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The Future of Our Past: Preserving Landmark Preservation

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INTRODUCTION

Thirty years ago, New York City enacted a landmark preservation ordinance, recently described as "the single most influential piece of legislation affecting land use in New York since the first zoning laws."[1] The ordinance was constitutionally approved in 1978 when, in *Penn Central Transportation Co. v. New York City*,[2] the U.S. Supreme Court found that New York City could, "as part of a comprehensive program to preserve historic landmarks[,] . . . place restrictions on the development of individual historic landmarks . . . without effecting a 'taking' requiring the payment of 'just compensation.'"[3]

New York City's landmark preservation ordinance was a reaction to the destruction of Pennsylvania Station in 1963,[4] an act of cultural vandalism reflecting the city's "notorious tendency to

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[1] Paul Goldberger, *New York, Lost and Found*, N.Y. TIMES, Apr. 9, 1995, at E3.

[2] 438 U.S. 104 (1978).

[3] *Id.* at 107.

[4] *See* Richard F. Babcock & David A. Theriaque, *Landmarks Preservation Ordinances: Are the Religion Clauses Violated By Their Application to Religious Properties?*, 7 J. LAND USE & ENVTL. L. 165, 179 (1992). The authors explore the development of preservationism in New York City:

> Preservation of historic or cultural sites has so vigorously permeated the national conscience that today Americans regard the concept as something that has been around for most of the nation's existence. In fact, the idea that landowners may be compelled to accept the community's opinion on what is necessary to preserve in order to foster a record of the nation's cultural heritage is a comparatively recent phenomenon. The Pennsylvania Railroad Station was torn down in 1963. . . .[I]t was that act of anti-preservationism that led to the enactment of the New York City Landmarks Preservation Act in 1965.

Id. at 179 (citations omitted).

sell off its greatest architectural works for a mess of pottage."[5] The ordinance was enacted to discourage the destruction not only of buildings but of the civilizing values associated with them.[6] Its comprehensive plan to safeguard the built environment was intended to benefit the city's residents by "fostering civic pride in the beauty and noble accomplishments of the past; protecting and enhancing the city's attractions to tourists and visitors;" stimulating the city's economy; and promoting landmark use "for the [residents'] education, pleasure and welfare."[7] The

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[5] Goldberger, *supra* note 1, at E3. *See* Herbert Muschamp, *Preserving the Shrines of an Age, Not the Spirit*, N.Y. TIMES, Apr. 30, 1995, at H40. Muschamp asserts that

> [u]ntil the first blow fell no one was convinced that Penn Station really would be demolished or that New York would permit this monumental act of vandalism. . . . We want and deserve tin-can architecture in a tin-horn culture. And we will probably be judged not by the monuments we build but by those we have destroyed.

Id. quoting *Farewell to Penn Station*, N. Y. TIMES, Oct. 30, 1963, at 38. *See also* Ada Louise Huxtable, *Good News and Bad News From Buffalo*, N.Y. TIMES, Oct. 2, 1977, §2, at 35, 42:

> The question one asks, perhaps futilely, is why these historic architectural treasures should be less eligible for esthetic and philanthropic concern than museums and office buildings?. . .They afford incalculable environmental enrichment. . . . But Americans clearly lack awareness and comprehension of some of their greatest cultural contributions. Architecture is a city's most important and vulnerable art, and this, tragically, is little understood.

[6] *See* Ada Louise Huxtable, *The "Side Street Spoilers"*, N.Y. TIMES, Sept. 23, 1979, §2, at 31. Huxtable describes the mindset leading to landmark destruction:

> Those were the days when no one questioned the iron rule of real estate that the "highest and best use of the land" was that which yielded the greatest return. . . .What the city lost of its urbanity and beauty—those civilizing factors on which so much of its values, economic and otherwise, depend—was never reckoned into the equation.

Id.

Huxtable has the credentials to support her critique and the others contained herein. A former New York Times architecture critic (1963-1982) and editorial board member (1973-1982), she is also the author of seven books on architecture, the recipient of the first Pulitzer Prize for distinguished criticism (1970), the recipient of a MacArthur fellowship (1981-1986), and a member of the American Academy of Arts and Letters and the American Academy of Arts and Sciences. *See* WHO'S WHO IN AMERICA 1805 (Paul Canning ed. Reed Reference Publishing 49th ed. 1995).

See also Muschamp, *supra* note 5, at H40 (noting that the preservation movement sparked by New York City's landmark preservation ordinance "has been the most influential force toward a civilized urbanism in the past half century").

[7] *Penn Central*, 438 U.S. at 109 (quoting N.Y.C. ADMIN. CODE, ch. 8-A, § 205-1.0(b) (1976))(internal quotations omitted).

city recognized that architecture is a social art that enlivens the environment and enriches the citizenry by its open presence.[8] The landmark preservation ordinance enabled the city to preserve both its architectural environment and its cultural identity.[9]

The ordinance also stimulated public interest in preserving our past, creating an "awakening awareness of the components, and the effects, of what and how we build, a recognition of far-reaching aesthetic and environmental values."[10] It recognized the built environment "as something that is terribly responsive to acts of will and judgment that have an endless impact on the state of humanity."[11] It found that the look and function of an envi-

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[8] *See* Ada Louise Huxtable, *The Sage of the Skyline*, N.Y. TIMES, Nov. 26, 1989, § 7, at 3, 24 [hereinafter Huxtable, Sage]. Huxtable discusses the philosophy of the urban critic Lewis Mumford:

> [H]e maintained, correctly and cogently, that architecture is a social art. He understood and honored everything that implies in terms of the relationship between use and beauty, the dichotomy of service and splendor, the tensions of structure and spirit, all those functional and esthetic complexities of the building art.

Id. at 24. *See also* Angela C. Carmella, *Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review*, 36 VILL. L. REV. 401, 403 (1991). Carmella asserts:

> Landmark preservation and architectural review have become widely used for design control. Their purposes are to minimize destruction and alteration of important structures and to ensure visual harmony of areas, not so much to enshrine the "beauty" of the built environment as to protect the messages it signifies and the stability and identity it promotes.

Id. at 403.

[9] *See* Goldberger, *supra* note 1, at E3 (noting that "1,021 individual buildings have now been designated as city landmarks"). *See also* Carmella, *supra* note 8, at 403. Carmella describes how cultural identity is enhanced through preservation stating that:

> There is considerable consensus among architectural commentators that architecture is expression. Buildings have "semiotic properties," which means they "function as signs, conveying cognitive and emotional meanings" to their viewers. Because of the meanings that come to be associated with the built environment, the protection of individual buildings and entire districts . . . provides cultural and psychological stability and identity in a rapidly changing society.

Carmella, *supra* note 8, at 403 (quoting John J. Costonis, *Law and Aesthetics: A Critique and a Reformulation of the Dilemmas*, 80 MICH. L. REV. 355, 392 (1982)).

[10] ADA LOUISE HUXTABLE, ARCHITECTURE, ANYONE? at xv (1986) [hereinafter HUXTABLE, ARCHITECTURE].

[11] ADA LOUISE HUXTABLE, WILL THEY EVER FINISH BRUCKNER BOULEVARD? 232 (1970) [hereinafter HUXTABLE, BRUCKNER] ("There is no art as impermanent as architecture. All that solid brick and stone mean nothing. Concrete is as evanescent as air. The monuments of our civilization stand, usually, on negotiable real estate; their value goes down as land value goes up.").

ronment are inseparable factors that can satisfy "the needs of the body, the spirit and the senses."[12]

Although landmark preservation appears to be a permanent fixture in the legal landscape, there is some ominous graffiti on its walls. Architecture is a social art and its preservation is subject to the changing terms of our social contract.[13] Because landmark preservation is regulation affecting how a landmark owner uses property, the current "anti-regulatory spirit . . . is no friend to preservationists."[14]

There also has been a weakening of the preservation spirit—a willingness to accept copies and imitations, fostering an increased complacence that devalues authenticity and denigrates our built environment.[15] Ada Louise Huxtable has warned that once people accept that reality is disposable and that the evidence of the built environment is not compelling, it becomes acceptable to revise, manipulate, or destroy that evidence of our cultural heritage.[16] Huxtable fears that we will come to prefer

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[12] *Id.* at 1. Lamenting that architecture may come to be viewed only in terms of its function, Huxtable writes:

> The story is repeated over and over. The landmark invites the wreckers and its replacement reduces the public image to the lowest possible common denominator. Architecture has ceased to be a noble art. But it only serves man's needs and aspirations, and men and cities get what they deserve.

Id. at 153.

[13] *See* Herbert Muschamp, *What of Cities If the Blueprint Is Republican?*, N.Y. TIMES, Mar. 12, 1995, at H38 ("Is architecture likely to be affected by the Republican agenda? How can it not be? Architecture is a social art. To a more or less conspicuous degree, every building bears the imprint of the social contract."). *See also* ADA LOUISE HUXTABLE, KICKED A BUILDING LATELY? 38 (1976) [hereinafter HUXTABLE, KICKED] ("Cities are built and unbuilt by the forces of law and economics, supply and demand, cash flow and the bottom line, far more than by the ideals, intentions, talents, and vision of architects and planners.").

[14] Goldberger, *supra* note 1, at E3.

[15] *See* HUXTABLE, BRUCKNER, *supra* note 11, at 211. Huxtable labels recreations, such as that of Colonial Williamsburg, as

> exercise in historical playacting in which real and imitation museum treasures and modern copies are carelessly confused in everyone's mind. . . .[T]he end effect has been to devalue authenticity and denigrate the genuine heritage of less picturesque periods to which an era and a people gave real life. This alone is history. The rest is wishful thinking, or in plainer words, corruption of preservation's legitimate aims.

HUXTABLE, *supra* note 11 at 211.

