Preservation and Community: New Directions in the Law of Historic Preservation*

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On a summer day in 1979, Washington fluttered with green banners, each embellishing a stately old structure and proclaiming its bearer to exemplify the city's "Buildings Reborn . . . New Uses, Old Places." At the same time, the Smithsonian's Renwick Gallery was sponsoring a photography exhibit extolling the "adaptive reuse" of old buildings; the American Institute of Architects' Octagon House (itself a recycled eighteenth-century residence) housed "Capital Losses," a photographic exhibit of the city's demolished or threatened old landmark buildings; and renovations were underway in the cavernous interior of the Pension Building, another reclaimed architectural relic. Such a day in the nation's capital reflects an interest that has sprung up in cities all over the country: Preservation of old structures has become a vogue.

The volume of preservationist statutes, grant programs, regulations, and lawsuits over the past few years attests the major role of federal, state, and local governments in contributing to historic preservation's new stature. With the arrival of budget cutters in Washington, however, the preservationist flags may soon come down;

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Note that this article cites a number of local ordinances. I used versions sent to me by local preservation offices during 1979 and 1980, but I warn the reader that amendments may have been made in the interim.

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sharp questioning of federal involvement in preservation has already begun.[1] The potential retrenchment in Washington pointedly raises the question whether current programs serve the public well-being. Why *should* our public institutions take an interest in preserving the nation's architectural heritage?

Until the recent past that interest was slight. The initial confrontation with a new continent required flexibility and openness to novelty rather than attention to tradition,[2] and the nation was long preoccupied with expansion and development. Consequently, American governments at all levels were slow to attend to the conservation of historic architecture.[3] Before the turn of the century, state and local governments gave only lukewarm support to the few private preservation efforts.[4] Federal support was almost nonexistent then, and very modest for decades thereafter. It consisted chiefly of the acquisition of a few individual park sites[5] and "landmarks" of national significance;[6] the protection of "antiquities" on federal property;[7] a Depression-era survey of historically and architecturally significant structures;[8] the founding of a nonprofit "National Trust" to encourage private preservation;[9] and the creation of an historic

1. *See* N.Y. Times, Feb. 20, 1981, at 14, col. 2 (western ed.) (proposed cuts in federal assistance to cultural programs); *id.* at 9, col. 6 (proposed cuts in the Interior Department's parks and recreation programs). Interior Secretary James Watt has abolished the Heritage Conservation and Recreation Service, which administered several federal preservation programs. *See* S.F. Chronicle, Feb. 20, 1981, at 1, col. 3.

2. *See* B. BAILYN, EDUCATION IN THE FORMING OF AMERICAN SOCIETY 22 (1960).

3. *See* J. MORRISON, HISTORIC PRESERVATION LAW 4, 11, 16 (2d ed. 1965). Morrison noted this country's slow start in preservation as well as the great increase in preservation measures between 1957 and 1965.

4. *See* C. HOSMER, THE PRESENCE OF THE PAST 29-62 (1965). For a more recent brief history of historic preservation, see N. WEINBERG, HISTORIC PRESERVATION IN AMERICAN TOWNS AND CITIES 20-27 (1979).

5. *See, e.g.*, Act of Dec. 27, 1894, ch. 12, 28 Stat. 597 (current version at 16 U.S.C. § 430f (1976)) (establishing Shiloh National Military Park); Act of Mar. 2, 1933, Pub. L. No. 72-409, 47 Stat. 1421 (current version at 16 U.S.C. § 409 (1976)) (establishing Morristown Historical Park).

6. Historic Sites, Buildings, and Antiquities Act of 1935, §§ 1-7, 16 U.S.C. §§ 461-467 (1976). Historic landmark designation of private property under this act actually began in 1960. G. GAMMAGE, P. JONES & S. JONES, HISTORIC PRESERVATION IN CALIFORNIA 22 (1975).

7. Act of June 8, 1906, Pub. L. No. 59-209, 34 Stat. 225 (current version at 16 U.S.C. §§ 431-433 (1976 & Supp. III 1979)).

8. The Historic American Buildings Survey was created in 1933 without specific statutory authorization as a program of the National Parks Service. *See* Peterson, *Thirty Years of HABS*, AM. INST. ARCHITECTS J., Nov. 1963, at 83.

9. Act of Oct. 26, 1949, Pub. L. No. 81-408, 63 Stat. 927 (current version at 16 U.S.C. §§ 468-468d (1976)) (establishing the National Trust for Historic Preservation).

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district in Washington's Georgetown.[10] During the 1950s, federal, state, and local governments embarked on urban renewal and highway projects that chewed up aging neighborhoods and distinctive old buildings, leading one commentator to remark that there "appear to be good reasons why preservation-minded individuals and groups often regard the government . . . as the major enemy."[11]

But in the last 15 years the situation has changed dramatically. In the mid-1960s federal legislation initiated surveys for a National Register of Historic Places and, to protect those historic places, imposed elaborate review-and-comment procedures on federally assisted projects. Since that time, federal grants have encouraged states to participate in surveys and conservation of historic properties,[12] and federal tax laws have been changed to induce private preservation and rehabilitation of historic properties.[13] The states have responded with expanded preservation programs;[14] many have altered common law rules that once inhibited the creation and enforcement of preservation easements or covenants and have enacted enabling legislation for local preservation controls,[15] resulting in local preservation of both individual historic landmarks and entire historic districts.[16]

Historic preservation, the erstwhile preserve of patriotic organizations and academic architecture buffs, now attracts the interest of local governments seeking to stave off suburban flight,[17] neighbor-

10. Act of Sept. 22, 1950, Pub. L. No. 81-808, 64 Stat. 903 (current version at D.C. CODE ANN. §§ 5-801 to -807 (1973)).

11. Jacobs, *Governmental Experience in the United States*, in HISTORIC PRESERVATION TODAY 104 (1966) (Nat'l Trust for Historic Preservation seminar).

12. 16 U.S.C. §§ 470-470t (1976), *as amended by* National Historic Preservation Act Amendments of 1980, Pub. L. No. 96-515, 94 Stat. 2987.

13. *E.g.*, I.R.C. §§ 38, 48(g), 167(o), 191, 280B.

14. *See* H.R. REP. NO. 269, 93d Cong., 1st Sess. 4-6, *reprinted in* [1973] 1 U.S. CODE CONG. & AD. NEWS 1548, 1553-54. For a compilation of these and other state legislative efforts in historic preservation, see National Trust for Historic Preservation, Significant State Historic Preservation Statutes (1979) (Information Sheet No. 21) [hereinafter cited as Significant State Statutes].

15. *See* Brenneman, *Historic Preservation Restrictions: A Sampling of State Statutes*, 8 CONN. L. REV. 231 (1976); Brenneman, *Techniques for Controlling the Surroundings of Historic Sites*, 36 LAW & CONTEMP. PROB. 416, 420-22 (1971); Note, *Conservation Restrictions: A Survey*, 8 CONN. L. REV. 383 (1976); *see* note 102 *infra*.

16. The complex "transfer of development rights" schemes for the preservation of landmark buildings are examples of innovative legislation in this area. *See* J. COSTONIS, SPACE ADRIFT (1974); Costonis, *Development Rights Transfer*, 83 YALE L.J. 75 (1973); Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574 (1972); note 115 *infra*.

17. *See* Galbreath, *Conservation: The New Word for Old Neighborhoods*, 8 CONN. L. REV. 312 (1976).

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hood organizations hoping to save their streets from various governmental and developmental bulldozers,[18] businessmen in quest of a combination of tax advantages and public relations,[19] and environmentalists buying time against dams and highways.[20] In short, there seems to be something for everyone in historic preservation.

That is just the difficulty: The phrase "historic preservation" is so elastic that any sort of project can be justified—or any change vilified—in its name. In a sense, every event is "history," and it is a cliche among professional historians that views of "historic significance" alter considerably with shifting social interests—a point amply attested by the sudden discovery of black history, the boom in the history of women's movements, and the reinterpretation of the Cold War.[21] Art and architectural historians, especially important to preservation, are equally flexible in their views of "historic significance," as shown by their recent interest in the art deco Coca-Cola signs, quonset hut offices, and White Tower diners that once horrified historic preservationists.[22]

Like "historic significance," "preservation" is a varying concept. Does "preservation" mean maintenance, or restoration, or indeed reconstruction and adaptive alteration?[23] Is it merely photographing

18. *See, e.g.*, WATCH v. Harris, 603 F.2d 310 (2d Cir. 1979).

19. *See* R. WARNER, S. GROFF & R.P. WARNER, BUSINESS AND PRESERVATION (1978). T. Bever, Economics of Historic Preservation 4 (May 1978) (Heritage Conservation and Recreation Serv. report), notes savings in construction costs and time as benefits of the rehabilitation of older buildings.

20. *See* Environmental Defense Fund v. T.V.A., 371 F. Supp. 1004 (E.D. Tenn. 1973), *aff'd*, 492 F.2d 466 (6th Cir. 1974). This type of litigation tends to center on preservation of archaeologically significant sites. *See, e.g.*, Stop H-3 Ass'n v. Brinegar, 389 F. Supp. 1102 (D. Hawaii 1974), *rev'd on other grounds*, 533 F.2d 434 (9th Cir.), *cert. denied*, 429 U.S. 999 (1976).

21. *Cf.* R. HOFSTADTER, THE PROGRESSIVE HISTORIANS 442–44 (1968) (comments on recent historiography). *See also* D. FISCHER, HISTORIANS' FALLACIES (1970); Becker, *Detachment and the Writing of History*, in DETACHMENT AND THE WRITING OF HISTORY 3 (P. Snyder ed. 1958). Preservation programs also reflect changes of opinion in the matters that are "historically significant." The National Park Service's National Historic Landmarks program, for example, has in recent years expanded its criteria to include sites significant in Afro-American and women's history. *See* C. GREIFF, THE HISTORIC PROPERTY OWNER'S MANUAL B-2 (1977). Federal matching grants for state preservation projects are being directed in part to projects that preserve areas associated with minority or ethnic history. *See $2 Million Available to State for Historic Preservation Grants*, [1979] 7 HOUS. & DEV. REP. (BNA) 636.

22. *See* Bulkley, *To Preserve or Not? That is the Question for a Neo-Neon Age*, Wall St. J., Mar. 28, 1980, at 1, col. 4. *See generally* R. VENTURI, D. BROWN & S. IZENOUR, LEARNING FROM LAS VEGAS (1972).

23. British law distinguishes "preservation" from "conservation"; the latter includes adaptive modern modification of older buildings, although in such a way as to "consort with" earlier styles. *See* PRESERVATION POLICY GROUP OF THE MINISTRY OF HOUSING AND LOCAL GOVERNMENT, REPORT TO THE MINISTER 4–5 (1970).

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old things or describing them in words? Does it include something new that further develops an older tradition?[24] Because historic significance is so open-ended and preservation so ambiguous, publicly supported historic preservation is singularly vulnerable to the charge of arbitrariness.

This is no matter of merely academic significance. Despite a certain little-old-lady aura about preservation in the abstract,[25] disputes over preservation can carry an extraordinary emotional force: Witness the Hawaiians who risked criminal trespass charges to prevent the armed services' practice bombing on ancient Indian shrines.[26] Money stakes also run high. In 1978, lease arrangements worth millions of dollars were lost when the United States Supreme Court decided in *Penn Central Transportation Co. v. New York*[27] that New York's preservation controls on Grand Central Station did not amount to a "taking" and that the owners could thus be prevented from adding a multi-story tower to the old building.[28] As the courts begin to interpret the wave of preservation statutes, some property owners are resisting landmark designation under the statutes. Once viewed as a merely honorary embellishment, designation is now fraught with tax consequences and use restrictions.[29]

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24. A recent case in Cape Cod provides an interesting example of several of these problems. Sleeper v. Old King's Highway Regional Historic Dist., No. 22,799 (Mass. Dist. Ct., Mar. 6, 1978), *aff'd sub nom.* Sleeper v. Bourne, No. 216 (Mass. App., Jan. 10, 1980). A would-be builder of a 68-foot radio tower noted that Cape Cod had been a center of early broadcasting experiments, *id.* at 4, and argued that his proposed tower was in keeping with this historic tradition. The local historic district board thought it more important to retain an uncluttered view of some indicia of old Indian and Colonial tales, *id.* at 4–5, and therefore denied his permit application. The court supported the board. *Id.* at 19. It is not altogether clear that Sleeper's version of Cape Cod's history is less compelling than that of the district board; nor is it altogether clear that his plan for a new structure was less preservative of a certain continuity with the past.

25. Modern preservationists appear to be somewhat defensive about any attribution of preservation to "little old ladies." *See* Edmisten, *Marshalling Preservation Law Resources*, 12 URB. LAW. 3, 42 (1980).

26. United States v. Mowat, 582 F.2d 1194 (9th Cir.), *cert. denied*, 439 U.S. 967 (1978); *cf.* Aluli v. Brown, 437 F. Supp. 602 (D. Hawaii 1977), *rev'd*, 602 F.2d 876 (9th Cir. 1979) (separate civil action to enjoin bombing pending preservation review).

27. 438 U.S. 104 (1978).

28. *Id.* at 138. For the interesting comments of the New York Supreme Court, Appellate Division, see Penn Cent. Transp. Co. v. City of N.Y., 50 A.D.2d 265, 377 N.Y.S.2d 20 (1975), *aff'd*, 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977), *aff'd*, 438 U.S. 104 (1978).

29. *See* HERITAGE CONSERVATION & RECREATION SERVICE, U.S. DEP'T OF THE INTERIOR, FEDERAL TAX PROVISIONS TO ENCOURAGE REHABILITATION OF HISTORIC BUILDINGS: AN ASSESSMENT OF THEIR EFFECTS 19 (1979); *Broad Range of Witnesses Object to Historic Preservation Tax Disincentives*, [1978] 6 HOUS. & DEV. REP. (BNA) 717 (comments of Clark J. Strickland, Connecticut state historic preservation officer). The tax consequences of National

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Aside from direct financial considerations, historic preservation activities may have consequences that give pause to the most socially conscious citizen: A preservation board's permit denial may block nursing home facilities,[30] a low-income housing project,[31] or a rapid transit facility;[32] and, perhaps most significant, in the wake of increased attention to historic structures, the low-income residents of old neighborhoods may be forced out by steeply rising rents.

The displacement of low-income residents, to which I shall return later,[33] may be the albatross of the modern historic preservation movement, evoking as it does the overtones of snobbery and special interest that have long dogged preservationists.[34] Almost a decade ago, Michael Newsome warned that poor black families might be displaced as middle class whites moved into spruced-up "historic" neighborhoods—and observed that it wasn't *black* history that the preservationists had in mind.[35]

The displacement issue raises the central problems in historic preservation law: What elements of the past are to be preserved, and why should their preservation take the form of maintaining buildings or groups of buildings? The answers clearly entail choices among political constituencies and preferences. But without a coherent rationale to explain and direct public involvement in preservation activities, the legal techniques for preservation become little more than

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Register designation were central to the new provisions for owner consent to National Register designation, National Historic Preservation Act Amendments of 1980, Pub. L. No. 96-515, sec. 201(a), § 101(a)(6), 94 Stat. 2987 (to be codified at 16 U.S.C. § 470a(a)(6)). *See* note 118 *infra*.

30. Geriatric Care, Inc. v. Capitol Zoning Dist. Comm'n, No. 78-3952 (Pulaski County Cir. Ct., Ark., filed July 21, 1978), *reported in* [Sept. 1978] National Trust for Historic Preservation, Historic Preservation Litigation Chart 1 [hereinafter cited as Litigation Chart]; Rangel v. Association Residence Nursing Homes, Inc., Civ. No. 75-1540 (S.D.N.Y., filed March 1975), *reported in* [Sept. 1975] Litigation Chart, *supra*, at 12 (Later Developments).

31. La Comisión Central de Cuidadanos de Alcalde v. Harris, Civ. No. 77-386P (D.N.M., filed July 6, 1977), *reported in* [Oct. 1977] Litigation Chart, *supra* note 30, at 12.

32. *See, e.g.*, Inman Park Restoration, Inc. v. Urban Mass Transp. Admin., 414 F. Supp. 99, 121 (N.D. Ga. 1976), *aff'd sub nom.* Save Our Sycamore v. Metropolitan Atlanta Rapid Transit Auth., 576 F.2d 573 (5th Cir. 1978).

33. *See* notes 180–202 *infra* and accompanying text.

34. *Cf.* C. HOSMER, *supra* note 4, at 139 (early preservationists' sensitivity to charges of aristocratic tendencies in their organizations); R. NASH, WILDERNESS AND THE AMERICAN MIND 169 (2d ed. 1973) (long-standing criticism of nature conservationists on similar grounds).

35. *See* Newsome, *Blacks and Historic Preservation*, 36 LAW & CONTEMP. PROB. 423, 423–24 (1971); *accord*, Riley, *Annapolis: White Sails in the Sunset*, Wash. Post, June 3, 1979, Magazine, at 14; *Pasadena Commission Helps Renewal Efforts*, Landmark & Historic Dist. Commissions, Aug. 1979, at 3, col. 1, and at 4, col. 1 (Nat'l Trust for Historic Preservation newsletter).

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new weapons for the politically adroit. Precisely because preservation calls for political choices, it is imperative to identify the public purposes of preservation so that preservation law can be made intelligible by reference to those purposes.

Can any coherent rationale give shape to the amorphous activities that might conceivably gather under the aegis of historic preservation? Just such a rationale has been emerging in the recent profusion of preservation programs—a rationale slightly unexpected and seldom fully articulated, yet repeatedly glimpsed in the major preservationist legislation and litigation over the last 15 years. According to this implicit rationale, the chief function of preservation is to strengthen local community ties and community organization.

The very inchoacy of the community-building purpose in preservation—not to speak of the many preservation activities that seem to diverge from such a purpose—suggests that this emerging rationale requires exploration and elaboration. This article undertakes that task, first crystallizing the main features of a community-building rationale for preservation, and then using the rationale as a standard for evaluating current preservation programs.

Since a community-building rationale grows out of preservation views of the past, the article begins in Part I with a discussion of those past views, stressing the aspects that have been incorporated into the new direction in preservation law. Part II of the article examines current preservation goals and the legal procedures for reaching those goals, in relation to a community-building rationale. The article concludes that historic preservation is important for maintaining the physical environment necessary for an urban community, but it can be even more important in providing procedural vehicles for community organization and activity.

I. THE EVOLUTION OF A COMMUNITY-BUILDING PRESERVATION RATIONALE

The history of historic preservation is commonly thought to reflect the emergence of three dominant perspectives.[36] The first of these, especially characteristic of the nineteenth century, is the idea that historic preservation should seek to inspire the observer with a sense of patriotism. Thus, nineteenth-century preservation activities revolved around structures associated with famous individuals or

36. A good summary of the shifts in these objectives appears in Schatzel, *Public Historic Preservation in Texas*, 49 TEX. L. REV. 267, 268–77 (1971). *See generally* Hosmer, *Private Philanthropy and Preservation*, in HISTORIC PRESERVATION TODAY, *supra* note 11, at 150.

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events; the movement to save Mount Vernon is perhaps the epitome of this approach.[37] The second theme has a cultural, artistic, and architectural focus, emerging at about the turn of the century with the entry of professional artists and architects into historic preservation. The protagonists of this view thought preservation activities should focus on the artistic merit of buildings or groups of buildings and on the integrity of their architectural style.[38] In recent years a third strand has appeared that incorporates some elements of the earlier two. Its most notable characteristic is a concern for the environmental and psychological effects of historic preservation. Indeed, this approach to preservation coincided with the environmental movement, and like that movement centers on the relationship of human beings to their physical surroundings. It stresses the "sense of place"[39] that older structures lend to a community, giving individuals interest, orientation, and a sense of familiarity in their surroundings.[40]

All three themes, or elements of them, now appear in current criteria for the National Register of Historic Places—criteria that (together with the earlier and similar National Landmarks program criteria) embody whatever nationwide agreement we have about what aspects of the past should be preserved.[41] Moreover, each

37. *See* C. HOSMER, *supra* note 4, at 41–62; J. MORRISON, *supra* note 3, at 2–3. Inspiration may still be the most commonly accepted rationale for historic preservation; certainly it was reflected in the major piece of federal preservation legislation prior to the mid-60s: the Historic Sites, Buildings, and Antiquities Act of 1935, 16 U.S.C. §§ 461–467 (1976). The preamble to this statute stated that historic structures were to be preserved "for the inspiration and benefit of the people of the United States." *Id.* § 461.

38. Such early American protagonists of this view as Andrew Green and William Sumner Appleton were apparently influenced by European preservationist thinkers, notably Morris and Ruskin. *See* C. HOSMER, *supra* note 4, at 93–95, 238, 255–57. *See generally* J. MORRISON, *supra* note 3. There is arguably an inspirational aspect to this branch of preservation as well, since art too may be viewed as inspiring the viewer.

39. *See* text accompanying note 83 *infra*.

