Penn Central in Retrospect: The Past and Future of Historic Preservation Regulation

J. PETER BYRNE*

TABLE OF CONTENTS

Introduction 399
I. The Saga of *Penn Central*. 402
A. "No Ordinary Landmark". 402
B. Making No New Law. 413
II. How *Penn Central* Became a Legal Landmark. 422
A. The Constitutional Scope For Historic Preservation 422
B. *Penn Central:* A Creation of Its Time 428
III. Land Use Law for a New Urban Era 435
A. The Post-Modern City 435
B. Adapting Preservation Law For Today's Cities 440
Conclusion 442

INTRODUCTION

The U.S. Supreme Court's 1978 decision in *Penn Central Transportation Co. v. City of New York*[1] is one of the best known cases in the Property Law canon. The Court there held that the refusal of the New York City Landmarks Preservation Commission to permit the owner to erect a 50-storey tower on top of Grand Central Terminal did not effect a taking of private property requiring the payment of compensation. The decision now is more than forty years old. Taught since then in most first-year Property classes,[2] *Penn Central* endures as the foundation of the modern application of the Takings Clause of the Fifth Amendment to

* Baumgartner Chair in Real Property Law, Georgetown University Law Center. © 2021, J. Peter Byrne. Thanks for helpful comments go to Sara Bronin, Bill Buzbee, Mike Seidman, and participants in a virtual faculty workshop at Georgetown Law. Thanks also to Luke Stegman and Aileen Kim for research help. This paper began as the keynote address at a symposium at the University of Virginia School of Law on Historic Preservation in the 21st Century in November 2018.

1. 438 U.S. 104 (1978).

2. *See, e.g.*, JESSE DUKEMINIER ET AL., PROPERTY 1050 (9th ed. 2018); THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 1237 (3d ed. 2017); JOSEPH W. SINGER ET AL., PROPERTY LAW: RULES, POLICIES, AND PRACTICES 1192 (7th ed. 2017).

public regulation of land use.[3] Of course, the academic literature on the rationale for and the propriety of the regulatory takings doctrine is massive; scholars have sifted its doctrinal innovations and shortcomings.[4] Not surprisingly, academic commentators have found Justice Brennan's opinion for the Court lacking in doctrinal clarity and theoretic depth.[5] Nonetheless, the Court has returned to *Penn Central* repeatedly because it reflects the enduring center of the Court's conflicting views about imposing constitutional limits on the regulation of property use.[6] The context of the litigation as it came to the Supreme Court helps explain that paradox: it was written to hold a diverse, tenuous majority of the Court.[7]

But all this attention still understates the continuing significance of the decision. *Penn Central* is the most important decision on historic preservation law ever rendered in the United States.[8] By validating stringent preservation restrictions on an addition to an individual landmark in the heart of the most voracious real estate market in the nation, the decision opened the way for a massive growth in the scope and intensity of municipal historic preservation law. Preservation in turn has shaped leading U.S. cities, as they have taken on new identities in a post-industrial society. The case is at least as important for its liberation of historic preservation law and the effect of that on U.S. cities, as for its statement of the regulatory takings doctrine. A reconsideration of *Penn Central* both highlights the growth of historic preservation regulation in urban land use law and clarifies the acceptable interpretive scope of the takings clause.

---

3. James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 35, 52 (identifying *Penn Central* as "the first of the modern takings cases, and the first to make clear that regulatory measures could result in implicit takings" as opposed to explicit takings of property through eminent domain).

4. *See, e.g.,* Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part I: A Critique of Current Takings Clause Doctrine*, 77 CALIF. L. REV. 1299 (1989); Gregory S. Alexander, *Takings, Narratives, and Power,* 88 COLUM. L. REV. 1752, 1772–73 (1988); Carol M. Rose, *Mahon Reconstructed: Why the Takings Clause is still a Muddle,* 57 SO. CALIF. L. REV. 561, 562 n.6 (1984).

5. *See, e.g.,* John D. Echeverria, *Is the Penn Central Three-Factor Test Ready for History's Dustbin*?, 52 LAND USE L. & ZONING DIG. 3, 5–6 (2000).

6. *See* Murr v. Wisconsin, 137 S. Ct. 1933, 1944 (2017); Lingle v. Chevron USA, Inc., 544 U.S. 528, 538–39 (2005); Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302, 331 (2002). Justice O'Connor described Penn Central as "the judicial 'polestar' of regulatory takings law." Palazzolo v. Rhode Island, 533 U.S. 606, 633 (2001) (O''Connor, J., concurring).

7. *See infra* at 22–24.

8. The nearest competitor surely must be *United States v. Gettysburg Electric Railway Co.*, 160 U.S. 668 (1896), where the Court held that the federal condemnation of land to preserve and protect the Gettysburg battlefield constituted a "public use" within the meaning of the Fifth Amendment. *See also* Roe v. Kansas *ex rel* Smith, 278 U.S. 191 (1928) ("[T]here is no basis for doubting the power of the state to condemn places of unusual historical interest for the use and benefit of the public."). More broadly, *Gettysburg Railway* established the constitutional legitimacy of the federal government acting to conserve cultural resources in order to foster virtuous civic attitudes in the public. *See* SANFORD LEVINSON, WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES 76–77 (Duke Univ. Press rev. ed. 2018); J. Peter Byrne, *Hallowed Ground: The Gettysburg Battlefield in Historic Preservation Law*, 22 TUL. ENVT'L. L.J. 203, 234–35 (2009).

Penn Central was decided at a nadir in urban prospects, as deindustrialization and White flight had brought many U.S. cities to points of chaos and insolvency. But at the same time, a new urban economy based on technology, media, and knowledge had begun to grow. For industries based on sophisticated services and creativity, recruiting talented and educated workers became more critical than legally protected spaces for industrial production and shipping. Land use laws based on separating competing uses of land became less important, while fostering an urban environment with cultural and aesthetic appeal to highly mobile and educated workers became paramount. Urban renewal and highway construction were largely abandoned; cities used planning and regulation to encourage mixed use, walkable, culturally dense neighborhoods.[9] In this context, historic preservation offered a legal means to encourage a lively urban environment.

This paper aims to explain how the *Penn Central* decision marks a crucial fulcrum in the evolution of land use law. The Court faced a new form of land use regulation—the historic preservation of a privately-owned landmark building in the urban center. The owners framed their challenge under the still inchoate regulatory takings doctrine, a decade before an increasingly conservative court sought to refashion it as a tool to restrain innovations in environmental law. The paper argues that what was intended as a modest opinion holding together a skittish majority to sustain the protection of a beloved train station by amalgamating landmark regulation to the traditional deference afforded zoning laws, resulted in a broad constitutional permission for historic preservation and other emerging land use regulatory tools.

To make this case, it will first present a narrative account of the litigation, illuminated by historic context and examination of the internal deliberation of the justices as shown in the papers of Justices Lewis Powell and Harry Blackmun.[10] The paper will then discuss the elements that combined to produce a decision apparently modest but of broad consequence. It then argues that *Penn Central* created the constitutional foundation for a new era in land use law, characterized by new forms of historic preservation and, more broadly, by urbanistic attention to physical and cultural context rather than by separation of uses. The paper also recognizes, however, that the continuing evolution of cities present issues and challenges for historic preservation law not anticipated in 1978: economic inequality, persistent racial segregation, and climate change suggest that historic preservation law must evolve to adapt to present urban realities.

---

9. *See* J. Peter Byrne, *The Rebirth of the Neighborhood*, 40 FORDHAM URB. L.J. 1595, 1601–03 (2013).

10. The Lewis F. Powell, Jr., Papers are held at the Law Library of The School of Law at Washington and Lee University. They are now available for download. Lewis F. Powell Jr., "Penn Central Transportation Company v. New York City" (Dec. 2, 1977). (https://scholarlycommons.law.wlu.edu/casefiles/595). The Powell papers regarding *Penn Central* will be cited hereinafter as Powell Papers. Harry A. Blackmun, The Harry A. Blackmun Papers (unpublished manuscript) (The Harry A. Blackmun Papers are held at the Library of Congress and must be viewed in person) (https://www.loc.gov/rr/mss/blackmun/). Blackmun's paper were less illuminating than Powell's.

I. THE SAGA OF *PENN CENTRAL*

The facts of *Penn Central* matter. The location and character of Grand Central Terminal and the economic challenges and urban tensions of the 1970s drove the litigation. Changing political and cultural sentiments ultimately determined its outcome. Thus, the article begins with the construction of the railroad terminal and the rise of historic preservation. Extra-legal factors, more than the original meaning of the Takings Clause or efforts to interpret confusing precedents, shaped the Court's opinion. The paper will present the facts in a compact narrative and later will amplify and explain the significance of the most salient facts.

A. "NO ORDINARY LANDMARK"

The advent of railroads drove social and economic change in nineteenth century America to a degree comparable with the advent of computers and digital technology in our recent past. Personal mobility grew exponentially, the national market emerged, and innovations in finance, law, and engineering created templates for the future.[11] Cities with strong rail connections flourished, others without wilted.[12] New York City, boasting a superb ocean port and water connections to the heartland via the Erie Canal, recognized the importance of rail but struggled accommodating it with its island geography.[13]

Grand Central Terminal was not the first railroad station erected on 42nd Street in New York City. Cornelius Vanderbilt's newly organized New York Central and Hudson Railroad erected there an ornate Grand Central Depot in 1871.[14] The location was chosen because it stood in open land and New York City recently had banned steam locomotives south of 42nd Street for safety reasons.[15] Thus, the railroad brought trains as far south into Manhattan as was legally permissible. As rail traffic grew, an Annex was added in 1885, closing what was then Fourth Avenue, and the entire station was enlarged again and remodeled by 1902. But as Manhattan grew inexorably to the north, steam engines proved an urban nuisance and a safety and health hazard to residents and passengers. After a collision between two trains in the tunnel north of the station in 1902 killed fifteen passengers, the state legislature prohibited steam locomotives within the limits of

---

11. *See, e.g.*, RICHARD WHITE, RAILROADED: THE TRANSCONTINENTALS AND THE MAKING OF MODERN AMERICA (1st ed. 2011).

12. *See, e.g.*, WILLIAM CRONIN, NATURE'S METROPOLIS 74–81 (1991).

13. *See* EDWARD G. BURROWS & MIKE WALLACE, GOTHAM: A HISTORY OF NEW YORK CITY TO 1898 943–45 (1999).

14. *See id.*; *see also* T.J. STILES, FIRST TYCOON: THE EPIC OF CORNELIUS VANDERBILT (2010).

15. NEW YORK CITY TRANSIT MUSEUM & ANTHONY W. ROBINS, GRAND CENTRAL TERMINAL: 100 YEARS OF A NEW YORK LANDMARK 14–23 (2013). On the banning of steam railroads below 42nd Street, *see* Christopher Gray, *Before There Was a 'Grand' in Central*, N.Y. TIMES (Feb. 28, 2013), https://perma.cc/GWW9-9YTH.

New York City.[16] Thus, regulatory legislation repeatedly dictated the location and shaped the functioning of the terminal.

How could the New York Central respond to this challenge? New technology and brilliant engineering provided an elegant solution. The railroad pioneered a switch to electricity to power its trains. The effort advanced significantly the technological feasibility of electric trains. "[T]he New York Central electrification stands as one of the most important accomplishments in the history of technological innovation."[17] The change to electricity not only enhanced safety and comfort, but it also permitted an entire rethinking of the railroad's operations at the Depot. Led by its visionary Chief Engineer, William Wilgus, the New York Central sunk its train yards entirely below ground. This led to the clearing and covering of sixteen city blocks owned by the railroad and now made available for intensive development north of the station and along what was now called Park Avenue. The timing was propitious because urban development had reached and moved past 42nd Street by 1903, making this real estate enormously valuable to the railroad company. On this land were constructed over the next 25 years the high-rise hotels, offices, and residences that became known as Terminal City and defined the character of Midtown New York.[18]

The new Grand Central Terminal, which opened in 1913, was made possible by the marvel of electricity. With no high roofed train shed required for stem engines, trains could enter in relatively shallow tunnels below ground. The new terminal was a marvel of traffic and passenger management for a new century that celebrated the unrivalled prominence of New York as the metropolis of the U.S. The architects created an efficient circulations system for pedestrians and vehicles around and through the station; internal sloping ramps for pedestrians converged on the monumental Main Concourse and a raised roadway around the terminal restored north south traffic circulation along Park Avenue. The terminal's exterior was designed in an exuberant Beaux-Arts style embellished with profusions of sculpture, painting, and electric lighting.[19] Serving both intercity and commuter rail travel, Grand Central long played a prominent role in the lives of New Yorkers and conveyed a magisterial image of the City to visitors.

The New York Central was not the only line serving New York City. The Pennsylvania Railroad had long brought passengers by ferry from a terminus in Jersey City, but early in the twentieth century bored tunnels under the Hudson River and brought trains to its recently opened and magnificent Pennsylvania

16. *See* NEW YORK CITY TRANSIT MUSEUM & ROBINS, *supra* note 15, at 40.

17. KURT C. SCHLICHTING, GRAND CENTRAL TERMINAL: RAILROADS, ENGINEERING, AND ARCHITECTURE IN NEW YORK CITY 106 (2001). Electric powered trains were also more efficient than steam for the growing commuter services; accordingly the electric lines extended through the Bronx on deep into Westchester County. *Id.* at 86–89.

18. JOHN BELL & MAXINE R. LEIGHTON, GRAND CENTRAL: GATEWAY TO A MILLION LIVES 47–55, 63–71 (2000).

19. *See* SCHLICHTING, *supra* note 17, at 139–46.

Station by 1910.[20] The Pennsylvania had been the largest railroad by traffic and revenue in the U.S. for the first half of the twentieth century; at one time, it was the largest publicly traded corporation in the world, with a budget second in size only to the United States government.[21] Early in the century, the two grand stations could be seen as rivals, but both proclaimed the world status of New York City.

By the 1960s, the decline in intercity rail travel and rail freight in the Northeast fatally weakened both rail companies. Government financed highways permitted commuters and trucks to enter cities for the cost of inexpensive gasoline. The railroads turned their attention to their most significant asset: real estate. Targeted as part of this move were urban stations, which saw diminished intercity passenger service and occupied prime central business district real estate. They also failed to exploit all the air space permitted to be built out under applicable zoning laws. In 1963, the Pennsylvania Railroad demolished Pennsylvania Station, placing passenger operations in cramped and soon squalid quarters beneath a new Madison Square Garden and office building.[22] This action further catalyzed the already active historic preservation movement in New York, which had long sought legal protections for historic landmarks. Public reaction to the demolition of Penn Station contributed to the enactment of the Landmarks Preservation Law in 1965.[23] The Pennsylvania Railroad and the New York Central, historically fierce competitors with each other, merged in 1968, forming the ill-fated Penn Central Transportation Company, which entered bankruptcy in 1970.[24]

The New York Central had already considered building above Grand Central Terminal. Early pre-construction plans included a 20-storey office building over the Main Concourse. Although plans for the office building were cancelled, the

---

20. Grand Central Terminal was designed contemporaneously with Pennsylvania Station in New York (1910) and Union Station in Washington, D.C. (1907). The elegance of Grand Central Terminal aimed to match or exceed that of the rival stations. *See* NEW YORK CITY TRANSIT MUSEUM & ROBINS, *supra* note 15, at 8–9.

