

THE ELEVATED RAILROAD CASES: PRIVATE PROPERTY AND MASS TRANSIT IN GILDED AGE NEW YORK

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INTRODUCTION

Largely erased from legal and historical memory, the elevated railroad cases dominated the New York state docket throughout the 1880s and '90s. In 1893, New York lawyer Frank Mackintosh wrote in the *Yale Law Journal* that the elevated railroad litigation was, “quantitatively speaking, the greatest which the world has ever witnessed.”¹ Mackintosh continued:

[s]ome idea of its magnitude can be had when one is informed that more than two thousand cases are constantly pending, and that it costs the defendant companies upward of a quarter of a million annually to carry on the litigation, entirely aside from judgments, costs and allowances paid, or voluntary settlements entered into by them.²

The elevated railroad cases were lawsuits by owners of commercial and residential buildings lining the streets of Manhattan against the companies that owned and operated the newly built elevated railroads. The property owners sought damages and injunctions against the railroad companies for the disturbance and loss of property value the latter allegedly caused. In the first significant elevated railroad case, *Story v. New York Elevated Railroad Co.*, the New York Court of Appeals unexpectedly held for the plaintiff abutting owners.³ A string of subsequent cases followed in which the court of appeals expanded the geographical scope of its ruling as well as

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1. Frank H. Mackintosh, *Elevated Railroad Land-Damage Litigation*, 2 *YALE L.J.* 106, 106 (1893).

2. *Id.*

3. *Story v. N.Y. Elevated R.R. Co.*, 90 N.Y. 122 (1882).

the damages owed to the abutters.⁴ Countless other cases, involving vexatious questions about damages, transfer of title, the rights of tenants, and other issues, flooded the lower courts.⁵ Edward Hibbard wrote contemporaneously in the *Harvard Law Review* that the elevated railroad cases “involved a larger amount of property rights than ever came before an American tribunal.”⁶

But the elevated railroad cases are notable for more than just their number and the immense sums at issue. They show a late nineteenth-century court doing a number of unexpected things. A long and undisputed line of precedent in New York had held that legislative authorization immunized public works from non-negligent damage to property.⁷ In *Story v. New York Elevated Railroad Co.*, the New York Court of Appeals boldly circumvented this precedent to decide the case on takings grounds.⁸ The majority in *Story* relied on a strained reading of a century-old property deed to identify a property right that could have been “taken,”⁹ and later majorities ignored the court’s own reasoning in subsequent elevated railroad cases.¹⁰ The court endangered a rapid transit system that the city had struggled to bring about for years. It knowingly precipitated an avalanche of litigation that repeatedly asked the court to decide damage questions and strained its already overburdened docket.¹¹ Defying the Progressive version of late nineteenth-century judging, the court was remarkably willing to sacrifice what might be deemed the legitimate expectations of the railroads to provide for injured smallholders. This court’s rejection of precedent, developmental needs, judicial administration, and the powerful railroads provides a strange new picture of late nineteenth-century judging.

This Note hazards a tentative explanation for the court’s behavior. Elevated railroads caused more damage, annoyance, and

4. See, e.g., *Moore v. N.Y. Elevated R.R. Co.*, 130 N.Y. 523, 528 (1892) (awarding damages for loss of privacy); *Lahr v. Metro Elevated Ry. Co.*, 104 N.Y. 268, 289–92 (1887) (expanding the application of *Story* to property owners on streets opened by the street opening act of 1813. For the text of the statute discussed in *Lahr*, see Revised Laws of New York of 1813, ch. 86, §§ 177–92 [hereinafter 1813 Act]).

5. Edward A. Hibbard, *Elevated Road Litigation*, 4 HARV. L. REV. 70, 79–83 (1891); Mackintosh, *supra* note 1, at 112–13.

6. Hibbard, *supra* note 5, at 70. Hibbard qualifies this by adding, “unless, perhaps, in the telephone cases.” *Id.*

7. See *infra* Section II.B.

8. *Story*, 90 N.Y. at 141–79.

9. *Id.* at 144–46.

10. See *infra* Sections V–VII.

11. See FRANCIS BERGAN, *THE HISTORY OF THE NEW YORK COURT OF APPEALS, 1847–1932* at 120–44 (1985).

loss of value than the average street railroad or regrading project, which might have caused the court to hesitate before reflexively applying the legislative authorization principle.¹² But comparison with earlier cases, in addition to the circumstances surrounding the ownership of the railroads, suggest that the court of appeals was reconsidering the early nineteenth-century judiciary's priority of development over individual property rights.

Was this rebalancing provoked by an enhanced concern for individual property rights or by a downgrading of developmental interests? There is good evidence for both explanations. Language in *Story* and successor cases strongly indicates that the 1880s court was motivated by an increased concern for private property rights.¹³ At the same time, the elevated railroads had recently been taken over by the notorious monopolist Jay Gould in a battle well-publicized in the New York papers and involving many ethically dubious tactics.¹⁴ Awareness of these events would likely have led court of appeals judges to doubt that the Gould-controlled company could fairly be equated with the public interest. The combined force of these considerations might have created a majority determined to side with the abutting owners, as it were, by any means necessary.

Part I of this paper outlines the halting development of the elevated railroads and their eventual acquisition by Jay Gould. Long sought by travelers, businesses, and the city government, the railroads were opposed by abutting property owners, who sought injunctions against the railroads and demanded damages for the mere presence of the new structures. Part II of this paper shows that abutting property owners faced steep legal obstacles: since the early years of the nineteenth century, New York judges, like those in other states, had interpreted the law of nuisance and takings to limit recovery for those injured by the construction and operation of important public works.

Part III demonstrates how the New York courts deployed their pro-development nuisance and takings doctrines to defeat the claims of abutting property owners injured by the surface railways that were the predecessors of the elevated lines. These cases, involving circumstances that seemed to differ only in degree from the elevated railroad cases, placed formidable precedent in the path of

12. See, e.g., *Lahr v. Metro Elevated Ry. Co.*, 104 N.Y. 268, 295 (1887); *Story*, 90 N.Y. at 142, 169.

13. *Story*, 90 N.Y. at 177. See also *Lahr*, 104 N.Y. at 291.

14. JULIUS GRODINSKY, JAY GOULD: HIS BUSINESS CAREER, 1867-1892 290-306; *A Judge's Official Acts*, N.Y. TRIBUNE, May 9, 1882, at 1; *Justice Westbrook's Acts*, N.Y. TRIBUNE, May 7, 1882, at 1.

abutting owners facing the imminent construction of the elevated roads.

Despite the weight of precedent backing the elevated railroad companies, the New York Court of Appeals held in favor of the abutting property owner in the first significant elevated railroad case. Part IV analyzes the majority opinion in this case, *Story v. New York Elevated Railroad Co.* The *Story* decision was both innovative and conservative. Superficially, the court left the existing structure of nuisance and takings law intact, but it skillfully evaded these doctrines' central precepts. Moreover, a new skepticism toward development and a concern for individual property are plainly evident.

Parts V and VI describe the courts' incremental extension of *Story* in subsequent elevated railroad cases. Part V shows that as the court of appeals expanded the territorial application of *Story* in successive cases, the court's reasoning grew increasingly unmoored from its original basis for identifying property rights in the abutter. Part VI shows how the court gradually enlarged the damages owed to property owners well beyond the harm to the specific property interests identified in *Story*, and also created a novel remedy to provide for permanent damages. Both developments indicate that the court of appeals was willing to ignore the force of precedent, even its own recent *Story* decision, to obtain substantial recovery for the abutters.

Part VII attempts to explain the court of appeals' surprising devotion to the abutting owners' cause. It argues the court was engaged in a reevaluation of the legal balance between individual property rights and public developmental needs. A majority on the court seems to have approached the cases with a heightened concern for private property rights. At the same time, the recent acquisition of the elevated railroads by Jay Gould likely led the judges to question the identification of the railroads with the public welfare.

The extraordinariness of the elevated railroads cases is easy to miss in a superficial reading. These cases employ an especially conservative, even archaic kind of doctrinal innovation. Instead of looking forward to the developing due process doctrine to protect property rights, analytically they looked to the past, to ancient forms of common law property such as easements and "incorporeal hereditaments."¹⁵ For property owners abutting a public street, these cases come close to reviving the old English doctrine of ancient lights, rejected by a pro-development New York court decades

15. *Story*, 90 N.Y. at 145.

before.¹⁶ The elevated railroad cases should serve as a reminder that activism comes in many guises, and that courts did not cease to approach cases instrumentally when they ceased to use openly instrumental reasoning.

I.

THE RISE OF THE ELEVATED RAILROADS

The elevated railroads were the product of a long and circuitous struggle to obtain rapid transit in New York City. Surface railroads began to operate on the streets of New York City in 1832.¹⁷ The first of these was a horse-drawn car running along Fourth Avenue between Prince and Fourteenth Streets.¹⁸ The owners of this line soon switched to steam power, but improvements in the design of cars led two decades later to a resurgence of the horse-drawn railroads.¹⁹ By 1855 horse-drawn lines were running on Fourth, Sixth, Third, and Eighth Avenues, and by 1864 the number of horse drawn lines had increased to twelve.²⁰

Even then, however, the streetcar lines were overburdened; the *New York Herald* editorialized that passengers were “packed into them like sardines in a box, with perspiration for oil.”²¹ Moreover, travel was frustratingly slow as the streetcars made their way down avenues congested with pedestrians, omnibuses, private carriages, and commercial carts.²² Changing residential patterns made the streetcars even more inadequate: the population of the city was spreading northward into Harlem and beyond, even pushing into the Westchester suburbs. Many of these people still worked in the financial and commercial center of lower Manhattan, and they demanded a speedier means of transport into and out of downtown.²³

16. *Parker v. Foote*, 19 Wend. 309, 318 (1838).

17. JAMES BLAINE WALKER, *FIFTY YEARS OF RAPID TRANSIT, 1864 TO 1917* 5 (Arno Press 1970) (1918).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 7 (quoting Editorial, *Metropolitan Conveyance—The Omnibus Nuisance*, N.Y. HERALD, Oct. 2, 1864, at 1).

22. *Id.* at 6.

23. THEODORE F.C. DEMAREST, *THE RISE AND GROWTH OF ELEVATED RAILROAD LAW* 3 (1894).

A. Beginnings of the system

The need for a rapid transit system within the city was strongly urged by the New York papers.²⁴ The first company dedicated to this purpose was organized in 1864.²⁵ Inspired by the recently constructed London Underground, the company proposed to build an underground line for New York.²⁶ The bill to authorize the underground railroad foundered in the legislature, however, in the face of opposition by the streetcar and omnibus proprietors.²⁷ After public support gathered for the underground proposal, the legislature passed the bill in 1865, but Governor Fenton promptly vetoed it.²⁸ Though the promoters of the underground railway company continued to press their cause, that project was not to be realized until forty years later.²⁹

The underground proposal did succeed in precipitating “a perfect avalanche of rapid transit schemes,” including “[s]ubways, depressed railroads, elevated railroads and railroads built through blocks,”³⁰ as well as a “pneumatic tube” in which “cars were to be blown from station to station by huge fans operated from stationary steam engines.”³¹ Of these proposals, the most promising seemed to be the elevated railroads. In 1866 the legislature passed an amendment to the General Railroad Law of 1850 authorizing the formation of a company to build an elevated railroad operated “by means of a propelling rope or cable attached to stationary [steam] power.”³² Designed by Charles T. Harvey, this model was called a “patent” railway.³³ Harvey promptly organized the West Side and Yonkers Patent Railway Company, with a proposed route from the Battery through Greenwich and Ninth Avenues up to Yonkers.³⁴ In

24. See, e.g., *Metropolitan Conveyance—The Omnibus Nuisance*, *supra* note 21.

25. WALKER, *supra* note 17, at 10.

26. *Id.*

27. *Id.* at 12–13.

28. *Id.* at 33. The governor cited the potential disruption of the Broadway commercial district, the absence in the bill of any timeframe for construction, and the fact that the bill permitted Battery Park, and potentially other public parks, to be converted into a passenger and freight depot. *Id.* at 33–36. Contemporaries hinted that the political power of the street railroads also influenced the governor’s veto. *Id.* at 36.

29. JOHN ANDERSON MILLER, *FARES PLEASE! A POPULAR HISTORY OF TROLLEYS, STREETCARS, BUSES, ELEVATEDS, AND SUBWAYS* 92 (Dover Publications 1960).

30. WALKER, *supra* note 17, at 40.

31. *Id.* at 68.

32. *Id.* at 58.

33. *Id.* at 59, 69. It was called this because Harvey had patented this method of cable propulsion. *Id.* at 69.

34. *Id.* at 72.

1867 the legislature authorized the company to commence construction of an “elevated (so called) railway” in accordance with its proposals, beginning with a one-half mile experimental structure along Greenwich Street.³⁵ If the structure was deemed suitable by a specially appointed commission, the company would be entitled to continue to build its railway.³⁶

In June of 1868 the initial trial of the patent railroad was a success,³⁷ but the company soon encountered financial difficulties.³⁸ It needed two years to complete the track to Thirtieth Street, and on this longer track the cable propulsion method failed.³⁹ In 1870, the property and corporate franchise of the West Side Railway were purchased by a group of investors who then incorporated as the New York Elevated Railway Company (hereinafter, the “New York Company”).⁴⁰ The New York Company substituted steam locomotive engines for the stationary engines and began to run cars between Battery Park and Thirtieth Street.⁴¹

Shortly afterward, the New York state legislature passed a special act chartering the Gilbert Elevated Railroad Company (hereinafter, the “Gilbert Company”).⁴² The company’s founder, Dr. Rufus Gilbert, envisioned a “tubular railway” to be operated by “atmospheric power,” in a manner similar to the underground pneumatic tube described above.⁴³ The Gilbert Company was not a success; James Blaine Walker wrote that “[t]he panic of 1873 and the financial depression following it, together with the impossible method of construction prescribed, prevented the company from

35. *Id.* at 71–72. *See also* DEMAREST, *supra* note 23, at 4–5.

