

Balancing Private and Public Interests in Historic Preservation: It May Be Constitutional, But Is It Right?

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INTRODUCTION

Historic preservation, as we know it, began in the eighteenth century as a private movement.¹ Today, historic preservation has transformed into a “publicly-supported movement” that encourages the protection and preservation of resources that are of historic significance.² These include buildings, landscapes, objects, and other resources that have significance and integrity.³ To be considered significant, a resource must have one of the following qualities: relation to American history, significant architecture, archeology, engineering, or cultural impact.⁴ In short, historic preservation tells important stories of the past. It tells stories of previous events, eras, and people; protects the history of diverse communities;⁵ and provides a way to connect the past to the present.

Some claim historic preservation is ruining cities.⁶ Others argue it is a great benefit to society.⁷ This juxtaposition presents the fundamental question of whether the field of historic preservation properly balances the rights of private property owners and the public’s rights to preserve historic properties.⁸ Is it ethical to take away certain property owners’ rights regarding their historically designated property for the benefit of the public? While preservation may be constitutional, is it right?⁹

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1. SARA C. BRONIN & J. PETER BYRNE, *HISTORIC PRESERVATION LAW 1–2* (Saul Levmore et al. eds., 2d ed. 2021) (citing NORMAN TYLER, ILENE R. TYLER & TED J. LIGIBEL, *HISTORIC PRESERVATION: AN INTRODUCTION TO ITS HISTORY, PRINCIPLES, AND PRACTICE* (3d ed. 2018)).

2. *Id.* at 1.

3. *Id.* at 67, 69.

4. *Id.* at 69.

5. *See id.* at 1.

6. *See generally* Adam A. Millsap, *Historic Designations Are Ruining Cities*, *FORBES* (Dec. 23, 2019), <https://www.forbes.com> [<https://perma.cc/6ZGW-Z4PB>].

7. *See generally* *Twenty-Four Reasons Historic Preservation Is Good for Your Community*, *PLACEECONOMICS*, <https://www.placeeconomics.com> [<https://perma.cc/G6HF-URKJ>] [hereinafter *Twenty-Four Reasons*] (last visited Apr 26, 2022).

8. *See* David A. Doheny, *Property Rights and Historic Preservation*, *THE PRESERVATION LEADERSHIP FORUM OF THE NATIONAL TRUST FOR HISTORIC PRESERVATION* (Dec. 9, 2015), at 1, <https://forum.savingplaces.org> [<https://perma.cc/YQ2A-SCU5>].

9. *See id.*

This Note will argue that historic preservation does favor the public's interest. While this is the ethically right choice because it benefits the general welfare, it is not equitable. Some homeowners are still disadvantaged as a result. However, there are ways in which the legal profession can help improve the practice of historic preservation law to strike a better balance between public and private interests, such as altering lawyer behavior through the *Model Rules of Professional Conduct* ("Model Rules").

Part I of this Note will provide the necessary background of historic preservation and ethics. Part II will present historic preservation's benefits and drawbacks to the general public, while Part III will outline historic preservation's benefits and drawbacks to private property owners. Finally, Part IV will provide an analysis about ethics in historic preservation and how it affects the legal profession through the *Model Rules*.

I. BACKGROUND: HISTORIC PRESERVATION AND ETHICS

A. TAKINGS

Historic preservation affects all Americans.¹⁰ As Patrice Frey, former "director of sustainability at the National Trust for Historic Preservation,"¹¹ said, "[E]veryone who cares about quality of place and values our collective story as Americans has a stake in this conversation."¹² The Fifth Amendment of the United States Constitution states, "nor shall private property be taken for public use, without just compensation."¹³ This is known as the Takings Clause and Just Compensation Clause.¹⁴ Not only does the Fifth Amendment apply to the federal government, but it also applies to the states through the Fourteenth Amendment.¹⁵ The Takings Clause is important to historic preservation because it was created to bar the "[g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."¹⁶

10. See Patrice Frey, *Why Historic Preservation Needs a New Approach*, BLOOMBERG (Feb. 8, 2019), at 1, <https://www.bloomberg.com> [<https://perma.cc/HD23-QQG5>].

11. Patrice Frey, GOVERNING, at 1, <https://www.governing.com> [<https://perma.cc/3P4W-8ULP>] (last visited Apr. 26, 2022).

12. Frey, *supra* note 10, at 1.

13. U.S. CONST. amend. V.

14. Ann K. Wooster, Annotation, *What Constitutes Taking of Property Requiring Compensation Under Takings Clause of Fifth Amendment to United States Constitution—Supreme Court Cases*, 10 A.L.R. FED. 2D 231 § 2 (2006).

15. *Id.*

16. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

1. EMINENT DOMAIN

Takings occur when the government seizes private property for its own use.¹⁷ Government takings occur in two scenarios: eminent domain and regulatory takings.¹⁸ Eminent domain is the “public power to condemn property for public use,” which is an implicit power through the Necessary and Proper Clause of the Constitution.¹⁹ Historic preservation can use the power of eminent domain to protect sites with historical significance that are “associated with historic events or personalities, prehistoric ruins, burial grounds, archeological sites, and paleontological sites” when it is necessary to prevent decay or destruction of a given site.²⁰ For example, in *Gettysburg*, the Court allowed the use of eminent domain to expand the Gettysburg National Military Park to achieve a public good through historic preservation, as the site would highlight the battle that took place there.²¹ However, a taking under eminent domain essentially ousts the private landowner and deprives them “of all beneficial enjoyment of the property,” so just compensation must be given to the property owner in exchange for the taking.²²

2. REGULATORY TAKINGS

A regulatory taking occurs when a government-created regulation imposes such a great burden on private property owners that it creates a taking.²³ Under its police power, a state may create a regulation that adversely affects property values.²⁴ However, if the regulation causes a “diminution in value,” the state must acquire the property and pay just compensation.²⁵ To determine if a regulation went “too far,” a balancing test between the burden and benefit must be performed.²⁶

Municipalities have the power to regulate a historic district through the “construction, reconstruction, alteration, or razing of buildings and other structures.”²⁷ Most historic preservation ordinances require residents to obtain permission from the local historic preservation board or other governing authority in order to

17. Wooster, *supra* note 14, at § 2.

18. BRONIN & BYRNE, *supra* note 1, at 347–48.

19. *Id.* at 347; see *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 679 (1896).

