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This Land is My Land: Historic Preservation and Land Use Regulation in
the Twenty-First Century

(Under the direction of MELVIN HILL)

The benefits of historic preservation are being challenged by various constituent groups. Some communities lack the knowledge and leadership to lessen the impact of constitutional challenges to the laws that help protect our historic resources. In a country where some view property rights as sacred and others find historic preservation valuable, common ground must be found. The only way in which to overcome future challenges is to understand them and recognize the key stakeholders in the future of historic preservation and land use policy. This is a guide to understanding the property rights movement as well as a forecast of how presidential administration policies, Congress, and the United States Supreme Court might affect historic preservation and land use regulation. Recommendations provide local governments with educational and legal tools that can help mitigate the cost of legal challenges and the damage of misleading perceptions for the preservation movement.

INDEX WORDS: Historic Preservation, Land Use Policy, Property Rights,
George W. Bush, U.S. Supreme Court, William Rehnquist,
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THIS LAND IS MY LAND:
HISTORIC PRESERVATION AND LAND USE REGULATION
IN THE TWENTY-FIRST CENTURY

by

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CHAPTER 1

INTRODUCTION

We shape our buildings, and afterwards our buildings shape us.
—*Winston Churchill*¹

The benefits of historic preservation are vital to communities all across this country. However, various constituent groups have succeeded in challenging many of its achievements. Despite local preservation ordinances and commissions and National Register districts found now in many communities, historic homes are still being demolished, main streets are deteriorating from neglect, and urban areas are losing their identities to unrestrained, suburban sprawl. Some communities lack the knowledge, leadership, and willingness to lessen the impact of these dilemmas, but others, even with the know-how, lose in court to constitutional challenges. In a country where some view individual property rights as sacred, but others see historic resources as equally important, common ground must be found. Historic resources should not have to compete in a losing battle for obvious reasons: once lost, they can never be replaced. The response by preservationists must be one that hears the voice of its opposition, while still maintaining the vision to reach its goals. The only way to anticipate and overcome such challenges is to more fully understand them. Thus, the intent of this paper is to address the following issues: What are the predominant factors affecting the success of historic preservation and what constitutional challenges lie ahead? Who are the stakeholders and key players? How do they perceive preservation and land use

¹ Quoted in Michael Mantell, Stephen Harper, and Luther Propst, *Creating Successful Communities*, (Washington D.C.: Island Press, 1990), 60.

regulation issues? What should the preservation response be to its opposition, so that historic resources are not lost in the process? In order to answer these questions, every new administration must be examined based on its campaign promises, as well as the Supreme Court's jurisprudence on land use and preservation issues.

Whether or not one believes certain types of regulation to be useful or invading, historic preservation will not survive without funding to make it possible and without public policy to make it legal. Preservation cannot depend on private funding alone to meet the needs of the State Historic Preservation Offices (SHPOs) and Certified Local Governments (CLGs). Federal funds and tax credits have been widely beneficial, but they only exist because laws have been passed to enable them. Whether one holds conservative or liberal beliefs on political issues, if preservation is a fundamental concern, then the policies forged by presidential administrations and the decisions on regulatory takings handed down by the United States Supreme Court hold the keys to the future for historic preservation. Particularly because of the numerous perceptions and stereotypes surrounding it, historic preservation is often mistakenly approached in a politically partisan manner. Instead, historic preservation should be portrayed as a non-partisan issue to which all parties and administrations can make a contribution.

The purpose of this thesis is not to oppose individual property rights, but rather to focus on the most effective, and least contentious, means of preserving our built and natural environment. The need for reasonable regulation to protect public health and safety, the environment and historic resources is critical. Primarily, this paper is an analysis of how we have arrived at our current state and what future directions are likely, in terms of viewpoints on land use regulation by citizens, grassroots organizations, and the three branches of the federal government. Moreover, this paper is intended to serve as a guide to understanding the property rights movement so that the funds of local governments are not drained by unnecessary legal challenges when trying to implement sound planning for the future. It is also meant to raise awareness of the stereotypes that

block preservation efforts and to provide recommendations and educational tools to overcome these perception dilemmas.

This Land is My Land: Historic Preservation and Land Use Regulation in the Twenty-First Century seeks to shed light on the numerous challenges and uncertainties facing historic preservation by providing a forecast and response for the future. Chapter Two is an analysis of the influence of the United States Supreme Court on property rights and historic preservation, focusing specifically on the opinions of the Chief Justice, William Rehnquist. Chapter Three discusses various perspectives on property rights, particularly in the last twenty years, and includes an examination of federal and statewide initiatives. Chapter Four profiles Gale Norton, the new Interior Secretary, in order to assess how her views could influence federal policy on preservation and land use by the Department of the Interior. Chapter Five provides a forecast of historic preservation and land use regulation in light of the current George W. Bush administration, Congress, and the Supreme Court. Finally, Chapter Six recommends a plan of action, consisting of legal and educational tools, for professionals and volunteers who are interested in protecting the historic and natural resources in their communities.

CHAPTER 2

**THE UNITED STATES SUPREME COURT'S
INFLUENCE ON HISTORIC PRESERVATION:
CHIEF JUSTICE WILLIAM REHNQUIST AND REGULATORY TAKINGS**

Nor shall private property be taken for public use, without just compensation. —
Fifth Amendment to the U.S. Constitution

The Fifth Amendment to the United States Constitution has sharply divided the Supreme Court and precipitated a heated debate about government land use regulations. The interpretation of the Fifth Amendment has stirred enough emotion, particularly in the last two decades, to raise some serious questions about the sovereignty of government and the rights of individual citizens. Yet, the robed men and women who serve as the decision-makers for this hot-button issue are the interpreters of the United States Constitution and the final authors of our nation's law. Thus, the Supreme Court decisions on the takings clause portend the future for land-use and preservation issues.

The Fifth Amendment to the United States Constitution prohibits “taking” private property for public use without paying “just compensation.”² This takings clause is intended to serve as a fulcrum upon which private property interests are balanced against the police power of the state.³ Defining the point when a regulation actually becomes a taking has proven to be one of the most difficult issues in these cases. In 1979 Justice William Rehnquist wrote the admission by the Court of a lack of clarity in the

² U.S. CONST. amend. V.

³ David Callies, ed., *Takings: Land Development Conditions and Regulatory Takings after Dolan and Lucas*, (Chicago: American Bar Association, 1996), 107.

development of a set formula for determining compensable takings.⁴ As a result, the Supreme Court jurisprudence has produced a jumbled state for interpretation, principally for the federal and state courts. David Callies, legal land use scholar, writes that a “survey of state and federal decisions reveals that there is considerable variety in the reactions to *Lucas* and *Dolan*,” recent decisions on regulatory takings.⁵ *Lucas v. South Carolina Coastal Council*⁶ and *Dolan v. City of Tigard*,⁷ two landmark takings cases won by the landowner, followed three earlier decisions, now called the 1987 takings “trilogy”: *Keystone Bituminous Coal v. DeBenedictis*,⁸ *First English Evangelical Lutheran Church v. County of Los Angeles*,⁹ and *Nollan v. California Coastal Commission*.¹⁰ To illustrate the ambiguity of the takings issue, unanimity by the Court was not actually achieved for the first time in years until the 1999 decision in *City of Monterey v. Del Monte Dunes*¹¹ that affirmed a \$1.5 million judgment in a temporary taking decision.

The deep-seated emotions that sparked the national debate on private property rights arose largely from a series of events beginning in the early 1920s. The Supreme Court decided *Euclid v. Ambler Realty Co.*¹² in 1926 upholding the constitutionality of the town of Euclid, Ohio’s zoning ordinance. The land in question was a 68-acre tract zoned to exclude industrial use, despite the protests of Ambler Realty Company who argued that the market value would be considerably lower if the land was limited to residential uses. *Euclid v. Ambler Realty* is the landmark zoning case in that it upheld an ordinance that created different districts in order to control growth as early as 1926. The

⁴ Callies, *Takings*, 224-225.

⁵ David Callies, “Regulatory Takings and the Supreme Court,” *Stetson Law Review*, Winter 1999, 551.

⁶ 112 S.Ct. 2886 (1992).

⁷ 114 S. Ct. 2309 (1994).

⁸ 480 U.S. 470, 488 (1987).

⁹ 482 U.S. 304 (1987).

¹⁰ 483 U.S. 825 (1987).

¹¹ Robert Freilich & Jason Divelbiss, “The Public Interest is Vindicated: *City of Monterey v. Del Monte Dunes*,” *Hot Topics in Land Use Law*. Ed. by Patricia Salkin and Robert Freilich, (Chicago: American Bar Association, 1999), 12.

¹² 272 U.S. 365 (1926).

Supreme Court exercised judicial restraint by arguing that the local government had not acted arbitrarily in the implementation of its ordinance, which was also justified by its public health and safety merits. Two years later, *Nectow v. City of Cambridge*¹³ struck down a zoning ordinance that mandated a residential classification of the plaintiff's land, despite the fact that the property was valueless for residential use because of its nearness to industrial uses. *Nectow v. Cambridge* became the leading case striking down "unreasonable" zoning. After these two cases, the Court remained silent on zoning issues until the historic *Penn Central Transportation v. New York City*¹⁴ case in 1978 that upheld the application of New York City's landmarks preservation law to the historic Grand Central Station.

Based on two of these landmark decisions, *Euclid v. Ambler* and *Penn Central*, landowners believed that property rights had disappeared from the nation. However, two of the 1987 Supreme Court decisions, along with more recent cases in 1992 and 1994, made a forceful statement on the constitutional rights of landowners, strengthening their movement and panicking preservationists. What happened? After the *Penn Central* case, the Supreme Court began striking down local land use ordinances that regulated the fundamental rights of property owners.

The opinions of Chief Justice William Rehnquist, and Justice Antonin Scalia reflect the strongest language upholding the constitutional rights of property owners in takings jurisprudence. Scalia, whose vision has dominated the law of land use regulation in the courts, supports the utilitarian, market-oriented approach to the law of private land use.¹⁵ Serving on the Court since 1972, Rehnquist dissented in *Penn Central* and has increasingly ruled in favor of the property owner over the government. As a result of his

¹³ 277 U.S. 183 (1928).

¹⁴ 438 U.S. 104 (1978).

¹⁵ Arthur McEvoy, "Markets and Ethics in U.S. Property Law," in *Who Owns America?* Ed. by Harvey Jacobs, (Wisconsin: University of Wisconsin Press, 1998), 101.

takings doctrine and the subsequent strengthening property rights movement, the Chief Justice and the Court have undoubtedly had an impact on historic preservation law. Regulations that protect historic resources from development or destruction have lost their legitimacy or have cost local and state government large sums of money. Therefore, it is important to understand the roles that the Supreme Court justices have each played in determining these circumstances. However, it is impossible to examine every justice within the parameters of this thesis, and thus, I will focus on William Rehnquist, both the chief justice and one of the major authors of court decisions on takings. As a result, one of the primary objectives of this chapter is to determine Chief Justice Rehnquist's influence on the protection of historic resources by examining his philosophy and opinions on regulatory takings.

Rehnquist the Man

His writing has been described as cold, conservative and cutting.¹⁶ In fact, Supreme Court Justice William Rehnquist saw it as his duty to reverse the liberal leanings of the Court during the previous Earl Warren era. Prior to his nomination, he was not particularly fearful of expressing his disappointment with the leftist direction of the Court.¹⁷ Serving on the Court with strong liberals like William Brennan and Thurgood Marshall led Rehnquist to write some sharp dissents, as in the landmark historic preservation case, *Penn Central v. City of New York*. Whereas Brennan was the champion of the underdog and defender of the minority, Rehnquist thought the Court should uphold the will of the majority.¹⁸ To Rehnquist, the Court's views during the Warren years did not reflect the average American or the authors of the Constitution.¹⁹

¹⁶ David Savage, *Turning Right*, (New York: John Wiley, 1992), 14.

¹⁷ *Ibid.*, 38.

¹⁸ *Ibid.*, 10.

¹⁹ *Ibid.*, 46.

“He pushed hard to block busing for desegregation, to limit the rights of crime suspects, to uphold death sentences, and to bring back religion to the public schools.”²⁰

Furthermore, he objected to the seeming intrusion of the Court into the affairs of towns and states.

Despite his staunch opposition in earlier years to most of the opinions of Brennan and the liberal faction, Rehnquist was able to win a majority once Anthony Kennedy was appointed. Justices Scalia, White, and Kennedy frequently voted with the Chief Justice, along with Justice O’Connor who was even more consistent, voting ninety-three percent of the time with him.²¹ Even before he was elevated to Chief Justice in 1986, Rehnquist wielded a substantial amount of influence among the others. This is also illustrated by the number of times he authors opinions for the Court in both majority decisions and in dissents.

While the conservative Rehnquist proved early in his career that he was a defender of the majority, he also illustrated that it was in his nature to protect the property owner. As early as the time he worked in a Phoenix firm after graduating from law school and serving in a Supreme Court clerkship, he spoke out against the invasion of property rights.²² The Phoenix City Council held a hearing in 1964 to discuss a proposed public accommodations ordinance modeled on the federal law Congress had recently passed. Rehnquist was the only one who criticized the ordinance, claiming that the private property values it would sacrifice would be greater than the ones it would produce.²³

Nixon appointed Rehnquist with the expectations that the justice would be a judicial conservative.²⁴ Since his appointment, scholars and writers have labeled the

²⁰ Ibid., 36.

²¹ Savage, *Turning Right*, 299.

²² Peter Irons, *Brennan v. Rehnquist*, (New York: Alfred Knopf, 1994), 49.

²³ Ibid.

²⁴ Sue Davis, *Justice Rehnquist and the Constitution*, (New Jersey: Princeton University Press, 1989), 4.

Chief Justice as a strict constructionist and others describe him as an activist devoted to political conservatism, along with many other descriptions. Some of those dissatisfied with Rehnquist during previous decades complained that he was neither a libertarian nor a strict constructionist.²⁵ The numerous opinions on Rehnquist concerning his overall record are important since they identify differing viewpoints on his decision-making and possible inconsistencies. However, for the purposes of this paper, only his values relating to private property and government regulations are being examined.

A key to his behavior on property can be found in his devotion to state autonomy in which he does not refrain from using the judiciary powers to restrict the powers of Congress.²⁶ Of Rehnquist, Owen Fiss and Charles Krauthammer argue that a high value is placed on state autonomy, because it is “consonant with classical laissez-faire theory which reduces the function of government to protecting private exchanges and the aim of the Constitution to protecting the rights and expectations of property holders.”²⁷ For Rehnquist, Fiss and Krauthammer hold that property rights constitute the controlling value and federalism is simply the means to protect that value. In other words, Rehnquist seeks to restrict the power of the federal government on behalf of the states, because the latter is principally concerned with preserving property and public order. However, when the states interfere with property rights, Rehnquist will sacrifice state autonomy.²⁸ Similarly, Rehnquist uses state autonomy less to promote liberty than to protect property and to repudiate equality.²⁹ He also believes that the most authoritative source for interpretation by the Supreme Court is the framers’ original intent. As Sue Davis explains it, “He has adapted the ‘intent of the framers’ technique to his own purposes.”³⁰

²⁵ Ibid., 18.

²⁶ Owen Fiss and Charles Krauthammer, “The Rehnquist Court,” *The New Republic*, 10 March 1982, 17.

²⁷ Ibid., 21.

²⁸ Ibid.

²⁹ Dennis Coyle, *Property Rights and the Constitution*, (Albany: State University Press of New York, 1993), 204. A study has revealed that Rehnquist ranks last among the current and previous justices on support of equality issues.

³⁰ Davis, *Justice Rehnquist and the Constitution*, 204.

Thus, he prioritizes state autonomy over other constitutional values, with the exception of property, by asserting that federalism was central to the framers' vision of the Constitution.

Rehnquist's constitutional philosophy has influenced him to write bold opinions on the land use cases involving the constitutional rights of property owners. Generally, his opinions have been clear, lucid, brief, and written by a "quick, incisive legal mind."³¹ Since he has been one of the most activist authors on this subject, his record in the area is insightful in understanding his influence. Rehnquist has often voted in favor of the government entity in landowner and property rights cases. However, most have been cases for which the Supreme Court voted in unanimity. Furthermore, his support for government has been directly related to those property cases also interpreting rights of free expression and equal protection, protected by the First Amendment and Fourteenth Amendment respectively.³² Coyle suggests that the Court has historically been sympathetic to defenses of property uses that have protected rights important from an egalitarian perspective, such as free expression and equality.³³ Therefore, in these instances in which property interests have been aligned with free expression and equal protection rights, Rehnquist typically has not supported property interests. For example, in *Metromedia, Inc. v. San Diego*,³⁴ Rehnquist dissented in a decision that a billboard ban enacted by San Diego violated the constitutional rights of property owners, because it restricted their noncommercial speech, such as some political advertising.

Though his overall property rights record shows support for the government in some instances, Rehnquist has been rather consistent on land use throughout his career.

³¹ Savage, *Turning Right*, 10.

³² The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech." The Fourteenth Amendment states that "No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." Coyle, *Property Rights and the Constitution*, 175 & 280.

³³ *Ibid.*, 174.

³⁴ 453 U.S. 490 (1981).

He has, in fact, written opinions or voted in favor of the property owner more frequently in land use cases (see *Kaiser Aetna*³⁵ and *Delmonte Dunes v. City of Monterey*³⁶) than in equality decisions. He wrote dissents in the following government-won cases: *Penn Central* and *Keystone Coal*.³⁷ In fact, Coyle notes that Rehnquist's support of landowners increased by thirty percent during the 1980s, the hallmark years for takings cases. Coyle believes Rehnquist has increased his sympathy for property rights, partly because of the 1986 appointment of Antonin Scalia, the Court libertarian.³⁸ Thus, Rehnquist's values, possible Court influences, and constitutional principles have all served to lay the groundwork for his support of the landowner in takings litigation.

To examine the broad scope of Rehnquist's opinions on regulatory takings, the following cases serve as a representative selection: *Penn Central v. City of New York*, *Keystone Bituminous Coal v. DeBenedictis*, and *Dolan v. City of Tigard*. Ranging from 1978 until 1994, these cases illustrate Rehnquist's philosophy on governmental regulations of land use, as well as the degree of consistency in his opinions. The language that he used, the influence he had on the other justices, and the results that the opinions rendered, are all contributors to the analysis of how Justice Rehnquist has affected historic preservation.

Penn Central Station v. City of New York

Penn Central is the leading legal affirmation of historic preservation because of its recognition of local preservation ordinances as a means to protect historic resources. In this 1978 case, the Supreme Court upheld New York City's Landmarks Preservation Law which prohibited Penn Central Transportation Company from constructing a fifty-

³⁵ 444 US 164 (1979).

³⁶ 119 S.Ct. 1624 (1999).

³⁷ 480 US 470 (1987).

³⁸ Coyle, *Property Rights and the Constitution*, 205.

five story office building in the air rights above Grand Central Station, a Beaux Arts railroad station designated as a historic landmark under the law. Two separate plans were submitted by Penn Central, including one that provided for the construction of the tower cantilevered above the railroad station and one that required removing part of the original building before adding the tower.³⁹

The legal battle began when the New York City Landmarks Commission denied Penn Central's application for a Certificate of Appropriateness (COA) in order to build the office tower above the station. The company argued in a New York trial court that both the designation and the denial constituted a facially and applied taking of its property without just compensation and arbitrarily deprived them of due process of law in violation of the Fourteenth Amendment. The court granted the appellants the injunctive relief they sought, but dismissed the takings claim. The trial court's grant of relief was reversed on appeal, and the New York Court of Appeals affirmed.⁴⁰ The latter confirmed that there was no taking or denial of due process for several reasons, including the following: The same use was permitted as before; the transfer of development rights provided compensation for any loss; and the appellants could not show that they could not earn a reasonable return on their investment.⁴¹

On appeal to the Supreme Court, Justice Brennan, writing the majority opinion, held that historic preservation benefits the entire city. In a lengthy discussion, he argued that many precious landmarks had been lost; also, special historic structures have significance and enhance the quality of life for all.⁴² The Court also held that the plaintiffs had not fallen short of their investment-backed expectations. In other words, the Court argued that the property could still be used and did not lose any of its value

³⁹ 96 S.Ct. 2655 (1978).

