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## Living Landmarks: Equipping Landmark Protection for Today's Challenges

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**LIVING LANDMARKS:  
EQUIPPING LANDMARK PROTECTION  
FOR TODAY'S CHALLENGES**

*Kyle Champion\**

When you buy from a small business, you are not helping a CEO buy a third vacation home. You are helping a little girl get dance lessons, a little boy get his team jersey, a mom put food on the table, a dad pay a mortgage, or a student pay for college. Our customers are our shareholders and they are the ones we strive to make happy.

– Kane's Diner (1968–2019)<sup>1</sup>

*The past few decades have brought tremendous change to New York City as gentrification continues its march through many of the city's*

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\* J.D. Candidate, Brooklyn Law School, 2021. B.S., University of North Carolina at Greensboro, 2010. Thank you to the untold New Yorkers behind the city's preservation movement, past and present. Our city is a better place because of them. Special thanks to all of the members of the *Journal of Law and Policy* for their hard work and encouragement.

<sup>1</sup> Kane's Diner was a twenty-four hour a day diner on College Point Boulevard in Flushing, Queens. After more than fifty years in operation, the diner closed on May 1, 2019 after the property was sold to a developer who plans to build condos on the diner's former site. Jenna Bagcal, *Kane's Diner in Flushing Shuts Its Doors After More Than 50 Years in the Business*, QNS (May 1, 2019, 3:00 PM), <https://qns.com/story/2019/05/01/kanes-diner-in-flushing-shuts-its-doors-on-may-1-after-more-than-50-years-in-the-business/>. The diner's menu was notable for its home-made aesthetic, with pictures of the owner's family, celebrities, and Greek references scattered throughout. The menu's last page offered thanks to the diner's "high class customers" for their support of the establishment. *Kane's Diner Menu*, KANE'S DINER, <https://web.archive.org/web/20190109210451/http://kanesdiner.com/menu.html> (last visited Mar. 23, 2020).

neighborhoods.<sup>2</sup> This change has transformed formerly neglected neighborhoods into highly desired locations. While these changes have introduced potential benefits to the transformed areas, they have also put immense economic pressure on important local establishments, such as diners, bars, and other informal gathering spaces that played an important role in their communities before the neighborhoods became “hot.”<sup>3</sup> Increasingly, this pressure has resulted in the shuttering of many such local establishments. Their disappearance represents not only a loss of an irreplaceable piece of organic New York culture, but also a profound and tangible detriment to pre-existing communities that are experiencing the impact of enormous economic and social change in their neighborhoods.<sup>4</sup> Currently, there are no legal mechanisms in place to protect such businesses from being washed away by a tide of money, greed, and shortsightedness.<sup>5</sup> This stands in stark contrast to the protection that is afforded to certain buildings and historic districts in New York which have been preserved through the city’s

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<sup>2</sup> For an in-depth look of how New York and its neighborhoods have gentrified, see Andrew Small, *The Gentrification of Gotham*, CITYLAB (Apr. 28, 2017), <https://www.citylab.com/life/2017/04/the-gentrification-of-gotham/524694/>.

<sup>3</sup> See Caroline Spivack, *Could Commercial Rent Stabilization Solve NYC’s Retail Vacancy Woes?*, CURBED (Nov. 8, 2019, 8:30 AM), <https://ny.curbed.com/2019/11/8/20953724/commercial-rent-stabilization-bill-nyc-retail-vacancy> (quoting Olympia Kazi, stating, “It’s about the culture of the city. Basically we’ve been bleeding culture out of the city . . . How unfair is it for these community spaces that have been operating for 10, 20, 30 years—building the neighborhood—and then suddenly have their rent spiked? It’s not [fair]. Not to anyone.”).

<sup>4</sup> Sharon Zukin, *New Retail Capital and Neighborhood Change: Boutiques and Gentrification in New York City*, 8 CITY & COMMUNITY 47, 47–48 (2009) (“Long-term residents often feel uncomfortable when the ethnic ownership and character of local stores changes, creating a different sense of place. Men and women who are used to congregating on the street to play dominos or chat may be pushed out of their space by social pressure and more vigilant policing, which increases their resentment of the new, privatized public space.”).