40. The National Historic Preservation Act of 1966, 16 U.S.C. §§ 470–470t, *as amended by* National Historic Preservation Act Amendments of 1980, Pub. L. No. 96-515, 94 Stat. 2987, picks up this thread, specifically stating as a purpose of the Act that "the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people." *Id.* § 470(b)(2). This orientation motif may characterize some earlier preservation activities as well, such as the efforts of ethnic groups, religious organizations, and families to mark out their own historic contributions. *See* C. HOSMER, *supra* note 4, at 267–68.

41. For the National Register criteria, see 36 C.F.R. § 1202.6 (1980):

"The quality of significance in American history, architecture, archeology, and culture is present in districts, sites, buildings, structures, and objects of State and local importance that possess integrity of location, design, setting, materials, workmanship, feeling, and association, and

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theme bears a direct relationship to a government interest often cited to justify government involvement in preservation.[42] Civic education supports the inspirational view, promoting tourism fits comfortably with the protection of representative or meritorious structures, and the interest in revitalizing city areas to render them stable, useful, and prosperous for current and future residents accompanies the maintenance of a community's sense of place.

Exploration of the "civic education" entailed in the early, inspirational phase of historic preservation suggests, however, that public purposes of preservation are somewhat deeper, and perhaps more closely related, than this merely additive listing implies.

A. *The Nineteenth Century: Preservation as "Inspiration"*

The nineteenth-century inspirational view of preservation was marked by an interest in civic education intended from the outset to have important political ramifications.[43] This was true even of pri-

(a) That are associated with events that have made a significant contribution to the broad patterns of our history; or

(b) That are associated with the lives of persons significant in our past; or

(c) That embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or

(d) That have yielded, or may be likely to yield, information important in prehistory or history."

For the most recent version of the National Landmarks criteria, see the interim regulations at 44 Fed. Reg. 74,826 (1979). The previous criteria were informally developed and published in pamphlets. *See* G. GAMMAGE, P. JONES & S. JONES, *supra* note 6, at 106. *But see* Historic Green Springs, Inc. v. Bergland, 497 F. Supp. 839 (E.D. Va. 1980) (strongly criticizing the Interior Department's failure to issue final regulations, holding National Historic Landmark designation a violation of the 5th amendment and the Administrative Procedure Act, and ordering the Secretary to promulgate substantive standards).

There is widespread reliance on the two sets of criteria. The Advisory Council on Historic Preservation has suggested that states adopt the National Register criteria for their own programs. Advisory Council on Historic Preservation, Guidelines for State Historic Preservation Legislation 6, 11 (Mar. 1972), *reprinted in Proposed Extension and Expansion of the National Historic Preservation Program: Hearing on H.R. 5743 and H.R. 7127 Before the Subcomm. on National Parks and Recreation of the Comm. on Interior and Insular Affairs*, 93d Cong., 1st Sess. 39, 44 (1973) [hereinafter cited as Guidelines]. Many local ordinances also have criteria based on the National Register or National Landmarks criteria, with modifications of the latter to include structures or areas of local significance. *See, e.g.*, PARK CITY, UTAH, CODE § 2.4 (1976); Seattle, Wash., Ordinance 98852, § 4 (April 7, 1970) (Pioneer Square Historic Dist.); Wichita, Kan., Ordinance 33-790 (Apr. 1, 1975) (amending WICHITA, KAN., CODE § 2.12.1019).

42. For a summary of these stated public purposes, see Williams, *Subjectivity, Expression and Privacy: Problems of Aesthetic Regulation*, 62 MINN. L. REV. 1, 34–36 (1977).

43. *Cf.* Mosse, *Comment*, in HISTORIC PRESERVATION TODAY, *supra* note 11, at 38–42 (discussing the motivations of the contemporaneous European preservation movement and its political implications, and arguing that a concern for medieval structures was the preserva-

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vate preservation activities. In the mid-nineteenth century, Edward Everett undertook fundraising lectures to support the preservation of Mount Vernon, apparently with the hope that this symbol of a national hero might narrow the growing abyss between North and South.[44] A few years later, the women's groups of New York hoped that their preservation efforts would help to root a burgeoning immigrant population in American life and heritage.[45]

Embodied in these private activities was the idea that reminders of a common past can link us together in a national community. Government support for preservation, meager though it was in the nineteenth century, relied on this rationale as stated in one of the few preservation cases from the era, *United States v. Gettysburg Electric Railway Co.*[46] The United States wished to condemn property for the creation of a national battlefield memorial at Gettysburg, and the question arose whether the condemnation was for a "public purpose." Justice Peckham's impassioned language was written within the memory of an internecine war that had jolted the nation as no other event in our history.

> Upon the question whether the proposed use of this land is a public one, we think there can be no well founded doubt.
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> . . . The battle of Gettysburg was one of the great battles of the world. . . . The existence of the government itself and the perpetuity of our institutions depended upon the result. . . . Such a use seems necessarily not only a public use, but one so closely connected with the welfare of the republic itself as to be within the powers granted Congress by the Constitution for the purpose of protecting and preserving the whole country. It would be a great object lesson to all who looked upon the land thus cared for, and it would show a proper recognition of the great things that were done there on those momentous days. By this use the government manifests for the benefit of all its citizens the value put upon the services and exertions of the citizen soldiers of that period. Their successful effort to preserve the integrity and solidarity of the great republic of modern times is forcibly impressed upon every one who looks over the field. The value of the sacrifices then freely made is rendered plainer and more durable by the fact that the government of the United States, through its representatives in Congress assem-

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tionist expression of the nineteenth-century European Right's growing nationalism and antipathy to industrialization).

44. C. HOSMER, *supra* note 4, at 47–48.

45. *Id.* at 138. The author quotes the 1900 report of the New York chapter of the Colonial Dames of America: " 'Americanizing of the children, enlisting their interest in historical sites and characters has a great significance to every thinking mind—the making of good citizens of these foreign youths.' " *Id.*

46. 160 U.S. 668 (1896).

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> bled, appreciates and endeavors to perpetuate it by this most suitable recognition. Such action on the part of Congress touches the heart, and comes home to the imagination of every citizen, and greatly tends to enhance his love and respect for those institutions for which these heroic sacrifices were made. . . . The institutions of our country which were saved at this enormous expenditure of life and property ought to and will be regarded with proportionate affection. Here upon this battlefield is one of the proofs of that expenditure, and the sacrifices are rendered more obvious and more easily appreciated when such a battlefield is preserved by the government at the public expense.[47]

This extended passage strikingly illustrates two elements of continuing and critical importance in historic preservation law. The first is the idea that preservation can in fact have the political purpose of fostering a sense of community. The second element, though less obvious, is equally important: It is the understanding that a *place* can convey this sense of community, or more generally, that visual surroundings work a political effect on our consciousness.[48]

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47. *Id.* at 680-83.

48. The idea that physical surroundings affect the human psyche may lie at the base of the widely drawn analogy between environmental concerns and historic preservation. Organizationally, early twentieth-century historic preservation efforts were joined to a concern for the natural environment, as in the American Scenic and Historic Preservation Society. This conjuncture has persisted through this century, for example in the jurisdiction of parks departments over historic sites and, more recently, in the Interior Department's proposal to create a combined registry of natural areas and historic areas. *See* HERITAGE CONSERVATION & RECREATION SERVICE, U.S. DEP'T OF THE INTERIOR, THE NATIONAL HERITAGE POLICY ACT 17 (1979); National Heritage Trust Task Force, Phase III Report (draft, Sept. 8, 1977). Today, one often hears preservationists speak of the "built environment," a phrase that seems to encapsulate the linkage of environmentalist and preservationist concerns. *See, e.g.*, ADVISORY COUNCIL ON HISTORIC PRESERVATION, SENATE COMM. ON INTERIOR & INSULAR AFFAIRS, 94TH CONG., 2D SESS., THE NATIONAL HISTORIC PRESERVATION PROGRAM TODAY 2-3 (Comm. Print 1976).

Despite the persistent joining of these subjects, a recent article denies that landmark preservation can be justified by analogy to the preservation of nature. Golding & Golding, *Why Preserve Landmarks? A Preliminary Inquiry*, in K. GOODPASTER & K. SAYRE, ETHICS AND PROBLEMS OF THE TWENTY-FIRST CENTURY 175, 180-85 (1979). The authors may reach this conclusion, however, only because they take a narrow view of the potential justifications for natural preservation, discussing only the arguments relating to the "rights" of animals and natural objects. Such "rights" analogies are difficult to apply to the historic preservation of structures. But a justification of environmental protection may also derive from the perspective of *human* needs and goals and of the desirable effects that the natural surroundings may have on the human psyche. Environmental policy arguments of this sort—which do seem to have been common in the history of environmentalism, *see, e.g.*, R. NASH, *supra* note 34, at 141-60, 262-63—could share more common ground with historic preservationist arguments, a point that Golding and Golding appear to acknowledge at the end of their article. Golding & Golding, *supra*, at 188.

Natural and historic preservation program goals may also diverge. For example, in the Adirondack area of New York State, the elaborate summer retreats of nineteenth-century

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Gettysburg may seem the easy case, dealing as it did with an event so emotionally charged for the later nineteenth-century public, and with a statute so easily framed in the language of a trust among generations.[49] But as preservationist efforts moved into a second phase—preservation for the sake of architectural merit, without reference to particular events or heroes—the legal discussion of public measures for preservation drew back from any consideration at all of the political concerns so clear in *Gettysburg*.

B. *The Second Phase: Preservation for Architectural Merit*

With the shift in interest to architectural merit, public involvement took the form of architectural controls designed to protect a few well-known old districts in such places as Charleston and New Orleans.[50] Challenges to these controls gave courts an opportunity for reasoned articulation of the purposes of preservation. But even though judicial opinions have generally upheld architectural controls,[51] analysis has not often strayed beyond the sterile confines of conclusory homilies about the validity (or invalidity) of "aesthetic" regulation, distinguishing preservation from "mere aesthetics" only by reference to a vague rationale of education or, somewhat later, to the promotion of tourism.[52]

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millionaires are now threatened by wilderness legislation. *See Compromise with Nature*, HISTORIC PRESERVATION, Sept.-Oct. 1979, at 13.

49. For the trusteeship argument in the context of historic preservation, see note 128 *infra*.

50. *See* notes 136–53 *infra* and accompanying text.

51. *E.g.*, Penn Cent. Transp. Co. v. New York, 438 U.S. 104 (1978); City of New Orleans v. Pregament, 198 La. 852, 5 So. 2d 129 (1941); City of New Orleans v. Impastato, 198 La. 206, 3 So. 2d 559 (1941); Opinion of the Justices to the Senate, 333 Mass. 773, 128 N.E.2d 557 (1955); City of Santa Fe v. Gamble-Skogmo, Inc., 73 N.M. 410, 389 P.2d 13 (1964); *see* F. BOSSELMAN, THE TAKING ISSUE 182–94 (1973); Hershman, *Beauty as the Subject of Legislative Control*, PRAC. LAW., Feb. 1969, at 20, 28–31; Note, *The Police Power, Eminent Domain, and the Preservation of Historic Property*, 63 COLUM. L. REV. 708, 732 n.243 (1963) (listing cases). Even commentators who are cool to architectural regulation generally, on first amendment or related grounds, seem to make an exception when these regulations serve historic preservation. *See, e.g.*, R. BABCOCK, BILLBOARDS, GLASS HOUSES AND THE LAW (1977); Note, *Aesthetic Control of Land Use: A House Build Upon Sand*, 59 NW. U.L. REV. 372, 390–91 (1964); Note, *Architectural Expression: Police Power and the First Amendment*, 16 URB. L. ANN. 273, 287 (1979). For some explanation of this greater tolerance for "aesthetics" in the historic preservation context, see note 52 *infra*.

52. *See* J. MORRISON, *supra* note 3, at 20–34. It is noteworthy that Morrison's discussion of historic preservation cases focuses on the dreary progression of "aesthetics" cases. However, historic preservation cases seem to have been able to escape the condemnation of "mere aesthetics" for two reasons: (1) The historic preservation cases usually involve some argument for promotion of education and the tourist trade, and thus do not rest solely on "merely aesthetic" considerations. *See, e.g.*, Opinion of the Justices to the Senate, 333 Mass. 773, 779,

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It is particularly ironic that judicial discussion lost its political starch as preservation efforts turned to architectural merit, since architects, of all the artists, have been least bashful about their own political significance and have continually taken the view, implicit in *Gettysburg*, that physical surroundings work a moral or political effect.[53] In earlier times, the Parisian architects of the French Revolution understood very well that the logic of revolution meant the destruction of the cathedrals, those sirens of a loathed ecclesiasticism.[54] In this century, Le Corbusier argued that through a "radiant" reconstruction of entire cities, the modern psyche could be reconciled to, and indeed made master of, modern technology.[55] That view was the subject of considerable polemics in Weimar and

128 N.E.2d 557, 562 (1955); (2) Architectural controls in historic zones entail certain express or implied visual standards with regard to the character of the neighboring buildings—thus regulation of these buildings avoids the problem of standardlessness that plagues other aesthetic zoning regulations. *See, e.g.*, Town of Deering *ex rel.* Bittenbender v. Tibbets, 105 N.H. 481, 202 A.2d 232 (1964). In Anderson, *Architectural Controls*, 12 SYRACUSE L. REV. 26 (1960), cited by the *Deering* court, 105 N.H. at 486, 202 A.2d at 235, the author suggests that historic preservation regulations may have acted as the bridge between the early judicial condemnation of aesthetic controls in land use regulation and the more recent approbation of the same sorts of controls. Anderson, *supra*, at 45–46. *See, e.g.*, State *ex rel.* Stoyanoff v. Berkeley, 458 S.W.2d 305 (Mo. 1970); Reid v. Architectural Bd. of Review, 119 Ohio App. 67, 192 N.E.2d 74 (1963); State *ex rel.* Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 69 N.W.2d 217, *cert. denied*, 350 U.S. 841 (1955). Architectural control ordinances, in the absence of any historic preservation component, still receive rough treatment from some courts, however. *See, e.g.*, City of West Palm Beach v. State *ex rel.* Duffey, 158 Fla. 863, 30 So. 2d 491 (1947); Pacesetter Homes, Inc. v. Village of Olympia Fields, 104 Ill. App. 2d 218, 244 N.E.2d 369 (1968); Morristown Road Assocs. v. Mayor of Bernardsville, 163 N.J. Super. 58, 394 A.2d 157 (Super. Ct. Law Div. 1978). For a review of the current status of aesthetics as a basis for state regulation, see Bufford, *Beyond the Eye of the Beholder: A New Majority of Jurisdictions Authorize Aesthetic Regulation*, 48 U. MO. K.C.L. REV. 125 (1980).

53. *See, e.g.*, N. PEVSNER, AN OUTLINE OF EUROPEAN ARCHITECTURE 7 (6th ed. 1960). Pevsner remarked that architecture is not only aesthetically superior to the other arts (since an architect's work encompasses sculptors' and painters' visual modes) but is also socially superior: The other arts need not be present in everyday life, but human beings always live among structures, which exercise "subtle but penetrating effects . . ., noble or mean, restrained or ostentatious, genuine or meretricious." *Id.* at 7. J.J. Dukeminier, in his argument for a more straightforward legal recognition of aesthetic goals, made a more restrained claim that architecture can have a "direct effect upon the equilibrium of the [individual's] personality and upon the happiness and richness of his life"—a view that the author based on "common sense conjecture." Dukeminier, *Zoning for Aesthetic Objectives: A Reappraisal*, 20 LAW & CONTEMP. PROB. 218, 231 & n.45 (1955).

54. *See* Bannister, *Comment*, in HISTORIC PRESERVATION TODAY, *supra* note 11, at 33, 34–35; *cf.* H. KOENINGSBERGER & G. MOSSE, EUROPE IN THE SIXTEENTH CENTURY 82–83 (1968) (describing the manner in which the sixteenth-century monarchs adopted the grand visual theatrics of Baroque architecture in order to impress viewers with the splendor of their regimes).

55. C.E. JEANNERET-GRIS (LE CORBUSIER), THE RADIANT CITY 29–30, 91–97 (Orion 1967).

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Nazi Germany, as architects constructed grandiose designs for cultural regeneration through the manipulation of structures.[56] More recently, the radical architect Robert Goodman has spoken of a "guerilla architecture" of protest and has argued that new and more highly personalized forms of architecture would accompany "cultural revolution."[57]

Thus the architects have continued to talk politics, and their newer views on the "legibility" of a city[58] help to identify the political aspects of preservation law. It should give us pause, however, to realize that in the past, architectural theory was also used to decimate older structures and neighborhoods, and to replace them with the urban renewal version of Le Corbusier's "radiant city" of superblock highrises.[59] In the most ironic twist in the legal history of historic preservation for twenty years, judicial opinions favoring public preservation measures have regularly quoted the Supreme Court's ringing words in *Berman v. Parker*:[60]

> The concept of the public welfare is broad and inclusive . . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.[61]

The opinions do not reveal the embarrassing origin of the language they quote: *Berman* upheld the condemnation of a structurally sound

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56. *See* B. MILLER LANE, ARCHITECTURE AND POLITICS IN GERMANY 1918–1945, at 41–65, 125–67, 185–216 (1968); R. TAYLOR, THE WORLD IN STONE: THE ROLE OF ARCHITECTURE IN NATIONAL SOCIALIST IDEOLOGY (1974).

57. R. GOODMAN, AFTER THE PLANNERS 187–204 (1971).

58. *See* note 73 *infra* and accompanying text.

59. *See* V. SCULLY, AMERICAN ARCHITECTURE AND URBANISM 165–71 (1969). R. STERN, NEW DIRECTIONS IN AMERICAN ARCHITECTURE 80–114 (rev. ed. 1979), relates the typical urban renewal projects to an "exclusivist" architectural attitude that seeks to impose relatively simple, prototypical, and formal architectural solutions across a whole range of buildings and planning problems. Stern contrasts this attitude with an "inclusivist" style—one that is more impressed with the complexity of problems and that attempts to accommodate new architecture to existing styles as well as to nonarchitectural values. *See generally* R. VENTURI, COMPLEXITY AND CONTRADICTION IN ARCHITECTURE (2d ed. 1977).

60. 348 U.S. 26 (1954).

61. *Id.* at 31, 34–35. Many historic preservation cases have cited *Berman*. *See, e.g.*, Penn Cent. Transp. Co. v. New York, 438 U.S. 104, 129 (1978); Maher v. City of New Orleans, 516 F.2d 1051, 1060 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976); Figarsky v. Historic Dist. Comm'n, 171 Conn. 198, 208, 368 A.2d 163, 170 (1976); Opinion of the Justices to the Senate, 333 Mass. 773, 779, 128 N.E.2d 557, 561 (1955); City of Santa Fe v. Gamble-Skogmo, Inc., 73 N.M. 410, 416, 389 P.2d 13, 17 (1964); Manhattan Club v. Landmarks Preservation Comm'n, 51 Misc. 2d 556, 559, 273 N.Y.S.2d 848, 851 (Sup. Ct. 1966).

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building inconveniently located in an urban renewal area.[62]

The courts' gradual withdrawal in preservation cases from all but the most conclusory remarks on aesthetics may reflect a particularly twentieth-century sensibility about the difficulty of aesthetic judgments. As Stephen Williams has recently reminded us, artistic expression is especially resistant to precise evaluation, either as to quality or as to effects.[63] But however appropriate the judicial diffidence about the *substance* of artistic expression and its political effects, that very diffidence should lead courts to give closer attention to the *procedures* through which others make these evaluations.[64]

The *Berman*-approved urban renewal projects show the need for closer attention to procedure in public forays into architecture. Although the apologists for urban renewal have rightly noted that its programs meant many different things, including rehabilitation and even some historic preservation activity,[65] it most strikingly conjures up the image of large clearance projects in low-income areas involving the demolition not only of historic structures,[66] but of entire black and ethnic neighborhoods,[67] and their replacement by massive office buildings and highrise housing projects. Such projects met the interests of potential financial backers and developers; some sites were apparently selected with a deliberate regard to the weakness of local neighborhood organization.[68]

62. Also rarely mentioned is the fact that *Berman* upheld an eminent domain proceeding, whereas preservation cases frequently concern the validity of architectural controls as an exercise of the police power without compensation. For an architectural control case that mentions (but dismisses as immaterial) this difference, see State *ex rel.* Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 272, 69 N.W.2d 217, 223, *cert. denied*, 350 U.S. 841 (1955).

63. Williams, *supra* note 42, at 16-21; *see* Michelman, *Toward a Practical Standard for Aesthetic Regulation*, PRAC. LAW., Feb. 1969, at 36, 42. *But see* Note, *Beyond the Eye of the Beholder: Aesthetics and Objectivity*, 71 MICH. L. REV. 1438, 1442-47 (1973) (empirical studies do show some aesthetic norms that are widely agreed upon).

64. Judicial decisions about architectural controls specifically for preservation have been somewhat more attentive to procedure, perhaps because the relevant standards and expertise seem more apparent. *See* South of Second Assocs. v. Georgetown, 196 Colo. 89, 91 n.1, 580 P.2d 807, 808 n.1 (1978); note 52 *supra*.

