HP 602 Final

QUESTION 1: 5 points

Why might someone argue that state and local preservation laws are better than Federal ones? Do you agree with this statement? Explain.

Local preservation laws are stronger than preservation laws because, simply put, they have more "teeth." This statement is evidenced by a comparison of NHPA and its Section 106 process, a state version of NHPA, and local opportunities.

The NHPA, first integrated into US law in 1966, requires federal agencies or agencies using federal funding to "look before they leap."[1] Basically, NHPA and Section 106 make sure that all historic resources are accounted for and considered before a national project, or "undertaking," is begun—a federal Advisory Council is called upon for expert advice. NHPA does not prevent these resources from being removed or destroyed, especially not from private entities. It also only protects historic resources that can be proven eligible for or are on the National Register—which is not extremely helpful if a historic site is locally valued but not nationally valued. However, it does make the federal government and entities using federal funding consider their actions, and, through Section 106, make a good faith effort to consider and document alternative options that would cause no or less damage to eligible historic sites.

State and local preservation laws, however, have several options not available to federal protections, and are generally stronger than federal laws. There

[1] Bergeron, Emily. "NHPA: Why We Needed a National Policy." Course Module 3. https://uk.instructure.com/courses/1911677/pages/the-nhpa-why-we-needed-a-national-policy?module_item_id=23372733. Accessed April 28, 2018.

are specific types of state laws that protect resources unique to or specially valued by the states, and state laws allow for stronger local laws. Local law, in fact, allows for the strongest protection of historic resources.[2]

State Historic Preservation Offices have their own inventory of historic resources—resources that are important to the state but not necessarily important to the country. States have the opportunity to broaden state NEPA policies definition of historic resources as well. They have also adopted policies similar to 4F—they have taken the language from 4(f) put applied them to preservation laws, which gives state preservation laws significantly more "teeth." Archeological statutes can have more "teeth" as well. States can also enact policies that affect preservation even though they do not necessarily fall under typical categories such as NEPA, NHPA, etc. There is simply a wider variety of laws available that can protect historic resources.

[2] Bergeron, Emily. "Intro to State and Local Laws." HP 602 Module 8. https://uk.instructure.com/courses/1911677/pages/intro-to-state-and-local-law?module_item_id=23372813. Accessed April 28, 2018.

QUESTION 2: 5 points

What are the benefits of using conservation/preservation easements? What rights are conveyed with a conservation easement? What, if any, are the disadvantages of this private form of preservation?

Perhaps one of the most notable aspects of conservation/preservation easements is that they are private. They are basically a property owner's way to ensure that no negative changes happen to his/her property from future buyers, inheritors, or developers (short of a federal undertaking and/or eminent domain, that is).

There are also fairly significant tax benefits to easements. For example, if you have a farm that is worth only so much to you, but a greater amount to a developer who may be able to put more properties and gain greater profits from your property, your property taxes may reflect that. But if you put an agricultural easement on your property that ordains that it will always be a farm (and not a mall), then your property value significantly decreases, and so will your property taxes. Estate taxes can be significantly reduced in the same way. Another benefit is that easements can be specifically tailored to a property, unlike National Register requirements, which impose a strict and predetermined framework on historic resources. Also, owners have more control over easements than land use

regulations, because easements are private and land use regulations can change as political power shifts over time.[3]

The rights conveyed with a conservation easement stem from a state's police power. The only right that is removed from the owner is usually the right to development, leaving the landholder with "nondestructive" rights.[4] Owners now have private control over what development happens to their land after they die or sell.

The only glaring and broadly applicable disadvantage to an easement is potential profit loss if the owner or inheritor wishes to sell the property.

[3] Bergeron, Emily. "Benefits of Easements," HP 602 Module 11. https://uk.instructure.com/courses/1911677/pages/benefits-of-easements?module_item_id=23372857. Accessed April 28, 2018.
[4] Bergeron, Emily. "Conservation Easements," HP 602 Module 11. https://uk.instructure.com/courses/1911677/pages/conservation-easements?module_item_id=23372856. Accessed April 28, 2018.

