1977

The Disparity Issue: A Context for the Grand Central Terminal Decision

John Costonis
Louisiana State University Law Center, john.costonis@law.lsu.edu

Follow this and additional works at: http://digitalcommons.law.lsu.edu/faculty_scholarship

Part of the Law Commons

Repository Citation
http://digitalcommons.law.lsu.edu/faculty_scholarship/69

This Article is brought to you for free and open access by the Faculty Scholarship at LSU Law Digital Commons. It has been accepted for inclusion in Journal Articles by an authorized administrator of LSU Law Digital Commons. For more information, please contact kayla.reed@law.lsu.edu.
THE DISPARITY ISSUE: A CONTEXT FOR THE GRAND CENTRAL TERMINAL DECISION

John J. Costonis*

Transferable development rights programs, while they represent an important new means of land use regulation, are of unsettled constitutional validity. The recent decision of the New York Court of Appeals in Penn Central Transportation Co. v. City of New York upheld such a program restricting the development of the Grand Central Terminal property and granting its private owner nondollar compensation in the form of transferable development rights. In this Comment, Professor Costonis focuses on the doctrinal significance of this decision in forging a "middle way" of land use regulation between the paths of police power and eminent domain.

"The concept of property," Professor Philbrick advised some years ago, "has never been, is not, and never can be of definite content." ¹ Unnerving and intriguing, his admonition explains why property jurisprudence stubbornly resists the best efforts of courts, legislators, and scholars to etch the concept's dimensions in stone. Each age must reformulate the premises of those preceding it to bring the entitlements of private ownership into conformity with dominant contemporary values.

No controversy better illustrates the changing conceptions of property than the recent decision of the New York Court of Appeals, Penn Central Transportation Co. v. City of New York (Grand Central Terminal).² That decision upheld the city's power to prevent, without providing dollar compensation, construction by the Penn Central Company and its lessee of a 59-story, $100 million office building atop the Grand Central Terminal. The decision is important for its immediate result—the preservation of New York City's best-known landmark building. But it has larger significance, I believe, in its teachings concerning the root entitlements of land ownership today. Chief Judge Charles Breitel's opinion, written for a unanimous court, both completes a cycle dating back to the United States Supreme Court's 1926 decision in Village of Euclid v. Ambler Realty


sustaining zoning as an exercise of the police power, and shapes new law for the future, redefining the manner in which public and private interests in land should be accommodated.

This Comment examines both facets of the Janus-like opinion within the context of what is here termed the "disparity issue" — the discrepancy in protection afforded property values depending upon whether government reduces them under its police power or its eminent domain power. My thesis is that *Grand Central Terminal* discards the dichotomy of current law and accepts the view that for certain types of land use controversies — here labeled the "disparity genre" — the financial burden of public intervention should fall neither solely upon the landowner, as orthodox police power doctrine would have it, nor upon government, as established eminent domain principles would dictate. Chief Judge Breitel achieves this turnabout in two ways: first, by recognizing that in appropriate instances police power regulation should be accompanied by a compensatory offset that affords the landowner an equitable return on his property; and second, by excluding from the base upon which that return is calculated what he calls the "social increment" of value, *i.e.*, that accruing to the regulated property by virtue of government's activities.

I. The Disparity Issue

The Supreme Court's decision in *Euclid* sustained government's power to restrict private land's profitability by zoning in order to achieve community planning goals. It held that zoning measures neither spring the fifth amendment's "taking" trap nor offend the fourteenth amendment's due process guarantees merely because a higher rate of return on zoned property would be possible absent the regulation. Landowners must simply accept the loss in value of their property — in *Euclid* a reduction from a market value of $870,000 to a zoned value of $540,000 — as one of organized society's less happy facts of life.

While *Euclid* laid the foundation for modern community planning, it also exacerbated the problem of the disparity in the treatment accorded landowners depending upon whether their property value is diminished by the police or the eminent domain power. *Euclid* taught that an owner forfeits profit expectancies in his land to the extent that its value is reduced under the police power. But for measures implemented through eminent domain, he receives prompt payment of the complete loss in dollars under the

---

3 272 U.S. 365 (1926).
4 See pp. 411-12 *infra*.
5 See pp. 415-18 *infra*. 
“highest and best use” standard. Near the shifting border between “takings” of property and valid regulation, this disparity of treatment has been a source of confusion and controversy ever since the *Euclid* decision.

In fairness to the Court, the disparity issue was hardly as visible in 1926 as it is today. For one thing, the nature of the landowner’s objection is more compelling at the present time. The Ambler Realty Company had demanded protection for no less than the full prezoning value of its property — which the Court without unfairness could declare a mere expectancy unprotected by the Constitution. But landowners today have long since abandoned that outpost. Conceding government’s power to bite deeply into land’s expectancy values, they ask only for some bare minimum of postzoning return in their parcels. Whether they are entitled to such a minimum and, if so, how much, are questions unresolved by *Euclid*.

*Euclid*, moreover, was decided in an era when judges located the police and eminent domain powers on different planets. Generally speaking, they viewed eminent domain as encompassing public acquisition of private property for improvements that would be available for “public use,” literally construed. To the police power, on the other hand, they assigned the less intrusive task of preventing harmful externalities, a point reflected in the *Euclid* opinion’s reliance on an analogy to nuisance law to bolster its support of zoning. So long as suppression of a privately authored harm bore a plausible relation to some legitimate “public purpose,” the pertinent measure need have afforded no compensation whatever. With the progressive growth of government’s involvement in land use, the distance between the two powers has contracted considerably. Today government often employs eminent domain interchangeably with or as a useful complement to the police power — a trend expressly approved in the Supreme Court’s 1954 decision in *Berman v. Parker,* which broadened the reach of eminent domain’s “public use” test to match that of the police power’s standard of “public purpose.”

Finally, the disparity issue was easily overlooked in *Euclid* because the city’s zoning scheme squared neatly with the externalities rationale. The plan merely divided the city into various use, height, and bulk districts in order to minimize potential con-

---

6 For a more complete exposition of the views developed in this and the following paragraph, including extensive citation to the pertinent literature and cases, see Costonis, “Fair” Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies, 75 COLUM. L. REV. 1021, 1033–46 (1975) [hereinafter cited as *Fair Compensation*].

