

FIFTEENTH ANNUAL BRIGHAM-KANNER PRIZE
PRESENTATION DINNER
AWARD RECIPIENT SPEECH

AWARD RECIPIENT

Stewart E. Sterk, *H. Bert and Ruth Mack Professor of Real Estate Law and Director of the Center for Real Estate Law & Policy at the Benjamin N. Cardozo School of Law of Yeshiva University*

INTRODUCTION

Lynda Butler, *Chancellor Professor of Law and Director, Property Rights Project, William & Mary Law School*

BUTLER. Each year, the Brigham-Kanner Prize is awarded to someone who has made significant contributions to our understanding of property and its role in society. The prize is awarded to someone who is thought deeply about property's relation to the human condition and about the importance of property rights to our political, economic, and social systems. Prior recipients have included some of the nation's leading property scholars, a Supreme Court Justice, a highly regarded practitioner, and a world-renowned Peruvian economist.

This year's recipient, Stewart Sterk, is one of the most complete scholars we have recognized. By complete I mean that he has approached the field of property totally and comprehensively. He has taught and wrote about almost every key aspect of property as an institution. General areas of his expertise include land use regulation, property, trusts and estates, real estate transactions, and intellectual property. His numerous publications address such topics as takings, inheritance, the moral obligations of land owners, zoning finality, servitudes, property and copyright, minority protection in residential private governments, and exactions, just to name a few. A member of the American Law Institute, Stew also has co-authored casebooks on land use regulation and on trusts and estates.

Stew received both his undergraduate and law degrees from Columbia University. After a clerkship, Stew began his academic career at Cardozo School of Law. He has also visited at Columbia and the University of Pennsylvania law schools.

In addition to writing scholarship that is rich with ideas, Stew has won teaching awards for the Best Professor or Best 1L Professor

so many times (at least fourteen) that he must have stirred up a bit of envy among his colleagues.

What I find most impressive about Stew are the accolades that I received from his peers once they learned that he was receiving the award. One word in particular impressed me because it is not usually used to praise academics who are at the top of their game, and that word is “generous”—generous as a colleague, as a co-author, as a teacher, and as a person. Stew, we are deeply honored that you are here to receive the Brigham-Kanner Prize. Please come forward.

STERK. It’s really very humbling to receive an award that, in the past, has gone to such a cadre of really distinguished people. I very much appreciate what the Brigham-Kanner Prize means, and I feel very honored to receive it.

I would like to start by basically responding to the invitation, for those of us who are academics, to learn from those of you who are practitioners and say that, at least for myself, it’s really something that makes this Conference particularly valuable—we always get an opportunity to listen to the issues that are on the front lines, and it really helps us and enriches us in the work that we do. So I really thank the sponsors of this Conference for making that possible.

I don’t think today is really the day for dealing with the substance of property law. Most of that is for tomorrow, and we’ll spend time on that. But I do want to at least remind everyone that this year, for better or for worst, it’s the fortieth anniversary of *Penn Central*.¹ And I want to raise that, in part, because for my career *Penn Central* has played a doubly important role. First, it introduced me to the law of takings. And second, it really provided me a gateway into my academic career.

I started my legal career as a law clerk to Judge Breitel in the New York Court of Appeals, and while I was there one of the cases that wound its way through the Court of Appeals was *Penn Central*. The opinion fell to Judge Breitel, and I got assigned to put together a first draft of this opinion. For those of you who remember, it was really an odd opinion—for which I take neither credit nor blame because it was really all the Judge’s idea. This opinion basically said that the government really didn’t have to worry about *Penn Central* very

1. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

much because the government had contributed so substantially to the value of Penn Central by running the subway lines through Grand Central that, really, compensation was not necessary.²

