Over My Dead Property! Why the Owner Consent Provisions of the National Historic Preservation Act Strike the Wrong Balance Between Private Property and Preservation

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INTRODUCTION

It is not unusual for an article about the tension between property rights and historic preservation to begin with a gloomy scenario. One day, you, the private property owner, receive a knock at the door. Upon opening the door, you discover an ominous government official who demands that you immediately stop construction on the addition to your home.

Flabbergasted, you begin to protest, naming the many reasons why the addition must be built. But, the official does not care that the quintuplets have outgrown your present home. Neither is he sympathetic when you tell him that you paid fair market value for fee simple ownership in the property. And, he appears bored when you protest that this is America, where private property rights are the foundation for the entire society. Because, after all, he reminds you, your property has been legally designated as a historic landmark. And, this designation gives the government power to prevent you from altering the historic character of your home.

But, what about your quintuplets? What about your fee simple interest in the property? What about your sacred rights as a private property owner?

And, so it goes. The story conveniently sets up a critique of the current historic preservation system, which, through either legislative decree or judicial decision, deprives owners of their full property rights. A remedy is proposed; property rights are vindicated.

This paper takes a different approach. Instead of arguing that historic preservation has gone too far in impinging on personal property rights, it will argue that, in some cases, historic preservation law affords too much protection to personal property rights. In particular, this paper

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will focus on the overprotection of property rights provided by the owner consent provisions of the National Historic Preservation Act Amendments of 1980 (the “Amendments”).

A careful study of the legislative history behind these consent provisions, which require owner consent before an individual property or historic district can be designated under the National Historic Preservation Act (NHPA) or the Convention Concerning the Protection of the World Cultural and Natural Heritage (the World Heritage Convention or WHC), reveals that Congress was largely motivated by a desire to protect unwilling property owners from burdens imposed by national historic preservation laws. This paper will show that such burdens are negligible for three reasons. First, the additional burdens imposed on properties designated under the NHPA or WHC are small. State and local laws and ordinances, which rarely have consent provisions, place a significantly larger burden on properties designated under them. Second, the small burden created by the NHPA and the WHC is counterbalanced by the benefit to the public good created by historic preservation. And, third, any burdens borne by a property from designation under NHPA and the WHC are further counterbalanced and outweighed by the economic benefit that private property owners will enjoy from increased land values that, in many cases, can be traced in part to the designations under the NHPA and the WHC.

While the burden placed on the property interests of the owners by the NHPA and other laws regarding historic properties is small, the harm to historic preservation caused by the consent provisions is substantial. The consent provisions have prevented otherwise qualified national historic and world heritage sites from receiving their respective designations. Without

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4 Id. § 470a-1.
5 See U.S. National Commission for UNESCO, Teleconference Regarding the U.S. World Heritage Tentative List Meeting Minutes, October 4, 2007, at http://www.state.gov/p/io/rls/othr/93470.htm (showing that historic district nominations to the World Heritage List are thwarted by the owner consent provisions); See, e.g A Bill Entitled the
designation and the entailing protection, these sites are more vulnerable to destruction. More
importantly, by making historic preservation more difficult, the consent provisions have
contributed to a loss of community.6

As a solution, this paper proposes that the owner consent provisions, as currently
constituted, be eliminated. The protection afforded to private property owners by the consent
provisions will be replaced by the government’s strict adherence to owner notification and public
hearing provisions currently provided under the NHPA and WHC. Furthermore, the legal
protection that is required for each property designated under the WHC will be based on legal
protections offered at the state level (with the option to beef up protection if a state does not offer
enough). This proposed system will be responsive to property owners’ concerns without making
such concerns dispositive of the entire process. As a result, the public interest in historic
preservation will be more evenly balanced against the owner’s interest in preserving her property
rights.

Part I of this paper describes the owner consent provisions of the 1980 Amendments to
the NHPA. Parts II and III review the legislative history of the provisions and explain the
reasons Congress included the consent provisions in the Amendment. Part IV investigates the
problems behind the reasons proffered for the consent provisions and proposes a procedural
solution to cure the problems presented by the consent provisions. Part V provides final
conclusions and observations.

I. **THE 1980 AMENDMENTS AND OWNER CONSENT**

“National Heritage Policy Act of 1979”: Hearing on S. 1842 Before the Subcomm. On Parks, Recreation, and
Renewable Resources of the S. Comm. on Energy and Natural Resources, 96th Cong. 401-02 (1980) [hereinafter
Hearings] (testimony of the Department of the Interior) (recounting the negative effects that the consent provision of
the Interior Appropriations Act of 1980 had on landmark designation and stating his opinion that such negative
consequences will result from owner consent provisions applied to properties eligible for the National Register
designation).

6 See Carol M. Rose, Preservation and Community: New Directions in the Law of Historic Preservation, 33 STAN. L.
REV. 473, 488-89 (1981) (noting the importance of historic sites and buildings to a sense of community).
The owner consent provisions were included in the 1980 Amendments because of Congress’s concern that the NHPA and other federal laws trigged by the NHPA burdened owners’ property rights. Unlike state and local programs that were more sensitive to local interests and would informally account for the owners’ wishes in the designation process, Congress was concerned that, without a consent provision, the federal program, removed from local pressures, would not sufficiently take into account the burden placed on property owners.

A. THE 1980 AMENDMENTS

The 1980 Amendments were passed to correct perceived deficiencies in the NHPA of 1966. In particular, the Amendments were passed to provide a more precise definition of the national historic preservation program, to clarify the program’s role at the national, state, and local levels, and to provide for increased participation of local governments in the national program through state and federal certification of local programs. In addition, the Amendments revised the structure of the Advisory Council on Historic Preservation, reauthorized funding for the Historic Preservation Fund through 1987, created a loan insurance program, provided provisions to protect archeological resources, authorized the establishment of a National Museum of Building Arts, and provided for procedures to implement the World Heritage Convention that was approved by the Senate on October 26, 1973.

B. OWNER CONSENT PROVISIONS OF THE 1980 AMENDMENTS

The owner consent provisions are included among the provisions that make up the 1980 Amendments. They consist of two distinct consent provisions that provide coverage of two different areas of historic preservation. The scope of the first consent provision covers properties

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10 Id. at 22.
11 Id. at 22-23.
of national, regional and local significance, namely properties included in the National Register of Historic Places (National Register) or designated as National Historic Landmarks. The scope of the second consent provision covers properties of international significance that are recognized through World Heritage Convention.

