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# Constitutional Law - Fifth Amendment - Declaration of Property as a Historic Landmark under State Law is Not a Taking Which Requires Just Compensation Where the Landowner is Guaranteed a Reasonable Return on His Investment

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## CONSTITUTIONAL LAW—FIFTH AMENDMENT—DECLARATION OF PROPERTY AS A HISTORIC LANDMARK UNDER STATE LAW IS NOT A TAKING WHICH REQUIRES JUST COMPENSATION WHERE THE LANDOWNER IS GUARANTEED A REASONABLE RETURN ON HIS INVESTMENT.

*Penn Central Transportation Co. v. City of New York* (U.S. 1978)

Pursuant to New York City's Landmarks Preservation Law (Landmarks Law or the Law),[1] the Landmarks Preservation Commission (Commission) declared Grand Central Terminal (Terminal) to be a historic landmark.[2] Subsequently, Penn Central Transportation Company (Penn Central), the owner of the Terminal, agreed to lease the airspace above the Terminal to UGP Properties, Inc. (UGP) for construction of a multistory office building.[3] In compliance with the requirements of the Landmarks Law,[4] Penn Central and UGP submitted two construction plans to the Commission for ap-

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1. NEW YORK, N.Y. CHARTER & AD. CODE, ch. 8-A, § 205-1.0 (1976). The Law was passed in 1965 pursuant to a state enabling act, N.Y. GEN. MUN. LAW § 96-a (McKinney 1977). Under the enabling act, the city is "empowered to provide by regulations, special conditions and restrictions for the protection, enhancement, perpetuation and use of places, districts, sites, buildings, structures, works of art, and other objects having a special character or special historical or aesthetic interest or value." *Id.* Under the Landmarks Law, the Landmarks Preservation Commission (Commission) is given the responsibility of designating certain buildings as "landmarks." NEW YORK, N.Y. CHARTER & AD. CODE, ch. 8-A, § 207-1.0(n) (1976). A landmark is defined as

> [a]ny improvement, any part of which is thirty years or older, which has a special character or special historical or aesthetic interest or value as part of the development, heritage, or cultural characteristics of the city, state or nation and which has been designated as a landmark pursuant to the provisions of this chapter.

*Id.* Moreover, the Commission may designate certain areas of the city as "historic districts." *Id.* § 207-1.0(h). The Law requires that public hearings be conducted prior to any designation. *Id.* § 207-2.0.

Once a building has been designated as a landmark, its owner is under an affirmative duty to keep the exterior of the building in "good repair." *Id.* § 207-10.0(a). In addition, any proposed alteration, demolition or construction to the building must be approved by the Commission. *Id.* § 207-4.0(a). If an owner proposes structural changes to a designated landmark, he may apply for a "certificate of no exterior effect," which will be denied if the proposal would alter the exterior of the building. *Id.* § 207-5.0. Alternatively, the owner may seek a "certificate of appropriateness," which will be granted if the proposal would not affect the "protection, enhancement, perpetuation and use" of the historic landmark. *Id.* § 207-6.0. In determining the effect of the proposed alterations on the character of the building, the Commission must consider aesthetic, historical and architectural values, architectural style, design, arrangement, texture, material, color, and other relevant factors. *Id.* § 207-6.0(b)(2). In the event both certificates are denied, the owner may apply for a "certificate of appropriateness based on insufficient returns," which is available when an owner is unable to receive a reasonable return on his investment in the property. *Id.* § 207-8.0.

2. Penn Cent. Transp. Co. v. City of New York, 98 S. Ct. 2646, 2655 (1978).

3. *Id.* at 2655. Under the lease, Penn Central was to receive one million dollars annually during construction of the office building and a minimum of three million dollars in annual rentals following its completion. *Id.* This income to Penn Central would have been partially offset by a loss of between $700,000 and one million dollars due to the displacement of existing concessionaires by the addition. *Id.*

4. NEW YORK, N.Y. CHARTER & AD. CODE, ch. 8-A, § 207-4.0(a) (1976) requires that any exterior alteration to a landmark be approved by the Commission. *See* note 1 *supra.*

proval.[5] Following the Commission's rejection of the proposals,[6] Penn Central and UGP brought suit,[7] contending, *inter alia*, that the restrictions on the development of the Terminal site constituted a "taking" of private property without just compensation in violation of the fifth amendment to the United States Constitution.[8] The New York Supreme Court, Trial Term, granted the plaintiffs' request for a declaratory judgment and injunctive relief, and barred the city from using the Landmarks Law to prevent construction of any structure which could otherwise be lawfully constructed at the Terminal site.[9] On appeal, the New York Supreme Court, Appellate Division, reversed the judgment of the trial court.[10] The New York Court of Appeals affirmed the Appellate Division's decision, maintaining that the

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5. 98 S. Ct. at 2655. The first plan consisted of a 55-story building to be cantilevered above the Terminal and to rest on the roof of the Terminal. *Id.* The second plan was for a 53-story building and required that portions of the Terminal's facade be torn down. *Id.* at 2656.

