FROM INDEPENDENCE HALL TO THE STRIP MALL: APPLYING COST-BENEFIT ANALYSIS TO HISTORIC PRESERVATION

BY

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Over the past fifty years, hundreds of municipalities across the country have enacted historic preservation laws—ordinances that regulate the alteration and demolition of buildings deemed historically or aesthetically significant. Recently, however, preservation has become pervasive, freezing the development of vast neighborhoods filled with undistinguished buildings. Local preservation commissions tend to focus on the benefits of saving old buildings rather than the costs. This Article encourages local governments to consider costs, and proposes adapting the federal model of agency cost-benefit analysis to historic preservation.

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I. INTRODUCTION

The rise of historic preservation law, as a nationwide force in urban planning, began with the fall of an exceptional building: New York City's original Pennsylvania Railroad Station.[1] In 1910, after a decade of anticipation, the station opened its doors to the public.[2] Crowds passed through a façade of stately Doric columns—grander in scale than the Brandenburg Gate in Berlin[3]—and entered a vast, 150-foot-high waiting room inspired by royal Roman baths.[4] "[O]n every hand were heard exclamations of wonder," the *New York Times* reported, "for none had any idea of the architectural beauty of the new structure."[5]

But in 1963, despite public protests, this masterpiece of Beaux Arts design was reduced to rubble.[6] Under pressure from falling revenue, the Pennsylvania Railroad razed its "temple to trains" and converted it into the humdrum commuter station that it is today, tucked under Madison Square Garden and a cluster of office towers.[7] "'One entered the city as a god,' the

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1 William A. Fischel, *Lead Us Not into Penn Station: Takings, Historic Preservation, and Rent Control*, 6 FORDHAM ENVTL. L.J. 749, 749 (1995); Paul Goldberger, *New York: Lost and Found*, N.Y. TIMES (Apr. 9, 1995), https://perma.cc/4EN7-23XT.

2 LORRAINE B. DIEHL, THE LATE, GREAT PENNSYLVANIA STATION 105 (1985); Eric J. Plosky, The Fall and Rise of Penn Station: Changing Attitudes Toward Historic Preservation in New York City 11–13 (Feb. 2000) (unpublished master's thesis, Mass. Inst. of Tech.), https://perma.cc/RFD2-FBRG.

3 Nick Bryant, *How Penn Station Saved New York's Architectural History*, BBC (May 28, 2015), https://perma.cc/JTV4-46EM.

4 Edward L. Glaeser, *Preservation Follies*, CITY J. (Spring 2010), https://perma.cc/V93S-XA7L.

5 *Pennsylvania Opens Its Great Station*, N.Y. TIMES. Nov. 27, 1910, at 7.

6 DIEHL, *supra* note 2, at 15.

7 EDWARD GLAESER, TRIUMPH OF THE CITY: HOW OUR GREATEST INVENTION MAKES US RICHER, SMARTER, GREENER, HEALTHIER, AND HAPPIER 148 (2011); Glaeser, *supra* note 4.

architectural historian Vincent Scully famously wrote of the original station. 'One now scuttles in like a rat.'"[8]

The demolition of Penn Station, described by one journalist as a "monumental act of vandalism,"[9] became the avatar—indeed, the founding myth—of the historic preservation movement.[10] In response to the public outcry, New York City established its Landmark Preservation Commission (LPC) in 1965.[11] The LPC became the model for similar review boards across the nation, tasked with identifying historic buildings and protecting them against destruction or alteration.[12]

Today, however, the use of Penn Station as a poster child for preservation is increasingly misleading. The architectural merits of Penn Station were obvious, while the opportunity cost to the city (of preventing redevelopment) would have been relatively low.[13] The Gotham of the 1960s was a far cry from the New York of the 2000s, with its fast-growing population and tight real estate market.[14] The population of the City actually declined between 1950 and 1960 as growth shifted to the suburbs.[15] Meanwhile, the City was gaining new office space at an unprecedented pace.[16] Nor was there any desperate need to relocate Madison Square Garden, which already had a home about a dozen blocks uptown.[17] As preservationists at the time pleaded, why destroy a cherished public space when the new complex could be built at another underutilized site in Manhattan—such as one of the city's many urban renewal areas?[18]

This was the era of master planners like Robert Moses, when national policy favored "slum clearance" and federally funded bulldozers demolished

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8 Herbert Muschamp, *In This Dream Station Future and Past Collide*, N.Y. TIMES (June 20, 1993), https://perma.cc/3JNV-J3J3.

9 Ada Louise Huxtable, Editorial, *Farewell to Penn Station*, N.Y. TIMES, Oct. 30, 1963, at 38.

10 David Dunlap, *Longing for the Old Penn Station? In the End, It Wasn't So Great*, N.Y. TIMES, Dec. 31, 2015, at A20.

11 *Id.* Peter Byrne questions this familiar account, pointing out that "agitation for a historic preservation ordinance in New York City substantially preceded the destruction of Penn Station." J. Peter Byrne, *Historic Preservation and Its Cultured Despisers*, 19 GEO. MASON L. REV 665, 668–69 & n.30 (2012) [hereinafter Byrne, *Cultured Despisers*] (citing ANTHONY C. WOOD, PRESERVING NEW YORK: WINNING THE RIGHT TO PROTECT A CITY'S LANDMARKS 6–10 (2008)). *But see About LPC*, NYC.GOV, https://perma.cc/MT6N-C7QU (last visited Apr. 15, 2017) (noting LPC's creation as a "response to the losses of historically significant buildings in New York City, most notably, Pennsylvania Station").

12 *See* sources cited *supra* note 1.

13 The cost to the *owner* might have been a different matter, of course. But as it happens, the redevelopment of Penn Station failed to rescue its owner from insolvency; Madison Square Garden didn't turn a profit until the 1980s. Plosky, *supra* note 2, at 49.

14 Between 1970 and 2000, the median price of a Manhattan housing unit increased by 284% in inflation-adjusted dollars. GLAESER, *supra* note 7, at 150.

15 Michael Oreskes, *Census Traces Radical Shifts in New York City's Populations*, N.Y. TIMES (Sept. 20, 1982), https://perma.cc/26KY-A8Q6.

16 *See* ANDREW CRACKNELL, THE REAL MAD MEN: THE RENEGADES OF MADISON AVENUE AND THE GOLDEN AGE OF ADVERTISING 16 (2011); JON C. TEAFORD, THE METROPOLITAN REVOLUTION: THE RISE OF POST-URBAN AMERICA 58 (2006).

17 Plosky, *supra* note 2, at 22.

18 *Id.* at 34.

broad swathes of downtown New York, Chicago, San Francisco, Boston, and New Haven.[19] Building on a massive scale was relatively easy. Preservation law was in its infancy, and New York, with its constant churn of Schumpeterian creative destruction, could fairly be described as the "House That Ruthlessness Built."[20] After all, who had protested when five hundred buildings were razed, in 1903, to make way for Penn Station?[21] No one had yet coined the term "NIMBY" (Not in My Back Yard),[22] let alone such neologisms as "LULU" and "BANANA."[23]

Half a century later, historic preservation is ubiquitous.[24] Whereas New York was a pioneer in the 1960s,[25] today hundreds of municipalities, from small towns to major metropolises, impose restrictions on property owners in the name of historic preservation. The number of local historic preservation ordinances nationwide mushroomed from a mere handful at midcentury[26] to more than 2,300 in 2015.[27] New York City alone boasts 35,000 landmarked properties.[28] Collectively, preservation boards have jurisdiction over changes to hundreds of thousands of buildings. Often operating independently of planning and zoning offices, they decide the fate not only of individual landmarks but of "historic districts" encompassing entire neighborhoods.[29] As Peter Byrne argues, "One can no longer analyze contemporary urban development and redevelopment without regard to historic preservation."[30]

It is easy to see why these laws have proven popular. At their best, they enable communities to safeguard their cultural heritage, preserve beautiful

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19 *See generally* MARTIN ANDERSON, THE FEDERAL BULLDOZER (1967).

20 Tony Hiss, *The Death and Life of Preservation*, N.Y. TIMES (Oct. 26, 2003), https://perma.cc/X9QB-JYK2.

21 *Id.*

22 JOHN TILSTON, NIMBY!: ALIGNING REGIONAL ECONOMIC DEVELOPMENT PRACTICE TO THE REALITIES OF THE 21ST CENTURY 13 (2012) (noting that the term NIMBY was first coined in 1980 (citing Emilie Travel Livezey, *Hazardous Waste*, CHRISTIAN SCI. MONITOR (Nov. 6, 1980), https://perma.cc/G8TM-4TQE)).

23 LULU stands for "Locally Unwanted Land Use"; BANANA stands for "Build Absolutely Nothing Anywhere Near Anything." *See* David Schleicher, *City Unplanning*, 122 YALE L.J. 1670, 1672 (2012) (citing Vicki Been, *What's Fairness Got To Do with It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 79 CORNELL L. REV. 1001, 1001, 1015 (1993)).

24 MICHAEL A. TOMLAN, HISTORIC PRESERVATION: CARING FOR OUR EXPANDING LEGACY 120 (2015).

25 N.Y DEP'T OF STATE, LEGAL ASPECTS OF MUNICIPAL HISTORIC PRESERVATION 1 (rev. 2005), https://perma.cc/735H-7KUH.

26 TOMLAN, *supra* note 24, at 120 (noting that only about a dozen cities had preservation laws before the 1960s).

27 NAT'L TR. FOR HISTORIC PRES., A CITIZEN'S GUIDE TO PROTECTING HISTORIC PLACES: LOCAL PRESERVATION ORDINANCES 1 (2002) [hereinafter LOCAL PRESERVATION ORDINANCES], https://perma.cc/JGQ4-ZM73.

28 This includes 1,355 "individual landmarks" and the buildings located in 138 "historic districts and district extensions." *About LPC*, *supra* note 11.

29 *See* INGRID GOULD ELLEN ET AL., FIFTY YEARS OF HISTORIC PRESERVATION IN NEW YORK CITY 8, 10 (2016), https://perma.cc/4LUU-PKDJ (discussing the designation process and the growth in protection of historic neighborhoods).

30 Byrne, *Cultured Despisers*, *supra* note 11, at 666.

architecture, foster civic pride, attract tourism, and promote social solidarity by maintaining a distinctive "sense of place."[31] Jane Jacobs, who gained fame opposing the vast urban renewal projects of the 1960s, devoted a chapter to the "need for aged buildings" in her magnum opus, *The Death and Life of Great American Cities*.[32] The contemporary literature on preservation is rife with praise for its many benefits.[33]

At the same time, many cities now face a combination of rapid population growth and a shortage of affordable housing.[34] Restrictions on development come at a cost. One recent study found that lifting barriers to urban construction could raise the gross domestic product (GDP) of the United States by between 6.5% and 13.5%—about one to two trillion dollars.[35] Zoning—which regulates building use, height, and bulk—emerged as a major force in the early twentieth century and has become increasingly strict in the past thirty years, even as academic support for it has faded.[36] Anika Singh Lemar coined the phrase "zoning as taxidermy" to describe how many land-use regulations restrict the supply of affordable housing and thereby unintentionally harm the poor.[37] Limiting urban density also has environmental costs, in part because it pushes development out to auto-dependent suburbs.[38] And excessive landmarking may block architectural innovation, holding cities hostage to an increasingly artificial past.[39]

As the opportunity costs of preservation have risen, the marginal benefits have declined. The reason for this is simple: the most important sites tend to be preserved first, and few buildings are as iconic as New

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31 Larry R. Ford, *Historic Preservation and the Sense of Place*, GROWTH & CHANGE, Apr. 1974, at 33; *see also infra* Part IV.B.2.

32 JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 187–199 (1961).

33 RANDALL MASON, ECONOMICS AND HISTORIC PRESERVATION 6 (2005), https://perma.cc/6FNX-BZ9U (finding that the literature is "weighted heavily toward advocacy"); *see, e.g.*, DONOVAN RYPKEMA, THE ECONOMICS OF HISTORIC PRESERVATION (1994); Robert Stipe, *Prologue* to A RICHER HERITAGE, at xiii–xiv (Robert Stipe ed., 2003); TOMLAN, *supra* note 24, at vi–vii; NORMAN TYLER ET AL., HISTORIC PRESERVATION: AN INTRODUCTION TO ITS HISTORY, PRINCIPLES, AND PRACTICE 11–18 (2009); Byrne, *Cultured Despisers*, *supra* note 11; J. Peter Byrne, *The Rebirth of the Neighborhood*, 40 FORDHAM URB. L.J. 1595 (2013).

34 *See generally* Ed Glaeser & Joe Gyourko, The Economic Implications of Housing Supply (Wharton Sch. of the Univ. of Pa. Samuel Zell & Robert Lurie Real Estate Ctr., Working Paper No. 802, 2017), https://perma.cc/Q5GW-PHEF.

35 Chang-Tai Hsieh & Enrico Moretti, *Why Do Cities Matter? Local Growth and Aggregate Growth* 26, 46 tbl.5 (Nat'l Bureau of Econ. Research, Working Paper No. 21,154, 2015). The study used data from 2009. In that year, U.S. GDP was approximately $14.5 trillion. Press Release, Bureau of Econ. Analysis, U.S. Dep't of Commerce., Gross Domestic Product: Fourth Quarter 2009 (Third Estimate) Corporate Profits: Fourth Quarter 2009 (Mar. 26, 2010), https://perma.cc/GUT4-TXWG. In 2016, U.S. GDP was approximately $18.5 trillion dollars. Press Release, Bureau of Econ. Analysis, U.S. Dep't of Commerce., Gross Domestic Product: Fourth Quarter and Annual 2016 (Third Estimate) Corporate Profits: Fourth Quarter 2016 and Annual 2016 (Mar. 30, 2017), https://perma.cc/PPJ2-PCPY.

36 Schleicher, *supra* note 23, at 1674 & n.7 (collecting sources).

37 Anika Singh Lemar, *Zoning as Taxidermy: Neighborhood Conservation Districts and the Regulation of Aesthetics*, 90 IND. L.J. 1525, 1535–42 (2015).

38 *See infra* Part IV.B.1.iii.

39 *See infra* Part IV.B.1.iv.

