THE RISE OF ROBERT MOSES AND THE FALL OF NEW YORK CONSTITUTIONAL PROTECTIONS AGAINST EMINENT DOMAIN

Christopher Dunn[*]

[*] Associate Legal Director, New York Civil Liberties Union (NYCLU). J.D., University of Pennsylvania; B.A., University of Virginia.

As a safeguard against the forced taking of private property at the hands of the government, the New York Constitution is dead. I do not, however, lay its demise at the feet of the recent New York Court of Appeals decisions in the Columbia University and Atlantic Yards controversies.[1] Rather, an examination of the arc of eminent domain law over the last 150 years reveals that the constitutional protections largely expired starting in the 1930s, a development that coincided with Robert Moses's four-decade campaign of bulldozing around New York State, through New York City, and over anyone who stood in his way.

I. PRE-MOSES CONDEMNATION LAW

In terms largely unchanged since its original adoption in 1821, the New York Constitution provides that "[p]rivate property shall not be taken for public use without just compensation."[2] Central to legal challenges brought in New York since the nineteenth century is the extent to which the "public use" language limits the government's power of eminent domain. And prior to the 1930s, the New York Court of Appeals infused the "public use" standard with considerable substance.

Four cases decided between 1876 and 1918 illustrate the court's approach. First is *In re Petition of the Deansville Cemetery Ass'n*,[3] which presented a challenge to legislation authorizing rural cemetery associations to exercise eminent domain. These associations used their eminent domain power to create cemeteries where the plots would be sold to members of the public and then controlled by those owners and their heirs or successors.[4] In defending the statute, the cemetery association argued that the courts had little role to play in reviewing legislation authorizing eminent domain and that, regardless, the taking of property for publicly available cemeteries qualified as a "public use."[5] After squarely rejecting the suggestion that "the question whether the use for which the property was taken was public or private" was not for the courts, the Court of Appeals

[1] *See* Kaur v. N.Y. State Urban Dev. Corp., 933 N.E.2d 721, 730–31 (N.Y. 2010), *cert. denied*, 2010 WL 3712673, at *1 (U.S. Dec. 13, 2010) (No. 10-402); Goldstein v. N.Y. State Urban Dev. Corp., 921 N.E.2d 164, 173 (N.Y. 2009);.

[2] N.Y. CONST. art. I, § 7(a).

[3] 66 N.Y. 569 (1876).

[4] *Id.* at 570–71.

[5] *Id.* at 571.

invalidated the statute by virtue of a relatively narrow view of "public use":

> It is argued that the property is to be used as a place of burial and that the burial of the dead is a public benefit, and therefore, the use is public. But the answer to this argument is, that the right of burial in these grounds is not vested in the public or in the public authorities, or subject to their control, but only in the individual lot-owners. If the fact that it is a benefit to the public that the dead should be buried is sufficient to make a cemetery a public use, the legislature might authorize A to take the land of B for a private burial place of A and his family. The fact that this land is taken for the benefit of a number of individuals for division among themselves or their grantees for their own use as a cemetery, makes the case no stronger than if taken for the benefit of a single individual.[6]

Eight years later in *In re Eureka Basin Warehouse & Manufacturing Co.*,[7] the court similarly rejected a statute authorizing the use of eminent domain to assist in the creation of a commercial shipping area in Brooklyn with docks and related buildings.[8] Most of the area would be controlled by a private entity, with the public being given access to only a limited area. In holding that the statute violated the constitution's "public use" provision, the Court of Appeals refused to accept the notion that supporting economic development that would benefit the public was sufficient to satisfy the "public use" requirement:

> We cannot regard such a project as a public purpose or use which justifies the delegation to this company of the right of eminent domain. The enterprise is, in substance, a private one, and the pretense that it is for a public purpose is merely colorable and illusory. The taking of private property for private purposes cannot be authorized even by legislative act, and the fact that the use to which the property is intended to be put, or the structure intended to be built thereon, will tend incidentally to benefit the public by affording additional accommodations for business, commerce or manufactures, is not sufficient to bring the case within the operation of the right of eminent domain, so long as the structures are to remain under private ownership and control, and no right to their use or to direct their management is conferred upon the public.[9]