36. DEMAREST, *supra* note 23, at 5; WALKER, *supra* note 17, at 73.

37. WALKER, *supra* note 17, at 74–75.

38. *Id.* at 78.

39. *Id.* at 79.

40. DEMAREST, *supra* note 23, at 5; WALKER, *supra* note 17, at 80. This group sought and received a charter in 1871 under New York’s general railroad incorporation statute of 1850. WALKER, *supra* note 17, at 80. It was unclear, however, whether this statute, which was designed to creating surface railway companies, could authorize an elevated railroad. A later case, *People’s Rapid Transit Co. v. Dash*, 125 N.Y. 93 (1890), determined conclusively that the 1870 incorporation did not grant the company such powers. The New York Company began to operate its road, but to quell legal uncertainty the company obtained a more explicit legislative sanction in 1875, in the form of the “Act to Authorize and Require The New York Elevated Railroad Company to continue and complete its railroad in the City of New York.” DEMAREST, *supra* note 23, at 5.

41. WALKER, *supra* note 17, at 80.

42. DEMAREST, *supra* note 23, at 6; WALKER, *supra* note 17, at 105.

43. WALKER, *supra* note 17, at 106. *See also* RUFUS H. GILBERT, *GILBERT ELEVATED RAILWAY DRAWINGS* (n.p., ca. 1873–1876) (on file at the New York Historical Society).

getting the capital to build the line.”⁴⁴ In 1875, the Gilbert Company appealed to the legislature for relief, a step that resulted in the enactment of the Rapid Transit Act of 1875.⁴⁵

The Rapid Transit Act instructed the Mayor of New York to appoint five commissioners to determine whether new railways were needed and to designate their proper routes, as well as to draft articles of association for new companies.⁴⁶ But the legislature neatly designed Section 36 of the act to benefit the existing elevated companies. Where an existing company’s routes coincided with the routes determined by the commissioners, Section 36 stated that the company would possess all the powers of a corporation formed under the 1875 Act and would be entitled to build “connecting routes” with ferry or rail depots.⁴⁷ As one legislator who objected to the Rapid Transit Act later complained, “this peculiar phraseology enables [the New York Company] to encircle the whole island.”⁴⁸ The commissioners conveniently ratified the route of the New York Company and authorized its “connection” to various ferry and train depots, allowing the company routes along Ninth, Second, and Third Avenues.⁴⁹ The commissioners also selected the route of the Gilbert Company, thus bestowing upon it the power to operate a railroad powered by steam locomotives, rather than by its originally sanctioned “atmospheric” method.⁵⁰ Released from the strictures of its original charter, the Gilbert Company began construction along its Sixth Avenue route.⁵¹

The commission also framed articles of association for a new company, the Manhattan Railway Company (hereinafter, the “Manhattan Company”). This company was designated to step in to complete the elevated roads should the New York and Gilbert

44. WALKER, *supra* note 17, at 106.

45. *Id.* See also Act of June 18, 1875, ch. 606, 1875 N.Y. Laws 740. The legislators framed this act in general terms, for public concern about the legislative corruption and the growing power of railroads had recently led to amendments to the New York Constitution prohibiting the legislature from passing a “private or local bill” of multiple enumerated types, including bills granting “the right to lay down railroad tracks” or awarding any “exclusive privilege, immunity or franchise whatever.” N.Y. CONST., art. III, § 17 (formerly § 18). But the purpose of the Rapid Transit Act was clear: to facilitate the construction of elevated railroads in New York City.

46. Act of June 18, 1875, *supra* note 45, at § 4.

47. *Id.* at § 36.

48. WALKER, *supra* note 17, at 119–21 (quoting Robert Strahan, Chairman of the Judiciary Committee of the Assembly of 1877).

49. DEMAREST, *supra* note 23, at 8; WALKER, *supra* note 17, at 108–12.

50. WALKER, *supra* note 17, at 109.

51. *Id.* at 112.

Companies fail to do so⁵² and thus, in the words of the commission, “to render assurance doubly sure that our labors will result in rapid transit actually accomplished.”⁵³ In 1879, the New York and Gilbert (recently renamed the Metropolitan) Companies fell into a dispute over grade crossings on certain areas of track that the commission had designated for use by both companies. Unable to reach a compromise, the companies resolved their conflict by leasing both roads to the Manhattan Company.⁵⁴ In 1879, the Manhattan Company took charge of the continuing construction and the operation of the two roads.⁵⁵

B. *The Jay Gould era*

But for the elevated railroads, the controversies had only begun. Although the Manhattan Company had “a complete grasp of the rapid-transit facilities in New York City,” it was financially weak.⁵⁶ The company had no record of dividend payments, its property was heavily mortgaged, and its finances worsened when the New York Court of Appeals ruled that the elevated structures were subject to real estate tax.⁵⁷ Many questioned the legality of the lease agreed to by the three companies, and stockholders feared legislative interference.⁵⁸ The price of the Manhattan Company stock dropped at the end of 1879, continued to slide in 1880, and many of the company’s directors resigned.⁵⁹

At this time the financier Jay Gould allegedly began to take actions to gain control of the Manhattan Company. The Gould-owned *New York World* began a relentless attack on the company’s financial position.⁶⁰ The New York state attorney general brought suit before an upstate judge, seeking to place the company in re-

52. MAURY KLEIN, *THE LIFE AND LEGEND OF JAY GOULD* 282 (1986); WALKER, *supra* note 17, at 110–11.

53. DEMAREST, *supra* note 23, at 10. It does not appear that this backup plan was well designed, however, as stock in the Manhattan Company was taken up by men interested in the New York and Gilbert Companies. KLEIN, *supra* note 52, at 283; WALKER, *supra* note 17, at 110.

54. DEMAREST, *supra* note 23, at 10; KLEIN, *supra* note 52, at 283; WALKER, *supra* note 17, at 112–13.

55. DEMAREST, *supra* note 23, at 10; KLEIN, *supra* note 52, at 283; WALKER, *supra* note 17, at 112–13.

56. GRODINSKY, *supra* note 14, at 288.

57. *Id.*

58. *Id.* at 290.

59. *Id.*

60. *Id.* at 291–93; KLEIN, *supra* note 52, at 285. Maury Klein, in a revisionist take, argues that Gould was not interested in elevated railroads in early 1881 and was not responsible for the suits against the Manhattan Company. Klein proposes

ceivership due to insolvency. Judge Westbrook did so, and journalists later alleged that both the attorney general and the judge were under Gould's influence.⁶¹ This influence has not been proved, but Judge Westbrook was suspiciously compliant. He appointed as receivers for the Manhattan Company two men who worked for Gould, and repeatedly put off efforts by the New York Company, then controlled by Cyrus Field, to cancel the 1879 lease due to the Manhattan Company's failure to pay dividends.⁶² Meanwhile Gould acquired shares in the Metropolitan Company, and managed to get elected to the company's board by promising shareholders that he would "build up" the company.⁶³ Obscure shareholders in the Manhattan Company brought suit, allegedly to intimidate Field and the other New York Company shareholders at Gould's behest, demanding from them the par value of the Manhattan Company stock that the New York shareholders had received per the lease agreement.⁶⁴

In October 1881, with the price of Manhattan Company stock at its lowest, Gould began to buy in. By October 8, Gould owned 20,000 shares in the Manhattan Company, and his business associate Connor owned 28,000 shares.⁶⁵ The next month, Gould's ticket of directors was elected to the Manhattan Company board.⁶⁶ Gould still sought control of the New York Company, the more profitable leg of the elevated system, from Field and other New York Company shareholders. On October 21, Judge Westbrook denied the New York Company shareholders' request to cancel the lease, and further suggested that the Manhattan Company shareholders might have a valid claim against the New York Company shareholders for the recovery of the par value of their stock.⁶⁷ This ruling was enough to make Field capitulate. With Gould controlling the Manhattan Company and Metropolitan Company boards and Field the

that "Gould did not enter the elevated railroad fracas until late June." KLEIN, *supra* note 52, at 286.

61. GRODINSKY, *supra* note 14, at 292-95; *A Chapter of Manhattan*, N.Y. TIMES, Dec. 27, 1881, at 4; *Field First to Confess*, N.Y. TIMES, Dec. 30, 1881, at 1; *Public Trusts Betrayed*, N.Y. TIMES, Dec. 27, 1881, at 1; *Relevant and Irrelevant*, N.Y. TIMES, Dec. 30, 1881, at 4.

62. GRODINSKY, *supra* note 14, at 295-98. Klein writes: "Not even the golden age of Tweed could boast a more curious legal proceeding. Gould's needs had been served to perfection." KLEIN, *supra* note 52, at 287.

63. GRODINSKY, *supra* note 14, at 295-96.

64. *Id.* at 297.

65. *Id.* at 299.

66. *Id.*

67. *Id.* at 302.

New York Company board, the three companies came to a new lease agreement, according to which the Manhattan Company would share the New York Company's profits, and the Metropolitan Company would essentially be shut out.⁶⁸

Within three weeks of the new agreement, the price of the Manhattan Company stock rose two-hundred percent, and Judge Westbrook arranged for the end of receivership.⁶⁹ The struggle for control of the elevated railroads was not completely over, however. Sylvester Kneeland, the largest shareholder in the Metropolitan Company, realized that the agreement disfavored Metropolitan Company shareholders and sued to enjoin the agreement for lack of shareholder consent.⁷⁰ Judge Westbrook conveniently stepped in, rejecting Kneeland's legal claims and declaring that the Metropolitan Company board acted in good faith and that the 1881 agreement was valid.⁷¹ Gould's control was solidified, though Kneeland persisted in various tactics to regain control of the Metropolitan Company board and void the agreement. By this time, too, Gould's actions had aroused such indignation that multiple legislative bodies held hearings in the spring of 1882 to examine the events of the previous year and the possible corruption of Judge Westbrook and the state attorney general.⁷² These events were in the background when, in the fall of 1882, the court of appeals decided the case of *Story v. New York Elevated Railroad Co.*

II. NUISANCE AND TAKINGS IN THE NEW YORK COURTS

The elevated railroads, while welcomed by commuters, businesses, and the city and state governments, dismayed property owners along the railroads' intended routes, who envisioned discomfort and loss of property value due to noise, vibration, smoke and light obstruction. Even before work on the structures commenced, property owners sought legal methods to arrest the railroad con-

68. *Id.* at 303.

69. *Id.*

70. *Id.* at 303-04. Gould countered by attempting to create two classes of Metropolitan stock, "assented" and "non-assented," with the latter having significant disadvantages, but the New York Stock Exchange rejected this move. *Id.* at 304.

71. *Id.* at 305.

72. *Id.* at 303-06, 312; *Justice Westbrook's Acts*, *supra* note 14; *A Judge's Official Acts*, *supra* note 14.

struction, or at least gain compensation for their expected losses.⁷³ But despite the near certainty that abutting owners would suffer substantial losses of property value, their prospects for recovery under existing law seemed slim.

A railroad in close proximity to residential property would seem a classic nuisance—a use of property by one party that resulted in an “indirect” injury to a neighboring property.⁷⁴ Traditionally, nuisance had been governed by strict liability and the remedy had been an injunction against the offending use.⁷⁵ But this severe remedy placed nuisance law at odds with the strong developmental push of the early nineteenth century.⁷⁶ In the first decades of the nineteenth century, the New York courts, like those in many other states, made doctrinal choices that limited the application of nuisance principles to many of the most important, and injurious, developmental projects. Primary among these doctrinal choices was the rule that the legislature had the power to authorize

73. See *The Elevated Railroad*, N.Y. TIMES, Feb. 18, 1875, at 10:

A suit will be instituted in the Supreme Court before Judge Lawrence today, against the New York Elevated Railroad Company by Joseph Haight, Jr., Charles Galloway, Stephen H. Davenport, and William J. Davenport, property-owners on the westerly side of Greenwich Street, in the Ninth Ward, to restrain the defendants from constructing a road and turnouts on that side of Greenwich street. The plaintiffs allege that in order to construct the road the company will be obliged to take up the pavement and sidewalk on that side of the street, and that the road would be a nuisance to property-owners in that district.

See also *The Elevated Railroad Opposed*, N.Y. TIMES, Mar. 24, 1876, at 8:

A meeting of property owners along Greenwich Street was held last evening at the Pacific Hotel . . . Mr. John Patten presiding. The meeting was called for the purpose of protesting against the further encroachments on private property by the Elevated Railroad Company, and to hear the report from a committee appointed at a previous meeting to get the advice of an eminent lawyer on the subject . . . Resolutions were next passed stating that the owners of property along the line had suffered great annoyance by the erection of the Elevated Railroad; that they had never given consent to such an erection, and that they protest against the usurpation of their rights, and the forcible occupation of their lands, and that they would oppose all further encroachments on their property by all means in their power.

74. See, e.g., GEORGE V. YOOL, AN ESSAY ON WASTE, NUISANCE, AND TRESPASS 83 (1863).

75. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 483–90 (2002); WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, BOOK III 216–22 (1799); YOOL, *supra* note 74, at 87.

76. See MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860 (1977), for the classic account of how nineteenth century judges used law instrumentally to aid development.

injury to the property of citizens for the sake of a public use without requiring compensation.