[16] Ada Louise Huxtable, *Inventing American Reality*, INTERIOR DESIGN, Feb. 1993, at 33 [hereinafter Huxtable, Inventing] (reprinting N.Y. REV. OF BOOKS, Dec. 3, 1992 at 24).

> a sanitized and selective version of the past, to deny the diversity and eloquence of change and continuity, to ignore the actual deposits of history and humanity that make our cities vehicles of a special kind of art and experience, gritty accumulations of the best and worst we have produced. This record has the wonder and distinction of being the real thing.[17]

She concludes that "[t]he devaluation of our cities and the structures in them that followed—essentially the abandonment of the richest and most revealing record of the human condition—has spread like a virus, invading and infecting architectural and urban standards in the most basic sense."[18]

The weakening of the preservation spirit and the simultaneous strengthening of the anti-regulation movement bodes ill for landmark preservation. One may ask whether the *Penn Central* case would be decided in the same way today. The only two members of the current Court who heard that case, Chief Justice Rehnquist and Justice Stevens, dissented. Since *Penn Central*, the Court has become increasingly interested in the question of when governmental regulation of private property becomes an impermissible taking absent government compensation. If raised today, the *Penn Central* question likely would be framed in terms of whether New York City's landmark designation and its subsequent regulation of the landmark property is a partial regulatory taking requiring compensation because it unfairly burdens the landmark owner.

This Article suggests possible answers to these questions. Part I analyzes the *Penn Central* majority and dissenting opinions in light of post-*Penn Central* Supreme Court decisions. In discussing the post-*Penn Central* cases, Part I also provides a historical case law background in takings analysis. Part II describes an emerging standard for evaluating challenges to landmark preservation determinations. Most important, Part II concludes that the burden has shifted to the government to demonstrate that landmark preservation is a legitimate governmental interest and that a particular landmark designation substantially advances that interest by permissible means. Part III argues that once the government carries this burden, the costs associated with preserving the landmark property may then properly be allocated to

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[17] *Id.* at 35.

[18] *Id.* at 33.

the property owner as an obligation of being a member of a civilized community.

This Article narrowly focuses on single building landmarks and is only concerned with whether a government's landmark designation of an individual building's exterior, and its restriction on the owner's use of that exterior, is a partial regulatory taking requiring compensation under the Fifth Amendment. As a result of its narrow focus, this Article does not address several subject areas, including: the preservation achieved by historic districting,[19] because historic districting more closely resembles traditional zoning actions and does not raise the same intensity of inquiry that landmarking individual buildings does;[20] the landmarking of individual churches, because this concerns actions implicating the First Amendment;[21] government actions

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[19] New York City's law defined an historic district as

> [a]ny area which: (1) contains improvements which: (a) have a special character or special historical or aesthetic interest or value; and (b) represent one or more periods or styles of architecture typical of one or more eras in the history of the city; and (c) cause such area, by reason of such factors, to constitute a distinct section of the city; and (2) has been designated as a historic district pursuant to the provisions of this chapter.

See Penn Central, 438 U.S. at 111 n. 11 (quoting N.Y.C. ADMIN. CODE, ch. 8-A, § 207-1.0(h) (1976)).

[20] *See, e.g.*, Mayes v. City of Dallas, 747 F.2d 323 (5th Cir. 1984); Maher v. City of New Orleans, 516 F.2d 1051 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976). In *Mayes*, the court found that

> [a] municipality has the constitutional power to regulate the use of private property in the interest of historic preservation. . . .On their face . . . the present municipal historic preservation ordinances satisfy requisite due process criteria as being of general application to well-defined geographic areas, supervised by a regulatory body of professional qualifications, with governing legislative criteria provided, and an administrative procedure adequate to assure that the regulatory powers be exercised in accord with the legislative criteria.

Mayes, 747 F.2d at 324 (citing *Penn Central*, 438 U.S. at 132-34 and *Maher*, 516 F.2d at 1060-64). Historic district preservation is not without its critics, however. See David B. Fein, Note, *Historic Districts: Preserving City Neighborhoods For the Privileged*, 60 N.Y.U. L. REV. 64 (1985). For a recent discussion of zoning issues, see Bradley C. Karkkainen, *Zoning: A Reply to the Critics*, 10 J. LAND USE & ENVTL. L. 45 (1994).

[21] *See, e.g.*, St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2d Cir. 1990); First Covenant Church of Seattle v. City of Seattle, 840 P.2d 174 (Wash. 1992); Society of Jesus of New England v. Boston Landmarks Comm'n, 564 N.E.2d 571 (Mass. 1990). *See also, e.g.*, Russell S. Bonds, Comment, First Covenant Church v. City of Seattle: *The Washington Supreme Court Fortifies the Free Exercise Rights of Religious Landmarks Against Historic Preservation Restrictions*, 27 GA. L. REV. 589 (1993); Alan C. Weinstein, The Myth of Ministry vs. Mortar: *A Legal and Policy Analysis of Landmark Designation of Reli-*

that result in a physical invasion of property[22] or that deprive a property owner of all economically viable use of the property;[23] the landmarking of building interiors;[24] and decisions based on state constitutional provisions.[25]

I

PENN CENTRAL: MAJORITY AND DISSENTING OPINIONS IN LIGHT OF POST-*PENN CENTRAL* SUPREME COURT DECISIONS

As discussed above, New York City enacted its landmark preservation ordinance in direct response to a single incident: the razing of Penn Station to permit construction of a new Madison Square Garden. But that single incident was only one highly visible and publicized example of what Huxtable describes as continuing "urbicide," the kindest justification for which is "ignorance."[26] Less kindly, she writes that urbicide was "destroying not only history and architecture but also the identity and charac-

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gious Institutions, 65 TEMP. L. REV. 91 (1992); Babcock & Theriaque, *supra* note 4; Carmella, *supra* note 8; Thomas Pak, Comment, *Free Exercise, Free Expression, and Landmarks Preservation*, 91 COLUM. L. REV. 1813 (1991); Karen L. Wagner, Comment, *For Whom The Bell Tolls: Religious Properties as Landmarks Under the First Amendment*, 8 PACE ENVTL. L. REV. 579 (1991).

[22] *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); Kaiser Aetna v. United States, 444 U.S. 164 (1979).

[23] *See* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992); First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987). For recent articles analyzing *Lucas* and reviewing the literature generated by that decision, see Louise A. Halper, *Why the Nuisance Knot Can't Undo the Takings Muddle*, 28 IND. L. REV. 329 (1995), D. Benjamin Barros, *Defining "Property" in the Just Compensation Clause*, 63 FORDHAM L. REV. 1853 (1995), and Hope M. Babcock, *Has the U.S. Supreme Court Finally Drained the Swamp of Takings Jurisprudence?: The Impact of* Lucas v. South Carolina Coastal Council *on Wetlands and Coastal Barrier Beaches*, 19 HARV. ENVTL. L. REV. 1 (1995).

[24] *See* Teachers Ins. and Annuity Ass'n. of America v. City of New York, 623 N.E.2d 526 (N.Y. 1993). *See also* Scott H. Rothstein, Comment, *Takings Jurisprudence Comes In From the Cold: Preserving Interiors Through Landmark Designation*, 26 CONN. L. REV. 1105 (1994); Albert H. Manwaring, IV, Note, *American Heritage at Stake: The Government's Vital Interest in Interior Landmark Designation*, 25 NEW ENG. L. REV. 291 (1990).

[25] *See* United Artists' Theater Circuit, Inc. v. City of Philadelphia, 635 A.2d 612 (Pa. 1993); Southern Nat'l Bank of Houston v. City of Austin, 582 S.W.2d 229 (Tex. 1979). *See also* Daniel T. Cavarello, Comment, *From* Penn Central *to* United Artists' I & II*: The Rise to Immunity of Historic Preservation Designation From Successful Takings Challenges*, 22 B.C. ENVTL. AFF. L. REV. 593 (1995).

[26] HUXTABLE, BRUCKNER, *supra* note 11, at 114.

ter that are the soul of a city or town . . . in the most destructive assault on the American scene since the Civil War."[27]

Perhaps, in a twisted sense, Penn Station had to be destroyed to preserve other landmarks, as the loss of Penn Station sparked passage of the ordinance that has protected other landmarks.[28] After Penn Station was demolished, people began to recognize that "the husbanding of the historic heritage" was essential to "the quality of the environment," which, in turn, "was finally beginning to be seen as a whole thing, intimately related to the quality of life."[29] Huxtable characterizes architectural preservation as "that combination of civilized sentiment and historic sensibility that makes cities rich and real and nothing to do with real estate values that make cities rich and sterile."[30] She argues that landmarks are a city's assets meriting preservation both as historical records and as contemporary stimuli of activities and attitudes that create an attractive quality of life for citizens.[31] The *Penn Central* majority accepted this argument in finding that New York City's landmark designation of Grand Central Terminal, and its subsequent denial of the owners' proposal to build a tower over the Terminal, did not take the owners' property in violation of the Fifth and Fourteenth Amendments.

Although the owners had administratively opposed designating the Terminal as a landmark, they did not seek judicial relief until the city rejected their proposal to construct a Mar-

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[27] Ada Louise Huxtable, *How Salem Saved Itself From Urban Renewal*, N.Y. TIMES, Sept. 29, 1974, § 2, at 27.

[28] *See* Muschamp, *supra* note 5, at H40. Muschamp explains the irony that

> [t]hough Penn Station was destroyed, the words mourning its demise have been chiseled into the record of the art they sought to protect. And the spirit behind the words was written into law less than two years later, in April 1965, when the New York City Landmarks Preservation Commission was created.

Muschamp, *supra* note 5, at H40.

