PUTTING HISTORY ON A STONE FOUNDATION: TOWARD LEGAL RIGHTS FOR HISTORIC PROPERTY

INTRODUCTION: GIVING MEANING TO THE CHOICE TO PRESERVE

Just over thirty years ago, environmental ethicist Christopher Stone responded to serious deficiencies in the nation's system of environmental protection with a novel proposal: give substantive rights to natural objects.[1] Stone's approach elevated the natural object above the uneven patchwork of protection afforded it by law to a common and higher standard; even in the absence or deficiency of environmental protection laws, natural objects would have a default right to exist free from damage—a right that must be rebutted by would-be exploiters. Through a guardian, they would have legal standing to bring an action on their own behalf. Further, any damage to them would, by right, be measured by their own injury and run to their own benefit. Thus, for instance, if a forest was to be cut, the logger must "compensate" other forests by an amount commensurate with the value of the forest lost. Such a system recognizes the intrinsic value of the natural object, its worth to future generations, and, in so doing, forces a more thoughtful consideration of its use.

Sixteen years after Stone introduced his proposal, the National Trust for Historic Preservation ("Trust") began publishing a list of the eleven "Most Endangered Historic Places"[2] in an effort to "raise awareness of the serious threats facing the nation's greatest treasures."[3] For two consecutive years in the 1990s, Independence Hall, the centerpiece of the "most historic square mile" in the nation,[4] found a sad place on the Trust's list.[5] Though the cash-strapped National Park Service (NPS) had managed to keep up appearances for years, Independence

1. Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL L. REV. 450 (1972) [hereinafter Stone, *Should Trees Have Standing?*].

2. The 11 Most Endangered Historic Places Archive is available at http://www.preservationnation.org/issues/11-most-endangered/ (last visited Feb. 11, 2009). *See also The Endangered Eleven: Landmarks Near the Edge*, PRESERVATION NEWS, XXVIII, Sept. 1988, no. 9, p. 3 (years before Independence Hall was listed, the National Trust for Historic Preservation president warned Congress of the need to adopt legislation that would provide more substantive protection for national landmarks.).

3. The 11 Most Endangered Historic Places Archive, *supra* note 2.

4. Nat'l Trust for Historic Pres., 11 Most Endangered Places: Independence National Historical Park, http://www.preservationnation.org/travel-and-sites/sites/northeast-region/independence-national-historical-park.html (last visited Feb 11, 2009) [hereinafter Trust, 11 Most Endangered Places].

5. *Id.*

Hall had been quietly, but dangerously, deteriorating behind the scenes.[6] A deferred maintenance policy of undertaking only small, provisional repairs allowed a leaky roof to severely weaken the structure, and the sprinkler system, according to the Park Service, was in such disrepair that a fire in the building could have leveled the place in under a half-hour.[7]

Despite the fact that Congress had charged the NPS with the preservation of National Landmarks like Independence Hall—and despite the fact that the NPS itself had created the definitive standards for the care and treatment of such property[8]—nearly every Congress and administration, Republican and Democrat alike, failed to provide political and financial support sufficient for the task.[9] Consequently, one year's operational deficits and deferred maintenance became the succeeding year's backlog.[10] As of 2007, the Park Service's maintenance backlog was estimated to be between $4.1 and $6.8 billion—more than double its annual operating budget.[11] While Congress finally approved a major overhaul for Independence Hall in the 1990s, a secure source of funding for future maintenance is still lacking.[12]

Not all that is historic can or should be preserved. The conservation of the historic[13] cannot be undertaken as an "inflexible reverence for a sacrosanct past"[14] but must be done as part of series of choices about managing change. However, Independence Hall's story questions the efficacy of even the strongest means to effectuate those choices. A truly iconic structure, Independence Hall had long before been the subject of a major preservation effort—one of the earliest such efforts in the nation.[15] It had been afforded the highest levels of protection

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6. *Id.* The block and the building are owned by the City of Philadelphia, but the land on which the building rests is owned by the National Park Service. Independence Hall Frequently Asked Questions, http://www.ushistory.org/independencehall/info/faqs.htm (last visited Feb. 11, 2009).

7. CHARLENE MIRES, INDEPENDENCE HALL IN AMERICAN MEMORY, at xvi (2002).

8. *See* The Sec'y of the Interior's Standards for the Treatment of Historic Properties, 36 C.F.R. § 68.3 (2008), *available at* http://www.nps.gov/history/hps/tps/standguide/.

9. *Hearing to Review the National Park Service's Funding Needs For Administration and Management of the National Park System Before S. Subcomm. on National Parks Comm. on Energy and Natural Resources*, 109th Cong. (2005) (statement of Robert Arnberger, Coalition of National Park Service Retirees), http://www.npsretirees.org/node/49.

10. *Id.*

11. NAT'L PARKS CONSERVATION ASS'N, THE BURGEONING BACKLOG: A REPORT ON THE MAINTENANCE BACKLOG IN AMERICA'S NATIONAL PARKS, http://www.npca.org/what_we_do/visitor_experience/backlog/ (last visited Feb. 11, 2009).

12. Trust, 11 Most Endangered Places, *supra* note 4.

13. This drive may be called "historic preservation," but with the understanding that "preservation," "rehabilitation," and "restoration," while commonly lumped under the heading of "historic preservation," are all terms of art and refer to varying degrees of intervention. *See* 36 C.F.R. § 68.3 (discussing the different standards to treatment encompassed by the terms "preservation," "rehabilitation," and "restoration").

14. John Nivala, *Saving the Spirit of Our Places: A View on Our Built Environment*, 15 UCLA J. ENVTL. L. & POL'Y 1, 51 (1996-97) [hereinafter Nivala, *Saving the Spirit of Our Places*] (quoting KEVIN LYNCH, WHAT TIME IS THIS PLACE 64 (1972)).

15. Diane Lea, *America's Preservation Ethos: A Tribute to Enduring Ideals*, *in* A RICHER HERITAGE: HISTORIC PRESERVATION IN THE TWENTY-FIRST CENTURY 1, 1-2 (Robert E. Stipe ed.,

available: as a National Historic Landmark, a National Historic Site, and a UNESCO World Heritage Site,[16] its care had been entrusted to the Park Service.[17] Unlike lesser known sites on the Trust's endangered list, Independence Hall attracts millions of visitors from every corner of the globe annually[18] and is located in one of the world's great cities. Independence Hall painfully demonstrates that even when the decision to protect is made, the mechanisms in place may not be sufficient to make that decision meaningful. Its story hints at serious flaws at all levels of the current preservation system no less threatening than those Stone's proposal attempted to address in the environmental protection system three decades ago. As the landmark case *Penn Central Transportation Co. v. City of New York*[19] asserted, important elements of our heritage continue to disappear because, just as Stone posited was happening to natural objects, there is a consistent failure to include adequate consideration of the value they represent in decisions about their fate.[20]

And thus, following Stone's lead, a new proposal: what if legal rights were afforded to historic property? A universal set of rights and judicially enforced remedies would elevate the preservation imperative above the uneven and incomplete line of current protections by ensuring that adequate consideration of the value of historic property would always be factored into decisions about its future. Historic property, viewed in context as a cultural resource in the same way Stone conceived trees and rivers and minerals as natural resources, would, by default, have a legally recognized intrinsic value and legitimacy. The property would have substantive rights that are in effect the gathering of the public interest past,[21] present, and future.[22] In the absence or inadequacy of established protection, the property-as-cultural relic speaks for—and protects—itself. The preservation

2003). *See generally* CHARLES B. HOSMER, JR., PRESENCE OF THE PAST (1965) (discussing the early preservation effort to save Independence Hall).

16. Nat'l Parks Serv., World Heritage Sites: Independence Hall, Philadelphia, Pennsylvania, http://www.nps.gov/history/worldheritage/ind.htm (last visited Feb. 11, 2009).

17. Trust, 11 Most Endangered Places, *supra* note 4.

18. *Id.*

19. 438 U.S. 104 (1978).

20. *Id.* at 108. "[I]n recent years, large numbers of historic structures, landmarks, and areas have been destroyed without adequate consideration of either the values represented therein or the possibility of preserving the destroyed properties for use in economically productive ways." *Id.*

21. *See generally* JOHN RUSKIN, THE SEVEN LAMPS OF ARCHITECTURE 325 (Brantwood ed., New York, Merrill & Co. 1890) (1857) (discussing a present obligation to the past fulfilled by restoring and maintaining historic property); *see also infra* notes 142-143 and accompanying text (discussing Ruskin's assertion that the destruction of historic structures morally violates an enduring ownership interest vested in a previous generation, a philosophical and figurative, if not legal, ownership interest: "[Historic structures] are not ours. They belong partly to those who built them . . . ."). RUSKIN, *supra*, at 358.

22. This notion that rights-holder status for historic resources gathers the interest of future generations parallels Stone's argument that similar status for natural objects would do the same. Stone, *Should Trees Have Standing?*, *supra* note 1, at 475; *see also infra* note 90 and accompanying text (discussing Stone's assertion that the natural object's right-holder status would, through its guardian, incorporate the interest of future generations).

ethic persists, its virtues and its fruits, even in times when and places where the political and popular will to enforce and fund it falters.[23] And thus, by vesting rights in the property we choose to preserve—and thus by definition intend to outlive us—we give real meaning and effect to that choice.

As shocking as the notion of giving substantive rights to property might seem, the extension of rights to rightless entities, including inanimate ones, is not new.[24] An extension of rights to historic property, in particular, could be seen as an extension and convergence of two legal theories: the public trust doctrine and the concept of cultural patrimony. Changes in the way society values historic property may already indicate a willingness to accept such a proposal.

I. SEEING THE FOREST FOR THE TREES: A LESSON IN RIGHTS FROM THE ENVIRONMENTAL MOVEMENT

Just about the time Stone was writing his article, Ada Louise Huxtable described historic preservation as that "combination of civilized sentiment and historic sensibility that makes cities rich and real and [has] nothing to do with real estate values that make cities rich and sterile."[25] But it does more than make cities rich and real. An evolving preservation theory has proven that crafting the built environment to reflect a conviction that the past is "inextricably linked to [the] future"[26] not only provides an existential "'foothold in space and time,'"[27] but, as *Penn Central* suggested, is essential to creating, enhancing, and sustaining quality of life.[28] Historic properties, like natural resources, are finite and essential.[29]

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23. A society's choices about what to preserve and what to destroy change over time. Slave quarters on southern plantations serve as a good examples of how what one generation devalued and destroyed can become lamented losses for the next. An accounting for an intrinsic value for all historic property impedes, if only partially, short-sighted decisions made in the perpetual present by forcing an evaluation of any destructive impact on the future.

24. *See* Stone, *Should Trees Have Standing?*, *supra* note 1, at 467 (discussing recent trends in liberalizing traditional standing requirements to allow suits to be brought to benefit the environment).

25. Ada Louise Huxtable, *The Side Street Spoilers*, N.Y. TIMES, Sept. 23, 1979, s2, at 31 ("Those were the days when no one questioned the iron rule of real estate that the highest and best use of land was that which yielded the greatest return." (quoted in John Nivala, *The Future for Our Past: Preserving Landmark Preservation*, 5 NYU ENVTL. L.J. 83, 90 (1996) [hereinafter Nivala, *The Future for Our Past*])). Huxtable continued, "What the city lost of its urbanity and beauty—those civilizing factors on which so much of its values, economic and otherwise, depend—was never reckoned into the equation." *Id.*

26. Kathryn R.L. Rand, Comment, *Nothing Lasts Forever: Toward a Coherent Theory in American Preservation Law*, 27 U. MICH. J.L. REFORM 277, 311 (1993).

27. *See* Nivala, *Saving the Spirit of Our Places*, *supra* note 14, at 12 (detailing the needs served by preservation of the built environment (quoting CHRISTIAN NORBERG-SCHULZ, ARCHITECTURE: MEANING AND PLACE: SELECTED ESSAYS 241 (1988))); *id.* at 10-11 (arguing that an existential foothold requires an ability to identify ourselves with our environment).

28. *Id.* at 10. "[H]istoric conservation is but one aspect of the much larger problem, basically an environmental one, of enhancing—or perhaps developing for the first time—the quality of life for people." Frank Gilbert, Introduction, *Precedents for the Future*, 36 LAW & CONTEMP. PROBS. 311, 312 (1971) (quoting Robert Stipe, 1971 Conference on Preservation Law, Washington, D.C., May 1, 1971 (unpublished text, pp. 6-7)).

Whether considered through psychological,[30] ecological,[31] economic,[32] or moral lenses,[33] the integration of historic property is essential to the livability—and ultimately, the success—of built environments no less than the natural resources used to build, power, and support them.[34] A historic property, then, is more accurately characterized as a historic *resource*, and the ethical and moral arguments for environmental conservation—intergenerational equity[35] and present and future quality of life among them[36]—apply with equal force to historic preservation.[37] Preservation of the fragile traces of human life on the landscape is an act of environmental ethics no less than the kind Professor Stone advocated.[38]

A. Stone's Proposal and the Reluctance to Giving Rights

Stone's novel proposal to give legal rights to natural objects[39] energized and challenged the environmental movement. Stone recognized and anticipated the

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29. *See* Nicholas A. Robinson, *Historic Preservation Law: The Metes & Bounds of a New Field*, 1 PACE L. REV. 511, 521-22 (1981) (quoting *Penn Cent.*, 438 U.S. at 108). The Supreme Court made the connection between preservation and environmental conservation: "[H]istoric conservation is but one aspect of the much larger problem, basically an environmental one, of enhancing—or perhaps developing for the first time—the quality of life for people." *Penn Cent.*, 438 U.S. at 108 (quoting Stipe, *supra* note 28). Stipe continued,

> "[I]t is quite wrong to draw the preservation movement into a narrow corner and argue that preservation stops with ancient buildings having proper historical credentials . . . . [T]he traditional associative values of architecture and history are not enough if human purposes are to be served, and it seems more important than ever that those concerned with these traditional values should now make common cause with other facets of the environmental movement."

Robinson, *supra*, at 522.

30. *See infra* notes 122-127 and accompanying text (discussing the psychological impact of historical resources and their destruction).

31. *See infra* note 112 and notes 144-150 and accompanying text (expanding upon the environmental impact of destruction of historic buildings and construction of new structures).

32. *See infra* notes 151-160 and accompanying text (discussing the economic benefits, particularly in regards to the labor market, that are produced by preservation).

33. *See infra* notes 137-143 and accompanying text (explaining the moral imperative to preserve both for future and past generations).

34. Nivala, *Saving the Spirit of Our Places*, *supra* note 14, at 10.

35. *See infra* notes 134-141 and accompanying text (arguing the importance of intergenerational equity in preservation).

36. *See infra* notes 120-134 and accompanying text (detailing the contributions, both tangible and intangible, preservation makes on our quality of life).

37. Malcolm F. Baldwin, *Historic Preservation in the Context of Environmental Law: Mutual Interest in Amenity*, 36 LAW & CONTEMP. PROBS. 432, 432-41 (1971). Professor Baldwin asserted that historic preservation and environmental conservation are part and parcel of a larger concept of "amenity," which he defined as "a whole catalogue of values (including) the beauty an artist sees and an architect designs for; it is the pleasant and familiar scene that history has evolved; in certain circumstances it is even utility—the right thing in the right place—shelter, warmth, light, clean air, domestic service." *Id.* at 432 (quoting WARREN JOHNSON, PUBLIC PARKS ON PRIVATE LAND IN ENGLAND AND WALES, at xi (1971)).

38. Nivala, *Saving the Spirit of Our Places*, *supra* note 14, at 10.

39. Stone, *Should Trees Have Standing?*, *supra* note 1, at 456. "I am quite seriously proposing that

understandable public shock to the idea of giving rights to natural objects.[40] This is due in part to the inevitable social reality that until the rightless thing is endowed with rights, the contemporary group of rights-holders cannot (or will not) see it as anything but a thing for their own use.[41] For instance, a slave's rights only extended insofar as they touched his usefulness to his master.[42] Those empowered with rights will see the rightlessness of rightless things as a wholly natural decree and not as what it is—a legal convention acting in support of the status quo.[43]

Accepting a rightless thing's rightlessness as a natural decree both permits and requires deferring consideration of the moral, social, and economic implications of its rightlessness. Such a blind acceptance can be a dangerous and costly ignorance.[44] It was only by operating under such an inclination, Stone asserted, that the Supreme Court could have reached a decision in the *Dred Scott*[45] case denying African Americans the "rights of citizenship 'as a subordinate and inferior class of beings . . . .'"[46] Until the thing is "seen and valued for itself,"[47] society at large will continue to resist giving it rights; without rights, though, it can be difficult to see and value it for itself.[48]

Not surprisingly then, extension of rights to rightless entities has been met with resistance.[49] However, the historical trend—both for mankind and for the law—has been to extend such rights.[50] Children, prisoners, aliens, women, the insane, African Americans, fetuses, and Native Americans have, through time, been extended status as persons even though the law has not always treated them as such.[51] Granted, while Stone himself does not address the matter, one might argue

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we give legal rights to forests, oceans, rivers, and other so-called 'natural objects' in the environment—indeed, to the natural environment as a whole." *Id.*

40. *See id.* at 455 (assuming the disbelief or ridicule that would come in response to his proposal).

41. *Id.*

42. *Id.* at 459.

43. *Id.* at 453.

44. *See id.* at 453-55 (detailing notorious examples of the denial of rights).

45. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

46. Stone, *Should Trees Have Standing?*, *supra* note 1, at 453 (quoting *Dred Scott*, 60 U.S. (19 How.) at 404-05).

47. *Id.* at 456.

48. *Id.*

49. *Id.* at 453-56 (reviewing the denial of rights to African-Americans, Chinese-Americans, Jews, fetuses, and women).

50. *Id.* at 450.

> Originally each man had regard only for himself and those of a very narrow circle about him; later, he came to regard more and more "not only the welfare, but the happiness of all his fellow men"; then "his sympathies became more tender and widely diffused, extending to men of all races, to the imbecile, maimed, and other useless members of society, and finally to lower animals . . . ."

Id. (quoting CHARLES DARWIN, DESCENT OF MAN, 119, 120-21 (2d ed. 1874)). "The history of the law suggests a parallel development." *Id.* at 450.