A. *English precedent*

In adopting this principle, New York courts took their cue from English judges who had confronted the same problems as England industrialized. In the 1792 case of *Governor v. Meredith*, the King's Bench laid down the rule that those who constructed public works pursuant to a legislative act could not be held liable for damage to private property unless they acted beyond the scope of their authority.⁷⁷ The plaintiff, a plate glass manufacturing company, brought an action for nuisance against the defendants, who had regraded High Ground Street under the authority of the local paving act.⁷⁸ The defendants had raised the level of the street by two feet, obstructing the plaintiff's entrance into its warehouse and endangering its supply of delicate plate glass.⁷⁹ The court held against the manufacturer. Lord Kenyon wrote, "[s]ome individuals suffer an inconvenience under all these Acts of Parliament; but the interests of the individual must give way to the accommodation of the public."⁸⁰ Judge Buller concurred: "[t]his is one of those cases to which the maxim applies, *salus populi suprema est lex* In this case express power was given to the commissioners to raise the pavement; and, not having exceeded their power, they are not liable to an action for having done it."⁸¹

Although the judges of the King's Bench expressed no doubt about their conclusion in *Meredith*, there was in fact recent contrary case law. Two decades earlier, in *Leader v. Moxon*, the Court of Common Pleas had held in favor of the plaintiff in a similar (though more severe) regrading dispute.⁸² In a decision clearly aimed at compelling Parliament to provide for the compensation of those injured by public works, Judge Blackstone wrote, "had Parliament intended to demolish or render useless some houses for the benefit or ornament of the rest, it would have given express powers for that purpose, and given an equivalent for the loss that individu-

77. *Governor and Co. of the British Cast Plate Mfr. v. Meredith*, 100 Eng. Rep. 1306 (1792).

78. *Id.* at 1306.

79. *Id.*

80. *Id.* at 1307.

81. *Id.* at 1307–08. "*Salus populi suprema est lex*" translates to "the welfare of the people is the supreme law."

82. *Leader v. Moxon*, 96 Eng. Rep. 546 (1773).

als might have sustained thereby.”⁸³ Because the legislation had not provided for compensation, Blackstone declared, it must be concluded that the commissioner was not entitled to injure the house, and was therefore liable.⁸⁴ But in *Meredith*, Lord Kenyon refused to follow *Leader*, declaring that he “doubt[ed] the accuracy” of the case report.⁸⁵ Later regrading cases, both in Common Pleas and King’s Bench, followed *Meredith*. In *Sutton v. Clarke*, the Court of Common Pleas argued that the defendant in *Leader*, although duly authorized by Parliament, had acted negligently in carrying out the regrading, and that *Leader* was therefore not inconsistent with *Meredith*.⁸⁶ This argument has been cited as the basis for the negligence exception to the legislative authorization rule.⁸⁷

B. Legislative authorization in New York

Across the Atlantic, the first sign that the New York courts were embracing the rule in *Meredith* came in the 1807 case of *Steele v. Western Inland Lock Navigation Co.*⁸⁸ The plaintiff was the owner of a plot of land through which the defendant, with state authorization, had dug a canal.⁸⁹ The plaintiff complained that both leakage from the canal and its obstruction of natural water-courses and ditches had flooded a portion of her lands, rendering them useless for farming.⁹⁰ Judge Thompson of the Supreme Court of New York held for the defendant. The primary ground for the decision ap-

83. *Id.* at 547.

84. *Id.*

85. *Meredith*, 100 Eng. Rep. at 1307.

86. *Sutton v. Clarke*, 128 Eng. Rep. 943, 948 (1815). See also *Boulton v. Crowther*, 107 Eng. Rep. 544, 545 (1824).

Robert Brauneis discusses these three cases—*Meredith*, *Sutton*, and *Boulton*—as precedent for American tort law in his essay, *The First Constitutional Tort*, 52 VAND. L. REV. 57 (1999). He describes the cases as “drawing a distinction between direct and consequential injuries.” *Id.* at 87. This characterization is somewhat puzzling, given that the leading case, *Meredith*, makes no reference either to “direct” or to “consequential” injuries. The case stands for the proposition that the legislature can injure the property of a subject without compensation in service of a public purpose. Later American state courts qualified this ruling by declaring that a legislature could not commit a *taking* of property, as opposed to a consequential injury, without compensation. But the foundation of both the British and American rules was not the notion that there was never liability for consequential injuries, but rather the principle that legislative authorization of an act that furthered a public purpose rendered the actor free from liability.

87. Brauneis, *supra* note 86, at 94.

88. *Steele v. President of Western Inland Lock Navigation*, 2 Johns. 283 (1807).

89. *Id.* at 283.

90. *Id.*

appears to be the judge's conclusion that the plaintiff had been compensated fully for all her damage through the condemnation proceedings for the portion of land taken.⁹¹ But he added, "[t]he company, in making this canal, acted under the authority of an act of the legislature, and no action will lie against them for any damages occasioned by cutting the canal, unless they exceeded their jurisdiction" and cited *Meredith* to support this proposition.⁹²

By 1828, the legislative authorization principle was in full effect in New York. In *Smith v. Lansing*, the Supreme Court of New York held against a dockowner whose business had been eroded by a pier and lock constructed during the building of the Albany Basin, at the termination of the Erie and Champlain Canals.⁹³ Witnesses testified that pier and lock blocked access by larger boats to the plaintiff's dock, and that "the water at the plaintiff's wharf is shallow, so that vessels cannot lay along side of it . . ."⁹⁴ Upholding the trial court's judgment against the plaintiff, Judge Sutherland wrote that the construction of the pier "was not a mere private operation . . . [but] essentially a public work," that the commissioners carrying it out were public agents, and the law which authorized its erection "is to be liberally construed."⁹⁵ In justifying his ruling, Judge Sutherland suggested that in return the property owners benefited from the convenience and growth which the completed projects would afford. He wrote:

every great public improvement must, almost of necessity, more or less affect individual convenience and propriety; and where the injury sustained is remote and consequential, it is *damnum absque injuria*, and is to be borne as a part of the price to be paid for the advantages of the social condition.⁹⁶

Judge Sutherland's opinion contains several such characterizations of the injury suffered by the plaintiff as "remote and consequential," and "consequential, slight and temporary."⁹⁷ The court may have emphasized this conclusion because of the recent amendment to the New York Constitution prohibiting takings of private

91. *Id.* at 286. Judge Thompson wrote: "The law required the appraisers to ascertain the value of the land, and the damages sustained by the owner, in consequence of the appropriation of it to the use of the company." *Id.*

92. *Id.*

93. *Lansing v. Smith*, 8 Cow. 146 (1828).

94. *Id.* at 155.

95. *Id.* at 150.

96. *Id.* at 149. This is an early and broad enunciation of the idea of "average reciprocity of interest" which still persists in our takings jurisprudence. "*Damnum absque injuria*" translates to "a loss or damage without legal injury."

97. *See id.* at 150, 151.

property for public use without compensation.⁹⁸ To rule that the plaintiff's injuries were embraced by the general legislative authorization principle, Judge Sutherland needed to show that they did not rise to the level of a taking.⁹⁹ This he did more by repetition than by a satisfying analysis of how a consequential injury differed from a direct injury and how both differed from a taking. This lack of analysis of the takings question was to be a pervasive feature of later cases involving injuries from public works.¹⁰⁰

Probably the most cited legislative authorization case in New York was the 1850 case *Radcliff's Executor v. Mayor of Brooklyn*.¹⁰¹ Digging by the city of Brooklyn into the natural bank adjoining Radcliff's lot during the opening of Furman Street had caused loss of support for his property, resulting in substantial damage.¹⁰² The court of appeals reasoned that "[t]he defendants are a public corporation; and the act in question was done for the benefit of the

98. N.Y. CONST. art. I, § 7 (then art. 7, § 7).

99. The repeated references to injuries as "indirect" and "consequential" in cases of this nature have led some historians to conclude that indirectness of injury was an independent basis for courts to deny recovery. See, e.g., HORWITZ, *supra* note 76, at 71-74; Brauneis, *supra* note 86, at 85-93. My reading of the cases is that indirectness was a subsidiary test used to determine whether the legislative authorization principle could be applied. The "leading case" on which Horwitz bases his interpretation, *Callender v. Marsh*, was a regrading case in which the Massachusetts court was clearly applying the legislative authorization principle. HORWITZ, *supra* note 76, at 72. See also *Callender v. Marsh*, 1 Pick. 418, 425-27, 435 (1823). Other cases cited by Horwitz, including *Lansing* and *Radcliff's Executor v. Mayor* (see *infra* notes 101-05, 124 and accompanying text) also involved public works. In each case, the court held that the injury in question was not a taking but rather an "indirect" injury. But this conclusion did not end the inquiry; rather it indicated that the court was free to apply the legislative authorization principle.

100. The court added an independent ground for denying relief to the dockowner: "[I]f the erections complained of, were unauthorized, we are still of opinion that the plaintiff has shown no injury resulting from them, which will enable him to sustain this action; that they are common nuisances, for which no private action can be maintained." *Lansing v. Smith*, 8 Cow. 146, 151 (1828). See HORWITZ, *supra* note 76, at 76-78 for an account of how the idea of a "public nuisance" was used to deny relief to plaintiffs. Horwitz concludes, "ironically, the more extensive the indirect injury from public improvements, the more often the public nuisance doctrine was invoked to defeat any recovery." *Id.* at 78. This strategy does not seem to have been used as often in New York courts as in some other jurisdictions Horwitz discusses.

101. *Radcliff's Executor v. Mayor of Brooklyn*, 4 N.Y. 195 (1850). Louise Halper has claimed that *Radcliff* was the first New York case to embrace the legislative authorization rule. Louise A. Halper, *Nuisance, Courts and Markets in the New York Court of Appeal, 1850-1915*, 54 ALB. L. REV. 301, 310 (1990). As the above material demonstrates, this rule had been in effect for many years prior.

102. *Radcliff*, 4 N.Y. at 195.

public, and under ample authority, if the legislature had power to grant the authority, without providing for the payment of such consequential damages as have fallen upon the testator.”¹⁰³ The court concluded that the legislature did have such power, for although the plaintiff’s property had “suffered damage,” the court could find no precedent for saying that the property had been “‘taken for public use,’ within the meaning of the constitution.”¹⁰⁴ The court added:

if any one will take the trouble to reflect, he will find it a very common case, that the property of individuals suffers an indirect injury from the constructing of public works; and yet I find but a single instance of providing for the payment of damages in such a case.¹⁰⁵

C. *Private companies*

The New York courts also extended immunity to privately owned companies operating a public work under legislative sanction. It will be recalled that in *Steele*, the first New York case citing the legislative authorization rule, the defendants were “the President, Directors and Company of the Western Inland Lock Navigation,” a private company entrusted by the state with “establishing

103. *Id.* at 198.

104. *Id.*

105. *Id.* at 206. The exception the judge cites is the Massachusetts case *Brown v. City of Lowell*, 8 Metc. 172 (1844).

The *Radcliff* opinion includes dicta indicating the court believed that an action would not lie even if the damage were caused by a private neighbor digging on his land. The court declared that a man may do many things “in the enjoyment of his own property, without being answerable to others for consequential damages—always assuming that he acts with proper care and skill.” *Radcliff*, 4 N.Y. at 199. The court continued that:

an unimproved lot of land in the city of Brooklyn would be worth little or nothing to the owner unless he were allowed to dig in it for the purpose of building; and if he may not dig because it will remove the natural support of his neighbor’s soil, he has but a nominal right to his property.

Id. at 203.

Radcliff is a very rich decision, with some language suggesting that the court was moving toward a negligence standard for all nuisance. At the same time, however, the court declared that a property owner “may not, however, under color of enjoying his own, set up a nuisance which deprives another of the enjoyment of his property.” *Id.* at 198. The case can be read to indicate either that a negligence standard prevailed for nuisance, with strict liability exceptions, or that a strict liability standard prevailed, with areas carved out for negligence. But there can be no doubt that the negligence standard was firmly entrenched for nuisances created by public works.

and opening Lock Navigations within this State.”¹⁰⁶ That the New York court so easily applied the rule from *Meredith* to a private company should not surprise. Most of the internal improvements in the early republic were carried out by joint stock companies chartered by the states.¹⁰⁷ Only later in the century, with the advent of general incorporation statutes and the sharpening of the distinction between public and private companies, would we expect this doctrine to come under pressure.

The application of the legislative authorization principle to a private company was challenged in the 1848 case of *Benedict v. Goit*.¹⁰⁸ The plaintiff, an innkeeper, claimed that the defendant Rome and Oswego Road Company had taken his property by constructing a plank road on a highway owned by the plaintiff subject to a public easement.¹⁰⁹ The highway, he argued, was now being used “for the purposes of the corporation.”¹¹⁰ He also claimed that by elevating the road eight feet, the company obstructed access to his inn and caused severe flooding, requiring him to incur “great expense in raising the house, barn and shed, and in filling up and raising the surface of the ground”¹¹¹ Concluding that the plank road “was a *public highway still*, open for public use,”¹¹² the supreme court held that the company had not taken any rights from the plaintiff, but rather had “succeeded to all the rights of the town commissioners to make such repairs in the road as the public interest required.”¹¹³ This resolution of the plaintiff’s takings claim enabled the court to dispose of his damages claim as well, for it meant that the legislative authorization principle would apply. “If the corporation has succeeded to the rights and powers of the commissioners of highways,” the court wrote, “then any inconvenience or damage which the plaintiff has suffered by proper and reasonable repairs of the public highway is ‘*damnum absque injuria*.’”¹¹⁴

106. *Steele v. President of Western Inland Lock Navigation Co.*, 2 Johns. 283, 283 (1807).

107. *See generally*, JOSEPH S. DAVIS, *ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS*, VOL. II (1917); JAMES WILLARD HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780–1970* (1970); JOHN LAURITZ LARSON, *INTERNAL IMPROVEMENT* (2001).

108. *Benedict v. Goit*, 3 Barb. 459 (1848).

109. *Id.* at 463–64.

110. *Id.* at 463.

111. *Id.* at 461.

112. *Id.* at 465.

113. *Id.* at 467.

114. *Id.* at 469. *See supra* note 96 for a translation of “*damnum absque injuria*.”

