Penn Central Transportation Company v. New York City: Easy Taking-Clause Cases Make Uncertain Law

In *Penn Central Transportation Company v. New York City,*[1] the Supreme Court held that New York City's Landmarks Preservation Law[2] as applied to Grand Central Terminal was not a "taking" of property for which compensation is constitutionally required. The decision has been hailed as a major victory for landmark preservation,[3] deplored as a threat to property rights,[4] and praised for clarifying a confused area of legal doctrine.[5] Little noticed is the fact that *Penn Central* did not pose the hard case for landmark preservation law:[6] a case in which preservation imposes unique and severe economic burdens on a property owner.[7] This comment argues that *Penn Central* was an "easy case"; the Court's doctrinal approach to the taking issue in *Penn Central* provides uncertain guidance for harder cases.

I. Penn Central—Owner of a Landmark

Grand Central Terminal was designated a "landmark" under New York City's Landmarks Preservation Law, which allows a building with "special character or special historical or aesthetic interest" to be so designated by the Landmarks Preservation Commission.[8] The statute requires owners of a "landmark" to keep its exterior repaired[9] and to seek Preservation Commission approval for

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1. 438 U.S. 104 (1978).

2. New York, N.Y., Admin. Code ch. 8-A, §§ 205-1.0 to 207-21.0 (1971 & 1975-76 Supps.).

3. Marcus, *The Grand Slam Grand Central Terminal Decision: A* Euclid *for Landmarks, Favorable Notice for TDR and a Resolution for the Regulatory/Taking Impasse,* 7 Ecology L.Q. 731, 732 (1979).

4. 438 U.S. at 143 (Rehnquist, J., dissenting); 25 Loy. L. Rev. 205 (1979).

5. Note, *Police Power and Compensable Takings—A Landmark Decision Clarifies the Rules:* Penn Central Transportation Co. v. City of New York, 11 Conn. L. Rev. 273, 289 (1979).

6. The exception is Soper, *On the Relevance of Philosophy to Law: Reflections on Ackerman's Private Property and the Constitution,* 79 Colum. L. Rev. 44, 62 (1979).

7. *See generally* Pyke, *Architectural Controls and the Individual Landmark,* 36 L. & Contemp. Prob. 398 (1971).

8. New York, N.Y., Admin. Code 207-1.0(n), *quoted in* 438 U.S. at 110. Designation can only take place after interested parties have been provided an opportunity for a hearing. *Id.* The decision is reviewed by the New York City Board of Estimate and may be reviewed by the courts if the owner requests. *Id.* at 111. Although Penn Central opposed the designation, it did not seek judicial review. *Id.* at 116. *See generally* Rankin, *Operation and Interpretation of the New York City Landmarks Preservation Law,* 36 L. & Contemp. Prob. 366 (1971).

9. 438 U.S. at 111.

external alterations.[10] Four months after Grand Central was designated a "landmark," Penn Central entered a lease agreement for the construction of an office tower above the terminal. Penn Central submitted two plans for the tower to the Preservation Commission, the first calling for a fifty-five story building, cantilevered above the terminal's Beaux Arts facade, the second calling for a fifty-three story tower that would require tearing down part of the terminal, including the facade.[11] The Commission rejected both plans as aesthetically wanting. Although the original 1913 plans for Grand Central Terminal had included a twenty story Beaux Arts office tower, Penn Central did not consider the 1913 design, and it did not submit any further plans to the Commission. Penn Central did not seek available judicial review of the denial of the certificates, but instead sued to enjoin the application of the Landmarks Preservation Law to the terminal, claiming a "taking" of property without compensation in violation of the fifth and fourteenth amendments.[12]

The economic impact of the preservation law on Penn Central was moderate. Under the lease agreement for the office tower, Penn Central would have been guaranteed a rental of $1 million annually during construction and a minimum of $3 million annually afterwards. These rentals would have been partially offset by the loss of existing concessions.[13] The trial court found that repair and maintenance costs of about $1,278,135 were necessary in 1972, and that Penn Central had operated the terminal at deficits of over $1 million in 1969 and almost $2 million in 1971.[14] However, the New York Supreme Court, Appellate Division, holding that Penn Central had not been deprived of all "reasonable use" of the property,[15] found that Penn Central's calculations were deficient because they attributed railroad operating deficits to the terminal, because they did not allow a rental value for railroad use of terminal space, and because Penn Central had not made adequate efforts to obtain rental value from underutilized terminal space.[16] The New York

10. *Id.* at 112. The statute provides three procedures by which the Commission may approve alterations: 1) a certificate of "no effect on protected architectural features"; 2) a certificate of "appropriateness"; and 3) a certificate of appropriateness on the ground of "insufficient return." *Id.*

11. *Id.* Penn Central applied first for a certificate of no exterior effect and then for a certificate of appropriateness. *Id.* at 116-17.