⁴⁰ Id. at 2649.

⁴¹ Id.

⁴² Id. at 2651.

with the opportunity for the transfer of development rights.⁴³ Most importantly, the Court established a three-prong analysis, known commonly as the *Penn Central* “balance of interests” test, which attempts to equalize the property rights of the individual and governmental interests. More specifically, the test evaluates the economic impact of the regulation, the owner’s investment-backed expectations, and the character of the governmental action.⁴⁴

In contrast, Justice Rehnquist wrote the dissenting opinion without acknowledging any benefits or the legitimacy of historic preservation. In fact, he clearly stated that historic landmark designation singles out a few victims that must foot the bill for a so-called “honor” that is not, in the least, beneficial to them or anyone else.⁴⁵ He also suggested that preservation of buildings was intended strictly for sightseers and tourists. In his dissent, he argued that the blame was unfairly placed on Penn Central since it did too satisfactory a job in designing the building. As a result, the company is being forced to preserve it. Yet, Rehnquist found that Penn Central’s proposed design for the addition was in full compliance with zoning, height limitations, and more. As a result, he cautioned against zoning laws that further restricted property after it was already in full compliance with regulatory ordinances. Finally, he viewed the alternative transfer of development rights as “imperfect compensation,” because they have an uncertain market value and “do not adequately observe the value lost when a building is designated as a landmark.”⁴⁶ Indeed, his strong opinion is highly critical of preservation, particularly in that it would be a burden falling only on the shoulders of the owner.

Probably the most problematic aspect of Rehnquist’s dissent is his distinction between the designation of historic districts and that of individual landmarks. He

⁴³ Id. at 2658.

⁴⁴ Id. at 2659.

⁴⁵ Id. at 2667.

⁴⁶ Stephen Eagle, *Regulatory Takings*, (Charlottesville: Michie, 1996), 212.

perceives the former as being mutually beneficial, whereas he declares that the latter is not. In other words, he did not support the positive benefits that others would reap from the burden placed on the single landowner. Unfortunately, Rehnquist's distinction fails to attest to the numerous benefits gained by the owner of an individually designated landmark, such as increased market value, tax credits for income-producing properties, and statewide economic incentives.

The majority opinion clearly recognized that the preservation of historic resources was a legitimate state interest. Brennan wrote that states and cities may enact land use restrictions or controls "to enhance the quality of life by preserving the character and desirable aesthetic features of a city."⁴⁷ The Court found a distinction between a physical invasion of property by the government and the ability of a public program to promote the common good. This distinction was irrelevant to Rehnquist since the mere interference was a taking of property. In his final comments, he stated that no "desire to improve the public condition is, indeed, achieved by a shorter cut than the constitutional way of paying for the change."⁴⁸

If one looks more closely at Rehnquist's opinion, another distinction becomes apparent. He voted to invalidate a city's landmarks law in *Penn Central* while he upheld a zoning ordinance that limited a developer's property in another takings decision, *Agins v. City of Tiburon*.⁴⁹ While these two seem inconsistent, from Rehnquist's viewpoint, the two decisions are not. Whereas *Agins* was an example of reasonable exercise of the police power, Rehnquist believed that the New York City preservation law went beyond the public benefit to an arbitrary point of unfairness.⁵⁰ The problem with this perception for preservationists is evident: He does not similarly view the singling out of a few

⁴⁷ 96 S.Ct. 2661 (1978).

⁴⁸ Id. at 2674.

⁴⁹ 447 U.S. 255 (1980).

⁵⁰ Sue Davis, *Justice Rehnquist and the Constitution*, 119.

buildings from surrounding buildings, as in designation, to be positive and beneficial to the community.

Rehnquist's opinion in the *Penn Central* case, despite the fact that it was a dissent, had the power to influence lower courts on this matter. His benefits versus burden analysis and distinction between district and landmark designation was influential, particularly in one case. The Supreme Court of Pennsylvania used his position in *Penn Central* to argue their holding in favor of the United Artists Theater over a preservation commission in 1991, thirteen years later. Because the *Penn Central* majority admitted that it did not have a precise standard for determining regulatory takings cases, some lower courts, as in the Pennsylvania case, used their own discretion in preservation cases. The Pennsylvania Court clearly objected to procedures of historic preservation commissions that seemed to lack due process.⁵¹ Obviously, Rehnquist had enough influence on this state supreme court that it would follow his argument that a specific piece of property should not be singled out and treated differently than neighboring properties, as in historic landmark designation. The Pennsylvania Supreme Court's message was straightforward: the taxpayers should bear the costs for actions that benefit everyone. In the opinion, the court wrote that its decision was partly based on its observation that basic private property principles had been eroded during the last fifty years.⁵² This example is one that likely occurred because of Rehnquist's strong position and the court's own opposition to the majority in *Penn Central*. Nevertheless, a decision like this seems to undermine *Penn Central* and the merits of historic preservation.

⁵¹ 595 A.2d. 8 (Pa. 1991).

⁵² Id. at 13.

Keystone Coal Association v. DeBenedictis

Although *Keystone Coal* does not directly relate to historic preservation or similar zoning laws, it illustrates an important regulatory takings case in which Rehnquist wrote an opinion. The statute in question was the Pennsylvania Bituminous Mine Subsidence and Land Conservation Act⁵³ which imposes regulation on the mining of coal in areas subject to subsidence. Specifically, Section 4 of the act prohibits mining that causes subsidence damage to public buildings, cemeteries, and residences, generally requiring fifty-percent of the coal underneath to remain in order to prevent harmful effects.⁵⁴ Section 6 of the act authorizes the state to revoke a mining permit if coal removal caused damage to a protected structure or area.⁵⁵ Individual coal companies and an industry association filed an action in the district court in which they claimed that the statute was facially invalid and that it constituted an impairment of contract obligations. In addition, the plaintiff argued that enforcement of the statute constituted a taking without just compensation, because it required them to leave 27 millions tons of coal in the ground. The court ruled in favor of the state, and the appeals court affirmed its decision that a taking had not occurred since the entire bundle of rights was not destroyed. Subsequently, the U.S. Supreme Court granted the plaintiff certiorari.

In many ways, Rehnquist's opinion for this part of the 1987 takings "trilogy" appears consistent with his earlier one in *Penn Central*. Again he wrote the dissent, criticizing the Pennsylvania statute that was restricting mining operations to control subsidence damage to the land above the coal. In a narrow vote, Justices Brennan, Marshall, Stevens, White and Blackmun upheld the Pennsylvania statute since the company could continue to mine and it was not affecting the petitioners' reasonable

⁵³ PA. STAT. ANN. tit. 52 § 1406.1.

⁵⁴ PA. STAT. ANN. tit. 52 § 1406.4.

⁵⁵ PA. STAT. ANN. tit. 52 § 1406.6.

investment-backed expectations.⁵⁶ Once again, Rehnquist disagreed with the majority, expressing that the statute constituted a taking if there was government authorization of a physical invasion of private property. However, he recognized that the mining law concerned public purposes, but that the majority should not have thrown out the comparison to *Pennsylvania Coal Co. v. Mahon*⁵⁷ which held there is a taking if regulation goes too far. Because the statute decreased the economic benefits in any way and interfered with the plaintiff's investment-backed expectations, the public concern for safety is overridden. The majority in this opinion adhered to the value of what was left to the owner after the taking, instead of the sole value that was taken. To Rehnquist, this was irrelevant to the mere fact that a taking is a taking, no matter the reason. He wrote that "the question is evaluated from the perspective of the property holder's loss rather than the government's gain."⁵⁸

Furthermore, he dismissed the Court's argument that the mining rights affected are simply part of the bundle of rights. Rehnquist respected fee simple rights, not ignoring any strand in the bundle, as the majority did. The justice consistently writes about the fundamental nature of the bundle of rights in his opinions.⁵⁹ It is also important to note that this is an example of Rehnquist subjugating state autonomy, or the right of the state to enact a statute, to property rights.

Rehnquist's dissents in *Penn Central* and *Keystone* are important cases for several reasons, although he was not writing the majority. First, as described earlier, he is quoted in lower courts that favored property rights. Secondly, he wrote the dissent for the minority, but several of those in the majority in these earlier cases have retired and been replaced by more conservative justices. As a result, Rehnquist has been joined by others

⁵⁶ 480 U.S. 470 (1987)

⁵⁷ 43 S.Ct. 158 (1922).

⁵⁸ 480 U.S. 508 (1987).

⁵⁹ Callies, *Takings*, 20.

who have helped him to win a majority for similar cases.⁶⁰ Thus, his strong principles in these dissents have become part of the content for successive majority opinions in both the Supreme Court and lower courts. Furthermore, the majority opinion in *Keystone* was not cited in either of the later 1987 trilogy cases, nor was it in *Dolan* for which Rehnquist wrote the majority.⁶¹ Finally, these dissents illustrate his basic beliefs regarding aesthetics, resource protection, and local and state government lawmaking bodies.

Florence Dolan v. City of Tigard

In *Florence Dolan v. City of Tigard*, a divided Supreme Court held that local governments must prove a “required reasonable relationship” between the conditions to be imposed on a development permit and the development’s impact. Private property rights advocates were handed a major victory and, as a result, local governments were cautioned that they must adequately demonstrate required relationships between dedications and the proposed impact. At the time that William Rehnquist delivered the 5-to-4 opinion of this 1994 case, he was serving as Chief Justice of the Court.

The Dolans own a 9,700 square foot plumbing and electrical supply store in Tigard’s central business district. A creek flows through a portion of her lot. She wanted to develop the site by doubling the size of the store and paving a thirty-nine-space parking lot. After applying for a building permit to develop the site, the planning commission would only allow her to do such upon the condition that she would dedicate a bike path and greenway to the city. The commission also required Dolan to dedicate a portion of her property lying within the floodplain for improvement of a storm drainage system along the creek. The commission made a series of findings concerning the relationship between the dedicated conditions and the projected impacts on the property.

⁶⁰ See *Dolan v. Tigard*, 114 S.Ct. 2309 (1994).

⁶¹ Callies, “Regulatory Takings and the Supreme Court,” 543.

Dolan requested variances and appealed to the zoning board on the grounds that the city's dedication requirements were not related to her proposal. She argued that the requirements constituted a taking under the Fifth Amendment. However, the board denied her claims, as well as the Oregon Court of Appeals and the Oregon Supreme Court. She then took her case to the U.S. Supreme Court where she was granted certiorari in order to resolve the issue of the connection between exactions imposed and projected impact of development.

Rehnquist's philosophy on the constitutionality of the bundle of rights is conveyed in this landmark decision. His opinion reminded us that the loss of the petitioners' ability to exclude, or the right to sole and exclusive possession, was one of the most essential in the bundle of rights. His opinion also rejected the theory of reciprocal advantage supporting the constitutionality of government actions in that the reciprocity overrides the burden on the owner.⁶² His argument ignored some of the central principles in the *Penn Central* precedent that justified financial burdens of the owner when the benefits would even be greater with the imposition. Nevertheless, the Rehnquist Court rejected these principles, despite the fact that Dolan would have been relieved of paying taxes and the land surrounding her store would have been improved.⁶³

The city argued that the plaintiff was not a homeowner, and thus, a business should not be given such special protection from local governments. However, Rehnquist responded that a government measure considered a business regulation does not make it immune from violation of the Fifth Amendment. He stated his forthright belief about the takings clause in the following: "We see no reason why the takings clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation."⁶⁴

⁶² Callies, *Takings*, 233.

⁶³ *Ibid.*

⁶⁴ 114 S.Ct. 2320 (1994).

If in any way the property owner has had any undue interference by a regulation, or a condition, in this instance, there is a taking and just compensation should be received. Otherwise, the taking cannot be allowed.

Several outcomes involving planning and zoning laws resulted from this case. First, the Court distinguished between land use regulations of a city and a decision about a permit.⁶⁵ The most important result of *Dolan* was the adoption of a three-part test to determine if a condition was also a taking. The three-part test is this: First, a nexus must exist between the legitimate state interest and the permit condition. Second, the permit condition must promote the legitimate state interest. Finally, Rehnquist coined the term “rough proportionality” to define the sufficient degree of connection between exaction and the impact of development that must exist. The city of Tigard passed the first two, but not the last, and most difficult, requirement. The Court concluded that the city had not provided enough factual findings that a rough proportionality did exist.

The dissenters wrote that the decision would pose a burden of proof on the city, despite the fact that it had a worthy comprehensive plan.⁶⁶ The city had the public interest in mind when granting the permit upon conditions. Tigard was a fast-growing suburban community of Portland, and its government was trying to reduce the amount of traffic and flood hazards and increase the amount of greenway belts. But Rehnquist quoted from *Pennsylvania Coal* to repeat his dissent in *Keystone* and *Penn Central* concerning the public interest: “A strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.” In a footnote, Rehnquist clarified that a difference about the burden of proof exists between regular zoning measures and conditions placed upon a party.

⁶⁵ Callies, *Takings*, 95.

⁶⁶ 114 S.Ct. 2329 (1994).

Dolan has also had widespread affects on the lower courts, as did the previous regulatory takings cases. Since adopted in 1994, the *Dolan* test has continually struck down county or city ordinances or permit conditions protecting natural or cultural resources that do not prove to be proportionate to the impact of a proposed development.⁶⁷ The case is likely to have an impact when local governments are perceived to be overreaching with their police powers to obtain more contributions from developers than can be justified.⁶⁸ In addition, the courts are in conflict about whether *Dolan's* test for property regulation should be applied in cases in which the alleged taking occurs through an act of the legislature. Moreover, the Court placed such a high emphasis on the "right to exclude" that the environmental protection from development may not be as strong in communities now. Even if a nexus exists, the proportionality test will be difficult to win. Finally, the case indicates to local governments that they need to hold proceedings in which they can show factual findings that justify the conditions imposed.

Rehnquist, based on these major takings cases in which he wrote opinions, illustrates that the legitimate government interest does not override the property owner's rights, even if he is ultimately gaining from the regulation. Rehnquist continually holds that the public interest can only follow the most constitutional way of paying for it. Furthermore, his language conveys that he justifies safety precautions as a legitimate public interest much more than an aesthetic or environmental regulation as contributing to the quality of life, or public good. He also dismisses attempts to physically occupy any land even if its value is not decreased. To him, the right to exclude and physical occupation are fundamental violations of the rights of property owners for which they must be paid compensation. Any strand taken from the bundle represents a taking,

⁶⁷ Callies, *Takings*, 233.

⁶⁸ *Ibid.*, 234.

regardless of the particular circumstances. In a physical invasion, the government “chops through the bundle, taking a slice of every strand.”⁶⁹

The Rehnquist Court and the Future of Regulatory Takings

Not long after the 1987 takings cases, property rights advocates embraced the decisions by the Rehnquist Court in the widely publicized *Lucas* case, along with *Dolan* in 1994. To many, the Court seemed to be taking giant steps toward relieving the property owner of any burden from the government. To others, the Court was finally issuing consistent decisions that were highly protective of private property rights.⁷⁰ As a result, many members of the legislative branch of the federal government began capitalizing on this increased awareness toward the rights of the property owner. Consequently, the power of local government to enact planning and zoning laws, as well as the goals of preservation commissions, were increasingly challenged.

William Rehnquist, though not alone, is largely responsible for the takings jurisprudence that has, and will, affect the protection of our historic and natural resources. Based on his record, along with that of the primarily conservative Court, the application of recent cases like *Lucas* and *Dolan* could prevail over *Penn Central* in takings claims. As David Callies says: “If *Penn Central* came up again in the United States Supreme Court, it would go the other way.”⁷¹ For one, more of the justices are present from the *Dolan* and *Lucas* decisions than *Penn Central*. In addition, justices like Scalia, Kennedy, and O’Connor almost consistently agree with Rehnquist in this area. And Justice Brennan, more sensitive to the environment and author of *Penn Central*, no longer sits on the Court. Moreover, Rehnquist has been consistent on takings law throughout his career with few exceptions in which he supported state autonomy. Almost every regulatory case

⁶⁹ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 US 419 (1982).

⁷⁰ Robert Zoeckler, “Lucas in Perspective,” *The Alliance Review*, Winter 1993, 1.

⁷¹ David Callies, Visiting law professor at Vanderbilt University, Interview by author, 29 March 2001.

prior to the 1987 trilogy in which he sided with the government was unrelated to land use.⁷² As the Court reviews more cases, a steady ascension in support of the property owner seems likely and consistent for Rehnquist. He has illustrated his philosophy on takings quite clearly through his numerous opinions, despite what might seem inconsistent at times, as in the *Penn Central* and *Agins* cases discussed earlier. The Chief Justice is truly conservative in his philosophy, leaving marginal room for historic preservation as an endeavor to benefit the entire community or to justify it as the grounds of reciprocal advantage. These facts are certainly not advantageous to the cause of historic preservation.

The extremely recent takings decision handed down by the Supreme Court, *Palazzolo v. Rhode Island*, is not good news for preservation either. The Court's majority decision in favor of the landowner, written by Justice Kennedy, included Chief Justice Rehnquist and Justices Scalia, Thomas, and O'Connor. Since 1962 Anthony Palazzolo fought the state to develop his beachfront property and he sued for more than \$3 million in damages as just compensation from the government. Palazzolo is an eighty-year-old Rhode Island builder who was barred from building 74 houses on an eighteen-acre salt marsh because of protective state regulations. As a result of his lawsuit against the state, the Rhode Island Supreme Court ruled that property owners are prohibited from challenging the application of land use regulations adopted before they acquired their properties.⁷³

Upon hearing the case after an appeal by the plaintiff, the Supreme Court overturned key parts of the Rhode Island Supreme Court's decision that the wetlands regulation on Palazzolo's property did not amount to an unconstitutional taking. The decision rejected the state's claim that because Palazzolo had foreknowledge of the

⁷² Coyle, *Property Rights*, 175-176.

⁷³ "US high court: developer may sue on land rights," 28 June 2001, in Excite news database on-line; accessed 30 June 2001.

regulation before purchasing the land, the application of the regulation could not be considered a taking. A further point addressed in the landmark decision is extremely beneficial to property rights proponents. The decision stated that future landowners also have a right to challenge unreasonable limitations on the use of property—not just the person who bought it before a regulation was enacted. In this case, the landowner had inherited the property from a defunct corporation. Thus, a taking is defined as such when the owner never actually had the right to develop his property in the first place. Indeed, this kind of standard could be potentially threatening to local historic district designation. Nevertheless, the Court remanded the case back to Rhode Island, deciding that the case was ripe for review there, because Palazzolo had pursued adequate application procedures.

In obvious ways, the legal future seems somewhat gloomy for historic preservation. Of course, the lower courts do not always apply the Supreme Court's decisions to their own, partly because of the thin line that distinguishes one case from another. However, there are occurrences of lower courts applying the three-part test from *Dolan* to exactions even beyond physical dedications,⁷⁴ which could snowball into threatening effects for local smart growth measures. It seems unlikely that Rehnquist will take a sudden turn in favor of the government in light of his constitutional principles of property rights and state autonomy. However, measures to protect our natural and built environment cannot be ignored, even by a property rights-laden Supreme Court, because the need for reasonable regulation to protect historic and natural resources and public health and safety exists.

Despite the unlikely odds of future propensity towards government regulation, the sitting justices are not always predictable on the subject of takings. For instance, David Callies believes that because Justice Antonin Scalia cites *Penn Central* in the *Lucas* case,

⁷⁴ Callies, "Regulatory Takings," 575.

more vagueness about the future on takings and historic preservation exists. Had he not given some approval to the decision by doing that, the future for preservation would certainly be bleak. Furthermore, in the recent *Palazzolo* case, the majority decided that the Rhode Island courts must review the case under *Penn Central's* "balance of interests" test rather than the *Lucas* "total deprivation of all economic use" standard,⁷⁵ because his parcel still retained significant development value. Thus, despite the lawsuit, the amount of damages Palazzolo can actually receive from the state of Rhode Island will be determined by a test in which some value to the property is recognized. The case may have been a blow for the protection of historic and natural resources, but at least it recognized a "balance of interests" test, which considers the governmental need to regulate as well as the economic interests of the owner.

