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Federal Historic Preservation's "Place" in Property Theory

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ARTICLE

FEDERAL HISTORIC PRESERVATION’S “PLACE” IN
PROPERTY THEORY

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ABSTRACT

Progressive Property Theory scholars often point to historic preservation as an example of how property, itself, imposes an obligatory use. A historic structure’s public benefit justifies restrictions in available uses. To date, however, Progressive Property Theory has considered historic preservation only as it is applied in state and local regimes, forgoing an analysis of the federal structure under the National Historic Preservation Act. This article establishes a synergy between the underlying principles of Progressive Property Theory and federal historic preservation and suggests that federal historic preservation’s identification and incentivization structures model a process that could move Progressive Property Theory toward wider applications.

Part I of this article explains the similarities between Progressive Property Theory and federal historic preservation. Using explicit textual comparisons between the foundational article on progressive theory (“A Statement of Progressive Property”) and the “purpose” section of the National Historic Preservation Act, this section demonstrates that federal historic preservation provides a model for putting progressive theory into practice. Part II differentiates state law and local historic preservation ordinances from federal law. Federal and local preservation regimes are commonly misunderstood to imply similar property restrictions.

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Through an explanation of legal differences between programs, the discussion highlights the limitations of focusing Progressive Property Theory on local preservation. Lastly, Part III considers the implications of federal historic preservation structures for diverse social justice outcomes as part of an argument for more frequent applications of Progressive Property Theory in conflicts over property. As a case in point, this final part describes an identification and incentivization regime found in federal historic preservation structures—one that mirrors the principles of Progressive Property Theory — and shows how it may usefully be applied to issues of affordable housing or open space conservation.

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INTRODUCTION

“The past is not the property of historians; it is a public possession. It belongs to anyone who is aware of it, and it grows by being shared. It sustains the whole society, which always needs the identity that only the past can give.”¹

Historic preservation is uniquely situated to address questions of community “significance” in conflicts over property use. Before a developer swings the wrecking ball, historic preservationists ask, “What will we be losing?” Similarly, Progressive Property Theorists look to property as a foundational part of community building, asking “how must we use property to better society?” With these dovetailing interests, historic preservation is often noted in Progressive Property Theory. However, this article is the first to show how the federal historic preservation structure provides a model for applying progressive theory in practice. Up to now, only state enacted and locally implemented historic preservation legal mechanisms have been discussed in Progressive Property Theory scholarship. It is a common misconception that federal and local preservation structures are the same, with equal legal ramifications. The article will show how local preservation ordinances differ in many ways from their federal counterpart.

To be sure, historic preservation is not a concern in every property decision. Only a subset of properties invokes historic preservation considerations. However, the analytic process by which a resource is evaluated for historic significance and “encumbered” – either through development restriction, right, or symbolically – provides a pathway for Progressive Property Theory to move from theoretical to practical. The goal is to find a creative way to bring social impact considerations into the classically private subject of property, because “efforts to change property law from the inside-through use of property concepts alone--are unlikely to bear fruit.”² But in order for Progressive Property Theory to be applied more frequently, some kind of balance

¹ U.S. CONFERENCE OF MAYORS, WITH HERITAGE SO RICH 1–2 (1966) (quoting Dr. Walter Havighurst).

² Ezra Rosser, *The Ambition & Transformative Potential of Progressive Property*, 101 CAL. L. REV. 107, 111 (2013).

between public benefit obligations and economic efficiency must be found. The process of contextualizing property in federal historic preservation law already injects economic considerations (such as tax incentives shaping voluntary property use) into decisionmaking, and thus provides a model for pursuing this balance. Moreover, this proposed coupling of Progressive Property Theory and traditional economic theory could be applied not only to instances of historic preservation, but to social justice issues such as affordable housing or environmental conservation.

By considering a property's potential significance for the community, as is already done in historic preservation designation processes, a property owner can establish a new "baseline" — a baseline that accounts for more than traditional "law and economics" considerations. As noted by Professor Henry E. Smith, "[o]nce we recognize the distinction between our interest in using things and the institutions that property law sets up to serve those interests, the role of property baselines as a means for achieving property's ends becomes clearer."³ In creating new baselines, historic preservation encourages not only the "preservation" of a historic resource in the strictest sense, but also its adaptation, modification, and mitigation. However, federal law has acknowledged that in order to realize the new baselines, property owners may need financial incentives to balance their private interests with a public interest in preservation. In sum, federal historic preservation structures uniquely allow social purpose and market-based economics to live together harmoniously in negotiations over the use of property. Progressive Property Theory scholar Eduardo Peñalver writes: "criticisms do not call into question the value of sound economic analysis within land use but only the value of a careless equation of efficiency with goodness. It rules out only the most imperial normative claims made by certain legal economists."⁴

Part I of this article will introduce Progressive Property Theory and its congruence with the aims and purpose of the National Historic Preservation Act. Additionally, this part recounts the symbolic impact of designation to the National Register of Historic Places and explains the legally required "contextualization" of property in Section 106 consultation. Part

³ Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1693 (2012).

⁴ Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 863 (2009).

II distinguishes state/local historic designation procedures from federal ones by highlighting the former's unilateral, top-down "use sacrifice" structure. To date, Progressive Property Theory's discussion of historic preservation is focused exclusively on the property impacts of local historic designation. This article pushes the analysis into federal-level preservation, but also reveals limitations and social consequences of local designation processes. Specifically, this part touches on historic preservation "white-washing," or the glorification of achievements by white people and minimization of achievements by African American people in history, and the rigidity of local laws when preserved places, such as confederate monuments, no longer serve a public benefit (and in some cases, harm). Part III describes the key elements of federal historic preservation, specifically a process to identify public benefits from property and a voluntary use of property for public benefit with compensation—and shows how this process could serve public interests beyond historic preservation. To be clear, this article does not suggest "federalizing" local property decisions. Instead, it advocates for using a federal law's procedures as a model to increase social responsibility into property use. By distinguishing elements of federal historic preservation and applying them to affordable housing and open space conservation, this shows that these procedures offer a superior model for incorporating public interests in decisions about the use of private property.

PART I. ESTABLISHING CONGRUENCE BETWEEN PROGRESSIVE PROPERTY THEORY AND HISTORIC PRESERVATION

The goals of the National Historic Preservation Act (NHPA or the "Act") and Progressive Property Theory are rooted in the same ethos: valuing something more than money. The purpose and procedures under the NHPA outline steps to consider a property's historical significance and the value it has for society. Similarly, Progressive Property Theory attempts to reframe the purpose of property, focusing less on utilitarian or economic efficiency and more on the role of property to better society overall.

This section introduces Progressive Property Theory as a recently established scholarly approach to property law. It focuses on Progressive Property Theory's "social-obligation norm," introduced by Professor Gregory S. Alexander. Historic

preservation is presented as an under-evaluated example of “human flourishing,”⁵ one means for reckoning social or public good. Next, the article compares the principles in A Statement on Progressive Property Theory⁶ with the requirements for “historic significance” under the National Historic Preservation Act, under Bulletin 15. This textual comparison finds a striking similarity to the way Progressive Property scholars and Historic Preservationists view the purpose of property. Historic Preservation is arguably the best example in property discussions to challenge the idea that “nothing in American law resembles a sustained account of a constitutional norm predicated on the idea that private ownership entails obligations to act (or refrain from acting) for the purpose of promoting the collective good of the community.”⁷

A. What is Progressive Property Theory?

At its simplest, Progressive Property Theory answers the question “what is property” using a social interest lens. As a response to a traditional law and economic approach, Progressive Property Theory asks not what rights an owner possesses, but what obligation does an owner have to use their property in a way that benefits society.⁸ Currently, law and economics dominates property theory.⁹ Law and economics focuses on the individual rights associated with property ownership, and the cost or monetary value of excluding or restricting one of those rights. In Progressive Property Theory, the perspective is turned on its head—reframing the statement, “you can’t tell me what to do on my land!” into “I am obligated to act in a certain way because of my land’s purpose to society.”

Just as Progressive Property Theory is made up of “overlapping but not identical alternative visions,”¹⁰ law and

⁵ Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 745 (2009).

⁶ Gregory S. Alexander et al., *A Statement of Progressive Property*, 94 CORNELL L. REV. 743, 744 (2009).

⁷ Alexander, *supra* note 5, at 757.

⁸ Brandon M. Weiss, *Progressive Property Theory and Housing Justice Campaigns*, 10 U.C. IRVINE L. REV. 251, 253 (2019).

⁹ *Id.*

¹⁰ Rosser, *supra* note 2, at 110.

economics comes in many varieties.¹¹ To streamline the argument, this article focuses on “social-obligation norm” theory as the principal feature of Progressive Property Theory, serving as a counterpoint to “wealth” creation as the driver of property considerations in Law and Economic Theory. No attempt is made to diminish other aspects of each theory, but the chosen focus on social obligations and wealth creation allows for the most telling contrast between the two approaches.