12. *Id.* at 118-19.

13. *Id.* at 116.

14. Penn Central Transp. Co. v. City of New York, 50 A.D.2d 265, 377 N.Y.S.2d 20, 33 (App. Div. 1975) (Lupiano, J., dissenting).

15. *Id.* at 28.

16. *Id.*

Court of Appeals, affirming,[17] reasoned that Penn Central had overvalued its investment in the terminal by not considering the amount of value contributed by government subsidies, and had undervalued its return by not including the return to other Penn Central properties in the area, which resulted from the railroad.[18] The United States Supreme Court concluded that Penn Central remained able to earn a "reasonable return" on its investment in the terminal.[19]

Furthermore, the New York City statutory scheme gave Penn Central "transfer development rights"[20] that allow property owners to transfer unused development potential to contiguous lots.[21] Owners of landmark sites like Penn Central may transfer development rights to a more extended set of lots.[22] At the time it sought to build over Grand Central Terminal, Penn Central owned a number of eligible recipient lots, and the lessee of the airspace over the terminal was apparently willing to contract to develop one of these other sites.[23] The Supreme Court found that these transfer development rights to the airspace "undoubtedly mitigate whatever financial burdens the law has imposed."[24]

II. Theories of the Taking Clause

The fifth amendment guarantee, "nor shall private property be taken for public use, without just compensation," poses difficult conflicts between governmental goals and the impact of governmental action upon private property values.[25] If compensation is required, governmental action may become too costly; if compensation is not required, the private landowner may bear a disproportionate share of the cost of producing a public benefit. Not surpris-

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17. Penn Central Transp. Co. v. City of New York, 42 N.Y.2d 324, 337, 366 N.E.2d 1271, 1279, 397 N.Y.S.2d 914, 922 (1977).

18. 42 N.Y.2d at 333-35, 366 N.E.2d at 1276-77, 397 N.Y.S.2d at 919-21.

19. 438 U.S. at 136.

20. Transfer development rights are the subject of major controversy. *See* Costonis, *"Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies,* 75 Colum. L. Rev. 1021 (1975); Note, *The Unconstitutionality of Transferable Development Rights,* 84 Yale L.J. 1101 (1975).

21. A contiguous lot, however, may not be developed more than twenty percent over its originally zoned maximum. 438 U.S. at 114.

22. *Id.* This privilege apparently was adopted to ensure that the Landmarks Law would not have an unduly harsh effect on Grand Central Terminal. *Id.*

23. Marcus, *supra* note 3, at 747.

24. 438 U.S. at 137. The transfer development rights, however, do not meet the " 'full and perfect equivalent' " standard of compensation. 438 U.S. at 150 (Rehnquist, J. dissenting) (quoting Monangahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893)).

25. *See* Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundation of "Just" Compensation Law,* 80 Harv. L. Rev. 1165 (1967).

ingly, courts have used a number of different theories to resolve taking clause questions.[26] While "essentially *ad hoc*"[27] adjudication can provide needed flexibility, commentators have deplored the confused state of taking clause theory.[28] Some scholars have attempted to reconstruct consistent themes from existing decisions.[29] Others have proposed new theoretical approaches[30] that have gained increasing judicial attention.

A. *The Appropriation Test*

Courts and commentators do agree that governmental assumption of title is the most obvious case of a "taking" that requires compensation.[31] This appropriation test has been extended to cases in which the government destroys property or renders it utterly worthless.[32] For example, when the government builds a dam and floods land, compensation is required.[33]

Nearly all discussions of the taking clause agree that the compensation requirement is not and should not be limited to cases in which the government appropriates property.[34] In determining what additional governmental action requires compensation, however, theories of the taking clause diverge sharply.

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26. "[T]his Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government . . . ." 438 U.S. at 124.

27. *Id.*

28. Dunham, Griggs v. Allegheny Co. *in Perspective: Thirty Years of Supreme Court Expropriation Law,* 1962 SUP. CT. REV. 63, 106. *See also* Sax, *Takings and the Police Power,* 74 YALE L.J. 36 (1964).

29. Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria,* 44 S. CAL. L. REV. 1, 7 (1971). *See also* Dunham, *supra* note 28.

30. Michelman, *supra* note 25; Sax, *supra* note 28.

31. *See* 438 U.S. at 123 n.25; United States v. Central Eureka Mining Co., 357 U.S. 155, 166 (1958); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922); Mugler v. Kansas, 123 U.S. 623, 669 (1887); Fred F. French Inv. Co. v. City of New York, 39 N.Y.2d 587, 595, 350 N.E.2d 381, 386, 385 N.Y.S.2d 5, 9-10 (1976); Lutheran Church in America v. City of New York, 35 N.Y.2d 121, 130, 316 N.E.2d 305, 311, 359 N.Y.S.2d 7, 15 (1974). *See generally* F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE 120 (1973); Michelman, *supra* note 25, at 1184; Sax, *supra* note 28, at 36-37; Soper, *The Constitutional Framework of Environmental Law,* in FEDERAL ENVIRONMENTAL LAW 20, 52 (1974).