QUESTION 3: 10 points

In the Module on constitutional limitations on land use, specifically regarding the establishment and free exercise clauses of the US Constitution, I detailed the case of St. Bart's. You also learned about the Religious Land Use and Institutionalized Persons Act that was passed in 2000 and its implications. If the St. Bart's case were decided today, do you think the outcome of the case would be different based on the requirements of RLUIPA? Would the outcome remain the same?
Explain incorporating a discussion of the types of scrutiny, the facts of the case, and the precedent that you read about.

If St. Bart's brought their case to court again today, it would not have a different outcome based on the requirements of RLUIPA.

RLUIPA applies in three different cases:

- The state or local government entity imposing the substantial burden receives federal funding;
- The substantial burden affects, or removal of the substantial burden would affect, interstate commerce; or
- The substantial burden arises from the state or local government's formal or informal procedures for making individualized assessments of a property's uses.[5]

First, in the case of St. Bart v. New York, the COA was denied to St. Bart's on account of the city's landmarks law. Because the Landmarks Law was instituted by the city, it is most likely safe to assume that it was enforced by an entity receiving some kind of federal funding. So, under this qualification, St. Bart's may qualify for RLUIPA today. It would also qualify under the second qualification, because the church's commerce was affected by the decision (although this was potential, and not past and current, commerce). The third

[5] Bergeron, Emily. "RLUIPA." HP 602 Module 13. https://uk.instructure.com/courses/1911677/pages/rluipa?module_item_id=2337 2894. Accessed April 28, 2018.

qualification is slightly more complicated to assess, however, as "substantial burden" is a term that needs a closer look to determine, and although the local government was making an assessment of the property's use, it did separate its religious functions from its community outreach functions, and in the end, RLUIPA decisions are not based on the potential to make money, but the potential to worship in a manner consistent with the appropriate religion.

Second, it necessary to establish what RLUIPA does not allow, and see if any of these situations were enforced during St. Bart's case. RLUIPA does not allow landmarking and zoning laws that:

- Treat churches or other religious assemblies or institutions on less than equal terms with nonreligious institutions;
- Discriminate against any assemblies or institutions on the basis of religion or religious denomination;
- Totally exclude religious assemblies from a jurisdiction; or
- Unreasonably limit religious assemblies, institutions, or structures within a jurisdiction.[6]

St. Bart's was "treated" in a parallel manner with Grand Central Station when the railroad company was denied the right to build an office tower above a building they already owned, so the Landmarks Commission most likely could not be accused of treating St. Bart's in a dissimilar way. They were not being discriminated against on the basis of religion or religious denomination because they were not being denied access to their place of worship or the act of worship itself. In fact, they were not being asked to change in any way, only told that they could not change in a way that would monetarily benefit the religious institution. And finally, their place

[6] Ibid.

of assembly—the sanctuary itself—was in a condition that was not hazardous to safe assembly and would not be affected by the application of the law. The last statement, however, is arguable from the church's point of view. The church did, in fact, argue that they could not properly assemble in the future—emphasis on future—because of rising maintenance costs. However, the church did have a trust fund that was potentially sufficient for future maintenance. Thus after considering these facts, the Landmarks Commission most likely did not violate any of RLUIPAs landmarks and zoning ordinances either.

In RLUIPA qualifying cases, the" Plaintiff must first prove a substantial burden to their religious practice."[7] In order to determine whether or not RLUIPA may have affected the outcome of the St. Bart's case, a few terms in this clause must be considered.

Definitions to consider:

1. Religious exercise : "including any exercise of religion, whether or not compelled by, or central to a system of religious belief – this means social events, concert series, meals, and meditation"[8]
2. Substantial burden: "When a person is required to choose between following the precepts of her religion and forfeiting government benefits on the one hand and abandoning the precepts of religion on the other there is a substantial burden. Where the state puts substantial pressure on an adherent to modify his religious behavior to violate his beliefs there is a substantial burden. Where regulations have a chilling effect on the exercise of religion there is a substantial burden."[9]

It's important to note that the building the church wanted to tear down in order to build the new building was not only on the National Register alongside

[7] Ibid.
[8] Ibid.
[9] Ibid.

the sanctuary, but also serving as a preschool and space used for church-related social events. Under RLUIPA, spaces for religion-related social events do qualify for inclusion, but the new proposed building included non-religion-related spaces that would simply serve to provide an income for the church. Thus the church technically did not need to tear down the existing building or build a new building for the social spaces themselves. This raises the question of whether or not a smaller building proposed only for the use of religious functions would have been approved, but since we do not know, it is only conjecture. However, going back to the definitions, it is also important to consider whether the denial of the office/income-advancing spaces in the new skyscraper enacted a "substantial burden" on the church.

