

NOTE

OFF THE MARK?: MITIGATING THE CONFLICT BETWEEN LOCAL LANDMARK ORDINANCES AND INDIVIDUAL PROPERTY RIGHTS

I. INTRODUCTION

Historic preservation efforts are fairly new in the United States.¹ The New York City Landmark Commission, for example, was only established in 1965.² Already in our short history as a nation, there have been efforts to demolish Independence Hall, Mount Vernon, the Gettysburg Battlefield, and many other historical sites.³ In Europe however, significant and substantive historic preservation efforts began much earlier.⁴ Property in Europe has often been seen as necessary to preserve because it is thousands of years old.⁵ In contrast, the United States has not always allowed its property to take on historic significance, and because of this, property has been altered or destroyed before it could age to the point where it takes on enough significance to warrant preservation efforts.⁶

Historic preservation is imperative to a country, state, or city both culturally and psychologically.⁷ Preservation helps citizens to understand the significance of different time periods.⁸ The designation of landmarks

1. Daniel T. Cavarelo, *From Penn Central to United Artists' I and II: The Rise of Immunity of Historic Preservation Designation from Successful Takings Challenges*, 22 B.C. ENVTL. AFF. L. REV. 593, 596, 598-99 (1995).

2. *Id.* at 601.

3. *Id.* at 597-98.

4. *Id.* at 594-95.

5. *Id.* at 596; Joseph L. Sax, *Heritage Preservation as a Public Duty: The Abbe Gregoire and the Origins of an Idea*, 88 MICH. L. REV. 1142, 1148-49 (1990).

6. Michael R. Allen, *What Historic Preservation Can Learn from Ferguson*, in BENDING THE FUTURE: FIFTY IDEAS FOR THE NEXT FIFTY YEARS OF HISTORIC PRESERVATION IN THE UNITED STATES 47 (Max Page & Marla R. Miller eds., 2016); Carrie Hojnicky, *Penn Station, the Hippodrome, and 10 Other Lost Buildings of New York City*, ARCHITECTURAL DIGEST (June 12, 2017), <https://www.architecturaldigest.com/gallery/lost-buildings-of-new-york-city>.

7. Barron M. Flood, Comment, "Every Sort of Interest": Penn Central and the Right to Community Making Places, 19 U. PA. J. CONST. L. 767, 769, 776-77 (2017).

8. Julia Rocchi, *Six Reasons to Save Old Buildings*, NATIONAL TRUST FOR HISTORIC

may also be economically beneficial because of the ability to facilitate tourism and increase property values.⁹

While society benefits from historically significant structures, landmark status often imposes significant costs on the individual property owner.¹⁰ The issue materializes when landmark status harms property values by limiting an owner's ability to use the property in order to achieve its highest value and most effective use.¹¹

Individual property rights and historic preservation efforts are two immensely important considerations, which often come into conflict through the concept of regulatory takings.¹² Property owners claim that historic preservation regulations are a violation of the Takings Clause of the Fifth Amendment, since they deprive property owners of their land without "just compensation."¹³ On the other hand, advocates for historic preservation argue that this regulation is a necessary action for the public good, which does not amount to a deprivation of property.¹⁴ The question, as is the case in many other circumstances, becomes: Who should bear the cost of the public good?¹⁵ This Note seeks to identify a potential way to mitigate that conflict so that both sides may bear and risk a little less.¹⁶

Using the legal framework developed in the historic *Penn Central Railroad* case, this Note surveys the status of historic preservation law in the present day United States, through the lens of both property rights advocates and proponents of historic preservation.¹⁷ The legal framework developed in *Penn Central* remains intact, and as it turns out, the factual scenario surrounding that case is fairly common in today's property law landscape.¹⁸

PRESERVATION (Nov. 10, 2015), <https://savingplaces.org/stories/six-reasons-save-old-buildings>.

9. Cindy Moy, Note, *Reformulating the New York City Landmarks Preservation Law's Financial Hardship Provision: Preserving the Big Apple*, 14 CARDOZO ARTS & ENT. L.J. 447, 482; Rocchi, *supra* note 8.

10. Cavarello, *supra* note 1, at 608-09; J. Peter Byrne, *Regulatory Takings Challenges to Historic Preservation Laws After Penn Central*, 15 FORDHAM ENVTL. L. REV. 313, 320 (2004).

11. Cavarello, *supra* note 1, at 608-09.

12. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123-24 (1978); Cavarello, *supra* note 1, at 605-06.

13. *Penn Cent. Transp. Co.*, 438 U.S. at 128-29.

14. *Id.* at 138.

15. *Id.* at 123-24.

16. *See infra* Part IV.1.

17. *Penn Cent. Transp. Co.*, 438 U.S. at 124-25, 127-28; *infra* Part III.

18. *Penn Cent. Transp. Co.*, 438 U.S. at 115-20; *Lilly Invs. v. City of Rochester*, 674 F. App'x 523, 524 (6th Cir. 2017); *Cal.-Nev. Annual Conf. of the Methodist Church v. City of San Francisco*, 74 F. Supp. 3d 1144, 1148-50 (N.D. Cal. 2014); *Old Orchard Conservancy v. City of Santa Anna*, No. G053003, 2017 WL 1908320, at *1 (Cal. Ct. App. 4th Dist. May 20, 2017).

In *Penn Central*, Grand Central Station was declared a landmark with all of the restrictions on development that come with landmark designation, but five months after this designation, the Penn Central Railroad Company developed a plan to build offices on top of the train station.¹⁹ The new landmark status rendered this design in violation of the landmark ordinance, and thus, the Penn Central Railroad Company was prohibited by the Commission from pursuing it.²⁰ Many cases that are currently being litigated in the historic preservation arena follow a similar trajectory.²¹ The property starts as a non-landmark, but when the property owner submits a design to the local ordinance or municipality, the design proposal then alerts the local ordinance or municipality to the fact that the property in question may have historic value.²² The property is subsequently landmarked, the design proposal is then rejected, since it is now in violation of the local landmark ordinance, and the property owner files suit.²³ There is much at stake for these property owners, as they may have invested a certain amount of money into the property, expecting the ability to implement this development and increase the value of the property.²⁴ They may also be forced to bear the costs of keeping the property in “good repair.”²⁵ However, on the other hand, the fate of historic preservation law hinges on these cases, and the ability of governments—national, state, and local—to be able to landmark properties with historic, cultural, or aesthetic value and protect them from degradation, deterioration, and alteration is essential.²⁶

Throughout this Note, the New York City Landmark Preservation Commission and Ordinance is used as an illustrating example of local landmark law.²⁷ The solutions proposed are specifically applied to the New York City Landmark Ordinance, but the principles are applicable in other jurisdictions as well.²⁸

In Part II, this Note gives background information pertaining to the evolution of historic preservation law in the United States, the rise of the

19. *Penn Cent. Transp. Co.*, 438 U.S. at 111-12, 115-16.

20. *Id.* at 116-17.

21. *Lilly Invs.*, 674 F. App'x at 524; *Cal.-Nev. Annual Conf.*, 74 F. Supp. 3d at 1148-50; *Old Orchard*, 2017 WL 1908320, at *1-2.

22. *Lilly Invs.*, 674 F. App'x at 524; *Cal.-Nev. Annual Conf.*, 74 F. Supp. 3d at 1148; *Old Orchard*, 2017 WL 1908320, at *1.

23. *Lilly Invs.*, 674 F. App'x at 526; *Cal.-Nev. Annual Conf.*, 74 F. Supp. 3d at 1148; *Old Orchard*, 2017 WL 1908320, at *1-2.

24. *Lilly Invs.*, 674 F. App'x at 524; *Cal.-Nev. Annual Conf.*, 74 F. Supp. 3d at 1148.

25. *Penn Cent. Transp. Co.*, 438 U.S. at 111-12.

26. *Id.* at 124-25.

27. 3 NYC Admin. Code §§ 25-301 to 322 (1996); *see infra* Part II-IV.

28. 3 NYC Admin. Code §§ 25-301 to 322.

property rights movement, and the regulatory takings doctrine.²⁹ Part III explains the inherent conflict between historic preservation laws and property rights interests, and the judicial decisions that leave the future of each uncertain and potentially vulnerable.³⁰ In Part IV, this Note offers a solution to this conflict by amending each state's or city's landmark preservation law to take away the minimum age requirement for landmark designation and moving to a totality of the circumstances test, as well as by implementing procedural changes in order to provide greater notice to property owners.³¹

II. THE BIRTH OF THE HISTORIC PRESERVATION AND PROPERTY RIGHTS MOVEMENTS

Historic preservation in the United States has mostly developed over the last hundred years and that development has increasingly come into conflict with property rights.³² The popularity of the property rights movement has ebbed and flowed in the last fifty years, increasing at certain points in recent history in response to what some view as abuses of government power at the expense of the individual property owner.³³ Early regulatory takings cases revealed a tension between the need for the government to regulate without having to compensate every injury and the importance of individual property rights.³⁴ Some per se tests developed out of regulatory takings cases.³⁵ Outside of the per se exceptions, a case-by-case ad hoc approach has developed.³⁶ This approach has important consequences for both historic preservation law and individual property rights.³⁷

Below, Subpart A gives an overview of the history of the historic preservation movement and what led to its pervasiveness in American law, existing at the national, state, and local levels, as well as the

29. See *infra* Part II.

30. See *infra* Part III.

31. See *infra* Part IV.

32. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 108-10 (1978); Cavarello, *supra* note 1, at 596.

33. STEVEN J. EAGLE, CATO INSTITUTE, CATO POLICY ANALYSIS NO. 558: THE BIRTH OF THE PROPERTY RIGHTS MOVEMENT 2 (Dec. 15, 2005); Nancie G. Marzulla, THE PROPERTY RIGHTS MOVEMENT: HOW IT BEGAN AND WHERE IT IS HEADED (1995), in *LAND RIGHTS: THE 1990S' PROPERTY REBELLION* 2, 3, 5 (Bruce Yandle ed. 1995).

34. See EAGLE *supra* note 33, at 15; Cavarello, *supra* note 1, at 618-19; Flood, *supra* note 7, at 781-82.

35. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992); *Loretto v. Teleprompter Manhattan Catv Corp.*, 458 U.S. 419, 434-35 (1982).

36. See *Penn Cent. Transp. Co.*, 438 U.S. at 124.

37. *E.g.*, Cavarello, *supra* note 1, at 618; Flood, *supra* note 7, at 772.

important goals accomplished by historic preservation efforts.³⁸ Subpart B details the current state of national, state, and local historic preservation laws.³⁹ Subpart C discusses the Takings Clause of the Constitution and the judicial history of the regulatory takings doctrine.⁴⁰ Next, Subpart D discusses the background of the progression and history of the property rights movement, recent cases indicating an increase in deference to property rights in judicial decisions, and the arguments that are put forth in favor of greater protections of individual property rights.⁴¹

A. *The Historic Preservation Movement in the United States*

The formal historic preservation movement dates back to eighteenth century Europe.⁴² The movement later took root in the United States in the twentieth century.⁴³ In both places, at first, historic preservation was driven by private individuals looking to instill a sense of patriotism in their fellow citizens.⁴⁴ Historic preservation was mostly left to the private sector, such as the private group, the Mount Vernon Ladies Association, which organized to save George Washington's home at Mount Vernon in 1858.⁴⁵ Government intervention came sporadically thereafter, usually in response to strong public support to preserve certain properties.⁴⁶ For example, in 1816, the City of Philadelphia purchased Independence Hall in response to local movements.⁴⁷

Later on, public entities, including national, state, and local governments waded into the issue of historic preservation with increasing frequency.⁴⁸ The first federal American preservation related law was the Antiquities Act,⁴⁹ which was passed in 1906 and protected archeological sites by criminalizing the looting of historic sites and provided a process for designating some national monuments.⁵⁰ Preservation was originally, in the late nineteenth century, under the

38. See *infra* Part II.A.

39. See *infra* Part II.B.

40. See *infra* Part II.C.

41. See *infra* Part II.D.

42. E.g., Cavarello, *supra* note 1, at 594.

43. *Id.* at 599.

