THE DIRTY DOZEN

How Twelve Supreme Court Cases Radically Expanded Government and Eroded Freedom

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anyone else to use it. This is particularly true in the case of the truly innocent owner who, by definition, does not anticipate his property being used illicitly. Moreover, it is safe to assume that many, if not most, ordinary citizens will be unaware of the holding in *Bennis* and its consequences. Property owners do not know and could not logically deduce that their innocence is no defense. Indeed, as Justice Clarence Thomas admitted in his concurring opinion, "One unaware of the history of forfeiture laws and 200 years of [Supreme Court] precedent regarding such laws might well assume that such a scheme is lawless."[33] That the forfeiture in *Bennis* would appear lawless to the vast majority of American citizens strongly suggests that whatever process Ms. Bennis was afforded, it was not "due process" within the meaning of the Fourteenth Amendment, two centuries of forfeiture jurisprudence notwithstanding.

Justice Oliver Wendell Holmes famously observed, "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."[34] Revolting it may be, but blind imitation of the past is the only explanation for the Supreme Court's decision in *Bennis v. Michigan*. The Court perpetuated and *expanded* the anachronistic doctrine of "guilty property" for no better reason than that the doctrine was an ancient one. In so doing, the Court ignored another doctrine, one nearly as old as our republic: "The Legislature . . . may *command* what is right, and *prohibit* what is wrong; but they cannot change *innocence* into *guilt*; or punish *innocence* as a *crime*."[35]

Tina Bennis was an innocent woman whose property was confiscated as punishment for the crime of another. Perversely, it was a crime in which *she* was the victim. If to describe her case is not to decide it, then "due process" has lost much of its meaning. In the wake of *Bennis v. Michigan*, so it has.

CHAPTER 9

Eminent Domain for Private Use

The Dirty Dozen List: *Kelo v. City of New London* (2005)
Dishonorable Mention: *Berman v. Parker* (1954)

What Is the Constitutional Issue?

"[N]or shall private property be taken [except] for public use. . . ."
—U.S. Constitution, Fifth Amendment.

On the day before Thanksgiving in 2000, Susette Kelo was living in her lovingly restored Victorian home in New London, Connecticut, when a notice was tacked on her front door from the New London Development Corporation (NLDC). The notice informed Susette that she had ninety days to vacate the premises because her home was being condemned. NLDC, using a grant of power from the town, planned to seize land belonging to Susette and her neighbors. Even worse, the land would be transferred to a private developer who would in turn build an expensive hotel, high-end condos, an office building, and other unspecified and upscale amenities on the property. There was nothing wrong with either Susette's home or her working-class neighborhood. It simply was not generating the taxes that the city decided it needed.

Susette and six of her neighbors decided to fight back, arguing that the Fifth Amendment prohibits the use of eminent domain to transfer property from one private party to another solely for so-called economic development—the promise of more jobs and tax revenues. During the seven years it took for her case to reach the U.S. Supreme Court, Susette's pink house came to symbolize the fight to reimpose limits on government's eminent domain power under the Fifth Amendment, limits essential to protecting homeowners and small businesses from unchecked condemnations for private gain.

Eminent domain is the power of government to take a person's land, home, or business. It has rightly been called a "despotic" power of government.[1] Because of the vast potential for abuse of such a drastic power, the words of the Connecticut and U.S. constitutions state clearly that private property shall not be "taken for public use without just compensation."[2] This constitutional provision, known as the Takings Clause, imposes two important limits on the taking of private property: First, the use must be public, and second, just compensation must be paid.[3] If private property could be taken for any use at all, the term "public" would not have been included.

Originally, "public use" was understood by everyone—courts, local governments, and the general citizenry—to have its ordinary meaning, and eminent domain was used only for projects that would be owned by and open to the public, such as roads and public buildings. Courts further explained that government was limited to taking only that property "necessary" for public use.[4] It could not simply grab additional land to increase its holdings.

The "public use" restriction in the Takings Clause fundamentally changed with the Supreme Court's 1954 decision in *Berman v. Parker*.[5] In *Berman*, the Court upheld the constitutionality of "urban renewal"—misguided efforts by federal and local government officials to revitalize urban areas, supposedly to remove slums and eliminate "blight."[6] The case arose in southwest Washington, D.C., in a poor area populated largely by minorities. Congress granted the district government the ability to acquire tracts of land through eminent domain for the purpose of redevelopment, including the resale of the land to private developers.[7] A department store owner objected to his land being taken and given to another private party. His executor, Berman, asked the Supreme Court to review a decision in favor of Parker and other government officials.

In *Berman* the Court read "public use" broadly enough to transform its meaning. "Public use" would now mean "public purpose," as loosely defined by a legislature or administrative agency. Although the circumstances in *Berman* were extreme—the area lacked plumbing and had the highest infant mortality rate in the District of Columbia—the decision had much broader legal implications.[8] Thereafter, courts routinely deferred to legislatures and planning commissions in eminent domain actions to uphold virtually any use of eminent domain, even for private development. What was once a narrow exception to the Constitution's public use requirement, born in a time of concern about urban decline, became a means for governments to take property from one private owner and transfer it to other private parties for their financial gain.