For decades, the New York Court of Appeals continued to adhere to the legislative authorization principle, often citing *Radcliff*. In an 1886 opinion, the court of appeals showed some uneasiness with the principle, declaring that “[t]he legislative power in this country is subject to restrictions” and that *Radcliff* “carries to the utmost limit the right of the legislature, for public reasons, to interfere with private property”¹¹⁵ But the court confirmed that “[t]he case has been frequently followed, and its authority completely established by repeated decisions in this State.”¹¹⁶ Since both surface and elevated railroads in New York City had been explicitly authorized by the New York state legislature, abutting property owners had little reason to hope that the courts would declare these railroads a nuisance.

D. Takings

The legislative power *was* subject to restriction in New York, despite the legislative authorization rule. Primary among these restrictions was the takings clause of the New York State Constitution, which read “[n]or shall private property be taken for a public use, without just compensation.”¹¹⁷ Even before this provision was added to the state constitution, Chancellor Kent had inscribed the just compensation principle in New York’s common law. In the 1816 case of *Gardner v. Trustees of Newburgh*, Kent wrote that the principle that citizens should be compensated for the deprivation of their property by a governmental power was “admitted by the soundest authorities, and is adopted by all temperate and civilized governments, from a deep and universal sense of its justice.”¹¹⁸ Although the state had the power to take a citizen’s property, he wrote, “a provision for compensation is an indispensable attendant on the due and constitutional exercise of the power”¹¹⁹

But to succeed under the takings clause, a plaintiff needed to show that his or her loss was considered “property” within the meaning of the takings clause, and that property had been “taken,” as opposed to merely injured, diminished, or obstructed. Some historians have claimed that early nineteenth-century judges employed a “physicalist” conception of a property with respect to the takings clause: a taking was the actual occupation of a person’s plot of land

115. *Cogswell v. N.Y., New Haven & Hartford R.R. Co.*, 103 N.Y. 10, 19 (1886).

116. *Id.*

117. N.Y. CONST. art. 1, § 7.

118. *Gardner v. Trustees of Newburgh*, 2 Johns. Ch. 162, 166 (1816).

119. *Id.* at 168.

by the state or a third party.¹²⁰ This view is perhaps oversimplified. New York courts recognized, for example, that the deprivation of a stream of water could constitute a taking. In *Gardner*, the plaintiff was protesting the diversion of water from a stream running through his land to conduits laid by the defendant village to supply the townspeople with water.¹²¹ Chancellor Kent declared that “[i]t is a clear principle in law, that the owner of land is entitled to the use of a stream of water which has been accustomed, from time immemorial, to flow through it”¹²² He continued, “[t]he plaintiff’s right to the use of the water, is as valid in law . . . as the rights of others who are indemnified or protected by the statute; and he ought not to be deprived of it . . . without his consent, or without making him a just compensation.”¹²³ In the *Lansing* case, the court stated that the plaintiff would have prevailed in his takings claims if he could have shown “a claim to the natural flow of the river, with which the state had no right to interfere by any erections in the bed of the river, or in any other matter.”¹²⁴

The deprivation of an easement was also considered a taking under the New York Constitution. In *Arnold v. Hudson River Railroad Co.*, the plaintiff had possessed a right to convey water over the surface of intervening lands to his nail factory.¹²⁵ The defendant railroad, having acquired title to a portion of the intervening lands, disrupted the channel the plaintiff had built to convey the water.¹²⁶ The court of appeals held that “Arnold’s easement was such an interest in land as could not be modified or discharged, save by conveyance in writing or operation of law”¹²⁷ The court continued that the easement “was property within the meaning of article 1, section 6 of the Constitution, and, therefore, could not, nor any portion of it, be taken for public use without compensation”¹²⁸ These cases suggest that the takings clause was thought to cover not

120. See, e.g., MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960* 145–51 (1992); John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 Nw. U. L. Rev. 1099, 1099–1101 (2000).

121. *Gardner*, 2 Johns. Ch. at 163. The legislation under which the village operated made provision for compensating the persons on whose land the conduits would be laid, but not for compensating the plaintiff for his loss of water. *Id.* at 162–64.

122. *Id.* at 164.

123. *Id.*

124. See *Lansing v. Smith*, 8 Cow. 146, 148.

125. *Arnold v. Hudson River R.R. Co.*, 55 N.Y. 661 (1873).

126. *Id.* at 661–62.

127. *Id.* at 662.

128. *Id.*

just physical property but all recognized common law forms of property. As Daniel Hulsebosch has written, “in the early modern period property really was a bundle of interests rather than a coherent thing The state’s denial of one of those recognized interests, whether directly through physical appropriation or indirectly through regulation, amounted to a taking.”¹²⁹

Though the property interests protected by the takings clause were thus understood more broadly than has been asserted, New York courts in the early and mid nineteenth-century did not view the clause as going so far as to protect the market value of property, as courts came to do at the end of the century in the rate regulation context.¹³⁰ Moreover, as cases such as *Lansing* and *Radcliff* indicate, nineteenth-century New York courts were eager to define damage even to recognized property interests as a mere injury, especially a “consequential injury,” rather than a taking. The courts were not looking to expand the scope of takings or even to think too hard about whether the loss of access or of land support might be the deprivation of a common law right. The narrowness of the takings doctrine is well illustrated by the 1861 case of *Bellinger v. New York Central Railroad*, in which a bridge constructed by the defendant railroad had caused a creek to overflow and flood a downstream owner’s land.¹³¹ The court noted that the legislature could not authorize a taking of property without compensation. “But this limitation has no application to cases where property is not taken, but only subjected to damages consequential upon some act done by the State or pursuant to its authority.”¹³² In the repeated and injurious flooding of the plaintiff’s land, the court found nothing amounting to a taking.

III.

THE SURFACE RAILWAY CASES

A. Drake—the first street railway case

These development-friendly principles of nuisance and takings law formed the basis of court decisions adjudicating the rights of abutting owners against New York City surface railways, several decades before the elevated railways were constructed. The first such

129. Daniel J. Hulsebosch, *The Tools of Law and the Rule of Law: Teaching Regulatory Takings After Palazzolo*, 46 ST. LOUIS U. L.J. 713, 731 (2002).

130. See Stephen Siegel, *Understanding the Lochner Era: Lessons from the Controversy over Railroad and Utility Rate Regulation*, 70 VA. L. REV. 187 (1984).

131. *Bellinger v. N.Y. Cent. R.R.*, 23 N.Y. 42 (1861).

132. *Id.* at 48.

case in New York State was *Drake v. Hudson River Railroad Co.*, which came before the Supreme Court of New York county in 1849.¹³³ By act of the New York legislature, the Hudson River Railroad was authorized to construct a railroad in Manhattan on or west of Hudson Street.¹³⁴ Property owners along the railroad's proposed route sued for an injunction, claiming the protection of both the takings clause of the New York Constitution and common law nuisance doctrine.¹³⁵ To bolster their takings claim, the plaintiffs argued that they were fee owners of the street bed to the center line of the street.¹³⁶ But the court rejected every argument of the abutters and refused to grant an injunction.

Judge Jones disposed of the plaintiff's takings claim in two ways. First, he argued, even if the plaintiffs did own the street bed subject to a public easement for street uses, the railroad track did not take, but merely used the street bed.¹³⁷ Second, the judge found that the entire fee of the street had been granted to the city of New York by its prior owner, the Protestant Episcopal Church.¹³⁸ The plaintiffs had no "special right to, or interest in the said streets, or the land forming the same, beyond, or in exclusion of other citizens."¹³⁹ These conclusions doomed the plaintiffs' takings claim, for all that remained to the plaintiffs was the alleged injury to the abutting property. Consistent with contemporary reasoning, the court found that these injuries did not constitute a taking, explaining rather unhelpfully that "the prohibition of the constitution is against taking private property for public use, without making compensation, and not against injuries to such property, where it is not taken."¹⁴⁰

The court also rejected the plaintiffs' nuisance claim. Judge Jones found that the damages predicted—for example, that access to the street would be hindered by the constant passage of trains, and that the presence of the railway would deter customers from the abutters' businesses—were too speculative to warrant an injunction.¹⁴¹ Interestingly, however, Judge Jones suggested that the plaintiffs might succeed on a damages claim once the railroad was

133. *Drake v. Hudson River R.R. Co.*, 7 Barb. 508 (1849).

134. *Id.* at 508.

135. *Id.* at 510–13.

136. *Id.* at 511, 529.

137. *Id.* at 529.

138. *Id.* at 529–30.

139. *Id.* at 546.

140. *Id.* at 559.

141. *Id.* at 549–51.

in operation.¹⁴² He declared that although the railroad was undoubtedly “a great public improvement,” still “[t]he interests of the individual whose property may be injuriously affected, must not be sacrificed to the success of the improvement because it is desirable and of value to the public”¹⁴³

However, a concurring opinion by Judge Edwards expressed doubt that the property owners would recover on nuisance grounds when the railroad was in operation. Recovery in nuisance cases, he maintained, was limited to “damage which is the natural and proximate consequence of the act complained of.”¹⁴⁴ The plaintiffs’ affidavits “state circumstances from which we can infer inconvenience to the plaintiffs,” he argued, “but not inconvenience amounting to that species of injury which the law will take notice of.”¹⁴⁵ Judge Edwards’s opinion, more consistent with the pro-development bias of the era, was typical in its lack of elaboration of what made an injury a “natural and proximate” result versus an “indirect and consequential” damage.

B. *Williams—a mixed message for New York City abutting owners*

The court of appeals veered from the pro-development path in *Williams v. New York Central Railroad Co.*¹⁴⁶ In contrast with *Drake*, the court found that the plaintiffs, property owners along Washington Street in Syracuse, NY, were the owners of the street in fee, while the city merely owned an easement for public travel.¹⁴⁷ The court of appeals ruled that the construction of the railroad “impose[d] an additional burden upon the land,” and therefore took away from the plaintiffs property rights reserved to them as fee owners.¹⁴⁸ Thus *Williams* can be seen as a rejection of Judge Jones’s first argument in *Drake*, that the railroad does not “take” but merely uses the street. Judge Seldon’s opinion includes other language favorable to abutting property owners. Seldon was adamant that the railroad was no ordinary street use; in fact, the two uses were “essentially different.”¹⁴⁹ First, the right to build and operate the railroad was given to the railroad only, and not to the entire public, and second, the railroad actually hindered use of the road as an

142. *Id.* at 551.

143. *Id.* at 545.

144. *Id.* at 556.

145. *Id.*

146. *Williams v. N.Y. Cent. R.R. Co.*, 16 N.Y. 97 (1857).

147. *Id.* at 100.

148. *Id.* at 109.

149. *Id.* at 110–11.

ordinary street.¹⁵⁰ Both of these conclusions challenged the notion that the railroad was a legitimate public use, and therefore the principle that the legislature could authorize this use to the detriment of abutters.

Yet Judge Seldon did not overrule *Drake*. To the contrary, he strenuously distinguished the two cases, stating that they “bear no analogy” because the plaintiffs in *Drake* were not fee owners of the street.¹⁵¹ Without property in the street, the abutters had no grounds to complain about the additional use of the street. Judge Seldon added that “it is claimed, and apparently with much justice, that, as to a large portion of the streets in that city [of New York], the fee of the land, and not a mere easement, is vested in the corporation [of the city of New York],” thus bringing them out of the application of the *Williams* rule.¹⁵² Thus despite its pro-property-owner language, *Williams* did little to lift the hopes of the abutters.

C. Kerr—*applying the legislative authorization principle*

Judge Seldon’s effort to distinguish *Drake* gave subsequent courts freedom to ignore the unsettling implications of his language in *Williams*, and instead to apply and expand upon *Drake* in New York City cases. This they did in the 1860 case of *People v. Kerr*.¹⁵³ The plaintiffs, property owners along Seventh Avenue, where the New York state legislature had authorized the construction of a street railroad, made both a nuisance claim and a takings claim against the railroad and city officials. Taking their cue from *Williams*, they claimed ownership of the Seventh Avenue street bed.¹⁵⁴ But the trial court found that the city owned the street bed in trust for the public.¹⁵⁵ This finding was enough to defeat the plaintiffs’ takings claim. Unlike in *Drake*, however, where the court judged the plaintiffs’ nuisance claim to be speculative, the trial court in *Kerr* found that the railroad would be an injury and interference with the abutting property, to the “extent that the same would constitute a continuous private nuisance to the owners and occupants thereof, *but for the act of the legislature authorizing the construction of said road.*”¹⁵⁶

150. *Id.* at 109.

151. *Id.* at 100.

152. *Id.* at 101.

153. *People v. Kerr*, 27 N.Y. 188 (1863).

154. *Id.* at 189.

155. *Id.* at 190.

156. *Id.* at 190 (emphasis added).

This last qualification was dispositive: the trial court ruled against the abutting owners on their nuisance claim, and the court of appeals affirmed, relying on the legislative authorization principle. The court of appeals argued that “what belongs to the public may be controlled and disposed of in any way which the public agents see fit.”¹⁵⁷ Citing *Radcliff*, Judge Emmot continued, “the principle is perfectly well settled that for any incidental injury or any consequential interference with the use or enjoyment of private property resulting from the lawful acts of the public or its agents, no action will lie, unless there has been negligence or willful misconduct.”¹⁵⁸

Thus *Drake* and *Kerr* effectively blocked the two legal avenues available to abutting property owners in New York City—takings, because as mere abutting owners the plaintiffs had no property that had been “taken,” and nuisance, because a legislatively authorized public use was immunized from liability for indirect or consequential damage.¹⁵⁹ Property owners facing the prospect of elevated rail-

157. *Id.* at 192.