According to the descriptions of "substantial burden," the church does not qualify. There are other worship spaces with the same religion in the city and the church was not being torn down or parishioners denied access in any way, so there was no "chilling" affect or encouragement in any way to abandon practice. The Landmarks Law was not forcing parishioners to do anything that would violate their practices, or making them choose between following the law and their religious doctrine. There was no substantial burden to "religious" practice.

RLUIPA's creation was inspired by cases like St. Bart's because certain populations felt that low scrutiny was too easily applied to churches and religious institutions. Even when high scrutiny is applied, however, St. Bart's was still not burdened in any "religious" way, only denied a future increase in income. RLUIPA was not created to help religious institutions make money or to

give them any kind of advantage over secular institutions or non profits facing the same governmentally involved or mandated policies. It was created so that religious institutions would not be unfairly disregarded or even benignly misunderstood when government laws or policies were triggered.

QUESTION 4: 5 points

Section 4(f) applies to all archaeological sites on or eligible for the National Register, even if such sites are discovered during construction, unless "the archaeological resource is important chiefly because of what can be learned by data recovery and has minimal value for preservation in place [and] the officials with jurisdiction over the Section 4(f) resource have been consulted and have not been objected to" such a finding. 23 U.S.C. 774.13(b). Or, Section 4(f) applies to those historically significant archaeological sites that warrant preservation in place.

Do you think this regulatory framework hinders the preservation of archaeological resources? Could a requirement of a full 4(f) review lead to the abandonment of potentially valuable resources? Or should we require any discoverable archaeological resource as warranting preservation on site?

Yes and no. I think the terms "important", "what can be learned by data recovery" and "minimal value" all gives this ordinance a lot of room for questioning and dispute. So though it hardly promotes a specific and mandatory adherence to preserving archaeological sites, it also does not blatantly hinder them. It simply depends on how the phrases above are evaluated.

However, putting any ambiguity aside, I think it is unrealistic to put all archaeological resources before public projects such as roads. There is a need for some kind of a system to differentiate between important-enough-for-a-feasible-alternative and able-to-move and/or document and carry on with the project. It is also important to note that Section 4(f) includes not only the protection of historic sites with national significance, but local significance as well. If local officials and agencies are allowed to define what is of "minimal value" for preservation in place, then the process should be adequate as it is, especially given that Section 4(f) is one of the only preservation-related laws that actually has any teeth.

Historic resources are treated differently than wildlife and waterfowl refuge and parks and recreation areas—the 4(f) process relies on Section 106 under NHPA and processed by the SHPO to determine how valuable the resource is. Thus I don't think that a full 4(f) review would hinder archeological resources in any way. A full review might warrant NEPA, NHPA, and Section 4(f) processes that may result in

ecological or public-use reasons that only further support the protection of the site, not cause it to be moved or ignored.

QUESTION 5: 5 points

Which fact, if true about a proposed project, would most strongly support an argument that an Environmental Impact Statement is required under the NEPA before the project may proceed? Why?

a. The private parties conducting the project receive funding from a state agency.

b. The project is prohibited unless the builder receives a municipal zoning variance.

c. The project involves draining ten acres of wetlands.

d. Congress has appropriated money to fund the project.

e. The Vice President of the United States is conducting the project personally.

Unfortunately, NEPA, like NHPA, is only triggered when projects are receiving federal funding. Option A would qualify if the project were receiving money from a federal agency, Option B does not specify that the builder is undertaking a MFA, Option C could be a private developer who has purchased all ten acres with private funding, and Option E, though related to a federal position, could also be funded by private funds.

For option D, if Congress itself has appropriate the money to fund the project, it is much easier to assume 3 things. First, that funding levels are high, that the allocation of resources has been given much consideration, and that considerable time and funding have been spent on the planning process. The doesn't quite rule out option B or C if they had specified that federal funds were included, because they could have qualified as a MFA if the project had a significant impact. Also, Option D might provide more clarity if it included the geographical or technology-related aspects of the project.

As far whether an EIS is specifically required or an EA would suffice, the outcome would be determined by the findings of an EA. Therefore even Option D might not require an EIS if the project is major with no significant impacts or De Minimis impacts.