Whether the recent narrow vote for the landowner in *Palazzolo* or the Court's unanimity on *Del Monte Dunes* in favor of the property owner are good predictors for the future is unknown. For one, the temporary taking ruling in *Del Monte Dunes* was not all that surprising, considering the fact that the developer went through five formal plans before being denied a permit by the city, of which many of the justices described as evident bad faith.⁷⁶ (Del Monte Dunes tried for several years, beginning in 1981, to develop a 37-acre oceanfront parcel and was denied a permit despite compliance with zoning.) Furthermore, the public interest was still vindicated since it was also decided that *Dolan's* rough proportionality standard could only be applied to exactions and dedications, and not denial of permits, as in *Del Monte Dunes*.⁷⁷ In essence, the Court found by unanimous decision that the *Dolan* standard was not designed to fit denials of development. Moreover, this portion of the decision represented the first time in years

⁷⁵ "Palazzolo v. Rhode Island: Regulatory Takings Case Decided in Favor of Landowner," 28 June 2001, in Excite news database on-line; accessed 30 June 2001.

⁷⁶ Michael Berger, "Municipal Myopia Run Rampant," in *Hot Topics in Land Use Law*. Ed by Salkin and Freilich, (Chicago: ABA, 1999), 4.

⁷⁷ *Ibid.*, 7.

the Court was unified on an important takings issue. In *Palazzolo*, Kennedy said for the majority that successors to legal ownership of property are still entitled to pursue takings claims. Still, the Court rejected *Palazzolo*'s invitation to broaden *Lucas*'s reach or narrow the *Penn* decision, indicating no dramatic change in takings jurisprudence. The takings issue, and thus, the future of preservation, may continually be in a state of limbo.

CHAPTER 3

THE PRIVATE PROPERTY RIGHTS MOVEMENT: WHAT *PROPERTY* MEANS IN AMERICA

The [property rights] debate is not over the retention or forfeiture of property rights. It is over the assertion that landowners have a right to do anything to their property regardless of the consequences to other landowners and the public at large. It is over the presentation of property rights and historic preservation as an either/or proposition. It is over the idea that the enjoyment of property rights requires the degradation of our cities and landscapes. —*Constance E. Beaumont*⁷⁸

The word *property* is often a contentious one, because the word creates differing reactions among people. To some, the word evokes the most profound kind of freedom accessible to mankind and the most sacrosanct of constitutional rights. Others even perceive it as freedom itself. And still others view property as a right that cannot be absolute—one that is limited, in fact—because otherwise, true collective freedom would not exist. Then there are those who find that *limits* on property are as sacrosanct as land use rights and property rights are to others. With such conflicting perspectives joined with the more recent, changing circumstances in the legislature and judiciary, it is not surprising that in the last two decades a near-rebellion has erupted between the opposing forces.

The increased public support for property rights that will be discussed in this chapter has been a result of both unwelcome and satisfactory court decisions, actions taken by presidential administrations, greater public awareness concerning land use

⁷⁸ “Property Rights and Civic Responsibilities,” *Preservation Forum* 7, no. 4 (1993): 32.

matters, and strong leadership at the grassroots level, among other causes. From another perspective, one might attribute the evolving legislative and judicial forces to the strength of the growing web of property rights organizations. Nevertheless, much of the popular support for property rights reform appears to be based largely on the perception that landownership implies the right to use land in whatever way the landowner wishes.⁷⁹ The popularity of it also stems from a desire to protect personal interests. These inclinations alone explain much of the growing fervor of the movement. However, how this mentality has taken shape is one of the most important issues to address when examining the recent evolution of the property rights movement. The following is a list of the numerous contributing factors to the property rights philosophy supported by advocates:

- Growing hostility, fear, and mistrust of government
- Concept of the “tragedy of the commons”
- Belief in “The American Dream”
- Lack of information regarding preservation planning principles
- America is increasingly a capitalistic and individualistic society
- Apathy toward community matters
- Federal government has not always succeeded or listened to those closest to the land
- Opposes the assumption that government is the better protector of the environment
- Percentage of land owned by federal government is approximately one-third of the United States’ total land

⁷⁹ Keith Wiebe and Betsy Kuhn, “Land Tenure, Land Policy, and the Property Rights Debate” in *Who Owns America?*, ed. by Harvey Jacobs (Wisconsin: University of Wisconsin Press, 1998), 79.

Philosophy and History

In many communities, especially those in the West, residents are often convinced that people and government working together in organized planning for a better future, such as for land use, is communistic and is to be avoided at all costs.⁸⁰ Undoubtedly, the United States is witnessing an era of growing hostility toward perceived excessive governmental control over individual freedom. There are many factors that have caused this way of thinking to be widespread in this country and that have increased the challenges for sound land use planning and historic preservation.

First, one of the most obvious reasons more and more people have become avid defenders of property rights is the perpetual fear and mistrust of the government. Part of this fear is well founded since the political history of this country has not always revealed a pleasing picture about how the government has handled its public lands. Not only has the government not always succeeded in its policies, but it has not always listened to those most directly affected by its decisions. Citizens have a right to expect the government to treat them fairly as well as to protect property rights.

Through its progress and subsequent development policies, the United States has also painted a picture about the American dream in which every person can achieve success simply by having a certain amount of money and land. Furthermore, a concept known as the “tragedy of the commons”⁸¹ has been embedded in the minds of many citizens. The idea that land belonging to everyone actually does not belong to anyone has influenced the way people perceive government as an interference in their lives. Clearly, many disagree or have never learned about, the benefits of parks, greenways, historic districts, and public spaces. This fact illustrates another reason for opposition to land use and historic preservation regulatory measures: the lack of education or information about

⁸⁰ Herbert Smith, *The Citizen's Guide to Planning*, (Chicago: APA Press, 1993), 42.

⁸¹ Nancie Marzulla, “The Property Rights Movement,” in *Land Rights*, 26.

the principles undergirding the future health and safety of the environment and cities. Consequently, a similar factor causing people to oppose governmental land use planning policies is a general apathy toward community matters.

The most obvious reason that many landowners hold property rights as sacrosanct is the capitalistic notion that a “man’s land [home] is his castle, to do with as he pleases.” The fact that we live in a capitalistic society that has become more and more individualistic only increases this attitude. People prioritize their economic and property rights to the extent that profiting or self-gain are deemed more important than protecting historic and natural resources. To a certain degree, the identity of being an American includes controlling and owning private property. The interesting contradiction in all this is the public’s strong support for our national parks and environmental protection and opposition to drilling. Opinion polls in the media continually illustrate this support.⁸² At the same time, the public opposes many kinds of regulation and wants the currently high gasoline prices to be lowered, particularly those who own the more gas-guzzling sport-utility vehicles.⁸³

For many, the tragedy is that “individual landowners make decisions that are economically and socially sensible to *them*, but are not judged to be as sensible to the broader public.”⁸⁴ Taking property rights from the private bundle and shifting them to the public bundle is one solution to this problem. However, the property rights proponents oppose the assumption that the government is the better protector of the environment than the private property owner. Of course, herein lies the philosophical disagreement between the advocates and the naysayers of government land use regulation.

⁸² “Macneil-Lehrer News Hour,” PBS, Interview with Greg Easterbrook, April 2001.

⁸³ *Ibid.*

⁸⁴ Harvey Jacobs, “The ‘Wisdom,’ but Uncertain Future, of the Wise Use Movement” in *Who Owns America?* (Wisconsin: University of Wisconsin Press, 1998), 36.

Much of the social conflict over property rights is tied to the certain statistical information concerning land administered by the government. Today the United States government owns 690 million acres of land, or about one-third of the country's total land area.⁸⁵ The public lands include parcels such as national forests, parks, military bases, and the White House. Of the 2.3 billion acres that comprise the country, 29% of the land is owned by the federal government; an additional 2% is held in trust by the federal government as Indian reservations; 9% is owned by state and local government; and 60% of the land in America is privately owned.⁸⁶ This last figure, for many, is too low, and the acreage regulated by the Interior Department over the years has been far too high. For instance, when 87% of Nevada's land was protected by a moratorium in the 1960s, a distinct outrage followed in the West, known as the Sagebrush Rebellion.⁸⁷ This populist movement was founded on the principle that the federal government had an obligation to dispose of its public lands as well as the general dislike of government regulation and development in the region.⁸⁸

The debate over property rights can be traced at least as far back as 1791, to the Fifth Amendment. Yet, the heightened debate on the subject during the latter part of the twentieth century can be attributed to what is commonly called the "environmental movement." Basically synonymous with this umbrella term "environmental movement" is federal land use policy; subsequently, historic preservation falls under the heading of land use. (For the purposes of this thesis, it is worth noting that scholars, legislators, and property rights advocates frequently use the term "environmental movement" to describe any control such as wetlands permitting to architectural review boards.) Although the environmental movement brought the property rights issue closer to the forefront, land

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Marzulla, "The Property Rights Movement," 3.

⁸⁸ Ibid.

use law had already been in existence for over a century. In essence, public regulation of the use and development of land comes in a variety of forms. These basic forms, established in the 1920s when the Supreme Court approved comprehensive planning in *Euclid v. Ambler Realty*,⁸⁹ are: type of use (zoning), density, aesthetics and design, and the effect of the use of the land on cultural and social values of the community.⁹⁰ Once people's property began being regulated in these four areas, opposition to such regulation of land was imminent.

It was during the 1960s and 70s that there was extensive growth of the environmental movement, evidenced by legislation such as the Clean Air Act,⁹¹ the Endangered Species Act,⁹² and the landmark National Environmental Policy Act of 1969.⁹³ The most important legislation ever passed relating to historic preservation was the National Historic Preservation Act of 1966.⁹⁴ Also, the Carter administration's expansion of designated lands in the 1970s became the smoking gun for anti-environmentalism and stoked the fire for the property rights movement. When Jimmy Carter was in office, there was a great movement of opening public lands to refuges and permanent park status. These numerous changes were, nonetheless, unwelcome by many landowners across the country.

Property rights made gains during the Reagan years as the president placed several westerners, who were determined to keep out government interference, into key cabinet positions. During the Reagan era, property rights made substantial legal gains as well, particularly at the Supreme Court level. Justices Scalia, O'Connor, and Rehnquist as Chief Justice, were all appointed during this time, and would take serious action in

⁸⁹ 272 U.S. 365 (1926).

⁹⁰ Peter Salsich and Timothy Tryniecki, *Land Use Regulation*, (Chicago: ABA, 1998), 1.

⁹¹ 42 U.S.C. § 7401 et. seq. (1970).

⁹² 16 U.S.C. § 1531 et. seq. (1973).

⁹³ 83 Stat. 852, 42 U.S.C. 4321 et. seq.

⁹⁴ 80 Stat. 915, 16 U.S.C. 470 et. seq. (1966).

takings law. Furthermore, Reagan would give property rights a boost with Executive Order 12630 that allowed the government to budget funds for compensating necessary takings and preventing unnecessary takings.⁹⁵

When George Bush became president in 1988, he wanted to be more environmentally friendly than his predecessor. As a result, landowners were taken by surprise by the president's actions, yet the administration tried to appease both sides. Meanwhile, a growing "wise use" movement that coincided with the burgeoning property rights activity was gaining strength. Leaders of the "wise use" movement urged a return to the perspectives on property rights of the founding fathers. They maintained that the nation's leaders of two centuries ago believed that social progress was dependent upon free enterprise and that democracy could not prosper if government inhibited economic freedom.⁹⁶ The agenda of the "wise use" movement centered on the idea that humans can find ways to use the earth wisely. Among the top goals of the movement, most certainly intertwined with those of private property rights organizations, were the following: opening all public lands to commercial mineral and energy production, allowing oil drilling in the Arctic National Wildlife Refuge, promoting commercial development within national parks, and establishing private property rights in lease-based grazing arrangements on public lands.⁹⁷

The Clinton administration gave high priority to environmental issues, promoting the idea that the Environmental Protection Agency be elevated to cabinet status. With the creation of the new White House Office of the Environment, Vice President Al Gore placed special importance on natural resource protection, particularly by proposing more expansive governmental regulation. Numerous measures, such as reauthorization of the

⁹⁵ Marzulla, "The Property Rights Movement," 16.

⁹⁶ Donald Last, "Private Property Rights with Responsibilities," in *Who Owns America?* Ed. by Harvey Jacobs, (Wisconsin: University of Wisconsin Press, 1998), 45.

⁹⁷ Jacobs, "The 'Wisdom,' but Uncertain Future, of the Wise Use Movement," 32.

Endangered Species Act, sought in particular by Clinton's Interior Secretary Bruce Babbitt, seemed far-reaching to many and had the effect of angering more people toward the environmental movement. The proposed property rights legislation of the 1990s, which will be discussed later on in the chapter, would be part of the injuries the strong environmental lobby would sustain during the Clinton administration.

Property Rights Organizations

The sheer number of property rights and land rights organization is one of the best illustrations of the rise of the movement at the grassroots level. Over five hundred property rights organizations with similar mission statements have formed across the nation today so that their voices might be heard. Americans for Land Rights, Alliance for America, Virginians for Property Rights, Oregonians in Action, League of Private Property Voters, Pacific Legal Foundation, Defenders of Property Rights, Mountain States Legal Foundation, and the Council on Property Rights are just a handful of these organizations and also some of the most well known. The Alliance for America serves a loose confederation of over 600 smaller property rights organizations. Oregonians in Action provided the lawyers for Florence Dolan, the landowner who was successful in challenging the City of Tigard's land regulations.

The Pacific Legal Foundation (PLF), founded in 1973, was the first nonprofit law firm specializing in defense of individual and economic freedoms—basically protecting property rights. After the *Nollan* case, it set up a follow-up program to attempt to preserve the gains from that decision. In previous years, the president and founder of this organization said the following about PLF: “We see the 1990s as our decade ...we have the weapons, court precedent, experienced personnel, and credibility.”⁹⁸ PLF is the organization currently representing the landowner in the landmark takings case recently

⁹⁸ Nancie Marzulla, “The Property Rights Movement,” 20.

decided by the Supreme Court, *Palazollo v. Rhode Island*. In other cases, when property is affected, an organization is often formed to provide a united front against the challenged ordinance, governing body, or permit denial. David Lucas, the landowner in the Supreme Court case, *Lucas v. South Carolina Coastal Council*, received so many calls and letters from people during his case that he formed his own group called the Council on Property Rights, which is a collective body of aggrieved property owners. The groups in the council range from small organizations run from someone's home to larger entities with dedicated staffs.⁹⁹

These groups share mission statements similar to that of the American Land Rights Association (ALRA). Part of ALRA's home page on the World Wide Web states the following:

Sometimes ALRA leads the way. Other times, we're simply a sergeant in a coalition organized by others. If you are an individual or group that is facing the threat of losing your land or rights to a Federal agency or law, call us.¹⁰⁰

Chuck Cushman, president of ALRA, commented that these organizations are frequently formed when one small property owner challenges the federal government.¹⁰¹ Later the group might blossom into a network of thousands. Cushman says that is how he formed ALRA in 1972 when the National Park Service wanted to eradicate a community in Washington state in order to form a park. Typically, he becomes involved with various communities when he reads about it in the newspapers or they seek his help. Monetarily, these organizations are supported largely by individuals who want to help others fight back against the government or maybe have been through their own battles. For instance, the Pacific Legal Foundation budget shows that 47% of total revenue comes from

⁹⁹ Ibid.

¹⁰⁰ American Land Rights Association, "ALRA Home Page," available from <http://www.landrights.org>; Internet; accessed 23 March 2001.

¹⁰¹ Chuck Cushman, president of American Land Rights Association, telephone interview by author, 23 March 2001.

individuals and small businesses; 28% from charitable organizations, 18% from corporations, and the remainder from others.¹⁰²

Other groups or confederations, like the Alliance for America, make it known that they are concerned about the environment as well as property rights. In fact, the mission statement of the Alliance suggests that its umbrella organization includes groups in fifty states, consisting of farmers, miners, loggers, ranchers, fisherman, recreationists, private property activists, and teachers. Other interest groups that create the common network of the property rights movement are real estate developers, off-road bikers, and “inholders,” a term describing those with property bordering or surrounded by federal land.¹⁰³

Cushman explains that the ultimate goal in his organization is to ensure that landowners are a part of the decision-making process. He greatly dislikes the top-down approach of the government and believes that an alternative, bottom-up approach is the only way to give people the incentive to be reasonable concerning land use regulation. In a town where seventy percent of the citizens were against historic district designation, Cushman was angered when the commission designated it anyway. When asked his opinion if seventy percent had supported the designation, Cushman replied that the minority should still be consulted and a feasible solution could only be one in which “the people were behind and happy with.”¹⁰⁴ When it comes to creating historic districts, Cushman fears that people are signing away their economic rights, or subjecting themselves to regulations they know nothing about. His organization believes that historic preservation is an idea that is only sold to a wealthy and elite few. The only way Cushman and his groups will support historic preservation is if the landowners are all involved in the process. He believes society should pay for its own appetites. In

¹⁰² Pacific Legal Foundation, “Annual Budget”; available from www.plf.org; internet; accessed 12 May 2001.

¹⁰³ Marzulla, “The Property Rights Movement,” 5.

¹⁰⁴ Chuck Cushman. Interview. 23 March 2001.

addition, the organization Virginians for Property Rights claims that the designation of historic property alone is an interference with property rights.

Even the prospect of the federal government stepping in to designate a forest as a national monument can spark intense opposition in various communities. For example, in northwest Alabama, an environmental leader received death threats because his group, Wild Alabama, supports the Bankhead National Forest becoming a national monument. Fears that property around the forest would be condemned were deeply embedded in the people in the area. One of the opponents remarked that the efforts to declare the forest a monument is almost like “communism in its purist form.”¹⁰⁵ The advocates, on the other hand, said that the change would actually better protect people’s land and that the government cannot condemn private property when a national monument is declared. The government can only purchase land on the boundaries. U.S. Representative Robert Aderhold (R-Haleyville) opposes the move, and believes that the declaration would affect new mining rights and mineral and energy leases. Even if opponents are not bothered by the latter, some believe that the federal government does not need any more wilderness land designations. These kinds of battles bring the passion felt by both sides to the forefront. Advocates believe monument designation would increase tourism and land protection, while opponents think their land is being taken away. The leader of Wild Alabama said that the private property rights controversy has become so contentious, it is “fanning the flames of demagoguery.”¹⁰⁶ A website was even created by a property rights organization to disseminate misleading information about the monuments. The fact that timbering and mining are part of some people’s livelihoods who live in the Bankhead Forest area is what drives such passion to its fullest extent. Nonetheless, this possibility arose during Clinton’s presidential term in which many monuments were

¹⁰⁵ “Monument proposal drives debate,” *The Cullman Times*, sec. A, p. 1.

¹⁰⁶ *Ibid.*

declared as a result of his administration's efforts toward protecting natural resources. The Alabama forest is now unlikely to be altered to national monument status since Clinton's presidential term has concluded.

Many of these ideas and beliefs are widely shared among property rights advocates. Understanding these kinds of thoughts and beliefs will help preservationists better deal with their opposition. Yet, expecting a complete consensus on historic district designation, for instance, is far-reaching, and is unrealistic.

Property Rights Legislation

Beginning most significantly in the early 1990s, property rights activists have chosen to use state and local governments as channels to fight what they believe to be an overabundance of land use regulation. These political channels seemed as worthwhile as the courts, and ones in which property owners could be more successful and have more power and influence.