158. *Id.* at 193. The question of whether a railroad was truly a public use had been debated for some time. See *Williams v. N. Y. Cent. R.R. Co.* 16 N. Y. 97, 108–09 (1857); *Benedict v. Goit*, 3 Barb. 459, 462–64 (1848); *Presbyterian Society v. Auburn & Rochester R.R.*, 3 Hill 567, 570 (1842). In *Kerr*, the court declared that the public use question had been decided by *Bloodgood v. Mohawk & Hudson R.R. Co.*, 18 Wend. 9 (1837). This decision had sanctioned the exercise of eminent domain powers by a railroad, declaring that the appropriation of property for the railroad, though the latter was privately owned, was an appropriation for a public purpose. If the railroad was deemed a public use, it was clear that the legislative authorization principle applied.

159. *Kerr* did leave a small opening for abutting owners: two judges, in a concurring opinion, suggested that abutting owners might have a property right to free access to their premises from the street. *People v. Kerr*, 27 N.Y. 188, 215. But this argument was soon rejected by the court of appeals in *Kellinger v. Forty-Second St. & Grand St. Ferry R.R. Co.*, 50 N.Y. 206 (1872). There the plaintiff, a property owner along Union Square, argued that the railroad “laid the track of its road so near the sidewalk as not to leave sufficient space for a vehicle to stand.” *Id.* at 208. As a result, “plaintiff and his family are thereby incommoded in leaving and returning to their residence, and that the rental value of said premises is greatly depreciated.” *Kellinger* demanded compensation and an injunction against the railroad. *Id.*

In response, the court of appeals reiterated the rules that abutting owners had no private property in the street and that a lawful, carefully operated railroad was no nuisance. Judge Church hedged on the question whether abutting owners had a private right of access. He stated that “[t]he abutting owners have an easement in the street in common with the whole people to pass and repass,” and even conceded that they had a right “also to have free access to their premises.” *Id.* at 211. But the judge concluded that the railroad’s interference with the plaintiff’s access was a “mere inconvenience” that did not rise to the level of a taking. *Id.* The court

road cars rattling by their windows confronted an uphill legal battle. There were undoubtedly judges sympathetic with the abutting owners, and there was some disagreement on the court of appeals as to how far the right of the legislature to interfere with private property extended.¹⁶⁰ But by 1880, the legislative authorization principle had been in effect for more than half a century, the results in *Drake* and *Kerr* had not been questioned, and a majority of judges appeared to believe that railroads were an important public innovation that should not be burdened by hundreds of damage claims. As a contemporary expert, Theodore Demarest, noted, “few would have hesitated to predict immunity from liability of the elevated railroad companies, to abutting landowners, in those cases where the fee of the street was vested in the corporation of the City of New York.”¹⁶¹

IV.

STORY V. NEW YORK ELEVATED RAILROAD CO.

The case that transformed the legal landscape for railroads operating in New York was *Story v. New York Elevated Railroad Co.*¹⁶² Rufus Story was the owner of two lots on Front Street, on which stood a four-story warehouse that he used for his office and for the sale of merchandise. One hundred years before, this property had been under the East River. In 1773, as part of its project of expanding and developing the city and waterfront, the corporation of New York City deeded the property to two individuals.¹⁶³ The grantees covenanted to build a wharf or street of fifteen feet in breadth adjoining the existing Dock Street, to make the street forty-five feet in breadth.¹⁶⁴ They also covenanted to build another

added that the decision in *Kerr* “has become a rule of property which should never be abrogated except for the most cogent reasons.” *Id.* at 209.

160. Contrast the *Radcliff* decision with this statement of Judge Seldon in *Williams*: “If the railway encroaches *in any degree* upon the plaintiff’s proprietary rights, then it is clear that the constitutional inhibition, which forbids the taking of private property for public use ‘without just compensation,’ applies to the case.” *Williams v. N.Y. Cent. R.R. Co.*, 16 N.Y. 97 (1857) (emphasis added) (for a discussion of the *Radcliff* case, see *supra* notes 101–05 and accompanying text). Seldon was able to bring a majority of the court along with him to the aid of abutters with ownership of the street bed.

161. DEMAREST, *supra* note 23, at 17.

162. *Story v. N.Y. Elevated R.R. Co.*, 90 N.Y. 122 (1882).

163. See HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730–1870 45–68 (1983) (explaining the use of water lot grants by the corporation of the city of New York).

164. *Story*, 90 N.Y. at 123–24.

street, parallel to Dock Street, and a third street to run along the outer portion of the lot granted, along the East River.¹⁶⁵ The grant continued:

which said several streets shall forever thereafter continue and be for the free and common passage of, and as public streets and ways for the inhabitants of the said city and all others passing and returning through or by the same, in such manner as other streets of the same city now are or lawfully ought to be.¹⁶⁶

In 1877, the New York Company was rapidly preparing to construct its track along these streets and in front of Story's premises, on route from the Battery to the Harlem River.¹⁶⁷

Story sued the New York Company in the court of common pleas.¹⁶⁸ He claimed that, by the terms of this original deed, the abutting owners along Front Street were the owners of the street bed, and therefore he was owner up to the center line of the street.¹⁶⁹ Story also argued that as an abutting owner he had an easement in the street, which the defendant was about to destroy.¹⁷⁰ He demanded an injunction unless the railroad paid his damages, which he estimated at \$25,000.¹⁷¹ Judge Robinson ruled that the plaintiff did not possess the fee of Front Street. Then, citing *Drake, Kerr, Kellinger*, and other surface railway cases, as well as *Radcliff*, the judge declared that plaintiff had no right to enjoin the defendant's construction, or to make "any claim to damages whatever by any reason of annoyance, inconvenience or detriment occasioned to his premises arising from the construction and legitimate use by the defendants of the street . . ."¹⁷² Invoking the legislative authorization principle, the judge declared that "[i]f the construction of this elevated railroad be authorized by law, it is in no respect a public or private nuisance."¹⁷³

This judgment was affirmed at the general term of the common pleas, with Judge Beach writing that the *Kerr* and *Kellinger* cases were conclusive against the abutting owner's claim for compensation for inconvenience resulting from the street's appropria-

165. *Id.*

166. *Id.* at 126–27.

167. *Story*, 90 N.Y. at 128; *Story v. N.Y. Elevated R.R. Co.*, 3 Abb. N. C. 478, 509 (1877).

168. *Story*, Abb. N. C. at 478.

169. DEMAREST, *supra* note 23, at 26.

170. *Id.*

171. *Id.*

172. *Story*, 3 Abb. N.C. at 509.

173. *Id.* at 502, 509.

tion to a public use.¹⁷⁴ But the concurring opinion by Judge Van Brunt contained certain discordant ideas, described sarcastically by Theodore Demarest as “ominous and prophetic suggestions,” that may have laid the seeds for the remarkable court of appeals decision to follow.¹⁷⁵ Van Brunt wrote:

I concur in the result of Judge Beach’s opinion, but I do not concur in the view that may be drawn from it, that the courts have as yet decided that abutting owners upon streets opened under the 1813 Act have no interest in the light, air and access which they have bought and paid for, such as will entitle them to compensation in case the same shall be appropriated by the Legislature to the exclusive use of the general public.¹⁷⁶

A. *The elevated railroad in the court of appeals*

The New York Court of Appeals heard arguments on Story’s appeal twice, in 1881 and 1882, and rendered a decision in the fall of 1882.¹⁷⁷ A divided court found for the plaintiff, Rufus Story. Two elaborately argued opinions, by Judge Danforth and Judge Tracy, reached the conclusion that, even if Story was not the fee owner of Front Street, he possessed easements of light, air, and access in the street, easements that would be taken by the railroad and that therefore required compensation.¹⁷⁸ A caustic dissent, written by Judge Earl and supported by two others on the court, argued that these “easements” were fictitious and that the principles outlined in the surface railway cases decided the dispute in favor of the defendant.¹⁷⁹

How did Rufus Story acquire a right to light and air? Decades before his suit, the New York courts had disavowed the English principle of “ancient lights,” whereby a property owner could acquire a prescriptive right to light and air against neighboring property owners. This principle, New York courts had declared in *Parker v. Foote*, was unsuitable for a rapidly developing state like New York.¹⁸⁰ In *Story*, Judge Danforth argued that Rufus Story’s right arose not by prescription but by the terms of the original covenant between the city and his predecessors in title.¹⁸¹ This covenant had

174. DEMAREST, *supra* note 23, at 26–27.

175. *Id.* at 27.

176. *Id.*

177. *Id.*

178. *Story v. N.Y. Elevated R.R. Co.*, 90 N.Y. 122, 141–79 (1882).

179. *Id.* at 179–98.

180. *Parker v. Foote*, 19 Wend. 309, 318 (1838).

181. *Story*, 90 N.Y. at 145–46.

declared that the streets in question must continue as public streets, “for the free and common passage of” the public.¹⁸² According to Danforth, “the value of the lot was enhanced thereby, and it is to be presumed that the grantee paid, and the grantor received an enlarged price by reason of this added value.”¹⁸³ The terms of this covenant “secured to the plaintiff the right and privilege of having the street forever kept open as such.”¹⁸⁴

Using the ancient language of common law real property, Danforth described the plaintiff’s right as “incorporeal hereditament” that “became at once appurtenant to the lot and formed ‘an integral part of the estate’ in it.”¹⁸⁵ The extent of this easement, or hereditament, was “to have the street kept open, so that from it access may be had to the lot, and light and air furnished across the open way.”¹⁸⁶ These easements of light, air, and access, Danforth argued, were property “within the meaning of the [New York] Constitution” as well as within the meaning of the various New York state railroad acts which mandated compensation for property acquired by railroads.¹⁸⁷ Therefore the substantial case law, including all of the surface railroad cases, “showing that when none of the land of the party is taken he cannot recover for consequential injury thereto . . . have no application to this case.”¹⁸⁸

But assuming that the abutting owners did possess property in Front Street in the form of easements of light and air, was it clear that those had been taken by the railroad? Could it not be said, especially since the abutters retained some access to light and air, that these easements were merely injured? Based on such earlier cases as *Radcliff*, *Bellinger*, and *Drake*, we would expect the court to say exactly that. Danforth declared, however, that the defendant’s structure would cause “an actual diminution of light” and would “depreciate the value of the plaintiff’s warehouse,” and he concluded, “[i]n doing this thing the defendant will take his property

182. *Id.* at 144.

183. *Id.* at 145. Danforth argued that “no special or express grant was necessary;” rather “the dedication, the sale in reference to it, the conveyance of the abutting lot with its appurtenances, and the consideration paid were of themselves sufficient” to require that Front Street be kept open as a public street. *Id.*

184. *Id.*

185. *Id.* Danforth continued: “[i]t follows the estate constitutes a perpetual incumbrance upon the land burdened with it. From the moment it attached, the lot became the dominant, and the open way or street the servient tenement.” *Id.*

186. *Id.* at 146.

187. *Id.*

188. *Id.* at 151.

as much as if it took the tenement itself. Without air and light, it would be of little value.”¹⁸⁹

Judge Danforth added a second, purely contractual ground on which to find for the plaintiff. He argued that the tenure of the city over Front Street was not absolute, but was rather “in trust” for the purposes stated in the original conveyance.¹⁹⁰ “Where a grant is made or trust created for a specific and defined purpose,” Danforth argued, “the subject of the grant or trust cannot be used for another and foreign purpose without the consent of the party from whom it was derived, or for whose benefit it was created.”¹⁹¹ In this case, the land in front of Story’s warehouse was to be “kept open for the purposes of a street.”¹⁹² Unlike the surface railroads at issue in *Kerr*, the elevated railroads were no ordinary street use—“the facts show the erection of a framework and such a structure as will fill so much of the carriage way of the street as is above fifteen feet above the road-way.”¹⁹³ By this reasoning, the legislature’s authorization of the railroad amounted to an interference with contract. For the legislature to “enlarge the use of the street as a highway beyond the limitation or purpose of the trust,” it must extinguish the property rights guaranteed by the trust through an eminent domain proceeding.¹⁹⁴

The second opinion in Rufus Story’s favor was written by Judge Tracy. In Tracy’s view, the original covenant created a right in the grantees “to have Front [S]treet kept forever as a public street.”¹⁹⁵ This right constituted a “private easement in the bed of the street . . . and passed to the plaintiff as the owner of [the abutting] lots.”¹⁹⁶ According to Tracy, “[t]hat an easement is property, within the meaning of the Constitution, cannot be doubted.”¹⁹⁷ Tracy then asked, “[H]as the plaintiff’s property been taken by the defendant, within the meaning of the Constitution of this State?” He answered affirmatively.¹⁹⁸ Tracy described the structure proposed to be built, which would contain a series of iron columns abridging the street and would “fill so much of the carriage way of

189. *Id.* at 146.

190. *Id.* at 156.

191. *Id.* at 157.

192. *Id.* at 158.

193. *Id.* at 160.

194. *Id.* at 159, 160.

195. *Id.* at 167.

196. *Id.*

197. *Id.*

198. *Id.* at 168.

the street as is about fifteen feet above the road-way.”¹⁹⁹ He then concluded: “We think such a structure closes the street *pro tanto* and thus directly invades the plaintiff’s easement in the street as secured by the grant of the city.”²⁰⁰ As if in response to those who might question whether this “invasion” rose to the level of a taking, Tracy declared: “[t]he extent to which plaintiff’s property is appropriated is not material; it cannot, nor can any part of it, be appropriated to the public use without compensation.”²⁰¹

B. *Property law in Story*

Essential, therefore, to the ruling in Story’s favor was the judges’ finding that he possessed a property right in the street. According to Judge Danforth, the “easements” that Story gained from the original covenant included a right to unobstructed light and air from the street.²⁰² Though Judge Tracy mentioned the absence of light and air as an injury to the plaintiff, he confined the easement possessed by the plaintiff to “a right to have Front [S]treet kept forever as a public street.”²⁰³ But the deed itself created none of these easements explicitly. The deed merely stated that the streets in question “shall forever thereafter continue and be for the free and common passage, and as public streets and ways for the inhabitants of the said city and all others in like manner as other streets of the same city now are or lawfully ought to be.”²⁰⁴

There is no mention of light or air, nor any reference to any right in the street possessed by abutters. And the deed is vague as to what the permissible uses of a public street were or what they “lawfully ought to be.” Both opinions therefore required substantial feats of judicial inference.

