SPEECH: KEYNOTE ADDRESS

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Today's birthday conference is entitled, as we can see, "45 Years of Preservation Law: New York City and the Nation, the Past and the Future." What does that tell us? Historic preservation is middle-aged: mature, experienced, time tested, realistic. No mid-life crisis looming here; although I can't help but remark on the fact that the actual birth date of New York City's Landmark Preservation Law, April 19th 1965,[1] is actually almost forty-six years ago, telling us that historic preservation law handlers are willing to shave almost a full year from its true age. Middle-age also means that it's time to hit the gym, take better care about what to eat, and start thinking about the next generation. Middle-age does also lead to some stocktaking, and that is what I'd like to do here this morning.

Necessarily selective and discriminating, I suppose a keynote presentation is looking at keynotes and the keynotes are chosen by the keynoter. So that's what I've done. I'm not covering everything but I am covering, I think, the high points of the past forty-five years, and I'm doing it in four parts. First, addressing the generic local ordinance that is, after all, the backbone of historic preservation law.[2] Next, I'll be talking about the surround of constitutional law, and especially where we stand together with the *Penn Central* framework first articulated by Justice Brennan and his colleagues on the Supreme Court in 1978.[3] Third, I'd like to talk a bit about the legal treatment of religious institutions, which, after all, own a few historic buildings; primarily their treatment under federal law and the, now almost all encompassing, Religious Land Use & Institutionalized Persons Act.[4] And finally, I'd like to discuss how historic preservation may be repositioned by its components, legally, to address the challenges of the next forty-five years. And I will do all of this in thirty-five minutes.

Although constitutional law itself has received much of the attention, the local historic preservationist is actually the foremost hero of our legal story. Through much of the twentieth century, local regulations of the built environment were handled almost exclusively by the zoning and related instruments, and standard zoning never concerned itself whatsoever with historic preservation. Zoning's trio, the violin, viola, and cello, of use and bulk restrictions affected what could be built, where it could be built, and how it

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1. Law of Apr. 19, 1965, No. 46, 1965 N.Y. Local Laws 261 (codified as amended at N.Y.C ADMIN. CODE §§ 25-301 to 25-321 (West, Westlaw through Local Law 29 of 2011)).

2. *Id.*

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

4. Religious Land Use & Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified as amended at 42 U.S.C. §§ 2000cc-2000cc5 (2006)).

could be built. Zoning was principally interested in controlling new development and not saying anything on its face about existing development.

Zoning was never meant, in fact, to preserve anything specific and never expressed a preference for the old versus the new. Indeed, the zeitgeist of zoning—certainly the zeitgeist of zoning through much of the twentieth century—was about simply regulating the shape of new development, if not stopping development at least earlier on. And even as it's known principally as a regulatory instrument, the deeper, darker reality of zoning is its creation of property right entitlements, expectations among landowners that they owned something that could be understood speculatively as a real estate asset and not just land and something that could be used in its existing state and existing use.

Indeed, if you go back and read the most famous, perhaps, land use decision rivaled only I think by *Penn Central*, the *Euclid v. Ambler*[5] decision of 1926 from the U.S. Supreme Court, it actually reads very, very much as a pro-property rights opinion, much more than a pro-regulation opinion. And that makes a lot of sense, given that it was authored by Justice Sutherland and joined by Justices who at the time were not interested in holding up regulation, but were interested in striking down, particularly national, regulation to the extent that it interfered with what were considered to be fundamental rights dealing with things like property and contract. Justice Sutherland and his colleagues in *Euclid* wanted to make sure that the single family home owners being protected in the village of Euclid by that town's zoning ordinance did not suffer grievous losses to property values occasioned not only by the intrusion of an industry coming up from Cleveland, but perhaps worse by the parasitic multifamily housing.

Zoning, then and through much of the twentieth century, was about the prevention of nuisance-like uses. The classic pig in the parlor, that's a pig in your living room, surely out of place—the notion of preventing harm to property owners from new development. What I've just described is not a historic preservation law regime. And indeed, historic preservation has benefited greatly in the establishment and subsequent maintenance of its separate and distinct legal regulatory regime at the local level, and especially from its separateness from zoning as I just described.

