

WITH PERMISSION: RETHINKING HOMEOWNER CONSENT IN HISTORIC DISTRICT DESIGNATIONS

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ABSTRACT

Homeowners across the country are facing a severe challenge to their ability to use their own property freely: historic district designation. Each state has its own standard for historic district designation. States typically grant local governments within their jurisdictional boundaries the power to designate historic districts, so long as the state guidelines set forth by the state are followed. In Texas, like many other jurisdictions, a historic district overlay can be placed on a property by the local government even if the property owner is adamantly against the designation. This Comment addresses the issues with historic district designation without property owner consent and proposes that the Texas legislature adopt the designation standard used in Houston which allows property owners to vote for or against their neighborhood becoming a historic district. This historic district designation standard gives power back to the people who are directly impacted by the historic district designation the most.

ABSTRACT	205
I. INTRODUCTION	206
II. HISTORIC PRESERVATION LAW BACKGROUND AND HISTORY	208
A. <i>The Purpose of Historic Districts</i>	209
B. <i>Case Law Regarding Historic Preservation Law and Takings</i>	214
C. <i>Historic District Codified Law</i>	216
1. <i>Texas Local Government Code</i>	216
2. <i>Houston Ordinance</i>	217
III. HOMEOWNERS SHOULD HAVE A VOICE IN WHETHER THEIR HOME GETS A HISTORIC DISTRICT OVERLAY	219
A. <i>Texas Should Adopt Model Legislation for the Local Government Code to Provide Homeowners More Choice</i>	220

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B. <i>The Texas Local Government Code Does Not Afford Property Owners a Choice</i>	221
1. <i>Living in a Historic District Can Place a Heavy Burden on Property Owners</i>	221
2. <i>The Armstrong Principle and the Government's Responsibility to Provide Public Goods</i>	224
C. <i>The Houston Ordinance Standard for Historic District Designation Affords Property Owners Choice Through Voting</i>	226
1. <i>Living in a Historic District Should Be a Choice</i>	226
2. <i>The Houston Standard for Historic District Designation Is Consistent with the Armstrong Principle</i>	229
3. <i>The Houston Standard for Historic District Designation Has Been Adopted Before</i>	230
D. <i>Practical Considerations for the Estate Planner</i>	231
IV. CONCLUSION	235

I. INTRODUCTION

The American Dream of today might be somewhat different than it was decades ago, but one crucial aspect remains the same: homeownership.¹ Americans still dream of buying a house of their own, just like their parents and grandparents dreamed of before them.² For those who are able to achieve such a monumental goal, renovating their home might be the next logical step.³ However, homeowners across the nation cannot freely renovate their homes because their neighborhood was designated as a historic district after they purchased their homes.⁴

The Johnsons are a working, middle-class family living the suburban dream in their home state of Texas.⁵ The Johnson family just purchased a beautiful home built in the early 1970s, and they are excited to renovate it over the next few years.⁶ However, the Johnsons were recently informed that their city council voted to make their neighborhood a historic district.⁷ This

1. See Taylor Tepper, *What Is The American Dream—And Can You Afford It?*, FORBES (AUG. 9, 2024, 5:01 AM), <https://www.forbes.com/advisor/personal-finance/what-is-the-american-dream/> [https://perma.cc/55HP-WFEF].

2. See *id.*

3. See Erin Carlyle, *Why Homeowners Renovate and What They Care About Most*, HOUZZ (June 11, 2019), <https://www.houzz.com/magazine/why-homeowners-renovate-and-what-they-care-about-most-stsetivw-vs~121693199?msockid=3f8f629996af625335dc77a3970e6341> [https://perma.cc/42RP-78BM].

4. Adam A. Millsap, *Historic Designations Are Ruining Cities*, FORBES (Dec. 23, 2019, 8:40 AM), <https://www.forbes.com/sites/adammillsap/2019/12/23/historic-designations-are-ruining-cities/?sh=1a1c%20e25d57af> [https://perma.cc/82HJ-XZ4F].

5. Author's original thought.

6. *Id.*

7. *Id.*

means that the Johnsons will soon have to obtain permission from their local historic preservation board for any exterior home modifications, including additions such as a wheelchair ramp or the planting of different bushes in their front yard.⁸ The Johnsons are heartbroken; they had plans to add a beautiful wraparound front porch and a new walkway to the front of their home.⁹ This was the home where they wanted to raise their children and grow old, but now they are no longer sure if they can turn it into the home they have always dreamed of.¹⁰

Under Texas Local Government Code Section 211.0165, a new historic district may be created with a three-fourths vote of approval from the municipal government and the zoning, planning, or historical commission.¹¹ Therefore, homeowners across Texas could be put in the same position as the Johnson family—forced to keep their home exactly as it was when it was built and unable to make changes unless their city’s historic board approves.¹² This completely disregards a property owner’s choice in what happens to their home and can place a heavy burden on homeowners in these proposed districts.¹³

Historic designations can be a valuable tool for appreciating the past and protecting structures of historic and cultural significance.¹⁴ However, when they stretch over an entire neighborhood in the form of historic district designations, they can increase housing prices and act as a roadblock for necessary adaptation.¹⁵ This Comment addresses the issue of historic district designations affecting property without the owner’s consent, which causes a slew of issues for property owners across the nation.¹⁶ To solve this issue, the state of Texas should amend its current legislation to only allow the creation of historic districts if a majority of property owners within the proposed district vote in favor of designation.¹⁷

Part II of this Comment explores the rapid evolution of historic preservation law over the last century through legislation and the judicial system.¹⁸ It specifically explores the process of historic district designation and how this process differs across jurisdictions nationwide.¹⁹ Part II will focus on comparing the current standard in Texas for historic district

8. *Id.*

9. *Id.*

10. *Id.*

11. TEX. LOC. GOV’T CODE ANN. § 211.0165(a)(2).

12. See generally *id.* (suggesting the likelihood of the creation of a historic district).

13. See discussion *infra* Section III.B.1.

14. Adam A. Millsap, *Cities Should Think Twice About Expanding Historic Districts*, FORBES (Mar. 17, 2021, 9:05 AM), <https://www.forbes.com/sites/adammillsap/2021/03/17/cities-should-think-twice-about-expanding-historic-districts/> [<https://perma.cc/T7AR-8SEW>].

15. *Id.*

16. See discussion *infra* Parts II, III.

17. See discussion *infra* Section III.A.

18. See discussion *infra* Part II.

19. See discussion *infra* Part II.

designation set forth in the Texas Local Government Code with a better, more democratic standard set forth through a Houston City Ordinance that gives property owners a choice through voting.²⁰ Part II exemplifies the choice that policymakers across the nation have when writing legislation on historic district designation standards: either allow property owners to make decisions for themselves and their family's home or allow hardworking homeowners to be steamrolled all in the name of historic preservation.²¹

Part III of this Comment analyzes the effects of placing a historic district overlay on a property both with and without the owner's consent.²² Part III begins by proposing a legislative amendment to Texas Local Government Code Section 211.0165, which would only allow historic districts to be designated if a majority of property owners living in the proposed district vote in favor of the designation.²³ Next, Part III discusses the ramifications of the Texas Local Government Code's current standard for historic district designations, in which a designation can be placed on a property without the owner's consent, offending their ability to make choices for their own home.²⁴ Specifically, it focuses on the heavy burden placed on homeowners, as well as the government's responsibility to bear such a burden, rather than on individual property owners.²⁵ Then, Part III discusses how historic districts can be implemented in a manner that does not offend property owners' choices.²⁶ Finally, Part III examines practical considerations for estate planning attorneys in dealing with historic properties.²⁷

II. HISTORIC PRESERVATION LAW BACKGROUND AND HISTORY

The preservation of historic properties through legislation is a fairly recent trend in American history.²⁸ Legislation exists at the federal, state, and local levels to protect our nation's most treasured sites and structures.²⁹ States typically delegate the power to localities to designate historic districts.³⁰ Thus, historic districts are most commonly designated through local ordinances.³¹ Texas enumerates this power to localities in Texas Local Government Code Section 211.0165, which provides the bare-minimum

20. See discussion *infra* Section II.C.

21. See discussion *infra* Part II.

22. See discussion *infra* Part III.

23. See discussion *infra* Section III.A.

24. See discussion *infra* Section III.B.

25. See discussion *infra* Section III.B.

26. See discussion *infra* Section III.C.

27. See discussion *infra* Section III.D.

28. JACOB H. MORRISON, HISTORIC PRESERVATION LAW 2 (1965).

29. *Id.* at 4-17.

30. JULIA H. MILLER, A LAYPERSON'S GUIDE TO HISTORIC PRESERVATION LAW: A SURVEY OF FEDERAL, STATE, AND LOCAL LAWS GOVERNING HISTORIC RESOURCE PROTECTION 1, 10 (1997).