65. Slayton, *The Operation and Achievements of the Urban Renewal Program*, in URBAN RENEWAL, THE RECORD AND THE CONTROVERSY 189 (J.Q. Wilson ed. 1966). For historic preservation in urban renewal projects, see U.S. URBAN RENEWAL ADMIN., HISTORIC PRESERVATION THROUGH URBAN RENEWAL (1963), and U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, PRESERVING HISTORIC AMERICA (1966). *See also* notes 134-202 *infra* and accompanying text.

66. *See, e.g.*, SPECIAL COMM. ON HISTORIC PRESERVATION, U.S. CONFERENCE OF MAYORS, WITH HERITAGE SO RICH 133-34 (1966).

67. *See* Note, *Judicial Review of Displacee Relocation in Urban Renewal*, 77 YALE L.J. 966, 967 n.7 (1968).

68. *See* S. GREER, URBAN RENEWAL AND AMERICAN CITIES 40-41, 60, 81, 120 (1965).

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The history of urban renewal is an object lesson in the political choices entailed in architectural decisions and in the serious disruptions that may follow where architectural decisions go forth without procedural protection for countervailing community interests. The lesson ought not be lost on the historic preservationists, whose efforts to save artistically meritorious structures have also looked to *Berman* for legal support. If architectural decisions do have political consequences, however difficult they may be to define, then surely we need some consideration of how and when the community may participate in those decisions.

While *Gettysburg* and the "inspirational" period of historic preservation emphasize historic preservation as a means of fostering community ties, the "artistic merit" phase teaches a certain humility about the aesthetic judgments entailed in preservation and a concomitant need to define procedures that assure an airing of views among those concerned.

C. *The Most Recent Phase: Preservation for Community*

1. *Substantive considerations.*

The third phase of historic preservation builds on elements of the past by expanding the substantive considerations implicit in *Gettysburg* and by increasing the attention paid to procedure. Although the effects of urban renewal and the urban freeway projects scarcely rival the effects of the Civil War battles that gave emotional resonance to *Gettysburg*, the saga of shattered neighborhoods did move architects and urbanologists to reconsider the political ramifications of the physical environment. The focus of this reconsideration, as in *Gettysburg*, was the contribution of the physical environment to the maintenance of community—not the national community as in *Gettysburg*, but the smaller community of the city and neighborhood. Jane Jacobs's 1961 book, *The Death and Life of Great American Cities*,[69] stressed the city dweller's need for buildings of varying ages and uses, discussed the psychological and social consequences of structural layout, and prescribed architecture that contributes to neighborly interest in the community. More recently,

See generally C. STONE, ECONOMIC GROWTH AND NEIGHBORHOOD DISCONTENT (1976). For an exhaustive study of this and related issues, see Note, *Citizen Participation in Urban Renewal*, 66 COLUM. L. REV. 485 (1966).

69. J. JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES (1961).

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Oscar Newman's *Defensible Space*[70] used many of Jacobs's ideas in exploring the use of architecture to encourage neighborhood crime prevention. And in his *Image of the City*,[71] Kevin Lynch took the simple phenomenon of *not feeling lost*[72] as a starting point for examining the architectural qualities—scale, border, direction, the punctuation of an occasional singular "landmark"—that make a neighborhood or a city "legible"[73] or "imageable"[74] in the viewer's mind. In the legible city, not only can urban dwellers find their way, but the architectural qualities themselves lend drama, interest, an occasion for anecdotes about the past, and thus a framework for identification with the shared experience of the community.

Although the contribution of architecture to community requires further definition, this discussion does suggest a consistent and substantive foundation for public involvement in preservation efforts.

In the past 15 years, the community-oriented architectural discussion has influenced the direction of public preservation activities, and its vocabulary has entered the legal terminology of historic preservation. In the U.S. Conference of Mayors report, *With Heritage So Rich*,[75] a volume widely regarded as the seminal work behind the 1966 National Historic Preservation Act (NHPA),[76] one finds the claim that an historic district is a legislative attempt to preserve the "village within the city."[77] Herbert Gans first used the phrase to describe Boston's West End,[78] an ethnic neighborhood ultimately cleared by urban renewal and something of a *cause celebre* in the anti-urban renewal literature.[79] The NHPA's stated purpose of providing a "sense of orientation to the American people"[80] reflects Lynch's

70. O. NEWMAN, DEFENSIBLE SPACE: CRIME PREVENTION THROUGH URBAN DESIGN (1972).

71. K. LYNCH, THE IMAGE OF THE CITY (1960).

72. *Id.* at 4, 125.

73. *Id.* at 2-6.

74. *Id.* at 9-13.

75. U.S. CONFERENCE OF MAYORS, *supra* note 66; *see* H.R. REP. NO. 1916, 89th Cong., 2d Sess. 5, *reprinted in* [1966] 2 U.S. CODE CONG. & AD. NEWS 3307, 3308.

76. 16 U.S.C. §§ 470-470t (1976), *as amended by* National Historic Preservation Act Amendments of 1980, Pub. L. No. 96-515, 94 Stat. 2987.

77. U.S. CONFERENCE OF MAYORS, *supra* note 66, at 31, *citing* Note, *The Police Power, Eminent Domain, and the Preservation of Historic Property, supra* note 51, at 731.

78. H. GANS, THE URBAN VILLAGERS (1962).

79. *See, e.g.*, Gans, *The Failure of Urban Renewal*, in URBAN RENEWAL, THE RECORD AND THE CONTROVERSY, *supra* note 65, at 537, 540-42.

80. 16 U.S.C. § 470(b) (1976), *as amended by* National Historic Preservation Act Amendments of 1980, Pub. L. No. 96-515, sec. 101(a), § 1(b)(2), 94 Stat. 2987 (to be codified at 16 U.S.C. § 470(b)(2)). The National Environmental Protection Act's historic preservation sections also reflect the impact of the community-focused architectural discussion and view his-

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language. Local ordinances for historic districts routinely regulate the scale of buildings in the districts,[81] and guidelines for preservation rehabilitation often discuss the relationship of structures to the visual definition of the entire street.[82]

As for the importance of orientation, when a Congressman asked why Washington's embattled Willard Hotel was "historic" though only 70 years old, a Park Service representative responded:

> [A] lot of things make things historic. It is anything that gives a place a sense of place . . . . And if we keep tearing down everything which gives the city a sense of identity, and putting up duplicates of commercial glass boxes . . . how do you know where you are?[83]

The Willard controversy gave courts an opportunity to comment on a community-building rationale for preservation. The decision in *Commissioner of the District of Columbia v. Benenson*,[84] one step in the protracted litigation over the Willard, favored the hotel's owners over the preservationists but acknowledged the ways in which historic structures strengthen the links of a community:

> There may well be those who think it lamentable that this handsome old hotel may soon be demolished. Retention of fine architecture, especially in the capital of a relatively young country such as ours, lends a certain stability and cultural continuity, which can only contribute over the years to national substance. If one looks at the architecture of a city and sees only the present, the feeling of

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toric preservation as part of "an environment which supports diversity and variety of individual choice," a phrase that echoes Jane Jacobs's views. 42 U.S.C. § 4331(b)(4) (1976).

81. *E.g.*, ATLANTA, GA., CITY CODE § 16-35006(c)(2); Charleston, S.C., Ordinance 1966-12, § 3 (Aug. 16, 1966), *as amended by* Charleston, S.C., Ordinance 1973-11, § 2 (Apr. 10, 1973) (current version at CHARLESTON, S.C., CITY CODE § 54-31(2)). Seattle, Wash., Ordinance 106348, § 3.01(6) (Apr. 4, 1977) graphically takes Lynch-like criteria into account in one of the categories for landmark designation: A structure may have significant "character, interest or value" in history if, "because of its prominence of spatial location, contrasts of siting, age, or scale, it is an easily identifiable visual feature of its neighborhood and contributes to the distinctive quality or identity of such neighborhood or the city."

82. *E.g.*, ROCKVILLE HISTORIC DISTRICT COMMISSION, ADOPTED ARCHITECTURAL DESIGN GUIDELINES FOR THE EXTERIOR REHABILITATION OF BUILDINGS IN ROCKVILLE'S HISTORIC DISTRICTS (1977) (accompanying A. SENKEVITCH, ROCKVILLE HISTORIC DISTRICTS PRELIMINARY PRESERVATION PLAN (1977)); *see* N. WEINBERG, *supra* note 4, at 138.

83. *Oversight Hearing on Pennsylvania Avenue Development Plan: Hearing Before the Subcomm. on Parks and Recreation of the House Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess. 65 (1975) (statement of E. Connally) [hereinafter cited as *Oversight Hearing*]. For somewhat comparable considerations in recent British preservation planning, see LEEDS CIVIC TRUST, CONSERVATION AREAS: A GUIDE TO THE LEGISLATION 16 (1975). This report discusses the importance of public participation in preservation planning, as well as the maintenance of the "social fabric" of existing communities and the preservation of historically and architecturally important structures that form a part of the "familiar scene."

84. 329 A.2d 437 (D.C. 1974).

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character is missing.[85]

If community-building is the central direction of recent preservation activity, several consequences follow. First, the age and fame of a structure are only two among several elements, including scale, distinctiveness of design, and location, that should be considered in assessing a building's importance to the community. Second, because a community exists over time, the present members are to be considered valuable. However important it may be to conserve the indicia of the past, some latitude must remain for the contributions of the present. Third, a community-building rationale should place preservation—and the physical surroundings generally—in a larger perspective of community needs. Finally, if it is recognized that physical surroundings play a political role in the community, the treatment of those surroundings cannot be viewed as the preserve of aesthetes and bluebloods, but must become an issue for a broader constituency.

2. *Procedural considerations.*

Here the substance of a community-oriented rationale blends into procedure. Who should assess the value of the physical environment and weigh it against competing needs? What forms should the evaluation take? It is no coincidence that the community orientation in modern preservation law has multiplied the devices through which neighborhood groups can command a role in the debate over potentially destructive projects. Much preservation litigation and many delays in the destruction of older structures have been possible only because of the proliferation of procedural devices around which neighborhood and local groups can organize.

Although the statutes creating these devices seldom link them explicitly to the community-building rationale, the new historic preservation procedures are fruit of the same tree. First, many of these procedures, like the community-building rationale, derive from a conscious reaction against the depredations of oversized government construction projects. Take, for example, the changing features of the federal highway program, where procedural amendments in 1966

85. *Id.* at 441–42 (footnote omitted). The public interest groups that litigated and lobbied for the Willard also seem to take a community-building approach to preservation. One of the most active, Don't Tear It Down, is interested in preservation as part of the entire "built environment" and "livable design" of the community. Interview with Judith Sobel, Executive Director of Don't Tear It Down, in Washington, D.C. (July 24, 1979); *see* statement of Carol Bickley, President of Don't Tear It Down, in *Oversight Hearing, supra* note 83, at 79–80. For this reason, the organization would not favor, for example, the retention of an old facade at the cost of a better building of good contemporary design. Interview, *supra*.

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and 1968 included not only environmental and historic preservation review, but also some local participation in what had been largely a state and federal decision process.[86] The legislative history of the 1968 amendments cited past neglect of the "urban environment"[87] and suggested procedural means by which to overcome that neglect: namely, the inclusion of local governments in route selection decisions.

Moreover, other recent preservation procedures have in practice been used primarily by neighborhood groups, even against larger local governments.[88] These procedural devices provide a centerpiece for community organization that in itself can strengthen neighborhoods by encouraging the process of community self-definition.

Finally, the new thinking on the substantive aspects of historic preservation suggests that procedures are required by which local residents can be asked about the physical elements that make a community "legible." Lynch's inquiry in *Image of the City* suggests that a community-oriented architectural theory must be linked to a process of community information-gathering and self-education.[89] Architects and other professionals may play an important role in the educational process, but the focus on community-building requires a retreat from architectural imperialism and an acceptance of community definition by community residents.

D. *Community-Building and Political Thought*

1. *Arts in a democratic regime.*

A community-building rationale for historic preservation could contribute to several traditional topics of American political thought. The first of these matters is the role of the arts in a democratic regime. The newer thinking on preservation, like the *Gettysburg* case in the nineteenth century, attributes political significance to physical surroundings. It thereby links historic preservation to a public discussion that dates from the founding of the nation: the quest for artistic forms appropriate to a republican government.[90]

86. Federal-Aid Highway Act of 1968, § 18(a), 23 U.S.C. § 138 (1976); Federal-Aid Highway Act of 1966, Pub. L. No. 89-574, § 15(a), 80 Stat. 771 (current version at 23 U.S.C. § 138 (1976)).

87. S. REP. NO. 1340, 90th Cong., 2d Sess. 11–12, *reprinted in* [1968] 3 U.S. CODE CONG. & AD. NEWS 3482, 3492–93.

88. *See, e.g.*, notes 223–24 *infra* and accompanying text.

89. K. LYNCH, *supra* note 71, at 140–59.

90. *See* N. HARRIS, THE ARTIST IN AMERICAN SOCIETY 28–53, 159–65, 208 (1966); J.

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That early discussion did not always make life easy for artists. Some eighteenth-century theorists—and much of the public—regarded the arts with hostility, as temptresses of a voluptuousness that would corrode the virtue requisite to republican government.[91] But others, particularly as the nineteenth century progressed, viewed artistic works as blandishments to reflection, sociability, and generosity.[92] Despite the content of these early discussions and their occasionally ludicrous vagaries (one 1790 essay argued that brick houses are the only suitable dwellings in a republic),[93] the participants at least paid the arts the compliment of taking seriously their political significance.

A consideration of that significance may be an inescapable part of any coherent rationale for the public support of historic preservation. The newer thinking about historic preservation has begun to revive, in an imaginative and provocative manner, the much older inquiry into the political connotations of artistic and architectural style. The tentativeness with which the "aesthetic" court decisions approached the role of the arts is an appropriate reminder of the problems it can create. Although caution is in order where politics crosses the arts and may bear on issues of speech and expression central to our political enterprise,[94] this difficulty cannot itself withdraw artistic expression from politics. It can, however, serve as a warning

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KASSON, CIVILIZING THE MACHINE: TECHNOLOGY AND REPUBLICAN VALUES IN AMERICA 1776-1900, at 142-47 (1976).

91. John Adams, who was certainly attracted to the arts, nevertheless wrote to Jefferson in 1816, "Every one of the fine Arts from the earliest times has been inlisted in the service of Superstition and Despotism." Letter from John Adams to Thomas Jefferson (Dec. 16, 1816), 2 THE ADAMS-JEFFERSON LETTERS 502-03 (L. Cappon ed. 1959) (quoted in J. KASSON, *supra* note 90, at 143-44). *See* N. HARRIS, *supra* note 90, at 28-53. As these authors note, some of the theoretical arguments derive from earlier European thinkers, particularly Plato and Montesquieu, and most particularly Rousseau. *See generally* L. MILLER, PATRONS AND PATRIOTISM: THE ENCOURAGEMENT OF THE FINE ARTS IN THE UNITED STATES 1790-1860 (1966); Lynes, *How a Few Artists Wormed Their Way in the Course of a Century into the Confidence of a Small Percentage of Their Compatriots*, in THE SHAPING OF ART AND ARCHITECTURE IN NINETEENTH-CENTURY AMERICA 104 (1972).

92. *See* N. HARRIS, *supra* note 90, at 159-62. *See generally* L. MILLER, *supra* note 91, at 8-32.

93. *On the Architecture of America*, AM. MUSEUM, Oct. 1790, at 176, *cited in* N. HARRIS, *supra* note 90, at 43-44 & n.77.

94. *See* note 127 *infra*. Art works in public view may be particular objects of political discussion. *See, e.g.*, O'Doherty, *Public Art and the Government: A Progress Report*, in 2 J. MERRYMAN & A. ELSEN, LAW, ETHICS AND THE VISUAL ARTS 5-67, 5-73 (1974) (National Endowment for the Arts support of "public art" results in "inevitably socio-political" dialogue within communities).

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against rigidity and as a reminder that any conclusions are necessarily approximate.

2. *Community-building and majoritarianism.*

A community-building rationale relates historic preservation to the most striking observation of Tocqueville's analysis of America and of modern egalitarian regimes: that we need to overcome the isolation and rootlessness that leave individuals no support against an overbearing majority. The same concern underlies American political science's preoccupation with the health of pluralistic institutions.[95]

This century's European totalitarian regimes effected the terrorization of their citizenry in part through the suppression of institutions that could orient and support individuals.[96] The European experience suggests that the appropriate antidote is not so much a sense of national community as the sense of cohesion that comes from local communities. Tocqueville spoke of the countermajoritarian benefits of voluntary organizations.[97] But since, as Marvin Meyers has pointed out, these organizations run against the grain in an egalitarian regime,[98] they need all the support they can get.

It is in reinforcing decentralized and pluralistic community-building that historic preservation law may make its most important contribution to our political life. Its substantive effects on our physical surroundings, including older structures and neighborhoods, can help to give residents a feeling of stability and familiarity, and they can aid in creating a sense of community among neighbors. Procedurally, the very process of community self-definition, including the procedures of modern historic preservation law, brings neighbors together in mutual education and mutual aid, helping to prevent a paralyzing sense of individual powerlessness. With these considerations in mind, I turn to an evaluation of the most important current programs for public support of historic preservation.

95. *See generally* Connolly, *The Challenge of Pluralist Theory*, in THE BIAS OF PLURALISM 3 (W. Connolly ed. 1969).

96. *See generally* H. ARENDT, THE ORIGINS OF TOTALITARIANISM (2d ed. 1958); C. FRIEDRICH & Z. BRZEZINSKI, TOTALITARIAN DICTATORSHIP AND AUTOCRACY (1965).

97. *See* 2 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 129–34 (12th ed. 1898).

98. *See* M. MEYERS, THE JACKSONIAN PERSUASION 36–42, 50–54 (2d ed. 1960). *See also* Connolly, *supra* note 95, at 5.

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II. THE COMMUNITY-BUILDING RATIONALE AND CURRENT PROGRAMS FOR HISTORIC PRESERVATION

A few years ago, George Lefcoe identified private development and governmental projects as two major sources of neighborhood destruction.[99] The control of these agents could as easily be identified as the chief object of historic preservation efforts—and as another indication of the relationship between historic preservation and neighborhood organization.[100]

Architectural controls on private construction and demolition plans are the most significant preservation controls on private development. These controls seek to protect both individual "landmark" buildings and entire areas included in "historic districts." The review-and-comment proceeding[101] is the most significant control over governmental programs. Landmark and district architectural controls are chiefly a matter of local administration, while review-and-comment procedures either are federal or are modeled on federal legislation. Important, though sometimes indirect, state components are found in both protective devices, however. State legislation, for example, enables municipalities to enact architectural controls; and state historic preservation officers inject state and local sites into the federal review-and-comment process by nominating them to the National Register.[102] The discussion that follows, therefore, concentrates on local landmark and district controls and on federal review-and-comment procedures, but it also touches on important preservation contributions from the states. The discussion also explores related local and federal devices such as tax benefits and grant programs.

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99. Lefcoe, *The Neighborhood Defenders*, 23 U.C.L.A. L. REV. 823, 826 (1976). Lefcoe regarded government programs and especially urban renewal as a more serious destroyer of neighborhoods in the United States than in other Western countries. *See id.* at 843–45. *See also* C. STONE, *supra* note 68 (Atlanta urban renewal programs).

100. For examples of historic preservation used for neighborhood conservation, see N. WEINBERG, *supra* note 4, at 121–47.

101. *See* notes 233–60 *infra* and accompanying text.

102. In addition, state legislation sometimes designates historic districts in which local architectural controls apply. *See, e.g.*, Minnesota Historic District Act of 1971, MINN. STAT. ANN. §§ 138.71–.75 (West 1979); Act Creating the Historic Beacon Hill District, ch. 616, 1955 Mass. Acts 513. Moreover, some states have environmental and preservationist review-and-comment procedures of their own; in the case of California's Environmental Quality Act, CAL. PUB. RES. CODE §§ 21000–21176 (West 1977 & Supp. 1979), these procedures may have wide-ranging consequences for both public and private development. *See* Comment, *Alternatives to Destruction: Two New Developments in Historic Preservation*, 19 SANTA CLARA L. REV. 719 (1979). For a summary of this and other state legislation, see Significant State Statutes, *supra* note 14.

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In discussing these programs, I follow the traditional division of "substance" and "procedure"—an imperfect division but one that, despite inevitable overlap, has some heuristic value in sorting out the major elements of historic preservation law. I begin with the programs that highlight most sharply the substantive aspects of historic preservation: local architectural controls on landmarks and districts. In the subsequent "procedural" sections, I discuss the procedural aspects of both the architectural control committees and the other major set of procedural devices for preservation: federal review-and-comment legislation.