Two things happened in the wake of *Berman*. First, the use of "blight" as a rationale for eminent domain was expanded dramatically. Highly subjective findings would suffice to justify a blight determination. For many cities the concept of "blight" was no longer limited to run-down slums; instead, it could be applied to virtually any area that the government determined was no longer "functionally" viable or was "economically obsolete." Cities declared neighborhoods blighted or "deteriorating" using such criteria as lack of adequate planning, no central air-conditioning, less than two full bathrooms, and even "diversity of ownership."[9]

Second, some governments pushed even further to seize well-maintained property in the name of "economic development." Initially they condemned slums, then blighted areas, then not very blighted areas, then perfectly fine areas. The Michigan Supreme Court's *Poletown* opinion in 1981 was the first to sanction this new trend.[10] In that case the city of Detroit took an entire neighborhood that everyone admitted was not blighted on the grounds that expansion of the nearby

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General Motors plant would create "public benefits" in the form of higher tax revenue and more jobs.[11] The Michigan Supreme Court bought this argument, ruling that eminent domain could be used for public benefit.[12] Detroit soon discovered that the closely knit community could not be replaced, and the plant did not live up to its promise of bringing economic prosperity to the city.[13]

For years public officials invoked *Poletown* to justify ever expansive uses of eminent domain. Then in a stunning reversal of legal precedent, in July 2004, the Michigan Supreme Court unanimously overturned the *Poletown* decision. In *County of Wayne v. Hathcock,* the court decisively rejected the notion that "a private entity's pursuit of profit was a 'public use' for constitutional takings purposes simply because one entity's profit maximization contributed to the health of the general economy."[14] In *Hathcock,* the court called *Poletown* a "radical departure from fundamental constitutional principles."[15] "We overrule Poletown," the court wrote, "in order to vindicate our constitution, protect the people's property rights and preserve the legitimacy of the judicial branch as the expositor, not creator, of fundamental law."[16]

A year later the U.S. Supreme Court considered the plight of Susette Kelo. The Court had not looked at a development case since *Berman* in 1954.[17] Meanwhile, public use became public purpose, which then became public benefit. What that meant was that government served the highest bidder—advancing the interests of the financially powerful rather than protecting the rights of citizens.

Indeed, the practice became so routine and widespread that Institute for Justice senior attorney Dana Berliner was able to document more than ten thousand instances of filed or threatened condemnations for private parties in the five years from 1998 through 2002.[18] This number was drawn from public records, however, and thus represents only a fraction of the actual number of cases where private property was condemned in order to become someone else's private property. There is no official database for such condemnations, and many, if not most, go unreported in public sources.

Kelo v. City of New London put the issue to the U.S. Supreme Court in the clearest possible terms.[19] What protection does the Fifth Amendment's public use requirement provide for individuals whose property is being condemned, not to eliminate slums or blight, but for the sole purpose of "economic development" that will allegedly increase tax revenues and improve the local economy?

If private property can be condemned and given to another private entity for private profit and if the determination of which properties are to be condemned can be delegated to a private group unaccountable to the electorate, then are there any limits on the exercise of this government power? Without accountability or constitutional constraints, all the incentives promote aggressive, unbridled use of the eminent domain power, regardless of the impact on the rightful property owners. Regrettably, that is what the Supreme Court condoned in *Kelo.*

What Were the Facts?

Overlooking the Thames River and Long Island Sound, the Fort Trumbull area of New London, Connecticut, was the site of a well-maintained, comfortable, working-class neighborhood. Fort Trumbull was home to many families that traced their roots back to the wave of Italian immigration in the late nineteenth and early twentieth centuries. One such family was the Dery family, headed by matriarch Wilhelmina Dery, who was born in her Fort Trumbull house in 1918. Her parents, the Ciavaglias, arrived from Italy in the 1880s. Like her neighbor, Susette Kelo, Wilhelmina Dery wanted to stay in her home and decided to fight the notice of condemnation that she had received.

In February 1998, Pfizer Inc. announced it was developing a research facility at a site near Wilhelmina Dery's and Susette Kelo's homes in Fort Trumbull. Although the neighborhood was in no way blighted, the city was struggling economically and saw an opportunity to capitalize not only on the new Pfizer facility but also on the land where Susette and her neighbors lived. With the city's approval, the NLDC prepared a plan, purportedly designed to revitalize the Fort Trumbull area but actually intended to complement Pfizer's plans. The NLDC was a private, nonprofit corporation not subject to election by the voters. All of its directors and employees were privately appointed.

The NLDC plan covered ninety acres next to the Pfizer site. In total, 115 land parcels were combined into seven larger parcels to include everything from a waterfront hotel and conference center to a marina, eighty new residences, a large office complex, space for research and development, and a variety of water-dependent commercial uses. The city estimated that the development plan would produce many new jobs as well as between $680,000 and $1,250,000 in new property tax revenue.