31. *Id.* at 11.

guideline for municipalities to follow when designating historic districts.³² Because the standards in Texas Local Government Code Section 211.0165 are not strict, municipalities are able to set their own guidelines for historic district designation.³³

A. The Purpose of Historic Districts

European nations have been preserving buildings with historic significance for decades.³⁴ America, on the other hand, did not popularize this practice until the twentieth century.³⁵ In the past, historic preservation was primarily concerned with local efforts to preserve individual buildings, such as the mid-1800s movements to save Independence Hall in Philadelphia and Mount Vernon.³⁶ The Antiquities Act of 1906 was the first federal legislation concerning historic preservation.³⁷ This Act authorized the President to designate “historic landmarks, historic and prehistoric structures, and other objects of historic scientific interest on federally owned or controlled lands,” as national monuments.³⁸ Under this Act, places such as the Grand Canyon and structures such as the Statue of Liberty became national monuments, receiving federal protection.³⁹ The Department of the Interior created the National Park Service in 1916 to:

promote and regulate the use of the Federal areas known as national parks, monuments, and reservations . . . to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.⁴⁰

In 1935, Congress passed the Historic Sites Act, declaring “it is 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.”⁴¹ While this act allows the National Park Service the power to “acquire in the name of the United States by gift, purchase, or otherwise any property, personal or real, or any interest or estate,” it also respects the choices of property owners, declaring that “no such property which is owned

32. TEX. LOC. GOV'T CODE ANN. § 211.0165.

33. See *Historic Designations*, PRES. TEX., <https://www.preservationtexas.org/saveaplace/historic-designations>[<https://perma.cc/86LZ-P5CG>] (last visited Jan. 8, 2025, at 2:49 PM CT).

34. See MORRISON, *supra* note 28, at 2.

35. *Id.*

36. Chauncey L. Walker & Marcia A. Israeloff, *Historic Preservation and the Institutional Owner*, 14 J.C. & U.L. 59, 60 (1987).

37. *Id.*

38. *Id.* (internal citations omitted).

39. *Id.*

40. *Id.* at 60–61.

41. *Id.* at 61 (internal citations omitted).

by any religious or educational institution, or which is owned or administered for the benefit of the public shall be so acquired without the consent of the owner.”⁴²

The first historic district was established in 1931 in Charleston, South Carolina.⁴³ New Orleans quickly followed suit by creating the Vieux Carré Commission in 1937 to preserve the Old French Quarter.⁴⁴ These districts were protected by strict regulations that stated architectural features on the exterior of buildings and structures could not be altered without approval from the local historic commission.⁴⁵ Historic district designations spread like wildfire across the country in the mid-20th century.⁴⁶ Today, historic districts exist in every state, as well as Washington, D.C., with over 2,300 districts throughout the country.⁴⁷ Much like the first historic districts in Charleston and New Orleans, the historic districts established today continue to face the heavy burden of regulations.⁴⁸

Historic districts exist because society at large values the preservation of such cultural assets.⁴⁹ Historic districts benefit people in a number of ways, including protecting neighborhood character, protecting historic resources, fostering civic pride, and encouraging better architectural design.⁵⁰ Society highly values preserving historic spaces, which led Congress to pass the National Historic Preservation Act in 1966 after many historic properties and neighborhoods were demolished in mass amounts during the 1950s and 1960s.⁵¹ In passing the Act, Congress laid out four key reasons historic preservation law is important, declaring:

- (1) the spirit and direction of the Nation are founded upon and reflected in its historic heritage;
- (2) the historical and cultural foundations of the Nation should be preserved as a living part of our community life and

42. *Id.* (internal citations omitted); *see also* 54 U.S.C. § 320102 (c).

43. Christopher C. Skelly, *Establishing Local Historic Districts*, MASS. HIST. COMM’N, 1, 4 (Mar. 2007), <https://www.hopedalema.gov/sites/g/files/vyhlf711/f/uploads/establishinglocalhistoricdistricts.pdf> [<https://perma.cc/5XUA-CSWZ>].

44. *Id.*

45. *Id.*

46. Sarah L. Mawhorter & Kelly L. Kinahan, *Where Preservation Meets Land Use Regulation: Historic Districts in Los Angeles*, J. OF THE AM. PLAN. ASS’N (Dec. 5, 2024), <https://www.tandfonline.com/doi/epdf/10.1080/01944363.2024.2417053?needAccess=true> [<https://perma.cc/D9QG-DELK>].

47. Alan Ehrenhalt, *The Escalating Argument Over Historic Preservation*, GOVERNING (July 23, 2024), <https://www.governing.com/urban/the-escalating-argument-over-historic-preservation> [<https://perma.cc/8XET-3ENE>].

48. Timothy Sandefur, *The Dark Side of Historic Preservation*, DISCOURSE (Mar. 21, 2023), <https://www.discoursemagazine.com/p/the-dark-side-of-historic-preservation> [<https://perma.cc/5BZ4-LFTD>].

49. Historic Districts Council, *Why Preservation?*, TRIBECA TR., <https://hdc.org/why-preservation/> [<https://perma.cc/5J4P-X7HE>] (last visited Oct. 1, 2025).

50. *About Historic Districts*, SAN MATEO HERITAGE ALL., <https://www.smheritage.org/about-historic-districts> [<https://perma.cc/KHM7-NLTZ>] (last visited Oct. 30, 2024).

51. *See* National Preservation Act of 1966, 54 U.S.C. § 300101.

development in order to give a sense of orientation to the American people;

- (3) historic properties significant to the Nation's heritage are being lost or substantially altered, often inadvertently, with increasing frequency;
- (4) the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans.⁵²

Historic preservation laws regarding private property, such as the designation of historic districts, are typically enacted through local ordinances; however, these laws can also be established at the federal and state levels.⁵³ The federal government preserves historic properties by adding them to the National Park Service's National Register of Historic Places.⁵⁴ This is "a national program to coordinate and support public and private efforts to identify, evaluate, and protect America's historic and archeological resources," which was authorized under the National Historic Preservation Act of 1966.⁵⁵ For a property to be placed on the National Register of Historic Places, it must hold:

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 components may lack individual distinction; or

(d) that have yielded, or may be likely to yield, information important in prehistory or history.⁵⁶

52. National Historic Preservation Act Amendments of 1980, Pub. L. 96-515, tit. 1 § 101(a), § 1 (b)(1-4), 94 Stat 2987 (1980).

53. See MILLER, *supra* note 30, at 9; see also *Historic Designations*, *supra* note 33.

54. *National Register of Historic Places*, NAT'L PARK SERV. (Sept. 30, 2024), <https://www.nps.gov/subjects/nationalregister/index.htm> [<https://perma.cc/TJ9Q-PP92>].

55. *Id.*

56. 36 C.F.R. § 60.4 (2025).

Historic sites such as “[c]emeteries, birthplaces, graves, commemorative properties and relocated structures are typically not listed, but there are exceptions.”⁵⁷

A property listed in the National Register of Historic Places has no restrictions on what the owner may do with the property.⁵⁸ It “does not prohibit under Federal law or regulation any actions which may otherwise be taken by the property owner with respect to the property.”⁵⁹ A property owner may even destroy the property, unless it is a part of a project receiving federal assistance.⁶⁰

The police power to implement historic preservation law belongs to the states, but many states create “enabling laws”—laws that grant police powers from the state to the local government—to protect neighborhoods with cultural or historic significance.⁶¹ “Certain states have passed enabling statutes (I) authorizing certain cities and towns to adopt historic preservation ordinances, (II) authorizing any city or town to put into effect historic preservation ordinances, or (III) authorizing, in a general way, control of private historic property where necessary to its preservation.”⁶² For example, the Texas Legislature passed an enabling law in 1962 to designate the Old Galveston Quarter as a historic district.⁶³

Historic districts can also be designated in state constitutions.⁶⁴ The French Quarter in New Orleans gained historic district status through a constitutional amendment in 1936.⁶⁵ Nearly every state has delegated police powers to local governments, empowering them to regulate any form of development that affects historic sites.⁶⁶

The strongest level of protection for historic preservation is surprisingly found in local ordinances.⁶⁷ These ordinances can protect an individual landmark alone, an entire historic district, or both.⁶⁸ To maintain the aesthetic integrity of a historic district, these ordinances may regulate the design of new buildings, as well as any changes made to existing buildings.⁶⁹

57. See *Historic Designations*, *supra* note 33.

58. *FAQs*, NAT’L PARK SERV. (Sept. 5, 2024), <https://www.nps.gov/subjects/nationalregister/faqs.htm> [<https://perma.cc/V7FH-NY87>].

59. See Walker & Israeloff, *supra* note 36, at 64 (internal citations omitted).

60. See *FAQs*, *supra* note 58.

61. See MILLER, *supra* note 30, at 10.

62. See MORRISON, *supra* note 28, at 17.

63. TEX. REV. CIV. STAT. ANN. art. 6145-4 § 1; see discussion *infra* Section III.B.2.

64. See MORRISON, *supra* note 28, at 17.

65. *Id.*

66. Constance E. Beaumont, *A Citizen’s Guide to Protecting Historic Places: Local Preservation Ordinances*, NAT’L TR. FOR HISTORIC PRES. (2002), at 1, <https://mrsc.org/getmedia/0E24E2FB-023D-45E0-A611-96B94FF43F35/toolkit.aspx> [<https://perma.cc/ZGC6-ZUAQ>].

