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WHEN HISTORY IS HISTORY: MAXWELL STREET, "INTEGRITY," AND THE FAILURE OF HISTORIC PRESERVATION LAW

MARK D. BROOKSTEIN*

"We should be grateful for Mrs. O'Leary [sic] cow else [sic] we would be saving every wood shack built prior to the 1871 fire on the grounds of historic value[.]")"

—Letter to the Commission on Chicago Landmarks, opposing Maxwell Street Market Historic District

INTRODUCTION

Most people would probably agree that historic preservation is a legitimate and important aspect of land use regulation. There may not, however, be as much agreement as to which historic properties should be preserved. There are easy cases, of course, like the preservation of a famous Civil War battlefield1 or a beautiful Beaux-Arts railway station.2 But what about a run-down area west of downtown Chicago, at the intersection of Maxwell and Halsted Streets? Although "Maxwell Street"3 is of conceded historical significance,4 its nomination to be designated a historic district on the

* J.D., Chicago-Kent College of Law, Illinois Institute of Technology, 2001; B.A. University of Wisconsin, 1992. The author wishes to thank Sarah Harding, without whom this Note would not have been at all possible. This Note is dedicated to the late, Honorable Abraham Lincoln Marovitz, Chicago-Kent alumnus and one of Maxwell Street's finest contributions to American society.

2. See Penn Cent. Transp. Co. v. New York, 438 U.S. 104 (1978). There, the owner of Grand Central Terminal in New York City sought to erect an office tower atop the terminal, but was prevented from doing so by a landmark ordinance. As the New York landmarks commission stated: "[We have] no fixed rule against making additions to designated buildings, it all depends on how they are done.... But to balance a 55-story office tower above a flamboyant Beaux-Arts facade seems nothing more than an aesthetic joke." Id. at 117-18.
3. Those more familiar with movies than with Chicago history may remember Maxwell Street as the location of Aretha Franklin's character's restaurant in The Blues Brothers.
4. See Alf Siewers, U. of I. Ready to Seal Fate of Maxwell St. District, CHI. SUN-TIMES, Nov. 18, 1994, at 20 ("The area is historic but 'where the difference of opinion comes is in the state and condition of the buildings,' said State Historic Preservation Officer William Wheeler.").

1847
National Register of Historic Places was blocked by the City of Chicago.

Since the enactment of the National Historic Preservation Act ("NHPA") in 1966, preservation law has focused primarily on two areas: first, whether historic designation amounts to a taking in violation of the Fifth Amendment; and second, whether a permit may be granted for the demolition of a building already designated a historic landmark. Little, if any, attention has been focused, however, on which properties are nominated and eventually designated historic landmarks. While the taking issue is beyond the scope of this Note, the demolition issue is more closely related, as it concerns balancing historical and development values.

This Note examines the process by which an area acquires historic district designation, focusing on local governments' ability to deny historic district status in spite of strong evidence to the contrary. In particular, this Note addresses whether historic preservation laws provide ample protection for the preservation of historically and culturally significant districts of racial and ethnic minorities, and whether new standards must be promulgated for such properties. Also, this Note examines how to deal with state and local governmental disagreement as to the designation of a specific


6. The Fifth Amendment states in pertinent part, "nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V. One of the most famous takings cases is Maher v. City of New Orleans, 516 F.2d 1051 (5th Cir. 1975). There, the plaintiff challenged the constitutionality of a city preservation ordinance that prevented the destruction of his Victorian cottage located in the historic Vieux Carre, popularly known as the French Quarter. See id. at 1053-54. The court held that a reasonable exercise of the police power does not become a taking simply because a property "does not achieve its maximum economic potential" as a result of the ordinance. Id. at 1065. The court even held that it was reasonable that Maher pay for the upkeep of the building. See id. at 1066-67. But see United Artists Theater Circuit, Inc. v. Philadelphia Historical Comm., 595 A.2d 6, 14 (Pa. 1990) (holding the historic designation of private property without the consent of the owner to constitute a taking).

7. See, e.g., Citizens Comm. to Save Historic Rhodes Tavern v. District of Columbia Dep't of Housing & Cmty. Dev., 432 A.2d 710, 715 (D.C. 1981) ("In order to authorize issuance of a demolition permit to raze a historic landmark, the Mayor's Agent must find 'that issuance of the permit is necessary in the public interest.'").


10. See National Register of Historic Places Definitions, 36 C.F.R. § 60.3(d) (2000): "A district is a geographically definable area, urban or rural, possessing a significant concentration, linkage, or continuity of sites, buildings, structures, or objects united by past events or aesthetically by plan or physical development. A district may also comprise individual elements separated geographically but linked by association or history."
property or district. What sort of discretion is due the local government from the state?

In this case, although the state initially supported the nomination of Maxwell Street to the National Register, the city opposed it. As a result, the state deferred to the city and recommended that the nomination be rejected. Thus, Maxwell Street most likely would have been designated a historic district but for the action of the city. Does a local government have the authority to make decisions for the entire state if a property is located within the city limits? On the other hand, can a local government be forced to designate an area, and if not, should the state nominate it on its own accord? Although the state is authorized by the NHPA to do so, politics and comity may prevent the state from wishing to take that step. While preservation clearly implicates local concerns, there is a countervailing federal interest in protecting against unbridled discretion on the local level. These competing interests must be balanced so as to not give short shrift to the national interest in preservation.

The Maxwell Street situation acts as a lens through which this problem may be viewed. Although Maxwell Street is local to Chicago, its significance is applicable throughout the country. Part I of this Note gives a historical overview of the Maxwell Street area. Part II surveys the evolution of historic preservation law in the United States. Part III surveys the process by which an area may be designated a historic district through state and federal enabling legislation. It also specifically examines the process by which the proposed Maxwell Street Historic District was recommended for, but subsequently denied, historic district designation. Part IV proposes some ways in which significant historic areas of racial and ethnic minorities may be afforded increased protection in historic preservation laws, including model guidelines for local governments to follow in determining whether areas of ethnic and racial significance should be included on the National Register. This Note

11. Presumably, the city would not have to worry about the state attempting to block a city nomination, because Chicago has its own register of historic landmarks. See CHICAGO, IL., MUNICIPAL CODE ch. 2-120, art. XVII, §§ 580-920 (1987).
13. See the Appendix for a detail of the proposed Maxwell Street Market District, as prepared by Lori Grove for the 1994 nomination to the National Register of Historic Places.
14. Because Maxwell Street has been home to so many different immigrant, ethnic, and racial groups, I use the terms somewhat interchangeably. This is in order to suggest that Maxwell Street is not the sole property of any single group, but rather, historically significant to
also recommends procedures allowing for more community input and review of decisions not to nominate.

I. MAXWELL STREET

A. The History of Maxwell Street

Chicago has been described as an ethnic "checkerboard." By the late 1920s, almost thirty percent of Chicago's population was European born, and Halsted Street was the home of at least a dozen cultures, with Swedes in the north and Dutch in the south. The first inhabitants of the area around Maxwell and Halsted Streets were Irish and German immigrants who had fled famine and depression in Europe. Unofficially, the area was regarded as "Chicago's Ellis Island." The first Jewish immigrants from Eastern Europe arrived in Chicago in the late 1880s and also settled in the area around Maxwell Street. These Jewish settlers "re-created a bustling, crowded Old World style market complete with open stands, live chickens, spirited haggling and a store that boldly advertised 'We cheat you fair.'" In 1912, the city council recognized it as the "Maxwell Street Market."

During the 1920s, as southern African Americans migrated to Chicago seeking work and better living conditions, they also gravitated to Maxwell Street. The area became their social, cultural, and economic center. Today, there is also a large Hispanic population. In addition, Maxwell Street gave birth in the postwar years to urban electric blues, as exemplified by artists like Muddy

many different groups, and therefore, important to the entire country. I am by no means suggesting that how one group views an area of significance is the same as how any other group views it.

15. See Irving Cutler, Jews Make Chicago Home, CHI. SUN-TIMES, Oct. 19, 1999, at 12. I do not believe that the author intended to use "checkerboard" in the same sense that Dworkin used it in discussing discriminatory statutes, see RONALD DWORKIN, LAW'S EMPIRE 164-90 (1986), but rather, in the more celebratory sense to describe Chicago's wealth of different cultures.


17. See id.

18. See Curtis Lawrence, City Dealing to Preserve Maxwell Street, CHI. SUN-TIMES, Mar. 12, 1999, at 6.


21. See Lawrence, supra note 18.

22. See id.

23. See id.
Waters, Howlin' Wolf, and John Lee Hooker. This sound came to be regarded as "Chicago blues" and exerted a major influence on the creation of rock and roll music. By the early 1950s, several recording companies sprung up, most notably Chess Records, which turned many of the Maxwell Street musicians into stars.

The market persisted until 1994, when the city moved it a few blocks east of Maxwell Street in order to allow the Chicago campus of the University of Illinois ("UIC") to clear the parcel for athletic fields and parking lots. While some vestiges of the old neighborhood remain, like Jim's Original Dogs and discount vendors, the "heyday" of Maxwell Street has long since passed. Indeed, due to its steady declined, the Department of Urban Renewal designated Maxwell Street a blighted area in 1996.

B. The Conflict between Preservation and Development

Currently, as part of a $500-million expansion of UIC, the university plans to redevelop the area south of its present campus, which includes the Maxwell Street area. The plan includes academic buildings, student residence halls, a parking structure, retail stores, and residential housing. The proposed historic district is bordered by Roosevelt Avenue on the north, Union Avenue on the east, Morgan Street on the west, and a railroad embankment between 15th and 16th Streets on the south.