Historic preservation laws, with New York City's 1965 law being the most prominent, although not the first, rejected many of zonings foundational ideas. To begin with, obviously, the local historical preservation ordinance plugged a large hole left unaddressed in the existing rezoning regime: how do we think about existing great buildings and their contribution to the community before we get to historic districts? Historic preservation law at the local level doesn't take into account all of the interests served by the built environment. It's not a balancing ordinance, as is zoning. It's not necessarily in accordance with a comprehensive plan even though when you read New York's local law it does refer to the other interests and the institutional mechanisms of review.[6] But in

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5.Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

6. N.Y.C ADMIN. CODE § 25-301 (describing the purpose as not just to preserve and perpetuate historic buildings but also to "stabilize and improve property values," "foster civic

the main, at its base, it is historic preservation of buildings and districts that are privileged above all other purposes. Historic preservation law authorizes the regulation of specific, named buildings. That is revolutionary in terms of land use regulation. It actually cuts against the foundational notion of zoning, which is, after all, zones—zones of generic categories of development all subject to the same rule leading to and the responding to the uniform treatment of property owners within the zone.

The basic idea is that I will be treated the same as my neighbor, guaranteeing fairness and equity justice, a notion of equal protection. Justice Holmes in the *Pennsylvania Coal v. Mahon*[7] case from 1922, with the Supreme Court, talked about the idea of an average reciprocity of advantage. Yes, I may be restricted by this regulation, but so are all my neighbors. I get benefits from the restriction on their property just as they get benefits from the restriction on my property. That is not the model of historic preservation at all. Historic preservation, indeed, is legal spot zoning, and indeed spot zoning as a phrase is not illegal. It's only illegal when we add the adjective "illegal" in front of it.

Historic preservation law relies fundamentally on discretionary case-by-case decision-making rather than on zoning's rule-based approach. That was truer decades ago. Zoning itself has become much less rule-based with its approach, much less based on the notion of zones with rules, and has become much more of a discretionary case-by-case instrument of regulation. Historic preservation has really taken advantage of its legal ability to regulate districts as well as individual buildings, becoming, some would say, far more like, and others would say too much like, zoning, and I'll address that a little later. In fact, in terms of challenges going forward with the regime I spelled out at the local level, this first part, the backbone of historic preservation law, one of the big challenges is this notion of historic preservation administrators under existing law, expanding the reach of what they are doing to, in some ways, take over the planning function.

And indeed in cities around the country, one often finds people interested in planning solutions involving balancing the preservation of community character and scale with other things that are relevant to historic preservation, but that are in many ways transcendent, while many people dissatisfied with the planning legal regime and the zoning legal regime have turned to the historic preservation legal regime to achieve purposes that may not be at the fundamental core of what historic preservation is all about. In a new book that's just coming out right now, one of my Harvard colleagues, Ed Glaeser, in the book *Triumph of the City*,[8] which otherwise celebrates the city, takes a somewhat critical look at how historic preservation laws have now been applied broadly within cities, in particular New York City. In it, he cites ways

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pride," "attract…tourists," and "strengthen the economy of the city."); *id.* § 25-303 (describing review procedures).

7. Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922).

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

in which the historic preservation regime begins to control what can happen throughout great swaths of the city. I think there is some danger in this enormous expansion. This is not a call not to do historic districts by the way, but it is a call to recognize that there are statutory limits and legal concepts of *ultra vires* of the statute, meaning beyond the authority of the statues, and we have to keep in mind the core ideas of historic preservation.

Another challenge going forward for the local ordinance is to deal with things like modernism and modern buildings. What's interesting is that law doesn't exist independent of the support to be provided by the people at which the level of the law operates, in this case local. But, the further that historic preservation veers away from popular understandings of what historic preservation is all about, the more it becomes vulnerable. Again, this is not a call to veer away from preserving modernist buildings, far from it. It is a call to situate all the activities conducted under the local preservation law within the sort of popular understanding, because law does operate within that protective armature and becomes vulnerable for the future when it begins to veer away from certain kinds of shared or popular understandings without the adequate education one would need.