Judge Tracy’s argument required less strenuous construction of the deed than Judge Danforth’s finding of a right of light or air. But, though the judge did not mention it, his conclusion that the elevated railroad was not an ordinary street use was in direct conflict with a declaration by the New York legislature that the elevated railroad was “a public use, consistent with the uses for which the roads, streets, avenues and public places are publicly held.”²⁰⁵ The court thus implicitly claimed for itself the right to determine what

199. *Id.* at 169.

200. *Id.* at 170.

201. *Id.*

202. *Id.* at 146.

203. *Id.* at 167.

204. *Id.* at 123.

205. N. Y. LAW 8175, ch. 606, §36; DEMAREST, *supra* note 23, at 29.

was and was not a public street use. This assertion was a notable, if disguised, departure from the principle embodied in the legislative authorization rule: that the legislature controlled the scope of nuisance law. Thus, although the majority did not openly question or qualify the legislative authorization doctrine, its decision in *Story* both circumvented the doctrine and challenged its theoretical underpinnings.

Similarly, the majority instituted no dramatic change in takings law. Though both Danforth and Tracy were evidently aware of the loss of property value that the abutting owners would suffer, they did not feel entitled to find a taking purely on this basis. Instead, they endeavored to identify easements in the street owned by the abutters, a form of property clearly covered by the takings clause of the state constitution. Still, the majority's conclusion that these easements had been taken, rather than only injured, defied numerous prior cases classifying a variety of substantial damage as mere "injury."²⁰⁶ Since these cases had never been clearly reasoned to begin with, Judges Danforth and Tracy did not have to work hard to circumvent them. But their finding of a taking in this circumstance was clearly at odds with earlier New York judges' approaches to the takings question.

V. THE EXTENSION AND GENERALIZATION OF *STORY*

Following *Story*, events seemed to give credence to the earlier generation's fear that exposing public works to liability would let loose a flood of lawsuits, burdening the judicial system and defendant companies alike. *Story* "brought upon the elevated railroad companies an avalanche of cases"²⁰⁷ as hundreds of property owners came forth to demand compensation. Though the result in *Story* dismayed the elevated railroad companies, both majority opinions so relied on the terms of the original deed to this unique plot of land that it was unclear whether other abutting property owners would be deemed to have similar rights. Over the following decade however, the court of appeals handed down a series of decisions that expanded the application of its ruling in *Story*. The expansion was geographical—the court extended to more and more areas of land in New York City its holding that abutting owners had property

206. See *supra* notes 99–100, 131–32, 137–40 and accompanying text.

207. Mackintosh, *supra* note 1, at 108.

rights in the street.²⁰⁸ But the expansion was also theoretical—as this holding was applied to areas that came into the possession of the city through a variety of statutes and conveyances, the court used increasingly strained interpretations to find the source of the alleged property rights,²⁰⁹ before finally declaring a blanket rule that all abutting property owners had rights in the street that would gain them compensation from the elevated railroads.²¹⁰

A. Lahr—*finding easements through implied contract*

In the next elevated railroad case it heard, *Lahr v. Metropolitan Elevated Railway*, the court of appeals had an opportunity to limit the change it had wrought in *Story*. Plaintiff George Lahr, owner of a lot on West Third Street, sued to recover damages for the injury he claimed would follow the construction of a railroad by the Metropolitan Company.²¹¹ West Third Street was not a water lot; rather, it had been opened under the 1813 Act.²¹² The court could easily have confined the result in *Story* to property owners tracing their title back to water lot deeds, the terms of which had figured so importantly in *Story*.²¹³ Instead, the court not only affirmed *Story* but expanded its holding to a wide swath of streets in New York,²¹⁴ stretching the reasoning of *Story* to do so.

Judge Ruger opened his opinion in *Lahr* by announcing: “The doctrine of the *Story Case* . . . although pronounced by a divided court, must be considered as *stare decisis* upon all questions involved therein”²¹⁵ Next he found that language of the 1813 Act—that the city owned the streets opened thereby “in trust, nevertheless, that the same be appropriated and kept open for or as part of a public street . . . forever, in like manner as the other public streets . . . in the said city are, and of right ought to be”—was sufficiently similar to the language of the conveyance in *Story* to require the application of the *Story* doctrine to the case at hand.²¹⁶ In elab-

208. *Kane v. N.Y. Elevated R.R. Co.*, 125 N.Y. 164, 183–84 (1891); *Abendroth v. Manhattan Ry. Co.*, 122 N.Y. 1 at 14 (1890); *Lahr v. Metro Elevated Ry. Co.*, 104 N.Y. 268, 289 (1887).

209. See, e.g., *Lahr*, 104 N.Y. at 289–90.

210. *Kane*, 125 N.Y. at 183–84 (1891).

211. *Lahr*, 104 N.Y. at 270.

212. *Id.* at 289–92; 1813 Act, *supra* note 4.

213. Indeed, the railroad’s attorneys argued that *Story* was wrongly decided, and that if it were to be upheld, the result should be limited to water lots. *Id.* at 268–69.

214. *Id.* at 289.

215. *Id.* at 287.

216. *Id.* at 289.

orating, Judge Ruger echoed the dual reasoning of Judge Danforth in *Story*. First, the 1813 Act and the proceedings under it, in which the abutting owners were assessed for the cost of street-building, amounted to a contract between the city and the abutters.²¹⁷ This “contract” could not constitutionally be impaired by state legislation.²¹⁸ Second, the act and proceedings under it gave abutting owners easements of air, light, and access in the street which “constitute property,” and could not be taken without compensation to the abutters.²¹⁹

The consequences of this ruling were substantial, for the majority of streets in New York City at this time had been opened under the 1813 Act. While *Story* had inspired a flood of lawsuits, its extension in *Lahr* prompted what Demarest called “a crusade of litigation . . . which has few parallels, for extent and pertinacity, in judicial history.”²²⁰

B. Abendroth & Kane—easements by mere fact of ownership

The suit of William Abendroth, owner of a property on Pearl Street, brought under consideration the areas of the city first settled by the Dutch.²²¹ At trial, the superior court found for the defendant railroad on the ground that the Dutch government had absolute ownership of the street, which passed to the city of New York. The plaintiff, therefore, had no easements or other property in the street.²²² In 1887, the general term reversed the decision, holding, interestingly, that it was not necessary for the plaintiff to show that he had property in the street to prevail; instead, Abendroth could recover based solely on the damages to his premises.²²³

The court of appeals, which heard the case in 1890, was unwilling to accept this dramatic revision of its precedent, but it reached a decision that achieved nearly the same result. The court held for the plaintiff, finding that Abendroth possessed property in the street based on the bare fact that he was an abutting owner.²²⁴ Judge Follet justified this conclusion by citing numerous cases in which abutting property owners specially damaged by public nui-

217. *Id.* at 290–92.

218. *Id.* at 292.

219. *Id.* at 291–92.

220. DEMAREST, *supra* note 23, at 36–37.

221. *Abendroth v. Manhattan Ry. Co.*, 122 N.Y. 1 (1890).

222. DEMAREST, *supra* note 23, at 38–39.

223. *Abendroth v. N.Y. Elevated R.R. Co.* 54 N.Y. Super. Ct. 417 (1887).

224. *Abendroth*, 122 N.Y. at 14.

sances successfully maintained actions.²²⁵ Though these nuisance cases did not say outright that abutters had property in the street, Follet concluded that the results reached in those cases must have been founded on the premise that abutters did have such property.²²⁶

The following year, in *Kane v. New York Elevated Railroad Co.*, the court of appeals confirmed the rule of *Abendroth* that all abutting owners possessed easements in the streets.²²⁷ There Judge Andrews declared that “however difficult it is to trace its origin or to refer it to any exact legal principle,” it was a clear rule of American law that the owner of a lot abutting on a city street “has, by virtue of proximity, special and peculiar rights, facilities and franchises in the street”²²⁸ These rights were property, “of which he cannot be deprived by the legislature or municipality, or by both combined, without compensation.”²²⁹ In further support of his ruling, Judge Andrews proposed that the 1813 Act’s declaration that newly opened streets were to be held in trust “in like manner as the other streets” of the city indicated that all streets in New York were held in trust for the partial benefit of abutting owners.²³⁰ His opinion concluded with a recitation of impressive vagueness, declaring that the plaintiff’s rights arose “from the situation, the course of legislation, the trust created by the statute, the acting upon the faith of public pledges and upon a contract between the public and the property owner, implied from all the circumstances, that the street shall be kept open as a public street”²³¹

Thus by 1891 the court of appeals had extended the rule announced in *Story*—that elevated railroads effected a taking of easements possessed by abutting property owners—to all locations and all kinds of title in the city of New York. It achieved this result through a gradual severing of the abutter’s rights from their initial foundations in a specific land conveyance, accomplished by successively larger steps of judicial inference. In order to make the circumstances in *Lahr* fit comfortably within *Story*, Judge Ruger found

225. *Id.* at 12–14. The cases cited included *Hussner v. Brooklyn City R.R. Co.*, 114 N. Y. 433 (1889), *Callanan v. Gilman*, 107 N. Y. 360 (1887), and *Fanning v. Osborne*, 102 N. Y. 441 (1886).

226. *Abendroth*, 122 N.Y. at 14.

227. *Kane v. N.Y. Elevated R.R. Co.*, 125 N.Y. 164 (1891).

228. *Id.* at 180. The judge did not explain why, if this doctrine was “prevailing” in the state of New York, the courts in *Story*, *Lahr*, and *Abendroth* went to such great lengths to establish the abutter’s property rights.

229. *Id.*

230. *Id.* at 182–83.

231. *Id.* at 185.

an implied contract between the city and the abutting owners, based on language in the 1813 Act and on the assessment of abutters in street-opening proceedings. In mind-bending fashion, the *Abendroth* case relied on nuisance law to identify property rights in the street that were legally necessary precisely because nuisance had been deemed inapplicable to this class of cases. Finally, in *Kane*, the court of appeals threw up its hands and simply asserted that property rights in the street existed for all abutters, no matter the origin of their title.

VI.

EXPANSION AND INNOVATION IN REMEDIES

The compensation that an abutting owner could expect from a successful suit depended on the extent of the property rights that the court found the owner to hold. Judge Danforth was clear in *Story* that the property rights of the abutting owners in the street consisted of three easements: light, air, and access. But the extension of the holding in *Story* to other kinds of titles was accompanied by a decreasing specificity regarding the abutting owner's rights. The *Lahr* opinion, too, spoke of "the right of free access to his premises, and the free admission and circulation of light and air to, and through his property."²³² But in *N.Y. National Exchange Bank v. Metropolitan Elevated Railway Co.*, the superior court referred generally to an "easement in said streets."²³³ Similarly, the *Abendroth* opinion refers to "property rights in the streets" and "incorporeal private rights" without specifying what those property rights were.²³⁴ The *Kane* opinion referred variously to "special and peculiar rights, facilities and franchises in the street," "a property right in the street," and "easements or rights in the nature of easements"²³⁵ As the description of the plaintiff's rights lost specificity, the types of damages sought and won by the plaintiffs expanded.

The question of remedies in the elevated railroad cases was further complicated by the courts' confusion about what class of law the elevated railroad cases fell into. Whereas the *Story* court had relied on takings law to establish that the plaintiff had rights that had been violated, subsequent courts often felt the need to analogize to other areas of the law, specifically trespass and nuisance.

232. *Lahr v. Metro Elevated Ry. Co.*, 104 N.Y. 268, 291 (1887).

233. *N.Y. Nat'l Exch. Bank v. Metro. Elevated Ry. Co.*, 53 N.Y. Super. Ct. 511, 511-12 (1886).

234. *Abendroth v. Manhattan Ry. Co.*, 122 N.Y. 1, 14, 16 (1890).

235. *Kane v. N.Y. Elevated R.R. Co.*, 125 N.Y. 164, 180, 181, 185 (1891).

For instance, the superior court in *American Bank-Note Co. v. New York Elevated Railroad Co.* wrote that the acts of the defendant involve:

in a certain aspect, a trespass from day to day upon such property; in another aspect they involve a taking of private property . . . and in still another aspect, and especially when their combined effects are considered, they constitute a private or special nuisance to the abutting property injured.²³⁶

On appeal, the court of appeals commented that its analysis regarding the plaintiff's injunction claim was "equally supported by the authorities if the construction and operation of the elevated road is treated as a nuisance, as we have sometimes declared it to be."²³⁷ Regarding the company's claim for damages, the court declared, "the wrong done . . . may properly be called a trespass upon the property of the abutting owners."²³⁸ Elsewhere the court of appeals spoke of the abutting plaintiff's suit as "an action to recover for an injury in the nature of a trespass."²³⁹ And the supreme court declared that damages in the elevated railroad cases should be measured "by showing how the rental value of the premises has been affected by the erection and maintenance of the nuisance."²⁴⁰ In these comments, the courts seemed to acknowledge that *Story's* use of takings law was a mere expedient, necessary because the legislative authorization rule had blocked off a more natural argument for recovery.

As the judges and lawyers sorted through the doctrine, the remedies for the plaintiffs' actions, both equitable and at law, began to converge on a single norm largely favorable to the plaintiff. Discussions of easements and specific harms fell away, and the courts tended to award the plaintiff the net change in the market value of his or her premises produced by the presence of the elevated railroad.

A. *Past damages*

The traditional suit for damages at law, called an action for "past damages," was a claim for money damages incurred up to the point at which the action was commenced.²⁴¹ Though the ruling in

236. *Am. Bank-Note Co. v. N.Y. Elevated R.R. Co.*, 13 N.Y.S. 626, 630 (1891).

237. *Am. Bank-Note Co. v. N.Y. Elevated R.R. Co.*, 129 N.Y. 252, 268 (1892).