[29] ADA LOUISE HUXTABLE, GOODBYE HISTORY, HELLO HAMBURGER: AN ANTHOLOGY OF ARCHITECTURAL DELIGHTS AND DISASTERS 9 (1986) [hereinafter HUXTABLE, GOODBYE].

[30] HUXTABLE, BRUCKNER, *supra* note 11, at 237.

[31] *See* HUXTABLE, KICKED, *supra* note 13, at 151.

> The message beginning to come out . . . is that it is just those "uneconomic" assets of history and style that must be used as the basis of rebuilding to achieve the kind of quality and interest that attracts the sort of money and activity that add up to the elusive creation of an attractive urban life.

HUXTABLE, KICKED, *supra* note 13, at 151.

cel Breuer-designed office tower atop the Terminal.[32] Although Breuer's design met all applicable zoning ordinances, the Landmarks Commission concluded that the plan "to balance a 55-story office tower above a flamboyant Beaux-Arts facade seems nothing more than an aesthetic joke."[33] Despite having "no fixed rule against making additions to designated buildings," the Commission said it "must preserve them in a meaningful way—with alterations and additions of such character, scale, materials and mass as will protect, enhance and perpetuate the original design rather than overwhelm it."[34]

The owners' argument to the Supreme Court was that the city's "substantial restriction imposed pursuant to [its] landmark law must be accompanied by just compensation if it is to be constitutional."[35] The Court's disposition of this argument was made easier by the owners' failure to "contest that New York City's objective of preserving structures . . . with special historic, archi-

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[32] *Penn Central* "briefly summarized" the landmark designation process:

> The [Landmarks Preservation] Commission first performs the function . . . of identifying properties and areas that have "a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation." If the Commission determines, after giving all interested parties an opportunity to be heard, that a building or area satisfies the ordinance's criteria, it will designate a building to be a "landmark" . . . . After the Commission makes a designation, New York City's Board of Estimate, after considering the relationship of the designated property "to the master plan, the zoning resolution, projected public improvements and any plans for the renewal of the area involved" may modify or disapprove the designation, and the owner may seek judicial review of the final designation decision.

Penn Central, 438 U.S. at 110-11 (citations omitted).

[33] *Id.* at 117-18. The design still generates caustic comments. *See* Ada Louise Huxtable, *On the Right Track*, N.Y. TIMES, Nov. 28, 1994, at A17 [hereinafter Huxtable, Track] ("[Grand Central] has survived its own threats, including a traumatic proposal to build a gargantuan tower of aggressive vulgarity on top, the cruelest of jokes on its Beaux Arts splendor.").

[34] *Penn Central*, 438 U.S. at 117-18. A landmark owner wishing to alter the property had three procedures available for obtaining administrative approval: (1) the owner could apply "for an order approving the improvement or alteration on the ground that it will not change or affect any architectural feature of the landmark and will be in harmony therewith;" (2) the owner could apply for permission which "will be granted if the Commission concludes . . . that the proposed construction . . . would not unduly hinder the protection, enhancement, perpetuation, and use of the landmark;" and (3) the owner could seek "a certificate of appropriateness on the ground of 'insufficient return' . . . to ensure that designation does not cause economic hardship." *Id.* at 112. Judicial review of a denial is available for all three procedures. *Id.*

[35] *Id.* at 129.

tectural, or cultural significance is an entirely permissible governmental goal."[36] The owners also failed to contest "that the restrictions imposed on [their] parcel [were] appropriate means of securing the purposes of the New York City law."[37]

The latter failure is one that contemporary litigators would not repeat. In the eighteen years since *Penn Central* was decided, the Supreme Court has revisited the regulatory takings issue several times. The Court has shown a growing interest in defining the point at which governmental regulation of private property constitutes an impermissible taking, requiring that the property owner be compensated. Under the post-*Penn Central* decisions, the government apparently retains broad regulatory authority to determine legitimate public purposes. Its authority to use those purposes to justify regulating the use of private property, however, clearly is subject to challenge. The following section analyzes the *Penn Central* decision in light of subsequent Supreme Court decisions.

A. Penn Central *1996: Could New York City's Landmark Preservation Statute Survive the Post-*Penn Central *Precedents?*

1. *Finding a Legitimate Governmental Interest in Landmark Preservation*

The question of whether the city ordinance in *Penn Central* could withstand constitutional scrutiny given the new precedents available to the Court is a vital one for landmark preservation. New York City's law "changed the nature of planning and architecture in the city and the whole country;" it is "the legal platform on which a whole culture of historic preservation has been built."[38] It embodied a message that preserving the built environment promotes the public welfare.[39] That, ultimately, was the

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[36] *Id.*

[37] *Id.*

[38] Goldberger, *supra* note 1, at E3.

[39] *See* Fein, *supra* note 20, at 79 ("Historic preservation contributes to the general welfare of the community, offers educational and cultural opportunities for the public, and enhances the general economic environment within a municipality by encouraging tourism and neighborhood reinvestment."). *See also* Manwaring, *supra* note 24, at 311-12. Manwaring explains:

> The objectives of preservation laws that have been recognized by the courts as promoting the public welfare include: 1) enhancing the beauty of the community for the pleasure and enrichment of the citizens, 2) increasing property values, 3) stabilizing the tax base, 4) attracting tourists to stimulate and support the economy, 5) revitalizing urban areas, and 6)

foundation for the legal platform on which New York City's preservation law rested. The city made a "judgment . . . that the preservation of landmarks benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole. . . ."[40] New York City's argument in *Penn Central* was that "regulation of private property for historical, cultural, and aesthetic values, if it is done in accord with a comprehensive plan that provides benefit to all, is in the public interest."[41] This argument was accepted by a majority of the Court, which began its decision by noting two concerns underlying preservation legislation:

> 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."[42]

> fostering civic pride, as well as educating the citizens in the cultural, historical, and architectural heritage of the community.

Manwaring, *supra* note 24, at 311-12 (citations omitted).

[40] *Penn Central*, 438 U.S. at 134. *See* Witold Rybczynski, *The Trickle-Down Theory of Architecture*, THE N.Y. TIMES MAGAZINE, Mar. 12, 1995, at 74. Explaining the appeal of historic landmark preservation, Rybczynski states: "The historic preservation movement revived an interest in our architectural heritage. The popular success of historic preservation is not, I think, merely a result of scholarly or patriotic enthusiasm; we have developed a genuine fondness for many of the features of old buildings." *Id.* at 75.

[41] HUXTABLE, *supra* note 10, at 150. *See* Thomas W. Logue, *Avoiding Takings Challenges While Protecting Historic Properties From Demolition*, 19 STETSON L. REV. 739, 743-44 (1990). Logue states that addressing community concerns is a legitimate purpose supporting regulation of property rights:

> Based on the Supreme Court view, courts routinely hold that the objective of historic preservation "falls within the permissible scope of the police power." This recognition of the legitimacy of physical and aesthetic value was extended to historic preservation in general and to the preservation specifically of districts, nonhistoric properties within districts, archaeological sites, environmental landmarks, individual landmark buildings, and interiors.

Id. at 743-44 (citations omitted).

[42] *Penn Central*, 438 U.S. at 108 (citation omitted).

Post-*Penn Central* takings jurisprudence acquired its basic test in *Agins v. City of Tiburon*[43] where property owners raised a facial constitutional challenge to municipal zoning ordinances that limited the owners' ability to develop their five-acre tract.[44] The test announced in *Agins* required that a challenged land use regulation "substantially advance legitimate state interests" by permissible means, means that do not deny an owner "economically viable use of his land."[45] If the preservation ordinance questioned in *Penn Central* were challenged today, therefore, the city would have to show that its interest in passing the ordinance was a legitimate state interest, that the ordinance would substantially advance that interest, and that the means employed by the ordinance were permissible.

The *Penn Central* ordinance would almost certainly pass the first test. Courts continue to define the concept of "legitimate state interest" broadly. In *Agins*, for example, a unanimous Court declared that governmental purposes such as discouraging "the 'premature and unnecessary conversion of open-space land to urban uses'" and protecting citizens "from the ill effects of urbanization" had "long . . . been recognized as legitimate."[46] Similarly, in *Nollan v. California Coastal Commission*,[47] in which owners of a beachfront property were asked to dedicate a strip of property along the beach, in return for a permit to build a home on their property, the Court "agreed that the Coastal Commission's concern with protecting visual access to the ocean constituted a legitimate public interest." [48] Nonetheless, the Supreme Court held that a taking had occurred when a government ordinance lacked the requisite nexus between the means chosen and the government interest being advanced.[49]

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[43] 447 U.S. 255 (1980).

[44] *Id.* at 257.

[45] *Id.* at 260.

[46] *Id.* at 261.

[47] 483 U.S. 825 (1987).

[48] Dolan v. City of Tigard, 114 S. Ct. 2309, 2317 (1994)(citing *Nollan*, 483 U.S. at 835). *See also id.* at 2317-18 (stating that "the prevention of flooding . . . and the reduction of traffic congestion in the Central Business District qualify as the type of legitimate public purposes we have upheld"); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 474 (1987)(upholding Pennsylvania's subsidence prevention legislation as protecting "the public interest in safety, land conservation, preservation of affected municipalities' tax bases, and land development in the Commonwealth").

[49] 483 U.S. 825 (1987).