At first, UIC sought to demolish the storefronts along Maxwell and Halsted. This drew protest from preservationists. The preservationists, in turn, called for saving nearly all the storefronts south of Roosevelt Avenue. Mayor Richard M. Daley, wishing to

24. See id.
25. See id.
26. See Guarino, supra note 19.
27. See id. ("Today, the tiny neighborhood southwest of the Loop known as Maxwell Street is a slum. Located just south of the UIC campus, Maxwell Street consists of run-down buildings, discount clothing shops and empty shacks. The occasional vendor roams about, hawking every oddity from chairs to porn videos.").
28. See id.
29. UIC was granted the power of eminent domain at the tail end of the Illinois Legislature's 1996 Spring Session to develop, for academic as well as retail and residential purposes, the forty-four-acre area south of the Chicago campus. See Dennis Conrad, U of I Seeks More Property Clout in Chicago—Legislative "Slam Dunk" Riles Some Lawmakers, PEORIA J. STAR, June 16, 1996, at C15.
30. See Lawrence, supra note 18.
preserve the look of the area while providing the necessary amenities for the residents of UIC's South Campus, suggested a compromise. The plan calls for "rehabbing" eight of the original storefronts, while the facades of thirteen other buildings will be preserved and tacked onto newly constructed buildings.

After the UIC board of trustees approved the plan, it went to the full city council in October 1999. The city council approved the plan in November. Despite preservationists' efforts to have Maxwell Street added to the National Register of Historic Places, on August 25, 2000, the Keeper of the National Register, Carol Shull, denied the application to designate the proposed Maxwell Street Market District a historic district. Since August 2000, ten buildings have been knocked down, with ten more to be demolished within the year.

33. As one writer explained:

The idea is to create a compact, old-time shopping district that evokes yesterday’s Maxwell Street but serves today's college community. Some of the still-surviving merchants might elect to stay, or in some cases, move east across the street. Jimmy's Original hot dog stand, for instance, might find a home across Halsted for its famous polish-sausage-smothered-in-fried-onions concoction. Other storefronts would be leases to local entrepreneurs. Imagine bookstores (new and used), a software exchange, a UIC Flames sports bar, an acoustic blues coffee shop, a Mexican bodega, a Jewish delicatessen. Think cobblestones and gaslight, Italian ice and a newsstand. It does, however, take some imagination.


34. "Facade-dectomies" is the process by which facades are stripped off of historic buildings and attached to new structures, as opposed to rehabbing existing buildings. Preservationists equate this with Walt Disney’s practice of using historic edifices, like castles and Western forts, as stage fronts for modern buildings at his successful theme parks. For preservationists, this creates a “Potemkin village.” Grigori Potemkin was an eighteenth-century Russian minister to Catherine the Great who erected fake villages and false-fronts so as to convince the empress that all was well as she toured through the countryside. See Bill Granger, Renewal Project Nothing but a Facade, CHI. DAILY HERALD, Sept. 6, 1999, at 7. See generally ADA LOUISE HUXTABLE, GOODBYE HISTORY, HELLO HAMBURGER: AN ANTHOLOGY (1986).

35. See Maxwell Street: 2nd Chance for UIC, supra note 32. Merely preserving facades, of course, misses the whole point of preservation in the case of Maxwell Street. What makes Maxwell Street historically significant is not so much its particular buildings, but instead the essence of what the place represents. While this sounds a bit too ethereal to be the basis for historic preservation, such factors are a legitimate basis for preserving historic properties, as will be seen.

36. Mayor Daley's approval of UIC's plan is necessary in order for UIC to obtain a crucial property tax subsidy. See id.

37. See Granger, supra note 34.


39. See National Register Rejects Maxwell St., CHI. TRIB., Aug. 26, 2000, § 1, at 5.

In order to evaluate whether Maxwell Street should have been designated a historic district, I will survey the history of preservation law in the United States, concluding that Maxwell Street should have been designated. Further, I conclude that the state deferred to the decision of the city to recommend against designation, even though the city improperly evaluated Maxwell Street under federal standards.

II. THE HISTORY OF HISTORIC PRESERVATION IN THE UNITED STATES

A. Antiquities Act and "Inspiration"

"Congressional interest in the protection and preservation of places of historic and natural interest has long standing in the United States." Indeed, in 1906 Congress enacted the Antiquities Act, which authorizes the president to set aside historic landmarks and structures as national monuments. The act is not without teeth; it makes it a crime, punishable by fine or imprisonment, to excavate, appropriate, injure, or destroy any historic or prehistoric ruin, monument, or any other object of antiquity on lands owned or controlled by the federal government without permission.

This act represents the first of what Carol Rose calls the "three dominant perspectives" of historic preservation. Rose calls this first perspective the "inspiration" period. During this period, in the mid-nineteenth century, the idea of historic preservation was to inspire a sense of patriotism and "civic education" among the observers of the structure. The quintessential example of this approach was the movement by the Mount Vernon Ladies' Association to save Mount Vernon. The project was financed by fundraising lectures conducted by Edward Everett in an effort to provide a symbol of a national hero that "might narrow the growing abyss between North and South."
Another strand in this line of thought was that such preservation would “help to root a burgeoning immigrant population in American life and heritage.”49 An expansion of this notion is an important factor in the model guidelines I will develop to determine whether an area that is historically and culturally significant to ethnic and racial minorities should be granted historic designation. The United States is no longer merely a country with a “burgeoning immigrant population,” but rather, a country whose different races and cultures are part of the very fabric of its thought and culture. To the extent that an “American Consciousness” exists, it is the result of the disparate cultural influences on American society.

Therefore, if the process of becoming an American was the inspiration provided by such sites as Mt. Vernon, then it follows that the continuing process of being American is exposure to, and inspiration by, the historically and culturally significant areas of all races and cultures.

Rose uses the preservation of battlefields as another example of this rationale.50 In United States v. Gettysburg Electric Railway Co.,51 one of the few preservation cases of the era, the Supreme Court held, in an opinion by Justice Peckham, that the preservation of a historic battlefield by Congress constituted a public purpose.52 The difference between a battlefield and an architectural structure such as Mt. Vernon, of course, is that a battlefield is an empty field. It does not necessarily have any physical evidence of the events that took place there, and the viewer is charged with using his or her imagination to experience the historical essence of the area. In short, historical preservation is not merely about preserving buildings or structures, but it is also concerned with preserving a historical essence or importance.

Indeed, in Gettysburg, Justice Peckham stated, “[i]t would be a great object lesson to all who looked upon the land thus cared for, and it would show a proper recognition of the great things that were

49. See id.; see also C. Hosmer, The Presence of the Past 47-48 (1979) (quoting the 1900 report of the New York chapter of the Colonial Dames of America: “‘Americanizing of the children, enlisting their interest in historical sites and characters has a great significance to every thinking mind—the making of good citizens of these foreign youths’”).
50. See Rose, supra note 45, at 482.
Upon the question whether the proposed use of this land is a public one, we think there can be no well founded doubt. . . . The battle of Gettysburg was one of the great battles of the world. . . . The existence of the government itself and the perpetuity of our institutions depended upon the result.
52. See id. at 680.
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done there on those momentous days."

Justice Peckham further stated, "[t]heir successful effort to preserve the integrity and solidarity of the great republic of modern times is forcibly impressed upon every one who looks over the field," and that "[s]uch action on the part of Congress touches the heart, and comes home to the imagination of every citizen, and greatly tends to enhance his love and respect for those institutions for which these heroic sacrifices were made."

The idea that emerges from this opinion is that what may make a historic site meaningful is not necessarily what is on top of it, but rather what essential activity or purpose occurred there. This ties in with Rose's argument that, aside from preservation law having the political purpose of fostering a sense of community, it also illustrates a second element that "a place can convey this sense of community, or more generally, that visual surroundings work a political effect on our consciousness." This idea is also echoed in a bulletin that describes the process for getting a battlefield added to the National Register:

In surveying a battlefield, a basic issue is where do battlefields start and end? Some battles were confined to relatively small geographic areas while others were fluid affairs with military activity extending over large regions. In many instances military groups traveled long distances before meeting in battle. Some battlefield sites today appear simply as an undifferentiated series of woodlots and fields.

Because an area of significance may not be fixed to a single definable area, what is important, for practical purposes, is to determine a general area that encompasses the important event or activity. It may be impractical to designate every square inch of an area where a significant activity took place, but it is possible to determine the focal point, or axis around which the activity turned. Thus, another factor that emerges when considering whether the historically significant area of a racial or ethnic minority ought to be designated is the extent to which an area was the focal point of an essential activity of that group.

53. Id. at 682 (emphasis added).
54. Id. (emphasis added).
55. Id. (emphasis added).
56. Rose, supra note 45, at 483.
B. Historic Sites Act and the Transition to an "Aesthetic" Ideal

Ultimately, however, the Antiquities Act was of limited purpose in historic preservation because of its application to only the vague terms "ruin," "monument," or "object of antiquity on lands owned or controlled by the federal government." Thus, the federal government enacted the Historic Sites Act in 1935 to increase the effectiveness of the Antiquities Act. The act declared it a national policy "to preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States." Interestingly, the language of the act explicitly states "inspiration" as one of its purposes, drawing on the earlier theme of historic preservation.