7 272 U.S. at 387–88.

flicts (externalities) between neighboring land uses. In the Supreme Court's apt calculus, Ambler's desire to profit at the expense of other Euclid property owners counted for very little against the city's need to prevent harmful externalities through comprehensive zoning controls. Because the plan was applicable citywide and property owners in the same zones as Ambler incurred identical burdens and benefits, Ambler could hardly object that it was being singled out to underwrite a community benefit or otherwise to bear costs that, in fairness, should have fallen on Euclid's citizenry as a whole.

But let us update the scenario to portray the disparity genre of land use dispute, a genre that promises to become a staple in our environmentally conscious age. Suppose that Ambler's proposed land use would not perceptibly harm its neighbors, that Ambler alone or a small group including Ambler were precluded from construction because the community wished the property to remain in the status quo, and, finally, that the return possible on the existing use were marginal or perhaps even negative. In short, let us substitute the Penn Central Company for Ambler. As owner of Grand Central Terminal, a landmark located in an area generally zoned for sixty-story-plus megastructures, Penn Central seeks the same entitlement as its neighbors to build to these levels but is denied permission to do so because the good people of New York City so enjoy its diminutive landmark. With these refinements in plot, the disparity issue, which seemed a bit player in Euclid, strides conspicuously to center stage demanding the attention of legislatures and judges alike.

II. THE NEED FOR A "MIDDLE WAY"

Recounting the principal questions that must be addressed to resolve the disparity issue both strengthens the case for seeking a "middle way" and exposes the risks that attend the quest. These questions, as I see it, are five. First, is it the case, as the loose language of innumerable zoning opinions implies, that overregulation is a "taking," hence remediable exclusively through eminent domain proceedings? Aren't enactments that exceed the police power's ambit, conventionally defined as permissible noncompensatory regulation, simply invalid police power measures, save in the rare case when government acts in bad faith or injures the landowner in ways that cannot be rectified through noncompensa-

---

9 The source of this non sequitur is Justice Holmes' famous aphorism in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922), that "while property may be regulated to a certain extent [under the police power], if regulation goes too far it will be recognized as a taking."
tory relief? Second, why must compensation be pegged to the prohibitively expensive "highest and best use" level in cases of overregulation? Is that standard really necessary to insure fair treatment for the landowner? Isn't it absurd a half century after *Euclid* to allow government to reduce land values far below this level in the run-of-the-mine zoning case but to insist that, should government seek to deal equitably with the landowner, nothing less than restoration of the land's value to its highest and best use will do? Third, why must compensation be paid in dollars when government, though often strapped for funds, is in a position to offer various nondollar trade-offs of palpable economic value? Fourth, why must government be constrained by eminent domain's burdensome procedural requirements when the effects of overregulation can be overcome in many cases by providing an appropriate compensatory offset in the regulatory program itself? Finally, should land's value in disparity disputes be fixed independently of the landowner's identity or of government's contribution to the land's profitability? Should it make a difference, for example, if the landowner has been the beneficiary of various public subsidies or if the land has experienced a sharp increase in value as a result of publicly financed improvements on or near that land?

III. THE SEARCH FOR A "MIDDLE WAY"

However desirable a middle way between the paths of the police power and eminent domain may be, determining its precise form is beset with perils. The primary conceptual issue is whether sufficient flexibility can be found in the police or eminent domain powers to locate the alternative within the compass of one or the other, or, if not, whether recourse must be had to a third power, intermediate between the two. But questions must be asked about the disparity genre as well. Are instances of the genre likely to recur often enough to warrant the laborious efforts that doctrinal reform will undoubtedly require? Or are we dealing with a problem peculiar to a limited category of properties such as landmarks? Again, is the nature of the public intervention defining the genre sufficiently discrete to set it apart from the "true" police power and the "true" eminent domain case? If not, grave equal protection questions arise. If the genre is merely a variant of the police power, how justify awarding compensation at all? If a variant of eminent domain, how rationalize a lesser amount of compensation for the genre landowner than for one whose property has been condemned outright?

Then there are the practical issues of the alternative's administrability. The most stubborn of these is fixing the amount of
compensation or, as I have labeled it in another essay, the "fair compensation" due the overregulated landowner. Cases following *Euclid* teach that fourteenth amendment objections are stilled when zoning leaves the landowner with a "reasonable beneficial use" — that hypothetical residuum of private utility which is a prerequisite for valid regulation. Presently employed as a threshold test to determine whether the police power has been abused, this standard is also useful in measuring the "fair compensation" due the overregulated landowner which, by hypothesis, equals the difference between the land’s reasonable beneficial use and the lower return accruing to it by virtue of the overregulatory measure. Applying this standard to individual properties, however, raises complex ethical and accounting issues — both for legislatures, upon whom the burden falls in the first instance, and for judges, who must review legislative or administrative determinations, or, as a last resort, articulate and apply the standard themselves. The burden becomes even more trying if Chief Judge Breitel’s concern for the "social increment" of value is factored into the equation because it becomes necessary to separate out the public and private increments of value in the pertinent property.

Finally, implementation of an alternative requires legislative and administrative bodies to identify appropriate nondollar trade-offs and to incorporate them into the fair compensation package. Illustrative is the transferrable development rights (TDR) device litigated in *Grand Central Terminal*. In return for retaining the Terminal site in its pristine landmark status, Penn Central was authorized to transfer to neighboring properties the authorized but unused rights accruing to the site prior to the Terminal’s designation as a landmark — the rights which would have been exhausted by the 59-story building that the city refused to countenance atop the Terminal. Prevailing bulk restrictions on neighboring sites were proportionately relaxed, theoretically enabling Penn Central to recoup its losses at the Terminal site by constructing or selling to others the right to construct larger, hence more profitable buildings on the transferee sites.

---

10 See generally *Fair Compensation*, supra note 6.
11 For a more detailed explanation of the content and relationship of the concepts of fair compensation and reasonable beneficial use, as well as a schematization of other indices of land’s economic value (including the highest and best use standard), see id. at 1049-55.
12 See pp. 422-25 infra.
Municipal officials and courts reviewing their efforts must confront an amalgam of economic, planning, and legal questions when dealing with TDR programs or related trade-offs that allocate bonus building rights as nondollar fair compensation. Are these rights in fact sufficiently profitable at the user site or sites to cure the overregulation? Do such schemes undercut rational planning by introducing "artificial" bulk restrictions and waivers into the municipal zoning code? Are the benefits that these schemes putatively accord the overregulated landowner improperly purchased at the expense of other landowners in the transfer district who may be disfavored by the deliberate lowering of density levels to enhance the transfer rights' marketability or who must contend with the congestion and other burdens caused by larger-than-normal structures within the transfer district?