1. *Social-Obligation Norm*

Where traditional property theory centers around an owner’s right to exclude, social obligation theory provides a community-based rationale for why an owner would give up a property right (generally a development right). Professor Alexander’s article “The Social-Obligation Norm in American Property Law” provides a sturdy backbone for the collective “Statement on Progressive Property Theory.” This subsection will demonstrate that the federal historic preservation decisionmaking process in Section 106 exemplifies an area where property use decisionmaking “explicitly acknowledge[s] such an obligation as a formal element of property law.”¹²

Roots of the social obligation norm trace back to French law professor Léon Duguit’s theory that property rights should not be excluded from sharing societal responsibilities.¹³ Duguit’s social obligation or social function theory spread around the world in the early 1900s, even becoming incorporated into multiple national constitutions.¹⁴ Although social obligation theory was incorporated into other countries’ legal structures, it has met resistance in the United States. William Blackstone’s view of an owner’s “sole and despotic dominion over property” reigns

¹¹ Alexander, *supra* note 6, at 749 n.8 (“I will be contrasting my social-obligation approach with a full family of approaches adopted by various legal scholars plying the ‘law-and-economics’ tradition. Thus I take into account the fact that law and economics has splintered into sundry variants since the 1970’s, when Judge Richard Posner first promoted ‘wealth-maximization’ as the solely relevant value (though he later turned away from that position).”).

¹² Alexander, *supra* note 5, at 752.

¹³ M. C. Mirow, *The Social-Obligation Norm of Property: Duguit, Hayem, and Others*, 22 FLA. J. INT’L L. 191, 192 (2010).

¹⁴ *Id.* at 195 (noting the incorporation of “social function” into Chilean and Bolivian constitutional statements on property).

supreme.¹⁵ Recently, Professor Alexander and other legal scholars have resurrected Duguit's view "[t]hat capitalist property, and particularly real property, is increasingly less of a subjective individual right and more of a social function."¹⁶

According to Alexander, property rights are "inherently relational" where owners owe some degree of responsibility to their neighbors, and the overriding concern should be "human flourishing."¹⁷ Although Blackstone's despotic dominion idea of property still maintains pole position, many legal structures also include the importance of relational and community benefits of private property. Eminent domain, nuisance laws, zoning, and environmental preservation all balance the rights of an individual with the broader public interest. Historic preservation is another example that incorporates both private and public interests. Specifically, the inability to alter one's home due to its preservation value is commonly viewed as an attack on individual rights – instead of conferring a benefit to the community.

Building on the Aristotelian view that humans are not self-sufficient on their own, human flourishing is comprised of two key characteristics: 1) "human beings develop the capacities necessary for a well-lived, and distinctly human life only in society with, indeed, dependent upon, other human beings[;]"¹⁸ and 2) "the capacity to make meaningful choices among alternative life horizons, to discern the salient differences among them, and to deliberate deeply about what is valuable within those available alternatives."¹⁹ A "capabilities" approach to human flourishing focuses on the concept that "[t]he well-lived life is a life that conforms to certain objectively valuable patterns of human existence and interaction" rather than goods, possessions or "negative liberties."²⁰ Amartya Sen includes the notion of "choice" in the capabilities approach to human flourishing.²¹ This might

¹⁵ *Id.* at 194 (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (facsimile ed. 1979) (1765-69)).

¹⁶ *Id.* at 199 (citing LÉON DUGUIT, LES TRANSFORMATIONS GÉNÉRALES DU DROIT PRIVÉ DEPUIS LE CODE NAPOLÉON 21 (2d ed. 1920)).

¹⁷ Alexander, *supra* note 5, at 747–48.

¹⁸ *Id.* at 760–61 (citing Gregory S. Alexander & Eduardo M. Peñalver, *Properties of Community*, 10 THEORETICAL INQUIRIES IN LAW 127 (2009)).

¹⁹ *Id.* at 762.

²⁰ *Id.* at 763–64.

²¹ *Id.* at 765.

include the choice not to destroy a significant piece of architecture because of its cultural value for the community.

With “community” as the foundation of this theory, it follows that if there is value in individual flourishing, then all individuals must have that same right of opportunity. Social obligation theory commands “that our (and others’) dependence creates, for us (and for them), an obligation to participate in and support the social networks and structures that enable us to develop those human capabilities that make human flourishing possible.”²²

B. Social Obligations and Historic Preservation

This article intends to expand scholarship on the relationship between Progressive Property Theory and Historic Preservation. Alexander explains social obligations norm in historic preservation as an example of a “use sacrifice.”²³ A historically significant structure is one that presumably benefits the community because of its uniqueness. As discussed in the subsequent section, historic significance can rely not only on aesthetics, but historical or cultural values. Alexander broadly associates historic preservation restrictions on the use of a property as a reflection of a community’s interest. Historic preservation laws protect property from being used in a way that the “community regards as against its collective interest.”²⁴

The nuances of historic preservation law (including the basic “federal” v. “local” distinctions described in Part II) require explanation, but the use-sacrifice principle is apt. In *Penn Central Transportation Corp. v. New York*, the most prominent case in historic preservation law, a local historic preservation ordinance restricted the proposed modern high-rise building expansion on the existing “beaux arts” train station.²⁵ Preservation of the train station was done for the collective benefit of the people of NYC and beyond. The architecture of the train station provided a cultural backdrop to Manhattan and “embod[ies] precious features of our heritage.”²⁶

²² *Id.* at 770.

²³ *Id.* at 791.

²⁴ *Id.* at 775.

²⁵ *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 115 (1978).

²⁶ *Id.* at 108.

1. Natural Alignment Between Progressive Property Theory and the National Historic Preservation Act

This subsection demonstrates that the federal historic designation process offers a model for property use decisionmaking that “explicitly acknowledge[s] such an obligation [to social value] as a formal element of property law.”²⁷ During the consultative process determining historical significance, various stakeholders rely on criteria outside those found in traditional economics. Reliance on “context” invokes considerations of community, and the four criteria used to determine eligibility for the National Register of Historic Places reflect that. To determine that a property is historically significant and suitable for inclusion on the National Register, the National Park Service (through State Historic Preservation Offices) screens properties using the NPS publication “National Register Bulletin 15.”

The National Historic Preservation Act (NHPA or the “Act”) was not the first piece of federal legislation centered with preservation, but it has proven to be the most influential.²⁸ Prior to the NHPA’s enactment in 1966, the country was struggling with rampant razing of historic resources after World War II, often in the name of “modernization.” The NHPA was legislated to serve as the historic preservation policy of the nation.²⁹ The Act creates leadership responsibilities, legal processes, and financial assistance opportunities to promote the preservation of significant historic resources.³⁰ Leadership in historic preservation comes from the NHPA-created Advisory Council on Historic Preservation, a national oversight body to ensure compliance under the Act and its regulations.³¹ The Act also provided authorities to State Historic Preservation Offices and Tribal Historic Preservation Offices to assist with financial grants or opportunities, to inform the public about historic resources, and to assist with designation of historic resources.³²

²⁷ Alexander, *supra* note 5, at 752.

²⁸ MICHAEL B. GERRARD ET AL., 1 ENVIRONMENTAL LAW PRACTICE GUIDE §2.02(1) (Matthew Bender & Co., 2021).

²⁹ *Id.* § 2.02(2).

³⁰ *Id.* § 2.02(2)(a).

³¹ *Id.* § 2.02(2)(b)(ii).

³² *Id.* § 2.02(2)(c)(i).

The NHPA is a comprehensive statute covering a wide variety of historic preservation issues. As such, it is too large and complicated to address fully here. Instead, this article will focus on two elements of the NHPA that best inform this article's focus on the Act's congruence with Progressive Property Theory. These two elements are 1) the National Register of Historic Places and its impact on private property action; and 2) the Section 106 consultation process for federal undertakings. These two elements created by the NHPA serve as models for how property can be evaluated and acknowledged to further progressive property goals, as explained later in Part III of this article.

2. *Symbolic Listing on the National Register of Historic Places*

Technically established by the Historic Sites Act in 1935, the National Register of Historic Places was expanded by the NHPA in 1966 and serves as the "honor roll" for historic structures.³³ The National Register includes "districts, sites, buildings, structures, and other objects that are significant in American history, architecture, archeology, engineering, and culture" and is the "official list" of historic places at the national level.³⁴ A property's inclusion on the list attests to its significant cultural value, but it does not put in place the constraints that one might expect: "[l]isting on the National Register is primarily honorific, meaning that it does not impose substantive restraints on how a private property owner may use his or her property."³⁵

In contrast to local preservation regimes described in Part II, listing to the National Register is primarily symbolic, "designed to be and is administered as a planning tool."³⁶ Secretary of Interior regulations specifically state:

"The National Register is an authoritative guide to be used by Federal, State, and local governments, private groups and citizens to identify the Nation's cultural resources and to indicate what properties should be considered for protection from destruction or impairment. Listing of private property on the National Register does not prohibit under Federal law or regulation any actions

³³ *Id.* § 2.02(2)(d)(ii).

³⁴ MATTHEW BENDER & COMPANY, INC., *supra* note 28, at § 2.02(2)(d).

³⁵ *Id.* § 2.02(2)(d)(ii).