6. *Id.* at 2656. The Commission, in rejecting the 55-story proposal, stated:

> [The Commission] has no fixed rule against making additions to designated buildings—it all depends on how they are done. . . . But to balance a 55-story office tower above a flamboyant Beaux-Arts facade seems nothing more than an aesthetic joke. . . .
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> . . . [W]e must preserve [landmarks] in a meaningful way—with alterations and additions of such character, scale, materials, and mass as will protect, enhance, and perpetuate the original design rather than overwhelm it.

*Id.*, *quoting* Trial Record at 2251. Furthermore, in disallowing the 53-story addition, the Commission stated that "[t]o protect a landmark, one does not tear it down. To perpetuate its architectural features, one does not strip them off." 98 S. Ct. at 2656, *quoting* Trial Record at 2255.

7. 98 S. Ct. at 2646. Penn Central sought a declaratory judgment and injunctive relief to bar the city, acting through the Commission, from prohibiting the construction of any structure that might otherwise be lawfully constructed at the Terminal site. *Id.* at 2657. Moreover, the plaintiff sought compensation for all periods during which the Terminal, while designated as a landmark, was subject to the restrictive conditions imposed by the Landmarks Law. *Id.* For a discussion of the consequences resulting from the designation of a building as a "landmark" under the Landmarks Law, *see* note 1 *supra*.

8. 98 S. Ct. at 2657. The "taking" provision of the fifth amendment provides: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The fifth amendment was made applicable to the states by operation of the due process clause of the fourteenth amendment. *See* Chicago B. & Q. R.R. v. Chicago, 166 U.S. 226, 239 (1897). In addition to arguing that the application of the Landmarks Law constituted a taking without just compensation, Penn Central contended that the Commission's action had arbitrarily deprived it of property without due process of law in violation of the fourteenth amendment. 98 S. Ct. at 2657.

Under the provisions of the Landmarks Law, affected landowners are allowed to seek judicial review of an initial designation, of a denial of a certificate of no effect, and of a denial of a certificate of appropriateness. *Id.* at 2653. Penn Central, however, neither sought judicial review of the original designation, nor of the denial of either certificate. *Id.* at 2655-56.

9. The trial court opinion was not reported. *See* 98 S. Ct. at 2657. The trial court, while granting the requested injunctive and declaratory relief, severed the plaintiff's claim for damages for the alleged "temporary taking" of the property. *Id.*

10. Penn Cent. Transp. Co. v. City of New York, 50 A.D.2d 265, 377 N.Y.S.2d 20 (1975). The Appellate Division found that the Landmarks Law was a valid exercise of police power in that it promoted a legitimate public interest in preserving structures worthy of landmark status. *Id.* at 274, 377 N.Y.S.2d at 29. The court determined that while Penn Central may have been deprived of the most profitable use of the Terminal, such a showing was not sufficient to constitute an unconstitutional deprivation of property. *Id.* The court noted that Penn Central could sustain its constitutional claims only if it established that it was deprived "of all reasonable beneficial use of [its] property." *Id.* at 272, 377 N.Y.S.2d at 28.

restrictions on development did not constitute a deprivation of property without due process of law.[11] On appeal, the United States Supreme Court affirmed,[12] *holding* that the application of the Landmarks Law to individual landmarks did not constitute a taking within the perimeters of the fifth amendment. *Penn Central Transportation Co. v. City of New York*, 98 S. Ct. 2646 (1978).

While the fifth amendment clearly provides that private property shall not "be taken for public use, without just compensation,"[13] the determination of what constitutes a "taking" within the meaning of this provision has proved to be a considerably difficult problem for the United States Supreme Court.[14] Although the Supreme Court has acknowledged that the taking provision was "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole,"[15] it has nonetheless been unable to develop clear standards for determining when "fairness and justice" activate the compensatory mechanisms of the fifth amendment.[16] As the Court explained in *Armstrong v. United States*,[17] "taking" problems arise because "not every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense."[18]

Although the determination of what constitutes a taking may largely be "a question of degree . . . [which] cannot be disposed of by general propositions,"[19] various factors helpful in making this determination have been promulgated by the Court. In *United States v. Willow River Power Co.*,[20]

11. Penn Cent. Transp. Co. v. City of New York, 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977). The New York Court of Appeals framed the issue as whether or not there was a deprivation of property without due process of law, rather than whether there was a "taking" within the meaning of the fifth amendment. *Id.* at 329, 366 N.E.2d at 1274, 397 N.Y.S.2d at 917. This characterization was based on the court's assumption that a "taking" could only occur where private property is appropriated for public use. *Id.*, *citing* 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).

12. Penn Cent. Transp. Co. v. City of New York, 98 S. Ct. 2646 (1978). The Supreme Court only addressed Penn Central's fifth amendment taking challenge. *Id.* at 2658. *See* note 35 *infra*.