67. *Id.*

68. *Id.*

69. *Id.*

Historic districts designated by municipalities through local ordinances have the most significant impact on homeowners compared to those designated by the federal government or the states.⁷⁰ This is because anytime a property owner wants to make a change to the exterior (and in some cases, the interior) of their home, the changes must first be approved by the local historic commission.⁷¹ Typically, this approval is gained through the commission granting the property owner a certificate of appropriateness for the renovation.⁷² Some of these commissions require homeowners to pay a fee when they submit an application for a certificate of appropriateness.⁷³

Property owners may also be required to submit multiple applications and attend numerous public hearings before approval is granted.⁷⁴ If approval is denied, the property owner has to start the process again before making any changes to their home.⁷⁵ Historic commissions usually do not allow any changes that they feel are inconsistent with the character of the historical district.⁷⁶ Thus, adding modern technologies, such as solar panels, to the property is often impossible.⁷⁷

There are two methods to preserve historic private property for the public good: (1) eminent domain—private property is acquiesced by the government, and the property owner is justly compensated; and (2) the police power—regulations are enforced upon property owners in the name of public interest without just compensation.⁷⁸

An ideal solution to the issues with historic districts would be for the government to utilize eminent domain and purchase properties of historical and cultural significance for preservation.⁷⁹ This solution would most likely satisfy any constitutional objections to historic preservation laws.⁸⁰ However, this solution fails to see the beauty and purpose of historic districts—keeping history alive, not frozen in time like a museum display.⁸¹ Thus, when the government implements historic preservation laws, it most often does so through police powers.⁸²

70. Andree Brooks, *The Benefit and Burden of History*, N.Y. TIMES (Aug. 21, 1983), <https://www.nytimes.com/1983/08/21/realestate/the-benefit-and-burden-of-history.html> [<https://perma.cc/9T5N-2DZP>].

71. *Id.*

72. *See id.*

73. Darla Morgan, *Question of Property Owner's Rights Issue in Historical District*, GALVESTON DAILY NEWS (Dec. 29, 1980, at 2A).

74. *See Cities Should Think Twice About Expanding Historic Districts*, *supra* note 14.

75. *Id.*

76. *See Historic Designations Are Ruining Cities*, *supra* note 4.

77. *Id.*

78. *See MORRISON*, *supra* note 28, at 21.

79. *Id.* at 20.

80. *Id.*

81. *Id.* at 20–21.

82. *Id.* at 21.

B. Case Law Regarding Historic Preservation Law and Takings

For years, the regulation of private property with historic value was not considered a legitimate government interest by courts.⁸³ Instead, they were seen as a matter of aesthetics—not something that affected public welfare.⁸⁴ This all changed in 1953, when the Florida Supreme Court held in *Merritt v. Peters* that aesthetic considerations of a community alone were sufficient to exercise police power, because the attractiveness of a community affects the people within it.⁸⁵ This was a significant deviation from the general rule established in 1909, when the U.S. Supreme Court held that building regulations based solely on aesthetic considerations could not be justified through the exercise of police power.⁸⁶ These building regulations also had to be based on the safety and well-being of the public.⁸⁷

One year after *Merritt* was decided, the U.S. Supreme Court held in *Berman v. Parker* that projects for the purpose of beautifying a community are well within the rights and powers of the government, since it serves a purpose for the public.⁸⁸

The *Berman* Court stated,

We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.⁸⁹

This statement by Justice William O. Douglas has been viewed by advocates of historic preservation law as the Supreme Court creating a legislative path for beautification projects, such as historic districts.⁹⁰ Indeed, this decision was only the beginning for such cases in the Supreme Court.⁹¹

83. *Id.*

84. See MORRISON, *supra* note 28, at 21.

85. *Merritt v. Peters*, 65 So. 2d 861, 862 (Fla. 1953) (citing *City of Miami Beach v. Ocean & Inland Co.*, 3 So. 2d 364 (Fla. 1941)).

86. See MORRISON, *supra* note 28, at 21.

87. *Id.*

88. *Berman v. Parker*, 348 U.S. 26, 35–36 (1954).

89. *Id.* at 33.

90. See MORRISON, *supra* note 28, at 9.

91. See *generally* *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 138 (1978) (holding

The Court further solidified its position that historic preservation law serves a legitimate public purpose in *Penn Central Transp. Co. v. New York City* by establishing a balancing test that looks at three factors to determine whether the imposition of historic preservation law constitutes a regulatory taking.⁹² These three factors are: “(1) the economic impact on the property owner; (2) the extent to which the regulation interfered with the property owner’s distinct investment-backed expectations; and (3) the character of the government action.”⁹³

The first factor is easy to measure; the property can be appraised to determine the fair market value before the regulation and compared to the fair market value after the regulation was enacted.⁹⁴ The second factor concerns the impact of the regulation on the property based on the expectations of a reasonable market participant.⁹⁵ The third factor examines a range of concerns, including what the regulation entails, who it affects, how it impacts them, and who bears the burden of the regulation.⁹⁶

The Court did not intend for these factors to be a stringent formula but instead an ad hoc factual inquiry.⁹⁷ This decision is one of many in which the Court has upheld the substantial regulation of an owner’s use of their property to serve a public interest.⁹⁸

The three-pronged test remains in use by the Court today, in conjunction with the *Armstrong* principle, to guide its takings inquiries.⁹⁹ In *Armstrong v. United States*, the Court stated: “The Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”¹⁰⁰ The firmness of this principle leaves no room for interpretation; the Framers of this nation intended for property owners to use their own property without unfair government interference.¹⁰¹

These two guiding ideas seem to be in direct opposition to each other, and indeed, critics have argued that the Court is inconsistent in its takings clause decisions.¹⁰² In *Loretto v. Teleprompter Manhattan Catv Corp.*, the

that the restrictions put in place by New York City Landmark Laws are “substantially related to the promotion of the general welfare.”).

92. See *id.* at 124.

93. Stephen Durden, *Sign Amortization Laws: Insight into Precedent, Property, and Public Policy*, 35 CAP. U. L. REV. 891, 896 (2007).

94. Jon Houghton et. al, *Application of the Penn Central Test*, 39 PRAC. REAL EST. LAW. 7, 8 (2003).

95. *Id.*

96. *Id.* at 10.

97. *Penn Cent. Transp. Co.*, 438 U.S. at 124.

98. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

99. Stephen Durden, *Unprincipled Principles: The Takings Clause Exemplar*, 3 ALA. C.R. & C.L. L. REV. 25, 27 (2013).

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

101. See *id.*

102. See Durden, *supra* note 99, at 30–34.

Court found a New York law that required a landlord to provide cable access, despite the owner's objections to cable on his property, was a taking.¹⁰³ The Court held "that a permanent physical occupation of property is a taking."¹⁰⁴ This decision aligns directly with the *Armstrong* principle.¹⁰⁵

Conversely, five years after *Loretto*, the Court in *Nollan v. California Coastal Commission* acknowledged the rule stated by *Loretto*, yet it held that a "permanent physical occupation" was not a taking as long as the restrictions were "reasonably necessary to the effectuation of a substantial government purpose."¹⁰⁶

The Court modified the *Nollan* rule a few years later in *Dolan v. City of Tigard* by stating that the government can totally deprive a property owner of their property if it can show an "'essential nexus' . . . between the 'legitimate state interest' and permit condition" depriving the owner of their property.¹⁰⁷ The *Nollan* and *Dolan* rules, much like the decision in *Penn Central*, are gross deviations from the *Armstrong* principle.¹⁰⁸

C. Historic District Codified Law

I. Texas Local Government Code

Article XI, Section 5 of the Texas Constitution allows any city with a population greater than 5,000 to create a city charter of its own.¹⁰⁹ The city charter may not violate the state constitution or any state legislation, but municipalities are afforded the freedom to run their cities with limited state interference.¹¹⁰ However, the Texas Legislature does offer some guidelines to municipalities through the Texas Local Government Code.¹¹¹

Under Texas Local Government Code Section 211.0165, a municipality cannot designate an area as being within a historic district unless the property owner consents or there is a three-fourths vote of approval from the municipal government and the zoning, planning, or historical commission.¹¹² Because one of the two methods for an area to be designated as a historic district is to obtain three-fourths approval from the municipal government and relevant commissions, it is possible for the burden of owning a home within a historic

103. *Loretto*, 458 U.S. at 441.

104. *Id.*

105. *See id.*; *see Armstrong*, 364 U.S. at 49.

106. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831–37 (1987) (quoting *Penn Central*, 438 U.S. at 127).

107. *Dolan v. City of Tigard*, 512 U.S. 374, 386 (1994).

108. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978); *see Nollan*, 483 U.S. at 831–37 (1987) (quoting *Penn Central*, 438 U.S. at 127); *see Dolan*, 512 U.S. at 386.

109. TEX. CONST. art. XI, § 5.

110. *See id.*

111. *See* TEX. LOC. GOV'T CODE ANN. § 211.0165.