The plan contained all the requirements set forth by Pfizer when it agreed to build its global research facility in New London: a luxury hotel for its clients, upscale housing for its employees, and office space for its contractors. Other upgrades to the area, such as renovation of a nearby state park and improvements to the sewage treatment plant, coincided with Pfizer's wishes. Such clout led the city's expert at trial to call Pfizer the "10,000-pound gorilla."[20]

With little concern for area residents, the NLDC decided that the Fort Trumbull neighborhood adjacent to the Pfizer facility would be "redeveloped." Faced with the threat of condemnation, many Fort Trumbull residents agreed to sell their property to the NLDC. Susette Kelo, Wilhelmina Dery, and five others refused. They rightfully wondered how the government could justify taking their property for a "public" use. The contested homes were on only two parcels of land: Parcel 3, which was slated for private office space, and Parcel 4A, which was to provide "park support." Curiously, during the *Kelo* trial, not a single witness could explain what "park support" meant. In total, the contested homes comprised 1.54 acres of the ninety-acre project.

Under the plan discussed at the time of the trial, the NLDC would own the land but lease it to private developers for one dollar per year. The developer selected by the NLDC received a ninety-nine-year lease, but the plans for the contested property were far from definite. The developer's own marketing study found that new office construction on Parcel 3 was "uncertain," "not feasible at this time," and "speculative." Similarly, by trial date, no plan specified what would happen with Parcel 4A—apart from knocking down the existing homes. That omission persists seven years later, as this book is written.

The NLDC, having been delegated the government's power of eminent domain, began condemnation proceedings, which were interrupted when the trial judge rejected the takings in Parcel 4A while upholding the takings in Parcel 3. He enjoined all the condemnations while the appellate courts reviewed his decision. After the Connecticut Supreme Court reversed the trial court in part and ruled 4–3 to uphold all the takings, Susette Kelo, Wilhelmina Dery, and their neighbors asked the U.S. Supreme Court to step in. The Court agreed to revisit takings in the context of economic development for the first time in fifty years. In a sharply divided 5–4 decision, the Court ruled against the property owners.

Where Did the Court Go Wrong?

Justice John Paul Stevens wrote the majority opinion, and from the outset he worked to portray the case as a routine application of prior Court holdings. To do so, Justice Stevens had to overcome explicit precedent that held condemnation for the purpose of taking property from private party A and giving it to private party B was unconstitutional.[21] Despite extensive evidence in the record that the homeowners' property was to be transferred to private parties who would derive significant benefit from the transfer, Justice Stevens rejected that notion. Instead, he insisted that the record did not establish who the beneficiaries would be. Nor did it establish an intent to redevelop the area *solely* to benefit Pfizer or another private party. Therefore, he wrote, it would be "difficult to accuse the government of having taken A's property to benefit the private interests of B when the identity of B was unknown."[22]

Although Justice Stevens recognized that the property would not be used by the public, he dismissed that as a limitation on the government's condemnation authority. Since the close of the nineteenth century, he argued, the Court had "embraced the broader and more natural interpretation of public use as 'public purpose.'"[23] He framed the issue this way: "The disposition of this case therefore turns on the question of whether the City's development plan serves a 'public purpose.' Without exceptions, our cases have defined that concept broadly, reflecting our

longstanding policy of deference to legislative judgments in the field."[24]

Not surprisingly, Justice Stevens next turned to *Berman v. Parker,* where he seized upon sweeping Court statements to validate essentially unfettered deference to legislative prerogative:

> The concept of the public welfare is broad and inclusive. . . . It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled. . . . If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.[25]

Then he quoted a 1984 opinion, *Hawaii v. Midkiff,* for the proposition that "it is only the takings purpose, and not its mechanics" that matters in determining public use.[26]

Justice Stevens noted that although the Fort Trumbull area was not blighted, the city overall was economically distressed and had developed a plan to rejuvenate itself:

> Given the comprehensive characteristics of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us, as it was in *Berman,* to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings here satisfy the public use requirement of the Fifth Amendment.[27]

In other words, explained Justice Stevens, the fact that property is taken from one person and immediately given to another does not diminish "the public character of the taking."[28] Even though an area containing several of the homes would be leased to a private developer at

one dollar per year for ninety-nine years, the Court had no problem concluding that the taking was for "public use."[29] To reach that conclusion Stevens employed an essentially subjective test: Was the governing body motivated by a desire to benefit a private party or by concern for the public? Because the New London city officials intended that the plan would benefit the city in the form of higher taxes and more jobs, the homes could be taken.

The *Kelo* decision means that cities can take homes or businesses and transfer them to developers if they think the developers *might* generate more economic gains with the property. No controls need be in place to ensure that the project live up to its promises. According to the Court majority, requiring controls would be "second-guess[ing]" the wisdom of the project.[30]

Worse yet, cities need not have any use for the property in the foreseeable future in order to take it. In fact, *Kelo* encourages cities to condemn first and find developers later. From now on, cities can negotiate a sweetheart deal but wait until after the condemnation to actually sign it. Or they can simply take property first and market it to developers later. In *Kelo* some of the homes were taken for an unidentified use and others for an office building that the developer had no plan to construct in the foreseeable future.[31]

Thus, according to the Supreme Court, cities can take property to give to a private developer with no idea of what will ultimately be built and no guarantee of any public benefit.