20. Christopher D. Bowers, *Historic Preservation Law Concerning Private Property*, 30 URB. LAW. 405, 406 (1998).

21. *Gettysburg*, 160 U.S. at 686.

22. Wooster, *supra* note 14, at § 2.

23. BRONIN & BYRNE, *supra* note 1, at 348.

24. See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 419 (1922). The police power is the ability “of a government to exercise reasonable control over persons and property within its jurisdiction in the interest of the general security, health, safety, morals, and welfare except where legally prohibited.” Police Power, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary> [https://perma.cc/M6NH-FE4J] (last visited Apr. 26, 2022).

25. *Pa. Coal Co.*, 260 U.S. at 413, 419.

26. Eric L. Muller, *Constitutional Conscience*, 83 B.U. L. REV. 1017, 1059 (2003).

27. Bowers, *supra* note 20, at 406.

demolish or make exterior changes to the historic property.²⁸ The government imposes these requirements to prevent the needless destruction of a historic site and maintain a city's character and history.²⁹

There is no rigid formula to determine "when 'justice and fairness' require that economic injuries caused by public action be compensated by the government."³⁰ However, *Penn Central*, the most important regulatory takings case in historic preservation, provides some guidance.³¹ The Supreme Court created an "ad hoc balancing approach which considers three factors: (1) the economic impact of the regulation; (2) the extent of interference with reasonable investment-backed expectations of the property's owner; and (3) the character of the governmental action."³² Under this test, no factor is determinative and "significant diminutions in property value are generally permissible without compensation."³³

Many private property owners claim the government imposed a regulatory taking to their land when the regulation limits their use "and disposition of the property above and beyond what would be allowed at common law."³⁴ For example, the regulation in *Pennsylvania Coal* was deemed a taking because it stripped the land of its commercial use since the regulation prohibited mining on the land.³⁵ This was held essentially the same as physically destroying the land.³⁶

Examples of takings are rare, especially in historic preservation.³⁷ Courts have consistently stated that historic designation, by itself, does not constitute a taking of private property without just compensation.³⁸ Due to this inherent constitutionality, very few historic preservation takings claims succeed.³⁹

Additionally, many historic preservation boards do not categorically prohibit all development.⁴⁰ Some takings claims fail because the owner asked to alter or demolish too much and failed to revise their plan.⁴¹ For example, the property owner in *Penn Central* submitted proposals to construct an office building with either fifty-three or fifty-five stories above Grand Central Terminal.⁴² These

28. *Id.* at 409.

29. *See id.*

30. Michael Allan Wolf, *Taking Regulatory Takings Personally: The Perils of (Mis)reasoning by Analogy*, 51 ALA. L. REV. 1355, 1371 (2000).

31. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

32. Daniel R. Hansen, *Environmental Regulation and Just Compensation: The National Priorities List as a Taking*, 2 N.Y.U. ENV'T L.J. 1, 5 (1993).

33. Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. ENV'T AFF. L. REV. 509, 518 (1998).

34. *See* Richard A. Epstein, *A Common Lawyer Looks at Constitutional Interpretation*, 72 B.U. L. REV. 699, 719 (1992).

35. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922).

36. *Id.*

37. *See* BRONIN & BYRNE, *supra* note 1, at 377.

38. Bowers, *supra* note 20, at 425.

39. *See id.*

40. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 136-37 (1978).

41. *See id.*

42. *Id.* at 116-17.

proposals were denied; however, the Court emphasized that historic preservation law did not “prohibit *any* construction” or *any* occupation “of the airspace above the Terminal.”⁴³ In this case, the property owner simply failed to resubmit a more realistic proposal.⁴⁴

B. ZONING AND HISTORIC PRESERVATION RESTRICTIONS

Federal, state, and local governments can designate historic districts and individual landmarks; however, local designations contain more limitations because zoning is under the control of the local government.⁴⁵ Zoning and historic preservation restrictions often overlap with each other.⁴⁶ Zoning “governs the use,” height, floor area ratio, “and placement of all buildings within a jurisdiction.”⁴⁷ However, zoning ordinances usually do not have limitations on aesthetics.⁴⁸ In contrast, historic preservation ordinances typically do not govern the use of property and focus instead on the aesthetic changes to the exteriors of historic landmarks and districts.⁴⁹

C. ETHICS IN HISTORIC PRESERVATION

Ethics is using one’s morals and values to determine “what is good and bad” and what is right and wrong.⁵⁰ Generally, determining what is right and wrong is often left open to individual interpretation. The world does not have a single moral compass, as everyone has different morals and values. However, in the legal profession, American lawyers have some ethical guidance with the *Model Rules of Professional Conduct*.⁵¹

Ethics in the historic preservation field is more difficult to determine. Many people have polarizing opinions. Some believe historic preservation benefits the general welfare.⁵² If the government desires to create a public good, it can take property to accomplish that purpose.⁵³ However, it cannot simply steal the land, as the government must purchase the property from the landowner if the action

43. *Id.* at 117, 136–37.