A measure of the complexity of the foregoing issues appears in Chief Judge Breitel's lament in *Grand Central Terminal* that judges who attempt to address them

[do] not pursue a path guided by ample precedent or wholly developed principles. The area is not merely difficult; it has at present viewing impenetrable densities. The last word has not only not been spoken; it has hardly been envisaged.14

The judiciary's reluctance to face the issues squarely is largely due to a breakdown in the national consensus concerning what the entitlements of private land ownership should be. From the founding of the Republic to at least the first third of this century, most Americans would have agreed that property's functions include buffering the individual from state intrusion 15 and encouraging efficient, and, for the landowner, profitable exploitation of the nation's land resources.16 But neither of these functions commands universal assent today. Landed property's preeminence in American folklore has withered in the face of the nation's urbanization, the shift in the preponderance of its privately held wealth from land to personalty, and the emergence of other safeguards against official caprice. Similarly, the imperative that land be exploited for profit has fared poorly against the telling assault of environ-

14 42 N.Y.2d at 337, 336 N.E.2d at 1279, 397 N.Y.S.2d at 922.
16 The Euclid decision itself evidences the depth of support for this function. Despite the extravagance — to contemporary eyes — of the Ambler Realty Company's claim, Euclid was resolved 6-3, and then only upon rehearing and the switch of votes by Justice Sutherland and one other Justice, *see* McCormack, A LAW CLERK'S RECOLLECTIONS, 46 COLUM. L. REV. 710, 712 (1946).
mentalists, proponents of growth control, and others who question centuries-long traditions favoring land's free alienability and unhindered development.

With the ancien régime fast fading, legislators and judges have been as befuddled as the rest of us. The former have essentially ignored the problem even though they are better equipped than the courts to take a leadership role in forging a new consensus. Without legislative aid, and reluctant to strike out on their own, the courts have temporized with incantation that decides individual cases but leaves untouched the underlying conflicts that make these cases so troublesome. Faithful to Hamlet's perception that we would "rather bear those ills we have,/Than fly to others that we know not of," both institutions have been content along with many commentators to acquiesce in the present system's inadequacies or even to deny their very existence. All the more extraordinary then is Chief Judge Breitel's resolution of the Grand Central Terminal controversy.

IV. Grand Central Terminal: The Controversy and the Decision

At stake in the Grand Central Terminal litigation was the aesthetic integrity of a world-renowned architectural gem. An imposing Beaux Arts building whose south facade has been termed "one of the most stunning achievements in the history of urban design," the Terminal has landmark qualities beyond dispute. Setting it apart from other landmarks, however, is the integration of its base with a comprehensive transit interchange which has substantially increased its value and that of surrounding sites. Penn Central attempted to capitalize on the site's prime location by leasing the air rights above the landmark for construction of a 59-story office building. A steep annual rental was stipulated in the lease: one million dollars during the construction period and a minimum of three million dollars thereafter. But the venture

---

17 W. SHAKESPEARE, HAMLET act III, sc. i, ll. 81-82.
19 The intermediate court characterized this feature of the Terminal as follows: The complete submergence of all the tracks and a double level track system not only resulted in the accommodation of more trains without the acquisition of more land but permitted construction of revenue producing buildings on air rights owned over the railroad tracks and the development of Park Avenue as one of the Nation's most prestigious residential communities. Penn Central Transp. Co. v. City of New York, 50 A.D.2d 265, 269, 377 N.Y.S.2d 20, 25 (1975).
20 Id. at 270, 377 N.Y.S.2d at 26.
was stymied in 1969 when the New York City Landmarks Commission, appalled that Penn Central contemplated obliterating the Terminal’s south facade, scorned the proposal as an “esthetic joke” and refused to grant the requisite approvals. Earlier, anticipating charges of overregulation in its landmarks program, the city had implemented the TDR scheme described above. The city also hoped that the residual income accruing to Penn Central from the continued use of the landmark as a transportation terminal, from the rentals of its many concessionaires, and from tax exemptions allowed it over many years, would enable the landmark program to withstand constitutional scrutiny. Despite the TDR option and the Terminal’s residual income, however, Penn Central sued for a declaration of the program’s invalidity, an injunction against its enforcement, and compensation for a temporary “taking” during the period from denial of approval to judicial resolution of the dispute.

The New York Court of Appeals upheld the program and denied compensation. In doing so, the court relied in part on the social increment theory of valuation, finding that public aid in making the Terminal a major transportation nexus had contributed substantially to the site’s value. The court held that public regulation need not guarantee a reasonable return on “that ingredient of property value created . . . by the accumulated indirect social and direct governmental investment in the physical property, its functions and surroundings,” although it must do so on value created by the “efforts of the property owner.” The court also ruled that, in computing the return possible on the privately created increment of value, the TDR option must be taken into account.

The Grand Central Terminal controversy fits neatly within the disparity genre of land use dispute. The proposed development—an office building—was prohibited not because of its inherent noxiousness, but because it would displace a use—a handsome facade—which the city wished to preserve for indisputably proper public purposes. Furthermore, the regulatory measure—a landmark designation—singled out Penn Central as owner of the landmark but left its neighbors free to profit from development under the generous density limits otherwise prevailing in the zone. Finally, the public intervention bit hard; Penn Central was forced not only to forgo the benefits of a lucrative

---

22 42 N.Y.2d at 328-29, 366 N.E.2d at 1273-74, 397 N.Y.S.2d at 916-17.
23 Id. at 327, 366 N.E.2d at 1272-73, 397 N.Y.S.2d at 916.
24 Id. at 327, 366 N.E.2d at 1272, 397 N.Y.S.2d at 916.
25 Id.
lease but to continue operating a facility which, it claimed, enjoyed marginal profitability at best.

Where Grand Central Terminal differs from other litigated instances of the disparity genre is in the deliberate effort of New York City to provide nondollar compensation as an offset to its draconian regulatory program. Electing the "middle way" of TDR, the city neither denied compensation altogether by invoking the orthodox police power nor conceded the landowner's entitlement to the "just compensation" of eminent domain. The court of appeals responded to the city's bold initiative with equally bold efforts of its own, recognizing the centrality of the disparity issue to the controversy's resolution and commencing the job of chipping away at that issue's "impenetrable densities."