13. U.S. CONST. amend. V. *See* note 8 *supra*.

14. *See, e.g.*, Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); United States v. Central Eureka Mining Co., 357 U.S. 155 (1958); United States v. Caltex, Inc., 344 U.S. 149 (1952);

15. Armstrong v. United States, 364 U.S. 40, 49 (1960). In *Armstrong*, a shipbuilder had contracted to furnish certain boats to the United States. *Id.* at 41. Upon the default of the shipbuilder, the government acquired title to all boats and materials pursuant to the terms of the contract. *Id.* Consequently, the plaintiff, holder of certain materialman's liens, was barred from enforcing his encumbrances against the property by the doctrine of sovereign immunity. *Id.* The Court found that since the value of the liens had been totally destroyed by the government for its own advantage, a taking had occurred which required "just compensation" under the fifth amendment. *Id.* at 48.

16. *See* Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962).

17. 364 U.S. 40 (1960). For a discussion of *Armstrong*, *see* note 15 *supra*.

18. 364 U.S. at 48.

19. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922). In *Pennsylvania Coal*, the Court indicated that the determination of whether a taking has occurred will depend upon the particular facts of each case. *Id.* at 413.

20. 324 U.S. 499 (1945).

the Court noted that in order to sustain a claim for compensation, it must be demonstrated that a property right was confiscated by the government.[21] Specifically, the *Willow River* Court explained:

> The Fifth Amendment, which requires just compensation where private property is taken for public use, undertakes to redistribute certain economic losses inflicted by public improvements so that they will fall upon the public rather than wholly upon those who happen to lie in the path of the project. It does not undertake, however, to socialize all losses, but those only which result from a taking of property.[22]

Furthermore, the Court has concluded that the character of the governmental action is an important consideration in determining whether a taking has occurred.[23] Where there has been a physical intrusion upon privately owned property,[24] or an appropriation of land by the government,[25] the Court has determined that the landowner is entitled to compensation.[26] In contrast, where economic interests of private citizens have been seriously impaired by restrictions imposed on the use of property, as through community zoning plans[27] or through prohibitions on the noxious use of prop-

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21. *Id.* at 502.

22. *Id.* The question of what constitutes "property" is an important consideration in analyzing a claim for compensation under the fifth amendment. In *Willow River*, the Court stated that "not all economic interests are 'property rights'; only those economic advantages are 'rights' which have the law back of them, and only when they are so recognized may courts compel . . . compensat[ion] for their invasion." *Id.* In contrast, less than three months prior to *Willow River*, the Court noted in United States v. General Motors Corp., 323 U.S. 373 (1945), that "property" was not to be construed "in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law," but rather should "denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." *Id.* at 377-78.

23. United States v. Cress, 243 U.S. 316 (1917). In *Cress*, the government had dammed a river, causing its tributaries to overflow onto the plaintiff's land and depreciating the value of the land by one-half. *Id.* at 318. The Court, in requiring compensation, stated that "it is the character of the invasion, not the amount of the damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking." *Id.* at 328.

24. *See, e.g.*, Causby v. United States, 328 U.S. 256 (1946); United States v. Cress, 243 U.S. 316 (1917). In *Causby*, the Court determined that takeoffs and landings by United States military aircraft which interfered with the use of the plaintiff's land for chicken farming constituted a "taking" in that the government had intruded upon a portion of the plaintiff's property for its own purposes. 328 U.S. at 262 n.7, 264. For a discussion of *Cress*, *see* note 23 *supra*.

25. *See* Berman v. Parker, 348 U.S. 26 (1954).

26. *See, e.g.*, cases cited at notes 24 & 25 *supra*.

27. It is important to note the fundamental characteristics of zoning laws. Generally, since most zoning regulations are required to conform to a comprehensive plan, similar restrictions are usually imposed upon parcels of land located within a given geographical area. *See, e.g.*, Rodgers v. Village of Tarryton, 302 N.Y. 115, 96 N.E.2d 731 (1951); Eves v. Zoning Bd. of Adjustment, 401 Pa. 211, 164 A.2d 7 (1960). Property owners are both benefited and burdened by the limitations. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388-89 (1926). The objectives of a zoning plan, whether they be the maintenance of property values, the assurance of orderly development, or a concern for aesthetics, are benefits which inure to all those similarly situated. *See id.* at 391-93. In other words, an "average reciprocity of advantage" exists among the landowners under typical zoning restrictions. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

erty, the Court has frequently concluded that no taking has occurred.[28] Rather, it has stated that as long as the regulation is a valid exercise of the police power in that it promotes the health, safety, morals or general welfare of the community, even a substantial interference with the economic expectations of an individual may not warrant compensation.[29] The Court has noted, however, that a regulation whose practical effect is the elimination of almost the entire economic worth of a property right may constitute a taking within the meaning of the fifth amendment.[30] Moreover, in *Goldblatt v. Town of Hempstead*,[31] the Court indicated that the extent of economic impact of a governmental regulation upon private property utilized for a

28. *See, e.g.*, Gorieb v. Fox, 274 U.S. 603 (1927) (ordinance requiring buildings to be set back from street line upheld); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (ordinance prohibiting the erection of industrial establishments and retail stores in residential districts found constitutional even though enforcement would result in economic loss to certain landowners); Reinman v. City of Little Rock, 237 U.S. 171 (1915) (ordinance prohibiting livery stables in certain areas upheld even though economic hardship would result); Welch v. Swasey, 214 U.S. 91 (1909) (statute prescribing height restrictions of buildings upheld); Mugler v. Kansas, 123 U.S. 623 (1887) (legislation prohibiting use of land for manufacture or sale of alcoholic beverages upheld in spite of financial loss which would result to certain landowners).

