CONSTITUTIONAL PERSPECTIVES ON HISTORIC PRESERVATION LAW: MEDIATING THE BALANCE BETWEEN PRIVATE OWNERS AND THEIR HISTORIC PROPERTIES

D.O. Malagrinò[*]

INTRODUCTION

Historic preservation zoning laws limit property owner sovereignty to protect cultural and heritage resources.[1] Historic preservation regulations typically do not restrict the uses of property, but instead primarily protect the aesthetic exterior features of the

[*] Associate Dean for Faculty Research & Development and Professor of Law, Charleston School of Law. Thanks are due to Judith D. Bowers, Bates McFadden Holman, Thomas P. Krahe, Forrest W. Lewis, AshleyAnn Sander, and Amy M. Saukas for their contributions to this article.

[1] *See* JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND CONTROL LAW § 12.6, at 575-76 (1998).

property.[2] Aesthetic considerations are a key factor in historic preservation zoning legislation, and in these contexts, the law has evolved to accepting widely the legitimacy of a city's aesthetic objectives to preserve historic properties and spaces.[3] But when might these regulations go too far? When might they amount to a "taking"? Traditionally, cities could not use their police power to accomplish goals that were purely aesthetic.[4] However, more modern understandings of a state's police power enable cities to designate certain districts as "historic" to regulate the aesthetics of private property both to protect historic landmarks or locales,[5] and to stabilize

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[2] J. Peter Byrne, *Regulatory Takings Challenges to Historic Preservation Laws After* Penn Central, 15 FORDHAM ENV'T L. REV. 313, 320 (2004).

[3] *See* DANIEL R. MANDELKER, LAND USE LAW § 11.24, at 462 (4th ed. 1997).

[4] All preservation laws must be enacted in accordance with the police power. *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926). The police power is the inherent authority residing in each state to regulate, protect, and promote "public health, safety, morals, or general welfare." *Id.* at 395. The scope of the police power and consequent justification for limiting an owner's property rights derive from social norms. Byrne, *supra* note 2, at 323 ("*Euclid* itself emphasized that restrictions that may have been objectionable to earlier generations now seem perfectly appropriate.").

[5] The basic Constitutional question is whether historic preservation is a legitimate function of the government. The U.S. Supreme Court in its 1978 decision in *Penn Central Transportation Co. v. New York City*, held that restrictions on property for the purpose of "preserving structures and areas with special historic, architectural, or cultural significance" are a valid use of governmental authority. 438 U.S. 104, 129 (1978). "[T]his Court has recognized, in a number of settings, that States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city." *Id.* Many state courts have explicitly held historic preservation to be a legitimate use of police power. *See, e.g.*, City of Santa Fe v. Gamble-Skogmo, Inc., 389 P.2d 13, 18 (N.M. 1964) ("Santa Fe is known throughout the whole country for its historic features and culture. Many of our laws have their origin in that early culture. It must be obvious that the general welfare of the community and of the State is enhanced thereby. Bearing in mind all these factors, we hold that regulation of the size of window panes in the construction or alteration of buildings within the historic area of Santa Fe, as a part of the preservation of the "Old Santa Fe Style" of architecture, is a valid exercise of the police power granted to the city."); Moviematic Indus. Corp. v. Bd. of Cnty. Comm'rs, 349 So. 2d 667, 669 (Fla. Dist. Ct. App. 1977) ("[Z]oning regulations which tend to preserve the residential or historical character of a neighborhood and/to enhance the aesthetic appeal of a community are considered valid exercises of the public power as relating to the general welfare of the community."); State v. Jones, 290 S.E.2d 675, 678 (N.C. 1982) ("[T]he general welfare under the police power is served by such historical preservation ordinances through contributing to economic and social stability, preserving past noteworthy architectural techniques, and promoting tourism revenues."); Second Baptist Church v. Little Rock Historic Dist. Comm'n, 732 S.W.2d 483, 485 (Ark. 1987) (citation omitted) ("With the passage of the Historic District Act, the Arkansas Legislature allowed qualified municipalities to take steps to protect

property values because, generally, private property that offends sensibilities and debases others' property values may affect the general welfare of the community.[6] In reviewing historic preservation zoning legislation, courts usually impose limitations on these laws by interpreting constitutional requirements that protect the individual property owner from arguably overly burdensome governmental actions.[7]

Many communities protect their historic buildings and neighborhoods by specially designating them as historic and prospectively subjecting them to strict design controls.[8] A "historic district" could be a neighborhood having unique historic architecture and other characteristics in which the zoning laws regulate the design of buildings and the use of the district's properties to maintain appearances that exemplify those special characteristics.[9] In addition to stabilizing property values and maintaining tourism, preservation of these characteristics may foster civic and neighborhood pride and form the basis for maintaining community character.[10] Often, communities accomplish their aesthetic goals using historic

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places of historic interest within their boundaries. It authorizes the use of historic districts to promote the educational, cultural and economic welfare of a community which has been deemed a legitimate use of the police powers by numerous state and federal courts.").

[6] State *ex rel.* Stoyanoff v. Berkeley, 458 S.W.2d 305, 309 (Mo. 1970) (quoting Deimeke v. State Highway Comm'n, 444 S.W.2d 480, 484 (Mo. 1969)) ("Property use which offends sensibilities and debases property values affects not only the adjoining property owners in that vicinity but the general public as well because when such property values are destroyed or seriously impaired, the tax base of the community is affected and the public suffers economically as a result."). Further, the court in *Stoyanoff* stated:

> If by the term 'aesthetic considerations' is meant a regard merely for outward appearances, for good taste in the matter of the beauty of the neighborhood itself, we do not observe any substantial reason for saying that such a consideration is not a matter of general welfare. The beauty of a fashionable residence neighborhood in a city is for the comfort and happiness of the residents, and it sustains in a general way the value of property in the neighborhood.

Id. at 310 (quoting State *ex rel.* Civello v. City of New Orleans, 97 So. 440, 444 (La. 1923)).

[7] *See, e.g.*, *Penn Central*, 438 U.S. at 124.

[8] MANDELKER, *supra* note 3, §§ 11.25-11.27, at 463-65.

[9] For more on historic districts, see generally *National Register Database and Research*, NAT'L PARK SERV., https://www.nps.gov/subjects/nationalregister/database-research.htm [https://perma.cc/NJ5J-PNEE] (Jan. 19, 2023).

[10] *See* JUERGENSMEYER & ROBERTS, *supra* note 1, § 12.6, at 575-76.

preservation or conservation easements—negative easements preventing destruction or alteration of buildings that are of historic or architectural importance.[11] As such, the owner of private property designated as a landmark or located within a historic district is typically prohibited from altering its external appearance or from erecting new structures without obtaining a permit from the appropriate regulating agency or review board, including, likely, a board of architectural review.[12] For instance, a city in southern

[11] *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.6 statutory note at 39 (AM. L. INST. 2000). Conservation easements are perpetual in duration and run to successors in interest. *See id.* § 4.3(4). As such, these agreements assure that historically significant homes cannot be torn down or substantially altered even after they are acquired by new owners. *See* Federico Cheever & Nancy A. McLaughlin, *An Introduction to Conservation Easements in the United States: A Simple Concept and a Complicated Mosaic of Law*, 1 J.L. PROP. & SOC'Y 107, 112-13 (2015). "The explosion in the number of conservation easements over the past four decades has made them one of the most popular land protection mechanisms in the United States." *Id.* at 109. The National Conservation Easement Database estimates that the total number of acres encumbered by conservation easements exceeds 40 million. *Id.* at 110.

[12] Under a conservation easement, a property's owner gives up the right to make certain changes to that property to preserve it for future generations. *See* Cheever & McLaughlin, *supra* note 11, at 108. Such an easement usually limits the usefulness of the property and lowers its value. *See id.* at 111. In return, there may be tax incentives for a landowner to donate the conservation easement. *Id.* When a conservation easement meets criteria spelled out in the Internal Revenue Code, the owner may qualify for a tax deduction, may be given a property tax reduction based on the property's reduction in value, or may be permitted to use the building in an otherwise unpermitted manner to generate an economic return. *See id.* at 119-34. The IRS first affirmed favorable federal tax treatment of a conservation easement in a 1964 Revenue Ruling. *See* Rev. Rul. 64-205, 1964-2 C.B. 62. The IRS declared:

> A gratuitous conveyance to the United States of America of a restrictive easement in real property to enable the Federal Government to preserve the scenic view afforded certain public properties, is a charitable contribution within the meaning of section 170 of the Internal Revenue Code of 1954. The grantor is entitled to a deduction for the fair market value of the restrictive easement in the manner and to the extent provided in section 170 of the Code; however, the basis of the property must be adjusted by eliminating that part of the total basis which is properly allocable to the restrictive easement granted.