³⁶ Parks, Forests, and Public Property, 36 C.F.R. § 60.2(a) (2021).

which may otherwise be taken by the property owner with respect to the property.”³⁷

It is a common misconception that listing on the National Register imposes preservation requirements or restricts a private owner’s property rights.³⁸ Instead, designation to the National Register is only the culmination of the SHPO’s application of evaluative criteria resulting in a determination that the resource is “historically significant.” Importantly, the criterion for listing goes beyond pure aesthetics, incorporating history and cultural significance. Specifically, 36 CFR 60.4 lists the following eligibility criteria:

(a) that are associated with events that have made a significant contribution to the broad patterns of our history; or

(b) that are associated with the lives of persons significant in our past; or

(c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or

(d) that have yielded, or may be likely to yield, information important in prehistory or history.³⁹

Public recognition of a property through National Register listing can provide indirect and direct financial benefits. For example, potential business owners can market the historic features of a building to better attract tourists.⁴⁰ Multiple studies have also determined that property values increase for homes located in listed Historic Districts, creating higher returns on investment.⁴¹ More directly, the federal government uses listing on the National Register as “a basis for qualifying a property for federal assistance in the form of favorable tax incentives, such as a 20 percent rehabilitation tax credit and a charitable contribution tax deduction for the donation of a preservation easement.”⁴²

³⁷ *Id.* § 60.2.

³⁸ MATTHEW BENDER & COMPANY, INC., *supra* note 28, at § 2.02(2)(d)(ii).

³⁹ 36 C.F.R. § 60.4(a)–(d).

⁴⁰ MATTHEW BENDER & COMPANY, INC., *supra* note 28, at § 2.02(2)(d)(ii).

⁴¹ RANDALL MASON, *ECONOMICS AND HISTORIC PRESERVATION: A GUIDE AND REVIEW OF THE LITERATURE* 7 (The Brookings Inst. Metro. Pol’y Program ed., 2005).

⁴² MATTHEW BENDER & COMPANY, INC., *supra* note 28, at § 2.02(2)(d)(ii).

The incentive structure for historic tax credits is foundational for efforts to apply federal historic preservation's structure to a broader range of transformative social outcomes. Benefits of tax credit investment is most easily presented in economic terms. Community benefits are less easily quantified, but still, this application of federal historic preservation structures will be attractive to utilitarian or Blackstonian developers looking to maximize profit. This strengthens the argument that a blended property use approach (drawing on both Progressive Property Theory and traditional law and economics) could have real world application.

Since at least 2013, the National Park Service has partnered with Rutgers University's Edward J. Bloustein School of Public Policy to publish annual reports on the economic impact of federal historic tax credits.⁴³ The historic tax credit program was enacted in 1976. Since then, "the [National Park Service] has certified the rehabilitation of more than 45,000 historic properties throughout the United States, with the HTC leveraging over \$173.7 billion in private investment in historic rehabilitation and generating over 2.8 million jobs."⁴⁴ Economic analysis included in each annual report includes data on jobs, income, wealth, and taxes to determine the impact of the federal historic tax credit on communities from both direct and indirect effects of historic rehabilitation.⁴⁵ In fiscal year 2019 alone, historic tax credit rehabilitation projects "generated approximately 110,000 jobs, including 39,000 in construction and 25,000 in manufacturing, and were responsible for \$6.2 billion in GDP, including \$2.0 billion in construction and \$1.7 billion in manufacturing. HTC-related activity in FY 2019 generated \$4.6 billion in income, with construction (\$1.7 billion) and manufacturing (\$1.1 billion) reaping major shares."⁴⁶ For comparison, historic rehabilitation provides a better "bang for your buck" than new development. "[A] \$1 million investment in historic rehabilitation yields markedly better effects on employment, income, GDP, and state and local

⁴³ See generally *Reports and Studies*, NAT'L CONF. OF STATE HIST. PRES. OFFICERS, <https://ncshpo.org/resources/reports-and-studies/> [https://perma.cc/4GRR-2Y2C].

⁴⁴ Nat'l Parks Serv., *A Message from the National Park Service, Preface to RUTGERS UNIV., ANNUAL REPORT ON THE ECONOMIC IMPACT OF THE FEDERAL HISTORIC TAX CREDIT FOR FISCAL YEAR 2019 (2020)*.

⁴⁵ See, e.g., RUTGERS UNIV., ANNUAL REPORT ON THE ECONOMIC IMPACT OF THE FEDERAL HISTORIC TAX CREDIT FOR FISCAL YEAR 2019 1 (2020).

⁴⁶ *Id.* at 2.

taxes than an equal investment in new construction or many other economic activities (e.g., manufacturing or services)."⁴⁷

Listing on the National Register should be viewed as the culmination of deliberations about a historic property's impact and importance to the public and the property's community—and, as such, connects directly to the idea of social obligation in Progressive Property Theory. A property would not likely be considered "historically significant," and therefore listed on the National Register, if it did not have the potential to positively contribute to "human flourishing." By setting up criteria for evaluating significance, federal historic preservation determines what aspects of a property's history are deemed to provide a public benefit.

3. *Section 106 Consultation Process*

Although National Register listing does not restrict private action, there are additional procedural consequences that could constrain other types of actions. The primary example is the consultation required under Section 106 of the National Historic Preservation Act⁴⁸ for any "federal undertaking" that has the potential to impact a historically significant resource. Section 106 is the primary mechanism to ensure that potential adverse impacts to historic resources are evaluated before the opportunity to preserve is lost.

Under Section 106 of the Act, the Federal agency is responsible for compliance:

"The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property."⁴⁹

⁴⁷ *Id.* at 4.

⁴⁸ National Park Service and Related Programs, 54 U.S.C. § 306108 (2018) (This section was formerly located at Section 106 of the Act. The term Section 106 is utilized both in practice and this article moving forward).

⁴⁹ *Id.*

Importantly, Section 106 applies only to “federal undertakings,” and for this reason it has been widely circumvented. Private industry seeking government permits often view Section 106’s consultative process as an impediment. Property developers, in particular, have engineered legal arguments narrowing the scope of applicable undertakings.⁵⁰ Circumventing consultation responsibilities prevents historic preservation advocates, including federally recognized tribes with specialized knowledge of culturally significant considerations, from voicing concerns about resource protection.⁵¹ While judicial interpretation has narrowed the application of “undertaking,” the statute itself also extends the scope of consideration by applying Section 106 to resources both “included in or eligible for inclusion in the National Register.” By including resources eligible for listing, federal agencies are responsible for evaluating potential impacts on a much larger number of places.

Regulations implementing Section 106 procedures are found at 36 CFR Part 800 and outline evaluative steps to comply with the Act.⁵² Determining whether the proposed federal activity is a qualifying “undertaking” is step one.⁵³ Step two requires a federal agency to identify historic resources.⁵⁴ It is this step that most aligns with Progressive Property Theory’s contextualization of property and its “human flourishing” potential. A federal agency must review existing information and seek additional information from consultative parties about properties within the proposed action’s “area of potential effects.”⁵⁵ Seeking information includes critical consultation with “any Indian tribe or Native Hawaiian organization that may attach religious or cultural importance in the area of the undertaking.”⁵⁶ Formal eligibility determinations typically are not deployed, however these may be necessary if there is disagreement about the significance of a property.⁵⁷ Further

⁵⁰ See generally Samuel W. Gieryn, *Circumventing Consultation Under the National Historic Preservation Act: How Judicial Misapplication of Section 106 is Putting Historic and Cultural Resources at Risk*, 41 N. ILL. U. L. REV. 16, 39–49 (2020).

⁵¹ See *id.* at 58.

⁵² Protection of Historic Properties, 36 C.F.R. § 800.3–.13 (2021).

⁵³ *Id.* § 800.3(a).

⁵⁴ *Id.* § 800.4(b).

⁵⁵ *Id.* § 800.4(c)(1–2).

⁵⁶ *Id.* § 800.2(c)(2)(B)(ii).

⁵⁷ MATTHEW BENDER & COMPANY, INC., *supra* note 28, at §2.02(2)(e)(ii)(B).

elements of resource identification are raised in Part III of this article when discussing the potential application of Section 106's structure to broader sets of property issues as they relate to Progressive Property Theory.

After identifying properties, federal agencies are responsible for assessing the effects on any historically significant resources.⁵⁸ While the ultimate effect determination lies with the federal agency, the SHPO and other interested parties must be consulted. By regulation, the SHPO has 30 days to concur or non-concur with the federal agency's effect determination. If adverse effects are identified, negotiations resulting in a Memorandum of Agreement will be undertaken to minimize and mitigate the loss of the historically significant resource.⁵⁹

As seen in the required Section 106 process, identifying historic resources and evaluating potential adverse effects is an iterative process that requires the contextualization of the significance of a property and the impact of its loss. This process of evaluating property beyond economic efficiency and wealth creation is unique under the law, but not unprecedented. Other procedural statutes like the National Environmental Policy Act attempt to require federal agencies to understand the value of the environment beyond narrow financial considerations. It is this balance of shared or community value with unfettered property use that drives Progressive Property Theory and its easy alignment with the purpose and policy of the NHPA. Finding the "significance" for humanity of property beyond wealth generation – either from history or for humanity -- drives the rest of this article's asserted congruence between progressive theory and historic preservation.