112. *Id.* § 211.0165(a).

district to be imposed upon homeowners without their consent.¹¹³ Consequently, homeowners may be burdened with heavy restrictions on their homes, such as aesthetic requirements, at the discretion of the local historical commission.¹¹⁴

2. Houston Ordinance

Because the Texas Constitution allows cities to create their own legislation, many have their own codified procedures for designating historic districts.¹¹⁵ Houston's city ordinances provide a multi-step process for the designation of a historic district.¹¹⁶ First, an application for designation must be submitted by either 10% of the property owners in the proposed area or by the Historic Architectural Review Commission.¹¹⁷ Then, a public meeting is scheduled, and a notice is provided to relevant property owners.¹¹⁸ After all property owners have been notified, the designation must receive support from at least 67% of the property owners.¹¹⁹ If not, the boundaries can either be redrawn or the application will fail.¹²⁰

Under the Houston ordinance, while some homeowners may be unhappy with the historic designation, the process has a more democratic nature because over two-thirds of homeowners in the proposed district must agree to the stipulations that come with being in a historic district.¹²¹ It offers a more democratic approach to historic district designation that balances the societal desire for historic preservation with property owners' need for choice.¹²²

The democratic method employed by the Houston city ordinance to create historic districts has been adopted by the Texas State Legislature before.¹²³ In 1962, it passed an enabling law that prescribed this same method of historic district designation for the Old Galveston Quarter.¹²⁴ Texas Revised Civil Statute article 6145-4(13) proposes,

(a) The powers granted to the Old Galveston Quarter Commission under this Act shall not take effect until an election has been held within the boundaries of the proposed District, and its creation has been approved by the majority of those voting in an election.

113. *See id.*

114. *See id.*; *see discussion infra* Sections II.A. & II.C.1.

115. *See, e.g.,* Hous., Tex., Code of Ordinances ch. 33, art. VII, § 33-222 (2025).

116. *Id.* at 33-222.1.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *See, e.g.,* Hous., Tex., Code of Ordinances ch. 33, art. VII, § 33-222 (2025).

122. *See id.*

123. *See* TEX. REV. CIV. STAT. art. 6145-4(13); *see discussion infra* Section III.C.3.

124. TEX. REV. CIV. STAT. art. 6145-4(13).

(b) A petition shall first be presented to the Commissioners Court signed by a majority of the resident property owners within the Quarter.

(c) The Commissioners Court shall then order an election to be held within the boundaries of the Old Galveston Quarter at which election shall be submitted the following propositions and none other:

“FOR the Old Galveston Quarter.”

“AGAINST the Old Galveston Quarter.”

(d) A majority of those voting in the Special Election shall be necessary to carry the proposition. Only resident property owners may vote at such an election. All such elections shall be conducted in the manner provided by the General Election Laws, unless otherwise provided. The Commissioners Court shall name polling places within the Quarter and shall appoint the judges and other necessary election officers.¹²⁵

Residents of the proposed district voted against designation by a slim margin.¹²⁶ The Old Galveston Quarter did not gain historic district status until the city council later passed an ordinance.¹²⁷ After the city ordinance was passed and the district gained historic status, residents complained about the restrictions imposed by the Historic District Board on them.¹²⁸ For example, residents had to appear before the board to make repairs to their homes, such as fixing their porch steps.¹²⁹ Furthermore, residents also had to pay \$25 to the board every time they needed to get the board’s approval for repairs.¹³⁰ Some homeowners who found the bureaucratic hurdles of getting permission to make changes to their homes gave up on renovating or repairing them altogether and allowed their properties to fall into disrepair.¹³¹ These types of restrictions on property owners’ freedoms perfectly illustrate the reasons why a democratic method of historic district designation is important.¹³² The state legislature’s proposal to create the historic district in 1962 respected the property owners’ rights by calling for a majority vote, and the city council’s decision steamrolled that respect for property owners to create a historic district, despite residents voting against it.¹³³

The Houston standard for historic district designation has not only been used in Texas but also in other states.¹³⁴ Connecticut also adopted a democratic approach for establishing historic districts throughout the state.¹³⁵ To establish a historic district in Connecticut, the municipality must appoint

125. *Id.* at art. 6145-4, § 13(a)-(d).

126. *See* Morgan, *supra* note 73, at 1-2A.

127. *See id.* at 2A.

128. *Id.*

129. *Id.*

130. *Id.*

131. *See id.*

132. *See id.*

133. *See id.*; *see* TEX. REV. CIV. STAT. ANN. art. 6145-4, § 13.

134. *See* CONN. GEN. STAT. ANN. § 7-147b (West 2011).

135. *Id.*

a Historic District Study Committee consisting of five members and three alternates.¹³⁶ This committee must submit a report that includes:

- (1) An analysis of the historic significance and architectural merit of the buildings, structures, places or surroundings to be included in the proposed historic district or districts and the significance of the district as a whole;
- (2) a general description of the area to be included within the district or districts, including the total number of buildings in each such district or districts listed according to their known or estimated ages;
- (3) a map showing the exact boundaries of the area to be included within the district or districts;
- (4) a proposed ordinance or proposed ordinances designed to create and provide for the operation of an historic district or districts in accordance with the provisions of this part;
- (5) such other matters as the committee may deem necessary or advisable.¹³⁷

After the committee submits this report to the proper department or commission within the municipality for approval, a public hearing must be held to inform the public of the new designation.¹³⁸ All owners of real property within the bounds of the proposed district must be given written notice of the hearing by mail at least fifteen days prior to the hearing.¹³⁹ The written notice must include a copy of the report, any recommendations made by the municipality, a map of the proposed district's boundary lines, and a copy of the proposed ordinance.¹⁴⁰ After the public hearing, ballots must be mailed to all real property owners within the proposed district.¹⁴¹ If at least two-thirds of property owners vote in favor of the designation, the legislative body of the municipality may then choose whether or not to establish the historic district.¹⁴²

III. HOMEOWNERS SHOULD HAVE A VOICE IN WHETHER THEIR HOME GETS A HISTORIC DISTRICT OVERLAY

Policymakers have a choice to make when writing historic district designation legislation: either allow historic preservationists to force their will onto homeowners by putting a designation over a neighborhood without property owners' consent, or grant hardworking homeowners the freedom to choose by ensuring that a vote takes place before a historic district can be designated.¹⁴³ Although historic district overlays can place a heavy burden

136. *Id.* § 7-147b(a).

137. *Id.* § 7-147b(b).

138. *Id.* § 7-147b(c)–(d).

139. *Id.* § 7-147b(e).

140. *Id.*

141. *Id.* § 7-147b(g).

142. *Id.* § 7-147b(i).

143. *Compare* TEX. LOC. GOV'T CODE ANN. § 211.0165 (allowing a municipal government to establish a historic district without consent from affected property owners), *with* Hous., Tex., Code of

on property owners, the Texas Local Government Code currently does not require property owners to consent to such an overlay on their property.¹⁴⁴ While proponents of historic preservation and courts alike try to steamroll property owners' ability to choose by arguing that historic preservation is a legitimate government interest, forcing someone to undertake the burden of living in a historic district is grossly unjust and does not serve anyone.¹⁴⁵

A. Texas Should Adopt Model Legislation for the Local Government Code to Provide Homeowners More Choice

The current standard for historic district designation in the Texas Local Government Code does not afford property owners a choice, allowing municipalities to make decisions on their behalf.¹⁴⁶ Therefore, the state of Texas should amend the Texas Local Government Code Section 211.0165(a) to the following:

(a) Except as provided by Subsection (b), a municipality that has established a process for designating places or areas of historical, cultural, or architectural importance and significance through the adoption of zoning regulations or zoning district boundaries may not designate a property as a local historic landmark or include a property within the boundaries of a local historic district unless:

- (1) the owner of the property consents to the designation or inclusion; or
- (2) if the owner does not consent, the designation or inclusion of the owner's property is approved by a *67 percent vote of the property owners in the proposed district*.¹⁴⁷

This legislative amendment would grant property owners in a proposed historic district the freedom to manage their own property without interference from a historic board or a municipal governing body that imposes heavy restrictions.¹⁴⁸ By adopting this amendment, the state of Texas would still allow municipalities to set their own standards of historic district designation, such as the permit process and the types of restrictions that are placed on historic district homes.¹⁴⁹ However, this amendment would give property owners a sense of choice in whether their neighborhood gets historical district status.¹⁵⁰

Ordinances ch. 33, art. VII, § 33–222 (2025) (providing an application for historic status), and CONN. GEN. STAT. ANN. § 7-147b (West 2011) (providing that a historic district may not be designated without a vote of approval from affected property owners).

144. TEX. LOC. GOV'T CODE ANN. § 211.0165.

145. See discussion *infra* section III.B.2.

146. See TEX. LOC. GOV'T CODE ANN. § 211.0165(a); see discussion *infra*, Section III.B.

147. TEX. LOC. GOV'T CODE ANN. § 211.0165(a) (emphasis added to indicate proposed changes).

148. Author's original thought.

149. *Id.*

150. *Id.*

B. The Texas Local Government Code Does Not Afford Property Owners a Choice

Historic districts exist across the United States because they meet a public need for cultural preservation.¹⁵¹ At the very core, historic districts are a public good.¹⁵² Turning someone's private home into a public good can be troublesome for several reasons.¹⁵³ It can make it much more difficult for property owners to fix their houses, as well as cause financial hardship.¹⁵⁴ These restrictions often impose the same costs as strict land-use regulations.¹⁵⁵ Under the Texas Local Government Code's standard for the designation of a historic district, the government is clearly overstepping by forcing local homeowners to take on the burden of beautifying the city—something that the municipality alone should be responsible for.¹⁵⁶

1. Living in a Historic District Can Place a Heavy Burden on Property Owners

The restrictions placed on homes in historic districts can often make it nearly impossible for homeowners to make changes to their homes efficiently.¹⁵⁷ It is typical for a historic preservation board to prohibit changes to the exterior of a home to preserve its historic character.¹⁵⁸ Some of these boards take it a step further by regulating interior changes, such as a homeowner's ability to install an air-conditioning system.¹⁵⁹ Part of the approval process for making changes to a home in a historic district involves a public hearing that the property owner must attend.¹⁶⁰ This can be a significant burden on busy, working-class Americans.¹⁶¹

Historic district designations have a significant economic impact on homeowners.¹⁶² Since these homes are typically more than fifty years old, they often can have structural issues, which means expensive repairs and renovations for the homeowners.¹⁶³ The additional maintenance required for

151. See Historic Districts Council, *supra* note 49.

152. *Id.*

153. See Sandefur, *supra* note 48.

154. *Id.*; see *Cities Should Think Twice About Expanding Historic Districts*, *supra* note 14.