51. Stone, *Should Trees Have Standing?*, *supra* note 1, at 450-51.

> [E]ven within the family, persons we presently regard as the natural holders of at least some rights had none. Take, for example, children . . . . We have been making persons of children although they were not, in law, always so. And we have done the same, albeit imperfectly

that all of these entities are human, so giving them rights-holder status just makes sense. Even accepting the idea that these entities were always seen as human (a debatable point in and of itself), the point is that even those entities one might, in 2009, take for granted as meriting rights were not always held out as such. Is it such a stretch to think that a nation that once failed to comprehend the necessity of giving rights to an entire race or sex might also fail to give rights in other instances where prudence, morality, or any number of other virtues might counsel differently? That said, as Stone pointed out, where a critical mass of interest gathers around a non-human entity, the law can accommodate it; after all, the law has already recognized that the universe of rights-holders includes non-human entities such as trusts, partnerships, corporations, joint ventures, ships, towns, and nations.[52]

B. The Meaning and Benefits of Rights-Holdership

Stone was deliberate in defining a rights-holder as one entitled to legal standing oneself, not merely one capable of having one's interests represented by someone else with standing.[53] The holder of legal rights possesses something more than the fact that some court will review the actions and processes of those who threaten it;[54] it has three additional characteristics which "go toward making [it] *count* jurally—to have a legally recognized worth and dignity in its own right, and not merely as a means to benefit . . . the contemporary group of rights-holders . . . ."[55] First, the rights-holder has legal standing to initiate legal action of its own accord.[56] Second, in deciding upon legal relief, the court must consider the rights-holder's own injury.[57] Third, that relief must actually benefit the rights-holder itself.[58] To Stone, an entity is imbued with these characteristics, then, not merely by expanding the universe of those able to speak for it, but only by giving it a voice to speak for itself.

What is the benefit of possessing these three characteristics? As a rightless entity, the natural object's inability to bring suit on its own behalf opens it up to the unfortunate reality that unless a willing representative with standing will bring suit on its behalf, a claim about damage to it will not be heard.[59] Stone used the

> some would say, with prisoners, aliens, women . . . the insane, Blacks, foetuses, and Indians.

Id.

52. *Id.* at 452.
53. *Id.* at 459.
54. *Id.* at 458.
55. *Id.*
56. *Id.*
57. Stone, *Should Trees Have Standing?*, *supra* note 1, at 458.
58. *Id.*
59. *Id.* at 459. Even the relatively broad spectrum of those capable of bringing suit for an environmental claim defined by *Sierra Club v. Morton*, 405 U.S. 727, 739-40 (1971) (holding plaintiffs must show a particularized interest to bring a claim), could not guarantee a suit could be brought in all cases. It should be noted, if only in passing here, that Justice Douglas' dissent to *Sierra Club* cited Stone's ideas. *Id.* at 749. *See also infra* note 232 (discussing Douglas' dissent and Stone's proposal).

example of a stream being polluted by an upper riparian state.[60] Unless the lower riparian state is willing to bring suit, the pollution is likely to continue.[61] The lower riparian state may have its own reasons for not bringing suit: it may also be polluting the stream and thus its own hands may not be clean;[62] or, it may be economically dependent on the upper riparian state.[63]

An equally common reason forestalling a suit is that a potential plaintiff may feel the costs of litigating are not worth the likely damage award.[64] Part of the reason damage awards may be too low to justify litigation is that they do not consider the entity's own intrinsic value, a value expressed legally in the entity's right to be whole.[65] Without establishing that streams have a right to be clean, a damage award ignores the stream's own injury and is, thus, grossly undervalued.[66] This value is also often not factored into cost-benefit or cost-cost analysis.[67] To Stone, an analysis balancing the economic hardship to the upper riparian of cleaning up the stream against either the cost to the lower riparian of having dirty

60. Stone, *Should Trees Have Standing?*, *supra* note 1, at 459.

61. *Id.*

62. *See, e.g.*, Missouri v. Illinois, 200 U.S. 496, 525-26 (1906) (holding that Missouri's action to enjoin Chicago's dumping of sewage into the Mississippi River—by way of Lake Michigan and several other contiguous bodies—was weakened in principle and harder to prove because St. Louis was also dumping sewage into the Mississippi).

63. Stone, *Should Trees Have Standing?*, *supra* note 1, at 459.

64. *Id.* at 460. Damage awards may be limited to the damage done to the individual plaintiff and thus not represent the overall harm done to similarly situated potential plaintiffs. For instance, if a polluter is injuring 100 downstream riparians $100,000 in the aggregate, each riparian may only suffer $100 individually, likely not enough to justify the expense of litigation or the trouble of securing co-plaintiffs. *Id.*

65. In 1985, Professor Stone re-addressed many of the issues he originally presented in his 1972 essay. Christopher D. Stone, *Should Trees Have Standing? Revisited: How Far Will Law and Morals Reach? A Pluralist Perspective*, 59 S. CAL. L. REV. 1 (1985) [hereinafter Stone, *Standing Revisited*]. He suggested that while a broadened universe of those capable of bringing suits on behalf of natural objects has solved some issues, the problem of evaluating and assessing damages to the environment itself remains a serious problem. *Id.* at 5-6. Recognizing this problem, "[s]everal statutes . . . permit suits by the state or another 'public trustee' to recover 'damages to the natural resources' from spills of oil and other hazardous substances." *Id.* at 6.

66. *Id.* at 7.

67. Frank B. Cross, *Natural Resource Damage Valuation*, 42 VAND. L. REV. 269, 294 (1989). Cross wrote:

> For some naturalists, particularly those who find some intrinsic value in nature, complete reliance on market valuation is illegitimate or even immoral. A remarkable historic example illustrates this point well. Certain rare butterflies lived only in isolated corners of Africa. Reportedly, unscrupulous collectors would collect a few specimens and then burn the surrounding grassland to destroy as many others of the species as possible, thereby enhancing the uncommonness of their own collections and increasing their value. Thus the free market created a direct incentive to destroy an endangered species. This natural response to market incentives obviously is contrary to the goals of applicable environmental legislation and illustrative of the shortcomings of market valuation. . . . [M]arket value may not be an adequate basis for [damage award calculation] when property is unique or seldom traded. Damage to public natural resources may fall within those categories in which market value is an inappropriate test of value.

Id. at 305-06 (citations omitted).

water or the benefit in having clean water is deficient.[68] He wrote, "The stream itself is lost sight of in 'a quantitative compromise between *two* other conflicting interests.'"[69] Finally, entities without rights lack the assurance that the benefit of damage awards will actually run to them.[70] Under the current system, using Stone's stream example, even if the lower riparian wins a pollution suit for damages, money does not necessarily go to repairing the damage done to the stream.[71]

Stone's rights-holder analysis has been applied in other fields, notably animal rights. In examining the whale's right to life, Anthony D'Amato and Sudhir K. Chopra explored the meaning of having rights under Stone's analysis.[72] First, in applying Stone's analysis to whales, D'Amato and Chopra identified value in a generalized legal competence arising from rights-holder status.[73] Such an assumed competence is accompanied by "flexibility and open-endedness."[74] It is what gives corporations the right to undertake activities (entering contracts, for instance) not specifically listed in their charters.[75] Second, D'Amato and Chopra suggested that rights-holder status would have value to whales by informing existing law and shaping future law.[76] For example, nineteenth-century courts routinely dismissed cases where a husband was accused of beating his wife, claiming a lack of "jurisdiction over what happened in the home" and that the wife had an adequate remedy in divorce.[77] At some point, however, courts "accepted the powerful moral claim" of the right of a wife to sue her husband for relief from abuse and recognized the claim as having existed "in the common law all along."[78] D'Amato and Chopra postulated that a legal entitlement to life for whales could be found in "the customary law practice of their preservation."[79]

A third benefit D'Amato and Chopra saw for whales as rights-holders results from the fact that, as Stone suggested,[80] the burden of proof in litigation and negotiation can depend upon which party is a claimant.[81] They predicted a court interpreting applicable rules might be more generous to whales as entities asserting their own rights rather than as third-party beneficiaries of someone else's rights.[82] Lastly, D'Amato and Chopra predicted that a body of jurisprudence applicable to

68. Stone, *Should Trees Have Standing?*, *supra* note 1, at 461.
69. *Id.* (quoting Smith v. Staso Milling Co., 18 F.2d 736, 738 (2d Cir. 1927)).
70. *Id.* at 462.
71. *Id.*
72. Anthony D'Amato & Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, 85 AM. J. INT'L L. 21, 50-53 (1991).
73. *Id.* at 51.
74. Stone, *Should Trees Have Standing?*, *supra* note 1, at 488.
75. D'Amato & Chopra, *supra* note 72, at 51.
76. *Id.* at 51-52.
77. *Id.*
78. *Id.* at 52.
79. *Id.*
80. Stone, *Should Trees Have Standing?*, *supra* note 1, at 488.
81. D'Amato & Chopra, *supra* note 72, at 52.
82. *Id.*

whale rights is more apt to be developed if it concerns whales as rights-holder rather than whales as third-party beneficiaries, noting the fact that much of corporate law developed as a result of corporations becoming right-holding entities capable of suing and being sued.[83]

C. Guardians for Natural Objects

But how would a system that endowed natural objects with rights operate in reality? Stone proposed a court-appointed guardianship arrangement for threatened natural objects, likening it to a situation where a court appoints a trustee for a corporation in bankruptcy.[84] A friend of the endangered natural object would apply to the court "for the creation of a guardianship."[85] The guardian would be given rights of inspection to inform the court of the object's condition.[86] If the guardian believed that there were incursions to the object's rights for which redress might be possible, "the guardian would be entitled to raise the [object's] rights" in the object's own name.[87] The guardian would thus avoid the process of establishing his or her own standing to bring the case.[88] The natural object as a "jural entity" represented by the guardian gathers up what might otherwise be fragmented and unrepresented claims—such as those whose potential award is too small to justify litigation, those "'too remote' causally," or those whose plaintiffs themselves lack standing.[89] Among these gathered claims are those of future generations whose enjoyment of the object might be jeopardized; Stone viewed "the guardian of the natural object as the guardian of unborn generations, as well as of the otherwise unrepresented, but distantly injured, contemporary humans."[90] Thus, the object representing itself addresses claims that for legal or practical reasons will not or cannot be addressed by the traditional class action suit.[91]

Stone proposed that damage awards to natural objects be placed in a trust fund administered by the object's guardian.[92] The funds would be used to preserve or restore the natural object.[93] Rather than setting an unrealizable goal of preventing

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83. *Id.*

84. Stone, *Should Trees Have Standing?*, *supra* note 1, at 464.

85. *Id.*

86. *Id.* at 466.

87. *Id.*

88. *Id.* Professor Mark Sagoff challenged the assumed benefit to the natural object in a guardianship arrangement, asserting:

> [I]t is reasonable to think that Old Man River might like to do something for a change, like make electricity, and not keep on rolling along. It is an incredible optimism which assumes the guardians appointed to represent nature would take an environmentalist position. These guardians would be chosen by the government, in other words by the lobbies, and thus nature could enter suits on the side of development.

Mark Sagoff, *On Preserving the Natural Environment*, 84 YALE L.J. 205, 222 (1974).

89. Stone, *Should Trees Have Standing?*, *supra* note 1, at 475.

90. *Id.*

91. *Id.*

92. *Id.* at 480.

93. *Id.* at 481.

all damage, the trust concept, as Stone conceived it, would assure that pollution would occur only where the social need is great enough for the polluter to pay for damages to affected persons and the natural object itself.[94]

D. The Necessity and Insufficiency of the Public Consciousness

Establishing substantive rights for natural objects, Stone admitted, would require "far-reaching social change[]."[95] While he asserted that the public in 1972 was becoming more environmentally sensitive, rights-holder status would require a "serious reconsideration of our consciousness toward the environment."[96] Yet he suggested that even though public consciousness may be necessary, it is insufficient.[97] While a realization that the environment must be protected is important, it is overwhelmed by the competing reality that the human population is increasing and with it, the demand on the environment.[98] Moreover, he suggested, "societies have long since passed the point where a change in human consciousness" alone will enable a viable solution.[99] Destiny, to Stone, is increasingly controlled by corporations: "More than ever before we are in the hands of institutions. These institutions are not 'mere legal fictions' . . . . [T]hey have wills, minds, purposes, and inertias that . . . can transcend and survive changes in the consciousnesses of the individual humans who supposedly comprise them, and whom they supposedly serve."[100]

Mark Sagoff, too, doubted the sufficiency of the public consciousness.[101] Specifically examining deficiencies in cost-benefit analysis applied to environmental questions, he lamented that public consciousness is so often measured by what an individual is willing to pay for a given change.[102] He called such reliance a "category-mistake"; measuring the convictions of citizens by what they are willing to pay for such convictions "confuses what the individual wants as an individual and what he or she, as a citizen, believes is best for the community."[103] The individual acting as a consumer is acting on his own behalf and as such is apt to make different decisions than the individual acting as a member of society.[104] Sagoff suggested that if environmental policy in a market-driven society were directed by the individual-as-consumer, it is likely that all natural beauty would devolve into "commercial blight."[105] Instead, the

94. *Id.*
95. Stone, *Should Trees Have Standing?*, *supra* note 1, at 492-93.
96. *Id.* at 493.
97. *Id.* at 494.
98. *Id.*
99. *Id.*
100. *Id.*
101. Mark Sagoff, *Economic Theory and Environmental Law*, 79 MICH. L. REV. 1393, 1410-19 (1981).
102. *Id.* at 1410.
103. *Id.* at 1410-11.
104. *See id.* at 1411-13 (stressing the distinction between public and private interests, and the danger of confusing them).
105. *Id.* at 1417.

environmental movement must rely on the political process to "rise above [individual] self-interest."[106] Rather than rely on a change in public consciousness to happen, then act, Sagoff suggested that "[p]olitical leaders are supposed to educate and elevate public opinion; they are not supposed to merely gratify preexisting desires."[107]

II. PRESERVATION AS AN ACT OF ENVIRONMENTAL ETHICS THROUGH THE LENS OF "SUSTAINABILITY"

Before considering how and why Stone's proposal might be applied to historic resources, it may be useful to consider why a preservationist might have any business appropriating an idea conceived by an environmentalist. The reality is that the environmentalist and the preservationist are kindred spirits. Both concern themselves with entities imbued with an intrinsic value, the failure to account for which leads to ill-considered decisions about their fate.[108] Both concern themselves with making sure one generation's use of its resources does not compromise the interests of the next—that is, that its use is "sustainable."

The concept of "sustainability" was first and most fully articulated by the United Nation's Report *Our Common Future* (also known as the Brundtland Report)[109] and includes three prongs: social responsibility, ecological responsibility, and economic responsibility.[110] Unfortunately, the term "sustainability" has devolved into a mere buzzword used in so many contexts that its meaning is often reduced to a broad association with only a vague notion of environmental stewardship.[111] It is not surprising, then, that the idea of preservation as the ultimate form of recycling has gotten so much attention.[112] But preservation's

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106. *Id.* at 1413-14.

107. Sagoff, *supra* note 101, at 1414.

108. *See supra* text accompanying notes 19 and 65-67 (discussing the consequences of our failure to consider the values of parts of our heritage and natural objects when we decide their fates).

109. U.N. World Comm'n on Env't and Dev., *Our Common Future*, U.N. DOC. A/42/427 (Aug. 4, 1987), *available at* http://www.un-documents.net/wced-ocf.htm.

110. Donovan D. Rypkema, *Historic Preservation as Sustainable Development*, PRESERVATION NORTH CAROLINA, April 10, 2005, http://www.presnc.org/Features/Historic-Preservation-as-Sustainable-Development [hereinafter Rypkema, *Historic Preservation*]. Citing the work of an international real estate firm in London, Rypkema relayed the relationship for each of the three prongs of sustainability. First, for a community to be viable, there needs to be a link between environmental responsibility and economic responsibility; second, for a community to be livable, there needs to be a link between environmental responsibility and social responsibility; and third, for a community to be equitable, there needs to be a link between economic responsibility and social responsibility. *Id.*

111. *See id.* (suggesting that "sustainability" has not been correctly defined).

112. *See* Preservation North Carolina, http://www.presnc.org (organization that protects historic properties in North Carolina selling bumper stickers that say "Historic Preservation: The Ultimate Recycling"); *see also* Donovan Rypkema, *Economics, Sustainability & Historic Preservation*, PRESERVATION NORTH CAROLINA, http://www.presnc.org/Features/Economics-Sustainability-Historic-Preservation [hereinafter Rypkema, *Economics, Sustainability & Historic Preservation*] (discussing the environmental impact of reusing old buildings); Jay Fulkerson, *Historic Preservation: The Ultimate Recycling*, http://pennhurst.890m.com/environmentalBenefits.html (last visited Apr. 22, 2009). Fulkerson reported:

relevance to "environmentalism" and "sustainability" goes well beyond mere recycling, having taken root in the 1950s, if not earlier, when the seeds of aesthetic-based preservation began to take hold.[113] As the *Berman v. Parker*[114] Court (and later, the *Penn Central* Court[115]) recognized even before what might be considered the birth of modern environmentalism ushered in by Stone and his contemporaries, preservation is part of a greater sensitivity to the environment.[116] Integral to the social and economic responsibilities inherent to true sustainability,[117] preservation is a process of "enhancing—or perhaps developing for the first time—the quality of life for people."[118] Examining the full extent of the relationship between preservation and the environment specifically and preservation and sustainability generally could fill volumes and is merely surveyed here.

A. Preservation as Part of Our Social Responsibility:

1. Preservation and the Psychology of the Built Environment

The built environment is an integral and inseparable part of the larger environment. It is the place where humanity meets nature, where the civilized and

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> The construction industry accounts for 11% of total energy consumption in the United States and 85% of that energy usage is in transportation of new materials to the site. Building construction consumes 40% of the raw materials annually entering the global market. Restoration of an existing structure does not require anything near the quantity of raw and finished material or transportation and construction energy consumed in the creation of new structures. Concurrently, restoration preserves the energy and cultural heritage embodied in the existing structure. New construction is highly waste generative, particularly if coupled with a demolition. Nearly twenty-five percent of solid waste in the United States is detritus from new construction and demolition. Demolition of historic structures is doubly irresponsible from an environmental perspective; in addition to forfeiting energy and material already embodied in the structure and adding to the burden of our landfills, the resources necessary for demolition are considerable given the quality and strength of many older structures.

Id. (citations omitted).