Id. Then, in 1976, Congress amended the Internal Revenue Code to allow tax deductions for charitable gifts to included donations of an easement exclusively for conservation purposes. *See* I.R.C. § 170(f)(3)(B)(iii), (h). With the Tax Reform Act of 1976, the federal government also began providing favorable terms for depreciation of the costs of rehabilitation. Pub. L. No. 94-455, sec. 2124, 90 Stat. 1520, 1916-18. Although the favorable depreciation terms were repealed by the Economic Recovery Tax Act of 1981,

California may designate its original settlement to be a historic district to commemorate the early days of its "Old Town" founded by Spanish missionaries and to preserve its historic buildings, thus requiring that all buildings within the historic district maintain an exterior mission-style appearance.[13]

Further, it is widely accepted that a city delegates such regulatory authority to review boards comprised of nonelected people, likely architectural experts, who will approve or deny such permit requests based primarily on aesthetic and/or architectural criteria.[14] And delegating the authority to architectural review boards is normally not *ultra vires*[15] because these review boards must still follow the specific standards in the enabling statute authorizing the local municipality to act when reviewing requests for any variances or special permits.[16]

Pub. L. No. 97-34, sec. 212(d), 95 Stat. 172, 239, the federal government now provides a credit for the costs of rehabilitation. *See* I.R.C. § 47.

[13] *Old Town San Diego Community Plan*, SAN DIEGO, https://www.sandiego.gov/sites/default/files/1_otsd_introduction.pdf [https://perma.cc/R6DY-FJDE] (last visited May 18, 2022). The plan states, "Old Town San Diego has significant historical importance for the City of San Diego. It is the site of initial settlement in the City and the birthplace of the State of California. The rich heritage of this community is of immense value to present and future generations." *Id.* at 2. Further, the plan states:

> In 1966, the City adopted the Old Town San Diego Architectural Control District Ordinance in recognition of Old Town's historic character, and created an Architectural Control Board to administer the zoning ordinance. The regulations placed architectural restrictions on new structures as well as the alteration or relocation of existing buildings to assure building designs compatible to the historical context of the community.

Id. at 7.

[14] *See* JUERGENSMEYER & ROBERTS, *supra* note 1, § 12.10, at 584-87.

[15] Local authorities have the power to enact zoning laws if authorized to do so by state "enabling acts." *See id.* § 12.9, at 582. If not authorized under the state enabling act, then the action is beyond the authority of the local authority (i.e., "ultra vires"). *See id.*

[16] *See* Anderson v. City of Issaquah, 851 P.2d 744, 751 (Wash. Ct. App. 1993) (alterations in original) (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926)) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men [and women] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."); *see also* Cope v. Inhabitants of Brunswick, 464 A.2d 223, 225 (Me. 1983) (citation omitted) (quoting Stucki v. Plavin, 291 A.2d 508, 510 (Me. 1972) ("[L]ocal zoning boards, like municipalities, have no inherent authority to regulate the use of private property. Instead, the power of a town, and therefore that of the local zoning board of appeals, is conferred upon the town by the State. . . . This power may not be delegated from the legislature to the municipality or from the municipality to a local administrative body

Indeed, both federal and state legislation protect historic landmarks by designating such buildings or districts as subject to special controls to prevent structures from being demolished or from having their exterior altered without prior approval by the appointed review board.[17] And, sometimes, these regulations prevent construction of new structures in historic districts when the new structure would arguably clash with the aesthetics of the historic district.[18] Consider the following hypothetical:

> Carolopolis is a city with an historic district—a neighborhood in which most of the buildings are over 200 years old; and many of the buildings are antebellum, a unique architectural style from the pre-Civil War era. The city's chamber of commerce markets the historic district's cultural heritage, which results in Carolopolis being a popular, world-wide tourist destination. The historic district showcases the unique aesthetic and architectural character of the buildings, and the international, historic significance of the locale. To preserve the distinctive, historic character of the district, Carolopolis has a city ordinance requiring a permit for all construction, renovations, alterations, and demolitions within the historic district. The city established a commission with the authority to grant or deny such permit requests.
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> Martha is the owner of a house within the district; her house itself is not of unique historic character. Martha seeks a permit to demolish the house and erect a new apartment building in its place; apartment buildings are otherwise authorized under the local zoning ordinance in this area. The commission denies Martha's permit request. The reason the commission gives for the denial is that, although Martha's house itself is not antebellum, the redevelopment of the property to an apartment building would tend to lessen the aesthetic appeal of the

without a sufficiently detailed statement of policy to: 'furnish a guide which will enable those to whom the law is to be applied to reasonably determine their rights thereunder, and so that the determination of those rights will not be left to the purely arbitrary discretion of the administrator.'").

[17] JUERGENSMEYER & ROBERTS, *supra* note 1, §§ 12.6-12.11, at 575-92; MANDELKER, *supra* note 3, §§ 11.24-11.36, at 462-74.

[18] MANDELKER, *supra* note 3, § 11.27, at 464-65.

> district and also detract from the distinctive, historic character of the district.[19]

Should Oliver be able to erect the apartment building on his private property? Would the permit denial constitute a taking of his private property for public use without just compensation? This particular house is not antebellum, and apartment buildings are otherwise permitted in the district. Historic preservation laws have been challenged facially and as-applied to particular sites as unconstitutional takings of property.[20] Although upheld by the Supreme Court, as long as the property retains an economically viable

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[19] ROBIN PAUL MALLOY & DYLAN OLIVER MALAGRINÒ, LAND USE AND ZONING LAW: PLANNING FOR ACCESSIBLE COMMUNITIES 121-22 (2d ed. 2022). This hypothetical is derived from the City of Charleston, S.C., and its Old and Historic District, Old City District and Historic Corridor District Regulations. *See Ordinance 2017-084*, CHARLESTON, S.C. (Oct. 4, 2017), https://www.charleston-sc.gov/DocumentCenter/View/16445/Ordinance-2017-084?bidId= [https://perma.cc/YPM2-QYUL]. The regulation states:

> Purpose of creating districts. In order to promote the economic and general welfare of the city and of the public generally, and to insure the harmonious, orderly and efficient growth and development of the city, it is deemed essential by the city council of the city that the qualities relating to the history of the city and a harmonious outward appearance of structures which preserve property values and attract tourist and residents alike be preserved; some of these qualities being the continued existence and preservation of historic areas and structures; continued construction of structures in the historic styles and a general harmony as to style, form, color, proportion, texture and material between structures of historic design and those of more modern design. These purposes are advanced through the preservation and protection of old historic or architecturally worthy structures and quaint neighborhoods which impart a distinct aspect to the city and which serve as visible reminders of the historical and cultural heritage of the city, the state, and the nation.

CHARLESTON, S.C. § 54-230 (2022), https://library.municode.com/sc/charleston [Perma.cc link unavailable].

[20] *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 133, 138 (1978) (noting plaintiff argued "New York City's [Landmarks Law was] *inherently incapable* of producing . . . governmental action which is . . . constitutional" while concluding "the application of [that law] ha[d] not effected a 'taking'") (emphasis added); *see also* United States v. Salerno, 481 U.S. 739, 745 (1987) (stating a facial challenge occurs where "the challenger [attempts to] establish that no set of circumstances exists under which [a law] would be valid").

use,[21] challenges have emerged in state courts and have sometimes been successful.[22]

This descriptive Article provides a study of historic preservation law that affects private property. To do this, the Article focuses on when permit denials for renovations to historic landmarks or to buildings in historic districts may violate the Fifth Amendment by using the *Penn Central* balancing test. This Article surveys early case law and more-modern case law that have affected uses of private property throughout the United States. First, this Article examines the constitutional issues faced by historic preservation efforts and the constitutional impact for historic preservation. Then, the focus is to look at the tools local, state, and federal governmental agencies employ when promoting historic preservation. And finally, this Article examines administrative issues affecting historic preservation.

I. CONSTITUTIONAL ISSUES

Historic preservation laws must be within the limitations of state and federal constitutional provisions that protect the rights of property owners. In general, constitutional challenges to historic preservation laws have arisen under the Takings, the Due Process, and the Equal Protection Clauses of the Fifth and Fourteenth Amendments[23] and the Free Exercise of Religion and the Free Speech Clauses of the First Amendment to the U.S. Constitution.[24] Here, the focus of this Article is on Fifth Amendment issues concerning due process and government takings.

Property owners challenging historic preservation laws sometimes argue that such laws, either generally or as-applied, amount to a taking of private property.[25] The basis of these claims is well-rooted in the foundation of this country. On June 8, 1789, Congressman James Madison made a historic speech to the House of

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[21] *Id.* at 138 (finding historic preservation law constitutional as applied to Penn Central).

[22] *See, e.g.*, Smith v. Zoning Bd. of Appeals of Greenwich, 629 A.2d 1089, 1104 (Conn. 1993); Williams v. City of Central, 907 P.2d 701, 708 (Colo. App. 1995); State *ex rel.* BSW Dev. Grp. v. City of Dayton, 699 N.E.2d 1271, 1276 (Ohio 1998).

[23] U.S. CONST. amends. V, XIV.

[24] U.S. CONST. amend. I.