QUESTION 6: 5 points

Which of the following state actions with respect to a parcel of land would most likely require that the state compensate the owner? Why?

a. A prohibition on the filling of wetlands on a parcel of land.

b. A requirement that the owner allow a path for beach access in exchange for a permit to construct a residence on the land.

c. A prohibition on the razing of a historic building on the land.

d. A prohibition on operating a slaughterhouse on the land.

e. A requirement that the owner allow destruction of a tree on the land to prevent the disease affecting the tree from spreading to trees on nearby parcels.

None of the options qualify for eminent domain, thus all of the options would have to fall under the category of regulatory taking. This is because nothing is being taken (besides Option E's tree), per say, but actions are being denied. Perhaps Option E could fall under eminent domain if the tree in question was a rare tree or famous tree of some kind that was the primary income-producing entity for a commercial business or owner on the estate (I'm thinking some kind of tourism operation).

Option A's situation is not quite clear enough to make a judgment either way—who is the owner of this land, how long have they owned it, was it under an easement when they purchased it, are other property owners nearby filling in wetlands, was their any kind of understanding in the contract that the wetlands were under any kind of environmental protection? The word "wetlands" should raise a red flag for any buyer looking to develop a property. Option C does not specify whether the owner is using federal funding or state funding, what the state's historic preservation-related laws allow, or whether the building is on the National Register or a state register. Option D does not specify whether the slaughterhouse

was previously in operation or whether the owner is trying to open up a new slaughterhouse (and what kind of zoning the property is under). And finally, Option E, as mentioned above, is also fairly vague. Of what value is the tree, and what purpose does the tree serve? I wonder if the owner could make a case that the tree was providing shade to his house and therefore lowering his energy bill…that seems far-fetched, but it is one of the only options I can think of, besides the tourism option I mentioned above.

Option B, however, perhaps most qualifies for a regulatory taking because an owner of a parcel of land (owned before the permit was requested, I assume) is given an exaction –the government has imposed "conditions on the development of the property."[10] It would be of great usefulness to know whether or not other property owners in the area also had to build a beach path before building a house—this fact might alter the legitimacy of the owner's case. The government is not over-regulating the property because the owner is still allowed to build, it is simply mandating a beach walk prior to building. Perhaps one important question is whether or not the beach access would lower the house's re-sale value in any way? Also, is it a simple process to just "leave a path" to the beach, or will it affect the design of the house in a costly way? Does the owner actually have to build a path for safety and liability (or environmental) reasons?

Another factor to consider is whether or not the government is abusing its power. There are two components to a ensuring that the government is not taking advantage of the owner:

[10] Bergeron, Emily. "Types of Takings," Module 12.

- There must be a substantial nexus between a legitimate state interest and the permit conditions exacted by the state
- The permit conditions must be related both in nature and extent to the impact of the proposed development. [11]

So the questions applicable to this case, more specifically, are: is the state either benefitting from the beach access or is the beach access necessary to the state, and does the building of the house actually limit public access to the beach in a way that it did not before? The answers to all of these questions could determine whether or not this case would qualify for an exaction, but I think regardless, Option B is the case that most qualifies, or at least gives enough detail to evaluate its qualifications.

QUESTION 7: 10 points

Rock art is one of the most fragile cultural treasures in the United States, however, some people are destroying them with their guns. These ancient drawings, already threatened by natural forces like acid rain and fungus are now being riddled with

[11] Bergeron, Emily. "Exactions," HP 602 Module 11. https://uk.instructure.com/courses/1911677/pages/exactions?module_item_id=23372887. Accessed April 28, 2018.

bullet holes and covered with spray paint. While shooting on public land is legal, County law prohibits firing toward natural features. Federal law also protects the petroglyphs and if caught, the perpetrators could face fines and even jail time. Vandals have also spray painted human figures on rocks in the area and shot them to pieces, etched initials and dates into the images, and looters have carted away pieces of rock containing the petroglyphs. Please watch the news story on target shooting and petroglyphs here (Links to an external site.)Links to an external site..

How would federal archaeology and historic preservation laws work against these individuals?

