1996

The Growth of Distrust: The Emergence of Hostility Toward Government Regulation of the Economy

William E. Nelson

Follow this and additional works at: http://scholarlycommons.law.hofstra.edu/hlr

Part of the Law Commons

Recommended Citation

Available at: http://scholarlycommons.law.hofstra.edu/hlr/vol25/iss1/1

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Review by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.
THE GROWTH OF DISTRUST: THE EMERGENCE OF HOSTILITY TOWARD GOVERNMENT REGULATION OF THE ECONOMY

William E. Nelson*

CONTENTS

I. INTRODUCTION .............................................. 2

II. THE BIRTH OF INTEREST-GROUP POLITICS ............... 5

III. THE GROWTH OF PROCEDURAL PROTECTION ............ 7

IV. THE INVALIDATION OF CONFISCATORY AND SPECIAL-INTEREST REGULATIONS .................. 17
    A. Zoning ................................................. 18
    B. Long-Term Protection of Tenants' Rights .......... 32
    C. Labor Law ............................................. 39
    D. Utility and Business Regulation .................. 46

* Joel and Anne Ehrenkranz Professor of Law, New York University. A.B., Hamilton College, 1962; LL.B., New York University, 1965; Ph.D., Harvard University, 1971. Students in first-year Property at New York University and Yale University were the inspiration for many of the ideas in this Article, while colleagues in the Legal History Colloquium at New York University provided invaluable criticism and insight. Joseph Kennedy also provided useful help. Finally, acknowledgment is due to the Filomen D’Agostino Greenberg and Max E. Greenberg Faculty Research Fund at New York University for its research support.
I. INTRODUCTION

We live today at a time of intense debate about the proper limitations on the police power—that is, the power of government to regulate the economy and other private affairs. Our era stands in sharp contrast to the decade of the 1930s, when government regulatory power was being expanded to its fullest scope. Commentators during those years observed that the police power was "the least limitable of the powers of government" and "extend[ed] to all the great public needs." It authorized the state to "require industry and commerce to be carried on in [a] manner which [would] promote the public health and welfare," even when such a requirement would "increase the cost of doing business." The police power also authorized government action "to promote justice and fair dealing and to prevent wrongs." Indeed, the power even became "elastic" in nature when it was invoked in support of legislation "passed to meet an existing emergency actually involving the public interest," which was thought to justify "interference by the state" in private markets and to give the legislature "power . . . to enact measures" "to avert a threatened pauperism."

---

2. Id.
8. People v. Moynihan, 200 N.Y.S. 434, 437 (Chautauqua County Ct. 1923) (sustaining the Fuel Administration Law, ch. 673, 1923 N.Y. Laws 1743 (1922), an emergency measure regulating the fuel supply during a temporary shortage).
Since the 1940s, in contrast, pressures have grown to cut back on the scope of police power. This Article seeks to explain historically how those pressures developed. The Article, it must be emphasized, takes no position in normative debates about the police power. It does not claim that legal thinkers of the New Deal era were correct in expanding the power to its outer reaches, nor does it argue that today’s neo-conservatives are right in striving to impose limits. Instead, the goal of the Article is to understand why New Dealers arguing for the expansion of regulatory power proved convincing to their contemporaries, while the dominant direction of thought today incorporates a profound distrust of the regulatory state.

The main thesis of this Article is that New Dealers perceived regulation as “the modern movement for social and economic progress” because they saw it as the only way to repair the damage done by an “unholy and corrupt alliance of business and politics that [had] made economic injustice a regular feature of the American system.” Although the Industrial Revolution had brought America unprecedented economic growth, New Dealers believed that the gains of growth had not been distributed equitably, but instead went disproportionately to the small group of capitalists and entrepreneurs who managed the system. By convincing others of their belief, they were able during the Great Depression to stitch together a coalition of the ill-housed, ill-fed, and underemployed who, through regulation, could advance the interests of nearly the entire community by controlling the depredations of the few.

When the regulatory laws of the Great Depression were seen in light of the prosperity of the 1950s, 1960s, and 1970s, however, they assumed

a new appearance. With the majority of Americans no longer poor, the old regulatory laws no longer appeared to benefit the many; instead, they seemed to help smaller, narrower groups that readily came to be perceived as special interests. The perception that special interests were the prime beneficiaries of regulation, in turn, made regulation suspect. Although suspicions arose only gradually, their cumulative effect, in the view of this Article, was substantial.

The interest-group perception of regulation was especially slow to emerge at the national level. It emerged first in the states. Accordingly, this Article focuses on state rather than federal regulatory law in order to appreciate the changing understanding of regulation in its fullest sweep.

In particular, the Article examines the regulatory law of a single state—New York—the source of many leading regulation cases. By focusing on this one state, which through most of the period under study was the most populous state and the economic and cultural leader of the nation, it becomes possible to analyze not only these leading cases but also the thousands of more mundane cases that applied their holdings on a day-to-day basis. While study of any single state provides only an incomplete sketch of developments in the nation at large, the picture that emerges from New York, will be less incomplete or distorted than that which would emerge from any other jurisdiction. A great advantage of New York is that it has a more complete set of lower court opinions than any other state. Moreover, in one important respect it was more typical of the nation as a whole than any other single state: with its metropolitan center on the Atlantic coast, its upstate industrial cities little different from those of the Midwest, its expanding suburbs, and its rural farmlands and environmentally protected woodlands, New York contained locales similar to those in the rest of the nation except the Deep South and the Far West. One would accordingly expect to find a wider variety of the socio-political forces that shape law in New York than in other jurisdictions. Of course, those forces would converge differently in New York than elsewhere, and the end legal product molded by them would differ. For example, social forces emerging out of the metropolitan center would have greater weight in New York, where New York City typically contained nearly half of the state's population, than in the nation at large, where the City never equalled even five percent of total population. When adjustments are made for these differences in configuration, however, the findings that emerge from this study about how socio-economic forces influenced government's power of regulation in New York can serve as preliminary hypotheses about more general national
developments, at least until scholars examine in similar detail states such as California and Texas, and a southern state like Georgia.

In tracing the efforts to restrict regulatory power as a form of special interest legislation, it is necessary to examine three different areas of legal doctrine—the law of taxation, of eminent domain, and of regulation itself. Tax law has an obvious potential for favoring some interests over others, in that citizens who receive special tax exemptions or monetary handouts from government will gain competitive advantages that will give them great wealth at the expense of those who pay their full tax share and receive no fiscal benefits. The power of eminent domain can also become a mechanism of special favoritism if government can use it to obtain property at less than the price a purchaser would have to pay on the open market, and especially if government can resell the property to a private citizen at less than the price that a citizen would have to pay on the market. Finally, regulatory schemes can favor special interests when they impose added costs on regulated enterprises and then confer benefits on either the customers or the competitors of those enterprises.

II. THE BIRTH OF INTEREST-GROUP POLITICS

Even before the regulatory state had reached its fullest fruition during the era of the New Deal, a few prescient thinkers had begun to articulate a new ideology of interest-group politics that would eventually send New Deal ideas of regulation into retreat. Perhaps the first thinker to glimpse the new vision was Judge Learned Hand, who in a 1929 speech before the American Law Institute observed:

Sometimes . . . we speak of the judges as representing a common-will, . . . [But] they are not charged with power to decide the major conflicts, and quickly learn their limitations if they try.

We think of the legislature as the place for resolving these, and so indeed it is. But if we go further and insist that there at any rate we have an expression of a common-will, . . . we should be wrong again. I will not of course, deny that there are statutes of which we can say that they carry something like the assent of a majority. But most legislation is not of that kind; it represents the insistence of a compact and formidable minority.14

One year later a well-known legal academic elaborated as follows on Hand’s earlier insight:

The task of government . . . is not to express an imaginary popular will, but to effect adjustments among the various special wills and purposes which at any given time are pressing for realization. . . . Government, from this point of view, is primarily an arbitrator, and since practically every arbitration must result in giving to one side more of what it thinks it ought to have than the other side is willing to admit, every governmental act can be viewed as favoring in some degree some particular and partial “will,” or special interest. It is therefore meaningless to criticize government . . . merely because it allows special interests to attain some measure of what they think themselves entitled to. The question is rather whether it allows the “right” side, the “right” special interest, to win; and the “right” special interest means only the one whose will is most compatible with what we, as critics, conceive to be the right direction for the society’s development to take.15

Thinking such as this did not become dominant during the Great Depression, when so many people were suffering that the ill-housed, the ill-fed, and the underemployed seemed to constitute the majority rather than a series of diverse special interests. Nonetheless, some slight movement did occur. For example, some New Dealers in the late 1930s began to perceive a need for the enactment of laws designed “to promote the organization of economically weak groups so that they might hold their own against stronger rivals.”16 This development pointed, in turn, toward a redefinition of democracy as “a society of various groups and classes” whose “power [was] evenly spread,” with “economic checks and balances to parallel the political checks and balances” and “a state of tension in society that permit[ted] no one group to dare bid for the total power.”17 It continued from there with V.O. Key’s classic, Politics, Parties, & Pressure Groups, which went through five editions and thirty-one printings between its first appearance in 1942 and its last printing in 1969,18 and Douglass Adair’s 1951 article rescuing Madison’s theory of factions in Federalist No. 10 from the dustbin of history,19 and

16. ELLIS W. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIGUITY 276 (1966); see also id. at 187-204, 276-80, 483-84.
18. V. O. KEY, JR., POLITICS, PARTIES, & PRESSURE GROUPS at iii (5th ed. 5th prtg. 1969).
19. Adair, supra note 13.
arguably culminating in Theodore Lowi's, *The End of Liberalism*,\(^{20}\) in 1969. Lowi argued persuasively that the progressive New Deal paradigm, under which the people had battled against special interests to achieve the common good, had become vacuous and that, in its place, a new paradigm of "interest-group liberalism"\(^ {21}\) had emerged. Under that interest-group paradigm, "[o]rganized interests emerge in every sector of our lives . . . answering and checking some other organized group," and "the role of government is one of insuring access to the most effectively organized by, and of ratifying the agreements and adjustments worked out among the competing leaders."\(^ {22}\)

As this Article demonstrates turning to the analysis of case law developments in New York courts, the new model of interest-group politics plays an important role. It enabled judges to identify statutes passed to accommodate special-interest groups and to differentiate those statutes from others adopted to further the common good. But the new model did not provide judges with a foundation for a new jurisprudence. Unlike the political theorists noted above, New York judges saw nothing affirmative in special-interest legislation. Still adhering to the nineteenth-century principle of *Taylor v. Porter*\(^ {23}\) which outlawed legislative redistributions of property from A to B, New York courts frequently remained committed to the protection and preservation of rights of private property. Just as the courts had extended the regulatory state during the prewar decades, after the Second World War they expanded the protection which they accorded property rights. As this Article illustrates, they acted initially through detailed elaboration of rules of administrative procedure, but ultimately their protection of private property rested on continued recognition of a constitutional right to wealth.

**III. THE GROWTH OF PROCEDURAL PROTECTION**

A central premise of regulatory law throughout the twentieth century has been deference by the judiciary to the political branches of government. Judges routinely have refused "to pass upon the good faith of


\(^{22}\) Id. at 51.

\(^{23}\) 4 Hill *140 (N.Y. Sup. Ct. 1843).
public officials in the discharge of their functions." They have found it "essential to a healthy and virile democracy that the acts of its public officials . . . ought to be immune from sporadic attacks in the Courts" that were "likely to undermine public confidence," simply because a "taxpayer [had] views of procedure and method[s that] differ[ed] from those of the duly elected and chosen officials." Hence the judiciary has always hesitated to "interfere with the exercise of discretion vested by statute in administrative officers."

Nonetheless, the courts have demanded that agencies adhere to due process requirements and otherwise act fairly in making decisions. Decisions of an administrative agency, it is said, must "be based upon a consideration of the relevant facts and a fair opportunity must be afforded to present" the facts. Moreover, "no essential element of a fair trial can be dispensed with . . . and no vital safeguard violated without rendering" the agency's decision "subject to reversal upon review." "A state may not by legislation make anything it declares . . . due process of law," which requires "vastly more than an adjudication by some public officer, whose decision is supreme."

Among the procedural rules that agencies had to follow throughout the 1920s and 1930s were those providing for a quorum and voting rights. An administrative decision would also be set aside if it was

"arbitrary, tyrannical and unreasonable," or "based on a finding of fact... not supported by common-law proof of a probative character." Finally, administrative actions would be set aside if they were taken pursuant to an unconstitutional statute or in excess of statutorily conferred powers, since it was never "within the discretion of an administrative body, no matter how 'progressive', to substitute its own views in place of the legislative mandate."

The trend during the two decades after World War II was to buttress these due process requirements in administrative law. The massive bureaucracy that had been put into place during and before World War II to advance and enforce particular legislative policy goals had matured from a set of informal policymaking entities into a sort of second-string judiciary. By the end of the 1960s, as the New York Court of Appeals ("Court of Appeals") observed in one administrative law case, "administrative inquiries" had become "endowed with many of the attributes of a legal proceeding, including notices of hearings, adjournments,

---

However, administrative agencies were "not restricted by technical rules or procedure," Hardenbrook v. Combs, 290 N.Y.S. 290, 293 (Sup. Ct. 1936), or formal rules of evidence. See, e.g., People ex rel. Hirschberg v. Board of Supervisors, 167 N.E. 204, 207 (N.Y. 1929).
35. See Reed v. Littleton, 9 N.E.2d 814, 816 (N.Y. 1937).