York's Penn Station or Philadelphia's Independence Hall. But remarkably, the pace of preservation has remained steady or even accelerated.[40] Historic preservation laws increasingly are used not as a means of saving cherished landmarks, but as an all-purpose tool for halting new construction—regardless of the architectural or cultural merits of the buildings preserved. Whereas once cities battled to preserve Penn Station and Grand Central, today skirmishes erupt over "historic" parking lots.[41] Washington, D.C. and Arlington, Virginia recently landmarked several strip malls.[42] In New York, the LPC landmarked a BP gas station as part of a historic district, nixing the station owner's plans to redevelop the property into a mid-rise condo development.[43]

Approximately 27% of the buildings in Manhattan have been designated as historic,[44] many of them in the past three decades.[45] New development in these areas is heavily curtailed.[46] Harvard scholar Ed Glaeser, a leading urban economist, has described the trend of pervasive landmarking as a new "NIMBYism" that "hides under the cover of preservationism, perverting the worthy cause of preserving the most beautiful reminders of our past into an attempt to freeze vast neighborhoods filled with undistinguished architecture."[47]

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40 *See* ELLEN ET AL., *supra* note 29, at 1; Brian J. McCabe & Ingrid Gould Ellen, *Does Preservation Accelerate Neighborhood Change?*, 82 J. AM. PLAN. ASS'N 134, 135 (2016); *Preserving City Landmarks*, BALT. SUN (May 11, 2009), https://perma.cc/AJ39-U2KX.

41 BENJAMIN ROSS, DEAD END: SUBURBAN SPRAWL AND THE REBIRTH OF AMERICAN URBANISM 93–94 (2014) (noting successful campaign to preserve a parking lot in Washington, D.C. in 1986); Aaron Wiener, *A Lot to Lose: Can a Parking Lot Be a Historic Landmark?*, WASH. CITY PAPER (Apr. 16, 2015), https://perma.cc/8QZ9-W7KM (discussing current issues with the 1986 landmark designation).

42 Josh Barro, *DC's Key Development Failure Isn't Downtown, It's Cleveland Park*, FORBES (Apr. 19, 2012), https://perma.cc/VQ7J-NE5P; Miles Grant, *Arlington Passes Strip Mall Preservation Act*, GREEN MILES (July 28, 2011), https://perma.cc/T4MJ-6QGF; *Historic Resources Inventory: Essential Properties*, ARLINGTON VA., http://perma.cc/5JZJ-KPPV (last visited Apr. 15, 2017.

43 Annie Karni, *This Gas Station is a Landmark?!*, N.Y. POST (Apr. 8, 2012), https://perma.cc/AMM6-JVWN. After considerable delay, the owner was eventually permitted to demolish the station and erect a seven-story commercial building. Lauren Evans, *"Historic" SoHo BP to Be Turned Into 7-Story Office, Retail Building*, GOTHAMIST (Apr. 11, 2013), https://perma.cc/SE6P-AAZ3.

44 ELLEN ET AL., *supra* note 29, at 4.

45 *Id.* at 1. During the Michael R. Bloomberg Administration, which was considered relatively development-friendly, the number of historic districts grew from sixty-four to over a hundred. Annie Karni, *Bloomy Deputy's 'Historic' Nabe Grab*, N.Y. POST (Apr. 8, 2012), https://perma.cc/XAV2-GEB8.

46 ELLEN ET AL., *supra* note 29, at 45 (finding that lots in historic districts "were considerably less likely to see new construction" than nearby non-LPC-regulated lots).

47 GLAESER, *supra* note 7, at 260–61.

Figure 1: Pennsylvania Station[48]

Figure 2: Landmarked Arlington shopping center[49]

48 Bird's-Eye View, Pennsylvania Station, New York City, LC-DIG-det-4a24329 (c. 1910–1920) (Detroit Publ'g Co. Photograph Collection, Library of Cong.).

49 Arlington Cty., Colonial Village Shopping Center (Sept. 13, 2008), https://perma.cc/B8V6-Z8W9.

Despite increasing recognition of the costs of excessive preservation,[50] most cities lack a formalized process for evaluating the tradeoffs.[51] Most land-use regulations, including landmark designations, are enacted at the local level. Unlike federal agencies, however, local preservation boards are generally not required to apply cost-benefit analysis (CBA) to their decisions.[52] Despite the enormous stakes involved, especially in cities with the most valuable real estate,[53] these municipal agencies tend to focus on the benefits of saving old buildings, without considering costs such as effects on affordable housing, the environment, and economic development.

This Article proposes adapting CBA to historic preservation at the local level. Part II provides an overview of historic preservation law. After a brief history of the rise of the historic preservation movement, I explain how local historic preservation typically works and describe the permissive legal regime that governs it. Whereas judicial review has proven a feeble check on excessive landmarking, I suggest that regulatory review may be more promising. Part III introduces the concept of CBA, focusing on the model of CBA used in federal "Regulatory Impact Analysis." While still somewhat controversial among academics, a broad political and scholarly consensus now supports the use of CBA by federal agencies.[54] Part IV proposes applying CBA to local historic preservation, and provides a basic framework. After identifying various potential costs and benefits of preserving old buildings, I suggest how CBA might be adapted to the context of local preservation and address potential challenges, such as the difficulty of quantifying benefits and the scarcity of resources for data-driven analysis in small municipalities. Finally, Part V elaborates on ways that local governments could put this proposal into practice.

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50 *See, e.g.*, REM KOOLHAAS, PRESERVATION IS OVERTAKING US (2014) (emphasizing aesthetic downsides); Byrne, *Cultured Despisers*, *supra* note 11, at 666–67 (responding to "widely noticed critiques" by Koolhaas and Glaeser); Glaeser, *supra* note 4 (emphasizing effects on housing prices); Joachim Beno Steinberg, Note, *New York City's Landmarks Law and the Rescission Process*, 66 N.Y.U. ANN. SURV. AM. L. 951, 990–94 (2011) (arguing that the LPC should take into account some economic factors when deciding whether to revoke landmark status); *see also* Kriston Capps, *Why Historic Preservation Districts Should Be a Thing of the Past*, ATLANTIC: CITY LAB (Jan. 29, 2016), https://perma.cc/THU8-BWHP; Will Doig, *Preserving History, or the 1 Percent?*, SALON (Apr. 14, 2012), https://perma.cc/4PZ2-VTQF; Sarah Williams Goldhagen, Op-Ed., *Death by Nostalgia*, N.Y. TIMES, June 11, 2011, at A21; Nicolai Ouroussoff, *An Architect's Fear that Preservation Distorts*, N.Y. TIMES, May 24, 2011, at C1; Emily Washington, *Historic Preservation and Its Costs*, CITY J. (May 2, 2012), https://perma.cc/NRQ2-JRED.

51 *See* discussion *infra* Part II.B.

52 *Compare, e.g.*, SEATTLE, WASH., CODE § 25.12.350 (2016) (not requiring CBA for landmark designation), *with* 40 C.F.R § 1502.23 (2016) (requiring CBA for federal actions under regulations associated with the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370h (2012)).

53 New York City real estate is valued at over $1 trillion. Josh Barbanel, *New York City Property Values Surge*, WALL STREET J. (Jan. 15, 2016), https://perma.cc/R7VD-BJTF.

54 *See* discussion *infra* Part IV.

II. OVERVIEW OF HISTORIC PRESERVATION LAW

A. The Rise of the Historic Preservation Movement

For most of the 19th century, historic preservation was largely left to the private sector.[55] Concerned citizens banded together to raise money and save prominent sites such as George Washington's Mount Vernon[56] and the Gettysburg battlefield.[57] Government intervention was sporadic and ad hoc, typically occurring only in response to grassroots campaigns with broad popular support.[58] One of the first acts of public preservation was Philadelphia's purchase of Independence Hall in 1816, spurred by appeals from local historical associations.[59] The federal government had virtually no role in preservation until the late 19th century, when it began to establish national parks such as Yellowstone.[60] Early efforts, both public and private, tended to focus on sites of civic importance, rather than architectural significance or aesthetic value.[61] Indeed, not until the 1950s did the Supreme Court rule that regulation of private property for aesthetic purposes was within the proper scope of the police powers exercised by local governments.[62]

The government's role in historic preservation expanded steadily in the first half of the twentieth century. For many years, the preservation of historic neighborhoods—such as Colonial Williamsburg and Greenwich Village—had been left to the philanthropic efforts of industrialists like Henry Ford and John D. Rockefeller.[63] But the rise of zoning laws in the early 1920s, upheld by the Supreme Court in the landmark case *Village of Euclid v. Amber Realty Co.*,[64] helped pave the way for other land-use restrictions. The first city to pass local preservation legislation was Charleston, South Carolina, which created a "historic district" with regulatory control in 1931.[65]

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55 TYLER ET AL., *supra* note 33, at 27–30.

56 *Id.* at 29–30.

57 The campaign to preserve the Gettysburg battlefield began with an association of Pennsylvania Civil War veterans, who started accumulating the land shortly after the end of the war. Later the federal government became the primary steward. SARA C. BRONIN & J. PETER BYRNE, HISTORIC PRESERVATION LAW 14 (2012).

58 *See* Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV 473, 474 (1981).

59 TYLER ET AL., *supra* note 33, at 27–28; SARA C. BRONIN & RYAN ROWBERRY, HISTORIC PRESERVATION LAW IN A NUTSHELL 8 (2014).

60 TYLER ET AL., *supra* note 33, at 30–31.

61 BRONIN & BYRNE, *supra* note 57, at 1.

62 Berman v. Parker, 348 U.S. 26, 28, 32–33 (1954).

63 TOMLAN, *supra* note 24, at 22–26.

64 272 U.S. 365 (1926).

65 TOMLAN, *supra* note 24, at 29; TYLER ET AL., *supra* note 33, at 38. The impetus for the Charleston ordinance, which made it illegal to erect certain buildings that would "detract from the architectural and historical setting," was a proposed new gas station. *Id.* at 38. Today, ironically, cities sometimes include gas stations in 'historic districts,' preventing owners from redeveloping them. *See supra* note 43 and accompanying text (discussing the dispute over a BP gas station in Manhattan).

This became the prototype for other early historic districts, such as the French quarter in New Orleans, Williamsburg, and the Georgetown section of Washington, D.C.[66]

Historic preservation law began to take its modern shape in the 1960s, catalyzed by the destruction of Penn Station.[67] To address concerns about the impact of large-scale federal infrastructure projects, Congress enacted statutes such as the National Historic Preservation Act (NHPA),[68] the National Environmental Policy Act,[69] and section 4(f) of the Department of Transportation Act.[70] The NHPA, which remains the flagship of historic preservation within the federal system, included a number of important provisions. It set up the Advisory Council on Historic Preservation, established the National Register of Historic Places, encouraged local governments to create historic districts, and stipulated that federal preservation programs would not interfere with private ownership rights.[71] It also required federal agencies to consider the impacts of federal projects that affect historic properties.[72]

Still, the federal government's role was (and is) a limited one. Federal legislation imposes substantial requirements on federal agencies, but is otherwise primarily designed to raise awareness.[73] It generally does not bind private parties.[74] Thus, listing on the National Register may affect federal agency action, but does not restrict the rights of private property owners in the use, development, or sale of historic property.[75]

More significant was the dramatic proliferation of local preservation ordinances.[76] The number rose from a dozen or so before the 1960s to more than 500 by 1978.[77] Just as Rachel Carson was galvanizing the environmental movement with the publication of *Silent Spring*,[78] historic preservation found its great national whistleblower in Ada Louise Huxtable, a noted architecture critic whose columns decried the demolition of Penn Station and urged the passage of strong landmarks laws.[79] Ten years after Penn Station's noisy

66 BRONIN & BYRNE, *supra* note 57, at 5.

67 *Id.*

68 54 U.S.C. §§ 300301–307108 (Supp. II 2015).

69 42 U.S.C. §§ 4321–4370h (2012).

70 Department of Transportation Act of 1966, Pub. L. No. 89-670, § 4(f), 80 Stat. 931, 934 (current version codified at 49 U.S.C. § 303 (2012)); BRONIN & ROWBERRY, *supra* note 59, at 4–5.

71 TYLER ET AL., *supra* note 33, at 46–47.

72 BRONIN & ROWBERRY, *supra* note 59, at 70 (describing section 106).

73 *See* Nat'l Tr. for Historic Pres. v. Blanck, 938 F. Supp. 908, 922 (D.D.C. 1996), *aff'd*, 203 F.3d 53 (D.C. Cir. 1999).

74 *See* Gettysburg Battlefield Pres. Ass'n v. Gettysburg Coll., 799 F. Supp. 1571, 1580–81 (M.D. Pa. 1992), *aff'd*, 989 F.2d 487 (3d Cir. 1993) (discussing the reach of NEPA and the NHPA).

75 TYLER ET AL., *supra* note 33, at 49.

76 *See* TOMLAN, *supra* note 24, at 120.

77 *Id.;* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 107 (1978).

78 RACHEL CARSON, SILENT SPRING (1962); Joshua Ulan Galperin, *Trust Me, I'm A Pragmatist: A Partially Pragmatic Critique of Pragmatic Activism*, 42 COLUM. J. ENVTL. L. 425, 472 (2017) (discussing the impact of Carson's book).

79 *Ada Louise Huxtable*, N.Y. PRESERVATION ARCHIVE PROJECT, https://perma.cc/DZ5C-F9CG (last visited Apr. 15, 2017).

fall,[80] Huxtable "marveled at how swiftly preservation had moved from 'an odd and harmless hobby of little old ladies in floppy hats who liked old houses' into what she called 'an integral, administrative part of city government dealing with an essential part of the city's fabric.'"[81] Today, with more than 2,300 ordinances in place, local governments remain the prime movers.[82]

B. Local Ordinances

To paraphrase Tip O'Neill, "all preservation is local."[83] Because local governments are the key players,[84] the legal regime that governs preservation—including the process of historic designation, the degree of regulation, and the composition of local boards—therefore varies to some extent from city to city.

One area of relative commonality is the criteria used for historic designation. A key part of the National Register's impact has been its influence as a template for local ordinances.[85] Historic preservation laws generally protect properties that are deemed to be "significant."[86] The Register defines a property as historically significant if it is a) associated with important historical events, b) associated with the lives of significant persons, c) emblematic of distinctive architectural or artistic characteristics, or d) likely to be instructive in history or prehistory.[87] Some local statutes incorporate Register listings by reference, so that federal designation automatically triggers the protection of local preservation law.[88] More commonly, a local commission makes its own determination based on similar or identical criteria.[89]

Notably absent from the list of common criteria are costs, such as effects on affordable housing, the environment, and the economy. While "purposes" sections sometimes allude to hoped-for economic gains from

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80 DIEHL, *supra* note 2, at 15–30.