With the encouragement of the property rights movement, some members of Congress have attempted to turn Executive Order 12630 into a federal statute. In the 103rd Congress, Senators Bob Dole of Kansas, Phil Gramm of Texas, and Richard Shelby and Howell Heflin of Alabama introduced the "Private Property Rights Act of 1993" as an amendment to an environmental bill. While it was defeated, others similar to it were introduced in the House that same year.¹⁰⁷ Near the end of the 103rd Congress, many other members of Congress began to introduce their own legislation. Senator Phil Gramm introduced one of the most stringent proposals, requiring the government to pay just compensation to the owners of land that is devalued by twenty-five percent or more

¹⁰⁷ Nancie Marzulla, "Property Rights Initiatives," *South Carolina Law Review* 46, no. 613 (1995): 630-32.

due to regulation.¹⁰⁸ Although most amendments did not pass, their attachment to certain bills prevented any environmental legislation from being passed at that time.

Despite the fact that property rights received notable attention in the 104th Congress, many landowners believed that the federal legislative branch was failing to fulfill their hopes for fair property rights protection. To the landowners' detriment, Congress adjourned in 1996 without enacting a takings bill. The same was true for subsequent years, although much headway was made in the realm of private property rights protection. (Several bills were passed in the House in the last several years which would have required a certain percentage of compensation for any governmental action reducing the value of even the smallest portion of land, similar to the Gramm bill.)¹⁰⁹

During the 106th Congress, the legislative branch capitalized on the growing dissatisfaction toward the environmental and land use regulation of the Clinton administration. In March 2000, by a vote of 226-182, the House passed H.R. 2372, known as the "Private Property Rights Implementation Act."¹¹⁰ The National Trust for Historic Preservation adamantly opposed this bill for several reasons. Primarily it would "prevent federal courts from abstaining from exercising Federal jurisdiction in actions where no state law claim is alleged."¹¹¹ The Trust believes that this type of legislation would increase the number of costly federal cases and would force communities to prematurely approve projects harmful to the environment and historic resources, as well as lower the amount of public participation in local land use planning.¹¹²

¹⁰⁸ Ibid.

¹⁰⁹ Lois Schiffer, "Taking Stock of the Takings Debate," *Santa Clara Law Review* 38, (1998): 160.

¹¹⁰ National Trust's Law and Public Policy Department. "Preservation Advocate News," available from <http://www.nthp.org/main/frontline/actioncenter.htm>; Internet; accessed 13 April 2000.

¹¹¹ United States House of Representatives, "Bill Summary & Status," available from <http://www.house.gov>; Internet; accessed 13 April 2000.

¹¹² National Trust's Law and Public Policy Department. "Preservation Advocate News." Available from <http://www.nthp.org/main/frontline/actioncenter.htm> Internet; accessed 13 April 2000.

Although the bill did not pass in the Senate, the prospect of this kind of legislation poses a serious threat for the future of historic preservation. More specifically, these bills are dangerous to the protection of historic resources since they throw out all factors other than the loss of value to the affected property.¹¹³ Furthermore, in many minds, this type of bill does not protect the property rights of ordinary citizens--its intended target. Instead, it gives developers ways to circumvent local and state procedures and take their opponents directly to federal court.¹¹⁴ In essence, these kind of circumstances are the ones that pose the threat to local neighborhood groups or planning commissions struggling to match the resources of developers. This kind of bill has been supported by conservative politicians, yet there is irony in the fact that it eliminates local control from the process, typically a welcome concept for conservatives. If property rights advocates are fearful of federal intrusion, then this type of legislation seems truly contradictory. The U.S. Conference of Mayors warned last year after H.R. 2372 was introduced that the legislation would impose an “unfunded burden on state and local taxpayers.”¹¹⁵

Despite the headway made in the federal legislature, advocates for private property owners have turned to the states for their protection and found a better success rate. By 1994, one hundred property rights bills had been introduced in forty-four states, and these have in general been more successful than the federal initiatives. In reaction to the demands by property owners, two types of bills have been introduced by state legislators. The first type is a planning bill modeled after President Reagan’s Executive Order 12630.¹¹⁶ (These are also known as “look before you leap” bills since they require state governments to plan before taking actions that might result in unconstitutional takings.) The second is a bill that identifies a numerical percentage of diminution in

¹¹³ Schiffer, “Taking Stock,” 160.

¹¹⁴ “Local control of zoning under attack in Congress,” *Atlanta Journal-Constitution*, 29 March 2000, editorial page.

¹¹⁵ *Ibid.*

¹¹⁶ Marzulla, “Property Rights Initiatives,” 633.

value that triggers the constitutional requirement of just compensation.¹¹⁷ The trigger point for these bills is often around a fifty-percent diminution in value, a model takings bill devised by Defenders of Property Rights, a prominent organization. It is important to note that there are some property rights advocates who do not support this latter type because of concern that, by setting a threshold, the bills might belittle the rights of owners who are subject to takings falling below that threshold. Consequently, the “look before you leap” bills are the more popular type of legislation of the two.

Many states made headway in the early 1990s in passing property rights legislation. For instance, the states of Arizona, Delaware, Idaho, Indiana, Mississippi, Missouri, North Carolina, Tennessee, Utah, Virginia, Washington, and West Virginia all had passed legislation by 1994. Washington, Delaware, and Arizona had already passed legislation by 1993.¹¹⁸ More specifically, the Washington law was an amendment to the Growth Management Act of 1991, a state land use planning bill strongly opposed by property rights advocates.¹¹⁹ Delaware enacted the first stand-alone property rights law in the country in 1992. (A stand-alone law can be described as a bill not attached as an amendment, such as the Washington law.) Arizona passed a “look before you leap” bill that was later voted down in a referendum.¹²⁰

In 1993, Florida, North Carolina, Virginia, and Utah passed property rights legislation, though the first three states’ laws were perceived by advocates as being weak. In 1995 Texas passed significant new legislation known as the Private Real Property Rights Preservation Act. As an insurance policy against the swing of the courts, it provides for compensation for many government actions that reduce the value of a parcel

¹¹⁷ Ibid.

¹¹⁸ Hertha Lund, “Property Rights and State Legislation,” in *Land Rights* ed. by Bruce Yandle, (Maryland: Rowman and Littlefield, 1995), 202-206.

¹¹⁹ Ibid.

¹²⁰ Ibid.

of land by more than twenty-five percent.¹²¹ In addition, the law requires the government to do a “takings impact assessment” before enacting laws that reduce property values.

From a preservationist perspective, the property rights legislation and takings bills that have been introduced and frequently passed are certainly not helpful to the cause but are not always harmful. On the federal level, the types of bills previously introduced are potentially threatening to the future of preservation. If federal property rights legislation had passed in previous years, many believe it would have faced a veto from President Clinton, whereas now that is impossible. Yet, it seems that many of the bills that have been passed on a statewide level do not always affect a broad area, being confined to limited areas such as forestry or navigable waters alone. In fact, the “look before you leap” bills have the potential to create a more positive way of dealing with the takings issue. For instance, in the *Lucas v. South Carolina Coastal Council* case, the state had to pay \$1.5 million to the plaintiff, a burden that the taxpayers ultimately had to bear. A planning bill could have required the state to budget the money ahead of time to pay for possible takings claims. Once again, evidence exists of significant funding being drained from a local or state government. Whether the state should have had to pay for the property is a separate issue. Yet, funds previously budgeted might have saved some headaches for the taxpayers and the state government. Thus, some of the property rights legislation could work to benefit the historic preservation cause in the long run.

Because the future of the case law is uncertain on the takings issue, property rights groups will continue to band together in pursuit of takings legislation. Yet, the recent Supreme Court victory of *Palazzolo* might somewhat deflect the push in the legislature for such policy. On the other hand, it might hand the movement the momentum it needs to pass further statewide planning and defined takings legislation. Property rights groups have had better luck in some states, particularly because the

¹²¹ Eagle, *Regulatory Takings*, 665.

environmental constituency has had less of a formal presence. A spokesperson from the organization Preservation Action, a national advocate for historic preservation, believes that the pace of state and federal property rights legislation will continue at about the same rate as it is now.

CHAPTER 4

GALE NORTON, NEW SECRETARY OF THE INTERIOR FOR THE BUSH ADMINISTRATION

In addition to the future challenges and ambiguities that the judiciary and the grassroots level pose, historic preservation faces uncertainty on another front: the newly elected President and one of his cabinet secretaries. Gale Norton, President George W. Bush's choice for Secretary of the Interior, became the first woman to head the department that oversees one-third of the nation's land. Despite her career success, the nominee did not have an easy Senate confirmation in January. The period during her hearings was filled with controversy, the Senate voting 75-24 to confirm.¹²² Dubbed a libertarian-leaning conservative who opposes most governmental regulation, Norton was typecast before her first day on the job. Evidence shows that these classifications were accurate based on her previous record, philosophy, and speeches. Yet, during her confirmation hearings, she stated that she was both a "compassionate conservative and a passionate conservationist,"¹²³ emphasizing that these two identifications were not mutually exclusive.

To no one's surprise, Gale Norton's appointment and confirmation stirred the environmental lobby, creating fears that many protective federal measures would be radically changed over time. Her association with logging, grazing, oil, and mining interests has caused further opposition to her appointment and confirmation. Some of

¹²² National Trust Department of Public Policy, "Preservation Advocate News"; available from <http://www.nthp.org/main/frontline/actioncenter.htm>; internet; accessed 6 April 2001.

¹²¹ "Norton calls herself 'passionate conservationist,'" *The Birmingham News*, 19 January 2001, sec. A, p. 6.

those fears are well founded, since her resume is replete with anti-regulatory measures and constitutional challenges to environmental laws while she served as Colorado's attorney general, legal staff for the National Park Service under President Reagan, and as a property rights attorney in the western region of the country. Senator Jeff Bingaman (D-NM) of the Senate Energy and Natural Resources Committee said during the hearings that Norton's record illustrates someone "championing the interests of the individual over the public, the states over the federal government, and economic development over environmental protection."¹²⁴ If these words accurately describe Norton, then it is indeed worrisome how her views will shape land use policy and historic preservation.

Her available biographical information relates to environmental issues rather than specifically to historic preservation. In fact, when the term "environmental" is used, the public typically thinks of issues such as parks, endangered species, and global warming. Yet land use, an aspect encompassed in historic preservation, is also a part of environmental policy. Thus, the direction of land use and preservation policy can be divined through trends in environmental policy emanating from the Interior Department under Gale Norton's leadership.

During questioning at the hearings, Ms. Norton was quoted as saying the following: "I value the preservation of our lands, and I value the ability of people to use those lands in an appropriate way."¹²⁵ Herein lies the uncertainty for preservationists. Accommodating multiple uses of public land, such as off-road vehicles and grazing is a concept that Norton has favorably cited throughout her career and in the recent Senate confirmation hearings. However, the interpretation of appropriate uses varies among people.

¹²⁴ "Cabinet Hearings: Conservationist Norton Faces Skeptics," *Atlanta Journal-Constitution*, 19 January 2001, sec. A, p. 1.

¹²⁵ "Interior choice faces sharp questioning," *New York Times*, 19 January 2001, sec. A, p. 30.

Background and Philosophy

Norton's background might shed some light on her perspectives on land and property rights and how she might feel about historic preservation. Gale Norton grew up in Denver, Colorado, but not as the daughter of a rancher or a miner in the Rockies. In fact, she lived in the suburban sprawl north of Denver as the daughter of an aerospace executive. She is married to John Hughes, a commercial real estate broker, and has resided in Highlands Ranch, a suburb south of Denver for many years. After completing college and law school at the University of Denver, she began her career at the Mountain States Legal Foundation, a conservative think tank that opposes the government's role in environmental protection. Headed by James Watt, later Secretary of the Interior under President Reagan, this law firm became known as the litigating arm of the "wise use" or property rights movement and has repeatedly sued the Interior Department. After her four-year stint at Mountain States, she worked for the Department of Agriculture and then became the assistant solicitor for conservation and wildlife at the Department of the Interior, serving under both Watt and Don Hodel. She also served on the Western Water Policy Commission under former President George Bush. It was during those years at Mountain States and the Interior that she became known as the protégé of James Watt. In fact, some bitter opponents have even dubbed her "James Watt in a skirt,"¹²⁶ to which Norton quickly responds that she is her own person. Watt enraged environmentalists for years by trying to bypass Congressional restrictions in order to allow for more oil and gas exploration in certain areas of the West. Despite her connection to Watt for some time, Norton has separated herself from his philosophy, which stems from the Sagebrush Rebellion of the 1980s, a radical viewpoint that seeks to block any federal control and defends property owners at all costs. In contrast, an advisor to Norton says that she will

¹²⁶ "The Westerner's Interior Motives," *The Washington Post*, 13 March 2001, sec. C, p. 1.

not be inclined to agree to any use of the land no matter what the cost.¹²⁷ Some say that Watt is a wise-user, whereas Norton is a free-marketeer, a less contentious concept discussed later in the chapter.

In 1991, Norton became Colorado's first female attorney general, serving two terms. While attorney general, she represented Colorado in the nationwide tobacco litigation. She was also a strong advocate of Colorado's self-audit law, which allows companies to conduct voluntary audits to determine whether they are complying with environmental requirements, much to the Environmental Protection Agency's chagrin. In addition, she litigated other state and federal constitutional issues, defended the state against federal mandates, and won a major court victory pressuring the federal government to adequately clean up hazardous wastes at Rocky Flats and the Rocky Mountain Arsenal. During her second term as attorney general, she made a run for the United States Senate and lost in the Republican primary. Finally, in 1999 she served as George W. Bush's environmental advisor during his presidential campaign and began private practice in a Denver law firm, Brownstein, Hyatt & Farber, P.C, that represents numerous developers and oil companies.

In order to evaluate how Norton might influence historic preservation, one must review her perspectives on takings and land use rights. Despite the fact that Norton's background reveals a more modern Western life, she still comes from the American West--a simple, distinguishable characteristic that reveals a lot about land use philosophy. Indeed, she rises from a region with a long-brewing conservative land movement, which has protested federal regulations that restrict the use of land without compensating for the loss of revenue those restrictions impose.¹²⁸ Norton says that there is a core value in the West in which the federal government is seen as remote and out of

¹²⁷ "Norton adds momentum to free market," *Seattle Times*, 4 February 2001.

¹²⁸ "Agency Heads Firm Up Conservative Tone of Bush's Cabinet," *New York Times*, 30 December 2000, sec. A, p. 1.

touch, a concept she better understood while working at the Mountain States Legal Foundation.¹²⁹ She also believes that Westerners' voices were not heard during the Clinton administration and not allowed the kind of input that they seek and deserve.

While in law school, Norton gravitated to the libertarian writings of Ayn Rand, which would form the philosophy for her life's work.¹³⁰ She is a former member of the Libertarian Party. Her legal writings have referred to the work of one of her mentors, Richard Epstein, a reputable libertarian professor and author on takings. Of her value system, Norton said: 'I came to the view that choices arrived at individually can lead to a stronger society than single choices dictated from the top.'¹³¹ She has described herself as a free-market conservative, an advocate of judicial restraint, and a champion of states' rights, which fit with her libertarian beliefs. Free-market environmentalism, commonly espoused throughout the West, uses market incentives to encourage good stewardship among private companies and citizens. Basically, the concept favors free market solutions to environmental problems rather than regulation and enforcement.¹³² The heart of the concept is that competition between private business interests and environmentalists for control of resources will produce mutually beneficial tradeoffs.

One of the biggest proponents of free-market environmentalism is Terry Anderson, a close advisor of Norton who heads up the Political Economy Research Center (PERC), a libertarian think tank in Montana. Anderson, the member of Bush's transition team who championed Norton for the Interior post, supports selling public lands that do not generate enough revenue, or turning them over to private or nonprofit groups to run. Free-marketeers like Terry Anderson urge positive market incentives over regulation: "We need to get the incentives right by using property rights and markets to

¹²⁹ "The Westerner's Interior Motives," *The Washington Post*, sec. C, p.1.

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² "Norton adds momentum to 'free market,'" *The Seattle Times*, 4 February 2001.

achieve what we want.”¹³³ Environmentalists fear this philosophy shared by Anderson and Norton. Mitch Friedman of the Northwest Ecosystem Alliance said that “free-marketeers tend to think that the bundle of rights you get in property is 100% of the stick,”¹³⁴ and he disagrees with this belief. He also said that he is not comfortable giving landowners a blank check and asking them for the favor of protecting habitat.¹³⁵

In the past, Norton has taken a strong position on some key issues, the takings clause among them. She shared her perspective on the courts’ takings jurisprudence in the *Colorado Springs Gazette* in July 1994:

In the judiciary’s hierarchy of rights, economic or property rights have not been as respected as civil rights, like free speech, voting, and privacy. This is an unjustified erosion of liberty.

Norton has made it part of her mission to defend the rights she believes are no longer protected today, as illustrated by her work at the Mountain States Legal Foundation, the Denver law firm, and the Department of the Interior. A constitutional lawyer, Norton has vocally supported the concept of states’ rights. She has spoken of doing battle on the issue of states being able to make their own decisions and of seeking a power shift from Washington back to the states and local communities.¹³⁶

In the past, Norton has argued that the Endangered Species Act and the Surface Mining Act are unconstitutional, among other land use statutes. For instance, she said she supports the goals of the Endangered Species Act, but would not endorse the law itself.¹³⁷ Following her confirmation, she announced that the administration was looking closely at the possibility of changes to the Endangered Species Act that would add

¹³³ “Free-Market Environmentalism Gaining Stature,” *The Washington Post*, 4 June 2001, sec. A, p. 4.

¹³⁴ “Norton adds momentum to ‘free market,’” *The Seattle Times*, 4 February 2001.

¹³⁵ *Ibid.*

¹³⁶ “Interior Choice sends signal on land policy,” *The New York Times*, 30 December 2000, sec. A, p. 1.

¹³⁷ “Interior nominee lays out policy course,” *USA Today*, 12 January 2001.

economic incentives for landowners.¹³⁸ She also commented that people should be rewarded for finding endangered species and that it might not require legal changes at all. Furthermore, in an article on private property rights in the *Harvard Law & Policy Journal*, she contemplated “a right to pollute.”¹³⁹ Not surprisingly, her critics have argued that Norton’s views on constitutional law are radical and that they fall far right of the mainstream.

Furthermore, the Alamosa River calamity that occurred in Summitville, Colorado during Norton’s tenure raised doubts about her beliefs, particularly regarding her philosophy of self-audit. A spill of cyanide and acidic water from a gold-mining operation killed nearly every species on a seventeen-mile stretch of the Alamosa River.¹⁴⁰ Although Norton’s office worked hard trying to get compensation for the damage, some were upset that no criminal charges were pressed against the company or its officers who fled the country. Regulation was reportedly lax, and after the incident, it was the federal government that stepped in to avert an even larger disaster. Some have argued that the state waited too long to let the federal government intervene. Norton’s philosophy that businesses will report and clean up their own pollution if given incentives proved inadequate to many in the Alamosa case. The people who live in the area who lost all aquatic life to a mine fear that a continuance of this self-audit philosophy would only “invite more Summitvilles.”¹⁴¹ In another case, her opponents claimed she sat out the fight against a corporate power plant that broke air pollution laws 19,000 times.¹⁴² Needless to say, those who live in the Alamosa river basin are not strong supporters of Norton’s philosophy.

¹³⁸ “Norton says administration must make case for drilling,” 13 February 2001, in CNN News database online; accessed 13 February 2001.

¹³⁹ Gale Norton, “Takings Analysis of Regulations,” *Harvard Journal of Law & Public Policy*, Winter 1990: 84-91.

¹⁴⁰ “Death of a River Looms Over Bush Choice,” *The New York Times*, 7 January 2001, p.1.

¹⁴¹ *Ibid.*

¹⁴² James Ridgeway, “Libertarian Belle,” *The Village Voice*, 30 January 2001. This information originally appeared in *The Denver Post*.

