THE CONTRIBUTION OF HISTORIC PRESERVATION TO CONSTITUTIONAL LAW

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Historic preservation may sound like an arcane legal subject. Land use law itself stands somewhat removed from the mainstream of environmental law, and within that specialty the subset of doctrines addressing the built environment seems even more rarified. Despite their apparent esoteric nature, however, conflicts framed by historic preservation have played a disproportionately significant role in shaping our contemporary constitutional law.

The lead example, of course, remains Penn Central Transportation Co. v. City of New York (1978) 438 U.S. 104. Practitioners recognize Penn Central as the primary modern authority validating the power of municipalities to restrain development without payment of compensation to private owners, provided the restrains flow from a comprehensive scheme invoking an average reciprocity of burden and advantage. Justice Brennan's "landmark" opinion set at rest the claims arising in the environmental decade of the 1970s that stringent regulation to protect environmental quality demanded government compensation to landowners for the property value lost from such regulation. The decision also brought new concepts into our constitutional lexicon: the assurance that a regulation could pass muster if it provided the owner a "reasonable rate of return" on its investment, and the suggestion that the constitutional calculus can include value added to a regulated parcel by transferring its development potential to neighboring parcels.

Penn Central did not arise, however, in the venues most likely to produce a conflict between development and natural resources calling for these principles to be enunciated; for example, restricting San Francisco high-rise development to protect neighborhood quality and Bay views, or restraining new residential subdivisions to preserve the natural features of the Santa Monica Mountains. Instead, the Supreme Court enunciated the fundamental principles of modern land use regulation in a sophisticated dispute over New York City's prerogative to limit development that would detract from the landmark qualities of Grand Central Station as an historic and architectural resource.

In retrospect, Penn Central demonstrates why the battleground of historic preservation has served as a fertile ground in which to build our constitutional law. Regulation to protect aesthetic and artistic quality, as opposed to that addressing dangerous or unpleasant nuisances, tests the limits of public power. On the other side of the equation, regulation that prevents alteration or loss of an historic resource, unlike limits on the development of raw land, posits an immediate and concrete interference with private expectations. Thus, the issues

in terms of both abstract doctrine and actual economic impact are usually sharply joined. When they arise as did Penn Central in one of the nation's most sophisticated legal communities, moreover, the municipal, private property , and citizen activist interests are represented by the finest legal talent available. Finally, because regulations to protect the built environment often represent the newest laws on the local books, the ordinances at issue usually reflect the cutting edge of legal draftsmanship.

The Penn Central case standing alone should convince all lawyers who call themselves "environmental" to tune into the relatively obscure world of historic preservation law. No elementary constitutional law course today can soundly ignore the Penn Central decision, and no responsible practitioner can fail to obtain at least a moderate awareness of current developments in the law of historic preservation.

Penn Central is merely the best known, not the only, historic preservation case that has shaped our constitutional law. Its setting -- Park Avenue in midtown Manhattan -- gave rise to a dispute as momentous as that over Grand Central Station, in answering some of the questions left open by Justice Brennan's 1987 opinion. Issues that had been dictum in Penn Central took center stage in the litigation known as Rector, Wardens etc. of St. Bartholomew's Church v. City of New York (S.D.N.Y. 1990) 728 F. Supp. 958, aff'd (2d Cir.) 914 F.2d 348, cert. denied (1991) 499 U.S. 905. Six blocks north of the railroad station the elegant Byzantine complex of St. Bartholomew's Episcopal Church spawned the dispute over New York City's authority to prevent demolition of the church's community house to make way for a proposed commercial high-rise tower. The church's proposal, narrowly approved by its vestry and opposed by a strong minority of its parishioners, produced a legal conflict even sharper than that in Penn Central. In the latter case the railroad did not seek to demolish the terminal, only to impair its surroundings by suspending a high-rise tower over the landmark. Moreover, in Penn Central the railroad conceded that in its existing use the terminal yielded a reasonable return on the railroad's investment. St. Bartholomew's, in contrast, proposed to demolish an architecturally significant community house, and claimed a compulsion to do so because the cost of maintaining the landmark interfered with the church's mission to the poor.

Prior to Penn Central, the traditional constitutional doctrine of "takings" focussed on two "objective" factors: legitimacy of the purpose of a particular land use regulation, and whether the particular regulation substantially advanced that purpose. Justice Brennan's discussion in Penn Central, however, introduced factors that might be called "subjective," in that they depended not only upon testing the governmental regulation in the abstract, but also the concrete impact of those regulations on a particular landowner. The new tests gave a landowner room to argue that an historic preservation mandate might deprive the owner of a "reasonable rate of return," or frustrate the owner's "investment backed expectations." Though not at issue in Penn Central, as explained above, these terms survived to become the focus of the St. Bartholomew's case.