21. *See* ALBERT J. CHURELLA, THE PENNSYLVANIA RAILROAD, VOLUME I: BUILDING AN EMPIRE, 1846-1917 ix–x, 501 (Richard R. John et al. eds., 2012).

22. The noted architecture scholar, Vincent Scully, famously wrote of Penn Station: "Through it one entered the city like a god . . . . One scuttles in now like a rat." *See* Alexandra Lange, *The Slide-Show Epiphanies of the Architectural Historian Vincent Scully*, THE NEW YORKER (Dec. 5, 2017), https://perma.cc/QLG3-VVDD.

23. N.Y.C. ADMIN. CODE § 25-301. *See* ANTHONY WOOD, PRESERVING NEW YORK: WINNING THE RIGHT TO PROTECT A CITY'S LANDMARKS 277–314 (2007). Wood points out that the public was largely apathetic about the demolition of Penn Station until the actual process of demolition, which took three years, was observed through the media. *Id*. at 323.

24. Two business journalists who covered the demise of Penn Central provided a damning assessment: "The railroad went broke because of bad management, divided management, dishonest accounting, diversion of funds into unprofitable outside enterprises, nonfunctioning directors or a basic disinterest in running, or even an inability to run, a railroad. Put even more bluntly, he may blame the bankruptcy on inefficiency, incompetency, gross miscalculations, practices bordering on fraud and a public-be-damned attitude." JOSEPH R. DAUGHEN AND PETER BINZEN, THE WRECK OF THE PENN CENTRAL 308 (1971, 1999).

Terminal was constructed with a steel frame capable of supporting twenty stories.[25] In 1954, New York Central proposed a 108-storey office building designed by the young I.M. Pei, which would have entirely replaced the terminal with what would have become the tallest building in the world.[26] In 1958, it proposed a 55-storey office tower with heliport and 2,400 car garage.[27] Both drew opposition and were never pursued.

The Landmarks Preservation commission designated Grand Central Terminal as a landmark in 1967 over the objection of the railroad.[28] At that point, the company essentially gave up on demolition. It leased the air rights above the Terminal to UGB Properties, Inc., a firm controlled by Morris Saady, a British real estate developer, who hoped to make a start in the New York market by building an office tower above the Terminal. Saady attempted to comply with the law and mollify public opinion. He enlisted the well-known modernist architect Marcel Breuer, who designed a 50-storey tower that would be cantilevered above the Terminal Building, obviating the need for demolition of a significant portion of the exterior. Indeed, Penn Central proposed to restore the exterior, which had been marred by commercial development and neglect. Some parts of the interior would be destroyed, but the LPC had no jurisdiction over interiors in 1967. Penn Central offered to execute a voluntary agreement to restore and maintain the interior Main Concourse.

Penn Central applied to the Landmarks Preservation Commission for a permit to erect the tower on the ground that the addition would have "no exterior effect" on the landmark.[29] Breuer himself testified that his proposal "does not destroy or affect exterior architectural features."[30] He further noted that the tower would not be visible from the street immediately adjacent to the terminal; to the extent the tower was visible from lower Park Avenue, it would be a visual improvement over the Pan American Building visible just to the north of the terminal.[31] The LPC nevertheless denied the permit in 1968, viewing the proposal as "no more than an aesthetic joke . . . . The tower would overwhelm the landmark by its sheer

25. BELL & LEIGHTON, *supra* note 18, at 52–53.

26. *Id*. at 4.

27. *Id*.

28. "The Commission further finds that, among its important qualities, Grand Central Terminal is a magnificent example of French Beaux Arts architecture; that it is one of the great buildings of America, that it represents a creative engineering solution of a very difficult problem, combined with artistic splendor; that as an American Railroad Station it is unique in quality, distinction and character; and that this building plays a significant role in the life and development of New York City." Penn Central Transportation Co. v. City of New York, 377 N.Y.S. 2d 20, 24–27 (N.Y. App. Div. 1975).

29. GREGORY F. GILMARTIN, SHAPING THE CITY: NEW YORK AND THE MUNICIPAL ART SOCIETY 403 (1995).

30. Statement by Marcel Breuer, Architect, F.A.I.A., to the Landmarks Preservation Commission of the City of New York, September 12, 1968, at 2 (on file with author).

31. *Id*. at 2–3.

mass . . . and would reduce the landmark itself to the status of a curiosity."[32] LPC members worried that denying the permit rendered them politically and legally vulnerable, but were willing to go down "with all flags flying."[33]

Penn Central and Saady next sought a permit in 1969 for a different plan, which would demolish the south façade and erect a 59-storey building on slender columns. The ground was that the alteration was "appropriate" for the landmark. Breuer had never been convinced that saving the façade was worthwhile, and his clients had realized that constructing his first design, which cantilevered the tower above the terminal, would be expensive. Breuer's clients argued that development to the south had obscured views of the façade, such that it was "hardly seen at all." Although the new proposal arguably had more design coherence, it involved actual demolition of the front of the landmark. At a hearing on the plan, Breuer questioned whether the exterior of Grand Central was "worth preserving"; he and Penn Central promised again to preserve and restore the legally unprotected Main Concourse, which Breuer described as "the last one of New York's great interior spaces."[34] LPC unanimously rejected the application. "To protect a landmark, one does not tear it down," the Commission declared. "To perpetuate its architectural features, one does not strip them off."[35]

At that point, in October 1969, Penn Central filed suit in the New York Supreme Court arguing that the denial of the permits effected a taking of their property.[36] Penn Central's prospects for success were excellent. Historic preservation regulation of private property was considered anomalous in the 1960s, especially as applied in high value urban real estate markets.[37] Unlike traditional zoning law, historic preservation could not be constitutionally justified by its

32. Penn Central, 438 U.S. at 117–18. The quote also is reported in a book co-authored by Harmon Goldstone, the chair of the LPC at the time the Penn Central proposals were rejected. HARMON H. GOLDSTONE & MARTHA DALRYMPLE, HISTORY PRESERVED: A GUIDE TO NEW YORK CITY LANDMARKS AND HISTORIC DISTRICTS 225 (1974). *See also* GILMARTIN, *supra* note 29, at 403.

33. GILMARTIN, *supra* note 29, at 403.

34. David K. Shipler, *New Tower Sought For Grand Central*, N.Y. TIMES, April 1, 1969, at 28.

35. David W. Dunlop, *Harmon Goldstone Dies at 89: Led Landmarks Preservation Commission*, N. Y. TIMES (Feb. 23, 2001), https://perma.cc/28SR-PKAF.

36. The complaint actually pressed what the New York Times called "a broad suite attack on the power of the [Landmarks Preservation Commission]." Robert E. Tomasson, *Penn Central Sues City in Fight to Build Grand Central Tower*, N.Y. TIMES, Oct. 8, 1969, at 51. The complaint contained seven causes of action including violations of the Due Process, Equal Protection, and Commerce Clauses. It also alleged that the ordinance failed to provide adequate standards by which the Landmarks Preservation Commission could make judgements about the "[a]esthetically good" and thus constituted an unlawful delegation of legislative authority. The ordinance contains a provision providing relief to the owner of a designated building if the owner can show that it is not otherwise capable of earning a reasonable return, N.Y.C. ADMIN. CODE § 25-309(a)(1), which is defined as a six percent return on its current assessed value, N.Y.C. ADMIN. CODE § 25-302(v), but such relief is not available to a property that has received any level of tax exemption. N.Y.C. ADMIN. CODE § 25-309(a)(2). Grand Central received a partial tax exemption.

37. Historic preservation, like other forms of aesthetic regulation, were viewed with suspicion by courts because judgments of significance, like those of beauty had a subjective element that was both expansive and susceptible to being manipulated for corrupt reasons. *See* note 166, *infra*.

prevention of nuisance-like conflicts among land uses.[38] Rather, it sought to preserve sites and buildings that contributed to the cultural orientation of people, arguably creating a public benefit instead of preventing a public harm. Once a building was designated as a historic landmark or as a contributing element in a historic district, the building could not be demolished or altered unless a commission of experts judged the proposed action visually compatible with the landmark or district.[39] Protection of historic districts had been approved in a few state court cases, at least for pre-Civil War neighborhoods in economically marginal cities.[40]

Additionally, the "average reciprocity advantage" approved of in *Maher v. City of New Orleans* could not be approved in *Penn Central*. In 1975, the *Maher* court approved a historic district regulation prohibiting demolition and rejected a takings challenge to the Vieux Carre Ordinance, which regulated the alteration and demolition of contributing buildings in the iconic French Quarter.[41] The protection of individual landmarks was considered far more vulnerable to property rights claims. Historic district regulation is more closely related to zoning in that virtually all the buildings within a historic district are simultaneously burdened by restrictions on their own development and benefitted by those placed on the buildings surrounding them. Thus, each owner within a district experiences an "average reciprocity of advantage." This advantage was identified as a factor militating against a finding of a regulatory taking in the foundational case, *Pennsylvania Coal*.[42] Indeed, the earliest historic district protections were essentially zoning overlays.[43]

But unlike in *Maher* and *Pennsylvania Coal*, in *Penn Central*, restrictions on individual landmarks imposed significant regulatory burdens on individual properties that were not similarly benefitted by restrictions on neighboring properties. Conventional legal thinking supposed that individual owners could be singled out for unique restrictions only to prohibit harms to the community, such as a nuisance.[44] Although a prohibition on the demolition of a contributing building within an historic district could be understood to protect the distinctive character of the district—what one court termed the "tout ensemble"[45]—and thus the value

38. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

39. N.Y.C. ADMIN. CODE § 25-305.

40. *See In re* Opinion of the Justs. to the Senate, 128 N.E.2d 557, 562–63 (Mass. 1955) (Nantucket); City of New Orleans v. Pergament, 5 So. 2d 129, 131–32 (La. 1941).

41. Maher v. City of New Orleans, 516 F.2d 1051 (5th Cir. 1975). *See also In re* Opinion of the Justs., 128 N.E.2d 557 (holding no taking in proposed historic district for Nantucket).

42. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (different property restriction "secured an average reciprocity of advantage that has been recognized as a justification of various laws.").

43. *Charleston and Preservation*, NAT'L PARK SERV., https://perma.cc/FNG3-KEDX (Feb. 22, 2018).

44. Carlos A. Ball, *The Curious Intersection of Nuisance and Takings Law*, 86 B.U. L. REV. 819, 863–68 (2006). This rationale was spelled out by Justice Brandeis in his magisterial dissent in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 417–19 (1922).

45. *City of New Orleans*, 5 So. 2d 129 at 131 ("The purpose of the ordinance is not only to preserve the old buildings themselves but to preserve the antiquity of the whole French-Spanish Quarter, the tout ensemble, so to speak.").

of all the individual buildings within the district, commentators doubted that demolition of an isolated landmark would impair the values of nearby properties.[46] It seemed strained to characterize demolition of an isolated landmark as involving the prevention of a public harm that would resemble a nuisance and defeat a takings or due process claim.[47]

The economic burdens on landmarks would be especially severe on downtown buildings, where large-scale redevelopment of old, generally much smaller buildings could produce great profits. The leading legal scholar on historic preservation at that time, John Costonis, warned in a contemporary article in the Harvard Law Review that prohibiting demolition of an individual landmark in an urban downtown likely would be found to be a taking.[48] He noted that few preservation ordinances at that time actually prohibited demolition; most simply imposed a waiting period during which preservationists could seek purchase of the property or some other negotiated compromise. Costonis reasoned:

> Courts have consistently held that landmark preservation statutes may not impose undue economic hardships on landmark owners, and that in cases of undue economic hardship the city must either acquire the building or permit its demolition. . . . Thus, the imposition of permanent landmark status on a building that is currently unprofitable seems clearly unconstitutional. On the other hand, the constitutionality of ordinances such as New York's . . . that do allow permanent designation if the landmark is returning a net profit of 6% of assessed valuation is less clear. While "undue economic hardship" is perhaps not normally thought to apply to ownership of buildings that return a profit, it is certainly arguable that in cases where the landmark owner is forced by designation to forego a vastly more profitable sale of his site the foregone opportunity constitutes such a hardship.[49]

Costonis posed as a solution a scheme of transferable development rights,[50] which New York had already adopted in part, and will be discussed below.

The early decisions of New York courts concerning the new Landmarks Preservation Ordinance were encouraging to the property owner.[51] In the first

---

46. Edward H. Wolf, *The Landmark Problem in New York*, 22 INTRAMURAL L. REV. N.Y.U. 99, 105–07 (1967); Note, *The Police Power, Eminent Domain and the Preservation of Historic Property*, 63 COLUM. L. REV. 708, 720–22 (1963).

47. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), had upheld local zoning regulations against a Due Process challenge on the ground that it prevented harm to residential buildings that were analogous to nuisances.

48. John J. Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574, 581–84 (1972).

49. *Id.* at 583 n.36 (citations omitted).

50. *Id.* at 589–602. Transferable development rights, often referred to as "TDRs," allow a property owner of a building under extraordinary regulatory burdens to use some of the development potential that cannot be used at the regulated site at a different site, which can then be built beyond the limits of the otherwise applicable regulations at the receiving site.

51. In *Trustees of Sailors' Snug Harbor v. Platt*, a charity that managed five old and rather decrepit buildings as a residence for retired sailors challenged the designation of its buildings as a landmark. The

takings challenge to the Landmarks Law to reach it, the New York Court of Appeals held it unconstitutional as applied to J.P. Morgan's landmarked home. The then occupants, the Lutheran Church, proposed to demolish the house to build an office building. The court described the landmarking as "nothing short of a naked taking."[52] It viewed the preservation restriction on demolition as a "government regulation which severely restricts the use to which the property may be put [and] is neither in pursuance of a general zoning plan, nor invoked to curtail noxious use [.]"[53] More generally, it noted: "The landmark preservation problem has received considerable comment the net effect of which is general agreement that attempts to designate individual landmarks in high economic development areas is fraught with trouble."[54]

The New York Supreme Court, the state's trial court, did not issue a decision in Penn Central's case until January 1975, when it held that that the imposition of preservation restrictions on the owners constituted a taking. The court stated: "The point of decision here is that the authorities empowered to make the designation may do so but only at the expense of those who will ultimately have to bear the cost, the taxpayers."[55] The court invalidated the restriction on the Terminal and saved for further proceedings the damages for the temporary taking sustained by Penn Central.[56]

This was the moment of greatest peril for preserving the Terminal. According to Gilmartin, Penn Central offered to settle the case: if the City did not appeal the invalidation of the denial of the permit, the railroad would not seek damages, but

---

trial court set aside the designation on the ground that it had effected a taking by imposing an undue burden on the trustees. 280 N.Y.S.2d 75 (1967). On appeal, the Appellate Division held that the Landmarks Ordinance was not unconstitutional on its face, but remanded to determine whether the prevention of demolition of five buildings charitably used for housing retired seamen would amount to a taking. 288 N.Y.S.2d 314 (1968). Because the property was tax exempt, the six percent hardship provision did not apply. The court held that the appropriate standard was whether "maintenance of the landmark either physically or financially prevents or seriously interferes with carrying out the charitable purpose." *Id.* at 316. The buildings eventually were saved when Mayor John Lindsay had the City purchase the buildings. GILMARTIN, *supra*, note 29, at 377. Today, it is operated as the Snug Harbor Cultural Center, containing gardens, art gallery, and concert venue. SNUG HARBOR CULTURAL CENTER, https://perma.cc/974L-DQYW (last visited Sept. 4, 2021).