The decision, particularly Justice Anthony Kennedy's concurrence, suggests but a few minor limits on the use of eminent domain for private development. If a city doesn't bother to prepare a plan, fails to follow its own procedures, or engages in outright corruption, property owners may still find some hope under the U.S. Constitution.[32] But there is almost always a plan; cities are quite adept at following their own procedures; and most cases of eminent domain abuse do not involve blatant corruption such as bribes. Consequently, the vast majority of individuals are left entirely without federal constitutional protection.

Some commentators claimed that *Kelo* didn't change anything and therefore no one needs to worry about it. But *Kelo* did change the law

by redefining "public use" to mean "public benefit." To the extent that governments were already taking homes and businesses for private commercial development, that is cause for greater concern, not less. Moreover, *Kelo* threw a spotlight on an already-existing practice that an overwhelming majority of people find outrageous and un-American. And by declaring that there are virtually no constitutional limitations on the ability of cities to take property from A and give it to B, the Court invited more abuse and thus made the problem much worse.[33] Under *Kelo*, government may condemn anyone's property as long as there is a plan to put something more expensive in its place.

The law before *Kelo* sometimes allowed condemnation of property that would result in private ownership, but each situation was extremely limited.[34] None necessitated the sweeping decision of the majority in *Kelo*. Indeed, four members of the Court agreed that its prior decisions did not dictate the result in *Kelo*. Dissenting justice Sandra Day O'Connor, joined by Chief Justice William H. Rehnquist and Justices Antonin Scalia and Clarence Thomas, divided previous cases into three categories: (1) transfer of property from private ownership to public ownership, (2) transfer of property to a privately owned common carrier or similar entity, and (3) transfer of property to eliminate an identifiable public harm.[35] As Justice O'Connor pointed out, "economic development" fits into none of these categories.[36]

Because we have a written Constitution and its text does not change except by amendment, the question in most constitutional cases is how the Court will apply that text to the facts. How far will the Court go in either enforcing or ignoring constitutional rights? For example, we know that the First Amendment protects free speech, but the Court has applied different free speech protection in areas ranging from advertising to the Internet, criticism of the government, and Nazi marches.[37] Although the text of the First Amendment did not change, in each of those areas the Court's decisions changed the law because they applied it to a new situation. Similarly, in *Kelo*, the Court applied the Fifth Amendment's Takings Clause to a different and far more extreme use of eminent domain. By upholding the condemnations in *Kelo*, the Court went to extraordinary lengths to ignore the constitutional mandate that

property be taken only for "public use." Never before had the Court gone so far.

When some law professors say that nothing has changed, what they mean is that the Court's general statements about public use have not changed. The Court has said for a number of years that it grants considerable deference to government determinations that a condemnation serves a public use. But at the same time the Court had generally prevented government from taking A's property in order to give it to B for B's private use.[38] In constitutional law, however, the application of general statements to specific facts tells us how seriously the Court takes constitutional rights. The question, therefore, is whether the courts will rubber-stamp virtually all uses of the eminent domain power or intervene when the legislature goes too far. Before *Kelo*, government could take property in deeply troubled, almost uninhabitable areas and transfer it to private developers. Now government can transfer just about any property to private developers. Some lawyers are apparently unable to tell the difference.

What Are the Implications?

Home and business owners should view *Kelo* with alarm. As Justice O'Connor noted in her dissent, "The specter of condemnation hangs over all property. Nothing is to prevent the state from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping center, or any farm with a factory."[39] Justice O'Connor also recognized the fundamental injustice at the heart of eminent domain abuse: "Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result."[40]

The *Kelo* decision opened the floodgates of abuse, spurring local governments to press forward with more than 117 projects involving the

use of eminent domain for private development in just one year.[41] In the first year after the decision was handed down, local governments threatened with eminent domain or condemned at least 5,783 homes, businesses, churches, and other properties so that they could be transferred to another private party.[42] Even before the Supreme Court's decision, cities had regularly abused the power of eminent domain, but *Kelo* became the green light that Justice O'Connor and Justice Thomas (in a separate dissent) warned about. The decision emboldened officials and developers, who started new projects, moved existing ones forward, and, especially, threatened and filed condemnation actions. Some courts, too, relied on *Kelo* in upholding projects that took the property of one private party only to turn around and give it to another.[43] Sadly, the decision profoundly discouraged many owners who wanted to fight the loss of their home or business but believed, after *Kelo*, it would be hopeless to fight.

At the same time that *Kelo* encouraged the use of eminent domain for private development, it also became a catalyst for national reform. One year after what appeared to be a total victory for local governments allied with private developers, the struggle to limit eminent domain abuse raged more intensely than ever. Many state legislatures responded to the public outcry by restricting eminent domain in a variety of ways. For example, Florida expressly prohibited the use of eminent domain to eradicate so-called blight, while Minnesota narrowed the definition of blighted property.[44] City officials and developers lobbied heavily against substantive limits while simultaneously trying to find ways around the new laws.

Justice Stevens noted in his opinion that states were free to provide greater protection against eminent domain.[45] This could be accomplished legislatively or by amending state constitutions. What seemed like a throwaway line from Stevens quickly took on profound significance, however, when the American public expressed unprecedented outrage over the *Kelo* opinion. Poll after poll found that 70, 80, and even 90 percent and higher of the respondents strongly disagreed with the decision.[46] The more people learned about the decision and its implications, the more the outrage grew. Indeed, a year after the decision was handed down, the polling levels had not changed significantly.[47]

The outrage crossed demographic boundaries. Friend-of-the-court briefs supporting the property owners had been filed in *Kelo* by the NAACP, AARP, Mexican American Legal Defense Fund, urbanologist Jane Jacobs, the National Federation of Independent Businesses, and the American Farm Bureau, among others. Reaction to the decision brought together a similarly wide array of nontraditional allies.