[25] *See* U.S. CONST. amend. V. The term "taking" comes from the Fifth Amendment to the U.S. Constitution, which states, "[N]or shall private property be taken for public use, without just compensation." *Id.*

Representatives and introduced several proposed amendments to the Constitution.[26] Madison's proposed amendments later became the Bill of Rights to the U.S. Constitution, which includes the Fifth Amendment.[27]

In early Supreme Court cases such as *Transportation Co. v. Chicago*,[28] Justice Strong and the Court noted that "private property shall not be taken for public use without just compensation being made."[29] In that case, the city's construction of a tunnel under the Chicago River had obstructed a landowner from fully using its property.[30] However, the Court held that the city was not required to compensate the property owner for the city's obstruction[31] because the Court ruled that there was no "physical invasion of the real estate of the private owner, [nor] a practical ouster of his possession."[32] Instead, the Court held that "acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking."[33] Justice Strong's rationale rests on there having been no

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[26] *On This Day: James Madison Introduces the Bill of Rights*, NAT'L CONST. CTR. (June 8, 2022) [hereinafter *On This Day*], https://constitutioncenter.org/blog/on-this-day-james-madison-introduces-the-bill-of-rights [https://perma.cc/65Y4-BWER]; *see also* Jack Rakove, *A Biography of Madison's Notes of Debates*, 31 CONST. COMMENT. 317, 317 (2016) (reviewing MARY SARAH BILDER, MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION (2015)) (noting Professor Bilder's "composition, compilation, and revision" of Madison's notes on debates and proposal of amendments "makes a landmark contribution to our understanding of the origins and interpretation of the Constitution.").

[27] *On This Day*, *supra* note 26; U.S. CONST. amend. V. The relevant clauses in the Fifth Amendment are the Due Process Clause and the Takings Clause. In Madison's proposed language, he aptly wrote, "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without a just compensation." 1 ANNALS OF CONG. 451 (1789); *see also* Christopher Serkin, *The New Politics of New Property and the Takings Clause*, 42 VT. L. REV. 1, 9 (2017) (discussing Madison's proposed amendments and protecting the "heart of the Takings Clause").

[28] 99 U.S. 635, 642-43 (1879) (noting the historical context for just compensation cases).

[29] *Id.* at 642 ("The decisions to which we have referred were made in view of Magna Charta and the restriction to be found in the constitution of every State, that private property shall not be taken for public use without just compensation being made.").

[30] *Id.* at 635-36.

[31] *Id.* at 645.

[32] *Id.* at 642.

[33] *Id.*

entry—no intrusion—on the plaintiff's lot, and the only real issue was that for a time, the construction was merely an inconvenience.[34]

The Supreme Court case first applying the Fifth Amendment directly to the states by way of the Fourteenth Amendment was *Chicago, Burlington & Quincy Railroad Co. v. Chicago*.[35] Writing the opinion for the Court, Justice Harlan held that under the due process of law, states were required to provide just compensation when seizing private property.[36] This decision resulted in a landmark opinion because prior to this case, the Bill of Rights (Amendments I through X) only applied to the federal government; in *Chicago, Burlington & Quincy Railroad Co.*, the Court applied the Bill of Rights, in part, to the local state government.[37]

A. Regulatory Takings

Now, under the Supreme Court's interpretation, the Takings Clause extends beyond just actual expropriation of private land through the exercise of eminent domain to include implicit takings of private property by government legislation as well; accordingly, if such a law is so burdensome as to amount to a "taking," then compensation must be paid.[38]

On historic preservation laws and the issue of takings, the leading decision is *Penn Central Transportation Co. v. New York City*.[39] The *Penn Central* decision provides the foundational legal framework within which local governments may enforce historic preservation laws without the constitutional requirement to pay "just compensation" because those restrictions do not amount to a taking.[40] In 1978, the Supreme Court in *Penn Central* held that New York City's Landmarks Preservation Law regulation did not interfere with Penn Central's reasonable, investment-backed expectations for its property

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[34] *Id.* ("All that was done was to render for a time its use more inconvenient.").

[35] 166 U.S. 226 (1897).

[36] *Id.* at 235-41.

[37] *See id.*

[38] Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (noting that if an exercise of the police power "goes too far" in interfering with property rights, it will be invalidated unless the government pays just compensation).

[39] 438 U.S. 104, 138 (1978) (primarily holding that a city can restrict property development near a landmark to preserve it without needing to pay compensation to the property owners).

[40] Byrne, *supra* note 2, at 313.

ownership, thus the restrictions did not constitute a taking.[41] As such, the Court upheld the action of the New York City Landmarks Preservation Commission denying approval for an elaborate Penn Central proposal to construct an office building above the existing Grand Central Terminal, which had been given landmark status.[42] The Commission concluded that the office building in the air space above Grand Central Terminal would destroy the Terminal's historic and aesthetic features, renowned as a prime example of neoclassic, Beaux-Arts design.[43] The Court noted that the Terminal site "must, in its present state, be regarded as capable of earning a reasonable return, and that the transferable development rights afforded appellants by virtue of the [site's] designation as a landmark are valuable, even if not as valuable as the rights to construct above the Terminal."[44] Thus, the Court held there was no taking[45]—a decision that has arguably extended and been applied more broadly to enable general land use regulations beyond mere historic landmark designations.

And so, the Court's 1978 decision in *Penn Central* marked the beginning of a period of time during which the Court had an intense interest in the regulatory takings doctrine. Subsequent decisions, including *Lucas v. South Carolina Coastal Council*,[46] have provided somewhat greater clarity than *Penn Central* did about how restrictive a land use regulation must be to cause a taking. Indeed, under the U.S. Constitution, a historic district or landmark designation would have

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[41] *Penn Cent. Transp. Co.*, 438 U.S. at 135-38.

[42] *Id.* at 115-18, 138.

[43] *Id.* at 117-18. Later, the Court explained that "New York City's objective of preserving structures and areas with special historic, architectural, or cultural significance is an entirely permissible governmental goal" and that "the restrictions imposed on its parcel are appropriate means of securing the purposes of the New York City law," so that only the "taking" issue was before the Court. *Id.* at 129.

[44] *Id.* at 129 (footnote omitted).

[45] *Id.* at 138.

[46] 505 U.S. 1003 (1992). It is obvious that the claim in *Penn Central* would not have even come close to meeting the later-established *Lucas* test for a categorical taking. In *Lucas*, the state's beachfront management statute, which banned development on any vacant lots, was a taking because it completely eliminated economic use of the property, regardless of the public prevention of harm. *Id.* at 1019. The state statute amounted to a per se taking. *Id.* at 1052 (Blackmun, J., dissenting).

to cause a very substantial value loss before it might trigger a compensable taking.[47]

In *Penn Central*, Justice Brennan articulated factors to consider in determining whether the permit denial amounted to an unconstitutional taking of private property without just compensation: (1) the "economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action."[48] Further, the Court applied a "parcel as a whole" theory, in that takings jurisprudence ought not to "divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."[49] Instead, "[i]n deciding whether a particular governmental action has effected a taking, th[e] Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole . . . ."[50] Justice Rehnquist explained, as a result of the Court's holding in *Penn Central*, the need to consider the effect of regulation on some identifiable segment of property makes all-important the admittedly difficult task of defining the particular parcel.[51] Thus, the identity of the particular parcel would be determined, in a given case, by applying the "parcel-as-a-whole" doctrine to the relevant facts.[52]

Certainly, *Penn Central* has always stood as a key constitutional test for historic landmark protection laws and, more generally, for historic preservation legislation as a tool of land regulation.[53] However, realistically today, the real question in these regulatory takings cases is: What ought to be the just compensation required for

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[47] *See, e.g.*, Keeler v. Mayor & City Council of Cumberland, 940 F. Supp. 879, 880, 888 (D. Md. 1996) (holding there was a regulatory taking where a church was denied permission to demolish a monastery and chapel located in a historic preservation district and to build a smaller, more modern facility); Broadview Apartments Co. v. Comm'n for Hist. & Architectural Pres., 433 A.2d 1214, 1216-18 (Md. Ct. Spec. App. 1981) (holding that Broadview suffered a regulatory taking when it was denied a permit to demolish the "Ascot House," a three-story, detached, early 1900s house, which had been designated a landmark under the City's preservation law).

[48] *Penn Cent. Transp. Co.*, 438 U.S. at 124.

[49] *Id.* at 130-31.

[50] *Id.*

[51] *See id.* at 149 n.13 (Rehnquist, J., dissenting).

[52] *See id.*

[53] Byrne, *supra* note 2, at 314.

the governmental action? Scholars have offered many thoughts as to what would constitute "just" compensation.[54] Few have offered any bright-line rule, test, or formula aimed at gathering those answers.[55] Perhaps the answer is as simple as calculating the "just compensation" in regulatory takings claims to be: no-compensation or "zero."[56]

Let us see how the Takings Clause evolved to include such implicit takings of private property by government legislation.