However, statutes would be upheld if they contained standards sufficient to ensure that the agency would be bound to the legislature's policy choices. See, e.g., People v. Sullivan, 280 N.Y.S. 48, 52 (App. Div. 1935) (dictum); Schlesinger v. Kosky-Moos, Inc., 276 N.Y.S. 980, 987 (N.Y. City Mun. Ct. 1934).
amendment of charges, taking of testimony, availability of transcripts, filing of briefs, etc.\textsuperscript{38}

The driving force behind this legalization of administrative procedure was a concern "not only that justice be done but that the appearance of justice be apparent."\textsuperscript{39} In the pursuit of justice, judges came to regard it as "the duty of the courts to set at naught arbitrary and unfounded administrative holdings,"\textsuperscript{40} for the purpose of "correcting administrative abuses,"\textsuperscript{41} and to set at naught "mechanical exercise[s] of administrative judgment" stemming from "internal policy and rules of thumb practice" that constituted "an arbitrary, unreasonable and capricious manner of making determinations."\textsuperscript{42} The very fact that the bureaucracy had broad powers and discretion to favor some interests in preference of others made it "imperative that the courts exercise the necessary supervision to assure that the decisional process on the administrative level [was] free from impermissible or irrelevant considerations or unsupported conclusions"\textsuperscript{43} and to remind agencies of their "heavy responsibility" to engage in "conscientious and painstaking assessment of the evidence presented."\textsuperscript{44} Even when the legislature declared administrative decisions final and not subject to judicial review, the result was not to eliminate all "judicial scrutiny whatsoever," since the courts still had "the power and the duty to make certain that the administrative official ha[d] not acted in excess of the grant of authority given him by statute or in disregard of the standard prescribed by the legislature."\textsuperscript{45}

The linchpin upon which the legalization of the administrative process rested was a distinction that the courts created between the legislative and judicial functions of administrative agencies. As the Court of Appeals declared in the 1954 case of \textit{Hecht v. Monaghan},\textsuperscript{46} "the

\begin{itemize}
\item \textsuperscript{38} Hacker v. State Liquor Auth., 225 N.E.2d 512, 516 (N.Y. 1967).
\item \textsuperscript{40} Swalbach v. State Liquor Auth., 166 N.E.2d 811, 813 (N.Y. 1960) (quoting \textit{In re Rumsey Mfg. Corp.}, 71 N.E.2d 426, 428 (N.Y. 1947)).
\item \textsuperscript{44} Kilgus v. Board of Estimate, 127 N.E.2d 705, 710 (N.Y. 1955) (quoting \textit{Weekes v. O'Connell}, 107 N.E.2d 290, 293 (N.Y. 1952)).
\item \textsuperscript{45} Guardian Life Ins. Co. v. Bohlinger, 124 N.E.2d 110, 114 (N.Y. 1954).
\item \textsuperscript{46} 121 N.E.2d 421 (N.Y. 1954).
\end{itemize}
functions of an administrative agency fall into two broad categories, legislative and judicial." In drawing "the line of demarcation between" them, the court held that "a judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. . . . Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule . . . ." The important criteria that distinguished judicial from legislative activity on the part of an administrative agency, according to the court, were "(1) the presence of parties, (2) the trial and determination of issues, and (3) a final order or judgment of rights, duties or liabilities."

When "an administrative tribunal [was] acting in a judicial or quasi-judicial capacity," the Court of Appeals held in Hecht that "no essential element of a fair trial [could] be dispensed with unless waived."

"The protection of basic fundamental rights . . . [was] highly important and necessary in an administrative . . . as well as in a purely judicial proceeding." This meant that a "party whose rights [were] being determined [had] to be fully apprised of the proof to be considered, with the concomitant opportunity to cross-examine witnesses, inspect documents and offer evidence in rebuttal or explanation." Thus, the "first fundamental of due process"—"notice of the charges made"—applied to an agency proceeding, and no person could "lose substantial rights because of wrongdoing shown by the evidence, but not charged." A party to an administrative adjudication also had a right

47. Id. at 424.
48. Id. (quoting Prentis v. Atlantic Coast Line, 211 U.S. 210, 226 (1908)).
to have subpoenas issued to assist in the gathering of evidence and a further right to have potentially exculpatory evidence turned over to him. While strict adherence to technical rules of evidence was not required at administrative hearings, those rules were effectively in place. Thus incompetent witnesses could not testify in administrative proceedings, the fruits of unlawful searches were inadmissible in evidence, and, although hearsay was admissible, it could not constitute the only evidence on which an administrative determination rested.

Such sorts of evidentiary objections were waived, however, if not made in a timely fashion. Administrative hearings normally had to be held in public under


the control of an impartial public official. Administrative decisionmakers could not base their judgments on personal knowledge or other matters outside the record of any proceeding, and were required to make specific fact-findings in support of their conclusions. Their decisions "like 'the common law concept ... call[ed] for consistency between decisions in like cases in the same jurisdiction'" and had to be in favor of the party who proved "its allegations by a preponderance of the credible evidence." If the courts did not review


It was not necessary, however, that the person or persons who made the decision personally hear all the evidence. See Rothkoff v. Ratner, 428 N.Y.S.2d 138, 140 (Sup. Ct. 1980).


Moreover, judges claimed that, "because of the special capability, competence and experience" of agencies, they accorded special "respect and weight" to administrative determinations,
and reverse an administrative determination, it became final and had the same res judicata effect as the final judgment of a court.\textsuperscript{67}

One important right that the New York courts did not fully extend to administrative proceedings was the right to counsel. Although they did hold that parties had a right to appear with retained counsel at administrative proceedings and that agency actions in the absence of such opportunity were void,\textsuperscript{68} they refused to uphold a right to assignment of free counsel to indigents,\textsuperscript{69} even though they recognized that "by reason of the present day complexities of administrative proceedings the layman who . . . represent[s] himself does so at a peril that is indeed substantial."\textsuperscript{70}

The rule giving the right to retain counsel to people who could afford lawyers and who, in zoning cases, license revocation cases and the like, had large amounts of money at stake, probably did more than anything else to legalize the administrative process in the post World War II years and thereby weaken the bureaucracy’s power to impose redistributive legislative policies on the rich. At the same time, the denial of counsel to the poor kept the administrative process informal in


\textsuperscript{70} New York State Comm’n for Human Rights v. E. Landau Indus., 293 N.Y.S.2d 917, 920 (Sup. Ct. 1968).
areas such as welfare and public housing law and left bureaucrats with overwhelming power to accomplish their goals, often at the peril of the poor.\textsuperscript{71}

A final way in which the courts furthered legalization of the administrative process was by a set of decisions weakening at the margins the classical doctrines requiring exhaustion of administrative remedies\textsuperscript{72} and prohibiting collateral attacks on agency decisions.\textsuperscript{73} Courts held, for example, that individuals seeking judicial review were “not required to exhaust their administrative remedies where to do so would be an exercise of futility”\textsuperscript{74} or where they were “in any emergency situation.”\textsuperscript{75} Collateral attacks were permitted, for instance, in a suit involving different issues than those ripe for agency adjudication,\textsuperscript{76} in a case raising a constitutional challenge,\textsuperscript{77} in a suit by a competitor based on a statute reflecting “an overriding legislative purpose to prevent destructive competition,”\textsuperscript{78} and “in an appropriate case, to prevent injustice.”\textsuperscript{79}

The courts intruded far less into the legislative than into the adjudicative side of the administrative process. On the legislative side, their main task was to enforce the proscription that the “[l]egislature may constitutionally delegate rule-making authority to an administrative

\textsuperscript{71} For a rare case in which a pro bono attorney was able to rescue a case that had been lost at an informal hearing, see Williams v. White Plains Housing Authority, 309 N.Y.S.2d 454 (Sup. Ct.), aff’d, 317 N.Y.S.2d 935 (App. Div. 1970).


\textsuperscript{76} See Warshak v. Eastern Air Lines, Inc., 78 N.Y.S.2d 413, 414 (N.Y. City Ct. 1948).


\textsuperscript{78} Dairylea Coop., Inc. v. Walkley, 339 N.E.2d 865, 869 (N.Y. 1975).

agency only if it furnishes the agency with at least a broad outline” or set of standards “within which to act.” They also enforced the corollary that “[a]dministrative agencies [could] only promulgate rules to further the implementation of the law” as it was handed to them and had “no authority to create a rule out of harmony with the statute.” In one important case, for example, the Court of Appeals struck down a policy of the State Liquor Authority to prohibit the opening of liquor package stores in shopping centers—a policy designed to preserve neighborhood stores—on the ground that the policy was without statutory support. On the whole, however, judges showed considerable deference to administrative rule making. Recognizing that any statute, “but particularly social legislation, . . . must be interpreted and enforced in a reasonable and humane manner in accordance with its manifest intent and purpose,” the Court of Appeals ruled that “required standards need only be prescribed in so much detail as is reasonably practicable in light of the complexities of the area to be regulated.” They also accorded administrative regulations the force of statute and allowed administra-


82. See Swalbach v. State Liquor Auth., 166 N.E.2d 811, 814-15 (N.Y. 1960); cf. Murphy v. Wyman, 328 N.Y.S.2d 520, 530 (Sup. Ct. 1972) (stating that soundness of general policy does not authorize administrative action, even though supported by statute, when such action is arbitrary or capricious).


tive agencies the power to alter their rules. Finally, they gave "great weight" to an agency's construction of its enabling legislation.

In their efforts to hold administrative agencies to rules of due process and fair decisionmaking in accordance with statutory standards, judges sought, in short, to attain a balance between protecting preexisting rights and allowing the legislature to advance the social policies desired by the majority. Their goal was to give deference to administrative policy judgments made in accordance with strictly applied statutory and procedural standards. Legislative views of social justice, redistributional or otherwise, would thereby be given effect, but administrators themselves would have their freedom narrowly constrained. In view of the role played in the administrative process by lawyers, who typically represented the rich and rarely represented the poor, it is not clear, however, that much scope was left for the attainment of the redistributional ends that had been at the heart of the New Deal's vision of social justice, with its goal of helping poor multitudes at the expense of a few rich.

IV. THE INVALIDATION OF CONFISCATORY AND SPECIAL-INTEREST REGULATIONS

Even when administrative agencies had acted fairly and in pursuit of their statutory mandates, the courts did not always sustain their actions. Despite the enormous amount of regulation upheld in the decades after World War II, the legislature's power to regulate did not become plenary and unlimited. Unlike the Supreme Court of the United States, New York courts after 1937 remained unwilling to defer totally to the political process and to the practical compromises to which politics inevitably led. Although New York judges construed regulatory, tax, and takings powers expansively in the post-World War II era and applied them to a variety of new problems, they still insisted on preserving some constitutional limitations on the powers' exercise. Unlike the Supreme Court, New York courts did not switch in 1937 from being jealous of legislative power to being deferential to it; both before and after 1937, New York judges were deferential to legislatures while simultaneously

striving to keep them under ultimate constitutional control in an effort to prevent capture by special interests.

A. Zoning

Especially in the field of zoning, judges invalidated a number of statutes and municipal ordinances as unconstitutional takings of property violative of the Fourteenth Amendment of the Federal Constitution and similar state protections. Thus, the Court of Appeals held in one case that a municipality could not act for purely aesthetic reasons when its zoning ordinance did not give it specific authorization to so act, while lower courts struck down legislation prohibiting construction on oceanfront land that prevented an owner from making any use whatsoever of his or her property.

More generally, the Court of Appeals throughout the period under study held that any zoning ordinance could "be stricken down as invalid" if it "prove[d] confiscatory." It first made that statement in 1954 in *Vernon Park Realty, Inc. v. City of Mount Vernon*, where it invalidated an ordinance requiring a landowner to develop its property as a parking facility instead of downtown commercial business property. It repeated the essence of the statement in 1960, twice in 1966, in 1972, in 1973, twice in 1976, in 1977, in 1978, and in 1979. Indeed, in this last case, the Court of Appeals labelled the anti-confiscation


91. See *id.* at 518-19, 522.


principle "black-letter law." The court also indicated that, even if an ordinance was not confiscatory, it would be held invalid if it was discriminatory or filled with "irrational ad hocery." Relying on these principles, lower courts struck down numerous local zoning controls, especially in cases such as one where the municipality "acted in a manner inconsistent with its own established plan of development and its own convictions as to proper land use," in response to pressures "raised by 'a large group of interested citizens.'" As the court in the case observed, "[H]owever meritorious a political approach, this [was] improper grounds for a zoning change."

The difficulty with all zoning, however, was that it inevitably grew to serve the interests of some portions of the state's population at the expense of others. One important group that zoning served was the children of the urban, immigrant poor whom the New Deal had championed. The Second World War and the G.I. Bill in its aftermath uplifted millions of those poor to a new middle-class status. With the help of VA and FHA mortgages and of new public policies prohibiting discrimination on ethnic and religious grounds, the new middle class spent much of its newly acquired wealth during the next quarter century

100. Id. at 619.


104. Id. at 700; accord Pleasant Valley Home Constr., Ltd. v. Van Wagner, 363 N.E.2d 1376, 1377 (N.Y. 1977).
moving out of tenement apartments and into single-family dwellings. The move to the suburbs was on, not only outside New York City, but outside the larger upstate cities as well.

The law of zoning facilitated and protected this suburban growth. Indeed, the most important function served by the law of zoning during the decades following World War II was to prevent intrusion of nonresidential uses into the state's newly developing suburban residential neighborhoods. Zoning was then seen as "a vital tool for maintaining a civilized form of existence" and preserving "the peace and security of dwelling districts." The 'blessings of quiet seclusion' held to be a permissible goal of local government, and for that reason judges were often prepared to enforce any "reasonable longstand-
ing comprehensive plan with a basic policy to establish and maintain [the] character [of a municipality] as a village of residences." As the leading case of Village of Belle Terre v. Boraas declared, the power to zone could be used to create "[a] quiet place where yards are wide, [and] people few" and "where family values, youth values, . . . and clean air make the area a sanctuary for people."

It followed that "[']f the authorities in [a] village desire[d] to keep the village practically free from business, of course they [could] do so." They could likewise refuse to allow industrial uses in residen-

110. Id. at 9.
GROWTH OF DISTRUST


For a case allowing an industrial use on its own specific facts in a residentially zoned area, see Incorporated Village of North Hornell v. Rafter, 40 N.Y.S.2d 938 (Sup. Ct. 1943).

ments in single family districts. However, municipalities typically could not exclude schools, parks, or clubs from their environs.