32. Van Alstyne, *supra* note 29, at 7. *See generally* Sax, *supra* note 28, at 46-68; Soper, *supra* note 31, at 52.

33. Pumpelly v. Green Bay Co., 30 U.S. (13 Wall.) 166 (1871). *See also* Griggs v. Allegheny County, 369 U.S. 84, 89 (1962) (noise from airplane flights requiring compensation); United States v. Causby, 328 U.S. 256, 261 (1946) (noise from airplane flights requiring compensation); Fred F. French Inv. Co. v. City of New York, 39 N.Y.2d 587, 591, 350 N.E.2d 381, 383, 385 N.Y.S.2d 5, 7 (1976) (limiting property use to a public park requiring compensation).

34. The exception is F. BOSSELMAN, D. CALLIES & J. BANTA, *supra* note 31, at 226-55.

B. *The Enterpriser Test*

Theoretically closest to the appropriation test is Professor Sax's 1964 proposal extending the compensation requirement to a wider range of situations in which the government acts to its own benefit.[35] Sax distinguishes two governmental roles: the government acts as an "enterpriser" when it "acquire[s] economic resources";[36] it acts as an "arbiter" when it settles conflicts among citizens.[37] Appropriation is not the only method by which the government acts as an enterpriser; it can also acquire resources by regulation.[38] Sax argues that since the likelihood of arbitrary action increases when the government acts on its own behalf,[39] courts should require compensation when the government acts as an enterpriser.[40] The concept of government enterprise, however, may not bear the weight Sax places upon it. Sax argues that a taking should be found when the government closes gold mines, freeing skilled miners for work in essential war industries[41] and thereby improving the government's competitive ability to acquire resources on the market.[42] Conversely, Sax would not find a taking when the government decides in favor of the interests of apple growers rather than owners of cedar trees,[43] or in favor of residential neighborhoods rather than quarries.[44] Governmental actions in furtherance of public goods such as defense or environmental protection, however, are more difficult to classify under Sax's analysis.[45] When the government acts to further public goods, it is neither settling conficts among particular private citi-

35. Sax, *supra* note 28, *passim.*

36. *Id.* at 62. Sax recognizes that this standard includes state collection of taxes and fines. *Id.* at 75. Rather as an afterthought, he stipulates that taxes do not raise takings clause issues because they do not impose burdens on isolated individuals. *Id.* at 75-76. Sax thus implicitly recognizes the importance of the fairness considerations discussed in the text accompanying notes 59-64 *infra.*

37. *Id.* at 62.

38. *Id.* at 63.

39. *Id.* at 64-65.

40. *Id.* at 63.

41. *Id.* at 71 (discussing United States v. Central Eureka Mining Co., 357 U.S. 155 (1958)).

42. "[I]n the performance of this enterprise capacity, government is very much like those who function in the private sector of the economy, and indeed is in its resource-acquiring job a competitor with private enterprisers. . . ." Sax, *supra* note 28, at 62.

43. *Id.* at 69 (discussing Miller v. Schoene, 276 U.S. 272 (1928)).

44. *Id.* (discussing Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) and Consolidated Rock Prods. v. City of Los Angeles, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638 (1962)). *See also* Hadacheck v. Sebastian, 239 U.S. 294 (1915) (closing a brickyard not a taking).

45. *See* Johnson, *Planning Without Prices: A Discussion of Land Use Regulation Without Compensation,* in PLANNING WITHOUT PRICES 63, 102-03 (B. Siegan ed. 1970).

zens, nor necessarily acting to enhance its own competitive position. Sax, himself, abandoned the government enterprise test precisely because he feared it would be interpreted to require compensation in cases involving governmental acts to acquire public goods.[46] Despite Sax's abandonment, however, the government enterprise test has gained increasing judicial recognition.[47]

C. *The Noxious Use Test*

Another approach to interpreting the taking clause is the noxious use test, which provides that governmental regulation is not a taking if it curtails a nuisance, but that it is if it inhibits an innocent use.[48] This theory was traditionally linked to the appropriation test because it rests on a formal, individualistic view of property rights: the owner is entitled to do what he pleases with what he owns, so long as he does not harm others.[49] Critics of the test question whether there are morally relevant differences between uses classified by courts as noxious and innocent. "Noxious uses," the critics claim, are not necessarily uses for which the owner is at fault or which violate the rights of others; rather, they are uses which are incompatible with other property owners' preferred uses.[50] For example, operating a brickyard is not morally objectionable, but may conflict with nearby residential quiet.[51] Since the moral line between noxious and innocent uses is not a significant one, the distinction does not provide a rationale for compensating an "innocent" property owner who bears the costs of regulation while ignoring the economic plight of an owner whose "noxious use" is curtailed.