Now, with that being said, as I've called for some boundaries or confines of what the local law may be, that doesn't mean that we shouldn't look at other laws that have an important impact at the local level on landmark preservation outcomes. And indeed, I do recommend the reconsideration of zoning to take account of things that are indeed affected by the demolition, alteration, and modification of buildings. Community character is the proper inquiry of zoning laws, even as it may be more narrowly the inquiry of historic preservation laws, and certainly zoning's propensity to create expectations among property owners of being able to develop. Thus, bringing out the need for historic preservation laws to destroy that idea is a conflict, and if we could indeed consider zoning and squeeze out some of the expectations and property rights that zoning has created, we then begin to create fewer problems for historic preservation, as it indeed requires property owners to maintain the building in its current form.

Another challenge for the local ordinance relates to what I call the tyranny of context: law's obsession with design conformity. That's actually the title of a book that I'm finishing right now. As one looks across the country, it's clear that in many cases, in most cases, administrators of historic preservation, interpreting words like "harmony" and "conformity" and "context" and "consistency" and "compatibility," have a constrained view of what those words may mean. It too often results in what I call the tyranny of context, in which there is an oversimplified reliance on the physical appearance of the surrounding environment to inform what can happen with new development within the historic district. Paul Byard's book, *The Architecture of Additions*,[9] addresses this idea of having a certain degree of flexibility on what the new can be without destroying the ultimate context. But, that ultimate context is not

9. PAUL SPENCER BYARD, THE ARCHITECTURE OF ADDITIONS: DESIGN AND REGULATION (1998).

strictly physically based, but can be defined, temporally, culturally, in a broader geography than just the immediate surrounding area.

Now, administrators are not simply responding to some conservative notion of what to approve and disapprove as they interpret these words. They're responding to a review of judges who indeed are disdainful, or at least certainly nervous, about untethered discretion in arbitrary and capricious decision-making, about vague and ambiguous laws, and these judges indeed prefer the brick-brick outcome. If something is brick, the new buildings need to be brick. Just because the form is the same, the glass and steel are the same, doesn't mean it's contextual. If the surrounding neighborhood is Victorian or Colonial, then I can't understand, says the average-person judge, why an administrator under the local landmarks preservation law would allow anything else. That's the sort of education that is required for a judge, but judges in some reviewing end up promoting for administrators a sense that they better not veer too far.

And just in case anybody thinks this was a chimerical fear, all they have to read is *Hanna v. City of Chicago*[10] from 2009, an Illinois intermediate case in which the plaintiffs alleged that Chicago's landmark historic ordinance was unconstitutionally vague and ambiguous in violation of the state's constitutional due process clause. The court agreed, saying that they believed that the terms "value," "important," "significant," and "unique" are vague, ambiguous, and overly broad; they were not persuaded by the city's arguments that the commission members can be well-guided by these terms. And if you read the ordinance it would not strike any of us here today as outlandish that the terms provide guidance because we know even if there is flexibility there, we've got a commission of qualified members—except that the Illinois court said that the qualifications articulated for the commission members are vague. And finally, the court concluded that no criteria by which a person of common intelligence may determine from the face of the ordinance, there is no criteria of whether a building or district will be deemed to have value or importance. So that decision sits there.

All right, that's part one, review of local ordinances and their importance and some of the challenges that they face. The second, perhaps more celebrated, part of the past forty-five years is the constitutional surround, and that surround has been defined most particularly by that most famous of cases, the *Penn Central Transportation Co. v. New York City*[11] case. But, it sits within a debate about private property rights, more generally, and government regulation.

Can enough be said about the *Penn Central* case? More important, will more be said about it by Supreme Court Justices in the future? Do we need perhaps to designate the *Penn Central* opinion a landmark, thereby requiring the U.S. Supreme Court to file for a certificate of appropriateness in order to alter or modify, let alone overrule it? After all, *Penn Central* both validated and disseminated New York City's local Landmarks Law. Indeed, much of its

10. Hanna v. City of Chicago, 907 N.E.2d 390 (Ill. App. Ct. 2009).
11. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

currency throughout the country is not owing simply to the fact that New York City is famous and important and when the city sneezes, the rest of the country catches a cold. Oh, that was about General Motors, I guess. But indeed, that *Penn Central* opinion described what a lot of local landmarks preservation law would look like, and lawyers read that opinion and now had a model for landmarking in their own home city. So let's remind ourselves what the case looked like back in 1978 when the opinion was actually written.

