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NOTES

HISTORIC DISTRICTS: PRESERVING CITY NEIGHBORHOODS FOR THE PRIVILEGED

INTRODUCTION

Since the early 1900's, municipalities have relied extensively on various land use controls to regulate the use and development of real property.¹ Over the past fifty years, zoning² has been the predominant method of land use control, employed first in cities but now used primarily in suburbs.³ Recently, historic preservation laws, especially historic district regulations, have begun to rival zoning regulations as the most important land use tools in urban areas.⁴ Unlike landmark regulations, which protect individual buildings, historic district regulations protect entire areas of aesthetic, architectural, or historic significance⁵ by restricting development and alteration within designated areas.⁶

¹ See text accompanying notes 7-21 *infra*. See generally J. Delafons, *Land-Use Controls in the United States* 19-27 (2d ed. 1969) (discussing early land use controls in American cities); S. Toll, *Zoned American* 143-210 (1969) (describing the creation and early operation of zoning in New York City).

² "Zoning is the division of [a] jurisdiction into districts ("zones") within which permissible uses are prescribed and restrictions on building height, bulk, layout, and other requirements are defined." J. Delafons, *supra* note 1, at 41.

³ See C. Weaver & R. Babcock, *City Zoning: The Once and Future Frontier* 13-14 (1979).

⁴ In a recently published guide to historic preservation law, the editor observed that "there are over 1,000 local preservation ordinances; every state has at least some preservation-related laws; and there are more than a dozen federal statutes and literally hundreds of pages in the Code of Federal Regulations pertaining to preservation programs." Duerksen, *Preface to A Handbook on Historic Preservation Law* xxi (C. Duerksen ed. 1983).

⁵ The historic district approach looks beyond individual buildings to a larger setting. Designation is based on the district having a preponderance of buildings of historical or architectural significance where the relationship of one building to another creates a whole which is greater than its parts. Some districts are characterized by a predominant uniform architectural style . . . while others derive their charm from the variety of styles and uses.

J. Pyke, *Landmark Preservation* 12 (2d ed. 1972).

⁶ Historic district ordinances prescribe regulations for the alteration, demolition, and construction of buildings within the designated area without controlling their use or ownership. *Id.* The typical historic district ordinance requires landowners to submit their architectural plans to an administrative preservation commission which must issue a permit—known as a certificate of appropriateness—before any building exterior may be changed. See *id.* Before the commission may issue a permit, it is usually required to find that the proposed change will result in no significant exterior effect and will be appropriate to the district, or that denial of the permit would cause economic hardship to the property owner. See, e.g., New York, N.Y.,

This Note examines historic districting, focusing on its tendency to displace or exclude low-income and minority residents from urban neighborhoods. Part I traces the development of zoning and historic preservation laws; it identifies three stages in the development of zoning and shows how preservation law has passed through only two of the three stages. Part II examines two adverse effects of historic districting: the displacement of the poor and minorities from neighborhoods undergoing revitalization and the exclusion of these groups from affluent residential areas. Part III argues that legislative action and greater judicial scrutiny are needed to minimize the displacement and exclusion caused by historic districting, without sacrificing its legitimate goals.

I

ZONING AND HISTORIC PRESERVATION LAWS

This Part shows that the development of zoning laws has evolved through three stages: first, zoning laws were used for limited health and safety purposes; second, zoning laws served to improve the quality of life in suburban communities; and third, zoning laws were used to exclude minorities and the poor from the suburbs, but then were attacked by some legislatures and courts to ensure zoning's proper use. This Part then demonstrates that historic preservation laws have passed through two of those three stages: first, preservation efforts occurred primarily at the private level to protect areas of historic significance; and second, federal and state governments enacted preservation laws that served aesthetic goals.

A. Zoning

1. *The Initial Stage*

When the concentration of population in urban areas increased in the early twentieth century, government extended the regulation of land use beyond the restriction of noxious uses of property.⁷ As cities grew and building heights increased,⁸ industrial activity interfered with residential living.⁹ Boston's regulations, which applied lower height limits to

Charter & Ad. Code Ann. ch. 8-A, §§ 207-6.0, 207-8.0 (Williams 1976). For a survey of methods by which preservation ordinances regulate architectural changes, see Dennis, Recommended Model Provisions for a Preservation Ordinance, with Annotations, in *A Handbook on Historic Preservation Law* A65-A95 (C. Duerksen ed. 1983).

⁷ See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386-87 (1926); *Developments in the Law—Zoning*, 91 Harv. L. Rev. 1427, 1433-34 (1978) [hereinafter *Developments*].

⁸ The invention of the elevator and the use of steel rather than concrete construction facilitated the erection of taller buildings. Coon & Damsky, *Zoning: As a Means and Not an End*, 4 *Zoning & Planning L. Rep.* 121, 122 (1981).

⁹ See J. Delafons, *supra* note 1, at 21; *Developments*, *supra* note 7, at 1434.

residential buildings than to commercial ones, typified the earliest zoning laws.¹⁰ The United States Supreme Court upheld Boston's restrictions as proper exercises of the state's police power¹¹ in *Welch v. Swasey*,¹² finding them reasonably related to the public welfare, especially to the prevention of fire.¹³

Legislators also enacted zoning ordinances to regulate specific uses of property, primarily the location and concentration of industrial activities.¹⁴ In 1916, New York City passed the first comprehensive zoning ordinance.¹⁵ The ordinance, which served as a model for the many ordinances enacted in the following decade,¹⁶ divided the city into three types of use districts—residential, business, and unrestricted—and also established bulk and height districts.¹⁷

At the federal level, the Advisory Committee on Zoning, appointed by Secretary of Commerce Herbert Hoover, issued the Standard State Zoning Enabling Act in the early 1920's.¹⁸ The Act provided state governments with a procedure to delegate the state's police power to municipalities for zoning purposes.¹⁹ The Act was immediately popular²⁰

¹⁰ 1904 Mass. Acts ch. 333, §§ 1-4; 1905 Mass. Acts ch. 383, §§ 1-5 (quoted in *Welch v. Swasey*, 214 U.S. 91, 92-95 n.1 (1909)).

¹¹ "The police power, briefly, is the power of government to enact regulations affecting private actions in order to protect the public health, safety, and general welfare." Coon & Damsky, *supra* note 8, at 122. The zoning authority is usually exercised by municipalities pursuant to an express delegation of the state's police power. See *Developments*, *supra* note 7, at 1429.

¹² 214 U.S. 91 (1909).

¹³ *Id.* at 107-08. The Court asserted that the lower height limitation on residential buildings was reasonable because "taller buildings in the commercial section of the city might be less dangerous in case of fire than in the residential portion." *Id.* at 107. Commercial buildings may be built "of fireproof construction," may be located closer to fire departments, and may contain fewer people at night. *Id.* The Court added: "That in addition to these sufficient facts, considerations of an aesthetic nature also entered into the reasons for their passage, would not invalidate them." *Id.* at 108.

¹⁴ See *Developments*, *supra* note 7, at 1434.

¹⁵ See J. Delafons, *supra* note 1, at 20.

¹⁶ See *id.* at 20-21.

¹⁷ *Id.* at 23; S. Toll, *supra* note 1, at 183-84. As one commentator has emphasized, the New York ordinance failed to achieve its objective of preventing incompatible land uses, because it was "too much concerned with conserving existing values, and too little concerned with guiding future growth and development." J. Delafons, *supra* note 1, at 23; see also S. Toll, *supra* note 1, at 183 ("zoning's first objective was to solidify a very particular *status quo*"). Delafons suggests that "[t]he authors of the ordinance were handicapped by uncertainty over what the courts would approve." J. Delafons, *supra* note 1, at 23. For a detailed description of the drafting, enactment, and effect of this ordinance, see S. Toll, *supra* note 1, at 172-210.

¹⁸ See J. Delafons, *supra* note 1, at 25; S. Toll, *supra* note 1, at 201. For a published version of the Act, see 4 R. Anderson, *American Law of Zoning* § 30.01 (2d ed. 1976).

¹⁹ S. Toll, *supra* note 1, at 201; 1 R. Anderson, *American Law of Zoning* § 1.13, at 19-20 (2d ed. 1976).

²⁰ Within one year of the Act's first printed edition, nearly one-quarter of the states had passed enabling acts that were modeled on the Standard Act. S. Toll, *supra* note 1, at 201.

because it bore the imprint of federal legitimacy and spared state legislators the task of drafting their own statutory language.²¹

2. Zoning's Prime

The New York City ordinance and the Standard State Zoning Enabling Act triggered the rapid promulgation of municipal zoning ordinances that regulated the purposes for which property could be used.²² The Supreme Court first considered the constitutionality of these use restrictions in *Village of Euclid v. Ambler Realty Co.*²³ At issue was whether a Cleveland suburb's zoning ordinance that prohibited a realty company from using its property for commercial purposes exceeded the state's police power.²⁴ The Court upheld the ordinance, finding its use restrictions sufficiently related to the public welfare.²⁵ The Court noted that although the general public interest may at times outweigh a municipality's interest in promoting police power objectives through zoning regulations, this concern was not compelling in *Euclid*.²⁶

Although zoning measures became more numerous and sophisticated after *Euclid*,²⁷ the Supreme Court has rarely decided zoning cases.²⁸ In *Village of Belle Terre v. Boraas*,²⁹ the Court's first zoning case in over forty years, the Court upheld a zoning ordinance that prohibited more than two unrelated persons from living in the same house. Relying upon *Berman v. Parker*,³⁰ the Court extended its notion of the proper use of the police power: "The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."³¹

²¹ *Id.* at 202.

²² By 1930, 1100 cities had enacted zoning ordinances; 15 years earlier, only five cities had zoning ordinances. J. Delafons, *supra* note 1, at 25.

²³ 272 U.S. 365 (1926).

²⁴ *Id.* at 384-85.

²⁵ *Id.* at 391. The Court stated that by excluding commercial buildings from residential districts, the legislature, *inter alia*, promoted the health of children, increased safety from fires, and facilitated the enforcement of traffic and general welfare regulations. *Id.* at 391.

²⁶ *Id.* at 390.

²⁷ See Developments, *supra* note 7, at 1437.

²⁸ *Id.* at 1436.

²⁹ 416 U.S. 1 (1974).

³⁰ 348 U.S. 26 (1954). In *Berman*, a case that involved land use laws but not zoning in particular, the Court broadened the legitimate aims of land use laws by holding that the public welfare encompasses "values [that] are spiritual as well as physical, aesthetic as well as monetary." *Id.* at 33 (quoted in *Village of Belle Terre v. Boraas*, 416 U.S. at 6). See text accompanying notes 87-92 *infra*.

³¹ 416 U.S. at 9.

3. *The Adverse Effects of Zoning and Government's Response*

In response to the migration to the suburbs following World War II, suburban municipalities amended their zoning laws to preserve the quality of life.³² Some municipalities passed zoning laws requiring larger minimum lot sizes.³³ Other towns restricted the number of building permits issued and the areas and type of development allowed,³⁴ and excluded entirely certain residential uses such as mobile homes, apartments, and row houses.³⁵ These land use controls frequently precluded the construction of low cost housing and consequently excluded poor and minority residents from the suburbs.³⁶

This practice has become known as exclusionary zoning.³⁷ The exclusion of minorities and the poor from the suburbs traps them in deteriorating urban neighborhoods and denies them equal access to employment, decent housing, and adequate education.³⁸ Because suburban communities do not have formal responsibilities to the metropolitan areas in which they are located, they are able to perpetuate class and racial segregation through the use of exclusionary zoning.³⁹

Most state courts have upheld exclusionary zoning ordinances,⁴⁰ re-

³² See *Developments*, supra note 7, at 1437, 1624-26.

³³ See E. Bergman, *Eliminating Exclusionary Zoning* 5 (1974).

³⁴ These zoning devices, generally categorized as phased zoning or timing controls, regulate the pace of development, particularly residential development, and are often justified by a desire to facilitate provision of adequate public services. See Note, *Phased Zoning: Regulation of the Tempo and Sequence of Land Development*, 26 Stan. L. Rev. 585, 591 (1974); see, e.g., *Golden v. Planning Bd.*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (upholding phased zoning as a reasonable exercise of the police power), appeal dismissed sub nom. *Rockland County Builders Ass'n v. McAlevey*, 409 U.S. 1003 (1972). Although the effect of these ordinances may not be exclusionary in the long run, their short-term effect is to restrict severely new development. See generally Note, supra.

³⁵ See E. Bergman, supra note 33, at 5; Babcock & Bosselman, *Suburban Zoning and the Apartment Boom*, 111 U. Pa. L. Rev. 1040, 1059-61 (1963).

³⁶ See Note, *Exclusionary Zoning and Equal Protection*, 84 Harv. L. Rev. 1645, 1646-47 (1971). Despite an abundance of federal housing programs in the 1960's, "[t]he amount of low and lower middle income housing constructed in the suburbs since World War II has been minimal." *Id.* at 1647. In some suburban areas, the total dwelling unit capacity has been drastically reduced by exclusionary zoning practices. See Note, *Snob Zoning: Developments in Massachusetts and New Jersey*, 7 Harv. J. on Legis. 246, 248-49 (1970).

³⁷ See E. Bergman, supra note 33, at 4. Bergman distinguishes between "the legitimate purpose of exclusion in *separating* uses within a municipality and the exclusionary purpose of *banning* uses from the municipality." *Id.* (emphasis in original).

³⁸ *Developments*, supra note 7, at 1438. For a discussion of the particular problems facing racial minorities in urban neighborhoods, see National Comm'n on Neighborhoods, *People, Building Neighborhoods* 251-66 (1979) [hereinafter *People, Building Neighborhoods*]; see also United States Commission on Civil Rights, *Equal Opportunity in Suburbia* 7 (1974) ("This economic-racial exclusion may well be called the racism of the seventies. . . . [It is] an image of a suburban 'white noose' encircling a black inner city.").

³⁹ See *Developments*, supra note 7, at 1438.

⁴⁰ See, e.g., *County Comm'rs v. Miles*, 246 Md. 355, 228 A.2d 450 (1967) (five-acre zon-

lying on the Supreme Court's broad construction of a local government's police power to enact land use controls.⁴¹ For example, courts have upheld ordinances mandating large minimum lot sizes,⁴² as well as ordinances banning apartment buildings.⁴³

Several efforts have been initiated at the state, regional, and federal levels to curb exclusionary zoning. The Massachusetts legislature has created a state review procedure to ensure that suburban communities provide adequate low- and moderate-income housing.⁴⁴ Municipal communities in the Dayton, Ohio metropolitan region agreed to provide 14,000 units of federally subsidized low- and moderate-income housing under a formula prepared by a regional planning commission.⁴⁵ To eliminate the discriminatory uses and effects of zoning, several presidential commissions have recommended various zoning reforms,⁴⁶ especially greater federal control over local zoning practices that prevent the construction of low- and moderate-income housing.⁴⁷

Judicial scrutiny of zoning ordinances has increased in the past dec-

ing); *Golden v. Planning Bd.*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (phased zoning), appeal dismissed sub nom. *Rockland County Builders Ass'n v. McAlevy*, 409 U.S. 1003 (1972).

⁴¹ See discussions of *Village of Euclid v. Ambler Realty Co.*, text accompanying notes 22-26 *supra*; *Village of Belle Terre v. Boraas*, text accompanying notes 29-31 *supra*; *Berman v. Parker*, text accompanying notes 87-89 *infra*.