<sup>5</sup> While there are currently two proposals in front of the New York City Council to regulate commercial leases, neither has been adopted. This effectively leaves commercial businesses—and the communities they serve—at the mercy of property owners. See Spivack, *supra* note 3 (discussing the newly proposed commercial rent control legislation).

*Landmarks Law.*<sup>6</sup> Today, preservation needs to be reimagined not only as a way to ensure the preservation of a neighborhood's aesthetic heritage, but also as a tool for maintaining the unique qualities and characteristics of a community, both for its own sake and to ensure that the neighborhood's commercial districts represent the tastes and values of all residents, not just of those with the most disposable income.

## INTRODUCTION

Over the past twenty years, the number of diners in New York City has been cut by more than sixty percent.<sup>7</sup> Once a defining characteristic of the city, as demonstrated by their prominence in New York-centric pop culture,<sup>8</sup> it is estimated that the number of diners or coffee shops<sup>9</sup> operating within the five boroughs has dropped from one thousand to 398 within a single generation.<sup>10</sup> The loss of diners and coffee shops is just one aspect of a larger trend occurring within the city, as rising rents have contributed to a doubling of the number of vacant storefronts within the five

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<sup>6</sup> N.Y.C. ADMIN. CODE § 25-301 (2020).

<sup>7</sup> Aaron Elstein, *Where Have All the Diners Gone?*, CRAIN'S N.Y. (Oct. 25, 2015, 12:00 AM), [http://www.crainsnewyork.com/article/20151025/HOSPITALITY\\_TOURISM/151029907/dark-times-for-diners](http://www.crainsnewyork.com/article/20151025/HOSPITALITY_TOURISM/151029907/dark-times-for-diners).

<sup>8</sup> Examples of New York City area-centric shows that featured frequent appearances at diners include *Friends*, *Seinfeld*, and *The Sopranos* (although, in the case of *The Sopranos*, often in New Jersey). *Id.*

<sup>9</sup> The statistics used in Elstein, *supra* note 7 are based on a definition that limited diners and coffeeshops to those establishments which utilized either the term "diner" or "coffeeshop" in their names. While useful for providing a picture of the challenges facing the diner and coffeeshop industry, it likely excludes a number of establishments which would otherwise qualify as diners or coffeeshops in the eyes of many New Yorkers. Admittedly, there is much disagreement even within the diner-loving community as to what constitutes a true diner. *See* Diners of NYC (@dinersofnyc), INSTAGRAM (Sept. 25, 2019), <https://www.instagram.com/p/B21Vmv6j-bL/> ("Because the textbook definition of diner is dated and lacking, through this project we've had to determine what makes a diner. Some restaurants, donut shops, and caf[é]s present a challenge in categorizing.").

<sup>10</sup> Elstein, *supra* note 7 (documenting the decline of diners in New York).

boroughs in just ten years.<sup>11</sup> Within these vacancies, there are local businesses that closed, not because they were unwanted by their community,<sup>12</sup> but rather because they could not afford the rents on their lease renewals.<sup>13</sup> While some of these businesses have reopened at new locations,<sup>14</sup> others have been lost, stealing a piece

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<sup>11</sup> Julia Marsh, *Vacant Retail Space Has Doubled in NYC over 10 Years*, N.Y. POST (Sept. 25, 2019, 11:28 AM), <https://nypost.com/2019/09/25/vacant-retail-space-has-doubled-in-nyc-over-ten-years/>.

<sup>12</sup> Particularly noteworthy is the shuttering of the restaurant Coffee Shop, which operated near Manhattan's Union Square. Although estimated to be one of American's highest grossing restaurants, the Coffee Shop closed in 2018 because of rising labor costs and escalating rents. The restaurant, which was known for its diverse clientele, was also the former workplace of Congresswoman Alexandria Ocasio Cortez. Maggie McGrath, *Remembering the Coffee Shop: A New York Institution Is Closing After 28 Years*, FORBES (Oct. 10, 2018, 4:30 PM), <https://www.forbes.com/sites/maggiemcgrath/2018/10/12/remembering-the-coffeeshop-a-new-york-institution-is-closing-after-28-years/#7aeeded10a02>.