1. Properties or Districts Included on the National Register or designated as National Historic Landmarks

The first consent provision limits the inclusion of a property or district on the National Register or the designation of a property or district as a National Historic Landmark. To

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13 Id. § 470a-l(c).
14 The National Register was established by Title I of the NHPA of 1966. Id. § 470a. In general, for a property to be included on the National Register it must be “significant in American history, architecture, archeology, engineering, and culture.” Id. § 470a(a)(1)(A). Inclusion of a property on or a finding by the NPS that a property is eligible for the National Register means that the Federal government engaged in a federal or federally assisted undertaking must “take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.” Id. § 470f. The federal government must also provide the Advisory Council on Historic Preservation opportunity to comment on such undertaking before taking any action (known as a Section 106 proceeding). Id. Note that Section 106 protection is available for properties that are eligible for the National Register but have not yet been listed. In addition, a property or district that is listed on the National Register qualifies for certain grants and loans authorized by the NHPA, See Id. §§ 470a(c) & 470d(a), and it may qualify for special federal income tax incentives. See I.R.C. § 47 (2006). Inclusion of a property or district on the National Register does not result in any direct burdens to property owners. However, it may trigger other Federal statutes or state and local historic preservation laws that can restrict property rights. See 126 Cong. Rec. 29,929 (statement of Rep. Gradison regarding certain tax disincentives to owners of properties on the National Register); H.R. Rep. No. 96-1457, 27 (1980) (concerning state and local laws being triggered by properties being placed on National Register).
15 The National Historic Landmark Program was established in 1960 by the National Park Service (NPS). Barry Mackintosh, The Historic Sites Survey and National Historic Landmarks Program: A History 41-42 (1985). The Program was fully implemented in 1983 with the promulgation by NPS of regulations under the authority of the Historic Sites Act of 1935 (16 U.S.C. § 461 (2006)) and the 1980 Amendments. National Historic Landmarks Program, 36 C.F.R. § 65.1 (2001). As a matter of course, all properties designated as National Historic Landmarks are listed in the National Register. Id. § 65.2(b). National Historic Landmarks differ from the other properties or districts on the National Register in that they must meet a higher level of national significance and they are subsequently provided with a higher level of protection in relation to federal undertakings. Compare National Historic Landmarks Program, 36 C.F.R. § 65.4 (1982) (providing the criteria for National Historic Landmarks), and 16 U.S.C. § 470h-2(f) (2006) (describing the protection afforded to National Historic Landmarks (known as Section 110 protection)) with 36 C.F.R. § 60.4 (1982) (providing the criteria for properties/districts listed on the National Register), and 16 U.S.C. § 470f (2006) (describing the protection offered by the Section 106 proceeding to properties listed on the National Register). In addition to the protections afforded by being in the National Register (see supra note 14), National Historic Landmarks are afforded the following protections: 1) Federal agency planning an undertaking that may have a harm a landmark must plan and take the necessary action to minimize harm to the landmark as well as providing the Advisory Council opportunity to comment (16 U.S.C. § 470h-2(f)); 2) NPS makes an annual report to Congress of landmarks that are in danger and such NPS may also study landmarks for recommendation to Congress of their inclusion in the National Park System; and 3) National Historic Landmarks receive protection from certain mining activities. Id. § 65.2(c).
simplify the analysis, the paper will refer to this consent provision as the National Register consent provision. 16 Under paragraph (6) of section 101(a) of the NHPA as amended by the 1980 Amendments, the Act provides that:

The Secretary shall promulgate regulations requiring that before any property or district may be included on the National Register or designated as a National Historic Landmark, the owner or owners of such property, or a majority of the owners of the properties within the district in the case of an historic district, shall be given the opportunity (including a reasonable period of time) to concur in, or object to, the nomination of the property or district for such inclusion or designation. If the owner or owners of any privately owned property, or a majority of the owners of such properties within the district in the case of an historic district, object to such inclusion or designation, such property shall not be included on the National Register or designated as a National Historic Landmark until such objection is withdrawn. 17

In clear and simple terms, then, the consent provision provides that no individual property may be included on the National Register if its owner objects and no historic district shall be included on the National Register if a majority of the property owners in the district object. 18

2. Properties or Districts Nominated for Inclusion on the World Heritage List

The second consent provision limits the inclusion of a property or a district on the World Heritage List. 19 Section 401(b) of the 1980 Amendments provides that the Secretary of Interior

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16 Because the consent provision is the same for National Historic Landmarks and for properties or districts listed on the National Register, this paper will not separately analyze the consent provision as it applies to National Historic Landmarks but instead treat National Historic Landmarks as properties or districts listed on the National Register. This will not change the analysis in any way. Rather, it will help narrow the analysis and prevent important issues from being muddied by confusion between National Register properties or districts and National Historic Landmarks.


18 This consent provision is often referred to as an owner-objection or negative consent provision given that it does not actually require consent for a property or district to be listed but rather gives the owner an opportunity to object. If the owner objects, the property is not listed, but, if the owner does not or fails to object, then the property can be listed. See id. However, for descriptive convenience, this paper will refer to this provision as simply an owner consent provision.

19 The World Heritage List is provided for by the World Heritage Convention, which was enacted to establish “an effective system of collective protection of the cultural and natural heritage of outstanding universal value.” Convention Concerning the Protection of the World Cultural and Natural Heritage, preamble, Nov. 23, 1972, 27
shall “nominate properties he determines are of international significance to the World Heritage Committee” for inclusion on the World Heritage List. However, just as national significance alone is not sufficient to place a property or district on the National Register, international significance is not enough to nominate a property for the World Heritage List. Section 401(c) of the 1980 Amendments explicitly provides that “no non-Federal property may be nominated by the Secretary of Interior…for inclusion on the World Heritage List unless the owner of the property concurs in writing.”

It is important to note that this consent provision is harsher than the consent provision that applies to the National Register Program. On first glance, the consent provision seems to have a similar impact on single property designations given that refusal of consent by the owner ends the process just as it does in the National Register context. However, the World Heritage provision is more protective of owners’ property rights.

Because the World Heritage consent provision is worded in positive language instead of the negative language used in the National Register consent provision, silence or failure to give consent prevents the property from being included on the List. This is a different and harsher

20 The World Heritage Committee is the body established by the World Heritage Convention to administer the terms of the Convention. It is made up of 21 member-states elected by the member-states and it is assisted by UNESCO. World Heritage Convention, supra note 19, at art. 8. One of the Committee’s principal duties is to define the criteria that govern inclusion of properties on the World Heritage List and apply those criteria to properties nominated by member-states to determine whether they should be included on the List. Id. art. 11.


22 See id. The owner must concur for a property to be listed. If the owner does not concur (either by opposing the listing or by silence), the property is not listed.
effect than that of the National Register consent provision, where silence or failure to object to a property’s inclusion on the National Register, means that the property can be listed.\textsuperscript{23}

The World Heritage consent provision is also more severe when applied to multiple properties, i.e., districts. By the plain terms of the National Register consent provision, a majority of property owners must object to the listing of their properties in order to prevent a district from being listed on the National Register. The World Heritage consent provision does not distinguish between the level of consent required for a single property and the level of consent required for a district but simply states that “\textit{no} non-Federal property shall be nominated for \textit{inclusion} on the World Heritage List” unless the owner consents.\textsuperscript{24} This means that if one property owner in a historic district refuses to consent to having her property included in a nomination of the historic district to the World Heritage List, then the district as constituted cannot be nominated.\textsuperscript{25}

\textbf{II. REASONS CONGRESS INCLUDED THE NATIONAL REGISTER CONSENT PROVISION IN THE 1980 AMENDMENTS}

Why did Congress include consent provisions in the 1980 Amendments, and why are the consent provisions for World Heritage properties harsher than those for National Register properties? This part of the paper and Part III will attempt to answer these questions through a review of 1980 Amendments’ legislative history and key events leading up to the passage of Amendments. A careful individual review of the legislative history and events leading to the