44. E.g., *id.* at 597.

45. See *id.* at 598.

46. See Alexander Kazam, *From Independence Hall to the Strip Mall: Applying Cost-Benefit Analysis to Historic Preservation*, 47 LEWIS & CLARK ENVTL. L. 429, 437 (2017).

47. E.g., Cavarello, *supra* note 1, at 597.

48. See Kazam, *supra* note 46, at 437-38.

49. Act of June 8, 1906, ch. 3060, 34 Stat. 225 (codified at 16 U.S.C. §§ 431-33).

50. See Jess R. Phelps, *Preserving National Historic Landmarks?*, 24 N.Y.U. ENVTL. L.J. 137, 145 (2016).

jurisdiction of the War Department, as it, at the time, mainly focused on the preservation of battlefields.⁵¹ Government intervention into preservation grew substantially in 1935 as a part of the New Deal.⁵² President Roosevelt transferred administration of preservation efforts from the War Department to the National Park Service and implemented programs in order to improve employment amongst architects and historians.⁵³ Overall, though a large expansion from the previous state of historic preservation law, these programs were slow to implement significant change and faced many challenges to effective preservation.⁵⁴ Even today, national historic preservation efforts have come to occupy a more symbolic or “largely honorific” place in our nation’s consciousness.⁵⁵

What is perceived as one of the greatest failures of historic preservation in New York is the demolition of the original Pennsylvania Station (“Penn Station”).⁵⁶ The historic preservation movement in New York City was already underway when the demolition of Penn Station began.⁵⁷ However, the loss of this monumental building helped the movement gain traction and public support.⁵⁸ The original Penn Station was built in 1910 in beaux-arts style by the architecture group McKim, Mead & White, with an ornate façade that stretched over two city blocks.⁵⁹ The demolition was announced in 1961 in order to construct Madison Square Garden, and it led to the formation of citizen groups in opposition, such as the Action Group for Better Architecture in New York.⁶⁰ In addition to Penn Station, there were many other historic buildings and properties at risk at the time.⁶¹ Ada Lousie Huxtable, a writer for the *New York Times*, stated in 1962 that the “old building mortality rate was running dangerously close to 100 per cent.”⁶² In 1958,

51. *See id.* at 146.

52. *See id.* at 145, 147-57.

53. *See id.* at 146, 148.

54. *See id.* at 156-57.

55. *See id.* at 167.

56. *E.g.*, Nick Bryant, *How Penn Station Saved New York’s Architectural History*, BBC NEWS (May 28, 2015), <http://www.bbc.com/news/magazine-3289001>; *Pennsylvania Station*, THE NEW YORK PRESERVATION ARCHIVE PROJECT (2016), <http://www.nypap.org/preservation-history/pennsylvania-station>.

57. *E.g.*, *Pennsylvania Station*, *supra* note 56.

58. *E.g.*, Bryant, *supra* note 56; *Pennsylvania Station*, *supra* note 56.

59. *E.g.*, *Pennsylvania Station*, *supra* note 56.

60. *E.g.*, Bryant, *supra* note 56 (referring to the current Penn Station which replaced the Beaux-Arts style structure, “Outside of the US penitentiary system, it is hard to think of a more joyless building.”); *Pennsylvania Station*, *supra* note 56.

61. *E.g.*, JAMES M. LINDGREN, PRESERVING SOUTH STREET SEAPORT: THE DREAM AND REALITY OF A NEW YORK URBAN RENEWAL DISTRICT 35, 41 (2014).

62. *Id.* at 35.

there was even a proposed demolition of Ellis Island in order to construct a resort on the property.⁶³

The New York City Landmarks Preservation Commission was subsequently developed in 1965.⁶⁴ Public and official support for the preservation of landmarks was high.⁶⁵ New York City Mayor John V. Lindsay stated in 1968: “When in any doubt on landmarks, I say designate.”⁶⁶ Today, New York has a large variety of designated landmarks including buildings, historical districts, and other property.⁶⁷ Some of the notable sites include the New York Public Library, St. Patrick’s Cathedral, and one of the most recent editions, The Stonewall Inn.⁶⁸

Historic preservation serves many important goals including patriotism, cultural identity, creating community-making places, preserving property values, facilitating tourism, and safeguarding historic and aesthetic heritage.⁶⁹ In the majority opinion of *Penn Central*, Justice Brennan acknowledged the increase of historic preservation laws enacted by municipalities.⁷⁰ He discussed how in recent years, large numbers of historic structures have been destroyed “without adequate considerations of either the values represented therein or the possibility of preserving the destroyed properties for use in economically productive ways.”⁷¹ Additionally, he purported that there is a “widely shared belief that structures with special historic, cultural, or architectural significance enhance the quality of life for all.”⁷² Ada Louise Huxtable, in her 1963 editorial, *Farewell to Penn Station*, stated: “[W]e will probably be judged not by the monuments we build but by those that we have destroyed.”⁷³

63. *E.g., id.*

64. See NYC LANDMARKS PRESERVATION COMMISSION: TYPES AND CRITERIA (2016), <https://www1.nyc.gov/site/lpc/index.page>.

65. See LINDGREN, *supra* note 61, at 35.

66. *Id.*

67. NYC LANDMARKS PRESERVATION COMMISSION, *supra* note 64.

68. Leah Rendon, *List of New York City’s Historical Landmarks*, USA TODAY, <http://traveltips.usatoday.com/list-new-york-citys-historical-landmarks-62411.html>; The Associated Press, *New York City Makes Stonewall Inn a Landmark*, N.Y. TIMES (June 23, 2015), <https://www.nytimes.com/2015/06/24/nyregion/new-york-city-makes-stonewall-inn-a-landmark.html>.

69. 3 NYC Admin. Code § 25-301 (1996).

70. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 108-09 (1978); see also Flood, *supra* note 7, at 774.

71. See *Penn Cent. Transp. Co.*, 438 U.S. at 108; see also Flood, *supra* note 7, at 774.

72. See 3 NYC Admin. Code §§ 25-301 to 322; *Penn Cent. Transp. Co.*, 438 U.S. at 108; see also Flood, *supra* note 7, at 774.

73. Ada Louise Huxtable, *Farewell to Penn Station*, N.Y. TIMES, Oct. 30, 1963, at 38.

Patriotism was one of the primary motivations in the early stages of historic preservation, particularly at the national level.⁷⁴ Historic preservation scholarship has often focused on the effect on the observer of historic places, instilling a sense of patriotism, as well as cultural and historic identity and pride.⁷⁵ Barron M. Flood believes that this value is so great to the public that he argues that there is a public interest in preserving historic structures such that the public has some sort of ownership interest in the rights of historic properties.⁷⁶ Further, he argues, “The right to a community seems almost fundamental.”⁷⁷ Flood contends that since much of each historic property’s value is created by the public and the citizens of a community, they have a right to “community-making places” and stand to suffer detriment stemming from the loss of these structures, individual members of the public should hold legal standing akin to someone with property ownership rights in that specific property.⁷⁸

There are both economic costs and benefits to historic preservation, however, it is widely held that the overall benefits to the public at large tend to outweigh the costs.⁷⁹ The criticisms of preservation tend to include decreased access to affordable housing; harm to the environment due to increased urban sprawl; the direct loss to individual property owners and the loss of development; and sometimes consequentially, progress.⁸⁰ The opportunity costs imposed by historic preservation regulations are the greatest where the zoning ordinances do not prohibit vertical development and the buildings or properties are low rise.⁸¹ While these are all important considerations, the economic benefits tend to be superior, including the fact that rehabilitation of an old building is more economically and environmentally efficient, preservation tends to increase and preserve property values, as well as the property values of entire neighborhoods and communities, and that preservation creates jobs and increases tourism.⁸² Historic preservation, though not perfect,

74. See Phelps, *supra* note 50, at 143, 145; Flood, *supra* note 7, at 769.

75. See Flood, *supra* note 7, at 769.

76. See *id.* at 776.

77. *Id.* at 782.

78. *Id.* at 768, 773 (citing Penn Cent. Transp. Co. v. City of New York City, 366 N.E.2d 1271, 1275 (N.Y. 1977)).

79. E.g., RANDALL MASON, ECONOMICS AND HISTORIC PRESERVATION: A GUIDE AND REVIEW OF THE LITERATURE, THE BROOKINGS INSTITUTION, METROPOLITAN POLICY PROGRAM 1, 5 (2005).

80. Kazam, *supra* note 46, at 459.

81. See *id.* at 460.

82. See MASON, *supra* note 79, at 7, 8.

has an important role in both the long and short term economic growth of cities and communities.⁸³

Additional arguments for historic preservation or adaptive reuse of old buildings include the fact that buildings built before World War II tend to be comprised of better materials, there may be potential in a destroyed building that is unrealized, many studies, such as Jane Jacobs in *The Death and Life of Great American Cities*, suggest that there are economic advantages to new businesses using old buildings, and that people are generally more attracted to the warmth of old buildings, which act as reminders of the city's culture and heritage.⁸⁴

The need for historic preservation is still dire today.⁸⁵ Despite the strides made by *Penn Central* and jurisprudence since, historic buildings are still torn down.⁸⁶ Often, individual property owners are left with control over the fate of these properties.⁸⁷ One example is St. Laurentius, a church in Philadelphia, where the Archdiocese of Philadelphia instructed priests to not help in preservation efforts for church buildings, which is directly at odds with the interests of the community these priests are supposedly serving.⁸⁸ The reasons for these instructions were likely economical, illustrative of the harm that landmark status may have on property owners, but could also lead to serious consequences for the fate of St. Laurentius and many other structures like it.⁸⁹

In New York, a lack of historic preservation law has led to the destruction of many significant would-be landmarks, one of the most famous of these being the demolition of Penn Station, as discussed previously.⁹⁰ Additionally, the Singer Building, home of the Singer Manufacturing Company, erected in 1908—which was briefly the tallest building in the world—was demolished.⁹¹ The Hippodrome, one of New York's largest theaters at the time of its construction, was destroyed in 1939 and replaced by an office building.⁹² The Biltmore Hotel was stripped to its building skeleton in 1981 and replaced with the Bank of America Plaza, and the Ritz Carlton was destroyed in 1963 and turned into an office tower.⁹³ These are all buildings of historical significance,

83. *See id.* at 5.

84. Rocchi, *supra* note 8.

85. *E.g.*, Flood, *supra* note 7, at 778.

86. *See id.*

87. *See id.*

88. *See id.*

89. *See id.*

90. *E.g.*, Bryant, *supra* note 56; *Pennsylvania Station*, *supra* note 56.