Although Section 106 only applies to "federal undertakings," the obligations on parties when an adverse effect is identified exemplify Progressive Property Theory's "requirement" that property serve a public benefit. While demolition or alteration are not prohibited when a federal undertaking adversely impacts a historic resource, the terms and actions in the required Memorandum of Agreement must preserve, or in the least, mitigate, the loss of a public benefit. This direct control over property aligns with progressive theory in general, and the

⁵⁸ 36 C.F.R. § 800.5(a).

⁵⁹ *Id.* § 800.6(v)(2)(c).

flexibility inherent in the preparation of Memoranda of Agreement suggests extended application to a wide variety of property-related matters.

4. *Cut from the same cloth: NHPA and Progressive Theory's Thematic Overlaps*

At its core, both historic preservation and progressive property theory are about more than just physical structures. Property is a stimulant for economic growth, a source of inspiration and culture, and a tool for education. Property provides an identity for an individual or community. The goal of this section is to expose the shared principles that undergird both historic preservation and Progressive Property Theory with a blow-by-blow comparison of the National Historic Preservation Act's "purpose" section and the foundational elements in A Statement of Progressive Property Theory. The compilation article A Statement of Progressive Property Theory, hereafter referred to as The Statement, establishes principles for the theory drawn from multiple scholars.⁶⁰ This short piece serves as both an introduction and a guide for any application of Progressive Property Theory. As such, its inspiration is akin to "purpose" or "policy" sections in the historic preservation statute, making explicit textual comparisons between the document apt. Two overarching and related values emerge from this comparison: 1) community; and 2) non-pecuniary value. Consideration of these two values will show yet again that federal historic preservation's structure offers a way forward for applying Progressive Property Theory to a diverse array of property-related disputes.

a. Community

Community is an essential part of both progressive property theory and historic preservation. Understanding that people cannot live in absolute independence helps frame how property connects to social life. Professor Eduardo M. Peñalver notes that "[i]t is possible to formulate a vision of property, and its relationship with freedom, in a way that is more cognizant of human beings' robustly social and interdependent nature."⁶¹

⁶⁰ Alexander et al., *supra* note 6, at 743.

⁶¹ Eduardo M. Peñalver, *Property as Entrance*, 91 VA. L. REV. 1889, 1938 (2005).

Property impacts individual views both by excluding people with contradicting opinions and strengthening shared values. Symbolic (and sometimes physical) walls are created by property's right to exclude, and that process has negative impact on the possibility of community.⁶² The Statement canonizes this idea with the concept that "Property enables and shapes community life. Property law can render relationships within communities either exploitative and humiliating or liberating and ennobling. Property law should establish the framework for a kind of social life appropriate to a free and democratic society."⁶³

Historic preservation's congruence with progressive theory's "community" element centers on "the institution of private property as a means of reinforcing community life, by permitting individuals to expose themselves more fully to the values of the particular community in which the property is situated."⁶⁴ The National Historic Preservation Act acknowledges the importance of the ability of a place to create a cultural foundation for community life. The goal of the Act is in effect to preserve what positively contributes to retelling the story of an influential place.

The internet has certainly disrupted this game, creating virtual communities and easing access to communities around the world. However, geography and physical structures remain vitally important in everyday life – particularly as they relate to a property owner's community involvement and the property's market value.⁶⁵ Peñalver recounts how property owners, for a variety of reasons, are generally more involved with local decisionmaking.⁶⁶ A property owner's connection not just to a sense of "home," but also to the financial benefits of their property investment, can sometimes spur them to take a more proactive role in community decisionmaking.⁶⁷ Online communities do not supplant physical communities in geographic space; rather, they supplement or augment those Real World connections among people.

⁶² *Id.* at 1891 (quoting JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 272 (1990)).

⁶³ Alexander et al., *supra* note 6, at 744.

⁶⁴ Peñalver, *supra* note 61, at 1944.

⁶⁵ *Id.* at 1949.

⁶⁶ *Id.* at 1950.

⁶⁷ *Id.*

It is in this sense that historic preservation exemplifies community in progressive property theory. “Use sacrifices” associated with local historic designation and positive market conditions in historic neighborhoods undoubtedly contribute to the betterment of community. The decision to preserve historically significant sites perpetuates the material substrate of a community, and thus forces social obligation into property decisions.

The federal statute memorializes this construction slightly differently, stating “the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people;”⁶⁸

The ability of property to sustain community life has both sociological and legal aspects. Courts have given community a cognizable legal interest in conflicts under the National Historic Preservation Act. Citing the above referenced provision of the Act, the Ninth Circuit Court of Appeals upheld the lower court’s determination that a community’s interest in a property’s social value is enough to grant federal standing under the Administrative Procedure Act. In *Presidio Golf Club v. National Park Service*, the Presidio Golf Club sued the National Park Service and the golf course’s management, under the National Environmental Policy Act and the National Historic Preservation Act, for failing to complete a proper environmental review on the proposed construction of a new clubhouse.⁶⁹ The new public clubhouse was to be located “near a century-old private Clubhouse which the Club seeks to preserve.”⁷⁰

The National Park Service contended that the Club lacked standing, in part, because any injury from the new clubhouse would be purely economic and therefore “not within the zone of interests to be protected by NEPA or NHPA.”⁷¹ The Club argued that their interest in preserving the original clubhouse is more

⁶⁸ National Historic Preservation Act, Pub. L. No. 89-665, as amended by Pub. L. No. 96-515 (When the NHPA changed titles, Section 1(b)(2) was not repealed but was also not included in the new title location)(1966).

⁶⁹ *Presidio Golf Club v. Nat’l Park Serv.*, 155 F.3d 1153, 1157 (9th Cir. 1998).

⁷⁰ *Id.* at 1156.

⁷¹ *Id.* at 1157 (“NEPA’s purpose is to protect the environment, not the economic interests of those adversely affected by agency decisions.” (citing *Western Radio Services Co. v. Espy*, 79 F.3d 896, 902–03 (9th Cir. 1996)).

than economic and rooted in the wider community benefits of the historic structure. Specifically, the Club states, "the historic Tudor Clubhouse provides far more than food, beverages, and shelter. It functions as a mock country manor for the rustication of its members [. . .] consistent with the purposes of NHPA."⁷²

The Club's stated purpose to "improve and maintain grounds and buildings for athletic purposes" implies the corollary purpose of maintaining an environment, both natural and built, suitable for the game of golf and post-game activities. A golf club attempts to create a rustic enclave for the rest and relaxation of its members.⁷³

The appellate court sided with the Club finding the community benefits of preserving the way a property cultivates social life to be within the National Historic Preservation Act's "zones of interest" and grounds for legal standing.⁷⁴

The *Presidio Golf Club* case exemplifies how a place can function as more than a vessel for basic human needs or narrowly defined pecuniary interests. Instead of providing mere food and shelter, the old Clubhouse – through its history and design – functioned as a community space for members and continues to transport them to a different era of golf.⁷⁵ This ability for a structure or place to communicate a legally recognizable interest for the community encourages a more practical view of Progressive Property Theory in property conflicts. Progressive scholars admit that their theory is still mainly a theory without concrete application, but cases like *Presidio Golf Club* reveal at least the potential to inject progressive property values into the interpretation of existing legal rights.

b. Non-Pecuniary Value

According to progressive property scholars, a property's value is not simply monetary. Likewise, while historic preservation

⁷² *Id.* at 1158.

⁷³ *Presido Golf Club*, 155 F.3d at 1158.

⁷⁴ *Id.* at 1160. Although the Club was granted standing, the appellate court upheld the district court's determination that the NPS's environmental review and historic preservation review was sufficient. *Id.* at 1164.

⁷⁵ Constructed in 1895, Presidio Golf Course is one of the oldest courses in the Western United States. PRESIDIO TRUST, WELCOME TO PRESIDIO GOLF COURSE & CLUBHOUSE, <https://www.presidiogolf.com/> [<https://perma.cc/M8JN-MHAZ>].

actions can in principle be reduced to appraisals, tax credits, or property tax increases, the properties themselves provide something more—a wellspring of non-pecuniary values, such as identity and memory. The attractiveness of a narrow monetary approach to property is its simplicity and predictiveness, but it is appealing also because society has determined wealth creation in itself a “worthy goal.”⁷⁶ But Peñalver replies that the negative social welfare implications of utilitarian property decisionmaking should not be disregarded.⁷⁷ Instead, in a true progressive property approach, it is virtue and the incommensurable values associated with virtuous decisionmaking that is the more worthy goal.⁷⁸

The importance of the plural values of property are reflected in Statement 2.5: “The plural values implicated by property are incommensurable. Because they relate to qualitatively distinct aspects of human experience, they cannot be adequately understood or analyzed through a single metric. Reducing such values as health, friendship, human dignity, and environmental integrity to one common currency distorts their intrinsic worth.”⁷⁹

According to Peñalver, progressive property theory’s “incommensurable value” is related to virtue ethics. “[V]irtue ethics’ recognition of a plurality of values makes it particularly well-adapted to provide a means for acknowledging and balancing an interest in the aggregate welfare or wealth of society with a concern for the full spectrum of the other human goods that land use decisions implicate.”⁸⁰ Incorporating virtues into property decisionmaking allows an owner to reap a different set of values – not just economic – and at the same time allow for human flourishing of others.⁸¹ In the same way, historic preservation roots a structure in the past based on its significance so it can inform future generations and influence, for example, individual and group identify formation. This value is incalculable, but certainly no less worthy than wealth creation.