V. Grand Central Terminal: An Assessment

A. Resolution of the Post-Euclidean Anomaly

When the Supreme Court decided in Euclid that noncompensatory public regulation could reduce the market value of private land without constitutional objection, it left two questions unanswered. The first was how much reduction in value is permissible, and the second was what type of compensation is necessary when regulation reduces the value of land below the permissible level. As Professor Berger has observed, the Court itself resolved the first question one year after Euclid when, in Nectow v. City of Cambridge, it set the standard of reasonable beneficial use. Until Grand Central Terminal, however, the courts have been silent on the second question. Accordingly, it has been assumed that, if government compensates at all, it must do so on the basis of the highest and best use standard of eminent domain. The bitter fruit of this reasoning has been the post-Euclidean anomaly: while routine zoning regulation may reduce the value of land to that provided by a reasonable beneficial use, once government undertakes to compensate it must pay a price based on the extreme standard of highest and best use.

26 The one exception to the statement in text is Fred F. French Inv. Co. v. City of New York (Tudor Parks), 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5, appeal dismissed, 429 U.S. 183 (1976), discussed pp. 418-21 infra, which also entailed a TDR program — there invoked to preserve two privately owned parks — and with respect to which Chief Judge Breitel also wrote an opinion for a unanimous court. For examples of litigation dealing with less explicit instances of the disparity genre, see Fair Compensation, supra note 6, at 1055-60.


28 277 U.S. 183 (1928).
Perhaps the single most important contribution of Chief Judge Breitel's opinion is his resolution of this anomaly. In square holding, he equated the compensation due when government over-regulates with that necessary to duplicate the reasonable beneficial use, the standard for valid regulation required by due process in normal zoning disputes. His resolution of the anomaly is best expressed in his own words:

Land use regulation often diminishes the value of property to the landowners. Constitutional standards, however, are offended only when that diminution leaves the owner with no reasonable use of the property. The situation with transferable development rights is analogous. If the substitute rights received provide reasonable compensation for a landowner forced to relinquish development rights on a landmark site, there has been no deprivation of due process. The compensation need not be the "just compensation" required in eminent domain, for there has been no attempt to take the property . . . .

. . . These substitute rights are valuable, and provide significant, perhaps "fair" compensation for the loss of rights above the terminal itself.29

Two points expressed in this passage merit emphasis. First, when overregulation, rather than a true "taking," is at issue, the compensation clause of the fifth amendment is inapplicable. The pertinent provision is instead the due process clause of the fourteenth amendment. Second, the same constitutional standard—reasonable beneficial use—determines the validity of both the regulation and the compensation which must be paid to validate overregulation. In either case, the fundamental principle is the same: rudimentary fairness is required to satisfy the demands of due process.30

29 41 N.Y.2d at 335-36, 366 N.E.2d at 1278, 397 N.Y.S.2d at 921-22.
30 Critics might object that Chief Judge Breitel's reasoning unduly favors government over the landowner. For example, the critical matter of determining whether a measure falls into the police power or into the eminent domain box turns largely on the regulating government's assumptions at the time it adopts the measure, not on the actual character of the measure's impact at the regulated site. The eminent domain classification will generally not apply when government believes that a measure constitutes valid regulation either because it falls within the police power's ambit or because it is attended by an appropriate compensatory offset. If the regulation is found to be overbroad or the compensation insufficient, the measure may be invalidated under the fourteenth amendment; but there is no condemnation. That the measure may bar virtually any use of the regulated site as in Tudor Parks, see pp. 418-21 infra, seems to be ignored. By providing declaratory relief only, Chief Judge Breitel imposes the expenses of delay and litigation upon landowners who successfully contest an overregulatory measure even though these expenses are directly attributable to the tainted governmental intervention.
B. A Bifurcated Police Power

Does the eminent domain, the police, or some third power provide the constitutional underpinnings for Chief Judge Breitel's resolution of the post-Euclidean anomaly? He clearly ruled out eminent domain in Grand Central Terminal by denying that overregulation is a "taking" and by insisting that "fair" rather than "just" compensation is sufficient to save an overregulatory measure. As he put the case:

In times of easy affluence, preservation of historic landmarks through use of the eminent domain power might be desirable or even required. But when a less expensive alternative is available, especially when a city is in financial distress, it should not be forced to choose between witnessing the demolition of its glorious past and mortgaging its hopes for the future. The landmark preservation provisions of the Administrative Code represent an effort to take a middle way.

While the implication that impoverished cities somehow enjoy a lesser duty to compensate than affluent ones is dubious, Chief Judge Breitel's general conclusion that the eminent domain route is inappropriate for disparity genre disputes is not. Highest and best use awards are neither necessary to insure overregulated landowners equitable treatment nor financially or procedurally practicable for most local governments.

Chief Judge Breitel's position does tilt in government's favor, though perhaps not unduly so. Surely government's assumptions when it regulates are entitled to great weight in a classification effort. Government should not be severely penalized for guessing wrongly in an area so permeated with uncertainty, especially when the regulatory measures in question are seldom comparable to the outright acquisitions traditionally undertaken through eminent domain. Moreover, even when regulation approaches confiscation, bona fide attempts to compensate may generate the same uncertainty, as subsequent discussion of Tudor Parks points out.

If government abuses the forbearance suggested by Chief Judge Breitel or acts in an acquisitory mode, judges can always invoke the exception allowing inverse condemnation relief. Most important of all, Chief Judge Breitel's position on this issue should not be divorced from his unwavering insistence that the landowner receive rudimentary fairness. If fairness is implemented through nondollar compensatory offsets, the landowner is given a remedy, albeit not the expansive remedy of eminent domain.

What I find most troubling in Chief Judge Breitel's reasoning is the unfairness that arises when, instead of providing a compensatory supplement, government chooses to rescind a measure which has been the subject of an adverse judgment in a declaratory action. In such a case, losses incurred during the interim period are left with the landowner. Such interim losses, however, may be the price which must be paid if government is to have the latitude necessary for effective public regulation.

