

February 2005

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### Repository Citation

Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective of Penn Central Transportation Co. v. City of New York*, 13 Wm. & Mary Bill Rts. J. 679 (2005), <https://scholarship.law.wm.edu/wmborj/vol13/iss3/2>

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**MAKING LAWS AND SAUSAGES:  
A QUARTER-CENTURY RETROSPECTIVE ON  
*PENN CENTRAL TRANSPORTATION CO. V. CITY OF NEW YORK***

Gideon Kanner\*

*The life of the law has not been logic: it has been experience.<sup>1</sup>*

*[T]he life of the law is not logic, but expedience.<sup>2</sup>*

INTRODUCTION

This Article does not seek to unravel the twists and turns of substantive legal doctrine said to govern regulatory inverse condemnation law. Others have done so in a fulsome fashion, and my own contribution to that subject may be found in an earlier article.<sup>3</sup> Rather than parse the elusive substantive meaning of the Supreme Court's opinions that have provided fodder for so many critical commentaries, I inquire here primarily into how the courts got so important a subject so wrong. Though I do so primarily from the point of view of a specialized lawyer trying to understand what black letter rules, if any, govern this field of law, and how judges came to rule as they did in the *Penn Central* case,<sup>4</sup> I also believe that these legal

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\* © Gideon Kanner 2004. Professor of Law Emeritus, Loyola Law School, Los Angeles. Editor, *Just Compensation*. Believing with Justice Douglas that legal commentators should disclose their point of view (William O. Douglas, *Law Reviews and Full Disclosure*, 40 WASH. L. REV. 227, 228–30 (1965)), this is to note that in my 40-year-long practice, I have typically represented property owners in eminent domain and inverse condemnation cases. I acted as counsel for private parties and amici curiae supporting them in seven U.S. Supreme Court regulatory takings cases.

The author gratefully acknowledges the generous help he received from colleagues, lawyers, law professors, and economists, who are too numerous to mention here, but whose knowledgeable and constructive critiques contributed to this Article.

<sup>1</sup> OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Mark DeWolfe Howe ed., Harvard Univ. Press 1963) (1881).

<sup>2</sup> *Kisbey v. State*, 682 P.2d 1093, 1095 (Cal. 1984) (Kaus, J.) (citing *Ne Casek v. City of Los Angeles*, 43 Cal. Rptr. 294 (Cal. Ct. App. 1965)).

<sup>3</sup> See Gideon Kanner, *Hunting the Snark, Not the Quark: Has the U.S. Supreme Court Been Competent in Its Effort to Formulate Coherent Regulatory Takings Law?*, 30 URB. LAW. 307 (1998) [hereinafter Kanner, *Hunting the Snark*] (commenting on the inconsistencies and anomalies of regulatory taking law).

<sup>4</sup> *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

developments should be viewed from a broader, civic point of view as well. With that in mind, I ask the readers to take a look with me at (i) how the quarter-century-old *Penn Central* case arose, (ii) how it was decided as it wended its way through four court levels, and (iii) how, in spite of its dubious provenance and inconsistency with the Supreme Court's preexisting taking jurisprudence that has never been overruled, to say nothing of the Court's lack of jurisdiction to decide it,<sup>5</sup> it somehow became the judicial "polestar" of regulatory takings law.<sup>6</sup> The readers are invited to make their own judgments as to whether, giving due regard to how the *Penn Central* case was decided, it represents "landmark justice"<sup>7</sup> or "economic lunacy,"<sup>8</sup> to borrow the expressions of *Penn Central's* admirers and critics respectively.

A personal observation seems appropriate before proceeding. My Professor title notwithstanding, I am, and throughout my forty-year-long legal career have been, an appellate lawyer practicing in the field of eminent domain and inverse condemnation. I conceive my function to be knowing the law, imparting it to my students, and bringing it to bear on a client's affairs when I act as counsel. I believe, naively perhaps, that the primary job of appellate courts is to resolve controversies in a principled fashion, and to provide society with precedents — rules that can be comprehended and applied to control similar cases so that in future controversies court rulings are reasonably consistent and the law need not be formulated all over again in each new case. Judicial result-orientation in pursuit of trendy political or ideological notions that may arise in a particular controversy, is counterproductive because such notions change continuously as popular attitudes change, and as different judges pursue different results. At the very least, changes in the law decreed by courts should be rooted in a thorough judicial knowledge of preexisting law and an understanding of the impact of contemplated change on it. That, however, was

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<sup>5</sup> Apart from the concerns expressed *infra* notes 216–19 and accompanying text, it also bears noting that the opinion of the New York Court of Appeals, *Penn. Central Transp. Co. v. City of New York*, 366 N.E.2d 1271 (N.Y. 1977), neither discussed nor resolved any issues of *federal* law which are indispensable for the exercise of jurisdiction by the U.S. Supreme Court. See ROBERT L. STERN ET AL., *SUPREME COURT PRACTICE* 144 (BNA, 6th ed. 1986).

<sup>6</sup> See *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring). For discussions of *Penn Central's* guiding principles, see Steven J. Eagle, *Planning Moratoria and Regulatory Takings: The Supreme Court's Fairness Mandate Benefits Landowners*, 31 FLA. ST. U. L. REV. 429, 501 (2004) [hereinafter Eagle, *Planning*]; Marla E. Mansfield, *Tahoe-Sierra Returns Penn Central to the Center Track*, 38 TULSA L. REV. 263 (2002); Gus Bauman, *Lucas Limited and Penn Central Promoted*, 54 LAND USE L. & ZONING DIG. (Jun. 2002).

<sup>7</sup> Charles M. Haar & Jerold S. Kayden, *Landmark Justice: The Influence of William J. Brennan on America's Communities*, LAND USE LAW 3, 5–6 (Aug. 1988).

<sup>8</sup> William W. Wade, *Penn Central's Economic Failings Confounded Taking Jurisprudence*, 31 URB. LAW. 277, 282, 307 (1999) (criticizing the economic implications of the New York Court of Appeals' decision in *Penn Central*).

not the case in the *Penn Central* case. Indeed, there is now reason to believe that the revolutionary changes in takings doctrine wrought by the Supreme Court's *Penn Central* opinion were unintended. The way things turned out, developments in regulatory inverse condemnation law have become the antithesis of reasoned legal reform.

*Penn Central* lacks doctrinal clarity because of its outright refusal to formulate the elements of a regulatory taking cause of action, and because of its intellectual romp through the law of eminent domain that paid scant attention to preexisting legal doctrine. Its aftermath has become an economic paradise for specialized lawyers, a burden on the judiciary,<sup>9</sup> as well as an indirect impediment to would-be home builders, and an economic disaster for would-be home buyers and for society at large. The vagueness and unpredictability of its rules, or more accurately the "factors" deemed significant by the Court which declined to formulate rules, have encouraged regulators to pursue policies that have sharply reduced the supply of housing and are implicated in the ongoing, mind-boggling escalation in home prices — a process that favors the well-housed rich and increasingly disfavors the middle class, to say nothing of those lower on the economic scale who are still climbing the rungs of the socioeconomic ladder.<sup>10</sup>

Though efforts to depict regulatory takings controversies as a conflict between property rights and the environment are common,<sup>11</sup> and while environmental

<sup>9</sup> See *infra* note 38 and accompanying text; RICHARD F. BABCOCK, *THE ZONING GAME* 101–06 (1966) (noting the pervasive judicial dislike for adjudicating land-use cases even at that time). I can add to that my own, more recent, anecdotal experience of judges' hostility to such claims, including privately voicing their dislike for "your kind of cases" as a retired California Supreme Court Justice put it to me recently.

<sup>10</sup> A quarter century ago, speaking in the context of a regulatory taking case, California Supreme Court Associate Justice William P. Clark, Jr., presciently predicted that extreme judicial deference to local land-use regulations would inevitably lead to just such a socio-economic cleavage among Americans. *Agins v. City of Tiburon*, 598 P.2d 25, 35 (Cal. 1979) (Clark, J., dissenting), *aff'd on other grounds*, 447 U.S. 255 (1980). Since then, reality and two Presidential Commissions on Housing have confirmed that this is exactly what has happened. See *infra* note 206. As of this writing, the problem of providing housing for the working class in California is approaching crisis proportions, with families doubling or tripling up in single-family homes. William Fulton, *Insight: Recent Home Price Escalation Raises New "Affordable" Housing Questions*, 19 CAL. PLANNING & DEV. RPT. 1 (2004). Nor is the problem confined to California. See John Delaney, *Addressing the Workforce Housing Crisis in Maryland and Throughout the Nation*, 33 U. BALT. L. REV. 153 (2004).

See *Ambler Realty Co. v. Village of Euclid*, 297 F. 307, 316 (W.D. Ohio 1924), *rev'd.*, 272 U.S. 365 (1926) (observing that the true purpose of zoning was to effect social and economic segregation in zoned communities).

<sup>11</sup> See, e.g., 8 NICHOLS ON EMINENT DOMAIN § 14E.9 (Julius L. Sackman ed., 3d ed. 2004) [hereinafter NICHOLS]. For an exposition of my views on this subject, see Michael M. Berger & Gideon Kanner, *The Need for Takings Law Reform: A View from the Trenches — A Response to Taking Stock of the Takings Debate*, 38 SANTA CLARA L. REV. 837 (1998)

concerns can properly inspire regulation of land, they are too often used as camouflage for rent-seeking by established affluent suburbanites.<sup>12</sup> All the talk about protecting the environment notwithstanding, most recent land regulatory taking cases that have been decided by the U.S. Supreme Court, arose in the context of housing construction that was impeded, or interdicted altogether, by the challenged regulations in disregard of legislative policies favoring the construction of housing.

The basic law of regulatory takings is as easy to state as it has proven difficult to apply by the courts. Because in modern theory property consists of rights rather than things to which those rights attach, it is the destruction of those rights insofar as their owners are concerned, whether by formal expropriation or confiscatory regulations, that constitutes a taking.<sup>13</sup> A regulatory taking is judicially recognized when property regulations, as Justice Holmes famously but imprecisely put it, go “too far” and impact on otherwise lawful attributes of private property ownership and use to an unreasonable extent, so that its nominal owners are de facto left with legal title, but little or nothing by way of benefits associated with property ownership — notably exclusive possession, use, or value.<sup>14</sup> As Justice Holmes colorfully put it in his extrajudicial correspondence, the impact of the “petty larceny” of the police power is something that owners of the regulated land have to endure.<sup>15</sup> But those owners should not have to endure damage inflicted by exercise of the police power on the order of “grand larceny” effected by confiscatory regulations. Unfortunately, courts have failed to draw any sort of discernible line separating these two degrees of regulation, shuttling unpredictably between competing doctrines and producing conflicting results. Over thirty years ago, California’s leading expert on

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[hereinafter Berger & Kanner, *Need for Reform*]. See also BERNARD J. FRIEDEN, *THE ENVIRONMENTAL PROTECTION HUSTLE* (1979); JAMES V. DELONG, *PROPERTY MATTERS: HOW PROPERTY RIGHTS ARE UNDER ASSAULT — AND WHY YOU SHOULD CARE* (1997); WILLIAM TUCKER, *PROGRESS AND PRIVILEGE: AMERICA IN AN AGE OF ENVIRONMENTALISM* (1983).

<sup>12</sup> See FRIEDEN, *supra* note 11, at 119 (noting that many ostensibly environmental controversies have little or nothing to do with genuine environmental concerns such as pollution, protection of genuinely endangered species, and the like).

<sup>13</sup> See *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377–78 (1945) (defining a taking as the deprivation of property rights of the owner, rather than the physical seizure of things or accretion of rights).

<sup>14</sup> *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 414–16 (1922). In *Mahon*, the regulation in question forbade the extraction of coal (owned by the Pennsylvania Coal Company) located under the Mahons’ house. Though the Mahons conveyed the right of surface support to the coal company, they sought an injunction against coal mining under their land on the basis of a statute enacted in order to prevent subsidence of the surface of land above mines. The Court held that the injunction would amount to a taking of the coal. For a detailed (and fascinating) description of the *Mahon* controversy and its historical context, see WILLIAM A. FISCHER, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* 13–48 (1995).

<sup>15</sup> *HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI* (Mark DeWolfe Howe ed., 1953).

government liability, Professor Arvo Van Alstyne, described the pertinent decisional law as “largely characterized by confusing and incompatible results, often explained in conclusionary terminology, circular reasoning, and empty rhetoric.”<sup>16</sup> Little has changed since then.

The major problem that bedevils this field of law is that an ideologically fragmented U.S. Supreme Court has refrained from articulating usable rules that might enable lower court judges and lawyers to make reasoned, analytical judgments about the merits of their cases in a consistent fashion. Current law, relying on *Penn Central* as its polestar, insists that the question whether a regulatory taking has occurred is to be decided by the Supreme Court itself, not on the basis of articulated legal doctrine, but rather on an ad hoc, case-by-case basis.<sup>17</sup> The Court thus has it that in reviewing lower court decisions in regulatory takings cases, it decides controversies by making “factual inquiries”<sup>18</sup> itself, thus conflating the roles of trial and appellate courts, with predictably unfortunate results. Unsurprisingly, with so fuzzy a standard of inverse condemnation liability, lower court decisions vary unpredictably.<sup>19</sup>

The *Penn Central* case arose out of the application of New York City’s historical preservation law<sup>20</sup> to the ornate and widely admired Grand Central Terminal. Because of the declining fortunes of railroads in the mid-twentieth century, operation of the terminal caused the Penn Central Transportation Company (then in bankruptcy along with a number of other railroads in the Northeast) to suffer an operational deficit in the \$1 to \$2 million per annum range. Accordingly, Penn Central sought to cure its cash flow problem by leasing the air rights above the terminal to UGP, a lessee who intended to build a fifty-story office building in the

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<sup>16</sup> Arvo Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1, 2 (1970) [hereinafter Van Alstyne, *Police Power*].

<sup>17</sup> *Penn Central*, 438 U.S. at 124. There are three exceptions to this approach. A categorical taking occurs when there is a permanent physical invasion of the regulated land, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), or when the regulation deprives the property owner of all economically viable property use, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992), or where owners are required to convey property to the government as a condition of development permit issuance, and the demanded property lacks a nexus or is disproportionate to the public burdens created by private development, *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987).

<sup>18</sup> *Penn Central*, 438 U.S. at 124.

<sup>19</sup> See David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from Penn Central to Dolan, and What State and Federal Courts Are Doing About It*, 28 STETSON L. REV. 523, 574 (1999) (surveying inconsistent judicial approaches and concluding that “state (and some lower federal) courts are not hearing (or not wanting to hear) the U.S. Supreme Court”).

<sup>20</sup> See J. Lee Rankin, *Operation and Interpretation of the New York City Landmarks Preservation Law*, 36 LAW & CONTEMP. PROBS. 366 (1971).

air space above the terminal and pay rent to Penn Central.<sup>21</sup> The original design of the Grand Central Terminal contemplated such a construction, but it envisioned a smaller building atop the terminal rising only twenty stories above it, which would have made it tall by the 1913 standards of the day. Over a half century later, after mid-Manhattan became a renowned skyscraper locale, Penn Central sought to build a fifty-story building above the Terminal, which would be more in keeping with its mid-twentieth century surroundings and with economic reality. However, the City's Historical Preservation Commission, whose approval was necessary for alteration of structures designated as historical landmarks, twice denied Penn Central's applications to do so, leaving deficit-ridden Penn Central with no available administrative remedies and no choice but to sue on the theory that by thus forcing it to operate at a deficit, the City denied it due process of law and de facto took its property.<sup>22</sup>

Penn Central's case was straightforward: its Grand Central Terminal revenues were below its expenditures, and the Historical Preservation Law which guaranteed the regulated property owners a reasonable return on their property, defined that return in terms of the excess of revenues over expenditures.<sup>23</sup> Thus, because Penn Central was receiving no net revenues from the terminal and was compelled by the regulation to operate and maintain it at a deficit, it appeared to have an open-and-shut legal case, subject to evidentiary proof.

But beyond such mundane accounting matters, the *Penn Central* case presented the courts with a collision between an ideologically irresistible force (the desire of the elites to preserve the widely admired Grand Central Terminal at no cost to the City) and a constitutionally immovable object (the Fifth Amendment prohibition on uncompensated takings). Nonetheless, it seems clear that, if analyzed in accordance with the then-existing legal doctrine,<sup>24</sup> the Penn Central Transportation Company presented a strong case of unconstitutional deprivation or regulatory taking of its

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<sup>21</sup> The precedent for this was the earlier construction of the high-rise Pan Am (now Met Life) Building on the air rights above Penn Central's tracks, just north of the terminal. *Penn Cent. Transp. Co. v. City of New York*, 377 N.Y.S.2d 20, 32 (N.Y. App. Div. 1975) (Lupiano, J., dissenting).

<sup>22</sup> *Id.* at 26 (noting that because Penn Central was the recipient of a partial real estate tax exemption, no further administrative remedies were available under New York law).

<sup>23</sup> *Id.* at 34-35 (Lupiano, J., dissenting) (quoting from the N. Y. CITY ADMIN. CODE § 207-1.0v[3][a]).

<sup>24</sup> See *Nectow v. Cambridge*, 277 U.S. 183 (1928) (holding that regulations that deny property owners a reasonable return on regulated property are unconstitutional and invalid); *Arverne Bay Constr. Co. v. Thatcher*, 15 N.E.2d 587, 592 (N.Y. 1938) (finding confiscatory regulations worse than outright uncompensated seizures because seizures at least relieve the aggrieved owner of property taxes); see also *Keystone Assocs. v. State*, 333 N.Y.S.2d 27 (N.Y. App. Div. 1972), *aff'd*, 307 N.E.2d 254 (N.Y. 1973). See generally Gideon Kanner, *Measure of Damages in Nonphysical Inverse Condemnation Cases*, 1989 PROCEEDINGS OF THE INSTITUTE ON PLANNING, ZONING AND EMINENT DOMAIN (1989) § 12.02[2][f], at 12-18 through 12-20 (discussing the *Keystone* litigation).

property when it showed to the trial court's satisfaction that it was being compelled to sustain an ongoing deficit from the operation of the Grand Central Terminal — a predicament that as a regulated common carrier, particularly one in bankruptcy, it was not free to terminate by ceasing the money-losing operation. Yet, each of the three appellate courts that reviewed the trial court judgment in favor of Penn Central, found fault with the decision. Remarkably, each reviewing court based its respective decision on matters entirely different from the ones considered and deemed decisive by the other two appellate courts. In terms of legal doctrine, their respective opinions had precious little, if anything, to do with each other, thus illustrating not only the old legal adage that hard cases make bad law, but as it turned out here, that they can make no law at all that is worthy of the name.

The New York Appellate Division reviewed the accounting evidence presented at trial and reversed the trial court judgment that favored Penn Central's submission. It was a technical decision concerning valuation methodology applicable to properties subjected to regulations alleged to force their owners to operate at a deficit.<sup>25</sup> Following that decision, the New York Court of Appeals largely ignored the issue developed at trial and dealt with by the Appellate Division. Instead, without affording the parties any advance notice or timely opportunity to be heard on this point, it went off on an ideological frolic that, stripped to its essence, de facto purported to supplant New York's law of property with a core feature of the failed ideology of Henry George.<sup>26</sup> George was a nineteenth-century pseudo-Marxist crackpot who, in defiance of the American legal tradition and of the Constitution, believed that it was a fundamental mistake to treat land as private property, and that the government, not private property owners, should capture increases in land values through the use of confiscatory taxation.<sup>27</sup> He was an anti-Chinese bigot to boot.<sup>28</sup>

The New York Court of Appeals held that (contrary to settled constitutional

<sup>25</sup> *Penn Central*, 377 N.Y.S.2d at 27–29.

<sup>26</sup> *Penn Central*, 366 N.E.2d at 1273; cf. Norman Marcus, *The Grand Slam Grand Central Terminal Decision: a Euclid for Landmarks, Favorable Notice for TDR and a Resolution of the Regulatory/Taking Impasse*, 7 *ECOLOGY L.Q.* 731, 739 n.37 (1978) (conceding that the New York Court of Appeals wrote from a “neo-Henry Georgian perspective,” based on George’s “quasi-Marxist work,” which overtly intended to take private property without compensation; i.e., to allow “public rather than private interests to capture the land value increments”); John J. Costonis, *The Disparity Issue: A Context for the Grand Central Terminal Decision*, 91 *HARV. L. REV.* 402, 415–16 (1977) (fawning over the Court of Appeals decision but noting that among the “daring strokes” used in the opinion was the “evocation of the ghost of Henry George”); FISCHER, *supra* note 14, at 50 (characterizing that opinion as “redolent of the spirit of Henry George”).

<sup>27</sup> David Montgomery, *Henry George*, in 8 *AM. NAT’L BIOGRAPHY* 849, 850 (John A. Garraty & Mark C. Carnes eds., 1999).

<sup>28</sup> *Id.* (George had it that the Chinese were “utter heathens, treacherous, sensual, cowardly and cruel.”).



law)<sup>29</sup> property owners are not entitled to a reasonable return on their property, but only to a return on that increment of the property's value said to be created by private entrepreneurship,<sup>30</sup> and denied them any right to a return on the increment of value said by the court to have resulted from public influences, as if, in Professor Fischel's apt words, "the Landmarks Preservation Commission were entitled to appropriate to itself all of the advantages of civilization."<sup>31</sup> On that basis, which lacked any evidentiary, doctrinal, or precedential support (at least none were mentioned in the opinion), the New York Court of Appeals ignored the language of the Landmark Preservation Law (which defined reasonable return in terms of excess of revenues over expenses) and asserted that property regulations could make *property owners suffer an indefinitely ongoing deficit and yet, under the court's view of the matter, be deemed to grant them a reasonable return*. Moreover, the Court of Appeals expressly conceded that in order to determine whether Penn Central was being deprived of a reasonable return on the privately created component of its property, the two elements of value it envisioned — the privately and publicly created ones — would have to be separated, although, paradoxically, the court also characterized them as "indistinguishable," and "inseparably joint."<sup>32</sup> Just how one would go about distinguishing the indistinguishable, and separating the inseparable, the court never took the trouble to explain.

In reviewing the Court of Appeals decision, the U.S. Supreme Court disregarded the holding of the lower courts<sup>33</sup> and held that Penn Central had not made out a case of taking of its air rights over Grand Central Terminal — a subject never litigated below.<sup>34</sup> As for the regulatory aspects of the controversy, the Supreme Court simply disregarded modern urban reality and held that inasmuch as the Penn Central Transportation Company was permitted to continue the same use of its land that it had made for the preceding half century, that fact precluded a finding of a taking. Though Penn Central had been twice denied permission to build in the air space above the terminal, on the record before the Court, Penn Central was concededly receiving a reasonable return and might yet obtain permission to build a smaller

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<sup>29</sup> See, e.g., *Nectow*, 277 U.S. 183 (holding that land-use regulations denying property owners reasonable use of their property constitute an unconstitutional denial of substantive due process).

<sup>30</sup> *Penn Central*, 366 N.E.2d at 1273, 1275.

<sup>31</sup> FISCHEL, *supra* note 14, at 50.

<sup>32</sup> *Penn Central*, 366 N.E.2d at 1276.

<sup>33</sup> *Penn Central*, 438 U.S. at 121 n.23.

<sup>34</sup> *Id.* at 130, 135. In fairness to the Supreme Court, it must be noted that in its appeal from the decision of the New York Court of Appeals, Penn Central abandoned the core issue it had pressed below, conceding that it was getting a reasonable return on its property, and argued instead that the regulation in question took its air rights above Grand Central Terminal. *Id.* at 129–30. Nonetheless, why the Supreme Court departed from its usual practice and noted probable jurisdiction to consider an issue that was never dealt with in the lower courts is a mystery. See *infra* note 342 and accompanying text.

building than what it had proposed, if it kept on trying to secure City permission to build one.<sup>35</sup> The Court also noted that under the challenged historical preservation law, Penn Central had the option of transferring its development rights to other properties, an option that — though inadequate as constitutional “just compensation” if a taking were to occur — mitigated its financial burdens.<sup>36</sup>

The fundamental flaw in the U.S. Supreme Court’s *Penn Central* opinion, which transcended the opinion’s other *lacunae*, was the Court’s explicit refusal to articulate the elements of a regulatory taking cause of action, pleading judicial inability to do so, and claiming to make its decisions in this field by making ad hoc, factual, case-by-case inquiries.<sup>37</sup> One finds it difficult to believe that the Court fully understood what it was about, and how its at times baffling language addressed the issue at hand with any degree of consistency with preexisting legal doctrine. If nothing else, by embracing this ad hoc approach of examining each case on its own peculiar facts, the Court de facto appointed itself a super zoning board of sorts that weighs facts underlying the constitutional issues arising in each land-use regulation case brought before it, not so much on the basis of broadly applicable legal doctrine as appellate courts are wont to do, but rather by making “factual inquiries” into each particular case under consideration, leaving one at a loss to determine what reliable *legal* criteria are to be used to judge these factual determinations and what facts should be decisive in trial. Paradoxically, in recent decisions, U.S. Courts of Appeals often take the opposite view, and when it comes to regulatory inverse condemnation cases, reveal their hostility to takings claims by proclaiming themselves to be opposed to this approach, which some of them derisively call the function of a zoning “Grand Mufti.”<sup>38</sup> Yet, they routinely decide zoning and land-use cases that give rise to

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<sup>35</sup> *Penn Central*, 438 U.S. at 137; cf. *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 350 n.7 (1986) (holding that though more than one application for building permission may be in order, making repetitive applications and pursuing other unfair procedures is not required in order to achieve case ripeness for litigation claiming a regulatory taking).

<sup>36</sup> *Penn Central*, 438 U.S. at 137.

<sup>37</sup> *Id.* at 124. While all cases are ultimately decided on their proven facts, it is an altogether different matter when the Supreme Court does not just look to facts found below, but rather purports to make factual inquiries itself.

<sup>38</sup> See *Hoehne v. County of San Benito*, 870 F.2d 529, 532 (9th Cir. 1989) (repeating this epithet disapprovingly); see also Michael M. Berger & Gideon Kanner, *Shell Game! You Can't Get There from Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 URB. LAW. 671, 693 n.103 (2004) [hereinafter Berger & Kanner, *Shell Game!*]. Further muddling this point, even as they rail against deciding land-use takings controversies, federal courts experience no problems wielding the authority of a zoning “Grand Mufti” when deciding constitutional claims in land-use cases other than takings. *Id.* at 693 n.102. Indeed, federal court adjudication of local land-use regulations is so extensive that it has been the subject of treatises. See, e.g., DANIEL MANDELKER ET AL., *FEDERAL LAW OF ZONING* (2004); STEVEN EAGLE, *REGULATORY TAKINGS*, at chs. 7–9 (2d ed. 2001); see also Donald G. Hagman & Dean Misczynski, *The*

constitutional issues other than takings, without voicing any such concerns. So far, the Supreme Court has not addressed this irreconcilable judicial divergence of approaches in adjudicating land-use cases. It too, freely decides non-takings zoning and land-use cases without proclaiming itself to be “simply unable” to articulate discernible legal doctrine.<sup>39</sup>

This de facto derogation of property rights has been in keeping with the judicial trends that began in the 1930s in connection with the New Deal legislation, which the Supreme Court eventually found constitutional, albeit only after the infamous “switch in time that saved nine,” and which ushered in an era of disparagement of private property rights. It should be self-evident that for all the talk about the importance of property rights in American law being in a state of decline,<sup>40</sup> there is more to this problem than just the stability of those rights in the abstract because property rights cannot be conveniently pigeonholed apart from other fundamental civil rights. As Judge Learned Hand put it, “[j]ust why property itself was not a ‘personal right’ nobody took the time to explain.”<sup>41</sup> Our society sets great store by material achievements of individuals, so that unleashing governmental power to extinguish property rights by regulatory fiat would greatly facilitate the undermining of all civil rights and unduly enlarge governmental power. People whose economic security can be snuffed out by unchecked governmental power over their property are not likely to take politically unpopular positions.

What makes today’s land-use takings controversies different from the regulatory

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*Quiet Federalization of Land-Use Controls: Disquietude in the Land Markets*, REAL ESTATE APPRAISER Sept.–Oct. 1974; Michael M. Berger, *Wet T-Shirts, Property Rights: A Constitutional Conundrum*, L.A. DAILY J., May 11, 1994, at 7 (spotlighting the anomaly whereby federal courts unhesitatingly involve themselves in zoning controversies involving the constitutionality of regulations of property whose owners seek to put on “wet T-shirt” contests involving buxom young women, an amusing but at best frivolous activity, but recoil from similar involvement in cases where property owners seek to exercise their property rights constructively to build badly needed housing, a land use that is highly favored by congressional policy; see 42 U.S.C. § 1441).

<sup>39</sup> See, e.g., *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985); *Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116 (1982); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

<sup>40</sup> See, e.g., James L. Oakes, “*Property Rights*” in *Constitutional Analysis Today*, 56 WASH. L. REV. 583, 584–86 (1981); Costonis, *supra* note 26, at 408–09. See FISCHER, *supra* note 14, at 251–52 (describing the NIMBY phenomenon that has resulted from the soaring perception of importance of property in the form of family homes, and noting the species of “property” that is being particularly disfavored is undeveloped land). I assume that my readers are familiar with the significance of this acronym (“Not In My Back Yard”) and perhaps even with its successors: BANANA (“Build Absolutely Nothing Anywhere Near Anybody”) and NOPE (“Not On Planet Earth”).

<sup>41</sup> Learned Hand, *Chief Justice Stone’s Conception of the Judicial Function*, 46 COLUM. L. REV. 696, 698 (1946).

battles of the 1930s is that many of today's land-use regulations that are at the forefront of the takings issues do not arise from considered, broadly applicable legislative enactments, but rather from ad hoc, whimsical decisions of unelected land-use boards or commissions pursuing the parochial self-interest of well-to-do local suburbanites who are already nicely housed, thank you very much, and who are out to keep competing seekers of the good life from their upscale communities. Also, though classified as performing a "legislative" function when enacting zoning ordinances,<sup>42</sup> the municipal government functionaries who usually make the many decisions in individual land-use regulation cases are not legislators in the true sense of the word; i.e., they are not elected officials who are concerned with regional or even community-wide policy concerns. Many of them are petty, local, politically appointed functionaries, some serving part-time, who often lack any planning or legal background,<sup>43</sup> who avowedly serve narrow local interests, and care not a whit for sound, even-handed public policy<sup>44</sup> or for the laws that favor the construction of new housing, particularly affordable housing, which they fiercely oppose at the behest of their affluent constituencies.<sup>45</sup> Their focus is narrow, and they often deal with one individual parcel at a time. The individual parcel owners are incapable of availing themselves of a democratic corrective via the ballot box because of the prohibitive cost and because the community at large is not interested in the confiscatory fate of one parcel, particularly when that fate is perceived as benefitting members of that community at the individual parcel owner's expense. This enables local regulators to curry favor with the many, at the expense of the few, and to shield themselves from accountability that real, i.e., elected, legislators have to confront come election time. This is precisely the sort of matter that should inspire judicial sensitivity to the impairment of constitutional rights of the abused individuals. But in fact, in spite of occasional bits of extravagant judicial rhetoric, the opposite is true.<sup>46</sup>

These factors, though at first blush removed from the subject of historical preservation which lay at the core of the *Penn Central* controversy, actually form a

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<sup>42</sup> *Arnell Dev. Co. v. City of Costa Mesa*, 620 P.2d 565, 568 (Cal. 1980).

<sup>43</sup> See generally *BABCOCK*, *supra* note 9, at 19–40 (describing the layperson as decision-maker).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 30–32; see also *FRIEDEN*, *supra* note 11, at 119–38 (describing the informal alliance between wealthy suburbanites and environmental activists in opposing new home construction); *infra* note 97.

<sup>46</sup> Probably the best example of this phenomenon was the language used in *Agins v. City of Tiburon*, 598 P.2d 25 (Cal. 1979), *aff'd on other grounds*, 447 U.S. 255 (1980) (exhorting the importance of private property rights, but then in stunning disregard of California pleadings and remedies law formulating a holding that defied Supreme Court jurisprudence of regulatory takings and deprived California property owners of any effective remedy in cases of economically confiscatory regulations). *Agins* was overruled by *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

cultural background against which all modern American land-use controls must be viewed in order to arrive at an accurate perception of today's regulatory reality.

### I. *PENN CENTRAL* IN CONTEXT

As noted, in rejecting *Penn Central*'s taking claim, the U.S. Supreme Court's opinion failed to articulate the elements of a regulatory inverse condemnation cause of action. It only professed to be able to state "several factors that have particular significance" in determining whether a regulation has gone too far, thus becoming a *de facto* taking.<sup>47</sup> These *ad hoc* factors were said to be (a) "the economic impact of the regulation on the [property owner],"<sup>48</sup> (b) "the extent to which the regulation[] interferes with the owner's distinct investment-backed expectations,"<sup>49</sup> whatever that means,<sup>50</sup> and (c) "the character of the government action"<sup>51</sup> (noting unhelpfully that a taking is more readily found when the interference with the owner's property is physical).<sup>52</sup> The Court gave no clue as to the meaning of the language used in the formulation of these factors, what sort of evidence would tend to prove their existence, what weight to assign to each of them, and how they translate into a proper inverse condemnation cause of action that, if proved, would entitle the aggrieved plaintiff to relief as a matter of law. It seems plain that this formulation was not a statement of law capable of straightforward application, but rather a vague delineation of an area in which individual judges of differing ideological persuasions can roam at will before rendering subjective decisions as to whether a taking has been shown.<sup>53</sup> As U.S. Circuit Judge James L. Oakes put it, "[*Penn Central*] juris

<sup>47</sup> *Penn Central*, 438 U.S. at 124.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> See R.S. Radford & J. David Breemer, *Great Expectations: Will Palazzolo v. Rhode Island Clarify the Murky Doctrine of Investment-Backed Expectations in Regulatory Takings Law?*, 9 N.Y.U. ENVTL. L.J. 449-50 n.3 (2001) (providing an extensive collection of commentaries vying with one another in criticizing the vague "expectations" element); Calvert G. Chipchase, *From Grand Central to the Sierras: What Do We Do with Investment-Backed Expectations in Partial Regulatory Takings?*, 23 VA. ENVTL. L.J. 43, 57 (2004).

<sup>51</sup> *Penn Central*, 438 U.S. at 124.

<sup>52</sup> *Id.* at 124; see Steven J. Eagle, "Character of Government Action" in *Takings Law: Past Present and Future*, in INVERSE CONDEMNATION AND RELATED GOVERNMENT LIABILITY 459 (A.L.I.-A.B.A. COURSE OF STUDY, Apr. 22-24, 2004) [hereinafter *Eagle, Character*].

<sup>53</sup> Though an economist rather than a lawyer, Professor Fischel hit the bull's eye when he pointedly observed that

The fundamental flaw is that the Court gave no indication of the weight that each criterion is to be given by a trial judge or jury. Attorneys with clients need rules better than "the character of the government action" and "the extent of the diminution of value." Such criteria are like saying that aggregate consumption is a function of income, wealth, and

prudence permits purely subjective results, with the conflicting precedents simply available as makeweights that may fit pre-existing value judgments . . . .”<sup>54</sup> The California Supreme Court foreshadowed this unfortunate development in the law when it observed, some three years before the *Penn Central* decision, that judicial characterizations of regulations as takings or as legitimate exercises of the police power are merely the courts’ shorthand way of labeling the results.<sup>55</sup>

There is now good reason to believe that in deciding the *Penn Central* case, the Supreme Court misapprehended the importance of the issues before it as well as of its decision, and it simply did not understand the revolutionary impact of its holding.<sup>56</sup> This may only be a part of a larger pattern of the Court’s reluctance to provide the consumers of its output with reasonably clear-cut rules<sup>57</sup> that would enable them to settle their controversies by compromise, or to resolve their lawsuits efficiently. Under *Penn Central*’s vague, multi-factor approach one cannot reliably tell what “the law” is, and how it applies to the controversy at hand without first taking years to let judges have a go at it on an ad hoc basis in each of the many factual variants of regulatory impositions on rights of private property ownership. That may be a mode of dispute resolution likely to find favor in the court of King

the interest rate, and then telling someone to use that information alone to forecast the consumption component of GNP next year.

FISCHEL, *supra* note 14, at 51.

<sup>54</sup> Oakes, *supra* note 40, at 613.

<sup>55</sup> *HFH, Ltd. v. Superior Court*, 542 P.2d 237, 247 (Cal. 1975), *cert. denied*, 425 U.S. 904 (1976).

<sup>56</sup> See *Looking Back on Penn Central: A Panel Discussion with Supreme Court Litigators*, 15 FORDHAM ENVTL. L. REV. 287 (2004) [hereinafter Transcript] (containing a transcript of a roundtable discussion including counsel who argued *Penn Central* in the Supreme Court, and former clerks for Justice Brennan, author of the majority opinion, and Justice Rehnquist, author of the dissent). The panel members provide an acute insight into what transpired as the controversy wended its way through the Supreme Court. They make clear beyond quibble that counsel for both sides had their own agenda whose core feature was to disassociate their submissions from Chief Judge Breitel’s intellectually disastrous opinion for the New York Court of Appeals. *Id.* at 295–96. See *Penn. Cent. Transp. Co. v. City of New York*, 366 N.E.2d 1271 (N.Y. 1977), *aff’d*, 438 U.S. 104 (1978). Justice Brennan’s clerk “thought Justice Brennan was making some modest efforts to bring a little content to an area of the law that was . . . then quite formalist and in disarray,” Transcript, *supra*, at 307, but did not think that the *Penn Central* case was especially important, *id.* at 295. Neither did Justice Stewart’s clerk. *Id.* at 307. At the time of the decision, the participants did not think the case was important enough to be discussed by them in this fashion twenty-five years later. *Id.* at 295. Lois Schiffer, head of the Justice Department litigation section, thought it was a “ho hum” case. *Id.* at 294.

<sup>57</sup> Paul M. Bator, *What Is Wrong with the Supreme Court?*, 51 U. PITT. L. REV. 673, 686 (1990); see, e.g., *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164–65 (1980) (concluding with an admonition that its holding was case-specific and not intended to control similar future controversies in the takings field).

Solomon,<sup>58</sup> but it isn't law that is consistent with the common law tradition of *stare decisis*.<sup>59</sup> Under the *Penn Central* approach, lawyers are unable to ascertain which facts of the controversy will prove to be the operative, much less decisive, nor the prospective likelihood of litigational success or failure. They are thus handicapped when trying to advise clients, plan contemplated litigation, and marshal evidence likely to satisfy judges.

In the absence of discernible rules, this legal regime encourages litigation, but makes it a "rich man's game" de facto available only to owners of property that is sufficiently valuable to justify the protracted litigation process, and who can afford huge legal bills (or whose cases are occasionally sponsored on a pro bono basis by organizations with an interest in the subject), but places ordinary property owners beyond the ambit of constitutional protection. It has been aptly said that these days, to pursue a regulatory taking case, one has to have ten years, a million-dollar litigation budget, endless patience, and bulldog-like tenacity.<sup>60</sup> To paraphrase Thomas Hobbes, one could say that this type of litigation is often nasty, brutish, and long.<sup>61</sup> In this climate of uncertainty and prevailing judicial hostility to claims of regulatory takings, government lawyers usually resist even meritorious claims, playing the odds and counting on the courts' propensity to rule in their favor for sometimes unarticulated, ideological, or fiscal reasons.<sup>62</sup> This judicial approach, along with the

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<sup>58</sup> See 1 *Kings* 3:16–28 (relating King Solomon's adjudication over custody of a baby).

<sup>59</sup> See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) ("Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes.").

<sup>60</sup> In the past quarter century, property owners have had few Supreme Court victories, only one of which affirmed an award of just compensation. *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999). To accomplish that feat, *Del Monte Dunes* had to go through five years of administrative proceedings involving five proposed development projects of varying sizes and nineteen plot plans, plus two federal trial court proceedings (including a jury trial) and two federal appeals before reaching the promised land of Supreme Court adjudication. In the lower courts, land owner victories are few and far between, even on egregious facts. In California, a state renowned for its litigiousness and harsh land-use regulations, there has not been even a single reported *regulatory* (non-physical) taking case in which the property owners prevailed. In the one California case that may appear to have done so, the taking was actually physical because, in addition to the administrative mistreatment of the owner, the City also fenced him out of his own property. *Ali v. City of Los Angeles*, 91 Cal. Rptr. 2d 458 (Cal. Ct. App. 1999), *cert. denied*, 531 U.S. 827 (2000).

<sup>61</sup> THOMAS HOBBS, *LEVIATHAN* 84 (J.C.A. Gaskin ed., Oxford Univ. Press 1996) (1651).

<sup>62</sup> See *infra* note 174 and accompanying text. At times, such belief by advocates for the government proves to be misplaced, so that the government too can suffer from uncertainty in the law. See, e.g., *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169 (Fed. Cir.) (upholding government liability for a regulatory taking of coal deposits, with the final settlement figure, including interest and attorneys' fees, totaling \$200 million), *cert. denied*, 502 U.S. 952 (1991); see George W. Miller, *The Odyssey of Whitney Benefits: What a Long, Strange Trip It's Been*, 1 REAL PROP. RTS. LITIG. RPTR. 11 (1995).

procedural complexity developed by the courts in the last two decades, de facto treats judicial inefficiency and lack of uniformity in the law as virtues. We can only speculate why the Supreme Court has been proceeding in this fashion, but the end product of its unpredictable decision making and its aversion to formulation of reliable rules capable of guiding people as they try to go about their lives without litigation, or facilitating litigation efficiently, is there for all to see.

As noted, we confront here a residue of the New Deal philosophy of the 1930s when the country, racked by the Great Depression, turned ideologically leftward, and the U.S. Supreme Court departed from preexisting law because it felt the imperative to replace freedom of contract and sanctity of property with new preferred values: the protection of fundamental rights and protection of insular minorities.<sup>63</sup> I see no point in debating here the historical adventures and misadventures of New Deal legislation in the courts, but these things must be mentioned because one cannot fully appreciate the current state of pertinent American law without bearing in mind these historical events that have reshaped American judges' attitudes toward property rights when such rights conflict with government regulations.