⁴² See, e.g., *County Comm'rs v. Miles*, 246 Md. 355, 228 A.2d 450 (1967) (five-acre zoning); *Simon v. Town of Needham*, 311 Mass. 560, 42 N.E.2d 516 (1942) (one-acre zoning); *Flora Realty & Inv. Co. v. City of Ladue*, 362 Mo. 1025, 246 S.W.2d 771 (en banc) (three-acre zoning), appeal dismissed, 344 U.S. 802 (1952) (per curiam).

⁴³ The practice of zoning an entire community for single family use was upheld in *Valley View Village, Inc. v. Proffitt*, 221 F.2d 412 (6th Cir. 1955). See *Babcock & Bosselman*, *supra* note 35, at 1060 & n.144. Communities that permit apartments frequently zone them in or near commercial districts. See *id.* at 1060-61.

⁴⁴ Mass. Gen. Laws Ann. ch. 40B, §§ 20-23 (West 1979). This so-called Anti-Snob Zoning Law allows nonprofit sponsors of low- and moderate-income housing to appeal local zoning decisions to a housing appeals committee, which determines whether a community has met its obligation to provide lower-cost housing. See R. Nelson, *Zoning and Property Rights* 37 (1977).

⁴⁵ See R. Nelson, *supra* note 44, at 36.

⁴⁶ See generally National Commission on Urban Problems, *Building The American City* (1968) [hereinafter *Building The American City*]; President's Committee on Urban Housing, *The Report of the President's Committee on Urban Housing, A Decent Home* (1968) [hereinafter *A Decent Home*]. These commissions are commonly known as the Douglas commission and the Kaiser committee respectively.

⁴⁷ The Kaiser committee on urban housing recommended that the Department of Housing and Urban Development be granted the power to override local zoning decisions that prevent the construction of federally subsidized low- and moderate-income housing. *A Decent Home*, *supra* note 46, at 143-44. The Douglas commission, in its effort to break the "regulatory conspiracy against low-income housing," *Building The American City*, *supra* note 46, at 243, suggested greater federal, state, and regional control over local zoning. See generally *id.* at 235-53. Despite the recommendations of these national commissions, little reform occurred. R. Nelson, *supra* note 44, at 36.

ade, but only in the states where the exclusionary effects of zoning are most severe.⁴⁸ Although the specific formulations vary, the courts have recognized that local zoning ordinances have a broad extraterritorial impact,⁴⁹ and therefore the courts have converged on the principle that each community must provide its share of the region's housing needs.⁵⁰ State courts in New Jersey,⁵¹ New York,⁵² and Pennsylvania,⁵³ relying on state constitutional provisions, require municipal land use regulations to promote the "general welfare," which they have defined as the welfare of the entire region.

The clearest articulation of this "fair share" principle is *Southern Burlington County NAACP v. Township of Mount Laurel*,⁵⁴ in which the New Jersey Supreme Court held that a municipal zoning ordinance that

⁴⁸ See *Developments*, supra note 7, at 1635. Lower federal courts have also addressed the exclusionary effects of zoning. See, e.g., *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir.) (municipality had obligation under Fair Housing Act "to refrain from zoning policies that effectively foreclose the construction of any low-cost housing within its corporate boundaries"), on remand from 429 U.S. 252 (1977), cert. denied, 434 U.S. 1025 (1978); *Dailey v. City of Lawton*, 425 F.2d 1037 (10th Cir. 1970) (actions of planning commission and city council in denying building permit and zoning change to low-income housing project found to be racially motivated, arbitrary, and unreasonable); *Kennedy Park Homes Ass'n v. City of Lackawanna*, 318 F. Supp. 669 (W.D.N.Y.) (city council's actions in amending zoning ordinance to prevent construction of low-income housing subdivision violated Fair Housing Act and Equal Protection Clause), aff'd, 436 F.2d 108 (2d Cir. 1970), cert. denied, 401 U.S. 1010 (1971). Cases invalidating exclusionary zoning practices usually are brought under the Fair Housing Act, 42 U.S.C. §§ 3601-3619 (1982), which is intended to protect individuals from private discrimination and to free the housing market from regulations that perpetuate segregated housing patterns. See, e.g., 114 Cong. Rec. 3421-22 (1968) (remarks of Senator Mondale, sponsor of the amendment). The Act has not been limited by *Warth v. Seldin*, 422 U.S. 490 (1975), which restricts the standing of nonresidents to bring federal constitutional challenges to zoning ordinances. See Sager, *Insular Majorities Unabated: Warth v. Seldin and City of Eastlake v. Forest City Enterprises, Inc.*, 91 Harv. L. Rev. 1373, 1376-1402 (1978). Nor has the Act been limited by *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977), which requires plaintiffs to prove a racially discriminatory purpose or intent in such cases; cf. *Washington v. Davis*, 426 U.S. 229 (1976) (proof of racially discriminatory purpose or intent required in equal protection challenge to land use law). See R. Schwemm, *Housing Discrimination Law* 126-27 & n.62 (1983); *Developments*, supra note 7, at 1683-94.

⁴⁹ See *Developments*, supra note 7, at 1636.

⁵⁰ See *id.* at 1635-41 for a discussion of the development of the concept of regionalism.

⁵¹ *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713, appeal dismissed, 423 U.S. 808 (1975) (commonly known as *Mount Laurel I*); *Southern Burlington County NAACP v. Township of Mount Laurel*, 92 N.J. 158, 456 A.2d 390 (1983) (commonly known as *Mount Laurel II*); see text accompanying notes 54-59 *infra*.

⁵² *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975); see note 57 *infra*.

⁵³ *Surrick v. Zoning Hearing Bd.*, 476 Pa. 182, 382 A.2d 105 (1977) (ordinance unconstitutionally excluded multifamily dwellings); *In re Girsh*, 437 Pa. 237, 263 A.2d 395 (1970) (failure of ordinance to provide for apartments was unconstitutional); *Camp Hill Dev. Co. v. Zoning Bd. of Adjustment*, 13 Pa. Commw. 519, 319 A.2d 197 (1974) (failure of ordinance to provide for townhouses was unconstitutional).

⁵⁴ *Mount Laurel I*, 67 N.J. 151, 336 A.2d 713, appeal dismissed, 423 U.S. 808 (1975).

limited residential construction to single family homes on lots of at least one acre violated the state constitution.⁵⁵ The court found that because low- and moderate-income housing was scarce throughout the region, Mount Laurel must provide its fair share of such housing.⁵⁶ In light of *Mount Laurel I*, a developing municipality in New Jersey is not just prohibited from adopting regulations that preclude the provision of adequate housing for all categories of people; it is obligated affirmatively to provide a "reasonable opportunity" for housing to all those "who may desire to live within its boundaries."⁵⁷ Eight years after *Mount Laurel I*, in *Mount Laurel II*,⁵⁸ the New Jersey Supreme Court attempted to strengthen, clarify, and facilitate the application of the *Mount Laurel* doctrine, in order to assure that the housing that had been expected would result from its decision.⁵⁹

B. Historic Preservation

1. The Initial Stage

The development of a historic preservation movement in mid-nineteenth-century America stemmed from the emergence of a national consciousness⁶⁰ and an interest in civic education.⁶¹ The preservation of buildings for their aesthetic merit was not a primary motivation, as it is

⁵⁵ Id. at 185, 336 A.2d at 730.

⁵⁶ "[T]he universal and constant need for such housing is so important and of such broad public interest that the general welfare which developing municipalities like Mount Laurel must consider extends beyond their boundaries and cannot be parochially confined to the claimed good of the particular municipality." Id. at 179, 336 A.2d at 727-28.

⁵⁷ Id. The New York Court of Appeals articulated a similar "fair share" doctrine in *Benson v. Town of New Castle*, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975), ruling that the constitutionality of a zoning scheme excluding multifamily dwellings should be measured by whether the ordinance provides for regional needs. The court wrote:

There must be a balancing of the local desire to maintain the *status quo* within the community and the greater public interest that regional needs be met. . . .

. . . While the people of New Castle may fervently desire to be left alone by the forces of change, the ultimate determination is not solely theirs. . . . Until the day comes when regional, rather than local, governmental units can make such determinations, the courts must assess the reasonableness of what the locality has done.

Id. at 110-11, 341 N.E.2d at 242-43, 378 N.Y.S.2d at 681-82.

⁵⁸ *Southern Burlington County NAACP v. Township of Mount Laurel*, 92 N.J. 158, 456 A.2d 390 (1983).

⁵⁹ Id. at 160 ("This Court is more firmly committed to the original Mount Laurel doctrine than ever, and we are determined, within appropriate judicial bounds, to make it work.").

⁶⁰ See C. Hosmer, *Presence of the Past* 22 (1965). By this period, many historic structures had already been lost to fire, urban growth, and changing taste. See C. Lockwood, *Bricks & Brownstone: The New York Row House, 1783-1929, An Architectural & Social History* 25 (1972) ("Fire was a constant threat to all eighteenth- and nineteenth-century cities.").

⁶¹ See Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 Stan. L. Rev. 473, 481-84 (1981).

today.⁶² Reflecting preservationists' preoccupation with imparting a sense of history and stability to American society,⁶³ early preservation activities focused on inspiring the viewer with a sense of patriotism and on protecting buildings associated with famous individuals or events.⁶⁴

Early historic preservation efforts were propelled by individuals and private organizations, not by the government.⁶⁵ Preservationists saved structures threatened with demolition by purchasing them with private funds.⁶⁶ Although local and state governments occasionally purchased and maintained threatened buildings,⁶⁷ the federal government did not participate, perhaps because the preservation of property was thought to be beyond its power.⁶⁸

The federal government began its first major preservation efforts in the late nineteenth century when it purchased Civil War battlefields as memorials.⁶⁹ Congress' condemnation of private property to establish a national memorial at the Gettysburg battlefield site led to the first significant preservation litigation.⁷⁰ In *United States v. Gettysburg Electric Railway Co.*,⁷¹ the Supreme Court concluded that the preservation of this historic site served a public purpose⁷²—recognizing, for the first time,

⁶² See Duerksen & Bonderman, *Preservation Law: Where It's Been, Where It's Going*, in *A Handbook on Historic Preservation Law 1* (C. Duerksen ed. 1983); Rose, *supra* note 61, at 481-84.

⁶³ Many preservationists believed that reminders of a common past could reunite America after the Civil War. See Rose, *supra* note 61, at 482. Others hoped that preservation efforts would make good citizens of recent immigrants. *Id.* at 482 & n.45.

⁶⁴ Rose, *supra* note 61, at 479-80; Weidl, *Historic District Ordinances*, 8 Conn. L. Rev. 209, 209 (1976).

⁶⁵ Duerksen & Bonderman, *supra* note 62, at 1; J. Morrison, *Historic Preservation Law* 2-3 (1965).

⁶⁶ For example, despite its rich collection of historic structures, Virginia did not protect historic monuments during the late nineteenth and early twentieth centuries. After appeals to the state and federal governments to save Mount Vernon failed, the Mount Vernon Ladies Association purchased the structure with private funds in 1858. J. Pyke, *supra* note 5, at 7-8; see also J. Morrison, *supra* note 65, at 3; Duerksen & Bonderman, *supra* note 62, at 1-2.

⁶⁷ In 1816, Philadelphia spent \$70,000 to prevent the sale of the old state capital and its grounds to developers. See Duerksen & Bonderman, *supra* note 62, at 2. The state of New York paid off the mortgage on the Hasbrouck House, a building closely associated with George Washington, to assure its protection. *Id.*; J. Pyke, *supra* note 5, at 7.

⁶⁸ See Duerksen & Bonderman, *supra* note 62, at 2.

⁶⁹ See *id.*

⁷⁰ See *id.*

⁷¹ 160 U.S. 668 (1896).

⁷² The Court stated:

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.

Id. at 681-82.

that such preservation could be within the government's condemnation power.⁷³

After local governments began to extend their police power reach to land uses that were not inherently noxious,⁷⁴ preservation efforts in the 1920's broadened to protect buildings of architectural as well as historical significance,⁷⁵ and to protect groups of buildings as well as individual landmarks.⁷⁶ In response to significant private preservation initiatives around the country,⁷⁷ local and state governments amended their zoning ordinances to protect famous old areas.⁷⁸ The first cities to enact such regulations were New Orleans,⁷⁹ Charleston,⁸⁰ and San Antonio.⁸¹

These early preservation ordinances, which were upheld by state courts,⁸² shared several characteristics. First, the ordinances imposed architectural controls on landowners, requiring them to maintain their buildings or prohibiting them from demolishing or altering their buildings without approval.⁸³ Second, the statutes applied the benefits and

⁷³ See Duerksen & Bonderman, *supra* note 62, at 2. A commentator has noted that the *Gettysburg* decision illustrates two important elements in historic preservation law: that preservation can foster a sense of community and that "a place can convey this sense of community, or . . . that visual surroundings work a political effect on our consciousness." Rose, *supra* note 61, at 483.

⁷⁴ See Duerksen & Bonderman, *supra* note 62, at 3. The Supreme Court validated such regulations in *Welch v. Swasey*, 214 U.S. 91 (1909). See text accompanying notes 10-13 *supra*. See also *Cochran v. Preston*, 108 Md. 220, 70 A. 113 (1908) (upholding maximum height restrictions).

⁷⁵ See Rose, *supra* note 61, at 484.

⁷⁶ Weidl, *supra* note 64, at 209.

⁷⁷ Major preservation efforts were undertaken by John D. Rockefeller, Jr. at Colonial Williamsburg and by Henry Ford at Greenfield Village, Michigan. See J. Pyke, *supra* note 5, at 8.

⁷⁸ Rose, *supra* note 61, at 505-06.

⁷⁹ See C. Hosmer, *supra* note 60, at 290-306; J. Morrison, *supra* note 65, at 12, 38-39, 57-58; Forman, *Historic Preservation and Urban Development Law in Louisiana*, 21 La. B.J. 197 (1973). In 1924, New Orleans enacted but did not put into effect the nation's first historic district ordinance. The Commission Council of New Orleans passed the Vieux Carre regulatory ordinance in 1937, preserving the city's Old French Quarter. See J. Morrison, *supra* note 65, at 17 n.11; Duerksen & Bonderman, *supra* note 62, at 6; Rose, *supra* note 61, at 505 n.139.

⁸⁰ See C. Hosmer, *supra* note 60, at 238-74. Charleston was the first city that actually zoned a historic district, the city's antebellum section. See Duerksen & Bonderman, *supra* note 62, at 6; Rose, *supra* note 61, at 505. Charleston's preservation regulations, enacted in 1931 as part of a new zoning ordinance, were a hybrid of district and use regulations. See J. Morrison, *supra* note 65, at 133-34 (digest of ordinance).

⁸¹ See C. Hosmer, *supra* note 60, at 275-90; J. Morrison, *supra* note 65, at 168-69; Duerksen & Bonderman, *supra* note 62, at 6. By the 1950's, however, only a few other cities had enacted preservation laws. See Duerksen & Bonderman, *supra* note 62, at 6.