31 42 N.Y.2d at 329-30, 366 N.E.2d at 1274, 397 N.Y.S.2d at 917.
32 Id. at 335-36, 366 N.E.2d at 1278, 397 N.Y.S.2d at 921-22.
33 Id. at 337, 366 N.E.2d at 1278, 397 N.Y.S.2d at 922.
If eminent domain is ruled out, should the police power, which in traditional understanding dispenses with compensation entirely, be rejected as well? Although Chief Judge Breitel's position is not entirely clear, his invocation of the standard of reasonable beneficial use under the fourteenth amendment implies that, for him, the imperative to compensate the overregulated landowner does derive from the police power. If this interpretation is correct, Chief Judge Breitel may justly be suspected of pouring new wine into old bottles. For the court's resolution of the Grand Central Terminal controversy differs from judicial resolution of ordinary zoning disputes by the way in which the reasonable beneficial use standard is applied. In the former, conceded overregulation is validated by compensation which brings the property's value up to that standard; in the latter, overregulation is not deemed to exist at all and hence no compensation is necessary.

Chief Judge Breitel's willingness to pour the new wine of compensation into vintage police power bottles was largely determined by the manner in which he conceptualized the constitutional issue. He viewed the "middle way" as falling not between the eminent domain and police powers, but between what he referred to as the "eminent domain" 34 and the "zoning" powers. 35 To arrive at this characterization, he distinguished the landmark-TDR program in Grand Central Terminal not from traditional exercises of the police power but from ordinary zoning regulation. 36 Zoning is distinguishable, he reasoned, because it advances a comprehensive community plan which assures orderly development or maintenance of an area's character and leaves each property owner in the zone "both benefited and restricted from exploitation, presumably without discrimination." 37 On the other hand, landmark designation was seen by Chief Judge Breitel as singling out the landmark owner for special and disadvantageous treatment. The landmark owner, he said, "may or may not benefit from the limitation but his neighbors most likely will. In contrast both an owner and his neighbor benefit to some degree and in some manner from zoning." 38

34 Id. at 330, 366 N.E.2d at 1274, 397 N.Y.S.2d at 917.
35 Id. at 329, 366 N.E.2d at 1274, 397 N.Y.S.2d at 917.
36 Id. at 329-30, 366 N.E.2d at 1274, 397 N.Y.S.2d at 917.
37 Id. at 329, 366 N.E.2d at 1274, 397 N.Y.S.2d at 918.
38 Id. at 330, 366 N.E.2d at 1274, 397 N.Y.S.2d at 918. Chief Judge Breitel also observed that landmark restrictions are superficially similar to invalid spot zoning measures, which also single out individual properties for severe burdens or benefits. Id. at 330, 366 N.E.2d at 1274, 397 N.Y.S.2d at 917. But he noted that, unlike spot zoning measures, landmark restrictions do not offend equal protection standards because the distinctive architectural or historic character of landmark buildings sets them apart from nonlandmark properties, rendering the classification reasonable. Id. at 330-31, 366 N.E.2d at 1275, 397 N.Y.S.2d at 918. Nevertheless,
THE DISPARITY ISSUE

Insofar as his opinion implies that landmark preservation does not advance a comprehensive community plan, Chief Judge Breitel seems to have misconstrued the purpose of landmark programs. Surely they can be regarded as a component of such plans, one of whose goals includes the maintenance of the desirable features of the existing urban fabric. It is true, of course, that landmark restrictions do zero in on individual properties while valid zoning measures do not. But this fact merely establishes that the former are nonzoning exercises of the police power, not that they undercut the community's comprehensive planning effort.

Elsewhere, I have argued that the police power is an inappropriate basis for public regulation—cum-compensation in disparity genre disputes, suggesting for this purpose a third power—the "accommodation power." It is unnecessary to repeat the pros and cons of that argument here other than to note that the symmetry of Chief Judge Breitel's effort to distinguish the Terminal dispute from the true eminent domain and zoning genres would improve markedly if the distinction offered were that between the true eminent domain and true police power genres. Whichever choice is made, it is critical to keep in mind that Chief Judge Breitel's alternative cuts both ways: while it reduces eminent domain's burdens upon government by dispensing with just compensation, it adds a new requirement to the police power in the form of fair compensation for disparity genre disputes. Chief Judge Breitel's overriding concern that the landowner be fairly treated evidences his appreciation of the middle way's latter dimension. But will others be similarly alert if the middle way is termed a police power exercise?

C. The Social Increment Theory of Valuation

Among the most daring strokes in Grand Central Terminal was Chief Judge Breitel's evocation of the ghost of Henry C. The Social Increment Theory of Valuation

he warns that the distinctiveness of landmarks provides all the more reason for courts to be vigilant that due process guarantees are satisfied as well. Id. at 331, 366 N.E.2d at 1275, 397 N.Y.S.2d at 918; cf. Udell v. Haas, 21 N.Y.2d 463, 476–78, 235 N.E.2d 897, 905–06 (1968) (discrimination in zoning between two parcels on opposite sides of the same road invalidated where not justified by comprehensive plan, as such discrimination is the 'opposite side of the coin, one side of which is 'spot zoning'). Regrettably, the characteristics that make a building a charming landmark, particularly those of diminutive size and location in downtown areas of high land value, are often the same characteristics that make its retention as a landmark unprofitable. See J. Costonis, Space Adrift: Saving Urban Landmarks Through the Chicago Plan 6–11, 65–88 (1974).


40 See Fair Compensation, supra note 6, at 1022.
George in deciding the case in part on the basis of a social increment theory of valuation. Under that theory, the portion of a property's value that is attributable to public investment and concomitant community growth is excluded from the base upon which the property's reasonable beneficial use is calculated. After finding that public enterprise had been vital in the development and prosperity of the Terminal, Chief Judge Breitel stated:

[T]he massive and indistinguishable public, governmental, and private contributions to a landmark like the Grand Central Terminal are inseparably joint . . . . It is exceedingly difficult but imperative, nevertheless, to sort out the merged ingredients and to assess the rights and responsibilities of owner and society. A fair return is to be accorded the owner, but society is to receive its due for its share in the making of a once great railroad.

Among the host of public contributions to the Terminal's value cited by Chief Judge Breitel were subsidies, irrevocable franchises, a delegation of the power of eminent domain, tax exemptions, and, most important of all, the routing of various modes of transit to converge below the Terminal.

The social increment theory and its underpinnings occupy many paragraphs of the opinion and will undoubtedly mesmerize the commentators. If there ever was a case warranting the theory's application, Grand Central Terminal is the case. The rough justice of discounting the Terminal's rate of return on the basis of New York City's active contributions to the profitability of the Terminal and of Penn Central's nearby holdings is intuitively appealing. I question, however, whether the theory will prove as durable or generally useful in the form offered as Chief Judge Breitel's other grounds for the decision.