1. A Primer on Takings and the Current State of Takings Law: Examining the Constitutional Scope of Eminent Domain, Its Extent, and Limitations

Limits to the government's power of eminent domain include requirements that the taking must be for "public use" and that the

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[54] *See, e.g.*, D.O. Malagrinò, *Among Justice John Paul Stevens's Landmark Legacies:* Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 53 CREIGHTON L. REV. 77, 102-08 (2019) (discussing that takings analysis should not concern itself with whether there has been a taking, but rather what "just compensation" is required, and that perhaps the *Penn Central* factors are really the test for just compensation). *See generally* Glynn S. Lunney, Jr., *Compensation for Takings: How Much Is Just?*, 42 CATH. U. L. REV. 721 (1993) (discussing when a government has "gone too far" to affect a taking); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967) (discussing the role administrative agencies take when considering whether the situation warrants just compensation).

[55] *See, e.g.*, Malagrinò, *supra* note 54, at 102-08 ("The courts could come up with a theory of justice, and, through the process of concrete application by common-law method, this theory of justice would acquire a predictable content, sensitive to the range of factors relevant to whether justice requires compensation and, if so, how much."). *See generally* Marc R. Lisker, *Regulatory Takings and the Denominator Problem*, 27 RUTGERS L.J. 663, 719-25 (1996); Michelman, *supra* note 54.

[56] *See* Patricia E. Salkin, *Applying the Public Trust Doctrine in New York: A Management Tool for Protecting Public Resources Today and for Future Generations*, 2 ALB. L. ENV'T OUTLOOK, Winter 1996, at 5, 7-8 (discussing Dean Martin Belsky's position in support of the government broadening its public trust doctrine to carve out an exception for regulatory takings claims with no compensation); THOMAS J. MICELI & KATHLEEN SEGERSON, THE ECONOMICS OF EMINENT DOMAIN: PRIVATE PROPERTY, PUBLIC USE, AND JUST COMPENSATION 3 (2007) (discussing a no-compensation rule and noting that "zero compensation is efficient"); Yun-chien Chang, *Economic Value or Fair Market Value: What Form of Takings Compensation Is Efficient?*, 20 SUP. CT. ECON. REV. 35, 40-42 (2012) (noting the scholarship on takings compensation splits between zero compensation, lump-sum compensation, and some compensation based on fair market value and economic value); *see also* Malagrinò, *supra* note 54, at 90-91 (discussing that the real question "should be what would constitute 'just compensation,' which very well may be zero in some circumstances.").

government must pay "just compensation" for the taking.[57] But when seeking to challenge a government regulation as an unconstitutional taking, the landowner must also show that the regulation "goes too far" and, thus, amounts to a taking, rather than merely a lawful exercise of the police powers.[58]

Property owners' claims of implicit takings typically fall into one of three categories—resulting physical occupations, exactions through conditions on development, and regulatory takings through permit denials. Physical occupations result when the government invades private property, such as if a law requires property owners to allow cable boxes to be installed on their buildings.[59] Exactions occur when the government imposes conditions on a private owner's property in exchange for a permit to develop, such as if the local board requires a private land owner to provide for beach access across the private property as a condition to issue a permit to build an addition to the existing structure on the land.[60] Permit denial cases typically involve a decision by a local government to deny a property owner's application

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[57] U.S. CONST. amend. V.

[58] Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[59] *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426-35 (1982) (discussing that due to the close link between physical occupations and actual expropriations through eminent domain, the Supreme Court has established a per se rule, requiring just compensation for all regulations that result in permanent physical occupation, no matter how minor the occupation).

[60] *See, e.g.*, Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987) (stating there must be an essential logical nexus between the conditions for approval burdening the property owner and the legitimate state interest affected by the proposed development project requiring that approval); Dolan v. City of Tigard, 512 U.S. 374, 389-91 (1994) (ruling that a governmentally imposed dedication of land for public use must be roughly proportional to the impacts on the community that will result from the proposed development project requiring approval); Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 612 (2013) (holding that an unconstitutional exaction could occur if the condition for approval is that the property owner must pay impact fees or "in lieu of" payments; these monetary exactions must still meet the *Nollan* and *Dolan* thresholds of requisite nexus with the legitimate governmental interests and roughly proportional to the community impact); E. Enters. v. Apfel, 524 U.S. 498, 529-37 (1998) (holding that a federal statute, the Coal Industry Retiree Health Benefit Act of 1992, which required a mining company to fund health benefits to its miners who had previously worked for the company and left the company before the Act, was an unconstitutional taking because it imposed harsh retroactive liability to the company that was disproportionate to its share of the mining field).

to use or alter the property in a particular way, which interferes with the property owner's intended use of the property.[61]

This Article focuses on when permit denials may violate the Fifth Amendment by using the *Penn Central* balancing test.[62] And like our hypothetical city of Carolopolis, regulatory takings through permit denials are the typical basis for a claim that the historic preservation legislation amounts to a taking.[63] Here, we see how these types of implicit takings developed and how more "takings" may occur now that the requirement that the taking must be for "public use" is not much of a restraint on government action since 2005.[64]

Prior to 1922, a government regulation of land was not a taking.[65] The Court opined that such regulations were an exercise of the government's police power to protect lives, safety, welfare, and morals.[66] For instance, in 1915, in *Hadacheck v. Sebastian*,[67] the Court held that a Los Angeles city ordinance prohibiting the operation of a brick kiln or a brick yard within the city limits was a legitimate exercise of police power and was constitutional even though the plaintiff claimed that the ordinance rendered his property valueless because it could only be used as a brickyard.[68] Justice McKenna's discussion in the opinion effectively states the Court's reasoning that "[t]here must be progress, and if in its march private interests are in the way they must yield to the good of the community."[69] Justice McKenna also noted the ordinance did not amount to a complete denial of the use of the plaintiff's property and the presence of a brickyard was inconsistent with neighboring uses.[70] The plaintiff could potentially use the clay on his land; of course, for the plaintiff, it "would be prohibitive 'from a financial standpoint'"—in other words, too expensive—to do so.[71] Justice McKenna discusses the

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[61] *See, e.g.*, Figarsky v. Historic Dist. Comm'n of Norwich, 368 A.2d 163, 166 (Conn. 1976).

[62] *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

[63] *See* discussion *infra* Section II.A.

[64] *See generally* Kelo v. City of New London, 545 U.S. 469 (2005).

[65] *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (ruling that "if regulation goes too far[,] it will be recognized as a taking").

[66] *Id.* at 406.

[67] 239 U.S. 394 (1915).

[68] *Id.* at 404-05, 409-10, 412-14.

[69] *Id.* at 410.

[70] *Id.* at 411-12.

[71] *Id.*

establishment of a nuisance-control measures test, such that governmental regulation would not amount to a taking if the regulation were to control uses constituting a common law nuisance.[72] *Hadacheck* was one of the first cases involving regulatory takings under zoning laws.[73] It recognized a city's police powers and use of zoning ordinances whereby the city may enact regulations to protect the safety of people's lives, property, welfare, peace, and morals.[74]

In 1922, in *Pennsylvania Coal Co. v. Mahon*,[75] the Court held that a Pennsylvania state law called the Kohler Act, which prohibited the mining of coal under a habitation, was not a legitimate exercise of police power; it amounted to an unconstitutional taking of property rights without adequate and just compensation.[76] Justice Holmes discussed the Court's decision and focused on the extent of the "diminution" in the value of the property in determining whether a regulatory act constituted a taking.[77] Holmes's often cited passage in *Mahon* is: "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[78] Thus, the Court derived a diminution-of-value test.[79]

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[72] *See id.* at 410-12 ("[G]ranting that the business was not a nuisance *per se*, it was clearly within the police power of the State to regulate it, 'and to that end to declare that in particular circumstances and in particular localities a livery stable shall be deemed a nuisance in fact and in law.'").

[73] *See id.* at 404.

[74] *Id.* at 406, 413-14.

[75] 260 U.S. 393 (1922).

[76] *Id.* at 412-15.

[77] *Id.* at 413. In comparison, in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, there was a state regulation requiring that at least 50% of underground coal be left in place where mining coal might cause subsidence damage to surface structures. 480 U.S. 470, 476-77 (1987). Unlike the similar law held to be a taking in *Mahon*, the Court found a valid public purpose behind the state regulation in *DeBenedictis* and concluded the regulation was not a taking. *Id.* at 481-502.

[78] *Mahon*, 260 U.S. at 415; *see, e.g.*, First Eng. Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 316 (1987); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 (1992); Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001); Murr v. Wisconsin, 137 S. Ct. 1933, 1942 (2017).

[79] *See Mahon*, 260 U.S. at 413; *see also* Nathaniel S. Lawrence, *Regulatory Takings: Beyond the Balancing Test*, 20 URB. LAW. 389, 396 (1988) ("Justice Holmes declared that while some diminution in property value had to be tolerated, when 'it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.'").