Even if one agrees with the excesses of the ideologically driven New Deal regulations, it is important to keep in mind that the problems of the Great Depression that inspired its far-reaching regulatory regime no longer prevail, and neither does the justification for perpetuation of the 1930s-style regulatory climate. Yet the influence on the law by the regulatory vision of that bygone era persists in spite of the legal maxim holding that "[w]hen the reason of a rule ceases, so should the rule itself."<sup>64</sup> In the decades that have elapsed since the Great Depression, world events have unmasked the ineffectiveness and counterproductiveness of the Marxist notions that informed much of the 1930s legislative and regulatory era.<sup>65</sup> However much one may admire the constructive aspects of social legislation of the New Deal, there seems to be little doubt that as to some issues, the courts of that era threw the baby out with the bathwater, in the sense that in retreating from the earlier substantive due process regime of active judicial supervision of economic legislation, they unduly and unnecessarily derogated private property rights to an extent that

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<sup>63</sup> See Eagle, *Planning*, *supra* note 6, at 471. It is difficult to see why individual property rights enshrined in the Bill of Rights are not deemed fundamental, personal rights. See Hand, *supra* note 41 and accompanying text. Indeed, it was judicial protection of property rights in the context of eminent domain that gave rise to the modern selective incorporation doctrine, whereby fundamental, selected provisions of the Bill of Rights are deemed incorporated in the Due Process Clause of the Fourteenth Amendment and thus made binding on the states. See *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226 (1897). See generally *Waltz v. Tax Comm'n*, 397 U.S. 664, 701-02 (1970) (Douglas, J., dissenting) (providing a concise description of that development in the law).

<sup>64</sup> CAL. CIV. CODE § 3510 (West 1997).

<sup>65</sup> See *supra* note 26 and accompanying text.



was unwarranted even then, and that may have made matters worse.<sup>66</sup> In other words, they went from one extreme to another.

In today's prosperous American society, property ownership by individuals has become widespread to an unprecedented extent, and is therefore in greater need of protection from governmental overreaching than it was in the 1930s because it affects greater numbers of politically less powerful people. Though many of these people may think they have the upper hand in today's land-use regulation climate, in which local zoning officials kowtow to them, no one knows what tomorrow will bring and what pressures may be brought to bear on their property interests by a growing population, increasingly shut out economically from home ownership, demanding its perceived due. It is one thing for government regulators of that bygone era to invoke policy and, borrowing Teddy Roosevelt's colorful phrase, confront the excesses of "malefactors of great wealth"<sup>67</sup> by regulating large economic forces in order to protect the broad public weal in times of economic crisis. But it is quite another matter to force individuals to live under a regulatory regime in which the law can forbid ordinary persons to build a home for their families unless they first submit to an at times nightmarish regulatory process. Such a process requires the issuance of multiple discretionary permits, which can stretch over a period of years or even decades, and which is at times transparently administered, not to advance good planning and protect the environment, as claimed by the regulators, but to exclude newcomers from desirable communities, denying land owners their constitutionally secured property rights, and expanding government regulatory powers in the process.<sup>68</sup>

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<sup>66</sup> See JIM POWELL, *FDR'S FOLLY: HOW ROOSEVELT AND HIS NEW DEAL PROLONGED THE GREAT DEPRESSION* (2003); cf. *Carolene Prods. v. United States*, 304 U.S. 144, 152 n.4 (1938). Even if one agrees with the notion that a historical imperative justified the Court's embracing of a laissez faire attitude toward pervasive regulations, it was hardly necessary for the Court — at a time when the Great Depression was ending — to assert in the infamous *Carolene Products* footnote 4 that it was largely abrogating constitutional protection of property rights in favor of personal rights and those of "insular minorities." I fail to see how the two are mutually exclusive — how protection of the rights of minorities is in tension with private property rights. Aren't members of minority groups just as much in need of protection of their property rights as those of the majority? And by what legitimate reasoning can it be said that members of a majority are to be deprived of a full measure of *their* constitutional rights? Are we to take it that one has to present some sort of "politically correct" socioeconomic provenance before one can invoke protection of the Bill of Rights?

<sup>67</sup> See Mr. Roosevelt's Speech at the Laying of the Corner Stone of the Pilgrim Memorial Monument, Provincetown, Massachusetts (Sept. 14, 1907), cited in Guido Calabresi, *Forward to The Supreme Court, 1990 Review*, 105 HARV. L. REV. 80, 130 n.163 (1991).

<sup>68</sup> See *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997) (Agency requiring an octogenarian, wheelchair-bound widow to sell her minuscule (circa 180 square feet) transferable development rights in a nonexistent market before being able to seek judicial relief for denial of her right to build a home.); see also *Healing v. Cal. Coastal Comm'n*, 27 Cal. Rptr. 2d 758 (Cal. Ct. App. 1994) (describing a seventeen-year regulatory nightmare that

No doubt, judges understand that to downgrade property rights to a sub-constitutional status outright would place those rights at the mercy of regulators and engender unacceptable political consequences. Such a paradigmatic shift would likely precipitate a political storm that they are not eager to confront, so those of them who disfavor property rights have been doing the next best, or more accurately, worst thing: keeping the law uncertain and surrounding the enforcement of property rights with an at times impenetrable conceptual, verbal, and procedural thicket that can serve to delay interminably, or even deny altogether to aggrieved parties the enforcement of their federal constitutional rights *without ever reaching the merits of their submission of violation of their federal constitutional rights, in any court* — a problem that emerged in 1997, and is still not fully understood even by most lawyers, but one beyond the scope of this Article.<sup>69</sup>

Thinking in broader terms, it seems plain that what is afoot is more than a series of legal disputes over specific land-use issues, and much more than the familiar wooden scenario of “developer vs. the environment,” often misrepresented by press coverage of these events as *the controversy*.<sup>70</sup> In fact, much of the real controversy has been between the housing “haves” and the “have nots.”<sup>71</sup> Paradoxically, we face a historical cultural clash — a process of erosion of individual property rights and an ongoing downgrading of the institution of private property vis-à-vis the

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befell an individual seeking to build a home for his family); Ron Russell, *After 17 Years, Dream Home Is Still That — Just a Dream*, L.A. TIMES, Mar. 20, 1994, at B1; RICHARD F. BABCOCK & CHARLES L. SIEMON, *THE ZONING GAME REVISITED* 241–42 (1985) (describing how the California Coastal Commission singled out the best, most environmentally sensitive, award-winning single-family housing project in the state for particularly harsh treatment in order to aggrandize its power, the motivation of the Commission functionary in charge being that “[i]f he could lick Sea Ranch, he could beat any proposal”). Then there is the wretched *Agins* saga in which it took Bonnie Agins (plaintiff in the *Agins* case) some thirty years of administrative applications and litigation before she was permitted to build a house on her land. Charles Gallardo, *After 29 Years, Tiburon House Going Up: Home OK’d but Not for Original Family*, MARIN INDEP. J., Oct. 1, 1997, at 1; see also Philip Hager, *Courting a Dream: 20-Year Fight to Build Tiburon Home Not Over Yet*, L.A. TIMES, Aug. 3, 1996, at A3, available at LEXIS News Library, L.A. Times File.

<sup>69</sup> See *Kottschade v. City of Rochester*, 319 F.3d 1038, 1041–42 (8th Cir. 2003) (acknowledging that the Supreme Court created such an anomalous remedial regime, but declining to address it), *cert. denied*, 540 U.S. 825 (2003). For a concise description of the problem, see generally Kanner, *Hunting the Snark*, *supra* note 3, at 360.

<sup>70</sup> See generally Gideon Kanner, *Lucas and the Press: How to Be Politically Correct on the Takings Issue*, in *AFTER LUCAS: LAND USE REGULATION AND THE TAKING OF PROPERTY WITHOUT COMPENSATION* 102–24 (David L. Callies ed., 1993) (discussing the shortcomings of the media coverage of the takings controversy).

<sup>71</sup> For all the disputations over the environment, endangered species, and clean water, over half of the Supreme Court regulatory takings cases involving controversies over land arose from frustrated efforts of landowners to build new housing.

government,<sup>72</sup> which occurs even as the proprietary status of an existing single-family home is reaching “sacred cow” proportions. From there it is but a short step to legitimizing public demands by the elites, who deem their own desirable suburban home turf secure, such as that preservation of environmental values *as perceived by them*, to say nothing of maintaining the agreeable ambiance of their tony suburbs, be accomplished by forcing owners of undeveloped land or of historical structures to maintain them unchanged at their own expense, with the public enjoying the resulting enhanced levels of amenities but contributing nothing to the cost of preservation and maintenance of the land or landmarks in question. In other words, commandeering the use other people’s property to suit one’s forcefully articulated but often self-serving notions of environmental values or preservation, is seen as a civic virtue in spite of the hardship this can inflict on owners of the regulated land, and the obvious constitutional problems it engenders.

I find the current judicial attitude unfortunate because legally protected property rights of all citizens, if nothing else, have made American housing and standard of living the envy of the world, and have added to our perceptions of individual freedom. This is consistent with historical experience that stability of land titles protected by a reliable rule of law is indispensable to the social stability of society as well. As Professor Reich put it: “property performs the function of maintaining independence, dignity and pluralism in society. . . . Indeed, in the final analysis the Bill of Rights depends on the existence of private property.”<sup>73</sup> Legally protected property rights enable all Americans, not just the wealthy ones, to advance in life, not only materially but in other ways as well. As those who demand an improvement in the lives of the poor incessantly remind us, the name of the game is well-paying jobs, good housing, and better financed education, leading to more secure, more affluent, and generally better lives. In a word: property. In fact, it is ordinary people of modest means who are more in need of reliable legal protection of what property they own than the rich and powerful who take care of their own interests, thank you very much, no matter who is in office. It is also the former, not the latter, who are currently suffering from an acute housing shortage that has kited the median California home prices to \$465,160, due in large measure to supply-limiting effects

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<sup>72</sup> In his extrajudicial expressions, Charles Breitel, Chief Judge of the New York Court of Appeals and author of the *Penn Central* opinion, employed disparaging phrases such as “so-called property rights” of the “so-called owner,” and “so-called private interests.” Nat’l Conf. of State Legislatures & N.J. Law Revision & Legis. Serv. Comm’n, *Proceedings of the Seminar*, TRANSFERABLE DEVELOPMENT RIGHTS, Sept. 30–Oct. 1, 1977, at 86, 113, 129 [hereinafter TDR Conference] (emphasis added); see also Jon M. Conrad & Dwight H. Merriam, *Compensation in TDR Programs: Grand Central Terminal and the Search for the Holy Grail*, 56 U. DET. J. URB. L. 1, 5 n.17 (1978) (providing more readily accessible, but selective, quotations of Chief Judge Breitel at that conference).

<sup>73</sup> Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 771 (1964).

of land-use regulations.<sup>74</sup>

The intellectual dishonesty implicit in the prevailing regime of land-use regulations is revealed when one reflects on the fact that under California law, to take a common example, each community must have a general plan and that plan must have a housing element providing for construction of affordable housing.<sup>75</sup> Zoning, in turn, must conform to the general plan. Though not concerned with regulation of individual parcels through zoning, a similar broad housing policy is a part of federal law as a matter of plainly articulated congressional enactment.<sup>76</sup> Lip service is assiduously paid to the dire need to construct affordable housing, and crocodile tears are regularly shed in public over the plight of members of the working and increasingly the middle classes that are increasingly denied adequate housing. But anyone trying to build new housing, particularly affordable housing, in a desirable community will instantly feel the wrath of the affluent NIMBYs.<sup>77</sup> As a leader of a homeowners' group in the upscale community of Encino in the San Fernando Valley put it: "People say we're against everything . . . . But we're only against 99% of everything."<sup>78</sup> It is thus no coincidence that extreme proposals to curb private property rights in America have come not from left-wing proles, but

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<sup>74</sup> Gregory J. Wilcox, *Homes' Biggest Leap: California Median Price Hits Stratosphere with 26.5% Bounce*, L.A. DAILY NEWS, June 26, 2004, at 1, available at 2004 WL 58345238; see also FISCHER, *supra* note 14, at 218–52 (discussing the causal relationship between severe land-use regulations and the cost of housing); Delaney, *supra* note 10, at 170 (discussing the rising cost of housing as a national problem).

<sup>75</sup> See, e.g., CAL. GOV'T CODE §§ 65302(c), 65580, 65581 (West Supp. 2005). Section 65580(d) imposes an obligation on state and local governments to facilitate the improvement and development of housing that meets "the housing needs of all economic segments of the community" — a legislative mandate observed as often in breach as in adherence. See also Michael M. Berger, *So Far, State's Housing Plan Has Been All Yak, No Shack*, L.A. Daily J., Mar. 2, 2005, at 6.

<sup>76</sup> 42 U.S.C. § 1441 (2000).

<sup>77</sup> Gideon Kanner, *When NIMBY Crazyiness Goes Bananas*, L.A. TIMES, Dec. 5, 1993, at B11, available at LEXIS, News Library, LA Times File (relating the NIMBY opposition in the San Fernando Valley to just about any new local project); see *supra* note 40 (defining NIMBY, BANANA, and NOPE).

A recent survey has it that "skyrocketing home prices" have finally persuaded Americans to favor construction of more affordable housing in their neighborhoods. Haya El Nasser, *Most Back Affordable Housing Next Door*, USA TODAY, May 24, 2004, at A1, available at LEXIS News Library, USA Today File. It remains to be seen to what extent the survey was sound and the survey respondents were candid. See also Campbell Robertson, *As Housing Costs Rise, Nimbyism Is Slipping*, N.Y. TIMES, Jan. 30, 2005, at A1, available at 2005 WLNR 1273407 (noting a brain-drain on New York's Long Island, as young people, unable to afford local housing, move elsewhere).

<sup>78</sup> Iris Schneider, *Homeowners of Encino Are "Only Against 99% of Everything"*, L.A. TIMES, Mar. 30, 1991, at B5, available at LEXIS, News Library, LA Times File (quoting Gerald Silver, member of the Homeowners of Encino board).

from some of the most influential and wealthiest individuals in the country.<sup>79</sup> Thus, it is no surprise that wealthy suburbanites rely heavily on zoning and other land-use laws to keep competing seekers of the good life out of their communities.<sup>80</sup> As Richard F. Babcock, the late dean of the nation's land-use bar, put it, the conservative inhabitant of a fashionable suburb "regards the zoning ordinance as an essential weapon in his battle with the forces of darkness."<sup>81</sup>

In light of these factors, it seems appropriate to examine the prevailing climate of land-use regulations as it has influenced the new understanding of property rights and has affected terms of public discourse, before plunging into the details of judicial decision making in the *Penn Central* case. These factors, as well as the judicial culture of eminent domain law, have to a great extent shaped the prevailing inverse condemnation jurisprudence in a negative way and were felt in the *Penn Central* adjudication.

## II. THE GUARDIAN OF ALL OTHER RIGHTS<sup>82</sup> MEETS THE AMERICAN NIMBY

Paradoxically, one major reason why the professed downgrading of property rights in the abstract has had the success it has, even in the rhetoric of homeowners, lies in an indirect and unintended consequence of widespread home ownership in America, the enormous economic benefits it has conferred on homeowners, and the resulting impact on popular attitudes. One of the motivating factors behind the familiar NIMBY phenomenon is the widespread, and so far correct, perception that the purchase of a [suburban] home (the more expensive, the better) in a desirable area has been a sure path to wealth in one's old age.<sup>83</sup> It turns out that the fast-

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<sup>79</sup> See Gladwin Hill, *Authority over Land Use Is Termed a Public Right*, N.Y. TIMES, May 20, 1973, at 1 (reporting the decision of a federal task force on land use, headed by Laurance S. Rockefeller, and composed in part by prominent bankers and a major developer, "recommending that henceforth 'development rights' on private property must be regarded as resting with the community rather than with property owners"); see also ELLEN FRANKEL PAUL, PROPERTY RIGHTS AND EMINENT DOMAIN 26-28 (1987). But see Richard A. Walker & Michael K. Heiman, *Quiet Revolution for Whom?*, 71 ANNALS ASS'N AM. GEOGRAPHERS 67 (1981) (providing critical a left of center perspective on these developments).

<sup>80</sup> See, e.g., *Ybarra v. Town of Los Altos Hills*, 503 F.2d 250 (9th Cir. 1974).

<sup>81</sup> BABCOCK, *supra* note 9, at 21.

<sup>82</sup> See JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT (1998); see also Tom Bethel, *The Mother of All Rights*, REASON, Apr. 1994, at 41 (criticizing the absence of civil liberties in Middle Eastern countries that do not protect private property by a rule of law).

<sup>83</sup> To illustrate with a personal example, in 1968 I bought a suburban home in a respectable, upper-middle class (but hardly posh) San Fernando Valley neighborhood for \$68,500. In 1989, by then in a fixer-upper condition, it sold for \$575,000, a sum exceeding the listing price by \$25,000. The buyer remodeled it and placed it on the market for over \$900,000. Today, when the median home in California goes for \$465,160, houses in that neighborhood sell for prices well into the seven figures. See Wilcox, *supra* note 74.

talking, suede-shoe real estate salesmen of the 1950s were right: buying a family home turned out to be a great investment for one's old age. Few other investments (certainly none that are available to people of ordinary means) have come close to the leveraged return provided by family homes, and no others simultaneously provide investors with a tax shelter and enable them, along with their families, to live comfortably in their investment even as its value grows exponentially.<sup>84</sup>

Whether consciously or intuitively, people are keenly aware of the effects of the law of supply and demand, with the result that they (or at least those of them who already own desirable homes) see limiting of the supply of new homes in their neighborhoods as a positive thing because it increases housing prices and kites the equities in the homes they already own. Accordingly, under the banner of "slow growth" or even "no growth," they vigorously oppose the construction of more housing in better communities, particularly if the proposed new homes are expected to be marketed below the prevailing neighborhood prices or value perceptions. Those already owning desirable homes have been reinforced in their attitudes not only by the awesome recent rise in housing costs,<sup>85</sup> but also by the realization that elected local politicians who set zoning and land-use policies, readily knuckle under to their demands, irrespective of whether those reflect good planning or good law. With the passage of time, once the no-growth ethic took hold, that attitude has spread to encompass opposition to the creation of new commercial facilities as well, usually by people who are already well housed and have all the material goods they care to consume, and do not wish to be disturbed by more traffic in their neighborhoods. Unwholesome short-term economic self-interest has thus supplanted

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In California, it was not just a "rising tide lift[ing] all the boats" but an explosion in home prices that "blew all the boats out of the water." FISCHER, *supra* note 14, at 234. Even those suburban "little boxes" that were derided in the 1950s by social critics as "ticky-tacky" and sold at the time for under \$10,000, no money down, are today fetching well over a quarter of a million dollars. John M. Broder, *50 Years Later, a Still-Proud Suburb Is Starting to Fray*, N.Y. TIMES, July 14, 2004, at A16 (reporting that modest, 800 to 1,100 square foot houses in Lakewood, a working-class community in the Los Angeles basin, that originally sold in the range of \$7,575 to \$8,525, are now selling for over \$300,000). Even after inflationary effects are taken into consideration, home ownership has thus provided lower-middle- and working-class homeowners of the last generation with undreamed-of nest eggs for their retirement. Economically, the "ticky" turned out to be anything but "tacky."

<sup>84</sup> To state the obvious, homes are usually bought on time and paid for in installments, so that if, for example, a \$100,000 house doubles in value to \$200,000, that is a return of 100% on its original cost. But if, as is common, the house was bought with 10% (or \$10,000) down, that means that its owners enjoy a ten-fold increase in their equity. Let's see ordinary citizens beat that in the stock market, using a largely risk-free, tax-advantaged investment strategy that also provides them with housing.

<sup>85</sup> In May 2004 alone, California median home prices shot up by 26.5%. Wilcox, *supra* note 74.

community values, and rules supreme when it comes to land-use controls.<sup>86</sup> Add to that the frequently abject judicial deference to decisions of land-use regulators<sup>87</sup> and what you get is a prescription for the perpetuation of a prevailing attitude whereby those who would exercise their property rights by developing land, if only to provide badly needed housing, are “bad,” while those who oppose any new development for any reason, thus perpetuating a growing housing shortage, are “good,” legislative policy declarations to the contrary notwithstanding.

Apart from purely economic benefits all this bestows on the NIMBYs, it also adds to perceived exclusivity of their communities and thus adds a social snobbery motivation that has fueled widespread political resistance to home construction, often based on ostensible environmental or preservationist concerns<sup>88</sup> and on sometimes contrived displays of ideological hostility to property rights, as rhetorical weapons. It is not uncommon that wealthy individuals whose annual incomes are well into the six figures, and who live in million-dollar suburban homes, publicly oppose new housing in their communities,<sup>89</sup> using slogans (typically deploring the imminent despoliation of the environment by “greedy developers”’ quest for profits)

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<sup>86</sup> One distressing aspect of this situation is that children of upper-middle-class suburbanites living in pricey homes, stand little or no chance of living in dwellings that even approach the level of amenities of their parents’ homes, and in many cases stand no chance of living in their parents’ communities where they grew up. Upscale communities are deliberately zoning themselves so as to exclude families with children. Laura Mansnerus, *Great Haven for Families but Don’t Bring Children*, N.Y. TIMES, Aug. 13, 2003, at A1.

<sup>87</sup> As two renowned land-use lawyers, and knowledgeable commentators put it: “In California, the courts have elevated government arrogance to a fine art.” BABCOCK & SIEMON, *supra* note 68, at 253.

<sup>88</sup> See Gideon Kanner, *The Case of Environmental Overachievers*, L.A. TIMES, June 25, 2000, at B19, available at LEXIS, News Library, LA Times File (commenting on local environmentalists’ habit of invoking the discovery of an extinct flower that, according to them, would miraculously come back from the dead and be found on the sites of proposed developments in various San Fernando Valley locations). Possibly the all-time records for such nonsense were established when a group of self-styled local environmentalists demanded that city regulators declare a local service station and car wash in their Studio City neighborhood a “cultural monument.” Bob Pool, *Attempt to Save Carwash Is Scrubbed by L.A. Panel*, L.A. TIMES, July 20, 1989, pt. 2, at 1. Topping that one, was a neighborhood demand for the designation of a vacant parcel of land in the San Fernando Valley as a “historical site” because on it a renowned Hereford stud bull, named Sugwas Feudal performed his procreative feats. Tracey Kaplan, *Is Site Historic or Just Bum Steer?*, L.A. Times (Valley edition), Feb. 6, 1993, at B3, available at LEXIS, News Library, LA Times File.

<sup>89</sup> See, e.g., Michael M. Berger, *A Step Down: Critics Who Killed Ahmanson Ranch Development Ignore Dire Housing Need*, L.A. DAILY J., Nov. 7, 2003, at 6 (commenting on how local environmentalists, led by prominent show business personalities, enthusiastically celebrated their success in killing a proposed 8000-unit housing project in an area where homes are in short supply).

that might be at home at a Marxist rally.<sup>90</sup> Many of these “environmental pretenders,” as the late UCLA Professor Donald G. Hagman was fond of saying, are motivated not by their desire to protect the environment or save the mythical hexasyllabus ant, but rather by their desires to enhance their lifestyles and boost the value of their homes<sup>91</sup> that, in the ongoing climate of restrictions on development of housing, have escalated in price to levels undreamed of a short time ago, thus enabling home owners to prosper at the expense of land owners.<sup>92</sup>

The cultural, political, and economic forces discussed above have engendered a set of prevailing attitudes among society’s elites and its politically potent haves whereby selfish disregard of constitutionally protected property rights of the political have-nots can masquerade as communal virtue. Name your land-use poison — congestion, sprawl, conversion of farmland, traffic, “McMansions,” or whatever — and the increasingly prevailing notion is that once the regulatory objective said to prevent or mitigate those effects is identified (and somehow it always translates into “slow growth” or “no growth” or “let them build elsewhere”), the process of regulation can proceed accordingly, in disregard of its economic and social cost. This is particularly so when that cost can be imposed on third parties that are either disfavored, and as such demonized (i.e., “greedy developers”), or unrepresented altogether in the decision-making process (i.e., would-be home buyers who do not as yet live in the regulated community and thus have no say in the matter).

We are moving toward a regime in which the right to build on one’s land is by degrees becoming so enfeebled that in some cases it de facto ceases to exist, except to the extent it is created on an ad hoc basis by the issuance of some sort of government entitlement. Thus, in furthering this approach, California courts took the extreme position that building on one’s land is a government-conferred privilege, not a right.<sup>93</sup> This regime has given rise to a situation in which otherwise

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<sup>90</sup> My favorite example of this phenomenon was the amici curiae brief filed in *Agins* by a Los Angeles homeowner group whose turf encompasses the likes of Beverly Hills, Bel Air, Brentwood, Malibu, and similar posh communities (and whose members disproportionately include business tycoons, movie stars and other show business personalities, successful professionals and all sorts of millionaire entrepreneurs), that gratuitously deplored, of all things, profits that were not in issue in that case. Brief of Amici Curiae Federation of Hillside and Canyon Associations, Inc., and Brentwood Community Federation at 28–29, *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (No. 79-602).

<sup>91</sup> See FRIEDEN, *supra* note 11, at 119.

<sup>92</sup> FISCHER, *supra* note 14, at 218–52 (pinpointing constrictive housing regulations as a causative factor enabling a de facto transfer of wealth from owners of undeveloped California land to owners of developed land).

<sup>93</sup> *E.g.*, *Trent Meredith, Inc. v. City of Oxnard*, 170 Cal. Rptr. 685, 691 (Cal. Ct. App. 1981) (“Development is a privilege, not a right.”). The U.S. Supreme Court disagreed in *Nollan v. California Coastal Commission*, 483 U.S. 825, 833 n.2 (1987). Notwithstanding *Nollan*, when I rose to address the California Supreme Court seven years later, on behalf of



sensible, moral and civic-minded individuals have convinced themselves that it is right and proper for them to demand that neighboring land owners be denied *their* property rights without recompense in order to assure greater wealth and a better lifestyle for themselves, but who take umbrage when similar regulations are applied to *themselves*.<sup>94</sup> It is common that captains of industry who publicly rail against intrusive government regulations of their businesses, are fierce supporters of draconian property regulations when it comes to their own posh, exclusive, tree-shaded suburbs.<sup>95</sup> Babcock wryly notes that wealthy inhabitants of exclusive suburbs hold a belief that “free enterprise reigns supreme — as long as the enterprise is exercised somewhere else.”<sup>96</sup> Conversely, suburban liberals whose hearts profess to bleed for the plight of the disadvantaged, ordinary folks who are ill-served by prevailing housing opportunities, can likewise instantly bare their fangs and go to the political barricades to keep low (or even lower) cost housing out of their communities.<sup>97</sup> It is common that during municipal hearings on applications for the issuance of development entitlements, would-be builders of new housing face jeering crowds of aroused suburbanites opposing the development.

From this prevailing attitude regarding property rights, it is only a short step to embracing the belief that compensation for regulatory takings must be denied across the board because if awarded, even in egregious cases, this would give legitimacy to the position of would-be builders, and provide financial disincentives to municipalities, discouraging them from holding the line against the dreaded new development. This attitude is usually camouflaged with much high-minded talk

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the landowner in *Hensler v. City of Glendale*, 876 P.2d 1043 (Cal. 1994), the *first* question from the bench was a challenge to the owner’s right to build, on the stated grounds that doing so in California is a privilege, not a right.

<sup>94</sup> Consider the instructive case of multi-billionaire and self-styled environmentalist, Wendy P. McCaw (ex-wife of wireless telephone tycoon Craig McCaw), who bought a \$9.1 million beachfront estate in Santa Barbara’s exclusive Hope Ranch area, only to find her property subjected to stringent California Coastal Commission regulations as in *Nollan*, an experience that transformed Ms. McCaw from an environmentalist into an outspoken property rights advocate. James Rainey, *Billionaire Battles Authorities on Access to Beach*, L.A. TIMES, Dec. 11, 2000, at A3.

<sup>95</sup> BABCOCK, *supra* note 9, at 21; see Douglas W. Kmiec, *Deregulating Land Use an Alternative Free Enterprise Development System*, 130 U. PA. L. REV. 28, 79–80 (1981).

<sup>96</sup> BABCOCK, *supra* note 9.

<sup>97</sup> See *id.* at 28–30. Thus, when the Rouse Company, a major national developer, proposed to build affordable new homes in Howard County, Maryland, planning to sell them in the mid-\$200,000 range, the proposal met with fierce opposition, with local regulators demanding that the new homes sell for at least \$320,000. Scott Wilson, *In Howard, Community Battles the Company That Built It*, WASH. POST, Oct. 22, 1997, at B1; see Gideon Kanner, *A Developer’s Communitarian Ideals Bite Back*, NAT’L L.J., Jan. 12, 1998, at A19 (finding irony in the fact that the founder of the Rouse Company served on the Rockefeller committee that had earlier recommended that private development rights should become public); *supra* note 79.

about protecting the environment, and with arguments that communities must be able to govern themselves with innovative regulatory schemes.<sup>98</sup> Closely related is the argument that courts must defer to local regulatory powers in order to refrain from “chilling” municipal regulators whose creativity would be assertedly stifled if legal relief were available for effective redress of constitutional violations of rights of disfavored land owners.<sup>99</sup> The fact that these regulatory excesses tend to chill constitutional rights of land owners does not appear to have penetrated the consciousness of judges buying into this argument, or perhaps more accurately, they simply don’t care. The frequently discernible and even occasionally articulated subtext in such assertions is that these “innovative” regulations can be used to engage in de facto social and economic discrimination that flows from their tacit (and sometimes not so tacit) exclusionary attributes.<sup>100</sup> Of course, such sentiments cannot be openly voiced in today’s cultural and legal climate, particularly when they have racist overtones,<sup>101</sup> so a suitable camouflage had to be devised. In a word: environment. Writ large.

Wealthy suburbanites whose lifestyle, energy consumption, housing, and commuting habits are the very antithesis of being environmentally desirable, are at the forefront of the fight to raise the economic and social drawbridges that guard entry into their communities, on the asserted grounds that they are only protecting the environment when in fact what they are about is protecting their own agreeable upscale lifestyles even when their proposed regulation has adverse environmental consequences.<sup>102</sup> They, or at least those among them who reflect on the future,

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<sup>98</sup> See Michael M. Berger, *Is an “Innovative Scheme” a New Label for Confiscating Private Property?*, 51 L.A. BAR J. 222 (1975).

<sup>99</sup> See *Agins v. City of Tiburon*, 598 P.2d 25, 30 (Cal. 1979), *aff’d. on other grounds*, 447 U.S. 255 (1980), *overruled by* *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

<sup>100</sup> See *Ybarra v. Town of Los Altos Hills*, 503 F.2d 250, 254 (9th Cir. 1974).

<sup>101</sup> *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977). For an acute insight into this problem compare *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998) (upholding the town’s large-lot zoning as desirable community planning), with *Dews v. Town of Sunnyvale*, 109 F. Supp. 2d 526, 533 (N.D. Tex. 2000) (finding that the same zoning law constituted an illegal, invidiously racially discriminatory device, amounting to, in the court’s blunt words, a sign reading “niggers keep out”). How an invidiously discriminatory, unconstitutional land-use scheme can constitute valid regulations, no one has explained.

<sup>102</sup> *Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980) (approving a large-lot zoning as retarding the “ill effects of urbanization”). But the Court overlooked the obvious fact that such land-consuming large-lot zoning, far from retarding urbanization, promotes sprawl and has other environmentally undesirable consequences, such as an inefficient infrastructure, increased traffic with a consequent increase in air pollution, and frustration of efficient mass transit. The Court thus confused environmental values with a high level of suburban amenities — the two are not the same, and often stand in tension with each other. See *infra* note 204.

surely must realize that a populous country like the United States, whose growing nine-figure population tends to cluster in areas near its coasts, cannot provide land for housing in the form of individual homes indefinitely, and that high — or at least higher — density housing has to be constructed for our growing population in better communities as well as in the downscale ones.<sup>103</sup> Nonetheless, they do their best to protect the privileged position they have carved out for themselves, from what they perceive to be an onslaught of competing seekers of the good suburban life.

By now this is all a relative matter. Such rent-seeking behavior has spread from upper-crust communities to the better middle-class suburbs whose inhabitants have seen market values of their homes soar into the high six figures and have drawn the obvious conclusion that what's good for the rich folks should be every bit as good for them. As California's late Supreme Court Justice Stanley Mosk once wrote, "[n]o one has ever devised an ordinance to preserve an urban ghetto or crowded central city environment; it is always to protect the outer city, the suburb, the middle or upper class housing development."<sup>104</sup> Just so.

### III. THE BRITISH ARE COMING!

But what does all that have to do with the *Penn Central* saga? Directly, nothing — indirectly, everything. The *Penn Central* controversy was a reflection of a popular attitude inspired by a movement of the American elites, seeking to institutionalize the above trends by de facto transplanting to America a system akin to the British Town and Country Planning Act, adopted in 1947 by the Labor government, under which land could not be put to new uses without "planning permission" granted by the government, and increases in its value were to be taxed away.<sup>105</sup> This was an avowed act of uncompensated expropriation that the British Parliament could accomplish by fiat because the United Kingdom lacks a written constitution forbidding uncompensated property takings by the government. Needless to say, the Act as originally enacted was a failure in Britain.<sup>106</sup>

In the United States, an effort was made in the early 1970s to import the regulatory aspects of the British system. In 1973, the grandly named Federal Task Force on Land Use of the Citizens Advisory Committee on Environmental Quality

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<sup>103</sup> See RICHARD F. BABCOCK, *The Egregious Invalidity of the Exclusive Single-Family Zone*, 35 LAND USE L. & ZONING DIGEST 4, 8 (1983).

<sup>104</sup> Stanley Mosk, *Finding a Direction for Our Environment*, BARRISTER, Spring 1976, at 16, 18.

<sup>105</sup> Arthur Shenfield, *The Mirage of Social Land Value*, APPRAISAL J., Oct. 1976, at 523, 525 (describing the 1947 Town and County Planning Act and its provision requiring "planning permission").

<sup>106</sup> Deprived of the fruits of entrepreneurship but still facing its risks, British land owners largely ceased to build needed improvements. *Id.* at 526–27, 529; see PAUL, *supra* note 79, at 54–55 (1987).

unveiled its report which proposed that thenceforth development rights in the United States should no longer be deemed private but rather resting with the community; i.e., they would become public.<sup>107</sup> Because of its openly expropriative features, this proposal faced obvious problems, not the least of which was constitutional. Unsurprisingly, it met with resistance. It is important to keep these background facts in mind because much of the public controversy on this subject has been successfully directed by the “police power hawks” toward assertions that it is rooted in the activities of the “property rights movement” said to oppose reasonable environmental regulations.<sup>108</sup> My perception has been that reality is to the contrary; that the property rights movement arose as a reaction to draconian regulations of private property.

Historically, it was widely and correctly believed in the United States that the right to build on one’s land, subject to reasonable regulations, was a well-established private property right. Indeed, the U.S. Supreme Court eventually reaffirmed that right in *Nollan v. California Coastal Commission*.<sup>109</sup> Proponents of this brave, new regulatory scheme were, of course, smart and well informed and they understood that an attempt to replicate the main features of British law in the United States would run into constitutional problems under *Pennsylvania Coal Co. v. Mahon*.<sup>110</sup> And so, an overt effort was launched to get the Supreme Court to overrule *Mahon*. The spearhead of this effort took the form of a commissioned book, *The Taking Issue*, written by three knowledgeable Chicago lawyers, as a candid effort “to assist

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<sup>107</sup> Hill, *supra* note 79; see FRIEDEN, *supra* note 11, at 122–24; PAUL, *supra* note 79, at 56–57.

<sup>108</sup> See, e.g., 8 NICHOLS, *supra* note 11, § 14E.10[2]. For an egregious example of this polemical approach, ascribing to the “property rights movement” positively conspiratorial attributes, see Douglas T. Kendall & Charles E. Lord, *The Takings Project: A Critical Assessment of the Progress So Far*, 25 B.C. ENVTL. AFF. L. REV. 509 (1998), charging that a conservative cabal, under the intellectual leadership of [former] Attorney General Edwin Meese and Professor Richard Epstein, is out to scuttle environmental protection laws. Why Meese, Epstein, and their cohorts would want to expose themselves to toxic substances, breathe polluted air, and have their children drink contaminated milk, the authors never explain. Nor is it readily discernible why during his tenure as U.S. Attorney General, Meese consistently filed amicus curiae briefs in the Supreme Court, supporting the regulators and opposing property owners complaining of confiscatory regulations. See Gideon Kanner, *Hot Air and Politics Masquerade as Legal Studies*, NAT’L. L.J., July 20, 1998, at A21; see also Gideon Kanner, *Is America About to Be Poisoned?*, DETR. LEGAL NEWS, May 18, 1995, at 10 (commenting on bizarre assertions that those seeking takings legislation were out to legalize the dumping of cyanide into drinking water); Berger & Kanner, *Need for Reform*, *supra* note 11, at 865 nn.113–14.

<sup>109</sup> 483 U.S. 825, 833 n.2 (1987).

<sup>110</sup> 260 U.S. 393, 415 (1922) (holding that when property regulations go too far they become a taking).

government officials and attorneys.”<sup>111</sup> The book made a splash upon publication, but eventually the U.S. Supreme Court rejected its core proposal (to overrule *Mahon*) in *Keystone Bituminous Coal Ass’n v. DeBenedictis*,<sup>112</sup> where the Court considered a regulatory scheme similar to that in *Mahon*, but, though the regulation was upheld, the Court distinguished *Mahon* without overruling it. This denied the “police power hawks” their fondest wish, and made it necessary for them to find a new way of end-running *Mahon*. Enter Charles Breitell, Judge (later Chief Judge) of the New York Court of Appeals, whose theories led to the *Penn Central* decision and are discussed in Part XII.

Ideas have consequences, and the appeal of the “land socialist” ethic, as well as of the avowedly socialist British approach to American elites, by degrees engendered an ideological and political atmosphere in which disparagement of private property rights became so common that positively embarrassing public arguments against land development of all sorts began to be publicly made by seemingly intelligent people, descending at times to a farcical level.<sup>113</sup> In this atmosphere, land-use law began to be treated as something not to be lived by, but something to be changed to suit the perceived exigencies of the moment. Whatever “the law” may appear to be, it can be twisted beyond recognition,<sup>114</sup> or it can quickly

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<sup>111</sup> FRED BOSSELMAN ET AL., *THE TAKING ISSUE*, at v (1973). Curtis Berger characterized Bosselman as the key spokesman for the “land socialists” school that sees land ownership as a privilege, believes that fee simple ownership gives no one an absolute right to develop, and sees zoning benefits as an expression of community grace which the community can remove without compensation. Curtis J. Berger, *The Accommodation Power in Land Use Controversies: A Reply to Professor Costonis*, 76 COLUM. L. REV. 799, 815 (1976).

<sup>112</sup> 480 U.S. 470 (1987).

<sup>113</sup> See BABCOCK, *supra* note 9, at 33–36 (quoting a farcical transcript of a zoning hearing). Closer to home, a few years ago some entrepreneurs opened two posh restaurants not far from my home, one in Studio City and the other in Toluca Lake (within walking distance of Bob Hope’s home), only to be confronted at the permit hearings by agitated neighbors opposing the issuance of permits to the restaurants on the grounds, inter alia, that their largely affluent, middle-aged patrons would get drunk and urinate on the lawns of nearby homes. David Wharton, *Battle of the Bistro*, L.A. TIMES (Valley edition), Sept. 25, 1988, at B4, available at LEXIS, News Library, LA Times File.

See also Stephen J.L. Page, *In My Former Life as a Seagull*, WALL ST. J., Dec. 27, 1994, at A16. In reporting his misadventures in applying for permission to build his home in Northern California, the author was confronted with the following statement by one of the zoning functionaries at the hearing: “In my former life as a seagull, I was flying up and down the California coastline and saw your house built shaped as a seashell, rather like a Nautilus seashell, built out of driftwood and feathers, with the aperture facing out to sea.” *Id.* Mr. Page was eventually permitted to build a 1900 sq. ft. home on a 47,000 sq. ft. lot in which he had invested \$1.4 million – a grotesque underimprovement on a lot that size and cost. *Id.*

<sup>114</sup> *Friends of Mammoth v. Bd. of Supervisors*, 502 P.2d 1049 (Cal. 1972) (holding that a statute explicitly requiring environmental impact reports before *public* projects could proceed, applied to *private* ones as well, even though the statute contained no such

metamorphose to frustrate land owners' perfectly legal plans to build in a way that their neighbors disapprove of, usually with judicial acquiescence.<sup>115</sup> When, as is often the case today, property owners cannot tell exactly what enforceable rights of user attach to the land that they hold title to and pay taxes on, the status of property *rights* as being constitutionally protected erodes.<sup>116</sup> Even vocal, leading supporters of the current regulatory climate admit that the land-use regulation process frequently involves pervasive delays and is replete with abuses that are "ubiquitous, vicious and devoid of any resemblance to procedural due process."<sup>117</sup> In this atmosphere it should not be surprising to see regulatory decisions that occasionally impose on the regulated to an extent that *de facto* deprives them of economically viable use of their land, thus giving rise to non-physical takings claims.

I am hardly alone in voicing concerns about the unreliability and severity of the land-use regulatory regime and the incoherence of the Supreme Court's takings jurisprudence dealing with its constitutional aspects. It was the late Norman Williams, a renowned, government-minded land-use treatise author (whose substantive views were at odds with mine) who harshly criticized the state of judge-made law: "the Court has succeeded in destroying what predictability has existed."<sup>118</sup> It was Williams who coined the colorful but apt term "gastronomic . . . jurisprudence" — i.e., whatever feels right in a judge's gut.<sup>119</sup> Williams had much company; commentators have not been kind to the judges' handiwork in this area of the law, and for the past two decades law journals have been full of harshly critical assessments of the state of regulatory takings law, written by authors favoring as well as disfavoring far-reaching land-use regulations.

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provision). The court achieved a semantic sleight of hand by arguing that private projects requiring permits are "public" because issuing a permit is a public act. *Id.*

<sup>115</sup> See *William C. Haas & Co. v. City and County of San Francisco*, 605 F.2d 1117 (9th Cir. 1979) (implicating state and local regulations in federal court litigation). The case exemplifies how "[t]he California [Supreme] court changed the legal rules so that any number of parties could stop a given development up to the moment at which it was physically improved." FISCHER, *supra* note 14, at 251; see also Robert I. McMurry & Gideon Kanner, *Shootout at Warner Ridge*, L.A. LAWYER, Jan. 1995, at 24 (describing how an attempt to build a perfectly legal mid-rise office building on appropriately zoned land was frustrated by local NIMBY objections); *Warner Ridge Assocs. v. City of Los Angeles*, 3 Cal. Rptr. 2d 306 (Cal. Ct. App. 1991). In spite of this ruling in favor of the developers, they lost their financing due to the long delay, and eventually lost their property by foreclosure.

<sup>116</sup> See Michael M. Berger, *To Regulate or Not to Regulate — Is That the Question?*, 8 LOY. L.A. L. REV. 253, 265–67 (1975).

