *Ben Avon* doctrine in its present form, it is perhaps time that the Supreme Court disengage itself from "ad hoc factual" inquiries where property, rather than personal, rights are involved. As ratemaking became more and more factually complex, the Court saved itself from the quagmire of active judicial review of facts and deferred to agency findings. The Court should take a similar approach to taking cases. Taking jurisprudence is relatively unique in that the Court continues to engage in broad factual inquiries although property rights, rather than personal rights, are implicated. Greater deference to the planning agency's findings as to the appropriate unit of property would serve the interests of judicial economy, yet judicial review of the ultimate issue of whether a taking had occurred would be preserved. Moreover, regardless of whether TDRs are held to be relevant to the taking or to the just compensation issue, the Court will at some point find itself

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[170] *Id.* at 289.

[171] *See* B. SCHWARTZ, ADMINISTRATIVE LAW 767-69 (2d ed. 1984).

[172] Alabama Public Serv. Comm'n v. Southern Ry., 341 U.S. 341, 348 (1951).

[173] *See* B. SCHWARTZ, *supra* note 171, at 629-32.

[174] *See, e.g.*, St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 77 (1936) (Brandeis, J., concurring).

obligated under its present scope of review to ascertain the economic value of TDRs in a limitless range of economic situations. When that occurs, deference to the local planning agency's expertise should be effected through reviewing facts under the traditional substantial evidence standard.

CONCLUSION

The Court appears to be moving toward a taking jurisprudence which would elevate certain select property rights, and potentially the "right to develop," above other rights and above the needs of the community. This approach invites conflict between standards for a taking violation and those for a due process violation. It focuses on the nature of the property right, rather than on the true economic impact of the regulation and the public policy concerns for preservation. Although the countervailing "diminution in value" approach necessitates some definition of the property taken, such factual matters may best be left, under either approach, to the expertise of the local planning agency. Regardless of which approach prevails, at some point the Court will find itself confronted with a complex evaluation of the economic value of TDRs. It is difficult to posit a question which calls more for judicial deference to the expertise of the local planning agency.

TDRs are an innovative advance in preservation techniques. When well planned and implemented, TDRs promise an equitable distribution of the costs of preservation among all of those who would benefit from it. Farmland, landmarks and scenic open areas are "public goods" like clean air and clean water; without regulation of the allocation of preservation costs, these costs will not fall proportionally on all those who benefit from preservation.[175] If TDRs do not fit neatly into our traditional concepts of police power versus eminent domain, regulation versus compensation, the fault may not lie with TDRs as much as with the traditional concepts. Land use is indeed one of the areas, like medicine and technology, in which innovation has rendered many legal precepts inadequate or obsolete. There is a need for greater flexibility in taking jurisprudence, and this need

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[175] *See* Davis & Kamien, *Externalities and the Quality of Air and Water*, in ECONOMICS OF AIR AND WATER POLLUTION 12-19 (W. Walker ed. 1969).

can be met through increased deference to the difficult economic and administrative findings made by local planning agencies. The present approach of the Court toward a hierarchy of property rights suggests there will be less flexibility and, accordingly, less of a future for innovative land use planning.