⁸² Legal challenges to early preservation ordinances were usually rejected. See Duerksen & Bonderman, *supra* note 62, at 7; see, e.g., *City of New Orleans v. Impastato*, 198 La. 206, 3 So. 2d 559 (1941) (upholding the New Orleans Vieux Carre ordinance); *Opinion of the Justices*, 333 Mass. 773, 128 N.E.2d 557 (1955) (upholding state legislation creating local historic district commissions in Boston and Nantucket).

⁸³ J. Codman, *Preservation of Historic Districts by Architectural Control* 1 (American Society of Planning Officials 1956); Duerksen & Bonderman, *supra* note 62, at 6.

burdens of preservation regulations to entire neighborhoods and not to individual buildings, thereby averting claims of discrimination against individual property owners.⁸⁴ Third, because land use regulations based solely on aesthetic considerations were struck down by state courts,⁸⁵ local and state governments relied on an economic rationale, tourism, as the primary basis for the legislation.⁸⁶

2. *Historic Preservation's Prime*

The Supreme Court's 1965 decision in *Berman v. Parker*⁸⁷ strongly supported land use controls based on aesthetic considerations.⁸⁸ In approving the destruction of a building located in the District of Columbia's urban renewal area, the Court emphasized the government's power to regulate for aesthetic ends. Justice Douglas wrote for a unanimous Court in *Berman* that "[i]t 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."⁸⁹

Berman triggered the most active period in historic preservation. Many local governments enacted preservation ordinances, often without waiting for state enabling legislation.⁹⁰ State governments began playing a more active role;⁹¹ by 1964, almost every state had enacted a preservation program.⁹²

In 1965, pursuant to a state enabling act,⁹³ New York became the

⁸⁴ See *id.*

⁸⁵ See J. Morrison, *supra* note 65, at 21; Duerksen & Bonderman, *supra* note 62, at 7. The courts believed that such regulations were not proper exercises of the police power. See, e.g., *Curran Bill Posting & Distrib. Co. v. City of Denver*, 47 Colo. 221, 227, 107 P. 261, 264 (1910); *City of Passaic v. Paterson Bill Posting, Advertising & Sign Painting Co.*, 72 N.J.L. 285, 287, 62 A. 267, 268 (1905); *City of Youngstown v. Kahn Bros. Bldg. Co.*, 112 Ohio St. 654, 661-62, 148 N.E. 842, 844 (1925); *White's Appeal*, 287 Pa. 266, 134 A. 409 (1926). Representative cases are collected in 1 N. Williams, *American Planning Law: Land Use and the Police Power* §§ 11.04-.06 (1974).

⁸⁶ See Duerksen & Bonderman, *supra* note 62, at 6.

⁸⁷ 348 U.S. 26 (1954).

⁸⁸ See Duerksen & Bonderman, *supra* note 62, at 7. The Supreme Court did not settle the question of regulating for aesthetic purposes alone until its decision in *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978). See text accompanying notes 109-13 *infra*; Duerksen & Bonderman, *supra* note 62, at 4.

⁸⁹ *Berman*, 348 U.S. at 33.

⁹⁰ Duerksen & Bonderman, *supra* note 62, at 8; see also J. Morrison, *supra* note 65, at 15-17 (discussing city-adopted ordinances in general).

⁹¹ Duerksen & Bonderman, *supra* note 62, at 8.

⁹² R. Montague & T. Wrenn, *Planning for Preservation 4* (American Society of Planning Officials 1964) (reporting that 42 of 47 states responding to a survey conducted by the Kentucky Attorney General's Office had preservation programs).

⁹³ In 1965, the state of New York enacted the Historic Preservation Enabling Act of 1965, N.Y. Gen. Mun. Law § 96-a (McKinney 1977), which empowered state municipalities to protect and preserve buildings and places of "special historical or aesthetic interest or value." *Id.*

first major city to pass a comprehensive landmarks and historic districts scheme.⁹⁴ New York City enacted its preservation ordinance and established the Landmarks Preservation Commission, with the purpose of "preserving sites and districts special to the city's cultural, social, economic, political, and architectural history."⁹⁵ Designation of property as a landmark⁹⁶ or a historic district⁹⁷ imposes significant limitations on its owner's use. Before altering, reconstructing, or destroying the exterior of an existing structure, or erecting a new structure on a designated site, the landowner must obtain Commission approval.⁹⁸ The Commission will approve the request if it finds that the proposed work would not affect any exterior architectural feature, would not be inappropriate, or that the denial of the request would result in insufficient economic return.⁹⁹ The ordinance provides interested and affected people with the opportunity to comment on designation proposals and with procedures to obtain modification, disapproval, or rescission of designations.¹⁰⁰

An influential 1965 report by the United States Conference of Mayors propelled the federal government to take an active role in preservation.¹⁰¹ The report found that nearly half the buildings identified by the 1935 federal Historic American Buildings Survey had been destroyed.¹⁰² The federal government followed most of the report's detailed recom-

⁹⁴ New York, N.Y., Charter & Ad. Code Ann. vol. 2, ch. 8-A, §§ 205-1.0, 207-1.0 to -21 (Williams 1976 & Supp. 1984).

⁹⁵ The ordinance, like most local historic preservation ordinances, also was dedicated to other purposes, such as safeguarding the city's heritage, stabilizing and improving property values, fostering civic pride in past accomplishments, encouraging tourism, strengthening the city's economy, and promoting the use of preserved sites and districts for the education, pleasure, and welfare of the people of the city. *Id.* § 205-1.0(b). The law expressly prohibits the Commission from performing zoning functions such as regulating the height and bulk of buildings, the area of open spaces, the density of population, or the location of trades, industries, or buildings designed for specific uses. *Id.* § 207-3.0(a).

⁹⁶ The New York City law defines a landmark as "[a]ny improvement," meaning "any building, structure, place, work of art or other object constituting a physical betterment of real property, or any part of such betterment," *id.* § 207-1.0(i), "any part of which is thirty years old or older, which has a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state, or nation." *Id.* § 207-1.0(n).

⁹⁷ A historic district is defined as:

Any area which . . . contains improvements which: (a) have a special character or special historical or aesthetic interest or value; and (b) represent one or more periods or styles of architecture typical of one or more eras in the history of the city; and (c) cause such area, by reason of such factors, to constitute a distinct section of the city.

Id. § 207-1.0(h).

⁹⁸ *Id.* § 207-4.0(a)(1).

⁹⁹ *Id.* §§ 207-6.0, 207-8.0.

¹⁰⁰ *Id.* § 207-2.0.

¹⁰¹ The report was published the following year. United States Conference of Mayors, *With Heritage So Rich* (1966).

¹⁰² *Id.* at 205.

mentations¹⁰³ over the next fifteen years. The most important result of the report was the passage of the National Historic Preservation Act of 1966 (NHPA),¹⁰⁴ which remains the basic federal preservation statute. The NHPA established the Advisory Council on Historic Preservation¹⁰⁵ to advise the President and Congress on historic preservation and to develop preservation guidelines and policies.¹⁰⁶ It also established the National Register of Historic Places, an official listing of the nation's historic properties,¹⁰⁷ and provided for matching grants-in-aid to states and to the National Trust for Historic Preservation.¹⁰⁸

There were two major developments in historic preservation in the 1970's. First, in the most significant preservation decision to date,¹⁰⁹ *Penn Central Transportation Co. v. New York City*,¹¹⁰ the Supreme Court upheld restrictions imposed by the New York City Landmarks Law on the alteration of designated buildings.¹¹¹ In upholding the New York City Landmarks Commission's designation of Grand Central Terminal as a landmark, the Court enthusiastically endorsed municipal preservation.¹¹² The Court held explicitly that governments may exercise their police power solely on the basis of aesthetic considerations.¹¹³

Second, local, state, and federal governments began to provide benefits and direct financial assistance to developers of, and investors in, properties designated for preservation. At the local and state levels, property tax provisions are the most common incentives.¹¹⁴ In some states, owners of landmarks or properties in historic districts may be eli-

¹⁰³ Id. at 208.

¹⁰⁴ Pub. L. No. 89-665, § 1, 80 Stat. 915 (1966) (current version at 16 U.S.C. §§ 470 to 470w-6 (1982)).

¹⁰⁵ 16 U.S.C. § 470i(a) (1982).

¹⁰⁶ 16 U.S.C. § 470j(a) (1982).

¹⁰⁷ 16 U.S.C. § 470(a) (1982).

¹⁰⁸ 16 U.S.C. § 470a(d) (1982). For a description of the role of the National Trust for Historic Preservation, see J. Pyke, *supra* note 5, at 10.

¹⁰⁹ The decision remains the Supreme Court's only direct examination of the merits of historic preservation.

¹¹⁰ 438 U.S. 104 (1978).

¹¹¹ The restrictions imposed by New York's landmark preservation scheme are described in text accompanying notes 93-100 *supra*.

¹¹² For discussions of *Penn Central*'s impact on historic preservation, see sources cited in note 127 *infra*.

¹¹³ Justice Brennan pointed out that "this Court has recognized, in a number of settings, that States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city." *Penn Central*, 438 U.S. at 129 (citations omitted).

¹¹⁴ For a summary and analysis of various state property tax incentives, see Duerksen & Bonderman, *supra* note 62, at 448-56; Powers, Tax Incentives for Historic Preservation: A Survey, Case Studies and Analysis, 12 Urb. Law. 103, 104-16, 119-33 (1980); Stipe, State and Local Tax Incentives for Historic Preservation, in Tax Incentives for Historic Preservation 91 (G. Andrews rev. ed. 1981).

gible for freezes on the assessed value of their property or for property tax abatements or exemptions, whether or not they renovate the property.¹¹⁵ In other states, expenditures for renovation and other improvements of designated landmarks may result in preferential property tax treatment.¹¹⁶

At the federal level, significant preservation incentives were first introduced into the Internal Revenue Code by the Tax Reform Act of 1976.¹¹⁷ In 1978, Congress created additional incentives for the renovation and restoration of designated properties, including a modification that expanded the kinds of rehabilitation projects that qualified for investment tax credits.¹¹⁸ Finally, in 1981, Congress replaced the 1976 Act's five-year amortization and accelerated depreciation incentives with generous investment tax credits of up to twenty-five percent for certified historic structures.¹¹⁹

¹¹⁵ See Roddewig, *Preservation Law and Economics: Government Incentives to Encourage For-Profit Preservation*, in *A Handbook on Historic Preservation Law* 449 (C. Duerksen ed. 1983).

¹¹⁶ See *id.*

¹¹⁷ Pub. L. No. 94-455, § 2124, 90 Stat. 1520, 1916-19 (1976). The 1976 Act deterred demolition of designated landmarks by denying to property owners deductions for demolition expenses, Pub. L. No. 94-455, § 2124(b), 90 Stat. 1520, 1918 (1976) (codified as amended at I.R.C. § 280B (West Supp. 1985)), and accelerated depreciation for replacement structures, Pub. L. No. 94-455, § 2124(c), 90 Stat. 1520, 1918 (1976) (codified at I.R.C. § 167(n)), repealed by Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 212(d)(1), 95 Stat. 172, 239 (1981). See Duerksen & Bonderman, *supra* note 62, at 18. In addition, the Act authorized owners of historic buildings used in a trade or business or held for investment to amortize their rehabilitation expenditures over five years rather than the life of the improvements, typically twenty years. Pub. L. No. 94-455, § 2124(a), 90 Stat. 1520, 1916-18 (1976) (codified at I.R.C. § 191), repealed by Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 212(d)(1), 95 Stat. 172, 239 (1981). See Roddewig, *supra* note 115, at 461. Owners who "substantially rehabilitated historic property" could choose to use the accelerated depreciation rates available to owners or developers or new comparable construction projects. Pub. L. No. 94-455, § 2124(d), 90 Stat. 1520, 1918-19 (1976) (codified at I.R.C. § 167(o)), repealed by Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 212(d)(1), 95 Stat. 172, 239 (1981). See Roddewig, *supra* note 115, at 461. Thus, for example, a developer who rehabilitated an apartment building in a historic district could use a more accelerated form of depreciation than an owner of a used residential building not located in a historic district. See *id.* at 461. The effectiveness of the 1976 provisions is evaluated in *id.* at 461-64.

¹¹⁸ Revenue Act of 1978, Pub. L. No. 95-600, § 315(b), 92 Stat. 2763, 2828-29 (1978) (codified as amended at I.R.C. § 48(g) (West 1984 & Supp. 1985)); see Roddewig, *supra* note 115, at 464. Although the 1978 Act permitted the taxpayer to use the investment tax credit in combination with accelerated depreciation, it prohibited the taxpayer from using the credit in combination with five-year amortization. See Roddewig, *supra* note 115, at 464. The significance of the investment tax credits and the other 1978 provisions is discussed in *id.* at 464-66.

¹¹⁹ Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 212(a), 95 Stat. 172, 235-36 (1981) (codified as amended at I.R.C. §§ 46, 48 (West 1984 & Supp. 1985)); see Roddewig, *supra* note 115, at 467. In contrast, thirty- and forty-year-old buildings, as defined in I.R.C. §§ 46(b)(4)(C), 48(g)(1) (West 1984 & Supp. 1985), are eligible for investment tax credits of only 15% and 20%, respectively. If an investment tax credit is allowed under § 46, the depreciable basis of the property is reduced by only one-half of the amount of the credit, rather than

The twenty-five percent credit is the most beneficial tax treatment available for real estate investment under federal law.¹²⁰ According to a recent study, over eighty percent of the property owners using the twenty-five percent credit said that it was an important factor in their decision to preserve a historic building.¹²¹ Since the tax credit was instituted in 1981, the number of rehabilitation projects stimulated by these incentives has risen dramatically.¹²²

Local, state, and federal governments have also established a variety of financing programs to facilitate preservation in the private sector. The largest of these initiatives, the Urban Development Action Grant (UDAG) program,¹²³ combines federal subsidies with private investment.¹²⁴ Other financial incentives provided by governments include subsidies for the purchase of unrenovated historic properties, reductions in interest rates for construction loans and mortgages, and reduced property taxes.¹²⁵

II

THE ADVERSE EFFECTS OF HISTORIC DISTRICTING

These numerous tax and other financial incentives, in combination

by the full amount of the credit, as is generally the case, see I.R.C. § 48(g)(1), (3) (West 1984 & Supp. 1985). Thus, owners of historic properties are able to depreciate 87.5% of their rehabilitation expenditures on historic structures, in addition to receiving the 25% investment tax credit. One commentator noted that the Tax Reform Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (1984), retained most of the 1981 Act's tax incentives for historic rehabilitation projects. See Seal, *Old Buildings Attract New Investment Money*, Nat'l L.J., Oct. 22, 1984, at 42, col. 1.

¹²⁰ See National Trust for Historic Preservation, Information Sheet No. 30, *Federal Tax Incentives for the Rehabilitation of Historic Buildings* 7 (1984). As the National Trust has noted, "[t]he margin of incentive for certified historic structures over other rehabilitations is substantial because of the additional five percent credit, the requirement of only a half adjustment to basis and the availability of the credit for income-producing residential projects." *Id.*

¹²¹ See Nolon, *Using Tax Credits to Save Historic Buildings: An Update*, Planning, Jan. 1984, at 24.

¹²² See *id.* at 24-26. According to the National Park Service, 2600 properties, representing a private investment of \$2.16 billion, were certified for the credit in 1983. This was an increase of 43% over 1982 and 87% over 1981. See *id.* at 26.

¹²³ See 42 U.S.C. § 5318 (1982).