91. Hojnicky, *supra* note 6.

92. *Id.*

93. *Id.*

architectural uniqueness, and indications of the city's culture and heritage, lost forever.⁹⁴

Much like the sites that have been lost through the years, despite the prevalence of historic preservation ordinances in most cities, buildings and properties may still be at risk.⁹⁵ For example, recently, a building by the well-known Brutalist architect, Marcel Breuer⁹⁶ has been voted, by the Fairfax County board of supervisors in Fairfax, Virginia, to be destroyed in order to erect a townhouse development on the property.⁹⁷ This occurred despite the fact that historians argued for the site's significance, the planning commission voted not to demolish it, and there was an online petition signed by over 1600 people to stop the demolition.⁹⁸

Likewise, many other Brutalist and Modernist structures are at risk or have already been demolished.⁹⁹ Chicago's Prentice Hospital was a Brutalist landmark designed by Bertrand Goldberg and referred to by structural engineer, William F. Baker, as "the only example of its type anywhere in the world."¹⁰⁰ The Chicago Landmarks Commission declined to designate it, and subsequently, there was a national campaign to seek its preservation.¹⁰¹ It was nevertheless demolished in 2014.¹⁰² Seven buildings by the famous Brutalist/Modernist architect Paul Rudolph were demolished in a five year span in the early 2000s.¹⁰³ The same threat and fate are imminent for many other Modernist and Brutalist buildings as well, many of which, such as Phillis Wheatley Elementary School in New Orleans, which was a segregated school for black students, had an internationally acclaimed design and was

94. Rocchi, *supra* note 8.

95. *E.g.*, Flood, *supra* note 7, at 778.

96. Ironically, Marcel Breuer is the architect behind the proposed and rejected Grand Central Station development. *See Penn Cent. Transp. Co.*, 438 U.S. at 116.

97. Patrick Lynch, *2 Classic Marcel Breuer Buildings at Risk for Demolition to Meet Opposite Fates*, ARCH DAILY (Aug. 2, 2016), <https://www.archdaily.com/792583/2-classic-marcel-breuer-buildings-at-risk-for-demolition-to-meet-opposite-fates>.

98. *Id.*

99. Cassie Owens, *Modernist Architecture, At-Risk or Demolished*, NEXT CITY (Oct. 16, 2013), <https://nextcity.org/daily/entry/modernist-architecture-at-risk-or-demolished>.

100. Deanna Isaacs, *Save Prentice or Save Lives*, READER (Sept. 10, 2012), <https://www.chicagoreader.com/chicago/northwestern-stoops-to-demolish-prentice-hospital/Content?oid=7412519>; Bertrand Goldberg, *Prentice Women's Hospital*, ARCHITECTURAL (2018), <http://architectuul.com/architecture/prentice-women-s-hospital>.

101. Elizabeth Byrd Wood, *Advocacy Lessons from the Campaign to Save Prentice*, FORUM J., Winter 2015, at 31, 32.

102. *Id.* at 29, 31.

103. Owens, *supra* note 99.

demolished in 2011, hold rich historical backgrounds and serve as important reminders of our past.¹⁰⁴

A major struggle that preservation encounters is the fact that these buildings are being denied the opportunity to gain the sufficient historical significance or appreciation needed to become historic in character.¹⁰⁵ Likewise, from today's perspective, Modernist and Brutalist structures may not seem important to preserve when compared to the economic benefit demolition and redevelopment may hold.¹⁰⁶ However, when viewed with the benefit of hindsight, Grand Central Station, the original Penn Station, and other buildings from that era appear much more significant and not simply vestiges of an outdated architectural style.¹⁰⁷

Michael R. Allen makes a similar argument, using as a case study, Ferguson, Missouri, the site of weeks of demonstrations after the death of Michael Brown in 2014.¹⁰⁸ Particularly in situations of historic importance that may be less conventional than, for example, a building, there is a very real risk that the areas of historic significance will be altered, almost certainly before the thirty to fifty year requirement for landmark designation has come to pass.¹⁰⁹ As Allen sees it, "Sites that acquire significant public meaning instantly through mass action or unrest often are bulldozed, cordoned off, or otherwise closed before the future of their physical forms can be discussed or debated."¹¹⁰ Allen pushes for greater recognition and earlier efforts of preservation for unconventional sites.¹¹¹ The same ideas may be beneficial for other properties as well.¹¹²

Owens illustrates the conflict further by pointing out: "Perhaps that makes preserving modernist gems more dire — for younger Americans to gain an appreciation for the work, the buildings would need to still be around."¹¹³ Once these buildings are taken down, they are lost forever.¹¹⁴

104. *Historic Phillis Wheatley Elementary School Torn Down in Treme*, THE TIMES-PICAYUNE (June 17, 2011, 10:00 PM), http://www.nola.com/education/index.ssf/2011/06/historic_phillis_wheatley_lem.html.

105. Owens, *supra* note 99.

106. *Id.*

107. *Id.*

108. Allen, *supra* note 6, at 44.

109. *Id.* at 47 ("Yet Canfield Green may be gone by the time we can historicize Ferguson Will a plaque or monument convey the events of 2014 in any teachable way?").

110. *Id.*

111. *Id.*

112. *Id.*

113. Owens, *supra* note 99.

114. Rocchi, *supra* note 8.

“Regret goes only one way,”¹¹⁵ and we are unable to renovate or save a historic site once it is gone.¹¹⁶ A goal of historic preservation should be to protect properties and buildings from the threat of what is popular at the given moment.¹¹⁷

B. Historic Preservation Law at the National, State, and Local Levels

Historic preservation law operates at the national, state, and local levels.¹¹⁸ These different levels, to some extent, interact with each other; however, local landmark law tends to be the most contentious and continues to subject property owners to the loftiest restrictions.¹¹⁹ Each level of landmark protection law has similar qualifications and one building or property could be concurrently protected by national, state, and local regulations.¹²⁰

At the national level, the most important developments in preservation law came with the National Historic Preservation Act of 1966 and the 1980 Amendment to the National Historic Preservation Act.¹²¹ The National Historic Preservation Act of 1966 broadened the federal role in evaluating properties and authorized grants to state and local governments for preservation use.¹²² It also created the National Register of Historic Places, which documented landmarks and potential landmarks.¹²³ The 1980 Amendments required the establishment of detailed criteria for designating National Historic Landmarks and for giving notice to interested parties with regard to pending nominations.¹²⁴

Today, only about twenty properties are designated each year on the national level, as it is difficult to obtain designation.¹²⁵ The criteria used includes: association with a past historic event, association with

115. *Id.*

116. *Id.*

117. *Id.*

118. *E.g.*, N.Y. Parks Rec. & Hist. Preserv. Law § 14.07 (2017); Kazam, *supra* note 46, at 438.

119. *E.g.*, Kazam, *supra* note 46, at 438.

120. National Historic Preservation Act Amendments of 1980, Pub. L. No. 96-515, § 201, 94 Stat. 2987 (codified as amended at 54 U.S.C. § 320101 (Supp. II 2015)); N.Y. Parks Rec. & Hist. Preserv. Law § 14.07 (2017); 3 NYC Admin. Code §§ 25-301 to 322 (1996); The Associated Press, *supra* note 68; Scott Horsely, *Obama Names LGBT Landmark As National Monument*, N.Y. TIMES (June 24, 2016), <https://www.npr.org/2016/06/24/483385747/obama-names-lgbt-landmark-as-national-monument>.

121. *E.g.*, Phelps, *supra* note 50, at 160.

122. *See id.*

123. National Historic Preservation Act of 1966, Pub. L. No. 89-665, 16 U.S.C. § 470, 80 Stat. 915 (1966) (prior to 1980 amendment) (Sec. 101 (a)(1)); Phelps, *supra* note 50, at 160.

124. *See* National Historic Preservation Act Amendments of 1980 Pub. L. No. 96-515, § 201, 94 Stat. 2987 (codified as amended at 54 U.S.C. § 320101 (Supp. II 2015)); Phelps, *supra* note 50, at 162.

125. *See* Phelps, *supra* note 50, at 164.

important people, association with “ideals that have shaped the nation,” outstanding architectural design or construction, properties that characterize a way of life, and places that “yield information about the nation’s past.”¹²⁶ Properties must also be fifty years old with limited exceptions.¹²⁷ A property becomes a National Historic Landmark through nomination by the owner or an advocate for the property with consent of the owner.¹²⁸ It is then evaluated by the Advisory Board and ultimately recommended to the Secretary of the Interior for the final determination.¹²⁹ However, the status of a property as a National Landmark is “largely honorific” and has very little actual regulatory impact.¹³⁰

At the state level, the process is fairly similar.¹³¹ In New York State, one distinction is that the nomination proposals may be submitted by the property owner, a municipal official, the local historic preservation board or commission, or a member of the public.¹³² It is required that property owners be given notice thirty days prior to the review of the property’s proposal.¹³³ State regulations impose some restrictions on properties, but particularly in urban areas, such as New York City, the majority of regulations, and thus conflict with individual property owners, comes at the local level.¹³⁴

Today, landmark preservation law in New York City is primarily governed by Title 25 of the New York City Administrative Code.¹³⁵ The Landmarks Preservation Commission is responsible for overseeing the designation of landmarks and historic districts.¹³⁶ The Commission is made up of eleven commissioners who are appointed by the mayor.¹³⁷ They manage a staff of architects, historians, preservationists, attorneys, archeologists, and administrative employees.¹³⁸ Currently, there are approximately 36,000 landmarked properties in New York City and 141 historic districts.¹³⁹

126. *Id.*

127. *Id.* at 165.

128. *Id.*

129. *Id.* at 167.

130. *Id.*

131. *See* N.Y. Parks Rec. & Hist. Preserv. Law § 14.07 (2017).

132. *See id.* § 14.09.

133. *Id.*

134. *See* Phelps, *supra* note 50, at 169.

135. 3 NYC Admin. Code §§ 25-301 to 322 (1996).

136. *See* NYC LANDMARKS PRESERVATION COMMISSION, *supra* note 64.

137. *See id.*

138. *See id.*

139. *See id.*

The landmark designation process begins when either the individual property owner or the commission applies for the property to become a landmark.¹⁴⁰ Subsequently, expert reports from architects, preservationists, and others will be compiled, and a public hearing will be held.¹⁴¹ After the public hearing, where the owner or other members of the community are able to argue for or against designation, the commission will vote on whether or not to designate.¹⁴² The decision shall act to designate within twenty-four months after the date that the motion to calendar the item was adopted by the council.¹⁴³

The factors that the Commission looks to in its decision are the cultural, historical, and aesthetic value of the property.¹⁴⁴ Additionally, the property must be at least thirty years old.¹⁴⁵ Once a property is designated as a landmark, the individual property owner must get the Commission's permission to make alterations to the property.¹⁴⁶ In addition, the property owner must maintain the structure's features in "good repair."¹⁴⁷ Forbidden alterations encompass a wide variety of changes including the installation of an air conditioner, making any changes to the façade, or the removal of fire escapes.¹⁴⁸ There is no measure in the ordinance which gives any amount of financial support to these property owners in order to maintain these conditions or give them reimbursement for the restrictions.¹⁴⁹

In order for the property owner to deconstruct, reconstruct, or alter any part of the property, they must apply to the Commission for a certificate of appropriateness.¹⁵⁰ The factors the Commission uses in determining whether to grant the certificate of appropriateness include: the effect of the proposed work and the relationship between the proposed work and the features of other improvements in the neighborhood.¹⁵¹ Once a property is designated as a landmark, fairly severe limitations are imposed on the property owner's ability to use their property.¹⁵²

140. Kazam, *supra* note 46, at 440.

141. 3 NYC Admin. Code § 25-303(a) (1996); Kazam, *supra* note 46, at 440.