The Manhattan district court and Second Circuit both agreed that St. Bartholomew's Episcopal Church failed to make its case of economic hardship to earn exemption from the landmark regulation. The district court opinion is particularly instructive in measuring the church's claim that "preservation costs too much." The trial court did not merely examine the record adduced before the New Yorks Landmarks Commission for substantial evidence in support of the commission's finding of no hardship. Instead the district judge held the church to prove by a preponderance of evidence produced before the landmarks commission that rehabilitation of the community house would prove prohibitive. In finding that the church failed this burden, the trial court independently assessed the credibility and relevance of the evidence produced in the administrative review, including the court's independent assessment of the church's definition of its financial needs. In virtually every category, including the church's management of its endowment funds, the trial court concluded that a plan different than that proposed by the church would not interfere with its financial solvency or religious mission.

In the context of historic preservation, St. Bartholomew's plowed new constitutional ground by erecting an extremely stringent test for proving economic hardship. The test emerged as all the more demanding because the enterprise at issue was not a profit-making one, in which conventional market terms such as "rate of return" would form meaningful constitutional criteria. Instead this case teaches us that to claim hardship, a charity must submit its very mission to the trial court's scrutiny, and not rest on its own definition of how that mission is fulfilled.

Most remarkably, this rule emerged in the context of a religious charity. Yet again the constitutional battleground was illuminated by a dispute centered on historic preservation: the degree to which preservation rules can and should apply to religious properties as they do to secular (including other charitable) ones. The most powerful salvo in that battlefield was fired, and deflected, before the Second Circuit in St. Bartholomew's. Before dismissing the church's economic hardship claim, the court of appeals addressed St. Bartholomew's assertion that the New Yorks landmarks law substantially burdened the church's free exercise of religion. In dispatching this claim as well, the Second Circuit relied on very recent authority in the United States Supreme Court, Employment Department v. Smith (1990) 494 U.S. 872, and concluded that a facially neutral regulation, not addressed to actual religious beliefs, will not run afoul of the Establishment Clause because it affects religious as well as non-religious property. The Second Circuit noted that at least 15 percent of the landmarks in New York City were religious buildings, a finding not surprising in light of the importance of religion in our society and the enduring architectural excellence of religious structures. The appeals court concluded that the city's landmark law neutrally applied to religious and non-religious property alike.

When the Supreme Court denied certiorari in St. Bartholomew's, one could argue that the law of the land did not recognize or sanction a different treatment of

religious properties when historic preservation motivated their regulation. That does seem to be the law today, but not just because of St. Bart's. Yet another preservation dispute, this one arising in the more modest community of Boerne, Texas, yielded even more sweeping rules of constitutional construction.

Boerne, a suburb of San Antonio, has been compared to Carmel or South Pasadena in our state: a small city blessed with quality architecture, distinctive if not overwhelming, which takes protection of that heritage seriously. When the local Roman Catholic Church decided to add an overpowering addition to its 1920s Mission-style sanctuary, the city denied the permit. Flores, the San Antonio archbishop, sued in federal court.

The archbishop faced formidable barriers in Employment Department v. Smith and the Second Circuit's application of it in St. Bartholomew's. Bishop Flores nonetheless had a Congressional assist, which he invoked: the Religious Freedom Restoration Act of 1993, 42 U.S.C. ß 2000bb [RFRA]. That measure provided that "Government shall not substantially burden a person's exercise of religion," even in a rule of general application, unless the regulation furthers an objective of "compelling governmental interest" and does so by the least restrictive means. RFRA applied not only to federal actions, but also actions taken by the states and their subdivisions. The legislative history expressed a Congressional intent in RFRA to displace Employment Department v. Smith and "restore the compelling interest test as set forth in Sherbert v. Verner [(1963) 374 U.S. 398]."

Now historic preservation became the humble pivot on which the Supreme Court would ultimately define some of the most fundamental boundaries in constitutional law: the power of Congress to reinterpret the Court's interpretation of the Constitution, and the power of Congress to set limits on state and local regulation. The crusty district judge for the Western District of Texas had little trouble with the issue; in response to the archbishop's reliance on RFRA, Judge Lucius Bunton's three-page opinion cited Marbury v. Madison (1803) 5 U.S. 137 and invalidated RFRA as a Congressional trespass into the Supreme Court's authority to declare the law. (Flores v. Boerne (W.D. Tex. 1995) 877 F. Supp. 355.) The Fifth Circuit, however, validated RFRA as a proper exercise of Congressional power under section five of the Fourteenth Amendment, authorizing Congress "to enforce, by appropriate legislation," the provisions of that amendment. (Flores v. Boerne (5th Cir. 1996) 73 F.3d 1352.)