113. *See, e.g.*, Berman v. Parker, 348 U.S. 26, 33 (1954) (recognizing aesthetic values as within the province of the legislature's consideration).

114. 348 U.S. 26. Though *Berman* is widely cited as upholding aesthetically based regulation, the language of the case indicates the court's consideration of preservation within the context of the community environment: "The concept of public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean . . . ." *Id.* at 33 (citations omitted); *see also infra* note 299 (discussing aesthetic rationales for preservation and *Berman* within that context).

115. 438 U.S. at 108 (quoting Frank B. Gilbert, Introduction, *Precedents for the Future*, 36 LAW & CONTEMP. PROBS. 311, 312 (1971) ("Historic conservation is but one aspect of the much larger problem, basically an environmental one . . . .")).

116. *See Berman*, 348 U.S. at 33 (finding that Congress can decide that the environment of the community "should be beautiful as well as sanitary").

117. Rypkema, *Historic Preservation*, *supra* note 110.

118. Gilbert, *supra* note 28.

the wild commingle. The National Environmental Policy Act (NEPA)[119] recognizes the built environment's place in the context of the greater environment partly by requiring environmental impact analyses to consider impacts on historic and cultural fabric.[120] A number of state environmental protection acts have followed NEPA's lead in this respect.[121]

The fact that a society builds makes its world *habitable*; what a society builds—and what it preserves—makes its world *home*, giving a foothold in space and time. "Home," as a sense and pride of place, is captured in the concept of the *genius loci*: "the cluster of associations identified with a place: a pervading spirit."[122] The historic resources of a society's built environment define the *genius loci* and as such profoundly affect us psychologically, biologically, and culturally.[123]

Those resources define the "distinctive character or atmosphere of a place with reference to the impression [they] make[] on the mind."[124] They have a psychological import that makes them more than mere props. As part of the built environment, they center the society of which they are a part, providing "images of reconciled conflict and integration that strive to make us . . . at home in the world."[125] When historic resources are destroyed, society loses a vital sense of itself.[126] Their endurance through time in the built environment instills life with qualities which "allow for man's sense of belonging and participation."[127] As the discussion of Professor Rand's theories suggests,[128] historic properties are integral

119. 42 U.S.C. §§ 4321-4370(d) (2006).

120. *Id.* § 4331(b)(4).

121. *See, e.g.*, California Environmental Quality Act (CEQA), CAL. PUB. RES. CODE §§ 21000-21006 (West 2008); New York State Environmental Quality Review Act (SEQRA), N.Y. ENVTL. CONSERV. LAW §§ 8-0101-8-0117 (McKinney 2008).

122. Nivala, *Saving the Spirit of Our Places*, *supra* note 14, at 1 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (Unabridged, 1986)).

123. *Id.* at 7-12. Professor Nivala asserted there is a biological, psychological, and cultural response to the built environment, of which historic structures are a core defining part. *Id.* at 7. "If a structure evokes a pleasurable response" within one who experiences it, Nivala suggested, "it is fair to assume it confers some biological advantage." *Id.* at 9. Admittedly, that advantage likely remains indirect and is not consciously perceived by the person experiencing it. *Id.* The capacity and predilection of humans to conceive of and organize environmental phenomena into a coherent pattern of image and meaning distinguishes them from other animals. *Id.* Humans "characterize [their built] environment 'into complicated symbol patterns in order to cope with the world and to come to terms with it.'" *Id.* (quoting Timothy O'Riordan, *Attitudes, Behavior and Environmental Policy Issues*, *in* 1 HUMAN BEHAVIOR AND ENVIRONMENT, ADVANCES IN THEORY AND RESEARCH 5 (1976)). This characterization allows people to orient themselves in space and time. *Id.* Nivala asserted "the structures of our built environment," as cultural constructs of imagination projected onto three dimensional form, "also carry cultural genetic signals." *Id.* at 10. "Those constructs may be individual or they may be social [and] . . . are a key to understanding ourselves and our position in our culture." *Id.*

124. *Id.* at 1 (quoting RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1987)).

125. Colin St. John Wilson, *The Natural Imagination: An Essay on the Experience of Architecture*, ARCHITECTURAL REV., Jan. 1989, at 66.

126. Nivala, *Saving the Spirit of Our Places*, *supra* note 14, at 9.

127. NORBERG-SCHULZ, *supra* note 27, at 181.

128. *See infra* notes 290-314 and accompanying text (presenting and analyzing the work of Professor

actors in the provision of security, stability, and reassurance in the face of an ever-changing environment.[129] Their preservation, then, rises to the level of environmental ethics, and is a value which W. Brown Morton maintained "should be . . . learned from earliest childhood taught at all levels of our educational system and reinforced by sound government policy."[130]

Preservation's relevance to social responsibility is more than psychological. The United States continues to face a shortage of affordable housing.[131] Most proposed solutions include some sort of "renewal," and are expensive, often destructive, and nearly as often succeed in segregating communities by race and economic status.[132] Though preservation is the most obvious solution—use of the historic preservation tax credit has produced almost 250,000 housing units[133]—it is rarely on the decision-maker's radar.[134] Houses built before 1950 are disproportionately home to people of lower incomes.[135] Preservation conserves needed housing stock, simultaneously retaining the diversity and cultural richness defining the communities of which they are a part without displacing people who can least afford to move.[136]

Rand).

129. Nivala, *Saving the Spirit of Our Places*, *supra* note 14, at 5.

130. W. Brown Morton III, *What Do We Preserve and Why*, *in* THE AMERICAN MOSAIC: PRESERVING A NATION'S HERITAGE 145, 176 (Robert E. Stipe & Antoinette J. Lee eds., 1997).

131. *See* Rypkema, *Economics, Sustainability & Historic Preservation*, *supra* note 112 (stating that there is "an affordable housing crisis").

132. *Id.* at 10.

133. David Listokin, Barbara Listokin & Michael Lahr, *The Contributions of Historic Preservation to Housing and Economic Development*, 9 HOUSING POL'Y DEBATE 431, 445-46 (1998), *available at* http://www.mi.vt.edu/data/files/hpd%209(3)/hpd%209(3)_listokin.pdf.

134. *Id.*

135. *Id.* at 464.

136. *Id.* at 468.

2. The Generational Equity Factor

Like natural resources, historic resources are finite.[137] The cultural investment over time from which historical resources derive at least part of their meaning cannot be replaced no matter how truthful the replica. As the nineteenth century preservationist and critic John Ruskin eloquently phrased it, "There is a sanctity in a good man's house which cannot be renewed in every tenement that rises upon its ruins . . . ."[138]

As a matter of generational equity, anything destroyed will be unavailable to future generations. Given this role, Professor Nivala suggested a moral imperative for preservation.[139] If the historic resources created by a given generation speak to its relationship with the world past and present,[140] succeeding generations need not "agree with statements made by the [resources], but [do] have an obligation to preserve what was said, both as a basis for present debate and as a record for those in the future."[141] While Nivala asserted a moral imperative to preserve for future generations, Ruskin argued for the moral imperative to preserve in the interest of both future *and past* generations.[142] Unifying the generational equity claims—both forward- and backward-looking—Ruskin elevated historic resources from the realm of present control: "They are not ours," he said. "They belong partly to those who built them, and partly to all the generations of mankind who are to follow us."[143]

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137. *See* Robinson, *supra* note 29, at 521-22 and accompanying text (noting that the Supreme Court has emphasized the "cultural significance" of these historic structures, and stressed that their protection should be looked upon with greater emphasis).

138. RUSKIN, *supra* note 21, at 325.

139. Nivala, *Saving the Spirit of Our Places*, *supra* note 14, at 4.

140. *Id.* at 13-14. Historic structures "'always tell several stories; they tell us about their own making, they tell us about the historical circumstances under which they were made, and they . . . also reveal truth.'" Nivala, *Saving the Spirit of Our Places*, *supra* note 14, at 13-14 (quoting CHRISTIAN NORBERG-SCHULZ, GENIUS LOCI: TOWARDS A PHENOMENOLOGY OF ARCHITECTURE 185 (1980)). "But to be read, they must be seen. To be seen, they must be preserved. This is a question of preserving structures significant to 'our individual and social needs for stability and reassurance in the face of environmental changes that we perceive as threats to these values.'" *Id.* at 14 (quoting JOHN J. COSTONIS, ICONS AND ALIENS: LAW AESTHETICS, AND ENVIRONMENTAL CHANGE, at xv (1989)).

141. Nivala, *Saving the Spirit of Our Places*, *supra* note 14, at 4.

142. *See generally* RUSKIN, *supra* note 21, at 320-61 (discussing architecture and memory).

> For, indeed, the greatest glory of a building is not in its stones, not in its gold. Its glory is in its Age, and in that deep sense of voicefulness, of stern watching, of mysterious sympathy, nay, even of approval or condemnation, which we feel in walls that have long been washed by the passing waves of humanity.

Id. at 339.

143. *Id.* at 358.

> What we have ourselves built, we are at liberty to throw down; but what other men gave their strength and wealth and life to accomplish, their right over does not pass away with their death; still less is the right to the use of what they have left vested in us only. It belongs to all their successors. It may hereafter be a subject of sorrow, or a cause of injury, to millions, that we have consulted our present convenience by casting down such buildings as we choose to dispense with. That sorrow, that loss, we have no right to inflict.

B. Preservation as Part of Our Ecological Responsibility

Concerns about greenhouse gas emissions often focus on the pollution created by a car-dependent culture; however, according to the Environmental Protection Agency (EPA), transportation accounts for just twenty-seven percent of the nation's greenhouse gas emissions, while forty-eight percent is produced by the construction and operation of buildings.[144] Indeed, destruction of historic resources, buildings in particular, results in a multiple hit on the environment.[145] According to the Advisory Council on Historic Preservation, approximately "80 billion BTUs of energy are embodied in a typical 50,000-square-foot commercial building . . . the equivalent of 640,000 gallons of gasoline."[146] Demolition wastes this energy and, equally problematic, creates enough landfill material to fill a train a quarter-mile long.[147] The construction of a new building of equal size will release "about the same amount of carbon into the atmosphere as driving a car 2.8 million miles."[148] Moreover, given the fact many historic structures already incorporate environmentally-friendly design elements[149] and can also be retrofitted with green features, it is simply not possible for a new building, no matter how efficient, to recoup the environmental cost of demolition and new construction.[150]

C. Preservation as Part of Our Economic Responsibility

Preservation is key to the economic health of communities and nations.[151] Its role in the economic revitalization of urban and rural areas is well documented.[152]

Id. at 358-59.

144. Richard Moe, President, Nat'l Trust for Historic Preservation, Sustainable Stewardship, Historic Preservation's Essential Role in Fighting Climate Change (Dec. 13, 2007), *available at* http://press.nationaltrust.org/content/view/336/162/.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

> Many historic buildings have thick, solid walls, resulting in greater thermal mass and reducing the amount of energy needed for heating and cooling. Buildings designed before the widespread use of electricity feature transoms, high ceilings, and large windows for natural light and ventilation, as well as shaded porches and other features to reduce solar gain. Architects and builders paid close attention to siting and landscaping as tools for maximizing sun exposure during the winter months and minimizing it during warmer months. Unlike their more recent counterparts that celebrate the concept of planned obsolescence, most historic and many other older buildings were built to last. Their durability gives them almost unlimited "renewability"—a fact that underscores the folly of wasting them instead of recognizing them as valuable, sustainable assets.

Moe, *supra* note 144.

150. *Id.* "Recent research indicates that even if 40% of the materials are recycled, it takes approximately 65 years for a green, energy-efficient new office building to recover the energy lost in demolishing an existing building." *Id.*

151. Rypkema, *Historic Preservation*, *supra* note 110. Even the World Bank recognized the relevance of preservation to economic responsibility, albeit in the cultural patrimony context: "the key economic reason for the cultural patrimony case is that a vast body of valuable assets, for which sunk

Preservation is up to twenty percent more labor intensive than new construction, which is materials intensive, and provides good, well-paying jobs particularly to those without advanced education.[153] This labor intensity has an immediate impact on local economies in two ways. First, a greater percentage of job costs are expended on local workers rather than materials.[154] Those workers then spend those earnings in their own communities.[155] Second, the materials preservation projects require are generally of the type procured locally, rather than the large-scale materials procured from across the nation or the globe.[156]

Preservation has important global implications. An increasing world population will place greater demands on raw materials and at the same time provide a surplus of labor.[157] The labor intensity and materials economy of preservation activity is an obvious answer to both problems.[158] Additionally, Donovan Rypkema asserted that to be economically competitive in a globalized world, a community must position itself to compete not just with other cities in the region, but with other cities on the planet.[159] A large measure of that competitiveness will be based on the quality of life the local community provides, and, as discussed above, the built heritage is a major component in creating quality of life.[160]

While sustainability is a rallying cry across the nation, there can be no meaningfully sustainable behavior—however sustainability is defined—without a central role for historic preservation.[161] Preservation, and the spirit of remembrance, respect, and reuse that defines it, is an essential element in a socially, ecologically, and economically responsible future. The relevance of a sustainable built environment to human destiny is no less significant than that of a healthy ecosystem. And thus, a return to Professor Stone's proposal.

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costs have already been paid by prior generations, is available. It is a waste to overlook such assets." *Id.*

152. *See, e.g.*, DONOVAN D. RYPKEMA, THE ECONOMICS OF HISTORIC PRESERVATION: A COMMUNITY LEADER'S GUIDE (2008) [hereinafter RYPKEMA, ECONOMICS OF HISTORIC PRESERVATION] (discussing the importance of historic preservation to economic revitalization and stability).

153. Rypkema, *Historic Preservation*, *supra* note 110.

154. *Id.*

155. *Id.*

156. *Id.*

157. *See id.* (discussing how the effects of a population's mass production of solid waste and expansive suburban sprawl).

158. *See id.* (summarizing the positive effects of the labor intensity of historic preservation "as part of the economic component of sustainable development").

159. Rypkema, *Economics, Sustainability & Historic Preservation*, *supra* note 112. The Inter American Development Bank relayed, "As the international experience has demonstrated, the protection of cultural heritage is important, especially in the context of the globalization phenomena, as an instrument to promote sustainable development strongly based on local traditions and community resources." *Id.*

160. *Id.*

161. *Id.*

III. PRESERVING THE GIFTS OF HISTORY'S BOUNTY: AN ARGUMENT FOR RIGHTS-HOLDER STATUS FOR HISTORIC PROPERTY

A. The Proposal: Reluctance and Promise

A universal set of rights and judicially enforced remedies afforded to historic resources would prove as equally promising for historic resources as Stone thought they would for natural resources. These rights would, in essence, elevate the preservation imperative above the uneven and incomplete line of current protections. Historic property would, by default, have value and legitimacy as a cultural object. The property would have substantive rights that are, in effect, the gathering of the public interest past,[162] present, and future.[163] In the absence or inadequacy of established protection, the resource-as-cultural relic speaks for—and protects—itself. The preservation ethic persists, its virtues and its fruits, even in times when and places where the political and popular will falters.

B. The Meaning and Benefit of Rights for Historic Property

The benefits afforded to historic resources by rights-holder status would parallel those that Stone asserted would run to natural objects as rights-holders.[164] First, historic property would be presumptively significant, requiring neither nomination nor acquiescence by a third party. Under the current system, such significance must be proven though a lengthy process not immune from political forces. This process must often be initiated from the ground up. Further, under the current system, such nomination can, at some point and to varying degrees, be railroaded by the property owner or other forces with vested interests.[165] As an aside, even if the property owner consents to the nomination, in the case of the National and most state registers, he has bound himself to no obligations with respect to the preservation of the historic property under his dominion[166]—obligations that would necessarily run to rights-holding entities.

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162. *See generally* RUSKIN, *supra* note 21 (discussing a present obligation to the past fulfilled by restoring and maintaining historic property); *see also supra* notes 142-143 and accompanying text (discussing Ruskin's assertion that that the destruction of historic structures morally violates an enduring ownership interest vested in a previous generation, a philosophical and figurative, if not legal ownership interest).

163. This notion that rights-holder status for historic structures gathers the interest of future generations parallels Stone's argument that similar status for natural objects would do the same. Stone, *Should Trees Have Standing?*, *supra* note 1, at 475; *see also supra* text accompanying note 90 (discussing Stone's assertion that the natural object's rights-holder status would, through its guardian, incorporate the interest of future generations).

164. *See* Stone, *Should Trees Have Standing?*, *supra* note 1, at 457-64; *see also supra* text accompanying notes 59-71 (discussing the benefits Stone perceives inferred upon rights-holding entities).

165. Stone, *Should Trees Have Standing?*, *supra* note 1, at 198.

166. Nivala, *Saving the Spirit of Our Places*, *supra* note 14, at 18 (stating that owner action/inaction is the force that most often imperils historic resources).

Second, historic resources, as legitimate rights-holders, could initiate court proceedings on their own behalf and in their own interest.[167] If no one is willing or able to bring suit to protect a property (because they lack standing, lack knowledge or understanding of the potential loss,[168] doubt the sufficiency of the potential remedy,[169] or harbor interests running contrary to the resource's protection[170]), then the property's interests need not go unrepresented. Third, the resource's right to be whole—perhaps best articulated as an intrinsic value emerging from generational equity concerns[171]—would be factored into decisions regarding its future. Including this often unquantified value in cost-benefit and cost-cost analysis mandates a more thoughtful consideration of alternatives to demolition.[172] At the very least, it ensures damage awards more accurately reflect the true loss by incorporating harm to present and future generations. Lastly, the damage awards could benefit the resource itself by being used to repair or recreate the resource (paid to its estate, perhaps) or added to a general fund to benefit similarly situated property.[173]

The expansion of benefits that D'Amato and Chopra postulate is conferred by Stone's rights-holder status and could conceivably run with equal effect to historic property.[174] Historic resources, like whales, could benefit from a "flexible and open-ended"[175] competence to undertake activities for their own benefit, including

167. Stone suggested a similar benefit would be awarded to natural objects as rights-holders. Stone, *Should Trees Have Standing?*, *supra* note 1, at 458; *see also supra* text accompanying notes 59-64 (discussing how Stone posited natural objects as rights-holders could initiate court proceedings on their own behalf and in their own interest).