<sup>13</sup> Gray's Papaya, a quintessential New York hot dog proprietor, was forced to shut down its Sixth Avenue location in Greenwich Village after its landlord raised the rent from \$30,000 per month, which the owners were able to afford, to over \$40,000. It was the second Gray's Papaya to shut down in the city due to rising rents. Daniel Maurer, *Breaking Like Hot Dog Skin: Gray's Papaya Aims to Open New Location Thursday*, BEDFORD & BOWERY (Mar. 20, 2017), <https://bedfordandbowery.com/2017/03/breaking-like-hot-dog-skin-grays-papaya-aims-to-open-new-location-thursday/>. Gray's Papaya's replacement, a pressed juice chain, has since closed after only five years in business at the location. A space that once housed a uniquely New York businesses now sits vacant. Jeremiah Moss, *Papaya to High-Rent Blight*, JEREMIAH'S VANISHING N.Y. (Feb. 27, 2020), <http://vanishingnewyork.blogspot.com/2020/02/papaya-to-high-rent-blight.html>. For a look at some of the more recent New York City diner closings, see *10 of NYC's Lost Diners from a Photo Project Documenting All of the City's Diners*, UNTAPPED CITIES (June 5, 2018), <https://untappedcities.com/2018/06/05/10-of-nycs-lost-diners-from-a-photo-project-documenting-all-of-the-citys-diners/>.

<sup>14</sup> The former Cup and Saucer diner—the victim of a fifty percent rent hike in 2017—recently reopened next to its former location under a new name, Two Bridge's Diner. Operating since 1988, the Cup and Saucer Diner occupied a prime corner spot at the intersection of Eldridge and Canal Streets near the Chinatown section of Manhattan. Elie, *Cup & Saucer Reboot Renamed 'Two Bridge's Diner'*, BOWERY BOOGIE (June 19, 2019, 5:03 AM), <https://www.boweryboogie.com/2019/06/cup-saucer-reboot-renamed-two-bridges-diner/>.

of New York's local culture along with them.<sup>15</sup> In gentrifying neighborhoods,<sup>16</sup> the theft of local culture is especially acute as long-term businesses are being pushed out and often replaced by corporate chains or other businesses without roots in the community.<sup>17</sup> Such commercial displacement, especially of businesses with deep roots in the community, not only transforms the appearance of commercial thoroughways in gentrifying communities, but also serves as an ever-present reminder of the neighborhood's shifting power dynamics.<sup>18</sup> This can lead long-term residents not only to fail to participate in the benefits of change in their community, but to resent it.<sup>19</sup>

The continued theft of the city's local character, especially through the constant expulsion of local businesses, has led to a great

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<sup>15</sup> For an indignant account of the loss of New York's culture through, among other things, commercial displacement, see generally JEREMIAH MOSS, *JEREMIAH'S VANISHING NEW YORK: HOW A GREAT CITY LOST ITS SOUL* (2017) (detailing the destruction of New York City's local culture through the "vanishing" of its local shops, bars, and restaurants).

<sup>16</sup> In the context of this Note, a neighborhood can be said to be gentrifying when it is experiencing a marked increase in new arrivals from a higher income class than that of the neighborhood's prior residents. Oftentimes, these new arrivals may also be from a different racial and cultural background. See Michael Henry Adams, *The End of Black Harlem*, N.Y. TIMES (May 27, 2016), <https://www.nytimes.com/2016/05/29/opinion/sunday/the-end-of-black-harlem.html>.

<sup>17</sup> A study conducted within the New York City neighborhoods of Harlem and Williamsburg—both of which are undergoing extensive gentrification—found an increase in the number of chain stores in both neighborhoods corresponding with a "deep decline in old, 'local,' retail stores." Between 1995 and 2006, the number of local stores in Williamsburg plummeted from eighty-six to forty-six percent. During the same time period in Harlem, the number of stores decreased from 613 to 373, a result of the neighborhood's construction boom. Zukin, *supra* note 4, at 57–58.

<sup>18</sup> See Maxime Felder & Loic Pignolo, *Shops as the Bricks and Mortar of Place Identity*, in *MOVING CITIES – CONTESTED VIEWS ON URBAN LIFE* 97, 97–99 (Lígia Ferro et al. eds., 2018) ("[C]ities and neighborhoods are seen through their main street, and more specifically through their main street's shops. They allow for the construction of a 'sense of place.'").