Without question laws relating to Antiquities would work against these three individuals. If these art pieces centered around religious worship or in any way, RLUIPA and AIRFA might be included as well. However, since the prompt does not specify that the objects are related to any kind of religious processes, I will focus on laws relating to archaeology and Native American artifacts: ARPA, NAGPRA and NHPA.

The Antiquities Act, while perhaps slightly antiquated itself due to more effective archaeological laws, would work against these individuals by fining them $500.00. While this amount hardly compares to the damage they have inflicted on cultural art that is thousands of years old, it may be at least a small deterrent from others following in their footsteps or the offenders repeating the crime. The Act requires a permitting process, but also specifies punishment for act that shall

"appropriate, excavate, injure, or destroy any historic or prehistoric monument or ruin."[12]

While AHPA does not seem to apply to this case, ARPA is the most hard-hitting attempt federal law had made thus far and certainly does. ARPA protects "any material remains of past human life of activities which are of archaeological interest and are at least 100 years old" and the rock art qualifies under the "human interest" definition, as a collection of objects that are "capable of providing scientific humanistic understandings of past human behavior, cultural adaptation, and related topics."[13] Under ARPA, a perpetrator can be fined up to $100,000.00 and/or imprisoned for five years.[14]

NHPA was amended in 1992 created THPOs and added Traditional Cultural Properties as an overlay of a type of significance. Most importantly, however, tribal consultation was added to Section 106.[15] The art in this case, however, could be protected under Traditional Cultural Properties is the local THPO wanted to put the rocks on the National Register.

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[12] "The Antiquities Act of 1906," HP 602 Module 9. https://uk.instructure.com/courses/1911677/pages/the-antiquities-act-and-its-regulations?module_item_id=23372826. Accessed April 29, 2018.
[13] "Archaeological Resources Protection Act," HP 602 Module 9, https://uk.instructure.com/courses/1911677/pages/archaeological-resources-protection-act?module_item_id=23372833. Accessed April 29, 2018.
[14] Ibid.
[15] Bergerone, Emily. "NHPA Amendments," HP 602 Module 10. https://uk.instructure.com/courses/1911677/pages/nhpa-amendments?module_item_id=23372845. Accessed April 29, 2018.

And finally, NAGPRA also applies to this case. Even though at first glance NAGPRA appears to apply to remains, the rock art may fall under the definition of "cultural patrimony," which is defined as:

> an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group.[16]

Perhaps this could only be argued if vandalizing or destroying the objects via bullet qualifies under the term "removal," however.

[16] "NAGRPA," HP 602 Module 9. http://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title25-chapter32&saved=%7CKHRpdGxlOjI1IHNlY3Rpb246MzAwMSBlZGl0aW9uOnByZWxpbSkgT1IgKGdyYW51bGVpZDpVU0MtcHJlbGltLXRpdGxlMjUtc2VjdGlvbjMwMDEp%7CdHJlZXNvcnQ=%7C%7C0%7Cfalse%7Cprelim&edition=prelim. Accessed April 29, 2018.

QUESTION 8: 10 points

You are a member of an organization trying to stop the construction of a telescope at this sacred site. The other members of the group know you have a background in preservation and are hoping you can provide them with some idea of how they might legally stop the construction. They have scheduled a meeting with a preservation lawyer and want you to prepare some information before the meeting. Time is money with these lawyers and the organization doesn't have a lot of money to waste. To prepare for your meeting with the attorney, put together a short memo on the following information for the group:

◦ What is the main question that you think you are trying to address? What is the issue you are addressing?
◦ Facts: Discuss legally significant facts and important background facts.
◦ Discussion:
- Introduction: What is the legal framework you are going to use to analyze the issue? Is this a constitutional issue? If so what kind?
- Are there any sub-issues?
- What laws/cases are most important to your argument.
- What facts of your case are most relevant to analyzing these laws/cases - in other words - apply the facts of the telescope case to the law
◦ Address likely counterarguments - what is your opposition going to use against you? How will you fight this?
To get you started in your research, here is some helpful information. You are always free to do more research, but please cite any outside information.
◦ You can find the Environmental Impact Statement (Links to an external site.)Links to an external site. here
◦ The University of Hawaii (Links to an external site.)Links to an external site. (who some people in your organization consider the enemy) has a website has a lot of helpful information on the project. You can access that here.
◦ Canadian-backed telescope construction delayed as Hawaiians defend Mauna Kea's sacred summit (Links to an external site.)Links to an external site.. National World.
◦ "Amid Controversy, Construction of Telescope in Hawaii Halted (Links to an external site.)Links to an external site.," New York Times.