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  \item \textsuperscript{23} This is because that National Register consent provision requires an owner object to a property’s listing rather than requiring that the owner consent to such listing as required by the World Heritage consent provision. \textit{Compare} 16 U.S.C. § 470a(a)(6) (2006) (National Register consent provision) \textit{with} 16 U.S.C. § 470a-1(c) (2006) (World Heritage consent provision).
  \item \textsuperscript{24} 16 U.S.C. § 470a-1(c) (2006).
  \item \textsuperscript{25} To be nominated, the district would have to be reconfigured to exclude the property of the non-consenting owner. Note that the final rules and regulations implementing the World Heritage Convention provisions of the 1980 Amendments clarify the terms used in the 1980 Amendments by stating, “\textit{any owner must concur before his/her property may be included within the World Heritage nomination.” World Heritage Convention Rule, 36 C.F.R. § 73.7(b)(1)(ii) (1982).
\end{itemize}
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passage of the consent provisions will reveal that Congress was largely motivated by a desire to protect private property rights from undue burdens that would result from the respective programs. 26 There are also indications that Congress was acting out of deference to state and local governments in passing the National Register consent provisions that the World Heritage consent provisions were the result of institutional inertia. However, both these reasons are secondary to the private property rights rationale found interspersed throughout the legislative history of both provisions.

At its core, the National Register consent provision represents Congressional concern for protecting private property rights from federally imposed burdens. The need Congress felt to protect property rights with the consent provision of the 1980 Amendments stems from two sources. First, Congress felt that between 1966 when the National Register was created 27 and 1980 when the Amendments were passed, the National Register changed from being a type of honor roll that placed no burden on property rights and was largely a federal planning tool 28 to a

26 Any inquiry into the reasons behind Congressional action, or what is commonly referred to as legislative intent, is fraught with problems. The intent of one outspoken individual is most likely not going to be the intent of a whole body. Often, legislators will state multiple and conflicting reasons for why the legislature acted the way it did. And, it is rare that an individual legislator has one single reason for passing a certain law—she probably had several, some having nothing to do with the substance of the law but perhaps everything to do with returning a favor to a colleague. See Edwards v. Aguillard, 482 U.S. 578, 636–37 (1987) (Scalia, J., dissenting). In addition, the information provided in a committee report that is supposed to reflect the intent of Congress as a whole may have been inserted by one Congressman’s staffer who may have been acting to influence future judicial interpretation. See Blanchard v. Bergeron, 489 U.S. 87, 98–99 (1989) (Scalia, J., concurring); see also Hirshey v. Federal Energy Regulatory Com., 777 F.2d 1, 7 (D.C. Cir. 1985) (Scalia, J., concurring) (doubting whether the details of a committee report ever “come to the attention of, much less are approved by, the house that enacts the committee’s bill.”); Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 620 (1991) (Scalia, J., concurring) (explaining that committee reports do “not necessarily say anything about what Congress as a whole thought”). However, the inquiry, while problematic, is still valuable, especially where the reasons for Congress passing a certain law are not obvious or the law seems unreasonable, and courts regularly rely on legislative history to determine legislative intent. See Garcia v. United States, 469 U.S. 70, 76 (1984) (stating that Committee Reports represent “the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation” and are therefore the “authoritative source for finding the Legislature’s intent.”). And, even outspoken critics of judicial use of legislative history have relied on it in certain cases. See, e.g., International Brotherhood of Teamsters v. Interstate Commerce Commission, 801 F.2d 1423 (D.C. Cir. 1986) (showing Judge Kenneth Starr’s reliance legislative history despite disparaging such reliance).

27 See supra note 14.

mechanism that was used at the federal, state, and local level to trigger additional burdens on historic properties. Of particular concern to Congress were the tax incentives and disincentives provided by the Tax Reform Act of 1976 for properties listed on National Register\textsuperscript{29} and the practice by state and local governments of using the National Register to trigger the application state and local preservation law to listed properties.\textsuperscript{30} Congress did not believe that such burdens should be placed on property owners at the federal level but rather were more appropriate at the state and local level where the powers of zoning and other regulatory powers reside.\textsuperscript{31} This deference to state and local government is the second source of the National Register consent provision. Each will be discussed in turn.

**A. Concern for Private Property Rights**

The only substantive protection or benefit provided by the NHPA of 1966 to properties listed on the National Register was Section 106, which required a Federal agency to consult with the Advisory Council and take into consideration any impact the agency’s undertaking (or a federally assisted undertaking) would have on a listed property.\textsuperscript{32} Because Section 106 only required consultation proceedings by federal agencies, the NHPA of 1966 did not burden private property rights in any significant way. Indeed, if anything, Section 106 protected the rights of owners of listed properties.

Between 1966 and 1980, two events occurred that altered the effect of the National Register on private property rights. First, Congress passed the Tax Reform Act in 1976, which

\begin{itemize}
\item \textsuperscript{30} H.R. Rep. 96-1457, at 27 (1980) (regarding state and local laws triggered by listing a property on the National Register).
\item \textsuperscript{31} Id.
\item \textsuperscript{32} See National Historic Preservation Act of 1966, Pub. L. No. 89-665, § 106, 80 Stat. 915, 917 (codified as amended as 16 U.S.C. 470 (2006)). The additional protections and benefits currently enjoyed by properties listed on the National Register were not provided for until after the passage of the 1980 Amendments and the subsequent rules promulgated by the NPS. See supra notes 14-15 (providing an overview of the additional protections and benefits granted to NR properties and NHLs by the 1980 Amendments)
\end{itemize}
provided for certain tax incentives for preserving properties listed on the National Register and corresponding tax disincentives for not preserving listed properties.33 Second, after the creation of the National Register, state and local governments linked application of state and local preservation laws to the listing of properties on the National Register.34

These two events upset the notion that the NHPA of 1966 placed no burdens on the rights of property owners. Now, by virtue of a property being listed on the National Register, an owner was subject to tax disincentives if she did not preserve her property. In addition, her property potentially became subject to state and local preservation laws, which usually place additional restrictions on the property.35

1. **Tax Reform Act of 1976**

The Tax Reform Act of 1976 contained provisions to encourage preservation and rehabilitation of properties listed on the National Register or in state or local historic districts approved by the Secretary of Interior.36 These provisions provided tax incentives for private and commercial investment in “certified historic structures”37 and tax disincentives for actions that

