

**LITIGATING *SUITUM* V. TAHOE REGIONAL
PLANNING AGENCY IN THE UNITED STATES
SUPREME COURT**

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Table of Contents

I. The <i>Suitum</i> Facts.....	182
A. The Facts According to Bernadine <i>Suitum</i>	184
B. The Facts According to the Tahoe Regional Planning Agency.....	186
C. Comparing the Competing Factual Accounts.....	189
II. Casting and Recasting the Legal Issue in <i>Suitum</i>	194
A. The Legal Issue Presented According to <i>Suitum</i>	195
B. The Legal Issue Presented According to the TRPA.....	199
C. Emphasis and Deemphasis at Oral Argument.....	205
III. Conclusion: Speculating About the Outcome.....	208

At least one thing is clear about the regulatory takings issue: legal academics and law students like to write about it. The sheer number of articles generated by the issue is somewhat mind boggling.¹ The issue has become a virtual rite of passage for

* Professor of Law, Georgetown University Law Center. I served as counsel of record for Tahoe Regional Planning Agency before the Supreme Court in *Suitum v. Tahoe Regional Planning Agency*, No. 96-243, which is the subject of this essay. The essay is based on a talk that I gave at Florida State University College of Law on March 19, 1997, when *Suitum* was still pending before the United States Supreme Court. The Court decided the case on May 27, 1997, after this essay was written. Because the purpose of this essay is to discuss the litigation strategies behind *Suitum*, I have deliberately not updated the essay in light of the Court's actual decision, except for this preliminary footnote discussion and a brief addendum at the end. The result is that the speculation in the final portion of the essay regarding the likely outcome of the Court is obviously now moot. I have nonetheless retained that portion of the essay because it reveals litigation strategies. Although I served as counsel of record for the Tahoe Regional Planning Agency in *Suitum*, the essay strives to describe the strategies of the opposing parties in an even-handed fashion, which is an objective that I no doubt fail to achieve. The views expressed in the essay are mine alone and do not represent the views of my client in *Suitum*. I would like to thank Peter Byrne, my colleague and co-counsel in *Suitum*, for commenting on an earlier draft.

1. A listing of recent articles on the regulatory taking issue published just in 1996 and early 1997 (not years immediately following a Supreme Court takings decision) is illustrative. See Shawn M. Willson, Comment, *Exacting Public Beach Access: The Viability of Permit Conditions and Florida's State Beach Access Laws after Dolan v. City of Tigard*, 12 J. LAND USE & ENVT'L. LAW 303 (1997); Brenna Durden, et. al., *Waiting for the Go: Concurrence, Takings, and the Property Rights Act*, 20 NOVA L. REV. 661 (1996); Christine Venezia, Comment, *Looking Back: The Full-Time Base-*

line in *Regulatory Takings Analysis*, 24 B. C. ENVTL. AFF. L. REV. 199 (1996); Anna R. C. Caspersen, *The Public Trust Doctrine and the Impossibility of "Takings" by Wildlife*, 23 B. C. ENVTL. AFF. L. REV. 357 (1996); Jesse A. Lynn, *Caveat Lessor? The Takings Clause and the Doctrine of Mission Inviolability*: 767 Third Avenue Associates v. Permanent Mission of the Republic of Zaire to the United Nations, 76 B. U. L. REV. 399 (1996); Molly S. McUsic, *The Ghost of Lochner: Modern Takings Doctrine and Its Impact on Economic Legislation*, 76 B. U. L. REV. 605 (1996); James H. Freis, Jr. & Stefan V. Rejniak, *Putting Takings Back Into the Fifth Amendment: Land Use Planning After Dolan v. City of Tigard*, 21 COLUM. J. ENVTL. L. 103 (1996); David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375 (1996); Alan E. Brownstein, *Constitutional Wish Granting and the Property Rights Genie*, 13 CONST. COMMENT. 7 (1996); Leslie M. MacRae, *The Regulatory Takings Bill: A Cure With Unintended Side Effects*, 5 DICK. J. ENVTL. L. POL'Y 57 (1996); William L. Inden, Comment, *Compensation Legislation: Private Property Rights vs. Public Benefits*, 5 DICK. J. ENVTL. L. & POL'Y 119 (1996); Michael Graf, *Application of Takings Law to the Regulation of Unpatented Mining Claims*, 24 ECOLOGY L. Q. 57 (1997); Gerald Torres, *Taking and Giving: Police Power, Public Value, and Private Right*, 26 ENVTL. L. 1 (1996); Susan A. Austin, Comment, *Tradable Emissions Programs: Implications Under the Takings Clause*, 26 ENVTL. L. 323 (1996); Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 GEO. L. J. 555 (1997); Thomas G. Douglass, Jr., *Have They Gone "Too Far"? An Evaluation and Comparison of 1995 State Takings Legislation*, 30 GA. L. REV. 1061 (1996); John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996); Royal C. Gardner, *Banking on Entrepreneurs: Wetlands, Mitigation Banking, and Takings*, 81 IOWA L. REV. 527 (1996); Steven H. Magee, *Protecting Land Around Airports: Avoiding Regulatory Taking Claims by Comprehensive Planning and Zoning*, 62 J. AIR L. & COM. 243 (1996); Noreen A. Murphy, *The Viability of Impact Fees After Nollan and Dolan*, 31 NEW ENG. L. REV. 203 (1996); Gregory J. Sidak, & Daniel F. Spulber, *Deregulatory Takings and Breach of the Regulatory Contract*, 71 N. Y. U. L. REV. 851 (1996); Jonathan M. Block, *Limiting the Use of Heightened Scrutiny to Land-Use Exactions*, 71 N. Y. U. L. REV. 1021 (1996); David E. Steinglass, Note, *Extending Pruneyard: Citizens' Right to Demand Public Access Cable Channels*, 71 N. Y. U. L. REV. 1113 (1996); Marshall S. Sprung, *Taking Sides: The Burden of Proof Switch in Dolan v. City of Tigard*, 71 N. Y. U. L. REV. 1301 (1996); George Wyeth, *Regulatory Competition and the Takings Clause*, 91 NW. U. L. REV. 87 (1996); Eric Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 NW. U. L. REV. 144 (1996); J. Peter Byrne, *What We Talk About When We Talk About Property Rights - A Response to Carol Rose's Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 1049 (1996); Kelly J. Strader, *Taking the Wind Out of the Government's Sails?: Forfeitures and Just Compensation*, 23 PEPP. L. REV. 449 (1996); Marc R. Lisker, *Regulatory Takings and the Denominator Problem*, 27 RUTGERS L. J. 663 (1996); Jason R. Biggs, Comment, *Nollan and Dolan: The End of Municipal Land Use Extortion - A California Perspective*, 36 SANTA CLARA L. REV. 515 (1996); Jennifer L. Bradshaw, Comment, *The Slippery Slope of Modern Takings Jurisprudence in New Jersey*, 7 SETON HALL CONST. L. J. 433 (1997); Lynn E. Blais, *Takings, Statutes, and the Common Law: Considering Inherent Limitations on Title*, 70 S. CAL. L. REV. 1 (1996); George E. Grimes, Jr., Comment, *Texas Private Real Property Rights Preservation Act: A Political Solution to the Regulatory Takings Problem*, 27 ST. MARY'S L. J. 557 (1996); Barton H. Thompson, Jr., *The Endangered Species Act: A Case Study in Takings & Incentives*, 49 STAN. L. REV. 305 (1997); James E. Holloway & Donald C. Guy, *Land Dedication Conditions and Beyond the Essential Nexus: Determining "Reasonably Related" Impacts of Real Estate Development Under the Takings Clause*, 27 TEX. TECH. L. REV. 73 (1996); Richard A. Epstein, *The Takings Jurisprudence of the Warren Court: A Constitutional Siesta*, 31 TULSA L. J. 643 (1996); Stephen P. Foley, Comment, *Does Preventing "Take" Constitute an Unconstitutional "Taking"? An Analysis of Possible Defenses to Fifth Amendment Taking Claims Based on the Endangered Species Act*, 14 UCLA J. ENVTL. L. & POL'Y 327 (1995/1996); Daniel A. Crane, Comment, *A Poor Relation? Regulatory Takings After Dolan v. City of Tigard*, 63 U. CHI. L. REV. 199 (1996); Michael A. Wolf, *Euclid at Threescore Years and Ten: Is This the Twilight of Environmental and Land-Use Regulation?*, 30 U. RICH. L. REV. 961 (1996); Charles M. Haar, *The Twilight of Land-Use Controls: A Paradigm Shift?*, 30 U. RICH. L. REV. 1011 (1996); Danielle M. Stager, *Takings in the Court of Federal Claims: Does the Court Make Takings Policy in Hage?*, 30 U. RICH. L. REV. 1183 (1996); Carol M. Rose, *A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation*, 53 WASH. & LEE L. REV. 265 (1996); Gregory M. Mohrman, Comment, *Police Power, Gifts, and the Washington Constitution: A*

environmental, land use, and property law scholars, as each, in turn, seeks to demonstrate his or her acumen by revealing the incoherence of the Supreme Court's regulatory takings precedent.² Certainly, my own academic hands are not entirely clean in that regard.³

This essay deliberately sidesteps many of the grander issues discussed and debated in that vast array of existing scholarship. The essay instead seeks to consider the strategic choices opposing parties face in litigating regulatory takings cases before the Supreme Court and the impact of choices made on the resulting judicial precedent. To that end, the focus of this essay is decidedly discrete: one case pending at the time of this writing before the United States Supreme Court, *Suitum v. Tahoe Regional Planning Agency*.⁴ This essay describes and discusses the litigation strategies of the two opposing parties in the case. The essay also speculates on the possible impact that the strategies will have on the Court's ruling.