81 Editorial, *New York City's Landmarks Law at 50*, N.Y. TIMES, Apr. 18, 2015, at A18.

82 LOCAL PRESERVATION ORDINANCES, *supra* note 27, at 1.

83 Thomas P. "Tip" O'Neill, the colorful Speaker of the House during the Reagan Administration, famously said "all politics is local." Paul Kane, *All Politics is Local? In the Era of Trump, not Anymore*, WASH. POST: POWER POST (Feb. 25, 2017), https://perma.cc/5Y34-NLJW. Like O'Neill's aphorism, this is only a slight exaggeration. All fifty states have enacted enabling laws that authorize local jurisdictions to adopt historic preservation ordinances. JULIA H. MILLER, NAT'L TR. FOR HISTORIC PRES., A LAYPERSON'S GUIDE TO HISTORIC PRESERVATION LAW: A SURVEY OF FEDERAL, STATE, AND LOCAL LAWS GOVERNING HISTORIC RESOURCE PROTECTION 8 (2008).

84 *See id.* at 8–11 (discussing the role of local preservation laws); TOMLAN, *supra* note 24, at 120 (noting the proliferation of local preservation laws).

85 *See* BRONIN & BYRNE, *supra* note 57, at 8, 57, 73 ("[L]ocal historic preservation designation criteria generally resemble those in the National Register in essentials . . . .").

86 *Id.* at 8.

87 36 C.F.R. § 60.4 (2016).

88 BRONIN & ROWBERRY, supra note 59, at 63; *e.g.*, CONN. GEN. STAT. § 22a-19a (2017).

89 TOMLAN, *supra* note 24, at 121.

tourism,[90] rarely do such considerations enter into the operative provisions on designation. New York City's Commission claims that it is not allowed to consider economic impact.[91] Based on the text of the Landmarks Law, however, this conclusion seems at least debatable. Nothing in the text expressly bars the consideration of economic factors.[92] And one of the statute's stated purposes is to "strengthen the economy of the city."[93] Likewise, other preservation ordinances can plausibly be read as authorizing consideration of economic effects.[94] If statutes are unclear, they could be amended to explicitly permit consideration of additional factors.

The designation process typically begins with the nomination of a building or neighborhood. In most cities, a nomination can be submitted by any resident,[95] or the preservation board itself may conduct research and hold hearings.[96] Once the city has designated a building as historic, it can prevent the owner from altering or demolishing it.[97] If the owner of a designated property wants to make a change, she must seek permission from the preservation board, which then decides whether the change is "appropriate"[98]—i.e., compatible with the historical character of the property or its setting.[99] Within historic districts, some cities even prohibit new construction on vacant lots.[100]

The scope of authority conferred on preservation boards varies widely. Often the board's decision must be approved by the local legislature.[101] In New York City, designations are subject to a veto by the City Council, but they become law if the Council fails to reject them within 120 days.[102] In practice, the Council appears to function as a rubber stamp, opposing the LPC on only a few rare occasions.[103] Chicago employs a similar process.[104] By

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90 *E.g.*, N.Y.C., N.Y., ADMIN. CODE § 25-301 (2016); SEATTLE, WASH., CODE § 25.12.020(B)(4) (2016).

91 Steve Cuozzo, Opinion, *Freezing NYC Growth*, N.Y. POST (July 11, 2013), https://perma.cc/5SW2-BTN4.

92 *See* N.Y.C., N.Y., ADMIN. CODE § 25-303(a). Indeed, the Commission need not designate any landmarks at all, so presumably it can refuse to do so for economic reasons. *See id.* (noting that the commission "shall have power" to designate landmarks).

93 *Id.* § 25-301(b)(f) (2016).

94 *See, e.g.*, CONN. GEN. STAT. § 7-147a(b) (2017) (authorizing municipalities to establish historic districts to "promote the educational, cultural, economic and general welfare of the public").

95 BRONIN & ROWBERRY, *supra* note 59, at 64.

96 *See* TOMLAN, *supra* note 24, at 121.

97 BRONIN & ROWBERRY, *supra* note 59, at 192, 199.

98 *E.g.*, N.Y.C., N.Y., ADMIN. CODE § 25-307(a) (2016).

99 BRONIN & ROWBERRY, *supra* note 59, at 199–200.

100 *Id.* at 207 (citing as examples Washington, D.C. and Raleigh, North Carolina).

101 MILLER, *supra* note 83, at 10.

102 N.Y.C., N.Y., ADMIN. CODE § 25-303(g)(2).

103 *See* J. Peter Byrne, *Precipice Regulations and Perverse Incentives: Comparing Historic Preservation Designation and Endangered Species Listing*, 27 GEO. INT'L ENVTL. L. REV. 343, 349 (2015) [hereinafter Byrne, *Precipice*] ("In practice, political actions to upset commission designation are very rare."); Robin Pogrebin, *City Council Revokes Landmark Status for Brooklyn Warehouse, Upsetting Preservationists*, N.Y. TIMES (Dec. 2, 2005), https://perma.cc/5TXR-QV8K.

contrast, in other cities such as Washington, D.C., the preservation board is empowered to make designations independently, without the approval of the legislature.[105]

The makeup of preservation boards also varies. Typically they are groups of five to fifteen residents with expertise in history, planning, architecture, or real estate.[106] In New York City, the LPC is composed of eleven members appointed by the Mayor for three-year terms.[107] The roster must include at least three architects, one historian, one realtor, and one city planner or landscape architect.[108] San Francisco's seven-member board includes a "preservation professional," two "historic architects," and an "architectural historian."[109] Experts from preservation-friendly fields like these tend to predominate.[110] Real estate professionals tend not to be as well represented, while economists and affordable housing advocates do not appear to be included at all.[111]

C. The Limits of Judicial Review

Landmark designations often deprive property owners of valuable rights, but judicial review of local historic preservation is extremely deferential.[112] As long as basic minimums of due process are satisfied,[113] preservation boards have virtually unchallengeable discretion to restrict development.[114]

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104 *See* CHI., ILL., CODE § 2-120-705 (2016) (the city council of Chicago has 365 days to act on any landmark recommendation before it is automatically granted).

105 D.C. CODE § 6-1103(c)(3) (2016); D.C. MUN. REGS. tit. 10-C, § 200 (2016).

106 BRONIN & ROWBERRY, *supra* note 59, at 191; CAL. OFFICE OF HISTORIC PRES., DEP'T OF PARKS & RECREATION, DRAFTING EFFECTIVE HISTORIC PRESERVATION ORDINANCES 14 (rev. 2005), https://perma.cc/Y2G8-E5HW; MILLER, *supra* note 83, at 10.

107 N.Y.C., NY, CHARTER § 3020(1)–(2) (2016).

108 *Id.* § 3020(1).

109 S.F., CAL., CHARTER § 4.135(1) (2016).

110 *See* Byrne, *Precipice*, *supra* note 103, at 349; Todd Schneider, Comment, *From Monuments to Urban Renewal: How Different Philosophies of Historic Preservation Impact the Poor*, 8 GEO. J. ON POVERTY L. & POL'Y 257, 265 (2001) (On the strong preservationist tendencies of landmarks commission appointees).

111 For instance, the federal guidelines for nominating a site to the National Register mention only historians, architects, and archeologists: "The [State Historic Preservation Officer] must submit draft nominations to a State Review Board, whose members include representatives from the main professional fields concerned with preservation: history, architecture, architectural history, and archeology." 36 C.F.R. §§ 60.3(o), .6(j)–(k) (2016); s*ee also* N.C. GEN. STAT. §160A-400.7 (2014) (specifying that a majority of historic preservation commission members "shall have demonstrated special interest, experience, or education in history, architecture, archaeology, or related fields").

112 BRONIN & ROWBERRY, *supra* note 59, at 217.

113 Including, for example, notice and an opportunity to be heard. MILLER, *supra* note 83, at 19–20.

114 *See generally* BRONIN & ROWBERRY, *supra* note 59, at 215–29 (collecting cases and describing the near-universal failure of Due Process and Takings challenges).

The Supreme Court gave its blessing to local preservation in *Penn Central Transportation Co. v. City of New York*.[115] In that pivotal case, the LPC vetoed plans to build an office tower atop Grand Central Terminal—some of the most valuable real estate in the world.[116] The company that owned Grand Central, which was on the brink of bankruptcy, argued that this amounted to a "taking" of property without just compensation in violation of the Fifth and Fourteenth Amendments.[117] The Court rejected this challenge in a 6–3 decision. Applying what it described as an "ad hoc" test for regulatory takings, the Court downplayed the economic harm to the company and deferred to the City's judgment that historic preservation "benefits all New York citizens and structures."[118]

By strongly affirming the constitutionality of New York City's Landmarks Law, the Court paved the way for similar laws across the country.[119] Notably, *Penn Central* involved the designation of an individual landmark, not a historic district. But because the Court's reasoning hinged in part on whether the property owner was singled out by government action,[120] it placed historic district designations, which affect whole neighborhoods, on even firmer constitutional ground. As even Justice Rehnquist acknowledged in dissent, laws of wide applicability are more likely to generate a uniform distribution of burdens and benefits; because property owners in historic districts presumably benefit from the preservation of their neighbors' buildings, they profit from a "reciprocity of advantage" that may justify the government's refusal to provide compensation.[121]

Other legal challenges have not fared much better. The vagueness and wide latitude of preservation ordinances have consistently withstood attack on due process grounds.[122] Although constitutional and statutory norms prohibit "arbitrary" agency decision making, the standard of review is permissive.[123] Courts generally give preservation boards the "final say" on aesthetic, architectural, and historical judgments.[124]

Despite the considerable power wielded by these agencies, courts have not required them to engage in anything resembling rigorous CBA. In one prominent case involving a historic district, *Maher v. City of New Orleans* (*Maher I*),[125] the owner of a dilapidated cottage in the French quarter was denied permission to tear down the structure and replace it with a seven-

115 438 U.S. 104, 152 (1978).

116 *Id.* at 116–17.

117 *Id.* at 119.

118 *Id.* at 124–25, 134.

119 At the time *Penn Central* was decided, 500 local governments had preservation ordinances. *Id.* at 107. Current estimates place the number at over 2,300. LOCAL PRESERVATION ORDINANCES, *supra* note 27, at 1.

120 *Penn Central Transp.*, 438 U.S. at 134–35.

121 *Id.* at 140 (Rehnquist, J., dissenting).

122 *See, e.g.*, Metro. Dade County v. P.J. Birds Inc., 654 So. 2d 170, 180 (Fla. Dist. Ct. App. 1995) (finding "exceptional importance" sufficiently precise for due process).

123 *See* Steinberg, *supra* note 50, at 975.

124 *See* Rebecca Birmingham, Note, *Smash or Save*, 19 J.L. & POL'Y 271, 295 (2010).

125 371 F. Supp. 653 (E.D. La. 1974), *aff'd*, 516 F.2d 1051 (5th Cir. 1975).

unit apartment building.[126] The court acknowledged that the French quarter was a "popular residential area" with above-average rents.[127] Maher's proposed apartment complex might have helped meet some of the demand. Yet neighborhood groups vigorously opposed it.[128] In upholding the denial of the permit, the federal district court rejected Maher's proposed balancing test, which would have required the court to "weigh[] the harm suffered" by the owner "against the public benefits secured by the preservation of this cottage."[129] The proper standard of review, the court explained, was simply to ask whether the ordinance deprived Maher of "any reasonable use or return from his property."[130]

On appeal, Maher challenged the ordinance on due process grounds.[131] He argued that the phrase "architectural and historical value" was too vague to provide adequate guidance to the preservation board.[132] He also cited evidence, including a federally funded study, suggesting that the ordinance had been applied in an arbitrary fashion.[133] The Fifth Circuit disagreed. Although conceding that "past enforcement of the Ordinance does not seem to have been uniformly predictable," it ruled in favor of the city.[134] The court argued that while "concerns of aesthetic or historical preservation do not admit to precise quantification," New Orleans had provided adequate safeguards against arbitrariness: guidelines for selecting board members with relevant expertise, particularized regulation of some specific items (e.g., balconies), and review by the city council.[135]

Traces of CBA can be detected in *Penn Central*. Indeed, early commentators on the decision suggested it might have limited precedential value because restrictions on less deserving sites would be harder to maintain against constitutional challenge.[136] After all, most landmarks aren't as grand (or as central) as Grand Central. Yet the decision has proven resilient.[137] *Penn Central*'s "ad hoc" test seemingly allows courts to balance government interests against the interests of private property owners. But in subsequent decisions, the Court has construed that to mean a balance between the regulatory scheme *in toto* (i.e., the public interest in having any landmark scheme at all) and the burden on an individual owner, rather than a balance between the government's interest in a particular landmark and the burden on the owner.[138]

126 *Id.* at 655–56.
127 *Id.* at 655.
128 *Id.*
129 *Id.* at 662.
130 *Id.*
131 Maher v. City of New Orleans (*Maher II*), 516 F.2d 1051, 1056 (5th Cir. 1975).
132 *Id.* at 1061.
133 *Id.* at 1061 n.57.
134 *Id.*
135 *Id.* at 1062.
136 Steinberg, *supra* note 50, at 983–85.
137 *Id.* at 984.
138 Steinberg, *supra* note 50, at 984 & n.249 (collecting cases).

Although *Penn Central* remains the dominant framework for regulatory takings analysis,[139] it has been widely criticized as too permissive.[140] Critics charge that it gives the government too much leeway to ignore the costs of regulation.[141] If the government were required to proceed through eminent domain, rather than ordinary regulation, it would have to pay "just compensation"—i.e., the "fair market value" at the time of the taking based on the property's "highest and best use"[142]—which would require the government to *internalize* (take into account) the cost of the imposition. Proponents of the "cost-internalization thesis" argue that imposing takings liability prevents overregulation by forcing the government to bear the costs.[143] After all, if the public benefits are as prodigious as the government says, it should be willing to pay a reasonable price.