142. 3 NYC Admin. Code § 25-303(a)(1).

143. *Id.* § 25-303(l)(3).

144. *Id.* § 25-302(n).

145. *Id.*

146. *Id.* § 25-305(a)(1).

147. *Id.* § 25-311(a)-(d).

148. New York City Landmarks Preservation Commission: Rules of the Landmarks Preservation Commission, Title 63 (2013) 4-5, 16, 20.

149. Moy, *supra* note 9, at 450.

150. 3 NYC Admin. Code § 25-305(a)(1).

151. *Id.* § 25-307(b)(1).

152. *See generally id.* §§ 25-302 to 322.

C. *A Brief History of the Takings Clause and Regulatory Takings*

The Fifth Amendment includes a provision known as the Takings Clause, which states that “private property [shall not] be taken for public use, without just compensation.”¹⁵³ This has been interpreted to mean that the government could take an individual’s property so long as it was for a public purpose, and the government paid the property owner financial compensation for the value of their property.¹⁵⁴ However, there is an issue when there is not an actual, physical condemnation of an individual’s property, but a government regulation that goes too far, so as to amount to a deprivation of property or a “taking” under the Fifth Amendment.¹⁵⁵ This issue has come before the Supreme Court in numerous cases, and subsequently, some framework has been established to analyze these cases.¹⁵⁶ Regardless, there are still some uncertainties in its application in certain circumstances.¹⁵⁷

The premise that government regulation could be in violation of the Takings Clause first came to be litigated in the early twentieth century.¹⁵⁸ Property owners argued that, although some regulation is allowable through the state’s police power, “a property owner retains some level of constitutionally protected use of its property.”¹⁵⁹ Throughout the twentieth century and up until the present day, case law has established some standards to determine when a regulation goes so far as to constitute a taking.¹⁶⁰ In the context of historic preservation regulations, this ad hoc approach leaves room for some landmark designations to potentially be held unconstitutional.¹⁶¹

Penn Central Transportation Company v. City of New York is considered to be the seminal case in terms of regulatory takings analysis for situations which do not fall under the two per se rules that have been established through other case law.¹⁶² The case also happens to implicate historic preservation.¹⁶³ The factual scenario regarding the case will be

153. U.S. CONST. amend. V.

154. *Kelo v. City of New London*, 545 U.S. 472, 477 (2005).

155. U.S. CONST. amend. V.

156. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 138 (1978); *Pa. Coal v. Mahon*, 260 U.S. 393, 415-16 (1922); *Hadacheck v. Sebastian*, 239 U.S. 394, 413-14 (1915).

157. *Flood*, *supra* note 7, at 772, 778.

158. *See Pa. Coal*, 260 U.S. at 415-16; *Hadacheck*, 239 U.S. at 413-14.

159. *Moy*, *supra* note 9, at 462.

160. *See Penn Cent. Transp. Co.*, 438 U.S. at 138; *Pa. Coal*, 260 U.S. at 415-16; *Hadacheck*, 239 U.S. at 413-14.

161. *Flood*, *supra* note 7, at 772, 778. *But see Cavarello*, *supra* note 1, at 616.

162. *Byrne*, *supra* note 10, at 323 (“*Penn Central* was the indispensable step in creating the safe harbor within which historic preservation could become ‘normal.’”).

163. *See Penn Cent. Transp. Co.*, 438 U.S. at 115-16.

discussed in further detail in Part III of this Note.¹⁶⁴ Essentially, Grand Central Station in New York City was declared a landmark, protected by the historic preservation law, and the owners of Grand Central Station filed suit against the city, contending that the restrictions deprived them of their property rights to build offices above the station.¹⁶⁵

The test determined in *Penn Central* is the test used in all regulatory takings cases that do not fall within the per se rules.¹⁶⁶ Peter Byrne states, “*Penn Central* was understood at all times to be a crucial Constitutional test for historic landmark protection laws and for historic preservation as land regulation more generally.”¹⁶⁷ Whether a taking has occurred depends on the particular circumstances of each case.¹⁶⁸ The Court in *Penn Central* determined that historic preservation law is a valid governmental action to “preserve structures of historic or aesthetic interest.”¹⁶⁹ The factors the court looked to were: (1) the nature of the government action; (2) the impact of the action on the investment-backed expectations of the affected property owner; and (3) the economic impact on the property.¹⁷⁰ Applying this balancing test, the court determines whether there has been a “taking” within the meaning of the Fifth Amendment.¹⁷¹ This is the test that has been the most pervasively used in subsequent regulatory takings jurisprudence.¹⁷²

D. *The Property Rights Movement and the Takings Clause*

Historic preservation and other regulation often come in conflict with, and at the expense of, the rights and liberties of individual property owners.¹⁷³ Throughout the last fifty years, we have seen the rise of the property rights movement in the United States, which has the potential to influence the future of historic preservation discourse.¹⁷⁴

Since the framing of the Constitution, there has been debate over and advocating by many for, greater protections of individual property rights.¹⁷⁵ Some argue that our interpretation of property rights should be constrained to the perspective of the framers’ intentions while writing

164. See *infra* Part III.

165. See *Penn Cent. Transp. Co.*, 438 U.S. at 115, 119.

166. See *id.* at 138.

167. Byrne, *supra* note 10, at 314.

168. See *Penn Cent. Transp. Co.*, 438 U.S. at 124.

169. See *id.* at 132, 138.

170. See *id.* at 124-25.

171. U.S. CONST. amend. V; *Penn Cent. Transp. Co.*, 438 U.S. at 124-25.

172. See *Penn Cent. Transp. Co.*, 438 U.S. at 124-25.

173. See EAGLE, *supra* note 33, at 14; Cavarello, *supra* note 1, at 616.

174. See MARZULLA, *supra* note 33, at 2, 3, 5.

175. EAGLE, *supra* note 33, at 6; MARZULLA, *supra* note 33, at 5.

the Constitution.¹⁷⁶ The argument postures that a tyrannical government with the ability to take private property is the very concept the framers largely sought to avoid, and therefore, we should interpret Constitutional provisions through that lens, with a greater deference toward the protection of property rights.¹⁷⁷

The popularity and vehemence of the property rights movement has ebbed and flowed throughout the last fifty years.¹⁷⁸ The 1970s saw the rise of the property rights movement in modern American history through the Carter administration's environmental regulations.¹⁷⁹ However, in the Reagan Era, where the administration was more cooperative with property owners, there was a temporary quieting of these groups.¹⁸⁰ Then, in the 1990s, in response to an increased push for environmental regulations, the movement surged back to the forefront.¹⁸¹ Since then, there has been a push for courts and legislatures to recognize greater protections of property rights.¹⁸² This has taken the form of both organized movements and judicial decisions.¹⁸³

A significant amount of animosity coming from property rights groups is directed against the imposition of environmental regulations and the effects that environmental laws tend to have on property rights.¹⁸⁴ Environmental regulation is usually seen as the most pervasive threat.¹⁸⁵ However, many property rights groups also realize the need to quash historic preservation regulations, contending that historic preservation law also imposes huge restrictions on property owners.¹⁸⁶ Additionally, a court decision against any regulatory taking, regardless of whether it deals with historic preservation directly, has implications for the fate of historic preservation.¹⁸⁷ This is because both environmental regulation and historic preservation challenges are usually based on violations of the Takings Clause.¹⁸⁸ Richard A. Epstein of the Hoover Institution has gone so far as to argue that the

176. EAGLE, *supra* note 33, at 6.

177. See MARZULLA, *supra* note 33, at 5.

178. *Id.* at 3.

179. See *id.* at 1, 5, 8-11.

180. See *id.* at 15.

181. See *id.* at 17-18.

182. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 119 (1978); Jody Lipford & Donald J. Boudreaux, *The Political Economy of State Takings Legislation (1995)*, in *LAND RIGHTS: THE 1990S' PROPERTY REBELLION* 239-44 (Bruce Yandle ed. 1995).

183. See MARZULLA, *supra* note 33, at 3-4.

184. *Id.*

185. *Id.* at 2, 5.

186. *Id.* at 3.

187. *Id.* at 4.

188. See *id.*; EAGLE, *supra* note 33, at 15.

government should be compelled to pay just compensation for every property landmarked.¹⁸⁹

In *The Dirty Dozen*, Robert Levy and William Mellor contend that *Penn Central* specifically, was one of the twelve cases in American history that has come at the greatest expense to individual property rights, since the decision favored government action and has allowed subsequent cases to come out the same way.¹⁹⁰ It is argued that the standard set out in *Penn Central* strongly favors government regulation (specifically historic preservation) being upheld as not in violation of the Takings Clause and the framework is not a fair standard for property owners.¹⁹¹ They contend the standard should be altered for stricter scrutiny on government regulations.¹⁹²

There was also a rise in the property rights movement in response to the 2005 case, *Kelo v. City of New London*, in which the Supreme Court broadened the state's police power with regard to eminent domain.¹⁹³ The property rights movement took this decision as a "call to arms."¹⁹⁴ They pushed for legislation that would curb the abuses of local government officials and achieved many successes.¹⁹⁵ Many states immediately passed legislation in response that restricted the use of eminent domain.¹⁹⁶

There are dozens of these property rights groups, some national and some local.¹⁹⁷ Many of these groups advocate pushing back against government regulation through two means: legislative and judicial.¹⁹⁸ Property rights advocates seek to make changes at the state and local level, helping to pass bills that would lessen the government's ability to take private property.¹⁹⁹ For example, one group proposes a bill that gives an actual numerical percentage of diminution of value that would equate to a taking.²⁰⁰ The groups also view bringing claims against the

189. Richard A. Epstein, *The Problem with NYC's Landmark Preservation Laws*, HOOPER INST. (April 20, 2015), <https://www.hoover.org/research/problem-nycs-landmark-preservation-laws>.

190. See ROBERT LEVY & WILLIAM MELLOR, *THE DIRTY DOZEN: HOW TWELVE SUPREME COURT CASES RADICALLY EXPANDED GOVERNMENT AND ERODED FREEDOM* 169 (Cato Inst. 2010).

191. See Cavarello, *supra* note 1, at 616.

192. See *id.* at 618.

193. See *Kelo v. City of New London*, 545 U.S. 469, 488-89 (2005).

194. E.g., Andrew Yaphe, *Assessments of Backlash: Evaluating the Response of the Property Rights Movement to Kelo v. City of New London*, 2 ELON L. REV. 223, 234 (2011).

195. See *id.* at 232, 234.

196. E.g., *id.* at 232.

197. See EAGLE, *supra* note 33, at 3.

198. See Lipford & Boudreaux, *supra* note 182, at 233, 239; see Erin O'Hara, *Property Rights and Police Powers of the State: Regulatory Takings: An Oxymoron?* (1995), in LAND RIGHTS: THE 1990S' PROPERTY REBELLION 32 (Bruce Yandle ed. 1995).