155. See *Cities Should Think Twice About Expanding Historic Districts*, *supra* note 14.

156. See TEX. LOC. GOV'T CODE ANN. § 211.0165(a).

157. See Sandefur, *supra* note 48.

158. *Id.*

159. *Id.*

160. See *Cities Should Think Twice About Expanding Historic Districts*, *supra* note 14.

161. *Id.*

162. *Id.*

163. Albert Vasquez, *In Love with Historic Homes? Here are the Pros and Cons of Buying One*, AV HOME EXPERTS (May 8, 2018), <https://www.avhomeexperts.com/blog/2018/5/9/in-love-with-historic-homes-here-are-the-pros-and-cons-of-buying-one> [https://perma.cc/AG3L-W5QG].

these homes can also result in higher property taxes.¹⁶⁴ The cost of approved materials to make changes to the property can be more costly than other alternatives.¹⁶⁵ Homes in historic districts also often require special home insurance, which usually protects the owner against damage or delays that occur during restoration projects and the loss of historic features.¹⁶⁶ These types of insurance policies can be more expensive than the home insurance required for a similar home without the historic designation.¹⁶⁷

It can take a long time for property owners to understand how to comply with all these regulations, and they may even need to hire attorneys or architectural experts to assist in making informed decisions.¹⁶⁸ For the average working-class American household, these costs can be prohibitive.¹⁶⁹ All of these unnecessary barriers and burdens on property owners can create unjustifiable delays and may lead to the abandonment of renovations that would otherwise be beneficial—and perhaps even necessary—to the property owner or the community as a whole.¹⁷⁰

Proponents of historic preservation law often argue that historic designation increases a property's value, but this has been the subject of many debates.¹⁷¹ Some studies have found that housing prices in historic districts are higher and attribute the price increase to the historic designation itself.¹⁷² However, studies that account for other control factors have found that historic designation alone will either slightly lower prices or not affect the price at all.¹⁷³

Many real estate professionals believe that historic district designations lower the prices of homes due to the restrictions homeowners face when trying to change their property.¹⁷⁴ Those who argue that historic designation increases property value often attribute the higher prices of homes post-designation to the aesthetic value that comes with historic designation.¹⁷⁵ Yet, this argument fails because the aesthetic value of the home itself and the surrounding neighborhood existed before the

164. *Historic Districts Pros Cons*, OPEN FOR HOMES, <https://blog.openforhomes.com/living-historic-district-offer/> [<https://perma.cc/P95C-EN27>] (last visited Nov. 15, 2024).

165. Karuna Eberl, *What To Consider Before Restoring a Historic Home*, FAMILY HANDYMAN (Apr. 16, 2024), <https://www.familyhandyman.com/article/what-to-consider-before-restoring-a-historic-home/> [<https://perma.cc/UT8C-QJAG>].

166. See Vasquez, *supra* note 163; see also Michael Weintraub, *The Role of Legal Counsel in Historic Property Transactions*, MICHAEL WEINTRAUB ESQ. (Aug. 22, 2024), <https://michaelweintraubesq.org/the-role-of-legal-counsel-in-historic-property-transactions/> [<https://perma.cc/3PS2-LS43>].

167. See Vasquez, *supra* note 163.

168. See *Cities Should Think Twice About Expanding Historic Districts*, *supra* note 14.

169. *Id.*

170. See Walker & Israeloff, *supra* note 36, at 66–67.

171. See *Historic Designations Are Ruining Cities*, *supra* note 4.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

designation.¹⁷⁶ Thus, the character and charm of the home cannot be attributed to any price increase.¹⁷⁷

It is more likely that factors independent of the historic designation itself are responsible for increased housing prices, such as the stability and walkability of the neighborhood.¹⁷⁸ Even if a home's value increases with historic district status, it often takes longer to sell a home in a historic district because buyers tend to worry about how the restrictions on such properties may affect them as homeowners.¹⁷⁹

Some cities offer tax breaks to owners of historic properties to offset the burdensome costs of maintaining these homes.¹⁸⁰ For example, the city of San Antonio, Texas, offers homeowners a 20% tax exemption on city property taxes for the first ten years following the designation as a historic district.¹⁸¹ If the same owners stay in the home for fifteen years, the exemption may be extended by five more years.¹⁸² Owners of historic homes may also be eligible for lower-interest loans for renovations and preservation.¹⁸³ However, these benefits are not available in every historic district, and they may not always offset the cost of maintaining the property.¹⁸⁴

The original purpose and goal of historic preservation was born of legitimate cultural interests and concerns.¹⁸⁵ Yet, today's version of historic preservation is, as one author put it, "a good idea that's gone too far."¹⁸⁶ There are an unnecessary number of historic districts in existence today, many of which lack any true historic or cultural value.¹⁸⁷ For example, 19% of properties in Washington, D.C. are located within a historic district overlay.¹⁸⁸ Even worse, 27% of land plots within the borough of Manhattan are located in historic districts.¹⁸⁹ If historic districts exist for the purpose of preserving important historic and cultural assets, only properties with

176. *Id.*

177. *Id.*

178. *Id.*

179. Jeff Somers, *Why Getting Your Neighborhood Declared a Historic District is a Bad Idea*, LIFEHACKER (Oct. 31, 2024), https://lifehacker.com/home/declaring-historic-district-bad-idea?test_uuid=02DN02BmbRCcASIX6xMQtY9&test_variant=B [https://perma.cc/H9ML-5VYG].

180. See Vasquez, *supra* note 163.

181. *Incentive Programs*, CITY OF S.A., <https://www.sa.gov/Directory/Departments/OHP/Landmarks-Heritage/Incentives> [https://perma.cc/3PFC-FRU5] (last visited Nov. 8, 2024).

182. *Id.*

183. Vasquez, *supra* note 163.

184. See *Historic Tax Credits and Deconstruction Tax Deductions Working Together to Preserve History and the Environment*, THE GREEN MISSION (Sept. 20, 2023), <https://www.thegreenmissioninc.com/article/historic-tax-credits-and-deconstruction-tax-deductions> [https://perma.cc/XUH4-7AX2].

185. See Walker & Israeloff, *supra* note 36, at 66–67.

186. See *Historic Designations Are Ruining Cities*, *supra* note 4.

187. *Id.*

188. *Id.*

189. See Scott Beyer, *Historic Preservation Is Great, Except When It Isn't*, GOVERNING (Sept. 25, 2020), <https://www.governing.com/community/historic-preservation-is-great-except-when-it-isnt.html> [https://perma.cc/YKS9-5LTQ].

genuine historic and cultural significance should be designated as historic districts.¹⁹⁰ By giving an entire neighborhood historic status, rather than individual buildings, neighborhoods can become stuck in time, or worse, downright boring.¹⁹¹

A city's environment should serve the people who currently live and walk among its streets.¹⁹² Infrastructure, such as housing and commercial buildings, is vital to a city's economy and needs to be flexible so the city can remain economically competitive.¹⁹³ Historic districts can halt a city's potential economic growth by limiting the land's potential optimum use.¹⁹⁴ New projects that could benefit the city and its residents are not pursued because of the protections surrounding old, out-of-use historical buildings.¹⁹⁵ It is counterproductive for a city's long-term success to limit growth simply because of a historic district designation that might have been made decades ago.¹⁹⁶

2. *The Armstrong Principle and the Government's Responsibility to Provide Public Goods*

Proponents of historic preservation argue that the government has a duty to preserve history and maintain the beauty of cities.¹⁹⁷ This argument is not without legal backing.¹⁹⁸ The Supreme Court's decision in *Berman v. Parker* opened the door for projects, such as historic districts, to be considered a legitimate public interest by stating that the "concept of the public welfare is broad and inclusive" because the "values it represents are . . . aesthetic as well as monetary", so it is "within the power of the legislature to determine that the community should be beautiful as well as healthy . . .".¹⁹⁹ This Comment does not seek to undermine the truth within this statement by Justice Douglas.²⁰⁰

However, the methods government entities use to regulate properties in historic districts often fly in the face of the individual freedoms that property owners should be afforded.²⁰¹ These regulations on property owners without their consent are in direct contrast with the *Armstrong* principle which states: "The Fifth Amendment's guarantee that private property shall not be taken

190. See *Historic Designations Are Ruining Cities*, *supra* note 4.

191. See Beyer, *supra* note 189.

192. *Id.*

193. See *Historic Designations Are Ruining Cities*, *supra* note 4.

194. See Beyer, *supra* note 189.

195. *Id.*

196. See *Historic Designations Are Ruining Cities*, *supra* note 4.

197. See MORRISON, *supra* note 28, at 4–11.

198. See *Berman v. Parker*, 348 U.S. 26, 33 (1954); see *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

199. *Berman*, 348 U.S. at 33.