In effect, cost-internalization incentivizes more careful weighing of costs and benefits.[144] Consider the early history of preservation. Before the existence of preservation laws, preservationists had to raise money to purchase whatever property they wanted to save. Willingness to pay provided a natural check on their ardor. George Washington's home, Mount Vernon, was saved;[145] John Hancock's was not.[146] One explanation for this

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139 *See* Thompson Mayes, *Preservation Law and Public Policy: Balancing Priorities and Building an Ethic*, *in* A RICHER HERITAGE: HISTORIC PRESERVATION IN THE TWENTY-FIRST CENTURY 157, 173 (Robert E. Stipe ed., 2003) ("Although the Supreme Court continues to review takings cases, as of this writing the Court has not fundamentally altered the *Penn Central* doctrine.").

140 *E.g.*, Richard A. Epstein, *From* Penn Central *to* Lingle*: The Long Backwards Road*, 40 J. MARSHALL L. REV. 593, 604 (2007); Andrew S. Gold, *The Diminishing Equivalence Between Regulatory Takings and Physical Takings*, 107 DICK. L. REV. 571, 610 (2003) ("Given the propensity of courts to find that there is no regulatory taking under *Penn Central* . . . ."); Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective on* Penn Central Transportation Co. v. City of New York, 13 WM. & MARY BILL RTS. J. 679, 692 (2005) ("[G]overnment lawyers usually resist even meritorious claims, playing the odds and counting on the courts' propensity to rule in their favor for sometimes unarticulated, ideological, or fiscal reasons."); Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 251 (2004) ("In practice, however, once the Court applies the balancing test to a state or local regulation, the result is inevitable: The regulation is sustained.").

141 *E.g.*, Kanner, *supra* note 140, at 689 (describing how *Penn Central* allows municipal governments to enact land-use regulations serving "narrow local interests" at the expense of less affluent individuals).

142 United States v. Fuller, 409 U.S. 488, 490 (1983) (citing United States v. Miller, 317 U.S. 369, 372–75 (1943)).

143 *E.g.*, William A. Fischel & Perry Shapiro, *Takings, Insurance, and Michelman: Comments on the Economic Interpretations of "Just Compensation" Law*, 17 J. LEGAL STUD. 269, 269–70 (1988) ("The compensation requirement thus serves the . . . purpose of . . . disciplining the power of the state, which would otherwise overexpand unless made to pay for the resources that it consumes."); Jack L. Knetsch & Thomas E. Borcherding, *Expropriation of Private Property and the Basis for Compensation*, 29 U. TORONTO L.J. 237, 243 (1979) ("[A] failure to pay full compensation will . . . discourage public agencies from taking these costs into account . . . .").

144 Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 420 (1977) ("[A] rule requiring compensation, by shifting the costs back to the electoral majority, may help induce these [elected] officials to weigh more accurately the costs and benefits of alternative measures.").

145 Tomlan, *supra* note 24, at 7–8.

146 *Id.* at 8.

might be the difference in "benefits." Washington's greater historical significance, as the nation's first president and its leading revolutionary, may have inspired more donations. Another reason may have been a disparity in "costs": whereas Washington's plantation was situated in rural Virginia, Hancock's house in Boston occupied valuable downtown real estate adjacent to the Massachusetts State House.[147] Preserving Hancock's home may therefore have had larger opportunity costs.

When Philadelphia wanted to save Independence Hall, the city had to put its money where its mouth was.[148] Now, unshackled by the compensation requirement, governments can afford to be less selective.[149] If citizens of Arlington, Virginia were required to pay for landmarking strip malls, they might think twice about whether the supposed benefits are worth the costs. As long as the main benefits of preservation accrue to the public, while the most immediate costs are borne privately, local governments may preserve more buildings than is just (for the individual) or efficient (for the general welfare).

Of course, as critics of the cost-internalization thesis point out, this argument has a flipside. If government must bear the costs but cannot internalize *benefits*, then it may *under*regulate.[150] Because landmarks tend to be "non-excludable" goods[151]—anyone walking down the street can look at a building—preservation may be hamstrung by free-rider problems. By allowing historic preservation to bypass the compensation requirement, *Penn Central* empowered even cash-strapped municipalities to protect their most cherished structures.[152] In 1963, New York City was close to bankruptcy and probably could not have afforded to purchase Penn Station.[153] Given the administrative challenge of charging every individual that might gain something from its preservation—such as a nicer view, a more inspiring commute, or a sense of civic pride—internalizing the benefits would be

147 *Id.* at 7–8 ("[T]he value of the land for redevelopment adjacent to the State House spelled its doom.").

148 *Id.* at 3.

149 *See supra* notes 139–143 and accompanying text.

150 *See* Vicki Been, *Lucas v. The Green Machine: Using the Takings Clause to Promote More Efficient Regulation?*, *in* PROPERTY STORIES 221, 224, 240, 249, 256–57 (Gerald Korngold & Andrew P. Morriss eds., 2004).

151 Economists refer to a good as "non-excludable" if it is difficult or impossible to prevent people from consuming it. Steinberg, *supra* note 50, at 955–56. While *interior* architecture may be excludable for some buildings (because one can charge admission fees at the door), preservation laws apply mainly to *exterior* architecture. Moreover, for many buildings it would be impractical to charge anyone who happens to walk through the door.

152 J. Peter Byrne, *Regulatory Takings Challenges to Historic Preservation Laws After* Penn Central, 15 FORDHAM ENVTL. L. REV. 313, 313–16 (2004).

153 *Id.* at 314 n.3.

difficult.[154] From this perspective, preservation law corrects for the market failures associated with public goods.[155]

Even if the market *under*provides historic resources to some extent, however, government may *over*provide them by a greater margin. That is, market failure may lead to an overcorrection that results in "government failure."[156] To be sure, as Vicki Been suggests, just compensation may sometimes be too powerful a check on regulation.[157] But that does not mean we should dispense with checks altogether.

For all its potential flaws, the permissive doctrine of *Penn Central* appears to be here to stay.[158] An important question, then, is how to impose checks within the current legal framework. Some Midwestern states have addressed this problem by taking dramatic action, such as repealing or substantially diluting the legislation that authorizes municipalities to enforce preservation laws.[159] In the absence of robust judicial review of historic preservation, however, a compromise solution may be more stringent regulatory review. It is to this possibility that I turn in Parts III and IV.

III. COST-BENEFIT ANALYSIS AND FEDERAL REGULATORY REVIEW

For local governments looking to introduce cost considerations into the landmarking process, the federal government's use of CBA to evaluate federal regulations offers a helpful guide. This Part begins with an overview of various forms of CBA. I then explain how CBA works at the federal level and summarize the debate between proponents and critics of CBA, focusing on aspects of the debate that may be most salient for applying CBA to historic preservation.

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154 This concept—the difficulty of capturing widely dispersed benefits—may explain the Court's frequent invocation of "reciprocity of advantage" in regulatory takings cases. *See* Steinberg, *supra* note 50, at 958–59 & n.47 (collecting cases).

155 Byrne, *Cultured Despisers*, *supra* note 11, at 675 (describing the cultural benefits of historic buildings as a "public good").

156 *See generally* PETER H. SCHUCK, WHY GOVERNMENT FAILS SO OFTEN: AND HOW IT CAN DO BETTER (2014). "Government failure" occurs when government intervention causes a more inefficient allocation of resources than would exist without such intervention. *See* CLIFFORD WINSTON, GOVERNMENT FAILURE VERSUS MARKET FAILURE: MICROECONOMICS POLICY RESEARCH AND GOVERNMENT PERFORMANCE 2–3 (2006).

157 *See* Been, *supra* note 150, at 223–24 (discussing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), as an example of the possible negative outcomes of compensation mandates).

158 Mayes, *supra* note 139, at 173 ("Although the Supreme Court continues to review takings cases, as of this writing the Court has not fundamentally altered the *Penn Central* doctrine."); Byrne, *supra* note 152, at 316 (noting the extreme infrequency of successful challenges to historic preservation designation).

159 *See* Capps, *supra* note 50 (discussing the "fierce campaigning against historic preservation in the Midwest," namely proposed bills and amendments in Michigan and Wisconsin that weaken state preservation laws).

A. The Basics of Cost-Benefit Analysis

The term "cost benefit analysis" has been used to describe a wide range of decision-making techniques.[160] In its most basic form, CBA may be older than recorded human history; when hunter-gatherers discovered fire, they had to decide whether the benefits of warmth, cooked food, and protection from wild animals outweighed the risks of getting burned. In the 18th century, Benjamin Franklin recommended a commonsense method of making difficult choices, in which one would "divide half a sheet of paper by a line into two columns; writing over the one Pro, and over the other Con."[161] At the more technical end of the spectrum, CBA refers to a highly formalized method that attempts to fully quantify and monetize costs and benefits, discounts to net present value, and uses these calculations to identify the most efficient level of regulation.[162] By translating costs and benefits into a common unit, such as dollars, formal CBA aims to make it easier for policymakers to compare the expenses of public programs to the returns they deliver, facilitating more efficient use of limited resources.[163]

The variant of CBA that has been implemented at the federal level is closer to the more formal, quantitative end of the spectrum.[164] Proponents of formal CBA tout its benefits for promoting transparency and rationality in agency decision making,[165] while critics have raised concerns about antiregulatory bias, lack of sufficient attention to distributional effects, and the feasibility of "pricing the priceless."[166] Yet even Franklin's informal, qualitative comparison of pros and cons might be an improvement over the current practice of landmarks commissions, to the extent that they ignore costs altogether.

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160 *See generally* Amy Sinden, *Formality and Informality in Cost-Benefit Analysis*, 2015 UTAH L. REV. 93, 96–100 (2015) (discussing the "broad range of [CBA] practices" and dividing such practices into two general categories, formal and informal).

161 *Id.* at 95 (quoting Letter from Benjamin Franklin to Joseph Priestley (Sept. 19, 1772)).

162 *Id.* at 96.

163 Richard Layard & Stephen Glaister, *Introduction* to COST-BENEFIT ANALYSIS 1, 2–4 (Richard Layard & Stephen Glaister eds., 2d ed. 2012) (describing the role of CBA in public policy decisions).

164 *See* Sinden, *supra* note 160, at 147–48, 152 (noting that despite the "tendency toward informality in Congress and the courts" the executive branch "appears to push toward more formality in CBA," as well as a "tilt toward formality in agency practice").

165 *E.g.*, CASS R. SUNSTEIN, THE COST-BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION 9 (2002) [hereinafter SUNSTEIN, COST-BENEFIT STATE].

166 FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 35–40 (2004) (discussing the "built-in [antiregulatory] biases in cost-benefit methods" and arguing that attempting to monetize benefits "stacks the deck against" policies to protect people and the environment). *See generally* Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553, 1562–63, 1579, 1584 (2002) (discussing arguments for and against CBA and stating that CBA's "fatal flaw" is that "it is completely reliant on the impossible attempt to price the priceless values of life, health, nature, and the future").

B. Cost-Benefit Analysis at the Federal Level

Since the 1980s, federal agencies have been required to weigh the likely costs of proposed regulation against its likely benefits.[167] Precursors to CBA can be found in statutes as early as 1902, as well as laws enacted during the New Deal.[168] As a decision-making tool for the modern regulatory state, however, CBA owes its prominence primarily to a series of executive orders beginning with the Reagan Administration in 1981.[169] Executive Order 12,291 required agencies to conduct a Regulatory Impact Analysis for all "major" rulemakings.[170] Agencies were instructed to evaluate costs and benefits and describe alternative regulatory approaches.[171] As the CBA regime developed, review of these analyses was centralized in the Office of Information and Regulatory Affairs (OIRA), within the Office of Management and Budget (OMB).[172]

The basic requirements of Executive Order 12,291 remain intact to this day, with a few modifications.[173] President Clinton's adoption of Executive Order 12,866, which reaffirmed the commitment to CBA in Executive Order 12,291, was seen as a rebuke to critics who had painted CBA as a partisan ploy designed to delay new regulation.[174] The Clinton Order softened the CBA mandate a little, drawing more attention to qualitative factors and requiring agencies to consider distributive impacts, such as effects on the poor.[175] Yet it shared the same general approach, declaring that citizens deserve a regulatory system that provides public goods such as health,

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167 Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation?: Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV 1489, 1506 (2002).

168 PAUL ROSE & CHRISTOPHER WALKER, CTR. FOR CAPITAL MKTS., COMPETITIVENESS, THE IMPORTANCE OF COST-BENEFIT ANALYSIS IN FINANCIAL REGULATION 3 (2013).

169 *Id.* at 4.

170 Federal Regulation, Exec. Order No. 12,291, § 3(a), 3 C.F.R. at 127, 128 (1982), *superseded by* Regulatory Planning and Review, Exec. Order No. 12,866, 3 C.F.R. at 638 (1994). The Order defines a "major rule" as one

> that is likely to result in: (1) An annual effect on the economy of $100 million or more; (2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Id. § 1(b), at 127–28. The superseding executive order retains the $100 million threshold. Exec. Order No. 12,866, § 3(f), 3 C.F.R. at 641.

171 *Id.* § 3(d), at 129.

172 SOFIE E. MILLER, REGULATORY STUDIES CTR., 20 YEARS OF EXECUTIVE ORDER 12866 (2013), https://perma.cc/93ZH-PJTB.

173 *See* MAEVE P. CAREY, CONG. RESEARCH SERV., R41974, COST-BENEFIT AND OTHER ANALYSIS REQUIREMENTS IN THE RULEMAKING PROCESS 3 (2014).