The Historic Sites Act authorizes the Secretary of the Interior to restore, reconstruct, and maintain historic sites and properties, as well as to establish historic museums. Aside from the more precise language of the act, it expanded on the Antiquities Act by authorizing the Secretary to enter into cooperative agreements with the states, municipal subdivisions, and private organizations and individuals, to assist in historical preservation efforts. Along with the Historic Sites Act's establishment of an advisory board on national parks, historic sites, buildings, and monuments, it also assigned to the National Park Service the responsibility for the general supervision of national historic preservation efforts, a responsibility it has maintained up to the present. The Historic Sites Act also authorized a National

58. In United States v. Diaz, 499 F.2d 113 (9th Cir. 1974), the appellate court reversed the defendant's conviction under the Antiquities Act for appropriating face masks found in a cave on the San Carlos Indian Reservation. The court held that because the terms "ruin," "monument," or "object of antiquity" were too vague to be of common knowledge, a person could not be expected to know with reasonable certainty what objects may not be taken. Id. at 114.
61. See Phelan, supra note 59, at 68.
63. See id. (declaring a national policy "to preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States").
64. See id. § 462(f).
65. See id. § 462(e).
66. See id. § 463(a).
67. See id. § 462.
Survey of Historic Sites and Buildings.\textsuperscript{68} While recovery from the Great Depression took precedence over such a comprehensive federal undertaking, individual and local preservation efforts, including historical districting, increased. Recognition of the significant economic benefits of such preservation and rejuvenation fueled these efforts.\textsuperscript{69}

Also in this period Congress chartered the National Trust for Historical Preservation in the United States to act as a private, charitable, educational, nonprofit corporation.\textsuperscript{70} The trust utilized donated properties and funds to preserve and maintain numerous significant historical and cultural properties, as well as to assist others in their private ownership of such properties.\textsuperscript{71} The trust also had the ability to protect those properties that it deemed to have historical significance.\textsuperscript{72}

The second theme in the evolution of historic preservation focused on aesthetic concerns, recognizing the artistic and architectural significance of buildings or groups of buildings.\textsuperscript{73} This phase reflected "the entry of professional artists and architects into historic preservation. The protagonists of this view thought preservation activities should focus on the artistic merit of buildings or groups of buildings and on the integrity of their architectural style."\textsuperscript{74} As noted above, this period witnessed the emergence of historic districting for aesthetic and economic purposes. "With the shift in interest to architectural merit, public involvement took the

\begin{itemize}
  \item \textsuperscript{68} See id. § 462(b).
  \item \textsuperscript{69} See Carpenter, supra note 47, at 429:
    The Vieux Carre district in New Orleans began generating $150 million annually in income from the tourist trade. The Beacon Hill neighborhood in Boston enjoyed similar economic success as a result of its recognition and preservation as an historic district; between 1955 and 1962, property values in the neighborhood tripled. Georgetown, a section of Washington, in the District of Columbia, was revitalized as a historic district and became one of the most fashionable and expensive areas in the city.
  \item \textsuperscript{70} National Trust for Historic Preservation in the United States, ch. 755, § 1, 63 Stat. 927 (1949) (codified as amended at 16 U.S.C. §§ 468-68d (1988)).
  \item \textsuperscript{71} See 16 U.S.C. § 468; see also H.R. REP. NO. 89-1916, supra note 41, at 3309; Phelan, supra note 59, at 69.
  \item \textsuperscript{72} Indeed, in 1988, the Supreme Court of Illinois held that the National Trust had standing to bring suit against the destruction of private buildings that it deemed to have national historic significance, even though the buildings were never officially declared "national landmarks." See Landmarks Pres. Council of Ill. v. City of Chicago, 551 N.E.2d 9, 14 (Ill. 1988).
  \item \textsuperscript{73} See Rose, supra note 45, at 480.
  \item \textsuperscript{74} Id.
form of architectural controls designed to protect a few well-known old districts in such places as Charleston and New Orleans."

A similar shift occurred in the courts. Opinions regarding historical preservation cases switched from political "inspiration" to "the sterile confines of conclusory homilies about the validity (or invalidity) of 'aesthetic' regulation, distinguishing preservation from 'mere aesthetics' only by reference to a vague rationale of education or, somewhat later, to the promotion of tourism." Indeed, in *Penn Central*, Justice Brennan recognized the positive effects that the preservation of aesthetic qualities can have on the community at large: "[S]tructures with special historic, cultural, or architectural significance enhance the quality of life for all. Not only do these buildings and their workmanship represent the lessons of the past and embody precious features of our heritage, they serve as examples of quality for today."

While Justice Brennan clearly refers to aesthetics in the sense of quality and beauty, by including the word "cultural," a broader reading of aesthetics is implied. What is important in preserving cultural heritage rests in preserving the *particular* aesthetic that an area may have. While this may include exquisite architecture, it is not limited to such, and may encompass the preservation of an aesthetic that makes the area culturally or historically significant. A factor thus emerges that considers the particular aesthetic of the area where the historically or culturally significant activity took place.

With this interest in historic districting came negative side effects. "Especially in the form of historic districting, however, historic preservation can have undesirable consequences that outweigh its positive contributions. Historic districting may displace and exclude minorities and the poor from urban neighborhoods."

75. *Id.* at 484.

76. *Id.* Rose asserts, "[t]here is arguably an inspirational aspect to this branch of preservation as well, since art too may be viewed as inspiring the viewer." *Id.* at 480 n.38. It is more than merely arguable, however, that the second theme also contains the element of inspiration. Indeed, as noted above, the enactment of the Historic Sites Act was "for the inspiration and benefit of the people of the United States." This suggests more than preserving architecture as a vehicle for mere artistic inspiration, but rather preservation in order to inspire the community as well.


Historic districts are often old residential areas of cities occupied primarily by poor and minority residents. District designation attracts developers and investors to these neighborhoods. Competition among those interested in profiting from designation inflates property prices, thereby initiating or accelerating the process of
Because this Note focuses on the process of designation itself, it is beyond the scope to discuss the effects that such designation may have on a neighborhood. It is important, however, to give it some consideration. It would indeed be ironic if residents were pushed out of their neighborhood after they had fought to have it designated. As Rose states:

The displacement of low-income residents... may be the albatross of the modern historic preservation movement, evoking as it does the overtones of snobbery and special interest that have long dogged preservationists. Almost a decade ago, Michael Newsome warned that poor black families might be displaced as middle class whites moved into spruced-up "historic" neighborhoods—and observed that it wasn't black history that the preservationists had in mind.79

Therefore, care must be taken to not look merely at the economic potential of a historic area, but also to its cultural and historic value as an end in itself. If recognition that a historically significant aesthetic does not necessarily have a fixed meaning, then areas that might not otherwise be considered to be historically significant would qualify for designation.80

While preservation activity increased with the passing of various preservation acts, by the mid 1960s preservation efforts had lagged. An influential study conducted in 1965 and published one year later by the United States Conference of Mayors entitled "With Heritage So Rich"81 indicated that nearly half of the buildings identified by the 1935 federal Historic American Buildings Survey had been destroyed.82 The committee recommended a comprehensive legislative program83 that was codified later that year as the National Historic Preservation Act of 1966.84

“gentrification”... which displaces the elderly, blue-collar workers, and the unemployed in favor of professionals and white-collar workers.... Thus, the displaced minorities and poor are the casualties of the reverse migration of the affluent back to the cities.

79. Rose, supra note 45, at 478; see also Michael DeHaven Newsome, Blacks and Historic Preservation, LAW & CONTEMP. PROBS. 423, 423-24 (1971).

80. One definition of aesthetic is a "philosophical theory or idea of what is aesthetically valid at a given time and place," and uses as an example, "the clean lines, bare surfaces, and sense of space that bespeak the machine age aesthetic." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1987). Therefore, whatever it is that makes an area unique at a given time is its particular aesthetic.


83. See U.S. CONFERENCE OF MAYORS, supra note 81, at 12.

C. The National Historic Preservation Act and a Community-Based Ideal

The NHPA established both an Advisory Council on Historic Preservation\textsuperscript{85} to advise the president and Congress on historic preservation and to develop preservation guidelines and policies,\textsuperscript{86} and the National Register of Historic Places,\textsuperscript{87} which is the official listing of the nation’s historic properties. The NHPA also provides for matching grants-in-aid to states and to the National Trust for Historic Preservation.\textsuperscript{88} Other grant programs also provide incentives for state and local historic preservation activity.\textsuperscript{89} The legislative history behind the NHPA captures the tension between historic preservation and urban development:

Notwithstanding the progress which has been made with regard to historic preservation . . . [properties] which are worthy of protection because of their historical, architectural, or cultural significance at the community, State or regional level have little protection given to them against the force of the wrecking ball . . . . It is important that they be brought to light and that attention be focused on their significance whenever proposals are made in, for instance, the urban renewal field . . . that may involve their destruction. Only thus can a meaningful balance be struck between preservation of these important elements of our heritage and new construction to meet the needs of our ever-growing communities and cities.\textsuperscript{90}

Two important points emerge from the above. First, properties that must be saved from “the force of the wrecking ball” may have significance independent of aesthetic concerns, for example, architectural significance. Historic or cultural significance is not inextricably tied to a narrow interpretation of aesthetics, but rather derives its value from its historical or cultural significance, as defined by its particular aesthetic. Second, while urban renewal is an important goal, it must be balanced with the equally important goal of preserving historically significant areas. Because the important historic areas of racial and ethnic minorities may very well be areas targeted for urban renewal, particular attention must be paid to the danger of destroying cultural heritage in the name of urban renewal.\textsuperscript{91}

\textsuperscript{85} See id. § 470i(a).
\textsuperscript{86} See id. § 470j(a).
\textsuperscript{87} See id. § 470(a).
\textsuperscript{88} See id. § 470a(d).
\textsuperscript{89} See Fein, supra note 78, at 76-78.
\textsuperscript{90} See H.R. REP. NO. 89-1916 (1966), supra note 41, at 3309.
\textsuperscript{91} See Rose, supra note 45, at 487.
The most infamous example of such activity is Boston's West End, "an ethnic neighborhood ultimately cleared by urban renewal and something of cause celebre in the anti-urban renewal literature." The concern of valuing development over preservation is expressed in the introduction of the NHPA:

The Congress finds and declares that... in the face of ever-increasing extensions of urban centers, highways, and residential, commercial, and industrial developments, the present governmental and nongovernmental historic preservation programs and activities are inadequate to insure future generations a genuine opportunity to appreciate and enjoy the rich heritage of our Nation... The third stage of historic preservation—what Rose calls "Preservation for Community"—incorporates elements from the first two stages and adds a concern for the environmental and psychological effects of historic preservation. Here, the focus is on a sense of community, familiarity, and orientation that older structures provide. Related to this third aspect is the environmental movement, which also centers on the relationship of people to their physical surroundings. The current criteria for the National Register of Historic Places contain "[a]ll three themes, or elements of them," which were discussed above.