<sup>117</sup> Norman Williams, Jr., R. Marlin Smith, Charles Siemon, Daniel R. Mandelker, & Richard F. Babcock, *The White River Junction Manifesto*, 9 VT. L. REV. 193, 242 (1984). These authors were at the time the *crème de la crème* of the regulation-minded land-use bar.

<sup>118</sup> NORMAN WILLIAMS JR., *AMERICAN LAND PLANNING LAW* § 5A.17, at 168–69 (rev. ed. 1988).

<sup>119</sup> *Id.* § 5A.02, at 136.

In sum, like the liberated contents of Pandora's box emerging into the world, the unfortunate attitudes toward other people's property have entered popular thinking and have become the prevailing sociopolitical reality that has seeped into pertinent jurisprudence. As a student of mine once observed, judges come from the privileged, well-housed socioeconomic classes that have been among the principal beneficiaries of this state of affairs, so it should not be surprising that they view the prevailing regulatory regime favorably. Thus, extreme land-use regulations not only impact the housing market, but they also engender broader attitudes and economic consequences, and set a cultural tone.<sup>120</sup> Once it becomes the norm that private property rights are to be disfavored, notwithstanding the constitutional protection ostensibly extended to them, the impact on prevailing attitudes is felt beyond just housing. Without a doubt it was felt in the *Penn Central* saga, in the form of Chief Judge Breitel's conviction that property owners abused by confiscatory regulations should not be entitled to compensation for their economic losses, but limited only to an economically ineffective judicial declaration that the regulations are invalid.<sup>121</sup>

#### IV. OUT OF THE "DARK CORNER OF THE LAW" — THE INTERRELATIONSHIP OF EMINENT DOMAIN AND INVERSE CONDEMNATION

Eminent domain has historically been "the dark corner of the law," as Lewis Orgel put it a half century ago.<sup>122</sup> There were few condemnations in the early days of American independence, and much of the governing law's substantive content was formed during the corrupt Robber Baron era of the nineteenth century, particularly in railroad construction.<sup>123</sup> At the time, for all their overreaching, railroads

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<sup>120</sup> DENNIS J. COYLE, PROPERTY RIGHTS AND THE CONSTITUTION 226–28 (1993).

<sup>121</sup> See *infra* note 232. *Contra* *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 649 n.14 (1981) (Brennan, J., dissenting) (charging Chief Judge Breitel with tampering with the language of *Mahon*, 260 U.S. 393 (1922)). Justice Brennan's nominal dissent actually represented the views of the majority of the Justices. Justice Rehnquist, though voting with the majority in this five-four decision to dismiss the owner's appeal as being from a non-final judgment, prefaced his concurring opinion with the statement that were it not for the lack of finality of the judgment, he would have no problem in agreeing with most that was said in Justice Brennan's dissent favoring the compensation remedy in regulatory takings cases. *Id.* at 633. Justice Brennan's views were later adopted by the Court in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

<sup>122</sup> 2 LEWIS ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 249 (James C. Bonbright ed., 2d ed. 1953).

<sup>123</sup> William G. Bryant, *Eminent Domain — Its Use and Misuse*, 39 U. CIN. L. REV. 259 (1970); Henry N. Scheiber, *Property Law, Expropriation, and Resource Allocation by Government: The United States, 1789–1910*, 33 J. ECON. HIST. 232 (1973). For a vivid description of railroad condemnation practices in pre-Civil War Ohio, see 1 JOHN SHERMAN, JOHN SHERMAN'S RECOLLECTIONS OF FORTY YEARS IN THE HOUSE, SENATE AND CABINET 81–82 (1895) (describing how unsophisticated farmers were induced to give land to the railroads in the often unrequited hope that railroads would bring prosperity). What Sherman

enjoyed judicial favor because they were perceived as harbingers of progress and prosperity, deserving of government subsidies and favored treatment by both legislatures and the judiciary, which provided it by imposing various limitations on condemnees' measure of compensation when their land was being taken for railroad rights of way. For some reason, ever since, this judicial attitude took root. Judges in eminent domain cases have been reluctant to acknowledge changes in society, and resistant to reforms that took place in other areas of the law.<sup>124</sup>

But the basic, pervasive problem in eminent domain law is that the Supreme Court has repeatedly intoned assorted bromides to the effect that the law of just compensation "evokes ideas of 'fairness' and 'equity,'"<sup>125</sup> and that judicial awards must provide a "full and perfect" monetary equivalent of what is taken from the condemnees, and restore them to the same economic or "peculiar[y]" position, as the court put it, that they would have been in had there been no condemnation.<sup>126</sup> But in the event, the Court has conceded that the law of eminent domain is not fair but "harsh,"<sup>127</sup> that the judicially-defined compensation standard of fair market value does not encompass elements that would be considered in voluntary market transactions,<sup>128</sup> and that therefore, as the California Supreme Court put it, the benign-sounding but misleading judicial rhetoric notwithstanding, condemnees

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did not tell his readers was that as a result of its largesse toward the railroads, the State of Ohio incurred huge debts. Bryant, *supra*, at 267. In California, there was a "revolving door" between railroad management and the California Supreme Court, whereby individuals freely moved from managing one to adjudicating in the other. See, e.g., KEVIN STARR, *INVENTING THE DREAM 200* (1985).

<sup>124</sup> See Comment, *Eminent Domain Valuations in an Era of Redevelopment*, 67 *YALE L.J.* 61, 66–67 (1957); *infra* note 130. Thus, in the midst of the huge federal highway construction program that transformed the country under the 1956 Federal Aid Highway Act and was generously funded by a gas tax scheme unheard of in the nineteenth century, the California Supreme Court borrowed language from *People v. Gianni*, 20 P.2d 87, 89 (Cal. Dist. Ct. App. 1933) (citing *Levee Dist. No. 9 v. Farmer*, 35 P. 569 (Cal. 1894)), *overruled by* *Valenta v. County of Los Angeles*, 394 P.2d 725, 727 (Cal. 1964), and absurdly asserted that it was its duty to keep condemnation awards down because otherwise, if condemnees were to receive compensation for their demonstrable economic losses, an "embargo" on public projects would have to be declared in California. See also *City of Oakland v. Oakland Raiders*, 646 P.2d 835, 846 (Cal. 1982) (Bird, C.J., concurring and dissenting) (asserting on the basis of nineteenth-century law that the California Supreme Court's constitutional interpretation powers were so modest that it lacked the authority to disagree with the legislative determination that a taking was for a public use, in spite of the fact that under hornbook law the interpretation of constitutional terms is a judicial prerogative).

<sup>125</sup> *United States v. Commodities Trading Corp.*, 339 U.S. 121, 124 (1950).

<sup>126</sup> *United States v. Miller*, 317 U.S. 369, 373 (1943).

<sup>127</sup> *United States v. Gen. Motors Corp.*, 323 U.S. 373, 382 (1945); see Thomas W. Merrill, *Incomplete Compensation for Takings*, 11 *N.Y.U. ENVTL. L.J.* 110, 111 (2002) ("The most striking feature of American compensation law — even in the context of formal condemnations or expropriations — is that just compensation means incomplete compensation.").

<sup>128</sup> *Kimball Laundry Co. v. United States*, 338 U.S. 1, 6 (1949).



cannot expect to be fully compensated for their demonstrable economic losses.<sup>129</sup>

The law of eminent domain has failed to develop and progress over the years, in the way other areas of the law have,<sup>130</sup> thus inspiring a highly respected, knowledgeable commentator to characterize it as “a mass of obtuse decisional law that is only occasionally relieved by judicial common sense, pragmatism and candor.”<sup>131</sup> Eminent domain law has been the subject of few defenses but much criticism by legal commentators, both scholars and practitioners, of all ideological persuasions.<sup>132</sup>

<sup>129</sup> *Cnty. Redevelopment Agency v. Abrams*, 543 P.2d 905, 909, 915 n.9 (Cal. 1975) (explaining that a party buying into the courts’ “panoramic” promises of fairness and indemnity in eminent domain cases only betrays “a fundamental misunderstanding” of the law).

<sup>130</sup> See Emerson G. Spies & John C. McCoid, II, *Recovery of Consequential Losses in Eminent Domain*, 48 VA. L. REV. 437, 449–51 (1962) (noting that “[i]n other areas of the law . . . recovery for consequential loss has become routine and is regularly expanding”); Comment, *supra* note 124, at 66–67.

<sup>131</sup> Arvo Van Alstyne, *Modernizing Inverse Condemnation: A Legislative Prospectus*, 8 SANTA CLARA L. REV. 1, 4 (1967). The cited article was a part of a series of studies by Professor Van Alstyne, California’s leading expert on government liability, performed for the California Law Revision Commission that at the time was considering reform in the law. This Commission effort, insofar as it related to inverse condemnation law, was a failure and no legislative recommendations ensued from it.

<sup>132</sup> By way of only a small sampling of the criticism heaped on the courts’ handiwork in eminent domain, where liability to pay “just compensation” is conceded, legal commentaries have consistently focused on the raw injustice produced by prevailing judge-made rules. See, e.g., Michael R. Klein, *Eminent Domain: Judicial Response to the Human Disruption*, 46 J. URB. L. 1 (1968) (commenting on the rampant undercompensation of condemnees); Curtis J. Berger & Patrick J. Rohan, *The Nassau County Study: An Empirical Look into the Practices of Condemnation*, 67 COLUM. L. REV. 430 (1967) (recognizing that condemnation “often occasioned losses . . . that the substantive law of damages [does] not reach”); James Geoffrey Durham, *Efficient Just Compensation as a Limit on Eminent Domain*, 69 MINN. L. REV. 1277 (1985); D. Michael Risinger, *Direct Damages: The Lost Key to Constitutional Just Compensation When Business Premises Are Condemned*, 15 SETON HALL L. REV. 483 (1985); Allison Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63, 106.

Of late the field of eminent domain law has received an additional wave of criticism because of judicial deformation of the law that increasingly allows takings of private property, not necessarily for any “public use” as specified in the Constitution, and as that term might be understood by intelligent English-speaking people, but overtly for the financial benefit of private parties with clout in city hall, who are the beneficiaries of widespread use of eminent domain that wrests unoffending private property from its unoffending owners, in order to turn it over at subsidized, below-market prices (sometimes gratis) to redevelopers who go on to build purely private, profit-making enterprises such as shopping malls, car dealerships, industrial plants, and even gambling casinos on the specious theory that doing so is incidental to the public purpose and that it will cause a trickle-down effect providing an economic “public benefit” deemed synonymous with “public use.” Comment, *The Public Use Limitation on Eminent Domain: An Advanced Requiem*, 58 YALE L.J. 599 (1949); James W. Ely, Jr., *Can the “Despotic Power” Be Tamed? Reconsidering the Public Use Limitation*

My favorite bit of acerbic prose came from the pen of Edward L. Lascher, the late dean of California's appellate bar and a popular columnist in the California State Bar Journal, who characterized the law of eminent domain as "a maniacal backwash of American law whose rites are performed by appropriately cast acolytes."<sup>133</sup>

As the tidal wave of condemnations swept across the country in the 1960s, in connection with redevelopment programs and federally-financed highway construction, liberal commentators, though generally supportive of government intervention in urban economies, deplored the mass undercompensation and mistreatment of poor people being displaced by government bulldozers,<sup>134</sup> while their conservative counterparts, in addition to voicing similar concerns, were also alarmed about erosion of private property rights.<sup>135</sup> All criticized the widespread unfairness being visited *en*

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*on Eminent Domain*, 17 PROBATE & PROP. 30–31 (Nov./Dec. 2003) (criticizing government uses of eminent domain to promote the interests of powerful private developers); Laura Mansnerus, Note, *Public Use, Private Use and Judicial Review in Eminent Domain*, 58 N.Y.U. L. REV. 413 (1983) (positing that "municipalities seeking economic advantage or reprieve [employ eminent domain law] on behalf of private enterprise in return for the promise of jobs [or] tax revenues"). The problem with the above approach is that it provides incentives to tax-hungry officials of downscale cities to enter into improvident or corrupt deals with redevelopers. See Ronald Smothers, *So Many Towns, So Many Temptations*, N.Y. TIMES, Feb. 27, 2005, at 25, available at 2005 WLNR 2975382. Even at its best, this process tends to transmogrify democracy into a form of plutocracy: those wealthy individuals or corporations who can prognosticate to the satisfaction of congenial municipal functionaries that they can put the subject land to a more profitable use than its rightful owners, may obtain it cheap or even cost-free by government force. See, e.g., *Kelo v. City of New London*, 543 U.S. 500 (Conn.), cert. granted, 125 S. Ct. 27 (U.S. Sept. 28, 2004) (No. 04-108) (considering whether condemnation of private property for economic development meets the public use test).

Recently, there has been some judicial resistance to the overreaching of these "new Robber Barons." Note, however, that on September 28, 2004, the U.S. Supreme Court granted certiorari in *Kelo v. City of New London*, to consider the issue whether condemnation of private property for so-called economic development meets the constitutional public use test. Stay tuned. *Southwestern Ill. Dev. Auth. v. Nat'l City Envtl., LLC*, 768 N.E.2d 1 (Ill.) (holding that a parking lot at an automobile racetrack is not a legitimate public use), cert. denied, 537 U.S. 880 (2002); *Wayne County v. Hathcock*, 684 N.W.2d 765 (Mich. 2004) (holding that the county's proposed condemnation met statutory requirements but failed constitutional requirements of public use for private development); *99 Cents Only Stores v. City of Lancaster*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001) (enjoining condemnation for a private Costco store), appeal dismissed, 60 Fed. App. 123 (9th Cir. 2003); see *Aaron v. Target Corp.*, 357 F.3d 768 (8th Cir. 2004). For an insight into the egregious facts of *Aaron*, see *Aaron v. Target Corp.*, 269 F. Supp. 2d 1162 (E.D. Mo. 2003).

<sup>133</sup> Edward L. Lascher, *Lascher at Large*, 50 CAL. ST. B.J. 36, 38 (1975).

<sup>134</sup> See, e.g., Charles Martin Sevilla, *Asphalt Through the Model Cities: A Study of Highways and the Urban Poor*, 49 J. URB. L. 297 (1971).

<sup>135</sup> MARTIN ANDERSON, *THE FEDERAL BULLDOZER* (1964); PAUL, *supra* note 79, at 31–34; BERNARD FRIEDEN, *DOWNTOWN, INC.: HOW AMERICA REBUILDS CITIES* (1989).

*masse* on people in the path of these projects, who were abused and undercompensated as their property was taken.<sup>136</sup> In spite of fierce opposition by the notorious “highway lobby,” Congress eventually responded by enacting the Uniform Relocation Assistance Act in 1970,<sup>137</sup> but the Act’s modest remedial effects have been palliative rather than structural. Though an improvement over past practices, the Act is largely a toothless tiger because it denies condemnees the right to sue to enforce its provisions.<sup>138</sup> The problem of widespread undercompensation in eminent domain is still with us today.<sup>139</sup>

In spite of these mild legislative changes, there is still much to be concerned about how eminent domain is being employed and litigated, not the least of it being the problem that its profligate use on behalf of private interests (notwithstanding the constitutional requirement of “public use”) encourages municipalities to use it — not to create public works — but to pursue tax revenues they hope will be generated by private businesses that are the primary beneficiaries of these brave, new condemnations. This goes on even as judges absurdly assert that the private economic benefits expected from such projects to their private promoters are merely “incidental” to the greater public good. At times, municipalities waste huge amounts of public money on public as well as transparently private projects, some of which fail, or even if successful, do not live up to the economic hopes voiced at their creation.<sup>140</sup> After all, whether funded with municipal or private funds these are entrepreneurial endeavors dependent on future private profits and as such are subject to market risks and failures. The emerging pattern shows that many of today’s

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<sup>136</sup> *Uniform Relocation Assistance and Land Acquisition Policy: Hearing on H.R. 386 and Related Bills Before the House Comm. on Pub. Works*, 90th Cong. (1968) (making clear the extent of undercompensation that often took the form of acquisition prices below the condemning agencies’ own appraisals); see PAUL, *supra* note 79, at 29–37; Berger & Rohan, *supra* note 132.

<sup>137</sup> 42 U.S.C. §§ 4601–4655 (1994).

<sup>138</sup> 42 U.S.C. § 4602 (1994).

<sup>139</sup> Systematic studies are hard to come by, but practitioners’ experience supports this conclusion. Condemnees’ lawyers typically charge clients a fraction of any judgment awarded over and above the condemnor’s offer or evidence. See, e.g., FLA. STAT. ANN. § 73.09(1)© (West 2005). It follows inexorably that either condemnees’ lawyers are magicians (they’re not; trust me) or government appraisals are often defective and can be rebutted in court. A recent exposé by the *Salt Lake Tribune* found that of landowners who decline state offers for their properties and litigate their cases, eight of ten recover more than the state offers, and those on the average receive forty-one percent more than the state offers. Ray Rivera, *UDOT: Fair Deals or Land Grabs?*, SALT LAKE TRIB., Oct. 24, 1999, at A1, available at LEXIS, News Library, Salt Lake Tribune File; Ray Rivera & Dan Harrif, *UDOT Appraisals Lose In Court*, SALT LAKE TRIB., Oct. 24, 1999, at A9, available at LEXIS, News Library, Salt Lake Tribune File.

<sup>140</sup> See *infra* note 142; *Worms in the Big Apple—And Elsewhere*, JUST COMPENSATION 11 (Feb. 2004) (commenting on the failure of several major redevelopment projects that resulted in nine-figure losses to the would-be condemnors, with little or nothing to show for it).

condemnations for redevelopment mostly benefit private, not public interests,<sup>141</sup> and regularly turn out to cost much more than anticipated, not because of over-compensation of condemnees, but because of the inherent cost of the projects, poor planning, or outright mismanagement.<sup>142</sup> This is obviously a subject whose pursuit would take us far afield from the present discussion, and therefore cannot be explored here to the extent it deserves.

Notwithstanding the vigor, consistency, and plain merit of criticisms by scholars and practitioners, these views have had at most a modest impact on the unsatisfactory judge-made eminent domain law. Judges who in other fields of law stress the need for periodic judicial reinterpretation of the law to match changed social conditions, and who glory in their function as social reformers,<sup>143</sup> by and large

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<sup>141</sup> DANA BERLINER, INSTITUTE FOR JUSTICE, PUBLIC POWER, PRIVATE GAIN: A FIVE-YEAR STATE-BY-STATE REPORT EXAMINING THE ABUSES OF EMINENT DOMAIN (2003), available at <http://castlecoalition.org/publications> (last visited Feb. 5, 2005); Dean Starkman, *Condemnation Is Used to Hand One Business Property of Another*, WALL ST. J., Dec. 2, 1998, at A1, available at LEXIS, News Library, Wall St. J. File; see also John Gibeaut, *The Money Chase*, 85 A.B.A. J. 58 (Mar. 1999).

<sup>142</sup> The paradigmatic example and current champion of such overruns is Boston's underground freeway, the "Big Dig," which was estimated to cost \$2.6 billion, but has already consumed \$14 billion. Fox Butterfield, *In Big Dig Town, a Solution Adds Confusion*, N.Y. TIMES, Apr. 14, 2003, at A14, available at 2003 WLNR 5225626. Close behind is New York City's \$109 million fiasco that occurred when the city set out to condemn land for the new NYSE headquarters. Charles V. Bagli, *45 Wall St. Is Renting Again Where Tower Deal Failed*, N.Y. TIMES, Feb. 8, 2003, at B3, available at 2003 WLNR 5171078. In addition there is the Los Angeles Belmont Learning Center debacle, where a high school on which the Los Angeles Unified School District has spent some \$217 million, was later discovered to have been constructed on top of an old oil field that seeps methane, making the center unfit for use as a school. Edward J. Boyer & Janet Wilson, *The Methane Down Below*, L.A. TIMES, July 30, 1999, at B2. Similarly, the twenty-year-old Los Angeles's North Hollywood redevelopment project has gone through over \$117 million with little to show for it. Patrick McGreevy & T. Christian Miller, *Heady Plans, Hard Reality*, L.A. TIMES, Jan. 30, 2000, at A1; see Marcia Slacum Greene et al., *D.C. Revitalization Promised, Not Delivered*, WASH. POST, Feb. 24, 2002, at A1; Marcia Slacum Greene et al., *Risky Ventures, Little Accountability*, WASH. POST, Feb. 25, 2002, at A1; see also *infra* note 450 (describing a \$100 million municipal fiasco whereby in the 1970s the City of Los Angeles acquired over 17,000 acres for a new municipal airport in Palmdale, California, but was never able to establish one).

<sup>143</sup> E.g., *People v. Anderson*, 493 P.2d 880, 887 (Cal. 1972) (forcefully asserting that when social conditions change, it is the courts' "mandate of the most imperative nature" to change the law accordingly); *Kriegler v. Eichler Homes, Inc.*, 74 Cal. Rptr. 749, 752 (Cal. Ct. App. 1969) ("[T]he judiciary should be alert to the never-ending need for keeping legal principles abreast of the times."); see Leonard M. Friedman, *The Courts and Social Policy*, 47 CAL. ST. B.J. 558, 563 (1972) (The presiding Justice of the California Court of Appeals writing that the Constitution takes the side of the individual "against the ponderous demands of the collective state."); Mathew O. Tobriner, *Can Young Lawyers Reform Society Through the Courts?*, 47 CAL. ST. B.J. 294, 298 (1972) (Associate Justice of the California Supreme Court calling for a "social 'revolution'," no less, to be worked through the courts at the behest of young lawyers — a group about as ill-equipped to reshape society as can be imagined.).

retreat from that position and shirk their responsibility to keep the law of eminent domain in harmony with changing social and urban conditions, and consistent with the legal doctrine prevailing in other fields of law. The law they apply in today's cases of mass displacement of urban populations is not much different than the law they applied when condemnations were rare and mostly impacted vacant land or individual farms, causing few incidental losses. From time to time, in evident recognition of the economic and moral deficiency of their handiwork, judges ritualistically assert that the concededly unsatisfactory state of eminent domain law should indeed be rectified, but they suggest that task to be legislative,<sup>144</sup> *even though* the black-letter rule formulated by the courts themselves is that it is the courts, not legislatures, that are primarily in charge of formulating rules of compensability.<sup>145</sup> An egregious example of such judicial nonfeasance was the absurd assertion by the California Supreme Court, at the time probably the most activist court in the nation, that it lacked "institutional competence" to rectify the concededly unsatisfactory rule denying compensation for loss of business goodwill in eminent domain, even as it expressly recognized that there had been great changes in urban conditions since the early-twentieth-century days when the court formulated its no-compensation rule, and that in its modern application this rule caused a disproportional share of the cost of public works to fall on small business people, in disregard of the constitutional policy of spreading the cost of public works on the society that benefits from them.<sup>146</sup>

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<sup>144</sup> *County of Los Angeles v. Ortiz*, 490 P.2d 1142, 1147 nn.8-9 (Cal. 1971) (opining that recovery for litigation expenses in eminent domain cases should be set by the legislature); *Town of Los Gatos v. Sund*, 44 Cal. Rptr. 181, 183 (Cal. Ct. App. 1965) (suggesting that recovery for moving expenses be sought from the legislature); *City of Los Angeles v. Allen's Grocery Co.*, 71 Cal. Rptr. 88, 93 (Cal. Ct. App. 1968) (conceding that the judge-made law is not as it should be, but suggesting that the legislature should rectify it). Note, however, that when the shoe was on the other foot, and the plain language of a controlling statute (regarding accrual of interest) favored the condemnee because of the condemnor's extreme delay in paying for what it took, the California Supreme Court had no trouble coming up with the ingenious notion that the legislature could not have intended to say what it plainly said, and proceeded to rescue the condemnor from the statutory consequences of its own grossly dilatory conduct. *People v. S. Cal. Edison Co.*, 996 P.2d 711, 716-17 (Cal. 2000); *see also United States v. Fuller*, 409 U.S. 488 (1973) (In another case where the shoe was on the other foot, the Court had no trouble invoking the idea of fairness to justify condemnation of range land for less than what its owner could obtain in the market.).

<sup>145</sup> *Seaboard Air Line Ry. v. United States*, 261 U.S. 299, 304 (1925) (holding that the courts are supreme in establishing the minimal constitutionally required compensation); *Joslin Co. v. City of Providence*, 262 U.S. 668, 675-76 (1923) (stating that legislatures may enact more generous rules that set compensation above the constitutional minimum which is set by the courts); *accord Redevelopment Agency of Burbank v. Gilmore*, 700 P.2d 794, 799 (Cal. 1985).

<sup>146</sup> *Cnty. Redevelopment Agency v. Abrams*, 543 P.2d 905, 916 (Cal. 1975); *cf. Armstrong v. United States*, 364 U.S. 40, 49 (1960) (holding that the Just Compensation Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole").

The bottom line of it all, that is pertinent to the topic at hand, is that the history of eminent domain law has engendered and perpetuated a judicial culture whereby property owners' rights and their claims to genuinely just compensation for conceded takings of their property are viewed with suspicion at best and hostility at worst, and in spite of occasional expansive, benign-sounding judicial prose, these rights and claims are narrowly construed. This culture extends *a fortiori* to inverse condemnation cases where, as noted, government liability is contested rather than conceded and compensation is not budgeted for.

Thus, unsurprisingly, the law of inverse condemnation, the "flip side" of eminent domain,<sup>147</sup> is a moral, intellectual, doctrinal, and procedural disaster area. Where private property is taken extralegally, forcing the owners to take the initiative and sue for their just compensation if they mean to receive any relief — things have gone beyond all reason.<sup>148</sup> Here, particularly where the taking is said to be effected by government regulatory acts that stultify economically viable uses of private property, thus effecting its *de facto* taking, the courts have created a legal regime of intellectual anarchy,<sup>149</sup> in which they shuttle willy-nilly from one jurisprudential approach to another and produce candidly *ad hoc* decisions in ways that suit their predilections and ideological preferences of the moment.<sup>150</sup> In this regime, property owners can be abused, not only by overzealous regulators whose at times grotesque contentions have become a fixture of American government, but also by judges who require relief-seeking land owners to perform costly and time-consuming but ultimately absurdly useless acts,<sup>151</sup> making them wander from court to court at great

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<sup>147</sup> There are significant differences between direct and inverse condemnation. *See, e.g., City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 711–12 (1999) (explaining that a condemnation action is initiated by the government and liability is conceded, but an inverse condemnation action is initiated by an aggrieved property owner and liability must be established); *see also Breidert v. S. Pac. Co.*, 394 P.2d 719, 721 n.1 (Cal. 1964) (Insofar as compensation is concerned, "[t]he principles which affect the parties' rights in an inverse condemnation suit are the same as those in an eminent domain action.").

<sup>148</sup> Shocking as this may be to persons untutored in the dark arts of eminent domain law, the courts have held it to be constitutionally permissible for government agents *acting without notice or any legal process* to seize private property and say to the dispossessed owner "sue me." *Stringer v. United States*, 471 F.2d 381, 384 (5th Cir. 1973). Note that *Stringer* was decided two years after the enactment of the Uniform Relocation Assistance Act that ostensibly forbids such practices. 42 U.S.C. § 4651(4) (1994).

<sup>149</sup> Michael M. Berger, *Anarchy Reigns Supreme*, 29 WASH. U. J. URB. & CONTEMP. L. 39 (1985).

<sup>150</sup> *HFH, Ltd. v. Superior Court of Los Angeles County*, 542 P.2d 237, 247 (Cal. 1975) (conceding that judicial conclusions finding an act to be a proper exercise of police power or a taking of property are merely the judges' "shorthand method of indicating the result").

<sup>151</sup> *See Shelter Creek Dev. Corp. v. City of Oxnard*, 838 F.2d 375, 380 (9th Cir. 1988) (holding that seeking just compensation from a federal court for a regulatory taking required the aggrieved landowner to seek a nonexistent permit from a local regulatory body that was forbidden by state law to regulate the activity in question); *Kinzli v. City of Santa Cruz*, 818

expense in search for promised relief that is revealed as not available in the end.<sup>152</sup>

The root of this doctrinal and moral hash is the courts' professed inability (but more likely, unwillingness)<sup>153</sup> to exercise a modicum of intellectual self-discipline and to provide some reasonably clear-cut basic rules on a consistent basis that would enable landowners who complain of egregious violations of their constitutional rights to state a cause of action, to present their cases to courts on the merits on manageable evidence, and to receive reasonably prompt and efficient adjudication of their claims. But that has not been the case. On the one hand, judges fear that the articulation of clear-cut rules likely to provide reliable relief, if only to genuinely aggrieved landowners in egregious cases, will be too costly,<sup>154</sup> but on the other hand judges are by and large smart and they understand that denying such relief altogether, as has been urged by the "police power hawks," will impair not only important property rights but other rights and liberties as well — and eventually lead

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F.2d 1449, 1455 (9th Cir. 1987) (holding that prior to seeking judicial relief for a regulatory taking of her land, a septuagenarian farmer's widow would have to become a developer, and prepare and submit for City approval a development plan for a sixty-five-acre tract of land (a remnant of her and her late husband's defunct dairy farm), even though the City had designated her land as unbuildable open space). Though the futility doctrine excuses the performance of futile acts, the *Kinzli* court stood it on its head by holding that to show futility the owner would have to perform the futile act rather than be excused from doing so. *Id.*

<sup>152</sup> *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995) (claiming a regulatory taking forbidding construction of a single-family home on a forty-acre parcel). The claimants were told, after an adverse state court decision, two federal trial decisions, and two federal appeals, that their federal constitutional claim would not be heard on the merits in either state or federal court. For other such litigational sagas that rival Dickens's *Bleak House*, see Berger & Kanner, *Need for Reform*, *supra* note 11, at 883 n.171.

<sup>153</sup> I find it hard to believe that highly intelligent judges who routinely parse and interpret the complexities of convoluted commercial transactions, as well as complex tax, antitrust, and other arcane laws, are abruptly struck incompetent to do likewise in the conceptually relatively straightforward field of inverse condemnation law, where they proclaim themselves to be simply "unable" to lay down any black-letter rules. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

<sup>154</sup> *See, e.g., Charles v. Diamond*, 360 N.E.2d 1295, 1305 (N.Y. 1977) ("Open-ended liability would inhibit the enactment of needed, but constitutionally borderline legislation."); *Langley Shopping Ctr. v. State Roads Comm'n*, 131 A.2d 690, 693 (Md. 1957) (expressing a desire to avoid requiring "the state to pay through the nose"); *Hensler v. City of Glendale*, 876 P.2d 1043, 1054–55 (Cal. 1994) (voicing concerns that local resources may be unable to pay inverse condemnation judgments if federal rules were to be followed in California). *See generally* *Kimball Laundry Co. v. United States*, 338 U.S. 1, 24 (1949) (Douglas, J., dissenting) (fearing "swollen awards" compensating for business losses); *United States v. Gen. Motors Corp.*, 323 U.S. 373, 385 (1945) (Douglas, J., concurring in part) (fearing "swollen verdicts" compensating for moving expenses). *See also* *People v. Symons*, 357 P.2d 451, 454–55 (Cal. 1960) (asserting a judicial duty to keep condemnation awards down to prevent an "embargo" on public projects). In fact, in spite of this unfounded judicial "parade of horrors" none of these fanciful apprehensions materialized.

to disagreeable political repercussions. For as Justice Potter Stewart astutely observed, property does not have rights. People have rights, and their rights in property are interrelated with their personal liberties, so that neither can have meaning without the other.<sup>155</sup> The merit of Justice Stewart's *bon mot* becomes self-evident when one reflects on the fact that there are no societies in the world where a high degree of personal and political liberties does not correlate with a high degree of economic freedom. Even Communist China has recently amended its constitution to provide for protection of property rights in an effort to maintain its rising prosperity.<sup>156</sup> And to the extent one might want to put the exercise of private property rights in tension with environmental concerns, the cold fact is that societies that respect property rights and protect them by a reliable rule of law have also evolved the most advanced schemes of environmental protection and remediation, whereas societies that do not respect those rights — notably but not exclusively the former eastern bloc — suffer from severe environmental degradation as well as low levels of personal liberty.

Notwithstanding the shopworn judicial jeremiads about impending fiscal doom that is sure to follow if genuinely fair compensation were to be provided to aggrieved property owners, no evidence supporting them has been presented and none of the dire judicial prophecies have materialized. Nor, to give away the punch line of this Article, was the public unable to pay for the preservation of Grand Central Terminal, even though New York City's assertedly threadbare financial condition was an avowed motivation of the New York Court of Appeals and to a lesser extent of the U.S. Supreme Court in ruling against Penn Central's constitutional claim.<sup>157</sup> Contrary to such judicial apprehensions, the historical record is clear that when public projects are cancelled, it is *not* because of the excessive cost of private property acquisition,<sup>158</sup> but rather because of environmental concerns,<sup>159</sup> NIMBY

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<sup>155</sup> *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972); see RICHARD PIPES, *PROPERTY AND FREEDOM* (2000). For a collection of historical expressions stressing the importance of property rights in securing personal liberty, see J. David Breemer, *What Property Rights? The California Coastal Commission's History of Abusing Land Rights and Some Thoughts on the Underlying Causes*, 22 UCLA J. ENVTL. L. & POL'Y 247, 281–82, n.205 (2004).

<sup>156</sup> Joseph Kahn, *China Moves to Protect Property, but the Fine Print Has a Caveat*, N.Y. TIMES, Dec. 23, 2003, at A1, available at 2003 WLNR 4632704 (reporting on constitutional amendments providing for protection of property rights in Communist China).

<sup>157</sup> *Penn Central*, 438 U.S. at 109 n.6. As for the New York Court of Appeal, see *infra* note 324 and accompanying text.

<sup>158</sup> Of course, there have been rare cases in which condemnors bit off more than they could chew and had to abandon some condemnations. The best comparatively recent example was the attempt by the California Department of Transportation (DOT) to condemn the Los Angeles landmark Union Station for a thrifty \$20 million, only to find itself confronted with a judgment for \$84,700,000. DOT then prudently abandoned the condemnation, but only after paying \$994,424 for the owners' litigation expenses. See also *Times-Mirror*



opposition,<sup>160</sup> political considerations,<sup>161</sup> assorted condemnors' illegalities,<sup>162</sup> mismanagement on the part of the government,<sup>163</sup> or widespread community

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*Co. v. Superior Court*, 44 P.2d 547 (Cal. 1935), where in a stunning example of bad judgment, the City of Los Angeles sought to condemn the Los Angeles Times headquarters building and printing plant for a new City Hall site, only to find itself unable to pay the judgment when the court found that the huge printing presses and other pieces of equipment owned by the Times were fixtures and as such would have to be paid for along with the building. *See also* *City of Los Angeles v. Klinker*, 25 P.2d 826 (1933). Unable to pay the judgment, the City turned over the Times parcel to the more affluent State of California for a new state building, but still built its landmark City Hall a block away, where it stands until this day, thus demonstrating conclusively that there was no lack of money for the new city hall, only that at first the City's arrogant but improvident reach exceeded its financial grasp. The State building was damaged beyond repair by an earthquake in the late 1960s and had to be demolished. Its site has ever since been sitting vacant and unused and a new state building was built elsewhere. So much for government economy.

<sup>159</sup> *See infra* note 162.

<sup>160</sup> A noted recent example was the attempted widening of the 101 Freeway in the San Fernando Valley at its interchange with the 405 Freeway, which is badly needed to relieve massive congestion. After announcing its decision to do so, the State Department of Transportation retreated ignominiously in face of protests of the local population. *See* Sharon Bernstein et al., *Freeway Builders Run into Wall of Politics and Protests*, L.A. TIMES, May 23, 2003, at A1; Caitlin Liu, *Panel Submits Scaled-Down Plans for 101*, L.A. TIMES, May 24, 2003, at B3; Caitlin Liu, *Valley's Silver Bullet Hits Mark*, L.A. TIMES, June 8, 2003, at B1 (noting that freeway congestion continues unabated for reasons that have nothing whatsoever to do with the cost of right-of-way acquisition); *see also* William Fulton, *The Gnatcatcher Follies*, CAL. LAW., May 1995, at 43 (vividly describing local environmentalists' efforts in Orange County, California, to stop construction of a badly needed local highway); *infra* note 164.

<sup>161</sup> Tom McClintock, *Self-Inflicted Gridlock*, CAL. POL. REV., May/June 2004, at 13 (California state senator recounting how at least six freeways in Southern California were cancelled on the basis of political decisions of Governor Jerry Brown's administration.).

<sup>162</sup> *See* the endless judicial saga that arose from the State's wholesale violation of environmental and relocation assistance laws that was interdicted by the federal courts. *Keith v. Volpe*, 352 F. Supp. 1324 (C.D. Cal. 1972) (granting injunction against State), *aff'd sub nom.*, *Keith v. Cal. Highway Comm'n*, 506 F.2d 696 (9th Cir. 1974), *cert. denied*, 420 U.S. 908 (1975); 501 F. Supp. 403 (C.D. Cal. 1980) (ordering attorneys' fees); 618 F. Supp. 1132 (C.D. Cal. 1985) (granting injunction against State); 643 F. Supp. 37 (C.D. Cal. 1985) (ordering attorneys' fees), *aff'd*, 784 F.2d 1457 (9th Cir. 1986); 644 F. Supp. 1312 (C.D. Cal. 1986) (ordering additional attorneys' fees); 644 F. Supp. 1317 (C.D. Cal. 1986) (ordering attorneys' fees for supplemental complaint), *aff'd*, 858 F.2d 467 (9th Cir. 1988), *cert. denied*, 493 U.S. 813 (1989); 833 F.2d 850 (9th Cir. 1987) (affirming initial action against State); 965 F. Supp. 1337 (C.D. Cal. 1996) (granting injunction against State); 960 F. Supp. 1448 (C.D. Cal. 1997) (granting defendant-State's motion for exhibit modification), *rev'd*, 118 F.3d 1386 (9th Cir. 1997).

<sup>163</sup> *See, e.g.*, Charles v. Bagli, *Doubts Rise on New Site for Big Board*, N.Y. TIMES, June 6, 2000, at B3; Michael Wilson, *Study Finds Steady Overruns in Public Projects*, N.Y. TIMES, July 11, 2002, at A14; *see also* Beth Barrett, *Building Up Debt: Redevelopment*

resistance.<sup>164</sup> Indeed, when condemnees challenge takings on the grounds that condemnors lack the funds to complete their overly ambitious projects, they are rebuffed by the courts.<sup>165</sup> To do justice to this unfortunate subject would take us far afield from the present topic, and its discussion must be saved for another day. Suffice it to say that condemning agencies have regularly wasted huge amounts of money on projects that never left the dock, or that after their initiation proved to be veritable public money-shredding machines.

Given the judicial *laissez faire* attitude toward condemnors whose profligacy and inefficiency is thus encouraged, it is incomprehensible that judges stubbornly cling to their unjustified fears that if the Just Compensation Clause is liberally construed and demonstrable economic losses imposed on condemnees are made compensable that the public fisc will be depleted, particularly when juxtaposed with the fact that reality has not been kind to such judicial gazing into the clouded crystal

*Agency Facing \$40 Million Shortfall*, L.A. DAILY NEWS, Dec. 14, 1998, at 1, available at LEXIS, News Library, Daily News File; Patrick McGreevy, *CRA Works on Plan to Avert Bond Default*, L.A. TIMES, Sept. 18, 1999, at B1.

<sup>164</sup> Three well-known instances of community oppositions are the San Francisco “freeway revolt,” the New York grassroots opposition to a Westway, and the South Pasadena resistance to the extension of the 710 Freeways. Richard Winton, *Freeway Extension Foes Show U.S. Transit Chief Their Outrage*, L.A. TIMES, Dec. 18, 1997, at B5; M. L. Gunzburg, *Transportation Problems of the Megalopolitan*, 12 UCLA L. REV. 800, 809–10 (1965) (describing Los Angeles freeway plans and their eventual cancellation resulting from opposition from the impacted affluent areas); see also Gideon Kanner, *What to Do Until the Bulldozers Come? Precondemnation Planning for Landowners*, 27 REAL EST. J. 47, 54 nn.21–22 (1998) (listing examples of governmental takings for unsuccessful projects, none of which resulted in compensation for condemnees).

<sup>165</sup> For a classic object lesson, see *Benevolent & Potent Order of Elks v. City Council of Lawrence*, 531 N.E.2d 1233, 1234 (Mass. 1988), which held that property owners in a redevelopment area lacked standing to challenge the financial ability of the redevelopment agency to complete its project. After the City acquired the area at a cost of millions, *Benevolent & Potent Order of Elks v. Lawrence Redevelopment Auth.*, 604 N.E.2d 715, 717 (Mass. App. Ct. 1992), the redevelopment project failed. Matthew Brellis, *Emerson College Likely to Stay Put*, BOSTON GLOBE, June 2, 1990, at 1 (Metro Sec.); *Lawrence Loses \$4.6M More in Land Taking*, BOSTON HERALD, May 18, 1994, at 22. Also see, *In re Condemnation by Penn Township*, 702 A.2d 614 (Pa. Commw. Ct. 1997), and *In re Redevelopment Plan for Bunker Hill Urban Renewal Project*, 389 P.2d 538 (Cal. 1964), both rejecting condemnees’ arguments that the cost of the proposed condemnation would be excessive, and allowing condemnation to proceed. For additional judicial misadventures where, acting in the name of saving the state money, the California Supreme Court facilitated the incurring of some \$100 million in losses self-inflicted by the California Department of Public Works which was in the habit of condemning excess land but then was unable either to use it or sell it, see Gideon Kanner, *Developments in the Right-to-Take Law*, 2002 INST. ON PLANNING, ZONING & EMINENT DOMAIN § 2.03[5], at 2–40 n.107. For commentary on cases where the courts permit condemnation even where it appears that the proposed public project cannot be built, see Thomas J. Posey, *This Land Is My Land: The Need for a Feasibility Test in Evaluation of Takings for Public Necessity*, 78 CHI.-KENT L. REV. 1403 (2003).

ball.<sup>166</sup> This is *a fortiori* when one reflects on the fact that in other areas of law, notably but not exclusively torts and civil rights, courts routinely and frequently hand out large, multi-million dollar judgments against the government, without voicing fears that the public treasury will be emptied. Quite the contrary, outside of eminent domain, judges hold that imposing liability on government entities and functionaries is sound public policy because it provides an incentive to public officials to act responsibly.<sup>167</sup> Why that reasoning is not deemed equally true in eminent domain, where the government receives a quid pro quo for what it pays, and damages are limited by the value of the taken land and do not include any subjective, open-ended damages as in tort cases, the courts have not explained.