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34 See State ex rel. BSW Dev. Group v. City of Dayton, 699 N.E. 2d 1271, 1273 (Ohio 1998) (quoting the Revised Code of General Ordinances of Dayton, § 150.45, which states “[w]henever an application is made for a demolition permit for any structure or site listed on or eligible for the National Register of Historic Places, no demolition permit shall be issued until the applicant has complied with the provisions of Section 150.246 of the R.C.G.O. irrespective of any other provisions of this subchapter”); CAL. PUB. RES. CODE § 5024.1(d)(1) (West 2001) (stating that the California Register shall include all “California properties formally determined eligible for, or listed in, the National Register of Historic Places”). However, instances of National Register listings triggering state and local laws are uncommon. See NATIONAL CONFERENCE OF STATE HISTORIC PRESERVATION OFFICERS, THE NATIONAL REGISTER OF HISTORIC PLACES AND DUE PROCESS 3 (2004), http://www.ncshpo.org/PDFs/NationalRegister/NRDueProcess.pdf.
35 Local preservation laws usually contain restrictions on demolition, new construction, and other uses of the historic property. See e.g., DC Historic Landmark and Historic District Preservation Act of 1978, D.C. CODE §§ 6-1104-1105, 6-1107 (2006).
37 Under the act, a building qualified as a certified historic structure if it was to be used in a trade or business or held for the production of income (therefore subject to depreciation under the Internal Revenue Code) and (a) is listed in the National Register, (b) is located in a Registered Historic District and is certified by the Secretary of Interior as being of historic significance to the district, or (c) is located in a historic district designated under a statute of the appropriate State or local government if such statute is certified by the
would thwart preservation of these structures.\textsuperscript{38} As a preservation incentive, the act provided for accelerated depreciation or amortization of costs incurred in rehabilitating properties. As a disincentive for actions harmful to preservation, the act disallowed the treatment of demolition costs associated with certified historic structures\textsuperscript{39} as immediately deductible business expenses and it denied accelerated depreciation for new construction on sites of demolished structures.\textsuperscript{40}

Congress intended these provisions to stave off the decay and subsequent demolition of historic structures in urban commercial districts.\textsuperscript{41} In addition, they were meant to correct provisions under the Internal Revenue Code that favored demolition of old buildings and construction of new ones and disfavored preservation and rehabilitation of older buildings.\textsuperscript{42}

While the Tax Reform Act of 1976 was beneficial in many respects to historic preservation and the tax incentives were widely taken advantage of, certain members of the business and industrial community who owner property listed on the National Register were opposed to the burden placed on their property rights by the tax disincentives and began to voice their objections to the NPS as the administrative body of the NHPA and Congress.

Many of the objections from the business and industrial communities had to do with the fear of being put at a competitive disadvantage compared to competitors whose manufacturing

\textsuperscript{38} Id. § 2124(b)(3).
\textsuperscript{39} Id. § 2124.
\textsuperscript{39} See supra note 37.
\textsuperscript{40} Id.
\textsuperscript{42} Id. Preservation and rehabilitation was not favored under the previous law because such costs were not subject to accelerated depreciation, as was new construction, but to straight-line depreciation. Accelerated depreciation is preferred over straight-line depreciation because under straight line depreciation an individual’s depreciable costs in an asset (here costs associated with rehabilitation or preservation) are deducted in a fixed proportion every year over the asset’s useful life. Accelerated depreciation, on the other hand, front-loads the depreciation deductions so that costs are recovered more quickly than in straight-line depreciation. This is preferable because of the time value of money, i.e., five dollars deducted from tax today is worth more than five dollars deducted from tax three years from now given inflation and the fact that the money saved from lower taxes as a result of the deduction can be invested and earn interest.
plants, stores, or offices were not certified historic structures and could thus be adapted to any changes in the market without any tax penalties. In addition, companies with historic properties were concerned that the tax disincentives associated with the Tax Reform Act of 1976 would set a precedent for future government restrictions on their property rights under the aegis of historic preservation. In spite of these objections, the Department of Interior went forward with its historic preservation program and began a controversial National Landmark designation of some of the objecting companies’ properties in 1978.

In 1979, the issue came to a head. Proctor & Gamble, whose Ivorydale plant near Cincinnati, Ohio was on the docket to be designated as a National Landmark, tried to pressure the Department of Interior to either hold in abeyance or drop the nomination of its plant from the list of properties to be designated as National Landmarks. However, Interior refused to stop the process and continued with the designation process.

Having failed to convince the Department of Interior to stop the designation process, Proctor and Gamble began to lobby Congress to get rid of the tax disincentives. Its efforts were successful when Representative Willis D. Gradison, Jr., of Cincinnati slipped a provision into the 1980 Interior Appropriations Act, enacted in November of 1979, which stated: “none of the funds appropriated to the Heritage Conservation and Recreation Service may be used to add industrial facilities to the list of National Historic Landmarks without consent of the owner.”

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43 Mackintosh, supra note 15, at 108-10 (recounting comments in letters made by the chairman of Marshall Field and Company and the chairman of Proctor and Gamble, both of whose companies had industrial and commercial properties eligible for designation as National Historic Landmarks).
44 Id. at 109-110 (providing comments from Proctor and Gamble’s chairman as representative of other objecting companies’ fears of the precedential effects the tax disincentives will have for “unknown entanglements later”).
45 Id. at 109.
46 This pressure included letters from the Chairman of Proctor and Gamble as well as Ohio Senators and Congressman to the Department of Interior. Id. at 110.
47 Id.
48 The Heritage Conservation and Recreation Service was the predecessor of NPS in administering the federal historic preservation program. NPS replaced the Heritage Conservation and Recreation Service as the...
At the same time this consent provision was passed, Congress was considering several pieces of legislation to amend the NHPA. Proponents of owner consent provisions (mainly companies and their industry representatives), fresh off a victory, sought general application of the 1980 Interior Appropriations Act owner consent provision to all National Register nominations. The Department of Interior opposed the consent provisions on the grounds that historic properties needed to be preserved on the basis of their merits. Interior was also concerned about the negative impact consent would have on preservation efforts. Over Interior’s protest, Congress added consent provisions to the NHPA with the passage of the 1980 Amendments.

2. Tax Reform Act and the Legislative History of the 1980 Amendments

An examination of the relevant legislative history of the 1980 Amendments reveals that, with a few exceptions, the tax disincentives provided by the Tax Reform Act of 1976 were the motivating force behind Congress’s support of the owner consent provisions. The two main documents that reveal the legislative intent of Congress are Committee Report on the 1980 Amendments and the Congressional Record of the passage of the 1980 Amendments in the House.

administrative agency of the federal historic preservation program at the end of the Carter Administration in January 1981. Mackintosh, supra note 8, at ch. 1.


51 See, e.g., Hearings, supra note 5, at 481-482 (statement of Merrill Butler, President, National Association of Homebuilders) (noting that historic designations have expanded from mere honor rolls to include other protections/restrictions including tax disincentives and expressing concern about the effect excessive restrictions on designated properties will have on necessary development projects).

52 See 126 Cong. Rec. 29,826-27, (1980) (Rep. Seiberling’s statements on the owner consent provision that was added to the 1980 Amendments at the suggestion of Rep. Dick Cheney); Id. at 29,829 (Rep. Gradison’s remarks regarding the necessity of a consent provision in the 1980 Amendments given the tax disincentives).
The influence that the tax disincentives had on Congress in passing the National Register consent provisions is most evident in the exchange between Rep. Seiberling of Ohio and Rep. Gradison of Ohio following Rep. Seiberling’s movement in the House to pass the 1980 Amendments.\(^5^3\) First of all, it is interesting to note that both Seiberling and Gradison are from Ohio, the state in which the Ivorydale plant of Proctor & Gamble resides. Proctor & Gamble, in a push to avoid the tax disincentives attached to National Landmark designation of its Ivorydale plant, provided the major impetus for the insertion of the owner consent provision in the 1980 Interior Appropriations Act, which was inserted by Gradison.\(^5^4\) How relevant this Ohio connection is to the existence of the owner consent provisions is left to conjecture, but it is curious.\(^5^5\)