There are two factors cutting against the theory's general applicability. First, it applies only to a small number of properties — like the Terminal — whose commercial utility is largely a consequence of massive public investments at or near the site and whose owners are the beneficiaries of dramatic infusions of public largess. Hence, one should read very literally indeed Chief Judge Breitel's admonition that "Grand Central Terminal is no ordinary landmark." Second, the segregation and quantification of an individual property's public and private increments of value are truly formidable tasks, especially when the respective governmental and private contributions have been made continuously.

41 See H. George, Progress and Poverty (1881); H. George, The Land Question (1935).
42 42 N.Y.2d at 333, 366 N.E.2d at 1276, 397 N.Y.S.2d at 919.
43 Id. at 332, 366 N.E.2d at 1275-76, 397 N.Y.S.2d at 918-19.
44 Id. at 331, 366 N.E.2d at 1275, 397 N.Y.S.2d at 918 (emphasis added).
over a long period. In this respect, sending attorneys out to develop the pertinent data, as Chief Judge Breitel invited the litigants to do in *Grand Central Terminal*, is akin to christening a search for the Holy Grail.

Even granting its general applicability, whether and to what extent the social increment theory was essential to the outcome in *Grand Central Terminal* is unclear. That it played an influential role in Chief Judge Breitel's reasoning is evident from the many paragraphs he allotted to it. But in concluding that the return on the Terminal was reasonable, he cited various other factors, including its continuing utility for railroad purposes, the rentals received from its many concessionaires, its profitability as the "flagship" of other nearby Penn Central-owned properties, and the TDR offset granted Penn Central under New York City's landmark program. Indeed, the passage quoted earlier can fairly be read to imply that the TDR offset alone afforded the Terminal a return sufficient to meet the minimum requirements of due process. Although one cannot be sure, it is a good guess that future courts, reluctant to become ensnared in the quixotic task of segregating a site's public and private increments of value, will choose to view one or a combination of these later-cited factors as furnishing the basis of the decision in *Grand Central Terminal*.

Where Chief Judge Breitel's innovative reasoning is likely to prove productive, however, is in its implicit support for public measures that seek partial recapture of private property's social increment of value to finance community amenities. In an earlier opinion, Chief Judge Breitel hinted at this possibility by suggesting that "assessments for public benefit" may ease the disparity dilemma provided that the courts are willing to sanction "an expansion of the traditional views with respect to what are assessable public benefits." TDR schemes aptly illustrate the point. Recall the objection that TDR programs "artificially" restrict general zoning densities within transfer districts in order to create a market for transferable rights. Under the theory expounded by Chief Judge Breitel, however, is not the "social increment of value" of properties within the transfer district properly "assessable" by government in aid of legitimate planning objectives? And if the reduction in value of these properties under a TDR program is marginal (as is the case under virtually all TDR proposals in the

---

45 Id. at 337, 366 N.E.2d at 1279, 397 N.Y.S.2d at 922.
46 See p. 412 supra.
United States \(^{48}\)), and therefore less than their social increment of value, cannot the reduction be deemed a valid government assessment? If so, *Grand Central Terminal*’s two major analytic strands — its acceptance of the social increment of value theory and its recognition of the role of TDR’s in affording fair compensation — are mutually reinforcing despite their independent development in the opinion.\(^{49}\)

**D. TDR in the Courts**

Chief Judge Breitel sustained the facial validity of TDR’s as compensation both in *Grand Central Terminal* and in an earlier opinion, *Fred F. French Investing Co. v. City of New York (Tudor Parks)*.\(^{50}\) Agreeing that development rights may be separated from their host parcel and transferred to other sites, he confirmed that these rights are an essential part of the host parcel’s value and “may not be disregarded in determining whether the [planning regulations have] destroyed the economic value of the underlying property.” \(^{51}\) In strong dictum in *Tudor Parks*, moreover, he endorsed the establishment of municipal development rights banks — institutions empowered to condemn and resell development rights — as a supplement to purely private trading in the rights.\(^{52}\) Finally, in *Grand Central Terminal*, he held that development rights may serve as the nondollar compensation required to bring the return on overregulated property up to the reasonable beneficial use standard. To Penn Central’s contention that the development rights it received might have a lesser value at the transferee sites than at the Terminal, Chief Judge Breitel responded that a loss in value at the transferee site does not of it-
self mean "that the substitution of rights amounts to a deprivation of property without due process of law" as long as "the substitute rights received provide reasonable compensation for a landowner forced to relinquish development rights on a landmark site." 53

Despite Chief Judge Breitel’s general endorsement of TDR programs, it would be a grave error to conclude that specific TDR programs are immune from judicial invalidation as applied. In fact, the New York Court of Appeals struck down the Tudor Parks TDR program, under which New York City attempted to preserve two privately owned parks in the Tudor City complex on Manhattan’s East Side by precluding development on them altogether but making their development rights transferable to a district located elsewhere on the East Side.54 Citing the program’s “mandatory” and “contingency-ridden” character, Chief Judge Breitel, writing for a unanimous court, castigated it as having created "floating development rights, utterly unusable until they could be attached to some accommodating real property, available by happenstance of prior ownership, or by grant, purchase, or devise, and subject to the contingent approvals of administrative agencies.” 55 In contrast, he later approved the Grand Central Terminal program ostensibly because the rights there were transferable to a variety of neighboring sites (several of which Penn Central owned),56 because the rights could be split between different transferee sites, and because Penn Central itself had previously considered transferring a portion of the rights to two neighboring sites it owned.57

Chief Judge Breitel’s stated grounds for distinguishing the two TDR programs are neither convincing nor helpful to municipal officials who wish to design a TDR program that will pass muster. In truth, the administrative contingencies of both programs were essentially the same. Moreover, both programs were mandatory in effect, both authorized the splitting of development rights, and both offered transfer districts which contained numerous sites suitable for development of the type desired. Indeed, the transfer rights in Tudor Parks were potentially more valuable than those in Grand Central Terminal because the transfer district was much larger and enjoyed median land values twice those

---

53 42 N.Y.2d at 335, 366 N.E.2d at 1278, 397 N.Y.S.2d at 921.
54 For an especially well-informed account of the Tudor Parks TDR program, see Marcus, Mandatory Development Rights Transfer and the Taking Clause: The Case of Manhattan’s Tudor City Parks, 24 BUFFALO L. REV. 77, 79–85 (1974).
56 42 N.Y.2d at 334, 366 N.E.2d at 1277, 397 N.Y.S.2d at 920.
57 Id. at 335, 366 N.E.2d at 1277, 397 N.Y.S.2d at 921.
of the parks themselves. The Tudor Parks developer, like Penn Central, had at one time unsuccessfully sought permission from the city to transfer its rights and, after the enactment of the pertinent TDR program, had actually received a "substantial offer" for those rights. The two situations differed only in that the Tudor Parks owner, although a leading New York City realtor-developer, apparently did not itself own land within the transfer district. While this difference may have made sale or use of the rights somewhat more problematic, it hardly negated their value, as evidenced by the "substantial offer" that the developer received for them.