199. See Lipford & Boudreaux, *supra* note 182, at 242.

200. See *id.* at 244.

government in court to be a potentially powerful way of effectuating change by challenging legislation and arguing for a different Constitutional interpretation than the *Penn Central* test.²⁰¹

A few cases in the 1990s show a willingness of courts to side with individual property owners in the context of regulatory takings.²⁰² Although these cases deal with a particular situation, exactions, they are relevant in demonstrating the Court's willingness to be deferential towards individual property rights over local regulations.²⁰³

In the first of these cases, *Nollan v. California Coastal Commission*, the plaintiffs were granted an application to demolish and rebuild their waterfront property conditioned on allowing a public easement to water access.²⁰⁴ The Court in *Nollan* looked to make sure there is an "essential nexus" between the government action and public interest.²⁰⁵ This heightened standard imposes a high burden on the government for justifying their regulatory action.²⁰⁶

The legal group who litigated the *Nollan* case was the Pacific Legal Foundation, a public interest law firm devoted to pursuing property rights cases.²⁰⁷ The group has taken hundreds of property rights cases and is still very active in that arena today.²⁰⁸ Subsequent to the Court's decision in *Nollan*, the Pacific Legal Foundation created a fund called the "*Nollan* Follow-Up Program" to raise money that would ensure that the property rights movement can continue to build off of those gains achieved through this decision, which was considered a significant victory for property rights.²⁰⁹

In *Dolan v. City of Tiggard*, a 1994 Supreme Court case, the Court expands on *Nollan*.²¹⁰ First, the Court looks at whether there is the "essential nexus," and next looks at the degree of connection between the action and the proposed development.²¹¹ Although both deal with particular situations not applicable to historic preservation cases, both

201. See *id.* at 239-40.

202. *Id.* at 240.

203. See *Dolan v. City of Tiggard*, 512 U.S. 374, 396 (1994); *Nollan v. Cal. Coastal Com.*, 483 U.S. 825, 841-42 (1987).

204. See *Nollan*, 483 U.S. at 828-29.

205. See *id.* at 837.

206. See *id.*; MARZULLA, *supra* note 33, at 15.

207. MARZULLA, *supra* note 33, at 20.

208. *About Pacific Legal Foundation*, PAC. LEGAL FOUND., <https://pacificlegal.org/about/> (last visited Aug. 23, 2018).

209. See MARZULLA, *supra* note 33, at 20.

210. See *Dolan*, 512 U.S. at 396; *Nollan*, 483 U.S. at 837.

211. See *Dolan*, 512 U.S. at 388; *Nollan*, 483 U.S. at 834-35, 837.

demonstrate the Court's willingness to come to a decision on the side of property rights.²¹²

Although there was a huge resurgence in the property rights movement in the 1990s, the issue is still very much relevant today.²¹³ On June 23, 2017, the Supreme Court decided a regulatory takings case in *Murr v. Wisconsin*.²¹⁴ The issue in the case was whether, for regulatory purposes, an individual's property should be considered in whole or in parcels.²¹⁵ In that decision, the government action was upheld.²¹⁶ This is just one example of the relevance of regulatory takings cases and the pushback against government regulation.²¹⁷

The overall issue across many doctrines is how much control the government should be able to enjoy over privately owned property.²¹⁸ The evolution of the regulatory takings doctrine has determined some per se tests where the government action will always be a taking.²¹⁹ However, the majority of cases are left to be determined by the use of an ad hoc balancing test.²²⁰ This test has major implications for historic preservation legislation.²²¹ Historic preservation law comes into conflict with property rights, the protection of which can be expanded greatly by subsequent court decisions.²²² This conflict is discussed in further detail in Part III of this Note.²²³

III. THE CONTINUED CONFLICT BETWEEN THE COMPETING INTERESTS OF HISTORIC PRESERVATION EFFORTS AND INDIVIDUAL PROPERTY RIGHTS

From the inception of historic preservation regulations up until the present day, particularly at the local level, the interests of effective preservation and individual property rights have often come into

212. See *Dolan*, 512 U.S. at 396; *Nollan*, 483 U.S. at 837.

213. See John Groen, *Supreme Court Setback Spurs New Drive to Protect Property Rights Nationwide*, FORBES (Oct. 3, 2017), <https://www.forbes.com/sites/realspin/2017/10/03/supreme-court-setback-spurs-new-drive-to-defend-property-rights-nationwide/#3995a7b4c1b>.

214. 137 S. Ct. 1933 (2017).

215. *Id.* at 1943-44.

216. *Id.* at 1949-50.

217. *Id.*

218. *Id.* at 1939.

219. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982).

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

221. See *infra* Part III.C.1.

222. See *Dolan v. City of Tiggard*, 512 U.S. 374, 396 (1994); *Nollan v. Cal. Coastal Com.*, 483 U.S. 825, 837 (1987).

223. See *infra* Part III.

conflict.²²⁴ Subpart A will examine the legal issue inherent in the conflict between historic preservation and individual property rights.²²⁵ Subpart B will analyze some recent case law dealing with historic preservation in order to identify current trends where the greatest conflict between historic preservation regulations and property rights occurs.²²⁶ Subpart C discusses the potential consequences, on both sides, if this conflict were to continue without mitigation.²²⁷

The legislation, as is, leads to this inherent conflict between these two competing interests.²²⁸ The legislation in many local ordinances, such as New York City, has been heavily criticized, which has led to proposed changes, but there has been very little actual change since the implementation of these laws.²²⁹ Landmark ordinances, particularly in New York, have been referred to as “a complex set of laws that struggles to balance normative values and descriptive realism.”²³⁰

A. Inherent Conflict Between Property Rights and Historic Preservation

Although some argue that, due in large part to the *Penn Central* decision, historic preservation is debatably immune from adverse judicial decisions, historic preservation ordinances are technically subject to the same level of scrutiny as any other government regulation.²³¹ The standard put forth in *Penn Central* is far from settled, and the amorphous standard leaves room for future judicial interpretations to further develop the test or interpret it in a different way.²³²

With the growing interest in property rights and push, by many, for greater levels of protection of economic and property rights, historic preservation efforts and individual property owners remain in conflict with one another.²³³ This Part discusses the conflict between historic preservation and individual property rights by expanding on the historical background and issue of the *Penn Central* decision.²³⁴

224. See *Penn Cent. Transp. Co.*, 438 U.S. at 111-13 (1978).

225. See *infra* Part III.A.

226. See *infra* Part III.B.

227. See *infra* Part III.C.

228. Moy, *supra* note 9, at 450.

229. *Id.* at 476-77.

230. *Id.* at 448.

231. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124-25 (1978); Cavarello, *supra* note 1, at 605-06.

232. See *Penn Cent. Transp. Co.*, 438 U.S. at 124-25.

233. See Lipford & Boudreaux, *supra* note 182, at 234.

234. See *infra* Part III.A.

The standard set out in *Penn Central* leaves historic preservation efforts vulnerable to future challenges.²³⁵ If a designation were to fail judicially and be considered a taking under the Fifth Amendment, the government would be required to pay “just compensation” for any “taking” of property found.²³⁶ National, state, and local governments cannot afford to pay out compensation for every landmark designation.²³⁷ Lacking the ability to pay this compensation, governments would have no choice but to allow many landmarks to go unregulated, and more importantly, unprotected.²³⁸

Historic preservation efforts and the interest of individual property rights first came to a head in *Penn Central*.²³⁹ Although the historic preservation efforts to save the façade of Grand Central Station won out over the plaintiff, Penn Central Transportation Company—owner of Grand Central Station—this is not the end of the story.²⁴⁰ Contrary to some opinions that view historic preservation as being immune from being considered a regulatory taking,²⁴¹ the legal standard in *Penn Central* leaves open potential vulnerability to historic preservation efforts.²⁴²

Two post-*Penn* regulatory cases, *Nollan* and *Dolan*, came out in favor of individual property rights over government action.²⁴³ It is conceivable to think of a situation in which historic preservation efforts are thwarted because the government interest factor is interpreted to be slightly skewed to the disadvantage of the government.²⁴⁴ The *Penn Central* test is a totality of the factors test and additional weight given to one of only three factors could begin to skew decisions, particularly in cases where the investment-backed expectations are fairly significant.²⁴⁵

235. See *Penn Cent. Transp. Co.*, 438 U.S. at 124-25; Flood, *supra* note 7, at 778.

236. E.g., *Penn Cent. Transp. Co.*, 438 U.S. at 124-25.

237. See *id.*

238. *Id.*

239. See *id.* at 111-12.

240. See *id.* at 138.

241. See Cavarelo, *supra* note 1, at 594.

242. See *Penn Cent. Transp. Co.*, 438 U.S. at 124-25.

243. See *Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994); *Nollan v. Cal. Coastal Com.*, 483 U.S. 825, 841-42 (1987).

244. See *Penn Cent. Transp. Co.*, 438 U.S. at 124-25, 127.

245. See *id.* at 124-25, 127-28.

*B. Late Designation of Landmarks
Leads to a Lack of Notice to Property Owners*

Historic preservation cases continue to come up fairly regularly.²⁴⁶ However, ripeness requirements restrict the number of cases that actually make it to court.²⁴⁷ The biggest issue that continually surfaces in these cases is the late designation of property as a landmark, which results in both greater urgency for the state and greater loss to the property owner.²⁴⁸

In *Williamson County Regional Planning Commission v. Hamilton Bank*, the Supreme Court created a two-part test for determining ripeness in regulatory takings cases.²⁴⁹ The first qualification is finality; the court needs to know the actual extent of the permitted development.²⁵⁰ The second is the exhaustion of state remedies.²⁵¹ The finality qualification may force property owners to wait long periods of time in order to be able to put forth their full detriment.²⁵² The second qualification additionally limits property owners by making them exhaust other remedies before being able to seek judicial review.²⁵³

A repeated theme in many of these cases is the late recognition of the historic significance of properties.²⁵⁴ This occurs where there is the greatest conflict between historic preservation regulation and individual property rights because the owners of the property have no notice of historic significance prior to their application to make alterations to the property.²⁵⁵ In *Old Orchard Conservancy v. City of Santa Anna*, the owner proposed development of a property in 2011, and when the city commenced its environmental review process, they posed concerns

246. *E.g.*, *Lilly Invs. v. City of Rochester*, 674 F. App'x 523, 524 (6th Cir. 2017); *Cal.-Nev. Annual Conf. of the Methodist Church v. City of San Francisco*, 74 F. Supp. 3d 1144, 1148 (N.D. Cal. 2014); *Old Orchard Conservancy v. City of Santa Anna*, No. G053003, 2017 WL 1908320, at *3 (Cal. Ct. App. May 20, 2017).

247. *E.g.*, *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985).

248. *E.g.*, *Lilly Invs.*, 674 F. App'x at 524; *Cal.-Nev. Annual Conf.*, 74 F. Supp. 3d at 1148; *Old Orchard*, 2017 WL 1908320, at *1-3.

249. *Williamson Cty.*, 473 U.S. at 194.

250. *Id.* at 186.

251. *Id.* at 194.

252. Douglas T. Kendall et al., *Choice of Forum and Finality Ripeness: The Unappreciated Hot Topics in Regulatory Takings Cases*, 33 URB. LAW. 405, 424 (2001).

253. *Williamson Cty.*, 473 U.S. at 194.