¹²⁴ See United States Dep't of Hous. & Urban Dev., *Urban Development Action Grant Program: Second Annual Report* 1 (1980); see also Dworsky, McVarish, Perry & Robinson, *Federal Law, in A Handbook on Historic Preservation Law* 324-26 (C. Duerksen ed. 1983); Roddewig, *supra* note 115, at 499-500. The UDAG program is discussed in greater detail at text accompanying notes 264-65 *infra*.

¹²⁵ See Roddewig, *supra* note 115, at 508-13; see generally D. Listokon, *Landmarks Preservation and the Property Tax* (1982); National Trust for Historic Preservation, *Changes in Federal Tax Incentives for Historic Preservation* (1982); National Trust for Historic Preservation, *Summary of Preservation Tax Incentives and the Economic Recovery Tax Act of 1981* (1981); J. Reynolds, *Historic Properties: Preservation and the Valuation Process* (1982); Coughlin, *Preservation Easements: Statutory and Tax Planning Issues*, 1 *Preservation L. Rep.* 2011 (1982).

with the legal principles established in *Berman* and strengthened in *Penn Central*,¹²⁶ have created an atmosphere conducive to preservation activity.¹²⁷ Historic preservation contributes to the general welfare of the community, offers educational and cultural opportunities for the public, and enhances the general economic environment within a municipality by encouraging tourism and neighborhood reinvestment.¹²⁸

Especially in the form of historic districting, however, historic preservation can have undesirable consequences that outweigh its positive contributions. Historic districting may displace and exclude minorities and the poor from urban neighborhoods.

A. Why Focus on Historic Districting?

Historic preservation law encompasses the regulation of both individual landmarks and historic districts. Although these two types of regulations involve similar review procedures for designation and permits, three features unique to historic districting make it more likely to displace and exclude minorities and the poor.¹²⁹

First, historic district regulations have a greater effect on urban neighborhoods. In contrast to the limited impact designation of one landmark has on a neighborhood,¹³⁰ a district designation in effect confers landmark status on every building within its boundaries.¹³¹ Historic districting therefore enables a preservation commission to control the development of an entire neighborhood, much as zoning laws enable a suburban planning board to direct the development of a municipality.¹³²

Second, district designation, unlike landmark designation, typically

¹²⁶ See text accompanying notes 109-13 *supra*.

¹²⁷ For a discussion of *Penn Central*'s impact on historic preservation, see Hershman, Critical Legal Issues in Historic Preservation, 12 Urb. Law. 19 (1980); Scott, Alas in Wonderland: The Impact of *Penn Central v. New York City* Upon Historic Preservation Law and Policy, 7 B.C. Envtl. Aff. L. Rev. 317 (1978); Siedl, Landmarks Preservation After *Penn Central*, 17 Real Prop., Prob. & Trust J. 340 (1982). For a discussion of the impact of tax and financial incentives, see Holubowich, Landmark Preservation: Battleground for the 80's, 68 A.B.A. J. 19 (Jan. 1982); Schulman, The Certified Historic Structure: An Aid to Neighborhood Conservation and Low Income Housing, 14 Urb. Law. 765 (1982).

¹²⁸ See *Bohannon v. City of San Diego*, 30 Cal. App. 3d 416, 422, 106 Cal. Rptr. 333, 336-37 (Ct. App. 1973); *City of New Orleans v. Pergament*, 198 La. 852, 858, 5 So. 2d 129, 131 (1941); Opinion of the Justices, 333 Mass. 773, 778-81, 128 N.E.2d 557, 561-62 (1955); *City of Santa Fe v. Gamble-Skogmo, Inc.*, 73 N.M. 410, 414-15, 389 P.2d 13, 17-18 (1964).

¹²⁹ See text accompanying notes 139-221 *infra*.

¹³⁰ Individual landmarks may have some general effect on a community. See K. Lynch, *The Image of the City* 2-3, 9-10, 78-86 (1960) (examining the contribution of singular landmarks to a city's "legibility" or "imageability"); Rose, *supra* note 61, at 497 ("A landmark does . . . help foster community cohesion.").

¹³¹ See N.Y. Times, May 20, 1981, at 1, col. 5; see also J. Pyke, *supra* note 5, at 12.

¹³² See Spatt, Letter to the Editor, N.Y. Times, July 8, 1980, at 16, col. 4.

is not hindered by conflict among neighborhood residents.¹³³ Unlike landmark regulations, which burden only landmark owners, the strict controls imposed by historic district regulations benefit and burden all district landowners in an essentially comparable manner.¹³⁴ Because property owners know that change in the neighborhood can be controlled by subjecting all property owners to similar restrictions, they often initiate district designation. In contrast, landmark owners usually contest landmark designation, generating conflicts with community residents, who often favor the designation.¹³⁵

Third, under the broad standards of most preservation ordinances, **virtually any neighborhood can be designated a historic district.**¹³⁶ To support a finding that a district is historic, the designating authority can refer to an entire neighborhood, not just to a single structure. Indeed, a historic district need not contain a single landmark building, as long as the designating authority finds some historic, aesthetic, or architectural significance to the area as a whole.¹³⁷ In effect, any district is historic if it "is, in some fashion or another, not run-of-the-mill."¹³⁸

B. Districting and Displacement

Historic districts are often old residential areas of cities occupied primarily by poor and minority residents.¹³⁹ **District designation attracts**

¹³³ See Rose, *supra* note 61, at 504. For a brief discussion of an instance in which the possible designation of a landmark raised exclusionary concerns, see note 215 *infra*.

¹³⁴ Rose, *supra* note 61, at 504.

¹³⁵ Interview with Frank Gilbert, General Counsel, National Trust for Historic Preservation, in Washington, D.C. (Nov. 8, 1983); Interview with Marjorie Pearson, Research Director, New York City Landmarks Preservation Commission, in New York City (Nov. 3, 1983).

¹³⁶ See Costonis, *Law and Aesthetics: A Critique and a Reformulation of the Dilemmas*, 80 Mich. L. Rev. 355, 364 (1982).

¹³⁷ Under the New York City Landmarks Law, for example, a "historic district" is any area containing improvements that

have a special character or special historical or aesthetic interest or value; and represent one or more periods or styles of architecture typical of one or more eras in the history of the city; and cause such area, by reason of such factors, to constitute a distinct section of the city.

New York, N.Y., Charter & Ad. Code Ann. ch. 8-A, § 207-1.0(h) (Williams 1976 & Supp. 1984).

¹³⁸ C. Weaver & R. Babcock, *supra* note 3, at 35. Norman Williams adds:

To the extent that a designation for historic preservation becomes a symbol of prestige, it is likely to be sought by and on behalf of all sorts of neighborhoods/communities with no historic value whatsoever—in which case it becomes not much more than a vehicle for local real estate promotion.

3 N. Williams, *American Planning Law: Land Use And The Police Power* 191 (Supp. 1984).

¹³⁹ See *The Effect on the Poor and Minorities*, in *Readings in Historic Preservation* 291 (N. Williams, E. Kellogg & F. Gilbert eds. 1983). The editors note that these areas are often run down and in need of substantial repairs, historically valuable, and occupied by minority residents. These factors combine to displace residents, unless care is taken to avoid this result. *Id.* Statistics compiled by the Annual Housing Survey indicate that "the median income of house-

developers and investors to these neighborhoods. Competition among those interested in profiting from designation inflates property prices, thereby initiating or accelerating the process of "gentrification."¹⁴⁰

Gentrification in the cities exacerbates an already severe national housing shortage that most harshly affects minorities and the poor. Two recent presidential commissions have addressed the state of the nation's housing. The 1982 Presidential Commission on Housing found that roughly 1.1 million low-income renters had inadequate housing and spent an inordinate portion of their income—over thirty percent—for rent.¹⁴¹ The Commission found that most of these renters were minorities, particularly blacks, and lived in older, larger cities.¹⁴² Three years earlier, the National Commission on Neighborhoods also identified the national housing problem: "For the low and moderate income family, their housing stock is shrinking while their housing costs are increasing."¹⁴³

The Commission on Neighborhoods believed, moreover, that the surge in neighborhood preservation exacerbated housing problems. Despite its "important and proper role,"¹⁴⁴ neighborhood preservation "initiates a process known as 'gentrification,' which displaces the elderly, blue-collar workers, and the unemployed in favor of professionals and white-collar workers."¹⁴⁵ A handbook on fighting displacement emphasized that "historic preservation laws are far more protective of buildings

holds living in older units in [sic] lower than the median for all households." National Trust for Historic Preservation, *The Economic and Social Benefits of Historic Preservation IV-5* (Aug. 1982) (citing the Annual Housing Survey) (on file at New York University Law Review) [hereinafter *Economic and Social Benefits*]. See also *id.*, Table IV-4, at IV-14 (financial characteristics of households living in older housing units).

¹⁴⁰ See *People, Building Neighborhoods*, *supra* note 38, at 12. The term "gentrification," first used by the British, refers to the influx to urban areas of the modern-day counterparts of the landed gentry. The National Commission on Neighborhoods explained the gentrification process and its effects:

As City Hall makes overdue physical improvements, as banks free up mortgage money for a formerly redlined neighborhood, as insurance companies write homeowners' policies in that neighborhood, the prime beneficiaries are often real-estate developers who renovate deteriorated housing units for new middle and upper middle class residents. . . . [R]esidents can no longer afford to remain in their own neighborhood. They are displaced to another deteriorating section of the city.

People, Building Neighborhoods, *supra* note 38, at 12. One observer describes the process by comparing neighborhoods to wine bottles: "the poorer, working-class populations are 'decanted' and the historic container is filled with a new, upper-class population." J. Fitch, *Historic Preservation* 66 (1982).

¹⁴¹ President's Commission on Housing, *The Report of the President's Commission on Housing* xxiv (1982) [hereinafter *Housing Report*].

¹⁴² *Id.* at 7-9.

¹⁴³ *People, Building Neighborhoods*, *supra* note 38, at 261.

¹⁴⁴ *Id.* at 11.

¹⁴⁵ *Id.* "This commission would consider neighborhood redevelopment worse than a failure if bricks and mortar were revitalized at the expense of the people in the neighborhoods." *Id.* at

than of the tenants inside them" and that "efforts to conserve our historical heritage may wind up imposing severe displacement costs on the lower-income people to whom these buildings have 'trickled down.'"¹⁴⁶ Thus, the displaced¹⁴⁷ minorities and poor are the casualties of the reverse migration of the affluent back to the cities.

Designation of older, economically depressed urban neighborhoods as historic districts can revitalize those communities or accelerate neighborhood revitalization begun before designation.¹⁴⁸ Revitalization is spurred by the tangible and intangible economic benefits that accompany district designation. As discussed above, local, state, and federal governments provide tangible economic incentives in the forms of property tax benefits, income tax benefits, and financial assistance.¹⁴⁹ These tangible benefits also create greater awareness in cities for the potential of revitalization.¹⁵⁰

Intangible economic benefits of district designation also help to create a favorable climate for investment.¹⁵¹ The architectural controls imposed by district designation assure investors, developers, rehabilitators, and residents that alterations and new construction in the district will follow strictly enforced architectural patterns.¹⁵² Uses of property and architectural styles that might alter the character of the neighborhood typically are restricted or prohibited.¹⁵³ By calling attention to the un-

12. See also *id.* at 289-91 ("In most instances to date, [historic preservation] has contributed to the displacement problem.").

¹⁴⁶ C. Hartman, D. Keating & R. LeGates, *Displacement: How to Fight It* 162 (1982) [hereinafter *Displacement*].

¹⁴⁷ The broad definition of displacement advocated by George and Eunice Grier has been widely accepted:

Displacement occurs when any household is forced to move from its residence by conditions which affect the dwelling or its immediate surroundings and which: 1. are beyond the household's reasonable ability to control or prevent; 2. occur despite the household's having met all previously-imposed conditions of occupancy; and 3. made continued occupancy by that household impossible, hazardous, or unaffordable.

G. Grier & E. Grier, *Urban Displacement—A Reconnaissance* 10-11 (1978).

¹⁴⁸ See Advisory Council on Historic Preservation, *The Contribution of Historic Preservation to Urban Revitalization* 1, 18 (1979) [hereinafter *Advisory Council*]; Rose, *supra* note 61, at 512-13; see generally *Economic and Social Benefits*, *supra* note 139, at IV-1 to -15, IV-39 to -48.

¹⁴⁹ See text accompanying notes 114-25 *supra*.

¹⁵⁰ M. Schill & R. Nathan, *Revitalizing American Cities: Neighborhood Reinvestment and Displacement* 25 (1983) (citing a recent Heritage Conservation and Recreation Service survey).

¹⁵¹ See *id.* (revitalization of inner-city historic neighborhoods results as much from cultural or emotional as from economic incentives).

¹⁵² See Rose, *supra* note 61, at 508-12.

¹⁵³ Chapman, *The Growing Public Stake in Urban Conservation*, in *Economic Benefits of Preserving Old Buildings* 10 (National Trust for Historic Preservation, 1976). This drive for uniformity concerns one commentator, who argues that "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." Rose, *supra* note 61, at 509.

derlying qualities of the buildings in the area and the general character of the neighborhood, district designation signals that a neighborhood is safe for investment.¹⁵⁴

Several recent studies have documented the ability of historic districting to help revitalize urban neighborhoods. A study of the effects of historic districting in twenty-six cities conducted for the Urban Institute concluded:

[I]n many cases, designation did help to create a more favorable climate for investment. The "aesthetic value" of historic designation may, to some extent, stimulate the interest of existing property owners in rehabilitating their structures. And it appears that designation often serves to direct the attention of outsiders, looking for an old home in the city, to the designated area.¹⁵⁵

A study conducted for the Advisory Council of Historic Preservation found that each of the four urban historic districts examined experienced significant revitalization after designation.¹⁵⁶ The study concluded that "[h]istoric preservation activity in urban historic districts has contributed significantly to the revitalization of those districts and [has] encouraged a return-to-the-city movement."¹⁵⁷ In each district, the revitalization process began as preservation-related activity,¹⁵⁸ which attracted "middle and upper income families and individuals" to the neighborhoods.¹⁵⁹

Neighborhoods in several cities, including Washington, D.C.,¹⁶⁰ San Francisco,¹⁶¹ Atlanta,¹⁶² and Boston,¹⁶³ as well as neighborhoods in Cin-

¹⁵⁴ D. Swift, *An Evaluation of the Local Use of Historic Districts to Stimulate Housing Rehabilitation* 70 (1979) (draft) (available at the Urban Institute, Washington, D.C.).

¹⁵⁵ *Id.*

¹⁵⁶ Advisory Council, *supra* note 148, at 4. The Advisory Council examined Old Town in Alexandria, the Strand in Galveston, the Savannah Historic District, and Pioneer Square in Seattle.

¹⁵⁷ *Id.* at 1.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 15.

¹⁶⁰ See Gale, *Middle Class Resettlement in Older Urban Neighborhoods: The Evidence and the Implications*, 45 J. Am. Plan. A. 293, 297-301 (1979) (discussing revitalization in Mount Pleasant and Capitol Hill); Newsom, *Blacks and Historic Preservation*, 36 Law & Contemp. Probs. 423, 423-26 (1971) (discussing revitalization in Georgetown and the resulting displacement of a large black community).