Framework for Determining the Validity of Property Rights Legislation, 71 WASH. L. REV. 461 (1996); Michael A. Wolf, *Fruits of the "Impenetrable Jungle": Navigating the Boundary Between Land-Use Planning and Environmental Law*, 50 WASH. U. J. URB. & CONTEMP. L. 5 (1996); Jerold S. Kayden, *Hunting for Quarks: Constitutional Takings, Property Rights, and Government Regulation*, 50 WASH. U. J. URB. & CONTEMP. L. 125 (1996); John J. Delaney & Emily J. Vaia, *Recognizing Vested Development Rights as Protected Property in Fifth Amendment Due Process and Takings Claims*, 49 WASH. U. J. URB. & CONTEMP. L. 27 (1996); Robert M. Washburn, *"Reasonable Investment-Backed Expectations" as a Factor in Defining Property Interest*, 49 WASH. U. J. URB. & CONTEMP. L. 63 (1996); Jeremy Walker, *Property Rights After Dolan: The Search for the Madisonian Solution to the Regulatory Takings Conundrum*, 20 WM. & MARY ENVTL. L. & POL'Y REV. 263 (1996); Stephen C. Werner, Jr., *To Compensate or Not to Compensate, That is the Question: Misconstruing the Federal Regulatory Takings Analysis in Zealy v. City of Waukesha*, 3 WIS. ENVTL. L. J. 203 (1996); Sarah E. Waldeck, Comment, *Why the Judiciary Can't Referee the Takings Game*, 1996 WIS. L. REV. 859 (1996); Louise A. Halper, *Tropes of Anxiety and Desire: Metaphor and Metonymy in the Law of Takings*, 8 YALE J. L. & HUMAN 31 (1996); Charles Tiefer, *Controlling Federal Agencies by Claims on Their Appropriations? The Takings Bill and the Power of the Purse*, 13 YALE J. ON REG. 501 (1996); Robert Brauneis, *"The Foundation of Our Regulatory 'Takings' Jurisprudence": The Myth and Meaning of Justice Holmes's Opinion in Pennsylvania Coal Co. v. Mahon*, 106 YALE L. J. 613 (1996); Carol M. Rose, Book Review, *Takings, Federalism, Norms Regulatory Takings: Law, Economics, and Politics*, 105 YALE L. J. 1121 (1996) (reviewing WILLIAM A. FISCHER, *TAKINGS, FEDERALISM, NORMS REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* (1995)).

2. See, e.g., Brauneis, *supra* note 1, at 613; Hart, *supra* note 1, at 1252; Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part I—A Critique of Current Takings Clause Doctrine*, 77 CAL. L. REV. 1299 (1989); Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part II—Takings as Intentional Deprivations of Property Without Moral Justification*, 78 CAL. L. REV. 53 (1990); Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. CAL. L. REV. 1393 (1991); Jed Rubenfeld, *Usings*, 102 YALE L. J. 1077 (1993); Mark Sagoff, *Muddle Through or Muddle Through? Takings Jurisprudence Meets the Endangered Species Act*, 38 WM. & MARY L. REV. 825 (1997); Barton H. Thompson, Jr., Note, *Judicial Takings*, 76 VA. L. REV. 1449 (1990); BRUCE ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977); WILLIAM FISCHER, *REGULATORY TAKINGS* (1996).

3. See Richard J. Lazarus, *Putting the Correct "Spin" on Lucas*, 45 STAN. L. REV. 1411 (1993).

4. 117 S.Ct. 1659 (1996) (cert. granted).

The essay is divided into three parts. It begins with an introductory description of the background facts. This description, however, is provided from two very different perspectives: first, the perspective of the private property owner and, second, that of the regulating agency. The essay next explores in some detail the ways in which the two opposing parties chose to litigate the legal issues presented before the Supreme Court both in their respective briefs and at oral argument. Most significant in this discussion are the techniques used to maximize the possibility of a major favorable ruling or to minimize the possibility of a damaging loss. The *Suitum* litigation proved especially complex in that regard. Finally, the essay briefly describes what happened at oral argument in the case, as reflected in the questions posed by the individual Justices and their harbinger for the result.

I. THE *SUITUM* FACTS

One of the happy incidents of Supreme Court litigation is that the relevant facts tend not to be sharply disputed.⁵ The Court has granted review to decide an important issue of law and not to resolve ongoing factual disputes. The Court is contemplating the impact of its ruling on all cases, whatever their factual variations, which is why oral argument is dominated by questions posing hypothetical fact patterns. Those hypotheticals allow the Court to explore the implications of possible rulings of law. The Court routinely denies review in those cases where messy factual disputes obscure the legal issue presented.

Of course, the facts before the Court quite often have a major impact on the outcome. Those facts inform the legal issue before the Court. They highlight, in one particular factual setting, the implications of the Court's resolution of the legal issue presented. For this reason, those litigants, like the United States, who are involved in substantial litigation before the Court and the lower federal courts, strive to have the Court address legal issues in cases that present the best possible factual settings. The United States will therefore decline to petition for a writ of certiorari in certain cases and will even acquiesce in certiorari requests from opposing parties seeking Supreme Court review from decisions favorable to the federal

5. How "happy" depends, of course, on how favorable the record is to one's legal arguments.

government. The government's strategic objective is to press its legal argument in a case with sympathetic facts.⁶

Litigants solely involved in one isolated case obviously are not similarly able to choose among a series of possible fact patterns presenting the same legal issue. But they, like all litigants before the Court, will seek to pitch the facts of a particular case in the light most favorable to their legal position. In the *Suitum* case, their doing so led to very different factual emphasis, even in the absence of any significant factual dispute for the Court's resolution.

The common factual ground between the parties is fairly straightforward. *Suitum* presents a regulatory takings challenge brought by a landowner, Bernadine Suitum, against the Tahoe Regional Planning Agency (TRPA), which is a bi-state agency created by an interstate compact entered into by California and Nevada and approved by Congress.⁷ Suitum contends that the TRPA has taken her land by barring her from building a home on her land.⁸ The relevant TRPA Code of Ordinance prevents any development of her property that requires more than *de minimis* impermeable coverage of the land.⁹ The TRPA's justification for the restriction is that the Agency has determined that Mrs. Suitum's property is a "stream environment zone" (SEZ), the disturbance of which (the Agency believes) would have a negative impact on the quality of Lake Tahoe.¹⁰ The district court dismissed her takings claim for lack of ripeness.¹¹ And the Ninth Circuit affirmed.¹²

The ripeness ruling was based on the availability under the TRPA Code of transferable development rights (TDRs) to landowners, like Mrs. Suitum, within the Tahoe Basin.¹³ TDRs allow a landowner, in effect, to sever development rights from her parcel and to sell them for application to other eligible parcels of property in the Basin. There are three different kinds of TDRs available to landowners in Lake Tahoe: "land coverage," "residential

6. These comments are based on my own experience in serving as an Assistant to the Solicitor General from 1986 to 1989.

7. See Pub. L. No. 91-148, 83 Stat. 360 (1969) (amended 1980).

8. See Complaint at 1-6, *Suitum v. Tahoe Reg'l Planning Agency* (filed Jan. 28, 1991), reprinted in Joint Appendix, *Suitum v. Tahoe Reg'l Planning Agency*, No. 96-243 [hereinafter Joint Appendix].

9. See *TAHOE REG'L PLANNING AGENCY CODE* § 20.4 (1996).

10. Respondent's Brief at 12, *Suitum v. Tahoe Reg'l Planning Agency*, No. 96-243 (1997) [hereinafter Respondent's Brief].

11. See Joint Appendix, *supra* note 8, at 150-53 (reprinting the unpublished district court's ruling).

12. See *Suitum v. Tahoe Reg'l Planning Agency*, 80 F.3d 359 (9th Cir. 1996).

13. See *id.* at 362-63.

allocations," and "residential development rights."¹⁴ To build a single family home or other residential unit in the Tahoe Basin, a property owner must have all three rights. Ripeness was lacking, the lower courts held, because petitioner brought her lawsuit without first seeking to determine her entitlement to TDRs and, pursuant to TRPA procedures, to seek approval from the TRPA of their proposed transfer through sale to an identifiable, eligible parcel of property.¹⁵

Within these common bounds, the TRPA and Mrs. Suitum present their facts with remarkably different emphases. Described below are the facts of the *Suitum* case, as presented by the parties. The competing descriptions are followed by a brief discussion of the ways in which the *Suitum* facts, notwithstanding their unique nature, present a classic regulatory takings dispute.

A. The Facts According to Bernadine Suitum

In 1972, Bernadine Suitum and her late husband purchased a residential lot (slightly less than one half acre) in the Lake Tahoe Basin to build a home for their retirement.¹⁶ It had always been their shared dream to have such a home.¹⁷ The Tahoe property was zoned for residential use at the time of their purchase and homes were being constructed on lots in the area.¹⁸

Unfortunately, Mrs. Suitum's husband soon became seriously ill and remained ill for several years. His poor health and the related health care expenses, made them unable to build a home during that time.¹⁹ Their neighbors, however, did construct homes and, as a result, surrounded the Suitum's vacant lot with homes on three sides.²⁰ Mrs. Suitum's husband ultimately died from his illness.²¹ On his death bed, he reportedly restated his desire to have his wife realize their dream of building a home on their land at Lake Tahoe.²²

14. TAHOE REG'L PLANNING AGENCY CODE § 21.6.A (1996) (residential development right), *id.* §§ 20.3.A(4), 37.11 (land coverage), *id.* §§ 33.2.A(3), 37.8.C, 37.8.E (residential allocation).

15. *Suitum*, 80 F.3d at 362-63; *Suitum v. Tahoe Reg'l Planning Agency*, No. CV-N-91-040-ECR (D. Nev. filed Mar. 30, 1994), *reprinted in* Joint Appendix, *supra* note 8, at 152-53.

16. *See* Petitioner's Brief at 2, *Suitum v. Tahoe Reg'l Planning Agency*, No. 96-243 (1996) [hereinafter Petitioner's Brief].

17. *See* Herbert A. Sample, *Supreme Court To Review Dispute Over Development*, SACRAMENTO BEE, Feb. 23, 1997, at A1.

18. *See* Petitioner's Brief, *supra* note 16, at 2.

19. *See* *Suitum*, 80 F.3d at 362-63.

20. *See id.*

21. *See id.*

22. U.S. Supreme Court *Scales Back Barrier That Kept 83-Year-Old from Building on Her Land; Pacific Legal Foundation Hails Ruling as "Monumental Victory" for Property Rights in America*, BUSINESS WIRE, May 27, 1997 (Pacific Legal Foundation Press Release) ("When her husband,

By the late 1980s, Mrs. Suitum, who is now eighty-two years old and in "frail health," had garnered the resources necessary to seek a permit to build a home on her land.²³ The TRPA, however, denied her a building permit.²⁴ The denial was based on the TRPA's designating her land a SEZ.²⁵ According to the TRPA, preservation of SEZ land is necessary for the protection of the Lake, because SEZs "'provide surface water conveyance from upland areas into Lake Tahoe and its tributaries.'"²⁶ But, for Mrs. Suitum, "assertions that the construction of Mrs. Suitum's home would have adverse environmental impacts on Lake Tahoe are not supported by the record."²⁷ In fact, Mrs. Suitum alleges that TRPA made no "individualized determination that the construction of Mrs. Suitum's home, employing appropriate technology and mitigation procedures, would cause so much as a single atom of nitrogen to tumble into the ditch 60 yards to the rear of her front property line and be borne thence to the lake."²⁸

The possible availability of TDRs has, according to Mrs. Suitum, no relevance to the question whether the government has taken her property.²⁹ Some TDRs are of limited scope. Mrs. Suitum would be entitled, for instance, to sell "land coverage" based on one percent of the size of her lot. Given a lot size of approximately 18,300 feet, Mrs. Suitum would therefore be allowed to sell the right to cover eligible land with 183 square feet of impermeable coverage, which is less than a fourteen square foot structure.³⁰ To obtain a "residential allocation," she would have to enter and win a lottery.³¹ Mrs. Suitum has no automatic right to such a TDR under the TRPA Code. And, while she does have a right to a "residential development right" under the Code, the market for such a "wholly arbitrary" "administrative contrivance" from SEZ property is, she argues, nonexistent.³²

None of these "administrative credits" changes the basic fact that she cannot use her land in any meaningful way. "The administrative credits are in no sense a strand in the bundle of rights

now deceased, became ill, Mrs. Suitum said her husband told her, "'Hon, keep on going. Build the house, and I'll be with you.' And that's what I tried to do, she said.").