29. *See, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Welch v. Swasey, 214 U.S. 91 (1909). In Lawton v. Steele, 152 U.S. 133 (1894), the Court stated that before the government may "interpos[e] its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference." *Id.* at 137. *Lawton* was cited with approval in Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962). The concept of public welfare was described by the Supreme Court in Berman v. Parker, 348 U.S. 26 (1954), which involved the plenary power of Congress to legislate with respect to the District of Columbia:

> The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. 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. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them.

*Id.* at 33 (citations omitted).

In examining the validity of zoning ordinances, the Court has indicated that such restrictions must "bear a substantial relation to the public health, safety, morals, or general welfare." Nectow v. Cambridge, 277 U.S. 183, 188 (1928). Applying this concept of public welfare to a case involving the prohibition of an existing use of land, the Supreme Court determined that a state had not exceeded "its constitutional powers by deciding upon the destruction of one class of property [without compensation] in order to save another which, in the judgment of the legislature, [was] of greater value to the public." Miller v. Schoene, 276 U.S. 272, 279 (1928). A restriction on the use of land which is not reasonably related to a substantial public interest would not survive constitutional challenges. Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Nectow v. Cambridge, 277 U.S. 183 (1928).

30. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). In *Pennsylvania Coal*, the plaintiff sold the surface rights to a parcel of land to the defendant, but expressly reserved the right to mine coal thereunder. *Id.* at 412. Subsequent to the transaction, a statute was enacted which prohibited any subterranean mining that threatened the support of the land above. *Id.* Consequently, it became commercially impracticable to mine the coal. *Id.* at 414. While recognizing that the statute furthered important public interests, the Court held that since the impact of the restriction was the near destruction of the plaintiff's investment expectations, the statute constituted an unlawful taking. *Id.* at 414-16. In discussing at what point the imposition of a land use restriction would rise to the level of requiring compensation in order to sustain the restriction as a valid exercise of police power, the Court stated: "The greatest weight is given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power." *Id.* at 413.

31. 369 U.S. 590 (1962).

specific business purpose was a relevant factor in determining whether a taking had occurred.[32] In summary, while the finding of a taking largely depends "upon the particular circumstances of each case,"[33] the Court has provided general guidelines for making the determination.

Due to the lack of a federal decision squarely addressing the constitutionality of prohibitions imposed upon selected individual landmarks under a landmark preservation statute,[34] the United States Supreme Court applied general principles derived from prior decisions in related areas to resolve the issues presented in *Penn Central.*[35] Writing for the majority, Justice Brennan addressed and rejected each argument asserted by the appellants.[36]

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32. *Id.* at 594. Specifically, the *Goldblatt* Court stated:

> There is no set formula to determine where regulation ends and taking begins. Although a comparison of values before and after is relevant, it is by no means conclusive . . . . [In] Hadacheck v. Sebastian, [239 U.S. 394 (1915)] a diminution in value from $800,000 to $60,000 was upheld. How far regulation may go before it becomes a taking we need not now decide, for there is no evidence in the present record which even remotely suggests that prohibition of further mining will reduce the value of the lot in question.

369 U.S. at 594 (citations and footnote omitted). The Supreme Court has therefore held that although regulations imposed upon private property are important considerations in determining whether a taking has occurred, they are not stripped of their validity solely because they result in a great diminution in the value of the investment. *See id.*; Hadacheck v. Sebastian, 239 U.S. 394, 408-09 (1915).

33. United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958).

34. The New York state courts, however, have addressed certain constitutional questions involving the Landmarks Law. In Manhattan Club v. Landmarks Preservation Comm'n, 51 Misc. 2d 556, 273 N.Y.S.2d 848 (1966), the New York Supreme Court, Special Term, held that the mere designation of a building as a landmark was not confiscatory because the property owner was free to alter the interior of the building and was guaranteed a reasonable return on his investment. *Id.* at 560, 273 N.Y.S.2d at 852. The court also maintained that the "promotion of the general welfare includes the historical and cultural purpose envisaged by the city law." *Id.* The court noted that in order for the ordinance to constitute a taking within the meaning of the fifth amendment, it must preclude the use of the property for all purposes for which the property was reasonably adapted. *Id., citing* Setauket Dev. Corp. v. Romeo, 18 A.D.2d 825, 826, 237 N.Y.S.2d 516, 518 (1963).

In two other cases, the New York courts were confronted with constitutional challenges to the validity of the Landmarks Law. *See* Lutheran Church in America v. City of New York, 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974); Trustees of Sailors' Snug Harbor v. Platt, 29 A.D.2d 376, 288 N.Y.S.2d 314 (1968). However, each case involved the application of the Law to charitable organizations, in which different considerations prevailed. In *Lutheran Church*, the court found that where the Law "would prevent or seriously interfere with the carrying out of the charitable purpose," it must be held invalid. 35 N.Y.2d at 131, 316 N.E.2d at 311, 359 N.Y.S.2d at 16.