¹⁶¹ See National Institute for Advanced Studies, *Market-Generated Displacement: A Single City Case Study* (1980).

¹⁶² See J. Franklin, *Back to the City: Case Studies of Neighborhood Revitalization in Eight Major Metropolitan Areas* (1977).

¹⁶³ See J. Gordon, *Neighborhood Change in Jamaica Plain: A Case Study of the Revitalization Process* (1981); Auger, *The Politics of Revitalization in Gentrifying Neighborhoods: The Case of Boston's South End*, 45 J. Am. Plan. A. 515 (1979); 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).

cinnati,¹⁶⁴ Brooklyn,¹⁶⁵ and Seattle¹⁶⁶ have all experienced revitalization after district designation. In Seattle, the establishment of the Pioneer Square Historic District spurred extensive private redevelopment of buildings¹⁶⁷ and attracted thousands of additional visitors to the area.¹⁶⁸ A study of the Park Slope Historic District in Brooklyn found that "the intangible or subjective benefits of historic designation appear to be real."¹⁶⁹

District designation, which helps to revitalize urban neighborhoods, may also result in a decrease in the housing supply and an increase in housing costs. As a result of rehabilitation activities, historic districts lose significant amounts of housing,¹⁷⁰ as much as one-third to one-half of their housing stock.¹⁷¹ The demand for housing in historic districts

¹⁶⁴ See K. Costello, *An Analysis and Evaluation of Local Preservation Efforts in Cincinnati, Ohio: The Dayton Street Historic District* (1982) (unpublished thesis) (available at National Trust for Historic Preservation); P. Myers & G. Binder, *Neighborhood Conservation: Lessons from Three Cities* 11-30 (1977).

¹⁶⁵ See Raymond, Parish, Pine & Weiner, Inc., *The Impacts of Historic District Designation* (1977) (available at the New York Landmarks Conservancy). This study analyzed the effects of district designation on the Park Slope area near Prospect Park in Brooklyn, New York. The study concluded that "historic district designation has a useful role to play in drawing a community together, attracting new families, promoting stability, and creating a sense of pride." *Id.* at 104. But see Dowd, *Park Slope—New Faces, New Shops and New Worries Over Its Growth*, N.Y. Times, May 7, 1984, at B1, col. 1.

¹⁶⁶ See Advisory Council, *supra* note 148, at D-17 to -43. Prior to district designation in 1970, preservation activity in Seattle's Pioneer Square was highly "speculative." *Id.* at D-17. After designation, "the scope of the restoration activity broadened considerably and the City became more actively involved." *Id.* at D-19. See also Uhlman, *Economics Aside, in Economic Benefits of Preserving Old Buildings* 5-31 (National Trust for Historic Preservation, 1976).

¹⁶⁷ See Advisory Council, *supra* note 148, at D-21, D-30.

¹⁶⁸ *Id.* at D-26 to -27; Chapman, *supra* note 153, at 9. Chapman asserted that "it is hard to imagine any federally financed renewal plan that could have revived the area as quickly as historic preservation techniques did." *Id.* at 11.

¹⁶⁹ Raymond, Parish, Pine & Weiner, Inc., *supra* note 165, at 104. This study found that "[a]ny attempt to ascribe a simple, quantifiable economic effect to . . . historic district designation appears doomed to failure," *id.* at 95, but "[f]rom the point of view of residents within or adjacent to the district, the designation is clearly perceived as having . . . benefits," including stabilization, increased property values, and the attraction of new residents. *Id.* at 100 (emphasis in original).

¹⁷⁰ See Advisory Council, *supra* note 148, attachments A-9, B-7, C-8, D-7 (tables detailing the change in the housing supply from 1960 to 1970 after designation in four historic districts); see also *Economic and Social Benefits*, *supra* note 139, at IV-2, IV-6. The Advisory Council study found that although the overall housing stock decreased in the four districts, in three of those four districts the "supply of convenient, sound downtown housing had been augmented." Advisory Council, *supra* note 148, at 20.

¹⁷¹ See Advisory Council, *supra* note 148, attachment B-7 (over one-third reduction in housing stock in the Strand Historic District, Galveston, from 1960 to 1970), attachment C-8 (approximately one-third reduction in housing stock in Savannah Historic District from 1960 to 1970), attachment D-7 (over one-half reduction in housing in Pioneer Square Historic District, Seattle, from 1960 to 1970). But see *Economic and Social Benefits*, *supra* note 139, at IV-6, table IV-5 (58% increase in housing stock in Society Hill, Philadelphia, from 1960 to 1970).

also increases,¹⁷² causing property values to increase significantly.¹⁷³

The displacement of the many renters who inhabit historic districts is the most common hardship imposed by revitalization.¹⁷⁴ Landlords may evict their tenants directly or may sell their buildings to people who will convert them to single-family use.¹⁷⁵ Additionally, rehabilitation may lead to steep rent increases, which in turn may force low-income tenants to leave their homes.¹⁷⁶ As one report makes clear, "[r]enters are much more vulnerable to uncompensated displacement than owner-occupants since rent can rise a percentage of income faster than property taxes."¹⁷⁷

Low-income homeowners, who ordinarily constitute a small percentage of district residents,¹⁷⁸ may also be displaced by gentrification.¹⁷⁹ Although homeowners are not subject to eviction, many may be unable to pay the higher property taxes that result from reinvestment¹⁸⁰ and the cost of the repairs that are required by the preservation code.¹⁸¹ Some homeowners may also leave the neighborhood because of high offers from buyers. The departure of renters and homeowners, involuntarily or voluntarily, transforms low-income and minority neighborhoods into

¹⁷² One study found that "the market demand for good, varied, convenient, urban housing" has been strong in each of the four historic districts surveyed. Advisory Council, *supra* note 148, at 20.

¹⁷³ *Id.* at 10. The appraised value of sample properties rose from 11.4% to 34.4% annually in the four historic districts studied by the Advisory Council. *Id.* at 11, exhibit 3. The study noted that "[s]ignificant increases in the real estate value of renovated properties in the historic districts have occurred [that] reflect a direct link between location in a historic district . . . and a higher value." *Id.* at 10.

¹⁷⁴ M. Schill & R. Nathan, *supra* note 150, at 48. From two-thirds to all of the housing units located in the districts studied by the Advisory Council were renter occupied. See Advisory Council, *supra* note 148, at A-9, B-7, C-8, D-7.

¹⁷⁵ See M. Schill & R. Nathan, *supra* note 150, at 48.

¹⁷⁶ See Economic and Social Benefits, *supra* note 139, at IV-5, IV-6. Tenants on fixed or limited incomes usually cannot afford a substantial rent increase. M. Schill & R. Nathan, *supra* note 150, at 48. Low-income interest groups have expressed their concern for the displacement of renters, see Rose, *supra* note 61, at 513-14, and the Department of Housing and Urban Development has recommended that steps be taken to minimize the displacement of people in connection with federally assisted activities, Displacement Potential to be Considered in All HUD Funding Decisions, [1979] 7 Hous. & Dev. Rep. (BNA) 541.

¹⁷⁷ Economic and Social Benefits, *supra* note 139, at IV-6. The report added that "[t]he elderly are also more likely to be adversely affected by higher rents and dislocation since many live on fixed incomes and rely on neighbors to help them with shopping and errands." *Id.*

¹⁷⁸ See note 174 *supra*.

¹⁷⁹ See People, Building Neighborhoods, *supra* note 38, at 12; R. Montague & T. Wrenn, *supra* note 92, at 13; Rose, *supra* note 61, at 514.

¹⁸⁰ See People, Building Neighborhoods, *supra* note 38, at 12; Rose, *supra* note 61, at 514. When high-income individuals rehabilitate homes in deteriorated neighborhoods, property values rise. When the city reassesses the property values, higher property taxes result. See M. Schill & R. Nathan, *supra* note 150, at 47.

¹⁸¹ See M. Schill & R. Nathan, *supra* note 150, at 47 ("owner-occupants are also affected by an increased strictness in code enforcement"); Rose, *supra* note 61, at 514.

"someone else's 'turf.'" ¹⁸²

Various studies connect displacement of the poor and minorities with district designation.¹⁸³ One study found that displacement had occurred in the four districts examined.¹⁸⁴ Each district was a poor neighborhood with overcrowded housing conditions.¹⁸⁵ After designation, each district lost a significant number of housing units,¹⁸⁶ and real estate values rose sharply.¹⁸⁷ For example, property values in portions of the Strand Historic District in Galveston increased an average of 84.9% in the first three years of rehabilitation activity.¹⁸⁸ Before designation, Alexandria's Old Town contained predominantly working-class residents. Historic preservation activities, however, caused a revitalization that brought expensive homes, fashionable shops, and an affluent, homogeneous resident population.¹⁸⁹ As property values rose, speculation increased and poor and minority residents were displaced from the historic district and from areas immediately outside the district.¹⁹⁰

Individual case studies of historic districts in Washington, D.C., San Francisco, Atlanta, Boston, Cincinnati, and Brooklyn revealed that significant demographic changes coincided with residential rehabilitation and rising property values.¹⁹¹ The Park Slope study, for example, found that revitalization contributed to the displacement of low-income residents.¹⁹² In a study of sixty-five urban neighborhoods undergoing rehabilitation in 1976-1977, the National Urban Coalition found that fifty percent of the neighborhoods experienced a decrease in the number of

¹⁸² M. Schill & R. Nathan, *supra* note 150, at 47.

¹⁸³ According to several social scientists, "[d]isplacement is the most difficult aspect of revitalization to examine systematically." Sumka, *Neighborhood Revitalization and Displacement: A Review of the Evidence*, 45 J. Am. Plan. A. 480, 483 (1979); see also M. Schill & R. Nathan, *supra* note 150, at 53.

¹⁸⁴ Although the study recognized the problem of displacement, it found that more study was required before preservation could be linked "per se with social displacement." Advisory Council, *supra* note 148, at 15.

¹⁸⁵ *Id.* at 4, 24.

¹⁸⁶ See note 171 *supra*.

¹⁸⁷ See note 173 *supra*.

¹⁸⁸ Advisory Council, *supra* note 148, at B-29, exhibit B-5; see also *id.* at B-26 to -27.

¹⁸⁹ *Id.* at 15; see also *id.* at A-9 to -10.

¹⁹⁰ See *id.* at 15. The study also found:

All of the historic districts had both a concentration of low-income individuals and blighted properties prior to historic preservation activities. Today, the deteriorating buildings have been renovated or plans have been made for their revitalization. Unfortunately, poverty has not been as easy to eliminate as decay to a building. What has occurred, however, is that the pockets of poverty that were once concentrated in the historic district areas have mainly been diluted and spread into other areas.

Id. at 24.

¹⁹¹ Economic and Social Benefits, *supra* note 139, at IV-6.

¹⁹² See Raymond, Parish, Pine & Weiner, Inc., *supra* note 165, at 97.

minority residents.¹⁹³ The National Commission on Neighborhoods also recognized the displacement associated with historic districting.¹⁹⁴ It found that historic district restoration "has often come at the expense of low and moderate income residents of those newly discovered historic neighborhoods, many of whom have been displaced by more affluent homeowners."¹⁹⁵

Preservationists generally deny that historic districting causes low-income and minority residents to be ousted from their neighborhoods.¹⁹⁶ They argue that districting is a result, not a cause, of gentrification.¹⁹⁷ This claim, however, conflicts with preservationists' boasts that districting revitalizes urban neighborhoods.¹⁹⁸ Moreover, even if district designation follows revitalization, it can still be used to preserve the status quo and to exclude the poor and minorities.

C. Districting and Exclusion

The current reverse migration of the affluent from the suburbs to the cities has created distinctive urban land use conflicts.¹⁹⁹ The new urban residents fear that rapid, uncontrolled growth will spoil their neighborhoods,²⁰⁰ much as new development threatened to transform suburban neighborhoods in the 1950's and 1960's.²⁰¹ Thus, like their suburban

¹⁹³ National Urban Coalition, *Displacement: City Neighborhoods in Transition* 36 (1978).

¹⁹⁴ See People, *Building Neighborhoods*, supra note 38, at 290 ("In most instances to date, [historic preservation] has contributed to the displacement problem.").

¹⁹⁵ Id. at 191 (referring to historic districting encouraged by tax incentives).

¹⁹⁶ See Benenson, *Historic Preservation*, 1984 Editorial Research Rep. 105, 121 (quoting Mary Means of the National Trust as saying, "I'm getting tired of preservation taking it on the nose as the great displacer"); Rose, supra note 61, at 514.

¹⁹⁷ See Raymond, Parish, Pine & Weiner, Inc., supra note 165, at 97 ("changing social composition brought about the historic designation"); Rose, supra note 61, at 514.

¹⁹⁸ For studies supporting the use of districting for neighborhood revitalization, see generally *Economic and Social Benefits*, supra note 139, at IV-1 to -7; R. Montague & T. Wrenn, supra note 92, at 8-15. As one commentator stated:

[W]hether one landmark or an entire district of buildings is preserved, the community can realize significant dollars-and-cents benefits. Its treasured old buildings are rehabilitated and its neighborhoods revitalized. As a neighborhood becomes a more attractive place to live or work, property values and tax revenues increase. . . . From the point of view of the city and the citizen, preservation can make a great deal of economic sense.

J. Pyke, supra note 5, at 4-5.

¹⁹⁹ See C. Weaver & R. Babcock, supra note 3, at 29-52. The authors observe that "the new demand for in-city living is moving only half a step ahead of the new interest in urban zoning." Id. at 52.

²⁰⁰ See id. at 38.

²⁰¹ Those who arrive first create an environment that is pleasing to themselves and immediately march on city hall to have that pattern of development cast into the permanent stone of the zoning ordinance. In this respect, the rediscoverers of the city are no different than their predecessors, that intrepid band which, two or three decades before, set out to settle the suburbs and to produce a generation that is now flirting with a return to the cities.

counterparts, some urban neighborhoods have responded to pressures from outsiders who seek to enter their community by exhibiting a "country club" attitude.²⁰² By using land use controls to upgrade their "membership" requirements, the residents hope to maintain their already vital urban communities.²⁰³

Zoning, however, is an ineffective tool to shield urban neighborhoods from the changes associated with explosive growth.²⁰⁴ Suburban zoning devices such as large lot zoning or prohibitions on apartment buildings are generally impractical in cities. Moreover, unlike suburban municipalities, urban neighborhoods do not enact their own zoning ordinances. Urban neighborhoods are regulated by city planning authorities who, anxious to attract new businesses and residents to the city, resist growth controls.²⁰⁵

Urban residents exercise greater control over the composition of their neighborhood by using historic district regulations.²⁰⁶ District

Id. at 37.

²⁰² See E. Bergman, *supra* note 33, at 5 ("As the community level became the area of concern, communities began to exhibit a 'country club' approach to decisions about the nature and pace of their membership expansion. When pressures to join increased, communities dramatically upgraded their membership requirements by rezoning residential uses to larger and larger lot sizes."); cf. C. Weaver & R. Babcock, *supra* note 3, at 5 ("In cities, as everywhere else, the importance of zoning is most clearly recognized by those citizens who view it as an understandable, workable, and controllable device for protecting their homes and neighborhoods from whatever they define as a deteriorating influence."). At issue is whether we want our cities to mirror our suburbs. One philosopher drew the comparison:

As if orchestrated by a master plan, suburbanization produced carefully differentiated enclaves. . . . This left society so divided by socioeconomic factors and political jurisdictions that we were morally and politically handicapped in responding to the forces of social change that confronted all cities in the 1960s. . . .