Besides, even on the faulty judicial premise, if genuinely just compensation to condemnees would indeed bid fair to impose undue financial burdens on the government, that would only be a concession that government projects are overly ambitious, or more egregiously in the case of takings for redevelopment, that private redevelopers are being spared the true cost of doing business, and are being enriched at the expense of indigenous home and business owners. More important, if these judicial concerns have any validity, that would only mean that the government is living beyond its means and that, from a constitutional point of view, huge uncompensated losses are being inflicted on individual condemnees in the name of “just” compensation. Why economic losses that would be intolerable for the government in spite of its vastly superior resources and its ability to spread the cost on society at large as a quid pro quo for benefits conferred on it, somehow become tolerable when inflicted on individuals, has gone without an explanation — at least an explanation likely to survive either economic or moral scrutiny. Finally, in eminent domain cases, unlike others, when land is acquired, the government receives a quid

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<sup>166</sup> See also *People v. Symons*, 327 P.2d 451 (Cal. 1960) (expressing fear that condemnation awards would create an “embargo” on public projects). But see Gideon Kanner, *Condemnation Blight: Just How Just Is Just Compensation?*, 48 NOTRE DAME LAW. 765, 786 n.101 (1973) [hereinafter Kanner, *Condemnation Blight*] (providing state budget data indicating that in the 1960s the California Department of Public Works was accumulating annual surpluses of over \$100 million). Even now, when California is suffering from a financial crisis, the Department of Transportation enjoys an available and unspent \$2 billion fund. Virginia Ellis, *Davis’ Road Funding Plan Criticized*, L.A. TIMES, Jan. 11, 2000, at A3. Notwithstanding the availability of highway construction funds, the freeway approval process is interminably delayed by environmental reviews and public protests. See Hugo Martin, *Open Roads Languish on the Drawing Board*, L.A. TIMES, May 29, 2001, at B2 (listing environmental protection laws and the NIMBY syndrome as causes for delays in construction); Hugo Martin, *Roads Mired in Review Gridlock*, L.A. TIMES, Nov. 13, 2001, at B1 (reporting the availability of \$1.8 billion in road construction funds, even as “environmentalists vow to oppose any drastic shortcuts” in the process of environmental review); see also *infra* notes 450–56.

<sup>167</sup> *Owen v. City of Independence*, 445 U.S. 622, 651–52 (1980) (using judicial compensation awards as an “incentive for officials who may harbor doubts about the lawfulness of their actions to err on the side of protecting citizens’ constitutional rights”).

pro quo for its money, at its judicially-determined fair market value, so that it only exchanges one asset (money) for another (land), and apart from transactional costs it experiences no net expenditure.

The problem is further exacerbated by the fact that in recent decades the judicial selection process has become more openly politicized, with disproportionate numbers of former government lawyers ascending the bench.<sup>168</sup> Unsurprisingly, the [former] bureaucrat-judges often tend to be sympathetic to government submissions.

There is also a political and ideological component to this problem. For reasons that elude me, American liberals who vociferously profess to be passionately devoted to fulsome implementation of individuals' constitutional rights enshrined in the Bill of Rights, particularly rights of the disadvantaged, and who criticize the inadequacy of government housing programs and demand that affordable housing be built, have on principle become openly hostile to those parts of the Constitution that protect private property rights, and fiercely oppose development of needed affordable housing in their own communities.<sup>169</sup> Conservatives, as is their wont,

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<sup>168</sup> C.J. WILLIAM REHNQUIST, SUPREME COURT OF THE UNITED STATES, 2001 YEAR-END REPORT ON THE FEDERAL JUDICIARY 2 (Jan. 1, 2002), available at <http://www.supremecourtus.gov/publicinfo/year-end/year-endreports.html> (last visited Feb. 7, 2005) (warning Congress that undercompensation of federal judges discourages skilled attorneys in private practice from seeking judicial nominees); see also Linda Greenhouse, *Rehnquist Sees a Loss of Prospective Judges*, N.Y. TIMES, Jan. 1, 2002, at A16.

In California, Deputy Attorney General Richard Frank has gloated over this phenomenon:

Government attorneys can take considerable comfort from the fact that when issues of special significance to the Public Law Section [of the State Bar] and its members do find their way to the [California Supreme] Court, the Justices will bring to their deliberations the shared experience derived from literally decades of public law service and practice. After all, before they were members of California's highest court, each of the current justices served a distinguished career as a public lawyer.

Richard Frank, *The California Supreme Court — A Tribunal of Public Lawyers*, 20 PUB. LAW 1-2 (Spring 1996).

<sup>169</sup> Ironically, those who voice such hostility are often quite wealthy and committed to exclusionary policies when it comes to their own turf. See William Tucker, *Environmentalism and the Leisure Class: Protecting Birds, Fishes, and Above All, Social Privilege*, HARPER'S, Dec. 1977, at 49 (noting that environmental advocates "were, quite simply, members of the local aristocracy"); see also FRIEDEN, *supra* note 11, at 37:

Marin County, a wealthy suburb north of San Francisco, is the best place to look for an understanding of what it means to stop suburban growth in the name of environmental protection. It means closing the gates to people who may want to move in and, where possible, even to people who may want to visit; turning to state and federal governments for help in paying the cost of exclusivity; and maintaining a tone of moral righteousness while providing a better living environment for the established residents.

may “talk a good game” in political speeches about protecting property rights, but when push comes to shove, are reluctant to impose costs on the government.<sup>170</sup> As the late Bert Burgoyne, a distinguished Detroit condemnation lawyer was fond of saying: “Liberal judges don’t believe in private property rights, and conservative judges don’t believe in making the government pay. So between them you have a hard row to hoe.”<sup>171</sup> The upshot is that aggrieved property owners’ regulatory takings cases are extremely difficult to win, even on egregious facts,<sup>172</sup> and their litigational fate may turn as much, or more, on the personality, ideology, and idiosyncratic sense of justice of individual judges presiding over their cases, as on the legal soundness of their submission. Though this is unfortunate, it is not surprising, given that in the regulatory taking field decisions are often made on the basis of vague formulations of law and on multiple-factor balancing tests that in application allow judges to rule whichever way they want. Even in the absence of such convenient intellectual camouflage devices that enable judges to rule as they please while maintaining a façade of following the law, many judges have over the years *de facto* ruled on the basis of their undisclosed notions of what the results should be by their lights.<sup>173</sup> An acute insight into this reality was provided by Texas Supreme Court Justice, Nathan Hecht, when he observed at a continuing legal education program on eminent domain:

These cases are fundamentally not so much about the words of the constitution, or words of statute, or what the science of accounting and appraisal say should be considered in the assessment of value — not so much about those things as it is about a deep-set policy question of what is the public going to pay for and what is the individual going to be stuck with. And that does not come through the cases of course; rarely are they that blunt about it.<sup>174</sup>

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<sup>170</sup> Gideon Kanner, *Who’s In Charge Here?*, NAT’L L.J., Feb. 25, 2002, at A20.

<sup>171</sup> Interviews with author.

<sup>172</sup> Horror stories abound, but my favorites are *Yardarm Restaurant* and *Rainey Brothers Construction*. *City of Pompano Beach v. Yardarm Restaurant, Inc.*, 834 So.2d 861 (Fla. Dist. Ct. App. 2002) (denying compensatory relief to property owners driven into foreclosure and bankruptcy by a lengthy series of harassing municipal illegalities); *Rainey Bros. Constr. Co. v. Memphis & Shelby County Bd. of Adjustment*, 967 F. Supp. 998 (W.D. Tenn. 1997) (denying relief for a construction permit cancelled unlawfully in mid-construction in *conceded* violation of local law and of the Constitution).

<sup>173</sup> Robert Kratovil & Frank J. Harrison, Jr., *Eminent Domain — Policy and Concept*, 42 CAL. L. REV. 596, 599 (1954) (“These policy factors . . . are usually left undisclosed or concealed behind a veil of concept.” (citing *Bacich v. Bd. of Control of Cal.*, 144 P.2d 818, 823 (Cal. 1943))).

<sup>174</sup> Videotape: CLE International, Program on Eminent Domain, Aug. 12–13, 1999, Austin, Tex., Video Tape #2 (copy on file with author). If the Constitution, statutes, and appraisal evidence are to be disregarded in favor of an undisclosed “deep set policy,” how can the

With this judicial attitude afoot in direct condemnation cases in which government liability for takings is conceded and budgeted for, and where for its money the condemnor by definition receives a quid pro quo at its judicially-determined fair market value, it requires little imagination to understand what things can be like in inverse condemnation where government liability is fiercely denied, and a victory for the landowners portends unbudgeted and unanticipated government expenditures. Keeping the law uncertain thus provides judges who are hostile to property owners' submissions with the option of denying compensation when their ideology or their idiosyncratic notions of government economy are threatened, or granting it when their personal ideas of right and wrong are offended.<sup>175</sup> Thus, in *Penn Central*, the Supreme Court provided a basis for such a lawless regime by asserting that it "quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons,"<sup>176</sup> and that in adjudicating taking claims the Court is given to engaging in "essentially ad hoc, factual inquiries."<sup>177</sup>

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courts rationally determine just "what the individual is going to be stuck with?" That approach does not leave much to go on other than the seat of the judicial pants. While Justice Hecht's blunt candor may provide a welcome insight to practitioners as to how laws and sausages are really made, it is hardly supportive of the legitimacy of judicial decision making in eminent domain cases.

<sup>175</sup> Justice Stevens's voting pattern provides an example. Since 1978 (when he joined Justice Rehnquist's dissent in *Penn Central*), Justice Stevens has always voted for the regulators in inverse condemnation cases. But in 1999, in *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1989), he was evidently so offended by the overreaching government conduct that he changed sides. In that case, the City regulators had the would-be developer submit five successive applications, and nineteen plot plans, only to conclude in the end, after five years of costly administrative proceedings, that nothing could be built on the 37.6-acre, beachfront subject property. For details of that litigation, see Michael M. Berger, *Vindicating the Rights of Private Land Development in the Courts*, 32 URB. LAW. 941, 991-94 (2000). The City argued that this process was perfectly proper under California law, and not even subject to judicial review. The Justices were aghast. For a criticism of the reasoning employed by the City in the *Del Monte* oral argument, see Eagle, *Planning, supra* note 6, at 500.

<sup>176</sup> *Penn Central*, 438 U.S. at 124; cf. Oakes, *supra* note 40, at 613 ("[J]urisprudence permits purely subjective results, with the conflicting precedents simply available as make-weights . . ."); Richard Minter, *You Just Can't Take It Anymore*, 70 POL'Y REV. 40, 44 (1994) ("Takings law 'is really the antithesis of law . . . every case is its own law,'" quoting Loren Smith, Chief Judge of the U.S. Court of Federal Claims.).

<sup>177</sup> *Penn Central*, 438 U.S. at 124 (overlooking the effect of the Supreme Court's "factual inquiries" on the ability of lower courts to follow precedent).

## V. JUDGING OR GOVERNING?

To begin with, the factual-inquiry approach used by the Supreme Court, though consistent with the “Grand Mufti” mode of judging so despised by the U.S. Courts of Appeals, runs counter to the Supreme Court’s long-standing, clearly articulated policy<sup>178</sup> and even on its own premise suffers from three major flaws. First, to the best of my knowledge the Court has not been asked to come up with a “set formula” in inverse condemnation law, any more than it provides “set formulas” in other fields of constitutional law. Ironically, in other areas of the law, the Court has at times retreated from the ad hoc mode of adjudication after trying it. The best known example is the Court’s retreat from the case-by-case approach to adjudicating obscenity. The process whereby the Court at first made its decisions as to what was obscene on a case-by-case basis, by actually viewing the allegedly obscene motion pictures, and its eventual retreat from such ad hoc adjudication to the customary appellate decision making (i.e., reviewing factual jury determinations for their correctness as a matter of law, not fact), is vividly described in the best-selling book *The Brethren*.<sup>179</sup> At least in obscenity cases the Justices could look at the pictures in question and readily make a judgment as to their obscene nature *vel non*, thus giving rise to Justice Potter Stewart’s famous *bon mot* of “I know it when I see it.”<sup>180</sup> But in land-use controversies that deal with complex matters that are usually far afield from those known to the Justices and regularly considered by the Supreme Court, there is at the very least a substantial question (to put it politely) as to whether the Justices, or their clerks who have no practice experience, possess sufficient backgrounds to make such judgments on the basis of “factual inquiries.”<sup>181</sup> I feel fully justified in making this criticism because in going through Justice Blackmun’s papers at the Library of Congress, I came across a marginal note in his own handwriting, relating to the *Williamson County* case, stating “I am not sure I fully understand this case.”<sup>182</sup> He didn’t.<sup>183</sup>

Second, such an overtly ad hoc decision-making regime is antithetical to a rule of law.<sup>184</sup> We properly think of law as a set of coherent rules that govern the

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<sup>178</sup> *United States v. Johnston*, 268 U.S. 220, 227 (1925) (“We do not grant a certiorari to review evidence and discuss specific facts.”).

<sup>179</sup> BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN* 192–94, 198–204 (1979).

<sup>180</sup> *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

<sup>181</sup> See Kanner, *Hunting the Snark*, *supra* note 3, at 339–40, 343–45 (providing instances of Supreme Court assertions that are grossly at variance with prevailing land-use reality).

<sup>182</sup> The document in question is an untitled, hand-written outline by Justice Blackmun, prepared for *Williamson County* Post-Argument Conference, Library of Congress Madison Building Manuscript Room (copy on file with author); cf. Kanner, *Hunting the Snark*, *supra* note 3, at 325–31 (explaining the deficiencies of the *Williamson County* opinion as land-use law).

<sup>183</sup> See Kanner, *Hunting the Snark*, *supra* note 3, at 325–31.

<sup>184</sup> My favorite example that makes this point is a comparison of *Kaiser Aetna* and *Pruneyard Shopping Center*. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (holds that

conduct of people and institutions, that lawyers can explain to clients, and that enable citizens to ascertain which of their expectations are enforceable, and which courses of action on their part are legal *vel non*. We also think of the legal process as providing an imperfect but substantially impartial resolution of factual disputes by trial courts, with appellate courts reviewing those decisions for their legal correctness. It is these perceptions of the law and its administration that engender respect for the judiciary among citizens and assure judges of the high standing they have historically enjoyed in American society. But to say that “the law” is unknowable without first engaging in a lengthy and costly multi-year litigation process that leads to ad hoc results arrived at *after the court of last resort first makes “factual inquiries” years after the trial has been completed*, is to say that there is no law worthy of the name. Under this legal — or perhaps more accurately, lawless — regime, parties commencing litigation have no way of knowing exactly what to plead or what to present by way of evidence — assuming they ever get to the stage of evidence presentation. Nor can they tell what legal arguments to make as their cases wend their way through the courts.<sup>185</sup> Thus, as discussed elsewhere in this Article, in *Penn Central*, the New York Court of Appeals decided issues that bore no resemblance to those tried and reviewed in the trial court and the Appellate Division respectively, while the U.S. Supreme Court dealt with issues never tried nor considered by either of the two lower state appellate courts. How are lawyers to prepare for that?

Moreover, precious few citizens can afford years or decades of protracted, costly administrative proceedings followed by multi-tiered litigation, followed by efforts to obtain review by the Supreme Court which turns away a vast majority of petitioners by peremptory denials of certiorari. This state of affairs and the cost associated with it, de facto puts most American property owners beyond the ambit of constitutional protection insofar as their property rights are concerned. As this

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owners of a private commercial marina that was subject to a public navigation servitude could exclude members of the public authorized by the government to enter it); *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980) (holding that the owner of a private shopping center, in which the government had no interest, could not exclude strangers who wanted to enter the mall not to shop but to circulate petitions). See Kanner, *Hunting the Snark*, *supra* note 3, at 320–22.

<sup>185</sup> *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002). On appeal, the case was remanded by the U.S. Court of Appeals to the trial court three times — not counting the fourth Ninth Circuit opinion that was reviewed on the merits by the U.S. Supreme Court. The litigation lasted longer than the lifetimes of some fifty plaintiffs. But after twenty years of litigation, it turned out that engaging in this latter day version of Dickens's *Bleak House* was unnecessary because the Supreme Court held that the facts were undisputed and only an issue of law was involved. *Id.* at 307. See Michael M. Berger, *Tahoe-Sierra: Much Ado About What?*, 25 U. HAW. L. REV. 295, 295 n.4 and accompanying text (2003) [hereinafter Berger, *Much Ado*] (discussing the Ninth Circuit opinion); see also Gideon Kanner, *Rolling the Dice with Ambrose Bierce*, 54 LAND USE L. & ZONING DIG. 12 (June 2002).



goes on, anomalies, abuses, injustices, and conflicts of decision proliferate in the lower courts, as is the virtually unanimous judgment of legal commentators of all ideological stripes.<sup>186</sup> Thus when the Supreme Court goes into the business of making ad hoc factual inquiries on a case-by-case basis instead of resolving legal issues in accordance with broadly applicable legal doctrine, that judicial approach de facto transforms American common law — to borrow Justice Frankfurter's tart imagery — into the law of a Kadi sitting under a tree and dispensing idiosyncratic justice by the seat of his pantaloons.<sup>187</sup> Such a system of decision making may be appealing to those who crave individually tailored justice, but it is unworkable because it subverts equality of treatment of litigants, as well as the core idea of stare decisis whereby courts are obliged to follow precedent, thus assuring that litigants of today will receive the benefit of the same law as litigants of yesterday. Besides, more important, there is a dearth of people capable of making such Solomonic judgments with any degree of consistency and fairness. After all, there was only one King Solomon and he was divinely inspired — something that cannot be said about the American judiciary.

Third, the unrestrained ad hoc approach suffers from another, practical problem. Factual ad hoc inquiries have to be made in virtually *every* case of *every* kind, but that hardly justifies the notion that they are to be made by appellate courts which lack the time,<sup>188</sup> the litigational tools,<sup>189</sup> and the institutional competence to make them. The usual pattern in American law, therefore, is that ad hoc factual decisions are made by juries (duly instructed on the applicable law),<sup>190</sup> or by judges acting as

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<sup>186</sup> For a sampling of the vast critical literature on this subject, see Callies, *supra* note 19, at 523 n.1. For an extensive collection of harshly pejorative assessments of judicial handiwork in regulatory taking law, particularly its ripeness attributes, by commentators *on both sides of the issue*, ranging from “worse than mere chaos,” through “inherently nonsensical,” to “a fraud or hoax on landowners,” see Berger & Kanner, *Shell Game!*, *supra* note 38, at 702–03.

<sup>187</sup> *Terminiello v. City of Chicago*, 337 U.S. 1, 11 (1949) (Frankfurter, J., dissenting).

<sup>188</sup> As former Justice of the New Jersey Supreme Court, Frederick W. Hall, aptly observed, appellate courts have to handle cases in a “rapid fire” fashion — “a professor can take five or six years to think about something that an appellate judge has to decide in thirty days.” TDR Conference, *supra* note 72, at 77. Today's appellate reality was captured by the title of U.S. Circuit Judge John C. Godbold's article, *Twenty Pages and Twenty Minutes: Effective Advocacy on Appeal*, 30 SW. U. L. REV. 801 (1976). See also Gideon Kanner, “*Holy Shit, I'm Going to Write the Law of the Land*”, 1 GREEN BAG 2D 425, 429–31 (1998) [hereinafter Kanner, *Holy Shit*].

<sup>189</sup> In arriving at their decisions, local trial judges presiding over land-use controversies not only have the advantage of being able to judge the credibility and skills of expert witnesses, but they also know “the lay of the land,” are usually acquainted with local government and business practices, and can question witnesses, call for additional evidence, appoint their own experts, and view the subject property. Appellate judges can't.

<sup>190</sup> And speaking of juries, though the Supreme Court held that plaintiffs in 42 U.S.C. § 1983 actions involving claims of regulatory takings may be entitled to a trial by jury on fact-bound issues going to liability, I am not aware of any cases (apart from *Del Monte Dunes*

triers of fact. The appellate courts then accept the facts as found at trial, and limit their decisions to review of the *legal* principles in issue (whether substantive, procedural, or evidentiary) that flow from the factual decisions made at trial. This is not to say that appellate courts are to act as wooden automatons interpreting but not making law, as conservative polemicists are wont to put it. Rather, acting in the best common law tradition, appellate courts may properly inform their decisions by sound public policies that are adhered to by their society, recognize and correct their own errors in earlier cases, as well as modify and adjust the decisional law in an incremental fashion to take account of unanticipated legal issues, novel factual situations, and changes in society. But as is now evident because of the revelations of Justice Brennan's former clerk, even as the Supreme Court revolutionized the law in *Penn Central*, it did not think that it was making any innovations in the law.<sup>191</sup>

What the New York Court of Appeals did in the *Penn Central* case provides a paradigmatic insight into much that is wrong with American inverse condemnation law in particular, and increasingly with American judge-made law in general, namely, a judicial confusion between adjudication of disputes whose principled resolution may produce new rules of law for the guidance of future litigants facing similar problems, and deliberate acts of judicial governance that look to the parties' controversies as mere fodder for judicial innovation, with convenient "rules" being invented ad hoc to reach ideologically desirable results. Machiavelli taught us that to be effective, governance has to be unprincipled at times.<sup>192</sup> That is why in a free, democratic society, those who would govern have to be tethered by the electorate to the ballot box to make sure they do not stray too far from the bedrock values held by the society they purport to serve. Law, on the other hand, has to be highly principled and consistently applied if it is to retain popular respect, which is indispensable to the courts' stature and effectiveness, particularly in the long run. That is why the judiciary has to be impartial and independent — both economically and ideologically — and why its decisions have to adhere to discernible, principled, and carefully husbanded legal doctrine as opposed to results demanded by trendy ideologies or the appointing authority's political preferences.<sup>193</sup> But judges cannot

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itself) where the courts have actually afforded plaintiffs in takings cases a trial by jury on the issue of liability. *See City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 707 (1999).

<sup>191</sup> Transcript, *supra* note 56; *see* TDR Conference, *supra* note 72, at 115 ("[A] court in the best common law tradition moves with very small halting steps." (quoting *Penn Central*)). Yet this did not inhibit Chief Judge Breitel and his colleagues from taking the revolutionary step of ostensibly supplanting New York's property law with Henry George's failed economic theories that were not supported by evidence or raised by briefing touching on that subject.

<sup>192</sup> *See* NICCOLÒ MACHIAVELLI, *THE PRINCE* (Angelo M. Codevilla, ed. & trans., Yale Univ. Press 1997) (1515).

<sup>193</sup> Jean Guccione, *Davis' Remarks Have Judiciary Seeing Red*, L.A. DAILY J., Mar. 2, 2000, at 1 (reporting that California's then Governor Gray Davis announced that judges appointed by him would have to rule his way or face a blacklisting when it came to higher court appointments).

have it both ways without doing damage to their stature in society. To invoke William Safire's colorful but insightful commentary on efforts to perform inconsistent functions, you can be a bagel or a doughnut, but if you try to be both, you're toast.<sup>194</sup> Or, as U.S. Circuit Judge Alex Kozinski aptly put: "When we act like politicians, we can expect to be treated like politicians."<sup>195</sup>

Appellate courts are confined to the trial record before them, made in contemplation of the prevailing substantive law as understood by the parties and trial judges, not the law as it might be perceived several years thence by ideologically-minded appellate judges eager to reshape society in accordance with their vision. Appellate courts are unaided by expert testimony when the need arises to consider facts that (though adequate for purposes of the trial court's decision) may not have been fully developed at trial so as to enable a judicial venture into the wild blue yonder of policy making and governance. Amicus curiae submissions that in theory are supposed to aid the appellate courts in such matters, are often largely partisan arguments supporting one side or the other,<sup>196</sup> and while they may occasionally alert the courts to matters that may not have been mentioned or fully developed by the parties, or can otherwise supply helpful arguments,<sup>197</sup> they are no substitute for educating appellate judges in the subtleties of problems facing them and the likely impact on the regulated activity by the contemplated judicial ruling that may not be discernible to people without deep expertise in the field under consideration.<sup>198</sup> Doing so at the U.S. Supreme Court level is well nigh impossible, given the time and briefing limitations imposed by the rules. Which is why it is particularly important that at that lofty level, the issues be properly developed below and delimited for Supreme Court consideration so they can be addressed by the parties as well as by the court, without the Justices drifting off in the proverbial rudderless boat on the uncharted sea of ad hoc result-orientation. Finally, appellate court decisions arrived at ad hoc but without a thorough understanding of the gritty realities of land-use practices from which the problem of the moment arose, may only engender more problems than they solve. The prevailing "ripeness mess" is a

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<sup>194</sup> William Safire, *Bagels vs. Doughnuts*, N.Y. TIMES, Oct. 25, 1999, at A31.

<sup>195</sup> *United States v. Burdeau*, 180 F.3d 1091, 1094 (9th Cir. 1999) (Kozinski, J., dissenting).

<sup>196</sup> *See, e.g., Nat'l Org. For Women, Inc. v. Schneider*, 223 F.3d 615 (7th Cir. 2000) (finding that lack of direct interest and unique perspective is sufficient grounds to deny requests for permission to file amicus curiae briefs); *United States v. Gotti*, 755 F. Supp. 1157 (E.D.N.Y. 1991) (denying leave to file an amicus brief because "the parties are well represented" and "joint consent of the parties to the submission by the amicus is lacking").

<sup>197</sup> For example, Justice Brennan's famous expression, "After all, if a policeman must know the Constitution then why not a planner?" in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 661 n.26 (1981) (Brennan, J., dissenting), originated in the argument contained in an amicus curiae brief in that case, Brief of Amicus Curiae National Association of Manufacturers at 15-16 (No. 79-678).

<sup>198</sup> Paul M. Barrett, *Justices Duck Weighty Business Issues, Critics Charge*, WALL ST. J., Oct. 5, 1993, at B1.

prime example.<sup>199</sup>

By degrees all of this raises the painful question whether what the Court has been doing in this area bears the stamp of legitimacy, or is only a costly, cruel ideological game that, whether intentionally or not, can mock the aggrieved parties who are being deprived of their property rights by increasingly harsh land-use regulations but are then told by lower court judges that whatever it is that they seek by way of securing judicial relief is the wrong way to go about it.<sup>200</sup> Note that by saying this I address not only the substantive results of litigation, which have problems of their own, but even more strongly the process. One should be able to present one's claim of federal constitutional violation to a federal court and receive a reasonably expeditious win or lose response on the merits without having to spend decades wandering through administrative proceedings, followed by multiple lawsuits in the state courts, only to be told at the end that the federal claim, though valid, will not be heard on the merits in either court system.<sup>201</sup>

To add insult to injury, modern land-use regulations that have fueled much of this litigation often fail to serve the public interest, but rather are frequently imposed by local entities serving parochial interests,<sup>202</sup> and not the cause of good planning or protection of the environment. As Professor Orlando Delogu put it: "There is no good faith, no forbearance out of respect for the constitution or a larger sense of the term 'general welfare.' There is only parochialism — in appropriate legal language, an abdication of larger responsibilities, and a misuse of police power."<sup>203</sup> Local

<sup>199</sup> See Berger & Kanner, *Shell Game!*, *supra* note 38, at 702–03; Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 WASH U. J.L. & POL'Y 99 (2000) [hereinafter Berger, *Bait & Switch*]; see also Kanner, *Hunting the Snark*, *supra* note 3, at 328–31, 342–45. See Callies, *supra* note 19, at 538 n.87, for an extensive collection of criticisms regarding the "ripeness mess."

<sup>200</sup> See, e.g., Berger & Kanner, *Need for Reform*, *supra* note 11, at 875 n.146, 883 n.171 (providing examples of property owners involuntarily cast in the role of latter day Flying Dutchmen, doomed to wander the seven seas forever — here doomed to wander through a multiplicity of courts — to no purpose); *Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 284 (4th Cir. 1998) (commenting that the case before it had "already passed through procedural purgatory and wended its way to procedural hell").

<sup>201</sup> *Sandy Creek Investors, Ltd. v. City of Jonestown*, 325 F.3d 623, 626 (5th Cir. 2003) (Case removed from state to federal court, and there dismissed for lack of federal jurisdiction.); *Anderson v. Charter Township of Ypsilanti*, 266 F.3d 487 (6th Cir. 2001) (Case filed in state court, then removed to federal court, then state issues remanded to state court and federal action stayed; following completion of state court litigation, case dismissed by federal court.).

<sup>202</sup> FRIEDEN, *supra* note 11; see also Melville Branch, *Sins of City Planners*, 42 PUB. AD. REV. 1 (1982); Rodney L. Cobb, *Land Use Law: Marred by Public Agency Abuse*, 3 WASH. U. J.L. & POL'Y, 195 (2000) (staff attorney for the American Planning Association); Williams et al., *supra* note 117, at 242 (conceding that often regulatory actions are "ubiquitous, vicious and devoid of any resemblance of procedural due process").

<sup>203</sup> Orlando F. Delogu, *Local Land Use Controls: An Idea Whose Time Has Passed*, 36 ME. L. REV. 261, 288 (1984).

regulators often advance the exclusionary interests of affluent and influential NIMBY suburbanites who get to enjoy their agreeable lifestyles, thank you very much,<sup>204</sup> while people on the lower rungs of the socioeconomic ladder are increasingly hard put to find a roof over their heads<sup>205</sup> as increasingly draconian land-use regulations restrict the supply of housing.<sup>206</sup> Much of this problem is the direct result of an overly deferential judicial approach to land-use regulation that, apart from legitimate, nuisance-based provisions said to justify it, has from the outset tended to serve as an exclusionary device, that even at its birth was correctly perceived by an intellectually honest judge as a means of effecting social and economic segregation,<sup>207</sup> and to a significant extent has done so ever since, overtly and covertly. Thus, most recently, in the *Tahoe-Sierra* case, the Supreme Court held against ordinary people's right to build single-family homes on their small lots above Lake Tahoe, while at the same time, commercial construction is booming on the shores of South Lake Tahoe, and wealthy, influential individuals like Michael Milken, Mike Love of the Beach Boys, and heirs to the Singer sewing machine fortune are building large, multi-million dollar palatial waterfront mansions, without hindrance from the authorities.<sup>208</sup>

But whatever the motivation behind judicial attitudes, as the late Arvo Van Alstyne put it some thirty years ago, this field is characterized by "confusing and

<sup>204</sup> During my years as a teacher of Land-Use and Eminent Domain law, I was frequently amused by the incredulous reaction of my well-to-do students from posh parts of town, when they learned to their amazement that an environmentally desirable community relies on compact, multi-family housing and mass-transportation. These factors are environmentally superior to large homes requiring a large and less-efficient infrastructure, thus frustrating the use of mass transit. The absence of mass transit in turn requires higher energy consumption per person and causes commuter traffic congestion as well as urban sprawl. The confusion on the part of these bright young people, between a high level of amenities and environmentally desirable conditions was all too apparent and it reflected values with which they had been inculcated.

<sup>205</sup> See Allison B. Cohen, *The Middle-Class Housing Squeeze*, L.A. TIMES, Mar. 7, 2004, at K1 ("[T]he median California home price in January was \$405,725, the middle-class dream of homeownership is moving out of reach for many."); Wilcox, *supra* note 74 ("The median price of a California home soared 26.5 percent in May to a record \$465,160."); cf. FISCHER, *supra* note 14, at 218–52 (analyzing the impact of land-use regulations on California housing costs and criticizing the lower courts' refusal to interdict unreasonable regulations).

<sup>206</sup> REPORT OF THE PRESIDENT'S COMMISSION ON HOUSING 177–81 (1982); REPORT OF THE PRESIDENT'S COMMISSION ON HOUSING — "NOT IN MY BACK YARD" — REMOVING BARRIERS TO AFFORDABLE HOUSING (1991).

<sup>207</sup> *Compare* *Ambler Realty Co. v. Euclid*, 297 F. 307, 316 (N.D. Ohio 1924) (invalidating the zoning ordinance in question and observing that the ordinance contributes to class segregation), *with* *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394 (1926) (containing, in the midst of the decision by Justice Sutherland, an out-of-the-blue vigorous diatribe denouncing the apartments and their inhabitants). *Res ipsa loquitur*.

<sup>208</sup> Eric Bailey, *Lake Stays Blue but Critics of Panel See Red*, L.A. TIMES, May 13, 2002, at B5; see Berger, *supra* note 185, at 323–24.

incompatible results, often explained in conclusionary terminology, circular reasoning, and empty rhetoric.<sup>209</sup> If anything, things have grown worse since Van Alstyne wrote.<sup>210</sup> In the aftermath of *Penn Central*'s formulation of its three-part test, which was followed a couple of years later by the different *Agins* two-part test,<sup>211</sup> some lower courts, notably in California and New Jersey, have seized on the multi-factor approach and have transmogrified it into vague ten-part tests that impose enormous evidentiary burdens and large litigation costs on the relief-seeking plaintiffs but enable trial judges to reach whatever results they want in any particular case.<sup>212</sup> Yet, whether a two-, three-, or ten-part test is the norm, that intellectual bucket of smoke is now "the law" that is said to govern most regulatory taking claims; i.e., those other than physical seizures and intrusions, and deprivations of all viable economic use of the regulated property. In short, to put it in scriptural terms, for the past quarter century the landowning citizens of this country have been asking the U.S. Supreme Court for intellectual bread, but the Court gave them doctrinal stone.

The bottom line of it all is that the Supreme Court has more or less given up on giving the country good, reasonably clear takings law and is trying its hand at case-by-case governance instead. Unfortunately, it lacks the time, the resources, the knowledgeable personnel, and in the end, the competence to do a good job of it.

#### VI. WHAT HATH *PENN CENTRAL* WROUGHT?

Though this Article goes on to examine the litigational process as the *Penn Central* case wended its way through four court levels, its primary concern is directed to the following questions:

- (i) Was the case ripe for judicial review, i.e., did the courts have jurisdiction to entertain it on the merits?

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<sup>209</sup> Van Alstyne, *supra* note 16, at 2.

<sup>210</sup> In spite of the enormous rise in the extent and intensity of land-use regulations in the last quarter century, the U.S. Supreme Court has affirmed only one – count 'em, one – taking case in which aggrieved property owners were awarded compensation below, and this on facts so egregious that the Justices of both ideological wings were visibly shocked during oral argument. *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999). But after the *Del Monte Dunes* decision came down, the Monterey City Attorney was quoted as saying: "Will it change anything? No." Kristi Belcamino, *Monterey Loses Long Court Battle*, HERALD (Monterey County), May 25, 1999, at A10.

<sup>211</sup> *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (holding that a regulation is a taking if (a) it "does not advance a legitimate state interest," or (b) "denies the owner economically viable use of his land").

<sup>212</sup> See *Kavanau v. Santa Monica Rent Control Bd.*, 941 P.2d 851, 860–61 (Cal. 1997); *East Cape May Assoc. v. Dept. of Env'tl. Pres.*, 693 A.2d 114, 128–29 (N.J. Super. Ct. App. Div. 1997).

- (ii) Was the state court decision sufficiently final to confer appellate jurisdiction on the U.S. Supreme Court?
- (iii) Given the prevailing rule that appellate courts of last resort do not consider issues that had not been properly raised and litigated below, was it a proper case for either New York Court of Appeals or U.S. Supreme Court review?
- (iv) Last and most distressing, did the New York Court of Appeals decide this case in good faith?

As shown presently, based on a clear historical record and a substantial body of settled law, the answers to these questions are in the negative, although I find the ripeness part puzzling because (a) in setting out to develop its property, Penn Central had applied for the necessary building permission, not once but twice, thus carrying its permit application process to its point of finality as required by *MacDonald, Sommer & Frates v. Yolo County*,<sup>213</sup> and then (b) sued in the state courts, seeking just compensation. Why that would not make the case ripe under the *Williamson County Planning Commission v. Hamilton Bank*<sup>214</sup> rule that imposes only these two ripeness conditions and does not require pursuit of administrative or non-monetary judicial remedies,<sup>215</sup> has not been explained, even though both the Supreme Court and lower courts have asserted after the fact that *Penn Central* was unripe.<sup>216</sup>

Also, in light of *San Diego Gas & Electric Co. v. City of San Diego*,<sup>217</sup> it seems clear that when the *Penn Central* decision of the New York Court of Appeals concluded with an order allowing the plaintiff to present additional proofs on remand to the trial court,<sup>218</sup> that left the litigation short of a final judgment, and thus

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<sup>213</sup> 477 U.S. 340 (1986) (holding that a landowner's quest for the administrative finality required for ripeness may have to be performed twice).

<sup>214</sup> 473 U.S. 172, 194–95 (1985) (holding that an as-applied federal taking claim is not ripe until after the property owners (a) have carried the administrative quest for necessary permits to its final conclusion (which does *not* require pursuit of either administrative or judicial [non-monetary] remedies), and (b) have sued for just compensation in the state courts).

<sup>215</sup> *Id.* at 192–93.

<sup>216</sup> *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 735 n.9 (1997); *see also* *R-Goshen LLC v. Village of Goshen*, 289 F. Supp. 2d 441, 448 (S.D.N.Y. 2003) (finding — but not explaining why — *Penn Central* was unripe).

<sup>217</sup> 450 U.S. 621 (1981) (holding that where a trial court's finding that a taking occurred is reversed and remanded, for a new trial, that procedural posture fails to meet the finality requirement of U.S.C. § 1257 and thus the Supreme Court lacks jurisdiction).

<sup>218</sup> *Penn Central*, 366 N.E.2d 1271, 1279 (N.Y. 1977). I must confess here to considerable confusion on my own part. I do not understand how the New York Court of Appeals could say that the Appellate Division's judgment ordering that the case be dismissed was affirmed, and yet the affirmance of that order of dismissal was to be followed by another trial in the

not subject to review by the U.S. Supreme Court on the merits for lack of finality. In fairness to the Court, *San Diego* was not decided until 1981, whereas *Penn Central* was reviewed in 1978, but that does not change the fact that this was a matter of jurisdiction, which the Court either had or didn't have. *San Diego*, being the most recent case on point is thus controlling, and it unmask, albeit retroactively, the U.S. Supreme Court's *Penn Central* decision as having been rendered by a court lacking jurisdiction. This jurisdictional error on the part of the Court was hardly unprecedented; when similar judicial errors occurred in the past, the Court has held that cases decided by it without jurisdiction to do so, lack precedential authority.<sup>219</sup> Therefore, in spite of its current iconic stature in the decisional law of taking jurisprudence, *Penn Central* is a non-case — a decision rendered by a Court without jurisdiction on two counts (lack of finality and lack of ripeness), and as such of no precedential authority. Yet, except for rare cases of categorical takings, *Penn Central* is now said to be the polestar — The Law of the Land.<sup>220</sup>

Be that as it may, and whatever its jurisdictional shortcomings, the *Penn Central* opinion de facto worked a watershed change in eminent domain doctrine. Unfortunately, in handing it down, the Court paid scant attention to preexisting law<sup>221</sup> and to litigational practicalities of the rules — or perhaps more accurately, non-rules — it formulated as it went along. As one commentator put it, “[w]ith this [*Penn Central*] case, the Supreme Court jumped back into the land use arena. Unfortunately, it landed on its head.”<sup>222</sup> Another well-informed commentator who

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form of a presentation of additional evidence going to the core issue of whether a taking occurred.

If the retrial was not to be an elaborate charade with a preordained result, the trial court would have to be empowered to reach the same conclusion as it did originally, that a taking *had* occurred. Otherwise what would be the purpose of such evidentiary presentation in the trial court after remand? If any of my readers can enlighten me as to how it is possible for an appellate court to affirm a judgment of dismissal and yet remand the case for another evidentiary trial, I would appreciate the help. See Costonis, *supra* note 26, at 417 (characterizing this aspect of the Court of Appeals decision, with understatement as “christening a search for the Holy Grail,” and referring to future courts’ grappling with this problem as a “quixotic task”).

Of course, as Judge Breitel explained later, *Penn Central* had been sent off on a wild goose chase. TDR Conference, *supra* note 72, at 147 (“[*Penn Central*] couldn’t show very much about it,” because coming up with the respective public-private breakdown figures would be “meaningless” and “You are going to be choosing an arbitrary figure.”).

<sup>219</sup> *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952).

<sup>220</sup> See *supra* note 6 and accompanying text.

<sup>221</sup> This brings to mind an old appellate lawyers’ joke involving the following exchange between a lawyer arguing a case and an appellate court justice: “JUSTICE: But counsel, isn’t controlling law contrary to your submission? COUNSEL: It wasn’t, Your Honor, until you spoke.”

<sup>222</sup> GEORGE SKOURAS, *TAKINGS LAND AND THE SUPREME COURT* 52 (1998) (criticizing the *Penn Central* Court for providing an “atheoretical set of tools that were difficult to apply”).



strongly favors unfettered government regulations, observed that

[T]he *Penn Central* test . . . is so vague and indeterminate that it invites unprincipled, subjective decision making by the courts. The [*Penn Central*] three-factor test (which may only be a two-factor test) does not provide any clear direction of how to decide regulatory takings cases, inviting judges to decide based on their own personal values.<sup>223</sup>

One surmises therefore that, putting the best face on it, and believing that the Court could not have intended to destabilize the law so dramatically, the ineluctable conclusion is that the Court did not fully understand either its own preexisting jurisprudence, or the enormous departures from it that the *Penn Central* opinion wrought, nor the obstacles to effective and efficient adjudication it was erecting. This much is no longer subject to serious argument, because of the recent candid on-the-record concessions of the participants in the *Penn Central* litigation — both advocates and the Justices' clerks — that they did not understand *Penn Central* to be a very important case.<sup>224</sup>

To make matters worse, it is certain that the U.S. Supreme Court's *Penn Central* opinion was drafted in haste. The case was argued on April 17, and the opinion filed on June 26, 1978. This timing suggests that it was a product of the notorious end-of-the-term crush of opinions being rushed to completion before the end of the Court's term on June 30.<sup>225</sup> As such it was unlikely to be an exemplar of thoughtful

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<sup>223</sup> John D. Echeverria, *Is the Penn Central Three-Factor Test Ready for History's Dustbin?*, 52 LAND USE & ZONING DIG. 3, 7 (2000).

<sup>224</sup> Transcript, *supra* note 56, at 294 (describing the cases as a “ho hum case”); *id.* at 295 (remembering thinking the case was important “but less important than a lot of the other cases that we had that term”).

<sup>225</sup> Cases that are argued during the Court's term, beginning on the first Monday in October, are decided by the end of that term. Thus, the end of the term has been described as the “dog days.” EDWARD LAZARUS, CLOSED CHAMBERS 26 (1998). There occurs the end-of-term crush, as clerks and Justices work to beat the clock and complete the still-undecided or incomplete opinions in cases argued earlier in the term. This is not to say that no work is done on parts of opinions before oral argument, but such efforts cannot come together, so to speak, as final, coherent judicial products until after oral arguments are heard. Only then do the Justices decide whether to affirm or reverse, which of them will be assigned to produce the majority opinion and the dissent, and how the opinion draft(s) must be modified to gain the assent of all Justices concurring in them.