So, New York City had enacted our birthday boy or girl, the Landmarks Preservation Law, through which it attempted to preserve historic landmarks and districts. It established the Landmarks Preservation Commission with its eleven members, designating landmarks on a particular landmark site or historic district. A landmark was a building thirty-years old or older with special character and aesthetic historical interest. A historic district would be an area of landmarks and one or more styles of architecture. After the Commission designation, something called the Board of Estimates, which existed when I had more hair, would look at the relationships between the narrow view of historic preservation and the relationship of those decisions to the city's master plan, something that has never existed. Projected public improvements and other plans approve or disapprove the designations, and once designated a landmark, or located within a historic district, the Commission had the authority, as we know, to approve all the changes to the exterior at that time—alterations, improvements—and the owner had to keep the building exterior in good repair. There were three procedures for the owner to apply to change things: a certificate of no effect on protected architectural features, a general certificate of appropriateness, and finally, a certificate of appropriateness for insufficient return. I can't make enough money, so that's why it's appropriate for me to be able to change the building, and even potentially demolish the building.

The law authorized the transfer of development rights in New York to contiguous sites, which would be across the street and across the intersection, allowing other sites to buy, effectively, the unused development rights and expand their development potential by up to twenty percent. At the time of the case, over 400 landmarks in thirty-one historic districts had been designated, so this was a robust kind of law, and then we got to the facts of the case.

Penn Central owned Grand Central Terminal, that great, still great, 1913 Beaux-Arts masterpiece. The remaining one, Penn Station, happened to be demolished of course. And Penn Central also owned TDR—transfer development rights—eligible sites. In 1967, the Commission designated the terminal a landmark. One year later, Penn Central, which owns Grand Central Terminal, entered into a fifty-year renewable lease with a developer to construct an office tower above the terminal, or taking off some of the terminal, that would pay a million dollars during the construction and then three million a year thereafter, with bump-ups, and Penn Central would lose a little bit of money on what would be taken away. Two plans were submitted, both done by Marcel Breuer, and both plans, the fifty-five and the fifty-three-

story buildings, were rejected on the basis that they destroyed the landmark and indeed its urban design. I mean, imagine a tower above the Grand Central Terminal. Oh, that's the Pan Am building, that's right, or the Met Life building or whatever, but this was literally right above it.

So that's the case that was brought to the U.S. Supreme Court, and it's hard to imagine just how seminal it was and how new it was to be able to do this, just as I've argued that the whole preservation law really cut against, in a revolutionary or radical way, the legal approach to regulation of land by dealing with specific buildings, treating them specially. Here you would have the substantial property rights, admittedly millions and millions of dollars annually that capitalize and turn into a lot of money, taken away from the owner, who owned it before the designation strictly for landmark designation. Well, the Supreme Court, six to three, sided with the City of New York.

It reviewed the case under the Fifth Amendment to the United States Constitution: the "Just Compensation" or "Takings Clause," which states "nor shall private property be taken for public use without just compensation." First, the Court stated in unambiguous terms that landmarks preservation laws—this one in particular, but also in general—substantially advance a city's legitimate interest in historic preservation. This would be squarely within the ambit of the police power of a city to enact laws. By the way, that wasn't always true, and indeed if you look at the evolution of what local governments and states could enact, laws to advance the purposes, back at the turn of the century, aesthetics, historic preservation, purposes of those sorts would've been deemed outside the ambit of the local government to regulate. And indeed laws were struck down if they just promoted aesthetics, which would be also viewed as part of historic preservation as it were. Then, legal decisions evolved, and aesthetics coupled with the police power quartet of announcing health, safety, morals, and general welfare would suffice. But you couldn't have the aesthetics alone, and it wasn't until the mid-twentieth century that aesthetics, standing alone, would serve as a basis for regulation of the built environment.[12]