23. Petitioner's Brief, *supra* note 16, at 2; Petitioner's Reply Brief at 6, *Suitum v. Tahoe Reg'l Planning Agency*, No. 96-243 (1996) [hereinafter *Petitioner's Reply Brief*].

24. See *Petitioner's Brief*, *supra* note 16, at 3.

25. See *id.*

26. *Id.* (quoting Tahoe Regional Plan Goals and Policies).

27. *Petitioner's Reply Brief*, *supra* note 23, at 14.

28. *Id.* at 15.

29. See *Petitioner's Brief*, *supra* note 16, at 12-29.

30. See *id.* at 21.

31. *Id.* at 20.

32. *Id.* at 5 n.5, 20-21.

constituting Mrs. Suitum's ownership of her Mill Creek Estates lot"³³ They, therefore, bear no relevance to the question whether her property has been taken.³⁴ They do not allow her to "exercise . . . her personal autonomy and dominion by realizing her longtime dream of owning a retirement home on her own land"³⁵

B. The Facts According to the Tahoe Regional Planning Agency

The relevant facts, according to the TRPA, begin not in 1972, but several million years earlier with the formation of the Tahoe Basin and Lake Tahoe. The basin was formed when faults caused the land to drop forming a trough or graben with the Sierra Nevada mountain range to the west and the Carson Range to the east.³⁶ The Lake is one of the largest inland mountain lakes in the world. Its surface is 191 square miles³⁷ and its average depth is 1027 feet with a maximum depth of 1645 feet.³⁸

The Lake's waters are also of an extraordinarily high quality, especially their exceptional clarity.³⁹ Long ago, Mark Twain wrote of the Lake:

So singularly clear was the water, that where it was only twenty or thirty feet deep the bottom was so perfectly distinct that the boat seemed floating in the air! Yes, where it was even *eighty* feet deep. Every little pebble was distinct, every speckled trout, every hand's-breadth of sand [T]he water was not *merely* transparent, but dazzlingly, brilliantly so.⁴⁰

The Lake's famously clear waters are the result of its distinct physical features, which contribute to exceedingly low nitrogen and phosphorous concentrations in the Lake.⁴¹ The waters benefit from the relatively small amount of land in the Basin surrounding the Lake—approximately 200,000 acres.⁴² Less land means less opportunity for rain runoff to carry nutrients from the land into the Lake.⁴³ The Lake's waters also benefit from the high concentration of SEZ lands in the Tahoe Basin.⁴⁴ Approximately 10% of the Basin

33. *Id.* at 19.

34. *See id.* at 34.

35. *Id.* at 18.

36. *See* DOUGLAS H. STRONG, *TAHOE: AN ENVIRONMENTAL HISTORY* 1 (1984).

37. *See id.* at 6.

38. *See* Respondent's Brief, *supra* note 10, at 2; *see also* STRONG, *supra* note 36, at xiii.

39. *See* Respondent's Brief, *supra* note 10, at 2.

40. MARK TWAIN, *THE INNOCENTS ABROAD: ROUGHING IT* 654 (Library of America ed. 1984).

41. *See* Respondent's Brief, *supra* note 10, at 2.

42. *See id.* at 2-3.

43. *See id.*

44. *See id.* at 2.

is SEZ.⁴⁵ These lands effectively filter out contaminants from the runoff prior to their entry into the Lake.⁴⁶ SEZ lands act like a sponge, soaking up nitrogen and phosphorous in the rainwater and retaining them in the soil.⁴⁷

The Lake's high quality waters, however, are an extremely fragile feature.⁴⁸ The Basin includes a high proportion of steep slopes—one half of the land has a gradient over 20 percent.⁴⁹ The soil is highly susceptible to erosion.⁵⁰ The Lake is dependent on preservation of the SEZs, the destruction of which would significantly increase the nutrient flow in the Lake and thereby lower water quality and clarity.⁵¹ And, perhaps most important, the Lake has a very lengthy retention time.⁵² Because there is only one outlet—the Truckee River—whatever contaminants go into the Lake stay there.⁵³ It takes approximately 700 years for Lake Tahoe to flush itself out.⁵⁴ By comparison, Lake Erie, which is far larger, flushes itself out once every 2.3 years.⁵⁵

The fragile ecosystem upon which the Lake depends deteriorated during the past several decades of uncoordinated development and SEZ destruction.⁵⁶ The Lake lost about one-half meter per year of clarity between the early 1970s and the 1980s, threatening both "economic and ecologic collapse" in the Tahoe Basin.⁵⁷ Consequently, Nevada and California sought congressional approval of the creation of the TRPA: to implement an enforceable program to stop and reverse the Lake's rapid decline.⁵⁸

The 1987 TRPA Plan, which Mrs. Suitum challenges, implements the enforceable restrictions on development necessary for all those dependent on the Lake's preservation, including those who own property in the Basin.⁵⁹ The Plan assesses the suitability of development on individual parcels, like Mrs. Suitum's, based on their actual

45. *See id.*

46. *See id.* at 3.

47. *See id.* at 3.

48. *Id.*

49. *See STRONG, supra* note 36, at 6.

50. *See Respondent's Brief, supra* note 10, at 3; *see also STRONG, supra* note 36, at 4.

51. *See Respondent's Brief, supra* note 10, at 3.

52. *See id.* at 4.

53. *See id.* at 3-4.

54. *See id.* at 4.

55. *See id.*

56. *See id.*

57. *Id.* at 5.

58. *See id.*

59. *See id.* at 7-8.

physical characteristics.⁶⁰ The focus of the inquiry is the property's potential, if developed, to create physical spillover effects that cause harm outside the property's own borders, including harm to the Lake.⁶¹ Prevention of such harmful effects is the only reason residential development of Mrs. Suitum's land is not allowed.⁶²

The TDR program is not an arbitrary "administrative contrivance."⁶³ It is the product of years of consensus building workshops, involving government officials, environmentalists, and property rights advocates.⁶⁴ The three kinds of TDRs correspond directly to the TRPA's objectives of limiting long term residential development, the annual pace of that development, and the amount of impervious coverage in the Basin.⁶⁵ A residential development right represents the right to have a residential unit on an eligible parcel of land, and there is a total cap on the number of such units in the Basin.⁶⁶ A residential allocation is necessary to construct a residence in a specific calendar year, and the TRPA Plan limits the number of allocations available each year.⁶⁷ Land coverage is the maximum percentage of impervious coverage of the surface allowed, which directly corresponds to the need to reduce the amount of contaminants flowing into the Lake in rain runoff.⁶⁸

Economically, TDRs avoid the windfalls and wipeouts that otherwise occur from land use regulation that bars development on some parcels and permits it on others. TDRs promote a sharing of the benefits generated and burdens imposed by development restrictions. The restrictions make the TDRs more valuable both by reducing harmful spillover effects and by requiring those with property eligible for development to purchase development rights from other landowners, like Mrs. Suitum.⁶⁹

Absent the kind of land use restrictions implemented by the TRPA Plan, there would be no winners in Lake Tahoe. There would only be losers as the Lake continued to decline on an accelerated basis and the value of all land in the area plummeted in tandem

60. See *id.* at 8.

61. See *id.*

62. See *id.* at 7-11.

63. Petitioner's Brief, *supra* note 16, at 11.

64. See Respondent's Brief, *supra* note 10, at 7.

65. See *id.* at 8-10, 42.

66. See *id.* at 8 (citing TAHOE REG'L PLANNING AGENCY CODE § 21.6.A (1996)); see also TAHOE REG'L PLANNING AGENCY CODE § 35.2.A (1996) ("[A] maximum of 1,600 multi-residential bonus units shall be assigned to plan areas.").

67. See Respondent's Brief, *supra* note 10, at 9 (citing TAHOE REG'L PLANNING AGENCY CODE § 33.2.A(3) (1996)).

68. See *id.* at 8-9 (citing TAHOE REG'L PLANNING AGENCY CODE §§ 20.3.A(4), 37.11 (1996)).

69. See *id.* at 42-43.

with the Lake's ecological collapse. Mrs. Suitum's dream of a retirement home—repeated throughout the Tahoe Basin causing the destruction of SEZs—would rapidly become a nightmare for the Lake and surrounding property owners, including Mrs. Suitum and her heirs.

Petitioner's TDRs are not, contrary to her suggestions, worth less than zero.⁷⁰ The undisputed factual record in the case demonstrates that a viable market exists for her TDRs, and that they would fetch, altogether, a sum as high as \$56,000 dollars.⁷¹ In addition, the record is likewise uncontradicted in its showing that the market value of her land, even restricted, is as high as \$16,750 to her neighbors interested in expanding their residential lots.⁷² Therefore, the value of her entire package of property rights, including TDRs and residual land, is as high as \$72,000, which is far more than the \$28,000 Mrs. Suitum claims she originally paid for the property.⁷³ Indeed, because her property values may well have declined if development in the Basin had not been restricted, her property may even be worth more restricted than it would have been had development continued in the Basin unimpeded.

C. Comparing the Competing Factual Accounts

The differences between the two statements of facts are stark. The facts according to the petitioner, Bernadine Suitum, begin with Mrs. Suitum herself. The emphasis is, understandably, on Mrs. Suitum's status as an individual and the apparent difficulties that she faces, given her advanced age, the loss of her husband, and her frail health.⁷⁴ Petitioner's facts next emphasize her relationship to her land.⁷⁵ She can credibly posit a close, personal identification with the land in light of her proposed use and the land's relatively small size.

Her counsel's obvious objective in describing the facts in this fashion is to engender the Court's sympathy. Mrs. Suitum certainly presents the characteristics of the classic sympathetic plaintiff, and

70. See *id.* at 13 (citing Plaintiff's Response to Defendant's TRPA Memorandum Concerning Transfer of Development Rights at 2, *Suitum v. Tahoe Reg'l Planning Agency*, No. 96-243 (1996) (C.A. Rec. Item #77)).

71. See Joint Appendix, *supra* note 8, 131-32, 142.

72. See *id.* at 131-32.

73. See Deposition of Bernadine Suitum at 18, *Suitum v. Tahoe Reg'l Planning Agency*, No. CV-N-91-040-ECR (D. Nev. taken on June 23, 1993).