52. Lutheran Church in America v. City of New York, 35 N.Y.2d 121, 132 (1974).

53. *Id.* at 129.

54. *Id.* at 131 (citing Costonis, *supra* note 48). Incidentally, the Lutherans never demolished the house but sold it to the Morgan Library and Museum, which incorporated it into its cultural complex, one of the jewels of the City today. *See* Paul Goldberger, *Architectural View: J.P. Morgan Jr.'s House is Back*, N.Y. TIMES (Nov. 3, 1991), https://www.nytimes.com/1991/11/03/arts/architecture-view-j-p-morgan-jr-s-house-is-back.html.

55. Penn Central Trans. Co. v. City of New York, No. 14763/69, at 8 (N.Y. Sup. Ct., Jan. 21, 1975) (unpublished op. on file with author).

The New York Justice who decided the case, Irving Saypol, had been the federal prosecutor in the spying case against Ethel and Julius Rosenberg. See Tom Goldstein, *Justice Irving H. Saypol, 71, Dies; Rosenberg Spy-Trial Prosecutor*, N.Y. TIMES, July 1, 1977, at 1.

56. *See* Paul Goldberger, *City's Naming of Grand Central As a Landmark Voided by Court,* N.Y. TIMES, Jan. 22, 1975, at 1.

otherwise would seek $60 million.[57] The Corporation Counsel recommended to Mayor Abraham Beame that the City accept the settlement. Doing so likely would eliminate protection of individual landmarks. The city was in desperate financial condition, teetering on the brink of insolvency.[58] The Municipal Arts Society learned of the offer and recommendation and went into full campaign mode, creating the "Committee To Save Grand Central." At this point, Jacqueline Kennedy Onassis stepped forward unbidden and volunteered to help the Society's campaign.[59] Many civic leaders joined the campaign, including the noted architect Philip Johnson, Bess Meyerson (a New York fixture who had been the first Jewish Miss America), then-Congressman Edward Koch, and former mayor Robert Wagner. Mrs. Onassis soon became the public face of the effort to save the Terminal, garnering vast media attention for the campaign, and even personally lobbied Mayor Beame. Some combination of pressure, charm, and a new, more sympathetic Corporation Counsel persuaded Beame to authorize the appeal.[60]

A divided panel of the Appellate Division reversed, holding that the restrictions did not amount to a taking.[61] The court stressed the importance of historic preservation, placing it alongside rising environmental consciousness. "In recent years, as we have become painfully aware that 'the frontier' has been disappearing and our natural resources are rapidly being depleted, there has been an increasing national growth of interest in preserving irreplaceable buildings and sites which have historical, aesthetic or cultural significance."[62] The court stated that to assess the owner's takings claim, "consideration must be given to the importance of the regulation to the public good, the reasonableness of the regulation in achieving such end and the effect of the regulation on the economic viability of the parcel involved."[63] The court viewed the third element, economic viability, to be the only contested issue; it reviewed Penn Central's evidence of a negative return but rejected its conclusion, finding that the company had not distinguished

57. GILMARTIN, *supra* note 29, at 404–05.

58. *See* Jeff Nussbaum, *The Night New York Saved Itself From Bankruptcy*, NEW YORKER (Oct. 16, 2015), https://www.newyorker.com/news/news-desk/the-night-new-york-saved-itself-from-bankruptcy; Frank Van Riper, *Ford To City: Drop Dead*, N.Y. DAILY NEWS, Oct. 30, 1975, at 1.

59. Diane Henry, *Jackie Onassis Fights For Cause: She Joins in Forming a Group to Rescue the Grand Central*, N.Y. TIMES, Jan. 31, 1975, at 1, 37. A hagiographic children's book tells the story with pictures. *See* NATASHA WING AND ALEXANDRA BOLGER, WHEN JACKIE SAVED GRAND CENTRAL: THE TRUE STORY OF JACQUELINE KENNEDY'S FIGHT FOR AN AMERICAN ICON (1977).

60. The 42nd Street entrance to Grand Central today is dedicated to Jackie Onassis.

61. Penn Central Transportation Co. v. New York, 377 N.Y.S.2d 20, 33 (N.Y. App. Div. 1975). The court quoted from John Costonis's evocation of the importance of historic preservation, but not from his critique of its economic impact on owners.

62. *Id*. at 23.

63. *Id*. at 27. Interestingly, this is truly an all-things-considered balancing test, far more than the Supreme Court's *Penn Central* test, which focuses more narrowly on economic impact and the "character" of the government action. It also embodies a sort of proportionality inquiry not incorporated into the Supreme Court's approach.

between railroad and building expenses and, thus, had not shown that it could not improve the profitability of its retail operations. The court also noted that Penn Central had largely ignored the value of its legal ability to transfer some of its development potential from the Terminal site to other adjacent sites that owned under the City's Transferable Development Rights program. The court concluded:

> The validity of the Landmarks Preservation Law, as applied to Grand Central Terminal, does not depend on a showing that the landmark parcel will be undiminished in any degree by the regulation's restrictions; only that it will not 'deprive the individual property owner 'of all beneficial use of his property' * * *.' In short, '(p)laintiffs have shown hardship but not confiscation.' But such hardship, in the proper exercise of the City's police power, must be subordinated to the public weal, since such regulatory authority is not only 'the least limitable of all the powers of government,' but it 'is not to be limited to guarding the physical or material interests of the citizen. His moral, intellectual, and spiritual needs may also be considered. The eagle is preserved, not for its use, but for its beauty.'[64]

The dissent read the evidence differently, concluding that Penn Central has shown that the Terminal without the tower was "incapable of producing a reasonable economic return."[65] But the dissent went on to criticize the balance struck by the Commission:

> [T]he declaratory judgment action initiated by plaintiffs herein has its inception not in a desire to demolish the landmark, but rather to alter it; that is, to use it in a manner which will insure a reasonable economic return while preserving the Landmark in a feasible and consonant manner. . . . By virtue of the fact that plaintiffs retained an outstanding architect firm and even submitted Breuer I which retains the famed south facade of the Terminal, their good faith in coming to terms with the landmark designation has been exhibited. The presence of the Pan Am building and the fact that the original plans for the present Terminal envisioned an office tower over such Terminal militate in persuasive fashion against the defendants' intransigent position.[66]

---

64. *Id*. at 29–30 (citations omitted).

65. *Id*. at 38.

66. *Id*. at 41. The dissent also voiced a criticism of the preservation decision that has become common among Property Law scholars. "[S]uch rigid application of the Landmarks Law designation may well be self-defeating . . . because the individuals who designed, built, indeed underwrote the great structures now deemed worthy of designation as Landmark, undoubtedly did so for a variety of reasons, among which was their intention to profit therefrom. It is not reasonable to assume that if the result of structural distinctiveness is to be a lessening of the entrepreneurial estate, there may well be no structures to designate as Landmarks in the years to come?" *Id. But see* J. Peter Byrne, *Precipice Regulations and Perverse Incentives: Comparing Historic Preservation Designation and Endangered Species Listing*, 27 GEO. INT'L ENVT'L. L. REV. 343 (2015).

Penn Central, however, had challenged the LPC decision for consistency with either the Landmarks Preservation Law or state administrative law, weakening the bite of these observations.

Penn Central sought further review in the New York Court of Appeals. That court, previously critical of the preservation law's impact on property rights, unanimously upheld the LPC's rejection of the tower. It did so on surprising grounds not raised or argued by any of the advocates, at once both narrowly tailored to the Grand Central Terminal but potentially creating broad grounds for resisting property rights challenges.[67] Perhaps, the court's key observation was: "Grand Central Terminal is no ordinary landmark."[68] Chief Judge Breitel's opinion acknowledged that the terminal had been "singled out"; that is, subjected to a regulatory burden as a landmark without receiving a reciprocal regulatory benefit.[69] But he also detailed the many public economic and social benefits that the railroads and the terminal had received over the years to justify the burden. He further argued that the owners benefitted from the terminal even if it never was able to earn a profit because of the economic benefit it conferred on the adjoining properties it owned within Terminal City.[70] Finally, he found that the legal and practical ability of Penn Central to apply some of its development rights from the terminal site to neighboring properties that it owned, now well-known as transferable development rights or "TDRs," had substantial value and lessened the economic burden on the Terminal.[71] Commentators have argued that Breitel's rationale seemed to draw on the theories of Henry George about how society creates the value of urban land.[72] The opinion seems better read as emphasizing the distinctive public support for the value of railroad assets in order to distinguish Grand Central from other sorts of historic buildings, such as the former Morgan mansion, where the New York courts had readily found the landmark restrictions violated the owner's constitutional property rights.

---

67. Penn Central Transp. Co. v. City of New York, 366 N.E. 2d 1271 (N.Y. 1977).

68. *Id.* at 1275.

69. *Id.* at 1274–75.

70. He analogized the terminal to a flagship store in a regional shopping center, which cannot earn enough revenue itself to justify construction but makes the other stores in the center profitable. *Id.* at 1276–77.

71. In this Judge Breitel distinguished a prior decision where he had written the court's opinion holding that TDRs lacked sufficient value to save a regulation from effecting a taking. *See* Fred F. French Investing Company, Inc. v. City of New York, 385 N.Y.S. 2d 5, 39 (N.Y. 1976).

72. WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 50 (1995); Gideon Kanner, *Making Laws and Sausage: A Quarter Century Retrospective on Penn Central Transportation Co. v. City of New York,* 13 WM. & MARY BILL RTS. J. 679, 685 (2005). Although Kanner characteristically denigrates him as a "pseudo-Marxist Crackpot," George addressed a central problem of urban land economics that an owner benefits from a rise in the value of urban land without making any endeavor to improve the use or social value of that land. *Id.*

Professor Barton Thompson, who worked on Justice Rehnquist's dissent in the case, has commented that Breitel's was the most novel and interesting of all the opinions in the case from an academic perspective. Richard J. Lazarus, *Transcript: Looking Back On Penn Central—A Panel Discussion with the Supreme Court Litigators*, 15 FORDHAM ENVTL. L. REV. 287, 291 (2004).

B. MAKING NO NEW LAW

Because New York's highest court had rejected a federal constitutional challenge to a state statute, Penn Central could bring its case to the U.S. Supreme Court as a mandatory appeal rather than as a discretionary Petition for Certiorari.[73] This proved significant. Justice Powell's and Justice Blackmun's case files give valuable insight into how the justices viewed the case. The "cert pool" memo expressed a view—which might have been held generally—that it was unfortunate there had not been more decisions below to flesh out the application of the Takings Clause to historic preservation, but that the justices should decide this case because it had come as an appeal rather than on certiorari, which was entirely discretionary. The memo stated:

> [T]he issues raised in this case have thus far received little attention in the lower courts, though the number of landmark laws now in effect suggest that they will soon be receiving considerable attention. If this case were here on cert, the paucity of relevant precedents would be one factor militating strongly in favor of a denial. However, because the issue is here on appeal, because the case raises issues of constitutional importance, and because the opinion below is—on several, material points—questionable, summary action would be inappropriate. Probable jurisdiction should be noted and the case set for oral argument.[74]

Justice Powell's law clerk wrote on the face of the memo: "It would be great if there were a way out of this appeal, so that the issue could percolate. Unfortunately, the court seems stuck."[75] Justice Powell himself wrote: "Important const. issue and very little authority." He also noted on his tally sheets for the votes on whether to note probable jurisdiction: "Potter thinks this is a zoning ordinance (Euclid) type case. I'm not so sure."[76] Eventually he was one of five justices to vote to note probable jurisdiction. The others were the three justices who eventually dissented, plus Justice White.[77] It seems likely that the case would never have been heard if the Court's appellate jurisdiction had not still been in place in 1977.

Briefing the merits, the lawyers for Penn Central[78] attacked the Breitel opinion and argued that the air rights above the station were a distinct and valuable

---

73. 28 U.S.C. § 1257(a). Mandatory appeals to the U.S. Supreme Court were eliminated in 1988. Act of June 27, 1988, Pub. L. 100-352, § 3, 102 Stat. 662. As footnote to history, the Covington and Burling associate on the jurisdictional Statement was John Bolton, the former National Security Advisor.

74. Prelim. Mem., Dec. 2, 1977 Conference, List 1, Sheet 1, No. 77-444 ASX, Penn Central Transportation Co. v. City of New York, at 8. This document was obtained from the Lewis Powell papers at Washington and Lee University and is on file with the author.

75. *Id.* at 1.

76. Powell Papers at 9.

77. According to Powell's tally, Brennan, Stewart, and Marshall voted want a substantial federal question and Blackmun was absent. *Id.*

78. Penn Central turned to Covington and Burling to handle the case in the Supreme Court. Covington had managed the immense bankruptcy of Penn Central for several years. Ironically,

property interest that the City had taken. In doing so, they made two concessions. First, they disclaimed any argument that historic preservation was not within the police power.[79] Also, they expressly declined to argue that Penn Central could not earn a reasonable return on the Terminal "because this factual question becomes immaterial once the Court of Appeals' error of law in abandoning the just-compensation rule is reversed."[80] This gambit appears to be based on their reading of Breitel's opinion holding that the record would have established a taking but for the civic significance of the landmark Terminal and the public contributions to its value.[81]

Gratified to have prevailed below but doubting that the U.S. Supreme Court would ever adopt an approach to constitutional property rights that sought to assess a public contribution to private value, the lawyers for New York City distanced themselves from Breitel's reasoning.[82] The brief strained to characterize Breitel's opinion as following normal police power analysis and disputed his conclusion that Penn Central had been "singled out" to bear a burden. "We think that in this, the Court erred. As we discussed above, the designation of individual landmarks is part of a comprehensive plan to preserve historic buildings throughout the City which plan is, in turn, integrated into the general land use plan for the entire City." Leonard Koerner, the City's Corporation Counsel advocate, treated the case as an ordinary exercise in land use regulation, where the owner had not shown that it could not make a reasonable return from the property.[83] The brief gave a detailed account of the finding of the intermediate appellate court below

---

Covington also had been pro bono counsel for the National Trust for Historic Preservation in a number of prior cases. The Trust planned to file an amicus brief in the Supreme Court; not surprisingly, Covington dropped the Trust as a client at that point. The Trust then turned to David Bonderman, a young lawyer at Arnold and Porter, who had been very active in Washington, D.C. preservation matters with the local organization, Don't Tear It Down.

An interesting historical footnote to Covington's representation is that the associate who worked the case and presumably drafted the brief was John Bolton, later the National Security Advisor.

79. Brief of Appellants at 12, Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) (No. 77-444), 1978 WL 223128.

80. *Id*. at 8 n.7.