Although the apologists for urban renewal have rightly noted that its programs meant many different things, including rehabilitation and even some historic preservation activity, it most strikingly conjures up the image of large clearance projects in low-income areas involving the demolition not only of historic structures, but of entire black and ethnic neighborhoods, and their replacement by massive office buildings and high rise housing projects. Such projects met the interests of potential financial backers and developers; some sites were apparently selected with a deliberate regard to the weakness of local neighborhood organization.

92. Id. at 489.
93. Id.
94. See id. at 488.
96. See Rose, supra note 45, at 488.
97. See id. at 480. For the National Register criteria, see 36 C.F.R. § 60.4 (2000): The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures and objects that possess integrity of location, design, setting materials, workmanship, feeling, and association and
(a) that are associated with events that have made a significant contribution to the broad patterns of our history; or
(b) that are associated with the lives of persons significant in our past; or
(c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose...
This third stage, responsive to the "shattered neighborhoods" left in the wake of urban renewal, began to "reconsider the political ramifications of the physical environment."\textsuperscript{98} The focus shifted to consideration of how the physical environment relates to the community and the individual's place within that community.\textsuperscript{99} Indeed, the language of the NHPA states "the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people."\textsuperscript{100} Rose proposes a community-building rationale for historical preservation:

\begin{quote}
It is in reinforcing decentralized and pluralistic community-building that historic preservation law may make its most important contribution to our political life. Its substantive effects on our physical surroundings, including older structures and neighborhoods, can help to give residents a feeling of stability and familiarity, and they can aid in creating a sense of community among neighbors.\textsuperscript{101}
\end{quote}

The process by which to accomplish this goal would be through the implementation of procedures designed to weigh and balance the competing interests of historic preservation and the community at large, such as compromise between new development and preservation.\textsuperscript{102} This view is entirely consistent with the NHPA's legislative history.\textsuperscript{103}

\section*{D. Historic Preservation and Maxwell Street}

One obstacle to Rose's community-building rationale is that historical preservation law is typically applied to events that occur after a site or district obtains designation. Examples include whether a historic district will get in the way of a proposed highway,\textsuperscript{104} or

\begin{quote}
\begin{itemize}
\item components may lack individual distinction; or
\item (d) that have yielded, or may be likely to yield, information important in prehistory or history.
\end{itemize}
\end{quote}

\textsuperscript{98} See Rose, supra note 45, at 488.

\textsuperscript{99} See id. at 489 ("In the legible city, not only can urban dwellers find their way, but the architectural qualities themselves lend drama, interest, an occasion for anecdotes about the past, and thus a framework for identification with the shared experience of the community.").

\textsuperscript{100} 16 U.S.C. § 470(b)(2) (1994).

\textsuperscript{101} See Rose, supra note 45, at 494.

\textsuperscript{102} See id. at 517-34.

\textsuperscript{103} See H.R. REP. NO. 89-1916 (1966), supra note 41.

\textsuperscript{104} See generally Guil, supra note 95. See also 16 U.S.C. § 470(f) (1994) (section 106 under the original version of the statute), which requires the head of any federal agency engaging in a proposed federal or federally assisted program to take into account the effect of the undertaking on any property listed on the National Register, and "afford the Advisory Council on Historic
whether historic district designation and subsequent gentrification push minorities out of their neighborhoods. 105

This Note is concerned with areas that are never designated in the first place, as opposed to problems that arise subsequent to designation. Here, the local government opposed the nomination of an otherwise eligible area for historic district designation based on economic and political concerns. While the NHPA does provide review mechanisms, the amount of discretion afforded local governments in the designation process carries considerable potential for abuse.

If the communitarian ideal of preservation that Rose speaks of is to be realized, the preservation laws must provide meaningful guidance in order to further the goal of preserving American heritage and culture. 106 Maxwell Street is a perfect example of local discretion eviscerating the legislative purpose behind the NHPA. Applying the factors developed above supports the conclusion that Maxwell Street should have been designated a historic district because it is the type of area that the NHPA was designed to protect. Maxwell Street has

Preservation...a reasonable opportunity to comment with regard to such undertaking.” Interestingly, the legislative history reveals that the original bill required a sixty-day waiting period after reporting such effect to the Advisory Council. Wilfred H. Rommel, Assistant Director for Legislative Reference, however, recommended that section 106 be amended because, “[a] 60-day waiting period in these circumstances could seriously interfere with the execution of important Federal programs.” H.R. REP. No. 89-1916, supra note 41, at 3312. The amendment dropping the sixty-day waiting period was ultimately incorporated into § 106. See 16 U.S.C. § 470(f).

105. See, e.g., Fein, supra note 78.

106. This is not to say that courts can arbitrarily compel historic designation for certain areas. In Deane v. City of New York Dep't of Bldgs., 677 N.Y.S.2d 416, 419-21 (N.Y. Sup. Ct. 1998), petitioners sought an injunction to compel the New York Landmarks Preservation Commission (“LPC”) to consider landmark status for the Jones Woods Houses and ten other tenements on the Upper East Side of the city. Not surprisingly, the court found:

Mandamus, the remedy Petitioners seek, does not lie to compel performance of any act that involves the exercise of judgment or discretion, or to compel an officer to perform any statutory duty in a particular manner.... No provision of the New York City Administrative Code requires LPC to consider any request for landmark status that is submitted to it. To the contrary, LPC has unfettered discretion to decide whether to calendar an item to be considered for landmark designation.... That LPC must apply stated statutory criteria in deciding whether a calendared building ought to be a landmark does not mean that it must go through the lengthy formal consideration process with respect to every single application that is submitted to it.

The Jones Woods houses and the tenements to their east dated to the late nineteenth century and were “symbols of the development of this area for middle and working class families.” Id. at 419. The LPC twice declined to consider the district for designation. Id. at 418. Interestingly, the LPC did designate “The Upper East Side Historic District,” a substantial area neighboring the Jones Woods Houses, that was “[d]eveloped in the late 19th and early 20th Centuries to serve the needs and tastes of New York’s upper classes.” Id.
aspects of all three phases of historic preservation that Rose suggests have been incorporated into the NHPA.

First, Maxwell Street served as the hub of economic and cultural activity for many immigrant groups entering America (as well for African Americans migrating to the north). As such, it represents "inspiration" to all groups attempting to achieve the "American Dream" while retaining their cultural identity. Maxwell Street thus creates a context through which an individual may place the past in relation to their present life, as well as the future of themselves and their community. This "inspiration" is not the result of viewing particular structures, but rather taken from the essential activity that occurred in the area as a whole. In this way, Maxwell Street is analogous to a battlefield, the significance of which is the preservation of its historical essence. The area that encompasses the activity itself, however fluid, is that which the NHPA seeks to protect.

Next, Maxwell Street is consistent with the broader interpretation of the aesthetic phase of historical preservation. Perhaps this aesthetic is "run-down" compared to Colonial Williamsburg, but its significance lies in the cultural aesthetic that served as the conduit for the essential activity that occurred. The question is not one of how pleasing the area is to look at on first blush—restoration and redevelopment is part of historic preservation—but rather the significance of its particular aesthetic. From the beginning, Maxwell Street has had a certain aesthetic that added to its uniqueness and was part of its very character. Certainly, one might reply that just because something has an aesthetic—everything has some aesthetic—does not mean that it should be preserved. This is true enough, but the point is not preserving everything with an aesthetic, but instead preserving an aesthetic that exists within the framework of a culturally and historically significant area.

Finally, the preservation of the proposed Maxwell Street District would further the goal of giving "a sense of orientation to the American people." This is accomplished by preserving the cultural and historic foundations of the ethnic and racial communities that Maxwell Street originally comprised. In this way, a focal point is created that acts as a ground for cultural identity. History is objectified through the preservation of the actual neighborhood, as opposed to literally tearing down history and replacing it with mere representations, such as a plaque or museum, that are insufficient to
give any real meaning to and recognition of the events and people that existed there.

Also, by giving the community a voice in balancing preservation and development interests, faith in the political process is fostered. Instead of viewing preservation as a mere cultural ornament to be worn at the caprice of powerful interest groups, people will take pride in a community that actively pursues measures to preserve and secure their culture and heritage. We begin our treatment of Maxwell Street with the procedures through which properties and districts are designated.