The next illustrative case is the court's 1888 ruling in *In re*

[6] *Id.* at 571, 573–74.
[7] 96 N.Y. 42 (1884).
[8] *Id.* at 48–49.
[9] *Id.*

Niagara Falls & Whirlpool Railway Co.,[10] which arose out of a plan to condemn private property near Niagara Falls and turn it over to a railroad that would operate a short line to provide views of the falls.[11] Though the Court of Appeals long had held that the taking of property for the construction of rail lines qualified as a public use, it rejected the taking in this case.[12] The court explained that, despite the fact the railroad as described in its official documents plainly qualified for the exercise of eminent domain, an examination of the project's details revealed that the intended specific use was not public because it had no proper station at its end, would not transport freight, could only operate during part of the year, and was intended only to provide "for the portion of the public who may visit Niagara falls better opportunities for seeing the natural attractions of the locality."[13] In taking this approach, the court outlined a relatively narrow view of public use:

> What is a public use is incapable of exact definition. The expressions "*public interest*" and "*public use*" are not synonymous. The establishment of furnaces, mills, and manufactures, the building of churches and hotels, and other similar enterprises, are more or less matters of public concern, and promote, in a general sense, the public welfare. But they lie without the domain of public uses for which private ownership may be displaced by compulsory proceedings.[14]

The court also squarely rejected the notion that a right of public access to the intended use was sufficient to satisfy the requirement of public use: "The fact that . . . the road will be public in the sense that all who desire will be entitled to be carried upon it, is not sufficient, we think, in view of the other necessary limitations, to make the enterprise a public one, so as to justify condemnation proceedings."[15]

Finally, there is *Bradley v. Degnon Contracting Co.*,[16] a ruling from 1918 in which the court also rejected a public use claim. There, a private contractor working on construction of the New York City subway built a rail line down the middle of a Brooklyn

[10] 15 N.E. 429 (N.Y. 1888).
[11] *Id.* at 430–31.
[12] *Id.* at 431–32.
[13] *Id.* at 432.
[14] *Id.* (emphasis added).
[15] *Id.*
[16] 120 N.E. 89 (N.Y. 1918).

street to remove materials being excavated for the subway.[17] After noting that it long had recognized that railroad use of a street amounted to a taking of the property of adjoining land owners, the court outlined a relatively restrictive view of public use:

> To constitute a use public, it must be for the benefit and advantage of all the public and in which all have a right to share—a use which the public have a right to freely enter upon under terms common to all. Public use necessarily implies the right of use by the public. The character of the use, whether public or private, is determined by the extent of the right by the public to its use, and not by the extent to which that right is or may be exercised. If a person or corporation holds or possesses the use, the public must have the right to demand and compel access to or the enjoyment of it.[18]

In light of these principles, the court held that the tramway did not qualify as a public use because it could only be used for the removal of the excavated materials, even though the use was part of a broader use—subway construction—that plainly was public.[19] Suggesting that each portion of a project might be subject to independent use analysis, the court said, "It is true its use facilitated and progressed the completion of a great public enterprise, but that fact . . . does not enter into the distinction between a public use and a private use."[20]

Thus, in the four decades leading up to the 1920s, the Court of Appeals created and enforced substantial barriers to eminent domain through its interpretation of the constitution's "public use" provision. That approach would soon come to an end, a change that coincided with the beginning of a half century of aggressive use of eminent domain by Robert Moses.

II. THE ARRIVAL OF ROBERT MOSES

As chronicled in Robert Caro's Pulitzer Prize winning *The Power Broker*, Robert Moses first assumed real power on April 30, 1924, when he was elected chairman of the New York State Council on Parks.[21] He was eligible for that position after

[17] *Id.* at 90.
[18] *Id.* at 93.
[19] *Id.* at 92–93.
[20] *Id.* at 93.
[21] ROBERT A. CARO, THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK 177 (1975).