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46. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 150 n.5, 151 (1971).

47. *See* Hasegawa v. Maui Pineapple Co., 52 Hawaii 327, 475 P.2d 679, 684 n.8 (1970); Sibson v. State, 115 N.H. 124, 336 A.2d 239, 241 (1975); American Dredging Co. v. State Dep't of Environmental Protection, 161 N.J. Super. 504, 391 A.2d 1265, 1268 (1978); Grimpel Assocs. v. Cohalan, 41 N.Y.2d 431, 433, 361 N.E. 2d 1022, 1024, 393 N.Y.S.2d 373, 375 (1977); Fred F. French Inv. Co. v. City of New York, 39 N.Y.2d 587, 593, 350 N.E.2d 381, 384, 385 N.Y.S.2d 5, 8 (1976); Lutheran Church in America v. City of New York, 35 N.Y.2d 121, 128-29, 316 N.E.2d 305, 310, 359 N.Y.S.2d 7, 14 (1974); Spears v. Berle, 63 A.D.2d 372, 407 N.Y.S.2d 590, 593 (App. Div. 1978); Alco Parking Corp. v. City of Pittsburgh, 453 Pa. 245, 307 A.2d 851, 863 n.14 (1973); San Antonio River Auth. v. Garrett Bros., 528 S.W.2d 266, 273-74 (Tex. 1975); Maple Leaf Investors, Inc. v. State Dep't of Ecology, 88 Wash. 2d 726, 565 P.2d 1162, 1165 (1977).

48. Mugler v. Kansas, 123 U.S. 623, 665 (1887).

49. *See generally* Sax, *supra* note 28, at 37-40.

50. "A nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard." Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926). *See generally* Michelman, *supra* note 25, at 1198; Sax, *supra* note 28, at 48-50; Soper, *supra* note 31, at 54.

51. *See* Hadacheck v. Sebastian, 239 U.S. 294 (1915).

D. *The Diminution of Value Test*

A further concern of courts has been with the diminution in property values caused by regulation. The theme was sounded by Justice Holmes who stated that "if regulation goes too far it will be recognized as a taking."[52] For example, the Supreme Court held that compensation was required when state law prohibited subsurface mining which threatened a dwelling and thereby rendered a mining company's retained subsurface rights valueless.[53] In order to apply this diminution of value test, courts must specify the unit of property for which economic loss is to be measured[54] and they must determine when a degree of loss has become too severe to be sustained without compensation.[55] In the severity determination, the "reasonable beneficial use" standard is commonly employed. Under that standard, a taking has not occurred if the owner retains some method of employing the property that yields an economic return, even if he has lost a more profitable use.[56] Courts vary widely in their assessments of tolerable economic loss.[57] They also vary widely in whether they consider diminution of value at all.[58]

E. *The Fairness Test*

Instead of focusing on economic loss *per se*, some courts and

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52. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

53. *Id.* at 414. *Pennsylvania Coal* is often read as standing simply for the proposition that when value is diminished too greatly, compensation is required. *See, e.g.*, F. BOSSELMAN, D. CALLIES & J. BANTA, *supra* note 31, at 142-48; Sax, *supra* note 28, at 41; Soper, *supra* note 31, at 56. For arguments that the case was more complex, see Costonis, *supra* note 20, at 1033-34; Michelman, *supra* note 25, at 1230-34; Comment, *Balancing Private Loss Against Public Gain to Test for a Violation of Due Process or a Taking Without Just Compensation*, 54 WASH. L. REV. 315, 327-30 (1979).

54. Sax argues that the need to individuate property interests poses an unworkable problem of definition for any theory of the taking clause which employs destruction or diminution of the property's value as a criterion for a taking. Sax, *supra* note 28, at 60. *See also* Michelman, *supra* note 25, at 1192-93. *But see* B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 156-67 (1977) (arguing that "common sense" understandings of property can provide a basis for individuating "things").

55. Sax, *supra* note 28, at 50-60; Soper, *supra* note 31, at 55-58.

56. The New York courts used this standard in *Penn Central.* See notes 15 & 17 *supra.*

57. *Compare* Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972) (ordinance limiting swamplands to indigenous uses did not require compensation) *with* Dooley v. Town Plan and Zoning Comm'n of Fairfield, 151 Conn. 304, 197 A.2d 770 (1964) (zoning property as part of a flood plain district required compensation) *and* Morris County Land Improvement Co. v. Parsippany-Troy Hills Township, 40 N.J. 539, 193 A.2d 232 (1963) (zoning restricting use of swamplands required compensation).