A. *Landmarks and Districts: The Competing Considerations*

1. *The pattern of preservation control.*

Although differences exist among preservationist architectural ordinances, most display a basic pattern. The ordinances prescribe methods for designating selected structures or districts as "historic" and for assessing individual applications to alter landmarks or properties within designated areas.[103] Under most ordinances, an architectural control board or committee performs these tasks. The boards often must include professionals in the fields of architecture, history, art history, and archeology;[104] many also include builders or other real estate professionals.[105] Presumably, members bring the standards of their professions to the tasks of landmark designation and review of applications to alter historic properties.

Local ordinances often specify standards according to which structures or areas are to be deemed "historic." These standards vary from place to place, but many closely parallel criteria of the National Register of Historic Places or the earlier National Landmarks criteria.[106] Local criteria for the grant or denial of individual construction permits vary more than the criteria for initial landmark designation.

The criteria for alterations within historic districts are especially complex.[107] They almost always give some consideration to the compatibility of the proposed change with the property's or district's his-

103. *See, e.g.*, NATIONAL TRUST FOR HISTORIC PRESERVATION, RECOMMENDED MODEL PROVISIONS FOR A PRESERVATION ORDINANCE WITH ANNOTATIONS (1980) (excellent compilation of provisions from various local landmark ordinances). *See generally* notes 203–32 *infra* and accompanying text.

104. *See* note 203 *infra* and accompanying text.

105. *See* note 205 *infra* and accompanying text.

106. *See* note 41 *supra*.

107. *See* notes 134–202 *infra* and accompanying text.

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toric features. Some legislation includes special hardship provisions for individual owners,[108] and other legislation envisions balancing the public benefits of alterations against the costs of losing an historic property or feature.[109]

Although designation, permit procedures, and review committees are features common to landmark and historic district regulation, landmarks and districts nevertheless raise some distinctly different issues in historic preservation regulation. The following sections first explore landmark, and then historic district regulation.

2. *Landmark regulation.*

The landmark is typically an individual building, and its role in a community-oriented preservation effort may seem somewhat obscure. A landmark does, though, help foster community cohesion. A frequent rationale for landmark designation is the building's association with past events or notable persons; its physical presence can unite the community by reminding members of a common past. The landmark can be a focal point for direction-finding; a particularly striking old building may, in Lynch's terms, lend "legibility" or "imageability" to a city simply because everyone knows where it is and can locate other places by reference to it. Or it may, by its artistry or by the drama or oddity of its decoration, serve as a point of shared pride, curiosity, or amusement to the community.[110]

Despite the landmark's potential for unifying the community, there are problems of equity resulting from the landmark's being singled out for special treatment. Since landmark designation usually imposes restrictions on the owner's alterations of the property, an owner may be forced to bear the burden of diminished property value and in effect to pay for the community's preservation preferences through an assessment not placed on the owners of ordinary properties. To be sure, landmark designation may provide some benefits to some landmark owners, as the preservationists argue; designa-

108. *E.g.*, Act Creating the Historic Beacon Hill District, ch. 616, § 7, 1955 Mass. Acts 513.

109. *E.g.*, Washington, D.C., Law 2-144, §§ 3(j), 3(k), 5(e), 6(f), 7(e) (Dec. 27, 1978).

110. The "way-finding" justification may, of course, depend on the location and surroundings of the landmark. Some landmark ordinances acknowledge this. *See, e.g.*, Seattle, Wash., Ordinance 106348, § 3.01 (Apr. 4, 1977). For amusement value, the reader is referred to the endearing whimsy of Lucy, an enormous century-old wooden elephant at Margate, New Jersey, preserved in part through local business effort and now a designated National Register property. Lucy's photograph is in R. WARNER, S. GROFF & R.P. WARNER, *supra* note 19, at 217.

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tion may give the structure greater notoriety and may assure the present owner that the property will not be altered in the future. Many owners nominate their own properties for landmark status, presumably to take advantage of these benefits. But for the owner who resists landmark designation and control, the burden probably outweighs the benefits.

The United States Supreme Court in *Penn Central* rejected the argument that the burdens of landmark regulation amount to a "taking" of property, at least where the owner retains reasonable beneficial use.[111] Before that decision, legislatures in many jurisdictions were apparently aware that landmark control might subject owners to special burdens. Perhaps because the constitutional status of landmark controls was uncertain, these legislatures made available special direct or indirect bonuses for landmarks.[112] Even New York City, whose regulations were at issue in *Penn Central*, attempts to protect a "reasonable return"[113] on landmark properties. New York also makes some effort to lessen the burden on landmark owners through tax relief[114] and an elaborate zoning scheme for transferable development rights.[115] The most serious problem with *Penn Central* may be

111. 438 U.S. 104, 137–38 (1978).

112. *See, e.g.*, Shull, *The Use of Tax Incentives for Historic Preservation*, 8 CONN. L. REV. 334 (1976). John Costonis, one of the chief scholars on the idea of "transfer of development rights" in landmark preservation, advocates such transfers as a form of "fair compensation" that falls between the highest-use compensation of eminent domain and the absence of compensation under the police power. For his theory, see Costonis, *Fair Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 COLUM. L. REV. 1021 (1975); see Berger, *The Accommodation Power in Land Use Controversies: A Reply to Professor Costonis*, 76 COLUM. L. REV. 799 (1976), for a critique.

113. NEW YORK, N.Y., ADMINISTRATIVE CODE ch. 8-A, § 207-8.0 (1976). Many of New York's landmark cases have focused on this "reasonable return" requirement. *See, e.g.*, Penn Cent. Transp. Co. v. City of N.Y., 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977), *aff'd*, 438 U.S. 104 (1978); Lutheran Church in America v. City of N.Y., 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974); Trustees of Sailors' Snug Harbor v. Platt, 29 A.D.2d 376, 288 N.Y.S.2d 314 (1968); Manhattan Club v. Landmarks Preservation Comm'n, 51 Misc. 2d 556, 273 N.Y.S.2d 848 (Sup. Ct. 1966).

114. NEW YORK, N.Y., ADMINISTRATIVE CODE, ch. 8-A, § 207-8.0(b)–(c) (1976).

115. NEW YORK, N.Y., ZONING RESOLUTION §§ 74–79, 791, 792, 793 (1968), *cited in* Marcus, *Air Rights Transfer in New York City*, 36 LAW & CONTEMP. PROB. 372, 374 & n.8 (1971). Under such schemes, the owner of restricted properties may "sell" unused air space to other properties, enabling the "buyer" to erect a structure that exceeds the height or bulk limits that would otherwise apply. Some of the difficulties with New York's plan are discussed in Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, *supra* note 16, at 586–89 (comparison with more elaborate scheme for Chicago's landmarks). Seattle's landmark ordinance provides for "economic incentives" that may be granted "as consideration for the imposition of controls on a designated landmark site or landmark." Seattle, Wash., Ordinance 106348, § 1.03(9) (Apr. 4, 1977). These incentives in practice usu-

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that it discourages such benefit schemes,[116] or may at least discourage schemes that go beyond New York's rather frail efforts.

In the post-*Penn Central* era, disgruntled owners may combat landmark designation with a procedural variant to the "taking" argument: that landmark designation so affects the property's value that the owner must at least be given notice and a right to contest designation. Although many ordinances provide for notification to the landmark owner, local regulations may provide that a building is protected as soon as it is placed under consideration for landmark designation—even before the owner has received notice—and that no permit for alteration or demolition may be granted until the architectural committee has reviewed it.[117] Nonconsenting landmark owners may contend that such provisions give them inadequate opportunity to contest landmark designation or to avoid the effects that designation may bring for their property.

An analogous argument emerged in connection with the National Register of Historic Places and indeed carried the day in the 1980 amendments to the National Historic Preservation Act.[118] These amendments permit owner objections to block the listing of a property on the National Register. Many preservationists have resisted

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ally take the form of zoning relief, *e.g.*, permission for additional parking spaces. Interview with staff member, Seattle Dep't of Urban Conservation, in Seattle, Wash. (Aug. 23, 1979).

116. In the wake of the *Penn Central* decision, Chicago's landmarks commission reportedly ceased paying compensation for development rights when it denied demolition permits. *Stronger Preservation Laws Sought After as a Result of Grand Central Decision,* [1978] 6 HOUS. & DEV. REP. (BNA) 247.

117. This appears to be the effect of the regulations under the Washington, D.C., landmarks preservation law. District of Columbia Department of Housing and Community Development, Rules of Procedure Pursuant to D.C. Law 2-144, § 1.1(j) (July 12, 1979); Interview with staff member, Washington, D.C. Dep't of Housing and Community Development, in Washington, D.C. (July 25, 1979).

118. National Historic Preservation Act Amendments of 1980, Pub. L. No. 96-515, sec. 201(a), § 101(a)(6), 94 Stat. 2987 (to be codified at 16 U.S.C. § 470a(a)(6)). The owner consent controversy had been brewing earlier. During the markup of the fiscal year 1980 Interior Department appropriations in the House Appropriations Committee, Subcommittee on Interior, an effort was made to require owner consent for National Register designation on the ground that designation without consent was an unconstitutional taking. Preservation Action, June 1979, at 1 (bulletin of Preservation Action). Preservation Action, a lobbying group, immediately attacked the argument with a memo which, relying on *Penn Central*, argued that National Register designation and the attendant tax incentives and limitations were much less restrictive than many other regulations upheld by the Supreme Court. D. Bonderman, Memorandum (1979) (legal opinion prepared for Preservation Action). The final House Appropriations rider required owner consent only where Heritage Conservation and Recreation Service grants were used to designate industrial properties under the National Historic Landmarks program. *See* Oldham, *Federal Tax Provisions and the Federal Framework for Historic Preservation*, 12 URB. LAW. 66, 72 (1980).

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owner consent provisions, taking the view that placement on the Register is merely honorific and causes no changes for which an owner's consent should be asked.[119] This view is unrealistic, however. First, National Register status itself sometimes triggers local protective restrictions,[120] particularly architectural committee review of proposed changes in the property.[121] Second, the 1976 Tax Reform Act treats National Register properties differently from other properties. Indeed, this tax statute may have triggered the debate on owner consent; while the Act's incentive provisions substantially benefit the owner who rehabilitates a National Register property,[122] the Act's demolition disincentives prevent the owner of a Register property from deducting demolition expenses or claiming accelerated depreciation on a new structure built upon the site.[123]

The *Penn Central* decision is an obstacle to arguing that differential tax treatment constitutes a "taking"; nevertheless, the designating authorities have made some implicit concessions to the landowner's concerns. Even before the new provisions for owner notification and objection, federal preservation offices established elaborate procedures for owner notification of National Register nomination, procedures that, until modified, explicitly required description of the tax consequences of Register status and gave owners an opportunity to comment on the potential designation of their properties.[124]

A community-building perspective on landmark procedures suggests serious questions about long-term benefits. From an economic standpoint, one might ask whether landmark designation and regulation impose such burdens as to discourage builders from investing in good or unusual architecture in the first place. Might not the original builders aim rather at mediocrity, because they know that prospective future owners may run the risk of landmark controls and

119. Interview with Nellie Longsworth, President of Preservation Action, in Washington, D.C. (July 25, 1979); Interview with staff member, Seattle Dep't of Urban Conservation, *supra* note 115. For a contrary view, see Historic Green Springs, Inc. v. Bergland, 497 F. Supp. 839, 853 (E.D. Va. 1980).

120. *E.g.*, Washington, D.C., Law 2-144, § 3(e)-(f) (Dec. 27, 1978).

121. *Id.* §§ 5, 6.

122. I.R.C. §§ 191, 167(o).

123. *Id.* §§ 280B, 167(n).

124. 41 Fed. Reg. 5904 (1976), *as amended by* 42 Fed. Reg. 14,097 (1977). These procedures were modified substantially by interim regulations vesting more responsibility in state preservation offices and passing over in silence the explicit requirement that owners be notified about tax consequences and given an opportunity to comment. 44 Fed. Reg. 64,407 (1979) (current version at 36 C.F.R. §§ 1202.12-.13 (1980)).

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consequently pay less for a creative or imaginative building? If so, landmark regulation may work to dampen creativity and in the long run may deprive the community of imaginative and dramatic architecture.[125]

In other ways, however, landmark regulation may encourage creative design. Besides the incentives from special tax or zoning benefits that legislatures can—and do—accord to the designated landmark property,[126] it is arguable that restrictions on landmark alteration might encourage builders, knowing that their investment may be preserved indefinitely, to strive for creative excellence. This view ascribes to the original builder a desire to make some lasting artistic statement—an ascription that certainly seems plausible in the case of architecture, the most public of art forms.[127] For example, one nineteenth-century commentator said about homebuilding: " 'Nothing is more remote from selfishness than generous expenditure in building up a home, and enriching it with all that shall make it beautiful without and lovely within. A man who builds a noble house does it for the whole neighborhood, not for himself alone.' "[128]

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125. For variations on this theme, see Hershman, *Critical Legal Issues in Historic Preservation*, 12 URB. LAW. 19, 28 (1980); Note, *Allocating the Cost of Historic Preservation for the Isolated Landowner*, 74 NW. U.L. REV. 646, 648 (1979).

126. *See* notes 112–15 *supra* and accompanying text. Aside from tax benefits and zoning relief, historic properties are eligible for special rehabilitation loans in some jurisdictions. North Carolina, for example, has established a statewide revolving fund for preservation loans. Howard, *Revolving Funds: In the Vanguard of the Preservation Movement*, 11 N.C. CENT. L.J. 256, 257–59 (1980). A number of localities, including Seattle and San Francisco, have similar loan funds which are described in Galbreath, *supra* note 17.

127. The argument for first amendment protection of architecture rests on the view that architecture is a "statement" to the public, or at least some form of speech or expression. *See* Williams, *supra* note 42, at 35; Note, *Architecture, Aesthetic Zoning and the First Amendment*, 28 STAN. L. REV. 179 (1975); Note, *Architectural Expression: Police Power and the First Amendment, supra* note 51. But Williams also alludes to architecture's "speech" to a captive audience, Williams, *supra* note 42, at 24, 28, a point that, according to Williams, lends legitimacy to its regulation, *id.* at 24.

128. H.W. BEECHER, NORWOOD; OR, VILLAGE LIFE IN NEW ENGLAND 213 (1892), *quoted in* N. HARRIS, *supra* note 90, at 215. Comments of this sort underlie an interesting subtheme in historic preservation literature: the view that the owner of an historic building holds the property in trust for the public. *See, e.g.*, American Scenic and Historic Preservation Society, 13th Annual Report 168, 169 (1908), *cited in* C. HOSMER, *supra* note 4, at 95 n.96 (remarks of Edward Hall, Secretary of the American Scenic and Historic Preservation Society, to the effect that even privately owned historic places may take on the character of public property). The argument runs through today's preservationist literature. For example, it is one of the foundations of some preservationists' position that owner consent should not be required for designation on the National Register of Historic Places: The owner is merely the "trustee" for the public and is not entitled to dispose of the property on the basis of private interest. Interview with Nellie Longsworth, *supra* note 119.

But what is the source of the public's interest in such properties? If there is anything to

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Landmark regulation, then, by holding out the hope of long-term protection, could encourage public architectural "statements" of imagination and drama. To be sure, this argument would be far more persuasive if there were no private law devices (such as easements and covenants) by which the original builder could attain the same protection.[129] I raise it only to suggest the ambiguity of incentives for the original builder to invest in creative and dramatic construction.

Concern about landmark restrictions is better focused on current owners. They may never have wished to make an architectural statement, and they may be alienated from the community because they are singled out to pay for its preservation preferences or are prevented from making an alternative investment in the community's well-being, whether with another architectural "statement" or some other needed public facility.[130]

The foregoing analysis suggests several directions for a community-conscious landmarks ordinance. First, a locality should recognize that even though landmark control may not be a "taking" since *Penn Central*, it is desirable to have some consent or compensation scheme to protect developers, owners, and builders, to whose creative endeavors the community must look for future contributions to the urban environment.[131]

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this argument, the "trust" must derive from the original "dedication": Architecture makes a public statement, and that statement becomes public property; like any other property, this property may become more valuable over time. It is noteworthy that many landmark preservation ordinances limit the scope of public control to *exterior* alterations; perhaps this limitation recognizes that the scope of the original "dedication" extended no further than those areas that had some public audience.

129. Some of these private devices have involved enforcement problems that have been removed statutorily only in the recent past. *See* note 15 *supra* and accompanying text; *North Carolina Legislature Enacts Package of Bills Recommended by Preservation Committee*, Landmarks and Historic Districts Commissions, June 1979, at 2, col. 2 (Nat'l Trust for Historic Preservation newsletter) (comments on North Carolina statutory clarification of the enforceability, assignability, and duration of preservation easements).

130. *See, e.g.*, Wash. Post, July 26, 1979, § A, at 12, col. 1 (editorial concerning the impending destruction of the facade of the old Keith-Albee movie theater). The editorial suggested that after a 1½-year delay and fruitless negotiation, a new building might make a greater contribution than the old: "There is a value to preserving the city's history in stone, but there is also a value to providing for the city's economic future." In this instance, a happy ending appeared the next day, when city officials apparently agreed to certain zoning or building code concessions in exchange for retention of the threatened facade. *Id.*, July 27, 1979, § C, at 9, col. 4.

131. *See* Gold, *The Welfare Economics of Historic Preservation*, 8 CONN. L. REV. 348, 368–69 (1976); Note, *Allocating the Cost of Historic Preservation, supra* note 125, at 663. On the "demoralization costs" of noncompensation generally, see Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214–24 (1967).

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Second, it is crucial that landmark designations avoid the appearance of unpredictability and caprice, and that the standards and procedures for landmark designation and control be clear from the outset. Buyers will then value the properties accordingly and be foreclosed from arguing that landmark designation causes an unexpected loss. This need for standards again bespeaks our need for a theory of the public purposes to be served by historic preservation; articulation of those public purposes would give rise to standards, and standards give notice to property owners. If the major public purpose of modern preservation law is community-building, landmark designation will value dramatic structures and beacon locations as well as the sheer age that gives rise to familiarity and evokes common memories.

A delineation of preservation goals must place preservation in the context of other community needs, thereby suggesting a third feature for landmark designation and protection: a provision which allows the landmark owner to argue that other pressing community needs outweigh the need for exact retention of an older structure. Here again, of course, it is critically important to have an articulable theory of the political value of architectural surroundings; without such a theory there is no ground on which to weigh preservation more heavily than other community needs, or indeed to weigh preservation at all.

Finally, a community-conscious preservation ordinance might better be enforced through a delay of the owner's proposed changes than through absolute prohibition of demolition or alteration. Mere delay, although not costless, gives landmark owners a weaker moral position from which to complain of caprice and special burden.[132] Delay gives all sides an opportunity to publicize their positions and to hear the positions of others; it may enable the would-be developer and those who wish to preserve a structure to arrive at a compromise position such as retention of a facade or adaptive reuse of the old structure.[133] Enforcement by delay affords each side the opportunity to educate the other and to educate the public about the community

132. J. Silverstone, Historic District Preservation 59 (1962) (unpublished thesis in University of Chicago Law School Library). The author cites a number of preservation officials who view voluntary compliance as the ultimate goal and delay as a valuable tool in attaining that goal. Since delay still imposes costs on the owner, however, it has been urged that delay in public land use decisions be compensated by a method analogous to eminent domain. *See* Mayor of Annapolis v. Anne Arundel County, 271 Md. 265, 316 A.2d 807 (1974); Marles, *Land Use Control through Municipal Delay: The Case for an Eminent Domain Remedy*, 11 URB. LAW. 311 (1979); Note, *Landmark Preservation Laws: Compensation for Temporary Taking*, 35 U. CHI. L. REV. 362 (1968).

133. Pyke, *Architectural Controls and the Individual Landmark*, 36 LAW & CONTEMP. PROB.

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values at stake in the preservation of old structures or in their replacement by other structures. In short, enforcement through delay would make landmark preservation a function of community education and community pressure—a desirable goal if preservation is to serve community-building.

3. *Historic district regulation.*

Historic landmark regulation typically pits an individual developer against the larger community. Historic district regulation, on the other hand, seems less likely to produce such conflict. First, stringent architectural controls usually apply to all properties within the district and thus, like ordinary zoning regulations, arguably give reciprocal benefits to all the owners.[134] Unlike landmark owners, the owners of property within an historic district, knowing that their neighbors' property is subject to comparable controls, can be assured that restoration of an original mansard roof will not be visually overpowered by a chartreuse door on a neighbor's garage. Second, the very character of historic districts seem to foster participation rather than rancor; if, as proponents say, the historic district creates the "village within the city,"[135] the district should be a place where community values are especially preserved.

Unfortunately, historic districts produce some rancors peculiarly their own, rancors that are ironically reminiscent of the very urban renewal projects that once devastated so many older neighborhoods. In both their motivations and their problems, historic district regulations have eerily mirrored urban renewal. Municipalities have traditionally undertaken historic district regulation not in order to foster community, but rather for fiscal purposes: Historic districts are thought to attract tourists[136] and to act as a centerpiece for middle-

398, 404 (1971); R. WARNER, S. GROFF & R.P. WARNER, *supra* note 19, gives a number of examples of such compromises. *See also* Guidelines, *supra* note 41, at 47.