Governor Al Smith appointed him chairman of the Long Island State Park Commission on April 18, 1924. That same day, Smith signed a bill that Moses had crafted that gave Moses enormous power to seize private property.[22]

As Caro details in a chapter entitled "The Best Bill Drafter in Albany,"[23] the bill was extraordinary in many respects. Most significantly for the purposes of this essay, it authorized the commission not only to exercise eminent domain but also to exercise "appropriation" as provided by a separate law, which meant the commission could summarily seize property without first going through the potentially burdensome and time-consuming eminent domain process.[24] In addition, while it purported to authorize the taking of property only for "parks," the bill defined "parks" to include "parkways . . . boulevards and also entrances and approaches thereto, docks and piers, and bridges . . . and such other . . . appurtenances as the . . . commission shall utilize . . ."[25] Between these two provisions, Moses was given the power to take vast areas of property on Long Island for parks, roadways and related uses and to do so summarily. Moses would exercise this power quickly, initiating four decades of property seizures on his part and marking the beginning of major changes in the New York Court of Appeals's view of the constitutional protections against government takings.

Shortly after gaining control of the Long Island State Park Commission, Moses began acquiring property for parks and roadways he planned. He quickly ran into trouble, however, in his efforts to acquire land for the Southern State Parkway, the route city dwellers could use to reach the park Moses was constructing at Jones Beach. The problem arose when a group of affluent Long Islanders purchased the nearly 1,500-acre Taylor Estate in East Islip through which the roadway was to be built and refused Moses's demand to sell rights to cross the property.[26] Using the authority he created through the bill signed by Governor Smith, Moses summarily seized the Taylor Estate on December 4, 1924.[27]

[22] *See id.*
[23] *Id.* at 172.
[24] *Id.* at 174.
[25] *Id.* at 175.
[26] *Id.* at 184.
[27] *Id.* at 184–86.

Not surprisingly, the property owners sued. They succeeded in blocking Moses in the lower courts, and he took the case to the Court of Appeals. In *Pauchogue Land Corp. v. Long Island State Park Commission*,[28] decided in May 1926, the court ruled that "[t]he appropriation of and entry on the lands was illegal when made."[29] This holding, however, was not based on the constitutional restrictions on eminent domain but instead on the constitutional requirement that "[n]o money shall ever be paid out of the treasury of this state, or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law."[30] Though Moses had secured sweeping power to take property on Long Island, the court found that the legislature had not yet appropriated any specific funds for those takings, and thus invalidated the seizure of the Taylor estate.[31]

Nonetheless, the Court of Appeals did not permanently block the taking, allowing that "if an appropriation of money is made available a lawful reappropriation of the lands will terminate their illegal acts and the action will be one for damages only."[32] And, as Caro explains, Moses ultimately was able to secure the appropriation and the property through an extraordinary legislative and public relations campaign that would become his signature strategy.[33]

Moses's next encounter with the Court of Appeals arising out of his property seizures came nine years later and again involved his Long Island redevelopment efforts. Having completed the parkway to Jones Beach, Moses's Long Island State Park Commission enacted a regulation barring left and u-turns anywhere on the roadway.[34] As a result, a landowner who had granted easements for the roadway was put in the position of having to travel all the way to Jones Beach before being able to turn around and proceed in the other direction towards New York City. He sued, claiming the regulation constituted an uncompensated taking of his private property because it

[28] 152 N.E. 451 (N.Y. 1926).

[29] *Id.* at 454.

[30] *Id.* at 453 (quoting N.Y. CONST. art. III, § 21 (omitted 1938)); *see* N.Y. CONST. art. VII, § 7.

[31] *Pauchogue Land Corp.*, 152 N.E. at 453.

[32] *Id.* at 454.

[33] *See* CARO, s*upra* note 21, at 218–19.

[34] Jones Beach Boulevard Estate, Inc. v. Moses, 197 N.E. 313, 315 (N.Y. 1935).

substantially reduced the value of his land.[35] A Nassau County Supreme Court justice dismissed the case,[36] the Appellate Division, Second Department reversed,[37] and the case went to the Court of Appeals.

In *Jones Beach Boulevard Estate, Inc. v. Moses*,[38] decided in 1935, the court upheld the regulation, again without reaching any issue of the constitutional restrictions on the power of eminent domain. Rather, giving voice to the worry of every parent of a young driver when it noted that "left turns are recognized generally as dangerous," the Court of Appeals decided the case by interpreting the agreement between the property owner and the commission as not entitling the property owner to make turns across the parkway, thereby obviating the constitutional issue.[39]

Thus, as Moses was ascending as a major force in New York, he had had only two minor brushes with the Court of Appeals, neither of which presented any significant issue about constitutional limits on eminent domain. Nonetheless, the court previously had demonstrated a willingness to restrict the use of eminent domain, which might have become a substantial barrier to Moses's work. One year after the *Jones Beach Boulevard* decision, however, the Court of Appeals would set off in an entirely new direction in eminent domain law, paving the way for Moses to proceed as he did.