Serving as the cornerstone of her plans for the Interior Department is a strong emphasis on local residents and Western lawmakers becoming a greater part of the decision-making process in determining land use policy. Using consultation and collaboration and forging partnerships with interested citizens, Norton believes Interior can “succeed in its effort to conserve America’s most precious places.”¹⁴³ Norton got started on this policy soon after her confirmation. She sent letters to local and state officials in the nine states where Clinton had designated national monuments, initiating a process of local involvement. More specifically, she asked for opinions on how the federal lands should be used and managed, including traditional multiple uses, such as grazing, vehicle use, and water rights. In addition, the Mountain States Legal Foundation, Norton’s former employer, filed a lawsuit challenging Clinton’s unilateral designation of the monuments in the past year.¹⁴⁴

Falling in line with her strong support of a local approach is her harsh critique of federal environmental protection efforts, namely those by the Clinton administration. She has voiced her concern with the numerous monument designations within a short timespan and has accused Democrats of “doing too much to lock up natural resources in the name of conservation.”¹⁴⁵ In one statement during her hearings, she alluded to implications that the current secretary was not listening to people in the West. Norton’s remarks illustrated her opinion of the Clinton administration’s actions concerning land. As a result, Senator Ron Wyden (D-Ore), her toughest critic during the Senate hearings, needed convincing that while providing flexibility to local officials, she would be unwavering in enforcement of the law. She answered the committee with a promise that she would enforce even those provisions with which she disagreed.

¹⁴³ “Excerpts from Senate Hearing on Norton’s Selection as Interior Secretary,” *The New York Times*, 19 January 2001, sec. A, p. 30.

¹⁴⁴ “GOP to Press for Unraveling of Clinton Acts,” *The New York Times*, 6 January 2001, sec. A, p. 1.

¹⁴⁵ “Interior choice sends signal on land policy,” *The New York Times*, 30 December 00, sec. A, p. 1.

Norton's critiques of the Clinton administration are rather significant considering the fact that the former Interior Secretary, Bruce Babbitt, and President Clinton set aside more land for future generations than any administration other than Jimmy Carter's. Babbitt and Clinton helped secure legislation that won the first financing for a Lands Legacy initiative that will help contribute billions to states and communities in order to set aside green spaces and parkland.¹⁴⁶ The previous Interior leadership also strengthened departmental regulations to protect habitats and designated nearly two dozen national monuments under the Antiquities Act of 1906. Great controversy has surrounded the prospect of Interior unraveling Clinton and Babbitt's accomplishments under Norton's leadership, yet many believe that the possibility is not likely. Some even project that the Bush administration would rather focus on its mission of opening up Western lands for development in lieu of undoing the monument designations.¹⁴⁷ Furthermore, it would be highly unpopular for Bush to revoke the national monuments since so many citizens support the parks. Yet, some conservationists fear that Norton and Bush might choose to grandfather mining and drilling rights in the new national monuments as the best alternative solution.

Although it is yet to be decided, undoing any of Babbitt and Clinton's legacy would likely be a prelude to increased development of public lands. Furthermore, the land use policy would have been completely different if former Vice President Al Gore had won the presidency, since he would have continued some of the trends of the administration while vice president and is adamantly opposed to any oil drilling that endangers fragile ecosystems. In the opinion of Peter Appel, a natural resources law

¹⁴⁶ "How an Interior Secretary Helped to Encourage a Presidential Legacy," *The New York Times*, sec. A, p. 31.

¹⁴⁷ "GOP to Press for Unraveling Clinton Acts," *The New York Times*, sec. A, p. 1.

professor, we would likely have witnessed more preservation and land use regulation on a federal level if Gore had won rather than Bush.¹⁴⁸

Confirmation Hearings

Finally, reviewing how Norton responded at her confirmation hearings might prove valuable in discerning the direction of her future policies. Although her written statement and oral testimony did not address her or the Bush administration's viewpoint on historic preservation, she did announce a possibility of changes to the Antiquities Act of 1906, the landmark preservation law Clinton used for the monument designations. The Antiquities Act was the earliest federal preservation statute. It authorizes the President to set aside historic landmarks, structures, and objects located on lands controlled by the United States as national monuments.¹⁴⁹ When asked by Senator Bingaman (D-NM) if she would advocate repeal of the Antiquities Act, Norton commented that the law had been very useful in the past and had shown "its ability to preserve some of our most important national monuments."¹⁵⁰ However, she also said that she would like to see a process of involvement of the people most affected. She did not know whether the administration's proposals would require congressional action. Norton was asked during the hearings whether she thought Clinton's use of the antiquities law was appropriate and she responded that she thought the goal of preserving land was admirable, but again, that she did not like the top-down process used by the previous administration. In fact, a bill was introduced in 1999 by Congressman James Hansen (R-UT), now chairman of the House Resources Committee, that would have

¹⁴⁸ Peter Appel, professor of law at the University of Georgia, interview by author, 13 April 2001, Athens, law school.

¹⁴⁹ Adina Kanefield, *Federal Historic Preservation Case Law, 1966-1996*, (Washington DC: The Advisory Council on Historic Preservation, 1996), 1.

¹⁵⁰ "Excerpts from Senate Hearing on Norton's Selection as Interior Secretary," *The New York Times*, 19 January 2001, sec. A, p. 30.

undermined the powers of the Antiquities Act for President Clinton had it been passed.¹⁵¹ More specifically, the bill would have provided for public participation in the designation process, an aspect that would now appease many business groups regarding the law. H.R. 1487 would have subjected the land in question to an environmental review process, which would have then subordinated the land to development threats which the conservation law was set up to circumvent in the first place.

If Norton (or any legislator, for that matter) does decide to contest the merits of the law, they will undoubtedly face great opposition. For one, the National Trust for Historic Preservation opposes any changes being made to the statute, because it has consistently benefited the cause of historic preservation. Preservation Action, the primary advocacy organization for historic preservation, remarked that they would adamantly oppose any challenges to this statute, along with numerous other organizations.¹⁵² The undoing of this law would be considered a major threat to the protection of historic and natural resources. Finally, Norton significantly commented during the hearings that private property rights did not trump all regulations and supported an intervening role by government if necessary. To these comments, Norton added, “You cannot use your property in a way that harms your neighbors.”¹⁵³

The Response to Norton’s Appointment

Having already established that Norton’s appointment created bitter opposition, it is important to understand the level of discord and the particular causes of it. Her most obvious opponents are environmentalists and Democrats who fear changes in water rights, antiquities law, and the Endangered Species Act, among many others. In addition,

¹⁵¹ Environmental News Network, “Group Fights Changes to Antiquities Act”; available from <http://www.enn.com/news/enn-stories/1999/06/062299/antiquities>; internet; accessed 8 July 2001.

¹⁵² Rhonda Sincavage, Preservation Action staff, telephone interview by author, 28 June 2001.

¹⁵³ “Norton calls herself ‘passionate conservationist,’” *The Birmingham News*, 19 January 2001, sec. A, p. 6.

her confirmation was also opposed by some moderate Republican groups, including Republicans for Environmental Protection (REP) which refutes the opinion that a “Republican conservationist” is an oxymoron.¹⁵⁴ Senator Wyden (D-Ore) expressed concern that she was not right for the job since she had a background as a lawyer who represented companies accused of breaking environmental laws. In fact, Colorado is one of the states believed to have kept the Environmental Protection Agency the busiest while Norton was Attorney General.¹⁵⁵ Further opposition was aroused from the amount of money she has been paid to lobby for Western states, particularly Alaska, in challenging Interior Department regulations.¹⁵⁶

For all the people who opposed Norton’s appointment, there were almost as many that vocally supported her. Even Senator Bingaman stated, after the hearings, that he was willing to give her the benefit of the doubt if she honored her commitments to the country’s resources. In her testimony she promised that she would enforce the laws that she had previously criticized, although she planned to emphasize collaboration with local citizens more fully. Senator Frank Murkowski (R-Alaska) of the Energy Committee favored Norton, for she would balance natural resource protection with development—“a balance that [he believes] has swung drastically out of proportion over the last eight years.”¹⁵⁷ During her testimony, Norton smoothly presented herself as more of a moderate, indicating that she would serve all Americans and not simply the property rights groups. Furthermore, many believe that although she favors private ownership of land, she will support the government intervening when necessary, as she promised. She has taken a leadership role in some instances where big polluters were not complying

¹⁵⁴ REP America, “REP America’s Opinions”; available from <http://www.repamerica.org>; Internet; accessed 25 January 2001.

¹⁵⁵ “Ms. Norton Takes the Edge Off,” *The New York Times*, 20 January 2001, editorial page.

¹⁵⁶ Bill records indicate that Norton was paid \$60,000 to write an amicus brief for Alaskan lawmakers in suing the Interior Department over fishing oversight in the state. “Interior nominee billed Alaska for assistance to private group,” 12 January 2001, in CNN News database on-line; accessed 12 January 2001.

¹⁵⁷ Adam Entous, “Bush interior nominee defends record,” Reuters News Service, 18 January 2001, in Yahoo News; accessed 21 January 2001.

with regulations. Her former boss at Interior, Don Hodel, recalls the difficulties of the job Norton faces:

On any given day, you are asked what to do with four million acres. The Bureau of Land Management wants to lease it for recreation. The parks chief wants a new national park, the Bureau of Reclamation wants to cover it with a dam, and the Bureau of Indian Affairs says it all belongs to the Indians.¹⁵⁸

The numerous concepts that Norton has supported at some point in her career, such as self-audit law, multiple use, free-market principles, and opening more land to commercial development, such as oil drilling, are all part of a bigger picture that implies anti-regulation. Whether or not she keeps her promises to enforce the laws that even she challenged earlier, her views are not supportive of the regulation that is sometimes required to protect our natural resources. It can be assumed that her views would be similar for protecting our historic resources. Apply the self-audit principle to preservation and the design review process no longer exists. The designation process would be left up to individuals. A Certificate of Appropriateness (COA) would no longer be a legitimate means of protecting the integrity of historic buildings. These kind of free-market principles applied to preservation would place full reliance on an entire group of downtown property owners to preserve the existing history out of the goodness of their hearts. Property owners would enjoy the preservation of their rights as landowners, but the consequences might be dire for main streets or historic districts if demolition and reconstruction were pursued without any forethought or oversight. In a locally designated historic district, it would also be unfair to expect only those owners who are not inconvenienced by the law to apply for a COA before making any significant alterations. Thus, the issue of fairness arises when one owner decides to alter a building's integrity or to demolish an historic structure, and as a result, he impacts the

¹⁵⁸ "The Westerner's Interior Motives," *The Washington Post*, sec. C, p. 1.

property values for everyone around him. He does not share similar values or standards and others unfairly suffer the consequences of his choice. Economic development consultant Don Rypkema summarizes this dilemma in an essay: “The property rights debate is about fairness and equity. It is about the fairness of allowing a single property owner to adversely affect the values of a multitude of owners.”¹⁵⁹

In an example of free-market environmentalism adopted by the group Defenders of Wildlife, ranchers were compensated for any livestock lost to wolves that were reintroduced into Yellowstone National Park.¹⁶⁰ When one applies this free-market environmentalism concept to historic preservation, the nuts and bolts are more difficult to grasp. When a person challenges a local historic preservation commission because he wants to demolish a historic building, the compromise does not come out so neatly. For one, local historic preservation commissions often do not have the funding to compensate for such a challenge, since they would have to purchase the building and property entirely. And if the commission loses the suit, and the court rules that the owner can do whatever he chooses with his property, then the building will be gone forever. The use of economic hardship variances that provide financial relief for regulations that truly put landowners in historic districts at financial risk illustrates a similar instrument to the one used by groups with the ranchers. (This idea of hardship relief will be discussed in greater detail in Chapter 6.)

Leading Interior

The basic premise of Norton and Bush’s promise concerning the Interior Department—focusing on local collaboration—has already been the forerunner to preservation efforts in a community other than the state enabling legislation. Successes

¹⁵⁹ Don Rypkema, “Property Rights/Property Values,” *Forum* 7, no. 2 (1993): 29.

¹⁶⁰ “Free-Market Environmentalism Gaining Stature,” *The Washington Post*, sec. A, p. 4.

that result from local collaboration are well documented. The some 2,000 local historic districts and over 1,000 Certified Local Governments (CLGs) across the country would be nonexistent if local citizens and officials did not work with federal and state agencies. However, sometimes a small handful of people who are unaware or unconvinced of the value offered by historic resources can block preservation measures, such as historic district designation. Compromises using free-market principles in this situation are more difficult to discern.

Although she might be committed to preserving our land, Norton's ideas obviously point toward increased development, a reality that is often a threat for historic preservation. For instance, she urges a far greater say for state and local interests in federal land decisions—hoping that such actions will be her legacy.¹⁶¹ Consultation and input are undoubtedly necessary, but it is at the local level where commercial interests exercise maximum leverage, often to the detriment of public lands.¹⁶² On the other hand, involving local citizens and officials in the process is a concept essential to historic preservation policy. Norton's belief that private property rights do not surpass all regulations will help balance the opposing forces at play concerning the use of land. Hopefully, this belief will be evident during her tenure as Interior Secretary. Thus, one can hope that the unique value of historic neighborhoods and communities will not be lessened by Norton's legacy at Interior.

One senator pointed out his support for Gale Norton by remarking that she knew what wilderness meant since she was from the West.¹⁶³ Nonetheless, greater substance is required from the Interior Secretary than knowledge of the wilderness alone. Senator Domenici, along with many other Republican lawmakers, are pushing pro-energy

¹⁶¹ "Norton says administration must make case for drilling," 13 February 2001, in CNN News database on-line; accessed 13 February 2001.

¹⁶² "Ms. Norton Takes the Edge Off," *The New York Times*, editorial page.

¹⁶³ John Heilprin, "Whitman, Norton confirmed by Senate," Associated Press, 30 January 2001, in Excite news database on-line; accessed 30 January 2001.

legislation and looking to Norton for leadership. Domenici believes that more of the resources for energy and our future are on the public-domain lands owned by Americans than on any other properties in the country.¹⁶⁴ Under Norton, they said they would expect to see more coal mining, less dam demolition, and new oil and gas production in Alaska.¹⁶⁵ Similarly, many industrial interest groups give Norton an excellent scorecard as well. The Independent Petroleum Producers Association, whose 5,000 members represent 85 percent of the oil wells drilled in the United States, is enthusiastic about Norton, because its members believe that she understands that federal lands dominate access to our country's natural resource base.¹⁶⁶

Norton shares George Bush's desire to open up the Arctic National Wildlife Refuge (ANWR) in Alaska for oil exploration, an idea for which she worked on the front lines under President Reagan. She commented in an interview on CNN News with Wolf Blitzer that drilling is even more desirous if the country continues to have energy problems and soaring natural gas prices. Furthermore, she insists that the drilling should pose little risk to the environment of the nineteen million-acre refuge, of which environmentalists disagree.¹⁶⁷ Nevertheless, she promised to evaluate the environmental consequences before doing anything and has a visit to the refuge planned for the summer. The coastal plain of the Arctic Refuge represents the last five-percent of the state that remains off-limits to drilling, according to the Sierra Club.¹⁶⁸ However, Norton claims that ANWR has never officially been a wilderness area.¹⁶⁹

¹⁶⁴ "GOP pushes energy policy at hearings," *Los Angeles Times*, 30 January 2001.

¹⁶⁵ *Ibid.*

¹⁶⁶ "New Picks Firm Up Conservative Cast of Bush's Cabinet," *The New York Times*, 30 December 2001, sec. A, p. 1.

¹⁶⁷ "Norton defends push for Alaska oil drilling," *The Atlanta Journal-Constitution*, 20 January 2001, sec. A, p. 1.

¹⁶⁸ "Norton: U.S. would drill responsibly in Alaska," 3 February 2001, in CNN News database on-line; accessed 3 February 2001.

¹⁶⁹ "Crossfire with Bill Press and Bob Novak," CNN News, Interview with Gale Norton, 5 July 2001.

There is no doubt that the Secretary of the Interior has great influence and power to wield in the area of land use and the environment. For one, she has the ability to bring changes to the management of the more than 500 million acres of public land, from national parks to wildlife refuges, and to regulating the thousands of mines operating on federal property. Many of her supporters believe she will bring changes. As Interior head, she can recommend changes to certain laws and she can follow through on her plan to implement local involvement in every decision. And when, and if, she does begin the local involvement process, how that actually works will be important to preservation, since public lands are often more vulnerable when subjected to local commercial interests.

Besides recommending constitutional changes, the Interior post contains great powers as written into the United States Code. Gale Norton can undoubtedly affect a wide range of programs, including the federal preservation program contained within the National Historic Preservation Act. The United States Code states that the Secretary can revise regulations for the state historic preservation offices, in consultation with the National Conference of State Historic Preservation Officers and the National Trust.¹⁷⁰ It also states that she has the authority of administering the matching grants-in-aid program to the states. Furthermore, Norton has full power over the National Register of Historic Places, including maintaining and expanding its register, as well as administering grants to the states for that purpose. She also sits on the influential National Advisory Council on Historic Preservation.

The kind of message she sends as Interior Secretary will be quite powerful. Property rights groups are anticipating with hope that she will be their savior from the past eight years of overbearing federal intervention. Based on her philosophy, Norton's appointment as steward of the nation's lands alone is a signal of a shift in land policy.

¹⁷⁰National Historic Preservation Act, 16 U.S.C., §§ 468-470 (1966).

The congressional Democrats, particularly those on the Senate Energy and Natural Resources Committee who eventually decided to vote for her confirmation, hope that Norton will live up to the more toned down image she portrayed during her hearings. Yet, someone in her position will always face tough critics, explaining why some conservatives are already concerned she is moving toward greater land acquisition, while others perceive her as an anti-environmentalist catering to big corporations and oil.

One way that Secretary Norton has added fuel to the fire already begun by her appointment was her selection of key aides. Norton chose Lynn Scarlett of the libertarian Reason Center in Los Angeles as her assistant secretary for budget and policy. According to the Department of the Interior's home page on the World Wide Web, the assistant secretary "discharges the authority of the Secretary for all phases of management and administrative activities and serves as a principal policy advisory to the Secretary."¹⁷¹ Some of Ms. Scarlett's responsibilities include providing detailed and objective advice on program planning, budget, and policy matters as well as overseeing compliance with environmental statutes and standards. Denver lawyer Bennett Raley is her choice for assistant secretary of water and science; he once advocated repeal of the Endangered Species Act. Cam Toohey was appointed to be Norton's special assistant for Alaska and Drue Pearce was named as senior advisor on Alaska issues;¹⁷² Toohey has been the executive director of Arctic Power, a lobbying group with drilling in the Arctic National Wildlife Refuge as its sole mission, and Pearce has been an Anchorage Republican who has promoted oil development in the area. Finally, her nomination of Steven Griles as deputy interior secretary has received sharp opposition from Congress; he has been both a representative of the mining, coal, and petroleum industries as well as a big supporter of multiple uses. His nomination for a job at Interior has generated more

¹⁷¹ Department of the Interior, "About DOI" ; Available from www.doi.gov; Internet; accessed 27 June 01.

¹⁷² Yereth Rosen, "Alaska drilling supporters get key Interior posts," Reuters, 17 June 200, Excite News; accessed 18 June 2001.

concern than that of others, because he would have the most important job under Norton. He also has the most notable reputation for wanting to loosen regulations and reduce governmental involvement in industrial affairs. Finally, the 38-member advisory board for the Interior Department is comprised of representatives from similar interest groups, and includes Henson Moore, a former deputy secretary of energy and now chairman of the American Forest and Paper Association; top officials from companies like General Electric; and others from mining and energy trade groups.¹⁷³ By surrounding herself with these seemingly extreme appointees, Norton has inevitably aroused more opposition to Interior and the administration.

Gale Norton has been described as an extremist by her opponents and it seems likely that she will not live up to this label while serving in the Interior post. However, her leadership will undoubtedly be different than the legacy left by Bruce Babbitt and Bill Clinton and the one that Al Gore would have set if he had won the presidency. How much she will listen to the property rights constituency is yet to be determined. Although the ANWR drilling proposal is likely to be blocked by congressional Democrats, pro-development policies seem inevitable. It seems evident, however, that Gale Norton deeply desires to change the image that her critics have shaped for her, and as a result, there may be some surprises to the current assessment of her value system. Of course, the most important question may be how much her philosophy mirrors that of the President of the United States, George W. Bush.

¹⁷³ "GOP to Press for Unraveling of Clinton Acts," *The New York Times*, 6 January 2001, sec. A, p.1.