Facilities, however, were subject to municipal health regulation. See Babcock v. Port Washington Little League, Inc., 144 N.Y.S.2d 179 (Sup. Ct. 1955).
Nor could municipalities impose other sorts of regulations which discriminated against nonresidents. An early case in support of this principle was People v. Grant, which involved a municipal ordinance excluding "through or transient vehicular traffic" from designated streets in an effort to preserve the tranquility of a residential area from commuter traffic generated by the presence of a nearby factory. Without reaching any constitutional issue, the Court of Appeals ruled that New York's legislation establishing municipal governments incorporated a principle that government holds "the fee of streets for the benefit of the whole people." It followed from this principle that "residents of a particular area in a town or village [did] not possess and [could not] be granted proprietary rights to the use of the highways therein, in priority to or exclusive of use by the general public." The court reiterated this holding in two other cases a few years after Grant, when it held that one municipality's attempt to bar transportation on its highways of garbage from other areas exceeded its power to regulate traffic and that another municipality's effort to maintain a park for residents of a single subdivision violated a legislatively imposed duty "to adapt park districts to the needs of growing communities."

The principle prohibiting municipal discrimination against outsiders was inconsistent, however, with one of the most important devices used in the 1950s and into the 1960s to protect the quality of life in expensive

118. Id. at 542.
119. Id. at 545.
120. See id. at 544.
121. Id.
122. Id.
suburban communities. The device was large-lot zoning. Early cases, for example, upheld minimum lot sizes of one or two acres, although not six acres. A parallel device was the "regulation of trailer camps," which, it was said, bore "a substantial relation to public health, safety, morals and general welfare." Under this rubric, municipalities were able to limit mobile homes to those already in town, to those only temporarily in town, or to only those located in mobile home parks.

As it became clear that zoning had become a device for protecting the suburban rich against those with a conflicting interest who had been left behind in urban poverty, the Court of Appeals began to express concern. In the 1975 case of Berenson v. Town of New Castle, the court took aim at "community efforts at immunization or exclusion" through the device of "exclusionary zoning ordinances," holding that "in enacting a zoning ordinance, consideration must be given [by a municipality] to regional needs and requirements."


132. Id. at 241 (quoting Golden v. Planning Bd., 285 N.E.2d 291, 302 (N.Y. 1972)).

133. Id.

134. Id. at 242.
Berenson did not lead to clearcut doctrine, however, since it held merely that in each case "courts must assess the reasonableness of what the locality ha[d] done."\(^{135}\) These individualized assessments led to holdings which approved one-acre minimum lots for mobile homes\(^{136}\) or which allowed mobile homes only temporarily\(^{137}\) or only in preexisting trailer parks.\(^{138}\) Under the Berenson approach, the Court of Appeals even sustained five-acre zoning for single family residences in an exclusive Long Island suburb.\(^{139}\) In short, exclusionary zoning as a device for protecting suburban residential neighborhoods remained alive and well in New York throughout the 1970s.\(^{140}\)

A second area in which the power of municipalities was deployed expansively to control land use within their borders, thereby maintaining a suburban lifestyle at the expense of potential newcomers, was in respect to the law of subdivision exactions. As late as 1950, it seemed clear that a municipality could not require a developer whose land met existing zoning requirements to satisfy any conditions or pay any exactions to obtain a building permit. When one suburban village, for example, sought to prohibit a developer whose land was zoned for apartments from building them until it became possible to connect up to a street sewage system, a trial judge struck the restriction down as "a condition" with which it was "impossible to comply" that "amount[ed] practically to a confiscation of petitioner's property."\(^{141}\) Two years later, however, in \textit{Brous v. Smith}\(^{142}\) the Court of Appeals began

\footnotesize{135. \textit{Id.} at 243. \\
140. \textit{Federal courts generally refused to insert themselves into the issue. See Warth v. Seldin, 422 U.S. 490 (1975) (dismissing a suit seeking relief from exclusionary zoning on grounds of lack of standing); cf. Calhoun v. Town Bd., 406 N.Y.S.2d 661 (Sup. Ct. 1978) (requiring compliance with minimal due process standards in proceedings that pass upon trailer permit applications).} \\
142. \textit{106 N.E.2d 503 (N.Y. 1952).}
dramatically to change doctrine to favor established suburbanites.

The *Brous* case arose pursuant to 1932 legislation that required cities, towns, and villages to deny building permits unless a road giving access to the proposed structure was suitably improved.\(^{143}\) In *Brous*, the town in question had interpreted the law to allow it to demand that developers construct roads to properties on which they wished to build at their own expense. The Court of Appeals agreed with the town's interpretation, observing that "in this era of the automobile, modern living as we know it is impossible without improved highways linking people with their jobs, their sources of food and other necessities, their children's schools and their amusements and entertainments."\(^{144}\) The court also rejected a challenge that the law, as interpreted, was unconstitutional, in that it required a private individual to build a public road.\(^{145}\)

In the court's unexplained view, the requirement of building a road was no different from minimum lot size, set back, and side yard requirements.\(^{146}\)

Following the *Brous* case, several lower courts upheld municipal refusals to grant building permits in cases where adequate roads or sewers were not provided.\(^{147}\) A more interesting development occurred when the City of New Rochelle demanded that a developer, in addition to building roads, donate a portion of her land to the school district as a condition of approval for her planned subdivision. When a trial judge intervened after the city, following the school district's receipt of the land, refused to keep its bargain, the judge did not set aside the donation or the bargain. On the contrary, he enforced it\(^{148}\) and thereby allowed municipalities to exact from developers seeking approval of building

\(^{143}\) See id. at 504; see also Act of April 8, 1932, ch. 634, § 280, 1932 N.Y. Laws 1460 (codified as amended at N.Y. TOWN L. § 280-a (McKinney 1987)).

\(^{144}\) 106 N.E.2d at 506.

\(^{145}\) See id. at 506-07.

\(^{146}\) See id. at 507.


plans a wide variety of donations, the cost of which the developers would, in turn, pass on to new home buyers, thereby increasing the price and exclusivity of suburban housing. Probably because municipal exactions favored only established residents, doctrine remained somewhat unsettled, as other judges refused to require developers to provide sewers or land for recreational purposes.

This doctrinal uncertainty forced the Court of Appeals to return to the exactions question, which it did in *Jenad, Inc. v. Village of Scarsdale.* Over a dissent which forcibly protested that requiring "'new people coming into the municipality [to] bear the burden of the increased costs of their presence'" constituted a "surrender" by judges of "their function of protecting basic property rights . . . [and] basic principles of [equality of] taxation," a four-judge majority specifically upheld the legislature's "grant to villages of power to make such exactions." Indeed, the majority went even further and declared that a municipality, instead of requiring a developer to build public facilities or allot land for community purposes, could demand "'monies in lieu of land' or construction." *Jenad,* in short, made it clear that municipalities could impose the costs of newcomers entirely on developers and, through the developers, on the newcomers themselves.

Nonetheless, the cases subsequent to *Jenad* were again mixed. In some, judges sustained the imposition of penalties on developers who had subdivided land without the required approval, while in others...

---


152. *Id.* at 677 (dissenting opinion) (quoting Daniels v. Borough of Point Pleasant, 129 A.2d 265, 267 (N.J. 1957)).

153. *Id.* at 678 (dissenting opinion).

154. *See* id. at 680.

155. *Id.* at 675.

156. *Id.*

exactions were upheld.\textsuperscript{158} On the other hand, judges struck down exactions that were not applied equally to all developers,\textsuperscript{159} exactions that constituted too high a proportion of the total value of the land,\textsuperscript{160} and exactions that were insufficiently connected to costs arising from development of particular land.\textsuperscript{161} They also refused to impose penalties in cases where developers had reasonably relied on municipal conduct or assurances\textsuperscript{162} or where municipalities had exceeded their statutory powers or followed improper procedures.\textsuperscript{163}

An important by-product of \textit{Jenad} emerged several years later when the Court of Appeals held in \textit{Golden v. Planning Board}\textsuperscript{164} that municipalities could constitutionally impose moratoria on development for such a reasonable period of time as was required to bring municipal services up to a level needed to accommodate the development.\textsuperscript{165} One factor

\begin{itemize}
  \item \textsuperscript{164} 285 N.E.2d 291 (N.Y. 1972).
that helped the court uphold the eighteen-year moratorium in the *Golden* case was that a developer could escape the moratorium at any time it wished simply by agreeing to construct the facilities needed to support its development—a6—an agreement which absent the *Jenad* case might have been found unconstitutionally coercive. Under the *Golden* rationale, however, municipalities could not unreasonably delay their provision of necessary services or permanently fail to provide them if such provision was possible. A municipality could permanently refuse to approve further development only if its inability to provide services was, in essence, incapable of being eliminated.

A third area in which the zoning power expanded in the post-World War II era, largely to protect the quality of suburban life, was aesthetic zoning. By the end of the 1950s, if not earlier, the New York courts had found aesthetic considerations were “not wholly without weight” in the zoning calculus, and, as a result, they had willingly enforced state and local legislation restricting signs and billboards. But they had

166. See 285 N.E.2d at 299.

For earlier cases reaching the opposite result, see *Mid-State Advertising Corp. v. Bond*, 8 N.E.2d 286 (N.Y. 1937) and *Town of Greenburgh v. General Outdoor Advertising Co.*, 109 N.Y.S.2d 826 (Sup. Ct. 1951).

Regulation of signs for aesthetic reasons needs to be distinguished from earlier regulation of gasoline service station signs for the purpose of preventing fraud on customers. See People v. Arlen Serv. Stations, Inc., 31 N.E.2d 184 (N.Y. 1940); Brody v. Save Way N. Blvd., Inc., 234
never upheld "a zoning ordinance which restrict[ed] the use of property for a purely aesthetic reason alone." 172

They did precisely that, however, in the 1963 case of People v. Stover,173 where the Court of Appeals, in upholding an ordinance that prohibited clotheslines on front lawns, "recognize[d] that aesthetic considerations alone may warrant an exercise of the police power." 174 Although it did observe that cases could "undoubtedly arise . . . in which the legislative body goes too far in the name of aesthetics," 175 the Court of Appeals, quoting the United States Supreme Court, also found that the ""concept of public welfare [was] broad"" and included ""aesthetic as well as monetary"" values. 176 The court quoted further, stating that it was ""within the power of the legislature to determine that the community should be beautiful as well as healthy." 177

Upholding a "general or unlimited power in government to regulate aesthetics" had the effect, as the dissenting opinion in Stover urged, of vastly increasing the breadth of the zoning power. 178 As the dissent noted, "[t]he avoidance by courts, sometimes seemingly to the point of evasion, of sustaining the constitutionality of zoning solely on aesthetic grounds ha[d] its origin in a wholesome fear of allowing government to trespass through aesthetics on the human personality." 179 Accordingly it "seem[ed] that extensions of categories of local legislation for purely aesthetic purposes should be defined and limited, and, if they are to be enlarged, it should not be under reasoning which sets no ascertainable bounds to what can be done or attempted under this power." 179

In the two decades following Stover, New York courts did, in fact, find themselves deeply involved in protecting aesthetic and related environmental values. In one case, for instance, in which the appellate


174. Id. at 275.
175. Id.
176. Id. (quoting Berman v. Parker, 348 U.S. 26, 33 (1954)).
177. Id.
178. Id. at 278 (dissenting opinion).
179. Id. (dissenting opinion).
180. Id. at 279 (dissenting opinion).
division found “some evidence in the record that . . . projected construction [would] devastate and destroy the existing topography and have a severe impact on the environs,” it modified a trial court order that had directed the issuance of a building permit and remanded to the local planning board for further consideration of the project’s impact. Courts also found themselves upholding legislation designed to protect aesthetic and environmental values in the Adirondack Park along with more prosaic municipal ordinances designed to prevent water pollution and erosion. Other important lines of cases dealt with legislative restrictions on the filling of wetlands and legislative requirements of environmental impact statements. Courts also found


themselves dealing with other aesthetic issues such as the height of fences.\textsuperscript{186}

The courts finally moved in two other directions on the subject of aesthetic zoning. First, they refused to hold unconstitutional a local ordinance creating a board of architectural review.\textsuperscript{187} Even more important was their upholding of historic preservation legislation.\textsuperscript{188} Indeed, the Court of Appeals went so far as to uphold the application of historic preservation legislation to churches,\textsuperscript{189} which until the 1970s had enjoyed virtual immunity from police power regulation.\textsuperscript{190}

Taken together, the zoning cases point toward two conclusions. The first is that municipal legislative bodies frequently acted to advance the interests of the people who controlled them. The second conclusion is that New York's judges generally acquiesced in such legislative action. But occasionally, in dissent and even in majority opinions, the judges protested.

\textbf{B. Long-Term Protection of Tenants' Rights}

Another body of postwar doctrine growing out of earlier legislation protective of the housing needs of the poor was landlord-tenant law. The

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{187} See Old Farm Rd., Inc. v. Town of New Castle, 259 N.E.2d 920 (N.Y. 1970).
\item \textsuperscript{189} See Society for Ethical Culture v. Spatt, 415 N.E.2d 922, 924 (N.Y. 1980); Lutheran Church in Am. v. City of New York, 316 N.E.2d 305, 307 (N.Y. 1974); see also Trustees of Sailors' Snug Harbor v. Platt, 288 N.Y.S.2d 314, 316 (App. Div. 1968) (stating that regulation preserving charitable property is void if it "seriously interferes with carrying out the charitable purpose").
\end{itemize}
\end{footnotesize}
postwar legal system continued, for example, to protect the well-being of tenants at the expense of landlords by stringent enforcement of housing codes that ensured minimum health and safety conditions in multiple dwellings. Many of the cases involved enforcement of ordinary code standards, such as those requiring proper documentation for use of a building, those requiring safety devices, and those setting plumbing standards. Others raised issues about landlords' criminal or civil liability for breaching the standards. Another line of authority dealt with conversion of rental units into cooperatives and condominiums. More extreme were cases prohibiting the eviction of tenants who had complained to housing authorities about code violations, or sustaining legislation which permitted tenants to pay rents to a court-appointed administrator, or allowed a municipality to


petition for the appointment of a receiver of rents when landlords failed to maintain premises properly.\textsuperscript{199} Even more extreme were the cases allowing municipal officials, without compensation, to dispossess tenants and, if necessary, demolish unsafe buildings.\textsuperscript{200} A final way in which government became involved in landlord-tenant law—in the long run, in conflict with the interests of tenants—was by virtue of its construction and maintenance of public housing for low income tenants.\textsuperscript{201}


The most important development in landlord-tenant law after World War II, however, was the substitution of state for federal rent control on May 1, 1950. The substitution legislation, which was initially applicable both to New York City and to the remainder of the state was held constitutional "[e]ven though it may ... compel an owner to operate his real property at a loss," because it had been "enacted to meet a passing emergency." Over time, though, rent control came to be limited solely to New York City, and as limited, it came to be a permanent feature of the state's legal system, which frequently provided protection against the vagaries of the marketplace to many of the poorest inhabitants of the state, although occasionally to the rich as well.

