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### **Penn Central Trans. Co. v. New York City**

438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978)

As part of a “comprehensive program to preserve historic landmarks and historic districts,” the City of New York (like many other cities) placed restrictions on the development of a number of designated historic landmarks across the city. This case involved the application of this Landmarks Preservation Law to Grand Central Terminal, the owners of which—Penn Central Transportation Co.—sought to build a multi-story office building in the airspace over the Terminal. The law, which operated as an addition to the City’s general zoning rules, required the owners to keep the exterior features of the building “in good repair,” and it mandated a prior approval process for any proposal to alter the exterior architectural features of the landmark. The law also sought to insure that the owners of the City’s 400 designated landmarks received a “reasonable return” on their investments. Owners of landmark sites were thus given opportunities to transfer development rights to other parcels.

■ MR. JUSTICE BRENNAN delivered the opinion of the Court.

. . . The issues presented by appellants are (1) whether the restrictions imposed by New York City’s law upon appellants’ exploitation of the Terminal site effect a “taking” of appellants’ property for a public use within the meaning of the Fifth Amendment, which of course is made applicable to the States through the Fourteenth Amendment, and, (2), if so, whether the transferable development rights afforded appellants constitute “just compensation” within the meaning of the Fifth Amendment. We need only address the question whether a “taking” has occurred.

. . . The question of what constitutes a “taking” for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. While this Court has recognized that the “Fifth Amendment’s guarantee . . . [is] 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,” *Armstrong v. United States* (1960), this Court, 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. . . .

In engaging in these essentially ad hoc, factual inquiries, the Court’s decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. See *Goldblatt v. Hempstead* (1962). So, too, is the character of the governmental action. A “taking” may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

“Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law,” *Pennsylvania Coal Co. v.*

Mahon (1922), and this Court has accordingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values. Exercises of the taxing power are one obvious example. A second are the decisions in which this Court has dismissed “taking” challenges on the ground that, while the challenged government action caused economic harm, it did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute “property” for Fifth Amendment purposes.

More importantly for the present case, in instances in which a state tribunal reasonably concluded that “the health, safety, morals, or general welfare” would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests. Zoning laws are, of course, the classic example, see *Euclid v. Ambler Realty Co.* (1926) (prohibition of industrial use); *Gorieb v. Fox* (1927) (requirement that portions of parcels be left unbuilt); *Welch v. Swasey* (1909) (height restriction), which have been viewed as permissible governmental action even when prohibiting the most beneficial use of the property.

Zoning laws generally do not affect existing uses of real property, but “taking” challenges have also been held to be without merit in a wide variety of situations when the challenged governmental actions prohibited a beneficial use to which individual parcels had previously been devoted and thus caused substantial individualized harm. *Miller v. Schoene* (1928), is illustrative. In that case, a state entomologist, acting pursuant to a state statute, ordered the claimants to cut down a large number of ornamental red cedar trees because they produced cedar rust fatal to apple trees cultivated nearby. Although the statute provided for recovery of any expense incurred in removing the cedars, and permitted claimants to use the felled trees, it did not provide compensation for the value of the standing trees or for the resulting decrease in market value of the properties as a whole. A unanimous Court held that this latter omission did not render the statute invalid. The Court held that the State might properly make “a choice between the preservation of one class of property and that of the other” and since the apple industry was important in the State involved, concluded that the State had not exceeded “its constitutional powers by deciding upon the destruction of one class of property [without compensation] in order to save another which, in the judgment of the legislature, is of greater value to the public.” . . .

*Pennsylvania Coal Co. v. Mahon* (1922) is the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a “taking.” There the claimant had sold the surface rights to particular parcels of property, but expressly reserved the right to remove the coal thereunder. A Pennsylvania statute, enacted after the transactions, forbade any mining of coal that caused the subsidence of any house, unless the house was the property of the owner of the underlying coal and was more than 150 feet from the improved property of another. Because the statute made it commercially impracticable to mine the coal, and thus had nearly the same effect as the complete destruction of rights claimant had reserved from the owners of the surface land, the Court held that the statute was invalid as effecting a “taking” without just compensation. . . .