44. *Id.* at 137.

45. See Millsap, *supra* note 6, at 1.

46. BRONIN & BYRNE, *supra* note 1, at 332.

47. *Id.*

48. *Id.*

49. *Id.* at 333.

50. See Ethic, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary> [<https://perma.cc/ACQ8-73QH>] (last visited Apr. 26, 2022).

51. See generally MODEL RULES OF PROF'L CONDUCT (2018) [hereinafter MODEL RULES].

52. See Jess Theodore, *Over My Dead Property! Why the Owner Consent Provisions of the National Historic Preservation Act Strike the Wrong Balance Between Private Property and Preservation*, SCHOLARSHIP @ GEORGETOWN LAW (Aug. 12, 2008), at 21, <https://scholarship.law.georgetown.edu> [<https://perma.cc/SN8Z-WVL7>].

53. Roger Marzulla, Ken Mehlman, Thomas O. Sargentich, Joseph L. Sax & Charles Tiefer, *Taking “Takings Rights” Seriously: A Debate on Property Rights Legislation Before the 104th Congress*, 9 ADMIN. L. J. AM. U. 253, 258 (1995).

constitutes a taking.⁵⁴ Many consider this a fair trade.⁵⁵ Others consider this as a violation of fundamental property rights.⁵⁶

II. HOW DOES HISTORIC PRESERVATION AFFECT THE COMMUNITY?

Typically, the general public (the community) wants to retain its right to preserve its historic resources.⁵⁷ Preservation allows the community to protect important landmarks and districts that have rich personalities, stories, and architecture.⁵⁸ Preservationists strive to preserve the prototype, as modern development has wiped away important, unique, and original architecture and replaced it with bland office buildings and modern concrete boxes.⁵⁹

A. BENEFITS TO THE COMMUNITY

While there are some drawbacks, historic preservation provides many benefits to the community.⁶⁰ To begin, the historic preservation movement creates new jobs and gives opportunities to those without a formal education.⁶¹ These jobs are generally well paid because rehabilitation is “more labor intensive than new construction;” therefore, the “work restoring historic buildings has a greater job creating impact per dollar spent than new construction.”⁶² For example, the city of Savannah spent one million dollars on the rehabilitation of historic sites, which created “about 1.2 more jobs and \$62,000 more in income for” citizens than new construction would have.⁶³

Many people are attracted to and seek jobs in historic districts due to the number of restaurants, activities, and businesses these districts contain.⁶⁴ In Rhode Island, “14 of the 25 highest rated restaurants” are located in historic districts, which demonstrates the striking demand for these valuable areas.⁶⁵

Downtown revitalization is another benefit created by the historic preservation movement.⁶⁶ In the past, downtowns of many cities were carelessly lost due to the creation of unoriginal shopping centers.⁶⁷ However, the movement was determined to differentiate downtowns from shopping malls with the reuse and

54. *Id.*

55. *See id.*

56. *See Twenty-Four Reasons, supra* note 7, at 1.

57. *See generally id.* at 7.

58. *See* BRONIN & BYRNE, *supra* note 1, at 67, 69.

59. *See id.* at 24 (citing JAMES MARSTON FITCH, HISTORIC PRESERVATION: CURATORIAL MANAGEMENT OF THE BUILT WORLD (1990)).

60. *See generally Twenty-Four Reasons, supra* note 7.

61. *Id.* at 2.

62. *Id.*

63. *Id.*

64. *See id.*

65. *See id.*

66. *Id.* at 3.

67. *See id.*

enhancement of its historic sites.⁶⁸ For example, in Raleigh, about “two-thirds of new businesses in downtown” chose their location because of the historic buildings, demonstrating the ever-increasing popularity of buildings with textured character and history.⁶⁹

Communities are often pleased that their property values increase as a result of historic preservation designation because it gives them a greater return on their investment.⁷⁰ While it is difficult to measure, studies show that “[i]n nearly every instance properties in local historic districts have greater rates of appreciation than properties elsewhere in the same city.”⁷¹ For example, between 2002 and 2016, single-family homes in an Indianapolis historic district “increased in value 7.3% each year, compared with just under 3.5% for houses not in historic districts.”⁷²

Heritage tourism is another crucial benefit of the historic preservation movement.⁷³ Heritage tourism is defined as “traveling to experience the places, artifacts, and activities that authentically represent the stories and people of the past and present.”⁷⁴ “[H]eritage visitors stay longer, visit more places, and spend more per day than tourists with no interest in historic resources.”⁷⁵ This industry houses more than 98,000 jobs, which demonstrates how historic preservation funnels wealth-generating opportunities back into the community.⁷⁶

Importantly, communities value historic preservation because it is a direct reflection of history.⁷⁷ The movement creates a historic nostalgia and sense of place that is difficult to duplicate without the process of designation.⁷⁸ This fosters strong “neighborhood stability and community engagement” because after a few years of living in a historic district, people “often feel a heightened sense of responsibility to maintain their homes and shared community spaces.”⁷⁹ For example, a private property owner in New Orleans was not allowed to demolish his cottage and replace it with a modern apartment building because of nationwide and local support for preserving the French Quarter’s heritage.⁸⁰ The Vieux Carre Ordinance, a regulatory ordinance used to protect buildings in the French

68. *See id.*

69. *See id.*

70. *See id.* at 6.