Throughout its various incarnations, rent control was routinely held constitutional in its entirety. As the Court of Appeals noted as late

---


as 1962, the state still faced a danger of “mass rent increases.”\textsuperscript{205} The danger made “protection of the public against such increases in a time of a rental housing shortage . . . a valid legislative purpose,”\textsuperscript{206} even if “in carrying out the scheme devised by the Legislature, a particular landlord or tenant may suffer.”\textsuperscript{207}

But, as rent control became permanent, courts began to face some extremely complex battles between various groups having interests in rent-controlled housing. One set of questions arose as judges reviewed administrative decisions fixing rents.\textsuperscript{208} Even more complicated were the cases limiting the power of landlords to evict tenants who remained in possession of apartments under rent control after the expiration of their original lease.\textsuperscript{209} Over time, this statutory right to remain in possession

\begin{flushleft}

Although federal law could preempt state rent control law in cases of low and moderate income housing, the construction of which was financed by a federally guaranteed mortgage, see Snyder v. Axelrod Management Co., 471 F. Supp. 308, 312 (S.D.N.Y. 1979); Argo v. Hills, 425 F. Supp. 151, 154 (E.D.N.Y. 1977), aff’d, 578 F.2d 1366 (2d Cir. 1978); Hudsonview Terrace, Inc. v. Maury, 419 N.Y.S.2d 409, 409 (App. Term. 1979), many cases held that the Federal Department of Housing and Urban Development and its predecessors had not taken the necessary procedural steps to bring about preemption. See Gramercy Spire Tenants’ Ass’n v. Harris, 446 F. Supp. 814, 826 (S.D.N.Y. 1977); Stoneridge Apts., Co. v. Lindsay, 303 F. Supp. 677, 679 (S.D.N.Y. 1969); Northridge Coop, Section No. 1, Inc. v. 32nd Ave. Constr. Corp., 141 N.E.2d 802, 809 (N.Y. 1957).


206. Id. at 572.

207. Id. at 573.


became transformed into a sort of quasi-inheritable estate through a byzantine process that none of those who had worked to establish rent control could have possibly foreseen.

Rent control was, after all, initially instituted as a temporary emergency measure, and landlords were deprived of the power to evict tenants only as part of a compromise that allowed them to increase rent when a new tenant entered into possession but prohibited them from evicting an existing tenant to obtain a new one. The question of how to deal with survivors of tenants who died while in possession of a rent-controlled apartment was not important either to the establishment of temporary emergency controls or to the compromise from which the eviction prohibitions sprang. However, as rent control became permanent, tenants did begin to die with some frequency, and the question of how to deal with those who lived with them had to be answered. Long before the 1980s it had been answered with a provision that upon the death of a rent-control tenant, the landlord could not dispossess "either the surviving spouse of the deceased tenant or some other member of the deceased tenant’s family who ha[d] been living with the tenant."

This restriction did not seriously limit a landlord’s ability to regain possession of premises after death, however, because landlords were assumed to have power to restrict those who, except for spouses and minor children, could occupy an apartment with a tenant. By evicting those who were not signatories of leases, landlords could ensure that a tenancy would end at a time no later than the death of the signatory and his or her spouse and the attainment of maturity by their children.

The landlord’s freedom to evict nonspouses was first challenged in *Hudson View Properties v. Weiss.* As of 1980, the tenant in the *Weiss* case had been living in the same apartment building for forty-six years, for much of the time with her husband. In 1976, her husband had moved out, apparently as part of a divorce proceeding, and then, at the end of 1979, “a man with whom tenant ‘ha[d] a close and loving relationship began sharing the apartment.’”

The landlord promptly ordered him to leave, and when he did not, began eviction proceedings on the ground that his presence constituted a violation of the terms of the lease. The tenant defended on the ground...
that expulsion of the tenant and/or her lover would constitute discrimination on the basis of marital status in violation of New York's Human Rights Law. The trial judge accepted this defense, but the appellate term reversed.\textsuperscript{213} The appellate division then reversed the appellate term and restored the trial court's judgment.\textsuperscript{214}

In this posture the case arrived before the Court of Appeals, which reversed yet again and reinstated the judgment of the appellate term with the following brief explanation:

In this case, the issue arises not because the tenant is unmarried, but because the lease restricts occupancy of her apartment... to the tenant and the tenant's immediate family. Tenant admits that an individual not part of her immediate family currently occupies the apartment as his primary residence. Whether or not he could by marriage or otherwise become a part of her immediate family is not an issue. The landlord reserved the right by virtue of the covenant in the lease to restrict the occupants and the tenant agreed to this restriction.\textsuperscript{215}

On this basis, the court had no difficulty concluding that the tenant's lover was not a member of her family and thus that the landlord could exclude the lover from residing in the apartment while the tenant was alive and from having any potential claim to continued residence after the tenant died.

Affirming the right of landlords to evict live-in lovers had the potential to send thousands of New Yorkers into the housing market, however, and vociferous protests were heard all the way to Albany. The legislature responded with a special-interest law declaring it "unlawful for a landlord to restrict occupancy of residential premises, by express lease terms or otherwise, to a tenant... and immediate family;" at least one other occupant and the dependent children of that occupant had to be allowed.\textsuperscript{216} Although the statute explicitly refused to grant mere occupants possessory rights greater in extent than those of a tenant, it protected whatever rights occupants had already acquired. It thereby created the possibility that a live-in lover could claim a right to remain in an apartment after the tenant's death, and by taking on a new lover, extend that possibility \textit{ad infinitum}.

This possibility came to fruition in Braschi v. Stahl Associates Co.,\textsuperscript{217} where a gay life partner of a man who had died of AIDS brought a declaratory judgment action to enforce a claimed right to remain in the apartment after the tenant’s death, on the ground that he was a member of the tenant’s “family.”\textsuperscript{218} While the Court of Appeals might have adhered to the implicit definition of a family pursuant to Hudson View Properties as consisting only of a spouse and blood relatives, the legislative response to that case had made the court more responsive to the realities of New York City’s dominant social and political interests. Accordingly, it decided that the “intended protection against sudden eviction should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life,”\textsuperscript{219} which the court found broad enough to comprehend “two adult lifetime partners whose relationship [was] long term and characterized by an emotional and financial commitment and interdependence.”\textsuperscript{220} The plaintiff gay life partner was thereby allowed, in effect, to inherit for his own life the tenant’s rent-control estate.

Through the mechanism of rent control, in short, the police power transformed residential rental markets in New York City. By the 1980s, tenants possessed a quasi-inheritable right to occupy rent-controlled apartments at fixed rentals subject only to minor cost-of-living adjustments granted by the city’s rent control authorities. In significant ways, the legislature and the courts would thereafter be required to compromise and adjust conflicts between what had become, in effect, competing property owners.

\textit{C. Labor Law}

In the field of labor law, judges similarly found themselves in the position of arbitrating among competing interests rather than acting, as they had before World War II, to promote the common good against special interests. The most important development in labor law in postwar New York was the emergence of a distinct body of state-created doctrine regulating collective labor activities by public employees.

Some of these state-law rules paralleled general labor law doctrines formulated under the National Labor Relations Act. Doctrine developed,

\begin{itemize}
\item 217. 543 N.E.2d 49 (N.Y. 1989).
\item 218. \textit{Id.} at 51.
\item 219. \textit{Id.} at 53.
\item 220. \textit{Id.} at 54.
\end{itemize}
for example, on such issues as the determination of whether a particular union was the appropriate bargaining agent for a group of workers\(^221\) or whether a particular individual or class of individuals belonged in a union,\(^222\) and the deduction of dues from employee paychecks.\(^223\) Other cases dealt with allegations of unfair labor practices by government bodies\(^224\) and grievances by individual employees.\(^225\) Finally, issues


Public employee unions had the same duty as private unions to represent their members fairly. \textit{See Jackson v. Regional Transit Serv., 388 N.Y.S.2d 441, 444 (App. Div. 1976).


of arbitration arose with frequency in public employee cases. But a different doctrinal configuration arose when other interests were in conflict, as was true of state labor law for public employees, which differed significantly from federal law under the NLRA. The first difference was that government entities were free to breach provisions of agreements negotiated with employee unions when the state had a legitimate interest in doing so. The second was that public employees in New York were denied the right to strike.

The Court of Appeals elaborated upon the first doctrinal difference in Board of Education v. Areman. The court observed that while in "private matters . . . freedom to contract [was] virtually unlimited," the management of "public" affairs was "subject to restrictive policies which reflect governmental interests and public concerns." Governments were "but representatives of the public interest and the public interest must, certainly at times, bind these representatives and limit or restrict their power to, in turn, bind the public which they represent." For this reason, government negotiators could not bargain away important


228. Id. at 946.

229. Id.
rights, such as the right to discharge employees for budgetary reasons, the right to grant tenure to teachers, the right to select the teachers, the right to determine the salaries of teachers, and the right to select the校长 and other administrative officers.


curricula and educational materials in public schools, the right to make work assignments, the right to renegotiate a contract after a reasonable time, and various other statutory rights. Another case invalidated a requirement of compulsory arbitration as violative of the one-person, one-vote principle.


Courts also determined that there was freedom to bargain about matters such as disciplinary policies, even in the absence of express statutory provisions granting such authority. See Board of Educ. v. Associated Teachers, Inc. 282 N.E.2d 109, 114 (N.Y. 1972); Malone v. City of Troy, 413
The second way in which labor law for public employees differed from that for private employees is that public employees lacked the right to strike. As Chief Judge Stanley Fuld explained for the Court of Appeals,

the ability of the Legislature to establish priorities among government services would be destroyed if public employees could, with impunity, engage in strikes which deprive the public of essential services. The striking employees, by paralyzing a city through the exercise of naked power, could obtain gains wholly disproportionate to the services rendered by them and at the expense of the public and other public employees. The consequence would be the destruction of democratic legislative processes because budgeting and the establishment of priorities would no longer result from the free choice of the electorate’s representatives but from the coercive effect of paralyzing strikes of public employees.237

Strikes by public employees were therefore subject to injunction,238 and


employees who went on strike could be held in contempt of court, fined two days pay for each day they remained out on strike and subjected to criminal prosecution. Public employee unions could also be required to pledge not to strike. Only an appropriate public official, however, could seek an injunction against a strike; a mere citizen could not.


Denial of jury trial in contempt proceedings was upheld even though juries were available in other sorts of contempt cases, see Rankin v. Shanker, 242 N.E.2d 802 (N.Y. 1968), but violators of an injunction could not be punished if procedural defects had occurred in obtaining the injunction. See In re Utica Teachers Ass’n, 325 N.Y.S.2d 587 (Sup. Ct. 1971).


As labor law developed in the second half of the century, a number of other new issues also emerged. One was the extent to which federal law preempted state law. See Slocum v. Delaware, Lackawanna & W. R.R., 339 U.S. 239, 244 (1950), rev’g 87 N.E.2d 532 (N.Y. 1949); Fitzgerald v. Catherwood, 388 F.2d 400, 403-05 (2d Cir. 1968); District 2, Marine Eng’nrs Beneficial Ass’n v. New York Shipping Ass’n, 287 N.Y.S.2d 799, 803 (App. Div.), modified, 239 N.E.2d 650 (N.Y. 1968); Committee of Interns & Residents v. New York State Labor Relations Bd., 391 N.Y.S.2d 503, 505 (Sup. Ct. 1977); ABC v. Brandt, 287 N.Y.S.2d 719 (Sup. Ct.), aff’d, 293 N.Y.S.2d 988 (App. Div. 1968).


D. Utility and Business Regulation

Nowhere was the new, postwar role of the judiciary as arbiter of the claims of special interests clearer than it was on the subject of utility and business regulation. In part, the judiciary found itself in this unpleasant position because of the expansion of the state's regulatory apparatus.

Charged with maintaining just and reasonable rates for consumers, the Public Service Commission ("PSC"), for example, strove to carry out its mandate by expanding its jurisdiction into two areas in addition to rate setting itself: first, into the definition of capital, and second, into analysis of utility and carrier expenses. Operating under a formula by which return was equal to total rates charged consumers minus total expenses, a commission that could force a reduction in expenses could similarly reduce the rates charged consumers, while the utility still earned the same return. Likewise, if the PSC could reduce capital expenditures, a smaller return and consequently lower charges to consumers would give the utility or carrier the same percentage return on its investment.

Early regulators on the PSC understood these basic business facts, and they therefore directed the use of specified accounting methods by regulated entities that would enable the PSC to understand the realities of an entity's balance sheet. In 1930, the PSC also obtained jurisdiction to approve and disapprove contracts into which a regulated firm entered. As the years progressed, the PSC continued to monitor accounting practices and to intrude its authority more and more into policing the contracts and business practices of those whom it regulated. The New York courts, in turn, sustained virtually every action that the PSC took.

Among the sorts of contracts that the PSC examined and disapproved were contracts between a regulated entity and an affiliated

245. See Staten Island Edison Corp. v. Public Serv. Comm'n, 188 N.E. 713 (N.Y. 1934); New York State Elec. & Gas Corp. v. Public Serv. Comm'n, 281 N.Y.S. 384 (App. Div. 1935), aff'd, 10 N.E.2d 567 (N.Y. 1937). However, the PSC could not disapprove contracts made before April 24, 1930, the effective date of the act giving it such authority. See New York State Elec. & Gas Corp. v. Maltbie, 264 N.Y.S. 97, 100 (Sup. Ct. 1933), rev'd, 270 N.Y.S. 1010 (App. Div. 1934), aff'd, 195 N.E. 182 (N.Y. 1935).
interest, such as a parent or subsidiary company, management contracts, contracts dealing with executive compensation and legal fees, and contracts providing dividends to shareholders or imposing indebtedness on the utility or carrier. The New York courts were not prepared to let "the rate-making power" become "subservient to the discretion of [a utility] which may, by exorbitant and unreasonable salaries, or in some other improper way, transfer its earnings into what it is pleased to call 'operating expenses,'" nor would they permit a utility through "the systematic withdrawals of earnings and the reduction therefore of working capital" imperil its "capacity to maintain adequate service" without rate increases.