In *Nollan*, the Nollans applied for permission to rebuild their beachfront home. Finding that "the new house would increase blockage of the [public's] view of the ocean," the Coastal Commission, as a condition of its permission, required "the Nollans to offset that burden by providing additional lateral access to the public beaches in the form of an easement across their [beachfront]."[50]

The Supreme Court found this condition to be a taking because it did not serve to advance the legitimate governmental interest of preserving the public's ocean view. There would have been no constitutional problem had the Commission "attached to the permit some condition that would have protected the public's ability to see," even if that condition "consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere."[51]

There likewise appears to be no question that the means chosen in *Penn Central* substantially advanced the preservation objective. New York City's law placed two major restrictions on a landmark owner's use of the property. First, the owner became obliged "to keep the exterior features of the building 'in good repair' to assure that the law's objectives not be defeated by the landmark's falling into a state of irremediable disrepair."[52] Second, the Landmarks Preservation Commission had to

> approve in advance any proposal to alter the exterior architectural features of the landmark or to construct any exterior improvement on the landmark site, thus ensuring that decisions concerning construction . . . are made with due consideration of both the public interest in the maintenance of the structure and the landowner's interest in use of the property.[53]

After establishing that a legitimate governmental purpose exists and that its means further the stated purpose, the remaining question raised is who shall bear the lost imposed by the regulation.

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[50] *Id.* at 828-829.
[51] *Id.* at 836.
[52] *Penn Central*, 438 U.S. at 111-12.
[53] *Id.* at 112.

2. *The Constitution and the Question of Who Rightfully May Be Forced to Pay the Cost of Landmark Preservation*

The means of landmark preservation employed in the *Penn Central* case certainly preserved the built environment and therefore substantially advanced legitimate government interests in landmarking. The most difficult question is whether the government did so in a manner that, under the Fifth and Fourteenth Amendments, would require the payment of just compensation to the affected property owner. Concerning this issue, the post-*Penn Central* decisions have muddied waters that previously ran clear.

For one hundred years, the government has been able, without payment of compensation, to "'interpos[e] its authority in behalf of the public, . . . [if it was shown first, that] the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.'"[54] Even this generous rule was "not applied with strict precision, for [the] Court has often said that 'debatable questions as to reasonableness are not for the courts, but for the Legislature. . . .'"[55] This remains the rule, at least regarding facial challenges to zoning restrictions such as those raised in *Agins*.

In *Agins*, the Court characterized its task as determining whether "the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest."[56] The Court found that the ordinances, evaluated facially, benefitted the owners "as well as the public by serving the city's interest in assuring careful and orderly development of residential property with provision for open-space areas."[57] The challenging owners, like all others, "will share . . . the benefits and burdens of the city's exercise of its police power," benefits that "must be considered along with any diminution in market value that the [challenging owners] might suffer."[58] The challenged ordinances limited development but "neither prevent[ed] the best

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[54] Goldblatt v. Town of Hempstead, 369 U.S. 590, 594-95 (1962)(quoting Lawton v. Steele, 152 U.S. 133, 137 (1894)).

[55] *Id.* at 595 (quoting Sproles v. Binford, 286 U.S. 374, 388 (1932)).

[56] *Agins*, 447 U.S. at 260.

[57] *Id.* at 262.

[58] *Id.*

use of [the owners'] land . . . nor extinguish[ed] a fundamental attribute of ownership . . . ."[59]

Similarly, in *Keystone Bituminous Coal Association v. DeBenedictis*,[60] the Court reviewed a coal mine owner's challenge to a Pennsylvania mining statute that required that 50% of the coal beneath certain structures be kept in place in order to prevent subsidence damage.[61] In *Keystone*, the Court noted that "one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property."[62] Although everyone "is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others."[63] Such "restrictions are 'properly treated as part of the burden of common citizenship.'"[64] Additionally, the coal mine owners did "not come close to satisfying their burden of proving that they [had] been denied the economically viable use of" the property affected by the restriction.[65] The Court has even used the burden of common citizenship rationale to validate restrictions that appear confiscatory both on their face and as applied.[66]

The "benefits and burdens of common citizenship" analysis, however, does not immunize all property-use regulations, even those that do not extinguish all economically viable uses of the property. *Dolan v. City of Tigard*,[67] the Court's most recent "benefits and burdens" inquiry, presents the greatest threat to *Penn Central*'s continued vitality.

In *Dolan*, the plaintiff sought a permit to expand her hardware store. The city conditioned the permit on Dolan's willingness to "dedicate the portion of her property lying within the

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[59] *Id.* (citations omitted).

[60] 480 U.S. 470 (1987).

[61] *Id.* at 477.

[62] *Keystone*, 480 U.S. at 491.

[63] *Id.* (citations omitted).

[64] *Id.* (quoting Kimball Laundry Co. v. United States, 338 U.S. 1, 5 (1949)).

[65] *Id.* at 499.

[66] For other cases employing the "benefits and burdens of common citizenship" rationale, see Andrus v. Allard, 444 U.S. 51, 65 (1979)(stating that "government regulation—by definition—involves the adjustment of rights for the public good," an adjustment which often "curtails some potential for the use or economic exploitation of private property"). *See, e.g.,* Pennsylvania Coal Co. v Mahon, 260 U.S. 393, 422 (1922)(Brandeis, J., dissenting)(stating that a property owner's bearing the costs of government regulations is a burden borne to secure "the advantage of living and doing business in a civilized community").

[67] 114 S. Ct. 2309 (1994).

100-year floodplain for improvement of a storm drainage system . . . [and to] dedicate an additional 15-foot strip of land adjacent to the floodplain as a pedestrian/bicycle pathway."[68] The Oregon Supreme Court found that both dedications had "an essential nexus to the development of the site" and that both were "reasonably related to the impact of the expansion of [Dolan's] business."[69]

In reversing, the Supreme Court began by repeating the *Agins* doctrine: "A land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'"[70] The latter factor was not an issue because Dolan, like most owners of landmarked properties, was still "able to derive *some* economic use from her property."[71] The first factor remained in dispute, however. The Court noted that, unlike the case of zoning regulations, which involve "essentially legislative determinations classifying entire areas of the city," here the city of Tigard had "made an adjudicative decision to condition [Dolan's] application for a building permit on an individual parcel."[72]

In *Dolan*, the Court drew a second distinction between the city's action and what is generally done under zoning provisions. Normally, a zoning regulation is "simply a limitation on the use [an owner] might make of her own parcel." By contrast, the city of Tigard had asked Dolan to "deed portions of the property to the city."[73]

The Court evaluated the city's action using a two-part test:

> [W]e must first determine whether the "essential nexus" exists between the "legitimate state interest" and the permit condition exacted by the city. . . . If we find that a nexus exists, we must then decide the required degree of connection between the exactions and the projected impact of the proposed development.[74]

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[68] *Id.* at 2314.

[69] Dolan v. City of Tigard, 854 P.2d 437, 443 (Oregon 1993).

[70] *Dolan*, 114 S. Ct. at 2316 (quoting *Agins*, 447 U.S. at 260).

[71] *Id.* at 2316 n.6 (emphasis in original).

[72] *Id.* at 2316.

[73] *Id.*

[74] *Id.* at 2317 (citation omitted).

The city satisfied the first part of the test: the permit conditions had an obvious nexus with the control of flooding and the reduction of traffic congestion, legitimate governmental objectives.[75]

The Court next addressed whether the "degree of the exactions demanded" by the city bore "the required relationship to the projected impact of [Ms. Dolan's] proposed development."[76] Historically, when called upon to evaluate "generally applicable zoning regulations," the Court has said that "the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights."[77] The *Dolan* majority, however, noting again that "the city made an adjudicative decision to condition [Dolan's] application for a building permit on an individual parcel," found that "the burden properly rests on the city."[78] That burden did not require a "precise mathematical calculation," although "the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[79] Not surprisingly, the city of Tigard did not meet this newly announced burden.

3. *Finding the Required Nexus: Analysis of Governmental Objectives and Means in Landmark Preservation*

The question at hand is whether New York City could have met the *Dolan* standard in *Penn Central*. Preservation remains a legitimate governmental objective, and landmark designation has an undeniable nexus with that objective. The question is whether New York City's findings regarding the benefits of preservation are constitutionally sufficient to justify the conditions imposed by the city on a landmark's owner.

Landmark designation is essentially a *Dolan*-type adjudicative decision regarding an individual parcel. Like the exaction requirement in *Dolan*, landmarking not only substantially restricts the use to which the property may be put, but also imposes affirmative duties on the owner. The *Penn Central* ordinance both limited the property's potential uses and required the owner to preserve the property at the owner's expense, subjecting viola-

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[75] *Id.* at 2317-18.
[76] *Id.*
[77] *Id.* at 2320 n.8 (citation omitted).
[78] *Id.*
[79] *Id.* at 2319-20.

tors to criminal fines and penalties. In a sense, the law required owners of landmarked buildings to deed the exterior of their buildings to the public.[80] A court could subject these duties to the *Dolan* burden where "the city must make some sort of individualized determination that the required dedication is related both in nature and extent" to the goals sought to be achieved by preservation.[81] Under *Dolan*, the city must do more than make conclusory statements; it "must make some effort to quantify its findings in support of the dedication."[82]

New York City was not put to the *Dolan* test in *Penn Central*. There, the Terminal owners conceded that the city's "objective of preserving structures . . . with special historic, architectural, or cultural significance is an entirely permissible governmental goal."[83] They also conceded that "the restrictions imposed on its parcel are appropriate means of securing the purposes of the New York City law,"[84] a concession that no owner would likely make today.

The Terminal owners argued simply that the city's denial of their application to build a tower atop the Terminal amounted to a taking of their property for which they were entitled to compensation. The terminal owners began their broad-based attack on the city's landmark ordinance by claiming that the permit denial had "deprived them of any gainful use of their 'air rights' above the Terminal," thus entitling them to "just compensation" for the fair market value of those rights.[85] The Court found "untenable" the claim that a taking occurred simply because the owners "have been denied the ability to exploit a property interest that they . . . had believed was available for development . . . ."[86] The Court declared that a takings analysis "does not

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[80] *See, e.g.*, Russo v. Beckelman, 611 N.Y.S.2d 869, 870 (Sup. Ct. 1994) in which the owner of a building that had been occupied by Mathew Brady from 1853-1860, the exterior of which "remained largely unchanged from the time of Brady's occupancy," sought an annulment of the building's landmark designation. The court denied the owner's petition, noting that "[t]he landmarking not only preserves the building, and depicts a trade, but also provides a portrait of an era that fills a too-little appreciated niche in New York's cultural registry." *Id.* at 870.