- "Hawaii Governor Says Telescope-Construction Timeout Extended (Links to an external site.)Links to an external site.," New York Times.

Question that I have about the prompt--is a non-profit formed by a university technically receiving federal funding, or would that be too indirect to qualify?

1. The Main Question: What laws can we use to stop this telescope from being erected on this site while trying to avoid using terminology or arguments stemming from us of the space for religious reasons (since those do not seem to get very far)?

2. Facts:
    a. There are no burial sites or archeological sites on the chosen construction site according to one article, but in another, Native Hawaiians claim that it IS an ancestral burial site.
    b. Hydrologists have confirmed there is not threat to the aquifer.
    c. Native Hawaiians began protesting at the inception of the projects, so "latches" cannot be claimed.
    d. Thirty Meter Telescope is a non profit run by the University of Hawaii, but since it is a 1.5 billion dollar project receiving 243 million from Canada, is it safe to assume that it is using federal funding as well? Since we know the project completed an EIS, then yes, the project is using federal funding.
    e. The volcano is already home to 13 other observatories.
    f. Mauna Kea has unique flora and fauna.
3. Discussion
    a. Introduction:
        i. Unfortunately this is not a constitutional issue. RLUIPA will not cover this, because the Native Hawaiians do not own the property, the project is not being led by a state or local government, and there is no interstate commerce being affected on behalf of the Native Hawaiians. The 5th and 14th amendments are not being compromised, because the Native Hawaiians are not being told they cannot access the mountain (there are already 13 other observatories there), and they are not being encouraged to abandon their practices. In fact, denying the university the ability to install the telescope may elevate the Native Hawaiians religion via government support.
        ii. This is also not an issue that can be argued under ARPA or NAGPRA due to the fact that archaeological investigations have already occurred, and though Native Hawaiians claim that the mountain is an ancestral burial ground, no cultural objects or remains were uncovered.
        iii. AIRFA only gives Native Americans the right to access sites and protection over sacred and religious ceremonial objects that they may use on the site. None of the sources say that Native Americans will be denied access to the mountain.
        iv. Sub-issues worth noting:
            1. Since the telescope will not affect the aquifer, one issue worth checking out may be the flora and fauna of the mountain. Is any of this endangered?
        v. Laws/cases important to argument:
            1. St. Bart's is not relevant since the property is not owned by the Native Hawaiians and no taking can be claimed. However, the Arizona Snowbowl trial may be helpful to look at. The tribes did not win the case but did ensure

that all AIRFA rights were protected. Even more helpful, however, may be the campaign that closed the pumice mine in the same area a decade earlier. A yellow flower was eventually found that halted the expansion. Perhaps a similar environmental factor using the rare flora and fauna on Mauna Kea could be used as a tool. In this way, an EIS under NEPA would most likely be the most applicable.

2. ESA and Thirty Meter Telescope:
    a. Unfortunately, it looks like for this case the EIS did not turn up anything significant. However, another attempt could be made under the ESA of 1973. If anything could be labeled as "endangered" or "threatened" on the site, it may halt the process. Section 7 of the act mandates that:
    b. Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. [17]

vi. I do not think there will be any counter arguments because I made every effort to avoid using any arguments using religious freedoms. I included AIRFA policies as a right to argue for, but not as prevention to the building of the telescope, as that argument seems destined to fail under counterarguments of the government elevating one religion over the other. I also avoided using any repatriation or burial laws such as ARPA and NAGRPA because the EIS and articles claimed that proper and good faith archaeological processes were carried through and no remains or cultural objects were found.

[17] Fish and Wildlife Service, "Endangered Species Act: Section 7," *Endangered Species Act of 1973 US Fish and Wildlife Service*. https://www.fws.gov/endangered/laws-policies/section-7.html. Accessed April 29, 2018.

QUESTION 9: 10 points

You have learned about federal, state, and local laws; private actions to protect historic resources; and international laws addressing intangible cultural heritage. With all of this information, do you think that these laws are fair? If not why and to whom do they apply differently? Do you think these laws are effective? Why or why not? Is it the drafting of the law or their enforcement that are problematic?