81. *Id*. at 8 n.7. Justice Powell's clerk called this "a very stupid strategic move." Bench Memo, April 15, 1978, at 11 n.1.

82. Brief of Appellees at 35, Penn Central Transportation Co. v. City of New York. 438 U.S. 104 (1978) (No. 77-444), 1978 WL 206883.

In a talk he gave in 1979, Judge Breitel characterized his approach in *Penn Central* as "daring," and expressed regret that the Supreme Court had not commented on it. Frank Schnidman, *A Trip Back in Time, including Judge Charles D. Breitel's Rationale for His Fred French and Penn Central Decisions*, 30 TOURO L. REV. 421, 428–29 (2014) (printing remarks delivered October 12, 1979).

83. Brief of Appellees, Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) (No. 77-444), 1978 WL 206883. Mr. Koerner later explained, "Our whole argument in terms of seeking to protect the landmark legislation was to treat this as just another exercise of the police power similar to zoning." *Looking Back On Penn Central: A Panel Discussion with the Supreme Court Litigators*, 15 FORDHAM ENVT'L. L. REV. 287, 289 (2004). *See also Through The Legal Lens: Interviews With Lawyers Who Shaped NYC's Landmarks Law: The Reminiscences of Leonard Koerner*, at 5 (January 3, 2016), https://perma.cc/ZQT6-NS8K.

that Penn Central had failed to prove that it could not earn a reasonable return on the Terminal.[84]

An impressive group of amici filed coordinated briefs supporting the City. The National Trust for Historic Preservation filed on behalf of itself, three large, historic cities, the National League of Cities, and the Sierra Club.[85] This brief presented a tightly structured argument that landmarking represents a legitimate land use regulation which cannot effect a taking when "it is conceded that the landowner can obtain a reasonable return on its investment without the use of the air rights?"[86] The umbrella Committee to Save Grand Central Station filed on behalf of the Municipal Arts Society, the American Institute of Architects, and several other civic and preservation organizations; elite lawyers, including some certainly familiar to the justices. This brief focused on assailing the arguments in Penn Central's brief:

> They now present an argument not advanced before the courts below, namely, that the "property" subject to the regulation is not the landmark building and the land on which it is located – defined by the Landmarks Preservation Law as the "landmark site" or the "improvement parcel"—but only the air space over it. Thus they subdivide their property so as to exclude the nub of the controversy settled by the Court's findings of fact below—that they had failed to prove that the law unreasonably interferes with their use of the landmark. They then invite this Court to embark with them on an unprecedented exploration of an extreme and extraordinary theory of law: that property regulations are invariably compensable "takings" to the extent of their diminution of the development potential of regulated land. This by their argument will always be true since the interest affected by a regulation can always be subdivided out as if it were a separate piece of property and then described, by their rationale, as having been "taken."[87]

Oral argument in the case occurred on April 17. The justices would have seen in the Washington Post or New York Times that morning that Jacqueline Kennedy Onassis, sporting a "Save Grand Central" button, and a group of New York notables had arrived at Union Station the day before on special train, the "Landmark Express."[88] They were greeted and supported by Senator Daniel

---

84. Brief of Appellees, *supra* note 82, at 28–32. The brief also explained how the TDRs could have been employed by Penn Central on other contiguous property that it owned. *Id*. at 31–32.

85. Brief Amicus Curiae of the National Trust for Historic Preservation et al., Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) (No. 77-444), 1978 WL 223131.

86. *Id*. at 3. Brief Amicus Curiae of the National Trust for Historic Preservation et al., at 3.

87. Brief Amicus Curiae of the Committee to Save Grand Central Station et al., Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) (No. 77-444), 1978 WL 206890, at 21–22. Amicus briefs supporting the City were also filed by the states of California and New York. The obviously self-interested Real Estate Board of New York and the fledgling Pacific Legal Foundation filed amicus briefs supporting Penn Central; they primarily assailed the reasoning of Judge Breitel.

88. *Celebrities Ride the Rails To Save Grand Central*, N.Y. TIMES, Apr. 17, 1978, at D9; Nancy Collins, *Riding the Rails for Grand Central; Jacqueline Onassis, Supporting the Station's 'Landmark' Status*, WASH. POST, Apr. 17, 1978, at Bi.

Patrick Moynihan and Joan Mondale, the spouse of the Vice President, and held a press conference urging the preservation of the terminal. This well-publicized event was the capstone of the public relations efforts of preservationists, organized by the Municipal Arts Society.[89] The paper will consider the effects of this public relations effort below.

Daniel Gribbon, a suave and experienced advocate, began his argument for Penn Central by noting that many state and city governments and civic organizations, as well as the United States, supported New York City's position. He sought to turn the tables by arguing that "the unusual display of public interest here serves to emphasize a principal element in Penn Central's case; that is, the enormous public benefit which, it is claimed, will be brought about by the governmental action that we challenge."[90] He readily conceded that the Constitution allowed the protection of individual landmarks but that, when doing so prevented the owner of an individual property from otherwise using its property rights to the full scope—here the air rights—it was a taking requiring the payment of compensation. He agreed that government could prevent such development to prevent a "noxious use" but argued that it needed to pay if the individual property was constrained to protect a public good such as preservation of the historic terminal. When questioned, he defined the lost value as the value that Penn Central would have been able to obtain by building the tower over the terminal, which he contended the City failed to recognize as a legitimate property interest.[91] Gribbon's argument was quickly bogged down from repeated questions from Justice Potter Stewart about the difference between zoning laws and historic landmark designation. Gribbon argued that zoning, including height limits, did not constitute a taking because of the average reciprocity of advantages and burdens felt by all property owners.[92] He then spent time critiquing the New York Court of Appeals' opinion, but Justice Stewart interrupted him and pointed out that no party

89. GILMARTIN, *supra* note 29, at 408–09.

90. Transcript of Oral Argument at 4, Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) (No. 77-444).

91. *Id*. at 8.

92. There was a reveling colloquy with Justice White:

> Mr. Gribbon: I would put it because they are taking a part of our property, for taking a part of our property right.
>
> Q: You would make the argument even if it were conceded which I am sure it is not, even if it were conceded that the old building was profitable in the sense that you were not losing any money on it.
>
> Mr. Gribbon: Yes, Your Honor if there were a cost—
>
> Q: If you could double what at least an accounting would show you could make by using the building, you would say they are taking part of your property?
>
> MR. GRIBBON: I think that is a fair statement, yes—
>
> Q: And that is your fundamental argument?
>
> MR. GRIBBON: It is based on the notion that the reason they are doing it is to benefit the general public. And if we can show any loss under the taking cases, whether there is an expectancy of profit here or whether it is a demolition, then it should be compensable.

Id. at 18.

defended the Court of Appeals' rationale. Gribbon continued to discuss the Court of Appeals' rationale, although no Justice asked any questions on that subject. The gist of his position was that Penn Central had a right to build up to the limits allowed by zoning and was entitled to the economic value of those air rights as just compensation.

Leonard Koerner, arguing for New York City, quickly conceded that a landmark regulation could effect a taking, but only if the owner was left without an economically viable use. Koerner argued that because Penn Central could continue to operate Grand Central in an economically viable fashion, no compensation had to be paid. On a question from Justice Powell, Koerner conceded that if the terminal could not be operated in a profitable way, compensation would have to be paid. He did not place a specific number on the profit that must be made, but he referenced that under the Landmarks Ordinance, a property without a tax deduction gets relief from preservation restrictions if it could not earn a return of 6%. Toward the end of his argument, Koerner raised the issue transferrable development rights. Only Justice Stevens appeared interested in discussing their role in the case. Koerner conceded that the TDRs were not equivalent in value to all the development rights, but that they contributed to the reasonable economic values retained by the owner and a fair result for the property owner.[93]

At conference, the justices voted tentatively six to three to affirm. Justice Powell's [and Justice Blackmun's] case files give valuable insight into how the justices viewed the case. Most thought the issue presented a difficult and close question; Justice Stewart thought that it was on a "knife edge."[94] Justice Blackmun felt that historic preservation was valid, that it represented a comprehensive approach, and that the zoning precedents "half-decided" the landmark issue.[95] Most of the justices saw it as a question of degree rather than any bright line. In this way, the facts that Penn Central could continue to use the terminal as it always had, and had never proved that the preservation restriction prevented it from making a profit from the terminal, were key. The availability of transferable development rights seems not to have been important. Justice Powell reported that Justice Blackmun thought that the Court need not consider TDRs, and that

93. An interesting footnote to the oral argument is that it was the only time Patricia Wald, later Chief Judge of the D.C. Circuit and a genuine hero in legal feminism, argued before the Supreme Court. Wald at the time was Assistant Attorney General for Legal Affairs and appeared for the United States as amicus curiae. At the time, it was a tradition that every Assistant Attorney General make one argument at the Court during her tenure. Years later in conversation with the author she confessed to being very nervous and deprecated her performance. Yet, she had a good grasp of the argument and the position of the United States, concluding (apparently after she was out of time), "I think the rule which appellant would suggest that any time there is a loss in value of property due to a reasonably valid regulation use of the police power that the owner must be compensated is indeed a radical revolutionary rule, which just simply has no foundation in the past cases of the police power or indeed in the taking cases themselves." *Id*. at 62.

94. Powell Papers at 49.

95. *Id*. at 50.

Justice Stevens thought them irrelevant. Powell added: "I think all of us agree to this."[96] Thus, whereas Justice Brennan's opinion treated the TDRs as contributing to the owner's retained value under the regulations, it does not seem as if the Court would have come to a different conclusion had they not existed.

Justice Powell had found the case challenging. As the former general counsel of the Colonial Williamsburg Foundation and the then-chair of its board of trustees,[97] he doubtless had no problem accepting the value of historic preservation. On the other hand, as a consummate corporate lawyer and author of the now notorious and frequently hyped "Powell Memo,"[98] he had an abiding concern for a business's property rights. His papers show that he obtained an extensive bench memo from his law clerk, studied the precedents, and listened carefully to the opinions of his colleagues. It appears to be significant that his law partner had represented the City of Alexandria in 1937 in opposing an appeal to the Supreme Court. The appeal, based upon constitutional property rights, was brought by a brick company prevented from mining clay on its land where a new zoning ordinance had reserved that land for residential uses.[99] Powell thus could see restrictive land use regulations that specially burdened a single owner from the perspective of the regulating city. Penn Central's arguments seem not to have moved him; his oral argument notes for Mr. Gribbon record only, "[e]ntitled to build building under N.Y. zoning law."[100]

Justice Brennan assigned himself the writing of the Court's opinion as the Senior Justice in the tentative majority; Chief Justice Burger had adamantly stated at conference that the preservation restraint was clearly a taking.[101] Brennan, well-recognized as a master of holding a majority together, had expressed in conference that the case was "novel, interesting, tough."[102] He noted

---

96. The conference notes also help explain the anomaly that Justice Stevens, who later became the chief defender of land regulations on the Court against regulatory takings challenges, joined Justice Rehnquist's dissent. At least at that time, he expressed some skepticism about historic preservation as a topic for regulation of private property. Powell records him as stating at conference that the federal government's historic preservation was always done at public expense, that this was fair, and "also is a prudent restraint against too many buildings being designated as landmarks." Stevens never had the opportunity to reconsider this view nor to confront the regulatory complexities of the federal section 106 process. *Id*. at 52.

97. *See* JOHN C. JEFFRIES JR., JUSTICE LEWIS F. POWELL: A BIOGRAPHY 128 (1994).

98. *See e.g*., *Powell Memorandum: Attack On American Free Enterprise System, Powell Archives*, WASHINGTON AND LEE UNIVERSITY, SCHOLARLY COMMONS, https://perma.cc/3KTG-47C5 (noting the memo has been "credited as having 'charged America' and scorned as being 'far out of touch with the concerns and structures of the current right.'").

99. West Bros. Brick Co. v. City of Alexandria, 169 Va. 271, 275 (Va. 1937).

100. Transcript of Oral Argument at 36–41, Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) (No. 77-444).

101. *Id*. at 15–16.

102. Transcript of Oral Argument at 36–41, Penn. Central Transportation Co. v. New York City, 438 U.S. 104 (1978) (No. 77-444). Powell notes on conference considering Jurisdictional Statement. For notes on Brennan's tailoring of his opinions to hold a majority, see Mark Tushnet, *Themes in Warren Court Biographies*, 70 N.Y.U L. Rev. 748, 763–67 (1995).

that Penn Central did not claim that historic preservation was per se invalid. He also asserted that under the Court's precedents the takings issue was one of degree and Penn Central had failed to prove that it could not make a reasonable return on the station. Thus, he placed the case on a fairly narrow, fact-based ground, consistent with the Court's precedents, which did not preclude other future preservation or land use restrictions from being found to be takings.

Brennan recognized that he had a fragile majority. Stewart, who could be quite protective of property rights,[103] stated at conference that he thought the case "very, very close."[104] He also seemed to feel boxed in by precedents, seemingly expressing regret that *Euclid* had taken away any bright line protection for property rights subject to land use regulations. Stewart thought the case turned on the finding of the New York courts that Penn Central had failed to show that it could not earn a reasonable return. Powell also viewed the case as close and wrote (dictated) a memo to himself describing his research and struggling with the scope of regulatory impositions. His notes show that he voted to affirm, stating his "reasoning at some length." He found dispositive in the case that Penn Central profitably could continue its present use of Grand Central as a train station. Justice Marshall had passed; he had questioned Koerner closely about the losses his approach could impose on owners,[105] so could not be counted on to support Brennan.[106]

The task of preparing a draft opinion fell to law clerk David Carpenter. Carpenter later recalled:

> At the time I thought Justice Brennan was making some modest efforts to bring a little content to an area of law that was, as Buzz [Thompson] said before, then quite formalist and in disarray. But was trying very hard really to hold the Court, that was the number one objective when you were working on an opinion for Justice Brennan, to produce an opinion that at least five Justices would join that would hold the court. As I noted, other clerks had told me that the opinion better not say very much before I started work on the draft and in fact after it was circulated, Justice Stewart's clerk read it and said he was pretty sure it doesn't say anything at all.[107]

Because of the press of other work at the end of the term, Carpenter prepared his draft over three "all-nighters" over Memorial Day Weekend.[108] Law professors may

---

103. Hughes v. Washington, 389 U.S. 290, 294–98 (1967) (Stewart, J., concurring).

104. Powell Papers at 49. Justice Powell also wrote in his conference notes that for Stewart the case is on a "knife edge" but he tentatively would vote to affirm. *Id.*

105. *See* Transcript of Oral Argument, *supra* note 90, at 35–37.

106. Justice Marshall authored the Court's strong property rights opinion in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 421, 442–56 (1982) (Blackmun, H., Brennan, W., White, B., dissenting), a case in which Justice Brennan joined the dissenters.

107. Richard J. Lazarus, *Looking Back On Penn Central: A Panel Discussion with the Supreme Court Litigators* 15 FORD. ENVT'L. L. REV. 287, 307–08 (2004).