174 ROSE & WALKER, *supra* note 168, at 4.

175 *See* Exec. Order No. 12,866, § 1(a), 3 C.F.R. at 638–39 (1994). The Reagan and Clinton Orders also differed in that Reagan required that benefits "outweigh" costs, whereas Clinton required only that benefits "justify" costs. Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161, 176–78 (1995) (comparing the Reagan and Clinton orders in greater detail).

safety, and clean air "without imposing unacceptable or unreasonable costs on society."[176]

Likewise, President Obama reaffirmed the importance of cost-benefit balancing in Executive Order 13,563.[177] President Obama's directive incorporated the Clinton Order by reference and provided that "each agency must . . . propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify)."[178] He appointed Cass Sunstein, one of the most prominent proponents of CBA, to run OIRA, and even extended the domain of CBA by requiring a form of retrospective review ("look back") for old regulations.[179] By 2012, with the bipartisan support of five presidential administrations,[180] the once contentious debate over federal regulatory review had evolved into "fairly broad agreement that it is not only legal, but . . . essential to effective executive branch management."[181]

Congress and the federal judiciary have also embraced CBA, signifying the collaboration of all three branches in creating what Sunstein dubs the "cost-benefit state."[182] Congress has enacted a number of important statutes that require CBA,[183] while the judiciary has developed a strong presumption in favor of allowing CBA where statutes are ambiguous.[184] Unless Congress has clearly said otherwise, agencies have "authority to consider costs as well as benefits" in issuing regulations.[185]

General guidelines for conducting Regulatory Impact Analysis are laid out in OMB guidance.[186] According to OMB, the analysis should include "a statement of the need for the [regulatory] action," a clear identification of a range of regulatory approaches, including the option of not regulating, and "an evaluation of the benefits and costs—[both] quantitative and qualitative—of the proposed [regulatory] action and the main alternatives."[187] OMB strongly favors estimating the monetary value of benefits and costs where possible.[188] Where monetization is not feasible, OMB directs agencies

176 Exec. Order No. 12,866, 3 C.F.R. at 638.

177 Improving Regulation and Regulatory Review, Exec. Order No. 13,563, § 1(b), 3 C.F.R. at 215, 215 (2012).

178 *Id.* One innovation of Executive Order 13,563 was the addition of "human dignity" as one of the qualitative factors that agencies may consider. *Id.* § 1(c), 3 C.F.R. at 216.

179 John M. Broder, *Powerful Shaper of U.S. Rules Quits, Leaving Critics in Wake*, N.Y. TIMES, Aug. 4, 2012, at A1.

180 ROSE & WALKER, *supra* note 168, at 5.

181 JEFFREY LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 24 (5th ed. 2012).

182 SUNSTEIN, COST-BENEFIT STATE, *supra* note 165, at 15, 19–20.

183 Hahn & Sunstein, *supra* note 167, at 1508–09 & tbl.2; ROSE & WALKER, *supra* note 168, at 5.

184 Hahn & Sunstein, *supra* note 167, at 1510.

185 *Id.*

186 OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR A-4 (2003) [hereinafter CIRCULAR A-4], https://perma.cc/KM9F-BU28; OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, REGULATORY IMPACT ANALYSIS: A PRIMER (2011) [hereinafter RIA PRIMER], https://perma.cc/F4FE-YKJZ.

187 CIRCULAR A-4, *supra* note 186, at 2.

188 *Id.* at 26.

to "explain why and present all available quantitative information."[189] For example, if an agency is unable to estimate the monetary value of clean water in a stream, it should provide any data it can obtain on the amount of water that would be affected.[190] Finally, if quantification is impossible, agencies should explain why and include a "description of the unquantified effects."[191]

OMB also identifies the main techniques that are used to estimate the value of difficult-to-quantify costs and benefits.[192] A common one is "contingent valuation," a survey-based method that is often used to price nonmarket resources, such as environmental preservation.[193] Survey participants are typically asked to identify how much they would be willing to pay for a particular outcome (e.g., preventing the extinction of bald eagles).[194] Another established method is the "revealed preference" study, which estimates how much people are willing to pay by observing their conduct in existing markets.[195] For example, economists often calculate the cash value of risks to human life by measuring the extra wages that are paid to workers with riskier jobs, on the assumption that workers accept the heightened risk in exchange for that premium.[196] One or both of these methods may be used to estimate the "value of a statistical life," a key part of the analysis for regulations designed to reduce risks to human life,[197] and a key reason why CBA tends to be most controversial in the context of health and safety.[198]

EPA has been a leader in developing CBA techniques, including contingent valuation.[199] One well-known EPA study, which could serve as a model for CBA in the historic preservation context, analyzed a proposal to regulate visibility-impairing emissions from a power plant near the Grand Canyon.[200] To estimate the aesthetic value of clear air, the agency presented respondents with photos of the Grand Canyon under different visibility conditions, and asked how much they would be willing to pay for a certain

189 *Id.* at 27.

190 *Id.*

191 *Id.*

192 *Id.* at 18–31.

193 *Id.* at 22.

194 Ackerman & Heinzerling, *supra* note 166, at 1558.

195 CIRCULAR A-4, *supra* note 186, at 20.

196 Ackerman & Heinzerling, *supra* note 166, at 1558.

197 CIRCULAR A-4, *supra* note 186, at 29. *See generally* RICHARD L. REVESZ & MICHAEL A. LIVERMORE, RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH (2008).

198 Robert Hahn & Patrick Dudley, *How Well Does the Government Do Cost-Benefit Analysis?*, 1 REV. ENVTL. ECON. & POL'Y 192, 192 (2007); Michael A. Livermore & Richard L. Revesz, *Interest Groups and Environmental Policy: Inconsistent Positions and Missed Opportunities*, 45 ENVTL. L. 1, 2–5 (2015).

199 *See generally* ECONOMIC ANALYSES AT EPA: ASSESSING REGULATORY IMPACT (Richard D. Morgenstern ed., 1997).

200 Leland Deck, *Visibility at the Grand Canyon and the Navajo Generating Station*, *in* ECONOMIC ANALYSES AT EPA: ASSESSING REGULATORY IMPACT, *supra* note 199, at 267, 268, 274.

level of visibility.[201] This method took into account not only the "use value" of a clear view (i.e., benefits to direct visitors), but also "bequest value" (i.e., "so others may enjoy") and "preservation value" (i.e., "to have conditions as natural as possible, even if no one were ever to visit").[202] The value that households placed on visibility at the Grand Canyon helped persuade EPA to issue the proposed regulation, and helped determine what threshold to use for the amount of pollution control.[203]

Of course, even with techniques such as contingent valuation and revealed preference, agencies may find it difficult to quantify or monetize all the relevant effects of regulation. According to a 2014 report by the Government Accountability Office, executive agencies monetized costs for about 97% of economically significant rules, and monetized benefits for about 76% of such rules.[204] Agencies reported that calculating costs (e.g., installing new screening equipment in airports) was generally easier than estimating benefits (e.g., enhancing national security).[205]

When benefits are difficult to calculate, a helpful tool is "breakeven analysis."[206] Because costs are often easier to quantify than benefits, agencies sometimes find it useful to weigh quantified costs against nonquantified benefits.[207] Breakeven analysis answers the question, "How high would the benefits have to be for the regulation to be justified?"[208] For instance, suppose a ban on new construction in an urban neighborhood is expected to cost $100 million annually in foregone investment, but has benefits that are difficult to quantify precisely.[209] Suppose the neighborhood has only a few distinctive buildings, none of which have outstanding cultural, touristic, or aesthetic value. Given the apparently modest gains from preservation, it seems unlikely that the benefits are worth $100 million or more per annum. The ban would likely fail breakeven analysis. By contrast, if the neighborhood is teeming with iconic buildings that attract tourists from around the world, $100 million might seem like a bargain. Even when quantification is speculative or impossible, breakeven analysis can yield insights.

C. Arguments For and Against Cost-Benefit Analysis

The case for CBA begins with the common-sense idea that governments should evaluate the pros and cons of their decisions, just as individuals do in everyday life. Proponents of agency CBA argue that it enhances the

201 *Id.* at 277–78.

202 *Id.* at 278.

203 *Id.* at 280.

204 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-714, FEDERAL RULEMAKING: AGENCIES INCLUDED KEY ELEMENTS OF COST-BENEFIT ANALYSIS, BUT EXPLANATIONS OF REGULATIONS' SIGNIFICANCE COULD BE MORE TRANSPARENT 23 (2014).

205 *Id.* at 24.

206 RIA PRIMER, *supra* note 186, at 13.

207 *Id.*

208 Cass R. Sunstein, *The Limits of Quantification*, 102 CALIF. L. REV. 1369, 1372 (2014).

209 This is a modified version of Sunstein's hypothetical. *Id.* at 1387.

rationality, consistency, and transparency of agency decision making.[210] By requiring agencies to consider costs and benefits, CBA can ameliorate problems such as poor priority setting, inefficient regulatory tools, and lack of attention to the side effects of regulation.[211] On the other hand, critics of CBA commonly object that it is biased against regulation, that it fails to adequately address distributive issues, and that it tries to price goods that cannot meaningfully be translated into dollars.[212]

Proponents of CBA, including those who embrace an active regulatory state, tend to see significant room for improvement in the quality of federal regulation. Sunstein, citing then-Judge Stephen Breyer's study of the cost-effectiveness of federal risk regulation, described federal regulation in 1994 as "notoriously and pervasively chaotic and irrational."[213] As Justice Breyer's study revealed, agencies often fail to set priorities rationally to achieve their goals.[214] By requiring explicit, systematic consideration of costs and benefits, CBA can reduce the risk of undue political influence or cognitive bias.[215] For example, an EPA CBA revealed that the health costs of lead contamination were much higher than the costs associated with other, more politically salient environmental concerns, such as contamination by radioactive materials.[216] Without CBA, agencies may be more likely to prioritize popular causes over ones that are more mundane yet more beneficial.

In the historic preservation context, undue political influence may take the form of pressure from developers or neighborhood interest groups. Because of the way city politics works, however, neighborhood interest groups may wield disproportionate power.[217] Well-heeled activists with the leisure to lobby landmarks commissions have become increasingly dominant forces in pushing for more preservation.[218] CBA could help correct for this influence. Because the activists tout only the benefits of preservation, a commission empowered (or required) to consider costs will be more equipped to resist the siren calls of the "new NIMBYism."

CBA can also help correct for common cognitive errors. For instance, vivid memories tend to disproportionately affect our thinking.[219] Public perceptions of the risks of air travel may be skewed by heavy media

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210 SUNSTEIN, COST-BENEFIT STATE, *supra* note 165, at 9.

211 *Id.* at 6.

212 ACKERMAN & HEINZERLING, *supra* note 166, at 35–40.

213 Cass Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 841 (1994) [hereinafter Sunstein, *Valuation in Law*] (citing STEPHEN BREYER, Breaking the Vicious Circle: Toward Effective Risk Regulation (1995))

214 BREYER, *supra* note 213, at 19–20.

215 *See generally* Cass R. Sunstein, *Cognition and Cost-Benefit Analysis: Legal, Economic, and Philosophical Perspectives*, 29 J. LEGAL STUD. 1059 (2000).

216 Matthew Adler & Eric Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L.J. 165, 175 (1999) (citing Albert L. Nichols, *Lead in Gasoline*, *in* ECONOMIC ANALYSES AT EPA: ASSESSING REGULATORY IMPACT, *supra* note 199, at 49, 78).

217 *See* Schleicher, *supra* note 23, at 1676–78. For an example of an influential interest group, see LANDMARK WEST!, https://perma.cc/GVM6-DNLT (last visited Apr. 15, 2017).

218 Doig, *supra* note 50.

219 CASS R. SUNSTEIN, SIMPLER: THE FUTURE OF GOVERNMENT 151 (2013) [hereinafter SUNSTEIN, SIMPLER].

coverage of airplane hijackings, which are rare but traumatic events.[220] These mental shortcuts, or "availability heuristics," may lead decisionmakers astray.[221] If a new FAA rule increases security at airports, it will make flying less convenient and more expensive, which in turn may lead some people to drive instead.[222] Because flying is safer than driving, on balance the rule may cost more lives than it saves.[223] As an approach that demands comprehensive, dispassionate, empirical evaluation, CBA serves as an antidote to cognitive bias and knee-jerk political reaction.

In the historic preservation context, CBA could help diminish the influence of "availability heuristics" that skew public perceptions of landmarking. Take Penn Station, for example. Although it was demolished more than fifty years ago, a ceaseless procession of vivid documentaries, romantic editorials, and idealized photos—all tending to depict the station at its grand opening, rather than in its grimier middle age—have constantly renewed its mythic status in the public imagination.[224] Because the demise of Penn Station looms so disproportionately in the popular mind, few people may realize what has become of preservation today: pervasive, parochial, and propelled by interest groups. Midcentury myth overwhelms modern reality.

CBA could help dispel the myth and highlight the reality by requiring a more precise accounting of costs and benefits. Local governments would be forced to set priorities more systematically, instead of preserving buildings willy-nilly in response to interest-group pressure. How highly would a strip mall score in a willingness-to-pay survey? Instead of hiding behind the banner of Penn Station, preservation would have to face up to the trivial benefits and high costs of many modern landmark designations.

CBA can enhance the transparency, consistency, and predictability of regulation in other ways as well. In the *Maher II* case, the Fifth Circuit conceded that the New Orleans preservation board had often exercised its powers unpredictably.[225] If the board had been required to engage in some form of CBA, perhaps its decision making would have been less arbitrary. In the environmental context, requiring EPA to state clearly the effects of a proposed rule helps alert affected groups, who often provide constructive criticism of EPA's estimates.[226] Thus, CBA can promote democratic values of transparency and accountability.

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220 *Id.* at 152.

221 *Id.*

222 SUNSTEIN, COST-BENEFIT STATE, *supra* note 165, at ix.

223 *Id.* at ix–x.

224 *See, e.g.*, American Experience: The Rise and Fall of Penn Station (PBS television broadcast Feb. 18, 2014); Bryant, *supra* note 3 (editorial with photos); Alex Arbuckle, *The Destruction of Penn Station*, MASHABLE (July 20, 2015), https://perma.cc/CE9M-Y6TR (photos); Matt Stopera, *Incredibly Upsetting Pictures of Penn Station Then & Now*, BUZZFEED (Jan. 17, 2013), https://perma.cc/C92P-HW3L (photos). *But see* Dunlap, *supra* note 10 (discussing the state of Penn Station at the time it was demolished).

225 *Maher II*, 516 F.2d 1051, 1061 n.57 (5th Cir. 1975). For further discussion of the Fifth Circuit's opinion in the *Maher* case, see supra notes 131–135.

