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ALAS IN WONDERLAND: THE IMPACT OF PENN CENTRAL V. NEW YORK UPON HISTORIC PRESERVATION LAW AND POLICY

Thane DeNimmo Scott*

I. INTRODUCTION

As urban America enters the 1980's, the attention being given to historic preservation by city planners and environmentalists is creating an increasing amount of controversy.\(^1\) Historic preservation litigation, through which competing economic and aesthetic interests within the community seek to affect urban life, is becoming a common phenomenon. Frequently, the urban landmark threatened with destruction becomes the focal point of divisive and exclusive interests which resort to legal battles to resolve the conflict.\(^2\) When faced with such a conflict, traditional legal principles and philosophies\(^3\) are often inadequate and are unable to provide uniform guidelines to resolve this problem.

The primary goal of the adjudicative and legislative processes is to objectify the priorities to be given parties in the conflict of private rights versus collective rights.\(^4\) By examining these often conflicting priorities one can see the dilemma perplexing judges and other policy makers. What are the rights and priorities to be afforded landowners, developers, environmental groups, institutional lenders,

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\(^3\) Within this article the phrase "traditional legal principles and philosophies" is used to refer primarily to the absolute right of the owner of a fee simple interest to use and dispose of his land with minimal interference by the community. See Cross, The Diminishing Fee, 20 LAW AND CONTEMP. PROB. 517 (1955). See also 3 AMERICAN LAW OF PROPERTY § 11.1 (A.J. Casner ed. 1952); 2 R. Powell, THE LAW OF REAL PROPERTY, ch. 13 ¶¶ 175-9, 190.

\(^4\) E.g., Ragsdale & Sher, The Court's Role in the Evolution of Power Over Land, 7 URB. LAW. 60 (1975).
regulatory agencies and other interested parties once a historic preservation policy is adopted? In the context of historic preservation the question is not the ability of the government to regulate land use and, as a consequence, to diminish the land's value, for that power is well-established. Rather "[t]he fundamental question that should be faced, and which deserves a rationally developed legislative response, is not whether these costs [e.g. inability to use land to obtain the greatest return] will be paid; it is who will pay them, in accordance with what substantive and procedural criteria, and through which institutional arrangements."

This article will deal with the preceding question by first examining the development of eminent domain and police power regulation of land use, examining the New York City Landmark Preservation Law as representative of historic preservation legislation. An examination of the litigation under this statute, culminating in the Supreme Court decision in Penn Central Transportation Co. v. City of New York, will show that historic preservation has generally been upheld as a legitimate exercise of police power in furtherance of the general welfare. Finally, an analysis of the impact of the Penn Central decision will illustrate that, while historic preservation is a sound economic and aesthetic policy, the means utilized to execute this policy by both the courts and legislatures are often short sighted and occasionally counterproductive.

II. THE INADEQUACY OF TRADITIONAL CONCEPTS OF LAND "OWNERSHIP" IN A HISTORIC PRESERVATION CONTEXT

When land was plentiful and people were few, the question of what rights properly belonged to a landowner had a very simple answer: a landowner could do as he pleased, since there was no real possibility that his actions could harm others. From the twelfth to the eighteenth centuries, the period during which our traditional concepts of ownership rights were formulated, landowners were almost entirely free from regulation by the sovereign. During this period land functioned as security for the propertied classes, providing stable value while simultaneously producing income—much like the contemporary function of stocks and bonds. However, concurrent with the rise of industrialization and urbanization in the nine-

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teenth century came increased regulation of land use. Since there were increased numbers of people in smaller spaces, there were many more ways in which land could be used harmfully.

 Twentieth century regulation of land use has expanded far beyond what a twelfth century landowner would have been able to foresee—yet our laws still reflect in many ways the "hands-off" attitude characteristic of early concepts of ownership. This tension between the increased need for regulation and the concept of ownership rights as absolute has created revolutionary changes in property law, while simultaneously creating the confusion which often accompanies rapid change. Society's confusion as to what rights inhere in "ownership" of real property is the largest single factor contributing to the present inadequacy of traditional concepts of permissible land use. The difficulties in historic preservation revolve not around the general question of whether historic preservation is good policy, but rather around the legal ambivalence surrounding the conflict of owner/developer versus society. "The difficulties lie... in the confusion concerning what this society's bottom-line perception of landed property's entitlements should be."10

 While real property has retained much of the protection which traditional legal concepts afforded it in an agrarian society, the need for this protection has diminished with the concomitant rise in other sources of economic wellbeing which provide the basis for security in a technological society.11 Land has, however, become more important in its value to society, as opposed to its value to the individual landowner, in that land use decisions made by the individual landowner are now an environmental concern to the community which is affected by those decisions. This heightened community concern has led to increasingly limited land use options available to the landowner, and is reflected in much greater governmental regulation of land use. Quite often this contraction of available choices concerning land use has led to dramatic changes in the value of real

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estate. Favored parcels of land increase in value and, alternatively, unlucky landowners are subject to greater restrictions which invariably result in decreased land value.  

Literally, land value is created—and destroyed—by governmental bodies, a concept which would have astonished those who developed early English property law, upon which our current legal system of real property is in large part based. Simply stated, "[t]he use and value of every tract of land in the United States today is affected more by what happens elsewhere than it is by any possible developments on the tract of land itself . . . ."14 This construction and destruction of land values due to government regulation has led to a new perception of land as property possessed of a bundle of rights. As land regulation, particularly historic preservation legislation, loosens the bundle and removes the rights traditionally inhering in urban land ownership, a point will be reached where the former landowner is left holding an empty bundle. Decisions which formerly would have been solely the landowner's are now subject to increased governmental involvement, involvement primarily caused by this progressive urbanization and industrialization.15

A substantial decrease in value often accompanies governmental involvement in land use decisions due to the greater restrictions placed upon land usage. The owner of an urban landmark (who has often, especially in a commercial context, borrowed heavily against the property’s supposed value)16 finds himself holding the string
instead of the bundle after use restrictions are applied to his prop-
erty, and is understandably upset. To those who argue that this is
a risk to which all who live in a civilized society are subject,17 the
landowner answers: "[i]f 'the public' wants the land uses (or non-
uses) which benefit 'the public' generally, then 'the public' should
buy the property, or an appropriate interest in the property, rather
than attempt to force individual property owners to devote their
property to public use without compensation."18 This argument is
a reflection of a long tradition equating real property with "private"
property. The landowner's argument, however, may have fallen on
more sympathetic ears in the fifteenth century, when concepts of
landed property's generally unlimited entitlement were uniformly
acknowledged and accepted as desirable to meet the needs of the
land-owning (and law-making) community. These needs have
changed and old formalistic legal doctrines19 inadequately reflect
the changing times. A man's home may be his castle, but woe unto
he who builds where zoning prohibits castles.

Historic properties within the central city which are, because of
their location and other facilities, susceptible of commercial uses20
present the dilemma in its sharpest detail: these properties are the
ones that society can least afford to have destroyed or modified, and
which the landowner can least afford not to develop.21 It is an eco-

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17 See J. Locke, Two Treatises of Government, First Treatise § 40 et seq. (2d ed., Cam-
18 Berger, To Regulate, or Not to Regulate—Is that the Question? Reflections on the Sup-
pposed Dilemma between Environmental Protection and Private Property Rights, 8 Loy.
19 See, e.g., Reich, The New Property, 73 Yale L.J. 733 (1964). The idea of absolute
ownership accompanying a fee simple interest is inappropriate in the late twentieth century.
20 Residential properties will also be dealt with in this article, although not to the same
extent. While residential properties present some of the same problems as do commercial
properties, both the solutions available and regulatory efforts applied to the residential
landowner are often different from those of owners of commercial historic properties. See
Sussna, Effective Housing Rehabilitation and Neighborhood Preservation, 1978 Inst. of
Planning, Zoning and Eminent Domain 91; Tondro, An Historic Preservation Approach to
Municipal Rehabilitation of Older Neighborhoods, 8 Conn. L. Rev. 248 (1976), for more
information concerning problems of residential historic properties.
21 With reference to such properties, the president of the National Trust for Historic Preser-
vation has recently stated that, "[w]ith current tax incentives available to developers and
with the escalating value of land, the economic pressure for demolition and subsequent
construction of a maximum-sized building is almost overpowering in the center of a city." 
Biddle, Historic Preservation: The Citizens' Quiet Revolution, 8 Conn. L. Rev. 202, 207
(1976).
The public benefits immeasurably from the preservation of historic structures, but the effect of non-compensatory regulation on the commercial landowner/developer may lead to his economic downfall. It is in this context then, that, as the forces of preservation and development collide, both developers and preservationists return to traditional legal principles to find support for their positions. Developers claim that ownership is absolute, preservationists point instead to the rights of the community to police its members. The present search for a balanced solution will begin with an analysis of the traditional legal doctrines utilized in this seemingly irreconcilable conflict.