More relevant is the exchange between Seiberling and Gradison regarding tax incentives. In his remarks, Gradison notes that arguments against owner consent rely on the assumption that the National Register is only for “planning purposes”; because the National Register was established exclusively for planning purposes, property rights should not be burdened. Gradison points out that tying tax disincentives to the National Register necessitates owner consent

\(^{5^3}\) 126 Cong. Rec. 29,828-29 (1980).
\(^{5^5}\) Interestingly, the consent provision was included at the suggestion of Rep. Cheney, then a Representative of Wyoming, when the bill was before the Committee on Interior and Insular Affairs for mark up. In negotiations over the provision, of which there is no record, Cheney promised his support and advocacy of the bill to others if the owner consent provisions were included. The Politics of Archaeology and Historic Preservation: How Our Laws are Really Made, in PROTECTING THE PAST (George S. Smith and John E. Ehrenhard eds., 2000), available at http://www.nps.gov/seac/protection/html/2d-neumann.htm. With respect to why Cheney pushed the consent provision, the legislative history is silent. However, according to Loretta Neumann, Rep. Seiberling’s Administrative Aide during the negotiation of the 1980 Amendments, Cheney suggested the consent provision out of concern for personal privacy and property rights. Letter from Loretta Neumann to author (May 12, 2008) (on file with author). Such concerns would seem to have been motivated at least in part by the tax disincentives created by the Tax Reform Act of 1976. It is also important to note that Rep. Seiberling seemed intent on softening Cheney’s original consent provision (which was a true owner consent provision as opposed to an owner objection provision (see supra note 18)) as indicated by his expression of gratitude to Cheney for “working with us and with the historic preservation groups… to refine the provision to the point where it does not frustrate the process of identifying and protecting historic properties.” 126 Cong. Rec. 29,829 (1980). Accordingly, it is difficult argue that Sieberling was simply finishing what Procter & Gamble started when it appears from his statements in the Congressional Record that he was actually pushing back on Cheney’s proposed consent provision.
because the tax disincentives make the National Register more than just a planning tool.

Gradison suggests that without such tax disincentives owner consent would not be necessary as long as the National Register was limited to use as a planning tool.\(^5^6\)

Seiberling agrees that the tax disincentives should be reviewed and ultimately removed because the tax disincentives ultimately acted as a disincentive to preservation.\(^5^7\) While Seiberling did not elaborate on how tax disincentives act as disincentives to preservation, his statements indicate that he did not support the tax disincentives and that such disincentives played a role in his support for the owner consent provisions provided by the 1980 Amendments. Seiberling’s view of the tax disincentives are especially important given he was both the sponsor of the bill that became the 1980 Amendments and the author of the Committee Report on the Amendments.\(^5^8\)

Interestingly, the Committee Report does not directly mention the tax disincentives as one of the motivating reasons for consent provisions. While indicating in several places that the consent provisions were motivated by a concern for restrictions placed on a property by virtue of the property being listed on the National Register, the Committee only mentions directly its concerns about state and local preservation laws being triggered by a National Register listing as motivation for passing the 1980 Amendments.\(^5^9\) However, language regarding the Committee’s view that the Register should be more than an honor roll but not more than a tool to be used in federal planning could be read as implicit disapproval of the tax disincentives.\(^6^0\) Indeed, tax incentives seem to make the National Register more than a simple planning tool and more like a

\(^{5^6}\) 126 Cong. Rec. 29,829 (1980).

\(^{5^7}\) Id.

\(^{5^8}\) See H.R. Rep. No. 96-1457, 16 (1980) (indicating that H.R. 5496, the bill that became the 1980 Amendments was introduced by Seiberling); Neumann, supra note 55 (indicating that Seiberling wrote the committee report, chaired the hearings before the Subcommittee on National Parks and Public Lands (which has jurisdiction over historic preservation) and handled the details of the Amendment of 1980).

\(^{5^9}\) Id. at 27-28.

\(^{6^0}\) See id.
tool that “restricts[s] . . . what a property owner can do with his or her property.” According to the Report, such property restrictions should not be tied to the National Register given the narrow purposes of the Register.

Only in the section of the Committee Report entitled “Additional Views” are the tax disincentives directly addressed. In a statement made by five Congressmen opposed to owner consent provisions, the Congressmen agree that owner consent should be provided for in any situation where an owner’s private property rights are infringed upon but they do not believe that listing a property on the National Register infringes on the owner’s property rights. In addressing the tax disincentives from demolition of historic properties, the congressmen claim that the disincentives do not infringe on the property rights of owners but “merely constitute an expression of the federal government’s favorable concern for historic preservation.”

The congressmen do not explicitly say that tax disincentives were one of the motivations for owner consent provisions. Yet, they do note that owner consent provisions would be necessary if the National Register burdened property rights and then argue that tax disincentives did not place such burden on listed properties. In their short statement in opposition to the owner consent provisions, the decision of the Congressmen to discount any burden placed on property rights by tax disincentives indicates that presence of tax disincentives was one of the main arguments put forth by supporters of the consent provisions.

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61 Id. at 27. It is puzzling that the Committee Report does not explicitly mention the tax disincentives as one of the factors restricting private property rights. The Committee explicitly stated its concern that property rights were being restricted by the National Register listings, and tax disincentives were one of the major burdens triggered by the National Register that were being debated at the time 1980s Amendment was passed. However, Seiberling’s failure to mention them directly in the report could have simply been an oversight as he was clearly aware of them and viewed them harmful to historic preservation as indicated by the Congressional Record. See 126 Cong. Rec. 29,829 (1980).

62 Id.


64 Id.
In sum, tax disincentives created by the Tax Reform Act of 1976 and triggered by a property being listed on the National Register were viewed by a majority of Congress as placing a significant burden on private property rights. This view was, to some extent, influenced by businesses that were concerned about the competitive disadvantage they would be placed at because of the tax disincentive. Because Congress did not feel that such burdens should be placed on a property unwittingly, Congress decided to include owner consent provisions in the 1980 Amendments.

3. State and Local Preservation Law

A second motivating force behind the National Register consent provision was the presence of state and local preservation laws that were triggered by properties being listed on the National Register. The Committee Report states that while it “recognizes that listing on the National Register does not, under this Act of the 1966 Act, restrict in any way what a property owner can do with his or her property, it is possible that “state and local laws for the protection of historic properties” could be “triggered automatically by National Register listings.” While this quoted section marks the only place this rationale for the consent provisions is found, its placement is the most prominent because it is the only burden on National Register properties that the Committee as a whole explicitly acknowledges.

Given Congress’s concern for placing any burdens on private properties listed on the National register, the Committee’s concern about the linking of state and local preservation law to the National Register makes sense. State and local preservation laws (especially local laws) are generally much more restrictive on property owners and their property than national laws.

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65 Id. at 27
preservation laws.\textsuperscript{67} Thus, by automatically triggering these restrictive provisions once a property is placed on the National Register, state and local preservation laws can place an unwanted burden on a property owner’s rights to his or her land.\textsuperscript{68}

B. Deference to State and Local Government

Any Congressional concern for burdens placed on private property by national historic preservation law has to be traced back to Congressional deference to state and local government operating under the authority of the police power, a power specifically designated to the states.\textsuperscript{69} Congress may generally only regulate private property through legislation and subsequent regulation that are authorized under Congress’s enumerated powers and that do not violate the Takings Clause of the Fifth Amendment or the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments.\textsuperscript{70} The Committee Report notes that because state and local governments have “the police power of zoning and other regulatory tools, . . . more protective controls are appropriate” at the state and local level.\textsuperscript{71} By refusing to burden property without owner consent, Congress showed deference to state and local police power while recognizing its own limitations under the Fifth Amendment.