There is a genuine danger that the current back-to-the-city movement will merely reproduce that error. It could happen that the ideal suburb, as understood a generation ago, and the ideal restored urban neighborhood in 1980 will have two things in common: isolation and sterility. What a hollow victory it will be if preservation succeeds in restoring everything about our cities except their livingness.

French, *On Preserving America: Some Philosophical Observations*, in *Preservation: Toward an Ethic in the 1980s* 190 (1980).

²⁰³ See C. Weaver & R. Babcock, *supra* note 3, at 37-38, 52.

²⁰⁴ According to Weaver and Babcock, zoning can more easily prevent change in suburban than in urban settings. "Prevention of change [by zoning] may well be easy in a suburban community where most of the development is new and nearly all of it monolithic. Neither of those factors is present in the average city neighborhood." Id. at 29.

²⁰⁵ See id. at 40-41 (discussing opposition of city officials to "downzoning," which is rezoning for less intensive and varied uses than previously permitted).

²⁰⁶ See R. Nelson, *supra* note 44, at 20 ("The beginnings of a response to demands for greater collective control and discretion over neighborhood quality can be seen in a rapidly spreading use of historic-district regulation."); Benenson, *supra* note 196, at 110-11 ("[P]reservation is now regarded as a legitimate and, in many cities, a key element in urban planning."). District designation is, among other things, "a convenient way of drawing a line around an area and saying that is somehow different than the squalor across the back alley." C. Weaver & R. Babcock, *supra* note 3, at 35.

designation imposes new costs on residents and heavily restricts further change in the neighborhood.²⁰⁷ The result is often to exclude low-income housing and therefore to exclude or displace poor and minority individuals. Historic districting frequently serves the same function in cities that exclusionary zoning serves in the suburbs.²⁰⁸ By controlling development, districting permits urban neighborhoods to perpetuate and in some instances to aggravate patterns of class and racial segregation.²⁰⁹

Residents of urban neighborhoods look to the historic preservation commission to play a planning role; they view district designation as a substitute for zoning or as a corrective for what they regard as zoning's failures.²¹⁰ Most preservation commissions, however, are explicitly denied the power to perform zoning functions. Historic preservation commissions are authorized to protect landmarks and historic districts, not to address general concerns about density, height, and use.²¹¹ A former chairperson of the New York City Landmarks Preservation Commission has warned against the efforts of residents to seek historic designation for inappropriate reasons:

²⁰⁷ See text accompanying notes 151-54 and 170-73 *supra*.

²⁰⁸ See *People, Building Neighborhoods*, *supra* note 38, at 55, 191, 197; *Displacement*, *supra* note 146, at 162, 164.

²⁰⁹ Preservationists have expressed concern for "the prospect of a 'Johannesburgization' of major American cities—i.e., the young, wealthy, white professionals in the central city surrounded by suburbanized minorities." National Trust for Historic Preservation, *Preservation: Toward an Ethic in the 1980s* 194 (1980) [hereinafter *Preservation: Toward an Ethic*] (from comments made at the National Trust 1979 Annual Meeting and Preservation Conference).

Norman Marcus, counsel to the New York City Department of City Planning, discussed the use of historic preservation laws to maintain patterns of neighborhood segregation in the cities:

The passing of the conventional wisdom torch from urban renewal . . . to landmark preservation gave impetus and a certain legitimacy to the gentrification phenomenon even though its consequences were often direct displacement of low- and moderate-income families and jobs. Gentrification, in turn, sharpened a perception of the cities as divided into areas of "halves" [sic] and "have nots"; the gentrifying of better areas got even better, but the areas where the private sector was disinvesting continued to decline. Marcus, *Zoning Exactions Employed to Solve Housing Problems*, N.Y.L.J., Oct. 5, 1983, at 6, col. 2.

Both the 1979 and the 1982 presidential reports emphasized the need for state and federal governments to fully enforce fair housing legislation. *People, Building Neighborhoods*, *supra* note 38, at 23, 265-66; *Housing Report*, *supra* note 141, at 25. Title VIII of the Civil Rights Act of 1964 bans discrimination on the basis of race, color, religion, national origin, and sex in virtually all transactions related to housing. 42 U.S.C. §§ 3601-3619 (1982).

²¹⁰ See Costonis, *supra* note 136, at 364.

²¹¹ See, e.g., New York, N.Y., Charter & Ad. Code Ann. vol. 2, ch. 8-A, § 207-3.0(a) (Williams 1976). The statute states that

[n]othing contained in this [ordinance] shall be construed as authorizing the commission, in acting with respect to any historic district . . . to regulate or limit the height and bulk of buildings, to regulate and determine the area of . . . open spaces, to regulate density of population or to regulate and restrict the location of trades and industries or location of buildings designed for specific uses or to create districts for any such purpose.

It is becoming increasingly apparent that there is a growing tendency to use designation for purposes outside the jurisdiction of the law and even at times explicitly denied to the Landmarks Preservation Commission by the law. . . . [L]andmarking is being used to stop demolition, to prevent development and change, to prevent a high-rise with change in use, bulk, scale, etc. These are planning issues reserved for the City Planning Commission²¹²

Other commentators have complained that designation is sought for purposes other than the preservation of historic areas.²¹³ One study found that the New York City Landmarks Preservation Commission had "willingly accommodated local groups in abusing the [landmarks] law by employing it for zoning purposes rather than for its lawful purpose of architectural preservation."²¹⁴

The Upper East Side in New York City is a prime example of the designation of a historic district to exclude the poor and minorities.²¹⁵ All thirty-three speakers who testified before the city's Board of Estimate in favor of designation were concerned that rapacious developers would

²¹² Spatt, *supra* note 132.

²¹³ See R. Nelson, *supra* note 44, at 20-21 (noting that historic designation "may make loans easier to get . . . gives nostalgia buffs a warm glow [and] says in a very affirmative way that there is something worth preserving about the style and character of many inner-city neighborhoods"); C. Weaver & R. Babcock, *supra* note 3, at 35 (describing use of historic districting to achieve control over "neighborhood quality"); Bender, *Preserving Our City's History*, N.Y. Times, Feb. 20, 1981, at A27, col. 3 (stating that "[t]he task of the Landmarks Preservation Commission, then, is not obstructionist, nor is it that of a surrogate city-planning commission"); Goldberger, *Landmarks Commission Survives A Decade, but Road Ahead Is Rocky*, N.Y. Times, Apr. 19, 1975, at 62, col. 3 (asserting that district designation "generally increases real-estate values and as a result, many neighborhoods of no real architectural quality have been demanding it as a social stabilizer, a function that falls within the City Planning Commission's purview, not the Landmarks Commission's"); Rose, *Designation? Certainly, How Much? The Debate*, N.Y. Times, May 4, 1980, § 8 (Real Estate) at 6, col. 5 (stating that if existing restrictions permit the development of undesirable structures, "the City Planning Commission (and not the Landmarks Commission) is the logical forum in which the possibilities of down-zoning or development limitations should be explored").

²¹⁴ *Interfaith Group Assails City's Landmarks Law*, N.Y. Times, Mar. 4, 1982, at B3, col. 5 (quoting study completed under the auspices of the Committee of Religious Leaders in the City of New York).

²¹⁵ As the recent fight over the landmark designation of the Isaac L. Rice Mansion in New York City illustrates, landmark designation proceedings occasionally generate the discrimination concerns more often associated with historic districting. Neighboring residents sought designation for the mansion when Yeshiva Chofetz Chaim, the owner, proposed to sell it to a developer who planned to build a thirty-story building that would include modern facilities for the Yeshiva. The many political issues that lurked beneath the designation decision included the local residents' apprehension that the tower might change the West Side's land use and socioeconomic character and the Yeshiva's insistence that its religious, cultural, and financial needs were more important than its neighbors' desires. One rabbi emphasized the discrimination he perceived: "A vote against the Yeshiva is literally a vote against the Jewish religious community on the West Side." Haberman, *Yeshiva Tries to Void Status as Landmark*, N.Y. Times, May 30, 1980, at B2, col. 4. See generally Costonis, *supra* note 136, at 386-91.

ruin their neighborhood.²¹⁶ Only fifteen people mentioned the need to preserve the Upper East Side's architectural unity.²¹⁷

Two debates following the designation of the Upper East Side provide additional evidence that preservationists were motivated by zoning concerns. In response to a request by a developer of a twenty-story apartment tower for a waiver of the restrictions, preservationists argued that

the designation . . . was intended to prevent tall buildings, not to permit them. . . . They further contend[ed] that the project would destroy the gentle nature of the [block on which it would be located], now one of the few full city blocks on the Upper East Side to contain no tall buildings, and that it represents another attempt to shoehorn development into tight Manhattan sites.²¹⁸

More recently, a proposal to extend the Upper East Side Historic District from fewer than sixty blocks to more than ninety-five has engendered debate.²¹⁹ Even though the residents were warned that they "should not think of historic districts as a way to halt development,"²²⁰ the proposal was offered as a way of relieving "powerful developmental pressures."²²¹

Despite the misuse of preservation by urban residents who seek to maintain their neighborhoods, the displacement and exclusion of minorities and the poor are not necessary byproducts of historic districting. If the problems associated with historic districting are to be solved, however, courts, legislatures, and preservationists must scrutinize more closely and control more tightly the designation and administration of historic districts.

III

THE PROPER USE OF HISTORIC DISTRICTING

Historic district regulations contribute to the general welfare of the community.²²² Despite its virtues, however, current historic districting

²¹⁶ See Costonis, *supra* note 136, at 364-65 & n.25 (citing Transcript of the Stenographic Record of the Discussion on Calendar Number 96: Held at the Meeting of the Board of Estimate on Sept. 10, 1981, New York City).

²¹⁷ See *id.*

²¹⁸ Goldberger, *Debate Over Proposed 71st St. Tower*, N.Y. Times, Nov. 10, 1981, at B8, col. 5.

²¹⁹ *Bigger East Side Historic Area Pondered*, N.Y. Times, Feb. 6, 1984, at B5, col. 1. Residents suggested extending the three-year-old historic district from its current edge at 79th Street to a new boundary at 96th Street. *Id.* at B5, col. 2.

²²⁰ *Id.* at B5, col. 1 (quoting Gene A. Norman, chairperson of the Landmarks Preservation Commission).

²²¹ *Id.* at B5, col. 2 (quoting Andrew J. Stein, Manhattan Borough President).

²²² See note 128 and accompanying text *supra*.

regulation displaces²²³ and excludes²²⁴ poor and minority residents from designated neighborhoods. By displacing residents, historic districting aggravates an already severe national housing problem.²²⁵ By enabling wealthier residents in effect to preclude minorities and the poor from living in designated neighborhoods, historic districting serves an illegitimate purpose.²²⁶

In order to prevent the displacement and exclusion of the poor, preservation proponents, legislators, and judges must use historic district regulations more self-consciously. First, proponents of preservation must recognize that historic district designations may have undesirable consequences. Second, legislatures should implement innovative controls to prevent the misuse of historic districting. Third, courts should more closely scrutinize preservation commission decisions to ensure that they comply with the enabling legislation and state and federal constitutions.

A. Preservationists' Awareness of Displacement and Exclusion

Initially, private and public advocates of preservation must recognize that historic districting displaces and excludes the poor. Although preservationists usually focus on the advantages of historic districting, they are beginning to acknowledge the problems associated with these regulations. At a national preservation conference in 1979, a preservationist spoke of a new direction for historic preservation:

In urban preservation and conservation, we need to stabilize neighborhoods in order to prevent displacement and to keep real estate prices at levels that will enable people of different incomes to live in rehabilitated communities. . . . [Developers] must recognize that all properties need not be sold at a profit; some properties must have lower prices. It may be easier to fix up property and rent it. . . . In such cases, organizations may have to interfere in the marketplace to prevent displacement.²²⁷

Additionally, in its 1979 report to the President, the National Commission on Neighborhoods asserted that

all levels of government must develop strong policies which insure that historic preservation programs do not contribute to the displacement of low and moderate income and minority residents of the designated areas. These policies must include a monitoring system which will consistently and effectively review preservation programs throughout

²²³ See text accompanying notes 139-98 *supra*.

²²⁴ See text accompanying notes 199-221 *supra*.

²²⁵ See text accompanying notes 141-47 *supra*.

²²⁶ See text accompanying notes 139-221 *supra*.

²²⁷ Yarn, *Preserving Our National Identity: A Federal Agency View*, in *Preservation: Toward an Ethic in the 1980s* 67-68 (1980) (from a presentation at the 1979 National Preservation Conference).

their implementation phase.²²⁸

Despite these occasional voices, however, most proponents of preservation have ignored the problems of displacement and exclusion.²²⁹ For example, the Conservation Foundation and the National Center for Preservation Law, in their recent handbook on historic preservation law, devoted only one equivocal sentence to the problems of historic districting: "Neighborhood revitalization will raise cries of low-income displacement."²³⁰ In addition, although the President's Commission on Housing recognized in 1982 that land use laws cause severe displacement and exclusion, it did not associate these problems with historic districting.²³¹ Until proponents of preservation acknowledge the link between historic districting and the displacement or exclusion of minorities and the poor, it will be difficult to remedy the problem through legislative and other innovations.

B. Legislative Control and Innovation

Local, state, and federal legislatures should ensure that historic districting legislation preserves historic neighborhoods without displacing or excluding the poor.²³² For several reasons, legislatures rather than courts should undertake the task of reforming historic districting laws to ensure that they are not used to harm minorities and the poor. In exercising their police powers, legislatures are required to enact measures that serve the general welfare of the entire community.²³³ Legislators should alter preservation ordinances that disadvantage portions of the community. In addition, historic districts are legislative creations;²³⁴ consequently, legislators should ensure that they are used properly. Fi-

²²⁸ People, Building Neighborhoods, *supra* note 38, at 55.

²²⁹ See, e.g., Biddle, *Historic Preservation: The Citizen's Quiet Revolution*, 8 Conn. L. Rev. 202 (1976) (written by president of the National Trust for Historic Preservation); Note, Urban Landmarks, 39 Alb. L. Rev. 521 (1975); Note, Zoning—Historic District Zoning in North Carolina, 16 Wake Forest L. Rev. 495 (1980); Comment, Historic District Zoning: A Texas Overview, 14 St. Mary's L.J. 709 (1983).

²³⁰ Duerksen, *supra* note 4, at xix.

²³¹ See generally Housing Report, *supra* note 141.

²³² See People, Building Neighborhoods, *supra* note 38, at 55-56; Costonis, *supra* note 136, at 434-38; Pulliam, Brandeis Brief for Decontrol of Land Use: A Plea for Constitutional Reform, 13 Sw. U.L. Rev. 435, 436-37 (1983); Rose, *supra* note 61, at 515-16; Comment, Beyond the Taking Issue: Emerging Procedural Due Process Issues in Local Landmark Preservation Programs, 10 Fordham Urb. L.J. 441, 456-67 (1982). Preservation regulations may have other adverse effects and uses. See, e.g., Note, First Amendment Challenges to Landmark Preservation Statutes, 11 Fordham Urb. L.J. 115 (1982) (discussing the constitutional conflict between the free exercise of religion and the application of landmark preservation statutes to religious properties).