254. *E.g.*, *Lilly Invs. v. City of Rochester*, 674 F. App'x 523, 524-25 (6th Cir. 2017); *Cal.-Nev. Annual Conf. of the Methodist Church v. City of San Francisco*, 74 F. Supp. 3d 1144, 1148 (N.D. Cal. 2014); *Old Orchard Conservancy v. City of Santa Anna*, No. G053003, 2017 WL 1908320, at *1, *3 (Cal. Ct. App. May 20, 2017).

255. *E.g.*, *Lilly Invs.*, 674 F. App'x at 524-25; *Cal.-Nev. Annual Conf.*, 74 F. Supp. 3d at 1148; *Old Orchard*, 2017 WL 1908320, at *1, *3.

about the potential for historic significance.²⁵⁶ In 2012, the property was listed on the Santa Anna Register of Historic Properties.²⁵⁷ Subsequently, the property owner's ability to develop the land was limited by its landmark status, and the property owner filed suit.²⁵⁸

Likewise, in another 2017 case, *Lilly Investments v. City of Rochester*, the plaintiff purchased property to develop, and when the plaintiff sought approval from the Commission, the Commission took issue with the potential historic significance.²⁵⁹ In *California-Nevada Annual Conference of the Methodist Church v. City of San Francisco*, a congregation agreed to sell their church to a private owner.²⁶⁰ A condition of the sale was that the church had to be demolished.²⁶¹ Three years after the initial applications were submitted for demolition, it was suggested, for the first time, that the church should be declared a landmark.²⁶²

These late designations provide no notice to property owners when they purchase their property or put money into developing the plans.²⁶³ Consequently, the economic benefit could be the property owner's very reason for purchasing the property or may have contributed to the owner's willingness to pay a particular price.²⁶⁴ This issue is relevant to the investment-backed expectations prong of the balancing test contemplated by the *Penn Central* Court.²⁶⁵ Moreover, the money and time the property owner spends developing the plans and waiting for a response is completely lost.²⁶⁶ On the other hand, if these properties are historically significant, despite the fault of the city in not registering them sooner, it could be a dangerous policy to disallow the designation since the goals of historic preservation are still present notwithstanding the potential oversight.²⁶⁷

Similar to the issues in many of the more recent cases, the New York City Landmark Commission designated Grand Central as a landmark in close temporal proximity to when Penn Central applied to develop the property.²⁶⁸ Cases such as this demonstrate where these two

256. See *Old Orchard*, 2017 WL 1908320, at *3-4.

257. See *id.* at *12.

258. See *id.* at *29-30.

259. See *Lilly Invs.*, 674 F. App'x at 524.

260. See *Cal.-Nev. Annual Conf.*, 74 F. Supp. 3d at 1148.

261. See *id.*

262. See *id.*

263. *Id.* at 1148-50.

264. *Id.* at 1148.

265. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 127 (1978).

266. Moy, *supra* note 9, at 487-88.

267. See Flood, *supra* note 7, at 782.

268. *Penn Cent. Transp. Co.*, 438 U.S. at 115-16; Amy Plitt, *How Grand Central Terminal, a*

interests come into the greatest conflict.²⁶⁹ The longer the Commission²⁷⁰ waits to designate the property as a landmark, the greater the disservice that is thrust upon the owner of the property.²⁷¹ However, on the other hand, the more important a property is, especially, for example, Grand Central Station, and especially after the dissatisfaction with the demolition of Penn Station, the greater the public interest for the Commission to act to save the building, however late.²⁷²

In the case of Grand Central Station, much can be attributed to the fact that the Landmark Preservation Commission was in its infancy at the time.²⁷³ However, had the property been designated earlier, the property owner's expectations would have differed.²⁷⁴ In fact, in 1968, just prior to creating the plans for the office space on top of the building, which would necessitate the tearing down of the façade, the owners of Grand Central, Pan Am, merged with the Penn Central Railroad.²⁷⁵ Without the ability to erect an office building on top of Grand Central station, it is still a valuable commodity—a huge property in midtown Manhattan wherein hundreds of thousands of people utilize and pass through every day.²⁷⁶ However, the building being designated prior to 1967 may have affected reasonable investment-backed expectations.²⁷⁷ If Grand Central was designated as a landmark earlier, the investment-backed expectations might be much closer to actual potential value of the property.²⁷⁸

The result of *Penn Central* is that the government action in declaring Grand Central a landmark was not held to be a taking, and the

NYC Landmark for 50 Years, was Saved from Destruction, CURBED (Aug. 2, 2017, 1:31 PM), <https://ny.curbed.com/2017/8/2/16082666/grand-central-terminal-landmarks-preservation-commission-midtown-east>.

269. *Penn Cent. Transp. Co.*, 438 U.S. at 147.

270. The Commission refers to the New York City Landmarks Preservation Commission which consists of eleven commissioners appointed by the Mayor and is responsible for administering New York City's administrative landmark laws. NYC LANDMARKS PRESERVATION COMMISSION, *supra* note 64. Each city or locality has a similar commission with similar responsibilities. Cavarello, *supra* note 1, at 601-03.

271. *E.g.*, Cal.-Nev. Annual Conf. of the Methodist Church v. City of San Francisco, 74 F. Supp. 3d 1144, 1148 (N.D. Cal. 2014).

272. *Penn Cent. Transp. Co.*, 438 U.S. at 115.

273. *See* Cavarello, *supra* note 1, at 601.

274. Garth Sundem, *What Do You Need to Know About Buying a Historic Property?* HOWSTUFFWORKS, <https://home.howstuffworks.com/real-estate/buying-home/what-to-know-about-buying-historic-property.htm> (last visited Aug. 23, 2018) (“Basically there are two stages at which you can get into historic property: before or after it’s been designated.”).

275. Plitt, *supra* note 268.

276. *Penn Cent. Transp. Co.*, 438 U.S. at 115; Flood, *supra* note 7, at 773-74.

277. *Penn Cent. Transp. Co.*, 438 U.S. at 115-16.

278. *Id.*

Penn Central company had no recourse.²⁷⁹ Two years later, the company filed for bankruptcy.²⁸⁰ There were, of course, many other factors that led to this, but this conflict between historic preservation and individual property rights has the potential to affect serious repercussions on both sides.²⁸¹ At stake for both sides, in any case, is the precedent the judicial decisions set.²⁸²

C. *What's at Stake?*

A shift in the result of historic preservation cases could have a ripple effect and a detrimental impact on the fate of many historic properties.²⁸³ The government cannot conceivably pay through the takings clause “just compensation” for every designated landmark or historical district.²⁸⁴ Individual groups and organizations would step in and try to mitigate some of the damage, but would unlikely be able to preserve most properties.²⁸⁵ Once historic preservation fails and property is changed, be it altered or deteriorated, the property can never return to the historically, culturally, or aesthetically significant shape it once held.²⁸⁶

Both historic preservation and property rights play an important role in society.²⁸⁷ The conflict between them could come at a detrimental consequence to the efforts of historic preservationists and also has a significant impact on individual property owners, especially when the regulations interfere with their investment-backed expectations.²⁸⁸ Additionally, since property must be designated as a landmark only after the age of thirty years, damage can occur in the interim.²⁸⁹ In fact, property owners who wish to resist their property being landmarked may even be incentivized to alter or change the property because a significant change in the integrity of the property would weigh against landmark designation.²⁹⁰

279. *See id.* at 138.

280. John Crudele, *Market Place; Penn Central's Next Move*, N.Y. TIMES (Aug. 14, 1985), <https://www.nytimes.com/1985/08/14/business/market-place-penn-central-s-next-move.htm>.

281. *See infra* Part III.C.

282. *See Penn Cent. Transp. Co.*, 438 U.S. at 138.

283. Cavarello, *supra* note 1, at 605-06.

284. U.S. CONST. amend. V; *Penn Cent. Transp. Co.*, 438 U.S. at 124-25.

285. Moy, *supra* note 9, at 477-79.

286. Rocchi, *supra* note 8.

287. *See Flood*, *supra* note 7, at 768.

288. Moy, *supra* note 9, at 462; *see Kazam*, *supra* note 46, at 445.

289. *See* 3 NYC Admin. Code § 25-302(n) (1996); Allen, *supra* note 6, at 47.

290. Flood, *supra* note 7, at 778.

1. Historic Preservation

The structure of historic preservation law, at the national, state, and local level, is dependent on the ability of these governments to designate properties without the burden of paying for each.²⁹¹ A shift in historic preservation regulatory takings cases that begin to come out on the side of individual property owners would force the government to pay the owner “just compensation” for the property if they wish to regulate it via landmark ordinances.²⁹² The result is unsustainable for the fate of the wide-spread historic preservation designation systems in place.²⁹³ The government would be unable to pay for each landmarked property, and what they did pay for, would have to come out of the government budget at the expense of other important considerations or likely at an increased cost to the taxpayer.²⁹⁴ The preservation of properties with important cultural or historical significance could be at risk.²⁹⁵

Without the protection of historic preservation law in place, and sometimes despite it, throughout the history of our country, there have been threats to some of the United States’ most historic properties.²⁹⁶ As stated earlier, without the intervention of early government efforts towards preservation, Independence Hall in Philadelphia, the site and building where the Declaration of Independence and the Constitution of the United States were debated and adopted, was at risk.²⁹⁷ Ellis Island, the site where millions of immigrants first came to the United States for over sixty years, and the Gettysburg Battlefield, the site of one of the most well known battles in the Civil War, have also been threatened.²⁹⁸

In New York alone, there have been many historic locations lost, often due to an increase in the construction of skyscrapers in the early twentieth century and then the “modernist construction fervor” of the 1960s.²⁹⁹ One of the goals of historic preservation is preventing the risk that long term value and historic integrity are lost to short term economic

291. See *Penn Cent. Transp. Co.*, 438 U.S. at 124-25.

292. U.S. CONST. amend. V; *Penn Cent. Transp. Co.*, 438 U.S. at 124-25.

293. See *Penn Cent. Transp. Co.*, 438 U.S. at 124-25.

294. *Id.*

295. Moy, *supra* note 9, at 482 (“The threat of demolition is very real.”).

296. *Historic Preservation Failures & Successes*, THE TR. FOR ARCHITECTURAL EASEMENTS, <http://architecturaltrust.org/historic-preservation/failures-successes> (last visited Aug. 23, 2018).

297. See Cavarello, *supra* note 1, at 597.

298. LINDGREN, *supra* note 61, at 35.

299. *Historic Preservation Failures & Successes*, *supra* note 296; Hojnicky, *supra* note 6.

goals and the whims of the time.³⁰⁰ Oftentimes, historic buildings are replaced with commercial buildings.³⁰¹

At stake for historic preservation is a slippery slope that bad precedent and negative court decisions may cause and the irrevocable losses we may suffer as a result.³⁰² All of the important aims of historic preservation, as discussed above, would be unable to be effectively served.³⁰³

2. Property Rights

For the fate of property rights and individual property owners, what is at stake is that future court cases may further harm the scope of what government action is allowed without being considered a “taking” requiring “just compensation” within the meaning of the Fifth Amendment.³⁰⁴ This will further burden individual landowners.³⁰⁵ The true risk is to the individuals who are bearing these costs and the unnecessary burdens they bear due to ineffective legislation that does not protect them to the fullest extent.³⁰⁶

In *Penn Central*, the Court discussed the premise of a property owner’s reasonable investment-backed expectations as a factor in determining whether or not there has been a regulatory taking.³⁰⁷ Essentially, the Court determines whether the regulation the government is seeking to propagate interferes unreasonably with the property owner’s expectations of the value of the property as evidenced by the resources the owner has put into it.³⁰⁸

As Justice Rehnquist discussed in his *Penn Central* dissent, the burden is on individual property owners, not on the city as a whole or even entire districts.³⁰⁹ In the case of *Penn Central*, this resulted in a multi-million dollar loss being imposed on the Penn Central Transportation Company.³¹⁰ As compared to zoning ordinances, the

300. Nate Berg, *Should We Demolish or Cherish Brutalist Architecture?*, THE DAILY BEAST (April 15, 2015, 3:15 PM), <https://www.thedailybeast.com/should-we-demolish-or-cherish-brutalist-architecture>. “Victorian homes . . . were once an eyesore to some in the same way Brutalist buildings are today.” *Id.*

301. Hojnicky, *supra* note 6.

302. Flood, *supra* note 7, at 778; Rocchi, *supra* note 8.

303. *See supra* Part II.A.