58. *Compare* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (statute prohibiting mining causing dwelling subsidence was a taking) *with* Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (ordinance prohibiting gravel pit excavations more than two feet below maximum surface water level was not a taking).

commentators have recently taken the view that the moral basis of the compensation requirement is the fairness of the imposition of the burden.[59] In a recent discussion of fairness, Professor Michelman singles out two features of a burden as particularly significant for deciding whether compensation is required.[60] The first feature is the burden's uniqueness—whether it is a hardship imposed on one or a few individuals, or spread more widely throughout society, like a tax.[61] The second feature is the burden's harshness, which Michelman regards as a function not only of the severity of the economic loss that the burden imposes, but more particularly of the extent to which the burden upsets "distinct investment backed expectation[s]"[62] of the property owner. Courts have cited Michelman for the proposition that fairness is an important consideration in applying the taking clause.[63] These courts were more concerned with general notions of fairness, however, than with Michelman's two point test. Before *Penn Central,* only one reported decision appears to have considered directly the fairness of interference with investment-backed expectations.[64]

III. *Penn Central:* An Easy Case

The Holmesian aphorism, "hard cases make bad law,"[65] poses a general challenge to defenders of principled judicial decisionmaking. A case may be "hard" for a legal theory if that theory cannot

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59. " '[T]he Fifth Amendment's guarantee [is] designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " 438 U.S. at 123 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

60. Michelman, *supra* note 25, at 1218-24. Michelman argues that the relevance of these features can be explained by either a more general theory of utility, *id.* at 1217, or a more general theory of fairness such as John Rawls's. *Id.* at 1219.

61. *Id.* at 1217.

62. *Id.* at 1233.

63. State v. Hammer, 550 P.2d 820, 825 n.16 (Alaska 1976); Midway Cabinet Fixture Mfg. v. County of San Joaquin, 257 Cal. App. 2d 181, 65 Cal. Rptr. 37, 44 (1968); State v. Nordstrom, 54 N.J. 50, 253 A.2d 163, 165 (1969); Lange v. State, 86 Wash. 2d 585, 547 P.2d 282, 285 (1976).

64. HFH, Ltd. v. Superior Court of Los Angeles County, 15 Cal. 3d 508, 521, 542 P.2d 237, 246, 125 Cal. Rptr. 365, 374 (1975). In that case, investors bought land contingent on its being rezoned for commercial use. They failed to take advantage of the change and claimed a taking when the land was downzoned. The court, comparing the investors to holders of a losing sweepstakes ticket, did not require compensation. The notion of "distinct investment backed expectations", however, may not always be read so narrowly. If courts consider merely the existence of expectations, and not their reasonableness or legitimacy, the fairness test will require compensation in a wide range of cases.

65. Northern Sec. Co. v. United States, 193 U.S. 197, 400 (1903) (Holmes, J., dissenting).

resolve it satisfactorily,[66] quite likely because the theory's basic principles point to different resolutions. A case may be "hard" for a judge because no legal theories apply directly or because applicable legal theories conflict.[67] *Penn Central* was an "easy" case on both of these counts. Predominant theories of the taking clause, with the possible exception of the noxious use test, resolve the case readily, and all compel the conclusion that compensation was not required.

Consider first the appropriation test. The city assumed no ownership rights over Grand Central Terminal; it did not literally "take" the terminal. Penn Central argued, however, that the city did "take" at least some of its property: the air rights over the terminal. The railroad argued that the city's denial of its certificate applications had rendered rights to the airspace over Grand Central worthless, and therefore constituted an obliteration of property akin to flooding from a dam.[68] Justice Rehnquist was persuaded,[69] but the majority rejected this argument, holding that a consideration of whether property rights have been abrogated must look to rights in the parcel as a whole.[70] This holding raises the theoretical difficulty of deciding what counts as a "whole parcel" of property,[71] for which the Court provides no guidelines. Even if this difficulty were avoided by granting that air rights are separate things, it does not follow that Penn Central suffered a "taking." The denial of two certificate applications hardly constitutes full extinction of the value of the air rights, particularly in light of the transfer development rights which Penn Central was granted. On the appropriations theory, Penn Central was clearly not entitled to compensation.

A court applying the enterpriser test would reach the same result. By enforcing its Landmarks Preservation Law, New York City did not acquire resources or improve its competitive position in the market. The city was not, for example, planning to purchase the terminal. New York City does benefit in an incidental way, of course, from the maintenance and preservation of tourist attractions; but this is the same manner in which private citizens in New York benefit from the presence of the terminal.[72] Instead, *Penn*

66. B. ACKERMAN, *supra* note 54, at 115.

67. R. DWORKIN, TAKING RIGHTS SERIOUSLY, 83-89 (1977).

68. 438 U.S. at 130. See note 33 *supra* and accompanying text.