35. 98 S. Ct. at 2658-66. Justice Brennan framed the questions confronting the Court as follows:

> The issues presented by appellants are (1) whether the restrictions imposed by New York City's law upon appellants' exploitation of the Terminal site effect a "taking" of appellants' property for a public use within the meaning of the Fifth Amendment, . . . and, (2) if so, whether the transferable development rights afforded appellants constitute "just compensation" within the meaning of the Fifth Amendment. We need only address the question whether a "taking" has occurred.

*Id.* at 2658-59 (citations and footnotes omitted). In regard to the second issue, under New York City's zoning laws, "owners of real property who have not developed their property to the full extent permitted by the applicable zoning laws . . . [may] transfer development rights to [other] parcels." *Id.* at 2654, *construing* NEW YORK, N.Y., ZONING RESOLUTION §§ 74-79 to 74-793 (1968). *See* Comment, *Development Rights Transfer in New York City*, 82 YALE L.J. 338 (1972).

36. 98 S. Ct. at 2662-65. Specifically, the appellants presented the following arguments to the Court: 1) Penn Central had a valuable property interest in the air space above the Termi-

Specifically, in response to Penn Central's contention that it was entitled to compensation for interference with the use of the Terminal's air rights irrespective of the value of the remainder of the property, Justice Brennan noted that the Court must examine the entire parcel in question, rather than dividing it into "discrete segments," in order to determine whether particular governmental conduct has "effected a taking."[37] The Court focused "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," which included the Terminal and its air rights.[38]

Furthermore, the majority noted that the Landmarks Law was similar to various zoning provisions in that both were related to the promotion of the public welfare.[39] Comparing the two types of restrictions,[40] the Court rejected the argument that diminution in property value alone would constitute a taking.[41] Moreover, unlike the discriminatory character of some land use schemes, the Court found the Landmarks Law to be a part of a "comprehensive plan."[42] In addition, Justice Brennan suggested that although the Landmarks Law did burden some landowners more than others,[43] it was nevertheless capable "of producing the fair and equitable distribution of benefits and burdens of governmental action which is characteristic of zoning laws."[44] Furthermore, the Court recognized that "[l]egislation designed to promote the general welfare commonly burdens some more than others."[45] In response to Penn Central's argument that a landmark preservation law differs from a zoning regulation in that owners subject to the latter enjoy a reciprocal benefit from surrounding properties while owners subject to the former do not,[46] the Court found that Penn Central did receive a reciprocal

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nal, and the restrictions imposed upon this interest by the Landmarks Law, without more, required compensation; 2) even if the interference with the air space did not in itself constitute a taking, the operation of the Landmarks Law had so diminished the value of the Terminal as to warrant compensation; 3) the decision to designate the Terminal a landmark was arbitrary because it was based on individual taste; 4) the Landmarks Law was so inherently different from zoning ordinances that the same considerations should not control a court's determination as to whether a taking has occurred; and 5) the Landmarks Law was an appropriation of a part of Penn Central's property for a strictly governmental purpose. *Id.*

37. *Id.* at 2663.

38. *Id.*

39. *Id.* at 2663-64.

40. *Id.*

41. *Id.* at 2663, *citing* Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Hadacheck v. Sebastian, 239 U.S. 394 (1915).

42. 98 S. Ct. at 2663. The Court rejected Penn Central's argument that the Landmarks Law was "like discriminatory, or 'reverse spot,' zoning; that is, a land use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones." *Id.* Rather, the Court found that the Landmarks Law "embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they may be found in the city." *Id.* (footnote omitted).

43. *Id.* at 2664.

44. *Id.* For a discussion of the characteristics of zoning laws, *see* note 27 *supra.*

45. 98 S. Ct. at 2664, *citing* Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Miller v. Schoene, 276 U.S. 272 (1928); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Hadacheck v. Sebastian, 239 U.S. 394 (1915).

46. 98 S. Ct. at 2664-65.

advantage from the operation of the Law. Justice Brennan concluded that the "preservation of landmarks benefit[ed] all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole."[47]

Finally, Justice Brennan dismissed the contention that the Landmark Law was an appropriation of private property by a governmental unit for its own use.[48] Rather, comparing the Landmark Law to the zoning ordinance at issue in *Young v. American Mini Theatres, Inc.*,[49] the majority concluded that the Law protected the aesthetic nature of the area while permitting Penn Central to utilize the remainder of its property in a profitable manner.[50]

After concluding that the "New York law [was] not rendered invalid by its failure to provide 'just compensation' whenever a landmark owner [was] restricted in the exploitation of property interests, such as air rights, to a greater extent than provided for under applicable zoning laws,"[51] the majority determined that the interference with Penn Central's property was not of such a magnitude as to require the exercise of eminent domain to sustain it.[52] The Court based this conclusion, in part, upon the fact that the Law did not interfere with Penn Central's primary use of the property as a railroad terminal,[53] and did not operate as an absolute bar to the use of the air space above the Terminal.[54] Rather, the Court noted that the Commission's decision did not foreclose the possibility that the construction of a different size structure would be permissible under the Law.[55] Finally, Justice Brennan noted that any loss suffered by Penn Central as a result of the Commission's action could be offset by transferring the existing air rights to other parcels.[56]

In conclusion, the Court determined that the Commission's actions did not constitute a taking within the meaning of the fifth amendment because the restrictions, while promoting the general welfare of the city, also permitted a reasonable return on the owner's investment and did not foreclose the possibility of new construction above the Terminal.[57]

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47. *Id.* at 2665. *See* text accompanying note 81 *infra.*

48. 98 S. Ct. at 2665.