304. U.S. CONST. amend. V.

305. *Penn Cent. Transp. Co.*, 438 U.S. at 147.

306. *Id.*; Moy, *supra* note 9, at 487.

307. *Penn Cent. Transp. Co.*, 438 U.S. at 127.

308. Moy, *supra* note 9, at 463.

309. *Penn Cent. Transp. Co.*, 438 U.S. at 139-40 (Rehnquist, J., dissenting).

310. *Id.* at 147.

burden is “uniquely felt” by the owners of landmarked properties.³¹¹ At the time, only four hundred properties in New York City had been designated, and Rehnquist highlights the fact that less than one tenth of one percent of the city’s population has a substantial cost imposed on them for the benefit of the public at large.³¹² Although many more properties are designated today, the point remains the same: a small fraction of the population disproportionately bears the costs of this public good.³¹³

The loss suffered by the Penn Central Transportation Company, due to being unable to build the office buildings on top of Grand Central Station, is illustrative of the great potential for loss to an individual property owner, be it a corporation or an individual citizen.³¹⁴ A property owner is left with the choice of not using their property for its best or most economically efficient uses or enduring fines and/or the threat of imprisonment for not complying with landmark regulations.³¹⁵ Some property owners may even be unable to bear the financial burden of maintaining the property and may have to give up the property entirely.³¹⁶

The United States Congress has recognized the hardship that owners of landmarked properties may be subjected to and have enacted measures which provide tax credits and tax exemptions for the rehabilitation of landmarked buildings.³¹⁷ New York City has also implemented procedures wherein property owners may ask for financial redress from the city, be allowed to transfer development rights,³¹⁸ or be exempt from certain taxes.³¹⁹ Additionally, property owners may apply for a certificate of appropriateness, which may allow them to be exempt from certain restrictions of landmark laws.³²⁰ However, these remedies have proven insufficient to many property owners.³²¹

First, in order to qualify for many forms of redress, the property owner must be able to show that they are unable to receive a reasonable

311. *Id.*

312. *Id.*

313. NYC LANDMARKS COMMISSION, *supra* note 64; *Penn Cent. Transp. Co.*, 438 U.S. at 147 (Rehnquist, J., dissenting).

314. *Penn Cent. Transp. Co.*, 438 U.S. at 117.

315. Moy, *supra* note 9, at 450.

316. *Id.* at 451.

317. *Id.* at 453.

318. Unused development potential may be used on a different site, zoning permitted. *Penn Cent. Transp. Co.*, 438 U.S. at 120.

319. Moy, *supra* note 9, at 453.

320. *Id.* at 454.

321. *Id.*

rate of return on the property—which is very difficult to satisfy.³²² Not-for-profit organizations have an even more difficult task in obtaining redress since they are not seeking a reasonable rate of return.³²³ The standard then becomes whether the regulation interferes with the charitable purposes of the organization.³²⁴ For all types of properties: personal use, for-profit, or not-for profit, the current landmark legislation does not give adequate notice on when a property owner may expect redress.³²⁵ Second, the 1986 Tax Reform Act lessened federal tax incentives for the rehabilitation of old buildings.³²⁶ Additionally, since redress in its forms is rarely seen or easy to achieve, the property owners do end up bearing these costs with little to no help from the city or municipality.³²⁷

In addition to the reality of these forms of redress being generally unattainable, in every step of this process, property owners incur costs.³²⁸ When a property owner challenges designation, appeals, or files for redress, they must incur the cost of attorneys, accountants, developers, architects, real estate advisors, and more.³²⁹ For every development plan the property owner submits, and the landmark commission rejects, the property owner bears this at their own expense with no benefit whatsoever.³³⁰

Lastly, regarding the *Penn Central* test, there may be a conflict in how a court determines investment-backed expectations.³³¹ The Court in *Penn Central* and subsequent courts measure investment-backed

322. *Id.* at 454. For example, for Radio City Music Hall was designated as a landmark in 1978. According to its owner, for Rockefeller Center, “landmark designation would further exacerbate the music hall’s dismal financial performance.” *Id.* They subsequently applied for decertification or in the alternative, monetary redress, and gave financial data that illustrated the financial loss they were suffering. The application was denied because Radio City submitted an incomplete application. *Id.* at 454-55.

323. *Id.* at 455.

324. *Id.* at 464.

325. Moy, *supra* note 9, at 489.

326. *Id.* at 477 (“From 1976 through 1986, the private sector invested nearly fourteen billion dollars towards the rehabilitation of almost twenty-one thousand historic buildings. The 1986 tax revisions, however, reduced the historic rehabilitation tax credit by five percent creating lower financial returns. . . . As a result, in the four years following the tax revisions, private investment decreased by more than two-thirds.”). The existing twenty percent tax credit after the 1986 tax reform did survive the 2017 tax reform. Shaw Sprague, *Determined Advocacy Preserves the Historic Tax Credit!*, NAT’L TR. FOR HIST. PRESERVATION (Dec. 20, 2017), <https://savingplaces.org/historic-tax-credits>.

327. Moy, *supra* note 9, at 450.

328. *Id.* at 487.

329. *Id.*

330. *Id.*

331. *Id.* at 463.

expectations from the time the property was landmarked.³³² But, according to Moy, “[i]t does not account for an organization’s changing activities, the steep cost of maintaining debilitated structures, or varying economic conditions.”³³³ Additionally, much criticism of the *Penn Central* test revolves around the fact that the test focuses on the value left in the regulated property rather than the value lost.³³⁴ The burden of proof is on the property owner, and it is difficult for any property owner to be able to show that a property has no economic use.³³⁵

Most concerning for individual property owners may be that since *Penn Central* in 1978, very few historic preservation challenges have been held to be takings.³³⁶ One notable example, that is often used as an argument against historic preservation, is the Boyd Theater in Philadelphia.³³⁷ The Philadelphia Historical Commission had proposed designation of the Boyd Theater³³⁸ and the theater objected, but was subsequently overruled.³³⁹ The trial court found the government action to be a taking and warned of “forgetting that 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.”³⁴⁰ However, the Pennsylvania Supreme Court reversed the ruling and found that there was not an unjust taking in violation of the Constitution.³⁴¹ Although historic preservation is not “immune” from regulatory takings findings, as some argue, it is undeniable that the vast majority of cases since *Penn Central* have protected historic preservation efforts over individual rights.³⁴²

Overall, the current state of landmark legislation may be harmful and even detrimental to individual property owners, be it religious organizations, charitable organization, corporations, or individuals.³⁴³ The legislation may leave a property owner with no real options and

332. *Id.* at 462-63.

333. *Id.* at 463.

334. Byrne, *supra* note 10, at 320.

335. *Id.*

336. *E.g.*, Keeler v. Mayor of Cumberland, 940 F. Supp. 879, 887-89 (D. Ma. 1996).

337. Moy, *supra* note 9, at 471.

338. *Id.*

339. *Id.*

340. Cavarello, *supra* note 1, at 609; Moy, *supra* note 9, at 471.

341. United Artists’ Theater Circuit v. City of Philadelphia, 635 A.2d 612, 618 (Pa. 1993) (“1. The interest of the general public, rather than a particular class of persons, must require government action; 2. The means must be necessary to effectuate that purpose; 3. The means must not be unduly oppressive upon the property holder, considering the economic impact of the regulation, and the extent to which the government physically intrudes upon the property.”).

342. Cavarello, *supra* note 1, at 594.

343. Moy, *supra* note 9, at 454.

serious consequences that include the inability to maintain the property on the part of the property owner.³⁴⁴ The legislation gives them little guidance on how to effectively challenge the property's landmark status and how to obtain redress.³⁴⁵

IV. MITIGATING THE CONFLICT

There is a need for legislative reform in the field of historic preservation.³⁴⁶ This legislative reform should come at the local level, in cities and municipalities, since therein lies most of the teeth of landmark preservation and the ordinances that most often lead to judicial action.³⁴⁷

In order to mitigate the conflict between historic preservation and property rights, this Note proposes two new rules to New York City's Landmark Preservation Ordinance.³⁴⁸ First, the minimum age requirement for landmark designation should be eradicated, and the test should be altered to a totality of the circumstances test, encompassing a number of relevant factors.³⁴⁹ The landmark commission should look to a totality of age, integrity, history, architect, aesthetics, cultural significance, and other factors in order to levy an earlier designation when appropriate.³⁵⁰ With this analysis, a property owner's investment-backed expectations will be adjusted, as they will be aware of the landmark designation significantly earlier on and can plan their investments accordingly with regards to the property.³⁵¹ Second, ordinances should be amended to allow for a pre-designation status.³⁵² This status would be used when a property may or may not ultimately be landmarked, but it gives the property owner or future property owner some notice.³⁵³ It will additionally give some low-level protections to the property at issue to ensure that it will not be entirely eradicated and that the city will be put on notice for any major changes.³⁵⁴ These revisions will function to lessen the deprivation of individual property rights, as well as leave historic preservation efforts less vulnerable under judicial review by mitigating this one prong of the test.³⁵⁵ Subpart A will discuss

344. *Id.* at 450.

345. *Id.* at 468.

346. *Id.*

347. Cavarello, *supra* note 1, at 599, 602-03.

348. *See infra* Part IV.A-C.

349. 3 NYC Admin. Code §§ 25-301 to 322 (1996).

350. *Id.*

351. *Id.*

352. *Id.*

353. *Id.*

354. *Id.*

355. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 127 (1978).

the process for amending existing rules or proposing new rules in New York City.³⁵⁶ Subpart B suggests eradicating the minimum age requirement for the determination of designation.³⁵⁷ Subpart C proposes a new rule giving certain properties not yet ready for landmark designation a pre-designation status.³⁵⁸

A. *Proposing New Rules and Amending Old Ones*

The changes to the legislative process should be made at the local level, such as in years past.³⁵⁹ To illustrate how the procedural changes that this Note advocates for can be logistically implemented, a brief overview of the New York City Administrative Procedure Act will be given.³⁶⁰ The New York City Administrative Procedure Act (“CAPA”) requires that agencies fulfill certain requirements when making new rules or amendments to existing rules.³⁶¹ The New York City Charter gives agencies, including the Landmark Preservation Commission, the authority to propose rules.³⁶²

In order for the Landmark Preservation Commission to amend the current rules of the preservation ordinance or pass new rules, it would need to be in compliance with CAPA.³⁶³ First, the agency responding to an issue with the current legal framework will draft a rule.³⁶⁴ The full text of the proposed rule must be published in the City Record.³⁶⁵ The proposed rule must be reviewed by corporation counsel, the Law Department, and the mayor’s office of operations in order to ensure compliance with the authority granted to the agency and that the new rule or amendment is consistent with the purposes of the existing ordinance.³⁶⁶ The agency shall then provide the public with the opportunity to comment on the proposed rule through submission of comments and a public hearing.³⁶⁷

356. *See infra* Part IV.A.