69. 438 U.S. at 143 (Rehnquist, J., dissenting).

70. *Id.* at 130-31.

71. See note 54 *supra*. An illustration of the difficulty here is whether the railway station and an attached railway hotel, under common ownership and management, would count as the "same" parcel.

72. To be an "enterpriser" under Sax's theory, the government must benefit in a special and not merely an incidental way. Sax, *supra* note 28, at 74. Justice Rehnquist argued that

Central involves the government acting as arbitrator between Penn Central's desire to achieve profit from an office tower and other citizens' desires to enjoy a familiar city vista.

The diminution of value test likewise does not entitle Penn Central to compensation. While Penn Central lost valuable uses of the property, it quite simply did not lose badly enough. The New York Appellate Division,[73] the New York Court of Appeals,[74] and the Supreme Court[75] all found that the railroad remained able to make a reasonable economic return on the property. All three courts noted that economically troubled Penn Central, once thwarted in particularly lucrative plans, had not attempted to develop other plans such as the originally planned smaller tower. Nor had it tried to make better use of the terminal space, or tried to use its transfer development rights.[76]

Finally, the fairness test similarly does not require compensating Penn Central. The burdens imposed by landmark preservation have been regarded as troubling with respect to fairness because they typically affect only those owners who happen to possess especially significant property rather than affecting—like zoning or historic district legislation—all of those whose property lies within a specified geographic area.[77] Since landmarks may stand alone or be widely scattered through an area, landmark preservation does not bring the reciprocal benefits to owners that attach to zoning or historic districts.[78] Landmark preservation, therefore, typically imposes unique burdens. The Supreme Court in *Penn Central,* however, rejected uniqueness of the burden as a sufficient reason for granting compensation to Penn Central, arguing that burdens may be unique without requiring compensation,[79] and that the Landmarks Preservation Law may sufficiently affect the quality of life in New York City to provide some reciprocal benefits to Penn Cen-

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the affirmative duty to maintain the landmark imposed by the statute on the landmark owner was similar to government acquisition of a benefit. 438 U.S. at 146 (dissenting). The government was not, however, acquiring for free a resource which it would have needed to purchase, thereby improving its competitive position.

73. See note 16 *supra* and accompanying text.

74. See note 18 *supra* and accompanying text.

75. See note 19 *supra* and accompanying text.

76. 438 U.S. at 137; 42 N.Y.2d at 334, 366 N.E.2d at 1277, 397 N.Y.S.2d at 920; 377 N.Y.S.2d at 28-29.

77. *See, e.g.,* Pyke, *supra* note 7, at 398.

78. Penn Central Transp. Co. v. City of New York, 42 N.Y.2d 324, 329-30, 366 N.E.2d 1271, 1274, 397 N.Y.S.2d 914, 917-18 (1977). The benefits are reciprocal because each owner's maintenance of his property benefits surrounding owners.

79. 438 U.S. at 133.

tral.[80] The Court made it clear that the fairness test requires more than a showing of a unique burden. The test also requires consideration of the extent of interference with distinct investment backed expectations. Penn Central remained able to use the terminal as it always had;[81] the investments it had made in the terminal as a railway station remained protected. The lease agreements were entered *after* the city's designation of Grand Central as a landmark; Penn Central had not bought land, refurbished the terminal or made other financial commitments aimed at developing the terminal prior to the designation. While the burden's uniqueness is somewhat troubling, on balance the fairness test does not require compensating Penn Central.

The one theory which may require compensating Penn Central is the noxious use test. The difficult issue here is deciding what counts as a noxious use.[82] If maintaining an eyesore may properly be regarded as a noxious use, the Landmarks Preservation Law as applied to Grand Central would not require compensation. Justice Rehnquist, however, argued in dissent in *Penn Central* that noxious uses are narrowly limited to those which affect the "health, the morals, or the safety of the public."[83] He did not consider the somewhat speculative connection which might be drawn between landmark preservation, enhancing the quality of city life, and improvement of public health and morals. Under Justice Rehnquist's standard, erecting an office tower is not a noxious use, and Penn Central should, therefore, be compensated.

IV. THE HOLDING IN *Penn Central* AND HARDER CASES

The *Penn Central* holding rested on three central propositions. First, in considering whether there has been a taking, courts must look to the "character of the [government] action."[84] By this, the Court understands most immediately whether the government acts as an appropriator.[85] The Court, in addition, refers to the government as acquirer of resources.[86] Second, courts must take into ac-

80. *Id.* at 135. The latter point is speculative and probably ingenuous. Although tourism benefits a railroad in an obvious way, it is unlikely that any increase in tourist revenues generated by landmark preservation would benefit Penn Central sufficiently to offset its loss of revenue from the lease. *Id.* at 140 (Rehnquist, J., dissenting).