III. CONDEMNATION IN THE MOSES ERA

As Moses ascended to power, the Court of Appeals embraced a far more expansive view of "public use" when the government sought to seize private property. That shift started in 1936 with a seminal decision about a public housing project slated for the Lower East Side in Manhattan.

New York City Housing Authority v. Muller[40] decided a challenge brought by the owners of two tenement houses on East Third Street in Manhattan. The New York City Housing Authority, which had been granted the power of eminent domain,

[35] *Id.*

[36] Jones Beach Boulevard Estate, Inc. v. Moses, 259 N.Y.S. 53, 56 (Sup. Ct. 1932), *rev'd*, 266 N.Y.S. 983 (App. Div. 1933), *rev'd*, 197 N.E. 313 (N.Y. 1935).

[37] Jones Beach Boulevard Estate, Inc. v. Moses, 266 N.Y.S. 983, 983 (App. Div. 1933), *rev'd*, 197 N.E. 313 (N.Y. 1935).

[38] 197 N.E. at 313.

[39] *See id.* at 315.

[40] 1 N.E.2d 153 (N.Y. 1936).

sought to seize the properties as part of a "slum clearance" project that would result in the construction of high-rise, low-income housing.[41] The issue presented to the Court of Appeals was whether the taking of property for use as private (though publicly owned) housing qualified as a "public use," a question the court stated had never before been decided.[42]

In approaching the issue, the court signaled its willingness to take a far more flexible approach to the notion of "public use," noting that "the courts have vainly attempted to define comprehensively the concept of a public use and to formulate a universal test."[43] Moreover, it suggested that to attempt such a definition or universal test "would, in an inevitably changing world, be unwise if not futile."[44] Consistent with this view, the court devoted considerable attention to the larger societal context in which the condemnation had taken place, focusing in particular on its view of the threat posed by "slums":

> The public evils, social and economic, of such conditions, are unquestioned and unquestionable. Slum areas are the breeding places of disease which take toll not only from denizens, but, by spread, from the inhabitants of the entire city and state. Juvenile delinquency, crime, and immorality are there born, find protection, and flourish. Enormous economic loss results directly from the necessary expenditure of public funds to maintain health and hospital services for afflicted slum dwellers and to war against crime and immorality. Indirectly there is an equally heavy capital loss and a diminishing return in taxes because of the areas blighted by the existence of the slums. Concededly, these are matters of state concern, since they vitally affect the health, safety, and welfare of the public. Time and again, in familiar cases needing no citation, the use by the Legislature of the power of taxation and of the police power in dealing with the evils of the slums, has been upheld by the courts. Now, in continuation of a battle, which if not entirely lost, is far from won, the Legislature has resorted to the last of the trinity of sovereign powers by giving to a city agency the power of eminent domain.[45]

With this foundation, it is no surprise that the court went on to find that slum clearance qualified as a public use.[46] In doing so, it flatly rejected—in direct conflict with earlier rulings—the

[41] *Id.* at 153–54.
[42] *Id.* at 154.
[43] *Id.* at 155.
[44] *Id.*
[45] *Id.* at 154 (citation omitted).
[46] *Id.* at 156.

argument that the dedication of the seized property for private use rendered the use something other than public use.[47] Indeed, the court essentially held that what controlled was not the ultimate use of the property, but instead, the reason for it being taken:

> It is also said that since the taking is to provide apartments to be rented to a class designated as "persons of low income," or to be leased or sold to limited dividend corporations, the use is private and not public. This objection disregards the primary purpose of the legislation. Use of a proposed structure, facility, or service by everybody and anybody is one of the abandoned universal tests of a public use. The designated class to whom incidental benefits will come are persons with an income under $2,500 a year, and it consists of two-thirds of the city's population. But the essential purpose of the legislation is not to benefit that class or any class; it is to protect and safeguard the entire public from the menace of the slums.[48]