III. THE DELEGATION OF FEDERAL PRESERVATION AUTHORITY TO THE STATE AND LOCAL LEVEL

The NHPA authorizes the Secretary of the Interior ("Secretary"), through the National Park Service ("NPS"), to promulgate regulations for State Historic Preservation Programs. The Secretary in turn authorizes the governor of each state to appoint a State Historic Preservation Officer ("SHPO") to prepare, implement, and administer a state preservation program. The SHPO also oversees implementation of the federally mandated preservation program. These responsibilities include, among other things, conducting a comprehensive survey of statewide historic properties, in cooperation with federal and state agencies, local governments, private organizations, and individuals. The SHPO's duties also include "responsibility to identify and nominate eligible properties to the National Register and otherwise administer applications for listing historic properties on the National Register."

107. See 36 C.F.R. § 60.3(h) (2000) ("The National Park Service is the bureau of the Department of Interior to which the Secretary of Interior has delegated the authority and responsibility for administering the National Register program.").
112. See 36 C.F.R. § 60 (providing the process by which properties are added to the National Register).
A. Nominating Properties to the National Register

In addition to state nomination of historic properties, the Illinois Historic Preservation Agency ("IHPA") provides a process by which interested parties may attempt to get a property nominated to the National Register.\(^\text{114}\) First, an applicant sends initial information to the IHPA concerning the property in question.\(^\text{115}\) The IHPA uses this information to determine whether the property may merit National Register listing. Next, the IHPA prepares and sends to the applicant an advisory staff opinion stating whether it believes the property may be eligible.\(^\text{116}\) If the IHPA believes the property is eligible, it will also enclose the full application materials.\(^\text{117}\)

Once the applicant has returned the full nomination form to the IHPA, it is presented at the next meeting of the Illinois Historic Sites Advisory Council ("Council").\(^\text{118}\) At the meeting, the applicant and any interested parties may address the Council regarding the nomination.\(^\text{119}\) If the Council approves of the nomination, it is forwarded to the Illinois Historic Preservation Officer ("IHPO") who nominates the property to the National Register if in agreement with the Council.\(^\text{120}\) If the Council advises against designation, the applicant must wait one year before submitting any new information about the property.\(^\text{121}\) Finally, the keeper of the National Register in Washington D.C. reviews the nomination and determines whether the property will be designated. If the nomination is approved, the property is listed in the National Register of Historic Places, thereby


115. See Sculle, supra note 114. The NHPA requests that the applicant send photos of the property, statement of significance, and statement of integrity. A property may be significant under any of the four National Register criteria. See supra note 97.

116. See Sculle, supra note 114.

117. If the applicant receives a negative staff opinion, they can request the materials anyway, but must devote special attention to the negative points made in the advisory opinion. See id.

118. The Council is comprised of fifteen voting members who are appointed by the director of the IHPA, and three ex-officio members. Each councilor is qualified by virtue of professional or civic involvement with preservation and meets four times a year to evaluate properties for nomination. See id.

119. See id.

120. See id.

121. See id.
entitling it to the protections and benefits of historic preservation law.\textsuperscript{122}

If the proposed historic area is already blighted and facing urban redevelopment, like Maxwell Street, an initial rejection is essentially final, because not only is no new information likely to emerge in one year, the area may not even exist in one year.

\textbf{B. The Role of Certified Local Governments}

Historic preservation also occurs at the local level. The NHPA provides that the SHPO assist local governments in developing their own local historic preservation programs and in becoming a certified local government ("CLG").\textsuperscript{123} The procedures for state, tribal, and local government historic preservation programs are provided by NPS regulations.\textsuperscript{124} The local government must satisfy several federal criteria in order to become certified. Among these are establishing a qualified historic preservation review commission ("commission"), and a process for reviewing applications for proposed changes, including demolition, to historic properties.\textsuperscript{125} The local government is also required to “provide[] for adequate public participation in the local historic preservation program, including the process of recommending properties for nomination to the National Register.”\textsuperscript{126}

Once a local government is certified, it becomes eligible for funds available through the NHPA, and is authorized to carry out the responsibilities delegated to it.\textsuperscript{127} Significantly, the certified local government has the authority to comment on the eligibility of a proposed property for designation:

Before a property within the jurisdiction of the certified local government may be considered by the State to be nominated to the Secretary for inclusion on the National Register... the [local] commission, after reasonable opportunity for public comment, shall

\textsuperscript{122} See 36 C.F.R. § 60.6(s). During the application process, the owner of the property is notified of the proposed nomination. If the owner (or a majority of the owners in the case of a proposed district) opposes the designation, the nomination proceeds through the same process, except instead of being officially listed on the National Register, the property is deemed “eligible” for listing. Eligible properties receive the same protection as listed properties, but do not qualify for grants or rehabilitation tax incentives. See also Jeffrey Jahns & William J. Fairbanks, Legal Aspects of Historic Preservation Law in Illinois, ILUL IL-CLE 7-1, 7-4 (1995).


\textsuperscript{124} See 36 C.F.R. § 61.

\textsuperscript{125} See 16 U.S.C. § 470a(c).

\textsuperscript{126} See id. § 470a(c)(1)(D).

\textsuperscript{127} See id. § 470a(c)(3).
prepare a report as to whether or not such property, in its opinion, meets the criteria of the National Register.\textsuperscript{128}

Given the size and scope of the national historic preservation program, efficiency demands that discretion be given to local governments in administering preservation programs.\textsuperscript{129} As discretion increases, however, so does the potential for the local commission to consider factors not otherwise part of the designation process. The national program has penalties for noncompliance, including increased oversight, revocation of federal funds, suspension from the grant program, and decertification.\textsuperscript{130} But, it is unlikely that a local commission’s failure to recommend an area based on a reasonable explanation would warrant such measures by the SHPO.\textsuperscript{131}

Indeed, comments received by the NPS in response to proposed revisions to regulations governing CLGs\textsuperscript{132} voiced concern over increased CLG participation in the National Register nomination process.\textsuperscript{133} In particular, these comments stated, “[s]ix commenters . . . believe that many CLGs may not be interested in, qualified for, or sufficiently objective to take the place of the review board in reviewing nominations. They expressed concern that the National Register process could be compromised.”\textsuperscript{134} In response, the NPS stated that “[t]he integrity of the National Register process is protected by the appeals process specified in 36 C.F.R. § 60.”\textsuperscript{135}

\textsuperscript{128} Id. § 470a(c)(2)(A).


The responsibility for most decision making in the State, tribal, and local government programs and the selection of specific projects and activities lies largely with each State, tribal, and local government based on its particular needs . . . . By placing more reliance on State, tribal, and local governments, by eliminating unnecessary detail and procedures, and by expressing a more flexible oversight philosophy, these revisions to 36 C.F.R. part 61 can reduce the need for a future rulemaking.

\textit{Id.}

\textsuperscript{130} See id.

\textsuperscript{131} As will be discussed in much greater detail, the Chicago commission’s stated reason for not recommending Maxwell Street for nomination was its lack of historic integrity.


\textsuperscript{133} See 36 C.F.R. § 61.4(b)(3).

The SHPO also may authorize the historic preservation review commission (Commission) of a certified local government . . . to act in place of the State Historic Preservation Review Board (Review Board) for the purpose of considering National Register nominations within its jurisdiction, provided that the Commission both meets the professional qualifications required for the Review Board when considering such nominations and otherwise follows the Secretary’s written guidance.

\textit{Id.}

\textsuperscript{134} National Park Service, \textit{supra} note 129, at 9.

\textsuperscript{135} Id.
While it is true that the decision to not designate is subject to review—as will be discussed in detail below—the appeal process is insufficient for at least two reasons. First, to analogize to the judicial process, courts of appeals simply cannot correct all errors made in the lower courts, either because parties do not appeal, or because of deference given to lower courts regarding issues over which lower courts generally exercise more expertise. It is more efficient to reach the proper result in the first instance than to rely on the hope that errors will be corrected later on down the line. This leads to the second problem: once an initial rejection occurs, final rejection is a fait accompli.

1. The Appeals Process

The regulations governing appeals refer to the failure of the SHPO to nominate a property that the local government considers eligible for nomination. The comments quoted above, however, address the opposite problem: What happens when the CLG, not the state, recommends rejecting the nomination? If on the one hand, the state refuses to nominate, the CLG (or for that matter, any person) may appeal directly to the keeper, whose decision "is the final administrative action on such appeals." But, what if on the other hand, the CLG opposes the nomination? Indeed, that is what happened in the case of Maxwell Street: although the state initially supported the nomination, it was the CLG, Chicago, which opposed it. While the keeper's decision is a final administrative decision—subject to judicial review—that trumps the state or the CLG, the problem is that for all practical purposes, the recommendation by the CLG is unreviewable.

At first blush, the answer to that concern is that reviewability of the CLG's recommendation is irrelevant because it is not binding on the state. Therefore, rejection by the CLG does not necessarily sound the death-knell for the nomination process. Under the NHPA, the interested party may appeal to the state if such a circumstance arises:

If both the commission and the chief local elected official recommend that a property not be nominated to the National

136. See 36 C.F.R. § 60.12 (providing the process for nomination appeals); see also 16 U.S.C. § 470a(a)(6) (“Any person or local government may appeal to the Secretary a nomination of any historic property for inclusion on the National Register and may appeal to the Secretary the failure or refusal of a nominating authority to nominate a property in accordance with this subsection.”).
137. 36 C.F.R. § 60.12.
Register, the SHPO shall take no further action, unless within thirty days of the receipt of such recommendation by the SHPO an appeal is filed with the State. If such an appeal is filed, the state shall follow the procedures for making a nomination pursuant to Section 101(a). Any report and recommendations made under this section shall be included with any nomination submitted by the State to the Secretary.\footnote{See 16 U.S.C. § 470a(c)(2)(B).}

This review mechanism, however, is not adequate to protect against improper recommendations not to nominate by the city.