200. See discussion *infra* Section III.C.

201. See Sandefur, *supra* note 48.

for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”²⁰² This statement is a firm stance by the Supreme Court that the Constitution affords respect to property owners and that property owners should not solely be responsible for providing a public good.²⁰³

Further, the Supreme Court held in *Loretto* “that a permanent physical occupation of property is a taking.”²⁰⁴ By putting a historic district overlay on a neighborhood, heavily restricting what current and subsequent property owners can do to their property indefinitely, municipalities are exercising a type of permanent physical occupation over that property.²⁰⁵ This is in direct conflict with *Loretto* and should not be permissible, especially since property owners are expected to incur the costs of maintaining the property themselves.²⁰⁶

The Court’s later decisions allowing the government to use private property to serve a public interest at the expense of the property owner, such as *Penn Central*, *Nollan*, and *Dolan*, blatantly disregard the precedent and the intentions of our Founding Fathers, who gave citizens authority over their property in our country’s Constitution.²⁰⁷ While this Comment does not argue that historic district designations are enough to constitute a taking, they are a form of government control over private property in which the property owner alone is expected to bear the burden of providing a public good.²⁰⁸ Thus, the current Texas Local Government Code standard is in direct violation of the driving principle behind the *Armstrong* decision.²⁰⁹

The current Texas Local Government Code standard disregards property owners’ sense of choice and encourages municipalities to place the heavy burden of historic preservation on individual property owners.²¹⁰ Proponents of historic districts may argue that this standard is justifiable and in alignment with the Court’s decisions in *Penn Central*, *Nollan*, and *Dolan* because historic districts exist to serve a public interest.²¹¹ While it is true

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

203. *See id.*

204. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982).

205. Author’s original thought.

206. *See Loretto*, 458 U.S. at 441.

207. *See id.*; *see Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978); *see Nollan v. California Coastal Comm’n*, 483 U.S. 825, 831–37 (1987) (quoting *Penn Central*, 438 U.S. at 127); *see Dolan v. City of Tigard*, 512 U.S. 374, 386–97 (1994); Susan Nigra Snyder & George E. Thomas, *On Preservation: Heritage, History, and Exclusion*, ARCHITECTURAL REC. (Feb. 5, 2024), <https://www.architecturalrecord.com/articles/16703-on-preservation-heritage-history-and-exclusion> [https://perma.cc/97QR-4GSX].

208. Author’s original thought.

209. *See TEX. LOC. GOV’T CODE ANN.* § 211.0165; *see Armstrong v. United States*, 364 U.S. 40, 49 (1960).

210. *See TEX. LOC. GOV’T CODE ANN.* § 211.0165.

211. *See Penn Central*, 438 U.S. at 124; *see Nollan*, 483 U.S. at 831–37 (quoting *Penn Central*, 438 U.S. at 127); *see Dolan*, 512 U.S. at 386.

that preserving our past is an invaluable public interest, the truth of the *Armstrong* principle cannot be ignored: individual citizens should not bear the heavy burden of providing a public good alone.²¹²

Since historic districts are a type of public good, they should be supplied and funded by the government, rather than by individuals.²¹³ When an individual alone bears the weight of a public good, it is essential to consider whether that public good—in this case, a historic district—has benefits that outweigh the burdens and whether alternative solutions should be pursued instead.²¹⁴

Historic districts exist to preserve history, but buildings with historic and cultural value can be preserved through alternative methods, such as gaining landmark status.²¹⁵ Additionally, since many historic districts lack true historic value, the burden they place on homeowners is unnecessary and unfair.²¹⁶ If a municipality wants to preserve its history, that burden should be placed solely on the municipality, not on individual property owners.²¹⁷

C. The Houston Ordinance Standard for Historic District Designation Affords Property Owners Choice Through Voting

The standard used by Houston for historic district designation affords property owners respect because it allows them to vote on whether they would like their neighborhood to be designated as a historic district.²¹⁸ This standard is ideal because it allows communities that want the designation to enjoy the benefits of living in a historic district, but communities that do not want it are not forced to take on a burden they do not want to bear.²¹⁹

1. Living in a Historic District Should Be a Choice

Owning a home in a historic district comes with a slew of restrictions and can be costly, but that does not mean people do not enjoy living in them.²²⁰ They allow homeowners to live in a piece of history while embracing

212. See *Armstrong*, 364 U.S. at 49.

213. See Sandefu, *supra* note 48; see Jonathan Anomaly, *Public Goods and Government Action*, 14(2) POL., PHIL. & ECON. 109, 116 (2013) (“Welfare economists suggest that governments should attempt to supply an ‘efficient’ level of public goods.”).

214. See Anomaly, *supra* note 213, at 118.

215. See Nicole McKernan, *Landmarks vs. Historic Districts vs. Historic Homes*, BOARD & VELLUM (Jan. 25, 2024), <https://www.boardandvellum.com/blog/landmarks-vs-historic-districts-vs-historic-homes/> [<https://perma.cc/JK6H-X84N>].

216. See *Historic Designations Are Ruining Cities*, *supra* note 4.

217. Author’s original thought.

218. HOUS., TEX., CODE OF ORDINANCES ch. 33, art. VII, § 33–222 (2025).

219. See discussion *supra* Section III.B.1.

220. *What Does It Mean to Live in a Historic District?* PRES. VA., <https://preservationvirginia.org/what-does-it-mean-to-live-in-a-historic-district/> [<https://perma.cc/JWS4-UFBE>] (last visited Nov. 15, 2024).

the comfort and convenience of modern life.²²¹ These homes have a sense of charm and were built with unique characteristics that modern homes lack.²²² They also offer a sense of cohesiveness and aesthetic appeal that cannot be guaranteed in other neighborhoods.²²³ The building designs that are specific to each city (think of the Pueblo-style homes in Santa Fe, New Mexico, or the “Shotgun” houses in New Orleans) are what make cities across the nation distinct from one another.²²⁴ The unique architecture and cobblestone streets of historic districts can evoke nostalgia and charm that modern neighborhoods often lack.²²⁵

One of the many benefits of living in a historic district is having a deep connection to local history.²²⁶ Historic districts can play a crucial role in preserving a community’s identity, serving as a tangible representation of its past.²²⁷ There is a sense of pride that comes with living in a historic district, and many of these homeowners love that they get to play an active role in preserving their community’s unique history.²²⁸

Playing a role in preserving community history also has its potential drawbacks.²²⁹ Tourists frequently flock to these neighborhoods to soak in the local culture.²³⁰ This can make homeowners feel like they are living in a tourist attraction.²³¹ Residents may experience issues with parking and noisy crowds outside their homes, not to mention that heavy tourism often drives up the prices of goods and services in the area.²³² Some residents might embrace this inconvenience with open arms, but many homeowners find these living conditions insufferable.²³³ It truly is a matter of personal preference, and it should not be assumed that anyone wants to live in a tourist-heavy neighborhood without their consent.²³⁴

Furthermore, homeowner consent is imperative because historic preservation law can lead to gentrification, negatively impacting local communities.²³⁵ Historic district designation can make neighborhoods too

221. See *Historic Districts Pros Cons*, *supra* note 164.

222. *6 Benefits of Owning a Home in a Historic District*, CITY OF LAKE LAND, [https://www.lakelandgov.net/departments/community-economic-development/historic-preservation/benefits-of-owning-a-home-in-a-historic-district/\[https://perma.cc/ZW7S-H6D9\]](https://www.lakelandgov.net/departments/community-economic-development/historic-preservation/benefits-of-owning-a-home-in-a-historic-district/[https://perma.cc/ZW7S-H6D9]) (last visited Nov. 15, 2024).

223. See Julia Rocchi, *10 Benefits of Establishing a Local Historic District*, NAT’L TR. FOR HIST. PRES. (Dec. 8, 2015), [https://www.lakelandgov.net/departments/community-economic-development/historic-preservation/benefits-of-owning-a-home-in-a-historic-district/\[https://perma.cc/687A-C57K\]](https://www.lakelandgov.net/departments/community-economic-development/historic-preservation/benefits-of-owning-a-home-in-a-historic-district/[https://perma.cc/687A-C57K]).