Last June the Supreme Court reversed, and in an opinion of obviously greater length and significance, affirmed Judge Bunton. (Boerne v. Flores (1997) 117 S.Ct. 2157.) The Court took Congress at its word that in enacting RFRA, the legislators sought to displace Employment Department v. Smith and replace its doctrine with that of Sherbert v. Verner. Distinguishing this effort from the Congressional power to promote voting rights by enacting restrictions on state election laws, the Supreme Court did not see Congress in the present case as

"enforcing" the Establishment Clause. "Enforcement," to the Court, meant responding in a remedial capacity to a demonstrated pattern of unconstitutional discrimination; that circumstance obtained with respect to voting in the 1960s, but not with respect to religious exercise in the Nation today. In RFRA, by contrast, the Congress sought to preempt the Court's power to interpret the Constitution, thus failing to respect a vital element of the Constitution's separation of powers.

The Justices moreover found RFRA objectionable for its pervasive intrusion into state and local decisionmaking, requiring that the most demanding "compelling state interest" standard be met in the incalculable scope of local regulations that the Congressional mandate attempted to embrace. Thus, the Court concluded, Congress created a double offense against Constitutional standards: not only against its sister branch of government, the Court, but also against the states.

Only once did historic preservation rate mention in the Court's opinion: in dispatching the archbishop's argument that Congress was acting in a remedial capacity in enacting RFRA. In cataloguing the Congressional testimony to disprove a general animosity or hostility to religious practices in contemporary American life, the Court described "zoning regulations and historic preservation laws (like the one at issue here), which as an incident of their normal operation, have adverse effects on churches and synagogues." So consumed was the Court in resolving the monumental structural issues presented by RFRA, that almost in passing it answered what remained as the key "preservation" issue in the case, namely that the neutral land-use regulation of religious properties can only be deemed "incidental," not giving rise to an independent claim of Free Exercise violation.

Thus, in defining and circumscribing Congress' power to reinterpret the Constitution and Congress' power to impose restraints on local regulation, the Supreme Court in Boerne "incidentally" validated the neutral regulation of historic religious properties. But did the Court go further, and forbid local or state governments on their own to give preferences to religious properties by exempting them wholesale from land-use regulation? Justice Stevens in his concurring opinion condemned RFRA as providing religious property owners with a "legal weapon no atheist or agnostic can obtain," a form of governmental preference for religion forbidden by the First Amendment.

A firm answer to this question may be soon at hand, here in California, in yet another constitutional case arising in the context of historic preservation. Three years ago then-Speaker Brown of the Assembly sponsored and secured enactment of a measure, at the request of several San Francisco religious bodies, which exempted all "noncommercial" property owned by religious associations from local historic preservation regulations. (1994 Cal. Stats., ch. 1199, enacting A.B. 133, 1994 Reg. Sess.) In order to secure the exemption, the religious association must in a "public forum" make its own determination of economic hardship arising from the contested regulation.

In April 1995, this measure was declared unconstitutional by the Sacramento Superior Court, and the state's appeal is now pending before the Third District Court of Appeal. (East Bay Asian Local Development Corp. v. State of California (3 Civil C024192; Sacramento Super. Ct. 95AS02560.) The successful plaintiffs include the leading land-use planning and historic preservation organizations in the Nation and California, such as the American Planning Association, National Trust for Historic Preservation, Planning and Conservation League, and California Preservation Foundation. While the superior court's judgment was filed without reliance on Boerne v. Flores -- in fact filed before the Fifth Circuit had reversed the district court -- the U.S. Supreme Court's determination that neutral regulation of historic resources only incidentally burdens the owners of religious properties undercuts the arguments of AB 133's sponsors that the measure is vital to protect religion in California. It seems likely that the court of appeal will find, as did the superior court, that this measure designed solely to single out religious institutions for economic advantage unlawfully favors religion under both the United States and California Constitutions.

In summing up this brief survey of constitutional law, practitioners of environmental and administrative law can see that historic preservation does not stand as a quaint hobby of volunteer societies and individuals, but instead has emerged in the last two decades as a powerful force in defining the most fundamental law of the nation.