2. The City’s de Facto Power of Final Determination

To be sure, the state is not required to follow the recommendation of the CLG in determining whether to nominate a property to the National Register. The state may certainly go ahead with the nomination process and submit the materials, along with the CLG’s comments, to the keeper. My argument, however, is that the recommendation by the CLG acts as the de facto final administrative decision. Here, because the state approved of and indeed initiated the nomination of Maxwell Street to the National Register, it is safe to assume that it supported the nomination. Therefore, the state had the authority to simply ignore the CLG and move forward with the process. Instead, after receiving the CLG’s comments, the state changed its position and recommended that Maxwell Street not be nominated. It is also fair to assume that the keeper, in deference to the expertise of the state, followed the state’s recommendation. In this way, the keeper was really deferring to the CLG, to which the state had already deferred.

Indeed, the letter from the IHPA informing the city that the proposed district was rejected by the keeper stated: “It was the Keeper’s opinion that the area was only a small fragment of the original market and it lacked sufficient historic integrity for listing in the Register.”\footnote{Letter from the IHPA to the city of Chicago (Sept. 13, 1995) (on file with author).} As I will discuss later, these were arguments made by the city, not the state. The IHPA had earlier determined that the proposed Maxwell Street district retained sufficient historic integrity to be designated. As I will also discuss later, the city of Chicago was wrong in its analysis of the “integrity” of Maxwell Street. There are, of course, compelling reasons why the state would defer to the city of Chicago. As discussed above, efficiency demands require the state to defer local matters to local governments. Also, there are political
considerations. If the city of Chicago, or other local government, is opposed to a particular designation, the state may not feel the need to press the matter further.¹⁴⁰

Politically, this makes sense. Given the conflicting priorities that inevitably exist between cities and the states in which they are located, some battles simply may not be worth fighting over. Is the state of Illinois really going to “go to the mat” over the preservation of a blighted area in lieu of UIC’s expansion?¹⁴¹ While this may be the reality of the situation, political deference is not a basis for evaluating the eligibility of a property for inclusion on the National Register. Therefore, some safeguards should be erected in order to check the impact of such considerations. Otherwise, the NHPA is merely form without substance.

This is not to say that negative CLG recommendations are inevitably a function of politics. The commission may legitimately find that the proposed property does not meet the national criteria. It goes without saying that the CLG may have very valuable input for the SHPO because the CLG is more intimately acquainted with properties within its borders. But, where politics are a weighty consideration, there must be a mechanism for checking the unbridled discretion of the certified local government. While the legislative history of the NHPA recognizes the need to balance preservation and development values,¹⁴² the balance should not be reached with the local government’s elbow on the scale.

C. The Nomination and Subsequent Denial of Maxwell Street’s Historic District Designation

Following the procedures outlined above, initial materials were sent to the IHPA concerning the eligibility of the Maxwell Street Market area for nomination to the National Register. Finding sufficient eligibility, the IHPA forwarded the nomination materials and requested additional information regarding Maxwell Street.¹⁴³

¹⁴⁰. While researching at the Commission on Chicago Landmarks, I was informed by the Chicago Landmark Commission’s Information Officer that it is typical for the state to defer to the commission’s recommendation.

¹⁴¹. This also gets us into the rather complicated area of “home rule” which is beyond the scope of this Note. It is at least worth noting that there are considerations other than mere deference between city and state.


The IHPA prepared an exhaustive, fifty-two page preliminary opinion\textsuperscript{144} of the Maxwell Street Market Historic District (with an equally long appendix of maps, photos, and descriptions of the relevant properties). Next, pursuant to the NHPA, the IHPA sent a copy to the Landmarks Division of the Department of Planning and Development in the city of Chicago.\textsuperscript{145} A copy was also sent to Mayor Daley. Most notably, the opinion found:

The Maxwell Street Historic District . . . meets Criterion \textsuperscript{A}\textsuperscript{146} for listing in the National Register of Historic Places . . . . The historic district is significant for its associations with the ethnic and commercial history of Chicago from circa 1870 to 1944 . . . . The succession of ethnic groups that have lived and prospered in the area are well-documented by scholars and through oral history.\textsuperscript{147}

The IHPA also found that "[the district] retains sufficient \textit{integrity} of location, setting, feeling, association, and materials from the period of significance."\textsuperscript{148} Taking account of the changes and deterioration that Maxwell Street has sustained over the years, the IHPA stated that "[i]n spite of alterations and demolition, a large concentration of historic buildings still remain that reflect its period of greatest activity and significance."\textsuperscript{149} This finding is particularly interesting because it is consistent with the notion—discussed earlier—that the NHPA does not merely preserve specific properties, but also the significance of the activity that once occurred there—similar to preserving a battlefield. This historical essence was also described as follows:

The buildings, often nondescript, which contained the storefronts and the apartments of their proprietors, and the streetscapes crowded with pushcarts and stands were the physical context in which the bustling commerce and acculturation took place. The historical significance of the area lies not in the occurrence of particular events of note within its confines, but \textit{in the vital activity that took place from day to day in the area}.\textsuperscript{150}

\textsuperscript{144} See Memorandum from the IHPA to Mayor Richard M. Daley and the Department of Planning and Development (Mar. 9, 1994) (on file with author) [hereinafter IHPA Memorandum].

\textsuperscript{145} Because the city of Chicago is a Certified Local Government, it has the opportunity to comment on a nomination before it goes to the Illinois Historic Sites Advisory Council. See 36 C.F.R. § 61.

\textsuperscript{146} Criterion A relates to districts "that are associated with events that have made a significant contribution to the broad patterns of our history." 36 C.F.R. § 60.4(a) (2000).

\textsuperscript{147} IHPA Memorandum, supra note 144, at 1.

\textsuperscript{148} \textit{Id.}

\textsuperscript{149} \textit{Id.} at 1 (emphasis added).

\textsuperscript{150} \textit{Id.} at 8 (emphasis added).
It is no secret that Maxwell Street is, and has always been, a rather run-down neighborhood. This is part of Maxwell Street’s historical essence and character. An early account of the area by a visiting English journalist in 1896 described:

Street stretches beyond street of little houses, mostly wooden, begrimed with soot, rotting, falling to pieces. The pathways are of rickety and worm-eaten planks, such as we should not tolerate a day in London where a house is being built. . . . The streets are quagmires of black mud, and no attempt is made to repair them. They are miserably lighted.\footnote{Id. at 37 (quoting H. MAYER & R.C. WADE, CHICAGO: GROWTH OF A METROPOLIS 261 (1969)). Besides this rather bleak description, it is also reported that “crime was almost non-existent and the death and disease rate was one of the lowest of the various immigrant groups.” \textit{id.} (quoting IRVING CUTLER, CHICAGO: METROPOLIS OF THE MID-CONTINENT 72 (1982)). Furthermore, “[t]he community in many ways resembled a teeming Eastern European ghetto: it housed kosher meat markets and chicken stores, matzo bakeries, tailor and seamstress shops, bathhouses and peddlers’ stables. Its rich and varied religious and cultural life included synagogues, Hebrew schools, literary organizations, Yiddish newspapers, and Yiddish theaters.” \textit{id.} (quoting Irving Cutler, \textit{The Jews of Chicago: From Shiel to Suburb, in ETHNIC CHICAGO 79 (Melvin Holli et al. eds., 1984)).}

Since the 1900s, Maxwell Street has gone through a continual “morphology of an old and impoverished neighborhood,” as wood buildings have been replaced with brick tenements and modified to accommodate growing and changing businesses and families.\footnote{Id. at 3. Amusingly, the Maxwell Street Civic Improvement Project of 1939, which sought to better the conditions of Maxwell Street “for the furtherance, improvement, and betterment of conditions as they relate to real estate and business interests,” failed due to lack of support from the area merchants. \textit{id.} at 5-6.} Maxwell Street’s importance is reflected in the rich ethnic and cultural heritage that it represents, as a “cultural point of entry for immigrant groups in Chicago.”\footnote{Id. at 8.} Of course, this is not to say that Maxwell Street ought to be preserved as is. Indeed, “rehabilitation” and “restoration” are included in the definition of “historic preservation” under the NHPA.\footnote{16 U.S.C. § 470w(8).} The question is not whether an area is not worth preserving because it is run down. Of course Maxwell Street is run down—that is why it was declared blighted. The question, rather, is whether the area is historically significant, and therefore worthy of historic preservation.

\textbf{D. The Commission on Chicago Landmarks and “Integrity”}

The Chicago Landmarks Commission recommended that the Maxwell Street Market Historic District not be nominated to the
National Register. Although the commission agreed that Maxwell Street has "rich historical associations," it concluded that "the proposed district lacks sufficient integrity" to warrant listing on the National Register." These comments were forwarded to the IHPO, which forwarded them to the keeper of the National Register, who ultimately determined that the area was not eligible for listing in the National Register. This result is unusual, because the state found that the proposed district did satisfy the integrity requirement. This is especially significant because the Chicago commission lacks expertise in evaluating "integrity" as compared with the IHPA. As noted above, in addition to being a CLG with respect to the NHPA, Chicago also maintains its own landmarks register. The Chicago Landmarks Ordinance does not list "integrity" as one of its criteria for determining designation.