This marked a major shift in the court's view of the constitutional restrictions on eminent domain. The *New York Times* reported the decision on the front page and reprinted the court's opinion on page four.[49] In the news story, it quoted the head of the Housing Authority as saying the ruling was "'the most important judicial decision in the history of housing legislation.'"[50]

Muller opened the door to a dramatic expansion of Moses's work. As Caro explains, Moses made an ambitious move in 1938 from rural parks and roadways to urban housing projects under the rubric of "slum clearance."[51] Among other projects, Moses would go on to use the expanded power of eminent domain to raze large areas of the Manhattan's Upper West Side in the name of urban development.[52]

Meanwhile, the Court of Appeals continued to loosen the constitutional reins on property takings. Thirteen years after deciding *Muller*, the court blessed government seizure of property for almost entirely private commercial purposes. In *Denihan Enterprises, Inc. v. O'Dwyer*,[53] a case challenging the exercise of

[47] *See id.* at 155–56.
[48] *Id.* (citations omitted).
[49] *Housing Act Valid, High Court Rules, Attacking Slums*, N.Y. TIMES, Mar. 18, 1936, at A1.
[50] *Id.* at 4.
[51] CARO, *supra* note 21, at 610–11.
[52] *See id.* at 611.
[53] 99 N.E.2d 235 (N.Y. 1951).

eminent domain to seize property for a parking garage taking up two-thirds of an Upper East Side block, the court accepted as unremarkable "the legality of the concept that private property may be condemned for parking motor vehicles when the public is primarily served in the taking of such vehicles from our streets to relieve traffic congestion."[54]

More significant still was the Court of Appeals's 1963 decision clearing the way for the Port Authority of New York—a rival of Moses's—to build the World Trade Center. In *Courtesy Sandwich Shop, Inc. v. Port of New York Authority*, the court firmly embraced the notion that government taking of private property to promote private commercial activity qualified as a "public purpose," a term the court by that time had adopted as a proxy for the constitutional requirement of "public use."[55] In support of its view that promoting private business interests was constitutionally sufficient, the Court of Appeals offered a sweeping endorsement of the public benefit of private commerce:

> The Appellate Division has stated that the concept of the World Trade Center is a public purpose. We understand this to mean that any use of the property sought to be condemned that is functionally related to the centralizing of all port business is unobjectionable even though private persons are to be the immediate lessees. The "concept" referred to by the Appellate Division can mean only that. It is the gathering together of all business relating to world trade that is supposed to be the great convenience held out to those who use American ports and which is supposed to attract trade with a resultant stimulus to the economic well-being of the Port of New York. This benefit is not too remote or speculative as to render the means chosen to achieve it patently unreasonable; nor is the benefit sought itself an improper concern of government. The history of western civilization demonstrates the cause and effect relationship between a great port and a great city. Fostering harbor facilities has long been recognized by this court as the legitimate concern of government. Even the centralization of inland trade has supported the exercise of the power of eminent domain for the establishment of public markets wherein private merchants plied their trades.[56]

The court did not stop there, however. Citing to *Muller*, it expressly endorsed the notion that "incidental" benefits flowing to the public were sufficient; moreover, it stated that "even esthetic

[54] *Id.* at 238.
[55] 190 N.E.2d 402, 404–05 (N.Y. 1963).
[56] *Id.* (citations omitted).

improvements" met the requirement of a public purpose and that "facilitating" commerce was sufficient to justify property seizures:

> More recently the indirect benefits deriving from slum clearance and from a "plan to turn a predominantly vacant, poorly developed and organized area into a site for new industrial buildings" have justified condemnation. To retreat from the public importance of piers, markets and slum clearance, even esthetic improvements have been held to be a public purpose justifying condemnation. No further demonstration is required that improvement of the Port of New York by facilitating the flow of commerce and centralizing all activity incident thereto is a public purpose supporting the condemnation of property for any activity functionally related to that purpose. Nor can it be said that the use of property to produce revenue to help finance the operation of those activities that tend to achieve the purpose of the project does not itself perform such a function, provided, of course, that there are in fact such other activities to be supported by incidental revenue production.[57]

Five years after the World Trade Center case, the Robert Moses era effectively ended when, in March 1968, he surrendered control over the Triborough Bridge and Tunnel Authority, which long had served as his base of power.[58] The Court of Appeals, however, was not quite done with its evisceration of the constitutional protections against government seizure of private property.