49. 427 U.S. 50 (1976). In *Young*, the City of Detroit adopted a zoning ordinance which regulated the concentration of adult movie theatres within a specified area. *Id.* at 52. In sustaining the validity of the ordinance in the wake of numerous constitutional challenges, the Court noted that "the City's interest in attempting to preserve the quality of urban life is one that must be accorded high respect." *Id.* at 71.

50. 98 S. Ct. at 2665.

51. *Id.*

52. *Id.* For the resolution of a closely analogous issue in *Pennsylvania Coal, see* note 30 and accompanying text *supra.*

53. 98 S. Ct. at 2665-66.

54. *Id.* at 2666. The Court recognized that the Commission had merely disapproved the plans for the two proposed structures. *Id. See* notes 5 & 6 and accompanying text *supra.* Penn Central still had the opportunity to submit plans for the construction of a building which would be compatible with the character of the Terminal. *See* 98 S. Ct. at 2666 & n.34.

55. 98 S. Ct. at 2666 & n.34.

56. *Id.* at 2666. For an explanation of the transferability of air rights, *see* note 35 *supra.*

57. 98 S. Ct. at 2666.

In a dissenting opinion,[58] Justice Rehnquist argued that the Landmarks Law only superficially resembled a zoning ordinance.[59] The dissent maintained that the Law did not impose the same restrictions on all property located within a designated area but, rather, singled out certain properties and treated them differently from adjacent parcels.[60] Moreover, unlike a valid zoning regulation, where any decrease in value of regulated property is at least "partially offset by an increase in value which flows from similar restrictions as to use on neighboring properties," the Landmarks Law did not provide for "an average reciprocity of advantage."[61]

More importantly, the dissent required closer scrutiny of the three operative components of the taking clause[62] and suggested there were only two situations where the destruction of property rights by governmental action would not constitute a taking within the meaning of the fifth amendment.[63] Specifically, the dissent acknowledged that prohibitions on certain uses of land were permissible where either the particular use was injurious to the health, morals, or safety of the community,[64] or where the restriction was applied over a broad cross section of the land and each landowner thus enjoyed a reciprocal benefit along with the burden.[65] According to the dissent, the former exception was inapplicable in the present case because the Law was not directed toward prohibiting a noxious use of the land.[66] In

58. Justice Rehnquist wrote a dissenting opinion in which Chief Justice Burger and Justice Stevens joined.

59. *Id.* at 2667 (Rehnquist, J., dissenting). In support of this conclusion, Justice Rehnquist cited the concession by the New York Court of Appeals to the effect that the restrictions imposed by the Landmarks Law were clearly distinguishable from those imposed by a zoning ordinance. *Id.* at 2667 n.2 (Rehnquist, J., dissenting), *citing* Penn. Cent. Transp. Co. v. City of New York, 42 N.Y.2d 324, 329, 366 N.E.2d 1271, 1274, 397 N.Y.S.2d 914, 917 (1977).

60. 98 S. Ct. at 2667 (Rehnquist, J., dissenting).

61. *Id.*, *quoting* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). In distinguishing the Landmarks Law from zoning ordinances, the dissent noted:

> Where a relatively few individual buildings, all separated from one another, are singled out and treated differently from surrounding buildings, no . . . reciprocity exists. The cost to the property owner which results from the imposition of restrictions applicable only to his property and not that of his neighbors may be substantial—in this case, several million dollars—with no comparable reciprocal benefits.

98 S. Ct. at 2667 (Rehnquist, J., dissenting). *See* note 27 *supra*.

62. 98 S. Ct. at 2668 (Rehnquist, J., dissenting). Specifically, the dissent separated the taking provision of the fifth amendment into its three essential parts: "property," "taken," and "just compensation." *Id.*, *quoting* U.S. CONST. amend. V.

63. 98 S. Ct. at 2669-72 (Rehnquist, J., dissenting).

64. *Id.* at 2669-70 (Rehnquist, J., dissenting), *citing* Mugler v. Kansas, 123 U.S. 623, 668-69 (1887).