[A]ppellants . . . essentially urge that any substantial restriction imposed pursuant to a landmark law must be accompanied by just compensation if it is to be constitutional. . . . They urge that the Landmarks Law has deprived them of any gainful use of their “air rights” above the Terminal and that, irrespective of the value of the remainder of their parcel, the city has “taken” their right to this superjacent airspace, thus entitling them to “just compensation” measured by the fair market value of these air rights.

Apart from our own disagreement with appellants’ characterization of the effect of the New York City law, the submission that appellants may establish a “taking” simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable. . . . “Taking” jurisprudence does not

divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the “landmark site.”

Secondly, . . . appellants argue that New York City’s regulation of individual landmarks is fundamentally different from zoning or from historic-district legislation because the controls imposed by New York City’s law apply only to individuals who own selected properties.

Stated baldly, 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 pursuant to the New York City scheme is a “taking” requiring the payment of “just compensation.” . . .

It is true . . . landmark laws apply only to selected parcels. But, . . . the New York City law embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city. . . .

. . . It is, of course, true that the Landmarks Law has a more severe impact on some landowners than on others, but that in itself does not mean that the law effects a “taking.” Legislation designed to promote the general welfare commonly burdens some more than others. . . .

[A]ppellants’ repeated suggestions that they are solely burdened and unbenefited is factually inaccurate. This contention overlooks the fact that the New York City law applies to vast numbers of structures in the city in addition to the Terminal—all the structures contained in the 31 historic districts and over 400 individual landmarks, many of which are close to the Terminal. Unless we are to reject the judgment of the New York City Council that the preservation of landmarks benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole—which we are unwilling to do—we cannot conclude that the owners of the Terminal have in no sense been benefited by the Landmarks Law. . . .

. . . We now must consider whether the interference with appellants’ property is of such a magnitude that “there must be an exercise of eminent domain and compensation to sustain [it].” *Mahon*. That inquiry may be narrowed to the question of the severity of the impact of the law on appellants’ parcel, and its resolution in turn requires a careful assessment of the impact of the regulation on the Terminal site.

. . . [T]he New York City law does not interfere in any way with the present uses of the Terminal. Its designation as a landmark not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions. So the law does not interfere with what must be regarded as Penn Central’s primary expectation concerning the use of the parcel. More importantly, on this record, we must regard the New York City law as permitting Penn Central not only to profit from the Terminal but also to obtain a “reasonable return” on its investment.

Appellants, moreover, exaggerate the effect of the law on their ability to make use of the air rights above the Terminal. . . .

. . . Their ability to use these rights has not been abrogated; they are made transferable to at least eight parcels in the vicinity of the Terminal, one or two of which have been found suitable for the construction of new office buildings. Although appellants and others have argued that New York City’s transferable development-rights program is far from ideal, the New York courts here supportably found that, at least in the case of the Terminal, the rights afforded are valuable. While these rights may well not have constituted “just compensation” if a “taking” had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on

appellants and, for that reason, are to be taken into account in considering the impact of regulation.

On this record, we conclude that the application of New York City's Landmarks Law has not effected a "taking" of appellants' property. The restrictions imposed are substantially related to the promotion of the general welfare and not only permit reasonable beneficial use of the landmark site but also afford appellants opportunities further to enhance not only the Terminal site proper but also other properties.

*Affirmed.*

■ MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE [BURGER] and MR. JUSTICE STEVENS join, dissenting.

Of the over one million buildings and structures in the city of New York, appellees have singled out 400 for designation as official landmarks. The owner of a building might initially be pleased that his property has been chosen by a distinguished committee of architects, historians, and city planners for such a singular distinction. But he may well discover, as appellant Penn Central Transportation Co. did here, that the landmark designation imposes upon him a substantial cost, with little or no offsetting benefit except for the honor of the designation. The question in this case is whether the cost associated with the city of New York's desire to preserve a limited number of "landmarks" within its borders must be borne by all of its taxpayers or whether it can instead be imposed entirely on the owners of the individual properties.