III. OVERVIEW OF TRADITIONAL EMINENT DOMAIN AND POLICE POWER REGULATION OF LAND USE

The Fifth Amendment provides the largest single restraint on land regulation by its command that "private property [shall not] be taken for public use, without just compensation." Thus, the "taking clause" of the Fifth Amendment, held applicable to the states by incorporation into the Fourteenth Amendment, has iden-

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25 "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. AMEND. V.

tified two significant and related areas of concern: the extent to which property can be regulated before it is "taken" and the adequacy of "just compensation." The principles which underlie these two areas have varied with the needs and policies of the community at the time of the "taking."[7] The Fourteenth Amendment, in addition to incorporating the sovereign's right of eminent domain reflected in the Fifth Amendment, also places procedural restraints on the states' regulatory processes by preventing a state from depriving "any person of life, liberty, or property, without due process of law." This safeguard does not require compensation but rather establishes defined procedures which the state must follow if it wishes to regulate or acquire any private property. Only eminent domain "takings," subject to the Fifth Amendment's just compensation command, require compensation.

During the early nineteenth century the police power was infrequently exercised in such a way as to cause substantial economic harm to the regulated property owner. When regulation did affect an interest in land, rather than legitimizing the regulation as an exercise of police power, eminent domain condemnation proceedings were used. Thus, the distinction between an eminent domain "taking" and the police power of the state to regulate land use was not a burning legal issue for the early nineteenth century courts. However, as urbanization and advancing technological achievement increased the need for regulated land use, the regulations more frequently had serious economic impact upon landowners. Consequently, courts were forced to draw guidelines defining the limits of a permissible non-compensatory regulation. An examination of the development of early case law shows the process of objectification of priorities assigned to parties in the conflict of collective rights

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17 These two questions—and their answers which reflect the community's current analysis of rights of property—have been a source of concern since at least the Roman Empire. See Matthews, The Valuation of Property in the Roman Law, 34 HARV. L. REV. 229 (1921). The right to just compensation following a taking and the concern with procedural safeguards to protect the taking process were first formalized in a document extorted from an unwitting and unwilling King John with just a hint of violence. See MAGNA CHARTA, ch. 39 (1215), which provided that "no free man shall be . . . deprived of his freehold . . . unless by the lawful judgment of his peers and by the law of the land."

18 U.S. CONST. AMEND. XIV, § 1. "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."


20 Id. at 866-71.

21 Id.
versus private rights to be inconsistent and often contradictory.32 The United States Supreme Court has, however, made one statement which has proven true in every case: "[t]here is no set formula to determine where regulation ends and taking begins."33

A. Early Application of Non-Compensatory Regulations

It was not until the late nineteenth century in Mugler v. Kansas34 that the Supreme Court first articulated the relevant factors in determining whether a taking had occurred. Mugler had invested his life's savings in property, structures and equipment "for use in the manufacture of a malt liquor commonly known as beer . . . ."35 Subsequently, the Kansas Constitution was amended to forbid the manufacture and sale of intoxicating liquors, and Mugler was left with a useless brewery. The opinion of the Court, written by Justice Harlan, accepted Mugler's assertion that if the statutes enacted to execute the amendment were enforced against Mugler, the value of his property would be materially diminished.36 Justice Harlan concluded, however, that since the rights of ownership never included the right to use the land for noxious purposes, regulation of property so as to prohibit uses harmful to society took nothing away from the landowner.37 As the Court held:

A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration

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32 Professor Van Alstyne has stated that "the decisional law is . . . often explained in conclusionary terminology, circular reasoning, and empty rhetoric." Van Alstyne, Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria, 44 S. CAL. L. REV. 1, 2 (1970). Other commentators have spoken without Professor Van Alstyne's elegance; Professor Dunham characterizes present land use law as subject to the "crazy-quilt pattern of Supreme Court doctrine." Dunham, Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law, 1962 SUP. CT. REV. 63. The explanation for the absence of predictable objective decisional criteria has been perceptively identified to be that "[c]hanges in the notions of general welfare, health and safety, which set the outer limit of the police power, also compound the difficulty of distinguishing a regulation from a taking." Comment, Regulation of Land Use: From Magna Carta to a Just Formulation, 23 U.C.L.A. L. REV. 904, 905 n.5 (1976).
34 123 U.S. 623 (1887).
35 Id. at 625.
36 Id. at 657.
37 Id. at 668-69.
by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests.\textsuperscript{38}

The difficulty with this analysis is that society's definition of noxious purposes changes with the needs and policies of the times, and the landowner who relies on current ideas of acceptable property uses may subsequently regret his reliance if he is forced to forfeit "rights" which a court now tells him he never had. However, while such a result may be unfortunate for the brewer, it is indispensable for society to retain this regulatory ability without the burden of having to compensate every landowner whose expectations suddenly evaporate. As stated by Justice Holmes in \textit{Pennsylvania Coal Co. v. Mahon},\textsuperscript{39} "Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."\textsuperscript{40}

Justice Harlan in \textit{Mugler} saw the difference between a taking and a non-compensatory police power regulation as a difference in kind, not degree. He felt that if the regulation was in its \textit{nature} an acceptable regulation, then its impact upon the landowner was irrelevant. This differentiation between the nature of the regulation and the extent of its impact has played a continuously important role, although its application has been inconsistent.\textsuperscript{41}

The prevention of noxious uses as a justification for adversely affecting recognized economic interests finds its contemporary expression in zoning laws, probably the most intrusive and comprehensive regulation of land use today.\textsuperscript{42} Zoning to prevent uses of land offensive to the community has been held to be a permissible exercise of the police power even when prohibiting the most beneficial (profitable) use of the property.\textsuperscript{43} Even the most extreme zoning case, prohibiting previously lawful uses of property and thus destroying an existing use which has subsequently become offensive, is a permissible non-compensatory police power regulation.\textsuperscript{44}

\textsuperscript{38} \textit{Id.}
\textsuperscript{39} 260 U.S. 393 (1922).
\textsuperscript{40} \textit{Id.} at 413.
\textsuperscript{41} See \textit{generally Pennsylvania Coal Co. v. Mahon}, 260 U.S. 393 (1922). See also text at notes 59 and 60, infra.
\textsuperscript{44} The Court [in \textit{Miller}] 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
After the "prevention of noxious use" category, a second category of taking challenges which have been uniformly unsuccessful is that in which challenged governmental action has caused economic harm, but which the court has characterized as affecting interests that were not sufficiently bound up with the reasonable expectations of the claimant to constitute "property" for Fifth Amendment purposes. Like the prohibition of noxious uses challenges, these challenges have failed on the theory that a landowner is not required to be compensated for economic loss caused by an impact upon an interest in land which is not part of the "bundle of rights" inhering in ownership of real property. It is to be emphasized, however, that community needs and perceptions contemporaneous with the taking challenge will be used to determine whether or not a taking has in fact occurred. This rapid shift in the community's perception of landed property's entitlements makes the outcomes of contemporary taking challenges unpredictable.

B. Elements of Eminent Domain "Takings"

In contrast, courts have required compensation where the regulation has involved both actual physical intrusion by the government to facilitate public functions and also has impacted upon recognized property interests. As stated in Penn Central, "a taking may more readily be found when the interference with property can be characterized as a physical invasion by the Government ... than when interference [presumably non-physical interference] arises from some public program adjusting the benefits and burdens of economic life to promote the common good."

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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.


Sec, e.g., United States v. Willow River Power Co., 324 U.S. 499 (1945) (interest in highwater level of river for power generation purposes is not property); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913) (no property interest can exist in navigable waters).

Sec text at note 9, supra.

Sec, e.g., United States v. Causby, 328 U.S. 256 (1946) (overflights by heavy government aircraft held to have destroyed property's use as commercial chicken farm).

Another successful challenge to non-compensatory regulation of land use has been where the regulation has, although substantially furthering important public policies, destroyed distinct investment-backed expectations. In such cases, the government is compelled to acquire the interest in property by exercising its right of eminent domain, thereby entitling the investor/landowner to the just compensation required by the Fifth Amendment. As the leading case supporting this concept of forced acquisition, Pennsylvania Coal Co. v. Mahon deserves close scrutiny.

In 1878 the Pennsylvania Coal Company conveyed surface rights to Mahon, but in express terms reserved the right to remove all the coal beneath the surface. The purchase agreement further provided that the grantee take the premises with risk and specifically waive all claims for damage to the property arising from subsidence of the surface caused by removal of the subsurface coal by the coal company. Subsequently, the Pennsylvania legislature passed an act which prohibited removal of subsurface coal in such a way as to cause subsidence of dwelling houses, public buildings, public streets and other rights of way. Since providing supports for the overstrata as the coal was mined was economically infeasible, the coal company brought suit claiming that the coal which had to remain unmined in order to provide surface supports had been expropriated for a public use by the government. The coal company demanded compensation, claiming that a taking had occurred. Pennsylvania argued that such a regulation was a valid exercise of the police power to prevent harmful uses. As Justice Holmes, writing for the majority, stated:

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 . . . . We are 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.  