The final nail in the coffin came in 1975, with the court's ruling in *Yonkers Community Development Agency v. Morris*.[59] The dispute there arose when the Yonkers development authority moved to condemn private property it intended to convey to the Otis Elevator Company, "a leading industrial employer in the City of Yonkers."[60] The condemnation was nothing short of a government transfer of property from one private owner to another for the benefit of the latter's private, commercial enterprise. Otis had openly expressed an interest in acquiring land adjoining its existing facility in Yonkers so it could expand its operations and had negotiated a deal for the property with Yonkers before the property was ever condemned.[61]

None of this gave the court a moment of pause. In rejecting the challenge to the condemnation, it unanimously held that the

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[57] *Id.* at 405 (citations omitted).
[58] *See* CARO, *supra* note 21, at 1140, 1144.
[59] 335 N.E.2d 327 (N.Y. 1975).
[60] *Id.* at 330.
[61] *Id.* at 331.

government's right to take property regardless of the intended use went beyond the type of slum clearance at issue in *Muller* to the much broader (and more ambiguous) goal of "economic development":

> Historically, urban renewal began as an effort to remove "substandard and insanitary" conditions which threatened the health and welfare of the public, in other words "slums," whose eradication was in itself found to constitute a public purpose for which the condemnation powers of government might constitutionally be employed. Gradually, as the complexities of urban conditions became better understood, it has become clear that the areas eligible for such renewal are not limited to "slums" as that term was formerly applied, and that, among other things, economic underdevelopment and stagnation are also threats to the public sufficient to make their removal cognizable as a public purpose.[62]

According to the court, the public use inquiry ended if the government could establish that the property was underdeveloped: "Where, then, land is found to be substandard, its taking for urban renewal is for a public purpose."[63] Thus, under such circumstances, there was no need to balance the public benefit against the private benefit: "It would not then be necessary, as a precondition to the taking, to determine that the public benefit in assuring the retention of Otis as an increased source of employment opportunity in Yonkers was sufficient to outweigh the benefit that may be conferred on Otis."[64]

Thus, by the time the Moses era came to an end, the Court of Appeals had effectively foreclosed eminent domain challenges grounded in the constitution's public use provision. The two recent decisions in the Atlantic Yards and Columbia University cases simply adhere to the hands-off approach adopted by the court thirty-five years ago.

IV. FEDERAL CONDEMNATION DISPUTES INVOLVING MOSES

While the New York Court of Appeals removed eminent domain impediments grounded in the constitution's "public use" requirement as Moses was aggressively seizing property across the state, the federal courts twice handed him defeats in eminent

[62] *Id.* at 330 (citations omitted).
[63] *Id.* at 331.
[64] *Id.*

domain disputes. In one case, Moses was undone by the authority he had at his start in the 1920s, and in the other he got a taste of what his opponents had long experienced at his hands.

Tuscarora Nation of Indians v. Power Authority of New York[65] arose out of the construction of the Niagara River Power Project in western New York, which was to include a power plant that would be the country's largest hydro-electric project. Moses had become the Power Authority's chairman in 1954. Using the same power of "appropriation" that he had written into the original legislation governing the Long Island parks, Moses in 1958 summarily seized nearly 1,400 acres of land owned by the Tuscarora Nation of Indians so the land could be used as a reservoir in conjunction with the project.[66]

Despite the national significance of the project, and the fact that "[c]onstruction work and power lines relocation [were] at the very edge of the Tuscarora reservation," the United States Court of Appeals for the Second Circuit blocked Moses.[67] Noting that he initially attempted to proceed by standard eminent domain proceedings but then withdrew that action and opted simply to appropriate the land, the court ruled that this went beyond what Congress had authorized when it approved the project. While recognizing that the federal legislation conferred on Moses's Power Authority the right of eminent domain, it balked at the summary seizure:

> The exercise of the right [of eminent domain] is thus the act of an agency of the sovereign. But just as the grant is given by Congress it should be exercised in the manner prescribed by Congress which is either in the district court where the property is located or in the state courts. The appellees, although they started their condemnation proceedings in the State court, chose to abandon that method and proceeded [by appropriation] . . . . If Congress wishes this to be the method of eviction it should at least so declare in specific terms.[68]

Given this, the court enjoined the seizure, barring Moses from "entering upon or damaging lands within the Tuscarora Reservation."[69]

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[65] 257 F.2d 885 (2d Cir. 1958), *vacated as moot sub nom.* McMorran v. Tuscarora Nation of Indians, 362 U.S. 608 (1960).