Now, leaving aside the merits of that case, it really provided me an education in and an introduction to takings—through the works of Henry George³ at the insistence of the Judge. When I think about *Penn Central* though, I marvel at how much the legal landscape has changed over the last forty years. And if you remember what things were like before *Penn Central* was decided, it wasn't at all clear that landmark preservation would be upheld. It wasn't at all clear how transferable development rights ("TDRs") would be treated from a taking's perspective. And, at least in my home state under the law of New York, it was not clear that there was any such thing as a regulatory taking at all because the Court of Appeals had basically held that when the government acted in a way that seemed to be confiscatory, that was only a due process violation—it couldn't be a taking because all the government had done was to excessively use the police power and the remedy was to strike down that ordinance.⁴ Whatever confusion *Penn Central* has generated since then, it at least eliminated some areas of confusion.⁵

For me, *Penn Central*'s importance was not really doctrine. When I entered the teaching market, there were no such things as visiting assistant professors. There were very few fellowships out there. Most people started an academic career by coming from practice or coming from a clerkship. By the time I entered the teaching market, every school was starting to ask for something called a "job talk"—a presentation that talked about some legal issue. For me it made sense to talk about *Penn Central* and the evolution of takings law in New York. So I spent a lot of time preparing for this talk, and I'll tell you, I don't have any idea what I said. Although I have no recollection of

2. See *Penn Central Transp. Co. v. City of New York*, 42 N.Y.2d 324, 327–37 (1977), *aff'd*, 438 U.S. 104 (1978).

3. See HENRY GEORGE, *PROGRESS AND POVERTY* 418–19 (4th ed. 1898) (arguing that all land value is created by the community and that a single tax on land value "is the taking by the community, for the use of the community, of that value which is the creation of the community.")

4. See *Fred F. French Investing Co. v. City of New York*, 39 N.Y. 2d 587, 594 (1976).

5. In *Penn Central* itself, the Court expressly rejected the contention that government could only engage in landmark regulation by compensating affected owners. 438 U.S. 104 at 131. The Court also established that a municipality could use TDRs to mitigate the impact of a challenged regulation. *Id.* at 137.

what I said during that talk, it must have gone reasonably well—otherwise I wouldn't be standing here now. But it shows how *Penn Central* was important to my career development beyond its ordinary doctrinal importance.

Now, I'd like to say that I started teaching property and I started working in property because I had a passion for the subject as a result of my work on *Penn Central* and elsewhere. But that really isn't true. The truth is that I chose to teach property because it was the first-year course in law school that I liked the least. The class I attended had too much Hohfeld, it had too much of estates in land, it had too much adulation of the then-recent landlord-tenant cases that provided excessive tenant protection. I just thought, I don't know if I would be able to do well at anything else, but this is a course I can probably do better than the class that I had. And that's how I essentially got into teaching property.

That's how I got into teaching property, but over time I certainly did develop a passion for the subject and for the material. Its importance to the human condition is absolutely critical. From a teaching perspective, I recognize that property is probably the most important teaching course of any in the first year (and I know people in other areas might disagree). Why? Unlike civil procedure, torts, criminal law, and maybe even contracts, property is not solely focused on litigation, and it is not solely focused on policy issues. Property allows a teacher of law to get people focused on issues of negotiation, issues of counseling, issues of drafting—issues that are critical to every lawyer in the profession. And most people leave their first year without having any sense of those issues outside of their property course. As much as I'd like to say I'd like to teach other courses, too, I just can't imagine ever stopping teaching property.

On the scholarly front, I think to the extent that my scholarship—which Lynda talked about—has made any impact at all, I would have to thank many of the people in this room and many of the people who have been past award winners of the Brigham-Kanner Prize. They've been so generous and so kind in providing me guidance, both in terms of their own work and in terms of their own personal comments on what I have done. I am really grateful to all of you who have done that over time.

Finally, I'd like to thank two other groups of people who've been absolutely essential. One is the group of my Cardozo colleagues,

several of whom are here, who have created a rich environment for me to work in. And the second is my family who are here and who have also provided support beyond anything that I could have otherwise imagined.

Again, I would like to thank all of you for making this day necessary, and I appreciate it very much. Thank you.