On other occasions, however, the PSC assisted utilities, for instance, in limiting their liability to customers for the negligence of their employees. In addition to regulating rates, the PSC also regulated other subsidiary transactions between utilities and their customers, such as the right to terminate service or demand security deposits, the location of service lines, and the lease, sale, and servicing of equipment.


252. General Tel. Co., 218 N.Y.S.2d at 278 (alteration in original) (quoting Chicago & Grand Trunk Ry. v. Wellman, 143 U.S. 339, 346 (1892)).


For a case refusing to approve the PSC's limitation of liability, see Shankman v. Consolidated Edison Co., 404 N.Y.S.2d 787 (Civ. Ct. 1978).

The PSC also sought to expand its jurisdiction by regulating utility advertising. It thereby embroiled itself in controversy as the legitimate interests of the groups it was attempting to help came into conflict with the equally legitimate interests of competing groups. In one case, the PSC, in an effort beginning in 1973 to promote energy conservation, sought to bar Central Hudson Gas & Electric from inserting advertisements in its bills urging customers to consume more electricity, while in another it sought to enjoin New York City’s Consolidated Edison Company from inserting materials supporting increased use of nuclear power plants on the ground that their benefits far exceeded their potential risks. Although a trial judge invalidated portions of the PSC’s directive in this case,\(^2\)\(^5\)\(^6\) the appellate division reversed his ruling and affirmed the PSC in its entirety, and the Court of Appeals affirmed the appellate division.\(^2\)\(^5\)\(^7\) However, the United States Supreme Court, relying on newly proclaimed commercial free speech rights under the First Amendment, reversed the Court of Appeals.\(^2\)\(^5\)\(^8\) Nevertheless, even after the Supreme Court’s reversal, the Court of Appeals sustained the determination of the PSC that the expense of the advertising allowed under the First Amendment could not be included in the utilities’ rate base.\(^2\)\(^5\)\(^9\)

Despite restrictions such as those considered above, which were imposed on common carriers and utilities during the postwar era, the two regulated industries did not fully lose their basic property rights. “Under the settled law of the State,” a franchise constituted “a property right . . . from the enjoyment of which” a carrier or utility could not “be excluded without compensation.”\(^2\)\(^6\)\(^0\) Thus, when the police commissioner of the City of New York turned a number of main avenues into one-way streets, the Court of Appeals required the City to pay just compensation to bus companies holding franchises to operate buses on
the avenues in question in both directions.\textsuperscript{261} It still remained the case that, however broad the police power might become, the New York courts would uphold franchised "property . . . protected both by the State and Federal Constitutions against a substantial curtailment or destruction by the government without payment of fair compensation."\textsuperscript{262}

Meanwhile, other business endeavors fared even better as judges struck down a wide variety of regulatory legislation which interfered with property or entrepreneurial rights. The cases fell into essentially two categories: (1) cases involving statutes that had no public purpose at all and thus reflected gratuitous hostility to a regulated entity, and (2) those involving legislation that aided one group of individuals at the expense of another rather than aiding the community as a whole.

\textit{Defiance Milk Products Co. v. Du Mond}\textsuperscript{263} was the leading case in the first category. The statute at issue in \textit{Du Mond}, which prohibited the sale of evaporated or condensed skimmed milk in containers weighing less than ten pounds,\textsuperscript{264} had the effect, according to the Court of Appeals, of prohibiting all consumer sales of "a wholesome and useful food."\textsuperscript{265} The court conceded that, if any "reasonable basis [had] existed for an absolute ban against evaporated skimmed milk," the prohibition on its sale would have been valid, but "no one ha[d] been able to discover any such basis."\textsuperscript{266} The court therefore declared the act invalid. For the same reason, analogous cases in lower courts struck down municipal ordinances limiting the hours during which barber shops could remain open\textsuperscript{267} and prohibiting the use of rope-geared, hydraulic elevators.\textsuperscript{268}

Lurking in \textit{Du Mond} was a related principle against overbroad legislation. The state had attempted to defend the legislation as an anti-fraud measure designed "to see to it that customers did not get evaporated skimmed milk when they were trying to buy evaporated whole milk."\textsuperscript{269} The court responded that "the Legislature could have demand-
ed other kinds of labels or special sizes, shapes or colors of contain-
ers to protect consumers, but that an absolute "prohibition was, as matter of law, not a reasonable way of dealing with such confusion or possibility of confusion as the legislators might have found to exist." The legislature could not, that is, outlaw a broad range of legitimate activities in order to reach occasional illicit acts occurring under the umbrella of the legitimate ones.

Other cases gave effect to this overbreadth principle. In People v. Bunis, for example, the Court of Appeals struck down a prohibition of all sales of magazines without covers—a prohibition that had been enacted in order to prevent sales of magazines, the covers of which had been returned to publishers for credit upon a false representation that the magazine itself had not been sold. The court held it "unreasonable and beyond the legitimate exercise of the police power for the Legislature to interdict all sales, permissible and illicit alike, in order to prevent those which are illicit."

Similarly, People v. Estreich declared unconstitutional a statute that prohibited junk dealers from selling stolen merchandise, whether or not they had reason to know it was stolen, simply in order to prevent them from selling goods they knew to be stolen. So, too, in People v. Kuc the court invalidated a municipal ordinance which prohibited all sales of newspapers on village streets after nine p.m. in order to prevent noisy hawking of newspapers during late evening hours.

A second category of cases regularly found unconstitutional by the courts involved laws that assisted a single group in the community rather than protecting the health, safety, or welfare of the community as a whole. The leading case of Trio Distributor Corp. v. City of Albany arose in response to a municipal ordinance that required the Good Humor Corporation and its distributors to staff Good Humor trucks with two individuals if ice cream products were being sold from the trucks.

270. Id.
271. Id.
273. See id. at 273-74.
274. Id. at 274.
275. 79 N.E.2d 742 (N.Y. 1948).
276. See id. at 742.
277. 4 N.E.2d 939 (N.Y. 1936).
278. See id. at 941.
280. See id. at 330.
The majority of the Court of Appeals suspected that the ordinance had been adopted to protect shopkeepers who sold ice cream from competition by itinerant Good Humor peddlers, and for this reason, the court found the ordinance invalid, declaring that "the police power is not designed to aid one group in a community against another, as the courts of this State have frequently had occasion to hold."\(^{281}\) Even though the stated purpose of the ordinance, as the dissent pointed out, was protection of the safety of children in the streets,\(^{282}\) that stated purpose would not immunize legislation from unconstitutionality if judges concluded that the real goal of the legislature was to benefit one group in the community at the expense of another.\(^{283}\) A "policy of achieving 'equitable distribution' . . . [could] not be frustrated by . . . [a] state's desire to protect a segment of its population."\(^{284}\)

Just as a statute could not be enacted for the purpose of advancing the interests of one group of individuals at the expense of another, so too it could not be administered with that purpose in mind. *Swalbach v. State Liquor Authority*\(^ {285}\) involved a challenge to the State Liquor Authority's policy of prohibiting retail wine and liquor stores from being situated in modern shopping centers,\(^ {286}\) apparently out of a "grave concern" that shopping centers were causing "the untimely demise of tens of thousands of small local retail businesses\(^ {287}\) and were "dangerously imperil[ing] the existence of the small local merchants."\(^ {288}\) But, however laudable the goal of preserving small town businesses may have been, the State Liquor Authority could not legitimately act for that purpose. Its sole power was to promote the "'public convenience and advantage,'"\(^ {289}\) not to aid a group of established small town merchants at the expense of entrepreneurs seeking to exploit new developments in the economy found "to be convenient" by "the public itself.\(^ {290}\)

An agency like the State Liquor Authority could not act in pursuit

---

281. *Id.* at 332.
282. *See id.* at 334 (dissenting opinion).
286. *See id.* at 812.
287. *Id.* at 817 (dissenting opinion).
288. *Id.* at 817-18 (dissenting opinion).
289. *Id.* at 814 (quoting Alcoholic Beverage Control Law § 101-c (Act of April 15, 1950, ch. 689, 1950 N.Y. Laws 1566 (repealed 1964))).
290. *Id.* at 815.
of the interests of only one segment of the community even when it consisted "of community residents and political leaders." Thus, letters from a state senator, assemblyman, and councilperson, together with a petition containing over 800 signatures in protest of the opening of a discotheque, could not justify the Authority in refusing to issue a liquor license to the new business. While the Authority might have been "swayed by the number of objectors," the Court of Appeals declared it essential to "keep in mind that ours is a government of law and not of men; and that decisions, especially where property rights are protected by Constitutions and laws, must be based upon such laws and not upon sympathy or public opinion." In an analogous case, the court had earlier held that the New York City Commissioner of Licenses could not refuse to approve the location of a junk yard on land zoned "as an unrestricted use district" simply because of "mere objections of the residents."

These cases appear to point back toward the earlier effort by Judge Irving Lehman in the mid-1930s to preserve the police power from capture by special interests, yet at the same time leave legislative bodies free to address the complex problems arising from the innumerable failures of the free market that were occurring in twentieth-century New York. As did Lehman, the judges of the post-World War II Court of Appeals frowned upon distributional decisions made solely in response to political pressures. Thus, they would not, as we have just seen, sanction the closing of a junk yard in an area zoned for unrestricted use merely because local residents objected to its opening. But Lehman and later judges would have protected the residents if zoning authorities had created legitimate expectations on their part by imposing restrictions in a comprehensive plan. As a result, established people in a community, who had used their political power to obtain a proper legislative or administrative determination that the good of the community consisted in the preservation of their rights, could have their rights protected. But individuals who had not used their political power in the proper forum could not thereafter use it elsewhere to defeat the claims of an entrepreneur striving to make a profit by exploiting the free market.

292. See id. at 971.
295. See id.
Thus, the line between allowing regulations to deal with market failures and invalidating regulations when their goal was simple redistribution came down to whether the interest groups assisted by legislation had followed proper procedures in the legislative process. If they had laid a foundation for establishing a market failure as a justification for a legislative regulation, the courts typically would sustain the legislation. But, if they had failed to lay the foundation, a finding of unconstitutionality might occur.

As thin and amorphous as this line might be, it is the only principled line that can be teased out of the New York cases. Unlike the United States Supreme Court, the New York courts were never willing to sustain all regulatory legislation that came before them, nor could they invalidate all except what was narrowly tailored to accomplish core health and safety concerns. An unprincipled alternative was to engage in ad hoc balancing on a case-by-case basis, as did one court in holding that a county ordinance prohibiting the idling of motor vehicles for more than three minutes was “an oppressive, unreasonable and arbitrary burden” in light of its “minuscule” effect in “combating air pollution.” Perhaps balancing was what they routinely did.

But balancing, in turn, had its problems, as illustrated by the Court of Appeals’ 4-3 decision in the case of *Wignall v. Fletcher*. At issue in *Wignall* was whether the Commissioner of Motor Vehicles could revoke the license of an eighty-two-year-old man who had been driving a motor vehicle with a license since 1910. The man, George Wignall, came to the Commissioner’s attention when he became involved in the first accident in his driving career, which occurred when a boy ran into the street and into the rear end of Wignall’s car. On one side of the scales was “the need for the . . . exercise by the commissioner of his duties in his laudable effort to prevent unsafe driving on the highways.” On the other side was the fact that a “license to operate an automobile is of tremendous value to the individual . . . for the essential purposes of attending at the village stores, taking his invalid wife to church on Sundays, and the like.” How would the judges of the Court of Appeals resolve this conflict?

The conflict, it should be noted, is one that is resolved daily by
countless officials and citizens, who make judgments whether to license and insure drivers and whether to take to the road and drive. The conflict is also one involving the most serious considerations on both sides. For most Americans in the second half of the twentieth century, the capacity to drive a car may be the most important entitlement they have; without a car, they would lose access to employment, shopping, entertainment, and social connection. Driving is surely one of the key symbols of freedom and empowerment in late twentieth-century America. At the same time, automobiles wreak more physical and social destruction than anything else in our culture. Apart from the inevitable diseases associated with aging and dying, nothing causes more deaths, accidents, destruction, pollution, and pain than automobiles.301 Every time a state official authorizes an individual to drive or declines to grant such an authorization, the official resolves this fundamental conflict between freedom and safety. That is, the official, or in the case of Wignall the fourth judge who created the one-vote majority on the Court of Appeals, determines whether safety, one of the two core values302 protected by the police power, or individual freedom, one of the two central rights303 protected by the Constitution, shall triumph.

This central issue of how to balance health and safety against freedom is one for which fixed legal principles do not exist. This insight into the absence of principle is one at which the United States Supreme Court arrived in the late 1930s, when it decided to defer judicially to whatever balances legislatures reached.304 The New York courts arrived at this same insight at least a decade earlier. And arguably, when the fourth judge on the Court of Appeals came down on the side of freedom in the Wignall case and ruled that the Motor Vehicle Bureau could not revoke the octogenarian’s license, he too was conscious of the insight.

We can never be certain, however, what the fourth judge and his brethren in the Wignall majority actually decided. All we know is what their opinion said. It said that, under proper circumstances, the Commissioner of Motor Vehicles would have power to revoke an octogenarian’s license, but that in Wignall the attempt at revocation failed because the

302. Health, of course, is the other.
303. Equality, of course, is the other.
Commissioner used improper procedures. After giving notice of a hearing under one section of the Vehicle and Traffic Law to determine whether Wignall was physically fit to drive, the Commissioner revoked his license under another section because Wignall failed to pass a new road test.\textsuperscript{305} The majority, in effect, interpreted the Vehicle and Traffic Law as authorizing the Commissioner, upon receipt of notice of some default by a driver, to take a single action against the driver, such as requiring either a physical examination or a road test, but not both. By implication, the majority also ruled that the Commissioner had no power to demand anything from a licensed driver unless the driver gave cause for the demand or the statute explicitly authorized it. The dissent, in contrast, appears to have taken the view that a licensed driver could be reexamined whenever officials of the Motor Vehicle Bureau doubted his or her driving competence.\textsuperscript{306}

This holding, in effect, returns us full circle to process and procedure. It appears that whenever a conflict emerged between a claim of right, on the one hand, and the power of regulation, on the other, the central question for New York judges was whether the regulators and those who benefited from regulation had adhered to proper processes and procedures. If they had, efforts at regulation were upheld. Only if they had not, did constitutional rights triumph.