74. See Petitioner's Brief, *supra* note 16, at 2; see also Petitioner's Reply Brief, *supra* note 23, at 1, 6.

75. See Petitioner's Brief, *supra* note 16, at 2; see also Petitioner's Reply Brief, *supra* note 23, at 18-20.

the facts emphasized are neither contrived nor improper. To be sure, the legal issues would remain virtually the same if Mrs. Suitum were a younger, robust, extraordinarily wealthy individual. Mrs. Suitum's own personal circumstances nonetheless legitimately emphasize how, for some, real property may be closely tied to personal identity and restrictions on use may cause personal hardship.

Petitioner's factual description also logically stresses certain features regarding the timing and nature of the restrictions imposed on the development of her property. The suggestion, both implicit and explicit, is two-fold: (1) the restriction is inequitable because so many others were allowed to build prior to its imposition; and (2) the impact of any development of her property, whatever its nature, must be fairly minimal in light of preexisting development.⁷⁶

Mrs. Suitum also naturally seeks to describe the purpose of the restrictions on development in a way that bolsters her claim that a regulatory taking has occurred. Hence, she emphasizes her view that the TRPA is not preventing a harmful use of her property.⁷⁷ Instead, the government is, in effect, using the natural condition of her property—as a filter—to enhance the value of property owned by the public and by other private landowners who were and are allowed to develop their properties. Such use amounts to the very kind of “public use” of private property that the Fifth Amendment proscribes in the absence of just compensation.⁷⁸ Mrs. Suitum, in effect, implies a view of democratic government as essentially rent-seeking on behalf of the majority and government officials.

Finally, Mrs. Suitum's presentation of the relevant facts downplays the value of the TDRs to which she is entitled based on her ownership of these parcels. Instead, she emphasizes the broader functions property may serve in promoting individual liberty. Presenting the facts in this manner furthers Mrs. Suitum's legal argument that TDRs are no substitute for her own personal use of her property and “the right to use property is an inherent attribute of ownership.”⁷⁹ TDRs do not allow her to exercise autonomy and dominion over her property or to realize her and her late husband's dream to build a home there.⁸⁰ At most, TDRs allow someone else—the purchaser of her TDRs—to use *their* property for

76. See Petitioner's Brief, *supra* note 16, at 2; see also Petitioner's Reply Brief, *supra* note 23, at 14, 15.

77. See Petitioner's Reply Brief, *supra* note 23, at 13-15.

78. *Id.* at 14-15; see also U.S. CONST. amend. V.

79. Petitioner's Brief, *supra* note 16, at 21 (citing Robert Nozick, ANARCHY, STATE, AND UTOPIA 171 (1974)); *United States v. Causby*, 328 U.S. 256, 261 (1946).

80. See Petitioner's Brief, *supra* note 16, at 17-20.

developmental purposes.⁸¹ Her land remains "taken," and therefore, the Fifth Amendment mandates that the government pay her "just compensation."

Contrast Mrs. Suitum's approach with that of the respondent TRPA. Petitioner's status as an individual disappears. She is no longer "Mrs. Suitum," as in petitioner's brief. She is now simply "petitioner."⁸² The party that receives detailed description is not the landowner. Instead it is the natural resource at stake, which includes both its enormous beauty and fragility. The first five pages of the TRPA's brief is devoted to a description of the Lake and its pressing environmental problems.⁸³ The description is complete with historical references to John Fremont's sighting of the Lake in 1844, Mark Twain's subsequent literary description,⁸⁴ together with congressional findings regarding the seriousness of the ecological threats to the Lake.⁸⁵

Mrs. Suitum's home becomes "impermeable coverage." The development restriction is not using the land as a filter, it is preventing contaminated rain runoff from spilling over outside the boundaries of petitioner's property. Petitioner's property is the source of the threat.⁸⁶

Finally, the TRPA's description of the facts emphasizes the substantial economic advantages to property owners, including Mrs. Suitum, of TDRs. It demonstrates that TDRs are the kind of innovative land use planning device that warrant commendation, not condemnation. TDRs seek to reduce inequities and achieve environmental protection by relying on property rights and market forces. They restore substantial economic value to petitioner's bundle of property rights and avoid collapse of an ecosystem upon which petitioner's pre-restriction, higher market value, depended.⁸⁷

Respondent's description differs from petitioner's but is no less legitimate. The rule of law petitioner seeks from the Court in *Suitum* would apply equally to a large corporate developer contemplating a major residential development on hundreds of acres of sensitive wetlands. It is essential for the TRPA to explain to the Court how the impacts of development of certain types of land, especially those aquatic in character, are not discrete. They have major spillover

81. See *id.* at 19-23.

82. See generally Respondent's Brief, *supra* note 10.

83. See *id.* at 1-5.

84. See *id.* at 1-2.

85. See *id.* at 4-5.

86. See *id.* at 3, 12, 45.

87. See *id.* at 40-49.

effects on adjacent lands and on common pool resources, such as Lake Tahoe. Likewise, it is legitimate for the TRPA to ensure that the Court appreciates the unique and tremendous beauty of Lake Tahoe, the resource at stake in *Suitum*.

Finally, the TRPA needs to reverse the equities by demonstrating that the economic impact on petitioner is less harsh than that suggested by her brief. The TRPA accomplishes this in two ways. First, it emphasizes the economic value of the TDRs and how they promote property rights by creating a new, marketable right. Second, the Agency places petitioner's alleged loss in perspective by showing that a fair comparison of values requires an accounting of the decline in land use values that would have occurred absent the very restrictions on development imposed by the TRPA Plan that petitioner attacks.

Whichever perspective one embraces, the *Suitum* facts plainly offer a classic regulatory takings case. The conflict in *Suitum* between environmental protection and private property rights occurs, as is typically the case, where land meets water. That is no coincidence. Where land and water physically meet and interact is also where two fundamentally different conceptions of property rights collide.

Private expectations in land ownership tend toward fixed, stable, absolutist notions of private rights in property.⁸⁸ Water rights are far different.⁸⁹ The fluid and mobile physical nature of the resource imposes obvious limits on the scope of any private rights assigned to that resource.⁹⁰ These physical characteristics make clear the need to limit those private rights, as well as the need for accommodation and compromise when competing rights in a common resource conflict, as they inevitably do.⁹¹

The collision between private expectations and environmental protection is further exacerbated at the border between land and water because land values there are high. People like to live in those border areas, such as coastal zones, because of their close proximity to water bodies. Additionally, those areas are attractive for manufacturing and commercial activities because of the many potential uses of water for transportation and in industrial processes. Because real estate speculators have often yielded high profits by developing

88. See Eric T. Freyfogle, *Context and Accommodation in Modern Property Law*, 41 STAN. L. REV. 1529, 1530-31 (1989).

89. See *id.*

90. See *id.* at 1530.

91. See *id.* at 1539-45, 1552-53.

these border areas, any restrictions on development are likely to disappoint significant, investment-backed expectations.

It is therefore no coincidence that virtually every regulatory takings case to reach the Supreme Court in recent years has arisen in those land/water border areas. In *Agins v. City of Tiburon*,⁹² the dispute was over large lot zoning in the City of Tiburon overlooking the San Francisco Bay. In *First English Evangelical Church v. County of Los Angeles*,⁹³ it was the construction of a camp for handicapped children in a flood plain. In *Nollan v. California Coastal Commission*⁹⁴ and *Lucas v. South Carolina Coastal Council*,⁹⁵ the properties bordered the Pacific and Atlantic Oceans along the California and South Carolina coasts, respectively. In *Dolan v. City of Tigard*,⁹⁶ the principal basis for the challenged land use regulation was the plumbing and hardware store's physical proximity to a waterway prone to flooding. *Suitum*, of course, involves a parcel of land two thousand feet from Lake Tahoe, saturated with groundwater, and bordering a creek that flows directly into the Lake.

Finally, the *Suitum* case raises the fundamental question presented by the regulatory takings issue: whether the government takes private property when it prevents a landowner from eliminating the essential ecological functions the land serves in the broader ecosystem. In *Lucas*, the Court indicated that a restriction amounts to a taking when it results in a deprivation of all economic value, unless background principles of law otherwise support the restriction.⁹⁷ *Lucas*, which may or may not be weighty precedent today,⁹⁸ does not address the far more important question of how to analyze a takings claim in the absence of a total economic wipeout. The court simply punts back to its previously-announced multi-factor test of *Penn Central Transportation Co. v. City of New York*.⁹⁹ Moreover, because such total wipeouts almost never occur, the question that is left unanswered is by far the more important issue.

The *Suitum* facts present that unanswered legal issue. The record makes clear that this is not a case of total economic wipeout, like *Lucas*, because even with the restriction significant residual

92. 447 U.S. 255 (1980).

93. 482 U.S. 304 (1987).

94. 483 U.S. 825 (1987).

95. 505 U.S. 1003 (1992).

96. 512 U.S. 374 (1994).

97. See *Lucas*, 505 U.S. at 1019 n.8, 1027-31.

98. See Richard J. Lazarus, *Counting Votes and Discounting Holdings in the Supreme Court's Regulatory Takings Cases*, 38 WM. & MARY L. REV. 1099, 1103-06 (1997).

99. 438 U.S. 104, 124-25 (1978).

value to the land remains.¹⁰⁰ In *Suitum*, unlike *Lucas*, the governmental agency obtained the critical trial court finding that the land may retain "significant residual value" as a possible privacy buffer to the neighbors.¹⁰¹ In addition, because of the TDRs available to the landowner in *Suitum*, it creates the possibility that *Lucas's* factual premise need not ever occur. So long as governmental agencies utilize TDRs and those TDRs possess some significant market value, a restriction on development should never amount to a total economic loss for a property owner. For this reason, the issue posed by *Suitum*—whether the value of TDRs is relevant to the threshold "taking" question rather than merely the subsequent "just compensation" question—is of enormous practical significance.

II. CASTING AND RECASTING THE LEGAL ISSUE IN *SUITUM*

Suitum is nonetheless an odd case for the resolution of any fundamental issue of regulatory takings law. Because the lower courts dismissed *Suitum's* complaint on ripeness grounds, the threshold question of ripeness is the only legal issue before the Court. The merits of the underlying takings claim are not before the Court. The Court almost never addresses the ultimate merits of a case without allowing the lower courts the opportunity to do so in the first instance. As a practical matter, where the lower courts dismiss a complaint on threshold jurisdictional grounds, the factual record before the Court is invariably insufficient for a decision on the merits.

Why then did the Court grant review in *Suitum*? The answer lies in the way that Bernadine Suitum's lawyer effectively recast the ripeness argument in the Supreme Court to present the broader legal issues within ripeness. In the Supreme Court, petitioner's counsel jettisoned factbound arguments of little interest to the Court in favor of more sweeping legal contentions of broader interest, at least to those individual Justices looking for opportunities to establish precedent protecting property rights from governmental regulation. Of course, because the TRPA's interest in the case is to avoid just that result, petitioner's legal strategy required the TRPA to modify its own arguments in significant respects.