224. See Beyer, *supra* note 189.

225. See *Historic Districts Pros Cons*, *supra* note 164.

226. See *6 Benefits of Owning a Home in a Historic District*, *supra* note 222.

227. See *Historic Districts Pros Cons*, *supra* note 164.

228. See *6 Benefits of Owning a Home in a Historic District*, *supra* note 222.

229. See *Historic Districts Pros Cons*, *supra* note 164.

230. *Id.*

231. *Id.*

232. *Id.*

233. See *id.*

234. Author’s original thought.

235. See *Historic Districts Pros Cons*, *supra* note 164.

expensive for the residents who already live there, especially for low-income individuals.²³⁶ Middle-class home buyers are typically willing to pay a higher price for homes in historic districts to take advantage of the tax benefits.²³⁷

“In larger cities, preservation can attract more affluent residents who bring new money, ideas, and beliefs about what a neighborhood should be and who should live in it.”²³⁸ Thus, neighborhood demographics change with historic district designation, and the original inhabitants who made the neighborhood worth preserving are unable to stay to reap the benefits.²³⁹

The issue of historic district designations being imposed on property owners is not unique to Texas.²⁴⁰ Property owners across the United States are fighting the imposition of historic district designation on their neighborhoods.²⁴¹ In Washington, D.C., the Bloomingdale neighborhood was given historic district status, although 55% of residents and the Advisory Neighborhood Commission opposed the designation.²⁴² Many residents raised concerns about the financial burden and hassles associated with living in a historic district.²⁴³

Similarly, residents of the Wheeler Street neighborhood in Montclair, New Jersey, have expressed concerns about the increased maintenance costs and how they can utilize their property if their neighborhood receives a historic designation.²⁴⁴ In San Mateo, California, community members have banded together to fight against historic district designations in their neighborhoods with a simple rallying cry: “no consent, no historic.”²⁴⁵

Homeowners across the nation want independence.²⁴⁶ They want the ability to make changes to their home.²⁴⁷ The mere fact that some people enjoy living in historic districts does not negate the need for choice.²⁴⁸ Before people are subjected to home renovation restrictions by their local historic board, they should be given a choice.²⁴⁹ After all, homeowners are the ones who must bear the burden, not the historic board.²⁵⁰ Providing homeowners

236. *Id.*

237. *See id.*

238. *Id.*

239. *See id.*

240. *See Historic Designations Are Ruining Cities*, *supra* note 4.

241. *See id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. Frank Elliott, *Support Homeowner Consent*, DAILY J. (Nov. 26, 2024), <https://savingplaces.org/stories/10-on-tuesday-10-benefits-of-establishing-a-local-historic-district> [https://perma.cc/9QAM-9P62].

246. *See Historic Designations Are Ruining Cities*, *supra* note 4.

247. *See id.*

248. Author's original thought.

249. *Id.*

250. *See Historic Districts Pros Cons*, *supra* note 164.

with a choice through voting on the designation is the ideal solution to the challenges that living in a historic district presents.²⁵¹

2. The Houston Standard for Historic District Designation Is Consistent with the Armstrong Principle

The Houston standard, with its democratic approach to historic district designation, is aligned with the driving idea behind the *Armstrong* principle.²⁵² Houston's democratic standard ensures that a historic district will not be designated without the permission of the owner, or at least a majority vote from the property owners in the neighborhood.²⁵³ This method of designation affords property owners the same respect that the *Armstrong* Court does by not forcing them to bear the burden of preserving history alone while the public enjoys the benefits.²⁵⁴ Using this method ensures that people who live in a historic district are not only active participants in the choice to create the historic district but also are aware of the designation well in advance, so they can be prepared to take on the extra responsibilities.²⁵⁵

Further, because the city of Houston gives property owners in historic districts a tax break, this standard is more aligned with the *Armstrong* principle because they are given some form of compensation from the government.²⁵⁶ The Supreme Court emphasized in *Armstrong* that citizens are entitled to just compensation if the government takes their property for public use.²⁵⁷ In Houston, property owners in historic districts are given a tax incentive to help offset the costs of maintaining their properties.²⁵⁸ Although the tax incentives may not entirely offset the costs of property upkeep, they provide homeowners with the support and compensation needed to bear the burdens associated with owning a home in a historic district.²⁵⁹

While tax incentives are indeed helpful to property owners, it cannot be argued that a tax incentive alone can compensate for a historic district designation being imposed upon a property owner.²⁶⁰ This is because tax incentives are usually not equally available to all residents of a historic district; thus, homeowners are not always truly compensated for the burdens

251. Author's original thought.

252. See Hous., Tex., Code of Ordinances ch. 33, art. VII, § 33-222 (2025); see also *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

253. Hous., Tex., Code of Ordinances ch. 33, art. VII, § 33-222 (2025).

254. See *id.*; see also *Armstrong*, 364 U.S. at 49.

255. See Hous., Tex., Code of Ordinances ch. 33, art. VII, § 33-222 (date).

256. *Historic Site Tax Exemptions Exemption Descriptions*, CITY OF HOUS. PLAN. & DEV. DEP'T (Mar. 21, 2019), <https://www.houstontx.gov/planning/HistoricPres/hist-incentives-broch.pdf> [<https://perma.cc/YM5F-JPKD>].

257. *Armstrong*, 364 U.S. at 49.

258. See *Historic Site Tax Exemptions Exemption Descriptions*, *supra* note 256.

259. See *id.*

260. Author's original thought.

that come with their homes.²⁶¹ Furthermore, the types of restrictions placed on homeowners, such as the requirement to attend a meeting to gain approval from the local historic board before making changes to their home, are a burden on the property owner's time and peace of mind.²⁶²

3. The Houston Standard for Historic District Designation Has Been Adopted Before

The democratic standard used in Houston for historic district designation has been adopted before.²⁶³ The state of Connecticut currently employs a democratic approach, requiring a majority of property owners to vote in favor of establishing a historic district.²⁶⁴ Connecticut serves as the perfect modern example of why homeowners should have the right to choose if they live in a historic district.²⁶⁵ Because historic districts can only be established through a majority vote, the homeowners who vote in favor of the designation are freely giving up some of their rights for what they see as "the greater good."²⁶⁶ By allowing property owners to vote, historic districts can still be established, but the property owners within that district can be better prepared to adhere to the restrictions that will be placed on their property.²⁶⁷

Connecticut is not the only state to have passed legislation giving homeowners a voice.²⁶⁸ The Texas State Legislature has recognized the importance of homeowner consent in historic district designation before.²⁶⁹ In 1962, when the Texas State Legislature passed an enabling act designating the Old Galveston Quarter as a historic district, it also required that a vote take place.²⁷⁰ The state legislature's respect for property rights was reflected directly through the statute language, which did not allow for the historic district to be established unless a majority of voters voted in favor of it.²⁷¹

Although residents exercised their right to vote against the designation, their voices were steamrolled when the City Council passed a city ordinance declaring the Old Galveston Quarter a historic district despite the community voting against it.²⁷² Since the designation was forced upon the residents, they

261. See *Historic Site Tax Exemptions Exemption Descriptions*, *supra* note 256.

262. See *Historic Designations Are Ruining Cities*, *supra* note 4.

263. See discussion *supra* section II.C.2.

264. CONN. GEN. STAT. ANN. § 7-147b (West 2011).

265. See Deb Cohen, *Living in a Local Historic District: Is It What You Think?* THE FRONT DOOR PROJECT, <https://thefrontdoorproject.com/historic-preservation/living-in-a-local-historic-district-is-it-what-you-think/> [<https://perma.cc/U8AL-ZGLY>] (last visited Nov. 15, 2024).

266. See *id.*

267. See *id.*

268. See TEX. REV. CIV. STAT. art. 6145-4.

269. *Id.*

270. *Id.*

271. See *id.*

272. See Morgan, *supra* note 73, at 1-2A.

were unprepared for the restrictions on their properties, and many complained about being unable to use their property as they so wished.²⁷³

The unhappy community members of the Old Galveston Quarter exemplify why community consent is essential to a thriving historic district.²⁷⁴ Since some homeowners felt frustrated by the process of getting permission to repair their homes, they stopped trying altogether, so their homes were no longer properly cared for.²⁷⁵ If the homes in a historic district are no longer cared for, repaired, and maintained, the aesthetic benefits of historic districts become obsolete, defeating the purpose of a historic district.²⁷⁶ Thus, obtaining community consent before designating a new historic district not only serves the interests of individual property owners but also those of the community at large.²⁷⁷

The Texas State Legislature recognized the importance of allowing property owners to have a choice, so they wrote legislation that did not allow for designation without a vote.²⁷⁸ Property owners today desire choice equally as much; thus, the standard for designation should not be any different today than the standard set forth by the Texas State Legislature in 1962.²⁷⁹

D. Practical Considerations for the Estate Planner

Historically significant properties, particularly family homes that have been passed down through generations, possess a special value far exceeding their monetary worth.²⁸⁰ They often hold emotional value for families and communities alike, making them invaluable to their owners.²⁸¹ A well-informed estate planning attorney can play a critical role in helping clients find the best way to manage historically significant properties.²⁸² To best understand the needs and desires of a client with a historically significant property, legal counsel should first examine both the tangible and intangible components that make the property valuable.²⁸³ While changes in the market may impact the monetary worth of the property, emotional significance cannot be dictated by market value.²⁸⁴

273. *Id.* at 2A.

274. *See id.*

275. *See id.*

276. Author's original thought.

277. *Id.*

278. *See* TEX. REV. CIV. STAT. art. 6145-4.

279. *See id.*; *see also* *Historic Designations Are Ruining Cities*, *supra* note 4.

280. Aaron Hall, *Preserving Heirloom Properties*, Aaron Hall Attorney, <https://aaronhall.com/estate-planning-for-heirloom-properties/> [<https://perma.cc/7FX5-NCGY>] (last visited Dec. 30, 2024).

281. *Id.*

282. *See* Weintraub, *supra* note 166.

283. *See* Hall, *supra* note 280.