71. *See id.*

72. *Id.*

73. *Id.* at 4.

74. *Heritage Tourism*, ADVISORY COUNCIL ON HISTORIC PRESERVATION, at 1, <https://www.achp.gov> [<https://perma.cc/U5UW-XLCM>] (last visited Apr. 26, 2022).

75. *Twenty-Four Reasons*, *supra* note 7, at 4.

76. *See id.*

77. *See* BRONIN & BYRNE, *supra* note 1, at 22 (citing Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473 (1981)).

78. *See id.*

79. *Twenty-Four Reasons*, *supra* note 7, at 29.

80. *Maheer v. City of New Orleans*, 516 F.2d 1051, 1054, 1061–63. (5th Cir. 1975).

Quarter, was deemed an appropriate use of the police power because it advanced proper social and economic goals of protecting a historic district.⁸¹

Historic preservation is also better for the environment than new construction, as “[t]he greenest building is the one already built.”⁸² Further, “almost every building typology” in the United States exhibited “a better environmental outcome through adaptive reuse than with demolition and new construction.”⁸³

B. DRAWBACKS TO THE COMMUNITY

Like other kinds of land use, historic preservation is not without its faults.⁸⁴ Many believe it has gone too far.⁸⁵ However, it may be important to keep in mind that a great number of those that attack historic preservation are “advocacy groups for real estate developers” who remain bitter about being prohibited from building large-scale skyscrapers.⁸⁶ For example, in New York City, “less than 5% of developable lots . . . [are] under the purview of the Landmarks Preservation Commission.”⁸⁷ However, historic preservation is continually attacked even though developers are free to develop on the other ninety-five percent of property in the city.⁸⁸ Additionally, while some of the following complaints are valid, proponents of preservation believe many go unsupported with little evidence, as they rely on rare or “isolated example[s]” to perpetuate a “blatant misrepresentation of reality.”⁸⁹

To begin, those that oppose the historic preservation movement claim that because preservationists rely on the Secretary of the Interior’s Standards for the Treatment of Historic Properties, which was drafted in 1977, they are using outdated tools.⁹⁰ For example, properties are “still categorized in a binary way”—historically significant or not.⁹¹ This places unnecessary limitations on some historic properties because they are more important and might require greater preservation than others.⁹² This is troubling because the United States has evolved since the late 1970s due to “rapid urbanization,” and the outdated tools cannot adequately honor “all facets of the American story.”⁹³

81. *Id.* at 1058, 1061.

82. *Twenty-Four Reasons*, *supra* note 7, at 17.

83. *Id.*

84. *See generally* Millsap, *supra* note 6.

85. *See generally id.*

86. *Twenty-Four Reasons*, *supra* note 7, at 1.

87. *Id.* at 16.

88. *See id.*

89. *See id.*

90. Frey, *supra* note 10, at 1.

91. *Id.*

92. *Id.*

93. *Id.*

Opponents also argue that historic preservation keeps cities frozen in time.⁹⁴ This obstructs the possibility of a new urbanism and productive development that adjusts to the fluctuating economic needs of a community.⁹⁵ Cities are being placed “under glass, preventing what should be some of our most vibrant neighborhoods” from evolving.⁹⁶ Opponents believe historic preservation limitations even suppress property values, as the land cannot perform to its optimum extent.⁹⁷ For example, a beautiful church in Manhattan remained empty for a significant amount of time because the Landmarks Preservation Commission denied its conversion proposal.⁹⁸ Because of the “prolonged underuse,” the church fell into disrepair and would have been better maintained if it had been in active use.⁹⁹ Circumstances like this prevent potential benefits to the community.¹⁰⁰

There are also environmental aspects that contribute to this argument.¹⁰¹ In some communities, historic preservation has notoriously denied the installation of distracting solar panels to roofs.¹⁰² These panels are imperative in reducing carbon use and improving the environment.¹⁰³ Opponents believe that without flexible standards, historic districts will not be habitable in the future, as residents will flock to different areas that encourage environmental improvement.¹⁰⁴

Others state that a major problem with historic preservation is purely aesthetic because many people have entirely different tastes.¹⁰⁵ Rather than creating an interesting contrast of old and new buildings, it creates a rigidly uniform formula of outdated buildings.¹⁰⁶ Further, historic preservation “protect[s] an abundance of uninteresting buildings that are less attractive and exciting than the new structures that could replace them.”¹⁰⁷ However, preservationists acknowledge that historic districts should change with time.¹⁰⁸ Proponents claim historic preservation is used over time to ensure the quality and character of a neighborhood is not destroyed through unnecessary change.¹⁰⁹

94. Millsap, *supra* note 6, at 1.

95. *Id.*

96. Binyamin Appelbaum, *When Historic Preservation Hurts Cities*, N.Y. TIMES (Jan. 26, 2020), at 1, <https://www.nytimes.com> [<https://perma.cc/P9CX-C9MP>].

97. Scott Beyer, *Historic Preservation Is Great, Except When It Isn't*, GOVERNING (Sept. 25, 2020), at 1, <https://www.governing.com> [<https://perma.cc/X3L9-7J6B>].

98. *Id.*

99. *Id.*

100. *See generally* Millsap, *supra* note 6.

101. *See* Appelbaum, *supra* note 96, at 1.

102. *See id.*

103. *Id.*

104. *See id.*

105. Beyer, *supra* note 97, at 1; Millsap, *supra* note 6, at 1.

106. *See* Beyer, *supra* note 97, at 1.

107. *Id.*

108. *Twenty-Four Reasons*, *supra* note 7, at 24.