It appears ultimately that while political theorists were able cleverly to adjust to the new realities of interest-group conflict, New York judges were not. They had the choice only of deferring to legislative policy judgments or of substituting their own judgment for that of the other branches of government. When they understood that those other branches represented the people at large in their efforts to attain the common good, it was easy to be deferential. But when they understood, as was often necessary in the postwar era of interest-group liberalism, that legislators represented only some special interests in their conflict with other interests, the judges were tempted to perceive at least some legislation as unfair and hence to strike it down as invalid. Only judges with extraordinary humility, who recognized that they could make no wiser choices than legislators, would continue to defer.

\textsuperscript{305} See \textit{Wignall}, 103 N.E.2d at 731.

\textsuperscript{306} See \textit{id.} at 732-33.
Directional shifts parallel to those in the law of regulation also occurred after World War II in the law of eminent domain and taxation, as New York judges grew increasingly suspicious that these public powers, like the power of regulation, were being used to further special interests rather than the good of the public as a whole. As was true with regard to regulation, there was no sharp doctrinal break during or immediately after the war years. Nonetheless, as government used eminent domain more extensively and taxed more heavily, judges began to see more cases in which the use of government powers raised suspicions. In response, the judges had to consider whether to alter their emphasis in deciding the cases.

A. Eminent Domain

The case in which the expanded use of eminent domain began was New York City Housing Authority v. Muller. The issue in Muller, on which there was “no case in this jurisdiction or elsewhere directly in point,” was whether the City of New York could condemn privately held land in order to construct “apartments to be rented to a class designated as ‘persons of low income.’” Rental to such a limited class, it was argued, made the taking one for a private rather than public use. At the height of the New Deal, however, the Court of Appeals rejected the argument, observing that it “disregard[ed] the primary purpose of the legislation,” which was “not to benefit that class [i.e., the poor] or any class,” but “to protect and safeguard the entire public from the menace of the slums.” As the legislature had noted and the Court of Appeals reiterated,

Slum areas are the breeding places of disease which take toll not only from denizens, but, by spread, from the inhabitants of the entire city and state. Juvenile delinquency, crime, and immorality are there born, find protection, and flourish. Enormous economic loss results directly from the necessary expenditure of public funds to maintain health and hospital services for afflicted slum dwellers and to war against crime.

308. Id. at 154.
309. Id. at 155.
310. Id.
311. Id. at 156.
and immorality. . . . Concededly, these are matters of state concern, since they vitally affect the health, safety, and welfare of the public. Time and again, in familiar cases needing no citation, the use by the Legislature of the power of taxation and of the police power in dealing with the evils of the slums, has been upheld by the courts. Now, in continuation of a battle, which if not entirely lost, is far from won, the Legislature has resorted to the last of the trinity of sovereign powers by giving to a city agency the power of eminent domain.312

Thus public housing was not class legislation designed to benefit the poor by tapping into the pockets of the rich, but legislation designed for the benefit of the people as a whole. It was, in short, a public use.

The years following World War II witnessed an enormous expansion in the Muller doctrine. Subsequent cases declared that either the provision of housing for those in need313 or the elimination of slums and blighted areas314 gave sufficient ground for use of the takings power, even if the property taken was later turned over to private enterprise for the construction of the intended new use.315 As a result of these cases it became clear by the 1970s, when “the complexities of urban conditions became better understood,” that properties subject to condemnation would include not only “‘slums’ as that term was formerly applied,” but also areas suffering from, “among other things, economic underdevelopment and stagnation.”316 It also became acceptable for the private entity that would ultimately obtain condemned land to act as

312. Id. at 154 (citation omitted).
A number of cases involved the state’s temporary appropriation of apartments, especially in resort areas, during the housing shortages immediately following World War II. See In re Rego Park Houses, 102 N.Y.S.2d 510 (Sup. Ct. 1950); Weitzner v. Stichman, 64 N.Y.S.2d 40 (Sup. Ct.), rev’d, 64 N.Y.S.2d 50 (App. Div. 1946), aff’d, 72 N.E.2d 625 (N.Y. 1947); London v. State, 92 N.Y.S.2d 756 ( Ct. Cl. 1949); see also Dormitory Auth. v. 59th St. & 10th Ave. Realty Corp., 308 N.Y.S.2d 160, 162-63 (Sup. Ct. 1970) (upholding power of Dormitory Authority to condemn land not only for collegiate housing but perhaps for classroom facilities as well).
“sponsor” for the project; indeed, in New York’s leading case, the Otis Elevator Company had threatened to move to a new location “if suitable land was not found for its needed modernization and expansion.” The Court of Appeals found “nothing malevolent about that,” nor was it troubled by the fact that Otis obtained “the condemned land for a price which [was] but a fraction of that paid” to the original “owners in condemnation.” The court, in short, had come to view the condemnation power as a sort of urban renewal subsidy, with the purpose of encouraging “the land clearing, the construction and other commitments the community desires . . . where the cost of acquiring the land privately . . . would be sufficiently expensive or difficult to deter private entities.”

The use of eminent domain to subsidize urban renewal was merely the beginning, however, of the judiciary’s expansion of the power. Courts upheld condemnations to facilitate the construction of highways, the elimination of billboards along highways, and the construction of parking facilities at business sites; to provide power sources and transmission facilities for utility companies; to enable municipalities to gain control of rapid transit and bus facilities; and to provide land

317. Id. at 331.
318. Id.
319. Id.
GROWTH OF DISTRUST

for future use of the United Nations.\textsuperscript{325} Courts also upheld use of the takings power to provide condemnees with substitutes, in the form of either land or access, for what had been taken from them in the original condemnation.\textsuperscript{326} Other cases allowed use of the power of eminent domain to save Carnegie Hall from destruction,\textsuperscript{327} to help the Museum of Modern Art finance a new wing,\textsuperscript{328} and to assist in the rehabilitation of New York City's Commodore Hotel into the Grand Hyatt Hotel.\textsuperscript{329}

With the decision of each of these cases, the link between government action and the public good became increasingly attenuated. The case that displayed the private character of the eminent domain power most clearly, though, was \textit{Courtesy Sandwich Shop, Inc. v. Port of New York Authority}.\textsuperscript{330}

The Courtesy Sandwich Shop had been condemned by the Port Authority to assemble the land on which to build the World Trade Center which, it was said, was needed as an instrument for the centralization of international trade.\textsuperscript{331} Building two more skyscrapers to house the offices of international trading firms was not the real purpose of the Trade Center, however. The real purpose, as Judge Van Voorhis noted in dissent, was to obtain rental income that “could be utilized to offset the deficits of operating the Hudson & Manhattan Railroad,” a subway to New Jersey over which the Port Authority had been asked to assume control.\textsuperscript{332} The Port Authority, “traditionally jealous of its solvency,” was unwilling to run the railroad without the income from the Trade Center.\textsuperscript{333}


\textsuperscript{328} Cases were divided, however, on whether the condemnation power could be used simply to provide access to landlocked property. Compare City of Utica v. Damiano, 193 N.Y.S.2d 295 (Oneida County Ct. 1959) (taking allowed), \textit{with} Saso v. State, 194 N.Y.S.2d 789 (Sup. Ct. 1959) (taking invalidated).


\textsuperscript{331} \textit{See id.} at 404.

\textsuperscript{332} \textit{Id.} at 409 (dissenting opinion).
Center, which it expected would exceed land acquisition and construction costs by enough to provide the requisite subsidy.\textsuperscript{333} It thus planned to "meet its [railroad] deficits by expropriating the good will and condemning the real estate of private property owners instead of by general taxation."\textsuperscript{334} A 6-1 majority on the Court of Appeals authorized it to do so.\textsuperscript{335}

This ability to use eminent domain takings to subsidize narrow interest groups like New Jersey commuters at the expense of the owners of condemned property depended, of course, upon the ability of condemnors to acquire greater value than the price which had to be paid to condemnees. Thus, it followed that by reducing the damages payable upon condemnation—the price paid to condemnees—judges could enhance eminent domain's subsidization effects. In the second half of the twentieth century, New York judges frequently pursued an ostensible policy that many government "interference[s] . . . must be shouldered" without compensation as "inconveniences to be borne by the individual for the larger benefit of the community and the public in general,"\textsuperscript{336} and that, when granted, "[d]amages should not be awarded twice, once for the direct taking and then again under the guise of consequential damages."\textsuperscript{337} These judges decided many cases that limited the award of consequential damages and thereby achieved enhancement of eminent domain's subsidization effects.\textsuperscript{338}

\textsuperscript{333} Id. at 410 (dissenting opinion).
\textsuperscript{334} Id. (dissenting opinion).
\textsuperscript{335} See id. at 411.
\textsuperscript{337} Mercury Aircraft, Inc. v. State, 264 N.Y.S.2d 7, 8 (App. Div. 1965); see also In re Baden-Ormond Area Urban Renewal Project, 231 N.Y.S.2d 679, 681 (Sup. Ct. 1962) (observing that "the carrying out of the program of urban renewal greatly outweighs the preservation of the respondent's bargaining position").
\textsuperscript{338} Although courts continued to adhere formally to the old rule that consequential damages for a change in grade of a highway were compensable when a statute authorized compensation, see Williams v. State, 309 N.Y.S.2d 795 (App. Div. 1970); Meloon Bronze Foundry, Inc. v. State, 176 N.Y.S.2d 452 (App. Div. 1958); Melillo v. Kracke, 26 N.Y.S.2d 743 (App. Div. 1941); Bachmann v. New York Tunnel Auth., 47 N.Y.S.2d 767 (Sup. Ct. 1941); Smith v. State, 48 N.Y.S.2d 58 (Ct. Cl. 1944), in at least some instances they found diverse, often technical reasons to avoid granting damages even in situations where statutes made damages available. See In re Brooklyn-Queens Connecting Highway & Parks, 90 N.E.2d 183, 184 (N.Y. 1949) (condemnee gained a benefit); Benderson Dev. Co. v. State, 401 N.Y.S.2d 931, 933 (App. Div.) (right to established grade held pursuant to permit revocable at will), aff'd, 385 N.E.2d 1299 (N.Y. 1978); New York Cent. R.R. v. State, 129 N.Y.S.2d 121, 124 (App. Div. 1954) (railroad cannot recover for damage to own land due to grade crossing elimination), aff'd, 127 N.E.2d 866 (N.Y. 1955); Dumala v. State, 340 N.Y.S.2d 515, 521 (Ct. Cl. 1973) (insignificant grade change at intersection of state and municipal roads due to change in state road for which there is no statutory liability); Aichino v. State, 154 N.Y.S.2d 627,
Other rules also limited a condemnee's ability to recover full compensation. Thus, no recovery was allowed for personal property located on condemned land or for fixtures that were removed from the land, and moving expenses could be recovered only if specifically


Some courts held, however, that fixtures were compensable, see In re County of Suffolk, 392 N.E.2d 1236, 1240 (N.Y. 1979); Cooney Bros. v. State, 248 N.E.2d 585, 587-88 (N.Y. 1969); Rose
authorized by statute. Nor could recovery be had for profits lost in the dislocations of a taking or for lost parking facilities, if they could be obtained in another location. Only minimal interest was awarded in eminent domain cases, and the rule that "value for condemnation purposes is value to the owner and not value to the taker"—a rule that enabled the taker to appropriate the profits of any condemnation project without having to pay for them—was made even more unfavorable to condemnees by one court's holding that a taker need not pay for any speculative "opportunities the owner may lose."

---


Other anti-compensation decisions were simply weird. Some upheld statutes permitting the state or its agencies to abandon condemnation proceedings after they had seized the land but before they had parted with the compensation. See Terrace Hotel Co. v. State, 227 N.E.2d 846, 850 (N.Y. 1967); Lafayette Hotel Co. v. County of Erie, 205 N.Y.S.2d 626, 629, 631 (Sup. Ct. 1960).

Another held that the state, pursuant to an unconstitutional statute, had acquired an unusually wide right of way for a highway that had been laid out 150 years earlier, even though the entire width had never been used. As a result, the state did not need to condemn new land when it sought to widen the highway. See Schillawski v. State, 173 N.E.2d 793, 795 (N.Y. 1961).

Oddest of all was In re Third Avenue Railroad Bridge, 270 N.Y.S.2d 791 (Sup. Ct. 1965), aff'd, 234 N.E.2d 445 (N.Y. 1967), which held that property owners along Third Avenue in Manhattan, who had received damage awards for the obstruction of their rights to light, air, and access when the elevated railway had been constructed during the late nineteenth century, had to repay those awards when the el was torn down in the 1950s.
It was a rare judge who by the 1970s approached any takings case from the perspective that "justice demands that the despoiler, whether individual, corporation, or government, be compelled to pay for that which he spoils." A perspective emphasizing justice was possible only in an area, like protection of the environment, that had "become a national priority." At least on occasion, however, it

347. Id.


The new, relaxed rule, as explained by one judge, was that "[w]hen one condemning authority [sought] to appropriate land already held by another, the Court, of necessity, [had to] resolve the question of competing priorities." City of Buffalo v. Iroquois Gas Corp., 332 N.Y.S.2d 925, 927 (Sup. Ct. 1972). Although the courts could not "resolve all of the complex problems arising from the existence of separate... political subdivisions where natural forces [were] such as to require them to collaborate," they could no longer be bound by the old fixed rule but instead could use their "equitable powers" to sculpt relief "on reasonable and equitable conditions." Buffalo Sewer Auth. v. Town of Cheektowaga, 228 N.E.2d 386, 390 (N.Y. 1967).