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260 U.S. 393 (1922).  
11 Id. at 393-94 n.1.  
12 Id. at 415-16.
Significantly, Justice Holmes viewed the difference between a permissible non-compensatory regulation and an eminent domain acquisition of a right for the public good as a difference in degree.\textsuperscript{53} Justice Holmes thus departed from Justice Harlan's earlier identification of the nature of the regulation as controlling, rather than the extent of its impact. Justice Brandeis, dissenting in \textit{Pennsylvania Coal}, was unable to distinguish \textit{Mugler} and unwilling to accept the extent of the impact as dispositive.\textsuperscript{54} The underlying reasons, however, for Justice Holmes' decision were not philosophically different from Justice Harlan's but were, in fact, an objection to the method by which the community sought to obtain private property without compensation.\textsuperscript{55}

Justice Holmes also pointed to the lack of foresight of public officials who had obtained surface rights for the public,\textsuperscript{56} by purchase or otherwise, without additionally purchasing the right of support for those surface facilities, and who now tried to obtain those previously overlooked rights through non-compensatory police power regulation.

The rights of the public in a street purchased or laid out by eminent domain are those that it has paid for. If in any case its representatives have been so short sighted as to acquire only surface rights without the right of support, we see no more authority for supplying the latter without compensation than there was for taking the right of way in the first place and refusing to pay for it because the public wanted it very much.

So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought.\textsuperscript{57}

\textit{Pennsylvania Coal} may, perhaps, be better understood as supporting the proposition that government must compensate when restricting uses of land which are harmful to the public, if such uses would not otherwise have been harmful but for government's initial

\textsuperscript{53} \textit{Id.} at 416.
\textsuperscript{54} See text at note 61, infra.
\textsuperscript{55} See text at note 57, infra.
\textsuperscript{56} \textit{Pennsylvania} had prohibited, by the instant legislation, mining of coal in such a way as to cause subsidence of any: public building or structure used by the public; street, road, bridge or public passageway; track, roadbed, right of way used in the service of the public; dwelling, factory, store or other industrial or mercantile establishment; and, cemetery or public burial ground. 260 U.S. 393, 393-94 n.1 (1922).
\textsuperscript{57} 260 U.S. 393, 415-16 (1922).
intrusion. Justice Holmes' decision was primarily based not on a legal distinction concerning the nature of the regulation or the extent of its impact but rather on his common sense view that half measures do not become whole measures by combining half price plus police power regulation. This aspect of the case has apparently been underappreciated by the commentators. Thus, while Justice Holmes' opinion is based primarily upon the extent of regulation, he did not view the nature of the regulation as unrelated. That Justice Holmes was less than candid in his opinion has caused difficulty in later years as the legal community struggles to reconcile *Mugler* and *Pennsylvania Coal*. The reconciliation lies not in the factual distinction between the cases, but rather lies in recognizing the flexibility of traditional legal concepts which would have permitted a variety of outcomes in either case.

Justice Brandeis, dissenting, was unable to distinguish *Pennsylvania Coal* from *Mugler v. Kansas*.

Every restriction upon the use of property imposed in the exercise of the police power deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgement by the state of rights in property without making compensation. But restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking. The restriction here in question is merely the prohibition of a noxious use. The property so restricted remains in the possession of its owner. The state does not appropriate it or make any use of it. The state merely prevents the owner from making a use which interferes with paramount rights of the public.

While Justice Holmes had stated that an exercise of police power would be justified if it secured to all an "average reciprocity of advantage," he was unable to find the advantage gained by the coal company: Justice Brandeis found it in "the advantage of living and doing business in a civilized community."

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59 "This [the extent of the intrusion] is a question of degree—and therefore cannot be disposed of by general propositions.” Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922) (emphasis added).

60 “[U]sually in ordinary private affairs the public interest does not warrant much of this kind of interference.” Id. at 413 (emphasis added).

61 Id. at 417 (Brandeis, J. dissenting).

62 Id. at 415.

63 Id. at 422 (Brandeis, J. dissenting).
The principle for which Pennsylvania Coal is most often cited is that "[w]hen it [the diminution of property value] reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act." The Court did not more specifically identify the certain magnitude nor identify what fact situations would not require compensation once the "certain degree" of regulation was reached, although clearly that possibility was left open for a few cases. Whichever cases do not require compensation even though the regulation has reached a "certain magnitude" could only be excepted from the rule by the nature of the regulation. This point is the furthest the Court's logic can be applied, although it is at this point that the kind/degree distinction is needed most. Pennsylvania Coal, while an aberration because of its unique fact situation which gives rise to Justice Holmes' displeasure, does explore the requirements of a taking in familiar kind/degree terms. Although the kind/degree terminology is consistently used in all the taking cases, the outcomes of these cases are often inconsistent.

Even if a court determines that compensation is warranted, a question remains as to the amount and type to be awarded. In other words, if a court determines that the nature of the regulation is acceptable and that the diminution in property value is of insufficient magnitude to require compensation, that ends the inquiry: the burden is allocated totally to the landowner. If, however, due to the magnitude of the property's devaluation or the nature of the regulation the cost is to be borne by the community, a determination must be made as to the amount and type of compensation to which the affected landowner is entitled.

C. Amount of Compensation in "Taking" Cases

A landowner who suffers an adverse economic impact due to police power regulation—for example, due to a zoning ordinance, which is the most common permissible non-compensatory regulation—normally has no recourse against the community and must bear the loss himself. An act which is a valid exercise of the police

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44 See, e.g., Large, This Land is Whose Land? Changing Concepts of Land as Property, 1973 Wis. L. Rev. 1039, 1052.
45 260 U.S. at 413 (Holmes, J.). As noted earlier, some of the emphasis applied to this frequently cited proposition may be misplaced. See text at note 57, supra.
46 A zoning ordinance is also the best regulation which comfortably fits Justice Holmes' justification for the police power—to assure each member of the community "an average reciprocity of advantage." 260 U.S. at 415. See text at note 62, supra.
power is by definition non-compensatory. However, for land the
value of which is reduced under the eminent domain power, either
through outright expropriation or an excessive or impermissible use
of police power, the landowner is compensated under the Fifth
Amendment's requirement of "just compensation." "Just compen-
sation" has been uniformly interpreted to be a generous standard,
reflecting not only the fair market value for the land considering the
use to which it is being put at the time of condemnation but also
with reference to the highest and most profitable use for which the
property is suitable and to which the property could be converted
in the reasonably near future. Additionally, the highest and best
use valuation must take into account any increment of value which
may result from the affected property's being used in conjunction
with other parcels. This disparity in treatment between "taken"
and "non-taken" property makes the classification of the govern-
ment action of great concern to the regulated landowner, and in-
creases the need for consistency in defining the point at which regu-
lation becomes a taking. In attempting to delineate the boundary
beyond which a regulation becomes a taking courts have formulated
various standards, each of which uses various criteria producing a
wide variety of results. No standard has been uniformly accepted or
even uniformly applied, even though in land use litigation the iden-
tification of the appropriate standard will often be the dispositive
factor.

IV. Historic Preservation Legislation as Police Power
Regulation

In examining historic preservation legislation as police power reg-
ulation, case law shows that "fourteenth amendment objections are
stilled when zoning leaves the landowner with a 'reasonable benefi-
cial use'—that hypothetical residuum of private utility which is a
prerequisite for valid regulation." This reasonable beneficial use

(1949); United States v. Causby, 328 U.S. 256 (1946); Olson v. United States, 292 U.S. 246
(1934).

For a comprehensive and articulate discussion of the disparity controversy in the context
of the New York Court of Appeals decision in Penn Central Transp. Co. v. City of New York,
42 N.Y.2d 324, 366 N.E.2d 1271 (1977), see Costonis, The Disparity Issue: A Context for the

Costonis, supra note 69 at 407; see also Village of Euclid v. Ambler Realty Co., 272 U.S.
365 (1926); Nectow v. City of Cambridge, 277 U.S. 183, 188-89 (1928).
standard, which is the standard presently used, is a closely tailored evaluation of the point at which the police power is exercised to an excessive degree. It presupposes that the nature of the regulation is permissible, and analyzes only the extent of the intrusion. The reasonable beneficial use standard is an outgrowth of zoning case law. Simply stated, any exercise of the police power for permissible purposes which leaves the landowner with a single reasonable beneficial use is a valid police power regulation, leaving the owner without compensation.

Many historic properties are marginally profitable properties which, if development were permitted, could be renovated or rebuilt to yield a more handsome profit. Consequently, the owner/developer often has both the capability and incentive to prove that a police power regulation has impacted upon the necessary residuum of private usefulness, made impossible a reasonable beneficial use and thus effected a taking, either through expropriation or overregulation. This is, in fact, the typical challenge made to much historic preservation legislation.

At the outset historic preservation legislation must confront a major policy decision: whether historic preservation should be encouraged by public acquisition and ownership of historic structures or should be based on providing incentives to stimulate private ownership and management of historic structures. Generally, the greatest benefits are provided by private involvement in preservation activities, and, while state preservation authority should be active in acquiring and managing historic structures which the private market will not support, the state's major role should be that of assuring viability to private preservation activities.