168. In September 2007, a circa 1799 hotel, the centerpiece of the small but sprawl-subsumed village of Morgantown, Pennsylvania, along with four other adjacent historic buildings dating from 1750 to 1813, was torn down to construct a new Rite Aid and its attendant parking lot. All the structures were part of the historic district. Preservation Pennsylvania noted the local population's lack of concern—and presumably, lack of understanding—of the demolition's significance, reporting that some locals, whose chief complaint was about the hotel's food service, were glad to see it go. Margaret Foster, *Historic Block to Fall for Rite Aid*, PRESERVATION ONLINE, Nov. 6, 2007, *available at* http://www.preservationnation.org/magazine/2007/todays-news-2007/historic-block-to-fall-for.html.

169. *See supra* text accompanying notes 64-67 (suggesting that some plaintiffs may not consider the non-monetary benefits when calculating the cost-benefit analysis of litigation).

170. For example, they may wish to demolish a historic structure and thus oppose preservation ordinances generally.

171. *See supra* notes 162-163 (describing the importance of a built and collective heritage).

172. Cost-benefit analysis related to natural object conservation is similarly affected by a consideration of the value intrinsic to natural objects. *See* Cross, *supra* note 67, at 305.

173. This comports with what Stone proposed for natural objects. *See* Stone, *Should Trees Have Standing?*, *supra* note 1, at 481; *see also supra* text accompanying notes 92-93 (proposing that damage awards be placed in a fund to preserve the actual damaged natural object, or, where that is not possible, that they be placed in a fund to preserve natural objects generally).

174. *See* D'Amato & Chopra, *supra* note 72, at 50-53; *see also supra* text accompanying notes 72-83 (discussing D'Amato and Chopra's interpretation of what Stone's right holder proposal would mean for whale conservation).

175. Stone, *Should Trees Have Standing?*, *supra* note 1, at 488; *see also supra* text accompanying notes 72-75 (citing a flexible and open-ended competence as, by way of example, the quality that gives corporations the right to undertake activities not specifically listed in their charters).

the ability to contract for their own maintenance.[176] A court may be more deferential to the resource-as-plaintiff than as a third party beneficiary of another's rights.[177] *Okinawa Dugong v. Gates*,[178] a decision that might well have verified D'Amato and Chopra's prediction in the animal-as-plaintiff scenario, is additionally significant here because it was within a historic preservation law context.[179] Though the Northern District of California Court followed the Ninth Circuit's lead in declining to afford standing to an animal,[180] what is telling is the clear recognition of the importance of placing the entity itself on the left side of the "v."

Additionally, there is an increased likelihood that a body of jurisprudence relating to historic resources and their protection would develop if those resources had substantive rights.[181] Finally, rights-holder status for historic resources would incorporate moral justifications for preservation in such a way as to inform current law and shape future law.[182] For example, courts may translate moral justifications for preservation into a legal right by finding a claim to be free from damage to have existed in the common law based on the customary practice of historic preservation.[183]

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176. *See* D'Amato & Chopra, *supra* note 72, at 51; *see also supra* text accompanying notes 73-75 (discussing the benefits a flexible and open-ended competence would afford to whales).

177. Such a deferential treatment for structures as rights-holders comports with a similar treatment D'Amato and Chopra postulate rights-holder status would afford whales. D'Amato & Chopra, *supra* note 72, at 52. *See also supra* text accompanying notes 81-82 (discussing judicial deferential treatment of whales as rights-holders).

178. 543 F. Supp. 2d 1082 (N.D. Cal. 2008). The Okinawa dugong is a species of marine mammal related to the manatee. *Id.* at 1083. It is listed as a protected "natural monument" on the Japanese Register of Cultural Properties. *Id.* at 1084. This Register is akin to the National Register of Historic Places in the United States. *Id.* at 1086.

179. Specifically, the claim arose under the National Historic Preservation Act of 1966, 16 U.S.C. §§ 470a–470x-6 (2006) (as amended in 1976, 1980, 1992, and 2000).

180. *Okinawa*, 543 F. Supp. 2d at 1093. The *Okinawa* court referenced the Ninth Circuit decision in *Cetacean Community v. Bush*, 386 F.3d 1169, 1178 (9th Cir. 2004) (holding that although Congress is not prevented from authorizing suits in the name of an animal, it did not in fact do so under the Administrative Procedure Act). The *Okinawa* court reiterated that standing under the Administrative Procedure Act, 5 U.S.C. §§ 551(2), 701(b)(2) (2006), is conferred on "persons" statutorily defined as "an individual, partnership, corporation, association, or public or private organization other than an agency." *Okinawa*, 543 F. Supp. 2d at 1093. The *Okinawa* court, like the Ninth Circuit court in *Cetacean*, declined to expand this basic definition to include animals. *Id.*

181. Similarly, D'Amato and Chopra suggested a body of applicable jurisprudence is more apt to develop if whales were themselves rights-holders rather than merely a third party beneficiary of someone else's rights. D'Amato & Chopra, *supra* note 72, at 52.

182. D'Amato and Chopra suggested the same would apply for whales. *Id.* at 51-52; *see also supra* text accompanying notes 77-79 (providing D'Amato and Chopra's example of how the notion of moral rights may inform existing law and shape future law).

183. This theory tracks D'Amato and Chopra, who suggested that courts translated moral justifications into legal rights for battered wives by finding such rights to have always been entrenched in the common law. D'Amato & Chopra, *supra* note 72, at 52. "[T]he court accepted the powerful moral claim of right and recognized it as somehow subsisting the common law all along, even though legal precedent was to the contrary." *Id.* D'Amato and Chopra proposed that courts could similarly find legal rights for whales to exist in the customary practice of their protection. *Id.*

C. Identifying the "Historic"

There is a threshold concern in giving rights to historic resources with which Stone presumably did not have to deal: to what entities would rights be afforded? While there might be little debate about what is "natural," what is "historic" needs more consideration.

Currently, registers at the state, local, and national level are used to identify historic resources.[184] The National Register of Historic Places is the official list of historic resources at the national level, and includes resources of national, state, or local significance.[185] These resources may include districts, sites, buildings, structures, or other objects significant in history, archeology, architecture, engineering, or culture.[186] Generally, only properties over fifty years of age are considered eligible.[187] While any individual can nominate a property to the National Register, the nomination must be approved by both the state historic preservation office (SHPO) and ultimately by the Secretary of the Interior.[188]

Many states also have their own registers of historic places, which may directly track the National Register or may essentially be inclusive of it.[189] Municipalities can exercise their power under a state's enabling statute to either

184. JULIA H. MILLER, A LAYPERSON'S GUIDE TO HISTORIC PRESERVATION LAW: A SURVEY OF FEDERAL, STATE, AND LOCAL LAWS GOVERNING HISTORIC RESOURCE PROTECTION 1-2 (2004).

185. *Id.* at 2.

186. *Id.* National Historic Landmark properties are a special subset of National Register properties and include resources of exceptional national significance. *Id.*; *see also* 36 C.F.R. § 60.4 (2008) (establishing criteria for designation as a National Historic Landmark).

187. Properties under fifty years of age must be of exceptional significance. Nat'l Park Serv., The National Register of Historic Places, Listing a Property: Some Frequently Asked Questions, http://www.nps.gov/history/nr/listing.htm (last visited May 14, 2009).

188. Joe P. Yeager, *Federal Preservation Law: Sites, Structures & Objects*, 8 WIDENER L. SYMP. J. 383, 393 (2002). Currently there are over 80,000 properties listed on the National Register. Nat'l Park Serv., The National Register of Historic Place, National Register Research, http://www.nps.gov/nr/research/index.htm (last visited May 14, 2009). Approximately 2500 of those are designated National Historic Landmarks. Nat'l Park Serv., National Historic Landmarks Program, http://www.nps.gov/history/nhl (last visited May 14, 2009). Among sites listed as National Historic Landmarks are the East Broad Top Railroad in Huntington County, Pennsylvania, and the Academy of Music in Philadelphia, Pennsylvania. *Id.* A searchable database of all National Landmarks is available at http://tps.cr.nps.gov/nhl/ (last visited May 13, 2009).

189. MILLER, *supra* note 184, at 2. Contrary to popular belief, designation as a National Historic Landmark or to the National Register of Historic Places is purely honorific and, with a few minor exceptions, bears no protective quality other than against federal or federally-funded action. Nat'l Park Serv., U.S. Department of the Interior, Working on the Past in Local Historic Districts § a, http://www.nps.gov/history/hps/workingonthepast/intro+sectiona.htm (last visited Apr. 20, 2009) [hereinafter Working on the Past § a]. The National Park Service, which administers the National Register, stated, "Under federal law, owners of private property are free to maintain, manage, or dispose of their property as they choose, provided that there is no Federal involvement." *Id.* Hence, Register properties like the 1805 John Wolfe Kemp House outside of Albany, New York, are not saved from the bulldozer when developers porting a multi-million-dollar development offer come calling. Elizabeth Benjamin, *Making It All Register: What Does a Listing on the National Register of Historic Places Really Mean?*, PRESERVATION ONLINE, Sept 26, 2003, http://www.preservationnation.org/magazine/2008/story-of-the-week/whats-in-a-name.html.

designate the site a historic landmark or include it as part of a larger historic district.[190] Generally, the administration of landmarks and historic districts is entrusted to a local administrative agency such as a landmarks commission, a historic district commission, or an architectural review board.[191]

Designations to registers, as landmarks, or historic sites are invariably made pursuant to findings of merit or "significance."[192] While nomination to the National Register is largely honorific,[193] its significance criteria often serve as the basis for state and local registers[194]—where the most substantive protection may be found.[195] National Register significance criteria include resources that (a) "are associated with events that have made a significant contribution to the broad patterns of our history;" (b) "are associated with the lives of persons significant in our past;" (c) "embody distinctive characteristics of a type, period . . .;" or (d) "have yielded, or may be likely to yield, information important to prehistory or history."[196]

The register system that is the backbone of preservation practice has at least two troublesome limitations. First, the "default setting" is non-eligible-unless-proven-otherwise. The system requires that someone both recognize a resource as significant and take the initiative to prove that significance through what can be a lengthy and time-consuming process. Additionally, a resource generally cannot be listed in the National Register or a state register over the property owner's objection or included in a historic district if a majority of property owners in the district object.[197] The result is that register nomination—and therefore preservation—is ultimately ad hoc; there is no overarching plan or logic to what is saved as part of the historical record.[198] Where a particular interest group exists to champion a preservation cause, a resource may be listed on the appropriate register

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190. MILLER, *supra* note 184, at 11. For example, Cincinnati, Ohio, named the Harriet Beecher Stowe House a local historic landmark. City of Cincinnati, Historic District and Landmark Guidelines, http://www.cincinnati-oh.gov/cdap/pages/-3668-/ (last visited Apr. 20, 2009). It also named the area surrounding the Hyde Park Observatory local historic district. *Id.* Local historic preservation ordinances are the most common—and seemingly most effective—way to identify and protect historic resources. Robinson, *supra* note 29, at 519. Forms of historic districting, like zoning laws, regulate all property within a given area, whereas landmark designations only apply to a specific parcel. *Penn Cent.*, 438 U.S. at 132.

191. Nat'l Park Serv., U.S. Department of the Interior, Working on the Past in Local Historic Districts § b, *available at* http://www.nps.gov/history/hps/workingonthepast/sectionb.htm (last visited Feb. 20, 2009) [hereinafter Working on the Past § b].

192. MILLER, *supra* note 184, at 2 ("The National Register includes districts, sites, buildings, structures, and other objects that are significant in American history, architecture, archeology, engineering, and culture. It includes not just nationally significant resources, but also those having state or local significance.").

193. Working on the Past § a, *supra* note 189.

194. MILLER, *supra* note 184, at 2.

195. *Id.* at 8.

196. 36 C.F.R. § 60.4 (2008).

197. *Id.* § 60.10(d).

198. Michael A. Tomlan, *Closing Comments: Tying it All Together*, *in* PRESERVATION OF WHAT, FOR WHOM: A CRITICAL LOOK AT HISTORICAL SIGNIFICANCE 203, 206-07 (Michael A. Tomlan ed., 1998).

and afforded some protection. If a group is disenfranchised, however, the chances for the same are understandably reduced.

The second problem with the register system is that while the criteria language is broad and inclusive, judgments about whether or not those criteria are met may not be. In part, this is because the definition of "significance" changes over time.[199] What one generation of decision-makers determines does not meet significance criteria might be highly significant to the next.[200] According to some, however, there are also "silent criteria" at work—political, status, end economic considerations that "pok[e], prod[], stretch[], and distort[]"[201] significance evaluations. These silent criteria stand to weaken the integrity of the system by creating registers that may exclude resources meriting protection and include those that do not.[202]

A solution to both problems rests on a "thorough and repeated questioning of the property itself and all the information at our disposal," including, foremost, a consideration of the forces at play—both those above board and behind the scenes—at any given time counseling for demolition or preservation.[203] Yet in order for this sort of review to take place, the default for register protection cannot be non-eligibility. An unprotected resource may very well be a demolished resource, therefore rendering the sort of "thorough and repeated questioning" necessary moot. The opposite default, where any property is considered significant unless proven otherwise, shifts the burden to the acting party—the would-be demolisher—to demonstrate the need for and propriety of his intended action. Additionally, it allows the proposed action to be considered without the looming threat of impending loss.

D. Guardians for Historic Property

For the kind of "thorough and repeated questioning" advocated above to take place, there must be a voice that speaks for the historic resource. Stone's guardian arrangement could be employed with equal effect for historic property.[204] In some respects, historic properties protected by easements already utilize a guardian

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199. *Cf.* Antoinette J. Lee, *The Social and Ethnic Dimensions of Historic Preservation*, *in* A RICHER HERITAGE: HISTORIC PRESERVATION IN THE TWENTY-FIRST CENTURY 385, 397 (Robert E. Stipe ed., 2003) (explaining that different groups consider different historic sites to be of greater importance based on cultural values).

200. *Id.*

201. Suzanne S. Pickens, *The Silent Criteria: Misuse and Abuse of the National Register*, *in* PRESERVATION OF WHAT, FOR WHOM: A CRITICAL LOOK AT HISTORICAL SIGNIFICANCE, *supra* note 198, at 193, 193-94.

202. *See generally id.* at 196-98 (discussing negative impact silent criteria had on preservation status of property or arguable eligibility).

203. Tomlan, *supra* note 198, at 205-06.

204. *See* Stone, *Should Trees Have Standing?*, *supra* note 1, at 464 (arguing that friends of natural resources should be able to apply to courts to gain guardianship over the resource); *see also supra* notes 84-88 and accompanying text (discussing how Stone envisions such a guardianship for natural objects would work).

arrangement of sorts. The preservation easement,[205] a conveyance by the property owner to a preservation organization or government entity whereby the owner voluntarily restricts his ability to alter or demolish his property, requires the easement holder to regularly inspect the protected property and bring suit to enforce the provisions of the agreement if necessary.[206] However, the easement is usually a voluntary instrument[207] and ignores the simple fact that more often than not it is the owner of a historic resource who, by action or neglect, is responsible for endangering it in the first place.[208] Under the proposed system, once a property achieved historic resource status, it would automatically be afforded a guardian to protect the resource's interest whether or not they were consonant with the owner's.

The guardian would, of course, need to be carefully chosen. Ideally, it would be a group of preservation experts with local, state, and national interests, such that sites that are nationally important but locally taken for granted[209] (or visa versa) are appropriately represented. While the guardian would clearly need to be independent of the owner, their relationship should be understood as one of collaboration to the extent it can be. The guardian would speak as the voice of the resource, addressing issues of its care and maintenance. When an owner wished to demolish or change a resource, the guardian would ensure that the social, ecological, and economic implications are considered. Note that the guardian cannot guarantee that a historic resource would not be demolished or degraded—

205. Preservation easements may be for a specified period of years or in perpetuity. Nat'l Trust for Historic Pres., Legal Advocacy & Tools, Preservation Easements: An Important Legal Tool for the Preservation of Historic Places, http://www.preservationnation.org/resources/legal-resources/easements/ (last visited Feb. 11, 2009) [hereinafter Preservation Easements].

206. *See generally* Robinson, *supra* note 29, at 528 (discussing preservation easements).

207. The incentive for easement grantors is usually a deduction from federal income tax for the value of the easement. The value of the easement is the decrease in the fair market value of the property upon which it is placed. *See generally* Treas. Reg. § 1.170-1(c) (2008) (explaining that value of deduction for charitable contribution of property is determined by market value of property at time of donation). Provided the transfer qualifies as a charitable contribution under the relevant provisions of the Internal Revenue Code, see, for example, I.R.C. § 170(f)(3)(B)(iii) (2008) (providing an exception for "qualified conservation contributions"), the fair market value of the easement may be deducted from the property owner's federal income taxes. Preservation Easements, *supra* note 205. It should be noted that once a property is under the protections of local law, an easement benefiting it may have little or no market value, *see* Treas. Reg. § 1.170-1(e) (2008) (explaining that deduction is not allowed if "conditions and circumstances surrounding transfer" make is such that recipient "may not receive the beneficial enjoyment of the interest"), and a deduction may not be permitted, *id.* Heightened scrutiny by the IRS in the wake of several easement scandals reported in the *Washington Post* may deter would-be easement donors. *See generally* Nat'l Trust for Historic Pres., Resources, Legal Resources, Easements, Easement Reforms Enacted by Congress in 2006, http://www.preservationnation.org/resources/legal-resources/easements/easement-reforms.html (last visited Apr. 22, 2009) (noting "reforms to address questionable practices by some easement holding organizations and promoters, as highlighted in recent years by . . . the news media"); Nat'l Trust for Historic Pres., Resources, Legal Resources, Easements, New IRS Reporting Requirements for Easement-Holding Organizations http://www.preservationnation.org/resources/legal-resources/easements/IRS-990-Updates.html (last visited Feb. 11, 2009) (discussing new reporting requirements for easement-holding non-profits).