The same was true where property owners sought to obstruct the condemnation power in reliance on some right created by regulatory legislation, such as the right of a tenant under rent control to renewal of its lease. Not surprisingly, judges invariably allowed condemnations to go forward. See In re Brooklyn Battery Tunnel Plaza, 62 N.Y.S.2d 305, 308 (Sup. Ct.), aff'd, 64 N.Y.S.2d 175 (App. Div. 1946); City Sch. Dist. v. Cohen, 132 N.Y.S.2d 365, 367 (Saratoga County Ct. 1954), aff'd, 137 N.Y.S.2d 695 (App. Div. 1955); cf. George F. Weaver Sons Co. v. City of Utica, 92 N.Y.S.2d 372, 377 (Sup. Ct. 1949) (holding that the city may condemn less than the full amount authorized by bankruptcy court). But cf. Society of the New York Hosp. v. Johnson, 154 N.E.2d 550, 552-53 (N.Y. 1958) (upholding express legislative grant of immunity from condemnation until expressly repealed).

was possible.  


B. Taxation

No fundamental changes occurred in formal doctrines of tax law during the second half of the twentieth century. But the enormous enhancement of government’s power and its increased use for the benefit of special interests, the effects of which we have already witnessed in the law of regulation and eminent domain, proved transforming in the area of real estate taxation as well.

The key transformation—one which typified the new uses of government power after World War II—occurred when the legislature began to grant tax exemptions, which had long been available to government agencies and charities, to profit-making entities organized for public benefit purposes. This new approach to tax exemptions had emerged initially in 1920 when the legislature adopted the Emergency Housing Law, which allowed the City of New York to remove from its assessment rolls newly constructed apartment buildings used exclusively for dwelling purposes.\textsuperscript{349} The Court of Appeals soon afterwards upheld the constitutionality of the legislation in 1923.\textsuperscript{350} This “so-called ‘housing legislation,’” which contained “correlative provisions” granting “tax exemption” and imposing “control of rent,”\textsuperscript{351} was designed to help the free market alleviate a perceived housing shortage in New York City in the aftermath of World War I and to regulate the housing market in the interim.

Although the Emergency Housing Law expired in 1925 and apartments constructed after that date did not receive tax exemption,\textsuperscript{352} the courts continued to sustain other legislative subsidies for the construction of housing. For example, the Court of Appeals in 1930

\begin{footnotesize}
\textsuperscript{350} See Edward J. Moberg Co. v. Mohr, 142 N.E. 280, 280 (N.Y. 1923) (mem.); Hermitage Co. v. Goldfogle, 142 N.E. 281, 281 (N.Y. 1923) (mem.).

To obtain exemption, buildings had to be completed within specified time periods, see Sikora Realty Corp. v. City of New York, 260 N.Y.S. 803, 804-05 (App. Div. 1932), \textit{rev’d on other grounds}, 186 N.E. 796 (N.Y. 1933), and not be used for any business purpose above the first floor. See People \textit{ex rel. 300 Park Ave., Inc. v. Goldfogle}, 233 N.Y.S. 102, 105 (App. Div. 1929).


\textsuperscript{352} See Act of April 1, 1924, ch. 87, 1924 N.Y. Laws 125 (extending tax exempt status to apartment houses that commenced construction by April 1, 1925) (repealed 1959).
\end{footnotesize}
sustained as "salutary" legislation that exempted buildings in the course of construction from assessment.\(^3\) Lower courts similarly sustained "beneficial legislation," granting exemptions to private limited dividend housing corporations,\(^4\) and a statute adopted during the Depression,\(^5\) as "part of a complete plan to give to distressed home owners an opportunity to save their homes from foreclosure."\(^6\) This plan exempted refinancings through the Federal Home Owners' Loan Corporation from the state's mortgage recording tax.\(^7\) Meanwhile, the Home Owners' Loan Act was sustained by federal judges as legislation of the "character . . . enacted by Congress over a span of years" and thus as an "act in furtherance of general or national as distinguished from local purposes."\(^8\) One state trial court sustained a tax exemption for a corporation that constructed an apartment building to furnish subsidized lodging and food to unmarried working women on the ground that no one could "close their eyes to conditions which every member of the community must know exists, nor to considerations which appeal to every right-thinking citizen."\(^9\) On this basis, the state judge took "judicial notice[] that there are many working women whose moral and physical well-being will be improved through an opportunity to obtain food and lodging in proper surroundings."\(^10\)

Even more important were the increases in taxes that occurred when government's assumption of increasing societal obligations demanded increased revenues. With the increase of taxes, the subsidization effect of tax exemptions for special interests likewise grew. As the legislature, in turn, granted a broader range of exemptions, the judiciary uniformly sustained the grants. The end result was that an issue that had been


\(^{357}\) For a case sustaining the constitutionality of the tax, see Franklin Society for Home Building & Savings v. Bennett, 14 N.Y.S.2d 49, 50 (App. Div.), aff'd, 24 N.Y.2d 854 (N.Y. 1939).

\(^{358}\) United States v. Kay, 89 F.2d 19, 22 (2d Cir. 1937), vacated on other grounds, 303 U.S. 1 (1938).


\(^{360}\) Id.
unresolved in 1920—whether government could use its fiscal power to compensate citizens for harm that it had not imposed—was dispositively resolved by 1980, by which time the government's power to compensate anyone for anything had become unquestioned.

*Williams v. Walsh* made this clear as early as 1942. The case arose when Henry Williams, a New York City fireman, enlisted in the marines in January 1942 and through his attorney-in-fact brought suit for the difference between his marine pay and his higher fire-department salary, in reliance on state legislation providing for payment of such differential to all public employees absent in military service. Although the gratuity at issue in the *Williams* case would ultimately prove massive in comparison with the World War I veterans' bonus, held unconstitutional in the 1921 *Westchester Bank* case, a unanimous Court of Appeals had no difficulty sustaining it. In the language of Chief Judge Irving Lehman,

"[T]he grant of special benefits and privileges . . . involved no arbitrary discrimination. There was reasonable ground for the determination by the Legislature that the State would receive adequate benefit from such a grant to all within the class defined by the Legislature. . . . "A class [might] lawfully be restricted, if the lines defining the restriction [were] not arbitrary altogether . . . ." The court there was considering the validity of limitations upon freedom of action imposed by the Legislature under the police power. The same rule applie[d], with greater force, where there has been a grant of special benefit . . . ."

Thereafter, the constitutionality of civil service preferences and bonuses for veterans was unquestioned. *Williams* made it clear, in short, that the legislature possessed plenary power to redistribute wealth among special interests through taxation and welfare subsidies. As one judge observed, it was "inherent in the normal exercise of the power to tax" for government "to select the

361. 43 N.E.2d 498 (N.Y. 1942).
362. See id. at 499.
363. People v. Westchester County Nat'l Bank, 132 N.E. 241, 247 (N.Y. 1921) (invalidating statute granting bonus to veterans on grounds that it was merely a gratuity and thereby unconstitutional).
364. Williams, 43 N.E.2d at 501 (quoting People v. Teuscher, 162 N.E. 484, 485 (N.Y. 1928)).

But when the state constitution itself specified limits on benefits such as civil service preferences, the legislature could not exceed them. See Meenagh v. Dewey, 36 N.E.2d 211 (N.Y. 1941).
subjects of taxation and to grant exemptions.\textsuperscript{366} The \textquotedblleft inequalities which result[ed],\textquotedblright in turn, \textquotedblleft infringe[d] no constitutional limitation.\textsuperscript{367}

Even so, familiar limitations to the granting of exemptions continued to be proclaimed. Thus it was declared that any \textquoteleft exemption from taxation \textquoteleft must clearly appear, and the party claiming it must be able to point to some provision of law plainly giving the exemption.\textsuperscript{368} Ambiguous language would \textquoteleft be \textquoteleft construed against the taxpayer', although\textquoteright it would not be interpreted in \textquoteleft so narrow and literal [a fashion] as to defeat its settled purpose.\textsuperscript{369} Also reiterated were the general rules that property held by an agency of the state for public,\textsuperscript{370} though not private purposes,\textsuperscript{371} was immune from taxation, and that property of the United States or of instrumentalities thereof was similarly immune\textsuperscript{372} unless Congress consented to the taxation.\textsuperscript{373} As entities with complex relationships to the federal government proliferated during and after World War II, however, there was a growing trend not to treat them as federal

\textsuperscript{366.} Garlin v. Murphy, 273 N.Y.S.2d 374, 378 (Sup. Ct. 1966).

\textsuperscript{367.} Id.


\textsuperscript{369.} Id.


instrumentalities and "to reject immunizing these private parties from nondiscriminatory state taxes as a matter of constitutional law," especially when the federal government itself failed to assert a claim of immunity. The reason for the trend, as explained by Kenneth Keating, a Court of Appeals judge who had also served New York as a United States Senator, was "that the problems which face State and local governments in meeting their responsibilities in our complex society require the expenditure of vast amounts of money." To circumscribe their power of taxation "could seriously unbalance the fiscal affairs of local tax authorities, particularly in times of distress," and leave them unable to provide for "new and increased burdens" in the nature of "necessary community services" that federal programs had helped to create.

Among charities, not-for-profit private schools and colleges became favored beneficiaries of tax exemptions. Their property received exemption not only when used in traditional teaching activities but also when used for research, for a nursery school, for a school of continuing education, or for lease to another educational institu-

---


376. See WHO'S WHO IN AMERICA 1659 (38th ed. 1974).


379. Schools conducted for profit, however, were not tax exempt. See Semple Sch. for Girls v. Boyland, 126 N.E.2d 294, 298 (N.Y. 1955); see also Hewitt v. Bates, 78 N.E.2d 593, 595 (N.Y. 1948) (holding that teachers conducting school in nature of business were not exempt from unincorporated business tax).


The appellate division reversed the trial court decision in this case, which understood that nursery schools were not educational but were merely "of distinct advantage to the individual parents and promote[d] their personal convenience." Croton Community Nursery Sch. v. Coulter, 121 N.Y.S.2d 755, 758 (Sup. Ct. 1953).

One college even obtained a tax exemption for vacant land which it had no intention of using for educational purposes and which a prior case had held subject to taxation. When colleges in the aftermath of World War II purchased formerly private dwelling houses, not "as a matter of business acumen" or "convenience to . . . its students, faculty and staff" but out of necessity "in direct furtherance of an expanded program in higher education," those dwellings became tax exempt when used initially to house students and later to house faculty. Even fraternity houses were granted tax exempt status when they were completely under university control, although not otherwise. Likewise, a cafeteria operated by a profit-making corporation but owned by a college and open only to the college's students, faculty, and staff would receive a tax exemption, as would recreational facilities used primarily by the same sorts of individuals. Although judges were "mindful of . . . the policy of having all realty bear an equal share of the cost of public services . . ., as well as the pressing need for tax money," they clearly placed more weight on the policy

388. See Cornell Univ. v. Board of Assessors, 260 N.Y.S.2d 197, 199 (App. Div. 1965); Cornell Univ. v. Thorne, 57 N.Y.S.2d 6, 9 (Sup. Ct. 1945); see also Plattsburgh College Benevolent & Educ. Ass'n v. Board of Assessors, 252 N.Y.S.2d 229, 239 (Sup. Ct. 1964) (finding that housing for students and faculty owned by independent charity was not exempt since it was not under direct university control); Faculty-Student Ass'n of N.Y. State College for Teachers, Inc. v. City of Albany, 191 N.Y.S.2d 120, 124 (Sup. Ct. 1959) (same); Plattsburgh State Teachers College Benevolent & Educ. Ass'n v. Barnard, 170 N.Y.S.2d 712, 718 (Sup. Ct. 1958) (finding that realty used to collect bequests and other funds on behalf of the college was not an educational purpose and therefore not exempt).
391. Faculty-Student Ass'n of Harpur College, Inc., 292 N.Y.S.2d at 228.
encouraging, fostering and protecting . . . educational institutions."

Hospitals were another favored charity entitled to tax exemptions even though they charged patients for their services. Like schools and colleges, they could obtain exemptions even for buildings used to provide housing for staff. But they were less successful in getting exemptions for other, more peripheral property, such as facilities used by doctors for private offices, hospital facilities that were temporarily closed down, or vacant land.

Favored tax treatment was also extended into new areas. It was routinely granted, for example, to not-for-profit entities with a purpose of protecting the natural environment or enhancing the cultural one. In addition, tax exemptions were granted to an agricultural

392. Id. (quoting People ex rel. Watchtower Bible & Tract Soc'y, Inc. v. Haring, 170 N.E.2d 677, 680 (N.Y. 1960)).

Cultural institutions received no exemption from unemployment insurance taxes, however, since the enabling legislation was not written so as to provide such an exemption. See Goldovsky Opera Inst. v. Catherwood, 304 N.Y.S.2d 306, 307 (App. Div. 1969); In re Peoples Theatres, Inc., 40 N.Y.S.2d 55, 56 (App. Div. 1943). But see In re Guerin, 80 N.E.2d 326, 329 (N.Y. 1948) (holding that theater company was exclusively educational in purpose, thereby exempting it from unemployment tax).
society, a Salvation Army thrift shop, an ambulance corps, a nonprofit lender of money at moderate rates, and a corporation formed to study the causes of delinquency and narcotics addiction.

Tax relief was extended even more broadly to people and organizations who constructed new housing during the post-World War II period, when housing was in short supply. In addition to existing exemptions for limited dividend housing companies, favorable tax treatment was granted to those who rehabilitated multiple dwellings or constructed new ones in blighted areas. Tax abatements were also upheld for veterans and low income elderly.