[81] *Dolan*, 114 S. Ct. at 2319-20.

[82] *Id.* at 2322.

[83] *Penn Central*, 438 U.S. at 129.

[84] *Id.*

[85] *Id.* at 130.

[86] *Id.*

divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."[87] Instead, it "focuses . . . both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole,"[88] a focus reaffirmed in subsequent cases.[89]

The Terminal owners found a much more receptive audience among the dissenting justices, who agreed that the landmark designation and restrictions unfairly singled out the owners to bear a burden that should be shared by the citizenry as a whole.[90]

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[87] *Id.*

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

[89] *See e.g.*, Andrus v. Allard, 444 U.S. 51 (1979). In deciding a challenge to the Eagle Protection Act brought by traders in Native American artifacts, the Court concluded:

> The regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them. Rather, a significant restriction has been imposed on one means of disposing of the artifacts. But the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking, because the aggregate must be viewed in its entirety. . . . In this case, it is crucial that [the owners] retain the rights to possess and transport their property, and to donate or devise the protected birds.

Id. at 65-66 (citations omitted). *See also* Concrete Pipe & Prods. v. Constr. Laborers Pension Trust, 113 S. Ct. 2264, 2290 (1993). The Court rejected the owner's attempt "to shoehorn its claim into" cases "dealing with permanent physical occupation or destruction of economically beneficial use of real property" by arguing that its property was taken completely:

> [W]e rejected this analysis years ago in *Penn Central*[,]. . . where we held that a claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable. To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of the parcel in question.

Id. at 2290 (citation omitted).

[90] *See also* Lynda J. Oswald, *Cornering the Quark: Investment-Backed Expectations and Economically Viable Uses in Takings Analysis*, 70 WASH. L. REV. 91(1995). Oswald observes:

> [H]istoric preservation ordinances that cover all of a specific area confer benefits upon the public as a whole. . . .Although each regulated landowner incurs a burden as a result of the regulation, each receives a benefit as well—the maintenance of a historically significant area, which presumably enhances the stability of the area and protects property values. . . .Contrast this scenario with the landmark regulation at issue in *Penn Central*. There, isolated property owners were singled out for regulation while their neighbors were not subject to such restrictions. In such an instance, it is more difficult to maintain that the property owner ought

This argument raises the greatest threat to landmark preservation under the post-*Penn Central* decisions.[91] The *Penn Central* majority did not require the city to make individualized findings sufficient to justify the restrictions imposed on the owners' use of the Terminal, showing that the restriction on development of the landmark bore some roughly proportional relationship to a permissible objective.

The *Penn Central* dissenters framed the question as "whether the cost associated with the New York City's desire to preserve a limited number of 'landmarks' within its borders must be borne by all of its taxpayers or whether it instead can be imposed entirely on the owners of the individual properties."[92] Just as *Dolan* distinguished Tigard's exaction requirement from traditional zoning schemes, the dissent in *Penn Central* distinguished landmark designations from traditional zoning. In traditional zoning, the Court said, there is "an average reciprocity of advantage" because any decrease in the value of an owner's property "will more than likely be at least partially offset by an increase in value which flows from similar restrictions as to use on neighboring properties;" there is "no such reciprocity" in landmark designations "[w]here a relatively few individual buildings, all separated from one another, are singled out and treated differently from surrounding buildings."[93] Specifically, the dissent noted that while "neighboring landowners are free to use their land and 'air rights' in any way consistent with the broad boundaries of New York zoning," the Terminal's owner "absent the permission of [the Landmark Commission], must forever maintain

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to bear the burden of regulation clearly intended to preserve aesthetic values for the public as a whole. If preservation of a landmark is a worthy public goal, it should be pursued through compensatory means. . . .

Id. at 142 n.229.

91 *See* Rothstein, *supra* note 24. Rothstein notes:

The justifications for historic preservation legislation go beyond aesthetics. . . .Economic growth, tourism, education, history[,] and neighborhood quality represent legitimate governmental interests advanced by historic or landmark preservation. These justifications have proven so persuasive that challenges to . . . preservation schemes have generally not questioned whether such statutes are legitimate exercises of police power, but rather have focused on whether such regulation "goes too far" and oversteps the bounds established by the Takings Clause.

Rothstein, *supra* note 24, at 1106-07.

92 *Penn Central*, 438 U.S. at 139 (Rehnquist, J., dissenting).

93 *Id.* at 139-40.

its property in its present state."[94] The Terminal was "thus subjected to a nonconsensual servitude not borne by any neighboring or similar properties."[95] The landmark designation did more than merely prohibit a use of the property—the owner became obligated "to maintain the Terminal in its present state and in 'good repair,'" and became subject to the Landmark Commission's control over the future use and development of the Terminal.[96] The dissenting justices reasoned that this type of control amounts to a taking in the constitutional sense for which compensation is required.

II
EMERGING STANDARDS IN THE EVALUATION OF LANDMARK PRESERVATION STATUTES

In analyzing the difficult constitutional questions of landmark preservation, one finds that the question asked by the *Penn Central* dissent is the same question Justice Holmes posed fifty years earlier in *Pennsylvania Coal Co. v. Mahon*:[97] "the question at bottom is upon whom the loss . . . should fall."[98] If the regulation advancing a legitimate governmental objective secures "an average reciprocity of advantage" for the affected parties, then the costs of regulation, like the benefits, have been distributed fairly.[99] Justice Holmes said, however, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[100] Without this Fifth

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[94] *Id.* at 143.

[95] *Id.*

[96] *Id.* at 146.

[97] 260 U.S. 393 (1922).

[98] *Id.* at 416.

[99] *Id.* at 415. Justice Holmes cited Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531 (1914), upholding safety regulations requiring coal mine owners to leave a barrier pillar of coal along the boundary of an adjoining mine:

> Legislation requiring the owners of adjoining coal properties to cause boundary pillars of coal to be left of sufficient width to safeguard the employees of either mine in case the other should be abandoned and allowed to fill with water cannot be deemed an unreasonable exercise of the [police] power. In effect it requires a comparatively small portion of the valuable contents of the vein to be left in place, so long as may be required for the safety of the men employed in mining upon either property.

Plymouth Coal, 232 U.S. at 540.

[100] *Mahon*, 260 U.S. at 415. *See* James L. Huffman, Dolan v. City of Tigard: *Another Step in the Right Direction, 25* ENVTL. L. 143, 152 (1995). Huffman discusses Holmes's observation:

Amendment limitation on the power of government to regulate, Justice Holmes further stated, "the natural tendency of human nature" would be to extend the scope of regulation "more and more until at last private property disappears."[101]

Given the Court's post-*Penn Central* decisions, if *Penn Central* were to come before the Court today for the first time, New York City's task would be more onerous than it was in 1978.[102] The elasticity of the ordinance's language would make the city's task of defending landmark decisions a *Dolan*-required precision more difficult. An example of this elasticity is the city's definition of a landmark:

> Any improvement, any part of which is thirty years old or older, which has a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation and which has been designated as a landmark. . . .[103]

> The takings clause . . . protects against . . . majoritarian tyranny. . . .The takings clause does it by insisting that the costs imposed by government use or regulation of private property are borne by all to whom the benefits inure. This was one of the central points of Justice Holmes' opinion in *Mahon*. The importance of average reciprocity of advantage is that it requires that the costs of regulation, like the benefits, be fairly distributed.

Id. at 152.

101 *Mahon*, 260 U.S. at 415. *See* Huffman, *supra* note 100, at 146.

102 See Oswald, *supra* note 90, at 94 (describing the Court's "line of takings jurisprudence that focuses primarily on economic considerations and that defies rational or coherent classification or analysis"). *See also* Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1 (1995). Stein notes the risks of legal uncertainty:

> The Court's incomplete expositions of takings procedure, takings law, and takings remedies leave litigants with an unusually high level of risk and uncertainty during the years of disagreement and can lead to the financial devastation of one or both of the parties. Landowners and regulators must make a variety of critical decisions early in the regulatory process without knowing the legal consequences of those decisions and without knowing how many years it will be before they will learn those legal consequences.

Id. at 4 (citations omitted).

103 *Penn Central*, 438 U.S. at 111 n.9 (quoting N.Y.C. ADMIN. CODE, ch. 8-A, § 205-1.0(b) (1976)). *See* Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473 (1981). Rose discusses the increased national interest in preserving old structures:

> The phrase "historic preservation" is so elastic that any sort of project can be justified—or any change vilified—in its name. In a sense, every event is "history," and it is a cliché among professional historians that views of "historic significance" alter considerably with shifting social interests. . . . Art and architectural historians, especially important to preservation, are equally flexible in their views of "historic significance."

Once a landmark is designated, the city has the power to determine whether and under what conditions the landmark may be altered. The city also has the power to insure that the landmark owner, at her own expense, maintains the exterior of the landmark "in good repair."[104]

Under the post-*Penn Central* cases, the city probably would have to answer the following questions: (1) is the governmental interest at stake legitimate?; (2) is there a reasonably close nexus between that governmental interest and the regulatory means chosen?; and (3) does the governmental interest outweigh the burden that the regulation imposes on the property owner?[105] The first two are due process questions focusing on the legitimacy of the governmental action, as the earlier discussion of *Agins*, *Nollan*, and *Dolan* described. They eliminate the possibility

> that the rights of the landowner will be limited for naught, when there is but a remote relation between the hardship imposed on the owner and the governmental objective being pursued; and second, that reasons might be cavalierly proffered, while the actual purpose of the legislation goes unspoken.[106]

The third question is really the core of a takings analysis, focusing on the harm done to the owner[107] and preventing govern-

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Id. at 476.