⁷⁶ Peñalver, *supra* note 4, at 861.

⁷⁷ *Id.* at 861–62.

⁷⁸ *Id.* at 863.

⁷⁹ Alexander, *supra* note 5, at 744 (emphasis added).

⁸⁰ Peñalver, *supra* note 4, at 867–68.

⁸¹ Alexander, *supra* note 5, at 750–51 (“[H]uman flourishing is a multivariable concept and that the multiple relevant components of human flourishing are incommensurable.”).

The challenge in both Progressive Property Theory and historic preservation is to convince society to overcome the driving influence of a pervasive neo-liberal market economy. Specifically, how will people decide that the values advocated in both Progressive Property Theory and historic preservation are more important than lost or relinquished financial opportunity? One solution is found in the incentivization program created with historic preservation structures. The use of tax benefits and other incentives to offset financial loss stimulates increased interest in the non-pecuniary value of property.

In historic preservation, the term “value” is rarely interpreted narrowly. Historic “significance” evaluation depends on a researched determination that the property provides one or more values established under four criteria considerations.⁸² Somewhat surprisingly to laypersons, architectural considerations are only a part of one criteria consideration.⁸³ The four criteria for historic significance are association with events (Criteria A), persons (Criteria B), design/construction (Criteria C), and “information potential” (Criteria D).⁸⁴ Importantly, “economic” value is not a criterion. Like The Statement’s focus on plural values, historic preservation’s “significance” determination (used here as a substitute for value) focuses entirely on non-economic values.

Federally, the National Historic Preservation Act canonizes values of historic preservation that remain incommensurable with monetary calculations: the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans.⁸⁵ Without oversimplifying, “plural” in the Statement is synonymous with “heritage” in the Act—both depicting a more holistic and encompassing sense of value, well beyond dollars and cents.

In a way that is commensurate with progressive property theory, values of property derived from historical significance and

⁸² CULTURAL RES., NAT’L PARK SERVICE, NATIONAL REGISTER BULLETIN: HOW TO APPLY THE NATIONAL REGISTER CRITERIA FOR EVALUATION 15 (1990).

⁸³ *Id.* at 2 (“C. That embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values . . .”).

⁸⁴ *Id.*

⁸⁵ Nat’l Historic Pres. Act § 1(b)(4).

preservation emphasize the improved quality of human experience. Authors Nestor Davidson and Dave Fagundes, in their article *Law & Neighborhood Names*, recount how the name of a neighborhood contributes to residents' identity as a part of their "cultural property."⁸⁶ They also analyze the impact of neighborhood names through a progressive property theory lens.⁸⁷ The novel argument that a name, alone, provides such strong cultural property in a neighborhood is an extrapolation about the influence of place and property on identity formation (itself, an example of a non-pecuniary value). It follows that the same reasoning used by Nestor and Fagundes to demonstrate names as "cultural property" contributing to a localized application of progressive property theory can be enlisted to advocate for increased attention to physical preservation of historic and cultural resources as an equally potent sources of identity.

Davidson and Fagundes do not explicitly reference historic preservation in *Law & Neighborhood Names*. However, history obviously plays an important role in determining what to name a neighborhood, but without the history made real through preservation efforts, there is no memory to draw on as people imagine their surrounds. The authors do attempt "to explain how the concerns of those seeking to preserve historical neighborhood names may be understood as expressing a collective property interest."⁸⁸ It is here where the commonality of historic names and historic structures connects historic preservation to progressive property theory.

Referencing a concept introduced by Peggy Radin, "some property transcends economic valuation because it is tied to individual self-realization in a way that cannot be reduced to monetary value,"⁸⁹ whether by name or physical preservation. Even while arguing against historic preservation, Professor Lior Strahilevitz admits that preservation considerations go beyond financial: "Such preservation, when successful, can provide current generations with guidance about how past challenges were

⁸⁶ Nestor M. Davison & David Fagundes, *Law & Neighborhood Names*, 72 VAND. L. REV. 757, 800–05 (2019).

⁸⁷ *Id.* at 799.

⁸⁸ *Id.* at 799–800.

⁸⁹ *Id.* at 801.

addressed, provide present generations with an escape from their current confines, or establish continuity with the past.”⁹⁰

When the commonalities between historic preservation and Progressive Property Theory are laid bare, some interesting twists become evident. For example, in historic preservation, there can be differing views on what values are important enough to preserve, eliciting meaningful questions like “what material goods will represent us and our past to future generations[?]”⁹¹ It is here where Progressive Property Theory can positively influence historic preservation. When presented with different, sometimes divergent values⁹² owners must refocus on the relative potential to promote human flourishing. As explained in Part III of this article, values can change over time or be improperly manipulated. Accordingly, linking preservation to beneficial non-pecuniary values can be difficult, but it remains an endeavor worth undertaking to build a better community and society.

PART II. APPLICATIONS OF PROGRESSIVE PROPERTY THEORY IN STATE AND LOCAL HISTORIC DESIGNATIONS

Progressive Property Theory scholarship to this point has explored historic preservation only as it relates to local historic designation. As discussed in Part I, federal historic designation creates a distinctive set of considerations about property use. This section will first restate the structure of local historic preservation efforts, highlighting the “use sacrifice” or regulatory model. Next, this section summarizes local historic preservation’s treatment in Progressive Property Theory, including a discussion of instances where historic designation under local programs fail to promote a public benefit. Current progressive scholarship combining local historic preservation and theory is certainly valuable. However, this article argues that analysis of congruences between progressive property theory and historic preservation only on local historic ordinance obscures its utility for historic preservation at the federal level.

⁹⁰ Lior J. Strahilevitz, *Historic Preservation and Its Even Less Authentic Alternative*, in *EVIDENCE AND INNOVATION IN HOUSING LAW AND POLICY* 121 (Lee Anne Fennell & Benjamin J. Keys eds., 2017).

⁹¹ THE GETTY CONSERVATION INSTITUTE, *VALUES AND HERITAGE CONSERVATION* 1 (Erica Avrami et al. eds., 2000).

⁹² *Id.* at 35.

A. Local Landmark Laws and Ordinances

Early local historic preservation efforts in the United States began primarily in the southern United States. In 1931, the City of Charleston, South Carolina established the country's first historic district.⁹³ Other southern cities such as New Orleans, Louisiana and San Antonio, Texas were among the first to enact historic preservation ordinances, but these ordinances focused on historic districts rather than individual structures.⁹⁴ New Orleans' Vieux Carré neighborhood and its associated historic preservation requirements is commonly noted as one of the first examples of local historic preservation efforts used to stimulate the economy of an area through tourism.⁹⁵

State legislation protecting historic structures accelerated leading up to the federal enactment of the NHPA. "By 1965, every state had a state historic preservation enabling statute on their books."⁹⁶ In general, these laws allowed the creation of local historic preservation commissions with the authority to approve, by permit, private actions after determining the impact of historic properties.⁹⁷ The local ordinances are rooted in the delegation of a state's constitutional police powers.⁹⁸ Many local ordinances have been challenged on constitutional due process grounds, but none more famously than the New York City's Landmark Preservation law.

This law, and the subsequent legal challenge in *Penn Central Transportation Co. v. New York City*, typify local preservation ordinances and the associated legal issues. Still, each local ordinance is slightly different one to the next, reflecting the values and processes of each community. In general, to withstand a constitutional challenge, all local ordinances have core elements.⁹⁹ Specifically, these elements include a statement of purpose,

⁹³ NAT'L TR. FOR HIST. PRES., A CITIZEN'S GUIDE TO PROTECTING HIST. PLACES: LOC. PRES. ORDINANCES 1 (2002).

⁹⁴ PATRICK J. ROHAN ET AL., ZONING AND LAND USE CONTROLS §7.01(1) (Matthew Bender & Co., 2021).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See NAT'L TR. FOR HIST. PRES. *supra* note 93, at 3–4.

⁹⁸ *Id.* at 1.

⁹⁹ *Id.* at 3–6.

definitions of applicable terms, the establishment of a preservation commission (including both the composition of who sits on the commission and what legal authorities are granted to them), criteria for designating historic structures, a process for designating structures, a review process for individual actions, and an appeals process.¹⁰⁰ In most locations, an applicant's proposed alteration, repair or demolition project affecting a structure that is locally designated or located in a designated historic district will undergo a review according to the commission's process for determining possibly deleterious impacts. If the applicant is successful, the commission will issue a "certificate of appropriateness" (or equivalent), which serves as a permit or approval for the proposed action.