CHAPTER 5

A FORECAST OF HISTORIC PRESERVATION AND LAND USE REGULATION

We must balance private rights and public needs to achieve a consensus of social justice.
—Grady Gammage¹⁷⁴

The Secretary of the Interior has the power to influence the country's agenda on property rights and land use by virtue of her position. If Secretary Norton's philosophy of governing Interior is supported by the current president, George W. Bush, which seems very probable considering they mirror one another on many issues, then it is likely that some of these free-market-friendly proposals will find their way into land use policies. More simply put, it is probably safe to assume that Bush chose Norton as Interior Secretary, because he believes she will help carry out his political agenda. Combining this factor with the strong likelihood that the president will be making new appointments to the Supreme Court sometime during his term, a forecast of probable future land use and preservation policy can be charted. The forecast will also be based on some of the legal and political issues that have already arisen in Congress and in the Supreme Court, and therefore, will illustrate both probable victories and challenges for historic resources and landscapes.

¹⁷⁴ "The Property Rights Debate: A Preservationist's Guide," *Forum News* 1, no. 4 (1995): 6.

President George W. Bush

George W. Bush's campaign attempted to appeal to voters by painting the candidate as more of a moderate Republican than some of his fellow party members and leaders. Calling himself a "uniter, not a divider," Bush produced expectations for the electorate that he would govern largely from the center. However, his appointment of John Ashcroft for Attorney General and Gale Norton, who some view as extreme choices for cabinet posts, caused many to think Bush was going to be farther from the center than he originally portrayed himself to be. Just how far from the center Bush might lead the nation is yet to be determined. During visits to the national parks and memorials, Gale Norton has repeatedly spoken of the president as a "compassionate conservationist." Now that he is president, forecasting whether he will actually be a compassionate friend or a foe of preservation is not so clear.

This past May in California President Bush said that he would pursue a "new environmentalism for the twenty-first century" that will show more deference to states, localities, and private property owners.¹⁷⁵ More specifically, Bush spoke of protecting both the legal rights of property owners and the interests of nature. In theory, President Bush, like Norton, wants the country's lands to be governed by the people closest to them. He dislikes the needless policies and conflict that he believes have brought more harm than good in the last thirty years. His more recent attentiveness to natural resource issues is a result of the poor report card that he has been given on environmental issues by many groups. In fact, recent television polls show that 41% of the American people approve of Bush on the environment while 50% disapprove.¹⁷⁶ But Bush never pretended to make the environment his main priority. From the beginning, he has spoken about his tax cut plan and his energy policy. At his core, Bush is an oil man. For a significant

¹⁷⁵ "Bush Pushes Local Control of Conservation Matters," *The Washington Post*, 31 May 2001, sec. A, p. 2.

¹⁷⁶ "Crossfire with Bill Press and Bob Novak," CNN News, interview with Gale Norton. 5 July 2001.

portion of his life, oil has been his livelihood—illustrated by the fact that he has been closely associated with oil companies as founder, chief executive, and board member. The former governor of Texas is now mapping the country's agenda with Dick Cheney, another oil businessman, at his side. That their campaign for the White House received \$1.8 million in contributions from the energy, oil, and gas industry illustrates an important alliance.¹⁷⁷ Thus, a shift from the former administration's policies should bring few surprises. Furthermore, George W. Bush's home state is one with little connection to the Department of the Interior mandates, though he spoke of understanding the Western mentality during his campaign. If he desires to bring Westerners' voices to the forefront as he has said, then Gale Norton as his Interior Secretary makes sense in light of his limited understanding of the West.

Considering his background and campaign, it seems inevitable that Bush will support more aggressive development of gas and oil on public lands. The future possibility of drilling for oil in the Arctic National Wildlife Refuge (ANWR) was discussed in the previous chapter. Again, this possibility is strongly supported by both Bush and Norton. Although they will face pressure from Western lawmakers and property rights groups to undo federal mandates, they also understand how popular parks are to the American public. As a middle ground approach, Bush might attempt to allow private interests to have a greater role in public land development, such as in writing Environmental Impact Statements (EIS).¹⁷⁸ Bush has stated that he prefers working with businesses in an effort to ensure proper management of natural resources.

That Bush's course is geared toward the economy and private interests is clear. How much this pathway will affect historic preservation is not. It seems likely that the

¹⁷⁷ Center for Responsive Politics, "Bush Campaign Finances"; available from <http://www.opensecrets.org/2000elect/>; internet; accessed 16 July 2001. This information came from FEC data.

¹⁷⁸ Environmental Media Services, "Bush Administration's Key Policies"; available from http://www.ems.org/bush_cheney/rivers.html; internet; accessed 28 June 2001.

administration will not be aggressive opponents to land conservation and historic preservation, but through inaction, it might achieve its goals of protecting private interests. Nevertheless, while Bush was governor of Texas, the Texas Historic Courthouse Preservation Program was established as a result of his and the state legislature's allocation of \$50 million for the purpose of restoring the some 200 courthouses in the state to their original splendor.¹⁷⁹ Even if Bush is not proactive concerning the national preservation program, any efforts similar to the statewide courthouse initiative in Texas could potentially give major funding boosts to special projects.

Federal Policy Forecast

In his forecast of the administration's environmental policy, natural resources law professor Peter Appel believes that it is in the appropriations process where the changes will be seen.¹⁸⁰ For instance, funding might be allocated for historic sites or conservation in general, but not be enabled for use in National Register or Endangered Species programs.¹⁸¹ Clearly, historic preservation experiences effects from budgetary issues. In addition to appropriations, the federal policy at stake for preservation and sustainable communities centers on issues such as alternative transportation, tax incentive programs, endangered historic sites, land preservation, and growth management, among others. The following programs represent the focus of legislation likely to be introduced or amended in Congress this term that is certain to affect historic preservation:

1. Historic Preservation Fund (HPF)
2. Save America's Treasures (SAT)

¹⁷⁹Terry Colley, Texas Historical Commission. [terry.colley@thc.state.tx.us]. "Thesis question." Private email message to author, [ccgrier@hotmail.com]. 24 July 2001.

¹⁸⁰ Peter Appel, professor of law at the University of Georgia, interview by author, 13 April 2001, Athens, law school.

¹⁸¹ Ibid.

3. Historic Homeownership Assistance Act (HHAA)
4. Conservation and Reinvestment Act (CARA)
5. Land and Water Conservation Fund (LWCF)
6. Amendments to the Antiquities Act of 1906
7. Drilling in the Arctic National Wildlife Refuge (ANWR)

Federal funding for historic preservation is vital to the state offices. This funding hangs in the balance while Bush's budget plan is debated in Congress. The *crème de la crème* of federal preservation policies, for example, is the Historic Preservation Fund (HPF). Bush's budget blueprint plan, if approved, includes a \$400 million cut in the Interior budget, which is a 3.9% reduction from the previous FY2001 levels. This plan singled out a \$35 million cut from the HPF, a fund that includes the signature "Save America's Treasures" program. Thus, FY2002 funding levels for the preservation fund are projected to return to FY2000 levels during the new administration. The FY2001 budget had been boosted \$20 million by the Clinton administration. Last year's boost was geared toward an increase of \$15 million to help underwrite all the work of the State Historic Preservation Offices (SHPOs) and tribal historic preservation programs.

The HPF is jointly administered by the National Park Service and its partners in state, tribal, and local governments. An apportionment is made to the state and tribal offices to assist in their efforts to preserve the past. With a total of \$46,495,000 for the SHPOs, the Park Service's allocation to the states this year averages around \$525,000 per state. The HPF has multiple purposes, which include the following:

1. Facilitates the nomination of historic properties to the federal National Register of Historic Places
2. Provides grants to local governments and American Indian Tribes to assist in preserving community heritage

3. Supports historic black colleges and universities in preserving community heritage
4. Supports states in assisting hundreds of private property owners with private investment in the rehabilitation of commercial historic properties under the Federal Tax Incentives Program
5. Facilitates state staffs in working with federal agencies on federal granting and licensure activities
6. Provides the public with educational and training programs¹⁸²

Some of the more specific projects include assisting Certified Local Governments (CLGs), restoration projects, historic structure reports, engineering studies, comprehensive historic preservation plans, and many others. Save America's Treasures program is also funded through the HPF and is dedicated to "identifying and rescuing the enduring symbols of the American tradition" that define the nation.¹⁸³ Specifically, Save America's Treasures (SAT) provides grants to assist with preservation of historic landmarks and special collections. Founded in part by former First Lady Hillary Clinton, the program was begun as a way to commemorate the millennium through an ongoing, living means that would also raise the visibility of preservation in the public consciousness. During the last three years, the program has received approximately \$30 million per year. These funds have been matched by more than \$52 million in private contributions for new preservation grants and special preservation projects in communities across the country. Project funding decisions are made by the individual states and not the National Park Service. Nevertheless, because the formation of SAT was centered on the celebration of the millenium, the program's reauthorization has an uncertain future, according to National Park Service officials.¹⁸⁴ Fortunately, First Lady

¹⁸² U.S. Department of Interior. *Why is the Historic Preservation Fund Important to America? Annual Report FY 2000*, (Washington D.C.: Government Printing Office, 2000).

¹⁸³ Richard Moe, "Letter to the President," *Forum News* 7, no. 2 (2000): 1-6.

¹⁸⁴ Sharon Park. [Sharon_Park@nps.gov]. "Thesis research." Private email message to author, [ccgrier@hotmail.com]. 11 April 2001.

Laura Bush, an advocate of the program, helped to ensure that Congress reinstated the program for 2002 after it had originally been left out of the administration's budget plan.

Obviously, the entire mission of historic preservation is affected by these federal funds that are allocated to the Department of the Interior. More than six hundred projects worthy of Save America's Treasures funding would require \$2.6 billion alone. Lower funding levels might not halt the mission of state offices or the Save America's Treasures program, but they will pose a need for more funding from private investment and state and local governments. The National Trust's president, Richard Moe, stated in a letter to the president-elect, that the HPF was already underfunded, "rarely receiving more than a third of the \$150 million authorized by the National Historic Preservation Act of 1966."¹⁸⁵ Other federal monies are geared toward preservation but are not supervised by the National Park Service, such as Department of Transportation grants called TEA-21 or some ISTEA grants.¹⁸⁶ Small percentages of these grants can be used for enhancements like preserving a historic train station or bridge.

The Conservation and Reinvestment Act (CARA) from the 106th Congress is one of the most important bills endorsing the mission of natural and cultural resource protection. Last year the bill passed the House by 315-102 but it never made it out of the Senate committee. The bill was reintroduced by Representatives Don Young (R-AK) and John Dingell (D-MI) who are actively seeking the approval of the newly elected president. George Bush did endorse the CARA bill as governor of Texas but has not approved the bill since beginning his term as president.¹⁸⁷

CARA would fund the nation's natural and cultural resource protection programs through 2015, including \$100 million annually for the Historic Preservation Fund for the

¹⁸⁵ Moe, "Letter," 1-6.

¹⁸⁶ Sharon Park. [Sharon_Park@nps.gov]. "Thesis research." Private email message to author, [ccgrier@hotmail.com]. 11 April 2001.

¹⁸⁷ Rhonda Sincavage, Preservation Action staff, telephone interview by author, 28 June 2001.

national preservation program. The Land and Water Conservation Fund (LWCF) was also a provision in the original bill. Preservationists and other CARA supporters hope that the bill will have a second chance of passage, particularly since the LWCF was part of Norton and Bush's campaign promise and was designated for full funding. More than 5,000 organizations support the passage of CARA, including the National Trust for Historic Preservation.

A modified version of the bill may lead to the demise of CARA's goals. Known as CARA "lite," this altered version may affect the bill's chance of passage. CARA "lite" provides for the possibility of increased funding for natural and cultural resource protection, but does not guarantee permanent funding for either the Historic Preservation Fund or the Land and Water Conservation Fund. This version was created to placate some of the objections to the high cost of the original bill and to have the protective programs strictly budgeted in the legislation in order to eliminate future discretionary authority.

Unfortunately, the bill will be opposed by more than those who simply believe it is too expensive. Chuck Cushman, the president of the American Land Rights Association, adamantly opposes the CARA bill for the federal "land grab" it symbolizes to the property rights network. He has stated that he took strong actions to oppose it in the last session and will take even further steps to keep it from passing again. Provisions in CARA like the Historic Preservation Fund are not to earmark federal land acquisition, although groups like Cushman's fear that is what ultimately will occur. Supporters hope CARA will make it out of the Senate Committee on Energy and Natural Resources this year so that it can be allowed a full Senate floor vote.

In addition to CARA, a homeownership bill advocated by preservationists is

currently being held up in congressional committees. Representatives Clay Shaw (R-FL) and John Lewis (D-GA) reintroduced the Historic Homeownership Assistance Act (HHAA) in the House on March 22, 2001.¹⁸⁸ This bill is identical to the one sponsored by them in the 106th Congress. The prospect for passage of the bill relies on the outcome of the congressional action on the FY2002 budget, which also determines how much of Bush's tax cut plan will be enacted into law. The Historic Homeownership Assistance Act (HHAA) would create an incentive in the federal tax code for the rehabilitation of historic, owner-occupied residences. This incentive would reverse the lack of investment and blight in historic neighborhoods through homeownership. This is an important bill for expanding preservation since most of the current legislation only supports tax credit for commercial and income-producing properties. The HHAA would produce exponential benefits: rehabilitation provides jobs, bolsters the tax base, and utilizes existing infrastructure, decreasing sprawl and saving taxpayers' dollars. However, the bill still faces stiff competition from other popular tax and budget items that have a higher priority with other members of Congress.¹⁸⁹

Despite funding cuts in preservation programs by the President, land conservation did win some points under his FY2002 budget request. While Bush is cutting the HPF, at the same time he is promising to increase monies for the Land and Water Conservation Fund (LWCF) to \$900 million.¹⁹⁰ This is the first time the fund would receive its fully authorized level since it began four decades ago. LWCF was created to purchase federal and state lands with revenues from oil and gas off-shore production in federal waters. Bush plans to allocate fifty percent of the funds to the states, which includes an increase of \$359.7 million for state grants compared to FY2001 appropriations. Besides the

¹⁸⁸ National Trust Department of Public Policy, "Preservation Advocate News"; available from <http://www.nthp.org/main/frontline/actioncenter.htm>; internet; accessed 6 April 2001.

¹⁸⁹ Ibid.

¹⁹⁰ U.S. Department of the Interior, "Secretary of the Interior Gale Norton Announces Historic Budget for Land and Water Conservation Fund"; available from <http://www.doi.gov>; internet; accessed 18 April 2001.

increased funding levels, the budget proposes to give states further flexibility in using the grants. States will be allowed to use monies for more than just land purchase and development projects; according to the Bush proposal, they can use funds for wetlands and endangered species protection and the benefit of wildlife and habitats.

Conservation easements, a tool frequently used to protect land from development, is a provision of the LWCF and part of a new tax law Bush signed in June 2001. People can now donate easements to a land trust or government agency after their death and qualify for an estate tax benefit.¹⁹¹ The tax law eliminates a requirement that a qualifying conservation easement be within twenty-five miles of a metropolitan area, national park or wilderness area or within ten miles of a national forest that is near a big city.¹⁹² This new policy will make conservation tools available to more people, while increasing the amount of formerly ineligible land in rural parts of the country. Russell Shay, policy director for the Land Trust Alliance, says that this law will increase the number of landowners who are actually eligible to receive benefits for donating development rights.¹⁹³ The policy allows donors and heirs to cut estate taxes by up to forty percent of the value of the land. A person can avoid having to sell or develop his land in order to afford the estate taxes. He also can retain the land for heirs by selling development rights to a land trust as an easement. This law will give people who pay estate taxes an incentive to donate an easement, and therefore contribute to the preservation of land, particularly in rural America.

Other than through funding the LWCF, Norton and Bush have pledged to help the environment via increased funding for infrastructure repairs in the national parks. The National Parks Legacy Project will provide \$5 billion over the next five years to complete

¹⁹¹ John Heilprin, "Tax Plan Boosts Conservation Tool," AP News, 9 June 2001, in Excite News database; accessed 18 June 2001.

¹⁹² Ibid.

¹⁹³ Ibid.

a backlog of road repairs, water waste treatment, and more. It seems that the administration has focused on making strides with environmentalists by picking out one or two projects on which to increase funding, as in the national parks maintenance and the LWCF. Bush has faced criticism that he has proclaimed a war on the environment, but some of these actions might soften the backlash against his previous “assault.” Unquestionably, the estate tax benefits accrued from easement donations are extremely advantageous to preservation. Maintenance of the national parks is a safe move in the name of the environment that will satisfy both sides. These are maneuvers that will not arouse any opposition from either Congress or property rights proponents.

Regardless of the outcome of federal legislation, policies and programs, one of the most significant hindrances to historic preservation will be the softening of the economy. The president will not be able to affect historic preservation as much as will people’s pocketbooks. In better economic times, people can spend more and invest in community revitalization. Since economic factors are so vital to the protection of resources, the tax credit programs established through both federal and state legislation must be maintained and encouraged. The important reinvestment of urban historic districts is beneficial to city revitalization and is largely the result of the tax program. Sharon Park, chief of Heritage Preservation Services at the Park Service stated that the department has witnessed a continuous increase in the use of the federal tax credits, as well as an increase in the dollar volume of the projects.¹⁹⁴ Because such tax programs are often popular with Republican administrations, the Park Service does not expect any negative fallout in the near future concerning the tax credit program.¹⁹⁵

Neither Gale Norton nor George Bush has directly addressed the administration’s position on funding for historic preservation or the future of the national preservation

¹⁹⁴Sharon Park. [Sharon_Park@nps.gov]. “Thesis research.” Private email message to author, [ccgrier@hotmail.com]. 11 April 2001.

¹⁹⁵ Ibid.

program through a written statement or speech. However, bills such as CARA and the HHAA, the antiquities law, appropriations to the Save America's Treasures program—all hang in the balance. A spokesperson from Preservation Action remarked that the future for preservation certainly is not bleak, but that potentially threatening property rights legislation continues to be introduced and important preservation policies like HHAA are being held up in congressional committees. President Bush and Gale Norton are most likely to affect federal policies and programs for preservation through funding. Therefore, preservationists should provide a counterbalance by concentrating on local governments; the administration cannot monetarily affect this level as much as it can on the federal level.

Forecast of the Courts

In the opinion of one legal scholar, the Bush administration is probably not going to dramatically affect preservation as much as the judiciary. Peter Appel, natural resources law professor at the University of Georgia, says, “tough legal battles are ahead for preservationists.”¹⁹⁶ Local governments have witnessed an increased amount of litigation from efforts to preserve open space, prevent sprawl, or create historic districts, such as land dedication requirements or development moratoria. Some of this litigation can be prevented (this will be discussed in the next chapter). *Lucas, Dolan*, and the recent *Palazzolo* decision have brought obstacles to land use planning that require changes and greater adaptation to the rights of property owners. The recent *Palazzolo* case involved the regulatory takings claim by a Rhode Island developer who owns eighteen acres of salt marsh subjected to a state wetlands regulation. In another part of the Supreme Court's *Palazzolo* decision not previously discussed, the majority maintained that the plaintiff did not need to submit further agency applications, reversing

¹⁹⁶ Peter Appel, professor of law at the University of Georgia, interview by author, 13 April 2001.

the state's decision that had denied the ripeness of his claim. The Court majority identified a certain threshold for adequate administrative procedures for the landowner by eliminating futility in further application processes. Decisions like this do not change the validity of preservation law, but potentially could open up the doors for more litigation. Palazzolo and other "over-regulated" property owners were certainly satisfied by this portion of the Court decision, because it removed a major roadblock to seeking takings claims in court. Next, the portion of the *Palazzolo* decision concerning the pre-existing legal restrictions at the time of the purchase does not invalidate preservation ordinances but might require new methods from local governments.¹⁹⁷ Yet, the Court narrowly ruled that pre-existing restrictions were not enough to deny takings claims. It is difficult to determine the actual difficulties that lie ahead. Based on many recent news headlines, state and local governments lost in *Palazzolo* and private property rights groups won a landmark victory.¹⁹⁸ Whatever the future might hold for these legal issues, local communities need not stop practices for land use planning.