III. REASONS CONGRESS INCLUDED THE WORLD HERITAGE CONSENT PROVISIONS IN THE 1980 AMENDMENTS


\textsuperscript{68} Note that it may be unconstitutional for a state or local government to automatically trigger the application of state and local laws to any property listed on the National Register. Such automatic listing likely deprives the owner of due process of the law given that most preservation laws require notice and a hearing before a property is protected under preservation laws, and these procedural protections would be lacking in the case of automatic application of the laws to National Register properties. See National Conference of State Historic Preservation Officers, \textit{supra} note 34, at 3.


\textsuperscript{70} U.S. \textit{Const.} amends. V, XIV, §1; \textit{see also} Pennsylvania Coal v. Mahon, 260 U.S. 393, 415-16 (1922) (providing that if the government goes to far in regulating a property it will be viewed as a taking); \textit{Penn Central}, 438 U.S. at 124. (providing a three-part test for determining whether government regulation amounts to a taking).

The World Heritage consent provision is quite a different animal than the National Register consent provision. For one, by its terms it requires a higher level of consent for designation of a historic site than does the National Register provision.\(^2\) The World Heritage Convention also requires a higher level of protection of protection for designated sites; World Heritage Sites must have sufficient protection (legal or otherwise) that ensures the sites’ preservation for future generations.\(^3\)

Unlike the legislative history of the National Register consent provision, the legislative history of the World Heritage consent provision provides no clues as to why Congress included the consent provision in implementing the World Heritage Convention. But, a comparison of the burdens associated with nominating a property under the World Heritage Convention to those associated with a property’s inclusion on the National Register reveals that the World Heritage consent provision, like the National Register provisions, was motivated by concern for private property rights. Because the concern results from a different set of circumstances, a separate analysis is worthwhile.

**A. Concern for Private Property Rights**

Article 5 of the World Heritage Convention requires that each member-nation shall take, “as far as possible, and as appropriate…legal, scientific, technical, administrative, and financial measures necessary for the identification, protection, conservation, preservation, and rehabilitation of properties of outstanding universal value,” i.e., properties that are nominated and included on the World Heritage List.\(^4\) The 1980 Amendments, which implement the Convention, provide that each nomination of a property to the World Heritage List “shall include

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\(^2\) See supra pp. 7-8.

\(^3\) See World Heritage Convention, supra note 19, at art. 5.

\(^4\) Id.
evidence of such legal protections as may be necessary to ensure preservation of the property and its environment (including restrictive covenants, easements, and other forms of protection).”

The Final Rules and Regulations promulgated by NPS regarding the World Heritage Convention stipulate that the following protection measures for private property satisfy the level of protection required by the 1980 Amendments:

(1) A written covenant executed by the owner(s) prohibiting, in perpetuity, any use that is not consistent with, or which threatens or damages the property's universally significant values, or other trust or legal arrangement that has that effect; and
(2) The opinion of counsel on the legal status and enforcement of such a prohibition, including, but not limited to, enforceability by the Federal government or by interested third parties.76

Basically, in order for a private property in the United States to be included on the World Heritage List, the owner must provide a legally enforceable guarantee that she will not use the property in a manner that threatens, harms nor is inconsistent with the cultural values imbued in the property.

On this basis alone the reasons why Congress required consent before a property could be nominated to the World Heritage List and why it required 100% instead of majority consent with respect to a district becomes sufficiently clear. The World Heritage Convention does not just result in some indirect burden to a listed property, by triggering a connected law. Rather, it requires a guarantee in perpetuity by the owner to maintain or, more precisely, to do nothing that adversely affects the cultural value of the property. Failure to do so opens the owner up to lawsuits from the Federal government as well as third parties.

These burdens are much more onerous than any restriction placed on an owner’s property rights by the NHPA. And, in return, the owner of the property seems to get little, in terms of direct benefits, for listing her property on the World Heritage Site. Thus, it is no surprise that

76 36 C.F.R. § 73.13(c) (1982).
Congress, which passed consent provisions for the comparatively less burdened National
Register properties, required consent before a property could be listed on the World Heritage List.

IV. ANALYSIS AND CRITIQUE OF THE RATIONALES BEHIND THE CONSENT
PROVISIONS

Historic preservation efforts at national, state, and local levels have matured significantly
since the 1980, when the Amendments were passed. The maturity of the current system may be
enough to negate some of the reasons proffered in 1980. Or, it may be possible that the
rationales for the Amendments were faulty from the beginning.

A. National Register Consent Provision

1. Tax Reform Act of 1976

The tax disincentives of the Tax Reform Act of 1976 provided the primary impetus for
the passage of the owner consent provisions. The turmoil they caused among large companies
and the subsequent pressure such companies placed on Congress provided the momentum
necessary to pass the owner consent provisions.

In perhaps the greatest irony concerning the consent provisions of the 1980 Amendments,
the controversial tax disincentives lapsed shortly after the owner consent provisions were passed.
“After all the turmoil they had stirred, the disincentives in the tax code expired at the end of 1983,
leaving owner consent as their legacy.” The expiration of the disincentives and subsequent
decision of Congress not to reinstate the tax disincentives removes the strongest argument for
keeping the owner consent provisions. As Rep. Gradison said during the passage of the
Amendments, “[i]f [the tax disincentives] were [eliminated] then I think it would be a possible to

77 See Mackintosh, supra note 15, at 112.
78 The current tax consequences of historic preservation are all positive. Under the latest tax incentive program
created by the Tax Reform Act of 1986 (I.R.C. § 47 (2006)), property owners receive a 20% tax credit for certified
rehabilitation of certified historic structures and a 10% tax credit for nonhistoric, nonresidential buildings built
before 1935.
go back and take a whole new look at this question of owner consent.” Perhaps it is now time for Congress to take that look.

Even if the tax disincentives were still in effect, they would not provide a convincing rationale for the continuation of the consent provisions. The main argument for consent provisions is that they are necessary to protect property rights from undue burden by the federal government. This argument relies on the notion that the federal government cannot impose substantial burdens on private property rights because the regulation of private property rights is within the state police power. And, Congress traditionally has no authority over a state’s exercise of its police power. Under this line of reasoning, the tax disincentive are an undue burden on the exercise of private property rights because they come from the federal government who has no authority to regulate private property. This argument, while compelling, is flawed for several reasons.

First, the tax disincentive created under the Tax Reform Act of 1976 is clearly within Congress’s taxation power under the Sixteenth Amendment. And, any notion that the disincentive amounted to a Fifth Amendment regulatory taking would probably not fly. Second, the economic cost of any burden placed on the property is outweighed by the increased economic value the property will likely realize from its inclusion on the National Register.