How then can one explain the differing outcomes in these cases? Perhaps the difference is that in Tudor Parks no residual return whatever was possible once the parks had been downzoned, while in Grand Central Terminal a significant return accrued to the restricted site. In the latter instance, therefore, the role of the TDR's was to supplement an existing return, while in Tudor Parks they afforded the only possibility of return. One might take this reasoning a step further by asking whether Tudor Parks is a disparity genre dispute at all. It could be that the court perceived the Tudor Parks scheme as invading the landowner's entitlements so drastically that the court would have been satisfied with nothing short of the city's use of its eminent domain power to acquire the parks outright. After all, the city did downzone the parks to zero density; further, it insisted that the developer open them to the public and maintain them at its own expense.

A second rationale may be ventured which is also rooted in the court's skepticism about the marketability of the Tudor Parks development rights. Read broadly, Grand Central Terminal and Tudor Parks passed judgment on three types of TDR programs — one employing a municipal development rights bank to purchase or condemn rights from the restricted landowner (approved in dictum in Tudor Parks), a second authorizing the owner to transfer his rights to a nearby site also owned by him (approved in

58 See Marcus, supra note 54, at 83-84.
59 Earlier, the developer had requested permission to transfer the TDR's to a building that it proposed to construct on a platform over Forty-Second Street. This request was denied on urban design grounds. See id. at 81.
60 Id. at 84 n.22.
61 To distinguish the two programs on this basis, however, assumes a point that regretfully was not argued or discussed in the Tudor Parks litigation — that the park sites could be viewed as isolated economically from the Tudor City buildings surrounding them. If the parks and surrounding buildings had been viewed as an integrated architectural and economic complex, as they obviously had been when constructed initially, the facts in Tudor Parks would have been substantially analogous to those in Grand Central Terminal.
Grand Central Terminal), and a third requiring transfer of the rights to a district located some distance from the restricted property and lacking the common ownership feature of the second (invalidated in Tudor Parks). Perhaps Chief Judge Breitel's message to municipal planning authorities is that he is willing to restrain his doubts about the economic utility of development rights in the first two instances, but not in the third. If so, Chief Judge Breitel's reasoning deserves the closest scrutiny because the great majority of current and proposed TDR programs are of the third type.

To distinguish between TDR programs on the basis of the transferor's ownership of sites in the transfer district would be to resolve a complex economic and factual problem by legal fiat. The value of TDR's depends upon the totality of circumstances surrounding the individual TDR program. Undoubtedly, TDR programs involving area-wide transfers can be conceived that are so out of line with the realities of the real estate market that the purported recompense offered the restricted owner is mythical at best. But, as empirical studies undertaken by this writer and others confirm, it is no less conceivable that these programs can provide substantial recompense and, more to the point, that the rights made transferable under them will in most cases prove more valuable than rights made transferable only to adjacent sites. Indeed, findings of precisely this nature explain why the Chicago Plan, a proposal for the preservation of landmark buildings in that city, abandoned the adjacency limitation of the Grand Central Terminal TDR program in favor of area-wide transfers. It would be ironic indeed if this modification, undertaken to enhance the marketability of development rights, were to prove the undoing of a TDR program on the ground that area-wide transfers, as a matter of law, undermine the program's economic credibility.

---


64 Id. at 578, 584-89.
E. Reasonable Beneficial Use: An Ethical Standard or an Accounting Rule?

Conspicuously absent from Grand Central Terminal is any attempt to reduce to dollars the Terminal's value in its reasonable beneficial use, its value when overregulated, or the value of Penn Central's development rights. At first blush, the omissions are puzzling both because these economic indices are basic to Chief Judge Breitel's conceptualization of the disparity issue and because the New York City landmark ordinance provides an explicit quantitative standard by equating the reasonable beneficial use of a privately owned landmark with a six percent return on its assessed valuation. However, the omissions are explained by the fact that the proceedings never reached the stage at which an attempt at valuation would have been appropriate. While the opinion sustained the landmark designation, it also granted leave to the parties to develop evidence bearing on the applicability of the social increment theory to the controversy. Without this evidence to measure how much of the Terminal's value should be excluded from the base for calculating its reasonable beneficial use, application of the foregoing indices in a more concrete manner was impossible.

In future litigation, however, an undertaking of this nature will confront courts that accept Chief Judge Breitel's formulation of the disparity issue. Some commentators are skeptical that the courts can do the job. Professor Berger, for example, confesses to having "little faith that the courts can establish workable rules that would readily distinguish the vaguely compensable from the vaguely noncompensable situations." Indeed, he calls into

65 N.Y. City Admin. Code ANN. ch. 8A, § 207-1.a(v) (Williams 1976).
66 See 42 N.Y.2d at 337, 366 N.E.2d at 1279, 397 N.Y.S.2d at 922.
67 There is an additional reason that Chief Judge Breitel may have felt it unnecessary to quantify the pertinent indices of value—a reason of a more theoretical character. The TDR program in Grand Central Terminal was designed to afford Penn Central an opportunity for economic return equal to or greater than that it would have had absent the restriction. It did so by allowing Penn Central to transfer the full equivalent of its unused development rights to parcels with a value roughly equivalent to that of the Terminal site. If we assume that the reasonable beneficial use of the Terminal site could have been set at a lower level than its profit potential prior to the Terminal's designation as a landmark and that the transfer rights would in fact bring a price roughly equivalent to their value at the Terminal site, the TDR program would afford Penn Central a substantially greater return than the fourteenth amendment demands. Under this reasoning, it was not inappropriate for Chief Judge Breitel to have disdained the fine tuning effort entailed in quantifying values for the various indices and to have engaged instead in a more general inquiry into the transfer rights' overall utility to Penn Central.
68 Reply, supra note 27, at 821.
question the capacity of legislatures to do so save in the case of "operating properties" such as apartment buildings, which, in the context of rent control schemes or landmark designations, are entitled to a six percent return on assessed valuation under New York City ordinances. For Professor Berger, computation of the value of a property's reasonable beneficial use turns on two variables — the property's investment base and its rate of return. Excepting the case of operating properties, he believes that the efforts to "predicate a fair return or to establish an investment base create difficulties defying solution," because the base value depends on the return and the fair return depends upon the base. To avoid this circularity, he urges what he terms the "balancing process — public benefit versus private detriment" as a more generally useful approach to resolving the constitutional issues posed by overregulation.