This part of the essay explores the various ways that *Suitum* and the TRPA tried to influence the judicial outcome by "pitching" the

100. See Joint Appendix, *supra* note 8, at 123-32, 139-43.

101. *Suitum v. Tahoe Reg'l Planning Agency*, No. CV-N-91-040-ECR (D. Nev. filed Mar. 30, 1994), reprinted in Joint Appendix, *supra* note 8, at 150, 152.

legal issue presented to the Court differently. Discussed first is how Suitum's counsel sought to present the legal issue in a way that maximized the possibility of the Court's handing down sweeping precedent favorable to them. Next, the essay addresses how the TRPA strived to recast the issue presented to minimize the scope of any unfavorable ruling by the Court.

A. The Legal Issue Presented According to Suitum

In the lower courts, the plaintiff landowner was represented by local counsel who presented a very narrow and quite extreme response to the TRPA's contention that plaintiff's complaint lacked ripeness. The TRPA claimed that the complaint lacked ripeness because the landowner had failed to pursue and obtain TRPA approval of the transfer of her TDRs prior to filing her complaint.¹⁰² The landowner's almost exclusive response was that the TDRs did not affect the ripeness of her complaint because they were a sham and lacked any market value.¹⁰³ The lower courts refused even to admit into evidence a supporting expert affidavit proffered by the landowner because it lacked any credibility.¹⁰⁴ By contrast, the lower courts accepted the TRPA's expert affidavits, which supported a finding that the TDRs possessed substantial market value.¹⁰⁵

As a practical matter, the ripeness dispute in the lower courts devolved into a factbound inquiry over whether the landowner's TDRs possessed significant market value. Once the lower courts concluded that they did, the courts accepted the TRPA's contention that until a landowner determined the full extent and value of those TDRs, a takings claim was not ripe because a court could not determine the economic impact of the challenged regulation on the property that had allegedly been taken. Relying on the Supreme Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank*,¹⁰⁶ the courts reasoned that until a court knows how "far" a regulation has gone, the court cannot decide whether a

102. See Defendant's Motion for Summary Judgment, *Suitum v. Tahoe Reg'l Planning Agency*, No. CV-N-91-040-ECR (D. Nev. filed Sept. 15, 1993) (C.A. Rec. Item #66); Defendant TRPA's Memorandum Concerning Its Transfer of Development Program, *Suitum v. Tahoe Reg'l Planning Agency*, No. CV-N-91-040-ECR (D. Nev. filed Dec. 8, 1993) (C.A. Rec. Item #74).

103. See Plaintiff's Response to Defendant TRPA's Memorandum Concerning Its Transfer of Development Program at 2, *Suitum v. Tahoe Reg'l Planning Agency*, No. CV-N-91-040-ECR (D. Nev. filed Jan. 7, 1994) (C.A. Rec. Item #77).

104. See *Suitum v. Tahoe Reg'l Planning Agency*, No. CV-N-91-040-ECR (D. Nev. filed Mar. 30, 1994), reprinted in Joint Appendix, *supra* note 8, at 151 n.2; see also *Suitum v. Tahoe Reg'l Planning Agency*, 80 F.3d at 359, 363 (9th Cir. 1996).

105. See *Suitum*, 80 F.3d at 363-64.

106. 473 U.S. 172 (1985).

regulation has gone "too far" and, therefore, amounts to a taking requiring the payment of just compensation.¹⁰⁷ The rationale is, at least on the surface, entirely in keeping with the rationale of the Court's precedent that a regulatory takings claim is not ripe until a property owner has taken the steps (permit application, variance application, amendment application) to determine precisely how the challenged law applies to the land in question.¹⁰⁸

In seeking Supreme Court review, Suitum's counsel needed to pursue a very different tact. A factbound argument will almost never result in Supreme Court review. The individual Justices disagree about many things. But they all share the sentiment that their job is not to correct lower court decisions. Their job is instead to review and decide only the most important legal issues facing the nation or those slightly less important legal issues that both divide the lower courts and require a uniform answer.

The Pacific Legal Foundation (PLF) took over as Suitum's lead counsel before the High Court. PLF is a conservative public interest litigation organization and is no novice in Supreme Court regulatory takings litigation. PLF has represented the interests of property owners as *amicus curiae* or as parties in virtually every land use takings case before the Court during the past two decades.¹⁰⁹ Their programmatic interest in the *Suitum* litigation no doubt extends further than Bernadine Suitum's more narrow interests in this case. One can anticipate that PLF lawyers saw in the sympathetic facts of Mrs. Suitum's personal circumstances an opportunity for favorable Supreme Court precedent that furthers PLF's broad property rights agenda.

PLF's challenge was nonetheless considerable given the procedural posture of the case and the narrow, extreme nature of the landowner's arguments on the ripeness issue in the lower courts. Each made this case an unlikely candidate for Supreme Court review. Also weighing heavily against the Court's review was the

107. *Suitum v. Tahoe Reg'l Planning Agency*, No. CV-N-91-040-ECR (D. Nev. filed Mar. 30, 1994), reprinted in Joint Appendix, *supra* note 8, at 153; *Suitum*, 80 F.3d at 362-63.

108. See *MacDonald, Sommers & Frates v. Yolo County*, 477 U.S. 340, 348 (1986) ("A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes.").

109. See, e.g., *Agins v. City of Tiburon*, 447 U.S. 255, 256 (1980); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 268 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 174 (1985); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 472 n.* (1987); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 306 (1987); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 826 (1987) (counsel of record for petitioner); *Yee v. City of Escondido*, 503 U.S. 519, 521 (1992); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1005 (1992); *Dolan v. City of Tigard*, 512 U.S. 374, 376 (1994).

unique nature of the TRPA's TDR program, which divides TDRs into at least three types and utilizes a fairly intricate program for their establishment and utilization. There are few obvious analogues in federal law or other state laws, which renders any judicial decision regarding the TRPA program potentially less significant.

PLF successfully obtained Supreme Court review by distancing itself from the factbound ripeness arguments made on behalf of its client in the lower courts in favor of broader legal theories of potentially greater interest to the Justices.¹¹⁰ PLF's argument was no longer that the TDRs lacked any market value (although disdain for TDRs remained palpable in the petition). The argument was that the Court's precedent did not make their valuation a prerequisite for ripeness.¹¹¹ This allowed PLF to present the case as an opportunity for the Court to sort out existing confusion in the lower courts regarding the meaning of the Court's ripeness ruling in *Williamson County*.¹¹² According to PLF, the Ninth Circuit's ruling in *Suitum* exemplified the ways in which the lower courts were misapplying *Williamson County*.¹¹³

In seeking Supreme Court review, PLF also described the case as implicating the viability of a recent Supreme Court case, *Lucas v. South Carolina Coastal Council*, in which the Court had endorsed an analytic framework for takings analysis potentially more favorable to landowners.¹¹⁴ As described by petitioner, "[w]hen all 'economically productive use' of land is forbidden, under *Lucas* the Takings Clause is violated unless the forbidden use could have been prohibited under common law nuisance doctrine."¹¹⁵ PLF contended that the Ninth Circuit ruling "could eviscerate the *Lucas* categorical taking doctrine. If the transfer of a development right is a 'use' of land, then *all* use of land is not denied whenever the regulator body fabricates a TDR program."¹¹⁶ PLF, in effect, collapsed the argument regarding the merits of a takings claim into its ripeness argument, which made the case potentially far more attractive to those

110. See Tanya Branson, *Property Rights Attorney Goes to the Supreme Court*, *TAHOE WORLD*, Apr. 17, 1997, at 9A ("The Pacific Legal Foundation and [Larry] Hoffman had the perfect client, an 82-year-old widow in a wheelchair, [Hoffman] joked to the bar association members."); Petition for Writ of Certiorari, *Suitum v. Tahoe Reg'l Planning Agency*, No. 96-243 (filed Aug. 12, 1996).

111. Petition for Writ of Certiorari at 13-16, *Suitum v. Tahoe Reg'l Planning Agency*, No. 96-243 (filed Aug. 12, 1996).

112. See *id.* at 11-12.

113. See *id.* at 12.

114. See *id.* at 16-18.

115. *Id.* at 17 (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992)).

116. *Id.* at 18.

Justices concerned about preventing erosion of their decision in *Lucas*.

Once the Supreme Court granted review in *Suitum*, PLF raised the stakes considerably by recasting yet again the nature of its legal claims on behalf of the landowner. Indeed, PLF's counsel of record changed to a more senior, policy-oriented attorney, which is likely why the tone of the briefing shifted dramatically.¹¹⁷ Gone was the more dispassionate discussion, evident in the petition for a writ of certiorari, explaining the need for clarification of the Court's ripeness precedent. Substantially deemphasized was the landowner's narrow contention that her case is ripe because the value of her TDRs—and thus the "economic impact" of the challenged regulation—can be readily determined based on appraisals without the need for any formal efforts to obtain approval of the transfer of her TDRs.¹¹⁸

In their place was the heavy artillery of the property rights movement. PLF's brief on the merits for the landowner, unlike its petition for review, reflected a concerted effort to use *Suitum*'s sympathetic facts to expand dramatically Fifth Amendment protection of private property rights in land.¹¹⁹ To be sure, PLF's merits brief maintained the essential focus on ripeness. But, as only hinted at in the petition, the brief now collapsed aggressive, libertarian theories of the Fifth Amendment Takings Clause into its ripeness arguments.¹²⁰

Petitioner's takings claim is ripe, the merits brief argued, because TDRs, and their value, are totally irrelevant to the question of whether property has been taken.¹²¹ The brief asserted that *Lucas* stands for the proposition that a landowner has a right to "use" property for essential uses such as the building of a home, and the "ruse" of TDRs "would render this Court's categorical takings doctrine" in *Lucas* "a nullity."¹²² Citing to Friedrich A. Hayek's *The Road to Serfdom*, the brief argued that "[p]roperty ownership without the right of use would be an empty formalism, incapable of performing its crucial social function of providing a bulwark of personal autonomy against the encroachment of an aggressive, overreaching state."¹²³ The "full exercise" of "development rights" the brief maintained, is

117. Compare *id.* at 25 (listing Victor J. Wolski, Counsel of Record) with Petitioner's Brief, *supra* note 16, at 34 (listing R.S. Radford, Counsel of Record).

118. See Petitioner's Brief, *supra* note 16, at 25-27.

119. See *id.* at 16-22.

120. See *id.*

121. See *id.* at 12-23.

122. *Id.* at 30-34.

123. *Id.* at 21.