As soon as state legislatures began to convene in the fall of 2005, many introduced legislation to curb eminent domain abuse. Trained and inspired by the Institute for Justice's Castle Coalition, property owners organized to secure passage of legislation that would address the problems in their respective states. Developers and mayors fought tenaciously against these reforms, but one year after *Kelo*, thirty-four states had enacted legislation that placed limits on previously unbridled authority.[48]

Citizen outrage persisted as the fall 2006 elections approached. Measures designed to amend nine state constitutions to limit eminent domain abuse by addressing "public use" were placed on the ballot. All nine passed overwhelmingly, with anywhere from 55 to 86 percent of the vote.[49] Clearly, *Kelo* is the most reviled Supreme Court decision in decades.

In the first major state supreme court decision to address eminent domain for economic development after *Kelo*, the Ohio Supreme Court unanimously struck down Ohio's eminent domain law.[50] The decision saved property owners in Norwood, Ohio, from having their property taken to expand a shopping mall. The court noted, "A primordial purpose of the public use clause is to prevent the legislature from permitting the state to take private property from one individual simply to give it to another. Such a law would be a flagrant abuse of legislative power . . . and to give it deference would be a wholesale abdication of judicial review."[51]

The court closed by saying, "Although the judiciary and the legislature define the limits of state powers, such as eminent domain, the ultimate guardians of the people's rights, as evidenced by the appellants in these cases, are the people themselves."[52]

That kind of activism by property owners and others who recognize

the importance of secure property rights to a free society will be necessary in coming years. Ultimately, the Supreme Court must overrule *Kelo*, but until that day the action will be in state courts and legislatures. Victories will have to be protected from relentless counterattacks by developers and mayors; legislatures that have insufficiently secured property rights will need to be emboldened; reforms will need to be passed in the dozen or so states yet to act; and constitutional protections will have to be effected through courts or initiatives.

Meanwhile, in New London, Connecticut, Susette Kelo's old neighborhood has been razed, but no redevelopment has occurred. Dozens of acres of land stand vacant where once a close-knit community lived. But Susette's little pink house, which will be moved to a nearby lot, will stand as an inspiration to all who work to protect property rights.

CHAPTER 10

Taking Property by Regulation

The Dirty Dozen List: *Penn Central Transportation Co. v. New York* (1978)
Dishonorable Mention: *Tahoe-Sierra Preservation Council, Inc., v. Tahoe Regional Planning Agency* (2002)

What Is the Constitutional Issue?

"[N]or shall private property be taken . . . without just compensation."
—U.S. Constitution, Fifth Amendment.

To most people, property means homes, cars, and other tangible assets; however, the phrase "private property" as used in the Fifth Amendment is broader than its lay usage. It encompasses not just the tangible, physical element of private property, but also the intangible bundle of rights associated with the ownership of property. For example, property carries with it the right to make ordinary use of it, to exclude others from use or ownership, and to dispose of it. Thus, rights in property are themselves a form of property; they have value and can be bought and sold. Like all private property, these rights may not be "taken" by the government except for public use and with just compensation.

While takings must be compensated, it has long been held that regulations for the health, safety, and welfare of the public—exercises of the so-called police power—are not takings. If the value of private property is diminished by a valid regulation, the Fifth Amendment's Just Compensation Clause is inapplicable, and there is no requirement that the government compensate the property owner. As Justice Oliver Wendell Holmes Jr. noted, "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[1] While this may sound like common sense, its implication for property owners has changed profoundly over the course of the last century as states have asserted their police powers expansively.

At the intersection of the power to take property and the power to regulate it lies the murky concept of *regulatory takings*. Judges and scholars have struggled to formulate a precise definition of the term, but the concept is simple enough: At some point a *regulation* diminishes the value of property so much that it ceases to be a *regulation* and becomes a *taking*. The concept was recognized by the Supreme Court of the United States as far back as 1872. Justice Samuel F. Miller, writing for the Court in the case of a landowner whose property had been flooded by the construction of a dam, noted: "It would be a very curious and unsatisfactory result [if] . . . it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use."[2]

The Court later recognized that the line between regulations and takings is crossed at some point before "total destruction" of the property's value, but the precise location of the line remained a mystery. The Court's only guidance was that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[3] In *Penn Central Transportation Co. v. New York*, the Court would undertake to define just how far was "too far."[4]

When government deprives a property owner of the use of his or her property, the cost must be borne by someone. Deciding how far a regulation may go before it becomes a taking is, in effect, deciding who will bear the cost. If property is taken for public use, it makes sense—both morally and economically—to spread the cost of obtaining the property over the entire public. Indeed, this is precisely the conclusion reached by the Founders and articulated in the Fifth Amendment; the "just compensation" provided to the property owner is supplied by the taxpayers. Everyone pays a little bit, but in exchange they enjoy their share of the benefit of the "public use" of the taken property. If property is taken without compensation, the entire cost is borne by the individual property owner.[5]

The allocation of these costs also has political implications. If the government is required to pay for the benefits it seeks to provide, taxpaying voters can weigh the costs they incur against the benefits they receive. Legislators will then have an electoral incentive to engage in takings only when the net benefit to society exceeds the net cost. Voters who must bear the additional cost will punish legislators who abuse takings.