Legislation providing for the public ownership and management of historic property does not provide an adequate response to current needs for landmark preservation. For many reasons, widespread public ownership of historic property is not feasible. Publicly-owned property may be expensive to acquire and maintain. It is no longer a source of tax

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71 See Town Hall Plan Dropped, N.Y. Times, Jan. 11, 1979, at C15, col. 5.
revenue. It is likely to be removed from economically productive uses. It is necessarily limited in scope and is hardly a feasible technique for the control of neighborhoods or areas, particularly in urban communities. Hence, the most significant role of state legislation and the greatest opportunity for innovative policy-making probably lies in the area of providing such services, standards, controls, and incentives as will encourage the practice of preservation techniques by private owners and users of historic property.74

Incentives provided to private efforts to preserve historic structures vary according to what the particular state or municipality views as the objectives to be achieved for the benefit of the community, the primary objectives being economic75 and cultural.76 The most comprehensive programs create tax incentives to stimulate private historic preservation efforts.77 These incentives will be examined more closely in the context of the New York City Historic Preservation Law78 which is discussed herein as a representative statute.

A. The New York City Landmark Preservation Law

The New York City Landmark Preservation Law is typical of many historic preservation laws in the United States79 in that “its primary method of achieving its goals is not by acquisitions of historic properties, but rather by involving public entities in land use decisions affecting these properties and providing services, standards, controls, and incentives that will encourage preservation by private owners and users.”80 The statute is implemented by the


77 See note 92, infra.

78 New York City Administrative Code, Ch. 8-A, § 205-1.0 et seq. (1976).

79 “The act is distinct, however, from most others in its broad definition of the subjects it seeks to preserve—landmarks, landmark sites, historic districts, exterior architectural features, and others.” Rankin, Operation and Interpretation of the New York City Landmarks Preservation Law, 36 Law and Contemp. Prob. 366, 367 (1971). See also Brenneman, Historic Preservation Restrictions: A Sampling of State Statutes, 8 Conn. L. Rev. 231 (1976). For foreign preservation programs, see note 177, infra.

Landmarks Preservation Commission, an eleven-member\textsuperscript{81} agency vested with authority to designate structures as landmarks, and areas as historic districts if the area contains improvements which:

(a) have a special character or special historical or aesthetic interest or value; and
(b) represent one or more periods or styles of architecture typical of one or more eras in the history of the city; and
(c) cause such area, by reason of such factors, to constitute a distinct section of the city . . . .\textsuperscript{82}

Once a structure or area qualifies, in the Commission's opinion, as a designated landmark or historic district, a public hearing is then held at which the owner and other affected or interested persons are given the opportunity to comment on the desirability of the proposed designation. Following this hearing the Commission may designate a building to be a "landmark,"\textsuperscript{83} situated on a particular "landmark site,"\textsuperscript{84} or may designate an area to be an "historic district."\textsuperscript{85} If the Commission decides to designate the property as a landmark, landmark site or historic district, New York City's Board of Estimate may modify or disapprove the designation,\textsuperscript{86} and the

\textsuperscript{81} The ordinance requires that the Commission include at least three architects, one historian qualified in historic preservation, one city planner or landscape architect, one realtor, and at least one resident of each of the city's five boroughs. New York City Administrative Code, Ch. 8-A § 534 (1976). In addition, the Commission has traditionally included one or two lawyers with experience in municipal government and several laymen with no specialized qualifications other than concern for the good of the city. Goldstone, \textit{Aesthetics in Historic Districts}, 36 \textit{Law and Contemp. Prob.} 379, 384-85 (1971).

\textsuperscript{82} New York City Administrative Code, Ch. 8-A § 207-1.0(h)(1) (1976). Landmarks are chosen through the application of similar criteria.

\textsuperscript{83} 'Landmark.' Any improvement, any part of which is thirty years or older, which has a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation and which has been designated as a landmark pursuant to the provisions of this chapter.\textsuperscript{Id.} § 207-1.0(n).

\textsuperscript{84} 'Landmark site.' An improvement parcel or part thereof on which is situated a landmark and any abutting improvement parcel or part thereof used as and constituting part of the premises on which the landmark is situated, and which has been designated as a landmark site pursuant to the provisions of this chapter.\textsuperscript{Id.} § 207-1.0(o).

\textsuperscript{85} 'Historic district.' Any area which: (1) contains improvements which: (a) have a special character or special historical or aesthetic interest or value; and (b) represent one or more periods or styles of architecture typical of one or more eras in the history of the city; and (c) cause such area, by reason of such factors, to constitute a distinct section of the city; and (2) has been designated as a historic district pursuant to the provisions of this chapter.\textsuperscript{Id.} § 207-1.0(h). The Act also provides for the designation of "scenic landmarks," see id. § 207.1.0(w), and "interior landmarks," see id. § 207-1.0(m).

\textsuperscript{86} In formulating its decision the Board of Estimate must consider the relationship of the
owner may then seek judicial review of the final designation decision.

Final designation as a landmark results in several major restrictions being placed on the property owner's use of the landmark site. The owner remains free to modify the interior of his landmark, although such modification must comply with other applicable zoning ordinances. The Commission must approve any modification, alteration or reconstruction of the exterior of the landmark.\(^7\) The ordinance establishes three methods of obtaining such approval. First, the owner may apply to the Commission for a "certificate of no effect on architectural features" which will be granted if the alteration does not affect any architectural features of the landmark and will harmonize with the landmark's historic features.\(^8\) Denial of the certificate is subject to judicial review.\(^8\) Second, the owner may apply for a "certificate of appropriateness" which, if obtained, evidences the Commission's conclusion that, after considering the property's aesthetic, historical and architectural values, the proposed construction on the landmark site would not unduly hinder the protection, enhancement, perpetuation and use of the landmark.\(^9\) Denial of this certificate is also subject to judicial review. The third procedure available to the owner is that he may seek a "certificate of appropriateness" based on the ground of "insufficient return."\(^9\) The purpose of this certificate is to ensure that the designation does not cause severe economic hardship. The procedure for obtaining such a certificate varies depending upon whether the property is taxable or tax-exempt.\(^9\)

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\(^7\) Id. §§ 207-4.0—207-9.0.
\(^8\) Id. § 207-5.0.
\(^9\) New York City Administrative Code, Ch. 8-A § 207-6.0(c) (1976).
\(^9\) Id. § 207-8.0.

If the owner of a non-tax-exempt parcel has been denied certificates of appropriateness for a proposed alteration and shows that he is not earning a reasonable return on the property in this present state, the Commission and other city agencies must assume the burden of developing a plan that will enable the landmark owner to earn a reasonable return on the landmark site. The plan may include, but need not be limited to, partial or complete tax exemption, remission of taxes, and authorizations for alterations, reconstruction or reconstruction appropriate for and not inconsistent with the purposes of the Act. § 207-8.0(c). The owner is free to accept or reject a plan devised by the Commission and approved by the other city agencies. If he accepts the plan, he proceeds to operate the property pursuant to the plan. If he rejects the plan, the Commission may recommend that the city proceed by eminent domain to acquire a protective interest in the landmark, but if the city does not do so within a specified time period, the Commission must issue a
The New York City landowner does gain one significant economic advantage by the landmark designation. Under New York City's zoning laws owners of any real property who have not developed their property to the full extent permitted by the applicable (non-landmark) zoning laws are allowed to transfer the unused development rights to contiguous parcels on the same city block.83 Landmark owners, as compared with other owners, have a broader range of recipient parcels (contiguous and non-contiguous) to which they may transfer the development rights which would have attached to their property but for its landmark designation.84 In other words, if a ten story building in an area which is zoned for a maximum height limitation of forty stories is designated a landmark, the owner would then be prohibited from building his otherwise allowable thirty sto-

notice allowing the property owner to proceed with the alteration or improvement as originally proposed in his application for a certificate of appropriateness.

Tax-exempt structures are treated somewhat differently. They become eligible for special treatment only if four preconditions are satisfied: (1) the owner previously entered into an agreement to sell the parcel that was contingent upon the issuance of a certificate of approval; (2) the property, as it exists at the time of the request, is not capable of earning a reasonable return; (3) the structure is no longer suitable to its past or present purposes; and (4) the prospective buyer intends to alter the landmark structure. In the event the owner demonstrates that the property in its present state is not earning a reasonable return, the Commission must either find another buyer for it or allow the sale and construction to proceed.

But this is not the only remedy available for owners of tax-exempt landmarks. . . . [If] an owner files suit and establishes that he is incapable of earning a "reasonable return" on the site in its present state, he can be afforded judicial relief. Similarly, where a landmark owner who enjoys a tax exemption has demonstrated that the landmark structure, as restricted, is totally inadequate for the owner's "legitimate needs," the Act has been held invalid as applied to that parcel. See Lutheran Church in America v. City of New York, 35 N.Y.2d 121 (1974).


ries. The owner would, under the New York City ordinance, be able to sell the development rights to his neighbor in the same zoning district who would then be able to build a seventy story building, using his right to build forty stories and adding the development rights to thirty stories he purchased from the landmark owner. This process is variously referred to as transferable development rights or air rights transfer. These rights are very valuable in many urban centers since the only place to build is up.