At the time *Penn Central* was handed down, the Court was deciding cases on the merits at the furious rate of 135 per year. *The Supreme Court 1977 Term*, 93 HARV. L. REV. 1, 137 (1978). Do the arithmetic, bearing in mind that the Court files no opinions for three months out of the year, that a year has only 365 days, or fewer than 250 working days, and that in addition to opinion writing, the Justices have to attend to a variety of administrative, professional, and ceremonial functions during the term, meet to consider petitions for

reflection and detached analysis, to say nothing of the fact that its issues fell into an area of the law that at the time was very rarely considered by the Court, which justifies the surmise that the Justices were not well acquainted with the subject of their decision (having considered no land-use/takings cases during the preceding decade), so that this was precisely the kind of case that warranted considerable self-education, reflection, and self-discipline by the decision makers, which it did not and could not receive, given its timing.

What we thus seem to have on our hands is a case of the proverbial jurisprudential giant standing on feet of clay. In an evident effort to reach the desired result — insuring the preservation of Grand Central Terminal as a historical landmark without compensation for the denial to Penn Central of economically viable use of its property — the New York Court of Appeals and the U.S. Supreme Court disregarded or ran roughshod over just about every rule that stood in their way, and made up ad hoc rules as they went along, without an attempt to integrate them into the preexisting fabric of the law. In a classic illustration of the old saw that hard cases make bad law, *Penn Central* made very bad law indeed. It failed in virtually every way a case can fail, jurisdictionally, procedurally, as well as substantively. Ironically, for all its transparent result-orientation, the *Penn Central* decision also failed to produce the results on the ground that were advanced in the courts as justification for the City's legal position.<sup>226</sup>

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certiorari, hear oral arguments, consider motions and emergency petitions in death penalty cases, etc. That does not leave much time for reflection and thoughtful analysis of the, at times, difficult issues and novel language of the opinions. As Justice Brennan's clerk put it: "[I]t was like sleepwalking." Transcript, *supra* note 56, at 301 (reporting that the *Penn Central* opinion was written — or "came together" as he put it to me in our telephone conversation in February 2004 — in a series of three all-nighters during the Memorial Day weekend). The draft was then delivered to Justice Brennan for his review and comments at 5:30 a.m. on the morning of Memorial Day. He returned the marked-up opinion to his clerk on Tuesday of the Memorial Day weekend. *Id.* at 302.

This end-of-the-term intellectual high-pressure atmosphere makes it unlikely, to put it politely, that the detailed language of opinions being rushed to completion, whether by the Justices, or as is far more likely, by their clerks, can possibly receive the thoughtful reflection they deserve. A novel phrase in a Supreme Court opinion that gives rise to uncertainty and much subsequent litigation may thus not be a considered formulation of legal principle, but rather a fortuitous choice of words made by a harried clerk pounding away at a word processor in a midnight effort to beat the end-of-the-term deadline, while wrestling with an unfamiliar subject and accommodating changes demanded by his or her Justice as well as the concurring Justices. As for the Justices (and their clerks) who are not authoring a particular opinion but concur in it even as they attend to the burdens of writing their own opinions, there is a legitimate question as to how well, or possibly whether, they are able to become fully acquainted with the details and subtleties of the law being expounded in this fashion. See generally Kanner, *Holy Shit*, *supra* note 188, at 430–31. See also Kanner, *Hunting the Snark*, *supra* note 3, at 344–45 (discussing the outright blunders that can occur towards the end of the Court's term).

<sup>226</sup> See *infra* note 438.

## VII. THE BACKGROUND

The problem originated in New York Chief Judge Charles Breitel's conviction that government regulators should not be required to pay for regulatory takings of private property. He first expressed that view in his dissent in *Keystone Associates v. State*,<sup>227</sup> where he argued that when a confiscatory statute fails to provide compensation for temporary denial of use of private property, it is unconstitutional and void, but nonetheless provides no basis for a judicial award of compensation to the aggrieved owners. Judge Breitel reasoned that because uncompensated takings are illegal, no compensation can be awarded because that would make the taking legal, so the aggrieved owner should only be entitled to a judicial declaration of invalidity of the regulation. He was right on his premise (that only uncompensated takings are illegal) but wrong otherwise.<sup>228</sup> He failed to confront the pragmatic problem that arises when the government regulations are not merely abstractly illegal but in application inflict irrevocable economic harm on the regulated owner, so that by the time they are declared invalid by the courts, the owner has already suffered irreversible economic losses.<sup>229</sup> Judge Breitel's *Keystone Associates* dissent thus failed to address the thrust of *Keystone's* submission, namely, the problem arising when plaintiff-landowners seek compensation for a *temporary* taking *that has already occurred*, causing substantial economic harm while in existence.<sup>230</sup> His

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<sup>227</sup> 307 N.E.2d 254 (N.Y. 1973) (awarding damages to a property owner for rents irrevocably lost when a law delayed development of the subject property, thus functioning as a temporary taking); see also *Fred F. French Inv. Co. v. City of New York*, 350 N.E.2d 381, 385 (N.Y. 1976).

<sup>228</sup> The validity of a regulation and the inquiry whether, though valid, it effects a taking of property, are two distinct issues. *Kaiser Aetna v. United States*, 444 U.S. 164, 174 (1979); *Hurley v. Kincaid*, 285 U.S. 95, 104 n.3 (1932) (finding the lack of compensation, not the taking, illegal and awarding just compensation as the aggrieved landowner's sole remedy); accord *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984); *Dames & Moore v. Regan*, 453 U.S. 654, 689, 691 (1981) (holding that damages are preferred to injunctive relief, particularly against the government); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 703-04 (1949) (explaining the reasoning for preferring damages to injunctive relief against the government); see also *Hurley*, 285 U.S. at 104 (warning that courts should not dictate to the executive branch of government what it may or may not do when the Constitution specifies a remedy).

<sup>229</sup> See Gideon Kanner, *Measure of Damages in Nonphysical Inverse Condemnation Cases*, in PROCEEDINGS OF THE INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN § 12.02[2][f] (Carol J. Holgren ed., 1989) (exploring the valuation litigation in *Keystone Assocs. v. State*, 307 N.E.2d 254 (N.Y. 1973)).

<sup>230</sup> *Keystone Assocs. v. State*, 307 N.E.2d 254 (N.Y. 1973) (Breitel, J., dissenting); cf. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 410 (1971) (holding that where a violation of a citizen's civil rights has already occurred, damages are the only practical remedy, because under these circumstances it is "damages or nothing"); see also *Owen v. City of Independence*, 445 U.S. 622, 651 (1980) (holding that damages are "a vital component of any scheme for vindicating cherished constitutional guarantees").

approach would have made invalidation without more an idle act in many cases because it would only tell the regulators “You shouldn’t have done it,” but would otherwise provide no realistic relief for the period of denial of viable economic use of the plaintiff’s property and of the loss of income that would have been generated by the property in the interim.<sup>231</sup> The fact that the illegality of the regulation may be established later, and the property’s reasonable use may be then prospectively restored to the owner by court decree, free of the illegal restraints on its use, does not remedy the irreversible economic harm already inflicted in the interim.

Judge Breitel eventually persuaded his colleagues to accept his no-compensation approach in *Fred F. French Investment Co. v. City of New York*.<sup>232</sup> In *French*, Breitel convinced his brethren that Justice Holmes did not actually mean “taking” when Holmes wrote in *Pennsylvania Coal Co. v. Mahon* that a regulation that goes too far will be recognized as a taking.<sup>233</sup> Rather, *French* held in a bit of revisionist history that Justice Holmes used the word “taking” as a metaphor when what he really meant was deprivation of property without due process of law. While over a half century had elapsed between *Mahon* and *French*, during which Holmes’s views had been analyzed and dissected by numerous courts and eminent scholars, no one else had argued that Holmes had spoken metaphorically. Nonetheless, *French* proceeded on the theory that because the Due Process Clause lacks the Just Compensation mandate, relief under a substantive Due Process theory would be limited to a declaration of invalidity of the regulation.<sup>234</sup> Of course, this was a mistaken notion, for two reasons. First, under the equitable cleanup doctrine, where injunctive relief is granted, the courts also provide complete relief by awarding damages for the harm inflicted before the issuance of the equitable non-monetary remedy.<sup>235</sup> Second, because violations of the Due Process Clause are every bit as unconstitutional as violations of the Just Compensation Clause, and 42 U.S.C. § 1983 provides for a remedy at law for violation of all constitutional rights,<sup>236</sup> one

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<sup>231</sup> In *Keystone Associates*, a State statute temporarily forbade the demolition of the old New York Metropolitan Opera House, which its new owners meant to replace with a modern building. When the statute was declared unconstitutional, the owners sued on a temporary taking basis, and recovered just compensation for denial of use of its property pending invalidation of the statute. *Keystone Assocs.*, 307 N.E.2d 254.

<sup>232</sup> 350 N.E.2d 381 (N.Y.), *cert. denied*, 429 U.S. 990 (1976).

<sup>233</sup> *Id.* at 385; *cf.* *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (“The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”).

<sup>234</sup> *French*, 350 U.S. at 385 (denying damages and finding that “declaratory relief” is the proper remedy).

<sup>235</sup> For a discussion of the doctrine, see *State ex rel. Leonardi v. Sherry*, 137 S.W.3d 462 (Mo. 2004).

<sup>236</sup> *Bello v. Walker*, 840 F.2d 1124, 1128–29 (3d Cir.), *cert. denied*, 488 U.S. 868 (1988) (remanding case for trial on the merits on a substantive due process theory); *Herrington v. Sonoma County*, 834 F.2d 1488 (9th Cir. 1987), *cert. denied*, 489 U.S. 1090 (1988) (awarding damages for confiscatory land-use regulations on a substantive due process theory); *see*

is hard put to fathom how the New York Court of Appeals intended to deny landowners any compensatory remedy because 42 U.S.C. § 1983 applies to actions of state and local officials and municipalities. In any event, Judge Breitel's historical revisionism was short-lived. Justice Brennan, surely no rock-ribbed defender of private property rights, shot down Breitel's theory in *San Diego Gas & Electric Co. v. City of San Diego*,<sup>237</sup> where he bluntly charged the New York Court of Appeals with tampering with the language of *Mahon*.<sup>238</sup>

The remarkable thing about Breitel's short-lived intellectual "metaphor" caper, and the associated excursion into substantive due process as a basis for judicial invalidation of economic property regulations, was that, though not expressly recognized at the time by most of its proponents, this would have de facto revived the moribund doctrine of *Lochner v. New York*<sup>239</sup> that is usually highly disfavored by the very people who support far-reaching economic regulation of property. Yet neither the New York Court of Appeals nor others who endorsed this reasoning<sup>240</sup> took note of this anomaly.<sup>241</sup>

also Kenneth B. Bley, *Substantive Due Process and Land Use: The Alternative to a Takings Claim*, in *TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER DOLAN AND LUCAS* (David L. Callies ed., 1996) [hereinafter *TAKINGS*].

<sup>237</sup> *San Diego Gas & Elec.*, 450 U.S. at 649 n.14 (Brennan, J., dissenting) (disagreeing with the majority's failure to recognize the primacy of the compensation remedy in regulatory takings cases). *But see* *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (adopting Brennan's dissent in *San Diego Gas & Electric*).

<sup>238</sup> *See San Diego Gas & Elec.*, 450 U.S. at 655 n.22 and accompanying text (Brennan, J., dissenting) (explaining why mere invalidation was inadequate by quoting a California city attorney who boasted that under the no-compensation approach, illegal regulations could be reenacted, causing everyone to start all over again).

<sup>239</sup> 198 U.S. 45 (1905). *See generally* Molly S. McUsic, *The Ghost of Lochner: Modern Takings Doctrine and Its Impact on Economic Legislation*, 76 B.U. L. REV. 605, 608-09 (1996); Norman Karlin, *Back to the Future: From Nollan to Lochner*, 17 SW. U.L. REV. 627, 631 (1988); Comment, *Resurrecting Economic Rights: The Doctrine of Economic Due Process Reconsidered*, 103 HARV. L. REV. 1363 (1990).

<sup>240</sup> *See, e.g., Agins v. City of Tiburon*, 598 P.2d 25 (Cal. 1979), *aff'd on other grounds* 447 U.S. 255 (1980), *overruled by First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

<sup>241</sup> *See, e.g., Daniel R. Mandelker, Land Use Takings: The Compensation Issue*, 8 HASTINGS CONST. L.Q. 491, 491-95 (1981) (arguing that the usual hierarchy of remedies whereby damages are preferred to specific relief should be obverted in inverse condemnation cases and replaced with a due process analysis with invalidation as the sole remedy). Remarkably, that article, authored by a highly qualified scholar, failed to discuss the *Lochner* implications of its argument, or even to cite any U.S. Supreme Court cases dealing with remedies in general or remedies for takings in particular.

VIII. THE *PENN CENTRAL* CONTROVERSY

Though recited in great detail in the U.S. Supreme Court opinion, the core operative facts underlying the *Penn Central* controversy were straightforward.<sup>242</sup> The rise in highway transportation and the consequent decline in railroad usage by degrees caused the Penn Central Railroad to become insolvent, and to file for bankruptcy.<sup>243</sup> As a public carrier that served the densely populated Northeast Atlantic Coast area, the railroad could not just shut down its money-losing operations, and had to continue operating while in bankruptcy. As a result, Penn Central found itself subject to an operational deficit. In 1969, it experienced a \$1,165,470 deficit from the operation of the Grand Central Terminal (which had been leased to the Metropolitan Transportation Authority), and that deficit figure rose to \$1,902,467 by 1971.<sup>244</sup> In short, Penn Central was locked into an ongoing deficit operation, with no relief in sight. The solution Penn Central came up with was to increase revenues from its property by leasing the air rights above the Grand Central Terminal to UGP Properties, which planned to construct a fifty-story office building directly above the terminal, not unlike an earlier such effort that resulted in the construction of the Pan Am (now Met Life) high rise office building on Penn Central's air rights above its underground tracks, somewhat north of the terminal itself.<sup>245</sup>

However, the ornate Beaux Arts Grand Central Terminal building had been designated by the City of New York as a historical landmark, and under New York's Landmark Preservation Law it could not be altered without City permission.<sup>246</sup> To obtain such permission, Penn Central submitted two successive plans for the

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<sup>242</sup> *Penn Central*, 438 U.S. at 107–15. In spite of its detailed dissection of the lower courts' decisions, the *Penn Central* opinion does not accurately depict the trial court's ruling. That court did *not* base its decision, as asserted in a footnote, on the ruling that “any regulation of private property to protect landmark values was unconstitutional.” *Id.* at 119 n.20. Rather, its decision was based on the economics forced on Penn Central that compelled it to operate indefinitely at a deficit.

<sup>243</sup> See Gideon Kanner, *Development in Eminent Domain: A Candle in the Dark Corner of the Law*, 52 U. DET. J. URB. L. 861, 861–72 (1975) (commenting on *Blanchette v. Connecticut General Insurance Corps.*, 419 U.S. 102 (1974), known as the *Regional Rail Reorganization Cases*, which dealt with other takings ramifications of railroad bankruptcies that included *Penn Central*).

<sup>244</sup> See *Penn Central*, 377 N.Y.S.2d at 33 (Lupiano, J., dissenting) (detailing Penn Central's financial obligations under its lease of Grand Central Terminal to the Metropolitan Transportation Authority as amounting to \$4,500,000 a year for five years, and \$2,000,000 thereafter).

<sup>245</sup> *Id.* at 32 (noting the similarity between the UGP plan and the Pan-American Building (now Met Life Building) built on Penn Central's air rights over its tracks just north from Grand Central Terminal).

<sup>246</sup> N.Y. CITY ADMIN. CODE § 25-305(a)(1) (LEXIS through 2004 legislation).

proposed new building. It retained the services of the renowned architectural firm of Marcel Breuer & Associates which at first came up with a design that later became known as Breuer I. It would not alter the concourse and it was in keeping with the original designs for Grand Central Terminal that contemplated the construction of an office building over the present terminal.<sup>247</sup> The Breuer I design called for a taller building than what had been originally contemplated when Grand Central Terminal was built, and it concededly would have improved access to the terminal and to the subway.<sup>248</sup> The Landmarks Commission denied approval for Breuer I on subjective aesthetic grounds, claiming that the proposed new building would ““reduce the Landmark itself to the status of a curiosity.””<sup>249</sup> Penn Central then submitted another design, known as Breuer II. The Commission disapproved that plan as well, commenting adversely on the fact that it would do away with the terminal’s façade.<sup>250</sup> At this point another property owner could have sought administrative relief. However, under New York law Penn Central could not pursue this form of relief because entities receiving partial exemption from real estate taxes (as did Penn Central) are not allowed to avail themselves of that option. At this point Penn Central did the only thing it could: it sued, challenging the constitutionality of the Landmark Preservation Law on the grounds that as applied, the law was a taking, and a denial of due process and of equal protection.<sup>251</sup>

#### IX. THE TRIAL COURT DECISION

Applying traditional law, the trial court concluded that Penn Central had been thrust into a position where it would have to suffer an ongoing deficit in the operation of the Grand Central Terminal for the indefinite future.<sup>252</sup> This, found the trial court, amounted to a taking because it deprived Penn Central of economically viable use of its property and imposed economic hardship on it.<sup>253</sup> Accordingly, the

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<sup>247</sup> JESSE DUKE MINIER & JAMES E. KRIER, PROPERTY 1067–68 (1988) (containing pictures of Penn Central’s proposed designs by Marcel Breuer).

<sup>248</sup> See *Penn Central*, 377 N.Y.S.2d at 31 (Lupiano, J., dissenting).

<sup>249</sup> *Id.* (Lupiano, J., dissenting).

<sup>250</sup> *Id.* (Lupiano, J., dissenting).

<sup>251</sup> *Id.* at 33 (Lupiano, J., dissenting).

<sup>252</sup> *Accord* *Averne Bay Constr. Co. v. Thatcher*, 15 N.E.2d 587, 592 (N.Y. 1938) (observing that forcing property owners into a predicament where no economically viable use could be made of their land would be worse than outright confiscation because confiscation would at least relieve them of having to pay property taxes and bear other economic burdens of ownership).

<sup>253</sup> *Penn Central*, 377 N.Y.S.2d at 33; see *Nectow v. City of Cambridge*, 277 U.S. 183 (1927) (holding a zoning ordinance that prevented the owner from receiving a reasonable return on his property to be unconstitutional); *Keystone Assocs. v. State*, 333 N.Y.S.2d 27 (App. Div. 1972), *aff’d*, 307 N.E.2d 254 (N.Y. 1973) (awarding compensation for a temporary regulatory taking for temporary denial use of the Manhattan Metropolitan Opera House).

trial court found the Landmarks Law unconstitutional as applied to the Grand Central Terminal. As related by the subsequent Appellate Division's majority opinion, the reason for the decision was the economic hardship the regulation imposed on Penn Central, the lack of a compensatory remedy provided by the Historical Preservation Law, and the inadequacy of relief by tax rebate. Actually, the trial court's findings were quite a bit more extensive.<sup>254</sup> The Appellate Division's assertion that the trial court's decision rested on the idea "that the authorities empowered to make the [historical landmark] designation may do so but only at the expense of those who will ultimately have to bear the cost, the taxpayers"<sup>255</sup> did not accurately depict the trial court's ruling. That court found, not only that Penn Central had been forced to suffer an operational deficit, but that the terminal was "deteriorating at a substantial rate," imposing an annual maintenance cost on Penn Central of \$1,278,135, as well as that ongoing operation of the terminal would continue to generate an ongoing deficit that had to fall on Penn Central.<sup>256</sup> That was a far cry from simply asserting that the expense of historical preservation should always have to be borne by the taxpayers. The core ruling of the trial court was thus based on the economic hardship imposed on Penn Central that deprived it of reasonable, beneficial, and economically viable use of its property.

The trial court severed the part of its decision finding liability from the compensation phase that would follow later, unless the City successfully appealed the trial court's liability decision.

#### X. THE NEW YORK ESTABLISHMENT "GOES TO THE MATTRESSES"

While everyone with an interest in the *Penn Central* case knows that the City appealed from the trial court's judgment and eventually prevailed, comparatively few people are aware that the City almost threw in the towel after losing in the trial court. Putting aside for the moment the novel decisions of the New York Court of Appeals and of the U.S. Supreme Court, which then still lay in the future, it was clear as the dust settled on the trial that on the basis of the then existing law, the trial court had ruled correctly. However sliced, the core fact was that Penn Central showed by uncontradicted evidence that it had been locked into an ongoing deficit operation, and thus had proven its case, whether one applies what later became the New York Appellate Division's majority view, or Justice Lupiano's dissent. Either way, the cold fact was that Penn Central had been forced into an ongoing, indefinite deficit condition, leaving open only the quibble as to whether the annual deficit was \$1,902,467 as contended by Penn Central, or \$1,089,672, which would have been

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<sup>254</sup> *Penn Central*, 377 N.Y.S.2d at 26.

<sup>255</sup> *Id.* at 33. (Lupiano, J., dissenting).

<sup>256</sup> *Id.* (Lupiano, J., dissenting) (citing operation at a deficit as a factor in the lower court ruling).



the figure arrived at under the evidentiary criteria laid down in the Appellate Division's later majority opinion. As correctly noted in the New York Appellate Division dissent, the difference between these two figures had no impact on liability because, either way, Penn Central was being forced to operate Grand Central Terminal at a loss. It thus appeared that — given the definition of “return” in the Historical Preservation Law as the excess of revenues over expenses — Penn Central would prevail on appeal as it had at trial because the presence of the deficit was incontestable and Penn Central's “return” under the historical Preservation Law was negative.<sup>257</sup>

Evidently, the City must have reflected on these realities, concluded that discretion would be the better part of valor, and largely decided not to appeal the trial court's judgment. The City was already deeply operationally and financially involved in the restoration and operation of the Grand Central Terminal, and intended to acquire it, thus making it advisable for the City to bite the bullet, comply with the trial court's judgment, or more likely, settle with sorely pressed Penn Central on advantageous terms. Thereby both parties would achieve what was salvageable from this confrontation. Indeed, Penn Central had offered to settle on terms whereby it would waive its claim to damages if the City would not appeal the trial court's decision, thus allowing Penn Central to proceed with its construction. Unsurprisingly, the City's lawyers thought that compromise along these lines was feasible and that a settlement could be worked out.<sup>258</sup>

The impetus to appeal came from outside the New York City government, notably from New York's Municipal Arts Society which Babcock and Siemon aptly characterize as a “‘big-name’ prestigious organization.”<sup>259</sup> These social “heavy hitters” were joined by Jackie Onassis, and later by the likes of Senator Daniel Patrick Moynihan. Their full-blown publicity campaign was professionally handled gratis by J. Walter Thompson, the large, highly regarded advertising and public relations agency. Babcock and Siemon relate that by the time it was over, everyone at J. Walter Thompson agreed that their effort in this case generated more footage and print than anything the people at this top-tier advertising and public relations firm had ever seen in their lives. The New York Establishment put on a full-court press to persuade, if not intimidate, Mayor Abe Beame to override the recom-

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<sup>257</sup> *Id.* at 34–35 (Lupiano, J. dissenting).

<sup>258</sup> BABCOCK & SIEMON, *supra* note 68, at 59–76 (describing the events surrounding the settlement negotiations).

As fully credentialed “police power hawks,” Babcock and Siemon opposed compensation for regulatory takings, and used the discussion of the *Penn Central* case in their book as a departure point for criticizing the compensation remedy, quarreling with Justice Brennan's *San Diego Gas & Electric* dissent, which favored compensation for regulatory takings. Nonetheless, in spite of these polemical departures, the chapter on the *Penn Central* case in the Babcock and Siemon book is rich in little-known factual details about the behind-the-scenes struggles that preceded the City's decision to appeal, and about what followed.

<sup>259</sup> BABCOCK & SIEMON, *supra* note 68, at 65.

mendation of the city attorney, and have the City appeal from the trial court's judgment holding the historical preservation law unconstitutional as applied to the Grand Central Terminal.<sup>260</sup> The effort was successful. The Mayor overruled the Corporation Counsel and announced that the City would appeal from the trial court's judgment. It was a triumph of high-society clout over legal analysis, but the way things are in the real world, when high-society speaks, mere mayors listen, and perhaps so do the courts.

I urge the readers to read this chapter in *The Zoning Game Revisited* for themselves, and thus gain a better understanding of how large, how professional, and how sophisticated this effort was. The people behind this propaganda campaign were not satisfied with just getting the City to appeal and letting the appellate process take its course. Later on, when the *Penn Central* case was before the U.S. Supreme Court, they organized a publicity campaign that extended far beyond New York and culminated in organizing a whistlestop train trek that went to Washington through New Jersey, Pennsylvania, Delaware, and Maryland. They named their train "The Grand Central Express."<sup>261</sup> It received huge amounts of publicity, and its promoters' avowed purpose was "to whip up emotions."<sup>262</sup>

Did the members of the New York Establishment actually believe that their publicity campaign would sway the Supreme Court Justices? One would like to believe that they respected the Justices too much for that. But the Justices are human and sometimes things are not quite what they appear to be from the vantage point of a high school civics class. On reflection, the better, if paradoxical, answer to the above question (whether all this flackery influenced the Court's decision) would appear to be both "yes" and "no." True enough, members of the New York Establishment had to be far too sophisticated to think that the Justices of the U.S. Supreme Court would permit themselves to be publicly depicted as being consciously swayed by these public relations antics. Still, when the likes of Jackie Onassis and a mob of political celebrities march in front of the Supreme Court building, compleat with picket signs, clowns, and balloons, that cannot fail to have some impact, if only subliminally.

Babcock and Siemon quote Margot Wellington, one of the leaders of the Grand Central Terminal preservation movement, as explaining that, though its leaders did not think their public relations campaign would sway the Justices, they were aiming their efforts at

these brilliant young clerks that come out of law schools, all of whom are a great deal closer to young passions and youthful

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<sup>260</sup> *Id.* at 67. The publicity efforts expanded even broader when *Penn Central* reached the Supreme Court, with the Municipal Arts Society traversing the North Atlantic coast on a special train known as "The Grand Central Express."

<sup>261</sup> *Id.* at 67.

<sup>262</sup> *Id.* at 69.

thinking than the gray eminences. The knowledge of a national sentiment for preservation and the knowledge of a national sentiment for the preservation of Grand Central is something that will have an effect on the Clerks and it's going to creep into the decision somehow. . . . And, in fact, there was a recognition in the decision.<sup>263</sup>

Babcock and Siemon agree; they observe that “this tale may be one of those instances where lay efforts did, in fact, have a significant impact on the opinion of the courts.”<sup>264</sup>

Three observations seem pertinent at this point. First, we have evidently come a long way from the days when Finley Peter Dunn’s fictional Irish publican, Mr. Dooley, famously observed that irrespective of whether the Constitution follows the flag, the Supreme Court follows the election returns.<sup>265</sup> *Penn Central* was not even a case of election returns, but merely the kind of hoopla that can sway elections, yet at least in the opinion of participants in the process as well as knowledgeable and prestigious gents like Babcock and Siemon, it appears to have had some influence on the Court’s end product. Second, Ms. Wellington’s observation revealed an astute perception on the part of the City supporters of the greatly increased if under-appreciated role of clerks in the decision-making process in the Supreme Court.<sup>266</sup> This is a subject that warrants considerable reflection and concern, because however smart and diligent the clerks may be, they are not Justices, they lack real-world experience in the practice of law generally and in the land-use field particularly, and no one has legitimately invested them with the power to shape American law to the extent they evidently do. Babcock and Siemon also report that while the *Penn Central* case was pending before the U.S. Supreme Court, “[t]here were numerous telephone calls from clerks to the New York Corporation Counsel’s Office inquiring about how the Transfer of Development Rights worked.”<sup>267</sup> This seems like an impropriety. Assuming that such calls were truly necessary, I fail to see why they

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<sup>263</sup> BABCOCK & SIEMON, *supra* note 68, at 69 (quoting Margot Wellington); see *Penn Central*, 438 U.S. at 109–10 (repeating the now familiar refrain that “burden[ing] the public budget with costs of acquisition and maintenance” is “neither feasible nor wise”).

<sup>264</sup> BABCOCK & SIEMON, *supra* note 68, at 63.

<sup>265</sup> Satirist Finley Peter Dunn created his fictional Irish bartender “Mr. Dooley” as an 1890s Chicago newspaper columnist.

<sup>266</sup> See Kanner, *Hunting the Snark*, *supra* note 3, at 333, 337–40, 345 (specifically referencing the clerks’ likely role in the formation of confusing regulatory taking law); Tony Mauro, *The Hidden Power of the Supreme Court: Justice Give Pivotal Role to Novice Lawyers*, USA TODAY, Mar. 13, 1998, at 1A. See generally EDWARD LAZARUS, CLOSED CHAMBERS (1998); John G. Kester, *The Law Clerk Explosion*, 3 LONG TERM VIEW 14 (1995); Andrew J. Kleinfeld, *Politicization: From Law School to the Courts*, ACADEMIC QUESTIONS, Winter 1993–94, at 9.

<sup>267</sup> BABCOCK & SIEMON, *supra* note 68, at 274–75.

could not have been made as three-way conference calls, with Penn Central's counsel on the line. One would like to believe that nothing of a partisan nature was said in those telephone conversations to strengthen the City's case or weaken Penn Central's. On the other hand, believing that might be a triumph of hope over the realities of human nature. Whatever you may think about that feature of the controversy, it was not legal ethics' finest hour.

Finally, to the extent Ms. Wellington thought that the knowledge of a national sentiment for preservation in general and preservation of Grand Central in particular would have "an effect on clerks and creep into the decision somehow,"<sup>268</sup> it was an accurate statement in the same sense one could say that Sherman crept into Georgia. This was a massive, brazen, top-of-the-news, Establishment-driven, professionally executed propaganda campaign overtly calculated to influence the Court and its clerks, that gave the appearance of having worked. It also established an unfortunate precedent of giving respectability to demonstrations taking place before the Supreme Court building when significant, controversial cases are argued — an activity that however well or ill intended, cannot help but detract from the perception of the Supreme Court as an impartial tribunal that is above the fray and shuns even the suggestion that it might be influenced by the cry of mobs milling in front of its building.

#### XI. THE NEW YORK APPELLATE DIVISION: THE DEVIL IS IN THE ACCOUNTING DETAILS

The New York Appellate Division reversed the trial court's judgment. Unlike the ideological *Sturm und Drang* that animated the subsequent decisions of the New York Court of Appeals and to a lesser extent the U.S. Supreme Court, the Appellate Division based its decision on mundane matters of accounting that were tendered to it for decision. The majority concluded that it was error for Penn Central to "improperly attribute a considerable amount of railroad operating expenses (and some taxes) to their real estate operations."<sup>269</sup> This accounting error, said the majority, was compounded by the fact that Penn Central failed to show an inability to increase the Terminal's commercial income by transforming vacant or under-utilized space to revenue producing uses, and that the unused transferable development rights above the terminal could not have been profitably transferred to nearby properties.<sup>270</sup>

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<sup>268</sup> *Id.* at 69.

<sup>269</sup> *Penn Central*, 377 N.Y.S.2d at 28.

<sup>270</sup> *Id.* at 28–29. Compare *Fred F. French Inv. Co. v. City of New York*, 350 N.E.2d 381, 387–88 (1976) (ruling that, unless the transferable development rights scheme identified the specific "receiving parcels," the scheme is invalid), with *Penn Central*, 377 N.Y.S.2d at 29 (discussing a transfer "to one or more nearby sites" that were already occupied by substantial buildings). For a more realistic assessment of the difficulties with which such a transfer would have been fraught, see Justice Lupiano's dissent, 377 N.Y.S.2d at 37–38. Eventually,

The majority opinion contained two eyebrow-raising twists that warrant comment. First, it is the well-nigh universal practice that when an appellate court's holding determining that an evidentiary rather than substantively fatal error occurred at trial, the matter is remanded for retrial, this time on the basis of proper evidence. But that is not what happened here. This was not a case in which the evidence disclosed some fatal legal failing in the plaintiff's substantive case. On the contrary, the court's majority found only that Penn Central's evidentiary presentation fell short of demonstrating a deficit because Penn Central used a wrong accounting procedure, had not attempted to prove what it could have done to improve its cash flow with a more efficient utilization of the Grand Central building, and that Penn Central's accounting failed to impute a rental from its railroad operations to its real estate operations.<sup>271</sup> These *lacunae* were correctable evidentiary failings that Penn Central should have been permitted to rectify on remand, if it could. The New York Court of Appeals later disagreed with the Appellate Division on that point and, after affirming its ruling, ordered that Penn Central be given an opportunity to present additional evidence after remand.<sup>272</sup> But the Appellate Division majority opinion concluded with an order that the case be remanded to the trial court with directions to dismiss the action and enter judgment for the City, rather than afford Penn Central a retrial in which it would have an opportunity to present the missing evidence in a manner held by the majority as essential to a determination of this sort.<sup>273</sup> There was no explanation why the Appellate Division ruled that way, thus heading Penn Central off at the pass, so to speak.

The majority ruling thus seems indicative of considerable result-oriented jurisprudence. Justice Lupiano's dissent, factually uncontradicted by the majority, indicated that the proceedings in the trial court did develop sufficient evidence of a deficit, albeit a smaller one, *even after using the approach preferred by the majority*. Thus, Justice Lupiano made clear that if Penn Central had been permitted to retry its case using the majority's rules, it still would have prevailed, albeit the amount of its annual deficit would be reduced from \$1,902,467 to \$1,089,672.<sup>274</sup>

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Penn Central was able to sell some development rights to local developers, who then presumably passed on the added cost to their buyers and tenants, thus distributing the cost onto the public, albeit in a random, haphazard, and self-serving way. Transcript, *supra* note 56, at 316. See generally David W. Dunlap, *A Battle Looms over Grand Central's Air Space*, N.Y. TIMES, July 6, 1989, at B3, for an insight into some of the problems involved in trying to use the transferable development rights associated with the Grand Central Terminal.

<sup>271</sup> *Penn Central*, 377 N.Y.S.2d at 28.

<sup>272</sup> Though the Appellate Division's decision was nominally affirmed by the New York Court of Appeals, that court ruled that Penn Central should be given the opportunity on remand to offer additional proof at the trial court level. *Penn Central*, 366 N.E.2d at 1279 (remanding with directions to allow further proceedings, thus technically granting a new trial rather than affirming the lower court's order of dismissal).

<sup>273</sup> *Penn Central*, 377 N.Y.S.2d at 30.

<sup>274</sup> *Id.* at 34 (Lupiano, J., dissenting).

Under the legal principles as to which the majority and the dissent did not disagree, there would still be liability on a taking theory, because either way Penn Central had been deprived of all economic return of its property and forced into a deficit operation. Why on those facts the majority denied Penn Central the opportunity to retry its case free of the correctible evidentiary error it perceived, is incomprehensible unless one surmises that the Appellate Division majority was more interested in the result than anything else.

The second twist was the majority's assertion that in order to prevail, Penn Central was obliged "to increase the Terminal's commercial income by transforming vacant or under-utilized space to revenue-producing use"<sup>275</sup> and to prove both what it could have done to increase income to acceptable levels and what an acceptable level of income entailed. Such a calculation would be inherently speculative, bearing, "a close affinity to Lord Dundreary's famous question; '[I]f you had a brother would he like cheese?'"<sup>276</sup> Such a calculation would also run counter to what the courts normally consider to be permissible appraisal methodology.<sup>277</sup> To say that one could try to pursue more economically productive efforts is one thing; proving that such efforts would be successful and *a fortiori*, how quantitatively successful they would prove to be, is quite another story. Moreover, with regard to regulated utility valuation, projections of future income may not be used.<sup>278</sup> Had such a showing been attempted by a property owner in an eminent domain valuation case, it would have been excluded as speculative and violative of the familiar rule that the property owner's intentions and plans for future use of the subject property are inadmissible.<sup>279</sup> The court did not explain why something that would have been inadmissible in an eminent domain valuation trial should be essential in an inverse condemnation case. There was no indication, at least none is noted in the opinion, that Penn Central was deliberately failing to increase its rental income from the terminal. In any event, under the arrangement between the City and Penn Central,

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<sup>275</sup> *Id.* at 28.

<sup>276</sup> *City of Oakland v. Pac. Coast Lumber & Mill Co.*, 153 P. 705 (Cal. 1915); see *Sawyer v. Commonwealth*, 65 N.E. 52, 53 (Mass. 1902) (denying recoupment of lost profits for a taking because business is "uncertain in its vicissitudes"); *Community Redevelopment Agency v. Abrams*, 543 P.2d 905, 912–13 (Cal. 1975) (finding business loss so "speculative that proof of it may justifiably be excluded").

<sup>277</sup> 4 NICHOLS, *supra* note 11, § 12B.08[2]; 1 ORGEL, *supra* note 122, § 162, at 657; see *Andrus v. Allard*, 444 U.S. 51, 66 (1979) (rejecting a loss of future profits as evidence of compensation because "[p]rediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform").

<sup>278</sup> 2 ORGEL, *supra* note 122, § 218, at 148–50.

<sup>279</sup> 4 NICHOLS, *supra* note 11, § 12B.08[2]; 2 ORGEL, *supra* note 122, § 218, at 55–56. Compare *Penn Central*, 377 N.Y.S.2d at 28 (finding error in Penn Central's failure to present such evidence), citing *Joseph E. Seagram & Sons, Inc. v. Tax Comm'n*, 200 N.E.2d 447 (N.Y. 1964), with *id.* at 34–35 (Lupiano, J., dissenting) (distinguishing cited authority and applying the Landmark Law's definition of "reasonable return").

rents went to the City's Metropolitan Transit Authority,<sup>280</sup> so it is not clear from the opinion how an increase in rentals would have inured to Penn Central's benefit or had any bearing on the economics of the matter.

To sum up, the difference between the opinions of the Appellate Division majority and the dissent was not really of a legal nature. Neither position was compelled by black letter law. It was rather a question of choosing from two competing accounting approaches that would enable a sound determination whether Penn Central suffered an ongoing deficit, and if so, its amount. This was largely a factual controversy that is usually decided by the trier of fact after hearing accounting testimony. Moreover, even on the majority's premise, a reversal of the trial court's judgment was not called for because had the case gone on to a valuation phase trial, all this would have "come out in the wash," so to speak, as the parties presented their competing valuation data and methodologies in accordance with the majority's views. Penn Central should have been afforded a fair opportunity to present the valuation evidence the majority thought to be essential, because this was a novel case, and there is a sound basis for concluding that until the Appellate Division spoke in this case, no one knew just what sort of economic evidence would satisfy the courts to prove Penn Central's case. Had the case been remanded for a new trial, and had Penn Central been unable to prove the existence of an ongoing deficit in accordance with the majority's standards of proof, the case would terminate on the merits in the City's favor. The City would thus not be prejudiced by a retrial. On the other hand, if the dissenters were right, Penn Central would have been able to satisfy the majority's evidentiary requirements and would have established a taking even under the more stringent requirements of the majority, so that denying Penn Central the opportunity to do so was prejudicial to it.

## XII. THE NEW YORK COURT OF APPEALS: HENRY GEORGE RIDES AGAIN — SORT OF<sup>281</sup>

The arguments of both parties in the New York Court of Appeals were essentially the same as those made below. Penn Central's first and foremost issue

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<sup>280</sup> 377 N.Y.S.2d at 33 (Lupiano, J., dissenting).

<sup>281</sup> See TDR Conference, *supra* note 72, at 86 (Judge Breitel crediting Henry George with the idea applied by the New York Court of Appeals but also averring that "I am not suggesting that this is the root of the Grand Central analysis at all."); BABCOCK & SIEMON, *supra* note 68, at 66-67 (pointing out that at least some Supreme Court Justices agreed that the New York Court of Appeals decision involved Georgist ideas); see also WILLIAM A. FISCHER, *THE ECONOMICS OF ZONING LAW 197-98* (1985) (describing the *Penn Central* decision as "neo-Georgist"). See generally JOHN FRED BELL, *A HISTORY OF ECONOMIC THOUGHT* (2d ed. 1967) (discussing the views of Henry George); Montgomery, *supra* note 27, at 850 (explaining George's belief that rent "belongs to the society whose labors generated it, and its collection by private individuals impoverishes those who produce it").

was whether, in light of the “incapab[ility] of producing a reasonable return,” the application of the Landmark Law constituted an uncompensated taking.<sup>282</sup> The City’s response was that Penn Central’s proof failed to establish that the economic restrictions on Penn Central were so severe as to make them unconstitutional.<sup>283</sup> But the court’s opinion failed to resolve or even to address this issue. It went off in an entirely different direction. It began by stating the central issue as follows:

The first [issue] is the extent to which government, when regulating private property, must assure what is described as a reasonable return *on that ingredient of property value created not so much by the efforts of the property owner, but instead by the accumulated indirect social and direct governmental investment in the physical property, its functions, and its surroundings.*<sup>284</sup>

It thus became clear that the Court of Appeals decided not to decide the principal issue tendered by the parties and litigated in the lower courts, but rather made up its own issue that it evidently found more congenial to the result it meant to reach. In a nutshell, the court asserted out of the blue that the return on one’s property protected by the Constitution does not “embrace all attributes, incidental influences, or contributing external factors derived from the social complex in which the property rests.”<sup>285</sup> Rather the court thought that it would be sufficient if “the privately created ingredient of property”<sup>286</sup> receives a reasonable return. It is that privately created and privately managed ingredient that is the property on which the reasonable return is to be based, said the court. “All else is society’s contribution

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<sup>282</sup> Brief of Plaintiff-Appellant at 3, *Penn Central*, 366 N.E.2d 1271 (No. 77-444).

<sup>283</sup> Brief of Defendant-Respondent at 2, *Penn Central*, 366 N.E.2d 1271 (No. 77-444).

<sup>284</sup> *Penn Central*, 366 N.E.2d at 1272–73 (emphasis added). The other issue concerned transferable development rights, a topic that is not delved into here because it was largely not the subject of review but rather a passing mention by the U.S. Supreme Court which did not analyze it, so that its pursuit here would, if I may say so, stick a harpoon into a whole other whale. Suffice it so say that in the event, the business of transferring those rights turned out to be nowhere as simple as sometimes supposed by fans of the *Penn Central* decision. See Dunlap, *supra* note 270 (discussing transferable development rights in the context of the *Penn Central* case); *Penn Central*, 438 U.S. at 138 (finding that the proceeds of TDR sales were intended to offset loss, thus only affecting the quantum of compensation).