In 1982, in *Loretto v. Teleprompter Manhattan CATV Corp.*,[80] the Court held that a "physical occupation of an owner's property authorized by government constitutes a 'taking' of property."[81] The case involved a cable company installing a cable box on the landowner's building to furnish cable service to the tenants.[82] A regulation in New York required the landlord to permit a cable television company to install its cable upon the landlord's property, effectively destroying the right of the landowner to exclude or control that portion of the property.[83] Justice Marshall discussed in the majority opinion that Teleprompter Manhattan's "minor but permanent physical occupation of an owner's property authorized by government constitutes a 'taking' of property for which just compensation is due under the Fifth and Fourteenth Amendments."[84] Marshall also pointed out that the right to exclude is "one of the most

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[80] 458 U.S. 419 (1982). There was a state statute requiring landlords to allow television cables to be installed on their premises for a one-time payment of just one dollar. *Id.* at 423-24.

[81] *Id.* at 421.

[82] *Id.* at 421-22.

[83] *Id.* at 423-24. The statute provided that:

> 1. No landlord shall
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> a. interfere with the installation of cable television facilities upon his property or premises, except that a landlord may require:
>
> i. that the installation of cable television facilities conform to such reasonable conditions as are necessary to protect the safety, functioning and appearance of the premises, and the convenience and well-being of other tenants;
>
> ii. that the cable television company or the tenant or a combination thereof bear the entire cost of the installation, operation or removal of such facilities; and
>
> iii. that the cable television company agree to indemnify the landlord for any damage caused by the installation, operation or removal of such facilities.
>
> b. demand or accept payment from any tenant, in any form, in exchange for permitting cable television service on or within his property or premises, or from any cable television company in exchange therefor in excess of any amount which the commission shall, by regulation, determine to be reasonable; or
>
> c. discriminate in rental charges, or otherwise, between tenants who receive cable television service and those who do not.

Id. at 423 n.3 (quoting N.Y. EXEC. LAW § 828 (McKinney Supp. 1981-1982) (current version at N.Y. PUB. SERV. LAW § 228 (McKinney 2021))).

[84] *Id.* at 421.

essential sticks in the bundle of rights."[85] Thus, the Court established the permanent physical occupations test for regulatory takings.[86]

In 1978, in *Penn Central*, the Court held that the City's Landmarks Law regulation did not interfere with Penn Central's reasonable, investment-backed expectations for its property ownership, thus the restrictions did not constitute a taking.[87] Where a regulation places limitations on land use, a taking may have occurred depending on the complex set of factors, including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable, investment-backed expectations, and the character of the governmental action.[88] In that case, there was no taking because there was no impact of great magnitude on Penn Central's primary expectations—that is, the terminal could be used as it always had been, and Penn Central was able to continue obtaining a reasonable return for that use.[89]

However, in 1992, in *Lucas v. South Carolina Coastal Council*,[90] the Court concluded that if the regulation goes so far as to eliminate all economically beneficial uses, then it falls into a category where it is unnecessary to balance factors to determine whether the regulation is even a "taking."[91] Instead, the regulation has crossed a threshold wherein it is a per se taking.[92] The Court held that when a regulation—in *Lucas*, a Beachfront Management Act that prohibited

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[85] *Id.* at 433 (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)). *See generally* Myrl L. Duncan, *Reconceiving the Bundle of Sticks: Land as a Community-Based Resource*, 32 ENV'T L. 773, 774 (2002) (discussing in general how the metaphor of a bundle of sticks has traditionally been used to describe the rights landowners have regarding their land).

[86] *See Loretto*, 458 U.S. at 441, *See generally* Robert M. DiGiovanni, Note, *Eminent Domain*—Loretto v. Teleprompter Manhattan CATV Corp.*: Permanent Physical Occupation as a Taking*, 62 N.C. L. REV. 153, 157 (1983) ("While acknowledging the use of the *Penn Central* balancing test in recent cases, the [*Loretto*] Court concluded that when the character of the government's action rises to the level of a 'permanent physical occupation,' no balancing is permitted: a permanent physical occupation is a taking per se.").

[87] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 138 (1978). New York City used its Landmarks Law, a historic preservation ordinance, to block construction of an office tower above the Grand Central Terminal, a designated historic landmark. *Id.* at 115-17.

[88] *Id.* at 124.

[89] *Id.* at 136-38.

[90] 505 U.S. 1003 (1992).

[91] *Id.* at 1030.

[92] *Id.*

developing land near the coast for environmental conservation efforts to combat erosion—deprives an owner of "all economically productive or beneficial uses of land . . . beyond what the relevant background principles would dictate, compensation must be paid to sustain it."[93] Justice Scalia did note in the majority opinion, that one way for a state to resist such a takings claim is a factual inquiry into the property owner's estate to show "the proscribed use interests were not part of [the property owner's] title to begin with," so that the severe limitation on property use is not "newly legislated or decreed . . . , but [is inherent] in the title itself."[94] In *Lucas*, the Court established the "total taking" test for regulatory takings.[95]

And whether the government regulation is even a taking has had heightened importance since 2005, when the Court liberalized the constitutional requirement that the government exercise eminent domain only for "public use."[96] In 2005, in *Kelo v. City of New London*,[97] the Court interpreted "public use" so broadly that it encompassed private use for public purposes.[98] The Court held that a state may exercise its eminent domain power to condemn non-blighted property and transfer it to a private corporation for the purpose of creating new jobs, promoting economic development, and increasing tax revenues without violating the public use requirement of the Fifth Amendment.[99] Justice Stevens, in the majority opinion, discussed the overarching purpose of eminent domain is to promote a viable public purpose, including public welfare, such as creating jobs, revitalizing and redeveloping an economically depressed area, and creating tax revenue for the City of New London.[100] And so, since 2005, more

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[93] *Id.* at 1008-09, 1030.

[94] *Id.* at 1027, 1029.

[95] *Id.* at 1030.

[96] U.S. CONST. amend. V.

[97] 545 U.S. 469 (2005).

[98] *Id.* at 477-83.

[99] *Id.* at 483-84.

[100] *Id.* at 480, 483-84; *see also* Ilya Somin, *Putting* Kelo *in Perspective*, 48 CONN. L. REV. 1551, 1553 (2016) (noting that once the Court's decision was handed down, there was a tremendous "political backlash" because of the ruling).

Worth noting, after the case was settled, many jurisdictions enacted a form of anti-*Kelo* legislation. *See* William J. Scheiderich, *Post-Post-*Kelo *Urban Renewal Legislation*, 30 ST. & LOC. L. NEWS, Summer 2007, at 5, 5 (noting in many states, "anti-*Kelo*" legislation sprung up soon after the Supreme Court decided *Kelo*). The City of New London initially negotiated to redevelop the Fort Trumbull area of New London because a pharmaceutical company, Pfizer, expressed interest in opening a home office in New

"takings" may be had now that the requirement that the taking must be for "public use" is not much of a restraint on government action.

London. *Kelo*, 545 U.S. at 473. After being convinced to invest $300 million in a new research facility at a defunct linoleum factory, Pfizer set its sights on redeveloping the land. *Id.* at 473-75, 477 (recognizing the fact that property owners have a constitutional right to protect their property from condemnation). The city owned most of the property—almost half was not taxable—and sought to sell it through a development company to generate much needed city income, so the city found a developer to organize its "economic development" initiative. *Id.* at 473-75 (noting that the New London Development Corporation ("NLDC") conducted the takings on behalf of the city and put together the development plan for the city). The city used its eminent domain powers to obtain many homes in the Fort Trumbull area, but a handful of holdouts remained unconvinced to sell their properties and initiated suit, taking their case to the Supreme Court. *Id.* at 475. The redevelopment plan was riddled with flaws evident from the commencement of the project which casted doubt on the success of the project. *See id.* at 473-75. Even after *Kelo*, the effects have rocked the city: litigation eventually cost the city the deal with Pfizer, caused Pfizer to uproot its headquarters, and leave the City of New London and cost the city approximately $80 million in taxpayer money. *Pfizer and* Kelo*'s Ghost Town*, WALL ST. J.: OPINION (Nov. 11, 2009, 12:01 AM), https://www.wsj.com/articles/SB10001424052748704402404574527513453636326 [Perma.cc link unavailable]; *see also* Somin, *supra*, at 1556 (discussing the Court's decision essentially "put the definition of the rights protected by the Public Use Clause at the mercy of the very government officials it is supposed to protect us against" and illustratively describing the decision as "like appointing a committee of foxes to guard the chicken coup"). Both the City of New London and the residents faced difficult times after settling *Kelo*. *See* Patrick McGeehan, *Pfizer to Leave City That Won Land-Use Case*, N.Y. TIMES (Nov. 12, 2009), https://www.nytimes.com/2009/11/13/nyregion/13pfizer.html [Perma.cc link unavailable]. The city lost the redevelopment deal, and the majority of the residents burdened by relocating lost their property. *See id.*

The entire story of *Kelo* is sad from start to finish. Being native to the region and growing up in Westerly, Rhode Island just eighteen miles from the Fort Trumbull area of New London, Connecticut, I found the City and State had serious missteps in handling the case. The complete area in and around New London earned a very bad reputation. Many have written articles, books, architectural take-offs, urban designs, and movies, but since the fanfare left, all that is left in the area are abandoned buildings and patrolling New London police officers. Residents look at the features of the City and often roll their eyes with disgust when they hear of the latest and greatest "thing" going into Fort Trumbull. Sadly, the neighborhood has been relegated to a judicial joke. Ms. Susette Kelo's home was saved, dismantled, moved to a new location where it was re-assembled, and is currently home to a local preservationist, Avner Gregory. *See generally* LITTLE PINK HOUSE (Korchula Productions 2017) (chronicling the events leading to the Supreme Court decision).