208. Nivala, *Saving the Spirit of Our Places*, *supra* note 14, at 18.

209. *See, e.g.*, Foster, *supra* note 168 (demonstrating local apathy to regionally-significant resources).

and nor should he, for obviously there will be instances where those actions will in fact best serve society's interest. However, his efforts would make sure it is only in situations where it indeed is in society's best interest that such action occurs.[210] In the event of a demolition or alteration, the guardian would make sure that the intrinsic value, both to current and future generations, would be realized as part of the transaction. The loss would be fairly compensated through a payment to the resource's estate or a general preservation trust fund established to preserve other historic resources.[211]

The likelihood that an owner and the guardian disagree would no doubt result in a body of jurisprudence developing in short order.[212] Perhaps much more importantly, it may also encourage the creation of an administrative remedy that avoids the time and expense of litigation. Rather than going to court, disputes could be referred to an independent authority composed of disinterested leaders representing a broad spectrum of affected parties, including developers, politicians, social justice organizations, business interests, and preservationists. While local interests could testify before it, ideally, the authority itself would be situated at a state or national level, insulating it from the developmental and political pressures and other shortcomings plaguing local review boards.[213] The authority would negotiate a legally binding Memorandum of Agreement between the parties and, in the event that such an agreement could not be reached, could issue its own legally binding decision.[214]

Putting aside the question as to whether or not current mechanisms of protection would be rendered entirely superfluous by a guardian-enforced set of rights for historic property, it is apparent such an arrangement would not resolve the shortcomings of existing preservation law so much as provide a backstop against unnecessary or thoughtless destruction. However, rights-holder status, as enforced through a guardian, would shift the burden onto the actor to prove that the resource cannot or should not be preserved. This is a major point. The lack of a comprehensive, long-term meaningful preservation strategy in the Unites States can be attributed to the simple fact that, as Jerry Rogers, a former Associate Director

210. Stone also felt it unnecessary and unworkable to have the guardian prevent environmental destruction in all cases, and instead envisioned that the guardian (through a trust fund) would ensure that destruction would be allowed only where and when social need clearly justified it. Stone, *Should Trees Have Standing?*, *supra* note 1, at 481.

211. Presumably, if it was decided that social need justified the destruction of the natural object, the intrinsic value of the object would be credited to the general trust fund to protect other similarly situated natural objects. *See* Stone, *Should Trees Have Standing?*, *supra* note 1, at 481 (arguing that trust fund concept could be used to preserve of monies for technological development to save damaged environmental resources). Such a system could be similarly employed for historic structures.

212. *See generally supra* text accompanying note 83 (arguing that granting moral rights to the environment would help to inform existing law and push its continued development).

213. *See infra* text accompanying notes 395-429 (discussing weaknesses in local level protections).

214. The Advisory Council on Historic Preservation (ACHP) fulfills a similar role in reviewing disputes between consulting parties over federal treatment of historic property through the § 106 process under the National Historic Preservation Act of 1966. However, the ACHP does not have the authority to issue its own legally-binding decision. *See infra* text accompanying notes 357-360 (discussing the ACHP and its role).

for Cultural Affairs of the National Park Service said, "When you're playing defense, you don't strategize very well."[215] Additionally, attributing rights-holder status to historic resources would force a realization of the true costs of the resource's loss—addressing an issue lamented by the *Penn Central* court thirty years ago.[216]

E. Valuating Resources and a National Preservation Trust Fund

These "true costs" incorporate the social, psychological, equitable, ecological, and economic value of the resource to present and future generations.[217] While quantifying such values may be difficult or even controversial, it is neither out of the realm of feasibility nor without precedent. After all, even human life has been converted to a dollar value for various purposes.[218] The EPA has, for instance, calculated the value of a statistical life (VSL) for cost-benefit analysis purposes.[219]

A seemingly logical starting point for valuing a historic artifact would be the cost to replicate it to the extent possible, using as much of the original fabric as practical.[220] However, in instances where a particularly important site is in a deteriorated state, replication cost may not provide a true valuation. Just as the concept of a decreased VSL for the elderly has been roundly criticized,[221] it is very likely older resources even in a diminished state may in fact be more valuable in a social capital context than newer ones in better condition.[222] In such cases,

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215. Robert E. Stipe, *The Next Twenty Years*, *in* THE AMERICAN MOSAIC, *supra* note 130, at 266, 291.

216. *See Penn Cent.*, 438 U.S. at 108 ("[I]n recent years, large numbers of historic structures, landmarks, and areas have been destroyed without adequate consideration of either the values represented therein or the possibility of preserving the destroyed properties for use in economically productive ways.").

217. *See supra* text accompanying notes 109-160 (discussing the social, psychological, equitable, ecological, and economic implications of preservation).

218. *See* CHRIS DOCKINS, KELLY MAGUIRE, NATHALIE SIMON & MELONIE SULLIVAN, U.S. ENVTL. PROT. AGENCY, NAT'L CTR. FOR ENVTL. ECONOMICS, VALUE OF STATISTICAL LIFE ANALYSIS AND ENVIRONMENTAL POLICY: A WHITE PAPER 18 (2004), *available at* http://yosemite.epa.gov/ee/epa/eermfile.nsf/vwAN/EE-0483-01.pdf/$File/EE-0483-01.pdf (estimating value of a statistical life, or VSL).

219. *See id.* at 4 (stating that the VSL in 2002 was $6.2 million).

220. Replication is in fact sometimes the remedy local preservation boards impose for demolitions in willful violation of ordinances. There are limitations to such replication; the washes of time cannot be imitated but not duplicated. *See* RUSKIN, *supra* note 21. For these reasons, among others, replication in some instances may not be preferable even to the extent it is possible.

221. *See, e.g.*, U.S. Envtl. Prot. Agency, Aging Initiative Public Listening Session (2003) (Statement Of Phil Coleman, Chair, Pennsylvania Chapter of the Sierra Club), *available at* http://www.epa.gov/aging/listening/2003/pitt_coleman.htm (discussing why a lower VSL for senior citizens is inappropriate).

222. However, the opposite may also be true; a newer structure may be more significant that an older one. Though its interpretation may change through time, significance is the paramount consideration irrespective of condition or age. *See generally* Elizabeth A. Lyon & Richard C. Cloues, *The Cultural and Historical Mosaic and the Concept of Significance*, *in* PRESERVATION OF WHAT, FOR WHOM: A CRITICAL LOOK AT HISTORICAL SIGNIFICANCE, *supra* note 198, at 37, 48 ("[H]istoric and cultural significance must continue to be the driving force in establishing the value and thereby the basis for the

replacement value ought to reflect the value to replicate a restored structure. While a restored-condition replacement valuation might be reserved for resources of National Landmark-caliber,[223] any and all valuations of replacement cost must also take into account the ecological cost in wasted embodied energy and other environmental costs inhering to demolition and construction of the new structure.

Whatever the intricacies of valuation, the end effect would be that historic resources are ascribed a "premium" that would be factored into decisions about their future. When the choice is made to degrade or demolish a historic resource, that premium would be paid into a general preservation trust fund. Where a demolition is a willful violation of an established preservation protection, the payment into the fund would be the full restored-state replacement cost (presumably sufficiently high to prevent the payment from being treated as merely an aspect of doing business by would-be midnight demolitionists). In cases where the demolition is agreed upon by the guardian, or, has been sanctioned by a court or other administrative body, a fixed premium could be paid to the fund. In cases where a resource is not demolished but degraded, the payment could track the severity of the degradation.

Monies in the general preservation trust fund would be used to benefit other historic resources. The effect of such a trust—well-funded and aptly managed—cannot be underestimated. Because so much historic property has been viewed as a marketable commodity whose principle purpose is to provide capital gains or income to its temporary owner, most of the historic resources that are sacrificed are lost because of two extreme economic situations.[224] In a bullish market, as soon as the value of a site exceeds the value of the resource on it, there is pressure to tear down the property and put the site to a more profitable use.[225] In a bearish market, alternatively, there is not enough economic activity to sustain the property.[226] While the "premium" discussed above would in part address the problem found in the bullish market by raising the value of the structure, the preservation trust fund could provide monies to address the problem found in a bearish market, assisting in revitalization of the resource and, consequently, the local economy of which it is a part.[227]

The fund would be managed as a public trust, though stringent use provisions must be incorporated to avoid its abuse by bureaucratic and political interests. While it is likely such a trust could not be funded in its entirety by the damage awards or premiums discussed above, those monies would nonetheless prove significant. Trust funds could be used to defray the costs guardians incur in the inspection and enforcement of the resource's rights. They could be used as a source of emergency loans to stabilize endangered property. They could be used to

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preservation of historic properties.").

223. *See supra* note 186 (discussing National Landmarks).

224. Robert Stipe, *Historic Preservation: The Process and The Actors*, *in* THE AMERICAN MOSAIC, *supra* note 130, at 2, 5.

225. *Id.*

226. *Id.*

227. *See supra* text accompanying notes 151-160 (discussing preservation's economic benefits).

assist property owners who cannot maintain their historic property because of economic hardship. They could also be used educationally, funding the interpretation of preserved resources to reflect in an increasingly respectful way "the diversity of human experience . . . mindful of its fragile traces on the land."[228]

IV. STEPPING STONES TO A CHANGE

Movement in the law and three other indicators—the emerging concepts of cultural patrimony, the public trust doctrine, and a growing and evolving understanding of our relationship to historic resources—suggest society is more willing to orient itself toward substantive rights for historic property. Cultural patrimony and the public trust doctrine, may, in fact, offer the legal stepping stones to arrive at substantive rights for historic property. Changes in our understanding of historic property's role in society and why it is we preserve may clear the path for this journey.

A. The Law

Novel though his approach is, Stone suggested that the law had, even prior to his article, been moving toward giving rights to natural objects.[229] The fact that Justice Douglas' dissenting opinion in *Sierra Club v. Morton*,[230] proclaiming that "[t]he voice of the inanimate object, therefore, should not be stilled,"[231] referenced Stone's article suggested that the latter's message may have been one that at least part of the world was ready to hear.[232] Stone cited a marked liberalization of standing requirements, broadening the universe of people able to bring suit against environmental degradation, as a reaction to the growing demand to afford natural objects benefits akin to (though not as satisfactory as) standing.[233] Additionally, he cited the passage of the National Environmental Policy Act[234] as part and parcel of

228. W. Brown Morton III, *What Do We Preserve and Why*, *in* THE AMERICAN MOSAIC, *supra* note 130, at 146, 177.

229. Stone, *Should Trees Have Standing?*, *supra* note 1, at 467.

230. 405 U.S. 727, 741 (1971) (Douglas, J., dissenting). *Sierra Club* was significant because it held that anyone demonstrating a particularized interested—aesthetic, recreational, or economic—could have standing in a natural resource matter. *Id.* at 739-40 (majority opinion).

231. *Id.* at 742 (Douglas, J., dissenting).

232. *See id.* (citing Stone, *Should Trees Have Standing?*, *supra* note 1). Justice Douglas' dissent speaks convincingly about the value in giving voice to natural objects themselves. However, he also said, "[B]efore these priceless bits of Americana (such as a valley, an alpine meadow, a river, or a lake) are forever lost or are so transformed as to be reduced to the eventual rubble of our urban environment, the voice *of the existing beneficiaries* of these environmental wonders should be heard." *Id.* (emphasis added). Douglas, then, advocated a broadening of the spectrum of those qualified with standing to bring suit on behalf of and in the name of the environment. *Id.* One infers then that he would stop short of conferring rights-holder status directly upon natural objects as Stone proposes.

233. Stone, *Should Trees Have Standing?*, *supra* note 1, at 467.

234. 42 U.S.C. §§ 4321-4370(d); *see supra* note 119 and accompanying text (discussing NEPA's inclusion of historic resources as part of the environment broadly conceived, that is that NEPA incorporates protections for "important historic, cultural, and natural aspects of our national heritage." 42 U.S.C. § 4331(b)(4)); *see also infra* text accompanying notes 361-363 (discussing NEPA's

an expansion of rights for the environment generally.[235] The Act, much like the National Historic Preservation Act of 1966 (NHPA), provided procedural safeguards to protect the environment against federal action.[236]

Using Stone's touchstones as a guide, it can be said that historic properties are increasingly entities under the law. Stone cited the liberalization of standing requirements[237] and the passage of the NEPA as evidence of an expansion of rights[238] for natural objects, which has clear counterparts in the preservation movement. Originally under the NHPA,[239] the sphere of those capable of bringing an action to preserve a resource was limited to those who could show an actual injury.[240] The law has widened that sphere to include plaintiffs who "used or derived a benefit from" the resource.[241] A challenge to a federal agency action under NHPA, then, need not be brought by the owner.[242] Additionally, the damage inflicted upon the resource need not actually have happened; plans for destruction are sufficient as long as the plaintiff can demonstrate the relationship between the destruction and his interest.[243] Accepting Stone's analysis as precedent, the very presence of federal legislation such as NHPA,[244] NEPA,[245] and Department of Transportation Act § 4(f)[246] suggests the law's movement toward rights for historic property. Their procedural safeguards not only parallel those Stone cites NEPA as offering to the environment, in the case of § 4(f) they actually provide more protection.

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protections of historic resources).

235. Stone, *Should Trees Have Standing?*, *supra* note 1, at 483-84.

236. *See id.* at 483 (noting that NEPA "is a splendid example of . . . rights-making through the elaboration of procedural safeguards").

237. *Id.* at 467.

238. *Id.* at 483.

239. 16 U.S.C. § 470; *see also infra* text accompanying notes 348-360 (discussing NHPA generally).

240. Yeager, *supra* note 188, at 406 (referencing South Hill Neighborhood Ass'n. v. Romney, 421 F.2d 454, 461 (6th Cir. 1969) (holding the plaintiffs lacked standing despite the fact they were citizens of the area affected)).

241. *Id.*

242. *Id.*

243. *Id.*

244. 16 U.S.C. § 470.

245. 42 U.S.C. §§ 4321-4370(d).

246. 49 U.S.C. § 303 (2006); *see also infra* text accompanying notes 364-367 (discussing § 4(f) generally).

B. Cultural Patrimony

The notion of the collective community interest rising above that of the individual self-interest within the private property context can be seen in the concept of cultural patrimony (also called cultural property[247]) and the public trust doctrine. According to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, "'cultural property' is property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science . . . ."[248] The definition enumerates categories of cultural property, including those as broad as "antiquities more than one hundred years old"[249] and "property relating to history."[250] While individual nations may designate different terms by which to define their cultural patrimony, the common thread is that objects of cultural patrimony are of such ongoing historical, traditional, or cultural importance that they cannot be fully subject to the traditional "bundle of sticks" approach to property ownership. In some cases, this may mean they "cannot be alienated, appropriated, or conveyed by any individual."[251]

The North American Graves Protection and Repatriation Act (NAGPRA) is the primary cultural patrimony law in the United States.[252] NAGPRA's scope is limited to Native American cultural items or human remains found on federal or tribal lands.[253] The law "seeks to place ownership or control of such items with the appropriate Indian tribe."[254] It also requires museums and federal agencies to assist tribes in "identification and repatriation of burial remains."[255] NAGPRA directs the

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247. Though the terms are often used interchangeably, "cultural patrimony" and "cultural property" are not synonymous. *See* David Rudenstine, *Cultural Property: The Hard Question of Repatriation*, 19 CARDOZO ARTS & ENT. L.J. 69, 76 (2001).

> It must be emphasized that cultural patrimony is a much smaller and narrower group of antiquities than the broad spectrum of cultural property. Patrimony refers to something so basic and fundamental to a society, a people, a civilization that its alienation would be unthinkable and would result in a loss so great that nothing could compensate for it. Patrimony tends to have continued historical, cultural, or religious significance to a society.

Id. While "patrimony" may be a narrower category than "property," Mexico provides an example of a nation which has found it necessary to expand its definition of the former category. *See infra* note 263 and accompanying text (noting Mexico's expanding definition of patrimony and corresponding increase in protection for covered items).

248. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 (1972)), *available at* http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION= 201.html.

249. *Id.*

250. *Id.*

251. 25 U.S.C. § 3001(3)(D) (2006).

252. *Id.* §§ 3001-3013.

253. MILLER, *supra* note 184, at 18.

254. *Id.*

255. *Id.*

Secretary of the Interior to establish a review committee to monitor these processes and enables enforcement through civil penalties.[256]

While the concept of cultural patrimony has been limited to Native American artifacts in the United States, older nation states often have well-developed and expansive patrimony laws.[257] Some patrimony laws merely prohibit the export of cultural patrimony; others prohibit its private ownership, and others do both.[258] French law, for instance, permits cultural property to be privately owned but prohibits it from being exported without state permission.[259] If cultural property is exported without state permission, however, ownership forfeits to the state.[260] Egypt's Law 117 flatly vests ownership in the state, holding "[a]ll antiquities are considered to be public property,"[261] and that "[i]t is impermissible to own, possess, or dispose of antiquities."[262]

Mexico has had a progression of laws with increasingly expansive definitions of patrimony and increasingly restrictive limitations on the treatment of objects described as such.[263] The 1930 Law on the Protection and Conservation of Monuments and Natural Beauty,[264] protecting only "monuments," allowed private ownership, but prohibited exportation and required that all sales be registered with the government.[265] The 1934 Law for the Protection and Preservation of Archeological and Historic Monuments, Typical Towns, and Places of Scenic Beauty[266] expanded the definition of "monument" and declared that all pre-Columbian "immoveable archeological monuments belong to the nation."[267] The

256. *Id.*

257. *See* John Henry Merryman, *"Protection" of the Cultural "Heritage"?*, 38 AM. J. COMP. L., (SUPPLEMENT) 513, 520 (1990) (explaining that cultural property is afforded less legal recognition in Unites States than other countries).

258. *See* Petition for Writ of Certiorari, Schultz v. United States, 540 U.S. 1106 (2004) (No. 03-592), 2003 WL 22490659, at *18 (referencing French law that prohibits exportation of cultural property but permits private ownership).

259. *Id.*

260. *Id.*

261. *Id.* at 4 (citation omitted).

262. *Id.* Egypt's law makes an exception for antiquities "found in or before 1983 . . . whose ownership or possession was already established [in 1983]." *Id.* (quotation omitted). Such objects do not escheat to the state. While a policy such as that in Law 117 would in the United States constitute a taking of private property requiring just compensation, no compensation is necessary in Egypt. *Id.* at 13. Moreover, the Egyptian government asserts a "blanket ownership" of patrimonial objects irrespective or whether or nor they have been discovered, whether or not the government has tried to reduce them to its possession, or whether or not it would need permission of the private landowner to enter his property to do so. *Id.*

263. *See* United States v. McClain, 545 F.2d 988, 999-1001 (5th Cir. 1977) (noting Mexican law "did not assert ownership of all pre-Columbian artifacts in 1934 . . . or in 1970 when a new law was enacted" and that such property finally became inalienable to the nation by the enactment of the Federal Law on Archaeological, Artistic and Historic Monuments and Zones in 1972).