108. *Id.* at 302.

take note that Carpenter had studied the Takings Clause in a constitutional law class taught by Henry Monaghan, and had read the leading law review articles by Joe Sax and Frank Michelman, being significantly impressed especially by the latter.[109] While those of us that have spent many years arguing about the meanings of the Penn Central opinion may be chagrined that it reflects primarily the work of a sleep deprived law clerk trying not to say anything new, the opinion has endured over many years in no small part because it sought to address the issues in a manner acceptable to worried centrist judges.

New York City's litigation approach proved wise, as the Supreme Court upheld the landmark protection as an essentially ordinary exercise in land use regulation. The Court broadly affirmed the validity of historic preservation as a public endeavor. The opinion began with the declaration that historic preservation had arrived as a legitimate basis for government act, a point that Penn Central had entirely conceded.[110] "Over the past 50 years, all 50 States and over 500 municipalities have enacted laws to encourage or require the preservation of buildings and areas with historic or aesthetic importance."[111] The Court noted that Congress, too, in enacting the National Historic Preservation Act, had found that "the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people."[112] In essence, the Court held that historic preservation promoted important public purposes, citing the "widely shared belief that structures with special historic, cultural, or architectural significance enhance the quality of life for all." To counter the supposed constitutional infirmity of historic preservation, that it secured public benefits rather than preventing public harms, the opinion found that the Court's precedents "are better understood as resting not on any supposed 'noxious' quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy—not unlike historic preservation—expected to produce a widespread public benefit and applicable to all similarly situated property."[113] The Court also asserted that a city could legitimately consider "the destruction or fundamental alteration of a historic landmark" to be harmful.[114] Thus, the Court both affirmed the widespread acceptance of the legitimacy of historic preservation and eliminated a constitutional objection previously voiced against it.

---

109. *Id*. at 309.

110. Brief of Appellants at 12 ("Penn Central makes no claim that the preservation of buildings of historical or aesthetic importance is an impermissible objective of governmental action in pursuit of the public welfare.").

111. Penn Central, 438 U.S. at 107.

112. *Id*. at 108 n.1. The Court also reiterated the accepted rationales for historic preservation.

113. *Id*. at 133 n.30. Justice Scalia later invoked this statement to argue that in regulatory takings cases no special allowance should be given to regulations that do prevent harm to the public so long as the regulated activity would not have constituted a nuisance at common law. Lucas v. South Carolina Coastal Council, 505 U.S. 1006 (1992).

114. Penn Central, 438 U.S. at 133 n.30.

A key issue is how the Court viewed the "singling out" of Penn Central to bear the landmark burden without enjoying the benefits of having neighboring properties similarly burdened, as would be the case in zoning or within a historic district. Brennan roundly rejected the significance of the argument. His opinion for the Court treats it as a complaint about arbitrariness, which he rejects on the ground that the landmark program is citywide and choosing to landmark Grand Central Terminal is far from irrational. To the argument that landmark preservation lacks a reciprocity of advantage, the Court emphasized that landmarking was a systematic, coordinated program based on comprehensible standards. The issues of discrimination or singling out and reciprocity of advantage perhaps had not been clearly distinguished in the arguments, but the majority was satisfied that there was no discrimination against Penn Central.[115]

Rehnquist's dissent follows Costonis, who in turn followed Justice Holmes in *Penn Coal*, by arguing that restricting the otherwise permissible development potential of a designated site without similarly restricting surrounding sites is constitutionally problematic.[116] Conference notes suggest that Rehnquist was the only justice who focused on the reciprocity of advantage issue at conference.[117] It should be noted that Rehnquist's dissent gave a broad approval regulation of private property in historic districts, so the Court was unanimous on that novel subject.

The Court's opinion notoriously admitted that "this Court, quite simply, has been unable to develop any 'set formula' for determining" when the economic burden of a regulation causes a regulatory taking.[118] The Court offered modest guidance:

> In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action.[119]

115. *Cf.* Hadacheck v. Sebastian, 239 U.S. 394, 404, 407–13 (1915); West Bros. Brick Co. v. City of Alexandria, 169 Va. 271, 281–93 (Va. 1937).

116. Penn Central, 438 U.S. at 138–153. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

117. It is at least ironic that the Landmarks Preservation commission probably could have lawfully designated the entire Terminal City as a historic district, given that it was developed as a coherent whole enabled by the covering of the train tracks. Although such a designation should have satisfied Rehnquist's test, it would have been so economically devastating to Penn Central as to be politically unrealistic.

118. Penn Central, 438 U.S. at 124.

119. *Id.*

Scholars have ridiculed this formulation as conceptually vapid and as giving guidance neither to litigants nor to lower courts.[120] But closer study of the case shows that the Court did not take the case to make new law but because appellants brought it as of right. The justices were persuaded that landmark protection had become a legitimate form of property regulation and brought it within the ambit of established law. The difficulty of holding the majority encouraged Brennan to craft an opinion that reviewed numerous precedents and stressed that regulation that advances the public interest can effect a taking only if it leaves the owner without reasonable economic value. The opinion has persisted for more than forty years because it was written to embrace a range of views and permit a flexible approach to the individual case.[121] Thus, it both permits a wide range of land use regulations but holds out the caution that regulators must leave the owner economic "viability."

II. HOW *PENN CENTRAL* BECAME A LEGAL LANDMARK

In this section, the paper will look more closely at factors that shaped *Penn Central* into such a crucially important warrant for historic preservation law. This will build on the previous narrative of how the decision came to have the character it did. A later section will examine how preservation law developed from *Penn Central*, assess the advantages of that development, and consider whether some aspects of preservation law need to be reformed for contemporary needs.

A. THE CONSTITUTIONAL SCOPE FOR HISTORIC PRESERVATION

There are several significant consequences to the constitutional test case for landmark preservation involving the Grand Central Terminal, an iconic landmark, well-known to all. Despite Penn Central's opposition to its designation in 1967, no one could seriously doubt that Grand Central was a historically significant building, the preservation of which reflected reasonable public policy. Historic train stations possess a stylistic grandiloquence that reflects past municipal pride and sets them aside from functionalist, mid-twentieth century public buildings. Indeed, the 1960s and 1970s witnessed the demolition of numerous magnificent train stations in many U.S. cities due to the decline in inter-city passenger rail travel, although many were protested by concerned citizens.[122] The

120. *See, e.g.*, Stepher J. Eagle, *The Four-Factor Penn Central Regualtory Takings Test*, 118 PENN STATE L. REV. 601, 605 (2014) (arguing that Penn Central fails "to meet the most basic practical requirement for a legal rule. . . . [W]ith its lack of objective criteria, [it] does not impart knowledge of the legal rights and obligations of either property owners or public officials, resulting in protracted litigation and arbitrary outcomes.").

121. Professor Barton Thompson, who as law clerk assisted Justice Rehnquist with his dissent in the case, once remarked: "[B]ecause it was written to try to hold together a majority, it sets out a test which is appealing to a large number of judges." Lazarus, *supra* note 107, at 308.

122. Chicago suffered the complete or partial demolition of five classic rail passenger stations between 1971 and 1984. Lee Bey, *40 years ago: The end of the line for a storied train station*, WBEZ CHICAGO (Nov. 6, 2013, 4:30 AM), https://perma.cc/XU9T-PLTK.

demolition of Penn Station had crystalized public support for a preservation law in New York. Moreover, Grand Central continued to function as a busy and essential terminal for rail commuter services, so it could not be claimed that building was practically obsolete.

Preservationists were able to mobilize popular support because Grand Central was well-known and loved. Although privately owned, the terminal was open to all and long woven into the daily lives of many. For many, it was a symbol of New York City's prestigious past—at a time when the City's fortunes reached a low ebb. Preservationists mounted an astute campaign, greatly aided by the willingness of Jacqueline Kennedy Onassis to become the public face of the movement, ensuring conspicuous media coverage. She was perhaps the most admired women in America, known for her good taste in redecorating the White House and her championing of the preservation of the historic buildings surrounding Lafayette Park in Washington, DC. The Municipal Arts Society had campaigned for preservation for many years and was well-versed in moving both elite and popular opinion. All this explains why Judge Breitel stated: "Grand Central is no ordinary landmark."[123] The members of the Supreme Court themselves would have been personally familiar with Grand Central Terminal and did not need to be persuaded that it was a monument deserving of preservation. Even so, the arrival at Union Station of the Landmark Express—on the day before the argument—may have made an impression at a time before efforts to send political messages to the Court became common.[124] The Court's embrace of the value of historic preservation in its opinion was unstinting.

The case would have felt different if the landmark at issue had been obscure or implausible.[125] To illustrate, one can imagine how the Supreme Court might have reacted if the test case had involved the nineteenth century Greek Revival dormitories for retired mariners involved in the first New York property rights case under the Landmarks Preservation Ordinance, *Sailors Snug Harbor*.[126] There the

---

123. The centrality of Grand Central in the life of New York is well-captured in New York Transit Museum and Anthony W. Robins, Grand Central Terminal: 100 Years of a New York Landmark (2013).

124. Gilmartin reports evidence of the justices being surprised at the amount of public interest in the case. GILMARTIN, *supra* note 29, at 409.

125. A similar "legal" benefit from an iconic site being the subject of Supreme Court decision can be found in *Cameron v. United States*, 252 U.S. 450 (1920), where the Court upheld President Roosevelt's designation under the Antiquities Act of the Grand Canyon as a National Monument based on the textually slim reed that it was an "object of unusual scientific interest."

126. Trustees of Sailors' Snug Harbor In City of New York v. Platt, 280 N.Y.S. 2d 75 (Sup. Ct. 1967), rev'd and remanded, 288 N.Y.S.2d 314 (App. Div. 1968). The trial court held that "[t]he regulation imposes so disproportionate a burden upon the landowner that it must be set aside in this case as an unlawful taking of property without just compensation." 280 N.Y.S. 2d at 79. The Appellate Division reversed and remanded for more fact-finding on the questions "whether the preservation of these buildings would seriously interfere with the use of the property, whether the buildings are capable of conversion to a useful purpose without excessive cost, or whether the cost of maintaining them without use would entail serious expenditure—all in the light of the purposes and resources of the petitioner." 288 N.Y.S. 2d at 316.

owner was a charitable corporation operating under a trust benefitting the ancient mariners, and the buildings it wished to demolish and replace were described by the New York court as "located on three levels, without elevators or fireproofing, . . . obsolete and unattractive to the mariners, as well as cramped."[127] Compared to Grand Central, the Snug Harbor dormitories involved obscure old buildings poorly suited for their intended humanitarian purposes without expensive renovations by a charity.

Yet nothing in the Court's opinion makes the high significance of Grand Central a factor in the regulatory takings analysis. Although the Court noted that Grand Central was "one of New York City's most famous buildings,"[128] the only *legal* significance it found was that Penn Central "did not seek judicial review of the final designation decision."[129] The "ad hoc" approach to takings described by the Court looks at the economic effects on the owner and the "character" of the government action, for example whether it is a regulation on development or a "physical invasion."[130] The degree of civic or historical importance of the resource protected does not come into the stated constitutional inquiry.[131] Older buildings of all sorts may be designated and thus placed under preservation jurisdiction and subject to the restrictions on alteration contained within the municipal ordinance. Unlike in the trial court's approach in *Snug Harbor*, proportionality of public benefit and private loss does not come into play as a matter of law.[132] This takes on added significance because the preservation laws of U.S. municipalities do not place protected resources into formal tiers, varying the degree of restrictions with the historic significance of the property.[133]

---

127. The trustees also argued that "the needs of the mariners for more modern facilities should be considered more significant than any architectural merit the buildings might possess. They also pointed out that the public takes no interest in the Harbor and that tourists seldom visit it."

128. Penn Central, 438 U.S. at 115.

129. *Id*. at 116.

130. *Id*. at 124.

131. Courts have at times taken into account the severity or urgency of harm to the public that a regulation seeks to prevent in deciding whether the regulation creates a taking. *See, e.g*., Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 488–91 (1987). Scholars have noted that the courts sometimes include the importance of the government purpose within the character of the government action. In *Lucas*, Scalia sought to reserve takings indulgence to regulations that duplicate the restrictions contained in common law nuisance. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1006 (1992). But courts applying *Penn Central* continue to give some weight to the strength of public harms prevented or of the public benefits secured.

132. In assessing challenges to historic preservation initiatives regarding private property under Protocol 1 of the European Convention on Human Rights, the European Court of Human Rights requires a showing of a "reasonable relationship of proportionality between the means employed and the public goal sought to be realized." Kristiana LTD. v. Lithuania, no. 36184/13, ¶ 102-112, (Eur. Ct. H.R., 2018). At the same time, the ECHR gives far more candid weight to public interests than U.S. courts.

133. By contrast, the National Historic Preservation Act authorizes the creation both of the broadly inclusive National Register of Historic Places and the more protected category of National Historic Landmarks. National Historic Preservation Act, Pub. L. No. 89-665, 80 Stat. 915 (1966) (as amended by Pub. L. No. 96-515). Even more explicitly, the historic buildings protected under section 1 of the Planning (Listed Buildings and Conservation Areas) Act 1990, are grouped by Historic England into

Thus, the constitutional approach created by the decision has come to permit preservation of much lesser landmarks, buildings that never could have generated the degree of sympathy that Grand Central Terminal engendered. For example, the New York Landmarks Preservation Commission designated in 2008 as an individual landmark the Public National Bank of New York Building, a 1923 building designed by an architect that the designation report describes as "little." One does not need to quarrel with the appraisal of architectural significance that the Commission gave the bank building to doubt that the U.S. Supreme Court would have viewed so favorably a landmark restriction preventing the owner from demolishing the bank to construct an office tower resembling surrounding buildings. The Court's opinion, unlike that of the New York Court of Appeals, did treat Grand Central as an "ordinary landmark."[134] Much of the contemporary criticism of preservation regulation is that it restricts changes to too many undistinguished buildings.[135] *Penn Central* arguably encouraged this by loosening constitutional protections without formally giving weight to the significance of the resource designated.[136]

Of course, it was not accidental that the Court confronted historic preservation in the shape of an iconic monument passionately embraced by the public. The preservation of Grand Central brought forth a maximum effort by the preservation community, moved not only by the merit of protecting its integrity, but by painful memories of the destruction of Pennsylvania Station. The LPC itself felt that it had to draw a line at Grand Central; it might well have folded if an addition had been proposed to some lesser building. John Belle and Maxine R. Leighton, architects of the eventual splendid restoration of the Terminal wrote: "The grassroots preservation movement made its stand at Grand Central; it was their Alamo. Consequently, securing Grand Central's continued existence has compelled architects to rethink their role in protecting our built heritage."[137] The campaign carried on to save Grand Central garnered significant media coverage: prominent politicians, architects, and celebrities, in addition to Jacqueline Kennedy, also publicly called for Grand Central to be saved. But these celebrities could not have garnered public support unless the buildings were truly magnificent and the public felt a sense of "ownership," having passed through and used it so many times.

---

three categories reflecting their significance and rarity. *See* Dept. for Digital, Media, Culture & Sport, Principles for Selection of Listed Buildings (2018).

134. *Cf.* 366 N.E. 2d at 1275.