Most important for this section is the local commission's ability to preclude alteration, repair or demolition of a structure designated as historic by withholding the "certificate of appropriateness." As contrasted with federal preservation, identification as historic under a local process creates a regulatory restriction on how property owners can use their property--if the proposed use would diminish the structure's historic significance. It is this feature that both allows for preservation and causes a stir among private property rights advocates. On the one hand, without ultimate control, it is unlikely that local preservation commissions would be effective in protecting historic buildings. On the other hand, property owners can find this power Draconian, arguing that under the US Constitution they should be able to do what they want with their own property, unimpeded.

The *Penn Central* case was decided more than 50 years ago but remains influential in determining the legality of local historic preservation commissions and their actions.¹⁰¹ Grand Central Station was designated by the local commission in 1967. To improve the train station's finances, the owners entered into a lease to construction an office tower above the terminal, a move that would bring in revenue from rents. Due to the local designation under the City's Landmark Preservation law, a "certificate for appropriateness" was sought for the office construction, but subsequently denied by the commission.¹⁰²

¹⁰⁰ *Id.*

¹⁰¹ ROHAN ET AL., *supra* note 94, at §7.04(1)(b) (citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978)).

¹⁰² *Id.*

Plaintiffs focused their arguments on the application of the Landmark Preservation law to commission's denial as an unconstitutional "taking" under the Fifth Amendment to the U.S. Constitution.

The New York Appellate Division reversed the trial court's verdict that the law was unconstitutional.¹⁰³ The appellate court reasoned that the law promoted a necessary public purpose, and that the construction denial did not amount to a taking because it did not deprive the ownership of all reasonably beneficial uses of the property.¹⁰⁴ The State of New York's highest court affirmed the decision, finding that the regulation did not amount to an uncompensated taking of property.¹⁰⁵ While language in the state court proceedings references the "value" of the terminal's preservation, it is important to establish that the legal opinion hinged on economic factors to demonstrate compliance with the Fifth Amendment.

The Supreme Court's opinion upholding the Landmark Preservation Law reiterated the importance of traditional real estate economics in the failed "takings" challenge. The Court focused on viewing the parcels of the property as a whole, finding a number of income or wealth generating opportunities available to the Owners despite restrictions imposed by preservation.¹⁰⁶ Specifically, the availability of transferable development rights as a means for "reasonable return" on the property, along with the continued use of the station as a railroad terminal, contradicted the Plaintiff's failed argument that the development restrictions in the name of historic preservation impeded the Owner's primary expected use of the property.¹⁰⁷

Penn Central's legal tests have been reinterpreted and massaged by other courts throughout the years, but the core determinations as applied to local historic preservation laws

¹⁰³ *Id.* at § 7.04(d) (citing *Penn Cent. Transp. Co. v. City of New York*, 377 N.Y.S.2d 20, 30 (N.Y. App. Div. 1975)).

¹⁰⁴ *Id.* (citing *Penn Cent.*, 377 N.Y.S.2d at 27).

¹⁰⁵ *Penn Cent.*, 377 N.Y.S.2d at 27 ("Put another way, while the exercise of the police power to regulate the private use of property is not unlimited, it is for the one attacking such regulation in any given case to establish that the line separating valid regulation from confiscation has been breached"); *aff'd*, *Penn Cent. Transp. Co. v. City of New York*, 42 N.Y.2d 324, 330 (N.Y. 1977).

¹⁰⁶ ROHAN ET AL., *supra* note 94, at §7.04(2)(d) (citing *Penn Cent. Transp. Co.*, 438 U.S. at 126).

¹⁰⁷ *Penn Cent. Transp. Co.*, 438 U.S. at 110, 121.

remain. As a result, the primary distinguishing element of local historic preservation from federal historic preservation is that in the former, private actions can be denied because of their impacts to a historic structure. This structure of providing “approval power” to the local commission for alterations, renovations or demolition to historic buildings undoubtedly prohibits a large number of adverse effects to historic structures. However, the system is not without its flaws.

B. Where Local Designation Structures Fall Short of Progressive Property Theory Goals

While local historic preservation commissions may be able to stave off the wrecking ball in the name of public good, that does not necessarily imply an easy alignment with the aims of Progressive Property Theorists. In this subsection, two negative elements of local historic preservation structures are considered via an analysis of current Progressive Property scholarship on local historic preservation regimes. Specifically, (1) local designation ordinances center authority for preservation on a specific governmental body and not the wider community; and (2) local preservation ordinances provide little flexibility for changing views on historic significance.

In “The Social-Obligation Norm in American Property Law,” Professor Alexander uses historic preservation, and Penn Central specifically, as an example of how a “use sacrifice” is justified through a progressive property lens.¹⁰⁸ Alexander recounts that a landmark ordinance, such as the one in Penn Central, that prohibits a property owner from development of a historic structure, aligns with two elements of progressive theory.¹⁰⁹ First, the landmark commission’s historic designation and subsequent restriction on alteration embodies the social obligation norm principal—namely, because of the property’s interdependent relationship with its surroundings, both physically and socially, the designated historic property confers an obligation on its owner to maintain its place for the good of the neighborhood.¹¹⁰ Second, on a larger scale, the impact of preservation provides a general

¹⁰⁸ Alexander, *supra* note 5, at 791–96.

¹⁰⁹ *Id.* at 791–92.

¹¹⁰ *Id.* at 792.

public welfare benefit when viewing a historic building (or historic district) within the wider urban community.¹¹¹

What Alexander omits in this analysis is that the “historic significance” determination is not necessarily rooted in the specific community that the preservation would presumably benefit. As noted above, the “use sacrifice” in local historic preservation structures is attached at the time a property is designated as historic – unlike the process in the federal structure. But to align with the social obligation norm theory, the significance determination should be made by the community as a reflection of what use or purpose a property best contributes to human flourishing. Unfortunately, the numbers do not always support this in practice.

In New York City, demographics in historic neighborhoods disproportionately skew towards white residents with college degrees.¹¹² Recently, the historic preservation industry is reevaluating whether the places preserved are inclusive enough. Sadly, “[e]ven at the local level, diverse histories are not always valued in the preservation process, especially as advocates and public officials focus on historic buildings or their architectural features—giving evidence to concerns about the politics and limits of authenticity in historic preservation.”¹¹³ Designation of historic resources in underrepresented communities provide the same value as those concentrated in affluent or elite neighborhoods, but up to this point in the historic preservation movement’s history, the local preservation structure (and the federal structure, for that matter) have been unable to distribute benefits fairly. The Landmark Preservation Commission in NYC has admirably created 114 historic districts within the City; however, those districts are located in only a handful of geographic areas.¹¹⁴ “While this concentration maps onto neighborhoods with older,

¹¹¹ *Id.* at 794.

¹¹² Ingrid Gould Ellen et al., *How Can Historic Preservation be More Inclusive? Learning From New York City’s Historic Districts*, in *ISSUES IN PRESERVATION* 35–39 (Erica Avrami ed. 2020) (explaining that in 2010 the average census tract in a historic district in New York City was 80 percent white and 9.5 percent black, while the average census tract not in a historic district was only 43 percent white and almost 30 percent black. Over 90 percent of residents living in historic districts held a college degree, compared to only 33 percent outside historic districts).

¹¹³ *Id.* at 35.

¹¹⁴ *Id.* at 37.

historic buildings, it also suggests that the city's preservation efforts have not been evenly spread across socioeconomically diverse areas."¹¹⁵ Accordingly, while the local preservation commission's ability to unilaterally preserve and restrict development may coincide with the social obligation norm theory, in practice it has not produced equitable results. This arguably hinders the effect on human flourishing by preserving spaces that only selectively represent diverse populations.

Efforts are in place to expand community input in the designation process at the federal level. The Advisory Council on Historic Preservation's proposed federal rulemaking that revises 36 CFR Parts 60 and 63¹¹⁶ is an example of community involvement playing out in real time. By proposing to allow a "community veto" of a property's listing to the National Register of Historic Places, it could be argued that the ACHP is attempting to find a balance between the law and economics and progressive property theory. State laws in Oregon¹¹⁷ and Texas¹¹⁸ also include provisions for owners to "opt out" of their historic designations. It unclear, and would require analysis beyond the scope of this article, whether efforts to increase "community involvement" and individual ownership veto rights is nothing more than a veiled effort to advance the interests of private property owners.

Unfortunately, local historic preservation can also contribute to second negative outcome, in a way that runs contrary to Progressive Property Theory. Specifically, preservation can be disguised as being done for the public good, but there are nefarious intentions behind such efforts. In many cases, the socially harmful effects cannot easily be undone. Alexander notes that "[t]he social-obligation theory recognizes that because individuals can develop as free and fully rational moral agents only within a particular type of culture, all individuals owe their communities an obligation to support in appropriate ways the institutions and infrastructure that are part of the foundation of that culture."¹¹⁹ However, there are local preservation examples where fake history is preserved or the true history is concealed. Combining this with a legal structure

¹¹⁵ *Id.*

¹¹⁶ National Register of Historic Places, 84 Fed. Reg. 6996 (March 1, 2019) (to be codified at 36 C.F.R. pts. 60, 63).