<sup>285</sup> *Penn Central*, 366 N.E.2d at 1273. I cannot help wondering what would happen in a New York courtroom if in a tax certiorari proceeding, the landowners were to make that very argument and contend that their *ad valorem* taxes should be reduced accordingly. After all, as the Supreme Court admonished, “[t]he principles governing the ascertainment of value for purposes of taxation, are the same as those that control in condemnation cases.” *Great N. Ry. Co. v. Weeks*, 297 U.S. 135, 139 (1936).

<sup>286</sup> *Penn Central*, 366 N.E.2d at 1273.



by the sweat of its brow and the expenditure of its funds. To that extent society is also entitled to its due.”<sup>287</sup>

If ever there was an argument that proved too much, this was it. First of all, property that has value, particularly value in exchange used in eminent domain, can have it only because people other than the owner find it desirable, and are willing to pay fair market value for it. To that extent, all value of property is derived from society because without society’s demand for it, it would have no value in exchange.<sup>288</sup> Moreover, the opinion conveniently ignored the risk element inherent in private entrepreneurship. “Society” does not invent new products and services, discern business opportunities, create business plans, raise and invest capital, take the risk of entrepreneurship, pursue the profit-making ideas, and stand ready to suffer the adverse consequences of prospective business failure. Moreover, society *does* get “its due” by imposing and collecting taxes — not merely *ad valorem* taxes, but also taxes on income and capital gains realized from private developments upon their completion — as well as assessments, exactions, user fees, sales taxes, and other monetary charges whereby those who do benefit from society’s “contribution” pay a quid pro quo for what they receive.<sup>289</sup> Beyond that, society also imposes negative effects on entrepreneurship; it limits the owners’ ability to profit by imposing a variety of regulations and limits on the use of private property and on

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<sup>287</sup> *Id.*

<sup>288</sup> See Kanner, *Condemnation Blight*, *supra* note 166, at 779.

<sup>289</sup> Compare *Penn Central*, 366 N.E.2d 1271 (embracing a form of neo-Georgism), with *Montgomery*, *supra* note 27, at 850 (noting as a linchpin of Henry George’s belief, that the “fundamental mistake is in treating land as private property”). Treating land as public property is a notion utterly inconsistent with the fundamentals of the American constitutional system that expressly protects private property rights. As a vigorous supporter of the views of the New York Court of Appeals had to concede, “[i]n [his] quasi-Marxist work, [George] proposed a land value tax which replaced all other forms of taxation in order to permit the public rather than private interests to capture land value increments.” Norman Marcus, *The Grand Slam Grand Central Terminal Decision: A Euclid for Landmarks, Favorable Notice for TDR and a Resolution of the Regulatory/Taking Impasse*, 7 *ECOL. L. Q.* 731, 739 n.37 (1978) (emphasis added). In other words, George’s purpose was to have the government expropriate private property, an aim precisely forbidden by the Fifth Amendment’s Just Compensation Clause, unless the property owner receives “just compensation.” Douglas W. Kmiec, *Inserting the Last Remaining Pieces into the Takings Puzzle*, 38 *WM. & MARY L. REV.* 995, 1031 (1997) (explaining that George’s ideas were “so greatly incongruous with American common law tradition that [they] never took root”).

A modern application of Georgist theories would lead to a dilemma. Modern environmentalist views discourage loud development, but the Georgist view encourages, or as one commentator put it, forces its development. Stewart E. Stark, Nollan, *Henry George and Exactions*, 88 *COLUM. L. REV.* 1731, 1732 n.6 (1988). Finally, if we ignore the entrepreneurial risks of land development, and assume that passive land appreciation should be captured by the public, why wouldn’t it follow as a matter of logic and fairness that when values decline through no fault of the owner, land owners should receive compensation?

business practices, which reduce the property's income-producing potential. This is *a fortiori* true in the case of heavily regulated enterprises such as public utilities and railroads. But regulation of utilities aside, why property owners should be taxed on the *full* value of what they own, *including* the increment resulting from the social contribution envisioned by the court, but be denied the right to a reasonable return on that same full value, the court never got around to explaining. Moreover, and more important if we are to deal with law (which is what the New York Court of Appeal was supposed to be doing), the *City's Landmarks Preservation Law* defined return in terms of economic productivity — not as a return on value, but as the excess of revenues over expenses,<sup>290</sup> and no amount of pseudo-Georgist pettifoggery could change the fact that Penn Central Terminal's revenues were below its expenditures so that sooner or later it would simply run out of money, and be forced to cease operations, which under the law was not an option for a railroad, particularly one in bankruptcy. Moreover, the New York Historical Preservation Law imposed the duty on owners of regulated properties to maintain them (something that can be quite costly in the case of old, historical structures), thus de facto conscripting Penn Central to take care, not only of the "privately created" element of the property's value, but the "publicly created" one as well.

Thus, unless we are to take leave of the meaning of English words, an entity experiencing an ongoing net deficit could not possibly be said to receive an excess of revenues over expenses and thus enjoy a return *as defined by the pertinent law*. The court's explanation was thus not an interpretation of the controlling law, but a conveniently contrived verbal formulation intended to justify denying Penn Central what it was entitled to under the law in issue. Significantly, this entire part of the opinion is unblemished by any reference to any pertinent law, nor to any legal, or economic treatises supporting this view.<sup>291</sup>

This was no small oversight on the court's part, for the legitimate task before it was not an academic discourse on economic theory, but rather an articulation of valuation rules under which real appraisers would have to form and testify to valid, non-speculative, admissible, and factually supportable opinions of value of the "public contribution" — something that I have never seen discussed in the countless eminent domain valuation cases that I have read over the decades. I am sure that some enlightening specifics would have been appreciated by members of the appraising profession before being ordered to march off into a litigational battle involving this novel theory of valuation. Nor was there any indication in the opinion that this contrived issue had been litigated below or raised in the briefing in the New York Court of Appeals (it wasn't), or that the record contained any evidence capable of supporting it.<sup>292</sup> It was a classic bit of judicial *ipse dixit*, or a real life

<sup>290</sup> *Penn Central*, 377 N.Y.S.2d at 34–35 (Lupiano, J., dissenting).

<sup>291</sup> *Penn Central*, 366 N.E.2d at 1273.

<sup>292</sup> *Id.* at 1279; see also TDR Conference, *supra* note 72, at 147 (admitting that the court was fully aware that it was deciding the "main pins" of the case, even though the parties

illustration of the old appellate lawyers' joke about an activist appellate judge who grew tired of the mundane cases on his docket, and placed an ad in the local legal newspaper that read: "Have opinion. Need case." Judge Breitel had the opinion, as may be seen from his dissent in *Keystone Associates*, which he articulated as a holding in *French*. The *Penn Central* litigation supplied the case.

Second, the court failed to address the fact that it was thus wielding a two-edged sword. Private entrepreneurs may benefit from social economic contributions, but the latter often cannot occur without the former, particularly on these facts. Without the privately financed construction of the Grand Central Terminal there would not have been anything on which society's contributions expounded by the Court could have worked their economic magic. Judge Breitel later conceded as much at the TDR Conference, when he observed that when Grand Central Terminal was built, New York's 42nd Street was still "almost a semi-rural area" and "[t]he moment you put Grand Central there everything started to burgeon."<sup>293</sup> These statements alone demonstrate that the flow of benefits was hardly the one-way street the opinion glibly envisioned. Indeed, the opinion expressly acknowledged the circularity of its own reasoning,<sup>294</sup> but simply dismissed it as unimportant. Having embraced as the premise of its decision the historical fact that Penn Central's predecessors benefited from government largesse in the past, the court asserted that it was "of little moment"<sup>295</sup> whether the Grand Central Terminal or its surroundings came first. Though this statement undermined the court's position<sup>296</sup> and at best raised a chicken-or-egg conundrum, the court took refuge in the fact that Penn Central, being a railroad, had been the beneficiary of public subsidies and benefits over the years, and therefore it was not unreasonable for it to be subjected to special burdens.

But even on its own premise, the principle thus posited by the court was deficient. The historical subsidy to railroads was not just a gratuitous government gift. It occurred because of the prevailing and justified belief that construction and operation of a railroad network was essential to the growing country's well-being and its development in the nineteenth century.<sup>297</sup> That government largesse was thus

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never briefed or argued them). Thus, apart from *Penn Central*'s other deficiencies, the court de facto denied Penn Central due process of law by depriving it of notice and an opportunity to be heard on the dispositive issue actually being decided.

<sup>293</sup> TDR Conference, *supra* note 72, at 147. For example, the reason Walter P. Chrysler decided to finance the construction of the landmark art deco Chrysler Building in mid-Manhattan was because of its proximity to Grand Central Terminal.

<sup>294</sup> *Penn Central*, 366 N.E.2d at 1275.

<sup>295</sup> *Id.*

<sup>296</sup> If indeed it was Grand Central Terminal that caused the intense development around 42nd Street, as suggested extrajudicially by Judge Breitel, then its primary benefit was conferred on society, not by it, and the court's entire theory collapses.

<sup>297</sup> See Harry N. Scheiber, *Property Law, Expropriation, and Resource Allocation by Government: The United States, 1789-1910*, 33 J. ECON. HIST. 232, 237-38 (1973); Bryant,

not merely of benefit to the railroads, but to itself (as, for example, using railroads as military transports in the Civil War and thereafter), and to society at large. Railroads opened up the West and contributed mightily to the country's commerce, which is why construction of railroads was subsidized. Indeed, today as in the past, railroads are vested with the power of eminent domain precisely because their operation has always been deemed to be a beneficial public use within the meaning of the Fifth Amendment. In short, railroads may have been the recipients of government subsidies (as well as frequent abusers of condemnees), but they also conferred reciprocal benefits on society.

Another reason why early railroads received such benefits was because they were taking great risks (many of them failed), and the government wanted them to succeed. Yet, recognition of the risk element is nowhere to be found in the court's analysis. No rational investor would want to take on the risk of creating an enduring project of the cost, scope, projected longevity, and magnificence of Grand Central Terminal, and submit to government limitations of its operational income, with the knowledge that at some unspecified future time the investment could become subject to a confiscatory regime, not merely by reasonable regulation of rates, but by manipulation of the very meaning of the term "return." And manipulation was exactly what it was. As the court put it: "Reasonable return, however, is an elusive concept, incapable of easy definition. For the reasonableness of the return must be based on the value of the property, and the value of the property necessarily depends on the return permitted or available. The inevitable circularity of reasoning is obvious."<sup>298</sup> That was another argument that proved too much, because the same is true of even the safest income-producing investments, i.e., Treasury bonds whose market value fluctuates with their yield. Yet I have never heard anyone complain that the task of ascertaining the return on those bonds is "an elusive concept." The dominant determination of acceptability of returns is made by the market; unless the return is acceptable to the market, investors won't invest their money to obtain it. As the Supreme Court put it, "[o]ne of the elements always relevant to setting the rate . . . is the return *investors expect* given the risk of the enterprise."<sup>299</sup>

Besides, I am not aware of any law that puts railroads, utilities, or other highly regulated businesses beyond the pale of constitutional protection. On the contrary, it is *because* they dedicate their facilities to public use, are highly regulated, and are geographically limited to the territory in which they are licensed to operate, that the law has historically assured them a reasonable return on their assets, and a reasonable profit from their operations as correlative with the law's limitations on

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*supra* note 123 (describing how railroads were the object of state generosity because of the prevailing expectation that their construction and operation would confer substantial benefits on society, and so they did, even if the ethics of their conduct left much to be desired).

<sup>298</sup> *Penn Central*, 366 N.E.2d at 1275.

<sup>299</sup> *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 314 (1989) (emphasis added).

rates they can charge. Thus, though such entities may be the beneficiaries of the government-conferred benefits, they are also a source of *public* benefits, and subject to government regulatory limitations on the return they may derive from their operations. The court's analysis was thus unbalanced because it looked only to benefits conferred by government on purely private entities, but ignored the role of taxation and of the privately-created benefits flowing to society from quasi-public entities such as public utilities and railroads.

Third, it is also worth noting, if only in passing, that the New York Historical Preservation Law required Penn Central to maintain its building in good repair at its own cost,<sup>300</sup> a provision whose purpose was to impose the cost of maintenance of historical landmarks protected by law on the landmarks' owners, making no exception for the "publicly conferred" component of the structure's value.<sup>301</sup> Thus the regulation in question not only locked Penn Central into an ongoing operational deficit condition, but also required it to maintain the "public" increment of Grand Central Terminal's value at its own cost while deriving no benefit from it. This was no trifling concern, for as of 1972 the cost of necessary maintenance came to \$1,278,135.<sup>302</sup>

Moreover, this entire "social contribution" approach is conceptually an argument that proves too much. I don't know of any business — from the local bakery to the mightiest industrial empire — that is not dependent for its success on benefits brought about by society at large, if only by protecting the enterprise from lawlessness and providing paying customers for their goods and services. The baker relies on roads that permit his suppliers and his customers to reach his shop, on maintenance of public safety that encourages people to go about their business that includes the patronage of his shop and the purchase of his baked goods, on regulation of utility rates that enable him to operate his baking ovens profitably, and on government food regulations that assure him and his customers of wholesome ingredients that go into his baked goods. So what? It has been said that taxes are the price we pay for our civilization, and so they are. The people are taxed and thus pay for the benefits they receive, as well as for the beneficial "social ingredient" their property derives from the society they are a part of, and to which they in turn contribute through their individual efforts as well as their taxes. But it is a far cry from recognizing that reality, to the proposition that by virtue of fulfilling its duty of providing general welfare that inures to the benefit of individuals, the government has an interest in everyone's property and is thus able to deny its owners the full measure of return on that property's fair market value.

More important, even if one were to disagree with what I say here, and embrace the view advanced by the New York Court of Appeals, it would still be incontestable

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<sup>300</sup> *Penn Central*, 377 N.Y.S.2d at 24.

<sup>301</sup> *Penn Central*, 438 U.S. at 109 n.6.

<sup>302</sup> *Penn Central*, 377 N.Y.S.2d at 33 (Lupiano, J., dissenting).

that this aspect of its *Penn Central* opinion was not just an incremental evolution of law of the kind that lies within legitimate, common law, judicial rule-making powers, but rather a revolutionary change in government economics, an area in which courts cannot legitimately claim special competence, and to which society at large had never consented. In fact, it was not any kind of *legal* development; it was an economic revolution. It was not constitutional in nature (where courts do have special competence), but rather one admittedly dealing with valuation methodology and economic philosophy (where courts lack special competence, are subject to legislative enactments, and in order to make their decisions, have to rely on expert witnesses who were conspicuously absent here).

That such a revolution should take place so casually, with no advance indication that it was being considered by the court, at the hands of seven men making tendentious arguments that were transparently (and indeed avowedly) intended to protect New York City from an adverse judgment, without any broadly based debate, or legislative input, and indeed without giving the parties advance notice and a reasonable opportunity to address this novel issue by proper briefing, was illegitimate, and an affront to a democratic society. There had been no widespread dissatisfaction with the prevailing American system of property rights, so the court lacked even the pretense of addressing a pressing social problem that the legislature had failed to deal with. It was simply an idiosyncratic exercise of raw judicial power that defies the core idea on which this country was founded, namely, that at least on some bedrock level government derives its just powers from the consent of the governed. And to the best of my knowledge, no democratic majority in the State of New York had ever consented to the installation of Henry George's failed radical, pseudo-Marxist philosophy as the linchpin of American law and economics. Such monumental changes in the American economic order, assuming they could pass honest constitutional muster, are the stuff of landmark legislative enactments, and even then only after studies, debates, and intellectual contributions by diverse segments of society that would be affected.<sup>303</sup> But Henry George's ideas never gained traction with the populace; he was a democratic failure in New York when he ran for Mayor of that city in 1886 and was soundly defeated.<sup>304</sup> His disciples advanced his single tax initiative in California in 1910, and were defeated there too.<sup>305</sup>

Finally, the proof of the pudding is that to the best of my knowledge New York courts have not applied this theory in valuation cases after *Penn Central*, whether

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<sup>303</sup> Judge Breitel stated later that "those decisions ought to be made legislatively," which was tantamount to conceding that his decision was inconsistent with the separation-of-powers doctrine. TDR Conference, *supra* note 72, at 115.

<sup>304</sup> Montgomery, *supra* note 27, at 850.

<sup>305</sup> *Id.*

for eminent domain or taxation purposes.<sup>306</sup> In several subsequent cases, the New York Court of Appeals dealt with reasonable return on privately owned property in the context of takings law, but in every one of them the court spoke simply of a reasonable return and gave not a hint that such return applied only to some unspecified “privately created” part of the subject property’s value.<sup>307</sup>

The Court of Appeals decision to remand the matter to the trial court only gave Penn Central the limited right to put on evidence in conformance with those “factors” that the court had already established.<sup>308</sup> Penn Central was thus no longer at liberty to try the far more important, fundamental issue — never tried before — whether those “factors” should have been imposed in the first place on society in general and on this litigation in particular. Thus, Penn Central was packed off to try to present in a new trial a case that the author of the opinion granting it magnanimous leave to do so, recognized could not be won, thus putting in question the court’s good faith in so ruling.

Be all that as it may, with a beginning like that, the *Penn Central* opinion went downhill in a hurry. The court went on to create a task for Penn Central that would have been worthy of the Pharaoh commanding the Israelites to make bricks without straw. This much is not subject to rational debate because later on in the opinion, the court expressly conceded that the issues it asked Penn Central to address on remand had “impenetrable densities,”<sup>309</sup> and that the private and public components of value are “inseparably joint.”<sup>310</sup> Nonetheless, the court invited Penn Central to perform the “exceedingly difficult” task of separating the inseparable, or “to sort out the merged ingredients and to assess the rights and responsibilities of owner and society.”<sup>311</sup> And even accepting that as a legitimate premise for the sake of argument, no guide was provided as to how that was to be done, nor was any explanation offered why the burden of proof on that novel and difficult point should fall on Penn

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<sup>306</sup> *Costonis*, *supra* note 26, at 417 (suggesting presciently that it would be “a good guess that future courts [would be] reluctant to become ensnared in the quixotic task of segregating a site’s public and private increments of value”).

<sup>307</sup> *See Seawall Assocs. v. City of New York*, 542 N.E.2d 1059, 1073 (N.Y. 1989); *De St. Aubin v. Flacke*, 496 N.E.2d 879, 885 (N.Y. 1986); *Church of St. Paul & St. Andrew v. Barwick*, 496 N.E.2d 183, 195 (N.Y. 1986); *Loretto v. Teleprompter Manhattan CATV Corp.*, 423 N.E.2d 320, 332 (1980).

<sup>308</sup> *See infra* Part I; *see also* TDR Conference, *supra* note 72, at 147 (Chief Judge Breitel admitting that Penn Central’s pursuit of the remand option would only result in a “mare’s nest” because Penn Central would be unable to satisfy the court’s criteria.).

<sup>309</sup> *Penn Central*, 366 N.E.2d at 1279 (conceding that Penn Central would inescapably fail at a new trial, in part due to the “impenetrable densities” of the issues posited by the court).

<sup>310</sup> *Id.* at 1276.

<sup>311</sup> *Id.*; *see also* 2 ORGEL, *supra* note 122, § 216, at 138 (noting “the impossibility of segregating for separate analysis an element of value inextricably entwined with the value of the entire property”).

Central rather than the City, which created the problem by its regulation, stood to benefit from its implementation, and *prima facie* was better equipped to meet that burden with tax, archival, and demographic records than a bankrupt private railroad corporation.

Just how one would have go about performing the impossible task of separating the inseparable, the court also did not bother to explain beyond offering the “elusive concept” of correlating property value with reasonable return.<sup>312</sup> With all due respect, this was not legal analysis, nor was it a coherent statement providing any insight into what Penn Central would have to prove on remand that would satisfy the court. It was doubletalk, or as Wade aptly characterized it, a prime example of the “analytically impoverished takings phraseology”<sup>313</sup> that seeks to supplant rigorous economic analysis with at best imprecise and at worst confusing words. The only specific suggestion the court offered that even remotely touched on valuation, was that value might be determined by looking to “assessed valuation *perhaps*, as a basis for determining the reasonableness of return.”<sup>314</sup> Here, the word “circularity” fails to do justice to the resulting intellectual and moral hash. Penn Central was thus told that in an effort to ascertain the reasonableness of the government regulation it was challenging as confiscatory, it should look to the very sum at which the government had assessed its property.

What made the *Penn Central* opinion even worse was that a scant two paragraphs after thus sending Penn Central off on this economic wild goose chase, the Court of Appeals tipped its hand and made clear that its analysis had not been intellectually honest. It did so by positing that in determining whether a private property produced a reasonable return, it was of importance to note that “the property may be capable of producing a reasonable return for its owners *even if it can never operate at a profit.*”<sup>315</sup> Shorn of its context, this statement was not unreasonable; businesses regularly fail to achieve or maintain profitability, which

<sup>312</sup> *Penn Central*, 366 N.E.2d at 1275.

<sup>313</sup> Wade, *supra* note 8, at 307.

<sup>314</sup> *Penn Central*, 366 N.E.2d at 1275 (emphasis added) (ignoring the settled rule that assessed valuation is usually excluded from evidence in valuation litigation due to its notorious unreliability); *see, e.g.*, CAL. EVID. CODE § 822(a)(3) (West 2005); *State v. Am. Support Found.*, 100 P.3d 932 (Ariz. Ct. App. 2004) (discussing why ad valorem tax assessment valuation techniques are improper in eminent domain law).

<sup>315</sup> *Penn Central*, 366 N.E.2d at 1276 (emphasis added). I cannot resist inquiring, if only rhetorically, if judges of the New York courts would consider it a “reasonable return” on their pension fund, were it revealed that the fund operations were losing money and could never operate at a profit. I am not oblivious to the differences between the profit expectations of a pension fund and a railroad operation — I only address the court’s meaning, if any, of the term “reasonable return,” to inquire if the fund’s negative “reasonable return” would be deemed acceptable to judicial retirees, if the judges’ retirement fund had been invested in — dare I say it? — railroad stocks and bonds.



is a reasonable attribute of entrepreneurship. But when they do, they are free to terminate their unprofitable operations. Penn Central did not have that option; as a public carrier in bankruptcy, it was compelled to continue operating at a loss, and under that ruling would inevitably run out of funds sooner or later.

It was that startling statement that, apart from ignoring governing law,<sup>316</sup> inspired Wade's characterization of the court's efforts as "economic lunacy," and rightly so.<sup>317</sup> It requires no further embellishment from me, except to observe that an investor knowingly parting with large sums of money in exchange for a multi-million dollar commercial property, with the realization that he would never see any profit from it, and indeed would suffer an ongoing loss for the indefinite future, would be a proper candidate for a conservatorship proceeding brought by his family.

One need not speculate as to how the "social ingredients" notion found its way into the Court of Appeals opinion because Judge Breitel explicitly provided the proverbial "smoking gun." Apart from various statements in the opinion that leave little to the imagination, he made it crystal clear in his extrajudicial public expressions that the economic burden imposed by the New York Court of Appeals on Penn Central, though one of the "main pins" of the case, as he put it,<sup>318</sup> was neither presented nor litigated by the parties in the lower courts, nor briefed in the New York Court of Appeals.<sup>319</sup> Nor was it based on any economic or appraisal evidence. Thus, consideration of this non-issue by the state high court was not only substantively lacking, but also improper under settled New York law.<sup>320</sup> The court also denied Penn Central due process of law by deciding, not the case submitted to it by the parties, but another case that it made up, to arrive at results that could not be reached on the basis of the statutory or decisional New York law, and that Penn Central never had an opportunity to address.

Judge Breitel's public concessions at the TDR Conference leave nothing to the imagination. There he admitted that when he wrote about the need to "separate the inseparably joint" elements of social and private value, he was sending Penn Central

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<sup>316</sup> Landmarks Preservation Law, N.Y. CITY ADMIN. CODE, ch. 8-A, *quoted in Penn Central*, 377 N.Y.S.2d at 35 (Lupiano, J., dissenting) (defining "reasonable return" as the earned income yielded by the improvement parcel during a test year, *which exceeds the operating expenses*).

<sup>317</sup> Wade, *supra* note 8, at 282, 307. Because I am not an economist and Dr. Wade is, I leave to him the task of dissecting the bizarre economics of the New York Court of Appeals's decision, and explaining the proper valuation approach. *See generally id.* at 298–306 (explaining the economics behind the *Penn Central* controversy and suggesting a more appropriate method of valuation).

<sup>318</sup> TDR Conference, *supra* note 72, at 147.

<sup>319</sup> *Id.* at 146–47.

<sup>320</sup> *See Feigelson v. Allstate*, 292 N.E.2d 787, 788 (N.Y. 1972); *Lindlots Realty Corp. v. County of Suffolk*, 15 N.E.2d 393, 395 (N.Y. 1938) (following the prevailing rule that parties not raising or litigating an issue in the lower courts are barred from raising it on appeal).

on a “search for the Holy Grail” as he put it<sup>321</sup> — a metaphorical expression that in popular idiom means a futile search for the unattainable, *pace* Indiana Jones. He also inferentially conceded that in deciding the *Penn Central* case the New York Court of Appeals sent Penn Central on a task that more resembled the proverbial “wild goose chase” than even a metaphorical “search for the Holy Grail,” which at least is a quest for something noble.<sup>322</sup> Why? Because he expressly conceded that if pursued in the trial court on remand under the rules laid down in his opinion, the *Penn Central* case would only produce not a “Holy Grail” of doctrinal development and orderly adjudication, but rather an intellectual “mare’s nest.”<sup>323</sup> He followed that statement with the joke that he would not have to worry about that because were the result of such a trial to come up to the New York Court of Appeals again he would no longer be there. I doubt that it will be funny to the New York judges who may be called on in the future to unravel such a “mare’s nest.”

This brings us to the “dark side” of the matter. If the foregoing shortcomings of the opinion can be said to be intellectual and economic, we now have to address the moral underpinnings of it all. First, the New York Court of Appeals’ decision contains revealing statements. It confesses:

In times of easy affluence, preservation of historic landmarks through use of the eminent domain power might be desirable, or even required. But when a *less expensive* alternative is available, especially *when a city is in financial distress*, it should not be forced to choose between witnessing the demolition of its glorious past and mortgaging its hopes for the future.<sup>324</sup>

One hardly knows where to begin in dissecting this statement, but since begin one must, one should note if only in passing, that no one proposed to demolish Grand Central Terminal. More important, we need to ask the question: “less expensive” *to whom?* When a loss is inflicted on an individual property owner in order to benefit the public, that does not reduce the cost; it only shifts the cost away from

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<sup>321</sup> See TDR Conference, *supra* note 72, at 146; see also Conrad & Merriam, *supra* note 72, at 5 n.17.

<sup>322</sup> See Costonis, *supra* note 26, at 417 (conceding that in spite of Professor Costonis’s admiration for Judge Breitel’s handiwork, the judicial invitation to Penn Central to separate the inseparably joint public and private components of value was “akin to christening a search for the Holy Grail”).

<sup>323</sup> TDR Conference, *supra* note 72, at 147.

<sup>324</sup> *Penn Central*, 366 N.E.2d at 1278. Note that even New York City’s counsel, the beneficiary of this opinion, conceded later that “obviously, that’s not a principle that can work. Either you can regulate or you can’t regulate; it cannot depend on the finances of the city.” Transcript, *supra* note 56, at 290.

the public which benefits, and in whose name the regulation is imposed, onto the affected property owner. Professor Arvo Van Alstyne dealt effectively with the “costs-less” fallacy in a law review article,<sup>325</sup> prompting the editorial staff to note that the question “is not *whether* these costs will be paid; it is *who* will pay them, in accordance with *what* substantive and procedural criteria, and through *which* institutional arrangements.”<sup>326</sup> The court’s embrace of this “less-expensive” approach was thus no more than a pursuit of the proverbial free lunch. Naturally, Judge Breitel later offered the customary judicial mini-Jeremiad about the unavailability of public funds to do what needs to be done, as a justification for plundering the resources of private citizens, asserting that “there just isn’t enough of that kind of money.”<sup>327</sup> But inflicting such losses on property owners is precisely what the Just Compensation Clause of the Constitution is intended to prevent, by imposing the burden on government to confine its acquisitory activities (whether *de jure* or *de facto*) to what it can pay for.<sup>328</sup> Moreover, in this case history proved that there *was* enough money. Grand Central Terminal was eventually restored to its former glory with public, not private, funds.<sup>329</sup>

Second, as a matter of both principle and law, it is difficult to accept the notion that the condition of the public purse delimits a specific constitutional provision explicitly set out in the Bill of Rights. Are we to take it that an impecunious municipality can get a free pass to violate its constitutional obligations and acquire private property for less than the law requires?<sup>330</sup> Wouldn’t that, by parity of reasoning, also imply that a wealthy community enjoying a fiscal surplus should have to pay

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<sup>325</sup> Arvo Van Alstyne, *Just Compensation for Intangible Detriment: Criteria for Legislative Modifications in California*, 16 UCLA L. REV. 491 (1969).

<sup>326</sup> Editorial Forward, 16 UCLA L. REV., at vii (1969).

<sup>327</sup> TDR Conference, *supra* note 72, at 87. How could he tell? What makes such judicial assertions particularly offensive is that in eminent domain cases, where condemnees challenge the right to take by arguing that the condemnor lacks the necessary funds to complete the project, the judicial response is to refuse to entertain such arguments. See Thomas J. Posey, *This Land Is My Land: The Need for a Feasibility Test in Evaluation of Takings for Public Necessity*, 78 CHI-KENT L. REV. 1403, 1403–05 (2003).

<sup>328</sup> See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (the public acquires only what it pays for); *Costonis*, *supra* note 26, at 413 (conceding that “the implication that impoverished cities somehow enjoy a lesser duty to compensate than affluent ones is dubious”). In other words, there is no justification for an impecunious municipality shifting its financial problems onto an innocent bystander, *a fortiori* when the straitened municipal condition is brought about by the city’s own profligacy, and where the bystander is insolvent due to large socio-economic changes in society that are beyond its control.

<sup>329</sup> See Herbert Muschamp, *Restoration Liberates Grand Vistas, and Ideas*, N.Y. TIMES, Oct. 2, 1998, at B6, available at 1998 WLNR 2796497.

<sup>330</sup> For a judicial articulation of a negative answer to that question, see *Community Redevelopment Agency v. Force Electronics*, 64 Cal. Rptr. 2d 209 (Cal. Ct. App. 1997) (denying an agency whose redevelopment project failed, the right to pay the condemnation judgment in installments).

for all of condemnees' demonstrable losses including those that are ordinarily non-compensable under current law, plus perhaps a *solatium* payment, as has been done at times in other countries? It seems to me that the definitive answer to arguments of municipal poverty was delivered by the U.S. Supreme Court as a matter of constitutional principle, when it observed, in *Watson v. City of Memphis*, that "vindication of conceded constitutional rights cannot be made dependent on any theory that it is less expensive to deny than to afford them."<sup>331</sup> Similar irresponsible government arguments of unaffordability have been repeatedly rejected by courts in cases where states that were sued for violation of prisoners' constitutional rights tried to plead budgetary constraints as a defense.<sup>332</sup> Indeed, as the California Supreme Court sternly admonished, a defense lawyer's argument to a jury in general civil litigation that it should bring in a low verdict because of the modest economic resources of his client is a reversible act of misconduct.<sup>333</sup> I fail to see how such misconduct rises to the level of "sound policy" when engaged in by judges rather than lawyers.

Third, before simply accepting the court's justification for its holding on the basis of New York City's financially diminished condition, it seems appropriate to inquire how the City came to be in "financial distress" and whether the moral aspects of the answer to that inquiry warrant consideration. They do. As it happened, the unfortunate fiscal condition of New York City was brought about at the time by its own reckless profligacy. If we say with *Watson v. City of Memphis* that it is no defense for a defendant to raise its own diminished finances as a defense to being ordered to meet its constitutional obligations, then it follows *a fortiori* that where the assertedly threadbare condition of the public purse is the direct result of municipal financial improvidence engaged in for base political reasons, this unmeritorious defense has even less substance. After all, New York's financial distress had been caused by the fact that it had earlier frittered away its funds because the City was exceedingly open-handed in pursuing its liberal social agenda, and its former Mayor, John V. Lindsey, had been exceedingly generous with municipal employee unions in anticipation of his run for President of the United States.<sup>334</sup> But however motivated, spending its money elsewhere was an informed choice on the City's part, hardly making it a sympathetic candidate for judicial solicitude when it proclaimed itself to be lacking funds to compensate Penn Central for preservation of the Grand Central Terminal.<sup>335</sup> The court thus unwittingly provided us with another instance

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<sup>331</sup> 373 U.S. 526, 537 (1963).

<sup>332</sup> See, e.g., *Gates v. Collier*, 501 F.2d 1291, 1321 (5th Cir. 1974) (holding that inadequate resources do not justify denial of constitutional rights).

<sup>333</sup> See *Hoffman v. Brandt*, 421 P.2d 425, 428 (Cal. 1966).

<sup>334</sup> It was New York City's fiscal improvidence that brought it to the brink of bankruptcy and motivated President Gerald Ford to deny it federal aid, giving rise to the famous newspaper headline "FORD TO CITY: DROP DEAD", N.Y. DAILY NEWS, Oct. 30, 1975, at 1.

<sup>335</sup> *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 28-29 (1977) (deeming it a valid government choice to spend funds for different things as it wishes, but not at the expense of the

of *chutzpah*, whose classic illustration is the case of the convicted murderer who killed both his parents and then threw himself on the mercy of the court on the grounds that he was an orphan.<sup>336</sup> A city that recklessly spends itself into near-bankruptcy in order to gain a political advantage, and then cries poor mouth in court when confronted with its constitutional compensatory obligations, does not appear to be very far removed morally from that traditional *chutzpah* scenario.

Fourth, why not remind the City that if it wanted to meet its preservationist goals, “mortgaging its future” was not a horrible alternative, but rather the customary, financially sound way to obtain funds with which to make large, long-term capital investments? After all, the City was already deeply involved in the operation of Grand Central Terminal.<sup>337</sup> So why not do it the old-fashioned way: by borrowing the necessary funds, issuing municipal bonds and then paying them off over a period of time? In fact, Grand Central Terminal was eventually restored with municipal funds, and therein lies a lesson. In the hands of the bankrupt Penn Central Company, the “preserved” Grand Central Terminal (after Penn Central lost its case), for all its architectural glory, was a shabby, dirty, smelly, neglected old building, used in places as a public urinal for the homeless, thus raising questions as to whether its preservation was worthwhile.<sup>338</sup> But in the hands of New York City after an infusion of public funds, it was renovated and became once again an aesthetic landmark of a great city,<sup>339</sup> thus illustrating the verity that things that are of value to the community should be maintained by the community whose members thus get to enjoy the benefit of preservation of significant historical structures while contributing pro rata to their preservation. I for one would call that good governance.

In sum, the economic reasons offered by the New York Court of Appeals for its decision revealed a judicial motivation that is unsupportable by any respectable economic, legal, or moral standard. It was evidently made up for the occasion in order to save the City from its financial obligation to observe the provisions of the Constitution. Wade may have been harsh in his choice of critical language, but he was intellectually and economically on-target when he characterized that decision as “the Breitel doctrine of legal-economic nonsense.”<sup>340</sup> The idea that a property

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rights of other parties). Municipalities are free to make fiscal choices, but those choices may have constitutional consequences.

<sup>336</sup> See *Williams v. State*, 190 S.E.2d 785, 785 n.1 (Ga. Ct. App. 1972); see also Gerald F. Uelmen, *Plain Yiddish for Lawyers*, 71 A.B.A. J. 78 (June 1985).

<sup>337</sup> See *Penn Central*, 377 N.Y.S.2d at 33 (Lupiano, J., dissenting) (noting that the New York Metropolitan Transit Authority together with the Connecticut Transportation Authority had leased Grand Central Terminal and were receiving all revenues from tenants and concessionaires); see also David W. Dunlap, *Transit Agency Seeking to Buy Grand Central*, N.Y. TIMES, Aug. 30, 1990, at B1, available at 1990 WLNR 3003997.

<sup>338</sup> See BABCOCK & SIEMON, *supra* note 68, at 71–75; see also *infra* note 446.

<sup>339</sup> See Muschamp, *supra* note 329. Also see a color photograph of the renovated terminal interior. *Id.* at A1.

<sup>340</sup> Wade, *supra* note 8, at 283.

may be producing a reasonable return for its owners even though it loses money and has no prospects of future operating profit does indeed sound more like financial double talk than an articulation of economic principle.

### XIII. THE U.S. SUPREME COURT: PENN CENTRAL'S FATAL CONCESSION

The *Penn Central* case that was reviewed by the U.S. Supreme Court bore little, if any, resemblance to the legal issues tried below. Whereas in the New York state courts Penn Central argued that the Landmarks Law forced it into an indefinite deficit operation, thus denying it a return on its property, in the U.S. Supreme Court Penn Central conceded that it was receiving a reasonable return.<sup>341</sup> How, in light of what thus proved to be Penn Central's fatal concession, the Court undertook to consider Penn Central's submission on the merits, is something of a mystery; it is one of the ostensible pillars of Supreme Court practice that issues presented for its review, that have not been raised or litigated below, will not be considered.<sup>342</sup> True enough, at the time the U.S. Supreme Court still had appellate jurisdiction, and technically Penn Central's cause was presented by appeal rather than by a petition for certiorari. That, however, was an academic distinction. It was then the Court's common practice to dismiss appeals it did not wish to consider, "for want of a substantial federal question."<sup>343</sup> Nonetheless, in *Penn Central* the Court noted probable jurisdiction, in spite of the fact that both parties disavowed the lower court's rationale for its decision, and that the Petitioner presented the Court with a new legal theory never raised or litigated below.

Some light has been shed on this mystery by recent disclosures of participants in the *Penn Central* Supreme Court litigation. To begin with, in spite of its victory below, New York City was not eager to defend Chief Judge Breitell's bizarre

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<sup>341</sup> *Penn Central*, 438 U.S. at 129–30, 129 n.26.

<sup>342</sup> See STERN ET AL., *supra* note 5, at 165–66. The Supreme Court does consider, at times, issues not raised below when they present plain error that requires reversal. *Id.* at 166–67. In *Penn Central*, however, the Court found no error and affirmed the decision of the New York Court of Appeals. See *Penn Central*, 438 U.S. at 104–06.

<sup>343</sup> STERN ET AL., *supra* note 5, at 241. The quoted phrase was a term of art and the Court frequently used it to turn away issues that were plainly federal and important, but which the Court for reasons best known to itself, did not wish to consider. A prominent and unfortunate example of that practice was the dismissal of the appeal in *Consolidated Rock Products Co. v. City of Los Angeles*, 370 P.2d 342, 344–45 (Cal.), *appeal dismissed*, 371 U.S. 36 (1962), which on a fully developed evidentiary record and lower-court factual finding that the property had been left with no use, squarely presented the question whether a regulation that rendered any reasonable use impossible constituted a taking. In *Consolidated Rock*, the regulation zoned the bed of an arroyo as single-family residential (a practically impossible use), while denying the Consolidated Rock Products Company a conditional use permit that would enable it to extract sand and gravel from the dry river bed, thus leaving the property with no permitted use. *Id.* at 344.

opinion, much less ask the U.S. Supreme Court to adopt it,<sup>344</sup> and wanted to get back to the question of reasonable return as decisive.<sup>345</sup> Similarly, Penn Central wanted to get away from having to deal with the Breitel opinion and wanted to address instead the issue of whether the City took Penn Central's air rights above the Grand Central Terminal.<sup>346</sup>

Penn Central presented four issues.<sup>347</sup> The Court declined to consider two of them because their premise was that a taking had occurred, raising matters of compensation.<sup>348</sup> Only the two issues that inquired *whether* a taking had occurred would be considered.<sup>349</sup> Of these, the first one, which dominated the second one, raised the question whether Penn Central was entitled to compensation for the air space above the Grand Central Terminal, which — it contended — had been taken by the regulation in question.<sup>350</sup> The remaining issue was rather hard to follow; as restated by the Court it asked,

[does] a finding that Penn Central has failed to establish that there is no possibility, without exercising its development rights, of earning a reasonable return on all of its remaining properties that benefit in any way from the operations of the Grand Central Terminal warrant the conclusion that no compensation need be paid for the taking of those rights?<sup>351</sup>

Translated into English, that issue stated as a triple negative, appeared to be directed to the transferable development rights aspect of the controversy — whether the availability of the transferable development rights kept Penn Central's predicament from becoming a taking. Thus, Penn Central's new principal legal submission was a far cry from the accounting matters (having to do with calculation of the deficit resulting from operation of the Grand Central Terminal in its regulated condition) that were tried below and reviewed by the Appellate Division. Nor did it deal with

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<sup>344</sup> See Transcript, *supra* note 56, at 290. As the City's counsel Leonard Koerner said, "[w]e wrote a piece in the [City's] brief in which we completely objected to Judge Breitel's position." *Id.* at 291. Koerner went on to proclaim himself to be "extremely pleased" with the fact that the Supreme Court rejected the doctrinal basis of *his own victory* in the New York Court of Appeals. *Id.* at 296. So pronounced was the City's disavowal of Judge Breitel's opinion that the City's counsel, concerned with the impact of that change of heart on Judge Breitel's perception of the matter, wrote to him, explaining "that while we loved what he did we really couldn't urge it on the Supreme Court. [Laughter]" *Id.* at 291.

<sup>345</sup> See *id.* at 292.

<sup>346</sup> See *id.*

<sup>347</sup> *Penn Central*, 438 U.S. at 122 n.24.

<sup>348</sup> *Id.*

<sup>349</sup> *Id.* at 122.

<sup>350</sup> *Id.* at 122 n.24.

<sup>351</sup> *Id.*

the matters decided by the New York Court of Appeals. It now raised entirely new issues.

As a mere mortal, I have no means at my disposal that might enable me to fathom why Penn Central was permitted to reach the merits of an issue that was neither raised nor considered below and why its appeal was not dismissed when it tried to do so.<sup>352</sup> This is *a fortiori* so because the Court did not intend the *Penn Central* decision to be an important addition to the jurisprudence.<sup>353</sup> Perhaps consideration of Penn Central's submission on the merits was only an application of the ancient Roman principle *quod licet Jovi, non licet bovi*, which translates into George Orwell's dictum that some animals are more equal than others.<sup>354</sup> Or perhaps the Court fell victim to the "have opinion, need case" syndrome<sup>355</sup> and seized on this opportunity to address the important, and at the time, novel subject of historical preservation and its limitations in cases where the regulations arguably render private property economically unviable.<sup>356</sup>

In some ways Penn Central's decision to shift theories was understandable. I don't envy Penn Central's appellate counsel the task of having to make the decision whether to present for review the New York Court of Appeals' strange economic theory and its pseudo-Georgist redefinition of "reasonable return" without a developed record — a formidable and unpromising task indeed. The Court could then simply say that Penn Central should have developed such a record after the New York Court of Appeals gave it the opportunity to do so.<sup>357</sup> And so, Penn Central's principal argument became the contention that the City of New York took its air

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<sup>352</sup> Evidently, Justice Brennan felt that sooner or later the Court would be called upon to decide a historical preservation case, so it might as well do so then. See Transcript, *supra* note 56, at 291 (noting that *Penn Central* "was one of those decisions that just called out for Supreme Court review" (quoting Stanford Professor Thompson, who at the time clerked for Justice Rehnquist)).