109. *Id.*

Some also believe that many of the landmarks and districts that are designated are “not that historic, culturally important, or high quality.”¹¹⁰ Some even believe that preservation is not actually about the protection of historic resources.¹¹¹ Instead, they believe landowners “who want to protect their investment” in their property intentionally align with “preservationists who can provide cover behind a veil of protecting history.”¹¹²

Opponents believe the movement has gone overboard in its designations.¹¹³ The restrictions created by historic designation create a cost that outweighs the benefits associated therewith.¹¹⁴ Rehabilitation can be especially challenging in a city where property valuations are low, financing is limited, and historic preservation tax credits are not a viable option.¹¹⁵ This is primarily a problem in cold markets where historic properties go unused because the demand is low and the cost of rehabilitation is high.¹¹⁶

The high increase in property values can negatively affect small businesses that cannot afford to pay rent in historic districts.¹¹⁷ Ultimately, this drives out beloved local businesses who once prospered in the area.¹¹⁸ This can also disadvantage those with limited resources and allow those with higher incomes to come out practically unscathed.¹¹⁹

III. HOW DOES HISTORIC PRESERVATION AFFECT PROPERTY OWNERS?

Generally, private property owners want less restrictive limitations, no restrictions, or better compensation for undertaking the burdensome limitations of historic preservation.¹²⁰ In *Penn Central*, Justice Rehnquist provided an important dissent that encompassed many property owners’ interests and arguments.¹²¹ He stated that historic designation can be problematic because of the heavy costs and limitations that follow.¹²² While landowners in historic districts can receive reciprocal benefits, such as increased land values, landowners of historic landmarks receive little benefits other than the “honor of the designation.”¹²³ Is this enough?

Landowners possess a fundamental bundle of property rights: possess, use, and transfer.¹²⁴ Neighbors are allowed to exercise these rights, but designated

110. Millsap, *supra* note 6, at 1.

111. *See id.*

112. *Id.*

113. *See id.*

114. *See id.*

115. Frey, *supra* note 10, at 1.

116. *Id.*

117. *See Twenty-Four Reasons*, *supra* note 7, at 1.

118. *See id.*

119. *See id.* at 8.

120. *See generally* Appelbaum, *supra* note 96, at 1; Frey, *supra* note 10, at 1.

121. *See generally* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 139–153 (1978).

122. *Id.* at 140.

123. *See Twenty-Four Reasons*, *supra* note 7, at 6; *Penn Cent.*, 438 U.S. at 139.

124. *See Penn Cent.*, 438 U.S. at 143.

landmarks are singled out to bear the burden of preservation.¹²⁵ The public does not currently pay monetary compensation for the public benefit of preserving historic landmarks, so is it fair for the landowner to solely bear the costs when the burden could be shared evenly by taxpayers?¹²⁶

A. BENEFITS TO THE PROPERTY OWNERS

Historic preservation can benefit private property owners in important ways.¹²⁷ To begin, property tax relief may be granted to owners of designated sites.¹²⁸ Tax relief may also be given to property owners who restore and rehabilitate historic sites.¹²⁹ This positively incentivizes owners to choose to restore and reuse historic buildings, which furthers historic preservation's cause.¹³⁰ Further, for low-income individuals occupying historic sites, extra relief can make a meaningful difference.¹³¹ Additionally, "federal and state historic-tax-credit programs help developers fund repairs and conversions," which lowers the economic burden placed on private individuals or groups in order to promote historic preservation's mission.¹³²

In certain jurisdictions, landowners who are not permitted to develop their property to its maximum extent under local zoning law may be allowed to sell or transfer the development rights to other specific parcels in order to properly maintain the historic site under the preservation ordinance.¹³³ However, because it is difficult to measure how prosperous a property could have been without preservation restrictions, Justice Rehnquist argued that the transfer of development rights has an ambiguous and indefinite market value that might not fully compensate an owner for the value of the property taken.¹³⁴

Finally, properties located in historic districts may have greater appreciation rates than other properties in the same town.¹³⁵ Therefore, property owners who buy historic sites or within historic districts can reasonably expect a sizeable return on their investment because people and businesses are naturally drawn to the pockets of a city that exuberate historic individuality and authenticity.¹³⁶

125. *Id.*

126. *Id.* at 148–149.

127. *See generally* Bowers, *supra* note 20, at 411–12.

128. *Id.* at 411.

129. Beyer, *supra* note 97, at 1.

130. *See id.*

131. Millsap, *supra* note 6, at 1.

132. *See* Beyer, *supra* note 97, at 1.

133. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 114 (1978).

134. *See id.* at 141.

135. *Twenty-Four Reasons*, *supra* note 7, at 6.

136. *See id.* at 3, 6.

B. DRAWBACKS TO THE PROPERTY OWNERS

While historic preservation does provide important benefits to property owners, the tension between private and public interests in this field often “begin[s] with a gloomy scenario.”¹³⁷ After receiving “a knock at the door,” you find “an ominous government official who demands that you immediately stop construction on the addition of your home.”¹³⁸ This is because historic preservation law can impose significant restrictions on private property owners and their property.¹³⁹

Opponents claim these restrictions are “unpatriotic, un-American, unconstitutional,” and a blatant oppression of freedom.¹⁴⁰ Justice Thomas furthered this argument when he stated the Framers believed the essential liberty of private property rights eclipsed public necessity, as they purposefully created property protections in the Constitution for a reason.¹⁴¹