"inherent in the ownership" of undeveloped land.¹²⁴ Because TDRs do not provide a landowner with the right to use his land—they "represent *variances* from restrictions on development of the purchaser's land"—their value has no bearing on the ripeness of a landowner's takings claim.¹²⁵

In short, PLF's brief sought to take the *Suitum* case far beyond ripeness and the implications of TDR programs for *Williamson County*. PLF's brief for the landowner sought, through ripeness, to have the Court endorse a theory of the Takings Clause that would make landowners far more likely to succeed on the merits in regulatory takings claims brought against land use regulators. Under that theory, landowners would have a fundamental "right to use" property for developmental purposes. And, programs like TDRs, which reduce the economic impact of a regulation, would not defeat the applicability of the *Lucas per se* rule for regulations that deprive a landowner of all economically viable use of her property.

Indeed, PLF's briefing became so focused on the merits of its takings claim that it finally abandoned any pretense of even linking the merits to the ripeness issue in its reply brief. The reply brief explicitly asked the Court to rule in favor of the landowner on the merits of her takings claim.¹²⁶ It did so notwithstanding that the petition for a writ of certiorari had presented only the ripeness issue to the Court.¹²⁷ The validity of the underlying regulatory takings claim was, therefore, not even before the Court.¹²⁸ Yet PLF's property rights zeal finally overcame those basic jurisdictional concerns in the reply brief.

B. The Legal Issue Presented According to the TRPA

The TRPA's outlook on the case is necessarily different. PLF seeks to make this a major takings case. The TRPA, having won below, has no interest at all in *Suitum* even being a Supreme Court case. The TRPA would, of course, prefer to have the Court affirm the lower court's judgment. But the Agency would likely not be displeased if *Suitum* were to become a minor, relatively unimportant case.

124. *Id.* at 23.

125. *Id.* at 22-23.

126. See Respondent's Brief, *supra* note 10, at 2, 15-17.

127. See Petition for Writ of Certiorari, *Suitum v. Tahoe Reg'l Planning Agency*, No. 96-243 (filed Aug. 12, 1996).

128. See SUP. CT. R. 14.1.

The TRPA certainly cannot afford to ignore the downside risks presented in *Suitum*. The landowner's personal circumstances make her legal position appear more sympathetic. There is also reason to anticipate that a majority of the Court may be initially hostile to the TRPA in this case. At least five Justices on the current Court have previously voted in favor of property owners' raising takings claims against land use regulators.¹²⁹ And it is doubtful that the minimum of four Justices who voted in favor of review in *Suitum* did so with the expectation of affirming the Ninth Circuit ruling. They are far more likely to have granted review with the opposite expectation.

The TRPA must, therefore, begin with the assumption that a majority of the Justices likely expect to rule against the Agency and reverse the lower court's judgment. The TRPA must, to be sure, resist that unfavorable result, but in so doing, it cannot afford to blind itself to the notion that not all losses would be equal. There are bases upon which the TRPA could lose the Ninth Circuit's favorable judgment that would amount to a devastating loss for the TRPA and for government regulators nationwide. Yet, at the same time, there are doubtless ways that the judgment could be reversed that would be far less troubling. Indeed, loss of a judgment on certain narrow grounds could even offer substantial benefits in both the current and future litigation.

The worst possible losses for the TRPA would be on one of two possible grounds. The first would be that the landowner's takings claim is ripe because all landowners have the inherent right to develop their property. The abrogation of that right, moreover, triggers application of the *Lucas per se* takings test. The physical suitability of the property for development would be irrelevant under that approach. So too would be the land's environmental fragility. Such a ruling would realize some of the worst implications of the Court's reasoning in *Lucas* and expand its possible application far beyond the narrow factual predicates of that case. Wetlands protection programs, restrictions on mining, and land use restrictions for the protection of endangered species would all be imperiled.

A second damaging basis for an adverse ruling would be that TDRs are irrelevant to the question of whether property has been taken. The Court would rule that although the positive economic value of TDRs mitigates the "economic impact" of a restriction on land use, such value is relevant only to the question of whether a

129. See *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (majority opinion in favor of landowner authored by Chief Justice Rehnquist and joined by Justices O'Connor, Scalia, Kennedy, and Thomas); see also Lazarus, *supra* note 98, at 1131-40.

landowner has received "just compensation" for "taken" property. It does not mean that there has been no taking in the first instance.

Whether TDR value is relevant to the threshold "taking" issue or only to the subsequent "just compensation" issue is of enormous practical significance. If relevant to the threshold taking issue, then positive TDR value would avoid the *Lucas per se* takings test whenever land use restrictions were coupled with TDR programs. There would likely never be the total economic wipeout necessary to trigger the *Lucas per se* test.

The positive economic value of TDRs would also substantially affect the result in cases where *Lucas* did not otherwise apply. In those cases, courts apply the three-factored takings analysis established by the Court in *Penn Central Transportation Co. v. City of New York*.¹³⁰ One of the three factors is the "economic impact" of the challenged regulation.¹³¹ By reducing the net economic impact of a land use restriction, TDR value would make courts less likely to conclude that a restriction on land use amounts to a taking under that analysis. That, in fact, was how the *Penn Central* Court weighed TDRs, as mitigating the economic impact on the landowner, and that ruling has fostered the use of TDRs in a variety of land use regulatory programs.¹³²

If, however, the Court were to accept PLF's contention that TDR value is relevant only to the just compensation issue, the opposite scenario would result, and courts would be more likely to find a taking requiring just compensation. They would do so applying the *Lucas per se* rule in more cases and would be more likely to do so applying the *Penn Central* framework. To the extent that courts measure "just compensation" based on the fair market value of the highest and best use of the property absent restrictions, TDR value would most likely fall short of that constitutional requirement. Federal, state, and local governments, therefore, would have to make up the difference between TDR value and just compensation where courts concluded that a taking had occurred. The upshot is that the constitutionality of land use programs that rely on TDRs would be jeopardized.

A far narrower basis for reversal would be that Suitum's takings claim is now ripe simply because the landowner need not seek

130. 438 U.S. 104, 124 (1978) (identifying as factors "of particular significance" in resolving a regulatory takings claim: (1) the "character of the governmental action;" (2) the extent of any "interfere[nce] with distinct, investment-backed expectations;" and (3) the "economic impact" of the regulation).

131. *Id.*

132. *See id.* at 137.

approval of the transfer of her TDRs to ripen her claim. A trial court can rely on appraisals offered by the parties to the litigation to determine TDR value. TDR value would, under this approach, be relevant in deciding the merits of Suitum's takings claim. But failure to seek formal TRPA approval of a transfer of TDRs to specifically identified property would not render the takings claim unripe.

This final approach would, of course, be adverse to the interests of the TRPA because it would require a reversal of the Ninth Circuit's favorable judgment. But the Court's rationale would be far less troubling to the TRPA than either of the two broader legal bases previously described. Indeed, there would be a significant silver lining to reversal on that narrow basis. In many circumstances, appraisal evidence of the value of TDRs is likely to be favorable to the government, perhaps even more so than relying on the marketing efforts of an individual landowner at any one discrete moment of time.

The *Suitum* facts are illustrative. Should the Court remand the case for TDR valuation based on the existing record, the TRPA will likely fare quite well. The lower courts rejected the landowner's proffered evidence that her TDRs lacked economic value.¹³³ As a result, the uncontroverted evidence before the trial court is that those TDRs possess substantial market value—as high as \$56,000.¹³⁴ There is also uncontradicted evidence at trial that the land itself retained a market value of approximately \$16,000 because neighbors would be interested in expanding the size of their lots surrounding their existing homes.¹³⁵ The substantiality of these sums render *Lucas* wholly inapplicable, and a successful takings challenge under the *Penn Central* framework highly problematic.

For this reason, the TRPA, like Bernadine Suitum, faced a considerable challenge in developing its litigation strategies before the Supreme Court. The Agency's preference was, of course, the Court's affirming the Ninth Circuit's judgment. Yet, at the same time, the TRPA needed to minimize the possibility of a loss on broadly damaging grounds and to maximize the possibility that any loss be based on narrow grounds that could inure to the Agency's benefit on remand.

133. See *Suitum v. Tahoe Reg'l Planning Agency*, No. CV-N-91-040-ECR (D. Nev. filed Mar. 30, 1994), reprinted in Joint Appendix, *supra* note 8, at 153; *Suitum v. Tahoe Reg'l Planning Agency*, 80 F.3d 359, 363-64 (9th Cir. 1996).

134. See *Suitum v. Tahoe Reg'l Planning Agency*, No. CV-N-91-040-ECR (D. Nev. filed Mar. 30, 1994), reprinted in Joint Appendix, *supra* note 8, at 153.

135. See *id.*

The TRPA's brief on the merits reflects these competing concerns. The brief stresses the very different implications of Suitum's various legal theories. The brief expressly labels them "narrow" and "extreme" and adopts a quite different emphasis and tone in their respective discussions.¹³⁶

Because the narrow ripeness ground is the least troubling, TRPA's brief discussed it first.¹³⁷ Doing so makes plain that should the Court agree with Suitum on this isolable ground, the Court need not address any of Suitum's broader property rights theories. TRPA's brief also explicitly acknowledged that Suitum's narrow claim presents a "close question."¹³⁸

To be sure, the brief contested Suitum's narrow argument and defended the judgment of the court of appeals. But it did so on a ground that is itself narrower than that of the court of appeals. The Ninth Circuit's opinion appeared to create a rigid rule of finality, suggesting that a takings claim would never be ripe until after a landowner formally sought Agency approval of the transfer of TDRs.¹³⁹ The TRPA's ripeness argument before the Supreme Court did not advance that same argument. It was based instead on more flexible notions of prudential ripeness and the need for the reviewing court to have the evidence of "economic impact" before it for an adjudication of a takings claim.¹⁴⁰ The tone of this portion of the brief was matter-of-fact and even-handed.

The tone of the remainder of the TRPA's brief was, however, decidedly different.¹⁴¹ The brief aggressively challenged PLF's broad property rights theories, which were not similarly characterized as presenting a close question. The brief sought to ensure that if the Court is inclined to rule against the TRPA, that the majority will decide not to do so on broader grounds than necessary. The focus of the presentation was aimed at those Justices on the Court, such as Justice Kennedy and perhaps Justice O'Connor, who are more likely to be at the center of a sharply-divided Court on regulatory takings issues.¹⁴²

The brief, therefore, directly challenged the landowner's reliance on *Lucas*.¹⁴³ The TRPA explained that *Lucas* has no bearing on this

136. Respondent's Brief, *supra* note 10, at 16.

137. *See id.* at 30-31.

138. *Id.* at 16.

139. *Suitum v. Tahoe Reg'l Planning Agency*, 80 F.3d 359, 362-63 (9th Cir. 1996).

140. Respondent's Brief, *supra* note 10, at 18-30.

141. *See id.* at 32-49.

142. *See Lazarus, supra* note 98, at 1116-18, 1131-40.