226 Adler & Posner, *supra* note 216, at 175.

Critics of CBA charge that it has an antiregulatory bias.[227] Because the costs of regulation tend to be easier to quantify than the benefits, the benefits of regulation may not get their due.[228]

This objection goes to the question of *how* CBA should be done, however, not whether it should be done at all.[229] Tools such as contingent valuation, revealed preference studies, and breakeven analysis have made it easier to take benefits into account.[230] Moreover, agencies have self-serving reasons to exaggerate those benefits to advance their regulatory agendas. Empirical studies of agency CBA have yielded no conclusive evidence of a tendency to underestimate benefits.[231] In fact, one OMB study found that agencies were more likely to overestimate benefits.[232] Numerous examples attest to CBA's power to spur tougher regulation, including the installation of automatic defibrillators on airplanes, the regulation of lead in gasoline, and the Reagan Administration's regulation of ozone-depleting substances (despite strong opposition in the conservative movement).[233]

Another standard objection to CBA is that it is biased against the poor.[234] Yet with Executive Order 12,866, agencies are now required to consider distributive concerns.[235] Moreover, insofar as willingness-to-pay methods are biased in favor of those who have the ability to pay, agencies can conduct a separate distributional analysis that gives more weight to low-income respondents. Richard Revesz, addressing himself to fellow progressives, urges that the proper remedy for economic inequality is more redistribution, not abandonment of CBA.[236] Egalitarian objections to CBA seem particularly inapposite in the context of historic preservation, which favors wealthy property owners by restricting the supply of new housing.[237]

A third critique of CBA is that it attempts to price the "priceless."[238] Because historic preservation frequently invokes values such as aesthetic beauty and civic pride, which may be difficult to quantify or monetize, this critique is more salient. Early opponents of CBA lamented that it "require[d] assigning dollar values to things that are essentially not quantifiable: human

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227 *See id.* at 171; CASS R. SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE 129 (1997) [hereinafter SUNSTEIN, FREE MARKETS] (chapter coauthored by Richard Pildes).

228 SUNSTEIN, FREE MARKETS, *supra* note 227, at 129.

229 *Id.*

230 *See supra* notes 192–198 (discussing these methods of analysis).

231 SUNSTEIN, SIMPLER, *supra* note 219, at 176–77.

232 *Id.*

233 *Id.* at 153–54.

234 SUNSTEIN, FREE MARKETS, *supra* note 227, at 129; SUNSTEIN, COST-BENEFIT STATE, *supra* note 165, at 7.

235 Regulatory Planning and Review, Exec. Order No. 12,866, § 1(a), 3 C.F.R. at 638, 638–39 (1994).

236 RICHARD L. REVESZ & A. MICHAEL LIVERMORE, RETAKING RATIONALITY: HOW COST BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH, 14 (2008*). But cf.* Louis Kaplow & Steven Shavell, *Why the Legal System is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994) (arguing that legal rules generally achieve redistributional goals less efficiently than income taxes).

237 *See infra* Part IV.B.1.ii (describing effects on housing supply).

238 ACKERMAN & HEINZERLING, *supra* note 166, at 8.

life and health, the beauty of a forest, the clarity of the air at the rim of the Grand Canyon."[239] Yet even the most prominent academic expositors of this view, Lisa Heinzerling and Frank Ackerman, concede that the value of such goods is less than infinite: "To say that life, health, and nature are priceless," they write, "is not to say that we should spend an infinite amount of money to protect them."[240]

Once that concession is made, say defenders of CBA, we are simply haggling about the price.[241] As we have seen, economists have developed advanced techniques for approximating how much value people place on nonmarket goods.[242] If government officials threw up their hands instead of trying to translate benefits into dollars, they would still need to make the same tradeoffs; the arithmetic would just be more casual and less explicit. CBA at least nudges government in the direction of more precision and transparency. As long as regulators do not have to make decisions solely on the basis of monetized factors—and even CBA's most ardent proponents reject that approach as an "arithmetic straitjacket"[243]—regulators retain discretion to make decisions based on unquantified criteria, such as the patriotic value of Mount Vernon, or distributional concerns, such as effects on poor people or children. As Sunstein argues, even if a full CBA is not feasible, "government can move in that direction by identifying the range of known costs, known benefits, and factual uncertainties, and by making its own assumptions clear."[244]

D. Cost-Benefit Analysis at the State and Local Level

Despite the apparent success of CBA at the federal level, states and localities have been slow to adopt it.[245] As Glaeser and Sunstein recently observed, "It is remarkable but true that nearly 35 years after President Reagan established what has proved to be an enduring national commitment to cost-benefit analysis, state and local governments have shown inadequate and at most sporadic efforts in following the federal government's lead."[246] A 2013 joint Pew Charitable Trusts and MacArthur Foundation report found that the majority of CBAs at the state level were concentrated in a dozen

239 Philip Shabecoff, *Reagan Order on Cost-Benefit Analysis Stirs Economic and Political Debate*, N.Y. TIMES (Nov. 7, 1981), https://perma.cc/NY6C-Z96Q.

240 ACKERMAN & HEINZERLING, *supra* note 166, at 9.

241 MATTHEW ADLER & ERIC POSNER, NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS 160 (2006).

242 *Id.* at 163 (noting that valuation of non-market goods has become a "cottage industry in applied economics"); *see also supra* Part III.B.

243 SUNSTEIN, SIMPLER, *supra* note 219, at 215.

244 SUNSTEIN, FREE MARKETS, *supra* note 227, at 130.

245 Edward Glaeser & Cass R. Sunstein, *Regulatory Review for the States*, NAT'L AFF., Summer 2014, at 37, 54.

246 *Id.*

states, which produced an average of only four CBAs per year.[247] The report also noted that the quality of the CBA "varies substantially."[248]

In an article for the magazine *National Affairs*, Glaeser and Sunstein advocate replicating the model of federal regulatory review, including a commitment to CBA, at the state level:

> The problem is that state- and local-government regulations have real and sometimes far-reaching consequences that have not been foreseen because state and local regulators are usually not required to undergo any kind of review process, or coordinate with any other entity, before issuing a new rule. The lack of cost-benefit analysis and of a central review office through which to aggregate important information about potential regulations means that state and local requirements often have costly unintended effects. . . .
>
> . . . .
>
> The wide disparities that exist across states suggest that either the stringent states or the more laissez-faire areas (or both) have made costly mistakes.[249]

Glaeser and Sunstein argue that states, rather than municipalities, are the "natural home" for regulatory evaluation, because they have more resources and a broader scope for addressing regional consequences.[250] This would be one plausible way to operationalize CBA of local historic preservation: require cities to submit major designation proposals to a state-level mini-OIRA for CBA. In addition to greater resources, an advantage of state-level CBA of historic preservation might be greater ability to take into account effects such as suburban sprawl, which may fall outside the jurisdiction of the city.[251]

As Glaeser and Sunstein concede, however, large cities like New York, Chicago, and Los Angeles would likely be capable of implementing CBA on their own, without state involvement.[252] Even in smaller cities, preservation boards or small regulatory review offices could apply a more informal, qualitative approach. Moreover, a decentralized CBA process seems especially appropriate in the context of local historic preservation, which brings local sensibilities to bear on local objects of significance to a particular community. Landmarking tends to be more idiosyncratic than, say, environmental regulation that just happens to be done at the local level. Preservation has some regional effects, but it is a "small event" compared to air pollution, and therefore may be more suited to local decision making.[253]

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247 PEW CHARITABLE TRS. & MACARTHUR FOUND., STATES' USE OF COST-BENEFIT ANALYSIS: IMPROVING RESULTS FOR TAXPAYERS 41 fig.12 (2013), https://perma.cc/6Y7K-YWKS.

248 *Id.* at 3.

249 Glaeser & Sunstein, *supra* note 245, at 45, 47–48.

250 *Id.* at 49.

251 *See generally* Philip Weinberg, Control *of Suburban Sprawl Requires Regional Coordination Not Provided by Local Zoning Laws*, N.Y. ST. B.J., Oct. 2000, at 44.

252 *Id.* at 48.

253 *Cf.* Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1327–28 (1993).

An alternative to the Glaeser–Sunstein approach would be to have one or more CBA-trained economists on the preservation board, or in the Mayor's office, who could coordinate directly with city planning and preservation officials. Ultimately, this Article remains agnostic about the best operational approach, but argues that CBA of historic preservation, whether at the state or local level, is both feasible and desirable.

IV. APPLYING COST-BENEFIT ANALYSIS TO LOCAL HISTORIC PRESERVATION

Despite lingering controversy, CBA now enjoys widespread support in government and in the legal academy.[254] This Article does not aim to resolve the longstanding debate over the merits of CBA. If one accepts CBA as a useful tool for assessing federal regulation, however, one should not categorically reject it for local historic preservation. Quantifying the costs and benefits of historic preservation is no more technically difficult, or morally fraught, than quantifying the costs and benefits of environmental preservation or preservation of human life. Moreover, even critics of formal CBA accept the "commonsense," qualitative balancing of pros and cons recommended by Benjamin Franklin.[255] Greater reliance on the Franklin Method may be appropriate in cities that lack the resources for advanced economic studies or surveys. Municipalities can mix and match quantitative and qualitative approaches—just as federal agencies do—depending on feasibility and stakes. A qualitative approach would still encourage municipalities to consider overall social costs, rather than just costs to individual property owners (as required by *Penn Central*).

This Part begins with a general argument for applying CBA to historic preservation, building on the discussion of the costs of excessive landmarking in preceding Parts. I then discuss the principal costs and benefits of historic preservation, including effects on economic development, housing affordability, tourism, aesthetic beauty, civic identity, and the environment. This latter section, on the costs and benefits, serves three purposes. Its main purpose is to describe the various pros and cons of preservation that local governments may wish to consider in applying CBA. Second, it provides additional support for applying CBA by highlighting some of the underappreciated costs of preservation. Finally, it suggests how particular costs and benefits might be measured. Given the nature of historic preservation, and the fewer resources available at the local level, much of the CBA will likely be qualitative. Where possible, however, I suggest potential methods for quantification or monetization.

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254 *See* ADLER & POSNER, *supra* note 241, at 4 (noting that "the main defenders of CBA are no longer the Reaganauts of the 1980s but relatively moderate and even liberal commentators," and noting the embrace of CBA by center-right and center-left think tanks); SUNSTEIN, COST-BENEFIT STATE, *supra* note 165, at xi (noting shift to "second generation debate" about "how (not whether) to engage in CBA"). *See generally* Don Bradford Hardin, Jr., Comment, *Why Cost-Benefit Analysis? A Question (and Some Answers) About the Legal Academy*, 59 ALA. L. REV. 1135 (2008) (documenting CBA's rise to prominence).

255 Sinden, *supra* note 160, at 97.

A. The Case for Applying Cost-Benefit Analysis to Modern Historic Preservation

The case for applying CBA to historic preservation stems from a simple recognition: preservation has value, but restrictions on development are costly. Dynamism and density allow cities to flourish as centers of creativity, environmental efficiency, and social mobility. A leading rationale for preservation is what scholars call "civic identity."[256] Paradoxically, however, by preserving cities in form we may fail to preserve their spirit. This may be especially true of fast-paced cities whose identity is bound up with notions of innovation, progress, and commerce. The best way to "preserve" a city like New York may be to allow it to change.

The argument for applying CBA has become more powerful over time. In the era of Penn Station, CBA might have been unnecessary. Sites that clearly merited landmark status were far more numerous, and urban land was much more affordable. Gathering data was more difficult, and statistical methods were less advanced. In these circumstances, careful calculation might not have been feasible or worthwhile. A grapeshot approach to historic preservation may well have been appropriate. In short, CBA itself might have failed cost-benefit analysis.

Today, the case for CBA is much stronger. Preservation has proliferated, while the price of urban real estate has skyrocketed.[257] Local governments have stretched the concept of a landmark beyond recognition, bestowing landmark status on mundane shopping centers and creating vast historic districts filled with generic buildings.[258] When more than 25% of the lots in Manhattan have been landmarked,[259] and nearly 20% in Washington, D.C.,[260] one suspects that historic preservation is no longer living up to its historic ideal.

At the same time, measurement of costs and benefits has become easier. With the rise of Big Data, cities now collect more information than ever about the urban environment.[261] Advances in the field of econometrics have made quantitative analysis more reliable.[262] Where once it may have been sensible to let historic preservation run wild, today a growing chorus of commentators argue that it should be tamed.[263]

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256 Byrne, *Cultured Despisers*, *supra* note 11, at 682 (citing Rose, *supra* note 58, at 543).

257 Richard Florida, *The Incredible Rise of Urban Real Estate*, ATLANTIC: CITY LAB (Feb. 25, 2016), https://perma.cc/GW7G-N9A3.

258 *See* GLAESER, *supra* note 7, at 161; Glaeser, *supra* note 4; *supra* notes 41–42 (discussing the designation of shopping centers and parking lots as landmarks).

259 ELLEN ET AL., *supra* note 29, at 4.

260 Byrne, *Cultured Despisers*, *supra* note 11, at 670.

261 *See generally* ANTHONY M. TOWNSEND, SMART CITIES: BIG DATA, CIVIC HACKERS, AND THE QUEST FOR A NEW UTOPIA (2013).

262 A similar set of trends may have caused environmental regulation to evolve from "command-and-control" approaches, such as fixed limits on pollution, to more sophisticated "market mechanisms" that allow for marginal-cost pricing, such as Pigouvian taxes and cap-and-trade. *See generally* Daniel C. Esty, *Red Lights to Green Lights: From 20th Century Environmental Regulation to 21st Century Sustainability*, 47 ENVTL. L. 1, 43–58 (2017).

263 *See* sources cited *supra* note 50.

Trends in environmental policy may offer a helpful analogy. In the 1970s, the federal government emphasized immediate, broad-brush responses to long-neglected problems, such as air pollution.[264] Because pollution was so severe, parsing the costs of regulation may not have been as important. Over time, however, as air quality improved and statistical methods advanced, Congress and EPA moved away from "1970s environmentalism" and refined the tools of regulation, increasingly incorporating balancing of costs and benefits.[265]

Historic preservation is, if anything, a better candidate for CBA than nature preservation. Applying CBA to buildings is less fraught than applying CBA to nature, because living organisms evoke more concern about preservation for their own sake than do inanimate objects. As one environmentalist critic of CBA argues, "costing nature tells us that it possesses no inherent value; that it is worthy of protection only when it performs services for us."[266] By contrast, preservationists appeal to more functionalist rationales such as community building, financial gains from tourism, and aesthetic value.[267] Whatever the challenges involved in quantifying benefits like these, they seem more tractable than measuring "intrinsic value."