357. *See infra* Part IV.B.

358. *See infra* Part IV.C.

359. Cavarello, *supra* note 1, at 599, 602-03.

360. *See* NYC Charter § 1043.

361. *Id.*

362. *Id.*

363. *Id.*

364. *Id.*

365. *Id.*

366. *Id.*

367. *Id.*

B. A New Test to Determine Landmark Protections

Taking away the minimum age of property and moving to a totality of the circumstances test to determine landmark or historic district status will help to mitigate these conflicts.³⁶⁸ The landmark commission should look to a totality of age, integrity, history, architect, aesthetics, cultural significance, and other factors in order to give an earlier designation when appropriate.³⁶⁹ If the transactions involving these properties reflect more accurate representations of what the property is worth, this would mitigate the deprivation of property.³⁷⁰ People will purchase properties under more realistic expectations and once they own the properties, will invest according to their revised expectations.³⁷¹ This may keep historic preservation cases out of court by lessening the loss of property owners, and if they end up in court, weaken the property owner's argument for the investment-backed expectation prong of the *Penn Central* test.³⁷² This leaves historic preservation efforts less vulnerable and hopefully will allow for the continuation of historic preservation.³⁷³

This change may potentially have very positive effects on the efforts of historic preservation to effectively preserve historic sites and buildings for potential economic value, as well as future education, and other benefits.³⁷⁴ As discussed by Michael R. Allen and others, properties may suffer irreparable damage fairly quickly.³⁷⁵ A thirty to fifty year minimum age requirement exacerbates this potential.³⁷⁶ Sites like the locations of the Ferguson demonstrations and other recent historic events, buildings from architecture movements that are no longer in style, but have yet to be seen as "historic," and others, are in danger of being destroyed.³⁷⁷ Getting rid of the minimum age requirement would allow municipalities to protect these properties earlier.³⁷⁸ If there were other factors that were significant, for example, the historic event that occurred, the reputation of the architect who designed the building, or the cultural significance of the site, that site should be able to be protected right away.³⁷⁹ The risk to these properties

368. 3 NYC Admin. Code § 25-302(n) (1996); Allen, *supra* note 6, at 47.

369. 3 NYC Admin. Code § 25-302(n).

370. *E.g.*, *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 115-16 (1978).

371. *E.g.*, *id.*

372. *See id.* at 127.

373. 3 NYC Admin. Code §§ 25-301 to 322.

374. *Id.* § 25-301.

375. Allen, *supra* note 6, at 47.

376. 3 NYC Admin. Code § 25-302(n).

377. Allen, *supra* note 6, at 47.

378. 3 NYC Admin. Code § 25-301(n).

379. *Id.*; *Penn Cent. Transp. Co.*, 438 U.S. at 108-09; Allen, *supra* note 6, at 47.

is too great.³⁸⁰ A property cannot maintain the same level of integrity over those long periods of time.³⁸¹ Additionally, if there is opposition to the site being designated as a landmark, there is an incentive for those opposed to alter the property in the meantime while there are absolutely no regulations on what can be done to the property.³⁸²

This amendment to the existing qualifications for landmark designation would also benefit property owners.³⁸³ When properties are designated earlier, it gives property owners more realistic expectations of the property's worth.³⁸⁴ With the thirty to fifty year limits, it creates a level of uncertainty as to when the property will be designated.³⁸⁵ Sometimes buildings or properties are designated fairly close to the end of the minimum time requirement, oftentimes not.³⁸⁶ If the property is designated before the owner of the property begins alteration, it may affect the construction of the building.³⁸⁷ If the landmark is designated not after building, but instead, right after a certain historic event occurs, the value of the property can then be accurately determined and all subsequent sales will be based on a more realistic estimate.³⁸⁸ This prevents the property from changing hands multiple times with one potentially unfortunate buyer owning the property at the time of designation and being unable to sell the property for an amount reconcilable with their investment-backed expectations due to the new restrictions.³⁸⁹

380. Allen, *supra* note 6, at 47; Owens, *supra* note 99.

381. Allen, *supra* note 6, at 47.

382. Flood, *supra* note 7, at 778.

383. 3 NYC Admin. Code §§ 25-301 to 322.

384. *E.g.*, *Lilly Invs. v. City of Rochester*, 674 F. App'x 523, 524 (6th Cir. 2017).

385. *E.g.*, *Guggenheim Museum is Designated as a Landmark*, N.Y. TIMES (Aug. 19, 1990), <https://www.nytimes.com/1990/08/19/nyregion/guggenheim-museum-is-designated-a-landmark.html> (The Guggenheim Museum in New York, designated after approximately forty years, "is one of the youngest buildings to receive the landmark designation" despite being designed by Frank Lloyd Wright, having been "an unofficial New York City landmark since its inception.").

386. *Lilly Invs.*, 674 F. App'x at 525; *Cal.-Nev. Annual Conf. of the Methodist Church v. City of San Francisco*, 74 F. Supp. 3d 1144, 1148 (N.D. Cal. 2014); *Old Orchard Conservancy v. City of Santa Anna*, No. G053003, 2017 WL 1908320, at *3 (Cal. Ct. App. May 10, 2017); *Guggenheim Museum is Designated as a Landmark*, *supra* note 385.

387. *Lilly Invs.*, 674 F. App'x at 525.

388. 3 NYC Admin. Code § 25-302(n); Allen, *supra* note 6, at 47.

389. *E.g.*, *Lilly Invs.* 674 F. App'x at 524; *Cal.-Nev. Annual Conf.*, 74 F. Supp. 3d at 1148; *Old Orchard*, 2017 WL 1908320, at *3.

C. Pre-Designation Status

The idea of pre-designation landmark status would be a new rule to the New York City Landmark Ordinance that is based on similar principles to the amendment discussed above, eradicating a minimum age requirement.³⁹⁰ Early notice of the historic value of properties and the potential for designation benefits both historic preservation efforts and the owners of these properties.³⁹¹ Property owners and potential buyers can adjust the value of the site and some minimum level of protections will serve preservation efforts.³⁹² The amendment eradicating the minimum age requirement would allow a property to be designated potentially right after a historic event or right after construction.³⁹³ Some properties, however, may have indications of historic significance, but may need time to fully develop this historic significance.³⁹⁴ This is when properties should be pre-designated.³⁹⁵

To ignore the landmark potential would be a disservice to the property owner or the next purchaser of the property who may not be aware.³⁹⁶ Again, investment-backed expectations may be altered and this status can give buyers and sellers a more realistic value.³⁹⁷ Additionally, the minimum protections help ensure at least some the historic integrity is maintained until full designation—which could be a significant period of time.³⁹⁸ These protections seek to preserve the site while not incurring a high cost to the property owner and ensure the owner has adequate notice of the restrictions imposed on the property.³⁹⁹

The requirements for this pre-designation status will use a similar multi-factor test to the designation requirement and follow similar procedural requirements.⁴⁰⁰ A nomination for designation can be brought by either a citizen or the Commission.⁴⁰¹ The Commission should then conduct a study in the normal fashion and report on the factors

390. 3 NYC Admin. Code § 25-302(n); NYC Charter § 1043.

391. *E.g.*, *Lilly Invs.* 674 F. App'x at 524; *Cal.-Nev. Annual Conf.*, 74 F. Supp. 3d at 1148; *Old Orchard*, 2017 WL 1908320, at *3.

392. *E.g.*, *Lilly Invs.* 674 F. App'x at 524; *Cal.-Nev. Annual Conf.*, 74 F. Supp. 3d at 1148; *Old Orchard*, 2017 WL 1908320, at *3.

393. 3 NYC Admin. Code § 25-302(n); Allen, *supra* note 6, at 47.

394. *Old Orchard*, 2017 WL 1908320 at *3.

395. 3 NYC Admin. Code §§ 25-301 to 322.

396. *E.g.*, *Lilly Invs.* 674 F. App'x at 524; *Cal.-Nev. Annual Conf.*, 74 F. Supp. 3d at 1148; *Old Orchard*, 2017 WL 1908320, at *3.

397. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

398. 3 NYC Admin. Code § 25-302(n).

399. *E.g.*, *Lilly Invs.*, 674 F. App'x at 524; *Cal.-Nev. Annual Conf.*, 74 F. Supp. 3d at 1148; *Old Orchard*, 2017 WL 1908320, at *3; Allen, *supra* note 6, at 47.

400. *See supra* Part IV.B.

401. 3 NYC Admin. Code §§ 25-301 to 322.

considered.⁴⁰² The factors include a totality of age, integrity, history, architect, aesthetics, cultural significance, and other significant factors in order to give an earlier designation when appropriate.⁴⁰³ The commission can then either make the decision to go through with the process for designation, or if they believe the factors to be significant, but not enough to be considered a landmark yet, pre-designation.⁴⁰⁴ For either designation or pre-designation, the public hearing and ability of the property owner to appeal the decision should remain the same.⁴⁰⁵

Once a property is pre-designated, there shall be some restrictions on the alteration of the property, however, these restrictions should not be as strict as a regular landmarked property.⁴⁰⁶ For landmarked properties, the property owner must apply for a certificate of appropriateness for any alterations.⁴⁰⁷ For a pre-designated property, the certificate of appropriateness would only be needed for certain alternations, mostly major ones.⁴⁰⁸ Major alterations would include total destruction of the property or large portions of the property or alterations to the façade.⁴⁰⁹ In these cases, the Landmark Preservation Commission should be more willing to negotiate and work with the property owners to compromise and come to a beneficial solution for all parties involved.⁴¹⁰

V. CONCLUSION

Two very important interests conflict with the issue of regulatory takings.⁴¹¹ Too great a protection of property rights at the expense of historic preservation efforts will have serious and long-lasting consequences.⁴¹² On the other hand, it is best to avoid deprivation of individual property rights to the greatest extent possible.⁴¹³ By eradicating the minimum number of years for landmark designation, this tension can be mitigated and hopefully become altered so as to benefit both interests.⁴¹⁴ Additionally, the pre-landmark designation serves both

402. *Id.*

403. *Id.*

404. *Id.*

405. *Id.* § 25-303(a).

406. *Id.* § 25-305.

407. *Id.* § 25-307.

408. *Id.*

409. *Id.*

410. *Id.*

411. *See supra* Part III.C.

412. *See supra* Part III.C.1.

413. *See supra* Part III.C.2.

414. *See supra* Part IV.B.

parties by putting them both on notice of the potential historic significance and by providing some low-level guidelines on maintaining the structure.⁴¹⁵ Some procedural shifts may also serve to help mitigate these tensions.⁴¹⁶ Predominately, the solutions work to limit the vulnerability of historic preservation designations to adverse judicial decisions by lessening the loss and burden suffered by individual property owners.⁴¹⁷

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415. 3 NYC Admin. Code §§ 25-301 to 322.

416. *Id.*

417. *See supra* Part IV.B.

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