81. *Id.* at 136.

82. See note 50 *supra* and accompanying text.

83. 438 U.S. at 144 (quoting Mugler v. Kansas, 123 U.S. 623, 668-69 (1887)).

84. 438 U.S. at 130.

85. *Id.* at 130-31.

86. *Id.* at 128.

count the "nature and extent of the interference"[87] with the property owner's ability to use his property. In considering the extent of interference, courts must focus particularly on the threat to "distinct investment backed expectations."[88] Finally, courts must look to the effect on the "parcel as a whole" rather than on particular rights in the parcel.[89] The approach of the *Penn Central* court is thus theoretically eclectic. It incorporates Sax's enterpriser test, Michelman's emphasis on investment backed expectations as an element of fairness, and dictates considering the impact of each with respect to complete parcels of property.[90]

The advantage of eclecticism is that it produces a result on which many would agree. The disadvantage is that it hides doctrinal conflict that may emerge later. Consider a "harder" version of *Penn Central:* a case in which the company was no longer able to realize a reasonable return on its investment or had made investments predicated on the possibilities of development then available, but later precluded by a Landmarks Preservation Law.[91] The Court specifically limited its holding to the case in which Penn Central remained able to "use the terminal for its intended purposes and in a gainful fashion";[92] the Court's holding does not state explicitly what the result would be if the terminal became an economic loss. In such a harder case, the criteria employed by the Court pull in different theoretical directions. In the harder case, the character of the government action would become no more that of an enterpriser than formerly. The enterprise test would still not award compensation. By contrast, the economic picture would have changed drastically and consideration of the fairness of the burden alone would dictate compensation. If the import of *Penn Central* is that *both* governmental enterprise *and* an unfair burden are necessary conditions for requiring compensation, even this harder case would not constitute a taking. If the import of *Penn Central* is that *either* governmental enterprise *or* an unfair burden suffices for a taking,

87. *Id.* at 130.

88. *Id.* at 124.

89. *Id.* at 130-31.

90. The Court employed what Ackerman views as the "lay" understanding of property rights. *See* B. ACKERMAN, *supra* note 54, at 156-67.

91. The city conceded that compensation would have been required had the terminal become economically unviable. 438 U.S. at 138, n.36. This "hard case" is a realistic one for landmark preservation. Landmarks are likely to be in older, decaying areas of towns. *See generally* Pyke, *supra* note 7. Attempts to increase economic value by such schemes as transfer development rights are contingent on market conditions in the area. *See generally The Unconstitutionality of Transferable Development Rights, supra* note 20.

92. 438 U.S. at 138, n.36.

compensation will be required in the harder case.

The New York Supreme Court, Appellate Division, recently applied *Penn Central* to a harder case, and found that compensation was required. In *Spears v. Berle,*[93] plaintiffs leased property for the purpose of mining sand. The property was classified as wetlands, and a permit was required for commercial use.[94] When plaintiffs' application for a commercial use permit was turned down, they argued that they had been deprived of all beneficial use of the property.[95] Applying *Penn Central,* the court found that plaintiffs were entitled either to a permit or to compensation.[96] The court's reasoning illustrates how *Penn Central* provides uncertain guidance. First, the *Spears* court reasoned that wetlands regulation involves governmental enterprise.[97] In this argument, the court analyzed wetlands regulation as government action for public good rather than government enhancement of its own resource position; the court's opinion thus illustrates how the concept of "government enterprise" may be extended to include governmental action for public goals.[98] Second, the *Spears* court relied heavily on the harshness of the burden, noting that "[t]he analogy to landmark preservation is a strong one, except that the burden on the wetlands owner is likely to be greater than on one who owns a structure designated as a landmark since the structure may be of some economic value."[99] Because the *Spears* court relied on an extended notion of "enterprise," it did not clearly differentiate the implications of the enterprise and fairness tests in this case. The court did appear to

93. 63 A.D. 372, 407 N.Y.S.2d 590 (App. Div. 1978).

94. *Id.* at 591. The controversies generated by wetlands regulation are similar to those generated by landmark preservation. Cases upholding wetlands regulation without requiring compensation to injured property owners include Candlestick Properties, Inc. v. San Francisco Bay Conservation and Dev. Comm'n, 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (1970); Turnpike Realty Co. v. Town of Dedham, 362 Mass. 221, 284 N.E.2d 891 (1972), *cert. denied,* 409 U.S. 1108 (1973); Sibson v. State, 115 N.H. 124, 336 A.2d 239 (1975); Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972). Cases holding wetlands regulation invalid without compensation include Bartlett v. Zoning Comm'n of Old Lyme, 161 Conn. 24, 282 A.2d 907 (1971); State v. Johnson, 265 A.2d 711 (Me. 1970); Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills, 40 N.J. 539, 193 A.2d 232 (1963).