¹¹⁷ OR. REV. STAT. § 197.772(3) (2021).

¹¹⁸ TEX. LOC. GOV'T CODE ANN. § 211.0165(a)(2) (West 2021).

¹¹⁹ Alexander, *supra* note 5, at 794–95.

in which the revisitation of social impact or public benefit is difficult, local preservation can sometimes work against the goals of Progressive Property Theory.

Debates over the benefits of historic preservation are assessed by Professor Lior J. Strahilevitz in “Historic Preservation and Its Even Less Authentic Alternative.”¹²⁰ Strahilevitz argues that historic preservation does not always insure a public good, and illustrates with an example of “fake history” – a baseless Civil War monument at the Trump National Golf Club.¹²¹ The argument is that if there is only a marginally greater benefit from fake history than real history, the public benefit of preservation is not worth the use sacrifice. Additionally, Strahilevitz argues that historic preservation is arbitrary and not reflective of true history anyway because of the concentration of historic structures in select geographic areas. So, the baseline of what is being preserved is not actually representative of history as it happened. Strahilevitz states “[t]o preservationists, soaring and expensive structures that are used and beloved by elites ought to be preserved, even if they become economically obsolete in their present form. But modest structures in overwhelmingly minority neighborhoods ought to be bulldozed in the name of progress.”¹²²

Strahilevitz’s final criticism of historic preservation—its tendency to preserve the history only of the advantaged—also troubles Progressive Property Theory. Alexander concurs: “[h]istoric preservation decisions are made through a political process, and political choices are often skewed in favored of the wealthy and privileged members of the community.”¹²³ It is important to remember that local preservation processes are decidedly more political than those within Federal structures. Alexander agrees with Strahilevitz’s incorporation of a study of Lexington, Kentucky that showed “how municipal and powerful private participants in that city created monuments and public parks that glorified historical white figures and ignored the role played by prominent African-Americans.”¹²⁴

¹²⁰ Strahilevitz, *supra* note 90, at 115-21.

¹²¹ *Id.* at 108-09.

¹²² *Id.* at 124.

¹²³ Gregory Alexander, *Of Buildings, Statutes, Art, and Sperm: The Right to Destroy and the Duty to Preserve*, 27 CORNELL J. L. & PUB. POL’Y 619, 627 (2018).

¹²⁴ *Id.* at 628.

Despite such instances of misused preservation, Alexander continues to counter Strahilevitz's critique of historic preservation in general, by pointing to other significant benefits seen from a social obligation perspective. Surprisingly, however, neither scholar takes notes of how the rigidity against changing designations itself runs counter to Progressive Property Theory. But the issue has recently come to light in reinvigorated efforts to remove confederate monuments that have harmful effects on some communities and thus do not serve the greater public good. The general point applies not only to Confederate monuments but to any historic structure, "most local preservation laws lack any form of public policy, or public interest exception or safety valve, that would allow demolitions or alterations when required by practical necessity."¹²⁵ Accordingly, an inability to change designations in local historic preservation raises questions about how effectively it can possibly further the goals of Progressive Property Theory. There is no "one size fits all" approach to reversing preservation designations, although enactment of countering state legislation or legal challenges to the scope of a designation can be effective.¹²⁶ Could preserving sites in a community that do not contribute to encompassing human flourishing--without the ability to revisit and revise the original designation-- actually hurt the goals of progressive property thinking? This appears to be the case.

It could be argued that the very nature of historic preservation forces a structure to be frozen in time, so this is not a fault of local historic preservation alone. A solution may be found in federal historical preservation structures, which replaces the politicized, top-down "use sacrifice" imposition with a voluntary, owner driven process. This might possibly short circuit designations that may have been made with nefarious motives. Moreover, the permanence of protections under the federal regime are not as solid as they are in local processes. As already stated, listing to the National Register of Historic Place is symbolic and does not confer a use restriction. However, if an owner decides to avail themselves of an incentive program, such as historic rehabilitation

¹²⁵ Jess R. Phelps & Jessica Owley, *Etched in Stone: Historic Preservation Law and Confederate Monuments*, 70 FLA. L. REV. 627, 670 (2019).

¹²⁶ Naomi Shavin, *States Are Using Preservation Laws to Block the Removal of Confederate Monuments*, ARTSY (April 24, 2018, 5:20 PM), <https://www.artsy.net/article/artsy-editorial-states-preservation-laws-block-removal-confederate-monuments> [<https://perma.cc/ZNB2-RB62>].

tax credits, provisions for preservation are imposed. Even then, flexibility is available. Federal historic tax credits are only subject to recapture for five years. Accordingly, if a property owner materially altered a historic structure resulting in the removal from the National Register of Historic Places after five years of obtaining the tax credits, there would not be a recapture.¹²⁷ There would be no financial or legal penalty if, for example, the preserved resource was viewed as socially harmful after five years and removed.

Also, historic designations in the National Register of Historic Places already have a pronounced community input component, further distinguishing federal preservation structure from the centralized designation process at local levels. State Historic Preservation Offices take the lead in identifying and nominating properties for inclusion, although owners can nominate properties voluntarily. Importantly, Advisory Council on Historic Preservation regulations require the SHPO to provide notice to property owners, solicit comments, and “also gives owners of private property an opportunity to concur in or object to listing.”¹²⁸ For any property where the owner objects to listing (or where a majority of owners object to a historic district nomination), the SHPO will submit the nomination to the Keeper of the National Register.¹²⁹ The Keeper will then make a determination on historic eligibility only.¹³⁰ This multistep public and government agency involvement process is more democratic, although it still concentrates designation to the symbolic list within a state.

Undoubtedly, the legal mechanisms associated with local historic preservation have preserved significant properties that would otherwise have been demolished. Local procedures offer an enactment, albeit incomplete, of Progressive Property Theory by identifying when an owner should be obligated to refrain from altering a structure for the betterment of the community. “Historic districts [...] offer a narrative connection with the past”¹³¹ and thereby create an identity that contributes to human flourishing.

¹²⁷ I.R.S., REHABILITATION TAX CREDIT RECAPTURE (2021).

¹²⁸ Parks, Forests, and Public Property, 36 C.F.R. § 60.6(b) (2021).

¹²⁹ *Id.* § 60.6(n).

¹³⁰ *Id.*

¹³¹ J. Peter Byrne, *Historic Preservation and Its Cultured Despisers: Reflections on the Contemporary Role of Preservation Law in Urban Development*, 19 GEO. MASON L. REV. 665, 678 (2012).

But clearly, local preservation has pitfalls that are largely sidestepped in federal preservation. As a constitutional exercise of local police powers, historic preservation commissions can expand protective authority to private actions that impact historic buildings. However, the power that comes with this concentration of decisionmaking within the local government can be exploited for ends diametrically opposed to human flourishing. Local landmarking laws also provide for long term, permanent preservation. Unfortunately, those laws do not allow for flexibility to remove protection when a building no longer contributes to human flourishing (and especially in cases where communities may be harmed by sites preserved). This is not to say that federal preservation does not also have flaws. According to a 2020 Los Angeles Times Op-Ed by noted historic preservation legal scholar Professor Sara Bronin, "(l)ess than 8% of sites on the National Register are associated with women, Latinos, African Americans or other minorities."¹³² Professor Bronin attributes this less to the structure of the National Register listing process, but to culturally significant resources missing the required "integrity" necessary for listing.¹³³

PART III. APPLICATION OF FEDERAL HISTORIC PRESERVATION TO OTHER COMMUNITY INTERESTS

This article draws attention to important differences between state/local historic preservation or "landmarking"¹³⁴ regimes and federal preservation programs under the National Historic Preservation Act. In Part I, the premise of "progressive property theory" and its congruence with the purpose of preservation under the Act is presented as a foundation for applying federal historic preservation's approach more broadly. Federal historic preservation is a proof-of-concept for the possibilities of inserting human flourishing into considerations of the use of private property. However, discussion in the preceding Part begs the question: can the mechanics of federal historic preservation law be used as a model to incorporate progressive theory goals in more

¹³² Sara Bronin, Opinion, *Op-Ed: How to fix a National Register of Historic Places that reflects mostly white history*, L.A. TIMES, Dec. 15, 2020, [<https://perma.cc/9BV3-5C77>].

¹³³ *Id.*

¹³⁴ Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).

expansive property use discussions? This section suggests that the application of two elements of federal historic preservation can serve as a proxy for social obligation. But instead of inserting social obligations through use restriction, federal structures open up law and economic considerations through the use of financial incentives. Such a combination of pure social norm theory and traditional economics provides an ideal blend of old and new property perspectives. Blending the underlying moral compass of progressive theory with an acknowledgement of the utilitarianism inherent in classic property thinking could create structures that promote the incorporation of human flourishing into a broader subset of property use conflicts without ignoring the rights of property owners. This section concludes that federal historic preservation can be a model process, already established as a niche area of federal law, that may be applied other social obligations beyond historic preservation.