Although Fort Trumbull spent twenty years vacant, housing feral cat colonies, currently, "all the properties on the Fort Trumbull peninsula are slated for development," to include a community center, a hotel, and, ironically, new housing. Johana Vazquez, *New London to Sell Remainder of Fort Trumbull Properties*, DAY (Jan. 19, 2023, 1:01 PM), https://www.theday.com/local-news/20230119/new-london-to-sell-remainder-of-fort-trumbull-properties/ [Perma.cc link unavailable].

So, how do historic preservation regulations survive takings scrutiny? How should the law mediate the balance between private landowners and their historic properties? Under the evolution of the Supreme Court's interpretations, constitutional protections limiting governmental exercise of eminent domain extend beyond physical condemnations of land to include implicit takings of private property by regulations that "go too far" as well. Accordingly, scrutiny of historic preservation laws focuses on whether the regulations are so burdensome as to amount to a "taking" because, then, compensation must be paid, which might foreclose implementing such regulations altogether.

II. HOW HISTORIC PRESERVATION LAWS MAY AMOUNT TO TAKINGS

In terms of historic preservation cases, this Article examines when denials for permits to alter historic buildings might violate the Fifth Amendment. Like our Carolopolis hypothetical, typically, a property owner argues that a taking has occurred as a result of the denial of an application concerning the use of his or her property. The argument raised by the property owner is that the permit denial based on a historic preservation designation unconstitutionally interferes with the owner's objectively reasonable, investment-backed expectations.

Penn Central is the primary authority for reconciling claims that historic preservation laws amount to unconstitutional regulatory takings.[101] *Penn Central* leads courts to employ a balancing test to aide in deciding whether historic preservation laws effect a taking.[102] The Court did not specify whether any of these factors—(1) the "economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action"—outweighed another.[103] But the Court did articulate clearly that when the character of the governmental action is in preserving historic structures, it is a permissible purpose, and that imposing restrictions on historic property through historic preservation laws is an

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[101] *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

[102] *See id.* at 124.

[103] *Id.*

"appropriate means of securing" that purpose.[104] Perhaps historic preservation laws could generate a taking if there happened to be a particularly aggressive program, but realistically, *Penn Central* has practically insulated historic preservation laws from regulatory takings challenges because a historic property will neither likely be divested of all economic value, nor deny a developer the possibility of a reasonable return.[105]

In fact, takings claims involving the mere designation of properties as historic resources and/or properties being merely located in a historic district are consistently rejected.[106] Moreover, takings claims involving the denial of permits to alter or demolish historic structures also are regularly dismissed because takings generally will not result when the owner may still earn a reasonable rate of return on his or her investment and can continue to use the property as-is.[107]

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[104] *Id.* at 129.

[105] Byrne, *supra* note 2, at 313, 316, 320-21. In his article, Professor Byrne identifies three principal reasons why *Penn Central* has effectively insulated historic preservation laws from regulatory takings challenges: (1) "*Penn Central* eliminated a variety of the concerns about coercive historic preservation regulations"; (2) "it directed attention to the value remaining in the property," and quite really, the structures protected by preservation restrictions nearly always retain some—and sometimes increase in—economic value; and (3) "preservation ordinances [since *Penn Central*] have been drafted and administered in [light of it] with sufficient flexibility to avoid constitutional confrontations." *Id.* at 316. Professor Byrne adds that, potentially, historic preservation could generate more takings if the zoning laws were particularly aggressive in preserving historic landscapes, "such as meadows or pastures produced through traditional farming techniques." *Id.* at 321 n.18.

[106] *See* United Artists' Theater Cir., Inc. v. City of Philadelphia, 635 A.2d 612, 619 (Pa. 1993) ("[I]n fifteen years since *Penn Central*, no other state has rejected the notion that no taking occurs when a state designates a building as historic."); Sleeper v. Old King's Highway Reg'l Historic Dist. Comm'n, 417 N.E.2d 987, 988 (Mass. App. Ct. 1981) (affirming a town's historic district committee's denial of a homeowner's request to erect a sixty-eight foot high antenna on his property because it was within the historic district and did not qualify as appropriate); Casey v. Mayor & City Council of Rockville, 929 A.2d 74, 86, 103, 108 (Md. 2007) (discussing the zoning of land as historic is a legitimate use of police power and does not qualify as a taking until a permit application is denied causing loss of all beneficial use).

[107] *See* Mayor & Aldermen of Annapolis v. Anne Arundel County, 316 A.2d 807, 822 (Md. 1974) (confirming the historic commission's denial of the county's permit to demolish a historic church and holding the denial was not a constitutional taking in that "the Commission may prevent the destruction or change in *the exterior* of the building. Not only is the County not deprived of *all reasonable use* of the site and Mt. Moriah . . . but its *use* is not disturbed at all. In sum, the rather mild limitation in regard to Mt. Moriah's exterior is far removed from unconstitutional confiscation."); Lafayette Park Baptist Church v. Bd. of Adjustment of St. Louis, 599 S.W.2d 61, 65 (Mo. Ct. App. 1980)

As such, generally speaking, permit denial cases concern when a property owner has been denied a permit during the permitting process due to the historic preservation laws in the locality, and this denial affects specifically the owner's investment-backed expectations associated with the respective property at issue.

A. Permit Denials

The vast majority of preservation takings claims fall within the "permit denial" category.[108] Many permit denial cases have similar issues faced by the individual property owners of historic properties. In fleshing out the root causes of the issues, it is critical to view the facts and circumstances of each case, starting with the property owner's legally recognized property rights. Normally, the property owner has the right to exclude others, the right to use of the property, and the right to transfer the property to others. Although property owners have a great deal of latitude and discretion when it comes to exercising their property rights, these rights are not absolute. When a property owner takes ownership of land subject to regulations, zoning laws, or other local ordinances, the property owner takes the property

(confirming the denial of a demolition permit of a historic church on property inside the historic district because the landowner could not supply evidence that the church could not "economically utilize the property," that it was "impractical to sell or lease it" or in any way obtain a reasonable return from it, "or that no market exist[ed]" for this type of property "at a reasonable price"); Buttnick v. City of Seattle, 719 P.2d 93, 94-95 (Wash. 1986) (ruling the application of Seattle's historic ordinance forcing the landowner to repair and rebuild a portion of the historic building's structure that was in hazardous condition was not an unconstitutional taking due to "[t]he estimated cost of replacement of the parapet and pediment on the subject building [did] not appear to impose an unnecessary or undue hardship on the property owner, considering its market value and income-producing potential").

[108] *See, e.g.*, First Presbyterian Church of York v. City Council of York, 360 A.2d 257, 261-62 (Pa. Commw. Ct. 1976) (affirming denial of a permit to demolish a historic structure due to the denial not causing the property to lose all use); Second Baptist Church v. Little Rock Historic Dist. Comm'n, 732 S.W.2d 483, 486 (Ark. 1987) (confirming the denial of a landowner's permit application to demolish a building on historic property to replace it with a parking structure and stating "an Historic District Commission may consider use only for the purpose of denying a certificate and, while the Commission does not have the authority to grant certain uses of property, it does have the authority to deny certain uses if those uses are 'obviously incongruous with the historic aspects of the District'"); Smith v. Zoning Bd. of Appeals of Greenwich, 629 A.2d 1089, 1092-93 (Conn. 1993) (affirming a zoning commission's denial of a landowner's application to subdivide their property into three lots in the historic district).

with notice of such obligations and, in turn, must abide by these public restrictions. Issues arise when exercising those rights conflicts with a historic preservation regulation.

In 1976, in *Figarsky v. Historic District Commission of Norwich*, the Court held that "[t]he Norwich historic district commission, after a full hearing, lawfully, reasonably and honestly exercised its judgment."[109] In this case, a property owner in historic Norwich, Connecticut applied for a permit to demolish a historic multi-story building, which was located in Norwich's historic district near the town green.[110] A denial of the permit was issued by the Historic District Commission.[111] Figarsky alleged that the ordinance was invalid and the Commission acted illegally and arbitrarily.[112] As a general rule, when purchasing property, one should make clear to the realtor their intentions as to the use of the property and inquire as to any obligations that are in place on the property. In doing due diligence, many issues surrounding historic properties can be identified prior to applying for permits.