95. Spears v. Berle, 63 A.D.2d 372, 407 N.Y.S.2d 590, 591 (App. Div. 1978). Without a permit, plaintiffs were limited to these uses: recreational or commercial fishing, shellfishing, aquaculture, hunting, trapping, watering and grazing livestock, making reasonable use of water resources, harvesting natural products, selectively cutting timber, and draining for agricultural purposes. *Id.*

96. *Id.* at 595.

97. *Id.* at 593. *But see* American Dredging Co. v. State Dep't of Environmental Protection, 161 N.J. Super. 504, 391 A.2d 1265, 1268 (1978) (wetlands regulation not governmental enterprise under *Penn Central).*

98. See notes 45 & 46 *supra* and accompanying text.

99. Spears v. Berle, 63 A.D.2d 372, 407 N.Y.S.2d 590, 594 (App. Div. 1978).

find that the harsh burden itself warranted compensation,[100] and thus may have interpreted *Penn Central* to mean that either the government's acting as an enterpriser or unfairness alone warranted compensation.

Defenders of landmark preservation, wetlands regulation, and other legislation with potentially harsh effects on property values ought not, therefore, to take too sanguine a view of *Penn Central*. The moral considerations which support the disjunctive, weaker interpretation of *Penn Central* are powerful. The argument for regarding enterprise alone as sufficient to warrant compensation is that the government ought to pay for advantages it acquires and that arbitrary governmental action should be discouraged. The argument that unfairness alone should require compensation is that it is wrong to pursue even very important public goals by methods which impose disproportionate burdens on a few property owners.

In defense of the stricter reading of *Penn Central*, requiring both governmental enterprise and an unfair burden for compensation, more can be said than that landmark preservation is an important value and that unless action is taken, irreparable damage to landmarks will result. The stricter reading defers more extensively to legislative judgment. It recognizes a taking only in the clearest cases of arbitrary action, when the government has both gained benefits for itself and imposed especially unfair burdens on the private owner. Courts and commentators have recommended judicial deference to the legislature in the area of landmark preservation because of the moral conflicts involved[101] and because legislatures are more able to adopt flexible compromises among competing values.[102] Transfer development rights are an example, and *Penn Central* reflects the Court's respect for such legislative accommodation.[103]

A final argument for judicial deference to the legislature with respect to landmark preservation is the relative novelty of issues such as environmental or historical preservation. Although preservation is increasingly recognized as a value,[104] discussions of the

100. *Id.*

101. Maher v. City of New Orleans, 516 F.2d 1051, 1061 (5th Cir. 1975) (Vieux Carre preservation ordinance not a taking); *cf.* Sax, *supra* note 28, at 175 (legislatures and administrative agencies as increasingly able to analyze costs and benefits when resource uses conflict).

102. Costonis, *supra* note 20, at 1049, 1076; Michelman, *supra* note 25, at 1253-56.

103. 438 U.S. at 137.

104. *See* Maher v. City of New Orleans, 516 F.2d 1051, 1060 (5th Cir. 1975). Congress has adopted landmark preservation as a policy. National Historic Preservation Act of 1966, §§ 1, 101-108, 201-212, 16 U.S.C. §§ 470-70t (1976).

moral basis for landmark preservation are as yet speculative.[105] Traditional theories of property rights simply do not address the question of whether property owners are obligated to use their land in ways which preserve historical, cultural, or environmental values.[106] The taking clause is generally thought to raise problems of compensatory justice, of whether someone has suffered deprivation of an existing compensable right. Such compensatory determinations are appropriate subjects for judicial resolution. If our moral and political orientations do not yet encompass resolutions for conflicts between property values and historical, cultural or environmental values, then landmark preservation may be better regarded as a problem of how to distribute rights and resources—as a problem of distributive justice. Distributive questions arguably are the province of the legislature rather than the courts. Courts should, therefore, adopt the strict reading of *Penn Central* and require compensation only in the clearest cases of arbitrary governmental action.

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105. *See, e.g.*, Golding & Golding, *Why Preserve Landmarks? A Preliminary Inquiry* in ETHICS AND PROBLEMS OF THE 21ST CENTURY 175 (1979). Sax simply asserts, without argument, that the public has "rights" to a vista. Sax, *supra* note 28, at 162.

106. *See, e.g.*, J. LOCKE, THE SECOND TREATISE OF GOVERNMENT §§ 25-51 (P. Laslett ed. 1960).