Well, in 1978 we have a clear, unambiguous statement that historic preservation could understand: the enactment of laws that would designate private property rights. Then we get to the meat of the case and what it's known for, which is this diminution of value for the owner of private property, and the U.S. Supreme Court said it was not a taking. It enumerated what has come to be known as the three factor inquiry or test,[13] to which judges, in reviewing historic preservation laws as applied, are directed to look: the economic impact of the action on the claimant, and then on the owner—its effect upon the owners distinct investment backed expectations—and to look also at the character of the action which has been a taking. And this underscores the purpose of the Just Compensation Clause, which is to assure

12. Berman v. Parker, 348 U.S. 26, 33 (1954) (establishing that governmental regulations could be based solely on aesthetic considerations).

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

that government is not forcing some people alone to bear the public's burden, which in all fairness and justice should be borne by the public as a whole.

Again, that's one of the quandaries for us in historic preservation—that the landowner is being treated specially and the question is how special can he or she be treated. In the *Penn Central* case, applying these three factors, the Supreme Court began to at least suggest how far government could go. As Justice Holmes had put it in the *Pennsylvania Coal v. Mahon* case: if regulation goes too far, it will be recognized as a taking.

Well, was this too far? The Court, in applying these three factors to the facts here, said it wasn't too far. Why not? First, Penn Central had admitted, in what in hindsight was a strategic blunder, that it had earned a reasonable return on its primary expectation to what the terminal would use. So Penn Central was earning a reasonable return, and the Court said the fact that it can't earn this speculative return is of no consequence, constitutionally, to their decision. The Court cited the Law's authorization of transfer development rights that allowed the transfer to at least eight surrounding parcels, and said that this sort of transferability should be taken into account, and is by us considering the impact of the regulation.

Justice Brennan and his colleagues said that landmark designation was pursuant to a plan of uniformed comprehensiveness that has always provided solace and comfort to lawyers and judges reviewing laws to ensure that they are not picky-choosy. Now, Justice Rehnquist, then subsequently Chief Justice, and finally the late Chief Justice Rehnquist, had a strong disagreement with this point. He said that landmarks preservation laws designating a landmark were the anticipants of zoning. And you know what? He had a point there that one could easily argue, but so be it. This notion of framing more comprehensively has become part of what we do.

Finally, Penn Central argued that you look to the parcel as a whole rather than to simply that portion being regulated by the law, and in this case Penn Central had argued the taking was of our right to develop property as opposed to the terminal, so there was a 100 percent taking of everything. Justice Brennan and his colleague said: No, we don't look just at the regulated portion. We don't look just at the ten-foot set back from the front lot line that occurs at all suburban developments and say that has 100 percent been a taking, thus compensation must be paid. We look at the parcel as a whole. And, again, sitting on this parcel was Grand Central Terminal, which Penn Central had admitted earned a reasonable return.

And finally the Court said, "come back and reapply in the future, if there's a problem." Now, no one in this room, not me at the podium, not you in the audience, no one in the halls of the academy, across the street at Columbia Law School and law firms in developers' offices, in city planning departments, the judicial chambers, can tell any of us categorically what is too much economic impact, what is too much interference with distinctive investment backed expectations. In short, when do we know a taking has occurred? And that's a problem. It's been very disturbing to legal academics and legal

technicians because they really cannot say with any degree of authority definitively what the *Penn Central* rule means for any given case.

Now, people react and respond and adapt, and I think there's been great adaptability to this uncertainty, and I think in the work-a-day-world in which we live, historic preservation operates just fine. So, I think the concern about the *Penn Central* case really resides in a much smaller place than our overall world. We can say to be sure that property owners are not entitled to the highest use of their property, and government regulation, including historic preservation laws, can deprive them of significant amounts of value.

All right, future challenges: the property rights movement is certainly still an issue. The reaction in the *Kelo* case[14] in the City of New London, dealing with the related issue of eminent domain, reveals that we need to continue to be very sensitive to the notions of hardship, listening carefully for calls of reasonable return. We need to review some of the local ordinances to make sure that they are in correspondence with the requirements, allowing for a reasonable return and perhaps revisit that intellectually interesting, but little applied notion of transfer of development rights.