[104] *Penn Central*, 438 U.S. at 111-12.

[105] Oswald, *supra* note 90, at 144.

[106] Dennis J. Coyle, *Takings Jurisprudence and the Political Cultures of American Politics*, 42 CATH. U. L. REV. 817, 855. The author contends that

> mid-level takings and due process review not only give each party a fair hearing, but also raise the quality of the cultural and legal dialogue on land use controls and rights. Seeking substantial reasons for governmental action requires that assertions not only be stated, but also supported, whereas the "any conceivable rational basis" test encourages vapid doctrine and creates a void easily filled by arbitrary state control.

Id. at 857.

[107] *Id.* at 848. Coyle compares the Court's treatment of due process and takings:

> The issues may often coincide, but they are not identical. The takings standard should be whether the restrictions imposed on a property owner's rights are so extensive as to constitute a taking. Whether the government actions are sufficiently related to an appropriate objective is the due process question. In the first instance the emphasis is on the harm to the owner while in the latter it is on the legitimacy of the governmental act. A particular measure may be essential or frivolous, and its impact on the owner may be severe or trivial; the issues are distinct.

Id.

ment from using its coercive powers to acquire the property interest of a citizen under the police power guise of regulating the owner's relationship with others.[108]

Is preservation a legitimate government objective? Most would agree that it is.[109] Architecture is more than just the utilitarian shaping of space. At its best, "it is a balance of structural science and aesthetic expression," it is the "way[ ] in which the equilibrium between the physical and the spiritual is resolved."[110] Preservation of architecture is the converse of its construction. Both "not only shape the city, they determine its future," and simultaneously "form the framework for all the city's activities; their size, quality and distribution create its appeal and amenity, and control its financial and functional health."[111] The careful

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[108] *See* Wayne McCormack, *Property and Liberty—Institutional Competence and the Functions of Rights*, 51 WASH. & LEE L. REV. 1, 30 (1994). The author noted that this statement

> could lead to the conclusion that the Compensation Clause only applies when government takes property values to an enterprise of its own, just as if the government were another person buying a property interest for its own purposes. . . .But the functional equivalent of government's taking property values for its own use can be found in governmental controls that force the relinquishment of one person's interests for the benefit of others without any government conduit. Thus, the Compensation Clause analysis needs more sophistication to allow for more subtle forms of governmental action.

Id. at 59 n.110.

[109] *See* Kathryn R. L. Rand, *Nothing Lasts Forever: Toward a Coherent Theory in American Preservation Law*, 27 U. MICH. J.L. REF. 277, 277-278 (1993). Rand posits:

> Most would agree that at least some degree of historic and cultural preservation is an important part of a nation's heritage and culture. Because preservation and historic and cultural significance are such broad and ambiguous concepts, however, laws regarding preservation are particularly susceptible to arbitrariness. To preserve a nation's cultural treasures effectively, applicable laws must define what is historically or culturally significant and indicate how these things should be preserved. This requires an underlying theory of preservation, currently lacking in American law.

Id.

[110] Huxtable, Interior, *supra* note 16, at 39. Additionally, Huxtable believes that

> whatever the innovations, or the heresies, architecture is part of a creative continuum; it builds on its own experience, even when it seems to break with it. What does not change is the artful resolution of the elements that are its basic tools—structure, space, form and light—and the poetic and pragmatic impact of a humanistic art, shaped by personal vision and the common culture.

Huxtable, *supra* note 16, at 41.

[111] Ada Louise Huxtable, *A Plan to Preserve the Upper East Side*, N.Y. TIMES, Aug. 8, 1981, § 2, at 25. *See also* Ada Louise Huxtable, *Creeping Gigan-*

marshaling of these activities—construction of the new and preservation of the old—must be considered a legitimate governmental activity.[112]

Is there then a reasonably close nexus between that interest and landmark preservation law? Yes, because the destruction or defacement of a landmark can be "culturally disintegrative" rather than "culturally vitalizing."[113] Control is essential "because change, as we experience it in the built and natural environments, is strikingly visible and often profoundly destabilizing."[114] Landmark preservation forces "an active awareness of a city's character, amenity and style, of its cultural and architectural tradition, of its ambiance and quality of life."[115] These cultural phenomena are as essential to a city's prosperity and health as its tax base.

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tism in Manhattan, N.Y. TIMES, Mar. 22, 1987, § 2, at 1 ("Architecture, whatever it is, can hardly be ignored. For better or worse, it alters the appearance, quality, style and spirit of the city, to say nothing of its substance, services and uses.").

[112] *See* Berman v. Parker, 348 U.S. 26 (1954). The Court articulated an expansive view of public welfare:

> 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.

Id. at 32-33. *See also* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). In upholding a village zoning ordinance restricting occupancy of one family dwellings to traditional families, the Court stated:

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one within *Berman*. . . .The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

Id. at 9.

[113] Costonis, *supra* note 9. Commenting on the underlying concerns in historic preservation, Costonis writes:

> The debate over visual beauty is in truth a surrogate for the debate over environmental change itself, or, to be more specific, the question whether that change is culturally disintegrative or culturally vitalizing. At stake are whether change should be permitted, what form it should take, what its pace should be, who should be benefited and who injured by it, and what role public administration can play as a vehicle for managing change.

Costonis, *supra* note 9, at 381 (citations omitted).

[114] Costonis, *supra* note 9, at 381.

[115] HUXTABLE, KICKED, *supra* note 13, at 150.

Landmark preservation does more than just save buildings; it saves a quality of life essential for the health and well-being of the citizens as well as the city. Preservation prevents cities from becoming malls, avoiding that sterility by insuring the continuation of

> a little thing called urbanity—the surprises and rewards of the special, the unexpected, the unique, and the offbeat rather than the sterile stereotype; the instructive and entertaining mixture that only a sophisticated culture can offer; the genuine context, the eternally intriguing and self-renewing aspects of a real place.[116]

Preservation preserves the quality of the built environment which, in turn, enhances the citizens' sense of identity and place. Preservation likewise promotes historical values by saving the original documents of our built heritage.[117]

Preservation is a legitimate objective of government, bearing an undeniable relationship to the civic health, prosperity, and well-being. The means chosen—restricting demolition or defacement of the landmark—are essential to that objective.[118] Without preservation, there would be no environmental continuity but only "an occasional embalmed architectural freak."[119] Proper preservation seeks to retain "the full range of styles, sensations and references that record the city's history and achievements visually and environmentally to keep them in the city's vital mainstream."[120] Preservation preserves the past "because it is part of the living heritage of the present, so that the process of

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[116] HUXTABLE, ARCHITECTURE, *supra* note 10, at 265.

[117] *See* Ada Louise Huxtable, *The Fall and Rise of Main Street*, N.Y. TIMES, May 30, 1976, § 6, at 13; Ada Louise Huxtable, *Avery Library Shows Off Its Riches*, N.Y. TIMES, July 6, 1980, § 2, at 19.

[118] *See* McCormack, *supra* note 108, at 18-19. McCormack argues that a sensible property system seeks to strike

> the best balances between freedom and order and between personal and collective decisionmaking. Most of the recent theorizing about governmental regulation of property and economic interests has been done in the context of what constitutes a "taking" of property. Those theories have tended to define property interests before asking about the propriety of particular governmental action. What we need to do, instead, is to define property interests according to permissible governmental invasion of particular functions. This will place property interests along with liberty interests in a dynamic tension with the proper extent of government power.

McCormack, *supra* note 108, at 18-19.

[119] HUXTABLE, BRUCKNER, *supra* note 11, at 219.

[120] HUXTABLE, BRUCKNER, *supra* note 11, at 219.

history enriches the city and the environment."[121] When preservation works, when landmarks survive, "they give a city the irreplaceable enriching references of history and style. They provide the touchstones of the original residual fabric, the patina of time and change, that makes authentic reference to the way it was, with room for ghosts to feel at home."[122]

III

DEFENDING *PENN CENTRAL* AND THE LANDMARK PRESERVATION STATUTE'S ALLOCATION OF PRESERVATION COSTS TO LANDMARK OWNERS

Do the preservation interests of the government outweigh the burden placed on the landmark owner, or is the burden so unduly oppressive that the government may only preserve the landmark by paying for it? Answering this question remains a difficult task.

Landmark preservation concerns the architectural environment, whether represented by buildings, structures, or landscapes, and architecture is social art:

> The importance of architecture as an art form is unquestioned. For thousands of years, western cultures considered architecture their single most important art form. Architects throughout history have viewed their craft as expressing and driving culture. Architecture and society have a profoundly interdependent relationship. Architecture expresses the values of its cultural context; at the same time it helps create the culture that it inhabits.[123]

Landmark preservation raises "basic questions of social life, freedom, and responsibility" and presents "cultural conflicts in which ideas and values are implicit in different patterns of resource use

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121 HUXTABLE, BRUCKNER, *supra* note 11, at 222.

122 HUXTABLE, ARCHITECTURE, *supra* note 10, at 159.

123 Raphael Winick, *Copyright Protection for Architecture After the Architectural Works Copyright Protection Act of 1990*, 41 DUKE L.J. 1598, 1599-1600 (1992). *See also* HUXTABLE, BRUCKNER, *supra* note 11, at 223-24. The author states

> What preservation is really all about is the retention and active relationship of the buildings of the past to the community's functional present. . . .[A] city's character and quality are a product of continuity. . . In urban terms, preservation is the saving of the essence and style of other eras, through their architecture and urban forms, so that the meaning and flavor of those other times and tastes are incorporated into the mainstream of the city's life. The accumulation is called culture.