65. 98 S. Ct. at 2671 (Rehnquist, J., dissenting), *citing* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). The dissent explained that while a zoning restriction may reduce individual property values, there is no taking because the burden is shared evenly among the property owners, and individual owners are benefited by the restrictions imposed on neighboring properties. 98 S. Ct. at 2671 (Rehnquist, J., dissenting). In contrast, in the instant case, the dissent argued that a multimillion dollar burden was being imposed on the property owners which was "not offset by any benefits flowing from the preservation of some 500 other 'Landmarks' in New York." *Id.* Such an imposition, the dissent contended, was of the type against which the fifth amendment was designed to protect. *Id.*

66. *Id.* at 2670 (Rehnquist, J., dissenting). The dissent noted that the "proposed addition to the . . . Terminal would be in full compliance with zoning, height limitations, and other health and safety requirements." *Id.*

addition, the latter exception was determined to be equally inappropriate because no other adjacent buildings were subject to similar restrictions.[67] Moreover, the dissent noted that the burdens imposed upon Penn Central, while not offset by any benefits accruing from other properties designated as landmarks,[68] included an affirmative duty to keep the landmark in good repair.[69] While recognizing that New York City was in a precarious financial situation,[70] the dissent maintained that the Court should not ignore the protection guaranteed by the fifth amendment and should not permit the taking of private property without just compensation.[71]

Although Justice Rehnquist properly recognized the two situations where the destruction of property rights by governmental action would not constitute a taking within the meaning of the fifth amendment,[72] it is submitted that the dissent incorrectly concluded that neither exception was applicable to the Landmarks Law.

Under the first exception, the "question is whether the forbidden use is dangerous to the safety, health, or welfare of others."[73] A statute which thus furthers the public welfare without prohibiting a dangerous use of land may not qualify under the noxious use standard, for, as the dissent correctly stated, "[t]he nuisance exception to the taking guarantee is not coterminous with the police power itself."[74] An argument can be made, however, that the alteration of historic landmarks is harmful to the public welfare and thus qualifies as a "noxious" use of land.[75] The majority's conclusion was not

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67. *Id.* at 2671 (Rehnquist, J., dissenting). *See* text accompanying note 60 *supra*.

68. 98 S. Ct. at 2670 (Rehnquist, J., dissenting). *See* note 61 and accompanying text *supra*.

69. 98 S. Ct. at 2667-68 (Rehnquist, J., dissenting). In explaining the significance of the landowner's affirmative duty to maintain the property, the dissent stated:

> [T]he landowner is not simply prohibited from using his property for certain purposes, while allowed to use it for all other purposes. Under the historic landmark preservation scheme adopted by New York, the property owner is under an affirmative duty to *preserve* his property as a *landmark* at his own expense. To suggest that because traditional zoning results in some limitation of use of the property zoned, the New York landmark preservation scheme should likewise be upheld, represents the ultimate in treating as alike things which are different.

*Id.* (emphasis supplied by the dissent).

70. *Id.* at 2674 (Rehnquist, J., dissenting).

71. *Id.*

72. *See* notes 63-65 and accompanying text *supra*.

73. 98 S. Ct. at 2670 (Rehnquist, J., dissenting).

74. *Id.*

75. Justice Brennan alluded to this argument in his analysis of Penn Central's contention that several of the cases cited by the majority in support of its conclusions involved governmental prohibitions on the "noxious use" of land, while, in contrast, *Penn Central* allegedly involved a restriction on the beneficial use of the property. *Id.* at 2664 n.30. He stated that the cited cases were not "noxious use" cases but rather could more easily be understood as involving restrictions designed to produce a public benefit and applicable to "all similarly situated property." *Id.* Justice Brennan added that "correlatively, [it could not] be asserted that the destruction or fundamental alteration of a historic landmark is not harmful." *Id.* This comment may be interpreted as suggesting a broader view of the "noxious use" exception than the dissent was willing to allow. In the dissenting opinion, Justice Rehnquist argued that *Penn Central* did not present a nuisance or "noxious use" case in that "the proposed addition . . . would be in full compliance with zoning, height limitations, and other health and safety requirements." *Id.* at 2670 (Rehnquist, J., dissenting). In response, Justice Brennan commented that "[t]he suggestion

grounded upon such a proposition, however, for it relied on the rationale underlying the second exception to dismiss Penn Central's claim for compensation.[76]

In regard to the fifth amendment exception concerning reciprocity of benefits,[77] the Court successfully analogized the Landmarks Law to zoning ordinances.[78] The majority determined that the restrictions imposed by the Commission, while not pertaining to any specific section of the city,[79] nevertheless provided the individual landmark designees with certain benefits.[80] A legitimate criticism of such a determination may be grounded upon the huge disparity between the benefits and burdens assigned to Penn Central. The majority described the benefits accruing to Penn Central as those set out in the Landmarks Law, namely: fostering civic pride; protecting the city's attraction of tourists; stimulating business and industry; strengthening the city's economy; and generally enhancing the quality of life for the city's workers and residents.[81] If one compares these "benefits" to the economic burdens imposed on Penn Central, the operation of the Law would appear to weigh heavily against the Terminal. Not only has Penn Central lost a minimum of three million dollars in annual rentals from UGP,[82] but it is required to preserve the Terminal as a landmark at its own expense.[83]

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that the beneficial quality of appellants' proposed construction is established by the fact the construction would have been consistent with applicable zoning laws ignores the development of sensibilities and ideals reflected in landmark legislation like New York City's." *Id.* at 2664 n.30. Thus, while the majority only passingly commented on a broader interpretation of the "noxious use" exception, it appears to be a plausible argument. *See also* note 29 *supra*.