143. *See* Respondent's Brief, *supra* note 10, at 34-36.

case at all because of the presence of economically viable use (relying on the record evidence of the significant residual value of the land).¹⁴⁴ And the Agency took broader issue with the PLF's claim that the Court in *Lucas* endorsed a constitutional right to develop property.¹⁴⁵ According to the TRPA, the Court's focus in *Lucas* was on property "value" and not on "use" *per se*.¹⁴⁶

The TRPA brief also singled out Justice Kennedy's separate concurrence in *Lucas* for special emphasis.¹⁴⁷ The brief argued that Kennedy's reasoning in that concurrence is at odds with PLF's extreme views regarding a constitutional right to develop property.¹⁴⁸ The concurrence's description of Fifth Amendment takings law focuses on the economic value of the regulated property. It does not endorse the notion that the Fifth Amendment supports a landowner's inherent right to "use" property in certain essential ways, such as the building of a home.¹⁴⁹

Justice Kennedy's views on *Lucas* are especially significant. There are only four Justices currently on the Court who joined the *Lucas* five-Justice majority—Chief Justice Rehnquist and Justices Scalia (the author), O'Connor, and Thomas. Justices Stevens, Souter, Ginsburg, and Breyer are unlikely adherents. Justice Kennedy's separate concurrence in *Lucas*, in which he declined to join Justice Scalia's majority opinion, is the likely harbinger of the Court's future treatment of *Lucas*.¹⁵⁰

The TRPA brief adopted a similarly aggressive approach to PLF's broad argument that TDRs are relevant only to the just compensation issue. The TRPA's theme here was stare decisis and federalism, again in an effort to persuade the more centrist Justices of the problematic nature of the TRPA's broad argument.¹⁵¹ The brief, therefore, stressed that the Court in *Penn Central* had specifically rejected the same argument being advanced by PLF in *Suitum*.¹⁵² The *Penn Central* Court held that the value of TDRs is relevant to a regulation's economic impact and therefore to the threshold question whether a taking had occurred.¹⁵³ And, the brief further stressed

144. *See id.* at 35 n.23.

145. *See id.* at 34.

146. *Id.* at 34-35.

147. *See id.* at 36.

148. *See id.*

149. *Id.*

150. *See Lazarus, supra* note 98, at 1107-09, 1131-40.

151. *See Respondent's Brief, supra* note 10, at 32-33.

152. *See id.*

153. *See id.* at 33 (citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 137 (1978)).

that state and local governments have long relied on that settled precedent in establishing TDR programs across the country.¹⁵⁴ The intended effect was to ensure that the Justices were aware of the costly ramifications for state and local governments of the Court's reaching out to decide the *Suitum* case on the broader grounds advanced by PLF on Suitum's behalf.

Finally, in a further appeal to those on the Court (likely a majority) concerned about erosion of private property rights, the TRPA brief stressed the property rights advantages of TDRs. TDRs, the brief explained, reflect a move away from rigid command and control regulatory approaches.¹⁵⁵ They express a revitalization of private property rights and market forces to achieve environmental protection in a fairer and more efficient manner.¹⁵⁶ TDRs, in effect, enhance property rights by creating a market in developmental rights.¹⁵⁷

The TRPA brief elaborated on the advantages of TDRs by focusing more particularly on the functioning of TDRs in the Tahoe Basin.¹⁵⁸ Under the TRPA Code, TDRs do not apply only to those whose property is restricted. They enhance the property rights of *all* landowners.¹⁵⁹ TDRs permit each landowner to sever development rights for transfer and application to other eligible property.¹⁶⁰ According to the TRPA brief, the upshot is two-fold: (1) development is steered to those parcels that are most environmentally suitable and economically profitable; and (2) the economic benefits and burdens of environmental restrictions are shared more equitably by all landowners in the Basin.¹⁶¹

C. *Emphasis and Deemphasis at Oral Argument*

The primary purpose of oral argument is, of course, to answer the Justices' questions. The current Court is quite lively during argument and their questions mostly reflect genuine, persistent probing of the legal issues presented.¹⁶² The Justices explore the soft spots in the positions of the parties, which are easy to write around

154. See *id.* at 16-17, 33.

155. See *id.* at 40-43.

156. See *id.* at 41.

157. See *id.* at 40-43.

158. See *id.* at 41-45.

159. See *id.* at 38.

160. See *id.*

161. See *id.* at 41-45.

162. See Joan Biskupic, *Justices Growing Impatient With Imprecision*, WASH. POST, May 5, 1997, at A17.

in briefing, but difficult to avoid orally when confronted with able, pointed questioning.

Although the oral advocate must ultimately speak to the issues of concern to the Justices, the oral argument does provide counsel with the opportunity to signal the party's priorities in the litigation and to establish a theme for the party's legal position. In *Suitum*, both PLF and the TRPA were faced with difficult choices in that regard.

PLF had to decide whether to focus on the possibility of a big win, by stressing its broad private property rights theories or to downplay the implications of its position, by emphasizing the more factbound equities presented by Mrs. Suitum's individual circumstances. Normally, if an oral advocate can win on any one of several possible grounds, the advocate should spend her limited time on her strongest ground. In this case, that rationale would suggest that PLF should spend its time on the narrow ripeness argument—its strongest on the merits. By doing so, however, PLF would miss its opportunity to press the broad property rights theories of greatest programmatic interest to PLF and the property rights movement.

The TRPA was faced with a similar dilemma. Unlike *Suitum*, the TRPA could preserve its judgment only if it defeated each of *Suitum*'s various grounds for reversal because any one of the three would be sufficient to vacate the judgment. Normally, in those circumstances, the oral advocate must spend her time on the *other side's* strongest position and her own weaker arguments. This may seem counterintuitive, but it remains prudent. There is little point in spending limited oral argument time making strong arguments against a legal theory that the Court need not even address to deal your client a loss. Based on this reasoning, the TRPA should allocate its oral argument time disproportionately to *Suitum*'s narrow ripeness argument because that is the petitioner's strongest argument.

What complicates the decision for the TRPA in *Suitum* is that not all losses are equal. As previously described,¹⁶³ affirmance is, of course, the best possible result, but a loss on narrow ripeness grounds is far more palatable than a loss based on PLF's broader theories. Indeed, as also discussed above,¹⁶⁴ such a narrowly-based loss may even have distinct, long term advantages for the TRPA in *Suitum* and for government regulators in future cases.

163. See discussion *supra* Part II.B.

164. See discussion *supra* Part II.B.

But it is less clear which way this factor cuts in terms of presenting TRPA's oral argument. It might seem, in the first instance, to support the TRPA's emphasizing in its oral presentation the flaws in Suitum's broad legal theories. The TRPA cares most about those issues and therefore should allocate its oral argument time accordingly. On the other hand, by doing so, the TRPA might unwittingly make it more likely that the Court will choose to address the broad theories. To the extent, therefore, that the TRPA is less confident of how the Court would rule in addressing those issues, the TRPA might decide in favor of their deemphasis rather than their emphasis.

So, what did the parties actually do at oral argument? The PLF attorney, arguing on behalf of the landowner, adopted an understated, moderate style.¹⁶⁵ (Rumor has it that he tried a more aggressive, sweeping approach in his moot court a few days beforehand, but that it bombed in front of a panel of more seasoned Supreme Court advocates). He focused on the narrow, ripeness argument in the first instance and moved only tentatively toward the broader legal theories.¹⁶⁶ He readily acknowledged, the reply brief notwithstanding, that the merits of the takings claim were not before the court and did not press the broader legal theories when initially rebuffed by several Justices.¹⁶⁷ The argument's emphasis was on Bernadine Suitum and her desire for a day in court. His opening statement was, "[t]his case is about an ordinary property owner

165. See Official Transcript of the Oral Argument in the United States Supreme Court at 3-24, *Suitum v. Tahoe Reg'l Planning Agency*, No. 96-243 (1997) [hereinafter Oral Argument Transcript] (argument of R.S. Radford, Counsel for Petitioner).

166. See *id.*

167. See *id.* The oral argument transcript reveals several exchanges where the PLF lawyer declined opportunities to press broader arguments and, in one instance, even had to be cajoled by Justice Scalia to do so:

Question: The Ninth Circuit didn't reach any takings question, did they?

Mr. Radford: No.

Question: They said that under *Hamilton County* this was simply—you had to pursue further remedies before they would even confront the question.

Mr. Radford: That's correct, Mr. Chief Justice.

Question: I thought it was your position that it doesn't go to the taking either.

....

Mr. Radford: That is indeed our position, Justice Scalia . . . [I]f this Court decides that there's residual value in the property and decides that that has some relevance to the takings question—

Question: Or decides that there may be. We don't need to make the factual determination.

Mr. Radford: That's correct[,] . . . Justice O'Connor . . . I think this is a *Lucas* case.

Question: Do we have to say whether it's a *Lucas* case or a *Penn Central* case in order for you to prevail on the ripeness claim?

Mr. Radford: No. That's not necessary, Justice Kennedy.

Id. at 9-11.

who's been denied all beneficial use of her land and then, in addition, has been denied access to the courts to seek relief for that categorical taking of her property."¹⁶⁸ The result was an effective, informative presentation that lacked the more extreme and fiery rhetoric that dominated much of Suitum's opening and reply briefs.

The TRPA likewise chose to emphasize the narrow ripeness issues before the Court. Its decision not to emphasize the broader legal theories before the Court was made easier by the TRPA's decision to agree to permit the United States, as *amicus curiae*, to use ten minutes of the TRPA's oral argument time in support of the TRPA.¹⁶⁹ Because the federal interest in the case was exclusively concerned with the implications of PLF's broader legal arguments, the TRPA could be confident that the United States would, if necessary, focus on those issues in its presentation.

The TRPA also sought to establish a theme in its oral presentation that underscored why the Justices (particularly Kennedy and O'Connor) should find the TRPA's legal position more attractive than they might have originally assumed. The theme was the advantages to *property owners* of a ruling in favor of the TRPA.¹⁷⁰ To that end, the TRPA sought to emphasize how: (1) affirmance of the court of appeals' judgment could be to property owner's advantage because the existing record favored the TRPA and dismissal provided the landowner with the opportunity to establish a more favorable record; (2) TDRs promote private property rights and reliance on market forces; and (3) the land use restrictions challenged in this case protect all property owners in the Tahoe Basin from the adverse economic effects of the destruction of a common resource upon which they depend. The TRPA's opening statement at oral argument was, accordingly, that "Petitioner's position is decidedly at odds with the interests of property owners concerned about governmental regulation."¹⁷¹

III. CONCLUSION: SPECULATING ABOUT THE OUTCOME

Speculating about pending Supreme Court cases is no more than that: speculating. The Justices are notoriously hard to read. What seems to be a Justice's obvious inclinations at oral argument can be quite deceptive when the opinions are released and votes made known. Even more "scientific" bases of speculations, such as

168. *Id.* at 3.