135. EDWARD GLAESER, THE TRIUMPH OF CITY: HOW OUR GREATEST INVENTION MAKES US RICHER, SMARTER, GREENER, HEALTHIER, AND HAPPIER (2011).

136. In practice preservation commissions probably permit greater alterations to buildings of lesser significance. For example, the New York City LPC in 2001 permitted the erection of 46 story tower (by Norman Foster) atop the landmarked six-story Hearst Building on Eighth Avenue. David W. Dunlap, *Landmarks Group Approves Plan For Hearst Tower*, N.Y. TIMES (Nov. 28, 2001), https://perma.cc/UJ3M-39MA. Approving adaptations to historic buildings has become more common as architects have become more skillful at designing appropriate modern additions.

137. BELL & LEIGHTON, *supra* note 18, at vii.

One cannot imagine creating a loud and visible public movement to save a more private, less grandiloquent building. Thus, the special character of Grand Central Terminal probably influenced both the public clamor for preservation and the receptivity of the Court to landmark controls.

The facts of the case promoted a broad preservation power in an additional way. The case involved only an addition to a landmark, not demolition. The cultural traumas that have galvanized the preservation movement have generally been caused by the destruction of revered landmarks, such as New York's Pennsylvania Station and the Chicago Stock Exchange.[138] Penn Central's initial proposal for Grand Central Terminal sought to avoid this most flagrant disregard for historic preservation; Breuer's design avoided all significant demolition. The exterior was to be restored. The interior could not have been designated under the ordinance at that time,[139] but the interior destruction was limited, and Penn Central was prepared to commit to the restoration and protection of the iconic Main Concourse.[140]

The LPC's rejection of Breuer's design expressed an aesthetic judgment: the tower was too big. "Quite simply, the tower would overwhelm the Terminal by its sheer mass. The 'addition' would be four times as high as the existing structure and would reduce the Landmark itself to the status of a curiosity."[141] The LPC stated that it was not opposed to additions in principle, but that each had to be judged on its own merits. Indeed, the Supreme Court's opinion notes that the LPC had permitted additions to other buildings.[142] Penn Central never challenged in court the reasonableness of the LPC's aesthetic judgment, as it could have done under the ordinance, but based its claim only on the taking of the air rights.[143] Accordingly, the Court's constitutional opinion drew no distinction between the preservation significance or economic effects of a regulation preventing demolition of a landmark and one preserving its spatial context. This is important because demolition results in the complete and final destruction of an historic resource while ill-conceived additions preserve the historic fabric of the original so that the harm to the landmark may be reversible.

Penn Central also proposed Breuer II, of course, involving the demolition of the exterior of the building, presenting a much easier case for rejection by the

---

138. Despite the best efforts of local preservationists, the Chicago Stock Exchange Building, designed by Louis Sullivan and Denkmar Adler, was torn down in 1972. Jay Koziarz, *Chicago's 10 most senseless demolitions, mapped*, CURBED CHICAGO (Feb. 6, 2020), https://perma.cc/QE6L-6MNH.

139. The LPC received authority to designate interiors only in 1973. See Nicholas Caros, Interior Landmarks Protection and Public Access, 116 COLUM. L. REV. 1773, 1775 (2016).

140. *See* Glenn Fowler, *Grand Central Tower Will Top Pan Am Building*, N.Y. TIMES, June 20, 1968, at 1, 36.

141. *Quoted in* Penn Central, 438 U.S. at 118.

142. Penn Central, 438 U.S. at 118 n.18.

143. *See* Save America's Clocks, Inc. v. City of New York, 124 N.E.3d 189, 195–96 (N.Y. 2019) (describing scope of judicial review of LPC decisions on the appropriateness of alterations to a protected building).

LPC.[144] Penn Central's takings claim challenged the rejection of both proposals. In the constitutional challenge, no court drew any distinction between prohibiting an addition and prohibiting demolition. Thus, the constitutional degree of economic pain that a historical commission can place upon a property owner was not calibrated by the quality or quantity of the historical resource protected. In other words, the Court did not incorporate into the constitutional analysis any inquiry about proportionality between private loss and public gain. This approach became standard doctrine in the Court's regulatory takings cases, where questions of proportionality are limited to exactions cases, where the government conditions permitting on obtaining a physical interest in land or its equivalent.[145] For historic preservation, the absence of proportionality in takings analysis allows commissions to insist on costly curatorial details in permitting so long as the costs for the property owner are not confiscatory. Local political realities and the varying extent of preservation enthusiasm among jurisdictions has ensured diversity of policies, but the constitutional framework created by *Penn Central* allows jurisdictions to maintain ambitious preservation programs when inclined to do so.

A good example of the type of preservation law that *Penn Central* unleashed is that of Washington, D.C. The District of Columbia had some weak historic preservation regulations prior to *Penn Central*, which did not prohibit demolition of designated buildings. Six months after *Penn Central*, D.C.'s relatively new local government unanimously enacted the Historic District and Historic Landmark Preservation Act,[146] drafted principally by David Bonderman, the lawyer who had authored the amicus brief in *Penn Central* for the National Trust in the Supreme Court. At least two novel elements of that ordinance seem to reflect the *Penn Central* opinion.

First, unlike New York's law, the Act allows an owner relief from the economic costs of preservation requirements only when detailed documentation shows that application of the requirements would create an "unreasonable economic hardship,"[147] defined as "a taking of the owner's property without just compensation."[148] That, of course, extends a statutory protection already applicable through the Takings Clause of the Constitution. No commercial or residential property owner has ever prevailed in D.C. by claiming an unreasonable economic hardship.[149] The Act thus takes full advantage of the broad authority that the Court granted local commissions to insist on costly preservation measures.

---

144. BELL & LEIGHTON, *supra* note 18, at 13.

145. *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374 (1994).

146. D.C. CODE § 6-1101.

147. *Id.* at §§ 6-1104(e), 1105(e), 1106(e).

148. *Id.* at § 6-1102(14).

149. *See, e.g.,* District Intown Properties LP v. District of Columbia, 198 F.3d 874 (D.C. Cir. 1999). *But cf*. Third Christ Scientist, Washington D.C.. HPA No. 2008-141 (2009) (unreasonable economic hardship on brutalist church), https://repository.library.georgetown.edu/handle/10822/761639.

Second, the Act authorizes the local Historic Preservation Review Board ("HPRB") to designate any property it judges to be historically significant without any formal political check.[150] Most jurisdictions made commission designation evaluations advisory only, requiring legislative action to make the designation legally binding.[151] Even New York City subjects the Commission's designation actions to a complex legislative veto.[152] The DC Commission's designations can be challenged only in court under typical administrative law grounds. Whereas DC's award of discretion to the HPRB probably reflects some local structural peculiarities, *Penn Central*'s comfort with landmarking seems a strong support for permissive designation.

Regardless of whether local jurisdictions chose to exercise it, *Penn Central* gave them wide authority to designate both landmarks and districts. After the case was decided it became nearly impossible for property owners to prevail in constitutional property claims against historic preservation regulators.

B. *PENN CENTRAL:* A CREATION OF ITS TIME

The time period during which the case was decided was propitious for preservation. The 1960s saw unprecedented prosperity and cultural aspiration.[153] President Lyndon B. Johnson's administration sought to advance culture in America, believing that the nation was prosperous enough to foster a "Great Society" that would provide spiritual and cultural enrichment for its citizens, as well as economic opportunity for the poor. In a commencement speech at the University of Michigan in 1964, President Johnson opined that Americans need a country that "serves not only the needs of the body and the demands of commerce, but the desire for beauty and the hunger for community."[154] The goal was to "build a society where the demands of morality and the needs of the spirit can be realized." Thus, in addition to landmark "anti-poverty" legislation, the Johnson years saw the creation of the National Endowments of the Arts and of the Humanities, the enlargement of public broadcasting, and, most directly relevant to this paper, the National Historic Preservation Act.[155] Despite a conservative political turn in the late 1960s, the 1970s saw the final demise of urban

150. D.C. CODE § 6-1103(c)(3).

151. *See* SARA C. BRONIN AND J. PETER BYRNE, HISTORIC PRESERVATION LAW 79 (2012).

152. N.Y.C. ADMIN. CODE § 25-303(4)(g)(2).

153. *See generally* JAMES T. PATTERSON, GRAND EXPECTATION: THE UNITED STATES, 1945-1974 (C. Van Woodward ed., 1996).

154. Commencement speech from President Johnson at the University of Michigan (May 22, 1964) *in* 3 THE MICHIGAN QUARTERLY REV. 230 (1964), http://www.umich.edu/~bhlumrec/c/commence/1964-Johnson.pdf.

155. National Historic Preservation Act (NHPA), Pub.L. 89–665, Oct. 15, 1966, 80 Stat. 915; National Endowment for the Arts, Pub.L. 89-209, § 5, Sept. 29, 1965, 79 Stat. 846; National Endowment for the Humanities, Pub.L. 89-209, § 7, Sept. 29, 1965, 79 Stat. 850; Public Broadcasting, PL 90-129, November 7, 1967, 81 Stat. 365.

renewal and the rise of the environmental movement.[156] Preservation and environmental protection share the normative claim that cultural and community values are as valid as commercial or property values, perspectives then gaining new legal weight.

The *Penn Central* court itself begins the body of its opinion by noting the wide public embrace of these cultural values:

> Over the past 50 years, all 50 States and over 500 municipalities have enacted laws to encourage or require the preservation of buildings and areas with historic or aesthetic importance. These nationwide legislative efforts have been precipitated by two concerns. The first is recognition that, in recent years, large numbers of historic structures, landmarks, and areas have been destroyed without adequate consideration of either the values represented therein or the possibility of preserving the destroyed properties for use in economically productive ways. The second is a widely shared belief that structures with special historic, cultural, or architectural significance enhance the quality of life for all. Not only do these buildings and their workmanship represent the lessons of the past and embody precious features of our heritage, they serve as examples of quality for today. '[H]istoric conservation is but one aspect of the much larger problem, basically an environmental one, of enhancing—or perhaps developing for the first time—the quality of life for people.'[157]

The Court also quoted from the National Historic Preservation Act, enacted by Congress in 1966, nearly contemporaneous with enactment of the Landmarks Preservation Law in 1965: "the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people."[158]

There was a hopeful fervor about historic preservation in the 1970s, because many believed that the powers to be were indifferent to architectural heritage and living neighborhoods.[159] Preservationists stood for meaning and community against money and politics—an opposition drawn in *Penn Central*. The writings of Jane Jacobs—with her defense of the traditional city buildings and neighborhoods against planned urban renewal projects—were gaining wider currency at this time.[160] Protection of the appealing remnants of an earlier urban life inspired

---

156. RICHARD LAZARUS, THE MAKING OF ENVIRONMENTAL LAW (2004).

157. Penn Central, 438 U.S. at 108 (citations omitted).

158. *Id.* (quoting 16 U.S.C. § 460(b)). These findings were dropped from the recodification of the Act in 2014, although not repealed. National Historic Preservation Act, Pub. L. No. 89-665, §1, 80 Stat. 915 (1966) (as amended by Pub. L. No. 96-515).

159. *See generally* ROBERT CARO, THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK (1975).

160. JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES (1961, 1993). Jacobs was not a strict preservationist, but valued older buildings as for their scale, visual interest, and orientation to the street. *See* Jane Jacobs, Downtown is for People (Fortune Classic 1958), FORTUNE, https://fortune.com/2011/09/18/downtown-is-for-people-fortune-classic-1958/ ("Think of any city street that people enjoy and you will see that characteristically it has old buildings mixed with the new.").

concepts of a future for the city on a human scale.[161] Critiques of the exclusionary effects of preservation were rarely broached before the 1980s.[162]

The case came to the Supreme Court before the election of Ronald Reagan changed its composition and outlook on property rights for at least a generation. The tender regard for private property and suspicion of public land use regulation evident in the dissent of Justice Rehnquist became the Court's dominant perspective after he became Chief Justice in 1986. Indeed, the expansion of constitutional property rights became a prominent area of judicial activism during the Rehnquist Court, bolstered by vigorous, growing public interest and property rights advocacy groups waging a concerted campaign for greater protection of property values against environmental and land use regulations.[163] Justice Powell was replaced by Justice Scalia, who became the most strident voice on the Court in favor of broad constitutional property rights that would require the payment of compensation for government regulation and conditioning of land uses.[164] Although *Penn Central* survived the Rehnquist Court as a vital precedent, it seems doubtful at best that those justices would have adopted its approach as a new matter.[165]

The prior evolution of legal doctrine had prepared the way for the *Penn Central* decision. Of course, the many land use regulatory decisions cited by the Court in *Penn Central* had fortified the Court's hands-off approach, which was consistent with the decline of Due Process review of state law generally dating back to the New Deal. The legitimacy of historic preservation regulations had been affirmed for historic districts. Though not the first case, *Maher v. City of New Orleans* presented a recent, thorough discussion of the matter by a respected federal court of appeals. The case involved an effort by a property owner to demolish a historic cottage in the French Quarter in order to build an apartment building. The court affirmed the preservation goal: "[C]onsidering the nationwide sentiment for preserving the country's heritage and with particular regard to the

---

161. SULEIMAN OSMAN, THE INVENTION OF BROWNSTONE BROOKLYN (2011).

162. An important exception was Michael Newsome, *Blacks and Historic Preservation*, 36 LAW & CONTEMP. PROBS. 423 (1971) (which raised an early alarm about historic preservation as a tool of private redevelopment displacing low income people of color both economically and culturally). The relationship between historically marginalized groups of people and historic preservation is a complex subject that I address below at 55–56.

163. *See* CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION: A FIRSTHAND ACCOUNT 183 (1991).

164. *See* J. Peter Byrne, *A Hobbesian Bundle of Lockean Sticks: The Property Rights Legacy of Justice Scalia*, 41 VT. L. REV. 733 (2017).

165. Ironically, Justice Stevens joined Rehnquist's dissent, although he would become the dominant voice supporting broad land use regulation on the Court in later years. Stevens stated at conference that the federal government preserves important sites and does so at public expense, which serves to prevent excessive preservation. Transcript of Oral Argument at 2-54, Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) (No. 77-444). Subsequent regulatory takings cases did not provide an occasion for Stevens to reconsider his skepticism about historic preservation, as they all involved protection of nature.

context of the unique and characteristic French Quarter, the objective of the Vieux Carre Ordinance falls within the permissible scope of the police power."[166]

The embrace of historic preservation as a proper purpose for land use regulation built upon and accelerated the growing acceptance of aesthetics as an acceptable goal for land use. For many years, state courts had resisted various forms of aesthetics regulation, emphasizing that they gave regulators too much discretion.[167] This changed with *Berman v. Parker*, ironically the case where the Supreme Court turned loose the use of eminent domain in urban renewal projects, the community planning antithesis of historic preservation.[168] In approving the massive condemnation and demolition of Southwest Washington, D.C., Justice Douglas for a unanimous Court equated the breadth of government power of eminent domain with the wide scope permitted by the Due Process Clause. He wrote:

> The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. . . . If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.[169]

State courts slowly followed suit in aesthetic zoning cases, although often expressing concern about the degree of discretion that aesthetic criteria gave regulators.[170] Historic preservation by contrast seemed more determinate and less arbitrary because the historic character of a building or district provided a more objective standard for judgment.[171]

Thus, by the time *Penn Central* came to the Court, historic preservation regulation was reasonably established as a legitimate purpose for regulation of private property. Neither the lawyers for Penn Central nor Justice Rehnquist in his dissent took issue with historic preservation as a basis for land use regulation. Rehnquist noted: "Appellants concede that the preservation of buildings of historical or aesthetic importance is a permissible objective of state action. For the reasons noted in the text, historic zoning, as has been undertaken by cities, such as New Orleans, may well not require compensation under the Fifth Amendment."[172] Thus, the case cemented in the United States the public value of preservation and extended constitutional favor to the imposition of preservation restrictions in individual landmarks. Accepting Penn Central's argument would have made

166. Maher v. City of New Orleans, 516 F.2d 1051, 1061 (5th Cir. 1975).

167. *See* James P. Karp, *The Evolving Meaning of Aesthetics in Land Use Regulation*, 15 COLUM. J. ENVT'L. L. 307, 310–12 (1990).