This concept of transferable development rights (TDR) is a relatively new approach to land use planning and regulation and promises to become widely applied. Although the constitutionality of specific TDR plans has been questioned, the technique, if knowledgeably used, is an effective means of minimizing the economic impact of a police power regulation, thereby preventing the regulation from amounting to a taking. Since the ordinance establishes the reasonable beneficial use standard to be a 6 percent return on investment, if a TDR alone amounts to a 6 percent return a taking would be prevented on the property from which the rights were being transferred.

It is generally believed that the benefits of TDR's outweigh their drawbacks:

TDRs are generally superior to other methods of protecting valuable landscapes and landmarks because they impose relatively little cost on the public, they are essentially self-working market operations that are difficult to thwart if properly planned, and because they provide some compensation to landowners whose privileges of conversion are restricted. Implementing a TDR Program requires a sophisticated under-

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9 The Supreme Court has frequently held that compensation must be the full monetary equivalent of the property taken. See, e.g., United States v. Reynolds, 397 U.S. 14, 16 (1970); United States v. Miller, 317 U.S. 369, 373 (1943); Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893); Porter v. United States, 473 F.2d 1329, 1334 (5th Cir. 1973). There are, however, no cases in which the court has confronted the issue of nonmonetary compensation, so it is still an open question. Blanchette v. Connecticut Gen. Ins. Corp., 419 U.S. 102, 149-54 (1974). It may eventually be decided under traditional compensation principles that TDR's are inadequate not only because they are not a sum certain payment and hence may be of unequal value to the property taken but also because it is nonmonetary compensation.

For further discussion of the constitutionality of TDR's, see Note, The Unconstitutionality of Transferable Development Rights, 84 YALE L.J. 1101 (1975).

97 New York City Administrative Code, Ch. 8-A § 207-1.0(q) (1970).
standing of the interrelationships between the various submarkets for housing, commercial floorspace, land, etc. Without such knowledge, use of TDRs may prove ineffectual or frustrating.**

The New York City Landmark Preservation Law is an example of a comprehensive police power regulation which seeks to preserve the aesthetic, cultural and historic architecture within the city by preventing unauthorized alteration or destruction of designated structures. Provided within the ordinance itself are the mechanisms through which an owner might seek exception from the statute, compensation through tax advantages and, additionally, permission to transfer the unused development rights from the landmark site to a designated parcel. Although the ordinance is comprehensive, it is also complex and may have a serious financial impact upon owners of historic property. Some basic questions challenging the essential nature of the regulatory scheme have arisen in litigation under the ordinance: does this ordinance leave the owner with a “reasonable beneficial use—that hypothetical residuum of private utility which is a prerequisite for valid regulation”?? Or, alternatively, does this regulation infringe to such an extent that it amounts to a taking, compelling acquisition by the government through eminent domain procedures with “just compensation”? If it is a taking, does the combination of tax advantages and TDR’s amount to “just compensation”?

B. Early Litigation Under the New York City Landmark Preservation Law

Litigation under the New York City Landmark Preservation Law


Although TDR's are a recent development, the concept has spawned a rather extensive bibliography. Among the more prominent articles are: Rose, Psychological, Legal and Administrative Problems of the Proposal to Use the Transfer of Development Rights (TDR) as a Technique to Preserve Open Space, 6 Urb. Law. 919 (1974); Costonis, Development Rights Transfer: A Proposal for Financing Landmarks Preservation, 1 Real Est. L.J. 163 (1972); Schnidman, Transferable Development Rights: An Idea in Search of Implementation, 11 Land and Water L. Rev. 339 (1976); Costonis, Development Rights Transfer: An Exploratory Essay, 83 Yale L.J. 75 (1973); Rose, Transfer of Development Rights: A Preview of an Evolving Concept, 3 Real Est. L.J. 330 (1975); Carmichael, Transferable Development Rights as a Basis for Land Use Control, 2 Fla. St. L. Rev. 35 (1974).

For a more extensive listing see Rutgers U., Development Rights Bibliography, Leaflet No. 533 (1976). For an excellent analysis of the New York City approach to TDR's, see Note, Development Rights Transfer in New York City, 82 Yale L.J. 338 (1972).

Law has established the reasonable beneficial use test as the appropriate standard to be applied in historic preservation cases. Although this test is now clearly defined and widely accepted, courts have experimented with a wide variety of standards, some of which will be examined in this section. Occasionally, some of these standards are a radical departure from today's reasonable beneficial use test. An early standard which was utilized in a historic preservation case, for example, even questioned the legitimacy of the state's interest in historic preservation, going so far as to hold that when historic preservation was the purpose of land use regulation a stricter standard than the usual reasonable beneficial use test was to be applied. While the United States Supreme Court and the New York State Court of Appeals now recognize the reasonable beneficial use test as the appropriate test in historic preservation litigation, the earlier cases, reflecting various solutions to this conflict between the community and the private landowner, deserve a close examination for their historical, although not precedential, value.

The first major case challenging the New York preservation statute, Trustees of the Sailor's Snug Harbor v. Platt, involved Sailor's Snug Harbor, a charitable home for retired seamen which used designated landmark structures (dating back to 1830) as dormitories for its residents. The institution planned to demolish the landmark structures and replace them with modern high-rise buildings. In challenging the landmark preservation ordinance the owner claimed that the ordinance's distinction between taxpaying and tax-exempt owners constituted unreasonable discrimination and thus violated both the Fourteenth Amendment of the United States Constitution and Section 11, Article I of the New York State Constitution. The trial court, while not reaching the unlawful discrimination contention, vacated the landmark designation on the

100 New York City Administrative Code, Ch. 8-A §§ 207-4.0—207-9.0 (1976).
105 See note 92, supra.
grounds that the public benefit derived from the landmark did not justify the burden on the owner, and that the limits of reasonable regulation had been exceeded: the ordinance was, therefore, found to be an unlawful taking of property without just compensation.107 While the decision cites Justice Holmes’ degree test from Pennsylvania Coal,108 it also introduces a balancing test typical of discrimination cases.109 The Snug Harbor court held that, “the regulation imposes so disproportionate a burden upon the landowner that it must be set aside ....”110 The court further identified the designation as unlawful “spot zoning”111 since it was an individual landmark designation112 and not an historic district113 (and therefore each parcel did not receive an “average reciprocity of advantage”114 to compensate for the regulation).115 The Appellate Division116 re-

107 Id. at 937-38, 280 N.Y.S.2d at 79.
109 “The regulation imposes so disproportionate a burden upon the landowner that it must be set aside in this case as an unlawful taking of property without just compensation.” Id., 53 Misc. 2d at 937, 280 N.Y.S.2d at 79 (1967) (citations omitted). See also note 110, infra.
110 Id., 53 Misc. 2d at 937, 280 N.Y.S.2d at 79 (1967). The balancing test is characteristic of a Fourteenth Amendment equal protection challenge. This test is no longer used due to later cases holding that economic regulation is unconstitutional only if there is no rational basis for believing that the regulation furthers a legitimate state interest. See Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).
111 Spot zoning is “the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners . . . .” Rodgers v. Village of Tarrytown, 302 N.Y. 115, 123, 96 N.E.2d 731, 734 (1951) (citations omitted). Sometimes, but more rarely, the term spot zoning is used to describe the reverse proposition, namely that in which a single lot is more severely restricted than other properties in the same area. (This is occasionally called “reverse spot zoning.”) The identification of individual historic structures as subject to greater restrictions than their neighbors might be categorized as spot zoning. However, if the zoning is in accordance with a comprehensive plan and serves the general welfare it would withstand a spot zoning attack. See 2 RATHKOPF, THE LAW OF ZONING AND PLANNING, Ch. 26 (4th ed. 1978).
112 See note 83, supra.
113 See note 85, supra.
114 Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922); see text at note 62, supra.
116 The New York State Supreme Court, Appellate Division, is not the court of last resort.
versed and remanded, concluding that the cultural benefit to the community justified the exercise of the police power. The appellate court did, however, remand the case for further factual analysis involving the ordinance’s provisions for relief of affected charitable institutions.

In Lutheran Church in America v. City of New York the New York City ordinance was again challenged following the landmark designation of Morgan House, the former Madison Avenue residence of J.P. Morgan and at the time of the controversy the offices of the Lutheran church. The Lutheran church, owner of the property, sought to demolish Morgan House and construct a nineteen story office building on the site. The church could not qualify for relief under the statutory provisions. The Commission refused to relax the restrictions on demolition, prompting the church to seek declaratory relief contending that either the law, or its application in this instance, was unconstitutional. The New York State Court of Appeals stated that a police power regulation becomes confiscatory when government “takes unto itself private resources in use for the common good . . . .” This is an application of the “nature of

but is rather the state intermediate appellate court. The Court of Appeals is the state’s highest court.