In contrast, if legislators are free to enrich a large group of voters at the expense of a single property owner or a small group of owners, it is in their electoral best interest to do so. Voters can be expected to accept and even demand any benefit, no matter how insignificant, if it costs them nothing to obtain it. Legislators who routinely supply voters with these benefits—that is to say, those legislators who confiscate the most property—can expect political rewards to follow. Under such a system, politicians need be careful only to avoid confiscating property under conditions that are so outrageous as to offend the morals of a majority of voters.

With so much at stake, where the Court draws the line between regulations and takings is not a dry legal exercise. It is a decision that has profound real-world consequences.

What Were the Facts?

On February 1, 1968, the Pennsylvania and New York Central railroads merged to create the Penn Central Transportation Co., the largest railroad in American history. Among its varied holdings and more than twenty thousand miles of rail, the newly formed giant was also the owner of the famous Grand Central Terminal in New York City. While

those familiar with Grand Central recognize it in the form it has existed since first opening in 1913, the original design included a twenty-story office building atop the terminal. The office building was never constructed.

Already strapped for cash, Penn Central initially decided to take advantage of the terminal's reinforced structure. Contemporaneous with the merger, the railroad entered into a renewable fifty-year lease with a corporation that wished to construct an office building on top of the terminal. The corporation, UGP Properties, Inc., guaranteed Penn Central $1 million annually during the construction and a minimum of $3 million annually thereafter. For Penn Central it was a highly attractive opportunity in otherwise trying times.

But there was a catch. In 1965, New York City adopted its Landmarks Preservation Law.[6] Under that law, the eleven-member Landmarks Preservation Commission was charged with identifying properties and areas that have "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." Having identified properties with these characteristics, the commission also had the authority to designate as a landmark any such property that was also at least thirty years old. As then-Justice William H. Rehnquist would note in his dissent: "The owner of a building might initially be pleased that his property has been chosen by a distinguished committee of architects, historians, and city planners for such a singular distinction. But he may well discover, as appellant Penn Central Transportation Co. did here, that the landmark designation imposes upon him a substantial cost, with little or no offsetting benefit except for the honor of the designation."[7]

The "substantial cost" referred to by Rehnquist was twofold. First, designation as a landmark imposed on the property owner a duty to keep the exterior features of the building in good repair. Second, and more important to Penn Central, the law required that the commission give advance approval to any proposal "to alter the exterior architectural features of the landmark or to construct any exterior improvement on the landmark site."

Penn Central and UGP submitted two plans to the commission that

would have significantly altered the appearance of the terminal but otherwise satisfied all applicable zoning laws. The first plan would have left the terminal intact but provided for the construction of a fifty-five-story office building atop it. The second called for tearing down a portion of the terminal and constructing a fifty-three-story office building. The commission found both plans wholly unsatisfactory and refused to approve either. In the commission's opinion, "to balance a fifty-five-story office tower above a flamboyant Beaux-Arts façade seems nothing more than an aesthetic joke" and would "reduce the Landmark itself to the status of a curiosity."[8]

Penn Central, having seen the promise of $150 million in additional revenue vanish with a stroke of the commission's pen, filed suit. Its legal theory, that application of the Landmarks Preservation Law had deprived it of "air rights," was not a novel one. The right to make use of the airspace above one's property was itself considered a valuable form of "property" and enjoyed robust legal protection. The ancient maxim at common law was "*Cujus est solum, ejus est usque ad coelum et ad inferos*" (Whosoever owns the land, owns to the heavens and to the depths). While the rise of commercial air traffic had undermined the literal application of the rule, property owners in 1968 still held most of the air rights they had traditionally enjoyed under Anglo-American law.

Penn Central met with initial success in the New York trial court, winning an injunction barring the city from using the Landmarks Law to impede the construction of the additions. This success was short-lived, however, as the case was reversed on appeal in a decision later affirmed by New York's highest court. Having wound its way through the state court system and lost, Penn Central appealed to the Supreme Court of the United States.

Where Did the Court Go Wrong?

The question before the Court was whether the New York City Landmarks Preservation Law had crossed the line between regulation and taking. Justice William J. Brennan, writing for the majority, noted the difficulty that the Court had in drawing this line:

> While this Court has recognized that the "Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.[9]

Brennan's characterization of this inquiry is profoundly troubling. Although allowing that these disproportionate burdens are compensable when fairness and justice require it, he implies that they are *not* compensable when fairness and justice dictate otherwise. This distinction may seem subtle, but it has significant consequences. Rather than compensation being the default rule, Brennan's characterization makes compensation depend on the elusive notion of what is just and fair. But the language of the Fifth Amendment presupposes that compensation is required unless the government can demonstrate otherwise. By opening the door to the notion that fairness and justice may dictate that property owners bear the cost, the Court effectively shifted the burden of proof from the government to the property owner. Once the Court placed the onus of proving injustice on the property owner, the outcome—that Penn Central and other property owners would go uncompensated—was virtually preordained.