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79 126 CONG. REC. 29,929 (1980).
80 Euclid v. Ambler Realty Co., 272 U.S. 365, 390 (1926); Berman, 348 U.S. at 32.
81 U.S. CONST. amend. XVI.
82 See Penn Central, 438 U.S. at 124. While a tax disincentive may deprive a property owner of some economic benefit or use of his or her property, the owner is still probably getting reasonable beneficial use out of the property. In any case, the decrease in beneficial use of the property would not qualify for a regulatory taking as defined in Lucas v. South Carolina Coastal Council. See 505 U.S. 1003, 1015 (1992). In Lucas, the Court rules that a property owner must be deprived of all economically beneficial use of property for a taking to be found. Id. A tax disincentive for ripping down a building does not amount to a complete deprivation of use.
Third, in cases where the tax disincentive is not outweighed by increase in economic value from the inclusion of the property on the National Register, the cost of the tax disincentive is still outweighed by the public benefit of preservation. Fourth, by viewing historic preservation as a public good, the tax disincentive may be perfectly reasonable as a mechanism used by Congress to make the owner who demolished the historic property take into account the cost of the negative externality to the public as a whole who lost part of its cultural heritage.

Finally, the owner consent provision as a whole could be viewed as a public choice defect. The major impetus for the consent provision came from a small but powerful group of industries and businesses, led by Procter & Gamble, that pushed through a consent provision in order to avoid the tax disincentives associated with historic properties that were eligible for landmark designation. The consent provision was not in the public interest given that the public as a whole has an interest in preserving its cultural heritage. However, the public was stymied from combating the owner consent provisions through either a lack of information regarding the impact of the consent provisions or the general collective action/free rider

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84 See 16 U.S.C. § 470 (2006) (stating that “preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans) (emphasis added).

85 See Carol Rose, The Comedy of the Commons: Custom, Commerce and Inherently Public Property, 53 U. CHI. L. REV. 711, 718-19 (1986). Rose explains that there are exceptions to the general rule favoring private property. One of the most clear is when there is a large number of individuals that share an interest in a particular good, commonly called a public good. In such a case, private collective action maximizing enjoyment of the good may not be possible because of coordination and free-riding problems. In such cases, a government may be a useful manager of the resource by making users of the public good take into account other users’ interests, i.e., take into account any negative externalities created by their actions. Thus, in the historic preservation setting, the government can reasonably make a property owner pay for destroying a property listed on the National Register because it is a public good to some extent, or a quasi-public good.

86 Under public choice theory, politics is viewed as a strategic game in which all players pursue their economic interests. Given that wealthy and better organized groups (often smaller groups with more concentrated interests) will be able to wield more political power, some political decisions can be the result of what are known as public choice defects, i.e., where the will of the majority is defeated by the will of the powerful few. See generally Daniel A. Farber & Philip P. Frickey, The Jurisprudence of Public Choice, 65 TEX. L. REV. 873 (1987). Thus, with respect to the 1980 Amendments, the consent provisions were the result of the power of Procter & Gamble and other large companies that made their voice heard through political contributions, lobbying, etc.

87 See supra pp. 13-14.
While one would hope that Congress would act for the public interest in such cases, members of Congress had a distinct interest in promoting the owner consent provisions given that the large businesses pushing for it were also large political donors and Congress was not facing similar pressure from citizen constituent groups because of the collective action problem.

2. State and Local Preservation Laws

State and local laws that are triggered by a property’s inclusion on the National Register seems to advance the goals of the NHPA as opposed to thwarting them. As stated in the preamble of the Act, “the historical and cultural foundations of the Nation should be preserved.” This simple policy would seem to be substantially advanced by the immediate application of state and local preservation laws to properties listed on the National Register because it is in state and local preservation laws where the true teeth of historic preservation are. Listing a property on the National Register, in and of itself, provides protection only from federal undertakings. It offers no protection from action at the state and local level where a property is likely to face the greatest threats. Linking the listing of a property on the National Register to state and local preservation laws would offer more protections for a property and better ensure preservation of the federal resource. Indeed, one could argue that Congress should require that the listing of a property on the National Register trigger state and local preservation

88 Since historic preservation is a public or collective good that a large portion of the population enjoys, the members of the public are faced with the free rider problem. Most individuals will not act to protect historic properties because they assume someone else will and the benefit an individual derives from historic preservation is probably not as great as the benefit a private property owner enjoys from having complete dominion over his or her property. Note that the interests of the public when aggregated in the preserving a property may outweigh the private property owner’s interest in his property, but because the public’s interests are dispersed over a large number of people, it will be difficult to motivate and organize action in behalf of preservation. See generally Mancur Olson, Jr., The Logic of Collective Action (1965).
90 See supra note 67 (providing examples of local ordinances that restrict owners’ property rights).
laws given the greater protection at those levels. While state and local preservation laws would restrict a property owner’s use in his or her property, the costs incurred by the landowner are justified by the public interest advanced by historic preservation and it is likely that the owner of the property herself will enjoy increased property value as a result of the designation.

Another reason why this fear of triggering state law rationale may no longer make sense is because it relies on a faulty assumption. The rationale relies on the assumption that many buildings are first placed on the National Register and then protected under state and local historic preservation ordinances. While this may have been how the process worked several years ago when some states did not have historic preservation programs, the maturation of the process to the point where today there are historic preservation laws in all 50 states and in a large percentage of cities and towns means that preservation efforts that take place now are more likely to first begin at the local and state level and then at the national level. This observation seems especially correct given that historical preservation groups today are savvy enough to realize that the real protection for historic properties exists at the state and local levels.

3. Deference to State and Local Government

Deference to state and local governments in terms of the regulation of private property is a tricky issue. In part, such deference is built into the American federalist system of government, which provides for the police power to be exercised at the state and local level as opposed to the federal level. Congress is generally limited to actions that are within its legislative power that do not violate the Fifth Amendment Takings Clause.

91 Note, however, that such a triggering mechanism would probably have to provide the owner will notice and opportunity to comment on such a designation in order to avoid Due Process issues. See supra note 68 (explaining the Constitutional implications of triggering state and local preservation laws by listing a property on the National Register).
92 See Berman, 348 U.S. at 33; Euclid, 272 U.S. at 390.
93 See U.S. CONST. amend. V; Penn Central, 438 U.S. at 123-25.
In the case of owner consent provisions, deference to state and local government is no longer an issue and thus can no longer be a rationale for the requirement of owner consent provisions. Perhaps thirty years ago, when state and local preservation programs were less developed or non-existent, this principle of deference made more sense given that burdens imposed at the Federal level would not be justified by or coextensive with burdens placed on property by state and local preservation law. Today however, any burden placed on private property by the tax disincentive would most likely be small compared to the burdens imposed at the local and state levels. Furthermore, today most state and local laws do not contain owner consent provisions. Thus, the federal law’s consent provision does not show deference. Indeed, in *Penn Central*, the Court endorses the notion that consent is not required at the local level, even though the New York ordinance at issue is causing a large diminution in the potential value of Grand Central. The Court indicates that the New York preservation law is reasonable inasmuch as it gives the property owner a judicial appeal of any designation, it is motivated by the general welfare, and it allows the owner to retain substantial present use or value of the property. The Federal law governing the National Register meets all the general requirements put forth by *Penn Central*: It provides an appeal to the Secretary of Interior regarding any listing, it was enacted for the general welfare of people, and it does not negatively affect the owner’s use or value of his or her property given that it places no affirmative burdens on the listed property.