B. The Costs and Benefits of Historic Preservation

A first step in applying CBA is to identify the relevant costs and benefits.[268] By definition, the cost of preservation is the prevention of new construction. Critics of preservation argue that it drives up the price of real estate, makes housing less affordable, stifles architectural creativity, and harms the environment by encouraging sprawl.[269] On the other side of the ledger, commonly cited benefits of preservation are aesthetic qualities, community-building, tourism, education, and the environmental value of building re-use.[270]

1. Costs

i. Overall Measurement

In historic preservation, as in other contexts, quantifying costs may be easier than quantifying benefits.[271] Measuring costs will be especially

264 SUNSTEIN, COST-BENEFIT STATE, *supra* note 165, at 3.

265 *Id.*

266 George Monbiot, Opinion, *Can You Put a Price on the Beauty of the Natural World?*, GUARDIAN (Apr. 22, 2014), https://perma.cc/L9Z7-TSPA.

267 *See infra* Part IV.2.i–iii.

268 ANTHONY E. BOARDMAN ET AL., COST-BENEFIT ANALYSIS: CONCEPTS AND PRACTICE 7 (4th ed. 2010).

269 *See* sources cited *supra* note 50.

270 BRONIN & ROWBERRY, *supra* note 59, at 13–16.

271 *See supra* note 204–205 and accompanying text.

straightforward when preservation boards are evaluating actual proposals for redevelopment. If a developer proposes to invest $20 million in a new apartment complex, that valuation provides at least a rough approximation of the opportunity cost of preventing new construction.[272]

In other situations, such as deciding whether to landmark a neighborhood, actual proposals for development may be unavailable. Estimating costs will therefore be more speculative. Cities could rely on historical data, however, to estimate a range for the likely amount of foregone investment over a given time horizon. This method would require comparing landmarked neighborhoods to similarly situated neighborhoods without landmark status, and measuring the difference in real estate investment. If monetization proves too difficult, cities could at least quantify the "development potential" of a given area by examining the extent to which *other* conditions, such as zoning codes or geologic properties, permit development in the first place. Advanced software is now available that can visualize zoning regulations, including height restrictions, and quantify the extent to which existing structures are using buildable space.[273] All things equal, preservation will have larger opportunity costs where existing structures are low-rise, zoning allows for more height, and thick bedrock permits the construction of skyscrapers.

In practice, local governments may wish to use the monetary value of foregone investment as an approximation for *all* costs, which would avoid "double-counting" of costs.[274] But this Article discusses distributive, environmental, and aesthetic concerns separately. This disaggregation of costs reflects two judgments. First, market valuations are imperfect measures of cost to society; we may care more about some costs than others, such as costs that fall heavily on the poor, and markets may neglect externalities such as environmental effects.[275] Second, disaggregation helps address the "incommensurability" objection—the idea that costs and benefits cannot meaningfully be reduced to a single measure, such as dollars—because disaggregation allows more specific comparison of pros and cons.[276]

ii. Distributive (Affordable Housing)

A commonly cited downside of preservation is its effect on housing affordability.[277] Carol Rose has referred to the displacement of low-income residents as the "albatross of the modern historic preservation movement."[278]

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272 A market valuation of $20 million suggests that society would be willing to pay $20 million for the new complex.

273 Kathryn Brenzel, *This Software Can Help Developers Find Property Primed for New Projects*, REAL DEAL (Mar. 29, 2016), https://perma.cc/9NXL-WBVN.

274 HARRIETTE C. HAWKINS ET AL., ECONOMIC IMPACTS OF HISTORIC PRESERVATION 18 (1997).

275 *Id.* at 307.

276 Sunstein, *Valuation in Law*, *supra* note 213, at 800 & n.69.

277 *E.g.*, BRONIN & BYRNE, *supra* note 57, at 660; Glaeser, *supra* note 4.

278 Rose, *supra* note 58, at 478.

In addition to basic economic theory, considerable empirical evidence supports the relationship between housing supply and affordability.[279] Because preservation limits new development, it restricts supply and thereby drives up prices.[280] According to one study, only five residential buildings taller than fifteen stories have been erected in historic districts in "southern Manhattan"[281] since 1970—less than half the rate in nonhistoric southern Manhattan.[282]

Even ardent preservationists admit that "[e]verything else being equal, restricting supply does increase price," and that "affordable housing is a serious problem in New York and other cities with strong preservation laws."[283] New York City's population is projected to grow by one million in the next twenty-five years, amplifying the affordability crisis.[284] On average, people who live in historic districts in Manhattan are nearly 75% wealthier, and 20% more likely to be white, than people who live outside those areas.[285] Washington, D.C. and Arlington County, which have landmarked strip malls and parking lots,[286] are also tight housing markets with rising prices.[287] Los Angeles has designated thirty historic districts, many of which are low-density neighborhoods with large single-family houses.[288] In Charleston, South Carolina, rampant landmarking has helped produce what one observer calls an "elite of increasingly wealthy downtown residents, and an affordable housing crisis for everybody else."[289]

That preservation is now so widespread suggests that it is sometimes used as a form of what scholars call "exclusionary zoning," a device for keeping density low and thereby excluding the poor, rather than a tool for preserving truly significant buildings.[290] Just as wealthy suburbs prop up property values with minimum-lot requirements, well-heeled urbanites "preserve" the elite status of their neighborhoods with height restrictions and historic district designations.[291] In a dramatic turnabout from the 1960s, real estate developers increasingly find themselves aligned with progressive

279 *See* Lemar, *supra* note 37, at 1561 (citing studies). Even if the poor cannot afford to buy an apartment in a new building, restricting new supply anywhere makes it more difficult for the city to accommodate demand. GLAESER, *supra* note 7, at 150–52.

280 GLAESER, *supra* note 7, at 150–52; Glaeser, *supra* note 4.

281 Glaeser uses this term to refer to Manhattan south of 96th Street. Glaeser, *supra* note 4.

282 *Id.*

283 Byrne, *Cultured Despisers*, *supra* note 11, at 669.

284 JESSE M. KEENAN & VISHAAN CHAKRABARTI, NYC 2040: HOUSING THE NEXT ONE MILLION NEW YORKERS 5–7 (2013).

285 GLAESER, *supra* note 7, at 150.

286 *See supra* note 42 and accompanying text.

287 Kathy Orton, *State of the D.C. Housing Market: The Calm Before the Storm?*, WASH. POST (Sept. 10, 2015), https://perma.cc/4PGE-WHV8.

288 *See* Office of Historic Res., L.A. Dep't of City Planning, *Historic Preservation Overlay Zones*, CITY OF L.A., https://perma.cc/6QAC-AYGX (last visited Apr. 15, 2017).

289 Capps, *supra* note 50.

290 *See generally* Richard Briffault, *Our Localism* (pts. 1 & 2), 90 COLUM. L. REV. 1, 346 (1990) (discussing exclusionary zoning).

291 *See* ROSS, *supra* note 41, at 93 (noting the influence of wealthy landowners on preservation in Washington, D.C.).

critics of urban NIMBYism, ranging from New York Mayor Bill DeBlasio, to columnist Paul Krugman,[292] to the magazine *Salon*.[293]

If cities value socioeconomic diversity and social mobility, they should consider the effects of preservation on the poor. Although distributive concerns may be hard to quantify, scholars have developed techniques for projecting the severity of affordable housing shortages based on existing capacity and demographic trends.[294] As part of a disaggregated CBA, analysts could provide data on demographics and housing prices in a given neighborhood, and attempt to predict, at least in qualitative terms, whether the impact on affordable housing is likely to be severe, moderate, or slight.

iii. Environmental

Insofar as historic preservation restricts development in cities, it may encourage sprawl by pushing development out to the suburbs. Because high-density areas benefit from greater economies of scale, cities tend to be more environmentally friendly than suburbs.[295] Cities consume less energy per capita due to their greater walkability, the availability of mass transportation, and the smaller size of urban residences.[296] Adding another unit to an apartment building tends to be less environmentally invasive than building a single-family home in the woods.[297] On average, cities have much lower carbon dioxide emissions than suburbs.[298]

Quantifying these effects may be difficult because they are far-reaching and indirect. EPA has already calculated a "social cost of carbon," however, to estimate the climate effects of rulemakings.[299] Moreover, a peer-reviewed economic study has already examined, and attempted to monetize, the relationship between carbon dioxide emissions and urban development.[300] The study estimated the difference in emissions-per-housing-unit between central cities and suburbs in forty-eight major metropolitan areas.[301] For those cities—the ones most likely to conduct formal CBA anyway—much of the methodological work has already been done.

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292 Konrad Putzier, *NIMBYs "Impose Cost" on New York: Krugman*, REAL DEAL (Feb. 19, 2016), https://perma.cc/7XMN-GBEG.

293 Doig, *supra* note 50.

294 *E.g.*, KEENAN & CHAKRABARTI, *supra* note 284, at 5–11 & tbl.1.

295 *See generally* WILLIAM B. MEYER, THE ENVIRONMENTAL ADVANTAGES OF CITIES: COUNTERING COMMONSENSE ANTIURBANISM (2013).

296 GLAESER, *supra* note 7, at 14.

297 *See* MEYER, *supra* note 295, at 23–25.

298 Edward Glaeser & Matthew Kahn, *The Greenness of Cities: Carbon Dioxide Emissions and Urban Development*, 67 J. URB. ECON. 404, 415–16 & tbl.5 (2009).

299 U.S. ENVTL. PROT. AGENCY, SOCIAL COST OF CARBON (2016), https://perma.cc/Y9K7-8UKK.

300 Glaeser & Kahn, *supra* note 298.

301 *Id.* at 415 tbl.5.

iv. Aesthetic

Aesthetic significance is one of the most widely cited rationales for historic preservation.[302] But some critics argue that preservation stifles architectural creativity and innovation.[303] For example, New York's Commission recently vetoed a world-renowned architect's plan to build a twenty-two-story glass tower on the Upper East Side.[304] Rem Koolhaas, a renowned postmodernist architect, has warned that the spread of preservation risks blanketing cities in an artificial, sanitized reproduction of the past.[305] Sarah Goldhagen, a noted architecture critic, laments that decisions are "mostly left to the whims of overly empowered preservation boards, staffed by amateurs casting their nets too widely and indiscriminately."[306]

Architectural history is replete with examples of controversial innovations that later won acceptance, such as the Eiffel Tower;[307] I.M. Pei's pyramids at the Louvre;[308] Frank Gehry's postmodern "dancing house" in Prague;[309] and Frank Lloyd Wright's houses in Oak Park, Illinois.[310] As one historian points out, if Oak Park had been designated a historic district in the early 1900s, Wright's designs would likely have been rejected as "incompatible" with the character of the existing neighborhood.[311] Likewise, if the LPC had existed in the 1920s, would the Empire State Building have been allowed to replace the opulent, yet increasingly outdated, luxury hotel that preceded it?[312]

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302 BYRNE & ROWBERRY, *supra* note 59, at 14.

303 *E.g.*, Goldhagen, *supra* note 50; Herbert Muschamp, *Fear, Hope and the Changing of the Guard*, N.Y. TIMES (Nov. 14, 1993), https://perma.cc/SM63-78D5; Ouroussoff, *supra* note 50.

304 GLAESER, *supra* note 7, at 149.

305 Ouroussoff, *supra* note 50.

306 Goldhagen, *supra* note 50.

307 Phil Edwards, *The Eiffel Tower Debuted 126 Years Ago. It Nearly Tore Paris Apart*, VOX (Mar. 31, 2015), https://perma.cc/EQ8A-5JSQ.

308 Susan Stamberg, *Landmark At the Louvre: The Pyramid Turns 20*, NAT'L PUB. RADIO (Dec. 7, 2009), https://perma.cc/3CZQ-EEVC.

309 Charles S. Dameron, *Out Together, Dancing Czech to Czech*, WALL STREET J. (June 8, 2012), https://perma.cc/T6CB-FCDK.

310 *Frank Lloyd Wright Dies; Famed Architect Was 89*, N.Y. TIMES Apr. 10, 1959, at 1; Melanie Sommer, *Frank Lloyd Wright: One of the Greatest, and Most Controversial*, MINN. PUB. RADIO NEWS (Jan. 19, 2007), https://perma.cc/RUU8-RD84.

311 TYLER, *supra* note 33, at 81–82.

312 Julie Satow, *Meet the Keeper of the Waldorf's Salad Days*, N.Y. TIMES, July 24, 2016, at MB4.

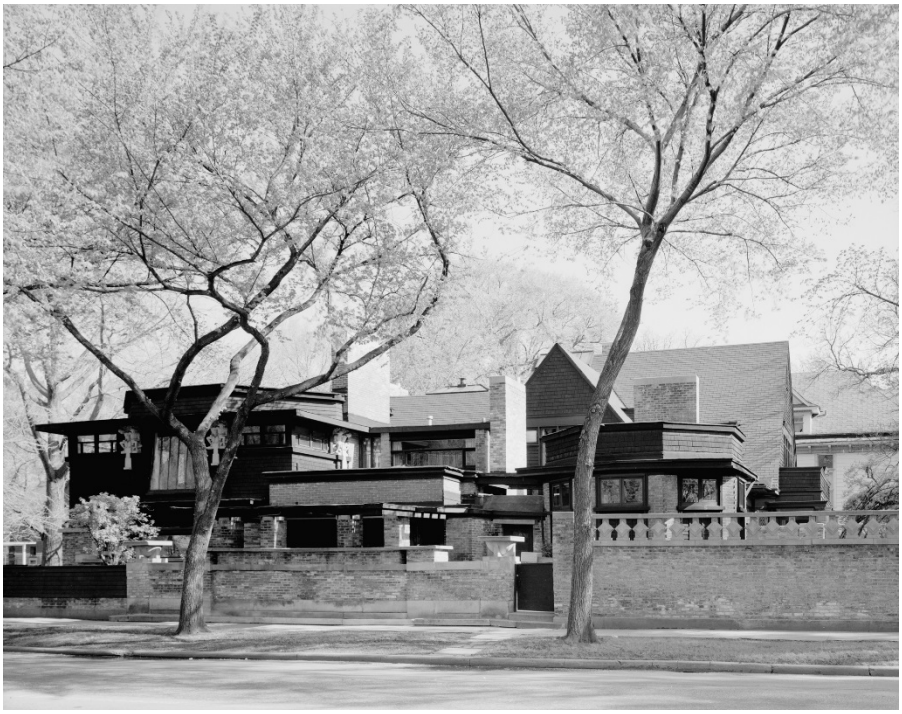

Figure 3: Frank Lloyd Wright house in Oak Park, Illinois[313]

As discussed in Part III.B, aesthetic effects of preservation can be measured using the willingness-to-pay method.[314] While precise monetization may be difficult, a survey-based technique would likely register a significant difference in aesthetic value between, say, a strip mall and a historic brownstone. For individual landmarks, surveys could present renderings that compare the existing structure to the proposed redevelopment. For historic districts, surveys could juxtapose images of the existing aesthetic with renderings of what the neighborhood might look like unpreserved.