The most important new extension of favorable tax treatment, however, resulted from the state’s effort to “encourage business development... by providing tax exemptions to those who would build,
expand or improve their industrial, business and commercial facili-
ties.” The state’s Industrial Development Agency Act, for exam-
ple, reflected a “modern view of the proper scope of governmental
activity,” which encompassed “the direct involvement of government in
dealing with the economic problems of our state” by creating “a
statewide program to maintain, expand and attract industry to our
state.” One approach, under section 485-b of the Real Property Tax
Law, was to exempt from assessment one-half of the value of any
new commercial improvements, such as a printing plant or a shop-
ping center. A more complex scheme, the constitutionality of which
was sustained by the Court of Appeals in a case approving a forty-year,
multi-million dollar tax abatement to what is now New York City’s
Grand Hyatt Hotel, involved acquisition of property by a municipal
development corporation and its lease back to private redevelopers.
In other cases, the Court of Appeals sustained the exemption of motion
picture admissions from the sales tax out of concern “that the vitality of
the moving picture theatre industry might be undermined” without the
exemption, as well as favorable tax treatment for the New York
Stock Exchange, out of concern that the preexisting stock transfer tax
“was driving business from the State.” The courts also sustained
favorable tax treatment for individuals who earned their living from
practice of a profession and for owner-occupants of business premis-

409. Newsday, Inc. v. Town of Huntington, 426 N.Y.S.2d 409, 413 (Sup. Ct. 1980), aff’d, 441
413. See id. § 485-b(2)(a); see also Newsday, Inc., 426 N.Y.S.2d at 414-15.
419. Courts refused, however, to hold that many occupations were actually professions. See Koner
Comm’n, 26 N.E.2d 955 (N.Y. 1940) (customs broker); People ex rel. Blaikie v. State Tax Comm’n,
es as part of an overall policy of encouraging investors to "'keep their money and securities [in New York]."'\textsuperscript{419} Finally, they upheld a practice of not assessing most machinery used in a business as part of the business realty subject to taxation.\textsuperscript{420}

The extension of exemptions in certain areas, with a consequent erosion of the tax base, led, in turn, to "'significant . . . efforts to broaden the real property tax base'" in other areas by restricting once traditional exemptions.\textsuperscript{421} Probably the most important of the restrictive cases—a case specifically cited by the Court of Appeals as one of these "efforts"\textsuperscript{422}—was \textit{Association of the Bar v. Lewisohn}.\textsuperscript{423}

As the court observed in \textit{Lewisohn}, tax exemptions had "proliferated at an alarming rate." By the mid-1960s, "more than 30% of the assessed value of all real property in the State was exempt from taxation for various reasons," and there were concerns that, if exemptions continued to grow at their then current rate, "one half of all real property on the tax rolls of local governments would [soon] be exempt from taxation."\textsuperscript{424} For this reason, the legislature authorized localities to terminate exemptions for all but a few specified sorts of not-for-profit organizations.\textsuperscript{425} Joining in this effort "to stem the erosion of municipal tax bases,"\textsuperscript{426} the \textit{Lewisohn} case upheld termination of the real estate tax exemptions of two hoary institutions—the Explorers Club of New York and the Association of the Bar of the City of New York.

\textit{Lewisohn} and the legislation that it construed did not, however,

\textsuperscript{419} See Martin v. Gwynn, 236 N.Y.S.2d 755, 757 (App. Div. 1963); West Mountain Corp. v. Miner, 381 N.Y.S.2d 606, 610-11 (Sup. Ct. 1976); Tri-County Asphalt & Stone Co. v. Board of Assessors, 190 N.Y.S.2d 1021, 1023 (Sup. Ct. 1958); cf. Grumman Aircraft Eng'g Corp. v. Board of Assessors, 141 N.E.2d 794, 799 (N.Y. 1957) (ruling that real property leased from federal government was not taxable). But see City of Lackawanna v. State Bd. of Equalization & Assessment, 212 N.E.2d 42, 47 (N.Y. 1965) (holding that towers, tanks, blast furnaces, and coke ovens at steel plant were not equipment and thereby taxable as real property).

\textsuperscript{420} See id.


\textsuperscript{422} See \textit{id}.

\textsuperscript{423} 313 N.E.2d 30 (N.Y. 1974).

\textsuperscript{424} \textit{Id.} at 36.


\textsuperscript{426} 313 N.E.2d at 36.
represent the sharp turn in policy which the Court of Appeals suggested they did. In fact, the courts had been growing increasingly hostile to upholding tax exemptions throughout the second half of the century. One court, for example, upheld the denial of favorable tax treatment to formerly substandard buildings that had been repaired or improved once those buildings ceased to be subject to rent control.\textsuperscript{427} Exemptions were similarly denied to professional associations,\textsuperscript{428} to nonprofit organizations providing recreation or mutual assistance to members and others,\textsuperscript{429} to entities holding property for ultimate charitable use,\textsuperscript{430} to an association chartered to erect a soldiers' memorial,\textsuperscript{431} to the American Kennel Club,\textsuperscript{432} and to the American Agriculturist.\textsuperscript{433} Cemeteries also found it increasingly difficult to sustain the burden of proof needed to obtain exemptions,\textsuperscript{434} and purchasers of real estate from tax exempt entities found it subject to immediate taxation.\textsuperscript{435} One judge in a suburban county even complained about the practice of assessing as farmland property that was "immediately salable . . . for development purposes," since the practice gave an "owner who retain[ed] such lands in a minimum use state . . . for speculative purposes . . . an unusual


advantage over the ordinary landowner."

The second case cited by the Court of Appeals was *Hellerstein v. Assessor of Islip*, which involved an effort to broaden municipal tax bases and render them more equal by limiting legislative freedom to sculpt tax benefits for special interests. *Hellerstein* was decided in the aftermath of both a long history of inequality in real property tax assessments and of judicial unwillingness to create procedures to correct the inequality. The court sought to achieve simultaneously the equality and the enhancement of tax bases by enforcing legislation dating back to the eighteenth century that required all property to be assessed at 100% of value. The *Hellerstein* court gave municipalities approximately eighteen months to comply with its mandate, but, in fact, the mandate never was obeyed. For example, in a case decided two years after *Hellerstein*, the appellate division observed that application of equalization rates in Nassau County would result in "the taxing unit . . . experience[d] a drop in property tax revenues" and then noted that "the answer, already provided by the Court of Appeals in *Hellerstein*, [was] for the taxing unit to reassess all of the properties on its rolls." Two years after *Hellerstein* the Court of Appeals was still lamenting the "deplorable disparity of equalization rates among the


438. *332 N.E.2d 279 (N.Y. 1975).*

439. The pattern of judicial unenforcement of the equality requirement began with cases like *C.H.O.B. Associates, Inc. v. Board of Assessors, 257 N.Y.S.2d 31 (Sup. Ct.), aff’d, 256 N.Y.S.2d 550 (App. Div. 1964), aff’d, 209 N.E.2d 820 (N.Y. 1965)*, where the trial judge declared that "the courts have uniformly held that . . . section [306] does not mandate assessments at 100% of full or market value," but "requires merely that the assessments be at a uniform rate or percentage of full or market value." *Id.* at 38; accord *Connolly v. Board of Assessors, 300 N.Y.S.2d 192, 195 (App. Div. 1969).*

As a result, the standard of assessment at 100% of full valuation had "not been adhered to in Nassau County since 1938 nor in any other area of the state," *700 Shore Rd. Assocs. v. Board of Assessment Review, 335 N.Y.S.2d 114, 117 (Sup. Ct. 1972)*, and the effort of one judge to compel the county to "establish an equitable and scientific system of assessing property for taxation" had been rebuked. *Carlson v. Podeyn, 197 N.Y.S.2d 1006, 1008 (Sup. Ct. 1960)* (issuing order holding assessors in contempt), *rev’d, 209 N.Y.S.2d 852 (App. Div. 1961).*

Thus, it was difficult for taxpayers to prove that their property was assessed at a higher rate than their neighbor’s. Even if proof were available there was little incentive to pursue the only available remedy, which was to obtain an increase in the neighbor’s assessment rather than a decrease in one’s own. *See Wolf v. Assessors of Hanover, 126 N.E.2d 537, 541 (N.Y. 1955).*


several boroughs" of New York City and how the problems it faced in the pending case would not have arisen “[i]f the property owners of each borough had been receiving equal treatment from the taxing authorities at the time of this assessment.”

Three years after Hellerstein, the appellate division extended the time for compliance to December 31, 1980, and the legislature soon did the same. Finally, in December 1981, the legislature, over the governor’s veto, passed “legislation which was designed to overrule” Hellerstein, and the Court of Appeals, in Colt Industries v. Finance Administrator, and the Court of Appeals acquiesced in the burial of its goal of equal taxation grounded upon an enhanced tax base.

Why did the court cave in? The answer lies in the practice by which “assessors customarily assessed residential at lower levels of assessment than commercial property,” which in turn meant that implementation of Hellerstein would “result in a significant shift of the tax burden to residential home owners, and cause a serious erosion in the tax base of assessing units.” This caused home owners, as well as many government officials, to unite against reassessment. Owners of commercial property, in contrast, were divided. Those who had constructed or renovated facilities in recent years had often been able to obtain favorable tax exemptions and abatements, whereas only those occupying structures built in the distant past paid full taxes. They probably found it easier over time to abandon their existing locations rather than to assemble the political pressure that was needed to force the legislature to comply with Hellerstein. Nor could the court impose pressure on the legislature, since it was incapable of issuing the one order that the legislature would have had to obey—an order prohibiting the collection of real estate taxes until such time as assessment practices had been brought into compliance with its mandate.

Fortunately, other efforts to enhance and equalize the tax base were more successful than the Court of Appeals’ initiative in Hellerstein. Among the revenue enhancements which the courts sustained were the imposition of an income tax on Native Americans residing on reserva-
tions in New York, 448 a sales tax on landlords’ receipts from their incidental activity of sub-metering electric current to tenants, 449 a real property tax on house trailers, 450 and a use tax on locomotives and automobiles operated within a city’s limits. 451 The state also continued its practice of allowing upstate municipalities to impose taxes on those portions of the New York City water supply system located outside the city’s limits. 452 “Upon the heels of the financial crisis confronting the State” 453 and its municipalities in the 1970s, the Court of Appeals sustained legislation requiring businesses that had already collected sales taxes to accelerate their payment to the state. 454 More generally, judges continued to adhere to the view that, in order to ensure adequate revenue collection, the “power of taxation on the local activities of large enterprises ought not to be viewed narrowly.” 455 “[F]airness and equity” were secondary “criteria against which the validity of tax statutes” 456 was to be measured, and it simply could not “be assumed that when the Legislature designed the particular statute it had either a specific or even a general desire to achieve a fair or balanced formula,” as distinguished from “the production or allocation of optimum revenue.” 457

Despite such dicta, however, judges did not entirely abandon

454. See id.
For some illustrative cases, see Trinity Place Co. v. Finance Administrator, 341 N.E.2d 536 (N.Y. 1975) and Bohling v. Corsi, 127 N.Y.S.2d 591 (Sup. Ct. 1953), aff’d, 118 N.E.2d 823 (N.Y. 1954).
457. Id. at 1340.
concerns about fairness and equity. In a number of cases, for example, they applied procedural rules facilitating taxpayer suits.\textsuperscript{458} In addition, the courts made certain that real estate taxes did not encompass income from the operation of a business but were based only on the value of the realty in question\textsuperscript{459} by formulating a rule that, in general, the reproduction costs of structures less depreciation, when added to the value of land, constituted the maximum amount at which a property could be assessed.\textsuperscript{460}

VI. CONCLUSION

Examination of doctrinal developments in New York’s law of administrative procedure, regulatory power, eminent domain, and taxation has uncovered common issues and, to a lesser extent, a common response to those issues. In all four areas, the years after World War II witnessed issues arising out of a growing perception that government entities often used their power to benefit special interest groups rather than the public as a whole. The common response was, on occasion, to strike down


As they sought to avoid overassessment, the courts conversely avoided underassessment by the rule that, in evaluating income data, assessors did not have to conform their assessments to an unprofitable use of otherwise sound realty. See \textit{People ex rel.} Lyford v. Allen, 146 N.Y.S.2d 186, 188 (App. Div. 1955); Carollee Realty Corp. v. Board of Assessors, 340 N.Y.S.2d 774, 780 (Sup. Ct. 1972).
government acts perceived to benefit narrow interests, although, in general, most legislative and administrative actions were judicially sustained.

Nonetheless, differences did exist between the doctrinal areas. New York's judges regularly held administrators to high standards of procedural regularity, and they struck down regulatory schemes with some frequency. In contrast, the judges made only minimal efforts to limit the power of eminent domain, and the limitations they imposed on legislative freedom of taxation were driven at least as much by concerns about preservation of the tax base as they were by objections to the equity of particular taxation schemes.

These differences between doctrinal areas were trivial, however, in comparison with the difference in attitude between cases from the 1920s and 1930s and cases in the aftermath of World War II. Especially during the years of the Great Depression, it had seemed clear that the exercise of government power to benefit the ill-housed, the ill-fed, and the underemployed was in the public interest of nearly the entire community, which had every right to control the depredations of the few. In the end, judges, especially the democratically elected ones who occupied the state bench in New York, could not stand in the path of laws enacted by the many to provide redress for the injustices visited upon them by the few. Hence, the judges deferred to the redistributive regulatory legislation of the Smith, Roosevelt, and Lehman administrations in Albany, as well as the national legislation of the New Deal and World War eras. Their deference made the legislation legitimate.

When the regulatory laws of the 1920s and 1930s were seen in light of the prosperity of the 1950s, 1960s, and 1970s, however, they assumed a new appearance. With the majority of New Yorkers no longer poor, the old regulatory laws no longer benefitted the many; instead, they seemed to help smaller, narrower groups that readily came to be perceived as special interests. But, as we have seen, identifying statutes as special-interest legislation did not dictate the appropriate judicial response. Judges had four possible approaches. First, they could adopt a nineteenth-century attitude and invalidate special-interest enactments as redistributive transfers of wealth between private individuals. Second, judges could reach the same result of holding a statute invalid by believing that they, unlike legislators who were inevitably beholden to special interests, possessed the independence necessary to achieve a disinterested, public-regarding resolution of interest-group conflict; this belief would lead them to invalidate legislation in particular cases in which they understood their impartial judgment to be superior to that of
GROWTH OF DISTRUST

beholden legislators. Third, the judges could focus on procedure and invalidate laws infected by procedural irregularities, while sustaining duly adopted laws. Fourth, they could assume a more humble attitude by which they recognized that they had no better standards than did legislators for resolving interest-group conflict and hence that they should defer to legislative judgments even though the legislators were beholden and the laws arguably were therefore unjust.

There is no way of knowing with certainty which of these attitudes judges adopted with greater frequency. Although they occasionally made oblique references to one or another of them, they did not identify their attitude with enough frequency to make a definitive judgment possible. We can only conclude that all four approaches were available to judges and that the judiciary as a whole vacillated among them in response to the facts of particular cases, the arguments of lawyers, and the predilections of the judges. The one conclusion at which one can arrive with certainty is that the interest-group nature of late twentieth-century politics, unlike the Marxian class-struggle character of the New Deal and Progressive eras, did not dictate a single, proper attitude that judges should adopt toward the regulatory, tax, and taking powers of government.