For a discussion of the harmful effects of a deteriorating environment on urban life, *see generally* P. BLAKE, GOD'S OWN JUNKYARD (1964); E. HIGBEE, THE SQUEEZE (1960); J. JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES (1961); I. NAIRN, THE AMERICAN LANDSCAPE (1965). It is evident that one method of improving the appearance of urban areas would be to preserve historic landmarks, for one of the real values of any historic building "lies in its being a delight to the eye." Comment, *Legal Methods of Historic Preservation*, 19 BUFFALO L. REV. 611, 613 (1970). The need for preservation was most aptly summarized by Robert Stripe in an address to the Conference on Preservation Law:

> Our problem now is to acknowledge that historic conservation is but one aspect of the much larger problem, basically an environmental one, of enhancing—or perhaps developing for the first time—the quality of life for people. Especially is this so for those people who in increasing numbers struggle daily to justify an increasingly dismal existence in a rapidly deteriorating urban environment.

Gilbert, *Precedents for the Future*, 36 L. & CONTEMP. PROB. 311, 312 (1971), *quoting* address by Robert Stripe, 1971 Conference on Preservation Law, Washington, D.C. (May 1, 1971) (unpublished text at 6-7).

76. *See* notes 39-47 and accompanying text *supra*.

77. *See* text accompanying note 65 *supra*.

78. *See* notes 39-47 and accompanying text *supra*. For a discussion of the characteristics of zoning ordinances, *see* note 27 *supra*.

79. 98 S. Ct. at 2665. For the pertinent provisions of the Landmarks Law, *see* note 1 *supra*.

80. 98 S. Ct. at 2665. *See* text accompanying notes 46 & 47 *supra*.

81. 98 S. Ct. at 2652, *quoting* NEW YORK, N.Y. CHARTER & AD. CODE, ch. 8-A, § 205-1.0(b) (1976).

82. *See* note 3 *supra*.

83. *See* note 1 *supra*; note 69 and accompanying text *supra*.

It is through a close examination of the Court's reasoning with respect to the benefits and burdens attributable to Penn Central, however, that the decision in the instant case assumes significance. It is submitted that in subjecting Penn Central to a severe financial burden, the Court has indicated the importance it attaches to the preservation of historic landmarks, and has recognized that factors other than purely economic considerations may be considered by courts in reviewing fifth amendment challenges to landmark preservation laws.[84] To extend the rationale underlying the validity of zoning restrictions—an average reciprocity of benefits—to the facts of *Penn Central* is to recognize the importance of preserving the nation's historical buildings.[85]

It is suggested, however, that the potentially expansive interpretation of *Penn Central* must be tempered by the limitations noted by Justice Brennan. Particularly, the majority was clearly influenced by the possible ability of Penn Central to construct some other type of office building above the Terminal.[86] As the majority explained, construction of another building would, in all probability, be approved if it "harmonize[d] in scale, material, and character with the Terminal."[87] More importantly, the Court noted that the decision was "based on Penn Central's present ability to use the Terminal for its intended purposes and in a gainful fashion."[88] Although the Court recognized that the destruction of the economic viability of a parcel of land due to landmark designation would permit relief under the Landmarks Law,[89] the *Penn Central* decision does not offer any guidelines to future courts to determine when, in the absence of such a provision, the fifth amendment would compel compensation. While responding to the particular situation presented in *Penn Central*, the majority has thus left the resolution of these issues for future determination.

In upholding the Commission's action prohibiting the construction of the proposed office building atop Grand Central Terminal,[90] the Court recognized the validity of land use restrictions based on cultural, educational, and aesthetic standards with regard to individual landmarks.[91] As the Court

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84. *See* text accompanying note 81 *supra*.
85. *See* note 75 *supra*.
86. 98 S. Ct. at 2666. *See* notes 54 & 55 and accompanying text *supra*.
87. 98 S. Ct. at 2666, *quoting* Trial Record at 2251.
88. 98 S. Ct. at 2666 n.36. *See* text accompanying note 53 *supra*.
89. 98 S. Ct. at 2666 n.36. Specifically, in a footnote, Justice Brennan explained:

> We emphasize that our holding today is on the present record which in turn is based on Penn Central's present ability to use the Terminal for its intended purposes and in a gainful fashion. The city conceded at oral argument that if appellants can demonstrate at some point in the future that circumstances have changed such that the Terminal ceases to be, in the city's counsel's words, "economically viable," appellant may obtain relief [under the provisions of the Landmarks Law].

*Id.*, *quoting* Transcript of Oral Argument at 42-43. For a discussion of when the Landmarks Law allows alterations to a structure in order to permit a landowner to receive a reasonable return on his investment, *see* note 1 *supra*.
90. *See* notes 34-57 and accompanying text *supra*.
91. *See* notes 39-47 and accompanying text *supra*; text accompanying note 81 *supra*.

interpreted the New York City Landmarks Preservation Law,[92] no taking has occurred as long as the landowner is guaranteed a reasonable return on his investment. It must be recognized, however, that the Court's sweeping prohibition may be limited by the particular factual setting in which *Penn Central* arose.[93]

*John J. Ford*

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92. *See* notes 53-55 and accompanying text *supra*; note 89 *supra*.
93. *See* notes 86-89 and accompanying text *supra*.