HUXTABLE, *supra* note 11, at 223-24.

and control."[124] The destruction or defacement of landmarks can cause detriment to the public, and can result in physical, financial, and psychological harm to the citizenry. With landmark preservation, the government acts to prevent a general harm and preserve a future legacy, not to secure a reciprocity of advantage among neighboring landowners.[125] For this reason, the landmark owner may properly be required to bear the cost of preservation.

Justice Brandeis made this point in his dissenting opinion in *Mahon*. He took direct aim at Justice Holmes's argument that Pennsylvania's subsidence prevention legislation did not secure "an average reciprocity of advantage that has been recognized as a justification of various laws."[126] Justice Brandeis countered that a "restriction imposed to protect the public health, safety, or morals from dangers threatened is not a taking."[127] He noted that the mine owner in *Mahon*, like the landmark owner, retained possession and use of the restricted property; the state "merely prevents the owner from making a use which interferes with paramount rights of the public."[128]

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[124] Coyle, *supra* note 107, at 831. See also Michael C. Blumm, *The End of Environmental Law? Libertarian Property, Natural Law, and the Just Compensation Clause in the Federal Circuit*, 25 ENVTL. L. 171, 196 (1995)("Ultimately, property rights are about maximizing social welfare. . . .Thus, property ought to be defined in ways that will produce the kind of society we want."). By "reinforcing decentralized and pluralistic community-building," preservation law

> may make its most important contribution to our political life. Its substantive effects on our physical surroundings . . . can help to give residents a feeling of stability and familiarity, and they can aid in creating a sense of community among neighbors. Procedurally, the very process of community self-definition . . . brings neighbors together in mutual education and mutual aid, helping to prevent a paralyzing sense of individual powerlessness.

Rose, *supra* note 103, at 494.

[125] *See* Joseph L. Sax, *Is Anyone Minding Stonehenge? The Origins of Cultural Property Protection in England*, 78 CAL. L. REV. 1543, 1544 (1990). Professor Sax describes his current endeavor

> to build a perspective of time into public policy, to institutionalize the long view, and to employ preservation not as a glorification of the past but as a promise to the future that the present will not impoverish it. In selecting the artifacts it wishes to pass on, preservation policy goes beyond simply saving certain objects and becomes a symbolic shaping of the national agenda. It serves as a banner announcing what the nation represents, or at least what it aspires to represent.

Id. at 1544.

[126] *Mahon*, 260 U.S. at 415(Brandeis, J., dissenting).

[127] *Id.* at 417.

[128] *Id.*

Justice Brandeis said the state's "prohibition of mining which causes subsidence is obviously enacted for a public purpose," a prohibition that, Justice Holmes had argued, did not secure "'an average reciprocity of advantage' as between the owner of the property restricted and the rest of the community."[129] Justice Brandeis said that argument simply did not apply:

> Reciprocity of advantage is an important consideration, and may even be an essential, where the State's power is exercised for the purpose of conferring benefits upon the property of a neighborhood . . . or upon adjoining owners. . . .But where the police power is exercised, not to confer benefits upon property owners, but to protect the public from detriment and danger, there is, in my opinion no room for considering reciprocity of advantage. There was no reciprocal advantage to the owner prohibited from using his [property in earlier cases] . . . unless it be the advantage of living and doing business in a civilized community. That reciprocal advantage is given by the act to the coal operators.[130]

The earlier cases cited by Justice Brandeis illustrate his point. In *Mugler v. Kansas*,[131] the state "in the exercise of her police powers, . . . lawfully prohibit[ed] the manufacture and sale, within her limits, of intoxicating liquors to be used as a beverage. . . ."[132] The owners of breweries built before the law was enacted claimed that the law could not be enforced against them "unless compensation is first made for the diminution in the value of their property, resulting from such prohibitory enactments."[133] The Court rejected that argument:

> A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests.[134]

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129 *Id.* at 422.
130 *Id.*
131 123 U.S. 623 (1887).
132 *Id.* at 664.
133 *Id.*
134 *Id.* at 668-69.

The state's power to enforce that declaration

> is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.[135]

Justice Brandeis also cited *Hadacheck v. Sebastian*.[136] The property owner in *Hadacheck* lawfully operated a brickyard inside a city.[137] When the city subsequently enacted an ordinance making that operation unlawful, the owner argued that the ordinance would compel him "to entirely abandon his business" and would completely deprive him of the use and value of the property on which it sat.[138] The Court responded that accepting the owner's argument "would preclude development and fix a city forever in its primitive conditions," and that if "private interests are in the way" of the progress being promoted by the proper exercise of the police power, "they must yield to the good of the community."[139] The *Hadacheck* Court drew a parallel with *Reinman v. City of Little Rock*[140] (a case also included in Justice Brandeis's catalogue):

> There was a like investment in property, encouraged by the then conditions; a like reduction of value and deprivation of property was asserted against the validity of the ordinance there considered; a like assertion of an arbitrary exercise of the power of prohibition. Against all of these contentions, and causing the rejection of them all, was adduced the police power. There was a prohibition of a business, lawful in itself, there as here. . . . They differ in particulars, but they are alike in that which cause and justify prohibition in defined localities—that is, the effect upon the health and comfort of the community.[141]

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135 *Id.* at 669.

136 239 U.S. 394 (1915).

137 *Id.*

138 *Id.* at 405.

139 *Id.* at 410.

140 237 U.S. 171 (1915)(prohibiting owner from operating a livery stable in an area where such use had been lawful before the ordinance was passed).

141 *Hadacheck*, 239 U.S. at 410-11.

These cases represent only a sampling[142] of those that Justice Brandeis used to support his argument in *Mahon* that there was "no room for considering reciprocity of advantage" when government exercised its police power "not to confer benefits upon property owners but to protect the public from detriment and danger," even when that exercise restricted or prohibited a prior lawful use.[143] There likewise was no need to provide compensation for the losses caused; the owners sustained those costs as a part "of living and doing business in a civilized community."[144]

The Court accented this allocation in *Miller v. Schoene*,[145] a case decided only six years after *Mahon* and resting upon the decisions catalogued in Justice Brandeis's dissent. Pursuant to a state statute, the property owners in *Miller* were ordered to cut down ornamental red cedar trees growing on their land because a disease carried by the trees threatened neighboring apple orchards.[146] The owners were only permitted to recover the cost of removing the cedars; they were neither compensated for the value of the trees nor for the diminution in the market value of the land caused by their removal.[147]

The Court said the state did "not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature

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142 *See* Pierce Oil Corp. v. City of Hope, 248 U.S. 498, 500 (1919)(holding that a city ordinance prohibiting a property owner engaged in the business of selling petroleum oil and gasoline from storing such materials in a certain locale did not violate the owner's rights because "a business lawful today may in the future, because of the changed situation, the growth of population or other causes, become a menace to the public health and welfare and be required to yield to the public good.")(citing Dobbins v. Los Angeles, 195 U.S. 223, 238 (1904)); Murphy v. California, 225 U.S. 623 (1912)(holding that a property owner convicted for continuing to run a pool hall after a city ordinance was passed prohibiting that activity was not denied his constitutional rights because "[t]he Fourteenth Amendment protects the citizen in his right to engage in any lawful business, but it does not prevent legislation intended to regulate useful occupations which, because of their nature or location, may prove injurious or offensive to the public"); Powell v. Pennsylvania, 127 U.S. 678 (1888)(holding that although a producer and purveyor of oleomargarine had invested in that business before the Pennsylvania legislature passed a law prohibiting it, the government could act to "promote the public health and prevent frauds in the sale of such articles").

143 *Mahon*, 260 U.S. at 422 (Brandeis, J. dissenting).

144 *Id.*

145 276 U.S. 272 (1928).

146 *Id.* at 277.

147 *Id.*

is of greater value to the public."[148] In cases "where the public interest is involved, preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of the police power which affects property."[149]

The cases that Justice Brandeis relied upon in his *Mahon* dissent have proven durable. For example, seventy-five years after *Mugler*, the Court reiterated that holding in *Goldblatt v. Town of Hempstead*,[150] where, for over thirty years, the property owners had mined sand and gravel from a lot located within the city.[151] The city then enacted an ordinance that effectively made the owners' mining unlawful and the owners sought compensation.[152] Although acknowledging that "the ordinance completely prohibits a beneficial use to which the property has previously been devoted," the Court found it irrelevant "that the use prohibited is arguably not a common-law nuisance."[153] The Court found "no indication that the prohibitory effect of [the ordinance] is sufficient to render it an unconstitutional taking if it is otherwise a valid police regulation."[154]

These same themes are present in the Court's post-*Penn Central* decisions. In *Andrus v. Allard*,[155] a case involving government regulations prohibiting commercial transactions in property lawfully acquired before the regulations became effective, the Court not only referred to the cases discussed above but quoted directly from Justice Brandeis's *Mahon* dissent:

> It is true that [the property owners] must bear the costs of these regulations. But, within limits, that is a burden borne to secure "the advantage of living and doing business in a civilized community." . . . We hold that the simple prohibition of the sale of lawfully acquired property in this case does not effect a taking in violation of the Fifth Amendment.[156]

In *Keystone*, where coal owners challenged the state's subsidence prevention legislation, which prohibited mining of fifty

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148 *Id.* at 279.
149 *Id.* at 279-80.
150 69 U.S. 590, 593 (1962).
151 *Id.* at 591.
152 *Id.*
153 *Id.*
154 *Id.* at 594.
155 444 U.S. 51 (1979).
156 *Id.* at 67-68 (quoting *Mahon*, 260 U.S. at 422 (Brandeis, J. dissenting)).

percent of the coal beneath certain structures, the Court, again relying on *Mugler*, refused to find that the prohibition amounted to a taking:

> Under our system of government, one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others. . . .These restrictions are "properly treated as part of the burden of common citizenship." . . . Long ago it was recognized that "all property is held under the implied obligation that the owner's use of it shall not be injurious to the community,". . . and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it.[157]

Finally, in *Concrete Pipe and Products v. Construction Laborers Pension Trust*,[158] an employer withdrawing from a multiemployer pension plan argued that a statutory withdrawal penalty that exceeded the employer's liability under the collective bargaining agreement amounted to a taking of its property without just compensation.[159] The Court quickly rejected the argument: "'This interference with the property rights of an employer arises from a public program that adjusts the benefits and burdens of economic life to promote the common good and, under our cases, does not constitute a taking requiring Government compensation.'"[160]

Justice Rehnquist's dissent in *Penn Central* focused on *Mahon*'s requirement that there be an "average reciprocity of advantage" flowing from a land-use regulation;[161] absent that requirement, even "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[162] The majority, while acknowledging "that the Landmarks Law has a more severe impact on some landowners

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157 *Keystone*, 480 U.S. at 491-92 (citations omitted).