118 Chapter 8-A provides some guidelines as to what constitutes an undue burden on commercial realty and provides relief in such instances (§ 207-8.0, subd. a). However, the corresponding provisions in regard to property devoted to charitable uses are limited to the instances where the institution desires to alienate the property by sale or lease (§ 207-8.0, subd. a par. [1], subpar. [b], cl. (2)). We agree with Special Term that this does not render the statute unconstitutional. It must be interpreted as giving power to the commission to provide relief in the situation covered by the statute, but not restricting the court from so doing in others. The criterion for commercial property is where the continuance of the landmark prevents the owner from obtaining an adequate return. A comparable test for a charity would be where maintenance of the landmark either physically or financially prevents or seriously interferes with carrying out the charitable purpose. In this instance the answer would depend on the proper resolution of subsidiary questions, namely, whether the preservation of these buildings would seriously interfere with the use of the property, whether the buildings are capable of conversion to a useful purpose without excessive cost, or whether the cost of maintaining them without use would entail serious expenditure—all in the light of the purposes and resources of the petitioner.

Id. at 378, 288 N.Y.S.2d at 316.

The case was not retried: the city entered into negotiations with the institution for the acquisition of the property.


120 Id. at 124-25, 316 N.E.2d at 307, 359 N.Y.S.2d at 10-11.

121 Id. at 124, 316 N.E.2d at 307, 359 N.Y.S.2d at 10.

122 Id. at 125, 316 N.E.2d at 308, 359 N.Y.S.2d at 11.

123 Id. at 128-29, 316 N.E.2d at 310, 359 N.Y.S.2d at 14. Significantly, while the majority
the regulation" test similar to that used by Justice Harlan in *Mugler*. The holding, simply stated, is that landmark preservation is not the kind of regulation which is sustainable under the police power. The reason it is not sustainable is not identified by the court, although it is plainly not solely a question of degree. This approach is interesting because "landmark preservation ordinances traditionally have been upheld under the police power on the basis of economic benefits accruing to the tourist industry." Citing with approval the rule in *Sailor's Snug Harbor,* the court also stated that the regulation amounts to confiscation when the owner has been "deprived of the reasonable use of its land." Although the *Lutheran Church* court echoed the familiar "reasonable use" terminology, that standard played a very different role in its decision.

Plaintiff established a hardship consisting of projected organizational goals which would be frustrated and *one* reasonable land use—a centralized headquarters located on the Morgan property—which would be denied by operation of the preservation law [as opposed to the elimination of *all* reasonable land uses]. The court, as a consequence, held that this degree of interference, when coupled with the accretion to city resources, constituted a taking within the confines of the definition it had developed.

Previously, New York State courts had identified the point at which a police power regulation becomes confiscatory to be when the "ordinance precludes the use of the property for *any* purpose for which it is reasonably adapted." The *Lutheran Church* court,

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125 "Note, Urban Landmarks: Preserving Our Cities' Aesthetic and Cultural Resources, 39 ALB. L. Rev. 521, 531 (1975). Several cases support this proposition. *Id.* at 523 n.16-17.

126 The Appellate Division in *Sailor's Snug Harbor* held that the landmark designation effects a taking "where maintenance of the landmark either physically or financially prevents or seriously interferes with carrying out the charitable purpose." 29 App. Div. 2d at 378; 288 N.Y.S.2d at 316.


however, "identified a lower threshold of interference for invalidating a landmark ordinance than for other land use controls under the police power." This lower threshold results in a landmark ordinance being invalidated if it requires landowners to use their property for the public good, which almost by definition all landmark ordinances require, and if the landowner can show that the ordinance precludes his use of the property in any one specific way. Under this standard few landowners would have difficulty establishing the requisite factors to invalidate a preservation ordinance. Under the more frequently used reasonable beneficial use test the landowner must show either that the ordinance rationally furthers no legitimate state interest or that there is no longer available to him any reasonable beneficial use to which the property can be put. This test is later used by the United States Supreme Court in Penn Central Transp. Co. v. City of New York. However, the New York Court of Appeals in its Penn Central decision used an extraordinarily broad test under which no landowner could invalidate a landmark ordinance. The New York State Court of Appeals has covered the spectrum of validation standards: the Supreme Court and most other courts presently apply the reasonable beneficial use test.

V. Penn Central Transp. Co. v. City of New York

A. State Proceedings

While the status of the landmark preservation ordinance was uncertain following Lutheran Church, the decisions of the New York State courts in Penn Central Transp. Co. v. City of New York compounded the confusion. In addition, the Penn Central decision by the Supreme Court in 1978 did not altogether resolve this confusion.

The background of the Penn Central case is complex and covers a period of eleven years from the landmark designation to the final decision. In 1967 the New York City Landmarks Commission designated Grand Central Terminal a landmark and the Board of Esti-
mate approved the designation. Following the designation, in 1968 Penn Central entered into a renewable fifty-year lease and sub-lease with UGP Properties, Inc. The terms of the lease provided for UGP to construct a multistory office building above the terminal, UGP paying Penn Central $1 million annually during construction and not less than $3 million annually thereafter. If things had gone as planned, Penn Central would have lost between $700,000 and $1 million in net rentals from displaced concessionaires previously located within the terminal. Subsequently, Penn Central and UGP applied to the Commission seeking permission to construct atop Grand Central Terminal. Penn Central, in its application, presented two plans, one for a fifty-five story building and one for a fifty-three story building, both of which satisfied applicable zoning ordinances. The Commission denied a certificate of no exterior effect and a certificate of appropriateness. Penn Central did not seek judicial review of the denial of either certificate. Because the terminal site enjoyed a tax exemption, remained suitable for its present and future uses and was not the subject of a contract of sale, no further administrative remedies were available to Penn Central as to the two proposed plans. Although Penn Central could not build above the terminal, it did own at least eight other properties which were eligible to receive the transferable development rights available to it by the Commission’s prohibition of construction.

Following the Commission’s denial of the certificates, Penn Central and UGP filed suit in the state trial court claiming that the landmark law had “taken” their property (i.e. development rights above the terminal) without just compensation in violation of the Fifth and Fourteenth Amendments of the United States Constitution and arbitrarily deprived them of their property without due process of law in violation of the Fourteenth Amendment. Penn Central sought an injunction enjoining the city from using the landmark law to impede the construction of an otherwise lawful structure above the terminal. The trial court granted injunctive relief.

133 Id. at 116. UGP Properties, Inc. (UGP) is a wholly owned subsidiary of Union General Properties, Ltd., a United Kingdom corporation.
134 Id.
135 Id. at 115.
136 The terminal was originally designed to support a 20 story tower above the base; however, the tower was never constructed. Id.
137 See note 92, supra.
138 438 U.S. 104, 115 (1978). See also text at note 95, supra.
139 Id. at 119.
The city appealed to the intermediate state appellate court, which reversed the trial court. The Appellate Division relied on traditional guidelines in evaluating whether a taking had occurred, holding that since the restrictions promoted a legitimate public purpose, Penn Central could sustain its claim only by showing that the regulation deprived it of all reasonable beneficial use of the property. The Appellate Division found that Penn Central had not shown that the unused development rights over the terminal could not have been profitably transferred to one or more nearby sites, thereby concluding that Penn Central had shown only that they had been deprived of the property's most profitable use, and that this showing did not establish any constitutional violation.

The New York Court of Appeals, with considerable embellishment, affirmed. In a unanimous opinion, written by Chief Judge Breitel, the court held that, a property owner is not absolutely entitled to receive a return on so much of the property's value as was created by social investment [i.e. as a result of subsidies and limited rights of eminent domain accorded to the railroad to obtain a right of way for its track] and, even as to the privately created ingredient of the property's value, a plaintiff seeking to show that an otherwise reasonable land use regulation constitutes a deprivation of due process of law must demonstrate affirmatively that the regulation eliminates all reasonable return.

The emphasis on receiving a reasonable return on only the private investment is a major part of the decision, although it was raised for substantially the first time in the Court of Appeals.
Another innovative and significant aspect of the decision was Chief Judge Breitel's holding that when government overregulates, the regulated landowner is required to be compensated to the value of the reasonable beneficial use of the property, rather than the highest and best use standard applied in eminent domain's just compensation. It must be noted, though, that since the court did not find overregulation much of its theory is dicta, however persuasive and attractive it might otherwise be. Prior to this decision, when government regulation caused the land value to fall below the reasonable beneficial use value, the landowner was awarded the value of the property for its highest and best use. After finding no taking, the court stated:

[land use regulation often diminishes the value of the property to the landowner. Constitutional standards, however, are offended only when that diminution leaves the owner with no reasonable use of the property. The situation with transferable development rights is analogous. If the substitute rights received provide reasonable compensation for a landowner forced to relinquish development rights on a landmark site, there has been no deprivation of due process. The compensation need not be the 'just' compensation required in eminent domain, for there has been no attempt to take the property . . . . These substitute rights are valuable, and provide significant, perhaps 'fair,' compensation for the loss of rights above the terminal itself.