[66] *Id.* at 887.

[67] *Id.* at 888.

[68] *Id.* at 894.

[69] *Id.*; *see* CARO, *supra* note 21, at 826. The project ultimately was built and the power plant is named after Moses. *Id.*

The other federal case is *United States v. 51.8 Acres of Land*,[70] where Moses got a taste of his own medicine. At issue was property on Long Island that Moses's Jones Beach State Parkway Authority sought to use for parkway and parks purposes in extending the Meadowbrook State Parkway.[71] As detailed in an affidavit from Moses, the Authority purchased the 200-acre property in 1953 and 1954 only after the Air Force informed Moses it had no interest in obtaining the property itself to expand an adjoining airfield.[72] In 1955, however, the federal government initiated a condemnation action and the very next day obtained an *ex parte* order "granting to the United States the immediate possession and exclusive use" of approximately fifty acres of the property.[73]

Moses moved to set aside the taking, claiming—ironically, given his long history of Machiavellian tactics—that the government had acted in bad faith in taking it. The district court rejected that claim, leaving Moses only to dispute the amount of compensation to be received for the property.[74]

V. THE MOSES LEGACY AND EMINENT DOMAIN

Notwithstanding these two setbacks in federal court in the 1950s, Moses was able to wield almost unchecked power to seize private property for nearly half a century. I do not suggest that this came about because he was able to dictate or even influence the development of eminent domain law. Rather, his reign and the corresponding transformation of the New York Court of Appeals's view of constitutional restraints on eminent domain both reflected a broader societal acceptance of massive public works projects and a corresponding decline in the perceived sanctity of the private ownership of property that stood in the way of those projects.

By the 1960s, however, public attitudes about Moses-like projects began to shift significantly. And in that decade, as chronicled in Anthony Flint's 2009 book, *Wrestling With Moses*,[75] three of Moses's projects were blocked, not because of any

[70] 147 F. Supp. 356 (E.D.N.Y. 1956).
[71] *Id.* at 357.
[72] *Id.* at 358.
[73] *Id.* at 357.
[74] *Id.* at 361.
[75] ANTHONY FLINT, WRESTLING WITH MOSES: HOW JANE JACOBS TOOK ON NEW YORK'S MASTER BUILDER AND TRANSFORMED THE AMERICAN CITY (2009).

litigation over "public use," but because of effective organizing and public advocacy by Jane Jacobs.[76] These projects included a plan to extend Fifth Avenue through Washington Square Park in Manhattan[77] and a subsequent plan—likely conceived to retaliate against Jacobs for her having stopped the Washington Square Park extension—to raze, as part of an "urban renewal" project, the quaint residential area of the West Village where Jacobs lived.[78] Finally, there was Moses's proposed Lower Manhattan Expressway, an elevated ten-lane highway that would have run through the middle of Soho and the Lower East Side and necessitated the demolition of over 400 residential and commercial buildings.[79]

While public attitudes about massive land-grabbing and neighborhood-destroying public works projects have changed since the end of the Moses era, the law of New York has not—as amply demonstrated by the Atlantic Yards and Columbia University decisions. Should another Robert Moses appear on the scene, he or she may have many forces to contend with, but, for better or for worse, the New York Constitution and the New York Court of Appeals will not be amongst them.

[76] *See id.* at 92, 135, 178.

[77] *See id.* at 61–62.

[78] *See id.* at 102.

[79] *See id.* at 137–39. Given her success as an advocate, it is ironic that, shortly before her death in 2006, Jacobs submitted an *amicus curiae* brief to the United States Supreme Court opposing the property seizure at issue in *Kelo v. City of New London*. Brief of Jane Jacobs as Amica Curiae in Support of Petitioners, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108).