Third: religious landmarks. We recently celebrated another birthday on September 22nd, 2010, which was the tenth anniversary of the Religious Land Use & Institutionalized Persons Act.[15] This was a law enacted after some constitutional developments in the U.S. Supreme Court,[16] which basically left religious institutions owning religious facilities relatively under-protected in their view, and through the evolution of a political system in which religious institutions may be able to claim, in some ways, some would argue, more protection rather than less protection for what they do. Religious exercise, after all, is protected by the First Amendment even as there may be some conflict with the so called establishment laws, which says the government may not establish religion either or help religion too much. There's an inherent tension there. The statutory enactment of the Religious Land Use & Institutionalized Persons Act, some people say, created this statutory regime at the national level, guaranteeing that historic preservation laws could not substantially burden the religious exercise of religious institutions. That included facilities and buildings, so churches and mosques and temples and all that are blessed by the stewardship that we have of religious institutions and their facilities.[17]

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14. Kelo v. City of New London, 545 U.S. 469 (2005).

15. Religious Land Use & Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified as amended at 42 U.S.C. §§ 2000cc-2000cc5 (2006)).

16. *See* Ashira Pelman Ostrow, *Judicial Review of Local Land Use Decisions: Lessons from RLUIPA*, 31 HARV. J.L. & PUB. POL'Y 717, 737-47 (2008) (discussing the pertinent judicial and legislative history leading up to RLUIPA); *see also* Karla L. Chaffee & Dwight H. Merriam, *Six Fact Patterns of Substantial Burden in RLUIPA: Lessons for Potential Litigants*, 2 ALB. GOV'T L. REV. 437, 443-47 (2009) (discussing "The Road Leading Congress to RLUIPA.").

17. 42 U.S.C. § 2000cc(a)(1) (2003) (requiring that all government land use regulations not substantially burden religious institutions except in furtherance of a compelling government interest, using the least restrictive means to achieve that compelling interest). *But see* City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (overturning the Religious Freedom Restoration Act

This led to the question: Would a landmark designation, or more significantly, would denial of a certificate of appropriateness to alter, modify, or demolish, be considered a substantial burden on the religious exercise of certain facilities? The answer has been, looking at the record in the judicial realm, no. The courts have been actually quite accommodating to the ability of local governments through landmarks preservation laws to treat religious institutions fairly similarly to the way other institutions are treated. A typical case has been the *Trinity Evangelical Lutheran Church v. City of Peoria*[18] case, in which a church bought an adjacent building, operated it as an apartment building for years, and about one year after the purchase, the church wanted to convert it to an additional assembly building for religious practice. After the landmarking—the church objected to the landmarking—it ended up in court. That court held that there was no substantial burden: it only effects one building, one location; doesn't stop the ministry from operating, even though yes, it limits its possibilities for expansion and adds a little bit to cost, but that's the price of doing business here. You're still in the business of religion, and so it's not a substantial burden.

That's been the judicial approach that we see now. A lot happens outside of courts, and we have to recognize—and its true—that dialogues between historical preservation or landmarks preservation commissions and churches, there is a little more negotiating leverage for churches by citing the Religious Land Use & Institutionalized Persons Act. It's harder to track that sort of special advantage that churches have. Certainly in the courts, and in any sort of argument one would finally make, it's "take a look at the courts." Substantial burden? Not something to be troubled with? And to the extent of course that St. Bart's[19] would want to be a fifty or seventy-five-story building taking down its community facility, that's not even religious exercise, even if the money is going to be used for a good cause, such as feeding the homeless or housing the homeless.

Okay, I'd like to conclude with a notion of re-positioning historic preservation law in the next forty-five years. We will be meeting here in the year 2056, and I've already actually agreed to give the keynote for the same honorarium I am receiving today, of course inflated to future value. I think I'd like to make three key points very briefly.