In fact, Julia Miller, the National Trust's law editor, finds no reason for panic in the recent *Palazzolo* decision. "Historic preservation ordinances are still valid and actions taken under such laws should continue to be upheld under Penn Central."¹⁹⁹ She claims that property rights groups have overblown what is truly only a small victory from the Supreme Court. The argument that the state's refusal to allow development on Palazzolo's acreage amounted to a total taking was rejected. This refusal should be a relief, since a different decision would have extended the principles in *Lucas* that considered the public purpose behind the taking as irrelevant when a total taking occurred. Furthermore, a confirmation of *Lucas* would have been cause for trouble in

¹⁹⁷ Anthony Palazzolo argued there was a taking although the restrictions were already in place when he legally acquired ownership of the property.

¹⁹⁸ Memorandum from Julia Miller to the National Trust's Forum list-serve. She is the National Trust's Editor of the Preservation Law Reporter. 5 July 2001.

¹⁹⁹ Ibid.

future takings cases, making the likelihood that the regulated land in question would be viewed separately rather than as part of the whole parcel. The bottom line is that the principles set forth in *Penn Central* will still be upheld. Thus, when the three-pronged test from this decision is applied, historic preservation ordinances are rarely found to be takings since the “character of the governmental action”²⁰⁰ is considered.

Despite the fact that the Supreme Court’s most recent takings decision should not greatly concern preservationists, there is still room for anxiety from the judiciary. Legal uncertainty will surface when one or more of the nine sitting justices on the Supreme Court decide to retire, allowing President Bush to appoint new ones. The possible retirements of Justice Sandra O’Connor and Chief Justice William Rehnquist loom larger since both have served on the court at least twenty years. The retirement of O’Connor, in particular, seemed imminent following the political fallout from the Supreme Court’s ruling in *Bush v. Gore*. Sources close to O’Connor commented that she was disturbed by the public’s anger over the Court’s decision, particularly the hate mail directed at the justices.²⁰¹ Furthermore, her husband has reportedly suffered serious health problems this past year. Justice O’Connor often casts the deciding vote on the court, and a conservative appointment by Bush might tip the balance. One law professor claims that a replacement of O’Connor would be the most important appointment in fifteen years.²⁰²

The court closed its term this past June without any announcements of retirement, however. Typically, court justices announce their retirements at or before the end of the term in June in order to allow the White House sufficient time to make appointments. In May, Justice O’Connor commented that she had no immediate retirement plans and Rehnquist had no information to offer on the subject.²⁰³ Nevertheless, their replacements

²⁰⁰ 438 U.S. 104 (1978).

²⁰¹ “Election still splits court,” *USA Today*, 22 January 2001, sec. A, p. 1.

²⁰² *Ibid.*, sec. A., p. 2.

²⁰³ “No Court Retirements This Term,” Associated Press, 28 June 2001, in Excite News database on-line; accessed 1 July 2001.

would not bring as many changes to the court makeup as would the replacement of the more liberal justices such as Ginsburg, Stevens, or Breyer. In fact, the President has commented that he wants judges who will conservatively interpret the Constitution and he considers Justices Antonin Scalia and Clarence Thomas to be the models of such thought. The more conservative justices have often sided with Rehnquist and Scalia on land use matters, offering some challenges on the horizon. So even if another term passes before any retirements occur on the Supreme Court, Bush still has the rest of his own term in office to have the opportunity to make one of the most important appointments of his presidency.

Conclusion

Bush, Cheney and Norton assert that they are in search of a better balance between the conservation of our natural and historic resources and their development than occurred during the last administration. If the balance is truly achieved in the manner they seek, then how can our resources be maintained if developed? The opening of the Arctic National Wildlife Refuge might have only minimal effects by some standards on the existing ecosystems. Cheney has said as much when discussing drilling in ANWR: “We think we can do it, given today’s technology, in a way that will not damage the environment, and will not permanently mar the countryside at all.”²⁰⁴ Yet, once the step is taken to open up one of the last truly preserved places in the country, the doors will be wide open for further exploration of more precious resources. In other words, increased drilling will send the message to the country that disturbing natural and historic landscapes is tolerable. Thus, the country might be desensitized even further to harmful development, and as a result, more cities and neighborhoods will suffer from unrestrained

²⁰⁴ Environmental Media Services, “Bush Administration’s Key Policies”; available from http://www.ems.org/bush_cheney/anwr.html; internet; accessed 9 July 2001.

sprawl. It seems that balancing protection with development, in terms of the possibilities weighed by the Bush administration, will be a more difficult compromise than the president conceives.

Essentially, the larger issue is the need for a preservation ethic within governmental entities, whether it be the legislature, the White House, or federal agencies. Such a mentality should be interwoven into governmental policies and practices in order to promote the protection and reuse of historic resources as part of their mission. It is unlikely that President Bush will be a leader in instilling such an ethic within the federal government, considering his campaign promises, background, and current energy-laden proposals. He has focused attention for conservation on the country's national parks and the LWCF, but many historic structures within the parks face demolition threats or loss of integrity.²⁰⁵ It will be harder to convince states and local communities of the benefits of preserving their heritage when the nation's leader plays such a tepid role in preserving federally-owned historic resources. The federal government should be the leading example for states in implementation of preservation-friendly policies.

In many other countries, preservation leadership has been exercised primarily by government agencies.²⁰⁶ In examining earlier history of the federal government's involvement, or the lack thereof, in historic protection and reuse, it might seem that our monuments were not as important or revered as those in other countries. Whereas many other countries had passed legislation to outline comprehensive national plans, America had not prior to 1966. Exploring how other nations preserved their heritage, a special committee of the U.S. Conference of Mayors led by Representative Albert Rains helped gain the national momentum needed to pass the landmark federal legislation for historic

²⁰⁵ Richard Moe, "Letter to the President," *Forum News* 7, no. 2 (2000): 2.

²⁰⁶ Robert Garvey, "Europe Protects its Monuments," in *With Heritage So Rich.*, ed. by Albert Rains and Laurance Henderson, (New York: Random House, 1966), 151-160.

preservation. The words in the 1966 publication of *With Heritage So Rich* by this special preservation committee illustrates the ideal role of the federal government well:

The great duty of preservationists at the present moment is to see that the ideal of beauty and order that is now not only respected but enjoined at the highest level of the United States government be brought home in unmistakable terms to state and local officials and to private citizens everywhere throughout the United States.²⁰⁷

The landmark historic preservation legislation passed in 1966 finally changed the way the government would share the responsibility of resource protection with local groups and citizens. Yet, nearly fifty years later strong leadership is still needed from the three branches of government to ensure protection of our historic resources and the livability of our communities. Of course, it is on the local level, and not from Washington, where zoning, architectural review, and subdivision ordinances are passed, actions that directly affect communities. In addition, non-governmental entities, such as local nonprofit organizations, should still be at the forefront of the preservation movement. Essentially, the cause of historic preservation cannot be left entirely up to the federal administration. Nevertheless, the citizens should be afforded a certain reliance on the national government to play an exemplary role in these issues, particularly for program funding states and localities. Furthermore, putting all faith in a philosophy like self-audit for historic preservation would produce few results when so little knowledge exists across the board. If the government were to stay completely out of people's way, would they in fact protect historic resources?

In addition to the National Historic Preservation Act, other federal measures have been signed into law by various presidents to aid in protecting historic properties, including measures to protect them from the relocation of federal facilities, for

²⁰⁷ Walter Whitehill, "The Right of Cities to be Beautiful," in *With Heritage So Rich*, ed. by Albert Rains and Laurance Henderson, (New York: Random House, 1966), 55.

instance.²⁰⁸ Yet, as our natural, cultural, and historic landscapes increasingly fall prey to our material needs and patterns of uncontrolled growth, the need for certain federal policies changes with time. In the past there was a need to establish a comprehensive national plan to protect our history. Ways have been needed to ensure the least amount of harm to resources from federal projects, such as Section 106 review, when building a highway. Upon recognizing the seriousness of decaying downtowns, a tax plan was passed in 1984 to provide incentives for investment in those downtowns. In the second millenium, new problems have arisen for which solutions must be found. For example, the rapid growth of suburban areas is not only at the expense of the downtown, but it also creates major traffic and transportation problems. It also brings the necessity of more sensible, well-planned development. Creating more livable communities is part of the historic preservation mission, and therefore, urban transportation policies need to be expanded to deal with problems caused by a lag in alternative modes of transportation. To avoid the problematic displacement of current residents, bills like the HHAA need to become law to ensure that homeowners, not just developers, receive incentives for owning historic properties.

The federal government should be, at minimum, an example of historic resource protection at the local and state level. For it to serve in the roles of “promoter” and “encourager” would be tremendous good fortune for the future of America’s neighborhoods and communities. Unfortunately, such leadership is unlikely from President Bush, who will most certainly be focusing on pro-energy policies in the years to come. With the impending energy crisis, Bush understandably will be adhering to the needs of the country in this area. In response to the one-third of Americans that oppose their energy plan, Bush and Cheney are correct in asserting that energy policies require

²⁰⁸ Jane Cassady, “Preserving Cultural and Historic Landscapes: A Study of Preservation Policies and Techniques” (Masters thesis, University of Georgia, 1997), 25.

hard choices that many Americans do not want to face. However, appropriations to land conservation and historic resource protection should not be dissipated at the expense of energy costs.

Norton will likely follow Bush's lead on such issues, and vice versa when the issues are pertinent to the West. How her management motto of "consultation, cooperation, and communication all in the service to the shared idea of conservation"²⁰⁹ will play out is certainly questionable. She has aligned herself and the Bush team with pro-energy people who support pro-development policies.²¹⁰ Yet, Norton will not likely burn all her bridges to the environmental and conservation lobby. She has reiterated that she cannot take the same stand on regulatory issues as she has in the past.

Finally, property rights organizations might be energized by the administration's choices, or at least continue to fight preservation-friendly bills like CARA. Bush might even have the chance to hand them a court appointee who views property rights like Scalia or Rehnquist. Nevertheless, the power and influence of these groups will continue, because property rights is a hot-button issue unlikely to lose popularity, and a freedom unlikely to lose its grip on the American psyche anytime soon. As a result, the likelihood that the current attitude will be altered to any significant degree by the new president is minute.

Although the future of preservation in light of the Bush administration and the Supreme Court is cloudy, obviously there could be some surprises. While it would be unlikely for there to be an all-out affront on preferable land use and historic preservation policy, having a sound plan at the local level that is proactive, rather than reactive, is vital to achieving greater success. Because there will be local and state legal challenges, it is

²⁰⁹ Steven Griles, "Speech to Senate Committee on Energy and Natural Resources," (Speech given in order to receive confirmation as deputy interior secretary on 16 May 2001, U.S. Capitol, Washington D.C.

²¹⁰ "Symbol of Shift at Interior," *The Washington Post*, 16 May 2001, sec. A, p. 21.

important for communities to be well-equipped with legal tools and knowledge of the benefits of preservation so as to continue desired goals such as downtown revitalization, historic district designation, and zoning regulation.

CHAPTER 6

THE PRESERVATIONIST RESPONSE

Woe unto them that join house to house, that lay field to field, 'til there be no place, where they be alone in the midst of the earth. —*Isaiah 5:8 KJV*

Without question, the most potentially successful, and also the most difficult, approach for preservationists in overcoming obstacles is to alter the way preservation is perceived. Grassroots groups, members of the judiciary, elected officials, the Secretary of the Interior, and the United States President are all either separated or united by ideology. Yet, preservation is neither a liberal or conservative issue, though people's perception would have them believe otherwise. The way people view a political conservative is problematic. It is believed to be a label for those persons who ask the government not to interfere in people's lives. Conservative is defined as "tending to conserve or preserve" in Webster's Dictionary. In fact, the word *conserve* is the root word of *conservative*. Once historic preservation can be seen on its own, and not as a litmus test for members of the Democratic Party, its benefits can be reaped by everyone. Conservatives need not view historic preservation as a liberal, leftist movement. Even Terry Anderson of the Political Economy Research Center in Montana admitted to the fact that 'in reality the tradition of conservationism is actually a conservative one.'²¹¹ However, his idea of using property rights as a leading force in conservation is not the only solution. Methods that allow for the most common ground between property owners and preservation advocates make for the best solutions.

²¹¹ "Free-Market Environmentalism Gaining Stature," *The Washington Post*, 4 June 2001, sec. A., p. 4.

Recommended Legal Tools

Richard Roddewig wrote in a 1993 article that one of the most significant challenges facing preservation throughout the remainder of the decade was how the community was going to respond to new judges and young people. “The benefits of preservation must be outlined for a new generation of Americans and for the new cadre of judges who may have little knowledge of the concept.”²¹² Now that the dawn of the second millenium is here, the preservation community’s response is as equally significant as in the previous decade. Preservationists must be willing to pay the price for their vision through constant vigilance. Benefits cannot be reaped without this vigilance or by harboring unwarranted expectations of the federal administration, and as a result, the importance of local level preservation leadership is reinforced.

If the response to the challenges on the horizon from the Bush administration should be a focus on the local level, then certain legal tools will be needed as well as increased public education of the benefits of preservation. These specific tools are important since they also help overcome the legal challenges that might arise from the judiciary at all levels. How these legal tools work and can be mutually beneficial to landowners and local preservation commissions will be discussed in this chapter. They include the following:

- Planning and background studies of potential development impacts, known as “factual findings”
- Sound administrative and procedural due process by local government bodies
- Conservation and preservation easements
- Alternatives to exactions and land dedication fees i.e. private open spaces and private land trusts

²¹² Richard Roddewig, “Historic Preservation and the Constitution,” *Preservation Forum* 7, no. 4 (1993): 21.

- Economic hardship relief for property owners
- Equitable impact fees if no alternatives

Factual Findings

Thorough comprehensive planning and background studies help lay the foundation for a strong defense against takings claims. Often referred to as “factual findings,” these studies are often essential to the legal merits of planning and preservation commissions during takings claims, particularly because they help to clarify the intent of a regulation or taking by illustrating potential development impact. The courts are more likely to uphold a sound, consistent plan already in place than a regulation imposed ad hoc for specific circumstances. The negative side is that the cost of these studies can be an undesirable expense for the local government entity. In *Dolan*, the Rehnquist Court concluded that factual findings were vital to land use cases and that the government would have to prove that there was a reasonable relationship between the proposed development and the permit conditions.²¹³ When the burden is on the city for permit conditions, it must ensure that it can show how the proposed development necessitates any regulations. Had the city of Tigard initiated findings concerning the need for the permit, then it could have succeeded. Such findings can be the saving grace for the cause of preservation in many instances. Unfortunately, the negative impact of the development is more easily anticipated by preservation experts than proven in a court of law. Hiring a consultant or investing in staff capabilities to aid a local commission in conducting solid surveys and inventories of various districts, or in producing a purposeful comprehensive plan, is the most efficient way in which to outline the “character of the government action” in challenges to preservation.²¹⁴ So, dollars initially invested in consulting or in staff funding could save future legal fees.

²¹³ 114 S. Ct. 2321 (1994).

²¹⁴ *Penn Central v. City of New York*, 96 S.Ct. 2659 (1978).

Administrative Procedure & Due Process

In addition to factual findings, commissions can undertake other efforts to prevent the lawsuits. This necessitates a careful procedural and administrative process for all those involved in implementation of a designation or land use regulation. Although *Dolan* placed the burden of proof on the city government, there are many instances, as in zoning measures, in which the petitioning party must prove hardship through an application process.²¹⁵ However, it is the responsibility of the government that the proper body hears the appeals and reviews permit applications in a timely manner, as specified in the preservation ordinance. Nevertheless, many land use cases illustrate that property owners must exhaust all possible administrative avenues for relief to have their day in court.²¹⁶ As a result, the development of land is not as speedy a process, and the petitioner might choose other avenues before litigation. Yet, *Del Monte Dunes* represents the other side of the coin. An administrative process full of inconsistencies that requires excessive applications from an owner will not be upheld in a court of law.

As to careful procedural process, local governments must ensure that proper due process is allowed for all citizens affected by provisions in a land use or historic preservation ordinance. This includes proper notice of actions planned by government bodies and the right to be heard through participation at a public hearing.²¹⁷ Nevertheless, the degree of procedural protection varies depending on the interest of the individual. For instance, an owner of property being considered for historic landmark designation has a stronger interest in the governmental action compared to one who lives four blocks away. If a local government illustrates fair and informed decision-making in

²¹⁵ Id.

²¹⁶ Richard Roddewig and Christopher Duerksen, *Responding to the Takings Challenge*, (Chicago: American Planning Association, 1989), 34.

²¹⁷ Bradford White and Paul Edmondson, *Procedural Due Process in Plain English: A Guide for Preservation Commissions*, (Washington, D.C.: National Trust, 1994), 6-9.

its procedures, land use decisions it has made will more likely be accepted by the public and upheld in court. Thus, knowledge of procedural and administrative process is a trusty weapon for historic preservation.

Private Tools & Alternatives to Land Dedications

Land use scholar David Callies believes that local government need not be distraught over cases like *Dolan* and has several further alternatives for those who still want to protect land but are unable to afford the high cost of litigation. First, he strongly advocates the reliance by government on private land trusts when it finds land use regulation critical. He further suggests that the government eradicate land dedication requirements to avoid costly litigation, but replace them with a requirement for developers to set aside private open spaces. Callies also promotes creativity in finding new funding sources for land acquisition of public open spaces, such as special local option sales taxes or bonds. Finally, there is the option of the government exercising its police power to deny development requests without requiring land dedication or impact fees.²¹⁸ Indeed, Callies seems to believe that the governmental imposition of impact fees poses the biggest threats for costly litigation.

By far one of the most effective private tools to benefit historic preservation in communities is the acquisition of easements. These are alternative conservation tools that have more of a guarantee of satisfying property owners as well as conservative lawmakers, because they result from a private contract between an owner and a selected second party, or the prospective easement holder. Furthermore, easements are private legal devices that are not created by public agencies, but land developers instead. Easements are responsible for preserving sensitive land, providing public access along rivers or greenways and allowing landowners to obtain income, estate, and property tax

²¹⁸ Callies, *Takings*, 282-285.

benefits while they are still living on their land. Landowners who are opposed to granting public access can still grant other kinds of easements and receive the federal tax deduction available from charitable gift donations. By granting an easement in perpetuity, the property owner has assurance of protection of the property for the future. (Nevertheless, there is a need for standards to be monitored by the proper agency or organization to ensure that the intended resources are actually protected for the future.) In addition, the restrictions of the easement are tailored to the individual property owner and to the particular property itself. For historic preservation easements, often the owner is prohibited from making alterations to the property without prior review and consultation from the grantee of the easement, usually a preservation organization or land trust. For state income and estate taxes, state laws may authorize deductions similar to the federal provisions. An easement also may decrease a property's local tax assessment and local property taxes. In cities or states where deductions do not exist, there is a need for legislation that requires a review of property taxes once an easement is granted.

Economic Relief and Equity for Property Owners

Local governments can establish an undue economic hardship variance for property owners that allows the possibility of some legitimate economically beneficial use of the property in situations where regulations may have an extreme result. Relief should be granted only upon a positive showing by the owner that there is no reasonable economic use of the property as illustrated by relevant information found in financial statements, appraisals, assessed value, and other data. By allowing such a variance, the landowner is more apt to consider the regulation less burdensome and not take the government to court.

If there is no alternative to requiring land dedications and impact fees, as those David Callies has suggested, then at minimum, an equitable basis should be established for the fees or dedication requirements. In some instances, the developer pays for

services such as sewer lines or roads that will be necessary because of the impact of his or her development. Other times, the government requires only the fee itself in lieu of the infrastructure improvements.²¹⁹ Local governments should ensure that the estimated cost is comparable to national standards or actual governmental projects already undertaken. The fee should also be only the necessary amount to cover the government's bill for the impact and needs of the developer's project on the community. Otherwise the situation will simply become another *Dolan* decision, where the government has the burden to prove the relationship between the proposed development and the consequential governmental costs.