²³³ See text accompanying notes 49-59.

²³⁴ In general, local commissions, established by municipal law pursuant to state enabling legislation, designate historic districts. See, e.g., text accompanying notes 93-100 *supra*.

nally, under most enabling legislation, legislatures are not granted authority to promulgate historic districting regulations that achieve objectives other than the preservation of buildings or districts of historic significance.²³⁵ Legislatures can remedy the current problems with historic districting while still achieving its legitimate goals through the two methods discussed below.

1. Amendments to Preserving Legislation

Local and state legislatures should amend their preservation laws in order to minimize the displacement and exclusion of the poor and minorities from historic districts. Several amendments to the state and local preservation legislation would limit the improper use of preservation. Preservation laws should contain provisions that require the regulatory authority to place preservation in the context of other community needs. At both the designation and permit stages, the commission should be required to balance the community's interest in preserving a historic district against those social needs, such as housing for the poor, that would be better served by alteration, destruction, or construction of buildings and other structures in the proposed district.²³⁶ Had preservation commissions weighed the social costs of completely preserving a historic district against the benefits, they might not have blocked the construction of low-income housing projects, nursing home facilities, and mass transit facilities.²³⁷

One municipality, the District of Columbia, has enacted historic preservation laws that reflect the need to balance the social costs and benefits of such measures. Under the District of Columbia's 1978 Histor-

²³⁵ See note 211 *supra* and accompanying text.

²³⁶ See Rose, *supra* note 61, at 491 ("[A] community-building rationale should place preservation—and the physical surroundings generally—in a larger perspective of community needs."). Preservationists have begun to recognize "the need . . . for forming alliances with other causes such as housing, transportation, energy and education." Preservation: Toward an Ethic, *supra* note 209, at 209 (from issue papers prepared for the 1979 National Preservation Conference).

²³⁷ The following citations indicate appeals taken from preservation commission decisions. No subsequent history is available. See *La Comision Central de Cuidadanos de Alcalde v. Harris*, Civ. No. 77-386P (D.N.M., filed July 6, 1977) (low-income housing project), noted in *National Trust for Historic Preservation*, Oct. 1977 *Historic Preservation Litigation Chart* 12; *Geriatric Care, Inc. v. Capitol Zoning Dist. Comm'n*, No. 78-3952 (Pulaski County Cir. Ct., Ark., filed July 21, 1978) (nursing home facility), noted in *National Trust for Historic Preservation*, Sept. 1978 *Historic Preservation Litigation Chart* 1; *Rangel v. Association Residence Nursing Homes, Inc.*, Civ. No. 75-1540 (S.D.N.Y., filed March 1975) (nursing home facility), noted in *National Trust for Historic Preservation*, Sept. 1975 *Historic Preservation Litigation Chart* 12; *Inman Park Restoration, Inc. v. Urban Mass Transp. Admin.*, 414 F. Supp. 99, 121 (N.D. Ga.) (first order 1975, supplemental order 1976) (mass transit facility), *aff'd sub nom. Save Our Sycamore v. Metropolitan Atlanta Rapid Transit Auth.*, 576 F.2d 573 (5th Cir. 1978).

ical Landmark and Historic District Protection Act,²³⁸ the mayor may approve the demolition of an otherwise protected structure if the demolition is necessary to effectuate a "project of special merit."²³⁹ Under the Act, "special merit" is defined as a "plan or building having significant benefits to the District of Columbia or to the community by virtue of exemplary architecture, specific features of land planning, or social or other benefits having a high priority for community services."²⁴⁰ The District of Columbia Court of Appeals has upheld demolition permits issued pursuant to this provision.²⁴¹

Preservation laws should also be amended to facilitate challenges to districting by those who are displaced or excluded.²⁴² Preservation laws place significant restrictions on residents' property interests. Because these laws interfere with residents' right to use and enjoy their property, procedural due process protections should be provided.²⁴³

Preservation laws, which generally contain few procedural safeguards, should be amended to include procedural safeguards similar to those found in a municipality's other land use laws, such as its zoning laws.²⁴⁴ The New York City preservation ordinance is a good example of

²³⁸ D.C. Code Ann. §§ 5-1001 to -1015 (1981).

²³⁹ Id. § 5-1004(e). The mayor may issue a permit to demolish a landmark or a structure within a historic district if demolition is "necessary in the public interest." "Necessary in the public interest" is defined as consistent with the Act or "necessary to allow the construction of a project of special merit." Id. § 5-1002(10).

²⁴⁰ Id. § 5-1002(11).

²⁴¹ See *Citizens Comm. to Save Historic Rhodes Tavern v. District of Columbia Dep't of Hous. & Community Dev.*, 432 A.2d 710 (D.C. 1981) (upholding demolition permit issued to allow construction of an office and retail complex of "exemplary architecture"), cert. denied, 454 U.S. 1054 (1981); *Don't Tear It Down, Inc. v. District of Columbia Dep't of Hous. & Community Dev.*, 428 A.2d 369 (D.C. 1981) (upholding demolition permit issued to public utility to build an electric power substation).

²⁴² See generally Comment, supra note 232, at 456-67.

²⁴³ See *Historic Green Springs, Inc. v. Bergland*, 497 F. Supp. 839, 852-53 (E.D. Va. 1980). *Historic Green Springs* is discussed at text accompanying notes 296-99 and note 298 infra.

The argument of property owners that preservation laws effect a taking of private property has not prevailed. See, e.g., *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978). Historic districting is particularly immune from takings challenges. Although districting does restrict development of private property, it also generates increases in property value. See Advisory Council, supra note 148, at 10-11; note 173 supra and accompanying text. For a discussion of preservation laws and the takings issue, see Bonderman, *Constitutional Law*, in *A Handbook on Historic Preservation Law* 350-68 (C. Duerksen ed. 1983).

²⁴⁴ The similarities between zoning and historic preservation for purposes of developing appropriate due process standards are discussed in Comment, supra note 232, at 459-61.

Zoning ordinances should be improved to ensure that urban zoning authorities fulfill their function of regulating growth and development, including the height and bulk of buildings, the amount of open space, the density of population, and the location of trades and industries. See J. Delafons, supra note 1, at 30-31. Developers can often obtain zoning variances because cities are intent on attracting development and the opposition is often too weak to defeat the zoning change. When zoning authorities fail to fulfill their role, preservation commissions may be pressured by neighborhood groups and politicians to perform zoning-type functions. See

a preservation law with inadequate procedural safeguards.²⁴⁵ Decisions by the Preservation Commission become effective upon passage,²⁴⁶ unless repealed by the Board of Estimate within ninety days.²⁴⁷ In contrast, zoning decisions by the City Planning Commission receive more extensive review.²⁴⁸ In addition, although the preservation law expressly provides for the Preservation Commission to promulgate procedures to carry out its functions,²⁴⁹ no procedures have been adopted. Although the Preservation Commission must give notice to all affected landowners prior to designation or to action on a permit request, failure to give notice does not invalidate the proceeding.²⁵⁰ Such procedural protections would ensure that potential victims of displacement have a meaningful opportunity to be heard before a district is designated.

Finally, the composition of preservation commissions should better reflect the communities they serve. The composition of Washington, D.C.'s Historic Preservation Review Board is tailored to achieve this goal. The ordinance requires appointments to the board to "be made with a view toward having its membership represent to the greatest practicable extent the composition of the adult population of the District of Columbia with regard to race, sex, geographic distribution and other demographic characteristics."²⁵¹ In contrast, the New York Landmarks Preservation Commission must be composed of at least three architects, one historian, one city planner or landscape architect, one realtor, and at

Costonis, *supra* note 136, at 364-65. Because preservation commissions are prohibited from performing zoning functions, see text accompanying notes 211-214 *supra*, they should not succumb to these pressures.

²⁴⁵ New York, N.Y., Charter & Ad. Code Ann. vol. 2, ch. 8-A, §§ 205-1.0, 207-1.0 to -21 (Williams 1976 & Supp. 1984). New York's preservation scheme is described in text accompanying notes 93-100 *supra*.

²⁴⁶ New York, N.Y., Charter & Ad. Code Ann. vol. 2, ch. 8-A, § 207-2.0(e) (Williams Supp. 1984).

²⁴⁷ *Id.* § 207-2.0(g). A former Corporation Counsel for New York City has attacked the designation process, particularly the failure of the City's Board of Estimate to review landmark designations adequately. Richland, *The Case for Tightening Reins on Landmarking*, N.Y. Times, Feb. 21, 1982, § 8 (Real Estate), at 1, col. 3. "The protesting property owner has a nearly hopeless task when he appears before the [Board of Estimate] to ask for repeal of the Landmarks Commission's decision. The commission enjoys sacred-cow status with the board, whose elected members seem to be intimidated by the mystique of 'art' and 'architecture.'" *Id.* at 1, col. 6. As a result of the board's "careless attitude," "the commission entered upon a veritable landmarking binge." *Id.*

²⁴⁸ If twenty percent of the potentially affected property owners object to a zoning regulation, it must be adopted by a three-fourths vote of the Board of Estimate. New York, N.Y., Charter & Ad. Code Ann. vol. 1, ch. 8, § 200.3 (Williams Supp. 1984). Unlike preservation decisions, which become effective upon passage, zoning decisions that do not meet with objection do not become effective for sixty days. *Id.* § 200.2.

²⁴⁹ New York, N.Y., Charter & Ad. Code Ann. vol. 2, ch. 8-A, § 207-18.0(c) (Williams 1976).

²⁵⁰ *Id.* § 207-12.0(a).

²⁵¹ D.C. Code Ann. § 5-1003(b) (1981).

least one resident from each of the city's five boroughs.²⁵²

2. *Restructure Financial Incentives*

Federal, state, and local governments should encourage preservation initiatives designed to minimize the displacement that results from historic districting.²⁵³ Legislators should also deny tax incentives to rehabilitators who displace and exclude minorities and the poor.²⁵⁴ Not all historic preservation activity need be income-producing; preservation laws should complement other policy goals, such as improving the housing stock for minorities and the poor.²⁵⁵ Like the affluent, poor and minority residents should benefit from historic preservation activities.²⁵⁶

Federal, state, and local governments should establish and strengthen financial incentives for preservation rehabilitation that enable minority and poor residents to remain in improving neighborhoods. At the federal level, financial assistance programs such as Community Development Block Grants (CDBG),²⁵⁷ Urban Development Action Grants (UDAG),²⁵⁸ Section 312 rehabilitation loans,²⁵⁹ urban home-

²⁵² Penn. Cent. Transp. Co. v. New York City, 438 U.S. 104, 110 n.8 (1978) (citing N.Y.C. Charter § 534 (1976)).

²⁵³ See National Urban Coalition, *supra* note 193, at 23. The coalition recommended that all levels of government "devise strategies to minimize the adverse effects of private market housing rehabilitation." *Id.* It concluded that "[t]his obligation exists not only because of this nation's announced commitment to decent housing for every American, but because government, as well as the private sector, must take cognizance of the social and political strains created by displacement caused by reinvestment and historic preservation." *Id.*

²⁵⁴ See text accompanying notes 286-91 *infra*.

²⁵⁵ During a 1979 preservation symposium, the relationship between historic preservation and neighborhood conservation was discussed and the following questions posed:

If [preservation and conservation] are allied, should preservationists become concerned with the entire spectrum of issues that affect urban neighborhoods, such as schools, crime prevention, job opportunities, etc.? . . . Should preservation add to its other objectives the goal of maintaining neighborhood diversity—a mix of incomes, races, ethnic groups and ages? . . . Is it advisable for preservationists to undertake government-assisted projects to aid low and moderate-income families while also achieving physical preservation objectives?

Preservation: Toward an Ethic, *supra* note 202, at 205 (from issue papers prepared for the 1979 National Preservation Conference).

²⁵⁶ See People, Building Neighborhoods, *supra* note 38, at 55-56, 320-22. The Commission recommended that "all levels of government must develop strong policies which insure that historic preservation programs do not contribute to displacement of low and moderate income and minority residents of the designated areas." *Id.* at 55.

²⁵⁷ This program, designed to assist community development and benefit low- and moderate-income people, has been used to encourage historic preservation through neighborhood revitalization projects. Although the program originally was administered through the United States Department of Housing and Urban Development, it is now run directly by the states. See National Trust for Historic Preservation, Information Sheet No. 12, Public Funds for Historic Preservation 5 (1983) [hereinafter Information Sheet No. 12].

²⁵⁸ UDAG grants are authorized by 42 U.S.C. § 5318 (1982). See text accompanying notes 123-24 *supra* and notes 264-65 *infra*.

²⁵⁹ These loans are available to rehabilitate property in federally assisted areas. The pro-

steading,²⁶⁰ Section 8 payments,²⁶¹ and the Neighborhood Strategy Area (NSA) program²⁶² can help achieve this objective.²⁶³ Under the largest of these programs, the UDAG program, the Department of Housing and Urban Development is authorized to make grants to areas that "are experiencing severe economic distress to help stimulate economic development activity needed to aid in economic recovery."²⁶⁴ To receive a grant, local governments must obtain from private investors a financial commitment several times the size of the grant.²⁶⁵

Using federal incentives, many localities already have implemented programs designed to achieve the valid goals of historic districting without causing displacement of a neighborhood's poor and minority residents.²⁶⁶ The Savannah Historic District and the adjacent Victorian

gram, which funds multifamily projects, gives priority to projects designed for low- to moderate-income families. See Information Sheet No. 12, *supra* note 257, at 6.

²⁶⁰ Through urban homesteading, vacant federally owned properties are transferred to local governments, which then sell these properties to individuals for a nominal fee. *Id.*

²⁶¹ These funds are used to provide housing for low-income families through supplementary rent payments. *Id.* Although the funds do not finance rehabilitation, they make it possible by assuring the developer of income through payment of rent subsidies. *Id.*

²⁶² Under the NSA program, rent subsidies are distributed to tenants of low- or moderate-income housing the rehabilitation of which is made possible by Section 8 assistance. The program is intended "to avoid displacing the poor in the name of revitalization," by providing the difference between what residents can afford and the market rates for renovated housing. *The Effect on the Poor and Minorities*, *supra* note 139, at 310.

²⁶³ There are many other potential financial assistance programs. For example, the National Trust for Historic Preservation, in conjunction with a corporation, established a \$1 million mortgage program designed for rehabilitating low- and moderate-income housing in urban historic districts. The program is an extension of the Trust's \$1 million Inner City Ventures Fund, which provides low-cost financing to nonprofit neighborhood groups involved in housing rehabilitation activity. Long-Term Mortgage Program for Historic Preservation Projects Established for Cities, [1983] 11 *Hous. & Dev. Rep. (BNA)* 534 (Nov. 21, 1983).

²⁶⁴ 42 U.S.C. § 5318(a) (1982). Funds are provided upon a showing that the project will directly benefit the area's low- and moderate-income residents. [1984] 12 *Hous. & Dev. Rep. (BNA)* 5-7 [sic].

²⁶⁵ See United States Dep't of Hous. & Urban Dev., *supra* note 124, at 1; see also Dworsky, McVarish, Perry, & Robinson, *supra* note 124, at 324-26 (C. Duerksen ed. 1983); Roddewig, *supra* note 115, at 499-500. The program disbursed approximately \$1.3 billion in federal assistance from its inception in 1977 to the middle of 1980, with approximately 43% of the projects involving some rehabilitation activity. See P. Myers, *Urban Conservation and Urban Economic Development: Collision and Convergence* 1-5 (1980).