This section describes the two elements of federal historic preservation that could be extended to other social decisions in a way that advances Progressive Property Theory. The first element is the evaluation process akin to Section 106, where an analysis is made to identify what community values an individual property would provide through a designated use. The second element is the incorporation of voluntary use exclusions tied to financial incentives. The central question is this: could communities experience “human flourishing” if these two elements—borrowed from federal preservation structures—were then applied to other contention issues such as affordable housing and open space conservation?

A. Application Element One: Evaluation Process

The NHPA’s Section 106 consultation process requires federal agencies to identify historically significant resources and any adverse effects associated with their proposed undertaking. This consultative or evaluative process could be applied in instances that do not involve historic significance. Two NHPA principles could be used as guides: 1) establishment of criteria for significance; and 2) scoped effort.

The NHPA establishes a baseline to consider historic significance under four criteria elements. With a focus on human

flourishing, it would be important to consider the type of property-use being evaluated, the scarcity of the property, and the needs of the community. By removing profit motivations from property use determinations, public use benefits of property can be more readily advocated. This analysis is already being undertaken by urban planners around the country. For example, David Chavis's article, "Sense of Community in the Urban Environment: A Catalyst for Participation and Community Development," applies a set of community-driven goals to property-use considerations, in a way makes the pursuit of human flourishing seem feasible.¹³⁵

Importantly, any effort to contextualize non-monetary benefits must be "scoped" appropriately, so that the risks of "paralysis by analysis" are avoided. Section 106 regulations deal with this problem by indicating the "level of effort" required to identify historic resources.¹³⁶ Section 106 requires a "reasonable and good faith effort" to identify candidate properties which includes the use of existing studies and research.¹³⁷ In a "human flourishing" analysis, the "reasonable and good faith effort" requires decisionmakers to review professional publications pertaining a property's context--but the expectation would not be so stringent as to delay action. The goal of such an evaluative process is to learn if the community needs certain property uses, not to analyze every potential property use. The scope is restricted to prevent creation of an unbridled hunting license.

B. Application Element Two: Incentivized Use Sacrifice

Federal historic preservation is dependent on financial assistance to further tip the scales in favor of preservation for a community benefit and away from mere economic efficiency. After the identification of an obligation to use property for public good, the voluntary nature of use restrictions become more palatable if a potential economic loss can be mitigated. Federal and state historic tax credits are specialized incentive mechanisms that have proved useful for historic preservation. However, there are other

¹³⁵ David Chavis, *Sense of Community in the Urban Environment: A Catalyst for Participation and Community Development*, 18 AM. J. OF CMTY. PSYCH. 55, 77 (1990).

¹³⁶ Parks, Forests, and Public Property, 36 C.F.R. § 800.4(b)(1) (2021).

¹³⁷ *Id.*

incentives, such as charitable donation tax exemptions, that could expand the use of property to enhance “human flourishing.” Such incentives “were designed to address perceived gaps in the dominant regulatory model and to bring market-based principles to bear on these resource challenges.”¹³⁸

The incentivization process built into federal historic preservation structures could become a model applied to property-related issues besides preservation of culturally significant sites. This possibility is illustrated here with two examples: 1) affordable housing and 2) open space.

In “Progressive Property Theory and Housing Justice Campaigns,” Professor Brandon Weiss identified the resurgence of “rent control laws” as something that could benefit from a practical application of Progressive Property Theory.¹³⁹ In general, a rent control law “refers to government limits on the rents that apartment owners can charge tenants.”¹⁴⁰ This highly regulated structure could yield progressive benefits if voluntary market-based incentives were made available to owners—like those developed in federal historic preservation.

Private property owners react negatively to rent control laws, just as they react negatively to use-controls imposed by local preservation efforts. Opposition to California’s Proposition 10, creating a system of rent controls, is easy to understand: “Prop. 10 could hurt homeowners by authorizing a new government bureaucracy that can tell homeowners what they can and cannot do with their own private residence.”¹⁴¹ Similar resistance by property owners is heard in cases where local preservationists seek to limit use of properties. But in the same way that economic incentives in federal historic preservation structures can blunt opposition to preserving our material heritage, so too could those voluntary incentives (e.g., charitable donations and conservation easements) be used to reduce the economic losses imposed by rent control measures that seek to expand affordable housing. Thus, federal historic preservation procedures become a tested model for applying in practice Progressive Property Theory to a different range of issues—here, affordable housing.

¹³⁸ Jess R. Phelps, *Reevaluating the Role of Acquisition-Based Strategies in the Greater Historic Preservation Movement*, 34 VA. ENV’T. L. J. 399, 411 (2016).

¹³⁹ Weiss, *supra* note 8, at 253–54.

¹⁴⁰ *Id.* at 271.

¹⁴¹ *Id.* at 272.

The same extension of incentive opportunities could also enable application of Progressive Property Theory to a second issue: preservation of open land. To preserve and protect private land that contributes to public benefits such as "water quality, farm and ranch land preservation, scenic views, wildlife habitat, outdoor recreation, education, and historic preservation," non-profit organizations (and local governments) have implemented a "conservation easement" approach. The Land Trust Alliance defines conservation easements as "a voluntary legal agreement between a landowner and a land trust or government agency that permanently limits uses of the land in order to protect its conservation values."¹⁴² In return for the restriction, an owner's donation of the easement can result in significant tax benefits. The value of the charitable donation can reduce the owner's federal (and sometimes state) income tax.¹⁴³ Perhaps it would be prudent to scrutinize other incentive programs, such as those already at work in federal historic preservation structures, to find other mechanisms that could protect open land for public benefits.

Interestingly, conservation easements used to protect open land might be applied, with little modification, to expand the supply of affordable housing. If implemented, property owners could see affordable housing as a contribution to human flourishing and choose voluntarily to restrict use without losing all financial benefits. In fact, California's "Affordable Housing Conservation Easement" has been discussed as an antidote to spectacularly rising housing costs in the state.¹⁴⁴ Land trusts are beginning to incorporate a "human dimension" into conservation easements.¹⁴⁵ In North Carolina, the Carolina Mountain Land Conservancy has set aside a parcel of land within its Green River

¹⁴² LAND TRUST ALLIANCE, *What you can do, What is a Land Trust?*, <https://www.landtrustalliance.org/what-you-can-do/conservation-your-land/questions> [https://perma.cc/SK8R-QG4T].

¹⁴³ *Id.*

¹⁴⁴ @MossyBuddha, *Borrowing from Habitat and Rural Land Preservation: Affordable Housing Conservation Easements for San Francisco (and beyond)*, MEDIUM (Sep. 16, 2015), <https://medium.com/@MossyBuddha/borrowing-from-habitat-and-rural-land-preservation-affordable-housing-conservation-easements-for-ec3ce4a5aa4c> [https://perma.cc/FD6X-5YXY].

¹⁴⁵ Karen Chávez, *Land trusts save land, lend a hand to affordable housing*, CITIZEN TIMES, May 21, 2017, <https://www.citizen-times.com/story/news/local/2017/05/21/land-trusts-save-land-lend-hand-affordable-housing/326005001/> [https://perma.cc/FM5L-KUCL].

Game Land property, encumbered by a conservation easement, explicitly for affordable housing.¹⁴⁶

Other financial incentives such as Community Development Districts, established by local governments to entice property development or low-income housing tax credits, also fit the mold of voluntary incentivization directed toward the lack of affordable housing. Perhaps, by extending incentivization processes found in federal historic preservation structures to other problems such as food deserts or neighborhood greenspaces, Progressive Property Theory can find a means for ready application.

CONCLUSION

Since the very idea of privately-owner property was first imagined and implemented, oft-debated issues pertaining to its use has shaped social life in myriad ways. In *The Federalist* No. 10, James Madison identified the political implications of property, specifically noting that “[t]hose who hold and those who are without property have ever formed distinct interests in society.”¹⁴⁷ A new and different view of property emerges from the effort here to see federal historic preservation structures as battle-tested applications of Progressive Property Theory. In this view, property can serve the individual wishes of an owner while contributing to a community and its residents’ wellbeing.

Although progressive property scholars have looked for help from local and state historic preservation activities, the autocratic and inflexible aspects of its legal structures undermine potential applications of progressive themes in widespread practical use. Instead, by including a public significance analysis combined with voluntary use restriction for public benefit, Madison’s observations about supposedly inherent divisive property interests might require emendation. Federal historic preservation frameworks provide a model for communities seeking stability or gentrification, affordability or growth, through a set of processes congruent with the ambitions of “Progressive Property Theory.” No longer is it necessary to treat the rights of property

¹⁴⁶ *Id.*

¹⁴⁷ *THE FEDERALIST* NO. 10, at 58 (Alexander Hamilton) (Charles Scribner ed., 1868).

owners and the desires of communities for “human flourishing” to stand in a zero-sum relationship.

The search for a more equitable and just world requires a look at how property and people intertwine. By exploiting federal historic preservation structures for a wider array of socially beneficial ends, future property use conflicts may be decided in a way that balance private interests and public good. Wealth generation as a sole driver of land-use decisionmaking will inevitably diminish the chances for a flourishing human society but including both opportunities for justifiable economic gain and community betterment is a recipe for beneficial change in the future.