Benefits of Historic Preservation

Unquestionably, educational and advocacy measures are as vital to the success and the endurance of the historic preservation movement as the use of the legal tools already discussed. The knowledge concerning the benefits of historic preservation and wise planning techniques needs to reach more communities, both small and populous, especially if the future is uncertain at the federal level. Furthermore, the benefits' argument for preservation could potentially serve to mitigate strong opposition from the property rights movement concerning historic district ordinances and other types of land use regulation. Considering the fact that the legal challenges from property rights advocates are based primarily on economics, it seems urgent that knowledge of financial incentives from preservation becomes more widespread.

Economic & Tax Incentives

Since the economic argument of the property rights movement is so inflammatory, it is important for more people to realize that living in a neighborhood that

²¹⁹ Mantell, Harper, and Propst, *Creating Successful Communities*, 182 (appendix A).

becomes designated as a local historic district is not going to cost them their bank accounts. At the same time, property value itself is relative. Many would believe that value from property completely originated from that parcel of land itself. Thus, he or she should receive the highest amount of return on their investment in that land. The other side of the argument is that it is the activity surrounding that piece of land that gives the certain value to it, and not the land itself. It is interesting to consider the value accrued to property because of historic preservation. Rehabilitated buildings increase property values for owners as well as increase city tax revenues. Furthermore, when a highway is stopped from barreling through the middle of a quiet community or revitalized downtown brings multitudes of tourists from the state, property values are prevented from being lowered or are actually increased because of historic preservation efforts.

Many states and communities have tax legislation and policies that provide owners with operating expenses for their historic properties. These policies recognize that property taxes are financially burdensome for owners, particularly when a building needs major reinvestment. Secondly, the tax breaks are meant to counterbalance any decreased value in property from preservation easements or regulation. Tax incentives discourage demolition as an aid to financial relief. For example, many states specify a freeze on the property tax amount for a period often up to eight years. Many state legislatures have little trouble enacting laws that may reduce someone's local taxes if supported by the affected local government. For instance in San Antonio, Texas, a full five-year abatement of property taxes is possible after rehabilitation, with an additional fifty-percent abatement for the subsequent five years.²²⁰

Even more important, private investment in the rehabilitation of historic properties has been fueled by the federal tax credit program that allows for a twenty-percent reduction on certified income-producing structures or ten-percent on non-

²²⁰ Mantell, Harper, and Propst, *Creating Successful Communities*, 67.

certified historic properties. Formerly abandoned warehouses are being turned into lofts and retail spaces everywhere as more downtowns are becoming viable places to live. However, bank decisions not to give loans in risky areas for historic redevelopment present a major obstacle to the work already in progress. As a consequence, the urban fabric of our cities suffers. Gentrification of the longtime residents often occurs or neighborhoods decline without reinvestment. These challenges can be overcome by solutions that some cities have been using which involve a more active role by city governments, particularly the coordination of public and private subsidies so that current residents can afford the rent. For instance, years ago the city of Pittsburgh created a low-interest loan pool available to homeowners to rehabilitate their houses through cooperative efforts between financial institutions and the city government. The Pittsburgh approach has since then sparked similar efforts in cities across the nation in the form of Neighborhood Housing Service organizations, which offer rehabilitation counseling, analysis of home repair needs, and other services.²²¹ Cooperative efforts with financial institutions are imperative to the rehabilitation of older neighborhoods and sustaining their current residents.

Community Values & the Public Realm

By expanding a city's tax base, increasing tourism, and providing more livable housing, historic preservation can appeal to one's financial understanding or practical reasoning. Beyond these matters, historic preservation instills a sense of pride in the community within its citizens. The beautification of the city through design review, rehabilitation projects, and landscape improvements certainly can make one feel proud to be a part of the community. But as preservationists so often point out in debates, there is

²²¹Antoinette Lee, "Discovering Old Cultures in the New World: The Role of Ethnicity," in *The American Mosaic*, ed. by Robert Stipe and Antoinette Lee, (Baltimore: J.D. Lucas Printing Co., 1987), 200.

more to the movement than simple aesthetics. Community values are influenced by the beauty and spirit of the surroundings, but they also stem from the interaction with one another. The increasing complacency in civic activity and social contact is disheartening and has greatly influenced opinions concerning development and governmental regulation. Communing with others at a public space, downtown shop, at the courthouse square, or in a neighborhood is an infrequent occurrence. When people interact with each other, it broadens the way in which they perceive community. They can see a much bigger world than simply a private parcel of land. This new perception of community promotes a vision of the shared ownership of parklands, monuments, benches near a fountain, and the sidewalk along a main street. People isolate themselves even further by driving their cars when public transportation exists or by not choosing to walk shorter distances when possible.

In his writings, contemporary political philosopher Jürgen Habermas argues that the democratic ideal was once at its greatest height when civic and political debate were a part of people's lives. The emergence of what he calls a "public sphere" allowed an open exchange of ideas and thoughts and is now in a state of radical decline. Certain institutional settings such as newspapers and coffeehouses encouraged the rise of this "public sphere" in previous centuries.²²² Essentially, the places where people can come together for public participation in debate are few.

Community service is greatly encouraged, and even required, among our nation's teenagers as a way in which they can give a part of themselves as well as being an alternative to dangerous activities such as drugs and alcohol. America's youth can serve communities better if they are able to understand their needs by experiencing everyday life in a way that unfortunately does not exist anymore. The connections to their communities and desire to serve would be that much stronger if they grew up

²²² Jürgen Habermas, *The Structural Transformation of the Public Sphere*, (Cambridge: MIT Press, 1991).

experiencing life in public spaces and had been exposed to places of community gatherings. Sadly, suburban youth rarely glimpse the urban fabric of their hometowns. Neighborhoods are defined as the interstate corridor sprawl that eventually extends into subdivisions and gated communities. Many would not know one way or the other that architecture does not have to be ugly and ill functioning and that history can certainly be preserved for future generations. Indeed, encouraging service for young people is vital to teaching them about community as well as providing them with knowledge of their roots and a sense of place. If they are learning about their heritage and community at an early age, younger generations will be much more likely to understand the benefits of historic preservation as they grow older. In fact, downtown discovery tours or architectural walks for children have been quite successful in cities like Birmingham, Alabama. The Birmingham Historical Society organizes an architectural walk through downtown for older elementary children led by trained volunteers. At an early age, children can discover their city's history and gain a sense of appreciation for the historic architecture. Often, many of the children attend school twenty miles outside of the city limits and never experience the cultural treasures of downtown Birmingham unless as a passerby on the interstate. These experiences from the tours are priceless in developing a strong sense of identity within the children. Also, the Massie Heritage Center program in Savannah, Georgia provides educational heritage programs for children at an early age.

A Better Quality of Life

“Quality of life” is a term often used by preservationists to describe one of the major achievements of the mission of historic resource protection. Yet, what quality of life means to one might be completely different to another. Nevertheless, a better quality of life can be defined like this: improvements in public safety, health, environment, housing, schools, or still another aspect that allows one to achieve a certain standard of living that is not decided by one's income. Historic preservation creates a better quality

of life in all those areas as well as promotes a strong sense of community pride. Historic preservation measures provide better housing options in downtown areas. The benefits of historic preservation are important for public health and safety reasons as they create functional places that attract many people rather than abandoned lots and buildings attracting crime activity. Rehabilitation projects promote a cleaner environment through recycling and landscape improvements along city sidewalks are environmentally better than constructing additional surface parking lots. Preserving the natural environment in rural areas is a more environmentally sound choice than rapid, unplanned growth and development that harms delicate ecosystems and agricultural land. The aesthetic benefits of preservation, including the beauty in sensitive development and the way communities are laid out, are numerous and instill pride within children and future generations of their heritage, culture and community. All of these factors contribute to a more productive, healthy outlook on the place where one lives, and as a result, raise the standards of people's lives in the public domain. Consequently, a better quality of life is ultimately attained for citizens in their respective communities.

Stewardship

In response to future challenges, particularly those that result from a lack of education on the subject, preservationists should appeal to people's logic. The historic preservation movement helps eliminate some of the wastefulness of our society today by recycling limited resources and conserving raw materials needed for construction. The two or three vacated big box stores often seen in small towns are good illustrations of the effects of not recycling our resources. Once a superstore like Wal-Mart is approved in a town, the previous store and its massive surface parking lot are abandoned. Often, the surrounding stores close down or change locations since they are not able to receive as much business. Not only is the town left with a paved-down lot, building, and sometimes an entire strip mall, whose construction once expended all kinds of resources, but another

even bigger project is to be built in the future. Not recycling our resources is wasteful, insensitive, insensible, and unjustifiable. An ethic of stewardship is an aspect of the broader historic preservation philosophy that laments this kind of wastefulness and one that President Bush has spoken of recently.²²³ Unfortunately, property rights advocates believe that stewardship is a status landowners have had the misfortune of attaining. Author Dennis Coyle writes that a twentieth-century form of feudalism is the source of the overbearing state control that forces certain obligations on the landowner.²²⁴ The following words from his book on the property rights philosophy illustrate this argument:

In an era of architectural review boards, historic preservation committees, conservation commissions, coastal commissions, wetlands committees, open space initiatives, growth moratoria, and subdivision exactions . . . signs of a revival of landowner rights must be placed in a sobering context.²²⁵

Unfortunately, these committees and review boards of which Coyle writes are merely a consequence of the progression of human carelessness and overabundant development during the last half-century. Stewardship of this land that is held only temporarily does not entitle anyone to absolute rights to do as he or she pleases. Indeed, it is a misconception that protecting property rights is the only channel in which to attain a truly free and just society.

Taking Action: Recommendations for Communities and Educational Institutions

Without statewide or local mechanisms to bolster these educational tools, the level of public consciousness will not be raised concerning the widespread benefits of historic preservation and the potential goals will not be attained. In order to ensure the

²²³ “Bush Pushes Local Control of Conservation Matters,” *The Washington Post*, 31 May 2001, sec. A, p. 2.

²²⁴ Coyle, *Property Rights*, 213.

²²⁵ *Ibid.*, 214.

implementation of the educational tools illustrated in this chapter, the following recommendations are proposed:

1. Form statewide and/or local advocacy organizations, public or private, that focus on educating the public of the rewards of historic preservation programs as well as articulating their message in order to eliminate misinterpretation. A grassroots effort must be made to inform citizens of the economic incentives associated with historic preservation and also that they are not signing away all of their rights when living in an historic district. In addition, advocacy organizations are needed to teach concepts such as quality of life, stewardship, community values, and public spaces. The distribution of information can occur through workshops, conferences, newsletters, special events, and keynote speakers at local club meetings.
2. If a statewide advocacy organization already exists, then programming needs to be established, if it is not already, to allow for significant public education. Funding and additional staff time can help achieve these results. Statewide preservation advocacy organizations serve as counterparts to the national advocacy organization, The National Trust for Historic Preservation. Though education is a part of The Trust's mission, such programs can reach people more efficiently at a statewide or local level. Many statewide organizations are membership-driven or prioritize legislative action or imperiled historic properties. These are all important elements, but public education still needs to be a priority. Besides altering the duties of the statewide organizations or dedicating separate organizations, communities can expend their efforts on forming local organizations that would work toward these same educational goals.
3. Local historic preservation commissions also need to direct an increased amount of funding to programming for educational purposes. Commissions are often overwhelmed by the amount of applications they must review for historic districts, and by the highly charged debates that arise from application denials. By dedicating

- a certain amount of time and funding to increasing public education on historic preservation and land use policy, commissioners and planning staff could possibly cut down on the amount of time spent on conflict resolution. Moreover, the preservation commission is meant to be one of the major voices of historic preservation in the community and should be equipped to serve in that role by being an educator. Finally, the educational process should not be limited to address only the built environment, but be extended to encompass land use issues, such as sprawl and transportation.
4. Communities should require candidates for public office to clearly state their beliefs on preservation and land use matters. The political process can serve as an educational public forum for the preservation community. If the government is to be an example in protecting concerning historic and natural resources as it should, then citizens should also encourage those with a strong preservation ethic to run for elected office. Such candidates can serve to bolster public awareness of historic preservation.
 5. Historic preservation graduate programs should develop curricula that are dedicated to educating future professionals in the field toward the important process of increasing public awareness. Experience outside of the classroom, such as that at public meetings, university forums, and high schools, can provide effective outlets for advocacy training of preservation graduate students.
 6. Programs for youth such as the ones in Birmingham, Alabama and Savannah, Georgia should be developed in more communities that allow children in both private and public institutions to visit their downtowns so that they can learn about their historical significance. These programs could be implemented between elementary schools and the local historical society, preservation organization, local government, or any public or private entity.

7. Beginning at early ages, children need to receive heritage and natural resources education, whether it is through an outside-of-the-classroom experience, such as a downtown discovery tour, or a school's curriculum. Local and statewide advocacy organizations should provide the necessary leadership and training for educators to implement this type of curriculum for school children.

Areas for Future Research

In the future, the theme of this paper can be expanded in numerous areas requiring additional research. They include the following areas:

1. A more detailed examination of Supreme Court cases affecting land use as well as lower court decisions
2. Update on state property rights legislation
3. Similar research at the beginning of next presidential administration
4. Update on legislation in Congress, such as Historic Homeownership Assistance Act and amendment to the Antiquities Act of 1906
5. An historical analysis of new presidential administration fears in comparison with what transpired in reality during the period from the 1960s through former president Bill Clinton's term in office

Conclusion

Attempting to alter the perception of preservation as well as educating the public on economic incentives are strategic responses. Still, one of the most important responses to the property rights argument is to listen to it. What good can ever be achieved if people do not respect the opinions of others who would sacrifice most other rights for the sake of property protection? Preservationists can advocate the importance of balancing private ambitions with the needs of a larger community, but the arguments are still going to fall on deaf ears. Although there might be possible compromises and

solutions to these property rights dilemmas, ideology is at the core. Certain freedoms are interpreted differently by people in differing regions, generations, and backgrounds. Everyone, unfortunately, does not find their sense of place, self, and worth from their heritage. Some find it from their business or property, and as a result, an appeal must be made to those identities if the efforts of historic resource protection are to continue. This can begin by using certain methods that are directly beneficial to the property owner's interests, such as the hardship variance already discussed, and by appealing to his or her pocketbook or business sense with the economic benefits of historic preservation.

Historic preservation ordinances are still valid, the national preservation program is still intact despite funding cuts for the state offices, and *Penn Central* principles were recently upheld by the Supreme Court. The future for historic preservation is not a dismal one, but one still plagued with challenges on many fronts. As of this writing, it seems that the Gale Norton and the Bush administration will not do much concerning preservation, which is unfortunate. The takings issue has not changed in the last couple of years, but its overall jumbled, confusing state is enough cause for future caution from the Supreme Court as well as the state courts. Understanding opponents' viewpoints, educating the public, and using legal tools at the local level are the most valuable weapons preservationists have against the inevitable challenges ahead. Actions cannot be taken to change the economy or change the way the president and the Interior Department decide policy matters on preservation and land use. Uniting all of the lobbyists on Capitol Hill for historic and natural resource protection is not going to completely diminish the power of those lobbying for land rights or the attempts to pass tougher property rights legislation in the fifty states. Debates on economics, freedom, civil rights, and quality of life will be never-ending deliberations. In the midst of these debates, preservationists should be proud of the successes across the country and should not be apologetic for the principles of the preservation movement. Although an upheaval of the way people think about community is far-fetched, preservation advocates can at least

continue making a difference. Changing perspectives on the term *conservative* and *conservationist* should be a priority for advocates as well as altering the image that preservation is only for the elite. Uniting our forces—both liberals and conservatives, Republicans and Democrats—is an idealistic goal, but one that would change outcomes on policy choices for a long time. Then maybe more could understand that everyone is part of a larger entity than just one piece of property. That entity is community.

As Constance Beaumont has stated so eloquently in her essay on civic responsibilities: “protection of property rights and historic preservation is not an either/or proposition.”²²⁶ People can have both in this country and enjoy the positive, lasting impacts of a better quality of life. People must be reminded, and reminded again, that they must serve as stewards of the land. This land does not belong solely to the living, for they are only temporary inhabitants upon it. Therefore, it is imperative that this kind of ethic be instilled in future generations. People can protect their culture by choosing not to allow the degradation of their cities, neighborhoods, and landscapes. Their lives are enriched by history: a history that they have created on their own and ones that they have shared. They can never cease preserving them.

²²⁶ Beaumont, “Property Rights and Civic Responsibilities,” 32.

GLOSSARY OF TERMS

Bundle of rights: The ownership of land is often visualized as a bundle of rights, including the right to control access to land, the right to develop, the right to hunt, the right to subdivide the land, and so forth.

Certificate of Appropriateness: A permit issued by a historic preservation commission to allow a property owner to make structural alterations beyond routine maintenance to a designated historic property.

Certified local government: A local government officially certified to carry out some of the purposes of the National Historic Preservation Act, as amended.

Certiorari: An appellate proceeding for re-examination of an action by an inferior court to enable an appellate court to obtain further information.

Conservation easement: A legal agreement a property owner makes to restrict the type and amount of development that may take place on his or her property.

Cultural resource: Building, site, structure, object, or district evaluated as having significance in prehistory or history.

Development moratorium: A mechanism used to restrict development for a limited period and can be imposed in two ways: restrictions on all development or on specific types of development. They can apply to zoning approvals, subdivision approvals, and building permits.

Easement: A right of one owner of land to make some particular use of the land of another owner, as created by express or implied agreement between the owners.

Economic hardship variance: An individual exemption from zoning requirements allowed when the impact of the zoning would pose an undue hardship on the owner due to unique conditions of the parcel in question.

Environmental impact statement: A provision of the National Environmental Policy Act of 1969 that requires a detailed statement in proposals by federal agencies concerning actions significantly affecting the quality of the human environment. The statement includes environmental impact of the proposed action as well as alternatives to the proposed action and any adverse affects that cannot be avoided by the action.

Exaction: A mechanism by which communities require dedication of land or facilities or payment of fee in lieu of land or facilities. Exactions are either explicitly mandated in development regulations or imposed informally on a case-by-case basis in rezoning or permit negotiations.

Fee simple: An ownership interest in real estate that is perpetual and without conditions, limitations, or restrictions. To own land in fee simple means to have complete ownership of the land with all the usual rights associated with ownership.

Gentrification: A possible result from the process of urban renewal and rehabilitation in which more affluent residents in a neighborhood displace the older, less affluent residents.

Grantee-Grantor: The person conveying property to another is the grantor. The recipient is the grantee.

Greenways: Local natural areas where recreation and conservation are among the primary values and can be privately or publicly owned.

Historic property: Any prehistoric or historic district, site, building, structure, or object.

Impact fees: Payment required from developer of which an amount is determined by a uniform formula rather than by negotiation.

Integrity: Authenticity of a property's historic identity, evidenced by the survival of physical characteristics that existed during the property's historic or prehistoric period.

Libertarian: One whose political views advocate a free-market economy, a foreign policy of nonintervention and free trade, and doctrine of freewill.

Ordinance: A rule established by authority; a permanent rule of action; a law or statute.

Permit: A widely used device allowing individual review and approval of proposed developments that require individual scrutiny to avoid or alleviate problems. The permit is available through the zoning board if the proposal adequately complies with the provisions in the ordinance, typically dealing with traffic.

Police Power: The power vested in a state to establish laws and ordinances for the preservation of public order and tranquility, the promotion of public health and safety, and morals, and the prevention, detection, and punishment of crimes.

Section 106 review: The federal review process created by the National Historic Preservation Act of 1966 designed to ensure that historic properties are considered during federal project planning and execution.

State enabling legislation: Legislation that authorizes local preservation zoning authority for cities and counties or provides an alternative to zoning as a means of historic resource protection.

Statute: An act of the legislature declaring, commanding, or prohibiting something.

Strict constructionist: In a court of law, one who more strictly interprets the Constitution and can be expected to favor judicial restraint, and thereby, steering the court toward a more moderate role.

Transfer of Development Rights: A concept under which a person whose right to develop his property is restricted is permitted to sell the rights to development to the owner of the land in an area where the local government is prepared to allow development.

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