In 1975, in *Eyerman v. Mercantile Trust Co.*,[113] the owner of a Missouri home died and, in her will, directed her executor to raze the home, sell the lot, and transfer the proceeds to the residuary of the estate.[114] The neighbors filed a petition for injunction against the razing, which was denied.[115] On appeal, the court reversed the denial of the injunction.[116] The court held that to allow the condition in the

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[109] 368 A.2d 163, 171-72 (Conn. 1976) (holding "[t]he plaintiffs had the burden of proving that the historic district commission acted illegally, arbitrarily, in a confiscatory manner or in abuse of discretion" and that the plaintiffs ultimately failed to meet that burden because none of the evidence presented suggested "the house, if repaired, would not be of some value, or that the proximity of the McDonald's hamburger stand rendered the property of practically no value as a part of the historic district").

[110] *Id.* at 166.

[111] *Id.* at 166, 169 (explaining "[t]he plaintiffs' principal claim [was] that the Norwich historic district ordinance [was] unconstitutional . . . and that the denial of . . . a certificate of appropriateness to demolish their building amount[ed] to a taking . . . without compensation").

[112] *Id.* at 169 (noting the plaintiffs argued the ordinance was "vague aesthetic legislation" inconsistent with due process and that because of the denial, the plaintiffs would "be forced to expend large sums [of money maintaining the] property without being able to put it to any practical use").

[113] 524 S.W.2d 210 (Mo. Ct. App. 1975).

[114] *Id.* at 211.

[115] *Id.*

[116] *Id.*

will would be in violation of the public policy of Missouri.[117] The Court mentioned the following public policies: (1) diminishing the value of surrounding homes; (2) the wasteful destruction of a valuable resource; and (3) the home's architectural significance.[118] The Court noted that "[t]he importance of this house to its neighborhood and the community is reflected in the action of the St. Louis Commission on Landmarks and Urban Design designating Kingsbury Place as a landmark of the City of St. Louis."[119] Although *Eyerman* was not a classic permit denial case, it involved a denied request on the basis of historic preservation restrictions.

Historic preservation laws have been enacted in many states since the mid-1960s.[120] Scholars indicate the initial uneasiness of the opinion decided in *Penn Central*, coupled with the lack of respect for

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[117] *Id.* at 213-17.

[118] *Id.* at 213-14.

[119] *Id.* at 213. Kingsbury Place is an area of high architectural significance, representing excellence in urban space utilization. The court noted:

> This designation, under consideration prior to the institution of this suit, points up the aesthetic and historical qualities of the area and assists in stabilizing Central West End St. Louis. It was testified by the Landmarks Commission chairman that the private place concept, once unique to St. Louis, fosters higher home maintenance standards and is among the most effective methods for stabilizing otherwise deteriorating neighborhoods. The executive director of Heritage St. Louis, an organization operating to preserve the architecture of the city, testified to the importance of preserving Kingsbury Place intact:
>
> "The reasons [sic] for making Kingsbury Place a landmark is that it is a definite piece of urban design and architecture. It starts out with monumental gates on Union. There is a long corridor of space, furnished with a parkway in the center, with houses on either side of the street, . . . [.] The existence of this piece of architecture depends on the continuity of the [sic] both sides. Breaks in this continuity would be as holes in this wall, and would detract from the urban design qualities of the streets. And the richness of the street is this belt of green lot on either side, with rich tapestry of the individual houses along the sides. Many of these houses are landmarks in themselves, but they add up to much more . . . [.] I would say Kingsbury Place, as a whole, with its design, with its important houses . . . is a most significant piece of urban design by any standard."

Id. at 213-14 (alterations in original) (footnote omitted).

[120] *See* Barry Cullingworth, *Historic Preservation in the USA*, 23 BUILT ENV'T 137, 140-41 (1997); *see also National Historic Preservation Act*, NAT'L PARK SERV., https://www.nps.gov/subjects/historicpreservation/national-historic-preservation-act.htm [https://perma.cc/62AE-4HE5] (Dec. 1, 2022) (explaining the history and evolution of the National Historic Preservation Act).

the historic building when the Pennsylvania Station was demolished, blazed the trail for historic preservation to be at the center of political discussion.[121] *Penn Central*'s analysis aided local historic preservation ordinances to fall under legitimate government interest, thus shielding them from attack on grounds of constitutionality.[122] The city of Charleston was a forerunner in historic preservation and began implementing its historic laws in the early 1930s.[123] Similarly, in the 1930s, San Antonio's "La Villita" Historic District was recognized.[124]

Property owners will likely still complain that historic preservation laws have gone too far and amount to unconstitutional takings. The threat of a municipality's actions amounting to an unconstitutional taking, requiring just compensation, provides property owners leverage as the municipality must decide whether the regulation is worth the possibility of paying just compensation. The threat of liability impacts the nature and scope of any regulation the local officials might enact, which provides at least some small degree of protection to the property owner.[125] As such, "[t]he rights of the property owners typically are incorporated into the historic preservation ordinance itself" through negotiation and compromise

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[121] *See* Sarah Harney, *The Politics of Preservation*, GOVERNING (Nov. 22, 2010), https://www.governing.com/topics/politics/Politics-Preservation.html [https://perma.cc/SP7M-L9MK]; David Alpert, *Historic Preservation Is a Political Movement*, GREATER GREATER WASH. (Nov. 7, 2008), https://ggwash.org/view/929/historic-preservation-is-a-political-movement [https://perma.cc/W27G-YVNG]; Patrice Frey, *Why Historic Preservation Needs a New Approach*, BLOOMBERG: CITYLAB (Feb. 8, 2019, 10:15 AM), https://www.bloomberg.com/news/articles/2019-02-08/why-historic-preservation-needs-a-new-approach [https://perma.cc/596M-EQ4Y].

[122] *See, e.g.*, Byrd v. City of Hartsville, 620 S.E.2d 76, 80 (S.C. 2005) (holding the "regulatory-inverse-condemnation action [was] governed by *Penn Central*" because it originated from the plaintiff suffering "a temporary denial of less than all economically viable use of [plaintiff's] property").

[123] *See generally Past PSC Advocacy Wins: 1931 Zoning Ordinance*, PRES. SOC'Y CHARLESTON (May 6, 2020), https://www.preservationsociety.org/past-psc-advocacy-wins-1931-zoning-ordinance/ [https://perma.cc/2V7B-KSF4].

[124] *See* Lydia Magruder, *La Villita*, TEX. ST. HIST. ASS'N, http://www.tshaonline.org/handbook/online/articles/hpl01 [https://perma.cc/P85H-FKKL] (June 6, 2018); *see also History*, LA VILLITA, https://www.lavillitasanantonio.com/History [https://perma.cc/M63M-4QKD] (last visited May 18, 2022).

[125] *See* First Eng. Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 340-41 (1987) (Stevens, J., dissenting) ("Cautious local officials and land-use planners may avoid taking any action that might later be challenged and thus give rise to a damages action. Much important regulation will never be enacted, even perhaps in the health and safety area.") (footnote omitted).

between the municipality and the affected property owners in an attempt to avoid such takings clams.[126]

Compare such negotiation and compromise in enacting ordinances with the types of negotiation and compromise that yield permits granted contingent on the property owner accepting conditions of development. The latter regularly raise potential claims that the conditions amount to unconstitutional exactions, which have had wide success in the non-historic preservation context.[127] This incentivizes local governments to be less likely to offer any advice to a permit applicant and instead just deny the permit if it does not meet the requirements of the zoning ordinance.

B. Administrative Issues Affecting Historic Preservation

And lastly, in an effort to provide an understanding of some common administrative protocols related to historic preservation laws, this Section first details the history of how preservation laws were enacted at the federal, state, and local levels. Then, this Section will provide context for how the above cases came about and how practitioners may avoid such litigation regarding historic preservation issues by describing the three main issues practitioners face when dealing with local historic preservation matters.

Approximately 100 municipalities enacted preservation laws by 1965.[128] In 1966, Congress passed the National Historic Preservation Act (the "NHPA"), allowing for the designation of particular buildings and sites as historic landmarks and listing them on the National

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[126] Byrne, *supra* note 2, at 330-34.

[127] *See, e.g.*, Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987) (stating that an exaction is a taking and thus unconstitutional if there is no nexus between the conditions for approval burdening the property owner and the legitimate state interest affected by the proposed development project requiring that approval); Dolan v. City of Tigard, 512 U.S. 374, 388-91 (1994) (stating that an exaction is also a taking and thus unconstitutional if it is not roughly proportional to the impacts on the community that will result from the proposed development project requiring approval). Further, in *Koontz v. St. Johns River Water Management District*, the Supreme Court held that an unconstitutional exaction could occur if the condition for approval is that the property owner must pay impact fees or "in lieu of" payments. 570 U.S. 595, 612 (2013). These monetary exactions must still meet the *Nollan* and *Dolan* thresholds of requisite nexus with the legitimate governmental interests and rough proportionality to the community impact. *Id.*

[128] *See* Frank B. Gilbert, *Current Statutory and Case Law Developments in Historic Preservation*, 1 PACE L. REV. 593, 597 (1981).