169. *See id.* at 42-49.

170. *See id.* at 24-42 (argument of Richard J. Lazarus, Counsel of Record for Respondent).

171. *Id.* at 24.

predicting the author of an opinion based on which Justices have authored previously-announced opinions in cases argued during the same two-week arguments sessions are of limited value and can easily go awry.¹⁷² The technique works only if the case of interest is one of the last to be decided, the opinions assignments are given out somewhat evenly among the Justices during the relevant two-week session, and there are no changes in opinion writing after the original assignment.

Supreme speculation is nonetheless an entertaining enterprise. So, notwithstanding the risk of future embarrassment, I will venture forth to speculate about the possible implications for the outcome of the Justices' questions and comments at oral argument.

The Court was, as always, fairly lively. And, the Justices seemed more skeptical of the TRPA's legal position at argument than they did of the landowner's position. It was not surprising that Chief Justice Rehnquist and Justice Scalia were openly critical of the TRPA's ripeness argument,¹⁷³ given their past writings. Nor was it surprising that Justice Thomas was silent. But Justice Stevens' complete silence—normally a strong advocate for the government in takings cases—and the aggressive questioning of the TRPA by Justices O'Connor,¹⁷⁴ Kennedy,¹⁷⁵ Souter,¹⁷⁶ Ginsburg,¹⁷⁷ and Breyer¹⁷⁸ suggested that the TRPA faces a considerable hurdle in obtaining an outright affirmance. Justice O'Connor, in particular, seemed especially concerned with the perceived inequities of depriving the "elderly woman the right to go to court."¹⁷⁹ And, Justice Souter expressed his concern that because the TRPA had created the

172. See Linda Greenhouse, *Telling the Court's Story: Justice and Journalism at the Supreme Court*, 105 YALE L.J. 1537, 1547-48 (1996).

173. See, e.g., Oral Argument Transcript, *supra* note 165, at 24-25 (questions posed by Chief Justice Rehnquist); *id.* at 32 ("you know the answer to that is, of course, the suit is ripe" (question posed by Justice Scalia)). The official transcript does not identify the Justices by name. The identifications referred in this footnote and elsewhere in this essay are based on my recollection of the argument and on contemporaneous notes compiled by others during the argument.

174. See, e.g., *id.* at 26 ("Well, and that [petitioner's narrow ripeness argument] sounds eminently reasonable in light of the evidence that we do have in front of us. Experts have given their opinion of the value.").

175. See, e.g., *id.* at 36 ("But it seems to me quite manipulative for you to say we want to use the courts to create our market. You want the ruling to create a market?").

176. See, e.g., *id.* at 35 ("Why should we characterize her as creating the uncertainty when it was your agency that created the rights?").

177. See, e.g., *id.* at 34-35 ("Why should it be Suitum rather than the agency that does the fleshing out?").

178. See, e.g., *id.* at 33 ("I can't think of any ripeness case I've ever read, and maybe you can cite one, but I can't think of any ripeness case I've ever read in which a factor like this made a difference.").

179. *Id.* at 46 ("I mean, why not give this poor, elderly woman the right to go to court and have her takings claim heard?").

valuation problem with TDRs and not Mrs. Suitum, the resulting factual uncertainty should not be a bar to her bringing her takings claim.¹⁸⁰

There was nonetheless possible good news for the TRPA at the oral argument. A majority of the Justices did not seem interested in ruling in favor of the landowner on any of the broader property rights theories that PLF was advancing. Most significant in that regard were comments made by Justices O'Connor and Kennedy, which are two votes that PLF would have to obtain in order to garner a five-Justice majority. Justice O'Connor appeared to express the view that the Court had previously rejected PLF's view of TDRs in *Penn Central*,¹⁸¹ and also discussed the evidence of the land having significant residual value,¹⁸² which would take the *Suitum* case the *Lucas* framework. Finally, Justice Kennedy suggested that the Court need not even reach any of these broader issues if the Court were to instead decide the case based on narrow ripeness grounds.¹⁸³

In all events, what is most important about the result in *Suitum* will clearly not be whether the Court affirms or reverses the Ninth Circuit's judgment. The importance of the Court's ruling in *Suitum* will turn on the Court's reasoning. It will depend on whether the Court decides the case on broad or narrow grounds. Based on the oral argument, a likely outcome would be a ruling in favor of *Suitum* but on the narrow ripeness grounds favored by the TRPA.

Moreover, even if the Court decides the case on narrow grounds, the opinion's significance will turn on the extent to which its author seeks through dictum to address issues outside the four corners of the Court's formal ruling. An opinion for the Court written by Justice Scalia would no doubt be far different than an opinion for the Court authored by Justice Breyer, even if their bottomline judgments were the same. For this reason, the identity of the Justice assigned to write the opinion for the Court is critical.

180. *Id.* at 32 ("No, but you are creating the uniqueness. I mean, you are supplying the ingredient which Justice Scalia referred to as being up in the mountains without any comparable sales, and the only thing that is unique is that, in creating the TDR scheme, you have created the problem. Why should the landowner have to wait because you created something which is difficult to value?").

181. *See id.* at 5 ("[The value of TDRs] might have relevance as to whether there's a taking, conceivably Well, but it was true in *Penn Central*, I guess.").

182. *See id.* at 7-8 ("Now, there is some residual value to the extent the property might want to be acquired by a neighbor or someone else to have a larger yard or additional property, I assume.").

183. *See id.* at 11 ("Do we have to say whether it's a *Lucas* case or a *Penn Central* case in order for you to prevail on the ripeness issue?").

Yet, there is very little that the advocates for the opposing parties can do to influence the identity of the author. That decision is one for the senior Justice in the majority to make. And it is made based on a host of factors; some relate to the case at issue, such as the strength of a particular Justice's interest and expertise in the subject matter of the case and, when applicable, the need to maintain a fragile majority coalition; but others have nothing to do with the case at hand, including, for example, whether there are other cases in the same two-week argument session that a particular Justice cares more about.

Whoever writes the Court's opinion in *Suitum* and regardless of what the opinion says, one thing, however, is for certain. No matter how narrow the Court's ultimate reasoning; no matter how fact-bound its rationale; law professors and law students will write a lot about the case. But, here again, I am not in a good position to complain, having launched in this essay what is a thinly-disguised opening salvo.

ADDENDUM

After the preparation of the essay and the talk on which it was based, the Court decided the *Suitum* case.¹⁸⁴ The Court unanimously concluded that the Ninth Circuit erred in ruling that petitioner's takings challenge was not ripe.

Justice Souter authored the opinion for the Court, which addressed only the narrow ripeness issue. The Court noted that the TRPA no longer seemed to be defending the rationale of the Ninth Circuit¹⁸⁵—that TRPA approval of a proposed transfer of TDRs was necessary for there to be a "final agency decision" within the meaning of *Williamson County*—which the Court then rejected.¹⁸⁶ The Court also rejected the TRPA's contention that any uncertainty regarding the precise value of petitioner's TDRs created a prudential ripeness concern sufficient to justify dismissal of petitioner's complaint.¹⁸⁷

The Court noted that courts routinely value property rights based on appraisal evidence and that the TRPA had itself introduced appraisal evidence in this case of the substantial value possessed by petitioner's TDRs.¹⁸⁸ And, echoing Justice Souter's questions at oral argument,¹⁸⁹ the Court explained that "While it is true that market value may be hard to calculate without a regular trade in TDRs, . . . this is simply one of the risks of regulatory pioneering, and the pioneer here is the agency, not *Suitum*."¹⁹⁰

The Court expressly declined to reach any broader issues regarding either the applicability of *Williamson County*¹⁹¹ or to address directly "the significance of the TDRs both to the claim that a taking has occurred and to the constitutional requirement of just compensation."¹⁹² According to the Court, "[t]he sole question here is whether the claim is ripe for adjudication, even though *Suitum* has not

184. See *Suitum v. Tahoe Reg'l Planning Agency*, No. 96-243, slip op. (May 27, 1997).

185. See *id.* at 8.

186. See *id.* at 8-14.

187. See *id.* at 14-18.

188. See *id.* at 15-16.

189. See *supra* note 176 and accompanying text.

190. *Suitum v. Tahoe Reg'l Planning Agency*, No. 96-243, slip op. at 16 (May 27, 1997).

191. See *id.* at 12 ("Amici . . . urge us to establish a rule that a taking plaintiff need only make a single proposal and a single request for a variance to ensure the ripeness of his claim That issue is not presented in this case.").

192. *Id.* at 1 ("[W]e have no occasion to decide, and we do not decide, whether or not these TDRs may be considered in deciding the issue of whether there has been a taking in this case, as opposed to the issue of whether just compensation has been afforded for such a taking.").

attempted to sell the development rights she has or is eligible to receive. We hold that it is."¹⁹³

However, Justice Scalia, joined by Justices O'Connor and Thomas, filed a separate opinion concurring in the judgment, declining to join parts of the Court's opinion.¹⁹⁴ Justice Scalia would have reached the broader issue and would have decided the ripeness issue on the ground that TDRs are wholly irrelevant to the threshold question of whether a regulation amounts to a "taking" of property.¹⁹⁵ He characterized "[p]utting TDRs on the taking rather than the just-compensation side of the equation (as the Ninth Circuit did below) as a clever, albeit transparent, device that seeks to take advantage of a peculiarity of our takings-clause jurisprudence."¹⁹⁶ Scalia faulted the majority opinion for presuming in its rationale that TDRs may be relevant to the taking issue.¹⁹⁷

Finally, Justice Scalia sought to distinguish the Court's prior opinion in *Penn Central*, but went on to posit that "[i]f *Penn Central*'s one-paragraph expedition into the realm of TDRs were not distinguishable in this fashion, it would deserve to be overruled."¹⁹⁸ Of course, because Justice Scalia's separate opinion attracted only three votes (including his own),¹⁹⁹ it does not constitute an opinion for the Court and is of no precedential effect. The separate opinion is nonetheless a reminder of PLF's primary objective and of the TRPA's primary concern in this case, which were not realized.

193. *Id.*

194. *See id.* at 3-7 (concurring opinion of Justice Scalia, with whom Justices O'Connor and Thomas join).

195. *Id.*

196. *Id.* at 4.

197. *See id.* at 1 ("That discussion presumes that the answers to these questions may be relevant to the issue presented at this preliminary stage of the present case: whether Suitum's takings claim is ripe for judicial review under the 'final decision' requirement. In my view they are not relevant to that issue, and the Court's discussion is beside the point.").

198. *Id.* at 6.

199. One of those votes was Justice O'Connor, which is somewhat surprising, not in light of her past voting, *see Lazarus, supra* note 98, at 1116-18, but only in light of her comments and questions at oral argument. *See Oral Argument Transcript, supra* note 165; *see also* discussion *supra* Part II.C.