134. Many ordinances treat historic district regulation as zoning; recent ordinances frequently refer to district regulations as "overlay zones" that add to existing land use zoning without superseding it. *See* note 217 *infra* and accompanying text.

135. *See* note 77 *supra* and accompanying text.

136. This point has been stressed repeatedly in statutes, ordinances, and case law. *See, e.g.*, Bohannan v. City of San Diego, 30 Cal. App. 3d 416, 422, 106 Cal. Rptr. 333, 336 (4th Dist. 1973); City of New Orleans v. Pergament, 198 La. 852, 858, 5 So. 2d 129, 131 (1941); Opinion of the Justices to the Senate, 333 Mass. 773, 780, 128 N.E.2d 557, 562 (1966); City of Santa Fe v. Gamble-Skogmo, Inc., 73 N.M. 410, 417, 389 P.2d 13, 18 (1964); Ch. 395, § 2, 1970 Mass. Acts 237; Charleston, S.C., Ordinance 1966-12, § 3 (Aug. 16, 1966), *as amended by* Charleston, S.C., Ordinance 1973-11, § 2 (Apr. 10, 1973) (current version at CHARLESTON, S.C., CITY CODE § 54-23); MENDOCINO CO., CAL., ZONING CODE art. 42, § 20-111 (enacted 1973). These statements of purpose may be taken with a grain of salt, particularly in the

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class residential and business investment in the city.[137] As in urban renewal, these motives, though blameless in themselves, have resulted in two characteristic threats to community values. The first of these concerns design: District regulation may place too much weight on uniformity. The second concerns social divisions: Regulation may contribute to the disruption of neighborhoods, particularly low-income neighborhoods. The following subsections examine these two problems in detail.

Districts and design. The number of historic districts has been estimated at 1900,[138] but most are the product of the past decade or so. Until recently only a handful of designated historic districts existed, and those few were usually areas that had been well-known and much-visited even before their formal recognition as historic districts. In 1931, Charleston, South Carolina, became the first city to zone an historic district. New Orleans's Vieux Carré followed a few years later and was in turn followed by San Antonio's La Villita.[139] In the 1940s and 1950s these pioneers were joined by several others, includ-

earlier statutes and judicial opinions, where legislatures and courts were especially attentive to constitutional objections to "merely aesthetic" regulation; the promotion of tourism undoubtedly appeared to give a more hard-headed foundation for regulation.

137. *See* J. Silverstone, *supra* note 132, at 3; STAFF OF THE SUBCOMM. ON HISTORIC PRESERVATION AND COINAGE, HOUSE COMM. ON BANKING, CURRENCY AND HOUSING, 94TH CONG., 2D SESS., PRESERVATION PROGRAMS OF THE FEDERAL GOVERNMENT IN THE AREA OF HOUSING AND COMMUNITY DEVELOPMENT 69 (Comm. Print 1976).

138. *Revisions to Historic Preservation Tax Incentives Considered by Interior*, [1979] 6 HOUS. & DEV. REP. (BNA) 973. These districts are estimated to contain between 750,000 and 1,000,000 historic structures. *Id.* Estimates of the number of historic districts vary, however. The 1900 figure may well have been derived from a calculation of 10% of the then-current number of National Register listings (19,000); within a single recent symposium on historic preservation in *Urban Lawyer*, the authors came up with several figures, although not all necessarily inconsistent: 1500, Fowler, *Historic Preservation and the Law Today*, 12 URB. LAW. 3, 4 (1980) (estimated National Register districts); 600, Gilbert, *An Overview of the Law of Historic Preservation*, 12 URB. LAW. 13, 13 (1980) (cities and towns with local landmark and/or district ordinances); and "over 500," Hershman, *supra* note 125, at 27 (municipal landmark or historic district ordinances).

139. J. MORRISON, *supra* note 3, at 17, 133–34. In 1924 New Orleans passed, but never carried into effect, an ordinance to protect the French Quarter; the first effective protection of the Quarter came with New Orleans, La., Ordinance 14,538 (Mar. 3, 1937), following an amendment to Louisiana's constitution that specifically authorized the creation of the Vieux Carré historic district. LA. CONST. OF 1921, art. XIV, § 22A (1936); *see* J. MORRISON, *supra* note 3, at 17 n.11; Forman, *Historic Preservation and Urban Development Law in Louisiana*, 21 LA. B.J. 197 (1974). Louisiana's current constitution authorizes local governments generally to create historic districts. LA. CONST. OF 1974, art. VI, § 17.

The San Antonio, Tex., Ordinance 01-355 (Oct. 12, 1939), is summarized in J. MORRISON, *supra* note 3, at 168–69.

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ing districts in Alexandria, Virginia;[140] Winston-Salem, North Carolina;[141] Washington, D.C. (Georgetown);[142] Santa Fe, New Mexico;[143] Lexington, Kentucky;[144] Annapolis, Maryland;[145] and Nantucket and Boston (Beacon Hill) in Massachusetts.[146] Although some were to act as protective buffers around specific landmarks,[147] historic districts generally tried to evoke a past era by preserving the area itself; a quarter built in a particular style was to form an "outdoor museum" in some ways comparable to the highly touted Williamsburg.[148]

The leading cities in historic district legislation were usually vacation areas that, as one commentator put it, wished "to capitalize on local color."[149] Their district legislation was designed to protect the tourist trade and to prevent over-commercialization that might kill the goose that laid the golden egg.[150] An initial concern was merely to limit the distraction caused by outsized or unsightly signs.[151] But

140. Alexandria, Va., Ordinance 470 (Aug. 13, 1946); *see* J. MORRISON, *supra* note 3, at 129-30.

141. Winston-Salem, N.C., Zoning Ordinance §§ 13(r), 14 (Dec. 21, 1948), *cited in* Note, *The Police Power, Eminent Domain, and the Preservation of Historic Property*, *supra* note 51, at 714 n.77.

142. Act Creating "Old Georgetown," Pub. L. No. 81-808, 64 Stat. 903 (1950) (codified at D.C. CODE ANN. §§ 5-801 to -805 (1973)).

143. Santa Fe, N.M., Ordinance 1957-18 (Oct. 30, 1957); *see* City of Santa Fe v. Gamble-Skogmo, Inc., 73 N.M. 410, 412-13, 389 P.2d 13, 15 (1964).

144. Lexington, Ky., Ordinance 3841 (Nov. 20, 1958); *see* J. MORRISON, *supra* note 3, at 145-46.

145. Annapolis, Md., Ordinance Creating Board of Review for Historic Annapolis (June 9, 1952); *see* J. MORRISON, *supra* note 3, at 130.

146. Ch. 601, 1955 Mass. Acts 494 (current version at ch. 395, 1970 Mass. Acts 237) (Nantucket); ch. 616, 1955 Mass. Acts 513 (Beacon Hill).

147. *See, e.g.*, Springfield, Ill., Ordinance (June 28, 1966) (establishing a protective district around Abraham Lincoln's home). The Springfield ordinance is discussed in M & N Enterprises, Inc. v. City of Springfield, 111 Ill. App. 2d 444, 250 N.E.2d 289 (1969); Rebman v. City of Springfield, 111 Ill. App. 2d 430, 250 N.E.2d 282 (1969).

148. The notion of a district as an "outdoor museum" dates at least from the late nineteenth century, with the 1891 opening of "Skansia," a park in Stockholm. This was Artur Hazelius's display of old buildings—complete with costumed guides—from different regions of Sweden and from various epochs in European history. *See* C. HOSMER, *supra* note 4, at 24. See also Michelsen, *The Outdoor Museum and its Educational Program*, in HISTORIC PRESERVATION TODAY, *supra* note 11, at 201, and particularly the comment thereto by E.P. Alexander, Vice-President of Colonial Williamsburg, *id.* at 218, 222, comparing historic districts to outdoor museums. Williamsburg and other early historic districts are described in N. WEINBERG, *supra* note 4, at 36-60.

149. Jacobs, *supra* note 11, at 126.

150. *See, e.g.*, the description of the motivations for Nantucket's historic district in Note, *Land Use Controls in Historic Areas*, 44 NOTRE DAME LAW. 379, 402 (1969).

151. *See, e.g.*, City of New Orleans v. Pergament, 198 La. 852, 5 So. 2d 129 (1941).

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the restrictions also reflected the view that tourists came to see the older structures as they appeared at the time of their construction.

The rationale of visual protection extended far beyond sign restriction to the most detailed regulation of changes in the exterior features of buildings. Like many current district ordinances, Massachusetts's 1955 legislation for Nantucket's historic district regulated building shape, color, roof slope, and window and door design. In *Opinion of the Justices to the Senate*,[152] upholding this legislation, the Massachusetts Supreme Court noted the rationale that tourists wanted to see the area as it had always looked, taking judicial notice

> that Nantucket is one of the very old towns of the Commonwealth; that for perhaps a century it was a famous seat of the whaling industry and accumulated wealth and culture which made itself manifest in some fine examples of early American architecture; and that the sedate and quaint appearance of the old island town has to a large extent still remained unspoiled and in all probability constitutes a substantial part of the appeal which has enabled it to build up its summer vacation business to take the place of its former means of livelihood. . . .
>
> It is not difficult to imagine how the erection of a few wholly incongruous structures might destroy one of the principal assets of the town.[153]

From prohibiting "incongruous" new structures, it was but a short step to prohibiting owners from demolishing older structures or even to requiring them to maintain unwanted old properties. Requirements of the latter type were challenged in a recent *cause celebre* in New Orleans's French Quarter, *Maher v. City of New Orleans*.[154] Maher sought permission to tear down a Victorian cottage next to his home in the Quarter. After much litigation, he was not only denied the permit but was also held responsible for minimum maintenance of the odious building.[155] The court said it contributed to the whole, or, as they say in Louisiana, to "le tout ensemble"[156]—appar-

152. 333 Mass. 773, 128 N.E.2d 557 (1955).

153. *Id.* at 780, 128 N.E.2d at 562.

154. 516 F.2d 1051 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976). Maher's extended administrative appeals and litigation are reviewed in the district court opinion, 371 F. Supp. 653 (E.D. La. 1974).

155. An interesting wrinkle was that the cottage was in fact of a Victorian style. Judicial opinions originally upholding the Vieux Carré ordinance had stressed the protection of buildings dating from the much earlier French and Spanish eras. City of New Orleans v. Levy, 223 La. 14, 64 So. 2d 798 (1953); City of New Orleans v. Pergament, 198 La. 852, 858, 5 So. 2d 129, 131 (1941).

156. City of New Orleans v. Pergament, 198 La. 852, 858, 5 So. 2d 129, 131 (1941).

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ently more so than the proposed replacement, a modern version of an earlier Spanish style.

Maher's tribulations illustrate an historic district design problem: What features "contribute" to a district, and why? Some communities devote little attention to those questions and borrow language from other ordinances with a certain nonchalance about what should be preserved in their own district.[157]

Legislation typically requires uniformity with whatever is already built. Many district ordinances follow the Nantucket statute and bar alterations that are "obviously incongruous" with the surrounding buildings because of design, arrangement, materials, color, and texture.[158] In the South and West, many towns "cash in on their 'Latin' traditions"[159] by prescribing one or more architectural styles.[160] In Santa Fe's historic district, new construction must conform to a "Santa Fe" style described in some detail;[161] in Nevada City, California, the appropriate style is "Mother Lode."[162]

Savannah's regulations have made the principle of uniformity a fine science, assessing proposed construction on the basis of "relatedness criteria"; a proposed structure wins "points" for design features that render it like its neighbors in height, roof angle and shape, materials, color, or "rhythm" of doors and other recessed spaces.[163] Much of Savannah's early restoration activity, including the description of uniform design features and "relatedness criteria," was the product of an urban renewal project.

Urban renewal initiated a number of other well-known preservation projects as well, such as Philadelphia's Society Hill and Providence, Rhode Island's College Hill district.[164] Urban renewal has not generally been regarded as a friend of historic preservation, and

157. J. Silverstone, *supra* note 132, at 13–14.

158. Ch. 601, § 8(b)–(c), 1955 Mass. Acts 494 (current version at ch. 395, § 9(b)–(c), 1970 Mass. Acts 237). Many ordinances borrowing this language also add scale as a factor for consideration. *See, e.g.*, ATLANTA, GA., CITY CODE § 16-35006(c)(2).

159. Jacobs, *supra* note 11, at 127.

160. *E.g.*, SANTA BARBARA, CAL., MUNICIPAL CODE ch. 22.24; *see* G. GAMMAGE, P. JONES & S. JONES, *supra* note 6, at 127.

161. *See* Santa Fe, N.M., Ordinance 1957-18 (Oct. 30, 1957).

162. Nevada City, Cal., Ordinance 338; *see* G. GAMMAGE, P. JONES & S. JONES, *supra* note 6, at 117.

163. Savannah's plan is described and illustrated in detail in Tondro, *An Historic Preservation Approach to Municipal Rehabilitation of Older Neighborhoods*, 8 CONN. L. REV. 248, 267–74, 306–11 (1976). A major document upon which this plan was based is HOUSING AUTHORITY OF SAVANNAH, HISTORIC PRESERVATION PLAN FOR THE CENTRAL AREA (1973).

164. U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, *supra* note 65, at 22–25, 54–57, 62–63; N. WEINBERG, *supra* note 4, at 68–77, 95–107.

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it is still a bit unsettling to read a sleek, early-60s—vintage brochure stating that urban renewal projects restore older sections through land acquisition and demolition of structures that "interfere" with "the approved plan" for renewal of the historic area.[165] It is perhaps more unsettling to read a recent proposal that historic districts now adopt the old urban renewal techniques of eminent domain and resale to developers (for restoration);[166] one imagines "selective clearance" of "interfering" buildings whose only sin is that they disturb the uniformity of the district's design.

The 1950s and early 1960s urban renewal plans for preservation have a continuing influence in historic district planning. The Urban Renewal Administration's 1959 College Hill project description was prominently cited in an architect's recent plan for preservation in Rockville, Maryland;[167] and Philadelphia's Society Hill project is frequently cited for the use of historic preservation for urban revitalization.[168] Given the strong influence of urban renewal projects on historic districts, it is no surprise that the districts sometimes share with urban renewal projects an overplanned quality and an imperious suppression of variety that may ruin the liveliness and diversity of an urban neighborhood.[169] Historic district regulation, by narrowing a builder's design choices to a few approved styles, can freeze a community's architectural character to reflect some quasi-mythic time in the past, at the cost of creative contributions by current residents. In Rockville, Maryland's historic district plan, one cannot but contrast the whimsical decorative freedom of the original nineteenth-

165. U.S. URBAN RENEWAL ADMIN., *supra* note 65, at 3. The co-sponsored study, HOUSING AUTHORITY OF SAVANNAH, *supra* note 163, at 25, also spoke of "selective clearance" to remove "blighting influences, including incompatible signs and unsightly structures." *See Historic Preservation via Urban Renewal*, 19 J. HOUSING 297, 299 (1962) (leading participant in Providence, R.I., preservation activity speaks of Urban Renewal's assistance in, among other things, removing "blighting influences").

166. Tondro, *supra* note 163, at 303-05.

167. A. SENKEVITCH, *supra* note 82, at 171, *citing* PROVIDENCE, R.I., CITY PLAN COMMISSION, COLLEGE HILL: A DEMONSTRATION STUDY OF HISTORIC AREA RENEWAL (2d ed. 1967) (conducted in cooperation with Providence Preservation Society and U.S. Dep't of Housing and Urban Development) [hereinafter cited as COLLEGE HILL].

168. *See, e.g.*, Ziegler, *Large-Scale Commercial Adaptive Use: Preservation Revitalizes Old Buildings—And New Ones Too!*, 11 N.C. CENT. L.J. 234, 235-36 (1980).

169. *See* J. JACOBS, *supra* note 69, at 190-97; Dunlop, *Perspectives on Philadelphia's Approach to Planning*, AM. INST. ARCHITECTS J., Mar. 1976, at 48. V. SCULLY, *supra* note 59, at 161-71, relates urban renewal projects to the "Garden City" conception of a "new town" in which, by contrast to the mixed uses and structure types of older cities, the entire range of living arrangements were to be allocated according to a single plan or design. R. STERN, *supra* note 59, at 80-91, points out that within large urban renewal projects, individual development parcels were sometimes planned separately, with little relationship to one another.

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century builders with the exacting rigidity of the planners' suggested guidelines for protecting or recreating those nineteenth-century choices.[170]

This drift to design uniformity is ironic, not only because it reflects a view of history as stasis, but because it reverses the position that preservationists have taken in some celebrated battles against urban renewal projects. Don't Tear It Down, one of Washington's more litigious preservation groups, got its start by battling the Pennsylvania Avenue Development Corporation's plan to remove the idiosyncratic old Post Office. In that effort the preservationists argued for diversity.[171]

Of course a communitarian argument for uniformity may be made—that similarity of design may lend "legibility" to a neighborhood or street, especially when the old buildings promote a sense of orientation through their familiarity and relationship to each other. But while uniformity may serve a purpose, there is surely a limit to its imposition short of the point of visual tedium and creative atrophy.[172] The visible elements of the past ought not hem us in, but should rather invite us to make creative contributions of our own.[173]

Some newer thinking on historic preservation attempts to assure that historic district regulation not stifle newer styles. Historic district plans since College Hill have allowed districts to contain a succession of styles rather than a single one.[174] Newer ordinances such

170. A. SENKEVITCH, *supra* note 82, at 51; ROCKVILLE HISTORIC DISTRICT COMMISSION, *supra* note 82.

171. Don't Tear It Down (1971) (promotional pamphlet of Don't Tear It Down, a citizen's action group). The National Historic Preservation Act Amendments of 1980, Pub. L. No. 96-515, sec. 505, 94 Stat. 2987, now require the Pennsylvania Avenue Development Corporation to identify and preserve "historic values" not already slated for redevelopment.

172. The concern to protect creativity has surfaced several times in connection with architectural controls outside the context of historic preservation. *See* Note, *Architectural Expression: Police Power and the First Amendment, supra* note 51, at 300–04, and authorities cited therein.

173. *See* Murtagh, *Comment*, in HISTORIC PRESERVATION TODAY, *supra* note 11, at 144, 148, observing that the Europeans seem better able to blend their appreciation of newer and older architectural elements. The architectural historian Vincent Scully, remarking on Washington's Pennsylvania Avenue redevelopment plan, said: "I prefer a little junk to a pompous stage set. . . . What we need here is a dialog between the old buildings and the new. A little mess is like fluid, both of decay and healing—full of ideas, excitement and promise." Von Eckardt, *Leave the Avenue As Is, Architect Asks, reprinted in Pennsylvania Ave. Comm'n: Hearings on S.J. Res. 116 before the Subcomm. on Parks and Recreation of the Senate Comm. on Interior and Insular Affairs*, 89th Cong., 2d Sess. 60 (1966).

174. *See, e.g.*, A. SENKEVITCH, *supra* note 82, at 170–77; COLLEGE HILL, *supra* note 167, at 73 *et passim*. A downtown restoration official in Corning, N.Y., epitomized the contemporary view in saying, "The most important thing to remember . . . is that we are not trying to

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as Exeter, New Hampshire's provide that new buildings in the historic district may have a modern design so long as the result "harmonizes" with nearby older buildings.[175] But the proviso begs the question of what it means to "harmonize," or taken negatively, as in the Nantucket statute, what it means to be "obviously incongruous" with the character of the district. These questions are unintelligible without reference to some theory of the way in which architecture, old and new, contributes to the community.

Without a theory, the tendency is to favor mere conformity. Although many newer ordinances and studies allow room for architectural innovation, other regulations are depressingly prim about flamboyance or modernity. In the venerable district ordinance of Charleston, South Carolina, a structure's "inappropriateness" may arise from "[a]rresting and spectacular effects, violent contrasts of materials or colors and intense or lurid colors, a multiplicity or incongruity of details resulting in a restless and disturbing appearance, [or] the absence of unity and coherence in composition not in consonance with the dignity and character of the present structure . . . or with the prevailing character of the neighborhood."[176] Chillicothe, Ohio's more recent ordinance includes explicit warnings: "Attention shall be taken to avoid the environmentally harmful effect often created by the clash of undisguised contemporary materials with those of older origin, such as aluminum or other metals, plastic, fiberglass and glass improperly used with brick, stone, masonry and wood."[177] In Park City, Utah, once a mining town and now a ski resort area, the preservation commission compares proposed changes in the district with an illustrated set of design criteria based on local nineteenth-century building practices. The criteria describe in detail approved vertical designs, pitched roofs, and natural materials, informing pro-

create a Disneyland of cute recreations of somebody's concept of the past. We are just trying to design new storefronts that respect the design of the original buildings—hence some modern designs were included." R. WARNER, S. GROFF & R.P. WARNER, *supra* note 19, at 178.