Register of Historic Places.[129] Regulation of historic landmarks, however, takes place more directly on the state level.[130] Every state has a historic preservation statute that authorizes a state agency to designate particular buildings or sites as historic landmarks or districts and to regulate or limit alteration of those sites or structures.[131] Local ordinances in some locales add locally designated historic sites.[132]

The NHPA established a detailed federal program for historic preservation.[133] The National Park Service is responsible for the National Register of Historic Places (the "Register").[134] The Register is the nation's official listing of historic places that are "worthy of preservation."[135] Now, in every state, there are State Historic Preservation Officer ("SHPO") offices, which manage "[s]urveying, evaluating and nominating significant historic buildings, sites, structures, districts and objects" to the Register.[136]

There are a variety of administrative issues affecting historic preservation planning. The main issues faced are financing historic preservation, mitigating gentrification, and expanding the scope and definition of "historic."

1. Financing

First, the issues of financing historic preservation are riddled in complexity. The cost of rehabilitating historic properties has been on

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[129] *See* Pub. L. No. 89-665, 80 Stat. 915 (1966) (codified as amended at 54 U.S.C. §§ 300101-307108).

[130] *See* JUERGENSMEYER & ROBERTS, *supra* note 1, § 12.9, at 582-84.

[131] *See id.*

[132] *See id.* § 12.10, at 584-87.

[133] *See National Historic Preservation Act*, *supra* note 120.

[134] *See* 54 U.S.C. § 302101. "The National Historic Preservation Act extends its protective consideration of the impact of federal 'undertakings' over all properties *eligible* for inclusion in the National Register of Historic Places, whether or not they have been actually designated for inclusion." Byrne, *supra* note 2, at 328-29; *see also National Register of Historic Places: FAQs*, NAT'L PARK SERV., https://www.nps.gov/subjects/nationalregister/faqs.htm [https://perma.cc/7LUM-JTBR] (Mar. 9, 2023).

[135] *National Register of Historic Places: FAQs*, *supra* note 134.

[136] *State Historic Preservation Offices*, NAT'L PARK SERV., https://www.nps.gov/subjects/nationalregister/state-historic-preservation-offices.htm [https://perma.cc/TF7Q-XT2P] (July 11, 2022).

the rise for many years.[137] The cost of ownership with regard to historic properties can be offset by some governmental programs.[138] The federal financial assistance for historic preservation projects can be viewed on government websites.[139] Between 2006 and 2009, approximately $20 million in grants were awarded to communities participating in the Preserve America program through the National Park Service.[140]

2. Mitigating Gentrification

The conservation and preservation of neighborhoods are generally at the forefront of many local city preservation plans. Mitigating gentrification is a point of concern for many residents in these communities.[141] As people grow older and newer generations arrive in neighborhoods, communities raise concerns about whether historic preservation is negatively affecting the neighborhoods by removing long-time citizens shrouded under the guise of historic preservation laws.[142] Conservation efforts in neighborhoods often stabilize the neighborhood, create and provide employment for city

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[137] *See* Emily Washington, *Historic Preservation and Its Costs*, CITY J. (May 2, 2012), https://www.city-journal.org/html/historic-preservation-and-its-costs-11014.html [https://perma.cc/2KCQ-FNQX].

[138] *See Historic Preservation and Community Development: Why Cities and Towns Should Look to the Past as a Key to Their Future: Hearing Before the Subcomm. on Federalism & the Census of the H. Comm. on Gov't Reform*, 109th Cong. 16-19 (2006) (statement of Janet Snyder Matthews, Associate Director for Cultural Resources, National Park Service).

[139] *See Grants & Funding Sources*, PRES. DIRECTORY, https://www.preservationdirectory.com/PreservationGeneralResources/GrantsFundingSources.aspx [https://perma.cc/Q5AD-F752] (last visited May 18, 2022); *see also Historic Preservation Fund Grants Manual*, NAT'L PARK SERV. (June 2007), https://www.nps.gov/orgs/1623/upload/HPF-GrantsManual_2011-508.pdf [https://perma.cc/AWC6-49D9].

[140] *Preserve America Grants in 17 States Announced; First Preserve America Stewards Designees Announced*, U.S. DEP'T INTERIOR (Jan. 16, 2009), https://www.doi.gov/news/pressreleases/2009_01_16_release [https://perma.cc/F9F5-VTQ7]; *see also Safeguarding America's Heritage*, WHITE HOUSE ARCHIVES, https://georgewbush-whitehouse.archives.gov/firstlady/preserve_01.html [https://perma.cc/E65B-LX2C] (last visited May 18, 2022).

[141] *See* Amanda Abrams, *Using Preservation to Stop Gentrification Before It Starts*, BLOOMBERG: CITYLAB (Dec. 14, 2016, 1:39 PM), https://www.bloomberg.com/news/articles/2016-12-14/historic-preservation-can-stop-gentrification-before-it-starts [https://perma.cc/DWF4-H2CA].

[142] *See id.*; *see also* Donald C. Bryant, Jr. & Henry W. McGee, Jr., *Gentrification and the Law: Combatting Urban Displacement*, 25 WASH. U. J. URB. & CONTEMP. L. 43, 57-58 (1983).

residents, stimulate the economy of the market area, ensure the most beneficial use of the property is utilized, and truly lessen gentrification.[143]

3. Expanding the Scope and Definition of "Historic"

As city leaders plan for historic preservation efforts in communities across the United States, many are looking to expand the perimeters of conservation.[144] The city planning and zoning offices must work hand-in-hand with the preservation efforts of their boards. To plan for the future, the boards should hold and maintain neighborhood meetings to ensure notice and the opportunity to be heard is had by all. The boards that thrive generally set up goals and ensure that the city, as well as board members, are aware of these goals. Keeping an open line of communication for dispute resolution between the boards and their communities is critical. The scope of the definition of "historic" is malleable, and it can change based on many factors.

Variations on the historic preservation easement have appeared in recent years. Some homeowners have entered into preservation easement agreements with private historic preservation associations.[145] Federal tax law permits a property owner who donates such an easement to a nonprofit preservation group to take an income tax deduction for the value of the easement.[146] For example, one variety of a preservation easement is the "façade easement," which is an agreement for preventing the façade of a house that is registered on the National Register of Historic Places from being altered.[147]

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[143] *See* Bryant & McGee, *supra* note 142, at 112-14.

[144] *See Expanding Historic District Boundaries*, HISTORIC DISTS. COUNCIL, https://hdc.org/preservation-resources/expanding-historic-district-boundaries/ [https://perma.cc/2XQX-FUM7] (last visited May 18, 2022); *see also* Frey, *supra* note 121.

[145] *See, e.g.*, *Easements*, PRES. SOC'Y CHARLESTON, https://www.preservationsociety.org/what-we-do/partnering-in-preservation/easements/ [https://perma.cc/V3FD-VFWM] (last visited May 18, 2022); *Preservation Easement Program*, HISTORIC NEW ENGLAND, https://www.historicnewengland.org/preservation/for-homeowners-communities/preservation-easement-program/ [https://perma.cc/N9Z4-23AB] (last visited May 18, 2022).

[146] *See* I.R.C. § 170(f)(3)(B)(iii), (h); *see also Facade Easement Contributions*, IRS (Oct. 23, 2009), https://www.irs.gov/pub/irs-wd/0943033.pdf [https://perma.cc/98RN-R4P2].

[147] *See Historic Preservation Façade Easement Program*, PRES. TR. VT. (2016), https://ptvermont.org/wp-content/uploads/2016/03/About-the-Easement-Program-2016.pdf [https://perma.cc/76QS-EPD6].

Another variety of the preservation easements is the "primary residence easements," which restricts any owner, present or future, from using the property as a vacation home.[148]

CONCLUSION

The goal of preservationists should be the big picture—the future face of the city. This Article examined regulatory takings and the fact that property is taken, typically for the public good. The "just compensation" element of the takings claims are the unanswered question in many of these cases and still baffle the court system today. Stepping aside from the compensatory component of the litigation, one should fully understand the big picture of these claims—the preservation aspect. Preservationists' accomplishments can be attributed to: (1) keeping historic properties in use and generating placement on the grand tax lists of the city; (2) preserving older industrial buildings for office space, mixed-use, and start-up businesses; (3) reducing the expense of acquiring property and the cost of demolition removal; and (4) encouraging and supporting the creation of new, interesting, thoughtful mixed-use neighborhoods with active community presence and street life. Because communities are continually aging, proactive planning through review boards, like a board of architectural review, and by city leaders will determine the future appearances of cities while ensuring the legacy of the cities for many years to come.

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[148] *See* Fred Bernstein, *Charleston: The Case of the Missing Neighbors*, N.Y. TIMES (Oct. 22, 2004), https://www.nytimes.com/2004/10/22/realestate/charleston-the-case-of-the-missing-neighbors.html [Perma.cc link unavailable]. Under a plan in use in Charleston, South Carolina, the owners of historic homes can donate primary residence easements to the Historic Charleston Foundation. *Id.*; *see also Easements*, HISTORIC CHARLESTON FOUND., https://www.historiccharleston.org/projects/easements/7 [https://perma.cc/G8UA-EZKN] (last visited Mar. 28, 2023).