264. 58 D.O. 7, 31 de enero de 1930.

265. *McClain*, 545 F.2d at 998.

266. 82 D.O. 152, 19 de enero de 1934.

267. *McClain*, 545 F.2d at 998 (quoting 82 D.O. 152, 19 de enero de 1934).

1970 Federal Law Concerning Cultural Patrimony of the Nation[268] expanded the definition of "monument" to include moveable pre-Columbian objects.[269] Finally, the 1972 Federal Law on Archaeological, Artistic and Historic Monuments and Zones[270] provided all "[a]rchaeological monuments, movables and immovables, are the inalienable and imprescriptible property of the Nation."[271]

C. Public Trust Doctrine

Like the concept of cultural patrimony, the public trust doctrine places in public hands sticks often bound up in the private property bundle.[272] In the United States, the doctrine has traditionally been used to require owners of private property to maintain access for the public to waterways and the subjacent and adjacent land.[273] However, as Joseph Sax has pointed out, "the public trust doctrine applies to a wide variety of resources in which the public has a strong interest."[274] Speaking specifically about natural objects, Sax suggested that certain resources "are so particularly the gifts of nature's bounty"[275] that they should run to the benefit of the public.[276] He asserted that the public trust doctrine is the most effective vehicle for enforcing public duties to preserve—duties that include preserving not merely access but the objects themselves.[277]

While courts have been reluctant to apply the public trust doctrine liberally, according to Professor Nancy Assaf McLaughlin, the doctrine, or something like it, is perhaps quietly at work in the form of conservation easements.[278] The preservation easement, akin to the conservation easement, has been used to protect a wide range of historic resources.[279] In addition to restricting the owner's ability to alter or demolish, preservation easements "also protect against deterioration by imposing affirmative maintenance requirements."[280] McLaughlin suggested that

268. 303 D.O. 8, 16 de diciembre de 1970.

269. *McClain*, 545 F.2d at 999.

270. 312 D.O. 16, 6 de mayo de 1972.

271. *Id.*

272. *See generally* Marc R. Poirier, *Modified Private Property: New Jersey's Public Trust Doctrine, Private Development and Exclusion, and Shared Public Uses of Natural Resources*, 15 SE. ENVTL. L.J. 71, 113-19 (2006) (discussing the usefulness and applications of the public trust doctrine). Professor Poirier also suggested that the public trust doctrine has been read to include an obligation to manage and not to dispose of natural resources, "counter to what some have perceived as a bias in property law favoring growth rather than preservation." *Id.* at 117 (citing J.B. Ruhl & James Salzman, *Ecosystem Services and the Public Trust Doctrine: Working Change from Within*, 15 SE. ENVTL. L.J. 223 (2006)).

273. Patty Gerstenblith, *Identity and Cultural Property in the United States: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559, 648 (1995).

274. *Id.* (citing Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 528-29 (1970)).

275. Sax, *supra* note 274, at 484.

276. *Id.*; *accord* Gerstenblith, *supra* note 273, at 648.

277. Gerstenblith, *supra* note 273, at 649.

278. Nancy A. McLaughlin, *Conservation Easements—A Troubled Adolescence*, 26 J. LAND RESOURCES & ENVT. L. 47, 56 (2005).

279. Preservation Easements, *supra* note 205.

280. *Id.*

conservation easements result in "a permanent form of public/private co-ownership of the encumbered land."[281] Like the public trust doctrine, the arrangement benefits the public by ensuring that the privately owned resource is "protected in perpetuity" for the public benefit.[282]

To McLaughlin, the fact that certain landowners have been willing to voluntarily restrict their property and bear the cost associated with such restrictions indicates that at least some segment of society "embrace[s] the notion that they have stewardship obligations as well as ownership rights with respect to" the resources in their possession.[283] She postulated that as the value of such restrictions and the resources they protect become better understood, they will not only become more common but will in fact "lead us to a new paradigm of private property ownership."[284]

D. A Growing and Evolving Understanding of the Role of Historic Resources

Whether or not it heralds the coming of "a new paradigm of private property," the growing appreciation of the value of important resources Professor McLaughlin anticipated may be seen in the evolving philosophy behind the American preservation ethic.[285] Additive and changing over time, it evidences an increasing realization that historic resources are integral actors in crafting a meaningful, sustainable built environment.

In the preamble to the NHPA, Congress articulated the reasons for federal involvement in historic preservation, stating the "spirit and direction of the Nation are founded upon and reflected in its historic heritage."[286] The preamble explains that this heritage, "as a living part of our community life,"[287] orients the American people, providing a "vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits . . . for future generations."[288] Moreover, it explains that preservation of this heritage will assist in federal decision-making, economic growth and sensible development.[289] At least three public welfare-oriented rationales propelling American preservation theory emerge from Congress' statement in the NHPA's preamble: "patriotic inspiration, aesthetic merit, and community [benefit]."[290] Professor Kathryn R.L. Rand introduced these rationales as themes in American preservation theory and suggested they correspond to particular periods within the preservation movement: 1890–1929 for patriotic

281. McLaughlin, *supra* note 278, at 48.
282. *Id.*
283. *Id.* at 56.
284. *Id.*
285. *Id.*
286. 16 U.S.C. § 470(b)(1); *see also infra* text accompanying notes 348-363 (discussing provisions of the NHPA generally).
287. *Id.* § 470(b)(2).
288. *Id.* § 470(b)(4).
289. *Id.* § 470(b)(6).
290. Rand, *supra* note 26, at 284.

inspiration,[291] 1930–1955 for aesthetic merit,[292] and 1956–1980 and beyond for community.[293]

The drive to preserve for patriotic inspiration (1890–1929)[294] was marked by efforts to preserve places "in which nationally famous people had lived or where important events had occurred," such as General Washington's Mount Vernon, Independence Hall described earlier, or the Gettysburg Battlefield.[295] Preservation for patriotic inspiration is focused on a reverence for what the resource to be preserved represents, not necessarily an interest in the resource itself; its value is found in the degree to which it instills a patriotic fervor in those who view it.[296]

An aesthetically driven motive for preservation (1930–1955)[297] valued the historic resource as a work of art or architecture—such as the quality of its construction and workmanship and nature of its detail and design.[298] This motive valued the resource for its own character as a work of art, not its associative capacity as a talisman to great people or events.[299]

The community benefit rationale for preservation (1956–present)[300] emphasizes "the contribution of the physical environment to the maintenance of the community."[301] Community benefit rationales justify preservation of historic resources not just because they may be beautiful or historic, in and of themselves, but because their beauty and history enhance the quality of life for all.[302] In its guide to creating local preservation ordinances, the National Park Service has

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291. *Id.* at 284-88.

292. *Id.* at 288-90.

293. *Id.* at 290-94.

294. *Id.* at 284-88.

295. Rand, *supra* note 26, at 284-85.

296. *Id.*; *see, e.g.*, United States v. Gettysburg Elect. Ry. Co., 160 U.S. 668, 681-82 (1896) (discussing what the Gettysburg Battlefield represents for American history).

> The value of the sacrifices [made by Civil War soldiers] . . . is rendered plainer and more durable by the fact that the government of the United States . . . endeavors to perpetuate it by this most suitable recognition. Such action on the part of congress touches the heart, and comes home to the imagination of every citizen, and greatly tends to enhance his love and respect for those institutions for which those heroic sacrifices were made.

Id. at 682.

297. Rand, *supra* note 26, at 288-90.

298. *Id.*

299. *Id.* Although many municipalities recognized the benefits of preserving architecturally significant resources, most preservation ordinances were grounded in health, safety, and tourism development because of uncertainties regarding the constitutionality of aesthetic-based regulation under the police power. *Id.* at 289. *Berman v. Parker* put these concerns to rest in 1954, giving support to aesthetically-motivated action: "The concept of public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean . . . ." *Berman*, 348 U.S. at 33 (internal citations omitted).

300. *See* Rand, *supra* note 26, at 290-94.

301. Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 488 (1981).

302. *Id.*

suggested the ways in which preservation enhances quality of life, articulating what is really the heart of the community benefit rationale:

> the promotion of . . . civic-mindedness or cultural education; the safeguarding of historical and cultural heritage; the improvement or stabilizing of property values; the enhancement of tourism or other types of business; the strengthening of the local economy; the encouragement of cultural diversity, or the provision of recreational amenities.[303]

The rubric of community benefit has been stretched even further in recent years, reflecting a deepening understanding of the broad benefits of preservation. Preservation in the community interest may serve aesthetic and patriotic purposes, as suggested above. As the NPS stated, it may also be motivated by economic,[304] diversity,[305] and recreational considerations.[306]

Professor Rand's categorization of the motivations behind the preservation movement[307] suggests a change in the public conscience that would favor rights-holder status for historic property. Admittedly, imposing a theory of different rationales and different periods associated therewith is artificial. NHPA preamble's mentioning of all three motivations suggests they are in fact additive; while a given rationale may have been particularly influential at points in history, all three have, and continue to motivate, preservation efforts.[308] Their interplay and continued use evidences a growing body of justification for preservation. Further, their use is a manifestation of a deepening understanding of the value of historic resources vis-à-vis their role in the life of the community and, increasingly, the individual. The

303. Working on the Past § b, *supra* note 191.

304. *See generally* RYPKEMA, ECONOMICS OF HISTORIC PRESERVATION, *supra* note 152 (evaluating the relevance of historic preservation to economic concerns). *See also* Fulkerson, *supra* note 112.

> Since so much of building construction is decided from an economic standpoint, it is interesting to note that when we preserve a building, the community is renewed economically at a higher level than with new construction. If a community chooses to spend one million dollars on rehabilitation rather than new construction, all of the following statements are true: 1) $120,000 more will initially stay in the local community; 2) Five to nine more construction jobs will be created than with new construction; 3) 4.7 more new jobs will be created elsewhere in the community, than with new construction; 4) Retail sales in the community, will increase $34,000 more than with new construction; 5) Real estate companies, lending institutions, personal service vendors, and eating and drinking establishments all receive more monetary benefit. With preservation projects, more money is returned to the local economy in the form of wages, rather than being spent for materials manufactured elsewhere in the United States and the world. Massive quantities of energy, as well as farmlands and forests, are saved, here and abroad.

Id.

305. Working on the Past § b, *supra* note 191.

306. *Id.*

307. *See* Rand, *supra* note 26 (noting the progression in preservation views over three time periods); *see also supra* text accompanying notes 290-312 (discussing the drivers for preservation action).

308. 16 U.S.C. § 470(b).

historic resource plays a different role in each stage of Rand's development. The resource-as-actor's changing role—its changing relationship with the individual and community—provides a lens through which to view changing preservation mores.

Under the patriotic rationale, the resource-as-actor is intentionally and purposefully distinct from the masses;[309] one is moved by the disconnect of the observer from the observed, by the stoic immobility and staid grandeur of the person or event remembered juxtaposed with the clatter and bang of one's own reality. One is meant to stand in awe, in reverence, of those monumental creations of man that "stir the emotions, arouse enthusiasm, and awaken zeal."[310] Under the aesthetic rationale, the resource-as-actor is the supermodel, less removed perhaps but still apart from the common experience. While the remove is central to the patriotic experience (we stand in awe of what "they did" at the Gettysburg Battlefield), it merely adds to the intrigue of the aesthetic experience. The beauty itself is central to the aesthetic experience and the wish is to actually experience it by interacting with the resource. One preserves the aesthetically pleasing thing so as to experience it oneself, not to remember another's experience with it.

Under a community benefit rationale, the resource-as-actor may yet be a celebrity, but it is celebrated not just for its beauty but also its general place in the community.[311] While a patriotic rationale also considers the community's interaction with the resource, it relegates the resource to the status of a memorial, a "prop." It assumes the interaction is predicated on the remembrance of heroic people and momentous events associated with the resource.[312] A broadening understanding of the merits of retaining historic resources was accompanied by—and perhaps part of—a growing acceptance that our relationship to those resources is more dynamic than that of actor and "prop." Historic resources, as the NHPA preamble states, are parts of a "living community" and, to the extent they take on a life of their own, are living parts of a living community. If "[t]he places where we work and live have a spirit, a spirit that enlivens our present by reminding us of our past and anticipating our future,"[313] they have ceased to be flat characters. They are

309. Perhaps for these purposes the reader may indulge the proposition that the structure-as-actor through the patriotic lens is a Queens' Guard.

310. Rand, *supra* note 26, at 287 (quoting State *ex rel.* Smith v. Kemp, 261 P. 556, 558-59 (Kan. 1927)).

311. *See* Nivala, *Saving the Spirit of Our Places*, *supra* note 14, at 8. "[Structures] that are significant define the very character of our surroundings. It is not because the structure is singularly beautiful, but because it has contributed to the 'actual beauty of the strong, finely detailed, self-assured place.'" *Id.* (quoting PAUL GOLDBERGER, THE CITY OBSERVED, NEW YORK: A GUIDE TO THE ARCHITECTURE OF MANHATTAN 55 (1979)). If the aesthetician championed Marilyn Monroe, perhaps the community driver looks to Jimmy Stewart.

312. Rand, *supra* note 26, at 286. "It would be a great object lesson to all who looked upon the land thus cared for, and it would show a proper recognition of the great things that were done there on those momentous days." *Id.* (quoting *Gettysburg Elec. Ry.*, 160 U.S. at 681-82, to demonstrate the patriotic driver's aim in preserving the Gettysburg Battlefield).

313. Nivala, *Saving the Spirit of Our Places*, *supra* note 14, at 1.

essential players in "the *genius loci*, 'a cluster of associations identified with a place: a pervading spirit.'"[314]

E. Summary

What may be seen through the law and through public perception, then, is the emergence of historic resources as entities. If the value placed on them is not only changing but additive over generations, then at some point that value must reach the level of cultural patrimony. The places, whether private or public in ownership, become a communal resource because they become part of the collective conscience of the society. When the property affected is of cultural import, when it defines a sense of place, its demolition is a public damage even if it at law it is only a private action.[315] The police power has tried to accommodate the value ascribed to these places. But, just as with the environmental movement, when the framework in place is no longer strong enough to keep growing developmental pressures at bay, a new framework must be found. If the resource's value to the culture transcends traditional private property law, then it cannot be in traditional private property law that a solution lies. To the degree it challenges the concept of private property in the interest of the public good, the notion of giving rights to historic property can be seen as an extension and convergence of the cultural patrimony and the public trust doctrine theories.

Patrimony laws are primarily aimed at keeping objects of cultural significance within their native country, not their preservation or maintenance.[316] They do not give substantive rights to objects as proposed above. However, they demonstrate the broader philosophy that the treatment of culturally important objects may rise above traditional private property law.[317] A full-fledged public ownership of the property has been seen as one solution.[318] While takings concerns would likely make such a solution nearly impossible in the United States,[319] the public trust doctrine as Sax conceived of it here liberally applied could accommodate private ownership and concurrently imply a duty not just to keep the property within the nation, but to maintain it.[320] By imposing stewardship obligations even to the

314. *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (1986)).

315. *Id.* at 18.

316. *See supra* text accompanying notes 246-271 (discussing patrimony laws in the United States, Egypt, and Mexico).

317. John Henry Merryman examined the extent to which cultural property has become a new category of property in the United States and concluded that if such a trend was occurring, it "has not advanced very far." Merryman, *supra* note 257, at 520. Merryman also surmised "[t]hat there is less legal recognition of cultural property as a category in the United States, when compared with many other nations, is easily confirmed by examining the statutory cultural property regimes of say, Italy, France, Spain, and Germany." *Id.*

318. *See supra* notes 263-271 (discussing the progression toward public ownership).

319. *See* Petition for Writ of Certiorari, *supra* note 258, at 13 ("The notion that a government may simply assert ownership (without offering compensation) over all property of a certain nature within its borders, even when that property is found on private land, is entirely foreign to our legal system.").

320. *See* Sax, *supra* note 274, at 485-89 (outlining the public trust doctrine).

extent they trump traditional ownership rights, a cultural patrimony-public trust convergence would arrive at "a new paradigm of private property ownership" of the sort proposed by Professor McLaughlin.[321]

While novel, the use of public trust theories is not unjustified here. If certain natural resources "are so particularly the gifts of nature's bounty"[322] that they should run to the benefit of the public, it can just as easily be suggested that culturally significant resources are the gifts of history's bounty and should similarly run to the public benefit. Sax asserted the public trust doctrine is the most effective vehicle for enforcing public duties to preserve, not merely access to but natural objects themselves.[323] The doctrine just as easily may be extended to apply to historical resources as well. Certain courts have seemed poised to accept such an extension of Sax's reasoning.[324] The Pennsylvania Supreme Court, for example, in *Pennsylvania v. National Gettysburg Battlefield Tower, Inc.*,[325] held the state to be the trustee of public resources.[326] In that case, the court refused to prevent construction on private land that interfered with the historic battlefield because there was no specific legislation defining the contours of the public trust.[327] If laws detailing the treatment of the historical property held to be of cultural import—that is, cultural patrimony laws—were promulgated, they would provide just the framework for the operation of the public trust doctrine that the Pennsylvania Supreme Court was looking for.[328]

The application of the public trust doctrine to cultural patrimony-type laws admittedly contorts legal-theory just beyond where it exists comfortably today. But to not go this extra distance is to stop short of awarding substantive rights and therefore to fail to invest in the resource the "legally recognized worth and dignity" core to Stone's plan.[329] Without substantive rights, it will exist "merely to serve as a means to benefit . . . the *contemporary* group of rights-holders."[330] If the goal for any given generation is for the resource to outlive that generation, a mere benefit to the contemporary rights-holders is insufficient. Depending on the provisions of the

321. McLaughlin, *supra* note 278, at 56.

322. Sax, *supra* note 274, at 484.

323. Gerstenblith, *supra* note 273, at 649.

324. The expansion of the public trust doctrine suggested here is not merely a theoretical proposal. *See generally* Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986) (stating that public recreation is an additional purpose for which the public trust doctrine has been expanded). "The role of recreation is a striking example of historic change in public policy doctrine." *Id.* at 779. Rose argued there is benefit in encouraging wide public use of recreational resources, as they provide a civilizing, socializing force that benefits us all. Poirier, *supra* note 272, at 103. The same rationale could easily be made from a community benefit perspective for the preservation of historic property, themselves seen as elements of a form of recreation—cultural tourism.

325. 311 A.2d 588 (Pa. 1973).