4. **Proposed Solution**

The owner consent provisions that are currently part of the NHPA should be completely removed. A conscientious application of the notification and public comment provisions that are

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94 *Penn Central*, 438 U.S. at 133-37.
96 Id. § 470(b)(4).
97 In fact, there is evidence that the listing a property on the National Register may actually help to increase its value. See *supra* note 83.
already part of Regulations implementing the NHPA offers sufficient protection to the interests of property owners whose properties are nominated for inclusion on the National Register. This conclusion necessarily follows from the above analysis. The rationales behind the owner consent provision are no longer applicable because the burdens to private property Congress was concerned with no longer exist or are sufficiently negligible given changes over the past 28 years.

B. *World Heritage Consent Provision*

1. *Burdens to Private Property*

A facial review of the burdens placed on a property as a result of its nomination to the World Heritage List compared to the burdens that existed in 1980 on properties listed on the National Register suggests that owner consent provision may be warranted in the case of properties nominated to the World Heritage List. However, they are only justified if the United States maintains the independent standard of legal protection that it established.

There is nothing in the World Heritage Convention that requires the United States to maintain its current baseline protection. In fact, the standard for legal protection required by a property on the World Heritage List is fairly flexible. In pertinent part, it requires that a member-nation take “as far as possible, and as appropriate…legal…measures necessary for the…protection, conservation, preservation, and rehabilitation of properties of outstanding universal value.”98 The United States, in implementing this statute through Department of Interior Rules and Regulations stipulated that the protection required for nomination include a written covenant in perpetuity that prohibited the property owner from taking any action that would be inconsistent with or other wise threaten or harm the universal values inherent in the property for which it was included on the World Heritage List.99

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98 World Heritage Convention, *supra* note 19, art. 5.
99 *See* 36 C.F.R. § 73.13(c) (1982).
While this level of protection is possible as evidenced by its existence in the regulations and its apparent application to today’s handful of World Heritage Sites, its appropriateness is questionable. The intent of the World Heritage Convention was to identify universally valuable cultural sites within individual member-states and include such sites on the World Heritage List to ensure their continued preservation. Although the United States has properties that qualify based on merit alone for inclusion on the World Heritage List, the owner consent provisions (required because of the burdensome legal protections nomination to the World Heritage List entail) prevent these properties from being listed and recognized. It is questionable whether the World Heritage Committee (the committee set up to administer the World Heritage Convention) would find such legal protections “appropriate” if it knew the impact of the legal protections was to significantly limit U.S. participation in the World Heritage List.

2. Institutional Inertia

The World Heritage consent provision may be a product of institutional inertia. Inertia is the resistance an object has to change in a state of motion. Inertia is common in governments because of the speed (or lack thereof) at which decisions are made, the tendency of bureaucracies to survive regardless, and the resulting red tape that comes from old laws still on the books and rules and regulations created by surviving bureaucracies. With respect to the World Heritage consent provisions, it may be possible to explain them as products of institutional inertia given the following facts.

When the National Landmark Program was first established in 1960, its creators assumed that only a small number of historic properties would be of true national significance. Given the small number, the preferred modus operandi would be to acquire through eminent domain all

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100 I.e., properties that are part of the World Heritage List.
nationally significant properties.\textsuperscript{101} Today, there are over 2,300 National Landmarks and many of those are privately owned.\textsuperscript{102} In between 1960 and today, the Department of Interior realized the value of having a slightly broader definition of “nationally significant” and opened up availability of landmark designation to a larger number of properties.\textsuperscript{103} However, this also resulted in the need for the Department to change its mode of operation from ostensibly acquiring all nationally significant properties to creating a framework in which private property could be landmarked and preserved at the same time. Naturally, this took time.

Likewise, when the World Heritage Convention was first implemented, following its ratification by the Senate in 1973, U.S. nominations to the World Heritage List were limited to federally owned or controlled properties given the notion that only federally protected properties would have the protections necessary to satisfy the World Heritage Convention. In 1980, nomination was open to all types of public properties and finally, in 1982, nomination was open to private properties.\textsuperscript{104}

In general, this gradual process of opening up nomination to more and more properties is analogous to the evolution of National Landmarks. In both cases, there was an initial starting assumption- the preferability of a small list of national landmarks acquired by eminent domain in case of national landmarks and that only federal control provided sufficient protection for a property to be on the World Heritage List. This assumption changed over time but because of institutional inertia the change was gradual. The inertia did not inhibit change but only slowed it so that at any one point in time, the facts on the ground justified a more progressive solution while the actual program reflected past realities. Such may be the case with the World Heritage

\textsuperscript{101} See Mackintosh, \textit{supra} note 15, at 69-72.
\textsuperscript{102} NPS, National Historic Landmark Program, at http://www.nps.gov/nhl/designations/Lists/LIST07.pdf.
\textsuperscript{103} Mackintosh, \textit{supra} note 15, at 69-70.
\textsuperscript{104} 36 C.F.R. 73 (summary of public comments, part (a)) (1982).
consent provisions, where federal, state, and local preservation protection may now afford sufficient legal protection to satisfy Article 5 of the World Heritage Convention but the harsh consent provisions still survive because they are based on the state of federal, state and local preservation law as it stood in 1982.

3. Proposed Solution

The World Heritage consent provision harms efforts to protect and promote internationally significant historic resources in the United States.105 While the concern that World Heritage Sites have sufficient protection is legitimate, Congress can provide for the protections in a more flexible way. By creating a flexible system like the one proposed below, Congress will enable more properties in the United States to be recognized as World Heritage Sites. And this, in turn, will further preservation efforts in the United States and potentially abroad.

A More Flexible Solution

It may be that many states and localities have sufficiently strong historic preservation laws to provide the legal protection necessary for properties nominated for the World Heritage List. In such cases, I propose that instead of requiring a written covenant and thus owner consent, the Department of Interior could simply piggyback off the protections provided at the local level, perhaps stipulating that the protection that exists in local statutes at time of the nomination creates a minimum level of protection that must be maintained by the property. Thus, the owner could not claim any additional burden and thus argue for owner consent because the owner’s

property would already likely be subject to the state and local laws. In cases where the Department of Interior finds that state and local statutes to be insufficient, it can then create some sort of covenant that may then require owner consent given the additional burdens. While this is not a perfect solution, it may present a sufficient compromise for the time being to enable more properties to be recognized by the World Heritage List.

V. CONCLUSION

The Consent provisions of the 1980 Amendments harm historic preservation efforts, especially at the national and international level. Historic preservation however is a public good that results in increased welfare for all and which studies suggest provides increases in economic value for individual property owners. Thus, Congress should seek not to restrict historic preservation because of concerns of encroachment on private property, but to promote preservation through the removal of the owner consent provisions from the 1980 Amendments. Rather than requiring owner consent, Congress should ensure that property owners are protected through diligent application of the provisions in the NHPA that require notice and public hearing of any properties nominated to the National Register or World Heritage List. Where notice and public hearing alone do not provide sufficient protection, Congress should apply more flexible solutions that are able to adapt to the changing landscape of historic preservation in the United States. By removing the owner consent provisions from law and creating more flexible solutions, Congress will ensure that the appropriate balance is struck between private property and historic preservation.