Whether the courts — or legislatures — can and will rise to the task of fine-tuning the standards of fair compensation has yet to be tested because judicial recognition of their emergence as an issue is original to Grand Central Terminal. Full treatment of the problem and of Professor Berger's discerning critique of the "middle way" discussed in this and an earlier essay of mine is impossible here, but three general observations can be offered. First, the constitutional standard of reasonable beneficial use — which must now be applied in New York whenever a landowner complains of overregulation — is essentially a standard for judicial review of legislative and administrative programs for compensation; it is not a substitute for those programs. Second, as a standard rather than a rule, reasonable beneficial use demarcates a threshold of fairness and does not purport to provide a quantitative measure of value. Consequently, mathematical precision
is not required of the judiciary in applying the reasonable benefi-
cial use standard. Nor is mathematical precision necessary to
improve existing land use jurisprudence. The constitutional stand-
ard developed in *Grand Central Terminal* will insure that thought-
ful attention is paid to the claims of the landowner concerning
the impact of regulation on his parcel's capacity to earn a reason-
able return, and that the role of nondollar compensation in miti-
gating overregulation is intelligently appraised in terms of its-economic credibility and its status under a reformulated police
power. Both steps will mark a welcome advance over the impres-
sionistic opinions that flaw the current jurisprudence.

A final observation, implicit in the first two, is that reasonable
beneficial use is primarily an ethical standard despite its rendition
in the syntax of the accountant. Community values and the re-
quirement of fundamental fairness for the landowner determine
whether the standard should be employed at all — it obviously
has no role where the proscribed land use is a nuisance — and, if
so, the level of the "threshold" of fairness. The great majority of
land use disputes involve little more than the prevention of harm-
ful externalities and should therefore continue to be resolved
under traditional police power principles. In the disparity genre
case, where other considerations predominate, the fourteenth
amendment standard is necessary to insure fair treatment both
for the overregulated landowner and, let it not be forgotten,
for the regulatory authority as well.

Although reasonable beneficial use functions as a standard in
the judiciary's hands, it must be translated into more concrete
form — through quantification or otherwise — by legislatures that
implement compensatory programs. These legislative efforts too
are ultimately founded on ethical considerations rather than on
those of a neutral accounting nature. In fact, the vicious circle
involving investment base and fair return that so vexes Professor
Berger can be resolved only by a prior value judgment that affords
the predicate for subsequent accounting calculations. For in-
stance, New York City's six percent figure for the return on land-
marks and rent-controlled buildings — which Professor Berger
apparently approves — is not divinely preordained. Forceful
arguments can undoubtedly be made for setting it at five or eight
percent. Realistically perceived, the six percent rate is nothing
more or less than the outcome of the familiar legislative process
of compromise of competing interests, in which the ethical values
of the public decisionmaker play a dominant role.

Why shouldn't a similar process be appropriate to apply the
reasonable beneficial use standard to various categories of non-
operating properties as well? The answer surely does not lie in
the circularity objection because, as the example of New York City's six percent rule illustrates, circularity yields to the tug and pull of the legislative process. The difficulties lie rather in the confusion concerning what this society's bottom-line perception of landed property's entitlements should be. This Comment urges that legislatures, not the courts, take the leading role in resolving the disparity issue because, whatever their failings, legislatures are better equipped than the courts both to seek consensus on this complex and controversial issue and to prescribe rules implementing the reasonable beneficial use standard for particular categories of regulated properties. The judiciary's task, under the constitutionally mandated standard, is to decide whether the rules that legislatures fix fall within this standard's ambit.

Contrary to Professor Berger's viewpoint, therefore, approval of Chief Judge Breitel's reasoning does not commit one to the view that the reasonable beneficial use standard is a "philosopher's stone" that "closes out the controversy over the bounds of the regulatory power" or that it will make "simpler" establishment of priorities among ethical values. But the reasonable beneficial use standard and the other determinants of value cited by Chief Judge Breitel as establishing a context for dealing productively with the disparity issue do illuminate the sources of the current impasse and contribute significantly to its resolution. No less importantly, Chief Judge Breitel's approval of those determinants signals the judiciary's willingness to accord legislatures significant latitude in prescribing the nature of the compensation due overregulated landowners. While there are many uncertainties attending such prescriptive efforts, particular rules for compensation are unlikely to prove objectionable to the judiciary so long as they are responsibly implemented and the compensation they provide is fair under the fourteenth amendment.

Efforts of this nature, in my view, are superior to the "balancing process" as a basis for resolving disparity genre disputes. As Grand Central Terminal so forcefully illustrates, there are cases in which the public benefits in question are priceless but the impact of noncompensatory regulation on the landowner devastating. What is gained by "balancing" in such instances? The suggestion flatly abandons fairness as the fulcrum of decision, substituting for it the all-or-nothing approach that created the impasse in the first place. Moreover, whatever the problems of administering the reasonable beneficial use standard, the balancing test is incom-

---

76 Reply, supra note 27, at 816.
77 Id. at 821.
78 Id. at 823.
parably more open-ended. Assuming that the pertinent factors can be isolated, the test tells us nothing about the relative weight that should be assigned to each, let alone how conflicts among them should be resolved.

On this issue as on the many other questions discussed in this Comment, Chief Judge Breitel has given us inventive and, in my view, strikingly useful assistance. He is surely correct that on these matters “the last word has not . . . been spoken.” But he is altogether too humble in suggesting that “it has hardly been envisaged.”