While I think that all of our preservation laws have the ability to work to a certain extent, some are undeniably stronger than others. For example, the Antiquities Act, while strong enough to deter a most-likely-in-debt graduate student from stealing or harming an archaeological artifact, would not deter people with experience in artifacts and the opportunity to greatly profit from them. In the same way, as cases relating to Native American worship especially show, NEPA and EIS statements can be virtually useless in the face of economically advantaged developers and project investors who have no moral qualms with saying, "I simply do not care" even after taking the time and paying for the expenses of a good faith effort.

Thus my favorite laws are local laws. The cases that were actually successful—Grand Central Station, for example—were established by state and local laws. Federal laws simply seem to have no teeth, and they have no opportunity to establish any protection for properties that are not federally owned or being developed using federal funding. MFAs are dangerous to preservation efforts, but only so many, as only so many will take place on federal lands or using federal funding.

That said, from a preservationist's point of few, conservation easements are probably the most effective method for ensuring that a historic resource or site does not get changed in a way that harms a historic site or denies access or use to a population that needs it. The limitations of this law, however, are severe, as it requires initial ownership in order to work, and historic sites and cultural resources are not always privately owned, especially for cultural resources used and cherished by Native Americans.

Overall, I think the strength and weaknesses of preservation laws all depend on and fluctuate within the budget of the entity driving the project connected to the resource. After taking this class, I sometimes feel that we could skip the entire process of litigation and lawyers' fees and simply have both parties compare bank accounts; whoever has the biggest account wins the case. Yet one law, Section 4(f), defies this cynicism. Why Section 4(f) is required to find feasible and prudent alternatives, and must take one of them instead of harming an environmental or historic resource, while other federal laws regarding historic preservation do not require this, leaves me with many questions. But despite these questions, it provides an excellent model for revisions that I think should be applied to NEPA and NHPA. And finally, the best model from 4(f) that perhaps all preservation, archaeology, and Native American related laws should review and consider as a revision is letting state and/or local preservation entities determine what is historically and/or culturally valuable, not the National Register.

QUESTION 10: 10 points

Tom purchased the house below in Detroit. He wanted to alter the property and convert it into an apartment building. To do this he planned to alter the exterior and add additional private entrances, add a large covered parking area (that would require the demolition of the carriage house), and replace the historic windows with modern ones. Before he could make any of these changes he had to submit his plans to the local preservation board for approval. The board tuned down his proposal because his changes were not in line with the preservation plan and not in keeping with the character of the other homes in this historic district. Tom is unable to convert his property into apartments based on this decision. He doesn't go through the appeals process, does not submit any alternate proposals, and immediately files an action claiming his property has been taken. Will Tom win on this claim? Why or why not?

No, Tom will not win his claim. First and foremost, local preservation laws and ordinances are the most powerful and the hardest to fight, especially since a large part of the community values the properties they were created to protect. Second, these preservation laws were in effect before he purchased the property. I do not think the destruction of the carriage house bears much weight outside of what the local preservation district enforces, because in most situations private owners have the right to tear down any historic resource they own.

Tom will also not win his claim because there is no definition of "taking" that his property falls under. This is certainly not eminent domain, as the local, state, or federal government is not using his property for any public use and offering him compensation for it. It is also not a regulatory taking. The first kind of regulatory taking, a physical taking, does not apply. There has been no physical invasion or seizing of the property. Perhaps what he is specifically claiming is an over-regulating taking or exaction taking. An exaction taking would not directly apply because the government (even the local government) is not requiring him to do

anything in order to develop the property—they are simply denying him the action of developing the property in the way he prefers. Thus the only option left to Tom is an over-regulating taking.

Looking at past cases such as Grand Central Station and St. Bart's, both privately owned entities who bought the property under one set of circumstances and seeking to change the properties after the fact, and who were both restrained under a local preservation law, the New York City Landmarks Law, Tom is unlikely to win because he has every right to utilize the property *that he bought.* Here it is imperative to note that the preservation board denied him a COA because the changes he proposed were not in line with other properties in the area. Thus no other property owner in the area has set a precedent for the changes he wished to make, and he cannot make the argument that another owner has been given approval for similar development actions. Money potentially made is not money lost. Tom does not qualify for a monetary compensation, or a taking, because he has not lost any money, and he was given no reason to think that he had any kind of right to make it.