The state, in other words, has a lot more experience evaluating and applying national standards—including integrity—to properties than does the city of Chicago. As of January 1, 1999, there were 145 individual landmarks and thirty-one districts designated as Chicago Landmarks through Chicago's own landmark designation ordinance. However, only thirty-one landmarks and two districts located in Chicago were listed on the National Register of Historic Places. In contrast, in May 1999 there were 1,300 Illinois locations, including 153 historic districts, listed in the National Register of Historic Places.

This means that the state has evaluated "integrity" 1,267 more times than the city has. Therefore, it is odd to think that the city

155. See Letter from Valerie Jarrett, Commissioner, Department of Planning and Development, to Henry B. Levinson, Robert W. Irwin Ltd. (June 8, 1994) (on file with author). The only building to be granted historic landmark status was the old Maxwell Street Police Station. Historic district status, however, was denied. See Guarino, supra note 19.

156. "Integrity is the ability of a property to convey its significance." National Park Service, National Register Bulletin 15: How to Evaluate the Integrity of a Property, at 1, available at http://www.cr.nps.gov/NR/publications/bulletins/nr15_8.htm (last modified Aug. 16, 1995) [hereinafter National Park Service, Bulletin 15]. The bulletin states that the seven aspects of integrity are location, design, setting, materials, workmanship, feeling, and association. Id. at 4.

157. See Jarrett, supra note 155.

158. See id.; see also Letter from Illinois Historic Preservation Agency to City of Chicago (Sept. 13, 1995) (on file with author).


160. See CITY OF CHICAGO, CHICAGO LANDMARKS MAP (1999).


commission would be more qualified to determine “integrity” than would the state. After all, because integrity is one of the criteria the IHPA regularly evaluates in determining whether a property ought to be nominated to the National Register, it has necessarily acquired more expertise in evaluating integrity. It simply appears that the commission got it plain wrong. In meeting notes concerning the nomination of Maxwell Street, the commission stated that it had previously declined to designate Maxwell Street as a Chicago Landmark partly because the “[l]andmarks staff felt they were being asked to landmark an activity, not a place.” In another document discussing the integrity issue, the commission stated that:

The street activity of the Maxwell Street market is its primary historical association. Given the makeshift, transitory nature of this activity, the buildings alone cannot convey the historical feeling of the market. The National Register assists in the preservation of buildings, not such fluid activity as was the historical essence of Maxwell Street.

It is clear, however, that the National Register preserves more than buildings. An NPS bulletin used to evaluate integrity states that “[a] property retains association [one of the seven aspects of integrity] if it is the place where the event or activity occurred and is sufficiently intact to convey that relationship to an observer.” One example of “fluid activity” preserved under the NHPA is the fighting that occurred on a battlefield. The commission, citing the same NPS integrity bulletin also stated that “a basic integrity test for properties having historical significance is whether a hypothetical person alive during the period of significance would recognize the property as it exists today. The Commission staff feels that the Maxwell Street District fails this test.”

Actually, the bulletin states, “[a] basic integrity test for a property associated with an important event or person is whether a historical contemporary would recognize the property as it exists today.” In order to satisfy integrity under National Register criterion A, however, “[a] property that is significant for its historic

163. See Meeting Notes from the Landmarks Division (Apr. 14, 1994) (on file with author).
164. Memorandum from Commission on Chicago Landmarks, Integrity Issue Related to the Proposed Maxwell Street Market (undated) (on file with author) (emphasis added) [hereinafter Commission Memorandum].
165. National Park Services, Bulletin 15, supra note 156, at 3 (emphasis added).
166. See generally National Register Bulletin, Battlefields, supra note 57.
167. See Commission Memorandum, supra note 164.
168. See National Park Services, Bulletin 15, supra note 156, at 8 (emphasis added).
association is eligible if it retains the essential physical features that made up its character or appearance during the period of its association with the important event, historical pattern, or persons(s)."\textsuperscript{169} It is a historical pattern, not an event or person, that Maxwell Street represents. Therefore, the commission’s stated standard is misplaced. The significance of Maxwell Street "lies not in the occurrence of particular events of note within its confines, but in the vital activity that took place from day to day in the area."\textsuperscript{170}

While the commission seems to conclude that a district can have integrity\textsuperscript{171} only if it has been perfectly preserved, “[a]ll properties change over time. It is not necessary for a property to retain all its historic physical features or characteristics. The property must retain, however, the essential physical features that enable it to convey its historic identity."\textsuperscript{172} Again, preservation necessarily includes some remedial action. It is paradoxical to suggest that the NHPA limits historic preservation to buildings and districts that are in pristine condition. Such properties are not in need of protection. That is like asserting that the First Amendment was enacted to protect speech that the government approves of.

Also, although the commission found it significant that only six out of sixty buildings listed on the state nomination were considered significant by a city-conducted historical survey,\textsuperscript{173} "[f]or a district to retain integrity as a whole, the majority of the components that make up the district’s historic character must possess integrity, even if they are individually undistinguished."\textsuperscript{174} The history of historical preservation in the United States indicates that the NHPA was designed to do more than protect buildings in pristine shape. The

\textsuperscript{169} See 36 C.F.R. § 60.4 (emphasis added).
\textsuperscript{170} See IHPA Memorandum, supra note 144, at 8 (emphasis added).
\textsuperscript{171} For an interestingly circular argument for why Maxwell Street does not retain its integrity, see Letter from Theodore Mazola, First Ward Alderman, City Council, City of Chicago, to Peter C. Bynoe, Chairman, Commission on Chicago Landmarks (May 3, 1994) (on file with author):
While the market has had historical significance in the history of our city during that period of time, historical significance alone is not sufficient to qualify an area for listing on the National Register. In order to qualify for listing an area must continue to convey its significance, i.e. retain its integrity. Anyone who has viewed or experienced the Market recently and is familiar with the history of the Market must come to the conclusion that the Market no longer conveys its significance and therefore lacks integrity.
\textsuperscript{172} See National Park Services, Bulletin 15, supra note 156, at 4.
\textsuperscript{173} See Memorandum from Commission on Chicago Landmarks to Program Committee Members (Apr. 26, 1994) (on file with author).
\textsuperscript{174} National Park Services, Bulletin 15, supra note 156, at 5 (emphasis added).
motivations for blocking the nomination of Maxwell Street appear more politically motivated. Indeed, the commission was concerned that nomination "may hinder UIC's ability to expand and/or significantly slow down the process." The commission further stated, "[e]ach position can be argued for and against, but the wisest course of action may be a carefully worded endorsement as long as it does not hinder UIC's ability to expand."

The commission decided against a carefully worded endorsement even though it recognized that

[a] refusal to endorse implies no acknowledgment of the past contributions of the Maxwell Street retail area and neighborhood to the fabric of the city . . . . A case may be raised that there has not been a sincere effort to note the historical contributions of this site in the form of immigrant and market and business incubator activities.

Because a majority of the City Council and UIC felt that unfettered expansion of the UIC campus outweighed the benefits of nominating Maxwell Street to the National Register, they lobbied to block the nomination. The state, likely wishing to avoid becoming embroiled in this particular political fight, deferred to the city. Certainly, the situation is not as simple as that and there are undoubtedly many interests at stake. Here, however, the largely unbridled discretion of the CLG displaced the NHPA's goal of balancing competing preservation and development interests.

Interestingly, as this Note was being prepared for publication, New York's Lower East Side, an area similar to (if not more famous than) Maxwell Street, was added to the National Register. The Lower East Side is "known for densely packed tenements that housed successive waves of Irish, Italian, German, Eastern European and Chinese immigrants rather than for monumental buildings." The area's designation purportedly is "representative of a growing movement to expand preservation to include places that are important to ordinary people." At the turn of the century, the area's heyday, "reformers exposed the tenements as unsanitary

175. See Meeting Notes from the Landmarks Division, supra note 163.
176. Id.
177. Id.
179. Id.
180. Id.
A vice president of the Lower East Side Tenement Museum explained, however, that while “‘[i]t may not be significant in the traditional architectural sense that most historic districts use...[i]t’s designated for real cultural reasons. These drab little tenements, which many New Yorkers still live in, have shaped our lives.’”\(^{182}\)

To be sure, there may be various reasons why the keeper of the National Register chose to designate the Lower East Side and not Maxwell Street. One might well ask, however, whether a large part of the answer is to be found in the support that the respective cities gave to the nominations.

### IV. PROPOSALS

At least part of the reason why the proposed Maxwell Street Market District was not nominated to the National Register is attributable to standards that failed to adequately take into account special considerations due properties that might otherwise slip through the cracks of preservation law. This leads to the conclusion that the national preservation law should be amended to specifically address properties like Maxwell Street. There are a few ways that national preservation law can be improved to provide added protection for properties of ethnic and racial significance.

First, more controls should be placed upon the CLG’s ability to comment on the SHPO’s nomination to designate an area to the National Register. As it stands, the NHPA merely states that the SHPO must “notify the owner, the applicable chief local elected official, and the local historic preservation commission.”\(^{183}\) Furthermore, the procedures for local government historic preservation programs, while outlining the procedures for becoming a certified local government, are silent on factors that local government must consider in commenting upon a state nomination.\(^{184}\)

One suggestion is the use of a federal form acting as a checklist accompanying the CLG’s comment. This form would outline the various categories under which a proposed property of ethnic/racial significance is to be analyzed. The IHPO could then use this report to help determine how much deference it should give to the CLG’s comments.