238. *Id.* at 270.

239. *Bruen v. Manhattan Ry. Co.*, 14 N.Y.S. 285, 286 (1891).

240. *Woolsey v. N.Y. Elevated R.R. Co.*, 9 N.Y.S. 133, 135 (1890).

241. Suits for past damages were triable by jury in accordance with the New York State Constitution. It was generally agreed by the New York courts that plain-

Story rested upon the railroad's injury to the abutters' easements of light, air, and access in the street, courts tended to look to the resulting harm to the abutter's premises on the side of the street for the purposes of adjudging past damages.²⁴² While this approach aroused the skepticism of some contemporaries, it appears consistent with contemporary doctrine, which permitted those from whom a section of property was taken via eminent domain to recover the loss of value of the entire property.²⁴³ Nevertheless, *Story's* emphasis on the particular easements of the abutters seemed to suggest that not every injury to the abutting premises deserved legal recognition. In *Lahr*, the defendant claimed that *Story* rendered it liable only for injury caused by the railroad's physical structure, and not for "gas, smoke, steam, dust, cinders, ashes and other unwholesome and deleterious substances from its locomotives and trains" ²⁴⁴

The court of appeals disagreed, and declared that the railroad was liable to the abutter for any injury resulting from its structure or operation that occurred through the destruction of the abutter's easements of light, air, and access.²⁴⁵ Gas, smoke, and cinders, being interferences with light and air, would count towards damages. The scope of damages stated in *Lahr* was still relatively narrow, though, for it excluded such other sources of injury as noise, vibration, and loss of privacy.²⁴⁶ The majority opinion added some ambiguity, however, by stating that "[h]owever the damage may be inflicted, provided it be effected by an unlawful use of the street, it constitutes a trespass rendering the wrong-doer liable for the consequences of his acts."²⁴⁷ A later majority on the court of appeals made use of this ambiguity: in *Kane*, the court used the notion of

tiffs could make successive suits for damages at what ever interval of time they preferred. DEMAREST, *supra* note 23, at 57.

242. *Id.*

243. See Henry de Forest Baldwin, *Some Questions Relating to the Measure of Damages in Street Opening Proceedings in New York City*, 6 YALE L.J. 263, 263-64 (1897).

244. *Lahr v. Metro Elevated Ry. Co.*, 104 N.Y. 268, 295 (1887).

245. *Id.*

246. The *Lahr* formulation was followed in the case of *Drucker v. Manhattan Ry. Co.* 106 N.Y. 157 (1887), in which the court asserted: "Smoke and gases, ashes and cinders affect and impair the easement of air. The structure itself and the passage of cars lessen the easement of light. The drippings of oil and water and possibly the frequent columns interfere with convenience of access." *Id.* at 164. The plaintiff had also listed noise and vibration among the injuries suffered; since the defendant did not object to these, the court declined to address them. *Id.* at 164-65.

247. *Lahr*, 104 N.Y. at 295.

the railroad as trespasser to hold that the noise of the trains was an actionable element for recovering damages.²⁴⁸

One year later, in *Moore v. New York Elevated Railroad Co.*, the court of appeals embraced damages for loss of privacy.²⁴⁹ Citing *Lahr*, the *Moore* court argued that the defendant railroads were “in such sense trespassers or wrongdoers as to be liable to such owners for all the injuries resulting proximately from the wrongful act of maintaining and operating their elevated road.”²⁵⁰ Since “the defendants have furnished the means and opportunity for those persons to invade the privacy of these rooms,” the court agreed that the railroad should pay for “loss of privacy thus occasioned so far as it depreciated the rental value of the rooms in the plaintiff’s building.”²⁵¹ That same year, the court sanctioned damages for a nearly inverse problem: a property owner whose business was rendered less visible to persons walking on the other side of the street. In *Messenger v. Manhattan Railway Co.*, the court held that “[t]he structure being an illegal one, the plaintiff was entitled to recover for all the damages of every kind caused to him while it was illegally maintained and operated,” including the loss of value from the inconspicuousness of his premises.²⁵²

As the kinds of injuries for which the abutters could recover expanded, the court increasingly came to refer to the rule of damages as simply the loss of rental value of the plaintiff’s premises for the relevant period. As the court declared in *Tallman v. Metropolitan Elevated Railroad Co.*, “[t]he question to be determined in such an action is, how much has the rental or usable value of the lot been diminished by the acts complained of?”²⁵³ This was essentially the remedy that the courts had adopted for the common law actions of trespass and nuisance.²⁵⁴ Thus the New York courts had moved well beyond *Story* not only in determining the basis for the

248. *Kane v. N.Y. Elevated R.R. Co.*, 125 N.Y. 164, 186 (1891). With Judge Earl dissenting, the court argued that because the defendant was a trespasser upon the property of the abutter, “any consequential injury to the plaintiff’s property from the acts of the defendant while engaged in the unauthorized occupation and use of the street was proper to be considered by the jury.” *Id.*

249. *Moore v. N. Y. Elevated R.R. Co.*, 130 N.Y. 523 (1892).

250. *Id.* at 527.

251. *Id.* at 528.

252. *Messenger v. Manhattan Ry. Co.*, 129 N.Y. 502, 504 (1892).

253. *Tallman v. Metro. Elevated R.R. Co.*, 121 N.Y. 119, 119 (1890).

254. As the supreme court explained: “The rule is now settled in this state that the proper measure of damages for a trespass upon real estate, or for the maintenance of a nuisance, is the difference in rental value free from the trespass or nuisance and subject to it.” *Mortimer v. Manhattan Ry. Co.*, 8 N.Y.S. 536, 538 (1890); DEMAREST, *supra* note 23, at 62.

abutter's rights but also in assigning them damages. In spite of the legislative authorization principle, the courts had come very close to treating the railroads as a nuisance, and in doing so gave the abutting owners a much broader range of damages than the narrow holding in *Story* would have suggested.

B. *Permanent damages*

In the first decade of the elevated railroad litigation, several plaintiffs succeeded in winning permanent damages against the elevated railroad companies, a novel remedy at the time.²⁵⁵ The first such case was *Lahr*, in which the plaintiff argued that the railroad's structure and operation "constituted a permanent appropriation of the street . . . and entitled the plaintiff to recover in a single action all of the damages occasioned to his property by such taking."²⁵⁶ The trial court had accepted this theory of damages, and the court of appeals found that defendant had not objected.²⁵⁷ The court of appeals therefore did not revisit this issue.

The lower courts applied permanent damages in a few additional cases,²⁵⁸ but before long the court of appeals condemned this remedy in *Pond v. Metropolitan Elevated Railway Co.*²⁵⁹ The court declared that its earlier decision in *Uline v. New York Central and Hudson River Railroad Co.*,²⁶⁰ in which the majority refused to allow permanent damages, was based on sound legal principle and should henceforth be the prevailing rule.²⁶¹ In *Uline*, a regrading case, Judge Earl argued that a permanent damages award would require the defendant to "make the same compensation which it would have been required to make if it had acquired a perfect title" to the plaintiff's rights, but would not in fact vest those rights in the defendant.²⁶² As a result, the defendant would be "left . . . liable to successive suits" on claims that its "interference with the street had been changed or increased."²⁶³ To declare that the railroad has in fact acquired title by estoppel would subvert the statute of frauds, Earl charged, and would allow the railroad to avoid the statutory

255. See Brauneis, *supra* note 86, at 132–35.

256. *Lahr v. Metro Elevated Ry. Co.*, 104 N.Y. 268, 293–94 (1887).

257. *Id.* at 294.

258. See, e.g., *Porter v. Metro. Elevated Ry. Co.*, 120 N.Y. 284, 284–85 (1890).

259. *Pond v. Metro. Elevated Ry. Co.*, 112 N.Y. 186 (1890).

260. *Uline v. N.Y. Central and Hudson River R.R. Co.*, 101 N.Y. 98 (1886).

261. *Pond*, 112 N.Y. at 189.

262. *Uline*, 101 N.Y. at 122.

263. *Id.*

proceedings for eminent domain and instead “acquire land by a pure trespass.”²⁶⁴

The *Pond* court endorsed Judge Earl’s reasoning in *Uline* and declared that an abutting owner “can recover only such temporary damages as have been sustained up to the time of [the suit’s] commencement, and that he is not entitled to damages measured by the permanent diminution in value of his property”²⁶⁵ Following *Pond*’s unequivocal ruling on this subject, the New York trial courts appear to have abandoned the permanent damages remedy. Yet the court of appeals had by then adopted a novel remedy that accomplished nearly the same end.

C. Conditional injunctions

Instead of or in addition to a suit for past damages, abutting property owners had the option of requesting an injunction against the railroad. This was the remedy sought by Rufus Story. In response, the court of appeals in *Story* issued an order that became the signature remedy of the elevated railroad cases. The court awarded Story an injunction, but withheld it until the defendant railroad had a reasonable time to acquire the plaintiff’s easements, either by agreement between the parties or by eminent domain proceedings.²⁶⁶

The conditional injunction was relatively but not totally novel. It made its first appearance several years before, at the end of the protracted *Williams* surface railroad case.²⁶⁷ At the final trial in 1879, the judge awarded the plaintiff an injunction, but then declared that the injunction would be denied unless he tendered his interest in the street to the railroad for a sum specified by the court.²⁶⁸ If the defendant failed to pay, the injunction would then issue.²⁶⁹ The court of appeals affirmed, with Judge Danforth, the author of *Story*, writing for the court.²⁷⁰ Danforth’s opinion for the

264. *Id.*

265. *Pond*, 112 N.Y. at 188.

266. *Story v. N.Y. Elevated R.R. Co.*, 90 N.Y. 122, 179 (1882). For a discussion of this remedy as a predecessor to the rule in *Boomer v. Atlantic Cement Co.*, see Halper, *supra* note 101, at 341–49.

267. *Henderson v. N.Y. Cent. R.R. Co.*, 78 N.Y. 423, 429–30 (1879). See also *supra* Section III.B. for a discussion of the first court of appeals ruling in *Williams*. The *Williams* case saw multiple trials, during which Williams died and was replaced in the suit by his executor, Henderson.

268. DEMAREST, *supra* note 23, at 86–87.

269. *Id.*

270. *Henderson*, 78 N.Y. 423. Judge Earl dissented here as well.

court held that the remedy issued by the trial judge was well within the power of an equitable court:

The defendant is not required to pay the money. It may submit to the injunction. Nor did the referee exceed his jurisdiction in awarding it. All the issues in the action were referred to him to try and determine, and it was his duty to award the proper judgment. In the exercise of its equitable jurisdiction the court, or referee acting in its place, may give full relief, having regard to the rights and interests of both parties.²⁷¹

Following *Story*, the court of appeals used the conditional injunction in many subsequent abutter actions. The court would stay the injunction to permit the parties to come to agreement, the railroad to initiate eminent domain proceedings, or the railroad to buy out the plaintiff at a price decided by the court. A decade into the elevated railroad litigation, the court of appeals acknowledged openly, “[i]t is idle to talk about a company situated like this corporation submitting to an injunction and ceasing to operate its road through the avenue for a single day.”²⁷² Increasingly, the preference of the courts was to fix the buyout price themselves, rather than allow, per *Story*, the parties to reach agreement or the railroad to initiate a condemnation proceeding.²⁷³

Abutting owners had thus been denied the traditional common law right of an unconditional injunction. As the court intimated in *Roberts*, it was simply not practical to order an elevated railroad to shut down, denying its services to the many New Yorkers who depended upon them. Yet the abutting owners gained something very valuable in return: the right to recover all of their future damages in a single action, avoiding the necessity of repeated suits to recover past damages. As with the award for past damages, the courts began to calculate the price at which the railroad must buy out the plaintiff's rights by assessing the change in market value of the plaintiff's premises. The railroad would be required to pay the abutter “a compensation based upon the lessened value of the lot owner's interest in the premises through the continued maintenance and operation of the elevated railway.”²⁷⁴ Thus, though the court of appeals had rejected the permanent damages remedy in *Pond*, the approach it adopted to injunction actions amounted to a

271. *Id.* at 429–30.

272. *Roberts v. N.Y. Elevated R.R. Co.*, 128 N.Y. 455, 475–76 (1891).

273. *See, e.g., id.* at 476. *See also Pappenheim v. Metro. Elevated Ry. Co.*, 128 N.Y. 436 (1891); *Am. Bank-Note Co. v. N.Y. Elevated R.R. Co.*, 13 N.Y.S. 626 (1891).

274. *Sperb v. Metro. Elevated Ry. Co.*, 137 N.Y. 155, 162 (1893).

permanent damages award. Indeed, in *Pappenheim v. Metropolitan Elevated Railway Co.*, the court of appeals slipped and referred to the plaintiff's award as "permanent damage."²⁷⁵ In the face of the impracticability of an injunction, the court created a novel remedy that gave plaintiffs full compensation for their injuries in a single action.

VII JUDICIAL REBALANCING IN THE ELEVATED RAILROAD CASES

The post-*Story* elevated railroad cases show the New York courts acting with remarkable flexibility, mainly in aid of the abutting property owners. These cases also shed light on *Story* itself. Reading *Story* in the context of preceding nuisance and takings cases and of subsequent elevated railway cases makes clear that *Story* was a thoroughly results-driven decision. Four judges on the court knew that they wanted to hold for the plaintiff, and through the idea of water lot-based easements of light, air, and access, they found a doctrinally permissible way to do it. Clearly the result in *Story* was not compelled by precedent; rather, precedent leaned heavily toward the court declaring that *Story*'s damage was "consequential injury," the railroad was a lawful public use, and therefore, under the legislative authorization principle, the railroad company was not liable. The court's reading of *Story*'s land grant was strained, and its claim that his newly discovered property rights had been taken, rather than merely injured, was at odds with the bulk of prior takings cases. The expedient quality of the *Story* decision is also revealed by the fact that later courts quickly moved beyond *Story*'s reasoning, both in identifying the abutters' property rights and assigning them damages.