<sup>353</sup> See Transcript, *supra* note 56, at 295, 305.

<sup>354</sup> GEORGE ORWELL, *ANIMAL FARM* 92 (Harcourt Brace 2003) (1946). Compare the plight of the property owner in *Yee v. City of Escondido*, 503 U.S. 519 (1992), where the Court declined to consider an issue that had been raised by the owner, on the grounds that it had not been properly stated. Or take the case of *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), where the court, over the dissent of Justices Scalia, Thomas, and O'Connor, declined to address the vexing, long-standing problem of constitutionality of the use of transferable development rights, as going to liability or to compensation after liability is found.

<sup>355</sup> See *supra* note 218.

<sup>356</sup> See, e.g., *Lutheran Church in America v. City of New York*, 316 N.E.2d 305, 307 (N.Y. 1974) (discussing the City's refusal to let a private charitable organization alter its landmark-status building, which had become inadequate for the organization's needs, without providing compensation to the organization).

<sup>357</sup> See *Penn Central*, 438 U.S. at 121 n.23, 122 (noting that Penn Central did not avail itself of the opportunity granted it by the New York Court of Appeals to develop the factors discussed by that court).



rights above the Grand Central Terminal.<sup>358</sup> Before commenting on the U.S. Supreme Court's opinion, one should reflect on the bizarre fact that of the four levels of courts that considered the *Penn Central* controversy, the last two decided the case on legal grounds that had nothing to do with the grounds on which the first two courts made their decision, and the three appellate courts decided issues that had nothing to do with each other, thus permitting one to wonder what was really going on here.

The Supreme Court opinion began with a review of inverse condemnation cases decided by the Court in the past, and then turned to the specifics of the *Penn Central* case. It is here that we get a glimpse of the Court's perception of this case because the opinion repeatedly states that Penn Central submitted its case on the premise that "any substantial restriction imposed pursuant to a landmark law must be accompanied by just compensation."<sup>359</sup> Actually, Penn Central's submission was not so extreme; it argued below that the restriction that caused the taking was not just any restriction, but rather a catastrophic one that denied it any reasonable return on the property to which it was entitled under the Historical Preservation Law, and forcing it into an ongoing, deficit-generating condition.

As noted, in the U.S. Supreme Court, Penn Central changed theories and conceded that its property was capable of earning a reasonable return. Instead, it sought to establish that its air rights over Grand Central Terminal had been taken, analogizing to cases of takings of avigation easements.<sup>360</sup> Under Penn Central's view of the situation, it did not matter whether the City flew aircraft through the airspace over Grand Central, or whether it forbade Penn Central to use that airspace. Either way the airspace was taken from Penn Central and became unavailable for its private uses.<sup>361</sup> Though it is the prevailing view that it is the deprivation of the owner, not the accretion of any interest to the taker that constitutes the taking,<sup>362</sup> the Court looked to the property interest that was left to Penn Central. It drew a distinction between physical invasions of property (including its superadjacent air space) and regulations that in the name of the police power serve to protect public health, safety, welfare, and morals — in this case promoting historical preservation, a proper object of governmental regulation. The Court and Penn Central thus talked

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<sup>358</sup> See Transcript, *supra* note 56, at 292.

<sup>359</sup> *Penn Central*, 438 U.S. at 129 (emphasis added); see also *id.* at 119 n.20 (ascribing a similar statement to the trial court); *id.* at 131 ("Appellants' position appears to be that the only means of ensuring that selected owners are not singled out to endure financial hardship for no reason is to hold that any restriction imposed on individual landmarks . . . is a 'taking' requiring the payment of 'just compensation.'").

<sup>360</sup> *Id.* at 130 (discussing the impairment of air rights); cf. *United States v. Causby*, 328 U.S. 256 (1946) (holding that low-flying aircrafts over one's property constituted a taking); *Griggs v. Allegheny County*, 369 U.S. 84 (1962) (finding an air easement resulting from low-flying county-owned planes).

<sup>361</sup> *Penn Central*, 438 U.S. at 130.

<sup>362</sup> *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945).

at cross purposes; Penn Central spoke of a de facto regulatory imposition of a servitude on the air rights above its property, which is inherently a partial taking both qualitatively and quantitatively, while the Court spoke of the property *as a whole* still retaining some utility to Penn Central, which was not inconsistent with Penn Central's legal argument. The Court thus evaded Penn Central's point, by giving no consideration to the argument that the City de facto took an easement above the Grand Central Terminal building, which is axiomatically an interest in land that is less than the property as a whole, but whose taking requires compensation.<sup>363</sup>

The U.S. Supreme Court's opinion in *Penn Central* has it that the question of whether a regulation works as an uncompensated taking of property is determined by consideration of three factors: (a) the character of the government action,<sup>364</sup> (b) the economic impact on the property owner, and more particularly (c) the extent to which the regulation interferes with the owners' "distinct investment-backed expectations."<sup>365</sup> This sounds to me like another way of looking at the economic impact on the property owner. The "character of the government action" goes primarily to the question of whether the interference with private property is physical or non-physical, a matter that was not in issue in *Penn Central*, and that was definitively settled a short time later in *Loretto v. Teleprompter Manhattan CATV Corp.*<sup>366</sup> in favor of a categorical rule that permanent physical invasion and occupation of private property is a taking. Obviously, this is not a decisive factor because if it were, only physical takings would be compensable. In any event, on the facts at hand the "character" part of the test was not in issue. That left the question of impact on the owners' economic condition caused by the regulation that, as noted *supra*, was catastrophic.

The last factor, or its variations — such as "investment-backed profit expectations"<sup>367</sup> — has been repeated by the Supreme Court a number of times, with no attempt by the Court to explain what it intended this phrase to mean, how it fits into the scheme of constitutionally protected property rights, or how it is to be applied

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<sup>363</sup> See JACQUES B. GELIN & DAVID W. MILLER, *THE FEDERAL LAW OF EMINENT DOMAIN* § 4.2(M)(7), at 336 (1982).

<sup>364</sup> See *Eagle, Character, supra* note 52, at 459.

<sup>365</sup> *Penn Central*, 438 U.S. at 124. The quoted phrase was appropriated, in somewhat truncated form, from Frank I. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of Just Compensation Law*, 80 HARV. L. REV. 1165, 1233 (1967). Professor Michelman's actual phrasing was "distinctly perceived, sharply crystallized, investment-backed expectation." The individual who served as Justice Brennan's clerk at the time, confirmed in a telephone conversation with me (on Feb. 24, 2004), that he was acquainted with Michelman's article, having studied it in law school, and he was the one who inserted the "expectations" phrase into the draft of Justice Brennan's *Penn Central* opinion.

<sup>366</sup> 458 U.S. 419 (1982).

<sup>367</sup> *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 349 (1986).

in land-use controversies.<sup>368</sup> The Court thus provided an excellent illustration of Dwight Merriam's immortal dictum that when the Supreme Court coins a new term in the land-use field, land-use lawyers will be buying new cars in the next three years.<sup>369</sup> I suppose we all should be grateful to Justice Brennan's clerk for not inserting Michelman's entire phrase — "distinctly perceived, sharply crystallized, investment-backed expectations" — into the *Penn Central* opinion. God only knows what Byzantine intellectual horrors we and our clients would have been subjected to if we also had to parse "distinctly perceived," and "sharply crystallized" along with the other imprecise terms in that phrase. On the other hand, if Merriam is right — as he appears to be — had "distinctly perceived" and "sharply crystallized" made it into the *Penn Central* opinion, inverse condemnation lawyers would probably be driving Aston-Martins by now.

It is also interesting to note that when Justice Brennan, the author of *Penn Central*, summed up his handiwork three years later in his celebrated dissenting opinion in *San Diego Gas & Electric Co. v. City of San Diego*,<sup>370</sup> he noted only two of *Penn Central*'s three factors as being particularly relevant: (a) the economic impact on the owner, and (b) the character of the government action.<sup>371</sup> He did not mention the expectations element, thus justifying the surmise that perhaps he was no longer committed to it, or perhaps he no longer saw it as sound, or at the very least, that he no longer saw it as particularly significant in the same way he did the other two factors. Possibly, it only signifies that Justice Brennan's new clerk in the *San Diego* case was unable to fathom the meaning of that phrase, so he simply ignored it. If so, who could blame him?

The Court's failure to define or otherwise explain the "expectations" phrase is no small oversight. Established constitutional doctrine has it that not all private economic advantages constitute constitutionally protected "property" in taking cases, and that it is only those economic advantages that are protected by law that enjoy the status of compensable property.<sup>372</sup> Historically, it had been believed that only

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<sup>368</sup> See Steven J. Eagle, *The Rise and Rise of "Investment Backed Expectations"*, 32 URB. LAW. 437 (2000); Michael M. Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning*, 20 URB. LAW. 735, 765–70 (1988); Robert M. Washburn, "Reasonable Investment Backed Expectations" as a Factor in Defining Property Interest, 49 WASH. U. J. URB. & CONTEMP. L. 63 (1996); Daniel R. Mandelker, *Investment-Backed Expectations: Is There a Taking?*, 31 WASH. U. J. URB. & CONTEMP. L. 3 (1987). For a humorous treatment of this subject, see Bruce W. Burton, *Post-Lucas Regulatory Takings and the Supreme Court's Riddle of R.I.B.E.: Where No Mind Has Gone Before*, 25 U. TOLEDO L. REV. 155 (1994).

<sup>369</sup> Dwight H. Merriam, *A Planner's View of Dolan*, in TAKINGS, *supra* note 236, at 212.  
<sup>370</sup> 450 U.S. 621 (1981).

<sup>371</sup> *Id.* at 648 (Brennan, J., dissenting).

<sup>372</sup> *United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945) (finding that economic interests in property require compensation for their taking when the courts "compel others to forbear from interfering with them or to compensate for their invasion").

recognized interests in property or vested rights to proceed with an improvement of land, as opposed to subjective economic expectations, enjoy legal and hence constitutional protection. But if we say with the U.S. Supreme Court that there are other, investment-backed expectations out there that enjoy constitutional protection, then it follows that under *Willow River*, they too are constitutionally protected “property.” This was obviously a matter of moment, crying out for some elaboration or explanation that the Court did not provide. To make matters more confusing at the present time, the *Penn Central* multi-part test is different from a later, two-part regulatory taking test articulated by the court two years later in *Agins v. City of Tiburon*, whereby a government regulation is deemed a taking when (a) it fails to advance a legitimate state interest or (b) imposes severe economic hardship on the regulated property’s owners.<sup>373</sup>

Besides, apart from the fact that the “expectations” test is at best confusing, it is at times meaningless because — at least as used by the courts — it presupposes the existence of a would-be developer out to build on the subject land, who acquired it by paying for it (thus making his interest “investment-backed”) with an expectation to do so. But this is neither an accurate nor a complete picture of reality. Land is owned by many different kinds of people with different motivations, plans and hopes. What if the land owner is not a developer, but rather has acquired the property by inheritance, or as compensation for services rendered, or in settlement of litigation, or bought it at a foreclosure sale, or won it in a card game or a lottery, thus acquiring it with no prior expectations, one way or another? Are such land-owners non-persons whose constitutional property rights are less worthy of constitutional protection than those of a developer? If so, why? Must one establish some sort of “correct” provenance before one’s property becomes constitutionally protected? What if the owner bought land as a long-term investment (without any initial intention to improve it), following the wisdom of Will Rogers who famously opined that one should buy land as a long-term investment because it’s the only thing they ain’t makin’ any more of? In fact, under eminent domain valuation law, owning and holding land for future appreciation may be in itself its highest and best use.<sup>374</sup> More important, why should an aggressive developer with a lot of money to invest and high expectations supported by a track record of successful building in spite of occasional temporary regulatory obstacles, get a better break from the law than other people who may not be eager to develop, or who may favor less intensive, more phased-out development, or who may want to hold land for the long term

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Unfortunately, this formulation is circular. Courts protect economic interests when they are deemed “property,” but *Willow River* has it that they are “property” when the law protects them.

<sup>373</sup> 447 U.S. 255, 260 (1980).

<sup>374</sup> *State v. Whitlow*, 52 Cal. Rptr. 336, 341–42 (Cal. Dist. Ct. App. 1966); *Comm’r of Transp. v. Bakery Place Ltd. P’ship*, 849 A.2d 896, 898 (Conn. App. Ct. 2004) (appraisers for both sides agreed that the land’s highest and best use was to keep it vacant).

hoping for a high return in the far future when they retire, or just want to leave it to their progeny? There is nothing unreasonable about any of these scenarios or about the owners' expectations that arise from them. It seems plain to me that whatever may be said about the motivations and visions for the future of any of these people, they all harbor the incontestable and perfectly reasonable expectation *that their constitutional rights will not be violated, for it is those rights, not one's subjective hopes or expectations for future use of one's property that are — and should be — constitutionally protected.*

Moreover, given the new environmental ethic that deplores aggressive development of land and lauds those who refrain from doing so, at least for the time being, why should environmentalist “good guys” be penalized by receiving lesser protection from the Constitution than their “bad guy” counterparts who, in the fashionable parlance of environmental activists, are out to rape the land in a quest for quick profits, and whose quite reasonable investment-backed expectations reflect that, certainly in cases where the land is already zoned for uses contemplated by the developer? In any event, the property owner in such cases is not complaining about the loss of expectations, but of a taking of the property to which the expectations may attach.

The Court's use of the “expectations” phrase in the *Penn Central* opinion bears the earmarks of having been adopted by its original author as a rhetorical rather than an analytical effort. It has been believed widely — correctly, as it turns out — by specialized land-use lawyers deeply involved in this subject, that this phrase was inserted into the *Penn Central* opinion by Justice Brennan's clerk who consulted Professor Michelman's prestigious article<sup>375</sup> (that has throughout enjoyed something of an iconic stature in the pertinent literature in spite of its dense academic prose), and in the process came across the phrase “distinctly perceived, sharply crystallized, investment-backed expectations,” which seemed apt for linguistically ornamental use in the task at hand, though hardly a manageable statement of a black letter rule of law capable of being applied in litigation before trial court judges who are rarely

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<sup>375</sup> Michelman, *supra* note 365, at 1233. When read in context, it seems clear — or at least as clear as anything in Professor Michelman's article is — that he was not trying to create a new standard of a taking *vel non*, but rather drawing a distinction between a regulatory diminution in value and complete destruction of a property interest. *Id.* at 1232–33.

Michelman's entire sentence reads:

More sympathetically perceived, however, the test poses not nearly so loose a question of degree; it does not ask “how much,” but rather (like the physical-occupation test) it asks “whether or not”: whether or not the measure in question can easily be seen to have practically deprived the claimant of some distinctly perceived, sharply crystallized, investment-backed expectation.

*Id.* at 1233. For an insight as to how the “expectations” phrase found its way into the *Penn Central* opinion, see Transcript, *supra* note 56, at 308–09.

willing or, with all due respect, capable of plumbing tenuous linguistic metaphors articulated in dense academic prose even when incorporated in Supreme Court opinions.<sup>376</sup> It seems likely that once the “expectations” phrase found a home in *Penn Central*, it was noted by subsequent Supreme Court clerks who likewise proceeded to use it, not only rhetorically, but also precedentially in the sense that they could now look to and cite prior opinions containing it. Unfortunately, like their predecessor, they did not explain its meaning either. It all brings to mind the line of California’s Chief Justice, the late Roger Traynor, who once observed that there are notions embedded in the law that have never been cleaned and pressed and might disintegrate if they were.<sup>377</sup> *Penn Central*’s “expectations” phrase would seem to provide a prime candidate for such intellectual “cleaning and pressing.”

The imprecision of the “expectations” phrase inspired regulatory extremists to argue that landowners’ expectations were not reasonable in cases where regulatory agencies were known to be contemplating future regulations, and hence, went the argument, the owners’ right to build somehow vanished, notwithstanding the ostensible availability of remedies under the substantive regulatory takings doctrine. This approach had it that because land purchasers were on notice that the government will or merely *may* regulate their land in the future, their development expectations in purchasing it were not reasonable, and their right to redress for regulatory takings eventually inflicted on them, somehow became unenforceable. Notwithstanding that this nonsense found its way into court decisions, such as *Good v. United States*,<sup>378</sup> which went so far as to sweep within the “notice” concept the mere “regulatory climate” prevailing at the time of the purchase of the subject property, it remained nonsense, not only because of the intellectual flimsiness of this approach, but if nothing else, because the U.S. Supreme Court had already indicated that vendees of regulated land are as protected by the Constitution as the sellers,<sup>379</sup> a fact that the *Good* court simply ignored.

One would have thought that where public functionaries announce in advance

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<sup>376</sup> This brings to mind the criticism of the Supreme Court’s performance in *Bator*, *supra* note 57, at 686 (charging that the Supreme Court fails to fulfill its central function of providing usable law to the consumers of its output, creating “instability and uncertainty and confusion” instead). That article is of particular significance because Professor Bator, who was well-credentialed in his own right to express his views on the subject, died before completing it, and his article was finished and edited by Professor Charles Fried, former U.S. Solicitor General and Justice of the Massachusetts Supreme Judicial Court, *id.* at 673 n.\*, who would appear to be even more highly qualified to voice a critical assessment of the Supreme Court’s performance.

<sup>377</sup> Roger Traynor, *No Magic Words Could Do It Justice*, 49 CAL. L. REV. 615, 621 (1961).

<sup>378</sup> 189 F.3d 1355 (Fed. Cir. 1999) (holding that the “regulatory climate” at the time of purchase was enough notice to invalidate a land purchaser’s expectation that he would be permitted to put the land to lawful uses).

<sup>379</sup> *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 833 n.2 (1987) (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984)).

that they intend to act in ways that will impair or violate the constitutional rights of citizens, including the current landowners' vendees, that would be a factor in aggravation of the constitutional wrong, not a defense. Try to imagine what would happen in an analogous situation in which a municipality were to announce that it meant to enforce racially restrictive covenants in future land transactions, and hence vendees of other than the Caucasian race buying houses in the regulated community would be deemed on notice and thus unable to enforce their equal protection rights and their right of occupancy of their new homes, the substantive rule of *Shelley v. Kraemer*<sup>380</sup> notwithstanding. Absurd? Of course. But I am hard put to see the logical difference between that risible "reasoning" and the reasoning of the "notice" argument in which local government functionaries let it be known that some time in the future they *may* adopt regulations that *may* give rise to takings claims and thus violate the constitutionally protected property rights of newcomers lawfully purchasing land in the community. In other words, the question is whether the regulation is unconstitutional, not whether the government announces in advance that it will or may impose that regulation. Indeed, it is settled law that when property is slated for condemnation or even in the process of being condemned, it may nonetheless be freely bought and sold, with the constitutionally required just compensation payable to the persons who owned it at the time of the taking *when it occurs*.<sup>381</sup>

Fortunately, the Supreme Court blew the "notice" deformation of the law out of

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<sup>380</sup> 334 U.S. 1 (1948) (holding that restrictive covenants excluding persons of a certain race or color violate the Fourteenth Amendment).

<sup>381</sup> It has been a perfectly logical and long-standing rule of eminent domain law that, in the words of the California Supreme Court, "the right to recover [just compensation for a taking] remains in the person who owned the property *at the time of the taking* or damaging, regardless of whether the property is subsequently transferred to another person." *City of Los Angeles v. Ricards*, 515 P.2d 585 (Cal. 1973) (citations omitted) (emphasis added). Thus the transfer of title to the subject property whether before, during, or after its taking, is irrelevant to the question of *whether* just compensation is payable for the taking; it only determines who *receives* the compensation, and that turns on who owns it *at the time of the taking*, rather than at some other time. Moreover, the law is clear that, notwithstanding government plans to condemn, the owner retains the right to put his property to any lawful use until such time as it is formally taken, *including the time after the government has filed a slow-take condemnation proceeding* in which the taking does not occur until after the final judgment is entered and just compensation paid. *Kirby Forest Indus. v. United States*, 467 U.S. 1 (1984); *see Matthews v. Md. Nat'l Capital Park & Planning Comm'n*, 792 A.2d 288 (Md. 2002) (holding that property must be valued considering the owner's improvements created after commencement of condemnation proceedings, up to the point of actual taking). Additionally, government expressions and regulations of property based on a prognostication of a future taking, far from providing a defense, are illegal, *Kissinger v. City of Los Angeles*, 327 P.2d 10 (Cal. 1958), and may under some circumstances give rise to inverse condemnation liability, *Klopping v. City of Whittier*, 500 P.2d 1345 (Cal. 1972). *See generally* Kanner, *Condemnation Blight*, *supra* note 166.

the water in *Palazzolo v. Rhode Island*.<sup>382</sup> Justice Kennedy aptly observed that one cannot thus put an expiration date on the Fifth Amendment's prohibition on uncompensated takings,<sup>383</sup> although Justice O'Connor, who concurred, was unwilling to give up this unsound idea altogether, arguing that the property owner's "investment backed expectations" should retain a role in deciding whether a taking has occurred.<sup>384</sup> She thus demonstrated her lack of understanding that there is a perfectly proper market in distressed properties that are regularly sold and bought by buyers who buy them with a clear understanding of their flaws, whether utilitarian, physical, or regulatory, which, at least in the buyer's opinion, have the potential of being remedied.<sup>385</sup> People active in this market are risk takers and that fact in no way makes their expectations unreasonable, whether they succeed or fail in their effort to achieve their investment objectives in a lawful way, whether trying to repair physical faults of the property, or trying to get the property rezoned, or obtaining the necessary entitlements for construction. They take risks in the hope of attaining high returns, and that is why they pay less. But this is not the kind of risk taken by the purchaser of a lottery ticket, as has been suggested. On the contrary, a lottery, even when honestly run, is inherently a random, arbitrary process. On the other hand, government-administered land-use regulations, one would fervently hope, are made of more principled stuff than that, and a showing of regulatory arbitrariness is usually tantamount to a showing of invalidity of the challenged regulation. The risk that investors in land take is that they may fail in achieving their investment objectives when *lawfully exercised* government discretion goes against them, not that the government will resort to illegalities and go "too far" by imposing unconstitutionally confiscatory regulations on their holdings. They no more take the risk of being treated in an unconstitutionally confiscatory fashion than they risk being imprisoned without cause and trial, or being compelled by the government to embrace a particular religion. Whether or not the government gives prior "notice" of its intentions or plans to act in an unconstitutional fashion is

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<sup>382</sup> 533 U.S. 606 (2001).

<sup>383</sup> *Id.* at 627.

<sup>384</sup> *Id.* at 633 (O'Connor, J., concurring).

<sup>385</sup> Thus, properties are commonly advertised and bought with the avowed expectation that the buyer will be able to obtain the necessary entitlements to build, including rezoning to a higher use in appropriate cases, or will otherwise remove flaws in title or condition. Such efforts by the buyer may succeed or fail, but there is nothing unreasonable about seeking the entitlements necessary for development. There is nothing exotic about any of this; it is very much a part of the conventional property valuation process. See *State v. St. Charles Airline Lands, Inc.*, 871 So.2d 674 (La. Ct. App. 2004) (allowing appraisers to consider the probability of obtaining a wetlands permit in valuing land). In fact, appraisers may consider potential use as an attribute of a property's fair market value, properly assigning an additional increment of value to the subject land where such a probability exists. GELIN & MILLER, *supra* note 363, § 3.2, at 114–18; see Steven J. Eagle, *The Regulatory Takings Notice Rule*, 24 U. HAW. L. REV. 533, 553 (2002).



simply beside the point, except to the extent it tends to show that the constitutional deprivation was intentional, thus making liability clear.

On principle, their investment strategy is no different than the case of people who pay low prices for securities of companies experiencing business reverses. The risk these investors undertake is that the market may turn against them, or that their hopes of being able to succeed under discretionary, but *lawful*, regulations will not succeed, *not* that the government will steal their assets in violation of the Constitution. There is nothing wrong with such expectations. They are very much a part of the real estate market as Justice Scalia correctly pointed out.<sup>386</sup>

Turning back to *Penn Central*, even under its reasoning the expectations element should not have been an obstacle because it was a part of Penn Central's quite reasonable expectations at the time Grand Central Terminal was built in 1913, that at a minimum, a twenty-story tower would be eventually constructed directly above the terminal,<sup>387</sup> leaving only the question whether building a structure taller than that would be unreasonable *over a half century later after midtown Manhattan had been transformed into the heart of one of the world's greatest cities, widely noted for the prevalence of high-rise buildings*. The suggestion implicit in the notion that the "expectations" of an owner must be immutably frozen as of the time when the investment-backed purchase is made, and that they do not encompass the buyers' visions or future developments in the area, makes no sense. Apart from being contrary to the prevailing motivation of real property buyers and of market reality, it implicitly embraces community stasis as the *summum bonum* of urban planning; i.e., that individuals who may have bought property in 1913 for a buggy whip factory thereby become locked into buggy whip manufacturing as the property's use extending into the indefinite future as their sole "reasonable" expectation. Reality is to the contrary: people who buy commercial real estate do so with an eye to the future. Often, they forego immediate return precisely because they anticipate future appreciation or future development opportunities, usually both. Indeed, it always has been a staple of eminent domain law that property is valued not only considering its current use, but also uses to which it is reasonably adaptable,<sup>388</sup> even where the latter involve probability of future rezoning or of securing other land-use entitlements necessary for development.

Penn Central's original design of the Grand Central Terminal was also an investment-backed expectation, because the contemplated structure's original steelwork was constructed, obviously at extra expense, to be strong enough to support the planned twenty-story office tower as well as the terminal. Though it was perfectly reasonable for Penn Central to suppose that its expectation to be able to build on top of the Grand Central Terminal matured as the area surrounding it

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<sup>386</sup> *Palazzolo*, 533 U.S. at 636–37.

<sup>387</sup> *Penn Central*, 438 U.S. at 115 n.15.

<sup>388</sup> *Boom Co. v. Patterson*, 98 U.S. 403 (1879).

changed, the Court ducked the issue by hinting that perhaps Penn Central should have kept on applying for permission to build, until it reached a point the City's regulators would find agreeable,<sup>389</sup> a clearly unreasonable prospect considering the cost of architectural design of a forty-, thirty-, or even twenty-story building.<sup>390</sup> Such a suggestion would have been unreasonable because of the cost and delay in preparing successive architectural plans for high-rise buildings. Indeed, a few years later, in *MacDonald, Sommer & Frates v. Yolo County*, the Court made clear that pursuit of piecemeal multiple applications or other unfair procedures is not required to reach finality of administrative decision making.<sup>391</sup>

Finally, as far as the economic impact on the owner test went, Penn Central's U.S. Supreme Court submission was not promising because of its fatal concession that it was deriving a reasonable return from its Grand Central Terminal building.

Though the *Penn Central* controversy was ultimately about whether Penn Central or the City of New York should bear the cost of Grand Central's preservation, and though the courts resolved that issue by placing that burden on Penn Central, in fact it was not the Penn Central Transportation Company but the City of New York that eventually paid for the preservation of the Grand Central Terminal<sup>392</sup> (which is what should have happened from the outset without the litigation that deformed the law in ways that still bedevil us and that are likely to continue doing so for the indefinite future). In terms of specific outcome at least, this would thus appear to be an appropriate case for the invocation of Shakespeare's characterization "as a tale, told by an idiot, full of sound and fury, [s]ignifying nothing"<sup>393</sup> in the end, as far as the physical outcome of this litigation actually went. Moreover, the case did not explicate nor clarify taking jurisprudence. Instead, it confounded the law and has made hash out of the economics underlying the controversy.<sup>394</sup>

Even though it passed over the creative economics of the New York Court of Appeals, the U.S. Supreme Court also confounded the law by simply ignoring

<sup>389</sup> *Penn Central*, 438 U.S. at 136–37.

<sup>390</sup> As counsel for Penn Central put it, "the idea that we could have had approval of a 20-story building is pure fantasy." Transcript, *supra* note 56, at 310.

Eventually, the New York courts recognized the unreasonableness of such a course of action on the part of property owners, and held in *Spears v. Berle*, 397 N.E.2d 1304, 1308 n.4 (N.Y. 1979), that in the analogous context of wetlands preservation, it was the duty of the regulators to inform the would-be builders of what sort of improvement they would permit, so that the development efforts could be directed to improvements with a likelihood of being approved without wasting time and money submitting successive development proposals that the regulators had no intention of approving.

<sup>391</sup> 477 U.S. 340, 349 n.7 (1986).

<sup>392</sup> See Muschamp, *supra* note 329 (reporting that the City's Metropolitan Transportation Agency had invested some \$200 million to acquire a leasehold interest in and restore Grand Central).

<sup>393</sup> WILLIAM SHAKESPEARE, *MACBETH* act. 5, sc. 5, ll. 26–28.

<sup>394</sup> See Wade, *supra* note 8.

another fundamental doctrinal principle of eminent domain law. Instead of inquiring into Penn Central's loss, the Court focused instead on what Penn Central was permitted to keep, in derogation of the familiar principle of eminent domain law that "the question is what has the owner lost."<sup>395</sup> Suffice it to say here that until the Court spoke in *Penn Central*, it had always been a doctrine of taking jurisprudence (i.e., of eminent domain law) that partial takings, whether direct or inverse, are compensable and require payment of the value of the part taken, plus severance damages to the remainder.<sup>396</sup> While in *Penn Central* the taking was said to be regulatory rather than physical, one is at a loss to understand how the means used by the government to deprive land owners of the benefits of ownership of a large part of their property are determinative of whether compensation is payable. As Justice Brennan wrote three years later, it simply does not matter whether the government occupies the subject land and thus physically prevents the owners from putting their land to economically rational use, or whether the government uses its coercive regulatory power (i.e., its threat of fines and imprisonment) to prevent the owners' efforts to make economically rational use of the property.<sup>397</sup> It may matter little whether their land is condemned or flooded or whether it is restricted by regulations, if in all those cases the effect is to deprive the owners of all or nearly all beneficial use of it.<sup>398</sup>

Adding further intellectual insult to economic injury, the U.S. Supreme Court asserted in *Penn Central* — without any effort to provide a logical, doctrinal, or precedential basis for its assertion — that "[t]aking' jurisprudence does not divide a parcel into discrete segments,"<sup>399</sup> when in fact, even as the Court spoke, the preceding century's prevailing, thoroughly settled takings jurisprudence held the opposite. Much of the then existing takings jurisprudence involved government partial takings, notably takings of easements, which are quintessentially partial takings, both qualitatively and quantitatively. Even after *Penn Central* in *Nollan v.*

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<sup>395</sup> *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 236 (2003) (quoting *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910)); see *Kimball Laundry Co. v. United States*, 338 U.S. 1, 13 (1949) (holding that the correct measure of compensation was the lost rental and not the diminution of value during the temporary taking).

<sup>396</sup> Of course, once it is recognized that property owners have been stripped of the use of a significant part of their property, the difference between the two modes of taking becomes practically and economically insubstantial. The means used to effect the taking cannot change the fact that a taking has occurred in the sense that the regulation has gone too far, leaving the nominal owner of the overregulated land with no viable economic use. See *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting). Either way, the owners' most important interest in their property, i.e., the right to use it, has been taken.

<sup>397</sup> *Id.* (Brennan, J., dissenting).

<sup>398</sup> *Id.* (Brennan, J., dissenting).

<sup>399</sup> *Penn Central*, 438 U.S. at 130; cf. *United States v. Grizzard*, 219 U.S. 180 (1911).

*California Coastal Commission*,<sup>400</sup> the regulatory taking in issue involved the imposition of an easement over a part of the Nollans' land, but the Court had no difficulty finding the Commission's unlawful effort to obtain it through the use of its regulations to be a taking.<sup>401</sup> Indeed, in his *Penn Central* dissenting opinion, Justice Rehnquist followed prior law explaining that "[p]roperty is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired."<sup>402</sup> Of course, it is hornbook law that a servitude, or easement, can be either passive (requiring no physical entry onto the servient land) or active (allowing the dominant owner to use the servient owner's land).

Why a taking of substantial rights in the subject land, effected by nonphysical means, should be treated differently than a taking effected by physical means, or by the compulsion of a court judgment rendered in an eminent domain action, when all three have the same impact on the property's owners who, ironically, are assessed for taxes on the basis of the land's highest and best use, is something that the Court likewise did not bother to explain. Either way, the owners are deprived of the ability to put the affected part of their land to economically rational uses, leaving them only with a residue of what they once owned, able only to look at nominally "their" land, take a stroll on it, keep others from trespassing, as well as pay taxes and bear other burdens and liabilities of ownership. The nonphysical attributes of a partial taking may involve different property interests, or criteria of compensation, than a physical taking of title or possession, and in some situations — such as setback cases — may invoke the *de minimis* concept or confer offsetting benefits on the usable part of the regulated land, but it makes little sense to say that two modes of government action having precisely the same substantial, adverse impact on property owners' ability to derive benefits from ownership of their land, should result in directly opposite legal consequences. The problem here is the Court's refusal to reconcile its prior holdings that (a) constitutionally protected "property" consists of rights rather than things, and (b) that it is the deprivation of the owner rather than a gain for the taker that constitutes a taking.<sup>403</sup> After all, passive easements (such as sight easements for highways, or scenic view easements) are condemned regularly,<sup>404</sup> but no one that I know of has had the *chutzpah* to suggest that just compensation in such cases should be denied altogether.

<sup>400</sup> 483 U.S. 825 (1987).

<sup>401</sup> *Id.*

<sup>402</sup> *Penn Central*, 438 U.S. at 146 (Rehnquist, J., dissenting) (quoting *United States v. Dickinson*, 331 U.S. 745, 748 (1947)).

<sup>403</sup> *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 324 n.19 (2002).

<sup>404</sup> See, e.g., *Kamrowski v. State*, 142 N.W.2d 793 (Wis. 1966) (upholding condemnation of a scenic easement for just compensation).

As for singling out physical takings as uniquely requiring compensation upon their taking, those situations represent only the easy case. Any effort to differentiate between physical and non-physical takings of property rights runs head-on into what, for a long time, has been a bedrock concept of modern property law; i.e., that “breaking the close”<sup>405</sup> as a precondition to taking of property is an outmoded concept that no longer limits the characterization of government activities as takings. Noted scholars have derided the notion of property as being limited to its physical manifestations, as “anachronistic”<sup>406</sup> and “outmoded,”<sup>407</sup> as well as “primordial”<sup>408</sup> and “primitive.”<sup>409</sup> The U.S. Supreme Court expressly agreed with this concept of property in *United States v. General Motors Corp.*, where it explained that the “property” referred to in the Fifth Amendment’s Eminent Domain Clause denotes, not physical things, but a “group of rights inhering in a citizen’s relation to the physical thing,” such as “the right to possess, use and dispose of it.”<sup>410</sup> In fact, this Hohfeldian view<sup>411</sup> of property as a complex of rights, privileges, duties, and obligations, rather than dirt and bricks, goes back to the nineteenth century.<sup>412</sup> Therefore, while physical occupation or invasion of the subject property is clearly a taking of the “I-know-it-when-I-seize-it” variety, *Tahoe-Sierra*’s effort to cabin the physicality of the taking as categorically different from non-physical takings is inconsistent with modern principles of property law and makes little pragmatic sense. To say that physical taking cases are inappropriate as precedents in cases of regulatory takings, as mistakenly asserted by the Supreme Court majority in *Tahoe-Sierra*,<sup>413</sup> only creates another thought-proof compartment in an area of law that has too many inconsistencies in it as it is. Put another way, the mechanism of the taking does not make the taking any less a taking.

The correct standard came from Justice Holmes when he explained that “the

<sup>405</sup> “The unlawful or unauthorized entry on another person’s land; a common-law trespass.” BLACK’S LAW DICTIONARY 184 (7th ed. 1990).

<sup>406</sup> Arvo Van Alstyne, *supra* note 16, at 2 n.5 (1970).

<sup>407</sup> *Id.*

<sup>408</sup> William B. Stoebuck, *Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect*, 71 DICK. L. REV. 207, 210 (1967).

<sup>409</sup> Jacob H. Beuscher, *Notes on the Integration of Police Power and Eminent Domain by the Courts: Inverse Condemnation*, in JACOB H. BEUSCHER & ROBERT R. WRIGHT, *LAND USE* 72 (1968).

<sup>410</sup> *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377–78 (1945).

<sup>411</sup> WESLEY HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* 39 (1919).

<sup>412</sup> *Thompson v. Androscoggin River Improvement Co.*, 54 N.H. 545, 551 (1874).

<sup>413</sup> 535 U.S. at 323. A good example of the interrelation between physical and non-physical factors giving rise to a taking may be found in *Pumpelly v. Green Bay Canal Co.*, 80 U.S. 166 (1872). There, even though the taking was physical (flooding of the owner’s land), the Court analyzed the problem almost entirely in terms of the deprivation of the owner’s rights to the use of his land; i.e., the question was not whether the land had been flooded, but rather how the flooding affected the owner’s right of user.

question is what has the owner lost."<sup>414</sup> The owners can lose the benefits of ownership of their land just as effectively by being forbidden to put it to economically rational uses, as by its physical taking — certainly in those cases where as a result of the use-stultifying regulation they lose their property by foreclosure or through bankruptcy.<sup>415</sup> Thus, the question should be whether the owners have lost all or most of their land's utility or value; i.e., whether the regulatory impact on the owners is unreasonable. The word "unreasonable" is firmly established in the law, including constitutional law, and no reason appears why it cannot be used in cases of claimed regulatory takings by inquiring as a matter of fact whether the regulation's impact on the affected property is unreasonable.<sup>416</sup>

Returning to *Penn Central*, the Court obviously had the raw power to rule as it did. That much has to be recognized as a reality of governance. But that does not change the fact that the novel *Penn Central* rule, pretending that takings jurisprudence does not recognize partial takings, lacked any precedential or doctrinal foundation, and it stands until today solely on the basis of the Court's *ipse dixit*. One would think that so revolutionary a ruling that was inconsistent with prior law, would rest on something more than merely a one-sentence, casual assertion that for all we know may have been inserted into the opinion by a harried clerk executing an "all-nighter."

That the Court failed to provide a respectable, intellectual basis for its ruling on this point either then or thereafter, is yet another reason why *Penn Central* leaves much to be desired as principled law. It is a manifestation of a growing problem within the Supreme Court jurisprudence whereby the Court appears more interested in shaping policy rather than deciding issues of law — in governing, rather than in resolving legal disputes in a principled and consistent manner.<sup>417</sup> To that end, under the leadership of Justice O'Connor, resolution of these important issues on a factually ad hoc basis survives as a process that fails to provide proper guidance to parties in future litigation, and de facto transfers power of ultimate approval of almost anything of substance that goes on in society into the hands of appellate judges who, at least in the case of land-use regulations, usually lack the necessary knowledge and experience.

Not only does the ad hoc approach give rise to problems engendered by the

<sup>414</sup> *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910).

<sup>415</sup> See cases collected in Berger & Kanner, *Thoughts, supra* note 258, at 741 n.255.

<sup>416</sup> Thus, in the law of eminent domain it is a common question in precondemnation blight cases whether the government has delayed the condemnation for an unreasonable period of time, or has otherwise acted unreasonably. See *Klopping v. City of Whittier*, 500 P.2d 1345, 1355 (Cal. 1972) (requiring just compensation when the government has delayed condemnation for an unreasonable period of time). This is a factual inquiry for the trial courts that is freely made without any undue doctrinal difficulties.

<sup>417</sup> See Bator, *supra* note 57.

Court's unfamiliarity with land-use issues and its limited time to decide that is compelled by its case load, but land-use law often involves decisions that are not really legal in nature, but rather implicate land-use policy, local concerns, and politics, and, in the real world, a good deal of parochialism. However much the philosopher-king model<sup>418</sup> of judicial performance may be admired by some, judges — who are often former prosecutors or other government functionaries lacking experience in the private sector — are not uniquely qualified to make such decisions on an ad hoc basis.<sup>419</sup> Those of us who get our hands dirty laboring in these legal vineyards in the lower courts know that, at least as one moves down the judicial pyramid, it becomes apparent that many judicial “kings” are not very philosophical, and many judicial “philosophers” are not very intellectually regal. Judges are frequently not intellectuals, but rather pragmatists who achieved their position through politics, not legal scholarship, and who think of themselves as decision makers, not philosophers. These lower-level judicial decision makers are usually disinclined to parse vague language of lengthy Supreme Court opinions. They see their function as disposing of cases on their dockets, not poring over the dense prose of Supreme Court opinions that has given intellectual fits to knowledgeable commentators on both sides of the issue, much less discerning how the Court's vague language may be nuanced by the familiar dense prose of academic commentators. That being the case, these factual ad hoc decisions may as well be made by juries,<sup>420</sup> the same way other factual decisions are made in fact-bound controversies such as those prevalent in regulatory takings cases where the Supreme Court tells us that decisions are made on an ad hoc, factual basis.<sup>421</sup> At least in jury trials the factual decision that is said to lie at the core of these controversies is the product of twelve minds whose diverse outlooks and biases tend to balance each other, and appellate review focuses on whether there was sufficient evidence capable

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<sup>418</sup> PLATO, REPUBLIC 471c-474b (G.M.A. Grube ed., Hackett Publ'g Co. 1992) (380 BC).

<sup>419</sup> Moreover, as the California Supreme Court pointedly observed, there is often a close relationship between local government functionaries and local judges. *Garrett v. Superior Court*, 520 P.2d 968, 970 (Cal. 1974).

<sup>420</sup> See *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 703–07 (1999). The idea is prevalent in American law that there is no right to a jury trial in eminent domain because there were no juries at common law in British eminent domain — or as the British call them “compulsory purchase” cases — and therefore juries are not available under the Seventh Amendment, which preserves the right to trial by jury only in cases where such a right existed at common law when the U.S. Constitution was adopted. This is a myth. See Eric Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 NW. U. L. REV. 144 (1996). Juries were used in British valuation trials until 1845. 2 ORGEL, *supra* note 122, § 252, at 268–71. The pertinent legal history is explained by the British Court of Appeals in *De Keyser's Royal Hotel, Ltd. v. The King*, 2 Ch. 197, 222 (1919). See also Keith Davies, *The Jury in Eminent Domain*, in EMINENT DOMAIN AND LAND VALUATION 151 (ALI-ABA Course of Study, Jan. 4–6, 2001).