In designing the CBA, one might distinguish between aesthetic *beauty* and aesthetic *distinctiveness*; whereas beauty is often said to be "in the eye of the beholder," some buildings are preserved because they exemplify architectural styles, not for beauty per se.[315] Because recognizing distinctiveness may require more expertise, it may be more difficult to capture with survey-based techniques. Still, some quantification seems possible. For instance, in considering whether to landmark a neighborhood

313 Looking South–Frank Lloyd Wright Home & Studio, 428 Forest Avenue & 951 Chicago Avenue, HABS ILL, 16-OAKPA,5--1 (undated) (Historic Am. Bldg. Survey/Historic Am. Eng'g Record/Historic Am. Landscapes Survey Collection, Library of Cong.).

314 *See supra* notes 199–202 and accompanying text.

315 *See* BYRNE & ROWBERRY, *supra* note 59, at 14.

with Greek Revival architecture, it might be helpful to know *how many* other examples of Greek Revival have already been landmarked.

2. Benefits

i. Aesthetic

Many old buildings and historic neighborhoods are prized for their architectural beauty or distinctiveness.[316] Because the aesthetic benefits of preservation are simply the flipside of the aesthetic costs, however, discussing them separately is unnecessary. The methods for measuring aesthetic benefits would parallel the methods for measuring costs.[317]

ii. Community-Building/Civic Identity

Community-building or civic identity has recently emerged as perhaps the chief rationale for preservation.[318] The importance of patriotic or civic motivations can be traced back to the preservation of sites such as Mount Vernon, Independence Hall, and Gettysburg.[319] The idea behind the community-building rationale is that preservation law enables communities to "identify, articulate, and discuss what physical elements of their neighborhood give it a distinctive identity."[320] Over time, this rationale began to displace traditional aesthetic justifications for landmarking.[321] Preservation activity increasingly focused on the ability of distinctive architecture to "lend drama, interest, an occasion for anecdotes about the past, and thus a framework for identification with the shared experience of the community."[322]

Yet scholars appear to have overlooked that preservation can also *undermine* civic identity. For instance, as one architecture critic argues, "preservation fundamentalism . . . is particularly egregious in New York, where the insistence that everything be exactly as it was" seems "altogether inconsistent with our nature and identity as a city."[323] New York's status as a dynamic global metropolis is part and parcel of its identity. In shaping identity, qualities such as ambition, opportunity, and innovation may matter

316 *See* TOMLAN, *supra* note 24, at 104 (providing more information on the types of nominations and the current mix of the National Register).

317 *See supra* notes 199–202 and accompanying text.

318 *See* Byrne, *Cultured Despisers*, *supra* note 11, at 665, 686 (noting Carol Rose's observation that "the chief function of preservation is to strengthen local community ties and community organization." (quoting Rose, *supra* note 58, at 475–76)).

319 Tom Mayes, *Why Do Old Places Matter? Civic, State, National, and Universal Identity*, PRESERVATION LEADERSHIP F. (Jan. 22, 2014), https://perma.cc/9VJW-WN3M.

320 Byrne, *Cultured Despisers*, *supra* note 11, at 682 (citing Rose, *supra* note 58, at 488).

321 Rose, *supra* note 58, at 479–80.

322 *Id.* at 489.

323 Paul Goldberger, Forty-Five Years of Landmarks in New York, Lecture at the Historic Landmarks Preservation Center (Apr. 19, 2010), https://perma.cc/9DKH-JEC2.

just as much as the postwar brick buildings that the LPC has preserved in such abundance. Similarly, in Chicago, the "city that invented the skyscraper," a soaring skyline may be a matter of civic pride.[324]

To take community-building effects into account, one must first identify the relevant community: neighborhood or city? One might argue that the proper unit of analysis is the neighborhood, where residents have close social ties. On the other hand, city government has a responsibility to look out for the common good of the city as a whole, not merely for the parochial interests of an aggregation of districts. The mission of New York's Landmarks Law is to "safeguard *the city*'s historic, aesthetic and cultural heritage."[325] A myopic focus on each neighborhood as a separate entity, without considering citywide effects, risks generating a NIMBYist anticommons.

Measuring civic value is challenging because of its intangibility, but may be easier in some ways than measuring aesthetic effects. Whereas it might take an expert to identify a significant example of Greek Revival architecture, community members are by definition authorities on what is significant to the community. In willingness-to-pay surveys, respondents could be asked to identify how much they value preserving a particular building or style as a matter of community identity or civic pride. Justifying preservation on communitarian grounds makes it more democratic and therefore more amenable to survey-based techniques.

iii. Tourism

Many ordinances cite encouraging tourism as a purpose of local preservation.[326] Only a handful of historic districts or landmarks, however, are likely to be extraordinary enough to attract significant tourism. How many people would visit Arlington or Washington, D.C. in order to see their "historic" strip malls—especially when there are many more significant sites nearby? Similarly, while tourists may flock to New York City to see neighborhoods such as Greenwich Village, the Upper East Side Historic District probably does not rank highly on most itineraries.[327]

Compared to other benefits of preservation, the value of tourism is relatively easy to measure. For instance, based on travel statistics and surveys, the tourism impact of Colonial Williamsburg is estimated to be $500 million annually, while annual expenditures of heritage travelers in the whole of New Jersey (a fine state, but not one known for historic

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324 MARCO D'ERAMO, THE PIG AND THE SKYSCRAPER: CHICAGO: A HISTORY OF OUR FUTURE 53, 55 (Graeme Thomson trans., 2002) (noting that the "[skyscrapers] may have become the symbol of the American metropolis.").

325 N.Y.C., N.Y., ADMIN. CODE § 25-301 (2016) (emphasis added).

326 *E.g.*, *id.*; MILWAUKEE, WIS. CODE § 320-21-1 (2017); S.F., CAL., PLANNING CODE § 10.1001 (2016).

327 *See, e.g., Things to Do in New York City*, TRIPADVISOR, https://perma.cc/HF9S-QA2D (listing Greenwich Village 39th and Upper East Side 129th) (last visited Apr. 15, 2017).

sightseeing) amount to an estimated $433 million.[328] Short of full monetization, cities may be able to use proxies—such as TripAdvisor rankings, surveys of hotel guests, or surveys of visitors—to estimate the amount of tourism.

iv. Education

Old buildings or historic neighborhoods may convey historical, architectural, or cultural knowledge by providing a tangible representation of the past.[329] But for most buildings, most of the educational value could likely be captured by methods of preservation less costly than landmarking—such as written description, photography, videography, or digital reconstruction. Indeed, landmarking may have negative educational value to the extent that it preserves a distorted version of the past; for instance, in the South, many antebellum plantations were saved while slave cottages were allowed to fall into disrepair.[330]

Because educational value seems unlikely to figure prominently in most landmarking decisions, a qualitative approach may be best. At minimum, analysts could describe why a building or neighborhood is significant in light of city, state, or national educational priorities, and explain why preserving it in physical form is necessary to capture the instructional value.

v. Environmental

Some environmentalists and preservationists invoke the slogan "the greenest building is one already built."[331] Generally, rehabilitating an existing structure is more energy-efficient than building a new one from scratch.[332] Preserving old buildings takes advantage of their "embodied energy"—the energy required to extract, manufacture, transport, and assemble building materials.[333] Environmental economists have developed quantitative methods for estimating "embodied carbon" based on construction materials, the expected life cycle of the building, and other factors.[334] These benefits could be incorporated into CBA of historic preservation and balanced against the aforementioned environmental costs.[335]

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328 Listokin et al., *The Contributions of Historic Preservation to Housing and Economic Development*, 9 HOUSING POL'Y DEBATE 431, 452–53 (1998).

329 36 C.F.R. § 60.4 (2016).

330 Byrne, *Cultured Despisers*, *supra* note 11, at 682.

331 BRONIN & ROWBERRY, *supra* note 59, at 16.

332 *Id.*

333 PATRICE FREY, NAT'L TR. FOR HISTORIC PRES., BUILDING REUSE: FINDING A PLACE ON AMERICAN CLIMATE POLICY AGENDAS 8 (2008).

334 *Id.* at 12–13; PATRICE FREY ET AL., NAT'L TR. FOR HISTORIC PRES. ET AL., THE GREENEST BUILDING: QUANTIFYING THE ENVIRONMENTAL VALUE OF BUILDING REUSE, at vi (2011).

335 *See supra* Part IV.B.1.iii.

V. IMPLEMENTING COST-BENEFIT ANALYSIS AT THE LOCAL LEVEL

The previous Part focused on how and why to conduct CBA of historic preservation. This Part briefly addresses some remaining questions about how to put that proposal into practice. First, when should CBA be performed—that is, to what range of decisions should it apply? Second, where should CBA be done—at what level of government (vertically), and in what branch (horizontally)? Finally, what effect should CBA have? Should its results be binding, as is often true of federal CBA? Or should it be advisory, like Congressional Budget Office (CBO) scoring? A very basic way of operationalizing CBA of historic preservation might be to put an economist on the landmarks board who could carry out advisory analyses. A more formal option would be to create a mini-OIRA in the Mayor's office with the power to veto decisions of the landmarks board that fail CBA. Informal models may be more appropriate in small towns, while formal models will be more feasible in large cities.

As to the first operational question—when CBA should be performed—federal practice is again a helpful guide. Formal CBA can be expensive, so federal CBA is generally limited to "major" rulemakings—those with an estimated annual effect on the economy of $100 million or more.[336] Likewise, at the local level, formal CBA may be practical only for the most important preservation decisions. The precise threshold for triggering CBA could be adjusted based on the size of the city, its budgetary resources, and the risk of corrupt deal-making, which may be higher where property owners themselves request a landmark designation. CBA of such requests could help determine whether they primarily serve narrow, exclusionary ends or in fact redound to the broader public interest.

Another aspect of the first question is where in the preservation process to insert CBA. Historic preservation entails a series of decisions, beginning with the bestowal of landmark status and continuing with regulation of landmarked properties. This Article has focused on what is likely the most consequential decision: the decision to designate a building or neighborhood in the first place. But policymakers could also apply CBA after designation, when the owner of a designated property proposes a change and the regulator determines whether the change is "appropriate." For instance, in Washington, D.C., the Mayor's Agent evaluates proposed changes and has the power to override the landmarks board in cases of "special merit."[337] As part of this evaluation, the Mayor's Agent could conduct a more formalized CBA that explicitly identifies costs and benefits. Although this would most likely be practical only for significant proposals (e.g., erecting a tower on a vacant lot), not trivial ones (e.g., repainting a door), it would have the advantage of focusing CBA on an actual proposal, rather than a projection based on historical averages. CBA could also be applied to local preservation decisions that resemble federal rulemaking, such as the

336 *See supra* note 170.

337 D.C. CODE § 6-1107 (2016). The authority has been delegated to the Mayor's Agent. D.C. MUN. REGS. tit. 10-C, § 400 (2016).

promulgation of rules about what types of windows can be used in historic districts.

The second question concerns the institutional locus of CBA. "Vertically," CBA could be performed at the state level or by the municipality. States have the advantage of more resources, so a state-centered model may be more practical in large states that lack major metropolitan centers. States also have greater ability to take into account regional effects, such as suburban sprawl. In general, however, one might prefer municipal governments for reasons of local autonomy and expertise. Large cities often have budgets on par with those of small states, so they may be equipped to handle CBA on their own.

"Horizontally," CBA-trained analysts could sit on the landmarks board, in the mayor's office, or in an agency adjoined to the city council (akin to the CBO). If the analyst were nominated to the board, she could interact directly with other members in the decision-making process, which might enhance deliberation. But locating CBA in an independent office would have the advantage of reducing groupthink and preserving independent-minded review. At the federal level, agencies are often required to conduct their own CBAs, but OIRA reviews them carefully and usually has the authority to override them.[338]

This leads to a final question: at the end of the day, what legal effect should CBA have? Should landmarks boards be able to proceed with preservation even if CBA indicates that the costs exceed the benefits? In the Obama Administration OIRA review, CBA was considered a binding "rule of decision" rather than merely an informational "nudge."[339] Agencies could move forward only if the benefits (qualitative or quantitative) justified the costs, unless they were required to do so by statute. But an alternative would be to conceive of local CBA as akin to CBO scoring. In this incarnation, CBA would serve an important but ultimately informational and advisory function.

VI. CONCLUSION

Once perceived as a harmless pastime, historic preservation has emerged as a powerful force for shaping the urban future. But the modern reality of preservation no longer reflects its idealized image. Gradually, one building or neighborhood at a time, local governments have blocked new construction in vast portions of major American cities, even as housing prices skyrocket and sites worthy of landmark status become increasingly rare. A growing number of critics argue that historic preservation has acquired a new purpose: preserving the narrow interests of property owners who seek to prevent new development.

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338 Michael A. Livermore, Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1339 (2013).

339 SUNSTEIN, SIMPLER, *supra* note 219, at 161.

Despite growing awareness of the costs of preservation, cities continue to save thousands of old buildings without systematically evaluating the tradeoffs. Meanwhile, the permissive constitutional regime of *Penn Central* has rendered judicial review virtually a dead letter. To rein in the excesses of local preservation, some states have begun to consider dramatic legislative reforms, such as making all local landmarking subject to the consent of the owner.

A promising alternative may be to require CBA. For more than three decades, under Republican and Democratic administrations, federal agencies have been required to identify the costs and benefits of regulation, quantify them if possible, and weigh them against each other. While far from perfect, this model of CBA is grounded in an extensive scholarly literature and a valuable body of practice. It is also flexible enough to be adapted to local historic preservation. Even if municipalities opt for a more informal, qualitative approach, applying CBA would encourage more comprehensive consideration of the effects of landmarking. By thinking more carefully about the costs and benefits of historic preservation, local governments may be better able to preserve the dynamism, creativity, and social mobility of the American city in the 21st century.