168. 348 U.S. 26 (1954).

169. *Id*. at 33.

170. Brian Soucek, *Aesthetic Judgments in Law*, 69 ALA. L. REV. 381, 412 (2017).

171. BRONIN AND J. PETER BYRNE, *supra* note 151, 143.

172. Penn Central, 438 U.S. 104, 147 n.10.

historic landmark regulation impossible, a step the Court was unwilling to take. "Agreement with this argument would, of course, invalidate not just New York City's law, but all comparable landmark legislation in the Nation."[173]

That brings us to the question of why the Court did not want to invalidate uncompensated landmark regulation. *Penn Central* represents an unusually clear manifestation of living constitutionalism. As David Cole has written: "Look behind any significant judicial development of constitutional law, and you will nearly always find sustained advocacy by multiple groups of citizens, usually over many years and in a wide array of venues."[174] Cole explains that such an influence is inevitable because courts must interpret a constitution "written in general and open-ended terms."[175] This is doubly true regarding constitutional property rights, which rest on such a vague and unconvincing textual basis that even Justice Scalia readily admitted that the original meaning of the Takings Clause did not apply to regulations of use.[176] Moreover, they must be interpreted in a vortex of federalism where the federal constitutional clauses are being applied to rights the substance of which are created and revised by state law.[177] Finally, U.S. law has never reached a consensus about the normative basis for or the clarity of scope of property rights.[178] The scope of the police power and concomitant strength of judicial protection of private property thus are inherently vague and have fluctuated for centuries in response to legal ideology, political mobilization, and broader social change. Even Justice Sutherland reflected this mutability in *Euclid*, suggesting that zoning made sense in the 1920's, although it would have been considered a violation of fundamental rights at an earlier time.[179] Such judgments are not analytic, but normative and contextual. In the *Penn Central* conference, Justice Stewart reportedly told his colleagues that judgments of this sort are "visceral rather than cerebric."[180]

John Compton's The Evangelical Origins of the Living Constitution presents a groundbreaking account of how the persistent Protestant agitation for prohibitions of lotteries and alcoholic beverages in the nineteenth century eventually persuaded courts to relax constitutional protections of property rights, which subsequently fostered constitutional space for economic and labor regulations

---

173. Penn Central, 438 U.S. at 131.

174. DAVID COLE, ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL 9 (2016).

175. *Id.*

176. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1006 (1992).

177. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 572–73 (1972).

178. The range of views extends from viewing property as a determinative, pre-political right that limits legislative power normatively to one that conceives of property in largely nominal terms permitting ongoing adjustments in property rules to increase public welfare or market efficiency. . multiple cities.

179. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). On the constitutional evolution to *Euclid, see* KIMBERLY K. SMITH, THE CONSERVATION MOVEMENT AND CONSTITUTIONAL CHANGE 200–13 (2019); Eric Claeys, *Euclid Lives?*, 73 FORDHAM L. REV. 731, 758 (2004).

180. Powell Papers at 49.

once thought to offend rights of private property.[181] Persistent political and legal campaigns eventually persuaded courts that lotteries and alcohol posed moral and social harms so that legislative regulation or prohibition of property embodying them became part of the police power.[182] Whereas Cole's examples are groups that campaigned to expand constitutional rights, such as for LGBTQ people and gun owners, Compton's evangelicals and the historic preservationists campaigned to limit constitutional rights to permit emerging public values to take coercive legal form without violating the constitution.[183]

Something analogous occurred with historic preservation. Long-term political, cultural, and legal advocacy had established its public value until it was assimilated to the police power. The justices' equation of the landmark law with zoning regulation implicitly captures this. Explicitly, the opinion affirms that "New York City's objective of preserving structures and areas with special historic, architectural, or cultural significance is an entirely permissible governmental goal."[184]

The history of the preservation movement is a complex topic that cannot be dealt with at length here.[185] Historic preservation was a grass roots movement that began slowly in the nineteenth century, first with volunteer efforts to save sites of patriotic importance, and then with vanishing sites of the colonial and early republic eras.[186] Whereas zoning was a top-down imposition typical of the Progressive Movement, with its origins in professional experts and government commissions, historic preservation emerged from the opposition of ordinary citizens, including many women, to the loss of cultural signposts through rapid urban changes. The growth of preservation law in New York has its roots in civic betterment and historical associations, such as New York's Municipal Art Society (founded in 1893), sometimes with a patrician tone, believing that aesthetic

181. JOHN W. COMPTON, THE EVANGELICAL ORIGINS OF THE LIVING CONSTITUTION (2014). *See also* Kellen Funk, *Shall These Bones Live? Property, Pluralism, and the Constitution of Evangelical Reform*, 41 LAW & SOC. INQUIRY 742 (2016).

182. *See* Mugler v. Kansas, 123 U.S. 623, 662 (1887) (no taking of brewery in prohibition of production and sale of alcoholic beverages); Champion v. Ames, 188 U.S. 321 (1903) (lottery tickets are commerce so that Congress could prohibit movement in interstate shipment).

183. A similar analysis is presented in SMITH, *supra* note 179. Smith analyzes how in areas of environmental concern, such as forests, wildlife, and urban planning, advocates in government agencies and non-profits established the realities of ecological values that diminished judicial protection of private property and state autonomy. For another important book on a successful constitutional campaign, *see generally* WILLIAM N. ESKRIDGE, JR. AND CHRISTOPHER R. BIANO, MARRIAGE EQUALITY: FROM OUTLAWS TO IN-LAWS (2020).

184. Penn Central, 438 U.S. at 129.

185. *See generally* RANDALL MASON AND MAX PAGE, GIVING PRESERVATION A HISTORY: HISTORIES OF HISTORIC PRESERVATION IN THE UNITED STATES (2d ed. 2019); ASTRID SWENSON, THE RISE OF HERITAGE: PRESERVING THE PAST IN FRANCE, GERMANY AND ENGLAND, 1789-1914 (2013).

186. *See generally*, CHARLES B. HOSMER, PRESENCE OF THE PAST: A HISTORY OF THE PRESERVATION MOVEMENT IN THE UNITED STATES BEFORE WILLIAMSBURG (1965).

improvements to architecture and landscapes would promote social improvement.[187] As early as 1913, civic activists tried to get a provision into the New York state constitution specifying that aesthetics was a valid ground for property regulation.[188] Immediately after *Berman v. Parker* was handed down in December 1954, preservationists choreographed the introduction in the New York legislature of what quickly was enacted as the "Bard Act," which empowered cities to regulate property for historic and aesthetic ends, declaring them within the police power if "reasonable and appropriate."[189] Preservationists waged long term public campaigns and gained significant political power in the post-war era when aligned with more broad-based neighborhood activists, primarily in Greenwich Village and Brooklyn Heights, fighting against urban renewal, highway construction, and galloping commercial real estate development. Robert Moses and the post-war boom in Manhattan construction galvanized preservation action in New York City, which reached a crescendo after the demolition of Penn Station. [190]

The public relations campaign to save Grand Central, described above, focused this activism on one ongoing litigation. Public sentiment, amplified by the media coverage of Jacqueline Kennedy and other luminaries, seems to have persuaded the City to appeal its initial loss (despite Penn Central's enticing settlement offer), played a role in the New York Court of Appeals creating an exception from its restrictive property rights precedents, and impressed the Supreme Court with the gravity of making landmark protection infeasible. The public legitimacy of historic preservation regulation meant that it could impose economic loses on an owner up to the point where it would deprive the property of economic viability.[191] Arguably, conservative property rights litigation and other campaigning subsequently created circumstances where the police power has shrunk.[192]

---

187. *See generally* RANDALL MASON, THE ONCE AND FUTURE NEW YORK: HISTORIC PRESERVATION AND THE MODERN CITY (2009); MICHAEL HOLLERAN, BOSTON'S "CHANGEFUL TIMES": ORIGINS OF PRESERVATION AND PLANNING IN AMERICA (2001).

188. WOOD, *supra* note 23, at 28.

189. WOOD, *supra* note 23, at 141. The Act was named for Albert Bard, who drafted it and had also been a chief advocate for the proposed 1913 constitutional amendment. *Berman* not only expanded the federal constitutional scope of the police power but led to a similar expansion in many state constitutions.

190. *See generally* ANTHONY FLINT, WRESTLING WITH MOSES: HOW JANE JACOBS TOOK ON NEW YORK'S MASTER BUILDER AND TRANSFORMED THE AMERICAN CITY (2011).

191. In later cases, the normal and desirable character of particular land use regulatory tools has been cited by the Court as a factor in not find a regulatory taking. *See* Murr v. Wisconsin, 137 S. Ct. 1933 (2017) (zoning lot merger); Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002) (development permit moratorium).

192. *See, e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1006, 1018 (1992) (quoting Court's warning against a "heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.").

III. LAND USE LAW FOR A NEW URBAN ERA

The prior section examined the factors that led to a broad and significant affirmation of historic preservation regulation, including of individual landmarks, in the *Penn Central* case. This section consideres the contributions the decision made to important changes in U.S. cities. As discussed above, the decision created a broad and permissive constitutional framework for historic preservation regulation of private property. Many cities, including those that would flourish in the coming period of time took advantage of this authority to revise local preservation laws and designate numerous historic districts and landmarks. Despite the warnings of some in the real estate industry that such laws would throttle urban development, preservation laws contributed to an urban renaissance that continued at least to the dramatic disruption caused by the coronavirus pandemic. The causes of this change are varied and only partially understood. Legal developments, including the growth of urban historic preservation, seem not to be primary drives of the change, but they have facilitated or contributed to the scale and character of the change.

This section sketches the change in urban character and fate and also describe how preservation laws, unleashed by *Penn Central*, furthered that change. It must be recognized that this resurgence of population and investment in cities, combined with cascading economic inequality, has made urban housing too expensive for many people with lower incomes. At the end, this section briefly suggest some ways that preservation laws may now conflict with urban needs and suggest some reforms that will better equip preservation law to serve contemporary needs. More detailed discussion of those complex issues will require another article.

A. THE POST-MODERN CITY

Appreciating the remarkable resurgence of U.S. cities requires remembering the depths to which they fell in the middle of the twentieth century. The story has been frequently told but now seems to recall a distant past.[193] From mid-century, cities outside the Sun Belt experienced population decline due to massive suburbanization and economic distress from loss of their manufacturing base. The construction of the interstate highway system facilitated residential development of far-flung formerly rural areas and detached manufacturing and commercial activities from traditional anchors in ports and rail terminals.[194] Upwardly mobile White people, supported by an expanding economy and a range of federal subsidies, flocked to new suburbs, while Black people escaping the oppression of Southern segregation moved to northern cities increasingly unable to provide the

193. *See generally* KENNETH JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES (1985); ANTHONY DOWNS, NEW VISIONS FOR METROPOLITAN AMERICA (1994).

194. *See generally* DOUGLAS W. RAE, CITY: URBANISM AND ITS END (2003).

kinds of employment that had provide toeholds for generations of European immigrants. Initially hemmed in by a web of discriminatory laws and practices, Black and Hispanic newcomers eventually came to many neighborhoods opened to them by White flight but left to crumble because of lack of investment and often misguided urban renewal policies. The social disorder and crime engendered by this lack of opportunity and ongoing discrimination accelerated urban decline to points of municipal insolvency and despair about the future of cities.

The resurgence of cities over the past quarter century has fed by changes in the global economy and culture. Urban economies were galvanized by the growth of service industries reliant on an educated work force, such as health care, finance, technology, media, and higher education. These industries recruited employees nationally and globally, drawing a diverse workforce to cities.[195] Studies in "agglomeration effects" show that such industries benefit from the greater exchanges and collaboration living in greater densities allows.[196] The capacity of urban areas to attract educated brain workers became more important than highway connections to suburbs.

In this new context, cities came to be valued as much for their stimulation of creativity and community as for their capacity to house many people efficiently.[197] These new arrivals valued urban life for reasons practical and cultural. Deindustrialization had eliminated major sources of pollution and noise that had pushed earlier generations of more affluent residents to the suburbs. For many of the educated newcomers, ethnic and cultural diversity was more an attraction than a cause of alarm.

For this post-modern city, historic preservation became the characteristic form of land use regulation, just as zoning had been for the auto/suburb era that preceded it. Eschewing a separation of uses among buildings, preservation regulated changes to the exteriors of buildings that had been found to convey historic "significance." Preservation gave identity to buildings and neighborhoods, providing a "sense of orientation"[198] for the educated strangers analytical work drew to cities. Architecture scholar Vincent Scully wrote that historic preservation reflects widespread "yearning to rebuild community."[199] Designating an area as a historic district publicly consecrates the identity of a neighborhood, fixing it with a name on an official map, and promulgating a narrative of its importance to the larger city or nation.[200] These designated buildings enhance the "imageability of

195. *See generally* ALAN EHRENHALT, THE GREAT INVASION AND THE FUTURE OF THE AMERICAN CITY (2012).

196. GLAESER, *supra* note 127.

197. *See generally* RICHARD FLORIDA, THE RISE OF THE CREATIVE CLASS: AND HOW IT'S TRANSFORMING WORK, LEISURE, COMMUNITY, AND EVERYDAY LIFE (2012).

198. National Historic Preservation Act of 1966, 16 U.S.C. § 470(b)(2).

199. Vincent Scully, The Architecture of Community, in THE NEW URBANISM 221, 223 (Peter Katz ed., 1994).

200. A strong identity of a district can precede designation as a historic district. Lynch defines districts generally as "relatively large cities which the observer can mentally go inside of, and which

city form," in terms coined by theorist Kevin Lynch, which provide "legibility" and meaning to the city dweller.[201] In a seminal article, Carol Rose identified "community building" as the defining rationale for modern historic preservation. She sought to crystallize the "implicit rationale [that] the chief function of preservation is to strengthen local community ties and community organization."[202] Rose drew on the work of Jane Jacobs and Kevin Lynch to argue that walkable neighborhoods containing older buildings have "legible" significance that confers psychological and social benefits on residents. "In the legible city, not only can urban dwellers find their way, but the architectural qualities themselves lend drama, interest, an occasion for anecdotes about the past, and thus a framework for identification with the shared experience of the community."[203] These claims are consistent with the chief legal criteria for designating buildings and sites for preservation protection, which requires that they convey the historical or aesthetic "significance" of the area to contemporary viewers.[204]

The municipal preservation law system also engenders a distinct special legal and political culture, including local advocacy groups, overseen by a specialized preservation review board, which makes ongoing decisions about physical changes in the district. Rose also highlighted the procedural contribution of historic districts in creating a forum where residents can debate the heritage and character of their community in hearings on permits, stressing the normative point that preservation laws must foster broad and diverse participation in such discussions. Collaborating to preserve a common image of community identity itself fosters a sense of belonging. Jane Jacobs had posited that retaining buildings of different ages promotes urban vitality.[205] The rise of historic preservation law reflects the change of the city from a place of physical production to that of creativity and imagination.