326. Gerstenblith, *supra* note 273, at 650.

327. *Id.*

328. *Id.*

329. Stone, *Should Trees Have Standing?*, *supra* note 1, at 458; *see also supra* text accompanying notes 54-58 (discussing the characteristics that Stone says go to making a thing count jurally).

330. *Id.* at 458 (emphasis added).

patrimony laws to which the public trust doctrine is applied, such an operation may or may not establish presumptively a historic property's right to exist. It is unlikely that such laws would enable the property to bring suit on its own behalf, to have its own damage assessed, or to be directly compensated for that damage. D'Amato and Chopra's additional benefits are also unlikely to be achieved through this means.[331] Extending and converging the public trust doctrine with cultural patrimony is probably best seen as a legal footpath toward arriving at substantive rights for historic property, rather than a substitute for it. Vesting rights in historic property appeals as a more honest approach simply because it is more straightforward.

Regardless of the path by which it is legally achieved, a solution is not likely to come to pass solely on the wings of an elevated public conscience. Suffice it to say Stone's[332] and Sagoff's[333] thoughts regarding the necessity but insufficiency of the public conscience are equally applicable here. Any lasting protection for historic resources will require the political process to "rise above [individual] self-interest."[334] It will be through political leaders "educat[ing] and "elevat[ing]" their constituents[335] and acting by mechanism of the law, to create a meaningfully fail-safe system of protection. As surveyed in the next Section, such a system is clearly not yet in place.

V. THE PRESERVATION PROTECTION PATCHWORK

The fact a site like Independence Hall could be allowed to deteriorate so severely[336] belies serious deficiencies not just in National Park Service funding, but in many aspects of the entire scheme our nation has developed to preserve its treasures.[337] Preservation laws—whether at the federal, state, or local level are weakened by the inevitable ebb and flow of political will and none function

331. *See* D'Amato & Chopra, *supra* note 72, at 51-53 (examining the whale's right to life using Stone's analysis and identifying value in a generalized legal competence arising from rights-holder status).

332. Stone, *Should Trees Have Standing?*, *supra* note 1, at 494; *see also supra* text accompanying notes 95-100 (discussing the importance but insufficiency of a change in public conscience to a viable solution to environmental problems).

333. Sagoff, *supra* note 101, at 1410-18; *see also supra* notes 101-107 (discussing the view that the market analysis, often used to measure public commitment to an idea, is the wrong mechanism to set environmental policy).

334. Sagoff, *supra* note 101, at 1413-14.

335. *Id.* at 1414.

336. *See supra* text accompanying notes 4-12 (discussing the deterioration of Independence Hall and the failure of the Congress and Administration to provide political and financial support up to the standards as defined by the NPS).

337. *See* Preservationists Center Stage at Capital Hill, Sept. 28, 2006, http://www.care2.com/c2c/groups/disc.html?gpp=4648&pst=525461. "'[T]he National Trust for Historic Preservation [spends] valuable time and money fending off threats to fundamental protections of landmarks . . . and the uneven effectiveness of the local and state laws that form the backbone of local preservation activity.'" *Id.* (quoting statement of Kathleen Crowther, Exec. Dir. of the Cleveland Restoration Society).

effectively in the absence of funding for their enforcement.[338] To accept the deficiencies in the current preservation scheme—to allow finite historic resources to be squandered—both requires and permits deferring serious consideration of the moral, social, environmental, and economic implications of their loss.[339] The clarity of hindsight shows this deferral as a costly ignorance; the historic and the beautiful are traded for what time reveals to be little more than a mess of pottage.[340]

What exists is a patchwork of protection, varying from locality to locality—with many localities having no protections at all.[341] Federal protections of historic property extend only against federal action and, even then do not strictly proscribe demolition.[342] As Professor Booth contended, if the federal government decided tomorrow that it wanted to turn the Grand Canyon into a nuclear waste repository, there is no law that would prevent it from doing so.[343] In the absence of comprehensive federal level protection, it is left to the states and local governments to decide state-by-state (and through the enabling statutes, municipality-by-municipality) the level of protection afforded to historic resources.[344] The fact many municipalities in the United States lack even land-use zoning laws let alone preservation ordinances indicates many municipalities lack the political will to enact land use ordinances because of the inherent restrictions on private property rights.[345] Even within those municipalities that have passed preservation ordinances, boards charged with their enforcement may not do so effectively.[346]

338. Telephone Interview with Richard Booth, Esq., Professor, Cornell Univ. (October 15, 2007) [hereinafter Booth].

339. *See* Stone, *Should Trees Have Standing?*, *supra* note 1, at 453-55, 459 (analogizing the deferring of extending rights to natural objects to the deferring of extending rights to other groups); *see also supra* text accompanying notes 39-47 (discussing the fact that affording rights to rightless entities has historically been met with disbelief and resistance, but that refusing to consider such a change is dangerous).

340. *See* Nivala, *The Future for Our Past*, *supra* note 25, at 83-84 (quoting Paul Goldberger, *New York, Lost and Found*, N.Y. TIMES, Apr. 9, 1995, at E3).

341. *See infra* text accompanying notes 377-430 (discussing local preservation protections and their weaknesses); *see also infra* text accompanying notes 420-430 (discussing the fact many municipalities lack protections).

342. Robinson, *supra* note 29, at 516.

343. Booth, *supra* note 338. While federal law may force a review of such an action, it does not uniformly prohibit it. *See also* MILLER, *supra* note 184, at 3 (federal historic preservation laws and environmental protection laws do not require preservation when other competing governmental interests are at stake).

344. *Id.*

345. Booth, *supra* note 338.

346. Working on the Past in Local Historic Districts, Creating and Using Design Guidelines § c, http://www.nps.gov/history/hps/workingonthepast/sectionc.htm (last visited Feb. 12, 2009). [hereinafter Working on the Past § c].

A. Federal Level Protections and Weaknesses

Historic preservation laws at the federal level are enacted through the plenary power granted to Congress to control federal public lands under Article IV of the Constitution.[347] The "big three" preservation laws at the federal level are the National Historic Preservation Act,[348] the National Environmental Policy Act,[349] and Section 4(f) of the Department of Transportation Act ("Section 4(f)").[350] Apart from Section 4(f), which applies only to Department of Transportation-action, the laws are procedural in nature, and none require federal, state, or local governments to preserve historic resources when other competing government interests are at stake.[351]

With the ruins of the magnificent Pennsylvania Station[352] newly emblazoned on the nation's cultural memory, Congress' admission in the preamble to the NHPA that "the present governmental and nongovernmental historic preservation programs . . . are inadequate . . . ." was a painful restatement of the obvious.[353] Intending to "insure future generations a genuine opportunity to appreciate and enjoy the rich heritage of our Nation,"[354] the NHPA provided the first statutory directive that federal agencies disclose and consider the impact of their projects on historic resources.[355] The NHPA established the "Section 106" review process (named for the relevant statutory section before it was codified at 16 U.S.C. § 470f), which requires federal agencies to consider the effects of federally licensed, assisted, regulated, or funded activities on National Register or Register-eligible properties.[356] If any of these "undertakings" are found by the agency to have an

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347. U.S. CONST. art. IV § 3, cl. 2.

348. 16 U.S.C. §§ 470a–470x-6.

349. 42 U.S.C. §§ 4321-4347.

350. 49 U.S.C. § 303.

351. MILLER, *supra* note 184, at 3.

352. The 1964 destruction of New York City's Pennsylvania Station, built in 1910, is seen as the watershed event in the historic preservation movement in the United States. Ironically, the Penn Central, the successor to the Pennsylvania Railroad which owned (and demolished) Pennsylvania Station, was the plaintiff in *Penn Central Transportation Co. v. City of New York*, the Supreme Court decision upholding the validity of local preservation ordinances. 438 U.S. 104. *Penn Central* arose in response to the same railroad corporation's plans to build a high-rise tower atop New York City's other iconic station, Grand Central Terminal, just across town from the remains of Pennsylvania Station. *Id.* at 115-18.

353. 16 U.S.C. § 470(b)(5).

354. *Id.*

355. *Id.* § 470f.

356. A Register-eligible property is one that is eligible for National Register status but due to the owner's objection has not been placed on the Register. Yeager, *supra* note 188, at 394. The review process initially defers to the SHPO, as the acting agency first consults with the SHPO in its assessment of the negative effects of any potential project within that SHPO's state. *Id.* at 396. If the SHPO determines that there will be no adverse effects on the property, the project may proceed without ACHP review. *Id.* If the SHPO determines there will be adverse effects, the SHPO and the acting agency are "encouraged to discuss measures . . . to minimize harm." *Id.* If no agreement is found, then the agency presents its case directly to the ACHP for comment. Upon reviewing the ACHP's comments, the

adverse effect on a historic property, the Advisory Council on Historic Preservation (ACHP) has an opportunity to comment.[357] An independent federal agency comprised of members from the public and private sector,[358] the ACHP participates as a facilitator rather than a regulator of agency action;[359] in the event a legally-binding Memorandum of Agreement cannot be worked out among consulting parties, the ACHP can issue formal comments that may be accepted or rejected by the agency involved.[360] While Section 106 requires an agency to disclose and consider adverse impacts, it need not avoid those impacts.

Like the NHPA, the NEPA is essentially a procedural statute.[361] It requires federal agencies to consider the impact of their proposed action on the "human environment,"[362] which the NEPA defines to include "important historic, cultural, and natural aspects of our national heritage."[363] The NEPA's protections are not markedly different from those of the Section 106 process and, as with the Section 106 process, the onus is on the agency to identify and disclose the harmful impacts of its proposed action on historic resources. Under the NEPA, however, there is no external body like the ACHP providing oversight of the process. While the NHPA imposes a duty on the acting agency to consult with state and federal preservation agencies, the NEPA does not.

Section 4(f) of the Department of Transportation Act[364] actually provides for some substantive protections,[365] dictating that the Secretary of Transportation may not approve a project requiring the "use" of the land from a historic site unless "there is no prudent and feasible alternative . . . and the . . . project includes all possible planning to minimize harm."[366] Because it limits the discretion of the acting agency in favor of preservation interests, Section 4(f) is considered the strongest preservation law at the federal level.[367]

Despite the succession of acts Congress has passed to "insure"[368] preservation interests, the letter of the law provides limited financial aid and qualified self-restraint on the part of federal administrative agencies.[369] While federal protections may focus attention on federal agency action affecting historic resources, they do not prevent federal agencies from harming those resources.[370] Section 4(f) has some substantive bite, but only comes into play when the offending action is by,

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agency makes a final determination and reports its decision back to the ACHP. *Id.* at 397.

357. 16 U.S.C. § 470j(a).
358. *Id.* (establishing the ACHP and specifying its membership).
359. MILLER, *supra* note 184, at 6.
360. *Id.*
361. *Id.* at 7.
362. 42 U.S.C. § 4332(2)(c) (2006).
363. *Id.* § 4331(b)(4).
364. 49 U.S.C. § 303.
365. Yeager, *supra* note 188, at 399.
366. 49 U.S.C. §§ 303(c)(1)-(2).
367. Yeager, *supra* note 188, at 399.
368. 16 U.S.C. § 470(b)(5).
369. Robinson, *supra* note 30, at 516.
370. MILLER, *supra* note 184, at 6.

funded, or permitted through the Department of Transportation.[371] Focusing attention on agency action generally does have positive effect.[372] However, the success of federal provisions requires vigorous enforcement by the preservation community, including the ACHP, the SHPOs, and individuals and interest groups.[373] Policing procedural violations of any federal protections may require costly litigation to find redress; while the Section 106 process provides an administrative remedy of sorts, the ACHP's comments are ultimately not binding. Additionally, the general currents of politics threaten the system; faltering policy leadership and retreats from financial commitment can and have undermined even well-functioning aspects of the federal preservation scheme.[374] Because local preservation efforts (where most preservation happens[375]) succeed or fail on the basis of leadership and guidance from the federal level rather than on the merits of the resources themselves, weaknesses at the top compromise the entire system.[376]

B. State and Local Level Protections and Weaknesses

State and local preservation ordinances—where the most substantive protections for historic property are to be found[377]—spring from the police power reserved to the states, which enable regulation of property to serve the interest of the health and welfare of the citizenry.[378]

New York was one of the first states to employ governmental power for preservation purposes, acquiring General Washington's headquarters in Newburgh, New York, in 1889.[379] Only thirty years earlier, the Commonwealth of Virginia had failed to employ the same muscle, leaving the General's beloved Mount Vernon to nearly collapse upon itself.[380] Through their SHPOs, states play an important role in the NHPA's Section 106 process, helping federal agencies identify historic resources, assess potential impacts, and develop alternatives to mitigate negative impacts.[381] Since the adoption of NHPA in 1966, each state has

371. John M. Fowler, *The Federal Government as Standard Bearer*, *in* THE AMERICAN MOSAIC, *supra* note 130, at 60.

372. *Id.* at 61.

373. *Id.*

374. *Id.* at 79.

375. Yeager, *supra* note 188, at 386.

376. J. Myrick Howard, *Where the Action Is: Preservation and Local Governments*, *in* THE AMERICAN MOSAIC, *supra* note 130, at 114, 144.

377. Yeager, *supra* note 188, at 386.

378. *See Berman*, 348 U.S. at 30; *see also* City of Carbondale, Illinois, Carbondale Historic Preservation Plan, Appendices: Legal Basis for Historic Preservation 115 (2002), http://www.ci.carbondale.il.us/pdf/legalbasis.cdl.pdf [hereinafter Legal Basis for Historic Preservation] (discussing historical preservation regulation a part of the police power proscribed to the state).

379. Robinson, *supra* note 30, at 514.

380. James E. Smith, Note, *Are We Protecting the Past? Dispute Settlement and Historical Property Preservation Laws*, 71 N.D. L. Rev. 1031, 1036-37 (1995). The Mount Vernon Ladies Association of the Union, a private organization of women with representatives from each state, did save Mount Vernon, and became a model for private initiative in historic preservation. W. Brown Morton III, *What Do We Preserve and Why*, *in* THE AMERICAN MOSAIC, *supra* note 130, at 152.

381. MILLER, *supra* note 184, at 8.

promulgated some sort of legislation regarding protection of historic property,[382] be it a Section 106-like[383] or Section 4(f)-like[384] review process for state or state-funded action, statutes enabling local-level preservation ordinances through delegations of the police power, statutes authorizing preservation easements, or a combination of these. The process through which individual states review state action with respect to historic resources varies state-to-state, though many track the federal Section 106 review process and include a state register of historic properties.[385]

Perhaps the greatest asset to preservation to be found in most state laws is the enabling legislation for local municipal preservation ordinances.[386] The real substantive preservation protections are found in local-level ordinances.[387] The seminal case *Penn Central Transportation v. New York City* upheld the constitutionality of such ordinances.[388] Whereas election to the National Register or many state historic registers is largely honorific, local designation as a historic landmark/historic district can effect significant substantive protection because changes to properties are regulated on a case-by-case basis.[389] The level of protection depends on the individual ordinances, (themselves dependent on the state level enabling laws),[390] their interpretation, and their enforcement.[391] Local preservation commissions are empowered to review proposed demolitions of and alterations to landmarks and within historic districts, as well as new construction within districts.[392] Depending on the enabling laws, some review board decisions are binding, though many are subject to review by the city council or other adjudicative authority.[393]

Like federal laws, state, and local laws depend on the active involvement of the citizenry to be effective.[394] Even then, the successes of those local protections are by no means guaranteed because the laws are vulnerable to the political process.[395] The historic districting/review board scheme that constitutes the most

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382. Smith, *supra* note 380, at 1042.

383. *See, e.g.*, SEQRA, N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to 0117 (McKinney 2005); CEQA, CAL. PUB. RES. CODE §§ 21000-21006.

384. *See, e.g.*, Minnesota Environmental Rights Act, MINN. STAT. § 116B (2008) (echoing section 4(f) in stating that state agencies may not demolish a historic resource unless there is "no prudent and feasible alternative site").

385. *Id.*

386. Robinson, *supra* note 30, at 531.

387. *Id.* at 516.

388. *Penn Cent.*, 438 U.S. at 138.

389. Working on the Past § a, *supra* note 189.

390. U.S. DEP'T OF THE INTERIOR, LEGAL AND FINANCIAL TOOLS USED TO PRESERVE AND ENHANCE HISTORIC RESOURCES, http://www.nps.gov/nr/publications/bulletins/nrb24/appendix3.htm (last visited Jan. 23, 2009).

391. *Id.*

392. *Id.*

393. *See* Smith, *supra* note 380, at 1043-44 (discussing different approaches taken to review demolition decisions).

394. MILLER, *supra* note 184, at 9.

395. *See generally* Working on the Past § c, *supra* note 346 (noting the effect political interference

common form of local protection can be flawed. Testifying before a House Subcommittee, Kathleen Crowther, Executive Director of the Cleveland Restoration Society, said that "the uneven effectiveness of the local and state laws that form the backbone of local preservation activity [necessitate that] . . . the National Trust for Historic Preservation spend valuable time and money fending off threats to fundamental protections of landmarks."[396]

The National Park Service admitted: "Despite a rapidly growing body of law dealing with the powers of local historic preservation commissions, there are troubling hints that in many communities existing commissions do not (because they cannot) do an adequate job of protecting local resources."[397] Common reasons for this inadequacy include weak or incomplete local ordinances, lack of staff support or financial resources for the review board, or failure of the review board to understand the ordinance and/or their role with respect to it.[398] Other serious problems arise when there is political interference with the operation of the review board, "perhaps taking the form of poor appointments to the commission or a tendency for the city council to overrule the commission almost automatically whenever an owner files an appeal to the council from a commission decision."[399] Additionally, if the review board (or the preservation ordinance itself) is not held in proper regard by the public attorney designated to fend off challenges to review board decisions, such challenges may be inadequately defended, and the legal advice to the board may be inadequate.[400]

Demolition by neglect, the term used to describe the situation whereby a property owner intentionally allows a historic property to suffer severe deterioration, potentially beyond the point of repair, is a major problem for local preservation boards.[401] While *Maher v. City of New Orleans*[402] suggests a review board may have some power to fight demolition by neglect by imposing an affirmative duty on the property owner to maintain the historic property, such an imposition is rarely pursued and, not surprisingly, an area of contention.[403] Many

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can have on local action).