With the debate thus framed, Penn Central's prospects for victory were bleak. Yet they became bleaker still as Brennan explained the process for ad hoc determination of whether fairness and justice require compensation:

> [T]he Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with

> distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by the government.[10]

The government had not physically invaded Penn Central's airspace by erecting a public building on top of Grand Central Terminal, so the last factor did not weigh in Penn Central's favor. Penn Central's hopes, if any, hung entirely on the economic impact of the regulation.

Surely, the railroad must have thought, the loss of $150 million was a sufficient economic impact that fairness and justice required the loss not be borne by Penn Central alone. Justice Brennan wasted no time in disabusing the company of this notion. Calling Penn Central's position "untenable," Brennan continued:

> "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 the rights in the parcel as a whole. . . .[11]

The application of the so-called parcel as a whole doctrine extinguished any remaining hope for Penn Central. In effect, the Court said, "Sure, you lost $150 million, but look at all the things the government let you keep!" Apparently, in the Court's view, $150 million was small change when one considers that Penn Central was allowed "to use the property precisely as it [had] been used for the past 65 years: as a railroad terminal containing office space and concessions."[12]

Ultimately, and unconvincingly, the Court attempted to soften the blow. First, the Court noted that it wasn't literally true that Penn Central had been denied all use of its air rights. The commission might, after all,

approve the construction of some smaller addition provided it "would harmonize in scale, material, and character" with Grand Central. Second, the New York law provided for "transferable development rights"—essentially a right that the company could transfer to a different parcel awarded in return for restrictions imposed on Grand Central. The mechanics of "TDRs," as they are known, are complex and well beyond the scope of this work. Suffice it to say that neither TDRs nor the vague promise that the commission might one day approve some addition came close to compensating Penn Central for the loss of its property rights.

Justice Rehnquist, joined by Chief Justice Warren E. Burger and Justice John Paul Stevens, issued a strong dissent. In Rehnquist's view there was no question that the Landmark Law had resulted in a taking. New York City had "destroyed—in a literal sense, 'taken'—substantial property rights of Penn Central."[13] According to Rehnquist, the only remaining inquiry was whether either of two very specific exceptions applied: the nuisance exception or the zoning exception.

Certainly, Penn Central's planned addition could not be considered a "nuisance" within the legal meaning of the term. The planned addition complied with all applicable building laws, other than the Landmarks Preservation Law itself, and did not violate established rights of other parties. Moreover, "[o]nly in the most superficial sense of the word [could] this case be said to involve 'zoning.'"[14] As it is typically understood, zoning involves limitations spread equally over a large area. Although everyone affected by the zoning is equally burdened, they also benefit equally from the enhanced value supposedly offered by the restrictions. In effect, there are reciprocal burdens and benefits from zoning experienced by all affected property owners. Rehnquist, distinguishing the situation in *Penn Central*, noted:

> Where a relatively few individual buildings, all separated from one another, are singled out and treated differently from surrounding buildings, no such reciprocity exists. The cost to the property owner which results from the imposition of restrictions applicable only to his property and not that of his neighbors may be substantial . . . with no comparable reciprocal benefits. And the cost associated with landmark legislation is likely to be of a completely different order of magnitude than that which results from the imposition of normal zoning restrictions.[15]

With neither exception applicable, Penn Central had, in the dissent's view, unquestionably suffered a taking for which just compensation was due. After strongly suggesting that Penn Central had not been justly compensated, Rehnquist concluded that the case should be remanded to the Court of Appeals "for a determination of whether TDR's [*sic*] constitute a 'full and perfect equivalent for the property taken.'"[16]

What Are the Implications?

Writing less than a decade after Grand Central Terminal opened, and more than fifty years before the decision in *Penn Central,* Justice Holmes observed: "The protection of private property in the Fifth Amendment . . . provides that it shall not be taken . . . without compensation. . . . When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears."[17]

Justice Holmes could hardly have been more prescient if he had identified Penn Central by name. Justice Brennan's opinion so far extended this qualification that Penn Central's "air rights"—$150 million worth of valuable property—were rendered as insubstantial as the air they encompassed.

Had the effects of the *Penn Central* decision been limited to Penn Central itself, the case would be unfortunate although hardly noteworthy; the decision came six years after Penn Central had already declared bankruptcy. Considering the long decline of the American rail industry and the company's many internal problems, Penn Central may have been doomed from the start.[18] What really matters, however, is not what the loss of $150 million meant to Penn Central but what the

Supreme Court's decision meant—and continues to mean—for property owners.

With the perspective afforded by the passage of time, it is now clear that the Penn Central decision was more than the final nail in a deceased railroad's coffin. It was also a dangerous precedent for further erosion of property rights. The extent of that erosion became painfully evident twenty-four years later in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency.*[19]

Tahoe-Sierra dealt with the rights of property owners in the Lake Tahoe basin. Over time, construction around the lake had increased runoff of organic material, and the ensuing algae growth threatened the lake's famed clarity.[20] The blame for this environmental damage might fairly be attributed to a number of different parties, but one group was indisputably innocent: the owners of undeveloped lots. Despite their innocence, the entire cost of preserving Lake Tahoe's clarity would be placed on these property owners; a series of rolling moratoria were put in place by the Regional Planning Agency that prevented any new home construction.