175. Exeter, N.H., Amendment to Zoning Ordinance, art. 6.72-1(e)(1) (1980). This is an interesting and slightly idiosyncratic ordinance; the provision cited goes on to admonish the would-be builder to "harmonize" any project "with nearby properties of the same nature, *i.e.*, commercial buildings should harmonize with the scale of adjacent commercial buildings, not that of important public buildings, like the Town Hall." *Id.*

176. Charleston, S.C., Ordinance 1966-12, § 3 (Aug. 16, 1966), *as amended by* Charleston, S.C., Ordinance 1973-11, § 2 (Apr. 10, 1973) (current version at CHARLESTON, S.C., CITY CODE § 54-31(9)). An almost verbatim provision appears in ATLANTA, GA., CITY CODE § 16-35006(c)(8). However fitting these strictures may be for preserving Charleston's eighteenth-century areas, one must wonder at their use by Atlanta, which is a much newer city whose earliest structures have been "gone with the wind" since the great Civil War fire.

177. CHILLICOTHE, OHIO, PLANNING AND ZONING CODE § 1197.13(b) (1977).

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spective builders that "Swiss Chalet" or "A-frame" buildings will be "discouraged" and that the deplored aluminum siding is "unacceptable."[178]

Such directives undoubtedly encourage pleasant open brickwork and the little boutiques and eating spots that seem to fit so well; they may even produce substantial tourist revenues—while the fad lasts. But they can also produce structures whose efforts to match the surroundings result in the kind of neo-Colonial house in Edgartown that Charles Moore described as "bearing about as much resemblance to the older houses as Little Orphan Annie, with her round and empty eyes, does to real people."[179]

Moreover, tastes may change. The promotion of tourism may provide no long-term protection for a neighborhood's older structures. The city that is seriously pursuing tourist dollars will turn an historic district into Disneyland if that is what brings crowds.

Even more important, while historic district designation can be a point of pride to a neighborhood, requirements of design uniformity can subtly inhibit the district as a community. Designation can prohibit newer elements that might lend focus and comfort to the area, and can stifle the process of change and imaginative reuse that is, after all, also an important part of a community's historic development.

Districts and displacement. Another motive that leads cities to designate historic districts is attracting taxpaying businesses and middle-class residents to the city. Historic preservation, and especially historic district designation, is widely perceived—whether correctly or not—as a lever for "revitalization."[180] Cities hope that historic district designation of a decaying residential or commercial area will call attention to the underlying quality of the structures of the area. A district's architectural controls also assure commercial developers and middle-class buyer-rehabilitators that further construction in the area will follow strictly limited restoration patterns. Such certainty, cities hope, will raise property values and property taxes and encourage surrounding areas to follow the example of rehabilitation and revitalization.[181]

178. PARK CITY, UTAH, CODE §§ 2.7, 2.7.5 (1976).

179. C. MOORE, THE PLACE OF HOUSES 16 (1974).

180. *E.g.*, U.S. ADVISORY COUNCIL ON HISTORIC PRESERVATION, THE CONTRIBUTION OF HISTORIC PRESERVATION ACTIVITIES TO URBAN REVITALIZATION 1 (1979).

181. *See, e.g.*, ADVISORY COUNCIL ON HISTORIC PRESERVATION, *supra* note 48, at 3; R. MONTAGUE & T. WRENN, PLANNING FOR PRESERVATION, 8–13 (1964); Canty, *Philadelphia in*

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It is only recently that historic districts have been viewed as potential contributors to urban revitalization. Whether or not these hopes are well-founded, they are a major force behind the burgeoning numbers of local districts created in the past ten years. The revitalization motive, even more than the tourism motive, links historic preservation with urban renewal.[182] It is not surprising, then, that revitalization through historic districting raises another urban renewal specter—the disruption of low-income families and neighborhoods.[183]

In urban renewal projects, such disruption was most visible and most serious in what Vincent Scully called the "cataclysmic" projects, where whole neighborhoods were leveled and the tenants turned out.[184] But clearance projects were not the only source of disruption. Even rehabilitation projects under urban renewal caused dislocation because of subsequent rent increases that low-income residents could not pay.[185]

Historic districting without careful attention to communitarian concerns threatens a similar dislocation, particularly given the rehabilitation incentives of the 1976 Tax Reform Act.[186] Historic districts, like urban renewal target zones, are frequently older residential areas that consist of Victorian houses occupied by low-income or ethnic minority residents.[187] Low-income interest associations such as the National Urban Coalition[188] fear that rehabilitation

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the Years Since its Local Renaissance, AM. INST. ARCHITECTS J., Mar. 1976, at 31; Dean, *Adaptive Use: Economic and Other Benefits, id.*, June 1976, at 26; Gold, *supra* note 131, at 357–58.

182. *See, e.g.*, R. MONTAGUE & T. WRENN, *supra* note 181, at 11; T. Bever, *supra* note 19, at 1, 6.

183. *See, e.g.*, STAFF OF THE SUBCOMM. ON HISTORIC PRESERVATION AND COINAGE, *supra* note 137, at 62–63; Newsome, *supra* note 35; J. Mollenkopf, Neighborhood Political Development and the Politics of Urban Growth: Boston and San Francisco 1958–1978, at 3 (1978) (paper prepared for 1978 Annual Meeting of the American Political Science Ass'n, New York, N.Y.).

184. V. SCULLY, *supra* note 59, at 245–52 (describing disruption of low-income area in urban renewal program in New Haven, Conn.); *see* Fried, *Grieving for a Lost Home: Psychological Costs of Relocation*, in URBAN RENEWAL, THE RECORD AND THE CONTROVERSY, *supra* note 65, at 359 (describing consequences of urban renewal in Boston's West End).

185. Gergen, *Renewal in the Ghetto: A Study of Residential Rehabilitation in Boston's Washington Park*, 3 HARV. C.R.-C.L. L. REV. 243, 293–300 (1968).

186. 26 U.S.C. §§ 48, 167, 191, 280B (1976).

187. *See, e.g.*, COLLEGE HILL, *supra* note 167. This was the plan for an urban renewal project to conserve the historic area in Providence, Rhode Island. In this plan, the blocks slated for clearance contained a noticeably high number of Victorian structures in low-rental areas. *See id.* at 97, 100, 117 (maps).

188. *Repeal of Historic Preservation Tax Incentives Urged by Urban Coalition*, [1978] 5 HOUS. & DEV. REP. (BNA) 844; *see* Canty, *supra* note 181, at 43; Dunlop, *supra* note 169, at 48; Roddewig & Young, *Neighborhood Revitalization and the Historic Preservation Incentives of the Tax Reform*

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in historic districts, leading to steep rent increases, will force low-income tenants to leave their old neighborhoods, without even the benefit of the Uniform Relocation Act payments that once assisted those displaced by urban renewal projects and other governmental acquisitions.[189] Low-income homeowners may not be injured economically by any rise in property values that accompanies the revitalization and "gentrification" of a neighborhood, but they too may nevertheless gradually depart the area, whether from irresistible offers from new buyers, from inability to pay for code enforcement repairs and higher property taxes, or from normal patterns of death and migration.[190] Their egress means a gradual social shift that can transform familiar low-income neighborhoods into someone else's "turf."

Preservationists are understandably sensitive about displacement, and many deny that historic districting by itself forces out low-income residents. They argue that historic districting is a result rather than a cause of middle-class interest in older neighborhoods. Displacement, they say, has more to do with housing market conditions than with the designation of historic districts.[191] While this argument may be correct, it is an uneasy companion to another preservationist argument that landmark and district designation enhances the value of structures by calling attention to them and protecting their aesthetic qualities.[192] In any event, the tax benefits for rehabilitation in historic districts[193] add marginally to property values and

Act of 1976: Lessons from the Bottom Line of a Chicago Red Brick Three-Flat, 11 URB. LAW. 51, 72 (1979). The recent report, NATIONAL COMMISSION ON NEIGHBORHOODS, PEOPLE, BUILDING NEIGHBORHOODS 55 (1979), considered the low-income displacement problem and recommended that National Register designations of historic districts be accompanied by impact statements and that neighborhood disruption be alleviated by special grants and technical assistance. Federal preservation officials have shown some of the same concerns in connection with tax benefits in historic districts; in the introductory remarks to the regulations concerning certification of state and local districts for rehabilitation tax benefits, state and local officials were urged to evaluate the "social implications" of district upgrading and to assure that "residents are provided for, as appropriate." 42 Fed. Reg. 40,437 (1977).

189. 42 U.S.C. §§ 4601–4655 (1976). While concerned about low-income resident displacement, HUD does not favor relocation benefits for those displaced by private revitalization. *See Displacement Potential to be Considered in All HUD Funding Decisions*, [1979] 7 HOUS. & DEV. REP. (BNA) 541.

190. *See* R. MONTAGUE & T. WRENN, *supra* note 181, at 13.

191. *Id.*; Interview with Nellie Longsworth, *supra* note 119; Interview with Judith Sobel, *supra* note 85; *see* NATIONAL COMMISSION ON NEIGHBORHOODS, *supra* note 188, at 290.

192. *See, e.g.*, M & N Enterprises, Inc., v. City of Springfield, 111 Ill. App. 2d 444, 450–51, 250 N.E.2d 289, 293 (1969); R. MONTAGUE & T. WRENN, *supra* note 181, at 8–14.

193. When such a neighborhood appears on the National Register, or when it is protected by a state or local statute that sufficiently preserves its historic character, the Tax Reform Act gives owners of historically significant depreciable properties substantial tax benefits for rehabilitation. *See* I.R.C. § 191. A 1978 amendment to the 1976 provisions requires

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thus to long-term displacement pressures on low-income residents of eligible historic districts.[194] The same may be said of other programs that fund historic preservation in older neighborhoods.[195] "Revitalization" through preservation may only serve to fragment low-income communities.

To be sure, any displacement caused by historic preservation is gradual by comparison with a typical urban renewal or freeway project. But the frequency with which the displacement issue arises should suggest an underlying doubt about historic districts, since an ostensible purpose of preservation programs is to foster community ties rather than disrupt them.

Some localities have addressed the problem through programs to aid low-income residents of historic districts or areas. Savannah uses federal "section 8" housing assistance to subsidize low-income renters in the city's historic areas.[196] San Francisco, Seattle, and other cities have used general revenue sharing or community development allo-

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that the locally protected historic district, to be certified, must itself meet "substantially all of the requirements for listing districts in the National Register." *Id.* § 191(d)(2)(B)(ii). With this amendment, it is presumably impossible for a local government to designate a spurious "historic district" merely for the purpose of securing tax benefits for commercial rehabilitation in the area.

194. HERITAGE CONSERVATION AND RECREATION SERVICE, *supra* note 29, at 7, 26–27 (report on the effects of the 1976 Tax Reform Act), minimizes the displacement effects, noting that many of the properties certified for tax benefits involve rehabilitations that add residences to the housing stock. This does not, however, speak directly to the problem of long-term low-income displacement due to increases in property values, taxes, and rents. More directly relevant is the report's point that some of the rehabilitation projects have included housing subsidies for low-income tenants. *Id.* On subsidy programs of this kind, see text accompanying notes 196–99 *infra*.

195. For example, low-income spokesmen are understandably wary when local governments channel federal community development block grant funds, 42 U.S.C. §§ 5301–5317 (1976), into historic preservation. *See, e.g.*, R. BROWN, WITH A. COIL & C. ROSE, A TIME FOR ACCOUNTING: THE HOUSING AND COMMUNITY DEVELOPMENT ACT IN THE SOUTH 62–68 (1976). Some elements of HUD have shown similar concern. *See, e.g.*, *Community Development Briefs*, [1977] 5 HOUS. & DEV. REP. (BNA) 316 (finding of the local HUD field office and of the Region V office that Milwaukee's proposed rehabilitation of the Pabst mansion was inappropriate for community development funding, in that the plan neither aided low- and moderate-income persons nor aided in the prevention of slums and blight). A HUD memo of Nov. 6, 1978 concerning the eligibility of preservation activities for community development funds also shows HUD efforts to target local preservation activities to low- and moderate-income residents or blighted areas. *HUD Encourages, Clarifies Use of CD Funds for Historic Preservation*, [1978] 6 HOUS. & DEV. REP. (BNA) 604.

196. U.S. ADVISORY COUNCIL ON HISTORIC PRESERVATION, *supra* note 180, at C-16; McMillan, *Staying Home in Savannah*, HISTORIC PRESERVATION, Mar.-Apr. 1980, at 10, 15–17; *State of Maine, Savannah, Ga. Receive CD Innovative Grants*, [1978] 5 HOUS. & DEV. REP. (BNA) 1302. For a description of Pasadena's use of the section 8 program, see *Pasadena Commission Helps Renewal Efforts, supra* note 35; *see* NATIONAL COMMISSION ON NEIGHBORHOODS, *supra* note 188, at 290 (mixture of HUD programs in a St. Louis preservation area described).

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cations to establish revolving funds for low-interest rehabilitation loans available to low-income owners of historic properties.[197] The Department of the Interior gave out a challenge grant to establish a revolving loan and grant fund in the historic district in Anacostia, Maryland, a low-income area near Washington.[198] Federal preservation officials have been particularly solicitous of neighborhood organization and low-income assistance in recent historic preservation grants to the states, stressing these goals in assessing state preservation plans.[199]

If preservation is viewed as a communitarian program, this governmental concern is entirely appropriate. Assistance to low-income residents can arrest or at least palliate the disruption that may occur with historic district designation and "gentrification" and can at the same time preserve the best aspects of historic district designation: increased pride in community, education, and the discovery of "roots."[200] A concern for community suggests, however, that historic district designation and control should spring at least in part from the initiative of those who have the greatest contact with the district, a matter to which I shall return when considering some of the procedural aspects of historic preservation law.

Displacement problems are sometimes conjoined with design issues in historic districts. Anacostia, Maryland, is emerging as a showcase for an historic district project in a low-income neighborhood.

197. Galbreath, *supra* note 17, at 317–22. For descriptions of programs in other cities, see *Cambridge Commission Making Grants up to $2000 to Assist Rehabilitation of Building Exteriors*, Landmark & Historic District Commissions, Oct. 1977, at 1, col. 1 (Nat'l Trust for Historic Preservation newsletter) (Cambridge, Mass.); *Cambridge Plans Grants to Help Owners Retain Architectural Details During Rehabilitation, id.*, Feb. 1976, at 3, col. 1 (Cambridge, Mass.); *Memphis Landmarks Commission Helps Restoration Work by Residents of Low-Income Victorian Area, id.*, June 1978, at 1, col. 1 (Memphis, Tenn.); *Racine Board Gets Community Development Funds, id.*, June 1976, at 3, col. 2, and at 4, col. 1 (Racine, Wis.).

198. *Interior Awards Over $1 Million to 10 Innovative Historic Preservation Projects*, [1979] 6 HOUS. & DEV. REP. (BNA) 1145.

199. *Interior Dept. Launches New $1 Million Historic Preservation Effort for States*, [1978] 6 HOUS. & DEV. REP. (BNA) 257; Planning Div., Heritage Conservation and Recreation Service, Dep't of Interior, Description of F.Y. 1979 Preservation Fund Priorities, Manual 185 (unpublished manual for use in reports to Congress).

200. Preservationists sometimes cite the activities of Lowell, Massachusetts, to illustrate that preservation need not be a blue-blood activity but can also relate to a quest for ethnic and working-class history, including, in this case, feminist history. Interview with Nellie Longsworth, *supra* note 119. Portions of this old planned industrial city have now become a national historical park and preservation district. 16 U.S.C. §§ 410cc to 410cc-35 (Supp. III 1979). *See Report Recommends District Designation to Save Ethnic Character of Neighborhood in Providence*, Landmark & Historic District Commissions, Oct. 1976, at 3, col. 2 (Nat'l Trust for Historic Preservation newsletter) (similar concern for the preservation and revitalization of an old immigrant neighborhood in Providence, R.I.).

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But the studies preliminary to its historic designation suggest the manner in which uniform historic design criteria, meant to revitalize a low-income area, can ignore the wishes of current residents. Residents' responses to an initial survey indicated concern about housing costs and the general neatness of houses and buildings in Anacostia. The architecture student surveyors, though, seemed to care most about the original character of the Victorian cottages. They devised a set of intricately detailed guidelines for "correct" rehabilitation: "yes" to round-cut shingles, "no" to wide-slat siding and picture windows.[201] A resident worried about cleanliness and a good coat of paint may find those directives tangential indeed. He may resent the suggestion that his planned installation of aluminum siding and a plate glass window will detract from the character of the neighborhood.[202] He may especially resist the idea that to make any improvement at all, he must use more expensive materials and designs.

Many resident resentments can be assuaged through subsidy programs and through the process of talking things over. Historic district designation and regulation, like landmark designation, should educate about the qualities that make an area definable and livable.

The landmark analogy is apt in another way as well. The larger community treats an historic district as an exploitable resource that gives visual definition and depth to the community at large and that may draw tourists and investors. But the larger community's definition of the district's desirable features may conflict with the area's self-definition, and designating an area as an historic district may disrupt existing relations among neighbors. If landmark regulation threatens to pit the larger community against an individual owner, then district regulation may pit the larger community against the smaller. Thus, accommodation between these communities becomes crucially important. This suggests the central importance of procedure in preservation law.

B. *Preservation Procedures and Community Accommodation*

Historic preservation cannot help build community unless the

201. SCHOOL OF ARCHITECTURE, UNIV. OF MD., DESIGN GUIDE FOR THE EXTERIOR REHABILITATION OF BUILDINGS IN OLD ANACOSTIA 42-72 (1975); SCHOOL OF ARCHITECTURE, UNIV. OF MD., OLD ANACOSTIA: A STUDY OF COMMUNITY PRESERVATION 86-109 (1975).

202. The study feared an "insensitive alteration" or an "additional intrusion" that is incompatible with "the established visual quality of the environment." *See* SCHOOL OF ARCHITECTURE, UNIV. OF MD., OLD ANACOSTIA: A STUDY OF COMMUNITY PRESERVATION 45-57 (1975).

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major questions of procedure—which groups should have a voice in preservation decisions, and how they should participate—are given proper consideration. This section explores the roles of experts and community groups on historic preservation boards and examines the newer review-and-comment procedures affecting government projects.

1. *The procedures of architectural control.*

Historic preservation procedures for architectural control attempt to bring professional judgment to bear on the disposition of historic properties and areas. Through preservation ordinances, the architectural review board and its professional architects, historians, archeologists, and art specialists dominate permit procedures for landmarks and historic district properties.[203]

Although the presence of professionals lends an aura of technical neutrality to preservation decisions, that appearance is illusory. Preservation decisions, even when made by professionals, are steeped in politics. First, the physical surroundings may have a political impact in themselves, and hence decisions about preserving structures necessarily carry political consequences for the community. More immediately, public decisions about preservation entail choices and compromise among constituencies, and despite the considerable deference to professional artistic and historical judgment, the review process often aims at the political goals of neighborhood self-govern-

203. *See, e.g.*, Act Establishing the Boston Landmarks Commission, ch. 772, § 3, 1975 Mass. Acts 1023; ALEXANDRIA, VA., CODE, art. XIV, § 42-89 (1963); NATIONAL TRUST FOR HISTORIC PRESERVATION, *supra* note 97, at 20. Some ordinances, however, do not provide for expert membership. *See* note 212 *infra*.

The expertise of the board may be a factor in upholding architectural controls that are otherwise subject to the attack of arbitrariness. *See, e.g.*, South of Second Assocs. v. Georgetown, 190 Colo. 89, 91 n.1, 580 P.2d 807, 808 n.1 (1978), where the court noted disapprovingly that the ordinance in question no longer required professional members. In Tacoma, Washington, dilution of the requirements for architectural and historical experts on the local review board has been a source of concern for local preservationists. Some of the correspondence about this matter is on file at the Heritage Conservation and Recreation Service's Tax Certification office.

The National Historic Preservation Act Amendments of 1980, Pub. L. No. 96-515, 94 Stat. 2987, will undoubtedly pressure localities to use professionals on preservation review commissions. This legislation provides that 10% of federal preservation grants to the states are to be passed on to localities that have state-certified preservation programs. *Id.* sec. 201(a), § 101(b)-(c) (to be codified at 16 U.S.C. § 470a(b)-(c)); *id.* sec. 203(b) (to be codified at 16 U.S.C. § 470c(c)-(d)). The local programs are to include review commissions that have professional members when available in the community. *Id.* sec. 501, § 301(13)(A) (to be codified at 16 U.S.C. § 470w(13)(A)).

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ment as well as accommodation between the neighborhood and the larger community.