In embracing preservation as a valid form of regulation of private property, *Penn Central* affirmed regulatory control over the cultural form of an expanded public realm. Preservation law placed in public control the exteriors of historically significant buildings, creating a collective benefit for members of the public, regardless of whether they "owned" any real estate. Public space now included

---

have some common characteristic." Preservation protects these common characteristics and amplifies a narrative meaning about them. KEVIN LYNCH, THE IMAGE OF THE CITY 66 (1960). Other historic districts have been essentially created by designation, carving boundaries from other areas and bestowing a name by which it can be referenced. *See* SULEIMAN OSMAN, THE INVENTION OF BROWNSTONE BROOKLYN: GENTRIFICATION AND THE SEARCH FOR AUTHENTICITY IN POSTWAR NEW YORK, 5–6 (2011).

201. KEVIN LYNCH, THE IMAGE OF THE CITY 10 (1960).

202. Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 469 (1981).

203. *Id.*, at 489.

204. This is embodied, for example, in the emphasis placed in the criteria for inclusion in the National Register of Historic Places on "[t]he quality of significance in American history . . . present in districts, sites, buildings, structures and objects that possess integrity . . . ." 36 C.F.R. § 60.4.

205. JACOBS, *supra* note 156, at 244–60.

the physical exteriors of designated private buildings, which constitute the aesthetic and cultural backdrop for city living.

Historic preservation has been one of the factors that has made urban life attractive to mobile creative brain workers, by providing an attractive context for social life with deeper cultural resonance. Designating a historic district publicly consecrates the identity of a neighborhood, fixing it with a name on an official map and promulgating a narrative of its importance to the larger city or nation. Landmarks provide exclamation points to architectural and social history. Just as a hemlock grove or saltwater wetland might endow a rural area with visual delight and ecological significance, a city's characteristic building types, whether Victorian row houses or Beaux-Arts train stations, convey aesthetic texture and temporal depth to urban living.

In addition to engendering community, historic districts paradoxically engender a peculiar form of personal freedom. People in a traditional neighborhood can move about freely on foot through a public realm that offers choices of activities and interactions from which a distinctive personal identity can be constructed.[206] The older urban neighborhoods that first attracted renovators were built prior to zoning and to the emergence of large vertically integrated homebuilders. Their buildings were constructed piecemeal or in small rows by many small firms. Designed prior to the dominance of the automobile, they are laid out to pedestrian scale, creating visually interesting streetscapes as well as easy access to local merchants and services on foot. The consequence of this is a walkable neighborhood built to human scale, where people can feel removed from the demanding structures of bureaucratic work-life and corporately dictated consumption patterns. Historian Sulemin Osman describes how such historic districts offered new residents of Brooklyn "a 'real neighborhood,' an authentic local place where genuine human contact and ethnic folk tradition remained uncrushed by alienating modernity and capitalism."[207] As such, it shares with cyberspace contemporary values of autonomy and participation that felt threatened by powerful impersonal forces of control characteristic of the larger society.

Historic preservation can also create individual and cumulative economic benefits for urban areas.[208] Historic district regulations, for example, enhance property values by protecting the setting within which any urban property sits and from whence it derives most of its value.[209] The revival of row house

206. *Cf.* MICHEL DE CERTEAU, THE PRACTICE OF EVERYDAY LIFE 91-106 (1984) (describing how walkers in the city create personal "local authority" within structures of bureaucratic control).

207. OSMAN, *supra* note 197, at 103.

208. Cultural historian Michael Kammen observed: "During the 1970s, decay in downtown areas of American cities grew aesthetically intolerable and economically disastrous, so chambers of commerce suddenly became interested in historic preservation and restoration because that held out the one remaining hope for survival." MICHAEL KAMMEN, MYSTIC CHORDS OF MEMORY: THE TRANSFORMATION OF TRADITION IN AMERICAN CULTURE 675 (Vintage Ed., 1993).

209. *See* GLAESER, *supra* note 127, at 150; DONOVAN D. RYPKEMA, THE ECONOMICS OF HISTORIC PRESERVATION: A COMMUNITY LEADER'S GUIDE 13 (2005); Vicki Been et al., *Preserving history or*

neighborhoods, a key stimulus to the urban revival, depended on small capital investments by individual homeowners and small scale developers. The value of every house was significantly enhanced by the visually consistent and culturally resonant collection of historic houses. Restraining the departure from preservation standards for each house increased the value of all the houses similarly regulated. Thus, the risk associated with the investment by each owner was mitigated by the legal protection of the visual context within which each house was improved consistent with historical standards. A critical mass of historic buildings generates more investment both within and at the periphery of the district. The historic preservation tax credit, crafted in 1986, has stimulated enormous amounts of private investment in larger scale projects pursued by sophisticated developers, but many of these have brought bringing long abandoned commercial districts into lively new uses.[210]

Penn Central settled more than the propriety of landmark regulation. It constitutionally affirmed land use regulation focused primarily on visual form and on the public character of individual buildings. The systemic changes in urban land use planning since 1978 have been a shift from zoning's forced separation of uses to the encouragement of mixed uses, and to an emphasis on individual site design and a building's relation to the public realm. These movements take inspiration from historic preservation but apply more generally to new development. The traditional mixed-use neighborhoods saved as historic districts provide the template and inspiration for the broader planning movement known as New Urbanism. The elements of New Urbanism are mixed uses, human scale, walkability, and contextualizing new buildings in a public realm of sidewalks and squares.[211] Although some well-known New Urbanist projects are large private developments that escaped traditional zoning strictures and are governed by private servitudes, the principles have entered public law through form-based codes that relax regulation of use and require new construction to be consistent with existing scale and design templates.[212]

Penn Central not only permitted regulation based on visual character but that applied to an individual building. Traditional zoning was comprehensive

---

restricting development? The heterogeneous effects of historic districts on local housing markets in New York City, 92 J. URB. ECON. 16 (2016).

210. Historic preservation also has generated significant urban economic benefits outside historic districts. A recent study found that there was a greater increase in real estate values in areas adjacent to historic district than within them. This makes sense because new development near a historic district captures some of the amenity value of the district without needing to abide by the restrictions on scale appropriate to the district. *Id.*

211. *See* CONGRESS FOR THE NEW URBANISM, *The Charter of the New Urbanism* (1996), at https://www.cnu.org/who-we-are/charter-new-urbanism. *See generally* PETER CALTHORPE, THE NEXT AMERICAN METROPOLIS: ECOLOGY, COMMUNITY, AND THE AMERICAN DREAM (1993).

212. *See, e.g.,* Sara C. Bronin, *Rezoning the Post-Industrial City: Hartford*, 31 PROB. & PROP. 44 (2017); Zach Patton, *The Miami Method for Zoning: Consistency Over Chaos*, GOVERNING (April 28, 2016).

regulation applying predetermined use and size categories to zones throughout the jurisdiction; changes to small areas were viewed suspiciously as "spot zoning."[213] Although tailoring regulations to individual parcels had previously begun to gain currency,[214] *Penn Central* allowed the Landmarks Preservation Commission to make a discretionary judgment about Grand Central as an individual parcel so long as the decision was part of a coherent overall if general policy. Thus, the approval of landmark regulation provides a constitutional basis for various forms of site planning and Planned Unit Development regimes in which regulators, with public participation, determine what standards an individual new development must meet.[215] This in turn has fueled regulatory exaction programs, where regulators determine what property an individual new project must convey to the public to mitigate public needs attributable to the project. The Supreme Court has broadly approved this approach, although with constitutional requirements that the property or money exacted must serve the needs that the development creates and be "roughly proportional" in value to that need.[216] The combination of site-specific regulatory requirements and the use of exactions have given public needs, at least as understood by planners, a greater role in urban development.

Penn Central has thus played a significant role in adapting land use regulation for the contemporary city. It did so directly by authorizing broad application of historic preservation regulations. And it did so indirectly by endorsing regulations based on the contributions of design to the public realm and to site-specific regulatory engagement about the public benefits of new private development. These legal developments collaborated with exogenous economic and social changes to create an urban renaissance unthinkable at the time the case was decided.

B. ADAPTING PRESERVATION LAW FOR TODAY'S CITIES

Even if one judges that the effect of historic preservation law on the revival of cities has been beneficial, one must consider whether reforms should be pursued given current urban conditions. Rising urban populations and economic inequality have led to a serious deficit in affordable housing and, consequently, a displacement of low income residents. In many cities, those displaced or confined by economic inequality are minorities, who also face employment and educational disparities. The legacies of redlining and urban renewal exacerbate current income and racial inequality.[217] In previous work, I have critiqued scholars who

213. *See, e.g.,* Daniel R. Mandelker, *Spot Zoning: New Ideas For an Old Problem*, 48 URB. LAW. 737 (2016).

214. *See, e.g.*, Cheney v. Vill.2 at New Hope, Inc., 241 A.2d 81 (Pa. 1968) (upholding Planned Unit Development ordinance).

215. *See, e.g.,* Howell v. D.C. Zoning Comm., 97 A.3d 579 (D.C. 2014).

216. Koontz v. St. Johns River Water Mgt. Dist., 570 U.S. 595, 612 (2013).

217. *See, e.g.,* Richard Rothstein, The Color of Law: The Forgotten History of How Our Government Segregated America (2017).

blame historic preservation law as a major culprit in restricting housing supply.[218] But economic inequality fostered by national tax and fiscal policies are reflected in market driven real estate markets. One may hope for fiscal and macroeconomic reform to lessen inequality, but—for the foreseeable future—both increased supply of market housing and a broader embrace of social housing measures seem necessary. Urban conditions are far different from what pertained in the 1970s when disinvestment and declining populations required measures to make urban life more attractive to those with choices. Land use law generally and historic preservation law in particular needs to devote itself more directly to justice.

Responding to climate change also requires innovation in historic preservation and other land use laws. New building materials, enhanced insulation, and solar and wind facilities must be encouraged or required to reduce emissions.[219] Similarly, a significant number of existing historic buildings will need to be physically altered, moved to new locations, and consigned to natural destruction as part of urban efforts to adapt to the consequences of climate change, such as sea-level rise.[220] These challenges will require a host of adjustments, starting with traditional preservation opposition to altering the appearance of historic buildings, moving them from significant locations, or tolerating their destruction. Even more generally, the reliance of historic preservation law on federal undertakings or applications by owners needs to be supplemented to address climate threats that now arise without direct human action.[221]

These are topics too large to take up at the end of a lengthy historical study, but the need to modernize historic preservation law needs to be affirmed. Historic preservation law is a now a mature land use regulatory system and needs to be better coordinated with other significant public needs. It began in opposition to the conventional planning of the 1960's, typified by urban renewal. Preservation law functioned apart from zoning and other land use requirements and was administered by separate agencies with the sole mission of promoting preservation. Standards for designation and for assessing demolition and alterations to designated buildings largely considered only preservation values, and they were limited only by protections of private property rights loosened in *Penn Central*.

Preservation law needs to balance historic preservation values with other important public values, such as the provision of affordable housing and the reduction of greenhouse gas emissions. These reforms are underway in many

218. Historic Preservation and Its Cultured Despisers: Reflections on the Contemporary Role of Preservation Law in Urban Development, 19 GEO. MASON L. REV. 665 (2012).

219. *See, e.g.,* Sara Bronin, *Adapting National Preservation Standards to Climate Change*, *in* Erica Avrami, ed., TOWARD SUSTAINABILITY AND EQUITY: ENVISIONING PRESERVATION POLICY REFORM (2021 Forthcoming).

220. *See, e.g.,* DAVID C. HARVEY & JIM PERRY, ED., THE FUTURE OF HERITAGE AS CLIMATE CHANGE: LAWS, ADAPTATION & CREATIVITY (1st ed. 2015); National Park Service, Cultural Resources Climate Change Strategy (2016), https://perma.cc/GUZ8-2NJQ.

221. *See* Sara C. Bronin, *Law's Disaster: Heritage at Risk*, *in* The Cambridge Handbook of Disaster Law, 46:2 COLUM. L.J. 489, 521 (Susan Kuo et al. eds., 2021 Forthcoming).

jurisdictions and need to be encouraged. Public needs like affordable housing and public transportation can be accommodated with preservation, as has been demonstrated by the "special merit" process in Washington, D.C.[222] Collaborative planning between preservation and other planning officials and their publics can anticipate needs and provide new solutions, such as through the preservation-minded, form–based codes of Hartford, Connecticut.[223] The preservation field itself has always encompassed more than the architectural monuments of the wealthy and powerful,[224] and it increasingly embraces the heritage of marginalized people, even when this requires creative use of digital and other narrative tools.[225] Historic preservation as a cultural movement has evolved continually, but the core legal instruments have remained largely unchanged since the aftermath of *Penn Central*.

CONCLUSION

The *Penn Central* decision is itself a significant "landmark" in law and urban history. Like other landmarks, it reflects the political and cultural currents of its time, as well as contingencies and happenstance. The decision has persisted as the "polestar" of regulatory takings law because it was crafted to appeal to a broad range of judicial temperaments. At the same time, it liberated historic preservation law from constitutional doubts about whether it served a public interest, was arbitrary or disproportionate, or unduly burdened private property generally. Historic preservation law has proved itself well-suited to an urban renaissance based on employing educated, mobile brain workers seeking deeper identities. Time will tell whether it can adapt to a new world prioritizing lessening economic inequality and racial injustice and coping with a looming climate catastrophe.

222. D.C. CODE §§ 6-1102(11), 6-1104(e).

223. HARTFORD HAS IT, *Hartford Zoning Regulations* (Jan. 19, 2019), https://www.hartfordct.gov/files/assets/public/development-services/planning-zoning/pz-documents/zoning-regulations/zoning-regulations-06052020.pdf.

224. *See, e.g.*, RICHARD MOE & CARTER WILKIE, CHANGING PLACES: REBUILDING COMMUNITY IN THE AGE OF SPRAWL (1997).

225. For example, the National Trust for Historic Preservation has created the African American Cultural Heritage Action Fund, https://perma.cc/K4RJ-W75U. *See* Casey Cep, *The Fight to Preserve African American History*, THE NEW YORKER (Jan. 27, 2020), https://perma.cc/62AZ-CZJS. *See generally* DOLORES HAYDEN, THE POWER OF PLACE: URBAN LANDSCAPE AS PUBLIC HISTORY (1997).