Only in the most superficial sense of the word can this case be said to involve "zoning." Typical zoning restrictions may, it is true, so limit the prospective uses of a piece of property as to diminish the value of that property in the abstract because it may not be used for the forbidden purposes. But any such abstract decrease in value will more than likely be at least partially offset by an increase in value which flows from similar restrictions as to use on neighboring properties. All property owners in a designated area are placed under the same restrictions, not only for the benefit of the municipality as a whole but also for the common benefit of one another. In the words of Mr. Justice Holmes, speaking for the Court in *Mahon*, there is "an average reciprocity of advantage."

Where a relatively few individual buildings, all separated from one another, are singled out and treated differently from surrounding buildings, no such reciprocity exists. The cost to the property owner which results from the imposition of restrictions applicable only to his property and not that of his neighbors may be substantial—in this case, several million dollars—with no comparable reciprocal benefits. And the cost associated with landmark legislation is likely to be of a completely different order of magnitude than that which results from the imposition of normal zoning restrictions. . . . To suggest that because traditional zoning results in some limitation of use of the property zoned, the New York City landmark preservation scheme should likewise be upheld, represents the ultimate in treating as alike things which are different. The rubric of "zoning" has not yet sufficed to avoid the well-established proposition that the Fifth Amendment bars the "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." *Armstrong*.

The Fifth Amendment provides in part: "nor shall private property be taken for public use, without just compensation." In a very literal sense, the actions of appellees violated this constitutional prohibition. Before the city of New York declared Grand Central Terminal to be a landmark, Penn Central could have used its "air rights" over the Terminal to build a multistory office building, at an apparent value of several million dollars per year. . . .

Appellees have thus destroyed—in a literal sense, "taken"—substantial property rights of Penn Central. . . . Because "not every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense," *Armstrong*, however, this does not end

our inquiry. But an examination of the two exceptions where the destruction of property does not constitute a taking demonstrates that a compensable taking has occurred here.

As early as 1887, the Court recognized that the government can prevent a property owner from using his property to injure others without having to compensate the owner for the value of the forbidden use. . . . The question is whether the forbidden use is dangerous to the safety, health, or welfare of others. . . .

Appellees are not prohibiting a nuisance. The record is clear that the proposed addition to the Grand Central Terminal would be in full compliance with zoning, height limitations, and other health and safety requirements. Instead, appellees are seeking to preserve what they believe to be an outstanding example of beaux arts architecture. Penn Central is prevented from further developing its property basically because too good a job was done in designing and building it. The city of New York, because of its unadorned admiration for the design, has decided that the owners of the building must preserve it unchanged for the benefit of sightseeing New Yorkers and tourists.

Unlike land-use regulations, appellees' actions do not merely prohibit Penn Central from using its property in a narrow set of noxious ways. Instead, appellees have placed an affirmative duty on Penn Central to maintain the Terminal in its present state and in "good repair." . . .

Even where the government prohibits a noninjurious use, the Court has ruled that a taking does not take place if the prohibition applies over a broad cross section of land and thereby "[secures] an average reciprocity of advantage." *Mahon*. It is for this reason that zoning does not constitute a "taking." While zoning at times reduces individual property values, the burden is shared relatively evenly and it is reasonable to conclude that on the whole an individual who is harmed by one aspect of the zoning will be benefited by another.

Here, however, a multimillion dollar loss has been imposed on appellants; it is uniquely felt and is not offset by any benefits flowing from the preservation of some 400 other "landmarks" in New York City. Appellees have imposed a substantial cost on less than one one-tenth of one percent of the buildings in New York City for the general benefit of all its people. It is exactly this imposition of general costs on a few individuals at which the "taking" protection is directed. . . .