396. *Historic Preservation and Community Development: Why Cities and Towns Should Look to the Past as a Key to Their Future: Hearing Before H. Subcomm. on Federalism and the Census*, 109th Cong. 88 (2006) (statement of Kathleen Crowther, Exec. Dir. of the Cleveland Restoration Society).

397. Working on the Past § c, *supra* note 346.

398. *Id.*

399. *Id.*

400. *Id.*

401. NAT'L TRUST FOR HISTORIC PRES., PRESERVATION LAW REPORTER EDUCATIONAL MATERIALS, DEMOLITION BY NEGLECT 1 (1999) [hereinafter DEMOLITION BY NEGLECT].

402. 516 F.2d 1051, 1067 (5th Cir. 1975) (upholding the constitutionality of ordinance requiring reasonable maintenance from property owners). The court said that an ordinance requiring the property owner to make such expenditures as reasonable did not overstep the bounds of police power and thus did not effect a taking for which compensation must be given. *Id.* at 1061. However, the court held that its ruling applied narrowly to this case (dealing with ordinances in the French Quarter of New Orleans) and that not every application of such an ordinance would be constitutional. *Id.* at 1067. If the regulation became "unduly oppressive" on the property owner, it may be seen as an unconstitutional taking. *Id.*

403. *See, e.g.*, Buttnick v. City of Seattle, 719 P.2d 93, 94 (Wash. 1986) (challenging Seattle's preservation ordinance's affirmative maintenance provisions). "Seventeen percent (39 commissions) of

preservation boards, particularly those in small municipalities, lack the political will to enforce laws prohibiting demolition by neglect. Alternatively, boards may doubt the enforceability of such laws. Demolition by neglect controversies may also be a problem for preservation boards because they "often involve a branch of local government over which the preservation board general has little influence or control—the code inspection and enforcement office."[404] There is often a conflict between these two governmental bodies who, even under the best of circumstances, rarely coordinate their actions.[405] At worst, "turf battles" result in the code enforcement office "ordering a building demolished as a safety hazard without consulting the preservation commission."[406]

Most local preservation ordinances include exceptions for cases of economic hardship.[407] When used appropriately, these provisions enable local preservation boards to address special claims on an individual basis and help prevent invalidation of their decisions on constitutional grounds.[408] Owners looking to circumvent preservation regulations, however, use demolition by neglect coupled with a claim of economic hardship.[409]

Local preservation law can be challenged on a variety of constitutional fronts. Although local preservation laws are rarely entirely invalidated as a result of constitutional challenges, municipalities may shy away from enacting them for fear of litigating such cases. Though *Penn Central* affirmed the use of local landmark preservation ordinances against a Fifth Amendment taking challenge,[410] a preservation ordinance that in effect deprived the owner of all economic value of the property would, in fact, be a taking and thus require compensation.[411] Of course, ambiguity concerning exactly what constitutes a taking requiring compensation remains, and critics suggest that cases such as *Dolan v. City of Tigard*[412] are leading to "increased opportunities to find that local planning boards have effected uncompensated takings."[413]

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the 222 preservation commissions responding to a National Center [for Preservation Law] questionnaire stated that they had been involved in a court case within the previous two years." Stephen N. Dennis, *When Preservation Commissions Go To Court A Summary of Favorable Treatment of Challenges To Ordinances and Commission Decisions*, 808 COLO. HIST. SOC'Y 1 (1988), *available at* http://www.coloradohistory-oahp.org/publications/pubs/808.pdf.

404. DEMOLITION BY NEGLECT, *supra* note 401, at 3.

405. *Id.*

406. *Id.*

407. *See, e.g.*, 1994 Ann Arbor City Code, Ch. 103 § 8-417.

408. MILLER, *supra* note 184, at 27.

409. DEMOLITION BY NEGLECT, *supra* note 401, at 1.

410. *See* Nivala, *Saving the Spirits of Our Places*, *supra* note 14, at 32-33 (discussing the importance of *Penn Central* in establishing the power of local preservation review boards and in effect bringing about the modern preservation movement in the United States).

411. *See generally Penn Cent.*, 438 U.S. at 137 (approving preservation restriction, in part, because it did not entirely prohibit proposed use).

412. 512 U.S. 374, 396 (1994) (stating that there are limits on governmental taking of land to further public goals).

413. James H. Freis, Jr., & Stefan V. Reyniak, *Putting Takings Back Into the Fifth Amendment: Land Use Planning after* Dolan v. City of Tigard, 21 COLUM. J. ENVTL L. 103, 172 (1996).

A due process claim against a preservation action can be made if it appears that the designation of the resource, the review of a proposed change to that resource, or the appeal of a review board decision was procedurally flawed.[414] Freedom of speech issues arise in a historic preservation context when ordinances regulate architecture as a form of expression.[415] In this latter case, if the architect can find other locations to execute this expression within the community, the preservation ordinance is likely to be upheld.[416]

Freedom of religion has created complex concerns with respect to preservation of churches and other religiously-affiliated property, particularly when an ordinances restricting demolition or renovation conflict with the wishes of the congregation.[417] Some courts have held that the landmark designation of churches flatly violated protection of religious freedom under a state constitution.[418] In general, the less impact a regulation has on the practice of religion within the structure, the more likely it is to withstand scrutiny.[419]

Perhaps the greatest inadequacy of local protections achieved through the historic districting/review board scheme lies in the fact that so many communities simply have not availed themselves of the scheme in the first place.[420] All fifty states have statutes enabling local preservation action through districting and review boards.[421] Yet approximately only 2300 of all the communities in the United States have created protections through the districting/review board means.[422] In September 2007, the absence of a preservation ordinance in Newtown Square, Pennsylvania, allowed the destruction of the 1897 Dunminning Mansion, a Normandy-style masterpiece, by a developer planning to build seventeen luxury homes on the site.[423] The structure was designed by Theophilus Parsons Chandler

414. *See* Legal Basis for Historic Preservation, *supra* note 378, at 116 (noting that due process protections apply to preservation actions). A substantive due process challenge can arise if an ordinance is deemed to have no real or substantial relation to the police power of ensuring public health, safety, and welfare. ANITA P. MILLER, NEW MEXICO HERITAGE PRESERVATION ALLIANCE, GRASSROOTS HISTORIC PRESERVATION, http://www.nmheritage.org/resources/ghp4.php (last visited Feb. 14, 2009).

415. *Id.*

416. *Id.*

417. *Id.*; *see, e.g.*, Rector, Wardens & Members of Vestry of St. Bartholomew's Church v. City of New York**,** 914 F.2d 348, 355-56 (2d Cir. 1990) (upholding preservation law as "valid, neutral regulation of general applicability," when plaintiff-church failed to show that law made religious practice in existing structure impossible).

418. First Covenant Church of Seattle v. City of Seattle, 840 P.2d 174, 188 (Wash. 1992) ("Imposing the City's [preservation ordinance] on First Covenant's church violates First Covenant's right to free exercise of religion under the First Amendment."); *see also* Soc'y of Jesus v. Boston Landmarks Comm'n, 564 N.E.2d 571, 574 (Mass. 1990) (determining that the landmarking of a church interior violated protections afforded to free exercise of religion under the Massachusetts Constitution).

419. *See generally* MILLER, *supra* note 184, at 30-31 (making clear that under the First Amendment, a free exercise of religion claim can be brought against regulation).

420. Booth, *supra* note 338.

421. Nivala, *Saving the Spirit of Our Places*, *supra* note 14, at 33-34.

422. Working on the Past § a, *supra* note 189.

423. Margaret Foster, *Pa. Developer to Raze Main Line Estate*, PRESERVATION MAG., Aug. 30, 2007, *available at* http://www.preservationnation.org/magazine/2007/todays-news-2007/pa-developer-to-raze-main.html.

(1845–1928), founder of the University of Pennsylvania's architecture department.[424] As a remedial gesture, the developer promised to use stones from the mansion in the new homes.[425]

As one of the oldest communities in the Commonwealth of Pennsylvania, Newtown Square's lack of a preservation ordinance is "ridiculous," according to Chris Driscoll, Vice President of the Newtown Square Historical Preservation Society, who continued, "Without a historic-preservation ordinance, there is little we can do."[426] That such a community—one with a rich history and its very own historic preservation society—lacks protective ordinances evidences a threshold problem in preservation: creating the popular and political consensus necessary to enact substantive protection.[427] Property owners are generally reluctant to voluntarily impose restrictions on their own property, particularly in areas where developmental pressures (i.e., sprawl[428]) drive up property values and incentivize demolition and subdivision.[429] Of course, it is particularly in these areas where preservation protections are most needed.[430]

C. Overcoming Weaknesses in Current Protections

The burden of proof, whether in litigation or not, as Jerry Rogers suggested, noted above, is always on the preservationist to prove his case. First, the preservationist must prove that the resource is worthy of preservation by going through a lengthy and involved process of listing on the National Register, a state register, or elsewhere.[431] Even after a resource has been identified as historic, a compelling argument for its preservation has to be made, and even once made, the resource can still be destroyed. Rights-holder status would shift the burden of proof to the actor wishing to demolish or degrade the resource to defend that action. The actor unable to present a compelling case that the social utility of the threatening project outweighs the social cost of the loss would be required to pursue other, presumably more thoughtful, less wasteful options. Moreover, if the decision is made to demolish—whether or not condoned by the Advisory Council on Historic Preservation—the destruction must be compensated to the structure's estate.[432] Of all the major federal-level preservation laws, the only one with any substantive protection, Section 4(f) of the Department of Transportation Act,[433]

424. *Id.*
425. *Id.*
426. *Id.*
427. Booth, *supra* note 338.
428. Professor Booth asserted that the average suburbanite definition of sprawl is "the driveway after mine." *Id.* Such an owner assumes he is not part of the problem, and will resist efforts to limit his own developmental options. *Id.*
429. *Id.*
430. *Id.*
431. MILLER, *supra* note 184, at 1-2.
432. Similarly, the destruction of the natural object would result in a damage award to the object's estate. *See* Stone, *Should Trees Have Standing?*, *supra* note 1, at 481-82 (explaining that, under rights-holder status, property essentially functions as individual would for legal transactions).
433. 49 U.S.C. § 303.

comes the closest to the "compelling case" standard advocated here. It allows demolition only in the absence of a prudent feasible alternative.[434] Whether or not rights-holder status would effectively color what is "prudent" and "feasible" in such a manner as to err on the side of preservation, at the very least it would force a realization of any loss and, equally important, re-attribute that realization as a benefit to other historic property.[435]

The merits of burden shifting described above can apply with equal efficacy to private actors. Given that most historic resources are imperiled by private action,[436] just as Stone said was the case for natural objects, a system that addresses both types of actors is necessary.[437] Rights-holder status would sidestep the weaknesses of local ordinances and state enabling laws by ensuring that the intrinsic value of the resource would be factored into a property owner's decisions about how to use his property. State statutes and local ordinances prioritizing private ownership rights would automatically need to be reconciled with the rights of the historic resource itself. Obviously, where no preservation ordinances have been enacted, as is the case for the majority of localities in the United States,[438] presumptive rights would provide the only protection for historic resources. However, their efficacy may be only slightly less even where ordinances are ostensibly in place. Problems with local review boards[439] may not be solved by rights-holder status, but such status would, just as it would at the federal level, in part insulate the property from ineffective regulators, political squabbles, and lack of resources.

Rights-holder status would presumably entail a duty to maintain that would be less subject to variance provisions for economic hardship;[440] the resource would not waive its right to be maintained simply because the owner pleads poverty. Demolition by neglect[441] would clearly be prohibited and a judicially redressable claim. However, it is conceivable that a general extension of the burden to

434. *See supra* notes 364-367 and accompanying text (discussing limits on Department of Transportation projects that will affect protected areas and restrictive standards).

435. *See* Stone, *Should Trees Have Standing?*, *supra* note 1, at 481-82 (noting that rights-holder status would impart not only rights to historic property, but liabilities and benefits as well).

436. Nivala, *Saving the Spirit of Our Places*, *supra* note 14, at 18.

437. *See* Stone, *Should Trees Have Standing?*, *supra* note 1, at 484. Stone advocated extending environmental procedural rights beyond situations where the federal government is the actor. *See id.* (noting there would be power to require same findings of private corporations that are now required of federal agencies). Much of the environment is threatened not by the government, he posited, but by private corporations, and therefore, he suggested, "[s]urely the constitutional power would not be lacking to mandate that all private corporations whose actions may have significant adverse affect on the environment make findings of the sort now mandated for federal agencies." *Id.*

438. Booth, *supra* note 338; *see also supra* text accompanying notes 420-420 (indicating that substantial problem with concept of local protections is fact that most localities have never bothered to enact said protections due to lack of political will).

439. *See* Working on the Past § c, *supra* note 346; *see also supra* text accompanying notes 396-400 (discussing general problems with local review boards).

440. *See supra* text accompanying notes 407-409 (discussing variance provisions affecting historic protections generally).

441. *See* DEMOLITION BY NEGLECT, *supra* note 401, at 1 (discussing use of demolition by neglect in conjunction with claim of economic hardship to circumvent preservation protections).

maintain to all owners of historic property, not just those covered under certain local ordinances, would create a call to meet the need with commensurate supporting funds. In other words, the more people burdened with a duty to maintain, the greater the social pressure to make available funds for this purpose. The preservation trust fund,[442] supported in part by the aforementioned damage awards, would be a logical starting point. The general extension of the burden to all historic resource owners may actually be a selling point for rights-holder status; even if an individual may believe in preservation, he may be reluctant to have his own property burdened, but would be willing to accept the burden in exchange for all other historic resources being similarly burdened.

The constitutional challenges to preservation ordinances would be weakened, if not eliminated, by awarding rights to historic property. Procedural due process claims arising from the nomination of the property to a register or as a historic district, substantive due process challenges to a local ordinance's relation to the police power, and freedom of speech and religion issues may still arise.[443] However, the consequences of the challenge's success are mitigated by the backstop of the property's own rights.

Although some may argue that the very act of assigning rights to historic property raises a Fifth Amendment takings concern to the extent that it tugs at the traditional bundle of sticks of an owner's property rights, this is not to say such an assigning of rights is an unconstitutional taking. As Stone's article demonstrates, rights have been extended to many rightless entities[444] and, with the very major exceptions of the Fourteenth[445] and Nineteenth Amendments,[446] each of these extensions has been done has been done within existing constitutional constraints. While western legal tradition compels the notion that an expansion of rights to a rightless entity necessarily strips some corresponding right from another entity, it does not automatically follow that an unconstitutional taking has occurred. Once achieved, it is conceivable that rights-holder status for historic property would side-step the need to compensate a historic property owner even in the unlikely instance he can demonstrate the preservation of his property effectively eliminates all of its economic value.[447] The responsibility to preserve would spring from the property's own right to be whole.

If the public trust doctrine[448] can be interpreted to suggest that that property rights may be more communal than generally acknowledged, the takings concern

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442. *See supra* text accompanying notes 218-228 (discussing a proposal for a general preservation trust fund).

443. *See supra* notes 414-419 and accompanying text (discussing viable due process challenges to preservation ordinances).

444. *See* Stone, *Should Trees Have Standing?*, *supra* note 1, at 451 (discussing extension of rights to different groups).

445. U.S. CONST. amend. XIV.

446. U.S. CONST. amend. XIX.

447. *Cf. Penn Cent.*, 438 U.S. at 137 (holding that a preservation ordinance that deprived a property owner of all uses of his property constituted a taking for which just compensation must be offered).

448. *See supra* text accompanying notes 272-277 (detailing public trust doctrine).

may be of less import.[449] The community-based perspective from which historic resources would be afforded rights is likely to be oriented toward and supportive of the enduring public benefit over the one-time private harm, especially since the burden would be shared by all historic resource owners.[450]

The preservation trust fund discussed previously[451] could be used to alleviate this burden. As the fund incorporates the monetized realization of the destruction of historic property, it is only fitting that it be used to forward preservation of the historic property chosen for preservation. Whether its funds are used to preserve igloos or Independence Hall, they facilitate what history will prove to be a paradigm of preservation sustainable in every sense.

CONCLUSION: A FUTURE FOR OUR PAST

A sustainable paradigm of preservation, the process of making informed decisions about what to keep and what to surrender, is integral to the maturation of a society no less than that of an individual. To preserve or destroy, to remember or forget—both individuals and societies are reflected in and shaped by these choices.

Historic resources are finite tools used in constructing a livable, meaningful built environment;[452] their preservation is an act of environmental ethics. A rights-holder status, as proposed by Christopher Stone,[453] applied to historic resources presumptively assumes their value as finite resources. Affording historic resources a presumptive but rebuttable right to exist facilitates our ability to choose whether to preserve or destroy by insulating that choice from the ebbs and flows of political and economic will. Rights-holder status, acting as a backstop to the tears in the current patchwork of preservation protections allows the interests of future generations who stand to benefit from the presence (or suffer from the loss of) historic property to be factored into decisions to preserve or destroy.[454] It ensures that damage awards resulting from destruction of historic property would run to benefit it or other similarly situated historic property.[455]

Whether or not a Stone-inspired solution to the problems inherent to the current preservation scheme will be adopted in the United States, a consideration of

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449. *See generally* Zachary Kleinsasser, *Public and Private Property Rights: Regulatory and Physical Takings and the Public Trust Doctrine*, 32 B.C. ENVTL. AFF. L. REV. 421 (2005) (discussing the role of the public trust doctrine in the takings context); *see also* Poirier, *supra* note 272, at 116-17 (stating that the public trust doctrine has been used as a property-based defense of environmental and land use regulation against a private property-based challenge even in instances where private property owners believe the government has effected a regulatory taking).

450. *Id.*

451. *See supra* text accompanying notes 218-228 (discussing the proposal for a general preservation trust fund).

452. Stipe, *supra* note 28.

453. Stone, *Should Trees Have Standing?*, *supra* note 1, at 456.

454. *See supra* notes 163 and accompanying text (providing background information about rights-holder status).

455. *See supra* text accompanying note 164 (explaining that benefits from rights-holder status would run to property in question).

its merits suggests what may be necessary to make preservation a core part of sustainable environmental planning. As we come to acknowledge the role our cultural treasures play in defining who we are, it is likely we will become less tolerant of our deficient means of preserving them. As we mature as a society, perhaps we will be more willing to devote our resources to preservation ends, even if it must be at the expense of some individual property rights. Perhaps our bequest to future generations will be not just our collection of iconic resources but instead, and at least equally important, a more thoughtful, effective and responsible means by which to save them.

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