In order to protect historic landmarks, laws can be created “by imposing affirmative duties upon their owners,” which ultimately creates limitations on the owner’s rights.¹⁴² Typically, a private property owner “must obtain a permit from the local historic preservation board before demolishing, altering, or replacing any visible feature of a historic” site.¹⁴³ The board will grant a permit if the alterations “are ‘appropriate’ or ‘compatible’ with the historic character of the structure.”¹⁴⁴ Some believe this unfairly leaves property owners at the mercy of a historic preservation board’s current opinion about whether a fence or a solar panel blends in with the neighborhood’s uniform aesthetic.¹⁴⁵

For example, in *Penn Central*, Grand Central Terminal, a historic landmark, was subject to several restrictions, such as maintaining the exterior of the building and obtaining approval before making any exterior changes.¹⁴⁶ Penn Central Transportation Company, the landowner, leased its airspace and submitted proposals to construct an office building on top of Grand Central Terminal.¹⁴⁷ The Commission denied these requests for several reasons, such as the economic impact of the restrictions did not result in a total diminution of the property’s value, as it could continue to rent out portions of the terminal like it had for the past sixty-five years.¹⁴⁸ This caused the owner to lose millions of dollars in

137. See Theodore, *supra* note 52, at 1.

138. *Id.*

139. See generally Millsap, *supra* note 6, at 1.

140. *Twenty-Four Reasons*, *supra* note 7, at 1.

141. *Kelo v. City of New London, Connecticut*, 545 U.S. 469, 505 (2005).

142. BRONIN & BYRNE, *supra* note 1, at 84.

143. *Id.* at 263.

144. *Id.*

145. See Millsap, *supra* note 6, at 1.

146. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 104 (1978).

147. *Id.*

148. *Id.* at 120, 136.

additional income per year.¹⁴⁹ The landowner undoubtedly considered this as a violation of their property rights.¹⁵⁰

Due to stringent limitations, property owners may not be allowed to add modern design features or use innovative technology, such as solar panels.¹⁵¹ This potentially holds owners back from productively enhancing the property and creating crucial benefits, such as energy efficiency.¹⁵² Even when owners are allowed to install solar panels, they have to bear both the high costs associated with ensuring they blend in correctly and the limitations about where the panels can be placed on the home, which “can diminish their efficacy.”¹⁵³

In many historic districts, the constraints on property owners can create additional costs and burdens, such as maintenance, utility, and compliance costs, “permitting delays, [and] restrictions that limit housing supply.”¹⁵⁴ For example, in a case in Washington, D.C., the Mayor’s Agent approved a permit to destroy the Foundry Branch Trestle, a historic structure.¹⁵⁵ The permit denial would have imposed strenuous economic hardship onto the landowner, as the restoration of the trestle would cost millions of dollars.¹⁵⁶ Denying the permit would clearly constitute a taking without just compensation because there was no other reasonable economic use for the structure.¹⁵⁷

For some low-income individuals, these added costs can seem almost insurmountable.¹⁵⁸ This problem snowballs into the issue of displacement.¹⁵⁹ Opponents argue that development in historic districts will exclude low-income individuals who live there while higher-income individuals move in.¹⁶⁰ While there is no denying that historic preservation causes a demographic shift and low-income renters who remain will use a “larger percentage of their income” to pay the rising rent, the topic of displacement is tricky and ambiguous.¹⁶¹ For example, studies show “that residential turnover does not occur more frequently in a gentrifying neighborhood than generally,” and the demographics shift as a result of gradual change “without mass evictions.”¹⁶²

Due to either a lack of knowledge or a desire to rebel against stringent historic preservation guidelines on private property owners, many historic structures face

149. *Id.*

150. *See id.*

151. Millsap, *supra* note 6, at 1.

152. *See id.*

153. *Id.*

154. *Id.*

155. *In re. Application of Wash. Metro. Area Transit Auth. To Demolish Foundry Branch Trestle*, HPA No. 18-297 at 1–2 (2020).

156. *Id.*

157. *Id.* at 3.

158. *See* Millsap, *supra* note 6, at 1.

159. *See* BRONIN & BYRNE, *supra* note 1, at 687.

160. *See id.*

161. *Id.*

162. *Id.*

the unfortunate fate of illegal alteration or demolition.¹⁶³ This causes many valuable historic properties to be forever lost along with important stories, architecture, and history.¹⁶⁴ There is also the possibility that property owners will abandon their historic properties because they are unable to sell a site with such burdensome restrictions.¹⁶⁵ This ultimately leads to demolition by neglect, causing the site to fall into such dilapidation that there is no other choice but to eventually demolish it.¹⁶⁶

IV. ETHICS AND THE LEGAL PROFESSION

After analyzing some of the benefits and drawbacks of historic preservation between private property owners and the community, this Note next turns to the problem of determining who historic preservation favors and what is ethically right and wrong. Ultimately, historic preservation favors the public. From the above analysis, it is evident that historic preservation provides the public with many benefits and few drawbacks, while it provides private property landmark owners with few benefits and numerous drawbacks.¹⁶⁷

This favoritism occurs because reasonable regulations are needed to protect the “public health and safety, the environment, and historic resources.”¹⁶⁸ Because of this, courts provide great deference to legislative regulations that promote and justify considerable public benefits in exchange for “significant private burdens.”¹⁶⁹ Ethically, historic preservation is correct, just, and right in this result, as it should promote the greatest amount of good for the greatest amount of people.

Although preservation is constitutional and properly favors the public’s interest, it still unfairly disadvantages private property owners’ rights, especially in cases where a particular landmark is historically designated.¹⁷⁰ “The Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”¹⁷¹ However, as demonstrated above, there are many instances in which private landowners are inequitably forced to bear a public burden.¹⁷²

163. See Bowers, *supra* note 20, at 413.

164. See *id.*

165. See Beyer, *supra* note 97, at 1; *In re. Application of Wash. Metro. Area Transit Auth. To Demolish Foundry Branch Trestle*, HPA No. 18-297 at 1 (2020).