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147 To illustrate the possible savings which would be realized by a municipality under the Court of Appeals holding, let us examine a hypothetical landmark with a highest and best use valuation of $1,000,000, a reasonable beneficial use value of $100,000, and a current market value of $500,000. Before this decision if government by police power regulation caused the property value to fall to $100,000 the owner would absorb a $400,000 loss; if the property value were depressed to $90,000 the owner could claim inverse condemnation and exchange the property for $1,000,000 (realizing a $500,000 profit). The New York Court of Appeals holding in Penn Central indicates that if government by overregulation depressed the value to $90,000 the municipality would have to award only the $10,000 necessary to return the property to its reasonable beneficial use valuation, the title to the landmark remaining in the owner.

148 42 N.Y.2d at 335-36, 366 N.E.2d at 1278, 397 N.Y.S.2d at 921-22 (emphasis added). This indicates that transferable development rights will become more universally utilized since (under this standard) TDR's will always offset and usually eliminate any need for compen-
This decisional standard, basically the reasonable beneficial use test, is clearly more favorable to those who seek to uphold the ordinance. These two elements, the elimination from consideration of land value created by societal efforts and the entitlement of the landowner to compensation based only on a reasonable beneficial use value, are likely to have substantial and extensive impact upon land use regulation since they redefine the "taking" limitations of police power (permissible non-compensatory regulation) by redefining both land value and compensation. 149

B. United States Supreme Court Decision

The United States Supreme Court reviewed the Penn Central case along more traditional guidelines. 150 Justice Brennan, speaking for the majority, identified the following issues:

(1) [w]hether 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 . . . and, (2) if so, whether the transferable development rights afforded appellants constitute 'just compensation' within the meaning of the Fifth Amendment. 151

The Court found it unnecessary to reach the second question. Justice Rehnquist, dissenting, framed the major issue as:

[w]hether 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. 152

The minority's formulation of the issue was based on allowing a landowner wide latitude in the use of his "private" property —
latitude previously delimited in the nineteenth century by Justice Harlan's concern in Mugler v. Kansas\textsuperscript{153} with the ability of government to exercise police power to promote the general welfare.

In a 5-3 decision the Court\textsuperscript{154} held that "[t]he restrictions imposed are substantially related to the promotion of the general welfare and . . . permit reasonable beneficial use of the landmark site . . . ."\textsuperscript{155} Therefore constitutional objections to the police power regulations were eliminated. The opinion neither accepts nor rejects Judge Breitel's ideas concerning the owner's entitlement, or lack thereof, to compensation for value contributed by societal efforts.\textsuperscript{156} Neither does the Court address the appropriateness of the reasonable beneficial use standard for determining the value to which the owner must be compensated.

The Court did, however, further identify the elements necessary to effect a taking and analyzed the taking doctrine in terms of the traditional "bundle of rights" concept:\textsuperscript{157}

"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.'\textsuperscript{158}

By examining both "the character of the action and . . . the nature and extent of the interference" the Court forthrightly stated that both the kind of regulation and degree of intrusion are relevant. Indeed there is a point at which kind and degree become so interre-

\textsuperscript{153} Mugler v. Kansas, 123 U.S. 623 (1887). See text at note 34, supra.

\textsuperscript{154} Justices Burger, Rehnquist and Stevens dissented in an opinion written by Justice Rehnquist.


\textsuperscript{156} Although the Court did determine that "[t]aking jurisprudence does not divide a single parcel into discrete segments . . . [but] 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 . . . .," this statement is too general to be considered a diplomatic rejection of the "social increment" theory. The "discrete segment" the Court examines is not the social contribution to the terminal's value but rather the development rights above the terminal which Penn Central no longer had and for which it sought compensation. The Court only refers to the "social increment" theory in a footnote, stating "since the judgment of the Court of Appeals in any event rests upon bases that support our affirmance . . . we have no occasion to address the question." Id. at 121 n.23. The "social increment" theory should still be considered good law in New York.

\textsuperscript{157} See text at notes 14-15, supra.

lated that they can no longer differentiate valid from invalid regulation. It is suggested that this point is where the regulation precludes any reasonable beneficial use or, as Justice Holmes phrased it, where the diminution of property value reaches a "certain magnitude" and the state is forced to acquire the property by eminent domain. All of these ideas are expressed in the reasonable beneficial use standard, which has as its foundation the idea that an individual should not be forced to subsidize the state by maintaining property which lacks all value to him as a result of government regulation. *Penn Central* holds that the reasonable beneficial use test is the appropriate decisional standard to evaluate historic preservation legislation.

One problem with the Court's analysis, however, is that it puts a premium on the definition of what the "parcel as a whole" is. This is especially significant in a time of sophisticated commercial land transactions when parties often seek to obtain less than a fee interest and both sales and extended lease arrangements of "discrete segments" (i.e. development rights) become more familiar. *Penn Central* stated that "[t]hey accept for present purposes . . . that the parcel of land occupied by Grand Central Terminal must, in its present state, be regarded as capable of earning a reasonable return . . . ." Once the reasonable beneficial use standard was found to have been satisfied, the only way *Penn Central* could have prevailed was to have shown that the landmark preservation law did not further any governmental interest, that is to say, that the nature of the regulation itself invalidated the regulation. The Court, however, explicitly rejected this contention.

In contrast, Justice Rehnquist disagreed that a reasonable beneficial use standard was appropriate, and instead focused on the "imposition of general costs on a few individuals," and the character of the invasion. "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." It would seem that, attractive though this argument is to those concerned with increased governmental regulation of private affairs, the argument will most likely be regarded as a relic of less industrialized, less urbanized, less regulated and perhaps more tranquil times.

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158 See text at note 65, *supra*.
160 Id. at 134.
161 Id. at 149 (Rehnquist, J. dissenting).
Applying the concepts of the majority, however, it is not immediately apparent that the long term lessee of Penn Central's development rights retained a reasonable beneficial use since the development rights above the terminal no longer existed as they were perceived by the parties at the time the lease was signed. To extend the issue still further, suppose UGP had purchased (rather than leased) the development rights from Penn Central for the purpose of constructing a fifty-story office building, initially financing its construction with a mortgage obtained using the development rights as the mortgage security—not an unlikely occurrence. The relative rights and priorities of the parties are uncertain when the security evaporates due to a police power regulation. In addition to these uncertainties, questions arise as to whether any compensation is necessary and, if so, the value to which the parties must be compensated. If the development rights are transferable, once the development of the original site is prohibited due to a landmark ordinance, it is unclear whether the development rights are a "single parcel" (as the developer would see them) or a "discrete segment" (as the owner of the freehold would see them). If the development rights are a "discrete segment" of a larger parcel, it could be expected that the existence of marketable development rights alone would provide a reasonable beneficial use for the larger parcel. If the development rights are in themselves a single parcel, then the reasonable beneficial use standard would be applied to the original site without examining the marketability of the development rights. It must be emphasized that the characterization of the affected property would likely be the pivotal point. In many ways Penn Central was an easy case.


The effects of Penn Central will most likely be far-reaching, as municipal, county, state and federal regulatory bodies begin to enforce their regulations within the expanded perimeter of the New York Court of Appeals and United States Supreme Court Penn Central decisions. If the case is expansively construed the progressive growth of government involvement in private land use will continue at a quickened pace. There are, however, several critical

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183 See note 16, supra.
184 See Freilich, Awakening the Sleeping Giant: New Trends and Developments in Environmental and Land-Use Controls, 1974 Inst. of Planning, Zoning and Eminent Domain 1;
factors which underlie the case and may substantially confine the application of *Penn Central* to several narrow classes of property or landowners.

Initially, it must be recognized that *Penn Central* was in a particularly weak position to object to Judge Breitel's elimination of the "social increment" in determining reasonable return.\textsuperscript{146} Grand Central Terminal's value came from massive public investment and *Penn Central*’s virtual monopoly over track space which was itself acquired by an exercise of the state's eminent domain power on behalf of *Penn Central*’s predecessor. Secondarily, the requirement that compensation be “fair” and not the “highest and best use” value may be applicable to only a restricted category of regulated property such as landmarks. As more cases are decided, the applicable categories to which this new compensation\textsuperscript{146} applies will be defined in greater detail.

If *Penn Central* is not narrowly construed several new developments might be expected. With New York City's Landmark Preservation Law to serve as a constitutionally permissible model, rapid growth of local landmark preservation is likely. This is especially true since under the Court of Appeals decision, which was not rejected by the Supreme Court, government need only compensate the owner to the reasonable beneficial use valuation and may disregard any social increment in determining value.

While the Supreme Court in reaching its decision precisely identified private investment in historic preservation as a desirable foundation of a preservation program, its decision discourages private investment efforts by tacitly approving the lower court's widening of the state's non-compensatory regulating ability. Of course the

\textsuperscript{146} The social increment theory and its underpinnings occupy many paragraphs of the opinion and will undoubtedly mesmerize the commentators. If there ever was a case warranting the theory's application, *Grand Central Terminal* is the case. The rough justice of discounting the Terminal's rate of return on the basis of New York City's active contributions to the profitability of the Terminal and of *Penn Central*'s nearby holdings is intuitively appealing . . . . [However] there are two factors cutting against the theory's general applicability. First, it applies only to a small number of properties—like the Terminal—whose commercial utility is largely a consequence of massive public investments at or near the site and whose owners are the beneficiaries of dramatic infusions of public largesse . . . . Second, the segregation and quantification of an individual property's public and private increments of value are truly formidable tasks . . . .