<sup>421</sup> *Penn Central*, 438 U.S. at 124.

of supporting the verdict, rather than having each appellate judge decide what verdict he or she would have returned at trial.

#### XIV. THE \$64 QUESTION: SHOULD PENN CENTRAL HAVE WON IN THE U.S. SUPREME COURT?

The answer to the above question is “yes,” but not necessarily for reasons contained in Penn Central’s submission. I have already expressed my views on the deficit operation theory that Penn Central originally presented at trial and on appeal in the New York Appellate Division, and that theory alone provided a sound basis for ruling in Penn Central’s favor. It fit into the parameters of *Nectow v. City of Cambridge*,<sup>422</sup> as well as those of public utility law. Unfortunately, Penn Central did not rely on *Nectow* and did not press that issue, choosing instead to rely on the deficit operation into which it had been forced. *Nectow* was not even mentioned in its briefing before the New York Court of Appeals, so one cannot very well fault the Court for not addressing it.

Readers of this Article — if they have read this far — must by now understand that I take a dim view of the New York Court of Appeals decision for the simple reason that it did not honestly address the issues tendered by the parties; it relied on no applicable precedent or legal doctrine, and its handiwork was not an adjudication of law, but rather an idiosyncratic policy decision that amounted to a back-door importation of some of Henry George’s failed ideas that even its beneficiaries disowned when the case reached the U.S. Supreme Court.<sup>423</sup> It focused on the benefit-to-the-owner feature of the failed Georgist system without giving consideration to entrepreneurial risk, or the benefits to society generated by the construction of Grand Central Terminal, to say nothing of the increased taxes of all sorts imposed on property owners and generated in the surrounding area.

As for Penn Central’s U.S. Supreme Court submission, I leave the task of defending it to Justice Rehnquist’s dissent,<sup>424</sup> noting only that once the Court chose to address the issue of taking of Penn Central’s air rights in spite of the fact that it had not been raised below, I believe there was merit to it. I see no substantial difference between the government saying to property owners “You can’t use your airspace because we mean to fly aircraft through it,” and saying “You can’t use your airspace because we like it the way it is.” Either way, the owners have lost the utility of their airspace — it has been de facto taken from them. The utility and value of such air space may be trifling in a rural area, but in the high-rise environs of mid-town Manhattan it is of great value — a fact that should have received careful consideration in the Court’s ad hoc factual inquiry calculus.

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<sup>422</sup> 277 U.S. 183 (holding that property regulations that deprived the subject land of reasonable return were constitutionally invalid).

<sup>423</sup> Transcript, *supra* note 56, at 290–91.

<sup>424</sup> *Penn Central*, 438 U.S. at 138–53 (Rehnquist, J., dissenting).



Be all that as it may, my view is that once the New York Court of Appeals ruled as it did, it provided Penn Central with a new, meritorious theory on which Penn Central should have won in the U.S. Supreme Court. The Court of Appeals decision unquestionably revolutionized the New York law of property, de facto transferring an important attribute of ownership (i.e., the right to receive a return on the full value of one's land) from its owner to the government. Thus, Penn Central would have been within its rights to invoke the teaching of *Hughes v. Washington*,<sup>425</sup> holding that it is unconstitutional for a state to effect a sudden, unanticipated change in private property rights, whereby rights that were deemed private before the lower court's decision become public afterwards. In *Hughes*, state law effected a sudden change whereby beachfront land that had traditionally been private became public by judicial fiat. And Penn Central was surely deprived of a substantial, valuable property right by the New York Court of Appeals decision which abruptly declared that significant elements of private property from which land owners were historically entitled to derive a reasonable return, de facto ceased to be private, and their nominal owners were no longer entitled to derive a return from their ownership, thus violating a long-standing principle of property law.

Of more immediate interest to the subject at hand was Justice Potter Stewart's concurring opinion in *Hughes*. He posited that "retroactive transformation of private into public property — without paying for the privilege of doing so"<sup>426</sup> is a taking. He reasoned that "the Due Process Clause of the Fourteenth Amendment forbids such confiscation by the state, no less by its courts than through the legislature, and no less when the taking is unintended as when it is deliberate."<sup>427</sup> More recently, the Court observed in the context of a taking case that "a State, by *ipse dixit*, may not transform private property into public property without compensation."<sup>428</sup> It seems clear that putting all else aside, under this approach Penn Central suffered just such a judicial taking of its property at the hands of the New York Court of Appeals, irrespective of whether the impact of the municipal regulation on Grand Central Terminal could be otherwise characterized as a taking. Moreover, because this judicial deprivation or taking occurred when the New York Court of Appeals, acting without warning or opportunity to be heard, abrogated the right to a return on all of one's property, and transferred that right to the public, this was the first time Penn Central could address this issue, and doing so in the U.S. Supreme Court would have been proper. However, Penn Central did not raise it, so its mention here is academic.

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<sup>425</sup> 389 U.S. 290 (1967) (finding it unconstitutional for a state to convert private beachfront property to public property with compensation).

<sup>426</sup> *Id.* at 298 (Stewart, J., concurring); see Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449 (1990).

<sup>427</sup> *Hughes*, 389 U.S. at 298 (Stewart, J., concurring); see also *Robinson v. Ariyoshi*, 753 F.2d 1468 (9th Cir. 1985), *vacated on other grounds*, 477 U.S. 902 (1986).

<sup>428</sup> *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980).

## CONCLUSION

With the Supreme Court's recent decisions in *Palazzolo*<sup>429</sup> and *Tahoe-Sierra*,<sup>430</sup> which have limited the availability of the categorical taking option as a means of relief to property owners complaining of confiscatory property regulations, the quarter-century-old, controversial *Penn Central* case has assumed added significance and has unwittingly become the "polestar" — the principal standard of regulatory taking law in most cases in which the non-physical taking is said to occur by way of regulations that have a severe economic impact on the regulated property owners, but fall short of total deprivation of their rights. Which is to say, most regulatory taking cases. Except for the comparatively rare categorical takings situations,<sup>431</sup> the cobbled together *Penn Central* three-part test of a regulatory taking contains the principal standard for determining whether or not a regulation is a compensable taking of property.<sup>432</sup>

But any way you slice it, *Penn Central* is an opinion that can be fairly characterized as a result in search of a rationale. As Judge Oakes wrote, the decision allows judges to reach whatever results they choose, with *Penn Central* providing a convenient makeweight.<sup>433</sup> With all due respect to all concerned, whatever that may be, it isn't law.

The preservationists were right when they demanded the restoration of Grand Central Terminal as the architectural and cultural icon of New York City. That it is, and I, a Californian, yield to no New Yorker in my admiration of the grandeur of that fine structure.<sup>434</sup> But saying that does not address the critical issue of what means should have been used to preserve it. Here, as is often the case with the

<sup>429</sup> *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

<sup>430</sup> *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002).

<sup>431</sup> *Loretto v. Teleprompter Manhattan CTV Corp.*, 458 U.S. 419 (1982) (finding that a categorical taking arises when the government physically occupies private land); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (enacting regulations that permitted third parties to enter private land); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) (denying a property owner an economically viable use of the property).

<sup>432</sup> See, e.g., *Friedenburg v. Dept. of Env'tl. Conservation*, 767 N.Y.S.2d 451 (N.Y. App. Div. 2003) (applying the three-part test of *Penn Central* to find a taking).

<sup>433</sup> See Oakes, *supra* note 40, at 613. As Justice Rehnquist's former clerk (who drafted the *Penn Central* dissenting opinion) put it: "[*Penn Central*] appears to offer refuge for virtually everyone — and in the process maybe doesn't say anything at all." Transcript, *supra* note 56, at 308. Well said.

<sup>434</sup> I suggest that next time you find yourself in New York City, you go over to Grand Central, stroll around, take in the sights, particularly the Grand Central Market, and raise a glass to toast your good fortune in being there. I did on October 1, 1998, when the newly restored Grand Central Terminal was formally rededicated. And a fine spectacle it was. By the way, while you are at it, seize the occasion and treat yourself to a meal at the Grand Central Oyster Bar. Have the oyster pan roast to make the cultural experience complete. Trust me.

environmentalist movement's other antics, land-use jurisprudence was treated to an unfortunate public spectacle of willful confusion between ends and means. And while that confusion prevailed in court and found a home in the decisional law — where it bids fair to consume judicial resources, vex land owners, and enrich lawyers in the years to come — it is doctrinally, economically, and morally defective.

Raise all the lawyers' wiles, quiddities, and pettifoggery you want; talk all the academic double-talk about "distinct investment-backed expectations" ("sharply crystallized" or otherwise); discourse on "non-segmentation," "conceptual severance," the "essential nexus," and the search for "the denominator" or the "Holy Grail" all you want, but after all is said, there is something very, very wrong with a supposed legal doctrine under which the highest court in the land, with over a half-century history of decision making in the regulatory taking field under its belt, proclaims itself to be "simply unable" even to state the elements of a regulatory taking cause of action. Worse, under *Penn Central*, what passes as law in this field allows the government to plunder most of a citizen's wealth, with the courts inquiring only whether something of value, anything at all, has been left to the victimized citizen.<sup>435</sup> Paradoxically, when the roles are reversed and the Court favors the government's litigational position, it executes a doctrinal about-face and has it that the decisive question is "what has the owner lost."<sup>436</sup>

The nightmarish procedural complexities of this field of law, even before they reached their current nadir, rightly inspired Fred Bosselman, one of the country's foremost and best informed (and significantly, most regulation-minded) land-use practitioners, teachers, and commentators to express his concern that the takings remedial regime had become so Byzantine as to deny due process of law to property owners, not by too little process, but by too much.<sup>437</sup> Since the time Bosselman spoke, things have degenerated into a wasteful, destructive game that consumes kings' ransoms in litigation expenses, but produces no discernible, much less reliable, substantive criteria applicable to future cases, nor effective remedial procedures, nor relief for genuinely aggrieved citizens, but often only shuttles them between courts in a manner that not too long ago was deemed the stuff of legal satire.<sup>438</sup> The upshot is that what we have on our hands can be fairly characterized

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<sup>435</sup> See, e.g., *William C. Haas & Co. v. City of San Francisco*, 605 F.2d 1117, 1118–19 (9th Cir. 1979) (finding no taking when 95% of value of the owner's \$2,000,000 parcel was destroyed by regulatory maneuverings). Though this does not appear in the opinion, Haas lost its property by foreclosure and was almost driven into bankruptcy.

<sup>436</sup> *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910).

<sup>437</sup> Fred Bosselman, *Land Planning and Regulation of Development* (A.L.I.-A.B.A. COURSE OF STUDY, Mar. 18, 1976), quoted in DONALD HAGMAN & DEAN MISCZYNSKI, *WINDFALLS FOR WIPEOUTS* 12 (1978). Bosselman is a co-author of *THE TAKING ISSUE* (1972).

<sup>438</sup> Berger, *Bait & Switch*, *supra* note 199, at 112 n.54 (retelling Arthur Train's vintage bit of classic legal satire about the wily Mr. Tutt who managed to persuade a federal court

at times as some sort of intellectual judicial *jihad* against property rights of Americans.

If that is supposed to be a principled legal regime, that by invoking “political ethics”<sup>439</sup> implements the Constitution’s solemn promise of protection of private property rights against government overreaching, it is certainly making its appearance in a convincing disguise.

There are seven specific lessons and one broader lesson to be learned from the *Penn Central* intellectual, economic, civic, and moral disaster:

- The common sense lesson is that if the City wanted the Grand Central Terminal saved and restored, it should have done just that in the first place, or worked out a compromise with Penn Central to accomplish the restoration by some sort of public-private arrangement, instead of assuring failure by trying to fob off the entire, financially unworkable task on a bankrupt corporation that lacked the spirit and the means to do the job even if it wanted to. Ironically, the restoration of Grand Central was eventually paid for with public funds anyway, so this whole intellectual and moral calamity was for naught.
- The civic lesson is that things that are of value to the community should be nurtured and preserved by the community. Preserving heritage and great artifacts of its civilization is not a cost-free process, and it becomes an odious one when a community’s “haves” try to foist its cost onto the “have-nots,” particularly when they enlist the courts in so immoral an enterprise.
- The social lesson is that while the do-gooder antics of influential members of New York’s high society may have been a factor in the *Penn Central* saga and made for an entertaining spectacle as it unfolded, at the end of the day the “Beautiful People” went home to their posh East Side penthouses, ultimately leaving the taxpayers holding the bag — *again*.<sup>440</sup>

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that jurisdiction in his client’s case lay in the state courts, and then persuaded the state court that it lay in the federal courts — a farcical situation that has become all too real in today’s regulatory taking law).

<sup>439</sup> *United States v. Cors*, 337 U.S. 325, 332 (1949).

<sup>440</sup> Such was also the case with New York’s Metropolitan Opera House. There, New York’s Beautiful People used their clout to persuade the legislature to prohibit temporarily the demolition of the Old Met building to give them time to raise money for its purchase. Of course, as usual, they talked a good game but in spite of their conspicuous wealth they never

- The moral lesson comes to us from Justice Black's admonition in *Armstrong v. United States*,<sup>441</sup> that the purpose of the Just Compensation Clause is to protect citizens from an overreaching government that would force individuals to bear public burdens alone, which "in all fairness and equity should be borne by the public"<sup>442</sup> that benefits from government acts.
- The economic lesson is captured by the old line that "there ain't no such thing as a free lunch," or as New Yorkers tend to phrase it in their quaint patois, "for nuttin' you get nuttin'." To put it in a more dignified way as did Justice Holmes in *Mahon*, the public, the same as private individuals, is entitled only to what it has paid for, and even when it wants something very much, it is not entitled to achieve its desire by a "shorter cut" than paying for the change.<sup>443</sup>
- The legal lesson is that while the "great body of the law consists of drawing . . . lines," as Justice Holmes put it,<sup>444</sup> the supposed "lines" judicially drawn in *Penn Central*, and now embedded in the law of inverse condemnation, are like the lines drawn in the blue skies by skywriters — attention-arresting when first appearing on high, but fuzzy to begin with, and quickly distorted or dissipated by shifting winds. The law, particularly decisional law, derives its legitimate strength from adherence to structure and process, every bit as much as from the substantive results it achieves in large controversies that capture public attention, as well as from the impartiality of its application. For if the "correct" results (politically or otherwise) were all there were to it, we would not need judges learned in the law to render decisions that shape public policy — any fair-minded, intelligent person would do nicely.<sup>445</sup> The courts are entitled to institutional

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raised the necessary funds. In the ensuing inverse condemnation action for a temporary taking, the citizens of New York wound up paying the tab in the *Keystone Associates* litigation. *Keystone Assocs. v. City of New York*, 307 N.E.2d 254 (N.Y. App. Div. 1973).

<sup>441</sup> 364 U.S. 40, 49 (1960).

<sup>442</sup> *Id.*

<sup>443</sup> *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

<sup>444</sup> *Schlesinger v. Wisconsin*, 270 U.S. 230, 241 (1926) (Holmes, J., dissenting).

<sup>445</sup> As a colleague of mine (who went on to become a judge) is fond of joking with the insight that experience and humor bring, insofar as results are concerned, most lawsuits could probably be resolved quickly and fairly by the nearest gas station attendant, the problem

respect by virtue of the great civic importance of their function, but their handiwork must earn respect for itself in the market place of ideas by its impartiality, the soundness of its doctrinal reasoning, its adherence to the rule of law, the strength of its moral fiber, the intellectual integrity of its output, and the pragmatic effect of its adjudication.

Application of these factors must ultimately produce the results, or something like them, that were contemplated by the law that inspired the adjudication in the first place. Otherwise, when the litigational outcome is at variance with the law's promise, and bears no relation to the facts on the ground, the litigation becomes a costly, wasteful charade. On that score, the *Penn Central* mess was an abject failure.<sup>446</sup>

- The fiscal lesson is that contrary to the disingenuous cries of municipal poverty that rent the air and were swallowed whole by the courts that decided *Penn Central*, the sky did not fall. Grand Central Terminal was eventually restored and continues to be rebuilt with public funds, and it

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being that going in, it is hard to tell which cases fall within that majority and which do require legal learning.

<sup>446</sup> BABCOCK & SIEMON, *supra* note 68, at 73 (describing the Grand Central Terminal that was "saved" by the force and majesty of the law as a dirty, neglected, "forlorn remnant of past magnificence now used to house a newsstand and a candy store," which reeked of stale urine in places, raising the question of whether it was worth saving); *see also* Editorial, *Playing Chicken with the Homeless*, N.Y. TIMES, Oct. 22, 1985, at A30. Its restoration was ultimately paid for with public funds in spite of the City's ostensible legal victory. Today, Grand Central Terminal is operated by the Metro-North Railroad that, like Penn Central, operates at an annual deficit, albeit a much higher one, at circa \$300,000,000. *See* Metro-North Railroad Financial Performance, at <http://www.mta.info/mta/ind-finance/month/mnr-financial.htm> (last visited Jan. 18, 2005).

Thus, one finds it hard not to conclude that the courts' performance in lending the prestige of their office to facilitation of the City's immoral and ultimately unsuccessful effort to plunder Penn Central's already depleted resources in order to shirk its civic and moral duty produced nothing by way of the law's stated objectives; i.e., the preservation of Grand Central at Penn Central's expense. That criticism is particularly warranted when one bears in mind *Penn Central's* infliction of serious, lasting damage on the institution of private property and on the law protecting it. In other words, for all the result-orientation displayed by the courts in *Penn Central*, the results on the ground were irrelevant to the courts' decisions. In the end, Grand Central Terminal's preservation and restoration were accomplished through public efforts (which is what Penn Central contended should have been the case from the outset), and they still are publicly funded. Michael Luo, *Lifting Grand Central's Shroud*, N.Y. TIMES, July 26, 2004, at B1 (reporting on the ongoing city restoration of Grand Central Terminal and noting that following the City's victory, "[w]hen Metro-North took over Grand Central in 1983, almost nothing had been spent on maintenance in years").

was Penn Central, not the City of New York, that went bankrupt.

The broader lesson that transcends the specifics of the *Penn Central* case is that the distressing conclusion drawn by Professor Allison Dunham over forty years ago (that judicial efforts in the takings field have been a failure), remains as sound today as it was then.<sup>447</sup> The problem is not that judges are “simply unable” to make reasoned judgments in this field of law, as they would have us believe. They are much smarter than that. It is rather that too many of them are unwilling to face the constitutional implications of the taking issue, and others are determined to find a way to deny American landowners the full scope of their constitutionally protected property rights on the basis of sometimes articulated and sometimes concealed ideological notions and unwarranted fears of prognosticated but usually unfounded fiscal consequences.<sup>448</sup> Paradoxically, in other fields of law, the same courts unhesitatingly issue enormously costly decrees and hand out huge monetary judgments against defendants, *including government defendants*, claiming to do so as a matter of justice and sound public policy, to make the victims of government mistreatment whole and to provide economic disincentives to government illegalities. They do so without judicial lamentations that the fisc is about to be reduced to a state of Carthaginian ruin.

Moreover, the question of affordability of just compensation payable by the government for takings of private property cannot be viewed in isolation. One must at least take note of the subject of government “pork” — huge legislative appropriations for the construction of public works and civic projects that though advanced in the name of public use, often serve no substantial or even legitimate public purpose, but are nonetheless funded profligately to reward political supporters in the legislators’ home districts<sup>449</sup> — at times, corruptly so. Here, the bitter

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<sup>447</sup> Dunham, *supra* note 132, at 106.

<sup>448</sup> See *supra* note 154.

<sup>449</sup> See Robert Pear, *Lawmakers’ Favored Projects from Home States Lay Deep Inside \$388 Billion Spending Bill*, N.Y. TIMES, Nov. 24, 2004, at A19 (“The projects are so numerous, so diverse and so scattered through the legislation that no one — not even Congressional aides responsible for the programs — knows all that has been stuffed into the bill.”); David E. Rosenbaum, *Call It Pork or Necessity, but Alaska Comes Out Far Above the Rest in Spending*, N.Y. TIMES, Nov. 21, 2004, at 28, available at LEXIS, News Library, N.Y. Times File.

The foremost current example of such practices is Boston’s “Big Dig,” an underground freeway running beneath the city that was pushed through by former House Speaker Tip O’Neill as a purely political *tour de force*, and, though estimated to cost \$2.6 billion, has so far consumed \$14 billion and counting. Butterfield, *supra* note 142. Now that the underground freeway has been opened to the public, it turns out that the tunnels have hundreds of breaches and leaks. Elizabeth Mehren, *Leaks and Flooding Drain Boston’s Faith in the Big Dig*, L.A. TIMES, Nov. 22, 2004, at A12 available at LEXIS, News Library, L.A. Times File.

irony is that often such wasteful, pork-laden projects involve government financed or subsidized construction requiring appropriation of private land by eminent domain. But in such cases, not only can the project itself be wasteful and the funds spent on it squandered,<sup>450</sup> but adding insult to injury, the owners of the homes and businesses acquired to make room for it are told that in order to facilitate the wasteful project, they must go without the full extent of the constitutionally promised just compensation, lest an “embargo” on public works descend upon us.

This is not to say that courts should involve themselves in passing judgment on the wisdom and economic soundness of the creation of public projects, however improvidently conceived, or on the wisdom of appropriations demanded (and often frittered away) by the executive branch of government after they are voted in by the legislative branch in an effort to gain political advantage for its members. I mention this subject only because the practice of handing out generous amounts of “pork” demonstrates conclusively that if funds for such civic frivolities are available to be spent with abandon, funds for genuinely needed public works and for demonstrable economic losses inflicted on unoffending land owners being bulldozed aside to make room for them, are also available — it is only a matter of priorities, not of availability of funds.<sup>451</sup> In the face of that fiscal reality the least the courts should

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<sup>450</sup> For an egregious example, see the unfortunate case of the “Intercontinental” Los Angeles Airport proposed to be built in the high desert, near Palmdale, north of Los Angeles. This boondoggle, for which a total of 17,500 acres of land was taken from private owners in the 1970s, was pursued even though there was no direct freeway or rapid transit connection between the airport site and the population centers it was supposed to serve, and there still isn’t. Unsurprisingly, after frittering away \$100 million (more likely three times that amount in today’s dollars) on land, the city of Los Angeles has never been able to establish a viable airport on that site, managing only occasional service by one airline. The thirty-six square miles consumed by the planned “intercontinental” airport site have been leased to sheepherders and growers of pistachio nuts. T. W. McGarry, *An Airport Waiting to Happen; Desert “Superport” to Ease LAX Traffic is 2-Decade Dream*, L.A. TIMES, May 2, 1988, pt. 2, at 8; Sharon Moeser, *Skywest Plans to Pull Out of Palmdale*, L.A. TIMES, Dec. 16, 1993, at B9. As I write this, the latest dispatch is that only one short-hop local airline contemplates a return to Palmdale, and to entice it, Los Angeles is offering it free rent. Jennifer Oldham, *Daily Flights to Resume at Palmdale — After Six Years, Airport Will Start Service to North Las Vegas*, L.A. TIMES, Sep. 8, 2004, at B3. Your tax money at work.

<sup>451</sup> As I write this, two news dispatches have put the problem of misallocation of public funds into sharp focus.

First, the U.S. Senate has decided to blow \$12 billion (later reduced to \$10 billion) on payments to tobacco growers to compensate them, not for loss of their businesses, but for the loss of federal subsidies they have been receiving. This payment, plainly in the nature of a tobacco subsidy, is being advanced even as the federal government unceasingly natters about the evils of tobacco and is suing cigarette manufacturers, whom it charges as purveyors of this health-endangering product, for hundreds of millions of dollars. Simon Romero, *In Tobacco Country, Growers Keep Their Fingers Crossed for a Windfall*, N.Y. TIMES, July 26, 2004, at A10; see Editorial, *The Stinky Tobacco Deal*, N.Y. TIMES, July 16, 2004, at A20.

Second, perhaps more incredibly, obesity is being declared a medical condition subject



do is refrain from transparently absurd judicial lamentations that a full and fair measure of genuinely just compensation for demonstrable economic losses, paid to victims of forceful private property acquisition, will bankrupt the government. Such judicial assertions become morally grotesque where beneficiaries of use of the eminent domain process are private redevelopers, mass merchandizers, automobile manufacturers and dealers, as well as gambling casinos, whose hoped-for successful pursuit of large amounts of money the courts solemnly, if absurdly, proclaim to be the linchpin that makes their private profit-making activities the equivalent of “public use,” on the theory that some of the prognosticated bonanza will trickle down into the community.<sup>452</sup> It is long overdue and it would be most appropriate for some courageous judges confronted with such schemes to call a spade a spade and proclaim that these are simply private profit-making endeavors.<sup>453</sup> It would also be nice if an occasional intellectually honest judge were to confront condemnors’ lamentations about imminent fiscal doom and professions of government penury,<sup>454</sup> to point out that if the government has hundreds of millions of dollars to fritter away on grandiose public and at times private projects, or to spend on subsidizing displays of antique farm machinery in East Overshoe, Nebraska, or some other such civic frivolity,<sup>455</sup> it surely must have enough money to pay the full market value for the

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to Medicare payments. Gina Kolata, *Health and Money Issues Arise over Who Pays for Weight Loss*, N.Y. TIMES, Sept. 30, 2004, at A1; Gina Kolata & Denise Grady, *Weight-Loss Field Awaits Change in Medicare Policy*, N.Y. TIMES, July 18, 2004, at 27. While a slimming down of America may be desirable, it is, at least in the vast majority of cases, something that is within individual cost-free control, and nowhere in the Constitution can I find a “fundamental right” to be made fashionably slim at government expense, that trumps the explicit constitutional requirement of providing “just compensation” for taking of private property.

<sup>452</sup> Gibeaut, *supra* note 141; Edward D. McKirdy, *The New Eminent Domain: Public Use Defense Vanishing in Wake of Growing Privatization of Power*, N.J. L.J., Mar. 15, 1999, at 1; Dean Starkman, *Take and Give: Condemnation Is Used to Hand One Business Property of Another*, WALL ST. J., Dec. 2, 1998, at A1; see Editorial, *Eminent Thievery*, WALL ST. J., Jan. 17, 2001, at A26 (noting that what distinguishes the United States from the world’s kleptocracies is respect for private property rights and their protection by a rule of law).

<sup>453</sup> For one such judicial effort (by California Court of Appeal Associate Justice Macklin Fleming), see *Regus v. City of Baldwin Park*, 139 Cal. Rptr. 196 (Cal. Ct. App. 1977). See also *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001). Other than these, such judicial profiles in courage have been rare.

<sup>454</sup> For a prime example of such arguments, delivered by a condemning agency to a California Court of Appeal in positively baroque prose, foreshadowing “self-strangulation” of “urban civilization” if fair compensation were to be paid to property owners for demonstrable economic losses, see Gideon Kanner, *When Is “Property” Not “Property Itself” — A Critical Examination of the Bases of Denial of Compensation for Loss of Goodwill in Eminent Domain*, 6 CAL. W. L. REV. 57, 79 n.96 (1969).

<sup>455</sup> I originally wrote this sentence intending it to be a sarcastic/rhetorical flourish. Since then I have learned that it is too true; the federal government has actually spent \$67,000,000 on an old locomotive display in Scranton, Pennsylvania, *House Reaches Compromise on*

property it acquires for the display grounds, and to compensate justly the displaced land owners for their demonstrable economic losses, proximately caused by their forcible displacement from their homes and businesses. Or at least it would not be amiss for the courts to point out that having persuaded the judiciary to view the feasibility of public projects as within the sole decision-making powers of condemning agencies, or altogether nonjusticiable, those agencies should also be required to confront the fiscal consequences of their own political and engineering decisions.

It is immoral for courts to proclaim themselves legally powerless to pass on condemnors' statutorily required determinations of public necessity (which includes economic feasibility),<sup>456</sup> and yet simultaneously de facto involve themselves in just such fiscal determinations by asserting, without the benefit of any evidence whatever, that creation of proposed public projects will be impaired if property owners receive compensation for demonstrable economic losses inflicted by the impact of government plans whose necessity and financial feasibility, we are told, are beyond judicial ability to consider. Put another way, when deciding statutory issues going to necessity for and feasibility of takings, courts tend to write a blank check to condemnors, but then expect the condemnees to cash it when the time comes for the condemnor to confront the full cost of the project, resulting from its own unfettered decision making.

No one, to the best of my knowledge, has yet improved on Professor Frank Michelman's observation that society cannot instigating projects whose cost

*Steam Locomotive Park*, N.Y. TIMES, Feb. 7, 1992, at A13, which the *Times* characterized editorially as “[a] second-rate collection of trains on a third-rate site,” Editorial, *Steamtown Steamroller*, N.Y. TIMES, Dec. 17, 1991, at A20. This bonanza of federal funds was squandered even though the National Park Service had earlier rejected this “park” as “having no historical significance.” *Id.*

I hasten to add that there is nothing wrong with subsidized displays of antique machinery, and that I am as fond of old choo-choo trains as the next fellow. Perhaps more so, being a former mechanical engineer. But there is no reason why such displays should be lavishly funded with public money on the backs of unoffending property owners for whom, it is said — with what purports to be a judicial straight face — there just are not any funds with which to compensate them fully for their demonstrable economic losses when their property is taken and their businesses destroyed.

<sup>456</sup> See *supra* note 165; see also *Rindge Co. v. County of Los Angeles*, 262 U.S. 700 (1923) (holding that a condemnor's determination of necessity of a taking is conclusive, even as against charges that the proposed public project is a wasteful effort to expend public funds); *Rosenthal & Rosenthal v. City of New York*, 605 F. Supp. 612 (S.D.N.Y.), *aff'd*, 771 F.2d 44 (2d Cir. 1985), *cert. denied*, 475 U.S. 1018 (1986) (refusing to consider condemnees' charge that the boundaries of the redevelopment project in question were corruptly drawn to confer improper economic benefits on the Mayor's political allies); *People v. Chevalier*, 340 P.2d 598 (Cal. 1959) (holding that the issue of project necessity and feasibility is non-justiciable even where it is charged that the decision to take was procured by fraud, bad faith, and abuse of discretion). See generally Michael V. McIntire, “Necessity” in *Condemnation Cases — Who Speaks for the People?*, 22 HASTINGS L.J. 561 (1971).

(including the cost of full compensation) exceeds their utility, so that projects that society cannot create without full compensation, it cannot afford at all.<sup>457</sup>

As for regulatory takings, it is no excuse to say that the task of formulating inverse condemnation criteria is difficult, though in truth it is not as difficult as it is made to appear in too many cases. High Court Justices, whether state or federal, are chosen for their conspicuous intellects and accomplishments (and so are their elite clerks), so it is, if nothing else, disrespectful to them to say that they are unequal to the intellectual task of judging difficult cases in this one field as opposed to others, even as they demand of lawyers that their regulatory takings submissions meet the required judge-made standards of proof, without providing a clear or at least a manageable answer to the question “proof of what?”<sup>458</sup> To quote Professor Dunham again, “[t]hat the problem is difficult of rational statement is no reason not to try.”<sup>459</sup> But the courts have not really been trying to resolve the doctrinal problem. Rather, they have strived to advance the cause of one side or the other on a case-by-case basis, and in doing so have been content to repeat unhelpful catchphrases that are extracted from previous opinions by litigants and lobbed at their adversaries in the hope that the court will find one of them more appealing than the others. James V. DeLong has aptly termed that process “a battle between competing aphorisms.”<sup>460</sup>

It is time for a change in judicial attitudes. If nothing else, courts of law should lay down rules of law. The policy concerns that have inspired courts to interpret constitutional law to meet the exigencies of changing times, in favor of those who exercise government powers over private property,<sup>461</sup> cut both ways and require the nurturing of balanced law that recognizes the social importance and constitutionally protected nature of private property rights, as well as *reasonable* limitations on the inroads being made into them. That needs to be done in fact — not merely by occasional lip service, but also by balanced rules that recognize constitutional as well as regulatory interests of both sides to these controversies.<sup>462</sup> On a policy level it must also be candidly recognized that the fallout of the prevailing judicial disparagement of private property rights of landowners has been conducive to reinforcement of an extremist regulatory culture that has become instrumental in

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<sup>457</sup> Michelman, *supra* note 365, at 1181.

<sup>458</sup> See *Kavanau v. Santa Monica Rent Control Bd.*, 941 P.2d 851, 860 (Cal. 1997) (listing at least ten factors that aggrieved property owners must present to the court in order to prevail). Significantly, the courts have not indicated which of these items would be decisive if proven.

<sup>459</sup> Dunham, *supra* note 132, at 105.

<sup>460</sup> DELONG, *supra* note 11, at 291.

<sup>461</sup> *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386 (1926).

<sup>462</sup> In this conflict between the ecological and the constitutional, it is plain that neither is to be consumed by the other. It is the duty of the department of conservation to look after the interests of the former, and it is the duty of the courts to stand guard over constitutional rights. *Comm'r of Natural Res. v. S. Volpe & Co.*, 206 N.E.2d 666, 671 (Mass. 1965).

bringing about a housing shortage that is rapidly approaching a crisis, with a market bubble for the haves and a draconian housing shortage for the have-nots. While the use of extrapolation to predict the future is risky business, enough dark clouds are appearing on the economic horizon to justify serious concerns on that score, particularly given the huge private debt being incurred by Americans in all walks of life, which is heavily contributed to by inflated home prices.<sup>463</sup> In this climate, continuing judicial commitment to a course of action that de facto disregards legislative policies that favor construction of housing while viewing favorably local practices impairing it, not only subverts those policies, but also poses serious economic dangers for the future.

Even on the environmentalists' fervently voiced, though occasionally shaky premises,<sup>464</sup> we no longer live in the bygone days when the polluted Cuyahoga River caught fire, or when Rachel Carson's plea for an environmental awakening first stirred the country into action. Today's environmental regulators are no longer supplicants for overdue reform. They often make their appearance on the scene as part of an intrusive, oppressive government apparatus that can make unreasonable demands and impose draconian penalties on citizens for unintentional, trivial, and basically harmless acts.<sup>465</sup> Thus, no matter how well inspired many regulations may be, one must still take into account not only their efficacy *vel non* but also their impact on citizens' constitutional rights and economic interests. In other words, the need for housing, too, is an important national policy that has received strong legislative endorsement and should weigh heavily on the scales of adjudication, even though it is largely ignored by the courts in takings controversies.<sup>466</sup>

In short, ends and means need to be distinguished, and the price of the beckoning "free lunch" must be assessed, if the process is to work honestly. As the usually reliable Justice Holmes put it:

[T]he state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their

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<sup>463</sup> See Motoko Rich, *Boom in Prices Brings Investors to Home Sales*, N.Y. TIMES, Mar. 1, 2005, at A1 (reporting a recent emergence of an orgy of speculation in which homes and condominiums are eagerly bought and promptly resold at substantial profits, earning the speculators six-figure gains in a matter of months or even weeks); Daniel Gross, *The Next Shock: Not Oil, but Debt*, N.Y. TIMES, Sept. 9, 2004, § 3, at 1; Gretchen Morgenson, *A Coming Nightmare of Homeownership?*, N.Y. TIMES, Oct. 3, 2004, § 3, at 9; Gretchen Morgenson, *Housing Bust: It Won't Be Pretty*, N.Y. TIMES, July 25, 2004, § 3, at 1.

<sup>464</sup> BJØRN LOMBORG, *THE SKEPTICAL ENVIRONMENTALIST: MEASURING THE REAL STATE OF THE WORLD* (2001).

<sup>465</sup> Berger & Kanner, *Need for Reform*, *supra* note 11, at 876–81.

<sup>466</sup> Delaney, *supra* note 10; see REPORT OF THE CALIFORNIA LITTLE HOOVER COMMISSION, *REBUILDING THE DREAM: SOLVING CALIFORNIA'S AFFORDABLE HOUSING CRISIS*, available at [www.novoco.com/Research\\_Center/calif\\_hoover\\_report.pdf](http://www.novoco.com/Research_Center/calif_hoover_report.pdf) (last visited Jan. 17, 2005).

forests and its inhabitants shall breathe pure air. *It might have to pay individuals before it could utter that word*, but with it remains the final power.<sup>467</sup>

Unlike members of the other two, politically-driven branches of government that historically pander to their constituencies, judges have a duty to be more than appeasers of popular clamor and facilitators of one trendy government policy at the expense of others. Their job is to reconcile if possible, or at least balance, the diverse policy demands and the competing public and private interests. That's what judging is all about. If nothing else, judges need to understand that land owners who plead for vindication of their constitutional property rights in the courts, may be right or wrong in their submissions, *as are all litigants in all cases in all fields of law*. But win or lose, they are our fellow Americans, and not some sort of legal pariahs whose plight is subject to being judicially viewed with thinly disguised contempt, as Judge Alex Kozinski aptly put it.<sup>468</sup> If the courts can formulate a body of jurisprudence in which anti-social individuals convicted of heinous criminal misconduct are nonetheless beneficiaries of a punctiliously fair judicial process, they should also be able to provide a modicum of fairness for faultless Americans whose "sin" is their desire to enjoy the benefit of the use of their land which is ostensibly constitutionally protected and on which — adding insult to injury — they are taxed on the basis of its highest and best use.

Finally, irrespective of what I have said here, judges are in the business of judging; that is what they are paid to do. If lawyers have to understand what passes for law in the field of regulatory takings to the extent necessary to explain the litigational prospects to their clients, marshal pertinent evidence, formulate coherent trial strategies, and structure competent legal arguments, then perhaps judges can manage to adjudicate the controversies tendered to them for decision without going to sometimes grotesque extremes in their search for ripeness, and hiding behind the smokescreen of ad hocery they have so often offered as a substitute for reasoned law that citizens can rely on. Perhaps, after a quarter century of dissembling and confusion, the time has come for judges to earn their pay in this field, to make doctrinally sound judgments that can move toward a principled body of reliable decisional law, and to cease playing intellectual "hidden ball" games in which — as

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<sup>467</sup> *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907) (emphasis added).

<sup>468</sup> *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 911 F.2d 1331, 1346 (9th Cir. 1990) (Kozinski, J., dissenting), *cert. denied*, 499 U.S. 943 (1991). For an egregious example of such unfortunate judicial behavior, see the nasty opinion in *Chongris v. Board of Appeals*, 811 F.2d 36 (1st Cir.), *cert. denied*, 483 U.S. 1021 (1987), turning away deserving plaintiffs and taunting them in the process, in spite of the fact that they had presented a plainly meritorious case of unlawful denial of use of their property. In the underlying state litigation, the position of their opponents was so frivolous that the latter were sanctioned by the Massachusetts Court of Appeals. *See id.* at 39.

Justice O'Connor would have it — there is *de facto* no precedent that can be relied on, and everything is up for grabs on a case-by-case basis.<sup>469</sup> Whatever that may be, it is not a process that is consistent with a rule of law or that can command public respect. In Justice Scalia's words, to have a rule of law we must have a law of rules.<sup>470</sup> In the long-run the present intellectual mess can only deliver random injustice, cause economic disruption and social instability, and contribute further to bringing the courts as well as the law administered by them into widespread and justified political controversy and general public disrepute.<sup>471</sup>

[W]here an appellate judge says that the . . . issue must be decided on the basis of the totality of the circumstances, or by a balancing of all the factors involved, he begins to resemble a finder of fact more than a determiner of law. To reach such a stage is, in a way, a regrettable concession of defeat — an acknowledgment that we have passed the point where “law,” properly speaking, has any further application. And to reiterate the unfortunate practical consequences of reaching such a pass when there still remains a good deal of judgment to be applied: equality of treatment is difficult to demonstrate and, in a multi-tiered judicial system, impossible to achieve; predictability is destroyed; judicial arbitrariness is facilitated; [and] judicial courage is impaired.<sup>472</sup>

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<sup>469</sup> *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring); *Tahoe-Sierra*, 535 U.S. at 326 n.23. Justice O'Connor's approach is not confined to regulatory taking cases. See Jeffrey Rosen, *Make Up Our Mind, Justice O'Connor*, N.Y. TIMES, Dec. 26, 1995, at A21 (“Rather than being guided by consistent legal rules, lawyers and judges must try to read her mind before they can be confident about what the law requires.”) It cannot go without notice that when it comes to a subject deemed important by her, Justice O'Connor has had no trouble insisting that the law be clear and certain, because, as she put it in *Planned Parenthood v. Casey*, 505 U.S. 833, 844 (1992), “[l]iberty finds no refuge in a jurisprudence of doubt.”

<sup>470</sup> See Scalia, *supra* note 59, at 1187.

<sup>471</sup> The courts' decline in stature was spotlighted by California's former Chief Justice Malcolm Lucas, who noted with alarm that over fifty percent of Californians rate courts as “poor” or only “fair.” Malcolm Lucas, *Introduction to Special Report on California Appellate Justice*, 45 HASTINGS L. J. 419, 421 (1994).

<sup>472</sup> Scalia, *supra* note 59, at 1182; Steven Eagle, *The Development of Property Rights in America and the Property Rights Movement*, 1 GEO. J. L. & PUB. POL'Y 77, 99–100 (2002) (observing that balancing tests are attractive to those who lack understanding and are afraid to expose their own deliberations to scrutiny); see also Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 COLUM. L. REV. 1697, 1700 (1988) (arguing in favor of predictability in the law and pointing out that any consistent, articulated approach to the taking problem is better than none); Charles Fried, *Courting Confusion*, N.Y. TIMES, Oct. 21, 2004, at A29 (voicing the concern that the Court's efforts are an “incoherent prolongation

We of the legal profession exhort our fellow citizens to submit to a rule of law as their civic salvation. We promise fairness, justice, judicial even-handedness, protection from governmental overreaching, and principled dispute resolution. Symbolically, we adorn our courthouses accordingly with images of revered historical lawgivers and with quotations from laws laid down by them. But when it comes to the subject at hand, aggrieved property owners quickly learn that the “law” administered by the courts adjudicating their dispute with their government is something less than a principled body of jurisprudence. It is rather an unjust and incoherent system in which, in Justice Scalia’s words, equality of treatment is indeed difficult or impossible to achieve, the inscription above the entrance to the U.S. Supreme Court — “Equal Justice Under Law” — notwithstanding.

Americans deserve better. The intellectual integrity of the law deserves better. The Constitution deserves better. And the courts deserve better even if — God help us — some of them do not seem to care.

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of a *fin-de-siècle* jurisprudence, where the court serves as nothing more than an ad hoc arbiter of issues it finds too difficult to decide in a principled way).