The politics of professional review boards. The composition of some architectural committees is inescapably political. Serving along with the generalists are members who are, in some instances, the nominees of professional organizations such as the American Institute of Architects;[204] many ordinances also explicitly provide positions for developers and real estate specialists.[205] Thus, a professional member may also be the voice of an organized constituency, a representative of those whose conduct is to be regulated. Representation of developers and builders is undoubtedly intended to facilitate compromise between the needs of new development and preservation. But the possibility of conflict of interest is serious; indeed, Atlanta's preservation ordinance provides a specific procedure to cope with such conflicts.[206]

Aside from personal conflicts of interest, the history of urban renewal suggests that architects, businessmen, and central city governments have sometimes been too ready to sacrifice neighborhoods for grandiose development schemes.[207] Professional members can no doubt make an important contribution to preservation boards. But professional members should not eclipse the views of merely "interested" members of the community. Judgments about the physical environment are too multifaceted to be settled by technical expertise. Moreover, community members have a certain expertise of their own: Their familiarity with the area breeds a sense of what makes it "legible," distinct, and exciting. They also know the competing community needs. Professionals alone may have too narrow a view of community values, yet, because of technical knowledge and organizational skills, they may be able to dominate preservation boards.

Under some local ordinances, neighbors can challenge the board's

204. *E.g.*, ATLANTA, GA., CITY CODE §§ 6-4042 to -4043 (Supp. 1978); Wichita, Kan., Ordinance 33-790 (Apr. 1, 1975) (amending WICHITA, KAN., CODE § 2.12.1015). Charleston, S.C., Ordinance 1966-12, § 3 (Aug. 16, 1966) provided for similar organizational affiliation until repealed by Charleston, S.C., Ordinance 1979-29, § 1 (Apr. 10, 1979) (current version at CHARLESTON, S.C., CITY CODE § 54-26), which provides that the City Council is to appoint at architect, an engineer, and a realtor to the review board, and may also consider recommendations from "cultural organizations."

205. *E.g.*, Act Establishing the Boston Landmarks Commission, ch. 772, § 3, 1975 Mass. Acts 1023; Seattle, Wash., Ordinance 106348, § 2.01(a) (Apr. 4, 1977).

206. ATLANTA, GA., CITY CODE § 6-4045 (Supp. 1978) provides that the members of the review board may contract with the city for ordinary business purposes, but not for matters relating to the Historic Atlanta District; nor may members review work in which they or their firms have an interest.

207. *See, e.g.*, C. STONE, *supra* note 68, at 176.

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decision before a body more amenable to their complaints. In New Orleans's Vieux Carré, appeals go to the city council;[208] in Nantucket, to the city's Board of Selectmen;[209] in Loudoun County, Virginia, to the County Board of Supervisors;[210] and in Washington, D.C., the architectural review committee is only advisory to the mayor, whose decision is final.[211] While these ordinances permit a decision by the architectural review board's experts, they contemplate review of that decision by a political body without particular expertise.[212]

Political review allows a district community to air its views. In *Maher v. City of New Orleans*,[213] for example, the architectural review commission granted Maher's application to demolish his cottage, but the Vieux Carré property owners helped to persuade the Council to reverse that grant.[214] The case illustrates how even a relatively technical decision—a demolition permit for a single cottage—can be politicized. In *Maher*, the beneficiaries were the neighborhood residents and property owners who wanted to halt Maher's plans, but they had to frame their arguments in a way that would convince the representatives of the entire city.[215]

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208. NEW ORLEANS, LA., CODE § 65-10 (1956). This provision is discussed at length in Maher v. City of New Orleans, 256 La. 131, 235 So. 2d 402 (1970).

209. Ch. 395, § 11, 1970 Mass. Acts 237. *But see* the judicial interpretation of this measure, note 215 *infra*.

210. LOUDOUN CO., VA., CODE § 750.16 (1978).

211. Washington, D.C., Law 2-144, § 4(c) (Dec. 27, 1978).

212. Even the architectural board's "expertise" may be doubtful. Most review boards have at least some slots for merely "interested citizens," and in smaller communities, where artistic and historical experts are not so readily available as they may be in larger cities, the ordinance may take the course of Colusa, Cal., Ordinance 293, § 34.02 (Sept. 30, 1975) and say nothing about expertise of board members. However, new federal grant programs under the National Historical Preservation Act Amendments of 1980, Pub. L. No. 96-515, 94 Stat. 2987, will undoubtedly lead many communities to attempt to provide for experts when they can. *See* note 203 *supra*.

213. 371 F. Supp. 653 (E.D. La. 1974), *aff'd*, 516 F.2d 1051 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976).

214. *Id.* at 656; *see* note 154 *supra* and accompanying text.

215. In administrative law, such a decision might well be viewed as regarding a "judicial" rather than a "legislative" fact; the allocation of such a decision to a local legislature suggests the degree to which historic preservation is a matter for community discussion and accommodation rather than technical expertise. Another New Orleans case, Tucker v. City Council, 343 So. 2d 396 (La. App. 1977), raised this point. The city council reversed the city preservation commission when the latter body refused to permit the razing of some century-old structures for the construction of a church parking lot. In contesting the city council's action, the plaintiff argued that the council should be confined to considering whether the preservation commission acted on the basis of appropriate evidence. The Louisiana court disagreed, pointing out that, unlike the preservation board, the council had other considerations beyond the aesthetic value and distinction of the buildings (here the safety of the church service participants, who had apparently suffered beatings and robberies in the past). 343 So.

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Political bodies of generalists can also review the experts' original designations of historic landmarks and districts. While architectural preservation boards usually make the initial surveys for landmarks and districts, their findings frequently serve only as recommendations to city councils or planning commissions. Although landmarks may in some places be designated by the architectural board, with an appeal to a planning commission or city council,[216] historic districts are most often created by council ordinance or occasionally by statute. They are often treated as zoning ordinances and must pass through the same series of hearings and political decisions that zoning laws undergo.[217]

The role of neighborhood control. The residents of an historic district should play a special role in district control. Indeed, many district ordinances provide at least informally for resident initiation of the historic district designation. In Colusa, California, for example, over half the property owners in the district must subscribe to an historic district application;[218] and in Washington, D.C., a recognized preservation group or a neighborhood association can make an historic district nomination by submitting evidence that "a substantial number of its members reside or own property in the proposed Historic District."[219] Moreover, local ordinances often require architectural con-

2d at 398. *But see* Gumley v. Board of Selectmen, 371 Mass. 718, 724, 358 N.E.2d 1011, 1015 (1977), in which the Massachusetts Supreme Judicial Court restricted the Nantucket Board of Selectmen's review powers over the local Historic District Commission to the issue whether the Commission's decision was " 'based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary.' " (quoting MacGibbon v. Board of Appeals, 356 Mass. 635, 639, 255 N.E.2d 347, 350 (1970)). It is not clear what nonpreservation considerations the Board of Selectmen may take into account in considering the "reasonableness" of a preservation commission's decision.

216. *See, e.g.*, New Orleans, La., Ordinance 5992, §§ IX.A(1), XIV.A (Feb. 19, 1976) (appeal to city council); NEW YORK, N.Y., ADMINISTRATIVE CODE ch. 8-A, § 207-2.0 (1976) (Commission decision subject to Board of Estimate veto). In Seattle, each landmark is created by council ordinance. Seattle, Wash., Ordinance 106348, § 11.01 (Apr. 4, 1977); *see, e.g.*, Seattle, Wash., Ordinance 107613 (Aug. 24, 1978) (designating the Thompson/LaTurner House as a landmark).

217. This pattern may be traceable to the first successful historic district, that of Charleston, South Carolina, where the district was established via zoning. *See, e.g.*, LOUDOUN CO., VA., CODE §§ 750.5-.6 (1978). In this ordinance, as in many others, historic district designation is treated as "overlay" zoning, adding to existing zoning requirements. *Id.* § 750.4; *accord*, WICHITA, KAN., CODE § 2.12.1018). *See* note 102 *supra* for creation of districts by state statute.

218. Colusa, Cal., Ordinance 293, § 34.04(e) (Sept. 30, 1975). Elkhart, Ind., Ordinance 2784 (Mar. 18, 1975) (amending Zoning Ordinance for the City of Elkhart § 21.3), also provides that, among others, the owners of 51% of a district's property may nominate the district for historic designation.

219. Joint Committee on Landmarks of the National Capital, Procedures for the

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trol boards to include residents of the regulated district.[220]

Seattle's historic districts show a mix of arrangements for neighborhood control and autonomy. Rather than vesting architectural control in a single city-wide board, each of the three older districts has its own board. The boards' compositions differ, but each includes representatives from among the district's own property owners, residents, and businessmen.[221] Seattle's newest district ordinance, for Columbia City, does place authority for architectural control in the central city-wide Landmarks Preservation Board, but "[i]n order . . . to maintain adequate community involvement and contact," two Board members work with a district neighborhood association to review proposed construction and make recommendations to the full Board.[222] For Seattle, Pike Place Market, which was created by initiative petition when urban renewal threatened the old market area,[223] is the most autonomous district; unlike the other districts, its board makes architectural control decisions rather than recommendations to a central city authority.[224]

Historic districts like Seattle's Pike Place Market may cure what observers see as a decline in neighborhood influence in city politics due to the decline of ward politics and the advent of "good government" measures for city-wide elections.[225] Some commentators feel that the centralization of the urban governing process left neighbor-

Designation of Historic Landmarks and Historic Districts, § 410.30 (July 22, 1976). *See also* Guidelines, *supra* note 41, at 43, which suggests that the preliminary investigation for a potential district be assisted by a study committee that includes experts in history, architecture, and other fields, but which also, "where possible," has these members selected from among residents of the proposed district itself.

220. *See, e.g.*, Charleston, S.C., Ordinance 1979-29, § 1 (Apr. 10, 1979) (current version at CHARLESTON, S.C., CITY CODE § 54-26).

221. Seattle, Wash., Ordinance 105462, § 4 (Apr. 5, 1976) (Ballard Avenue Landmark District); Seattle, Wash., Ordinance 100475, § 3 (Dec. 1, 1971) (Pike Place Market District); Seattle, Wash., Ordinance 98852, § 2 (Apr. 17, 1970), *as amended by* Seattle, Wash., Ordinance 103393, § 2 (May 29, 1974) (Pioneer Square Historic District).

222. Seattle, Wash., Ordinance 107679, § 5 (Sept. 25, 1978). The city's preservation staff apparently would like to manage all future districts in this more centralized way. Interview with staff member, Seattle Dep't of Urban Conservation, *supra* note 115.

223. V. STEINBRUECK, SEATTLE CITYSCAPE #2, at 40 (1973); Interview with staff member, Seattle Dep't of Urban Conservation, *supra* note 115. The district was created by Seattle, Wash., Ordinance 100475, § 2 (Dec. 1, 1971).

224. Seattle, Wash., Ordinance 100475, § 6 (Dec. 1, 1971).

225. *See* C. STONE, *supra* note 68, at 168, 213; Lefcoe, *supra* note 99, at 835. H. GANS, *supra* note 78, at 170, 264-65, 298, also argued that residents of low-income neighborhoods are likely to have few skills in formal organization, and therefore they are likely to be particularly weak in larger-scale politics. *See also* Dixon, *Rebuilding the Urban Political System: Some Heresies Concerning Citizen Participation, Community Action, Metros, and One Man-One Vote*, 58 GEO. L.J. 955, 963-66 (1970).

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hoods—particularly older and poorer neighborhoods—helpless to prevent destruction caused by centrally mandated clearance programs. Historic district status can restore leverage to a neighborhood, at least insofar as the designation—and the procedures accompanying the designation—enable a neighborhood to control its own physical environment.[226]

Self-government through historic district legislation may have its own problems, however. The first is the potential discord among the district residents themselves. A district created by referendum, for example, might be the result of attempts by middle-class entrants to drive out their lower-income neighbors. Where the district board represents too many local businesses and too few tenants, its actions are likewise suspect.

Perhaps even more serious, self-government in an historic preservation district can be insensitive to the needs of the larger community. A local district board might claim to be preserving its own physical environment in avoiding nursing homes, integrated housing projects, or any change whatever.[227] Some warhorse historic district cases suggest a conscious attempt to prevent low-cost housing.[228] The last-minute creation of an historic district recently prevented a new

226. Montgomery & Gellen, *Emerging Issues in American Housing Policy*, in A DECENT HOME AND ENVIRONMENT 168-69 (D. Phares ed. 1977). The very process of organizing a district may bring a neighborhood together. In that archetype of the American city, Peoria, Illinois, a member of the historic preservation board remarked that "[h]istorical zoning seems to have an ability to unify and strengthen the neighborhood by bringing together those people who appreciate the unique and attractive aspects of their neighborhood. Some of the people on Randolph and Roanoke streets did not know one another prior to their battle for historic zoning." He went on to remark that such people were a "resource" in preserving inner-city areas: "These are the people who know first hand what a livable city is." *Peoria Commissioner Analyzes Start of Program*, Landmark & Historic District Commissions, Oct. 1976, at 1, col. 1 (Nat'l Trust for Historic Preservation newsletter).

227. In Mendocino, California, for example, review board members are to be electors or property owners in the district, with no other stated qualifications, MENDOCINO CO., CAL., ZONING CODE, art. 42, § 20-114 (enacted 1973); and although the standards by which they judge construction incorporate a book of photos of pre-1900 structures with whose designs new structures are to "be in general accord," *id.* § 20-119, some local residents think that the preservation controls in the old town are being used simply to halt development, rather than to assure the compatibility of new development with the old. Interview with member of local bar, in Mendocino, Cal. (Sept. 1, 1979). For a similar type of problem, see the delegation issue presented in Washington *ex rel.* Seattle Trust Co. v. Roberge, 278 U.S. 116 (1928), where the Supreme Court invalidated that portion of a local zoning ordinance that conditioned the construction of a children's or old people's home on the consent of neighboring property owners.

228. *See, e.g.*, Town of Deering *ex rel.* Bittenbender v. Tibbetts, 105 N.H. 481, 482-83, 202 A.2d 232, 233-34 (1964) (banning of a "pre-built home" on the ground that its design and location "were such as to impair the atmosphere of the town").

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development in one portion of Denver.[229] One can only guess the uses that proponents of exclusionary zoning might find for historic district organization.

It may be that historic district self-government—available in large part only to older neighborhoods—can alleviate the power imbalance of older neighborhoods against newer areas. But not even strong neighborhood proponents suggest that neighborhoods should be autonomous; rather, local residents should have the means to alert central urban institutions to neighborhood interests so that city authorities can weigh competing interests.[230] Under this theory, a local historic district's self-governing machinery might best aim at informing and educating by airing divergent opinions about specific aspects of the physical environment in order to arrive at reasoned conclusions about the community value of existing structures and proposed architectural changes.[231]

In the final analysis, an historic district exists because it acts as a landmark to the larger community. The balancing problem is, on the one hand, to prevent the larger community from exploiting the district neighborhood and, on the other hand, to prevent the district neighborhood from arrogating special privileges to itself at the expense of the larger community's needs.

The best way across this tightrope follows Seattle's management of Columbia City—delegation of much district management to the neighborhood itself, allowing the neighborhood to advise and delay, but not to halt, a project.[232] The ultimate decision is best left to the greater community's political institutions, subject to pressure from neighborhood publicity and educational efforts.

2. *Review-and-comment procedures*.

Recent historic preservation legislation has included a procedural innovation usually associated with the environmental movement: review and comment for federally supported projects. In the historic preservation context, review and comment have functioned chiefly to strengthen local community organization.

Development of federal review-and-comment procedures. In the past, fed-

229. Kronholz, *Denver's Inner City Enjoys a Resurgence*, Wall St. J., Mar. 30, 1979, at 40, col. 1.

230. *See, e.g.*, Lefcoe, *supra* note 99, at 834, 843.

231. *See* note 226 *supra*.

232. *See* notes 221–26 *supra* and accompanying text.

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eral grants to cities helped to relieve city governments of fiscal dependence on local constituencies and hence enabled them to resist neighborhood pressures.[233] Since the mid-1960s, however, federal review-and-comment legislation[234] has given neighborhood preservationists a second chance to bring pressure to bear where federal funds are involved in a local project. For neighborhood and civic preservationist groups, the federal review-and-comment procedures can serve functions analogous to those of historic district legislation: Civic groups get a forum in which to stave off disruptive projects and get additional time for self-education, organization, and accommodation between civic or neighborhood groups and the larger community.

The federal highway program was the first to institute preservation review proceedings. The Department of Transportation Act of 1966 attempts to shield historic properties along with natural and scenic areas in the path of proposed highway projects. It requires self-review by federal transportation agencies, including a survey of potential damage to historically significant properties, and, in the event of unavoidable adverse effects, adoption of "all possible planning" to minimize the harm.[235]

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233. The insulation of city governments from neighborhood pressure was certainly a problem with earlier urban renewal programs. L. FRIEDMAN, GOVERNMENT AND SLUM HOUSING 153 (1968). Despite statutory obeisances to citizen participation, it may be a problem as well for successor programs such as general revenue sharing, 31 U.S.C. §§ 1221–1264 (1976); *see* C. Rose, Citizen Participation in Revenue Sharing: A Report from the South, in *Proposed Extension of the State and Local Fiscal Assistance Act: Hearings on H.R. 6558 and Related Bills Before the Subcomm. on Intergovernmental Relations and Human Resources of the House Comm. on Government Operations*, 94th Cong., 1st Sess. 628 (1975), community development, 42 U.S.C. §§ 5301–5317 (1976 & Supp. III 1979), and Urban Development Action Grants, 42 U.S.C. §§ 5318–5319 (Supp. III 1979).

For the contemporaneous decline of neighborhood influence in local politics, see authorities cited at note 225 *supra*. For the difficulties that local citizens encountered in challenging urban renewal through litigation, see McGee, *Urban Renewal in the Crucible of Judicial Review*, 56 VA. L. REV. 826, 845–56 (1970). These difficulties, clustering chiefly about restrictive rulings on standing, dissipated to some degree in the late 1960s, when some charges of racial discrimination were leveled successfully at renewal projects. *Id.* at 858–94.

234. An excellent summary of the federal review-and-comment legislation in this area, along with the major problems that have emerged to date, may be found in Comment, *Federal Historic Preservation Law: Uneven Standards for Our Nation's Heritage*, 20 SANTA CLARA L. REV. 189 (1980). This comment, of course, predates the National Historic Preservation Act Amendments of 1980, Pub. L. No. 96-515, 94 Stat. 2987.

235. Department of Transportation Act of 1966, § 4(f), 49 U.S.C. § 1653(f) (1976). In 1968 this section's language was incorporated into the Highway Act, 23 U.S.C. § 138 (1976), and similar review-and-comment requirements appear in the Urban Mass Transportation Assistance Act of 1970, 49 U.S.C. § 1610 (1976). In addition to § 4(f) self-review, transportation projects are reviewable by the Advisory Council on Historic Preservation under the NHPA. 16 U.S.C. § 470f (1976).

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The National Historic Preservation Act (NHPA),[236] also passed in 1966, is a wide-ranging review-and-comment statute which requires, before approval of funds for any federally assisted project, a search for any National Register properties[237] that might be adversely affected. If such properties exist, the program agency must submit the project to review and comment by the NHPA-created Advisory Council on Historic Preservation.[238]

The National Environmental Policy Act of 1969 (NEPA)[239] includes historic elements among the aspects of the environment to be protected in federal plans and programs;[240] federal agencies must prepare environmental impact statements for historic properties affected by major federal actions. Since any agency preparing an environmental impact statement must secure the comments of other agencies with special expertise about any environmental impact, NEPA creates another potential review-and-comment role for the Advisory Council on Historic Preservation.[241]

The next step came in 1971, when Executive Order 11,593 required that federal agencies consult the Advisory Council to develop procedures to assure historic preservation in their program activities.[242] Under the authority of the NHPA and the executive order, the Advisory Council adopted its own regulations in 1974, establishing a unified review process for projects subject to both NEPA and

236. 16 U.S.C. §§ 470–470t (1976), *as amended by* National Historic Preservation Act Amendments of 1980, Pub. L. No. 96-515, 94 Stat. 2987.

237. The 1976 amendments to the National Historic Preservation Act, Pub. L. No. 94-422, 90 Stat. 1320 (codified at 16 U.S.C. § 470f (1976)), extend these review-and-comment requirements to properties *eligible* for inclusion on the National Register. For the litigation background, see note 244 *infra*.

The recent National Historic Preservation Act Amendments of 1980, Pub. L. No. 96-515, sec. 201(a), § 101(a)(6), 94 Stat. 2987 (to be codified at 16 U.S.C. § 470a(a)(6)), provide that an owner may block Register listing. The owner may not block a determination of Register *eligibility*, however, so review-and-comment procedures continue to protect even those eligible properties that are kept off the Register by owner objection. *Id.* The amendments also clarify federal agency duties to identify and preserve historic properties within their control. *Id.* sec. 206 (to be codified at 16 U.S.C. § 470h-2).

238. 16 U.S.C. § 470f (1976). The Council comments on the adverse effects and possible means of mitigation.

239. 42 U.S.C. §§ 4321–4347 (1976).

240. *Id.* § 4331(b)(4).

241. *Id.* § 4332(2)(C). The old regulations of the Council on Environmental Quality specifically listed the Advisory Council as among the agencies whose comments must be solicited when their area of expertise is relevant. 40 C.F.R. § 1500.9 & app. II (1978), *repealed*, 43 Fed. Reg. 55,990 (1978). The new regulations still permit a broad role for the Advisory Council, but they put more of a burden on it to step forward and assert its interests. *See* 40 C.F.R. § 1501.6 (1980).