166. See Beyer, *supra* note 97, at 1.

167. See *supra* Part II and Part III.

168. Doheny, *supra* note 8, at 1.

169. Muller, *supra* note 26, at 1060.

170. See generally Millsap, *supra* note 6, at 1; *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 104 (1978).

171. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

172. See generally Wolf, *supra* note 30, at 1371; *Penn Cent.*, 438 U.S. at 104.

Proponents argue that the Takings Clause is rooted in fairness and justice, as landowners are compensated for the public good.¹⁷³ However, opponents believe this means “no more than to pay a property owner market price in return for bowing to the government’s exercise of raw power of the sword.”¹⁷⁴

Although a historic preservation land-use ordinance is assumed to be constitutional under the police power, actions can be taken to better balance the two interests.¹⁷⁵ For example, states are trying to do more to protect landowners by passing protective laws.¹⁷⁶ In Texas, a law was passed that forbids governmental activity that “reduce[s] a property’s value by 25 percent or more.”¹⁷⁷ While state action is a start, there are ways in which the legal profession can help better strike a balance between public and private interests in historic preservation, such as altering lawyer behavior through the utilization of the *Model Rules*.

A. PREAMBLE: A LAWYER’S RESPONSIBILITIES: SECTION 6

In the *Model Rules*, Section Six emphasizes a lawyer’s responsibilities by stating:

As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel.¹⁷⁸

While there are certainly instances in which landowners receive a greater return on their investment due to historic preservation, there are, unfortunately, some instances in which low-income individuals, families, and communities are disadvantaged.¹⁷⁹ For example, eminent domain could benefit a wealthy developer by essentially taking a private individual’s property.¹⁸⁰ Because the private property owner is a lower income individual, they may have to give up their land because they do not have access to the justice system.¹⁸¹

For example, in *Kelo*, the City of New London used eminent domain to take private property and redistribute it to developers to create community benefits,

173. Stephen Durden, *Unprincipled Principles: The Takings Clause Exemplar*, 3 ACRCL 25, 55 (2013).

174. *Id.*

175. *See* Bowers, *supra* note 20, at 425–426.

176. *See id.*

177. *Id.* at 426.

178. MODEL RULES pmb. ¶ 6.

179. *See Twenty-Four Reasons*, *supra* note 7, at 6; Millsap, *supra* note 6, at 1.

180. *See generally* *Kelo v. City of New London, Connecticut*, 545 U.S. 469, 472 (2005).

181. *See generally id.* at 505.

such as “new jobs and increased tax revenue.”¹⁸² The Court held that this did not violate the Fifth Amendment because it provided a legitimate public benefit.¹⁸³ However, Justice Thomas dissented and argued that the taking of private property for a broad public benefit will disproportionately affect lower-income individuals who may lose their homes due to the rise in modern development.¹⁸⁴

Because historic preservation can use eminent domain to protect historic sites, it is possible that a lower-income property owner will lose their property for the benefit of the community.¹⁸⁵ To prevent Justice Thomas’ fears from becoming a reality, lawyers have a special responsibility to devote their time and effort to help achieve justice for disadvantaged private property owners that do not have equal access to legal representation when they believe historic preservation law is not being fairly administered.¹⁸⁶

B. PREAMBLE: A LAWYER’S RESPONSIBILITIES: SECTION 13

Section Thirteen states that “lawyers play a vital role in the preservation of society.”¹⁸⁷ The historic preservation movement is essentially the preservation of society because it preserves resources that are of historic significance.¹⁸⁸ Historic preservation protects important architecture, sites, districts, and other resources to ensure America’s society is preserved.¹⁸⁹

Importantly, the movement also protects the history of diverse communities and preserves significant sites and areas that illustrate American history.¹⁹⁰ Because of this, lawyers should strive to fulfill their important role in historic preservation. In order to better preserve society, lawyers have a responsibility to better balance justice in historic preservation between private and public interests so historic landmarks can be preserved while ensuring fair treatment to property owners.¹⁹¹

There are many ways attorneys can get involved with historic preservation. First, there are “many commercial and residential historic rehabilitation projects [that] are eligible for various types of development financial incentives.”¹⁹² However, these incentives often have ambiguous requirements and require collaboration with preservation organizations.¹⁹³ Lawyers can help developers and

182. *Id.* at 469–70.

183. *Id.*

184. *Id.* at 521–22.

185. See Bowers, *supra* note 20, at 406; *id.*

186. See *Kelo*, 545 U.S. at 521–22; MODEL RULES pmb. Sec. 6.

187. MODEL RULES pmb. ¶ 13.

188. See BRONIN & BYRNE, *supra* note 1, at 67, 69.

189. See *id.*

190. See *id.* at 1.

191. See MODEL RULES pmb. ¶ 13.

192. *Historic Preservation Law*, GARY COLE LAW, at 1, <https://www.garycolelaw.com> [<https://perma.cc/P454-VXZN>] (last visited Apr. 26, 2022).