As Mr. Justice Holmes pointed out in *Mahon*, "the question at bottom" in an eminent domain case "is upon whom the loss of the changes desired should fall." The benefits that appellees believe will flow from preservation of the Grand Central Terminal will accrue to all the citizens of New York City. There is no reason to believe that appellants will enjoy a substantially greater share of these benefits. If the cost of preserving Grand Central Terminal were spread evenly across the entire population of the city of New York, the burden per person would be in cents per year—a minor cost appellees would surely concede for the benefit accrued. Instead, however, appellees would impose the entire cost of several million dollars per year on Penn Central. But it is precisely this sort of discrimination that the Fifth Amendment prohibits.

. . . A taking does not become a noncompensable exercise of police power simply because the government in its grace allows the owner to make some "reasonable" use of his property. . . .

Appellees, apparently recognizing that the constraints imposed on a landmark site constitute a taking for Fifth Amendment purposes, do not leave the property owner emptyhanded. As the Court notes, the property owner may theoretically "transfer" his previous right to develop the landmark property to adjacent properties if they are under his control. Appellees have coined this system "Transfer Development Rights," or TDR's.

Of all the terms used in the Taking Clause, "just compensation" has the strictest meaning. The Fifth Amendment does not allow simply an approximate compensation but requires "a full and perfect equivalent for the property taken." *Monongahela Navigation Co. v. United States* [1893]. . . . And the determination of whether a "full and perfect equivalent" has been awarded is

a “judicial function.” *United States v. New River Collieries Co.* (1923). The fact that appellees may believe that TDR’s provide full compensation is irrelevant.

The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid. . . . The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry. *Monongahela Navigation*.

. . . Because the record on appeal is relatively slim, I would remand to the Court of Appeals for a determination of whether TDR’s constitute a “full and perfect equivalent for the property taken.”

Over 50 years ago, Mr. Justice Holmes, speaking for the Court, warned that the courts were “in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.” *Mahon*. The Court’s opinion in this case demonstrates that the danger thus foreseen has not abated. The city of New York is in a precarious financial state, and some may believe that the costs of landmark preservation will be more easily borne by corporations such as Penn Central than the overburdened individual taxpayers of New York. But these concerns do not allow us to ignore past precedents construing the Eminent Domain Clause to the end that the desire to improve the public condition is, indeed, achieved by a shorter cut than the constitutional way of paying for the change.

## EDITORS’ NOTES

(1) **Query:** Does the text of the Fifth Amendment’s Takings Clause settle this case? Does the original understanding of the text settle the question whether the Takings Clause embraces “regulatory takings” as well as “physical takings” any more than the text itself? Is Holmes’s view in *Mahon* fairly attributable to the framers and ratifiers of the Takings Clause?

(2) **Query:** What other approaches should one use to decide whether the Landmark Preservation Law constituted an unconstitutional taking? What approach or approaches does Brennan apply?

(3) **Query:** What about *balancing*: should the court balance the state’s interests promoted by the regulation against the property owner’s interests in the property? Are some state interests qualitatively more or less significant in constitutional terms than others? How does one make these judgments as a matter of constitutional interpretation?

(4) **Query:** Does Rehnquist’s dissent necessarily presuppose that property rights are fundamental rights that warrant aggressive judicial protection, or does his invocation of the unfairness of imposing the costs of a general public benefit on a few have a basis in democratic principles of equality? See Richard A. Epstein, *Takings* (Cambridge: Harvard University Press, 1985).

(5) **Query:** To what extent is the disagreement between Brennan and Rehnquist a disagreement about WHO shall interpret the Constitution with respect to questions of property rights and their regulation?

(6) Re-read Rehnquist’s dissent after you have read the next case, *Lucas v. South Carolina Coastal Council* (1992). **Query:** To what extent does Rehnquist anticipate the arguments of Scalia’s opinion for the court regarding “regulatory takings” in the latter case?