242. 36 Fed. Reg. 8921 (1971), *reprinted in* 16 U.S.C. § 470 app. at 429 (1976).

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NHPA.[243] These regulations have caused a flurry of litigation because they give the Advisory Council a role in a variety of federally supported projects whose participants resent the Council's presence.[244]

243. 39 Fed. Reg. 3366-67 (1974) (§ 800.2) (current version at 36 C.F.R. § 800.9 (1980)).

244. The most difficult litigation controversies over the regulations have typically arisen in the context of some uncompleted urban renewal project dating from the 1960s; the project typically called for demolition of some property that had historic interest, but that was placed on the National Register of Historic Places only after the basic funding arrangements had been made between the federal agency and the local renewal authority. In the usual case, some irate local group spearheaded the National Register nomination in order to halt the renewal activity. The Advisory Council's 1974 regulations raised two related problems. The first concerned the categories of properties that are to be protected by Advisory Council review, and the second concerned the nature of the federal agency activity that triggers review.

The Council's 1974 regulations required that programs affecting properties merely eligible for the National Register (as well as properties already on the Register) be subject to Advisory Council review. The NHPA's language did not include merely eligible properties until the 1976 amendments, and several courts ruled that the statute gave the Advisory Council no review powers over merely eligible properties. *See, e.g.*, Wisconsin Heritages, Inc. v. Harris, 460 F. Supp. 1120 (E.D. Wis. 1978); Save the Courthouse Comm. v. Lynn, 408 F. Supp. 1323 (S.D.N.Y. 1975); St. Joseph Historical Soc'y v. Land Clearance for Redev. Auth., 366 F. Supp. 605 (W.D. Mo. 1973). Some of these cases, however, sustained some role for the Advisory Council, or at least some further administrative review. In some of these, the courts took the view that the federal program agency, in connection with its own Executive Order 11,593 duties, had "adopted" the Advisory Council's review procedures. *See, e.g.*, Save the Courthouse Comm. v. Lynn, 408 F. Supp. 1323, 1337-38 (S.D.N.Y. 1975). Other courts took the view that aside from the NHPA, NEPA applies to historic properties whether or not they are actually listed on the National Register, and thus some environmental impact statement had to be prepared in connection with projects that affect merely eligible properties. *See, e.g.*, Wisconsin Heritages, Inc. v. Harris, 460 F. Supp. 1120, 1125-26 (E.D. Wis. 1978). *But see* St. Joseph Historical Soc'y v. Land Clearance for Redev. Auth., 366 F. Supp. 605, 612 (W.D. Mo. 1973), which confined NEPA review to properties actually on the Register.

As to the second and related problem, the type of agency activity that necessitates review, the Advisory Council's regulations have also taken a more expansive view than have some courts. In the NHPA's language, Advisory Council review is triggered by "approval of the expenditure of any federal funds on the undertaking" that affects a National Register property (now including eligible properties). 16 U.S.C. § 470f (1976). This language seems to allow a more sweeping interpretation than NEPA's trigger for an environmental impact statement ("major Federal actions," 42 U.S.C. § 4332(2)(C) (1976)). The key lies in the definition of "undertaking," and while the Advisory Council's regulations defined "undertaking" to include each stage of a continuing project, 36 C.F.R. § 800.2(c) (1980), some courts have interpreted "undertaking" more narrowly: Focusing on the "approval of the expenditure" language, 16 U.S.C. § 470f (1976), they have said that review applies only at the initial funding decision on a project as a whole. Thus, the reasoning goes, if no National Register properties were affected at the time of the initial funding decision, then the NHPA does not require review, even though later stages of the project may affect Register properties belatedly nominated. NEPA, on the other hand, because of the "continuing responsibility" language of § 4331(b), has been viewed as requiring revised impact statement review for the later stages of continuing projects. *See, e.g.*, Hart v. Denver Urban Renewal Auth., 551 F.2d 1178 (10th Cir. 1977); Wisconsin Heritages, Inc. v. Harris, 460 F. Supp. 1120, 1125-26 (E.D. Wis. 1978); Save

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Not surprisingly, the main targets of federal review procedures have been highway and urban renewal projects. Local citizen groups have used the review-and-comment statutes to delay or redirect offending projects by insisting on Advisory Council review or agency preparation of an environmental impact statement. The preservation groups have run into technical litigation problems at times, but even where NHPA review has failed, the groups have frequently succeeded in imposing at least the delay required to prepare a NEPA environmental statement.[245]

Preservation groups must also face the bureaucratic resistance implicitly acknowledged in the very passage of review-and-comment statutes: Governmental agencies may only grudgingly pause to consider the preservation impact of their projects.[246] In several cases, one glimpses this basic indifference or even antagonism to preservation.

Fund-shifting gimmickry in highway cases is one example. All federal review procedures are predicated on some federal participation in a project, but in several highway cases, litigation was required to overturn the program agencies' transparent attempts to escape review through avoiding the appearance of federal participation. In *Thompson v. Fugate*,[247] for example, federal interstate highway funds were awarded to help Virginia construct every segment of a highway encircling Richmond—except the one segment that barreled through a venerable eighteenth-century mansion once owned by Thomas Jefferson's family.[248]

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the Courthouse Comm. v. Lynn, 408 F. Supp. 1323, 1340–41 (S.D.N.Y. 1975). *See also* Jones v. Lynn, 477 F.2d 885 (1st Cir. 1973) (NEPA); Boston Waterfront Resident Ass'n v. Romney, 343 F. Supp. 89 (D. Mass. 1972) (NEPA). The effect of such decisions has been to restrict the applicability of the NHPA, particularly in the context of older projects, even where an impact statement revision may be required under NEPA. This restrictive interpretation of NHPA review has recently been rejected by the Second Circuit in WATCH v. Harris, 603 F.2d 310 (2d Cir. 1979), where the court found no reason to hold that NHPA review should be more limited than NEPA review. *See also* Comment, *supra* note 234, at 210.

245. *See* note 244 *supra*.

246. Henderson & Pearson, *Implementing Federal Environmental Policies: The Limits of Aspirational Commands*, 78 COLUM. L. REV. 1429 (1978), is an interesting commentary on the difficulties of review-and-comment legislation; it focuses particularly on the problem of "appropriating" the expertise of program agencies for some goal in which they are uninterested. Provocative though the article is, in this author's view it gives insufficient weight to the opportunities that review-and-comment legislation opens up for public interest and community groups, who often can develop a high level of expertise of their own and who in addition may be particularly interested in the opportunities that review-and-comment presents for delay, publicity, and persuasion about publicly supported projects. *See id.*, at 1461.

247. 347 F. Supp. 120 (E.D. Va. 1972).

248. The mansion was the Tuckahoe Plantation, which had been the home of Thomas

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A similar fund-shifting device, again involving Virginia, was contested in *Ely v. Velde*.[249] Local residents of a rural historic area attempted to enjoin construction of a prisoner reception center funded through an unrestricted block grant by the federal Law Enforcement Assistance Administration.[250] The Fourth Circuit Court of Appeals applied NEPA and NHPA review requirements to the project even though the block grant formula is designed to minimize federal intervention. But the court imposed no review requirements on the recipient state government,[251] and the district court implied on remand that Virginia could avoid review by shifting its Law Enforcement Assistance Administration funds to a different project and placing what were ostensibly state funds in the prison project.[252]

Jefferson's mother. A similar instance of highway segmentation occurred in a case followed by the *Fugate* court, Named Individual Members of the San Antonio Conservation Soc'y v. Texas Highway Dep't, 446 F.2d 1013 (5th Cir. 1971), *cert. denied*, 406 U.S. 933 (1972). As in *Fugate*, the project was subjected to environmental review despite the segmentation. While Gray, *The Response of Federal Legislation to Historic Preservation*, 36 LAW & CONTEMP. PROB. 314 (1971), argues that transportation programs were sensitized relatively early to historic preservation concerns—at least by comparison with other programs, notably those in housing and urban development—some of the Advisory Council staff members disagree. They view federal transportation programs as particularly "captive" to state interests and particularly apt to defer if the state agencies are indifferent to preservation. Interview with staff member, Advisory Council on Historic Preservation, Dep't of the Interior, in Washington, D.C. (July 29, 1979).

249. 451 F.2d 1130 (4th Cir. 1971).

250. The Administration was the creation of the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. §§ 3701–3796 (1976).

251. 451 F.2d at 1139.

252. Ely v. Velde, 363 F. Supp. 277 (E.D. Va. 1973). The district court ruled that the plaintiffs had to undertake the exceedingly arduous task of tracing the substituted funds back to the Law Enforcement Assistance Administration grant—that is, they would have to show that without the grant funds for other projects, the state would have expended its state funds on those other projects rather than on the prison center. *Id.* at 283. The case more broadly suggests that the evasion of preservation review can be a special problem in projects funded under decentralized federal block grant allocations to states or localities, since the possibilities for fund-shifting and the difficulties of tracing are particularly great with such allocations. *See* ADVISORY COUNCIL ON HISTORIC PRESERVATION, *supra* note 48, at 46–47. Some review provisions can be written into the block grant statutes, however. *See, e.g.*, the Community Development Block Grant program, where the statute provides that HUD may delegate to localities the NEPA review responsibility for projects funded through the allocations. 42 U.S.C. § 5304(h) (1976). Conflicts of interest could be particularly sharp for the local grant recipients, however. Preservationists have recently challenged delegation of review responsibility to the city in connection with an Urban Development Action Grant in Charleston, South Carolina. *See Historic Preservation Groups Fight UDAG Development in Charleston, S.C.*, [1980] 7 HOUS. & DEV. REP. (BNA) 923.

"Privatization devices" are also used by government agencies: Grant-spending operations run federal funds through such a series of organizational pretzel turns that the project appears to be a private operation rather than a federal undertaking. *See* Weintraub v. Rural Electrification Admin., 457 F. Supp. 78 (M.D. Pa. 1978); for a federal regulation (as com-

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The resistance or indifference of government agencies to preservation appears even in the designation process for the National Register through which historically significant places become eligible for federal review-and-comment protection. The Advisory Council insists that the designation process should be professional, leaving political considerations to the later review-and-comment proceedings.[253] But in practice, politics visibly affect the state participation central to National Register listings.

State participation in the federal review-and-comment process. Under the NHPA, the National Register is to include not only nationally significant properties, but also properties of state and local historic significance. In administering the Act, however, state historic preservation officers and their staffs have assumed a position of critical importance in designating *all* Register properties. These state officers (known in preservation circles by the unlovely acronym of SHPOs) directly nominate many of the properties and places that are considered for—and generally accepted by—the Register.[254] They also participate in the Register nominations made by federal program agencies. These program agencies must identify properties eligible for the Register before they fund construction of a project and must consult with the state officer as they make the survey.[255]

The state officers, then, are key figures in the nomination of properties that ultimately appear on the Register. But these officers can be pressured by other state officials and may be understandably timid about nominating properties where National Register designation could delay a much-desired civic auditorium or highway.[256]

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pared to a federal "undertaking") see Edwards v. First Bank of Dundee, 534 F.2d 1242 (7th Cir. 1976).

253. ADVISORY COUNCIL ON HISTORIC PRESERVATION, *supra* note 48, at 18.

254. Until the passage of the 1980 amendments, state historical preservation officer duties were established by regulation. The current versions of the regulations related to state officer duties in the nomination of properties are at 36 C.F.R. §§ 1202.12(b)-(c), 1202.15 (1980). The 1980 amendments introduce a list of statutory duties for state historical preservation officers. National Historic Preservation Act Amendments of 1980, Pub. L. No. 96-515, sec. 201(a), § 101(b)(3), 94 Stat. 2987 (to be codified at 16 U.S.C. § 470a(b)(3)).

255. *See* 36 C.F.R. §§ 800.4, 1201.8 (1980); note 254 *supra*.

256. Interview with staff member, Advisory Council on Historic Preservation, Dep't of the Interior, in Washington, D.C. (July 24, 1979). The staff member thought, for example, that the state historical preservation officer in one state was intimidated by the director of the state's transportation department, who had much better political connections. *See* ADVISORY COUNCIL ON HISTORIC PRESERVATION, *supra* note 48, at 28; Gantz, *The Federalism of American Historic Preservation*, in HISTORIC PRESERVATION IN WEST GERMANY AND THE UNITED STATES 15 (1977); Kellogg, *Role of State and Local Laws and Programs in Historic Preservation*, 12 URB. LAW. 31, 39 (1980).

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Moreover, despite federal regulations requiring professional boards and staff in the state offices and federal insistence that state offices submit elaborate preservation plans,[257] state preservation programs vary considerably in quality.[258] The 1980 amendments to the NHPA continue to prod the states to establish professionally staffed boards,[259] but these programs will continue to depend on the budgetary decisions of state legislators, some of whom bridle at the expense of funding federally imposed professionals. State officials also have an eye on electoral politics and in the past have apparently preferred that federal historic preservation grants be used for showy "brick-and-mortar" preservation projects instead of drab surveys.[260] It is not surprising that in some states the designation process maintains a certain ad hoc quality.

The importance of citizen groups in the designation process. Given the vagaries of the state designation process, civic groups are doubly important in the review-and-comment process. They often take the first step leading to National Register nomination and designation by identifying to state preservation officers the significance of particular sites. Second, these same civic groups are virtually the only bodies that use the courts to enforce preservation review when federal, state, and local program agencies all seek to avoid review.[261]

Private litigation is especially important since the Advisory Council cannot bring lawsuits on its own behalf. And federal preservation review is by no means self-enforcing against hostile governmental agencies. In some instances, neither a federal agency nor a state preservation office nominates a threatened site. The federal program agency may think the site insignificant, and the state historical officer may be unaware of the threat or unwilling to protect the site by nomination. In extreme circumstances the Secretary of the Interior can

257. 36 C.F.R. § 1201.7 (1980); *see* Planning Div., Heritage Conservation and Recreation Service, *supra* note 199.

258. ADVISORY COUNCIL ON HISTORIC PRESERVATION, *supra* note 48, at 13-15; Gantz, *supra* note 256, at 14 (detailing a conflict between the federal preservation bureaucracy and the state of Indiana when the Indiana legislature refused to fund more than one professional preservation staff member); Interview with staff member, Planning Div., Heritage Conservation and Recreation Service, in Washington, D.C. (July 19, 1979).

259. *See* note 203 *supra*.

260. The National Historic Preservation Act Amendments of 1980, Pub. L. No. 96-515, sec. 202(a), 94 Stat. 2987 (to be codified at 16 U.S.C. 470b(a)(3)), attempt to overcome this tendency by raising federal grants to state surveys to 70% of cost (as compared to 50% for other state preservation activities). *Id.* at sec. 202(a).

261. ADVISORY COUNCIL ON HISTORIC PRESERVATION, *supra* note 48, at 60; Interview with staff member, Advisory Council on Historic Preservation, *supra* note 256.

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decide on his own that an area is eligible for National Register listing, even absent a federal agency submission or state officer determination.[262] But those rare instances highlight how the entire review process depends on the alertness of local groups whose preservation interests may run contrary to the decisions of their own local governments.

In short, interested citizen groups are the ones who bring threats of destruction to the attention of the state historic preservation officer or the Advisory Council or the federal preservation bureaucracy. Where one or another of these bodies does not place the property on the Register, the civic group may still litigate to enforce some sort of preservation review. Where the matter does come before the Advisory Council for review, citizen group pressures and complaints are vitally important to bolster the Advisory Council and provide an alternative viewpoint against the program agencies whose main interest is to get the project underway, whatever the preservation effects.[263]

In the final analysis, then, federal preservation review depends on civic and neighborhood organizations. Despite the complications of the statutory authority and its accompanying bureaucracy, federal review-and-comment legislation is essentially a delaying and educational device for the benefit of those civic and neighborhood groups.

It is by no means contrary to the community-building view of preservation that these local groups seem at times to act for motives other than pure interest in history and aesthetics. Litigation records are replete with cases of eleventh-hour designations of historic significance and National Register eligibility. These cases give the impression that neighborhood citizens were oblivious to the historic significance of the old county courthouse,[264] Greek Revival and Richardsonian Romanesque main street storefronts,[265] or ancient

262. 36 C.F.R. § 800.4(3) (1980); *see* Stop H-3 Ass'n v. Coleman, 533 F.2d 434 (9th Cir. 1976).

263. Interview with staff member, Advisory Council on Historic Preservation, *supra* note 256. The staff member noted that the Advisory Council must rely on outside sources of information, and at times the only means by which the Council learns of destructive projects is through the direct communication of civic groups. *See also* ADVISORY COUNCIL ON HISTORIC PRESERVATION, *supra* note 48, at 61.

264. Save Our Sycamore v. Metropolitan Atlanta Rapid Transit Auth., 414 F. Supp. 99 (N.D. Ga. 1976), *aff'd*, 576 F.2d 573 (5th Cir. 1978); Save the Courthouse Comm. v. Lynn, 408 F. Supp. 1323 (S.D.N.Y. 1975).

265. WATCH v. Harris, 603 F.2d 310, 314 (2d Cir. 1979) (commenting briefly on the phenomenon of the eleventh-hour Register designation). *See also* Hall County Historical Soc'y, Inc. v. Georgia Dep't of Transp., 447 F. Supp. 741 (N.D. Ga. 1978).

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shrines[266] until they had exhausted all other means of avoiding the inroads of government projects in their neighborhoods.

Some of this delay may be due to ignorance of review devices. Some may represent the time it takes for the proposed demolition to awaken the community to its own attachment to a building or an area. But suppose that the neighborhood citizens only think belatedly of historic or aesthetic significance and are in fact using historic preservation review as a makeweight to avoid a project destructive to the neighborhood. The impurity of motive is less important if one views historic preservation as essentially a community-building process, involving community discussion and self-education about the best means by which to protect a physical environment in which neighbors can feel at home. Age, representativeness of style, association with past events, and even aesthetic quality are only some of the many factors that contribute to a physical environment that draws members of a community together. If the historic preservation review statutes help citizens identify the features that they value in their communities, they perform a useful educational function.

Preservation review-and-comment procedures, like local architectural control ordinances, sometimes only delay a decision adverse to the stated concerns of the neighborhood. Delay, of course, has its costs,[267] but it also serves to bring the developers and the preservationists into contact so that they may refine and publicize public purposes at stake in a project, weigh considerations of the physical environment against competing social goals, and perhaps devise an accommodation.

III. CONCLUSION

A major public purpose underlying modern preservation law is the fostering of community cohesion, and ultimately, the encouragement of pluralism. Preservation law encourages a physical environment that supports community; it also provides procedures that can themselves organize a community, both by focusing the members' attention on aspects of the physical environment that can make them

266. Stop H-3 Ass'n v. Coleman, 533 F.2d 434 (9th Cir. 1976); Aluli v. Brown, 437 F. Supp. 602 (D. Hawaii 1977), *rev'd*, 602 F.2d 876 (9th Cir. 1979); Environmental Defense Fund v. Tennessee Valley Auth., 371 F. Supp. 1004 (E.D. Tenn. 1973), *aff'd*, 492 F.2d 466 (6th Cir. 1974).

267. *See* Marles, *supra* note 132. In the case of a delay in a governmental project, however, the costs of delay may be spread through the public.

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feel at home and by defining a smaller community's contribution to a larger.

Modern historic preservation law is communitarian in both the substantive and the procedural senses. The most important substantive contribution of preservation law has been recognition of the political aspect of our physical surroundings—especially the older features of those surroundings—and the consideration of which kinds of physical environment are appropriate to a nation of democratic communities. Perhaps the chief danger accompanying this recognition is the possibility of dogmatism—and dogmatism in matters of expression is something of which we should be especially wary. That danger alone makes it vital that preservation decisions be the product of a wide range of views.

Proper procedures help ensure the availability of those views. The most important procedural contribution of preservation law has been the provision of focal points for neighborhood and civic organization and education. These opportunities for community influence have value not only because a neighborhood is especially able to assess the worth of its own streets and structures, but because discussion itself can strengthen the neighborhood, encourage self-definition, and give leverage with the larger community. The dangers of community influence are those so familiar in land use generally: No one wants the highway, the prison, or the housing project. In short, local groups may pay too little attention to the needs of the larger community.

In practice, both local architectural ordinances and federal review legislation must grapple with the issue of who should make final decisions. Perhaps just as important as the point "where the buck stops," however, is the *route* that the buck takes. A route through neighborhood and community groups is in keeping with preservation's emerging communitarian purpose. Such a route substantially aids the ultimate decisionmaker and helps to strengthen pluralistic government. The potential demolition of a venerable building or the alteration of a portion of an historic district becomes the occasion on which elements of a whole range of interest groups—developers, neighborhood, city, state, and nation—consider and debate the physical elements that bind communities together and link present communities to the past and to the future. This, I suggest, is the way that modern preservation law serves the public well-being.

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