\(^{181}\) Id.

\(^{182}\) Id.


\(^{184}\) See generally 36 C.F.R. § 61.
recommendation by evaluating whether the CLG considered the enumerated factors and what conclusions it reached with regard to each. In other words, did the CLG give a serious analysis to the property or did it merely conclude that the property did not satisfy the criteria and reason backward from there.

Next, in order that local governments accurately analyze whether these properties satisfy the national standards, standards specific to properties like Maxwell Street must be promulgated. A separate category in the National Register, "Historic/Cultural Properties of Racial/Ethnic Groups," should be created. This would assist the CLGs in reaching the correct result in the first instance, instead of relying on judicial review, which poses problems for interested parties who may lack the resources to undertake litigation with a city government. A better alternative would thus be clear guidelines for CLGs to use in evaluating the properties.

**A. Criteria for the CLG to Follow in Order to Evaluate Cultural Properties**

Presumably, a local government is expected to rely upon the criteria and analytical methodology outlined and developed through the National Preservation Program. The NPS publishes bulletins to assist in the analysis of historic properties using relevant criteria. A local government, however, might find it more useful to have a single manual for determining whether a nominated property satisfies the criteria for the proposed Ethnic/Racial Properties category. The manual would be tailored to address the concerns of preserving significant urban districts within the context of urban development. In this way, CLGs would have more guidance on how to properly evaluate such properties. Another alternative would be to actually include factors for consideration in the Code of Federal Regulations itself. These factors would thus have the force of administrative rules, which would cabin the discretion of the CLG much more effectively. At the end of this Note is a proposed amendment to the federal regulations for certified local governments that reflects the factors considered above, taking into account the purposes of the NHPA. A

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bulletin is, to be sure, a more modest proposal that would not require an entire agency rulemaking process.

Of course, the local government could reach the result to recommend against nomination even after considering these factors. However, if more concrete guidelines were developed, it would be easier for a reviewing body to determine whether a local commission applied the correct criteria. By way of analogy, it is useful to consider the role of a reviewing court in administrative law. In *Securities and Exchange Commission v. Chenery*, Justice Murphy, discussing judicial review of administrative agencies, stated that, "[i]f the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action."

In the case of Maxwell Street, the commission repeatedly stated that the district lacked sufficient integrity, and on that basis alone recommended against designation. The few reasons proffered, however, are contrary to both federal guidelines for determining integrity and the state's findings. While the CLG ought to be given discretion, it is still being delegated federal authority and, therefore, should implement such power accurately. As Justice Frankfurter stated in *FCC v. RCA Communications, Inc.*, "Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body."

If interested parties disputed the recommendation of the CLG, such parties could bring the matter to the attention of the IHPO. If the state determined that the CLG was acting inconsistently with the regulations, it could condition receipt of funds on compliance with the regulations. If the CLG continued to act arbitrarily, it would then be

187. Id. at 195.
188. This is to be distinguished from the city's home rule authority. In *Landmarks Pres. Council of Ill. v. City of Chicago*, 531 N.E.2d 9 (Ill. 1988), the court stated:

> [W]e must keep in mind that under the 1970 Illinois Constitution, the City is a home rule unit of local government. The 1970 Constitution of Illinois bestows broad authority on home rule units . . . . The powers and functions of home rule units shall be construed broadly . . . . It has been stated that home rule units have the same powers as the sovereign except where such powers are limited by the General Assembly.

Id. at 15. However, this broad authority reflects the relationship between the city and state. Here, however, the relationship is also between the city and the federal government. Therefore, with a more accurate procedural framework, the local certified government's actions could be more easily checked.
189. 346 U.S. 86, 90 (1953).
subject to decertification for cause. In the extreme case of appealing a final decision of the keeper to judicial review, the proponent of the nomination would be armed with regulations against which the keeper's actions could be measured. If it were found that the keeper acted arbitrarily, the court could order an appropriate remedy.

B. Arbitration between the CLG and the Proponents of Nomination

Disputes could also be handled on the local level. Once national standards were promulgated, a local arbitration process could be established in order to resolve disputes concerning decisions to recommend against designation made by the CLG. By having a separate administrative process, parties could save the twin burdens of involving the state and potentially facing litigation. Furthermore, a separate arbitration board devoted to historic preservation would develop expertise in evaluating these properties. In the case of a dispute between the CLG and the proponents of nomination, the two groups could negotiate a compromise before a neutral body that would have the requisite expertise to evaluate the competing interests of preservation and development. In this way, these competing interests would be maximized to the extent possible. The panel would thus add a layer of insulation between politics and preservation.

While either party might appeal a board decision adverse to their interest in the event that no compromise could be reached, the reviewing court would have the findings of the board before it. Because the board would be more intimately acquainted with the particular issues than the court, the court would likely give considerable deference to the board's findings and recommendation. The parties would therefore have an incentive to reach a compromise, as opposed to risking in court either the same decision, or a decision worse than what they would have agreed to otherwise before the board. This is comparable to BATNA (best alternative to negotiated agreement) in the administrative law context.

190. See 36 C.F.R. § 61.6 ("Each SHPO also must follow procedures for removal of certified local government (CLG) status for cause.").

Such cooperative measures would also further Rose's notion of "The Community-Building Rationale for Historic Preservation," which seeks to overcome people's "isolation...against an overbearing majority," and "help to give residents a feeling of stability and familiarity [that] can aid [in] creating a sense of community among neighbors." Even in the event that the CLG ultimately recommended against designation, the proponents' interests would be vindicated to the extent that their voice was truly heard in the debate. The proponents would not merely present their case for nomination to the CLG before the CLG rendered its recommendation. Instead, the community interested in preserving ethnic and racial heritage, as embodied in areas like Maxwell Street, would take an active part in helping to steer the course that such heritage takes into the future.

C. Model Guidelines for Recommendation of Proposed Historic Districts to the National Register of Historic Places

Following is a draft of model guidelines that a certified local government should use to determine whether to recommend nomination of a proposed historic district for designation to the National Register of Historic Places.

_Model Guidelines for Districts and Other Properties of Cultural and Historic Significance—Racial and/or Ethnic Minority Groups_

When determining whether to recommend nomination of a proposed historic district for designation to the National Register of Historic Places, a certified local government shall consider the following factors:

1. The extent to which the area is historically or culturally significant to a racial or ethnic minority:
   a. Commercial;
   b. Religious;
   c. Social.

2. The extent to which the significance of the area is generally recognized by the community in which it sits, and to society at large:
   a. Common knowledge;
   b. Expert testimony;

192. Rose, supra note 45, at 494.
(c) Recognition by governmental or other relevant agencies.

(3) The nature of the activity that occurred in the area and its significance to the particular group:

(a) Fluid movement like that which occurred on a battlefield;
(b) Whether the activity was "essential" to the group;
(c) Ability of the activity of the area to "inspire";
(d) Aesthetic of the area at the time in which it undertook the essential activity;

(4) "Integrity" guidelines as set forth in Federal Bulletin 15:

(a) Location—The place where the historic property was constructed or where the historic event or happenings occurred;
(b) Design—For districts significant primarily for historic association, design concerns more than just the individual buildings or structures located within the boundaries. It also applies to the way in which buildings are related: for example, spatial relationships between major features, visual rhythms in a streetscape, the layout and materials of walkways and roads;
(c) Setting—The physical environment of a historic property. Setting refers to the character of the place in which the property played its historical role. It involves how, not just where, the property is situated and its relationship to surrounding features and open space;
(d) Materials—The physical elements that were combined during a particular period of time and in a particular pattern or configuration to form a historic property. A property must retain the key exterior materials dating from the period of its historic significance;
(e) Workmanship—The evidence of artisans' labor and skill in constructing or altering a building, structure, object, or site. It can apply to the property as a whole or to its individual components. It can be expressed in vernacular methods of construction or in highly sophisticated configurations and ornamental detailing;
(f) Feeling—A property's expression of the aesthetic or historic sense of a particular period of time. It results from the presence of physical features that, taken together, convey the property's historic character;
(g) Association—The direct link between an important historic event, activity, or person. A property retains association if it is the place where the event or activity occurred and is sufficiently intact to convey that
relationship to an observer;

(h) For properties nominated under Criteria A, the property is eligible if it retains the essential physical features that made up its character or appearance during the period of its association with the important event, historical pattern, or person(s).

(5) Balance the value to the community of preservation with the value of development:

(a) Compromise through the mediation process will property;

(b) Analogize with "takings" law—will property developed with preservation in mind still afford a reasonable rate of return.

CONCLUSION

The NHPA has in many ways executed its charge that "the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people." More must be done, however, in order to protect certain culturally significant properties from slipping through the cracks. Maxwell Street is a paradigm of the type of significant area that the NHPA was designed to protect from "the force of the wrecking ball." In this case, however, other considerations prevailed in the unequal balancing of interests.

While the complete removal of political considerations in historic preservation is unrealistic, providing guidelines to local governments can minimize the risk of losing these properties. In this way, historically and culturally significant properties may be prevented from becoming reduced to a footnote in history, commemorated by a plaque.

195. UIC agreed to a "memorialization of the market and of the area's history." Meeting Notes from the Landmarks Division, supra note 163.
The proposed historic district includes all of the remaining buildings in the neighborhood associated with the Maxwell Street Market, and it has historical significance prior to 1944 as required for 1994 National Register eligibility. Within the current-day market area, the nominated district includes only Maxwell Street as the extension of the open air market into the area south of Maxwell Street west of Halsted is post-WWII.