In fact, a later court of appeals majority openly discussed the results-driven nature of the *Story* decision, noting that:

[w]hen the courts acquired possession of the question, and it was seen that abutting land, which before the erection of the road was worth, for instance, ten thousand dollars, might be reduced to a half or a quarter of that sum in value, or even rendered practically worthless by reason of the building of the road, it became necessary to ascertain if there were not some principle of law which could be resorted to in order to render those who wrought such damage liable for their work.²⁷⁶

275. *Pappenheim*, 128 N.Y. at 444–45.

276. *Bohm v. Metro. Elevated R.R. Co.*, 129 N.Y. 576, 587 (1892).

What remains to be explained is why the court of appeals was so favorable to the abutting property owners in *Story* and subsequent elevated railroad cases. This Note attempts only an initial, tentative response to this question. It proposes that the court of appeals was rethinking the balance between development and individual property rights, due to both an enhanced concern for property rights and a suspicion that the public interest was not truly represented by the elevated railroad companies in New York.

It may be that elevated railroads were so foul and disruptive that the court felt compelled, without more, to provide compensation for abutting owners. The steam-powered elevated railways were much more onerous than the mainly horse-drawn surface railways then operating in New York City. In *Story*, Judge Tracy described at length the structure of the elevated road, as if to show how much of the street it would occupy.²⁷⁷ Judge Danforth noted that “[t]he defendant intends to run its trains as often as once in three minutes, at a rate of speed as high as eighteen miles per hour.”²⁷⁸ In *Lahr*, Judge Ruger discussed the “gas, smoke, steam, dust, cinders, ashes, and other unwholesome and deleterious substances” that the railroads imposed on the unlucky property owners.²⁷⁹ At trial, witnesses complained that “there is always dirt coming in from the elevated railroad;” “[w]hen the trains pass, the whole house shakes;” “you cannot have a conversation while the elevated railroad goes by;” “in regard to leaving the windows open, you cannot do it on account of the dirt and steam coming [in];” and that express trains “go so fast they shake the windows and make an awful noise.”²⁸⁰

Yet in numerous earlier cases, the New York courts had no difficulty applying the legislative authorization principle even when

277. *Story v. N.Y. Elevated R.R. Co.*, 90 N.Y. 122, 169 (1882):

[T]he defendant’s road is to be constructed upon a series of columns about fifteen inches square, fourteen and a half feet high, placed about five inches inside the edge of the sidewalk and carrying cross girders, which support four sets of longitudinal girders, upon which are placed cross ties for three sets of rails for a steam railroad; that the girders are thirty-nine inches deep; and the longitudinal girders thirty-three inches deep.

278. *Id.* at 142.

279. *Lahr v. Metro Elevated Ry. Co.*, 104 N.Y. 268, 295 (1887).

280. Trial testimony of John Carley, Herman Boehack, and William Haas, *in* Supreme Court of the State of New York Appellate Division First Department: William H. Henke and Amelia Henke, Plaintiffs and Respondents, against The New York Elevated Railroad Company and the Manhattan Railroad Company, Defendants and Appellants: Case on Appeal, (Douglas Taylor and Co. Printers ed.) (1898).

the plaintiff suffered significant damage or lost substantial property value. In *Steele*, the newly built canal caused the plaintiff's ten acres of farmlands to be flooded, "so that the plaintiff has totally lost the benefit and profits of the grass and corn thereon growing, and the said land has become totally barren, unproductive, of no value."²⁸¹ In *Lansing*, witnesses testified that since the erection of the offending pier, the annual value of the plaintiff's dock had been reduced by one half.²⁸² In *Radcliff*, a section of the plaintiff's plot of land collapsed due to the regrading project on nearby Furman Street.²⁸³ The courts' seeming indifference to considerable property damage in these earlier cases suggests that *Story* represents a significant shift in New York judges' relative weighing of individual property rights and public development projects.

Language in *Story* and subsequent cases suggests that this shift was prompted by a heightened concern for individual property rights. Certainly, the court of appeals evinced more concern for private property than had earlier judges in cases such as *Lansing*, *Radcliff*, and *Kerr*. Judge Tracy wrote passionately in *Story* that:

[t]he argument has been pressed upon our attention with great ability that as railroads, like streets, are intended to facilitate trade and commerce, and lands taken for either are taken for public use, the legislature may, in its discretion, appropriate the public streets of our cities to the use of the railroad corporations, and this without reference to the form of their structure or even the extent of the injury wrought upon property abutting thereon. This is a startling proposition, and one well calculated to fill the owners of such property with alarm. It cannot be that the vast property abutting on the streets of our great cities is held by so feeble a tenure.²⁸⁴

Judge Tracy appeared to fear a slippery slope by which the streets would be taken over by more and more injurious structures: "If one road may be authorized to be constructed upon two series of iron columns placed on the street, than another may be authorized to be supported upon brick columns, or upon brick arches spanning the street."²⁸⁵ In making this argument, Tracy may have been reflecting upon, and revealing his uneasiness with, the lengths

281. *Steele v. President of Western Inland Lock Navigation Co.*, 2 Johns. 283 (1807).

282. *Lansing v. Smith*, 8 Cow. 146, 155 (1828).

283. *Radcliff's Executor v. Mayor of Brooklyn*, 4 N.Y. 195 (1850).

284. *Story v. N.Y. Elevated R.R. Co.*, 90 N.Y. 122, 177 (1882).

285. *Id.* at 169.

to which the legislative authorization principle had been put in the past.

The majority opinion in *Lahr* expressed an equal outrage at the plaintiff's losses. Chief Judge Ruger, noting that an abutting owner may be charged by the city with the cost of constructing the street, wrote:

[h]e is therefore compelled to pay for [light, air, and access] at their full value, and if in the next instant they may . . . be taken away and diverted to inconsistent uses, a system has been inaugurated which resembles more nearly legalized robbery than any other form of acquiring property.²⁸⁶

What earlier would have been dismissed as *damnum absque injuria* was now attacked as "legalized robbery."²⁸⁷

The contractual logic that Ruger invoked appears frequently in other decisions. Judges argued that the abutter had paid for the light, air, and access—whether in buying the property or in paying assessments for opening the street—and that therefore he or she deserved to reap the benefit of them. Judge Danforth, for example, wrote that the value of Story's lot had been enhanced by the language in the original conveyance providing for an open street, "and it is to be presumed that the grantee paid, and the grantor received an enlarged price by reason of this added value . . ." and that "[t]here was thus secured to the plaintiff the right and privilege of having the street kept open as such."²⁸⁸ Needless to say, the earlier courts did not comment on the fact that Radcliff had paid for his plot of land in Brooklyn or that Lansing had paid for the construction of his dock in the decisions rejecting these plaintiffs' claims decades earlier.

It is also probable that the 1880s court of appeals regarded developmental projects with less enthusiasm than did judges of earlier generations. New York City had only recently left the era of Boss Tweed, in which public works projects served as a means for Tammany Hall loyalists to line their pockets.²⁸⁹ Moreover, the abuse of public works by greedy men of private enterprise was of immediate relevance in the elevated railroad context. During the two-year period in which *Story* was argued before the court of appeals, financier Jay Gould came close to completing his hard-fought battle for control of the elevated railroads. Gould's tactics, discussed at greater

286. *Lahr v. Metro Elevated Ry. Co.*, 104 N.Y. 268, 291 (1887).

287. See *supra* note 96 for a translation of "*damnum absque injuria*."

288. *Story*, 90 N.Y. at 145.

289. See KENNETH D. ACKERMAN, *BOSS TWEED* 1–8 (2005); ALEXANDER B. CALLOW, JR., *THE TWEED RING* (1966).

length above, included using a privately owned paper to denigrate the stock of the railroad companies, allegedly exerting influence over an attorney general and state judge, bringing lawsuits to harass the owners of rival companies into submission, and evading shareholder consent requirements.²⁹⁰ All of these activities were covered in the New York papers, most notably in lengthy exposés published by the *New York Times* in December of 1881.²⁹¹ The *Times* editorialized, “[t]here is no more disgraceful chapter in the history of stock jobbing than that which records the operations of Jay Gould, Russell Sage, Cyrus W. Field, and their associates in securing control of the system of elevated railroads in this City.”²⁹² While “[w]e have never been led to expect that they would have a fastidious regard either for the rights of other men or the interests of the public,” the *Times* declared, “what is both surprising and disgraceful is the facility with which they succeeded in using the Attorney-General’s office and the Supreme Court of this state to further their object.”²⁹³

The strategies allegedly used by Gould in gaining control of the Manhattan were reminiscent of tactics used in the “Erie Wars,” when Gould fought Cornelius Vanderbilt for control of the Erie Railroad. This episode saw an unprecedented corruption of the legislature and judiciary and resulted in the impeachment or resignation of three judges.²⁹⁴ It prompted reformist lawyers of the New York bar in 1869 to begin organizing the Association of the Bar of the City of New York “in hopes of improving the moral character of lawyers and judges.”²⁹⁵ Elite lawyers such as James Coolidge Carter, John E. Parsons, Edmund Randolph Robinson, George L. Rives, and other members of the Bar Association mistrusted Gould and the rapacious, overreaching capitalism he represented.²⁹⁶ Gould’s acquisition of the elevated railroads appeared to mock the reform-

290. GRODINSKY, *supra* note 14, at 290–308.

291. *A Chapter of Manhattan*, *supra* note 61; *Field First to Confess*, *supra* note 61; *Public Trusts Betrayed*, *supra* note 61; *Relevant and Irrelevant*, *supra* note 61.

292. *A Chapter of Manhattan*, *supra* note 61.

293. *Id.*

294. These events were contemporaneously described in the famous article by Charles Francis Adams, *A Chapter of Erie*, 109 NO. AM. REV. 30 (1869). Among the judges tarnished by the scandal was Albert Cardozo, father of Benjamin Cardozo, who chose to resign rather than face impeachment. Judge Cardozo’s role in the scandal is detailed in Andrew L. Kaufman, *The First Judge Cardozo*, 11 J. L. & RELIGION 271 (1994).

295. Lewis A. Grossman, *James Coolidge Carter and Mugwump Jurisprudence*, 20 LAW & HIST. REV. 577, 589 (2002).

296. *Id.* at 589–90; GEORGE MARTIN, CAUSES AND CONFLICTS: THE CENTENNIAL HISTORY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, 1870–1970 3–141 (1970). John E. Parsons went on to serve as counsel for Rufus Story and

ers' efforts and signal a return to the Erie days. As the *Times* wrote, the elevated railroad scandal "recalls in a painful way the days when Judges whose names are covered with obloquy and legislators whose obscurity alone shielded them from lasting infamy were at the command of scheming stock jobbers, among whom the leading spirit in this colossal scandal was conspicuous."²⁹⁷

Prompted by the *Times*' demand for public inquiries, two legislative committees held hearings to examine the conduct of Judge Westbrook and Attorney General Ward in the spring of 1882.²⁹⁸ The committees examined General Wager Swayne, counsel for the receivers of the Manhattan Company, about the many letters that had passed between himself and Judge Westbrook during the course of the litigation and questioned Gould about his role.²⁹⁹ Ultimately, a majority of the judiciary committee favored exonerating Judge Westbrook, though criticizing his conduct as "indiscreet and unwise," while a minority sought impeachment.³⁰⁰ A majority of the assembly voted to adopt the committee's majority report, though not before several members stood and "denounced in very severe terms the Judge's conduct and the majority report."³⁰¹

The judges on the court of appeals could not have avoided knowledge of these events, especially since the committee hearings occurred while the court was hearing arguments in the *Story* case. It would be very surprising if the circumstances surrounding the ownership of the elevated railroads had no influence on the judges' attitudes toward the claims of the abutting owners. Unlike the engineers and entrepreneurs who began the elevated companies, men like Charles T. Harvey and Dr. Rufus Gilbert, Gould and the other financiers battling him for control were not interested in an efficient and effective rapid transit system but in enlarging their own wealth and power. With this in mind, members of the court would have had difficulty equating the elevated railroad companies with the public interest. The timing of the Gould takeover, the publicity of his tactics, and his general notoriety are too significant to ignore. The court of appeals deciding *Story* and subsequent elevated railroad cases could not have avoided questioning whether a Gould-controlled railroad truly represented a "public use."

numerous other abutting owners in elevated railroad suits including *Lahr*, *Tallman*, and *Mortimer*.

297. *A Chapter of Manhattan*, *supra* note 61.

298. *A Judge's Official Acts*, *supra* note 14; *Justice Westbrook's Acts*, *supra* note 14.

299. *Justice Westbrook's Acts*, *supra* note 14.

300. *Westbrook Exonerated*, N.Y. TRIBUNE, June 1, 1882, at 1.

301. *Id.*

CONCLUSION

Whether prompted by the injuriousness of the elevated railroad, an increased concern for individual property rights, or a distrust of Jay Gould, the elevated railroad cases were a remarkable work of judicial creativity. Without acknowledging that it was doing anything unusual, the majority in *Story* sidestepped a half-century of nuisance and takings law to find for the plaintiff property owner. In subsequent cases, the courts continued to use doctrinally inventive means to side with the abutting owners, managing to find ways to compensate them for their full loss of market value. In the next decade, the United States Supreme Court would move openly toward requiring compensation for loss of market value in the rate regulation context.³⁰² There the Court employed its emerging doctrine of substantive due process.³⁰³ In the elevated railroad cases, the New York Court of Appeals accomplished the same result, but by reaching back to the ancient common law—to “incorporeal hereditaments” and “servient tenements,” to the historic property rights of easements of light, air, and access. The elevated railroad cases demonstrate the flexibility of the common law of property, as well as the varied forms that judicial innovation has taken in the Gilded Age and beyond.

302. See Siegel, *supra* note 130, at 94.

303. *Id.* at 255.