Thus, the *Tahoe-Sierra* plaintiffs—owners affected by the moratoria and an association representing them—brought to the Court strong claims for fairness and justice. Moreover, the case arose in the wake of a trend in Supreme Court jurisprudence that seemed to offer the prospect for revived protections for property rights. While the Court in *Penn Central* had been persuaded by the fact that the railroad was not prevented from earning a "reasonable return" on its investment, here the lots were rendered entirely worthless.

Additionally, much had happened in the law of takings since the decision in *Penn Central.* In *Lucas v. South Carolina Coastal Council,* the Court had held that a similar—but permanent—prohibition on construction deprived owners of all economically viable use of their land and was therefore a per se regulatory taking.[21] In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* the Court had held that "temporary takings which . . . deny a landowner all use of his property are not different in kind from permanent takings, for which the Constitution clearly requires compensation."[22] If temporary takings

are compensable and regulations that deprive property of all economically viable use are per se "takings," it should follow logically that temporary regulations that impose similar burdens—say, twenty years of rolling building moratoria—are compensable. Despite the force of this argument, the Court was unconvinced. "Logically," declared Justice Stevens, property like the plaintiffs' "cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted."[23]

Recall that in *Penn Central* the Court measured the scope of the deprivation with reference to the value of the "parcel as a whole." Although this test may often create unjust results, as it did for Penn Central, at least it contemplates that sometimes a plaintiff will be compensated. After all, the parcel as a whole has a finite value against which the deprivation may be measured. In *Tahoe-Sierra,* Justice Stevens did not concern himself with the degree of deprivation, which was total, but instead with the length of deprivation. In effect, the Court rejected any diminution in value caused by the "temporary" twenty-year moratoria, because over the infinite course of time the moratorium could conceivably be lifted.

In a triumph of form over substance, *Tahoe-Sierra* gives legislatures virtually free rein to deprive property of its entire value for an unlimited amount of time without compensation, provided they style each successive deprivation as "temporary" in nature. As Justice Clarence Thomas correctly pointed out in dissent, "[T]he 'logical' assurance that a 'temporary restriction . . . merely causes a diminution in value,' . . . is cold comfort to the property owners in this case or any other. After all, 'in the long run we are all dead.'"[24] This observation is not hyperbole; writing shortly after *Tahoe-Sierra* was decided, one legal scholar noted, "Of the 700 or so ordinary people who started on this journey, 55 have since died."[25]

Beyond their legal repercussions, the *Penn Central* and *Tahoe-Sierra* decisions also create perverse economic incentives for future development. The message the two cases send to property owners is "build now, before the regulators rob the property of its value."[26]

The economic implications of *Penn Central* extend even to the

design of future buildings. As Rehnquist noted in his *Penn Central* dissent, "Penn Central [was] prevented from further developing its property basically because too good a job was done in designing and building it."[27] For corporations—planning on thirty-, forty-, or fifty-year timescales—the *Penn Central* decision creates an incentive to blend in as "just another office building," rather than invest in architecture that is unique, beautiful, or, as Justice Brennan described Grand Central, "magnificent."[28] It is a popular myth that a system with robust protection for property rights disdains these qualities, that ruthless market efficiency promotes nothing but austere functionality. There could be no more striking refutation of that argument than Grand Central Terminal itself, an American cathedral produced in an age before the regrettable decision in *Penn Central*.[29]

Near the end of his opinion, Justice Brennan observed that holding the restrictions placed on Penn Central to be a taking would "invalidate not just New York City's law, but all comparable landmark legislation in the Nation."[30] Surely Brennan was not arguing that unconstitutional laws become constitutional merely through force of numbers. This puzzling argument could perhaps be explained most charitably as judicial modesty. Brennan seemed to ask, "Who am I to say fifty states are wrong?" The obvious answer is that Brennan was a justice of the United States Supreme Court. As a justice he was not merely permitted but obligated to invalidate unconstitutional state actions without regard to whether or not the states might find it inconvenient.[31] That he and the five justices who joined the majority opinion failed to meet that obligation in *Penn Central Transportation Co. v. New York* has—at the ongoing expense of property owners—earned the Court's decision a place among the Dirty Dozen.

CHAPTER 11

Earning an Honest Living

The Dirty Dozen List: *United States v. Carolene Products Co.* (1938)
Dishonorable Mention: *Nebbia v. New York* (1934)

What Is the Constitutional Issue?

"The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." —U.S. Constitution, Ninth Amendment.

Every day across America thousands of individuals engage in the most massive expression of civil disobedience this nation has ever seen. You will not find them on picket lines or in marches. Instead, you will find them working hard at honest occupations to provide for themselves and their families. Tragically, they do so under laws and regulations that treat them as outlaws. Such is the legacy of the Supreme Court's evisceration of constitutional protection for economic liberty—the right to earn an honest living free from excessive or arbitrary government regulation.

What sort of people persevere in the face of such adversity? They