²⁶⁶ Four neighborhood organizations in Denver, Dallas, and Philadelphia have initiated programs to develop low-income rental housing, based primarily on grants and funds provided by the Inner City Ventures Fund, described in note 263 *supra*. In Denver, the Del Norte Neighborhood Development Corporation will rehabilitate a low- and moderate-income apartment building using Inner City Ventures Fund awards, in addition to CDBG and Section 8 assistance. [Current Developments] *Hous. & Dev. Rep. (BNA)* 265-66 (Aug. 27, 1984). In Dallas, a community development corporation will rehabilitate Victorian cottages originally slated for high-rise development, creating an inner-city neighborhood for low- or moderate-income families. *Id.* at 265. In North Philadelphia, a community corporation will purchase, rehabilitate, and sell or rent seven townhouses to low- or moderate-income residents. *Id.* Us-

District are the most notable examples.²⁶⁷ Savannah succeeded through private sector activity aided by public sector support.²⁶⁸ The Historic Savannah Foundation, a private preservation organization, played a major role in obtaining designation of the Savannah Historic District and actively participated in the neighborhood's revitalization.²⁶⁹

The foundation subsidized low-income renters through two programs of the United States Department of Housing and Urban Development: Section 8 housing assistance and Section 312 investment rehabilitation loans.²⁷⁰ This program has enabled the Savannah Historic District to achieve dramatic revitalization with minimal displacement.²⁷¹ Although some displacement occurred as a result of the district designation, the neighborhood retains an economically and racially diverse population.²⁷²

The neighboring Victorian District is currently being restored with the assistance of the Savannah Landmarks Rehabilitation Project, an offshoot of the Historic Savannah Foundation.²⁷³ The population of the Victorian District is eighty-nine percent black and mostly poor.²⁷⁴ Savannah Landmarks, relying on public subsidies and private grants, is trying to make at least half of any rehabilitated units available to current residents.²⁷⁵ Without these subsidies and grants, the rent and mortgage increases that result from rehabilitation costs would probably displace most residents.²⁷⁶ Although some gentrification activity is occurring in

ing Venture Fund monies, equity syndication, and local foundation grants, another Philadelphia group will create a boarding house for senior citizens by purchasing and rehabilitating a vacant 18th century house. *Id.*

²⁶⁷ The Savannah Historic District was established in 1973. The district, at approximately 2.5 miles square, is the largest historic district in any major city in the nation. Advisory Council, *supra* note 148, at C-11; see generally *id.* at C-1 to -38; Displacement, *supra* note 146, at 164.

²⁶⁸ Advisory Council, *supra* note 148, at C-1, C-14 to -15, C-30; Displacement, *supra* note 146, at 164.

²⁶⁹ See Advisory Council, *supra* note 148, at C-8 to -20.

²⁷⁰ See *id.* at C-16; McMillan, *Staying Home in Savannah*, in *Historic Preservation*, Mar.-Apr. 1980, at 15, 17; Rose, *supra* note 61, at 515; State of Maine, *Savannah, Ga. Receive CD Innovative Grants*, [1978] 5 *Hous. & Dev. Rep. (BNA)* 1302.

²⁷¹ See Advisory Council, *supra* note 148, at C-21; see also Displacement, *supra* note 146, at 164 (discussing similar efforts in Savannah's Victorian District); McMillan, *supra* note 270, at 15-17 (same).

²⁷² See Advisory Council, *supra* note 148, at C-20 to -21.

²⁷³ Twelve hundred housing units are being renovated in the Victorian District, a 45-block area south of the Historic District. Displacement, *supra* note 146, at 164. For a description of the efforts in the Victorian District, see Advisory Council, *supra* note 148, at C-19 to -20, C-34 to -37; McMillan, *supra* note 270.

²⁷⁴ See Displacement, *supra* note 146, at 164.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

the Victorian District,²⁷⁷ the early results suggest that the revitalization has not significantly altered the economic and racial composition of the neighborhood.²⁷⁸

Similar programs to provide assistance for housing rehabilitation exist at the state²⁷⁹ and local²⁸⁰ levels, where the majority of public funds for preservation are currently provided.²⁸¹ Low-interest rehabilitation loans, for example, can be made available to low-income owners of historic properties through revolving funds.²⁸² In Norfolk, Virginia, a Private Loan Program provides rehabilitation loans, secured by second mortgages, to homeowners of low and moderate income.²⁸³ In Detroit, a neighborhood organization purchased or acquired options on Victorian homes in a local historic district and created a 109-unit rehabilitation project for low-income residents.²⁸⁴ Similar efforts have been undertaken in Saint Louis, Dallas, Pittsburgh, and Cincinnati.²⁸⁵

²⁷⁷ B. Reiter, R. Jones, L. Adler & C. Adler, *Preservation for People in Savannah* 24 (1983).

²⁷⁸ See *id.* at 26. From 1977 to 1982, the percentage of the population on fixed incomes fell only slightly, from 55.2% to 54.0%. *Id.* at 24.

²⁷⁹ At the state level, funds are often provided through economic or business development agencies, housing finance agencies, and quasi-public organizations. Information Sheet No. 12, *supra* note 257, at 9.

²⁸⁰ At the local level, planning, community development, housing, urban conservation or preservation, and downtown revitalization agencies usually administer the programs. *Id.*

²⁸¹ *Id.*

²⁸² A revolving fund, owned and administered by a nonprofit organization, uses a source of money to make loans for the express purpose of purchasing and restoring architecturally significant structures. All proceeds from restoration are returned to the fund. See Galbreath, *Conservation: The New Word for Old Neighborhoods*, 8 Conn. L. Rev. 312, 317 (1976) (describing Seattle revolving fund). San Francisco, Savannah, Seattle, and other cities have established such funds, financing them with general revenue sharing (Seattle), community development allocation (San Francisco), or privately raised funds (Savannah). See *id.* at 317-22 (discussing Seattle and San Francisco); Advisory Council, *supra* note 148, at C-10 to -11 (discussing Savannah).

²⁸³ See Galbreath, *supra* note 282, at 313-14. The program, designed to supersede HUD's Section 312 and 115 rehabilitation loan and grant programs, was a model for programs in Seattle and Pittsburgh, leading innovators in the field of neighborhood preservation. *Id.* at 313. Section 312 loans are described in note 259 *supra*. Section 115 grants are earmarked for rehabilitation. Galbreath, *supra* note 282, at 314 n.3.

²⁸⁴ See Galbreath, *supra* note 282, at 324-25; Osman, *Designing the Renaissance of a Proud But Decayed Neighborhood in Detroit*, 63 J. Am. Inst. Architects 18, 19-20 (May 1975).

²⁸⁵ See T. Conley, *Lafayette Square: An Urban Renaissance* (1974) (discussing a St. Louis historic district); L. Dunsavage & V. Talkington, *The Making of a Historic District: Swiss Avenue, Dallas, Texas* (National Trust for Historic Preservation Case Studies in Preservation, 1975); A. Ziegler, *Historic Preservation in Inner City Areas: A Manual of Practice* 34-35 (1971) (available at National Trust for Historic Preservation); Galbreath, *supra* note 282, at 314-16, 322-28; *The New Look of Cincinnati's Mt. Auburn*, *Historic Preservation*, Apr.-June 1972, at 31.

Arthur Ziegler, head of a Pittsburgh organization that restored historic districts with minimal displacement, reported on previous preservation activities in Pittsburgh:

[P]reservationists have been as indifferent (perhaps even more indifferent) to community self-determination as have redevelopment authorities. Historic preservation groups

Tax breaks should not be offered to rehabilitators who prevent poor and minority residents from remaining in their communities.²⁸⁶ If the government fails to support preservation through tax incentives, reinvestment in older urban neighborhoods will still continue, albeit perhaps more slowly. Because historic rehabilitation is profitable on its own terms, developers will undertake many preservation projects without tax incentives.²⁸⁷

To reduce the risk that support for, and interest in, preservation will decline with the withdrawal of tax breaks, governments could offer tax incentives for projects designed to minimize the adverse effects of dis-tricting.²⁸⁸ In addition, tax breaks could be offered in conjunction with existing or proposed federal low-income housing programs. The objective of historic preservation tax policy should be to encourage neighborhood-based ownership and management of housing.²⁸⁹ Through

across the country from the 1930's up until today remorselessly removed neighborhood residents regardless of their longevity in the proposed historic district or their commitment to that area. They simply replaced them with well-to-do residents who could understand the value of the structure and who could afford to restore and maintain them [sic].

A. Ziegler, *supra*, at 22.

²⁸⁶ Several groups have advocated the repeal of federal tax incentives. The National Commission on Neighborhoods "does not believe that the Federal Tax Code should give special benefits to those who eject the poor from their neighborhoods under the banner of historic preservation." *People, Building Neighborhoods*, *supra* note 38, at 197. Accordingly, the Commission recommended to Congress that federal tax incentives "be allowed to expire. . . . Removal of this special tax benefit for restoration by the affluent would not put an end to displacement but it would at least put an end to an important incentive to that displacement presently in the Tax Code." *Id.*

The National Urban Coalition also has urged Congress to repeal its preservation tax incentives. The Coalition warned that uncontrolled rehabilitation leads to rent increases, which force poor tenants to leave their neighborhoods. See *Repeal of Historic Preservation Tax Incentives Urged by Urban Coalition*, [1978] 5 *Hous. & Dev. Rep.* (BNA) 844.

²⁸⁷ See *Developers Discuss Historic Preservation*, *Urban Land*, Nov. 1983, at 12. Wayne Ratkovich, president of Ratkovich-Bowers, Inc. of Los Angeles, said that his

company was involved in historic rehabilitation before the tax credit was available, so that was not our reason for undertaking these projects. We have always felt there was a good market for rehabilitated properties and that, though the tax credit is important, historic rehabilitation is still profitable on its own.

Id. Brad Griffith, executive vice president of Leggatt McCall & Werner, Inc., of Boston, said that for his company, "the 25 percent investment tax credit is an added extra. A development deal must fly on its own, before the tax credit, to be considered. And the benefits of historic renovation are generally good enough by themselves for us to get involved." *Id.* at 13.

²⁸⁸ Federal preservation officials have urged state and local officials involved in grants of federal tax benefits "to evaluate the social implications of improvements in [historic] districts to assure that the residents in these districts are provided for." Additional Interim Procedures for Historic Preservation Certifications Pursuant to the Tax Reform Act of 1976, 42 *Fed. Reg.* 40,437 (1977).

²⁸⁹ See *People, Building Neighborhoods*, *supra* note 38, at 191-96. The National Commission on Neighborhoods suggests that neighborhood control of housing should be enhanced by greater use of neighborhood improvement corporations and real estate investment trusts, and

individual, cooperative, and condominium ownership and through resident landlords and investors, communities can free themselves from the absentee control that tends to displace poor and minority residents.²⁹⁰ Neighborhood-based ownership and control of housing will be responsive to residents' wishes for the maintenance and improvement of a decent urban living environment.²⁹¹

C. Judicial Scrutiny

Greater scrutiny of preservation schemes should be exercised by the judiciary. For many years, courts were hostile to claims that the police power encompassed aesthetic objectives.²⁹² Now that aesthetics is an accepted goal for the police power, courts subject preservation laws to a lower level of scrutiny than other land use regulations. As one commentator has noted about historic preservation law, "[i]n no other area of planning law has the change in judicial attitudes been so complete."²⁹³ The courts explain their deference to preservation laws as an unwillingness to evaluate legislative aesthetic judgments.²⁹⁴ It is the subjective nature of aesthetic judgments that should lead courts to scrutinize the procedural aspects of preservation laws more closely.²⁹⁵

Courts should undertake several inquiries to assure that historic districting will not cause displacement or exclusion. First, if legislatures fail to impose procedural due process protections, courts should do so when they are absent from districting laws²⁹⁶ and should strike down those laws that violate procedural due process. In *Historic Green Springs, Inc. v. Bergland*,²⁹⁷ a landmark designation was set aside on procedural due process grounds.²⁹⁸ Although other courts have subjected preservation

by tax code changes to deter fast turnover tax shelters and to encourage major investments in repairs. *Id.*

²⁹⁰ See *id.* at 191.

²⁹¹ See *id.* at 192.

²⁹² See note 85 *supra* and accompanying text.

²⁹³ 1 N. Williams, *supra* note 85, § 11.02, at 245.

²⁹⁴ See, e.g., *Maier v. City of New Orleans*, 516 F.2d 1051, 1059-61 (5th Cir. 1975), cert. denied, 426 U.S. 905 (1976); *City of Santa Fe v. Gamble-Skogmo, Inc.*, 73 N.M. 410, 415-16, 389 P.2d 13, 17 (1964).

²⁹⁵ Rose, *supra* note 61, at 487.

²⁹⁶ See Comment, *supra* note 232, at 456-67 (advocating interest-balancing and administrative standards approaches).

²⁹⁷ 497 F. Supp. 839 (E.D. Va. 1980).

²⁹⁸ In *Green Springs*, the Department of the Interior's designation of a 14,000-acre area as a historic landmark was challenged as improper. The court held the designation "invalid based on the Department's failure to promulgate substantive standards for national historic significance and its failure to prepare and publish rules of procedure to govern the designation process." 497 F. Supp. at 856. Although the Green Springs area was designated a landmark, the designation of an area "roughly the size of Manhattan Island," *id.* at 842, is more akin to districting than to landmarking. See *id.* at 844.

laws to procedural due process review, most have upheld the laws despite the inadequacy of the ordinances' procedural safeguards.²⁹⁹

Courts should also ensure that historic preservation laws are not being used to further zoning objectives. Although state preservation enabling statutes prohibit historic preservation commissions from engaging in zoning determinations, many district designations and permit review decisions achieve the same effect. Courts should therefore require preservation authorities to remain within their legislative mandate.

Finally, courts should review historic district designations that are, in effect, exclusionary zoning ordinances. Courts have begun to scrutinize large-lot zoning schemes; similarly, they should critically review historic district designations. Several state courts have ruled that certain land use controls should not undermine the opportunity of all citizens to obtain decent housing. Historic districting, which is merely another form of land use control, should be subject to the same scrutiny applied to exclusionary zoning. When historic district designations or permit review decisions are found to restrict the access of minorities and the poor to decent housing, only the most compelling state interest should sustain them. Mere legislative determinations of aesthetic significance do not justify the displacement and exclusion of minorities and the poor from historic districts.

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²⁹⁹ See, e.g., *Maier v. City of New Orleans*, 516 F.2d 1051, 1058-64 (5th Cir. 1975), cert. denied, 426 U.S. 905 (1976); *Young v. Mellon*, 93 Cal. App. 3d 1001, 156 Cal. Rptr. 165 (Ct. App. 1979) (deleted from official reporter on direction of California Supreme Court by order dated Aug. 29, 1979); *Society for Ethical Culture v. Spatt*, 51 N.Y.2d 449, 415 N.E.2d 922, 434 N.Y.S.2d 932 (1980); *Manhattan Club v. Landmarks Preservation Comm'n*, 51 Misc. 2d 556, 273 N.Y.S.2d 848 (1966).