284. *Id.*

These properties can be particularly challenging to manage in estate planning due to the complexities of historic preservation laws, as well as the unique financial and tax benefits and environmental regulations associated with historic properties.²⁸⁵ While some clients may have strong feelings about homeowners' rights and dislike the idea of historic preservation controlling subsequent owners, others may desire to maintain the historical character of their property long after it has been given to subsequent owners.²⁸⁶ Estate planning attorneys should remain well-informed about the tools available to help meet the needs of clients with historically significant properties.²⁸⁷

Many people are adamantly against the idea of living in a historic district and would do almost anything to prevent their neighborhood from receiving the designation.²⁸⁸ Estate planning attorneys may be able to help clients stop designations by using trusts.²⁸⁹

In 2018, residents of the Eastmoreland neighborhood in Portland, Oregon fought over their neighborhood becoming a historic district for years.²⁹⁰ Those who wanted the designation wanted to preserve the character of the homes, while opponents were adamantly against the restrictions that would be imposed on their homes.²⁹¹ The opponents implemented a creative strategy to win the battle—split their homes each into a thousand trust shares.²⁹²

Under the controlling law, a historic district cannot be established if more than 50% of property owners object to the designation.²⁹³ Each of the shares counted as a vote; thus, one property owner who owned all one thousand shares in their property could have a thousand votes.²⁹⁴ The ambiguity in the language of historic preservation statutes, such as this one, allows both homeowners and proponents of historic preservation to abuse their power, taking actions for their own benefit.²⁹⁵ By staying well-informed, an estate planning attorney can similarly take advantage of shortsighted legislation, thereby meeting their clients' needs.²⁹⁶

285. See Weintraub, *supra* note 166.

286. See David Toback, *When Your Estate Contains Historically Significant Items*, DAVID TOBACK ATTORNEY AT L. (July 28, 2021) <https://www.davidtobacklaw.com/when-your-estate-contains-historically-significant-items/> [<https://perma.cc/G58Q-WQCL>]; see also Sara Roth, *Eastmoreland residents who split homes into shares successfully halt historic district*, KGW8 (Apr. 25, 2018, 6:23 PM), <https://www.kgw.com/article/news/local/editors-picks/eastmoreland-residents-who-split-homes-into-shares-successfully-halt-historic-district/283-545736598> [<https://perma.cc/YD94-B9Q9>].

287. See Hall, *supra* note 280.

288. See Roth, *supra* note 286.

289. See *id.*

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

295. See Walker & Israeloff, *supra* note 36, at 65–66.

296. Author's original thought.

Estate planning attorneys should be aware of how to advise a client who wants to maintain the historic integrity of a home that is not already protected by historic preservation law.²⁹⁷ For example, if a client has inherited a home that their family has lived in for generations but does not want to live in it, the client may want to find a way to ensure the home retains its historic character.²⁹⁸ In this scenario, an ideal solution for such a client would be to bequeath the home to a historic preservation institution.²⁹⁹ Another choice the client has is to sell, but unless the home is already protected by historic preservation law, the new owner would be able to demolish the home or completely renovate it, stripping the home of its historic character.³⁰⁰

Because historic properties are typically older, they are frequently accompanied by environmental issues such as asbestos, lead paint, and other types of contaminants that are harmful to human health.³⁰¹ These contaminants often require specialized handling during renovations.³⁰² Well-informed legal counsel plays a crucial role in helping clients address such issues during the estate planning process.³⁰³ In some cases, an environmental consultant may need to assess the property to ensure that state and federal environmental regulations are being complied with.³⁰⁴ These time-worn properties are often equipped with outdated materials, which need to be assessed and may even require replacement for the safety of subsequent residents.³⁰⁵ By staying well-informed on such issues with historic properties, legal counsel can ensure that any environmental issues are addressed before the sale or transfer of the property, thereby saving their clients both time and money in the future.³⁰⁶

Additionally, an attorney might want to advise a client to use a historic preservation easement to ensure the home maintains its historic character for years to come.³⁰⁷ A historic preservation easement can place specific restrictions on how a home may be renovated, which may be enforced by a qualified organization dedicated to historic preservation.³⁰⁸ A historic preservation easement not only preserves the home's historic character but also protects it from demolition.³⁰⁹ Similar to the rules and restrictions in a

297. See Toback, *supra* note 286.

298. See *id.*

299. *Id.*

300. *Id.*

301. See Weintraub, *supra* note 166.

302. *Id.*

303. *Id.*

304. *Id.*

305. See Hall, *supra* note 280.

306. See Weintraub, *supra* note 166.

307. See *Easements to Protect Historic Properties: A Useful Historic Preservation Tool with Potential Tax Benefits*, NAT'L PARK SERV. TECH. PRES. SERV. (2010) <https://www.nps.gov/orgs/1739/upload/brochure-easements-historic-properties.pdf> [<https://perma.cc/4UCW-ND3U>].

308. *Id.*

309. *Id.*

historic district, if the subsequent owner or resident wants to alter the property, approval from the organization might be required.³¹⁰ An attorney might also suggest that a client put the property in a trust with additional funding to help with the property's upkeep.³¹¹

A historic preservation easement could also provide the client with additional tax benefits.³¹² "If certain criteria are met, the owner may be eligible for a federal income tax deduction for the value of the easement, and federal estate taxes also may be reduced."³¹³ The owner may also be eligible to receive state and local tax benefits for the easement.³¹⁴ Well-informed legal counsel is critical in assisting property owners with the applications for these tax benefits.³¹⁵ An attorney can help coordinate with federal, state, and local agencies to ensure their clients receive the best possible benefits for their property.³¹⁶

Legal counsel might also suggest establishing a nonprofit entity or a charitable trust to own or manage the property.³¹⁷ Such an entity could maximize funding opportunities for the property, opening it up to potential funding from donations or grants dedicated to historic preservation efforts.³¹⁸ These additional funding sources can help property owners ensure that their historically significant properties are properly preserved for generations to come without having to bear the entire cost alone.³¹⁹

Family properties are sometimes the only things that have remained consistent throughout generations in a family.³²⁰ The transfer of such properties is a significant responsibility that requires thoughtful and intentional assistance from legal counsel.³²¹ Passing on a family property to the next generation is about more than transferring ownership; it is about preserving family history and community pride that has been held by a family for generations.³²² In many cases, the transferring of historic family properties can cause inter-family turmoil.³²³ By taking the time to understand the complex family dynamics at play, legal counsel can help clients resolve

310. *Id.*

311. Telephone Interview with Eric. J. Smith, Att'y, L. Off. of Eric J. Smith (Nov. 18, 2024).

312. See *Easements to Protect Historic Properties: A Useful Historic Preservation Tool with Potential Tax Benefits*, *supra* note 307; see also Weintraub, *supra* note 166.

313. See *Easements to Protect Historic Properties: A Useful Historic Preservation Tool with Potential Tax Benefits*, *supra* note 307 at 2.

314. *Id.*

315. See Weintraub, *supra* note 166.

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

320. See Hall, *supra* note 280.

321. *Id.*

322. *Id.*

323. See *id.*

these issues through the use of mediation strategies, such as interest-based negotiation and active listening.³²⁴

Legal counsel can offer a more holistic approach that honors the client's family heritage by understanding family dynamics and suggesting the use of preservation strategies, such as recording oral stories, creating a family archive, or displaying historical artifacts.³²⁵ By acknowledging family dynamics, legal counsel can help facilitate a smooth transition of ownership that not only honors a family's past but meets the needs of future generations.³²⁶

Clients have unique goals and attachments to their family's properties.³²⁷ By staying well-informed on how to manage such properties and taking the time to understand a client's goals and family dynamics, legal counsel can play a critical role in helping families maintain their legacy for generations to come.³²⁸

IV. CONCLUSION

Hardworking homeowners across the nation want the freedom to use and renovate their property as they see fit.³²⁹ The restrictions that historic district designations impose on homeowners not only make it more difficult for homeowners to make necessary repairs but can also cost them unnecessary time and money.³³⁰ While historic districts can play a crucial role in preserving history and culture, the burdens they place on homeowners must not be overlooked.³³¹ Because historic districts are a public good, the government should bear the burden of providing this good for the public rather than individual citizens.³³²

With this in mind, the Texas State Legislature should adopt more equitable legislation that requires homeowner consent through a vote before a neighborhood can be declared a historic district.³³³ By adopting this standard statewide, Texas homeowners will be able to exercise their freedom over their property as guaranteed by our Founding Fathers in the United States Constitution.³³⁴ Yet, the goals of historic preservation law can still be met by communities that eagerly desire historic district designation.³³⁵ This

324. *Id.*

325. *Id.*

326. *See* Hall, *supra* note 280.

327. *See id.*

328. *See id.*; *see also* Weintraub, *supra* note 166.

329. *See Historic Designations Are Ruining Cities*, *supra* note 4; *see also* Elliott, *supra* note 245.

330. *See Historic Designations Are Ruining Cities*, *supra* note 4.

331. *See* discussion *supra* Section III.C.1.

332. *See Armstrong*, 364 U.S. at 49; *see also* Anomaly, *supra* note 213, at 118.

333. *See* discussion *supra* Section III.A.

334. *See* Snyder & Thomas, *supra* note 207; *see* discussion *supra* Section III.A.

335. *See* discussion *supra* Section III.A.

legislative change would create a more transparent relationship between local governments and residents.³³⁶ By empowering homeowners with a voice in the designation process, the state ensures that the preservation of history does not come at the expense of their personal freedoms or financial stability.³³⁷

336. See discussion *supra* Section III.A.

337. See discussion *supra* Section III.A.