\textsuperscript{147} See note 147, supra.
New York State Court of Appeals has no power to establish binding precedent outside of New York State. However, the financial attractiveness to municipalities of the decision will likely provoke similar reasoning and results by other states’ courts. Additionally, the Court of Appeals decision unnecessarily redefined the compensation necessary when a taking does occur, also restricting compensation to only that lost value which had been created by “private efforts.” The dissimilarity between these contemporaneous decisions on identical facts by the two most influential courts does not insure growth in a market which relies on stability and predictability of long-term profit to encourage substantial private investment.

Concurrent with a possible proliferation of legislation similar to the New York ordinance, it might be expected that susceptible historic urban structures will decline in marketability (especially commercial structures) as institutional lenders withdraw mortgage money. In an unhealthy market such as this, a marginally profitable structure may suffer serious economic injury with its designation as a landmark. 187

This problem of uncertainty concerning the financial stability of historic structures may be offset by legislative efforts drafted in response to Penn Central. The new legislation should provide a comprehensive and equitable system of historic preservation which allows both owner and community maximum flexibility within clearly established guidelines and which is no longer constrained by outmoded doctrines. New legislation should also assure all who are involved in the commercial real estate market—especially institutional lenders—of the predictability and profitability of the market in historic urban structures. Such a statute might provide that the state guarantee the mortgage of any designated historic structure by purchasing the mortgage from the mortgagee for the remaining indebtedness if the mortgagor should default. This would eliminate the high-risk nature of mortgages on historic structures, making mortgage money available at lower interest rates and thereby encouraging private preservation. A mortgage guarantee program would literally stabilize the financial aspects of historic preservation overnight. Additionally, such a program might awaken the state to the commercial risks inherent in historic preservation—a risk of which institutional lenders are acutely aware. Properly done, the costs of such a guarantee program would be far less than the economic benefits inherent in a predictable, stable and efficient preser-

187 See note 16, supra.
In constructing new doctrines, the various standards currently applied by courts should be examined for the land use patterns which evolve in response to each standard. A uniform local standard can then be devised which reflects the community's priorities in this field and gives the preservation program predictability and stability.

Of more distant concern, but of potentially greater aesthetic and architectural impact, historic preservation cases such as Penn Central may force a developer to fully utilize all property rights available to him at the time of constructing a distinctive structure. A structure need only be thirty years old to be designated a landmark. It is not unrealistic to assume that some buildings currently under construction may be designated landmarks even before the original mortgage is repaid.

Whichever standard, the one preferred by the New York Court of Appeals or the one advocated by the United States Supreme Court, is applied to compensation of affected landowners, it still must be decided who will quantify the appropriate standard. Either the judiciary or the legislature must determine what is the minimum acceptable "reasonable return" on an investment before a reasonable beneficial use becomes impossible. In New York City legislation has set the reasonable return on landmark property at a minimum of 6 percent. A legislature's involvement in this decision-making process is preferable to a judicial determination of the quantifiable standard. Neither the forces of rampant commercial development

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169 See note 83, supra.

170 New York City Administrative Code, Ch. 8-A § 207-1.0(v)(1) (1970).

171 Although reasonable beneficial use functions as a standard in the judiciary's hands, it must be translated into more concrete form—through quantification or otherwise—by legislatures that implement compensatory programs. . . . Realistically perceived, the six percent rate is nothing more or less than the outcome of the familiar legislative process of compromise of competing interests, in which the ethical values of the public decision-maker play a dominant role . . . . [L]egislatures, not the courts, [should] take the leading role in resolving the disparity issue because, whatever their failings, legislatures are better equipped than the courts both to seek consensus on this complex and controversial issue and to prescribe rules implementing the reasonable use standard for particular categories of regulated properties. The judiciary's task, under the constitutionally mandated standard, is to decide whether the rules that legislatures fix fall within this standard's ambit.

nor the preservationists are so legislatively underrepresented or politically isolated as to require judicial protection. The kind of policy-making considerations involved in determining the minimum acceptable reasonable return clearly constitutes a political decision, over which legislatures have traditionally been accorded wide latitude. Additionally, a legislature, having jurisdiction over zoning and taxation programs, is uniquely able to develop a comprehensive, stable preservation program. Such a program is imperative in order to attract capital to a secure and financially predictable investment, thereby encouraging private preservation efforts.

One problem with historic preservation legislation was not comprehensively addressed by any court during the Penn Central controversy. Historic preservation efforts may sometimes run afoul of the constitutional requirement of equal protection, which mandates that all structures similarly situated be similarly treated. Almost by definition such a requirement puts a premium on location in considering the acceptability of the regulation. Regulation of historic structures, unlike historic districts, may be susceptible to abuse because there is no guarantee that all similar structures will be treated alike, since they are not all located in one compact, easily regulated area. This abuse is commonly known as "spot zoning." There has been, however, no showing that courts are less able to identify and remedy discrimination in the regulation of land use than they are in other analogous fields. With the increased impact of urban land use decisions on the community, perhaps the new trend of zoning for the individual landmark might better be conceptualized as regulation according to class of land usage rather than the present policy which considers primarily geographic location. This zoning for the single landmark will undoubtedly withstand the usual equal protection challenge to such individualized legislation. The focal point in such an equal protection challenge would probably be the number of parcels affected and the consistency with a prescribed program, rather than the contiguity of the affected

174 See text at notes 72-74, supra.
175 See note 111, supra.
parcels. Both the number of parcels affected and the regulation’s consistency with a prescribed program will insure similar treatment for similar structures. The emphasis given to location as the primary and often sole determinant of the property’s approved use should be eliminated as other traditional but antiquated property doctrines are being relinquished. The British, who developed many of the property principles now utilized in the United States, have since discarded location as the most significant feature of land use planning and now classify structures, for purposes of historic preservation, according to the structure’s cultural significance.\(^\text{177}\) By examining innovative foreign preservation policies in addition to developments under the various federal, state and local standards now utilized, a municipality will be able to devise a preservation program uniquely suited to its own needs.

VI. CONCLUSION

Examination of case law developments in the area of police power regulation of land use shows the absence of a uniform, consistently applied decisional standard. The primary method of evaluating the validity of a police power regulation in the late nineteenth century was to determine the nature of the regulation: if it regulated aspects of land ownership considered to be the proper concern of government it was a valid regulation, regardless of how extensive its impact might be on the owner. This refusal to recognize the degree of interference as important was rejected by Justice Holmes, who stated that there was a certain point beyond which regulation amounted to a taking and as such required compensation. These two considerations, the nature of the regulation and the extent of its impact, were used inconsistently by the New York State courts to reach widely different results in their struggle to define a deci-

sional standard to be used to evaluate historic preservation legislation. This process culminated in the *Penn Central* litigation, where the state's highest court held that New York City's historic preservation ordinance was invalid only if it removed all reasonable beneficial use from the property. The New York Court of Appeals further held that in determining a reasonable return on his investment an owner was not entitled to a return on any investment in his property that resulted from societal efforts. The Supreme Court reviewed the case in a more conservative manner, including in its decisional standard a consideration of both the nature of the regulation and the extent of its impact on the landowner. The final standard that has evolved incorporates features of all the tests of validity that preceded it: a police power regulation of historic property is valid if it allows the owner a reasonable beneficial use of his property and furthers a permissible government interest. While this standard clarifies the general principles involved, it leaves unanswered many questions concerning historic preservation law and policy.

Much historic preservation legislation and litigation has created confusion as courts and legislatures struggle to mold outmoded legal doctrines to fit new needs of the contemporary community, needs which are substantially different from those which the legal doctrines were initially designed to meet. This confusion stems basically from the community's uncertainty and ambivalence toward landed property's entitlements. Confusion originates also in the modern struggle to objectify the priorities to be given parties in the conflict of collective rights versus private rights, where both collective and private rights exist simultaneously in the same piece of property. The primary dilemma which the community must confront in the conflict of private rights versus collective rights is the extent to which private rights can be extracted from an unwilling private party, without compensation, for the collective good. In the context of historic preservation and other land use programs the question is phrased in terms of the constitutional ambit of police power regulation and the identification of when collective acquisition becomes a "taking."

While the community struggles to resolve the conflict between private and collective rights with new legislation such as New York City's Landmark Preservation Law, it cannot escape the problems typically attendant to innovative legislation. New ideas introduced in the legislation, among them the potentially far-reaching concept of transferable development rights, have yet to be finely tuned. New
problems, such as the removal of necessary stability from the commercial mortgage market, have accompanied the state's intrusion into previously untouched areas. The *Penn Central* litigation, along with earlier litigation, has mounted a challenge based upon traditional eminent domain and police power principles. This challenge has been unsuccessful, although it has precisely delineated areas of concern to which policymakers must respond in designing a long-lasting, successful preservation program. *Penn Central* has shown that historic preservation legislation is characteristic of new legislation: the underlying legislative policy is sound while the means utilized to execute that policy should be revised in light of new experience to more closely implement the desired objectives.