193. *Id.*

property owners by obtaining and maximizing historic tax credits, acquiring historic preservation easements, and explaining “historic preservation laws and administrative procedures” so the language is understandable and clear to everyone—regardless of education level.¹⁹⁴

Second, attorneys can help developers and property owners obtain a historic preservation landmark designation and property owners that object designation, and in both cases, lawyers should utilize “local and federal landmarking laws to obtain the best outcomes for [their] clients.”¹⁹⁵ For those that object designation, attorneys can help their clients alter their properties “without special governmental approval” by helping clients understand historic preservation law.¹⁹⁶

Attorneys can also offer their services for dispute resolution.¹⁹⁷ Disputes arise in many scenarios, such as landmarking cases, objections to a property owner’s wish to alter their property, and the denial of financial incentives.¹⁹⁸ Attorneys can provide their services in litigation, arbitration, mediation, and administrative appeals.¹⁹⁹

Next, lawyers can help “historic rehabilitation projects [that] require services related to complying with state and federal historic preservation regulatory requirements, as well as local ordinances.”²⁰⁰ These projects are typically “required to be reviewed and approved” for compliance with the appropriate laws and guidelines.²⁰¹

Attorneys can also assist developers in the acquisition of historic properties, “the negotiation and documentation of disposition and development agreements with local agencies,” and contract structuring.²⁰² Lastly, lawyers can “advise corporate investors in connection with private equity investments and nationally-syndicated affordable housing and historic tax credit funds.”²⁰³

C. RULE 6.1: VOLUNTARY PRO BONO PUBLICO SERVICE

Regarding public service, Rule 6.1 states that “[e]very lawyer has a professional responsibility to provide legal services to those unable to pay.”²⁰⁴ A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year.²⁰⁵ Lawyers should consider using their pro bono hours to help individuals

194. *Id.*

195. *Id.*

196. *See id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Historic Preservation Law*, SHEPPARD MULLIN, at 1, <https://www.sheppardmullin.com> [<https://perma.cc/XUM8-EJAF>] (last visited Apr. 26, 2022).

203. *Id.*

204. MODEL RULES R. 6.1.

205. MODEL RULES R. 6.1.

of limited means who are either trying to protect historic landmarks or are disadvantaged because of historic preservation.²⁰⁶ Similarly, attorneys should also consider dedicating their time to assist local preservation groups in their mission to preserve this country's historic sites.²⁰⁷

Regardless of the completion of one's pro bono hours, lawyers should consider providing additional services to landowners of limited means and preservation groups striving to protect some of America's most historic and precious landmarks and districts.²⁰⁸

There are many worthy organizations that promote historic preservation or protect private property owners' rights that attorneys can join to lend their services. For example, the National Trust for Historic Preservation, a nonprofit organization, greatly relies on attorneys to either join their organization or offer their services through pro bono work.²⁰⁹ This organization seeks to "save America's historic sites; tell the full American story; build stronger communities; and invest in preservation's future."²¹⁰ If litigation is necessary, the National Trust will file a brief that "provides a broader legal understanding of a given preservation law issue or provides a national perspective for a court to consider."²¹¹ The attorneys will also help initiate a "lawsuit or join an existing lawsuit."²¹² Lastly, the Law Division also creates important legal scholarship, assists in making changes to laws and guidelines to better protect historic sites and districts, and provides advice to advocates, private property owners, and governmental bodies.²¹³

D. RULE 6.4: LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

Lastly, regarding law reform activities that could potentially affect client interests, Rule 6.4 states:

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.²¹⁴

206. See MODEL RULES R. 6.1.

207. See MODEL RULES R. 6.1.

208. See MODEL RULES R. 6.1.

209. *Law Division*, THE PRESERVATION LEADERSHIP FORUM OF THE NATIONAL TRUST FOR HISTORIC PRESERVATION (June 6, 2016), at 1, <https://forum.savingplaces.org> [<https://perma.cc/7W5R-Q83E>].

210. *About*, THE PRESERVATION LEADERSHIP FORUM OF THE NATIONAL TRUST FOR HISTORIC PRESERVATION (June 6, 2016), at 1, <https://forum.savingplaces.org> [<https://perma.cc/96ZJ-D3U2>].

211. *Law Division*, *supra* note 209, at 1.

212. *Id.*

213. *Id.*

214. MODEL RULES R. 6.4.

If a lawyer is involved in a particular organization that could compete with, affect, or benefit a client's interests, the lawyer is required to disclose their position.²¹⁵ For example, real estate lawyers that are members of a particular organization, such as a historic preservation organization, should disclose that information to any client with conflicting interests. Lawyers have a special responsibility to serve their community.²¹⁶ Attorneys can better achieve that through transparency.²¹⁷

CONCLUSION

Addressing the fundamental question of whether historic preservation properly balances private and public interests proves to be challenging, as there are many moving parts that contribute to the answer.²¹⁸ Ultimately, the movement does not equitably and evenly balance the two interests, as it favors the public interest to provide for the greater good and the general welfare of American communities.²¹⁹ This result demonstrates that historic preservation is constitutional and ethically right, but it still unfairly disadvantages private property owners in some circumstances.²²⁰

Realistically, there is virtually no way in which historic preservation could perfectly balance both interests; however, there are ways in which the scales could tip towards equity. Using the Preamble, Rule 6.1, and Rule 6.4 of the *Model Rules of Professional Conduct* as a guide, lawyers can alter their behavior to better stabilize the two interests to help historic preservation protect America's history and architecture, while also protecting private property owners' rights.²²¹

215. See MODEL RULES R. 6.4.

216. See MODEL RULES pmb. ¶ 6.

217. See MODEL RULES pmb. ¶ 6.

218. See Doheny, *supra* note 8, at 1.

219. See *id.*

220. See generally Millsap, *supra* note 6, at 2.

221. See MODEL RULES pmb. ¶ 6, 13 and R. 6.1, 6.4.