158 113 S. Ct. 2264 (1993).

159 *Id.* at 2270.

160 *Id.* at 2290 (quoting Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 225 (1986)).

161 *See Penn Central*, 438 U.S. at 147.

162 *Id.* at 152 (quoting *Mahon*, 260 U.S. at 416).

than on others," said that impact "in itself does not mean that the law effects a 'taking.'"[163]

In support of its holding, the majority pointed to cases such as *Hadacheck*, *Miller*, and *Goldblatt*. In each, the property uses were lawful, and the regulation of the uses was upheld as being "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."[164] Furthermore, the majority stated it could not "be asserted that the destruction or fundamental alteration of a historic landmark [was] not harmful."[165]

The *Penn Central* majority also rejected as "factually inaccurate" the Terminal owners' "repeated suggestions that they [were] solely burdened and unbenefited."[166] New York City's preservation law applied "to vast numbers of structures in the city in addition to the Terminal."[167] Furthermore, unless the Court was willing (which it was not) to reject the city's judgment "that the preservation of landmarks benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole," the Court would not "conclude that the owners of the Terminal ha[d] in no sense been benefited by the Landmarks Law."[168] Although the owners believed "they [we]re more burdened than benefited by the law," the Court said that was also true of the owners in cases such as *Hadacheck*, *Miller*, and *Goldblatt*, owners who in effect had their present use of their property regulated out of existence.[169] The Terminal owners, in contrast, were not only permitted to "continue to use the property precisely as it ha[d] been used for the past 65 years,"[170] but were also afforded "opportunities further to enhance not only the Terminal site proper but also other properties."[171]

Although the *Penn Central* majority made a convincing argument that the landmark restrictions secured that average reci-

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163 *Id.* at 133.
164 *Id.* at 133 n.30.
165 *Id.*
166 *Id.* at 134.
167 *Id.*
168 *Id.* at 134-35.
169 *Id.* at 135.
170 *Id.* at 136.
171 *Id.* at 138.

procity of advantage that *Mahon* appeared to require as a justification for such laws, it may well be that Justice Brandeis's position is the stronger: when government acts, as it does in landmark preservation, "not to confer benefits upon property owners but to protect the public from detriment and danger, there is . . . no room for considering reciprocity of advantage."[172] When the owner of a landmarked property is prevented from destroying or defacing that landmark, the only reciprocity necessary is "the advantage of living and doing business in a civilized community."[173] Landmark preservation saves and enhances that civilized community; that is the only reciprocal advantage to which the landmark owner is entitled.

CONCLUSION

It is difficult to deny "that the quality of the city is eroded and ultimately lost by the destruction" of landmarks.[174] They are a tangible record of a city's culture; "there is no culture without creativity, and there is no meaningful culture of any period without that vital spark of fresh ideas and new forms that, fanned into brilliance by the greater epochs, becomes the enduring expression of an age."[175] A landmark is designated to recognize "a superb creative and cultural achievement," and preserves "the irreproducible record of the art and ideals of a master or an age," a record whose "concept, craft, materials and details may be irreplaceable at any price."[176]

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[172] *Mahon*, 260 U.S. at 422.

[173] *Id.*

[174] HUXTABLE, BRUCKNER, *supra* note 11, at 61. Questioning cities' decisions to destroy historic landmarks, Huxtable writes:

> No one denies that the quality of the city is eroded and ultimately lost by the destruction of such buildings. . . . To destroy out of ignorance is one thing; to destroy with understanding of the meaning and consequences of the act is a sordid commentary on the values and morality of men.

HUXTABLE, BRUCKNER, *supra* note 11, at 61.

[175] HUXTABLE, BRUCKNER, *supra* note 11, at 26. The author described the function of preservation:

> What remains is the continuum called culture, the mixture of past and present, of art, history and humanity, of creative experiment and monumental elegance, that brings people to cities like lemmings to the sea. The strong survive and add to urban heritage; the weak disappear forever.

HUXTABLE, BRUCKNER, *supra* note 11, at 240.

[176] HUXTABLE, BRUCKNER, *supra* note 11, at 26. Huxtable observes:

> [W]e can think of many reasons why not [to raze an old landmark and build a new replica]. They have to do with the value of a lively original versus a dead copy, the integrity of a work of art as expressive of its time,

The preservation of the cultural record serves the public well and its destruction or defacement produces a public harm. A landmark has become "integrated, through its art, into the rich and complex life and use"[177] that makes our built world "a historical, esthetic, urban, environmental and societal whole."[178] Its loss "profoundly weakens and depersonalizes [the citizens'] sense of community and place."[179]

New York City's Landmark Law recognized both present and future benefits from preserving the past. Present benefits included preserving buildings that "had character, quality, art and style, and a genuine community role."[180] Future benefits included preserving parts of the city "worth handing down to future generations."[181] For both the present and the future, a landmark is "a unique social, esthetic and historical document"[182] bearing within itself pleasures and lessons that cannot be obtained from models or replicas:

> To equate a replica with the genuine artifact is to cheapen and render meaningless its true age and provenance; to imply equal value is to deny the act of creation that was informed and defined by the art and custom of another time and place. What is missing is the original mind, hand, material and eye. In other words, authenticity.[183]

Preservation involves the environmental future as well as its present. It recognizes and encourages the present "public uses of

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> the folly of second-hand substitutes for first-rate inventions, the esthetics and ethics of duplication measured against the creative act. . . .

HUXTABLE, BRUCKNER, *supra* note 11, at 210.

177 Huxtable, Interior, *supra* note 16, at 39.

178 Huxtable, *supra* note 8, at 3.

179 Ada Louise Huxtable, *From Sentiment to Social Force*, N.Y. TIMES, Feb. 3, 1974, § 2, at 26.

180 Ada Louise Huxtable, *New York Rediscovered*, N.Y. TIMES, July 18, 1976, § 6, at 33.

181 Goldberger, *supra* note 1, at E3.

182 Ada Louise Huxtable, *A Landmark House Survives the Odds*, N.Y. TIMES, Feb. 28, 1980, § 3, at 1, 10.

183 Huxtable, Interior, *supra* note 16, at 34. *See* HUXTABLE, ARCHITECTURE, *supra* note 10, at 68 ("Every age has its architectural vocabulary, based on its particular articles of faith. All architects build with such a set of principles, whether they invent them . . . or inherit them as received wisdom. . . .That is how style evolves."). *See also* HUXTABLE, BRUCKNER, *supra* note 11, at 46 ("The Times Tower was never a masterpiece; it was ambitious, pedestrian and dull. But it was legitimately conceived for its day, and such buildings, as they embody and preserve historic attitudes and styles, actually improve with age.").

history, art, and craftsmanship;"[184] it appreciates that "there is a force and drama tied directly to the forms and nature of the physical environment that is the quality of the metropolis itself."[185] It also recognizes that landmarks represent "the forms and evidence of American civilization" the preservation of which saves "tomorrow's heritage."[186] Preservation is spurred by the recognition that

> the present is a dimensionless bore without the past. We all know that the richness, the interest, the art and character of cities depends on the contrasts and continuity of new and old. . . .We accept that the spirit and the senses must be satisfied by human scale and historic anchors.[187]

Preservation enriches "the quality and character of the present by retaining the spirit and substance of the past;"[188] preservation retains for us in the present and for those in the future a "quality and a sense of time and place."[189] Those are its benefits, which are available to all who live in a civilized community.[190] That is what would be lost by destruction or defacement. That is why government can not only intercede to preserve but can, consistent with the Fifth Amendment, require the owner to bear the cost.

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184 Ada Louise Huxtable, *The Fight to Save an 1840 Vermont Inn*, N.Y. TIMES, July 30, 1981, at C10.

185 HUXTABLE, KICKED, *supra* note 13, at 155.

186 HUXTABLE, BRUCKNER, *supra* note 11, at 115.

187 Ada Louise Huxtable, *The Bulldozer Approaches a Historic Block*, N.Y. TIMES, July 14, 1974, § 2, at 21.

188 HUXTABLE, GOODBYE, *supra* note 29, at 10.

189 HUXTABLE, KICKED, *supra* note 13, at 105.

190 Huxtable described the experience of sitting on a balcony overlooking the concourse at Grand Central Terminal:

> Rising into those vast heights is the buzz of all the voices of travelers and transients mingling in the upper air. . . .The soft, susurring sound transforms activity and motion into a shared experience; it contains the timeless promise of the city's, and the world's, pleasures and adventures. This is the essence of urbanity.

Huxtable, Track, *supra* note 33, at A17.