First, I think we need to strengthen historic preservation laws. We'll look at that I think a little bit later today. We can tinker with them to make them better. I think we can do better on insufficient returns or reasonable returns, but I would resist the temptation to broaden historic preservation laws as

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of 1993, 107 Stat. 1488, 42 U.S.C. §§ 2000bb-2000bb-4, as an unconstitutional exercise of Congress's power under section five of the Fourteenth Amendment). RLUIPA was a direct response to *City of Boerne* and should be read only as a statutory codification of existing Supreme Court jurisprudence. Ostrow, *supra* note 16, at 739-40 & n.102.

18. Trinity Evangelical Lutheran Church v. City of Peoria, No. 07-cv-1029 (C.D. Ill. Mar. 31, 2009), *available at* http://lawoftheland.files.wordpress.com/2009/04/trinity-evangelical-v-city-of-peoria1.pdf (order granting summary judgment).

19. St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2d Cir. 1990); *see generally* BRENT C. BROLIN, THE BATTLE OF ST. BART'S (1988).

such. I think they operate well within their confine if they are clearly understood. They are not substitutes for planning in the city, and I think we are strongest when we operate squarely in what historic preservation laws are understood to be. In the *New York Citineighbors*[20] case, interestingly, where the question was whether the Landmarks Preservation Commission decisions here in New York State would be subject to the State Environmental Quality Review Act, SEQRA,[21] the court understood just how narrow landmarks preservation designations and decision-making would be by calling the decisions of the Landmarks Preservation Commission ministerial[22] because they are so circumscribed in their decision-making and they really have nothing to do with the environment at large. One can contrast this, by the way, with the *Hanna*[23] decision in Chicago.

All right, so that's historic preservation laws. I would broaden, secondly, the rhetorical positioning of the value of historic preservation with another legal regime. Sustainability comes to mind, but also, the broader function of historic preservation after all is to maintain the connection between people and place. John Costonis writes about this in his superb book, *Icons and Aliens*,[24] talking about how the purpose of historic preservation is actually to guarantee an emotional stability. Cherished features of our environment are preserved not because they are beautiful, but because they reassure us by preserving, in turn, our emotional stability and world pace by frightening change. Now, that can be done within the broader array of laws. It's inherently done through historic preservation. I'm not suggesting that we rewrite those laws. We can talk about this, although I don't have time, in terms of even promoting the preservation of a skyline. And of course the New York City situation, now with the Empire State Building and Vornado's proposal[25] raises that very kind of thing. There are also plans in London dealing with its view management of St. Peter's and St. Paul's Cathedral and other facilities[26] that guarantee that even a skyline should be protected even if we don't do it necessarily under historic preservation laws themselves.

I'd like to conclude then with the following thought: Historic preservation of the environment could even most broadly be understood as a universal human right. Certainly we have the UNESCO World Convention, adopted back in 1972,[27] and its collection of cultural heritage, and we're not going to

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20. *In re* Citineighbors Coal. of Historic Carnegie Hill v. N.Y.C. Landmarks Pres. Comm'n, 811 N.E.2d 2 (N.Y. 2004).

21. *See generally* N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to 8-0117 (McKinney 2005).

22. *In re Citineighbors*, 811 N.E.2d at 4.

23. Hanna v. City of Chicago, 907 N.E.2d 390 (Ill. App. Ct. 2009).

24. JOHN J. COSTONIS, ICONS AND ALIENS: LAW, AESTHETICS, AND ENVIRONMENTAL CHANGE (1989).

25. Charles V. Bagli, *A Fight on New York's Skyline*, N.Y. TIMES, Aug. 24, 2010, at A18, *available at* http://www.nytimes.com/2010/08/24/nyregion/24empire.html.

26. *See* GREATER LONDON AUTH., THE LONDON PLAN: SPATIAL DEV. STRATEGY FOR GREATER LONDON 223-28 (2011), *available at* http://www.london.gov.uk/priorities/planning/londonplan.

27. *See generally* Convention Concerning the Protection of the World Cultural and National Heritage, Nov. 16, 1972, U.N.E.S.C.O., *available at* http://whc.unesco.org/archive/

amend the 1948 Universal Declaration of Human Rights,[28] but one could easily imagine it saying everyone is entitled to enjoy the benefits of cultural heritage. And that, after all, is what the legal regime of historical preservation, at its broadest, is all about. Thank you very much.

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28. *See generally* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).