Owner Challenges Under Federal Law: Takings/Penn Central
• 1913: Penn Central builds Grand Central Terminal
• 1967: NYC Landmarks Commission designates the Terminal as a landmark
• 1968: UGP enters 50-year ground lease, plans to build office building atop the Terminal
• Commission denied certificate of appropriateness for both plans, prompting Penn Central and UGP to sue claiming landmark designation was a “taking”
I.M. Pei (1956) “Hyperboloid”

1st Breuer (1968) (preserving façade)

2d Breuer design (covering façade)

• N.Y. Supreme Court (trial court): granted declaratory relief that landmarks law was a taking and enjoining barring NYC from blocking construction of otherwise permissible building
• Appellate Division: reversed; no taking, as regulation didn’t deprive them of all reasonable beneficial use of property
• N.Y. Court of Appeals: affirmed; no taking
Sax, *Takings and the Police Power* (1964)

- Government owes compensation when it acquires property rights for use as an enterprise (e.g., a public good)
- But not when it merely arbitrates private disputes or regulates an externality to prevent harm (*Mugler*)

Prof. Joe Sax

---

University of Missouri School of Law

- If Sax’s test has descriptive force or normative validity, on which side does NY ordinance fall? Does it:
  - Provide a public good?, or
  - Arbitrate a private dispute or regulate an externality to prevent harm to the community?
Problem with Prof. Sax’s formulation is that it may pose a false dichotomy
- One can say that historic preservation creates a “public good” like parks, libraries, or museums
- One can also say that historic preservation avoids public externalities (destruction of landmarks causes harm to citizens through loss of heritage)

Cf. Justice Scalia in *Lucas*
- Scalia, in questioning the “harm-avoidance” justification for treating regulation as not effecting a taking: “The distinction between regulation that ‘prevents harmful use’ and that which ‘confers benefits’ is difficult, if not impossible, to discern on an objective, value-free basis.” [p. 266]

- Compensation should be paid if:
  - Burden falls unfairly on one owner or a small group, and
  - Settlement costs are relatively small and manageable

Professor
FrankMichelman

University of Missouri School of Law

- Does NYC landmark preservation ordinance involve an “average reciprocity of advantage”?  
  - According to the dissent? No 
  - According to the majority? Yes 
  - What is the reasoning of each side? With which do you agree?
Penn Central Factors [p. 250]

1. What’s economic impact of regulation on owner?
2. What’s the extent of interference with the owner’s “distinct investment-backed expectations”?
3. What is the character of the government action involved? (regulation vs. physical invasion; importance of the government’s action to the public interest)

Reasonable and Distinct Investment-Backed Expectations

- Whose are relevant? UGP’s? or Penn Central’s?
- What if you knew a regulation was pending (or about to be proposed) when you bought?
- Why isn’t the economic impact of the landmark regulation too great an interference with Penn Central’s expectations?
- What if you got land as a gift?
Splitting the Denominator

• **Penn Central** (middle of p. 253): “‘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. . . . [T]his Court focuses rather . . . on the nature and extent of the interference with rights in the parcel as a whole.”

• Suppose Penn Central had sold its air rights to UGP by zoning lot merger **before** NYC designated the building as a landmark
• Could UGP then claim that the landmark designation constituted a taking?
• Penn Central RR had extensive underground track easements
• Are they part of the parcel, too?

Blue area: Penn Central's subsurface rights

TDRs

• Issue: If the landmark regulation had been a taking, could Penn Central’s entitlement to transferable development rights (TDRs) have constituted just compensation for the taking?
  – Having found no taking occurred, Court ultimately does not address this issue
• Could TDRs have been “just compensation” if the landmark ordinance had been a taking?
• Do they prevent the regulation from being a “taking” by giving residual value to the parcel?

• The “denominator problem” continues to be a source of substantial contention among the justices
• We’ll see this again in *Palazzolo v. Rhode Island* case (p. 275) and in *Murr v. Wisconsin* (2017)