<sup>19</sup> See *id.* at 99.

deal of lamentation within the popular culture<sup>20</sup> and has increased awareness of the precarious nature of what remains.<sup>21</sup> Increasingly, outraged New Yorkers are turning to activism and fundraising in hopes of curtailing the ongoing destruction of such an important element of New York's local history and culture.<sup>22</sup> While activism has been successful in raising awareness for some threatened institutions,<sup>23</sup> so far, it has failed to obtain any legal protection for the businesses activists seek to protect.<sup>24</sup> Additionally, while some

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<sup>20</sup> See Kevin Baker, *The Death of a Once Great City*, HARPERS (July 2018), <https://harpers.org/archive/2018/07/the-death-of-new-york-city-gentrification>.

<sup>21</sup> See Owen Gleiberman, *Film Review: 'The Lost Village'*, VARIETY (Oct. 25, 2018, 7:20 PM), <https://variety.com/2018/film/reviews/the-lost-village-review-1202995652/> (describing the cycle of shop closures in Greenwich Village).

<sup>22</sup> For an example of a prominent organization in the fight to protect the city's local businesses, see SAVE N.Y.C., <https://www.savenyc.nyc/> (last visited Mar. 23, 2020) (“#SaveNYC is a grassroots, crowd-sourced, DIY movement to raise awareness and take action for protecting and preserving the diversity and uniqueness of the urban fabric in New York City.”); see also Jim Dwyer, *To New Yorkers' Delight, Coogan's Says It Isn't Closing After All*, N.Y. TIMES (Jan 12, 2018), <https://www.nytimes.com/2018/01/12/nyregion/coogans-bar-staying-open.html> (recounting how community members rallied to temporarily save a local bar and restaurant, Coogan's, after its landlord demanded a \$40,000 monthly rent increase). Unfortunately, Coogan's is now closed for good as of March 2020. Jim Dwyer, *Coogan's Is Closing. This Is the New York That We're Losing.*, N.Y. TIMES (Apr. 21, 2020), <https://www.nytimes.com/2020/04/21/nyregion/new-york-coronavirus.html>.

<sup>23</sup> Jesse Jarnow, *Gem Spa Rally Turns Beloved East Village Institution into Mock "Schitibank"*, GOTHAMIST (Sept. 16, 2019, 3:26 PM) <https://gothamist.com/arts-entertainment/gem-spa-rally-turns-beloved-east-village-institution-mock-schitibank> (recounting a “cash mob” event where an artist transformed the famed corner store into a dystopian faux-counterculture bank branch after rumors circulated that Citibank was interested in taking over the space). Sadly, Gem Spa has since shuttered after one hundred years in the East Village. See Jen Carlson, *East Village's Iconic Gem Spa Has Permanently Closed*, GOTHAMIST (May 7, 2020, 5:41 PM), <https://gothamist.com/food/east-villages-iconic-gem-spa-has-permanently-closed>.

<sup>24</sup> See Steven Wishnia, *Will NY City Council Finally Take Action to Save Small Businesses from Extinction?*, GOTHAMIST (Sept. 24, 2018, 2:25 PM), <https://gothamist.com/news/will-ny-city-council-finally-take-action-to-save-small-businesses-from-extinction>. As of publication, no major pieces of legislation addressing the city's small business crisis have been passed. See, e.g.,

small businesses have been rescued through crowd fundraising efforts,<sup>25</sup> the long-term viability of such an approach is dubious as the success of any given campaign seems likely to correspond closely with the particular community's affluence, likely signifying that stores frequented by poor or marginalized communities will have less ability to shape their respective communities.<sup>26</sup> Plus, even in instances when activism has been successful in saving a business, it often proves short-lived as such victories rarely result in anything other than delaying an eventual rent hike or eviction.<sup>27</sup>

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*Regulation of Commercial Rent*, N.Y. CITY COUNCIL, <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4230081&GUID=B2FF2D24-F642-42A1-BEBB-D8D59E079D99&Options=ID|Text|&Search=1796> (considered by the Committee on Small Business Nov. 14, 2019); *Creating a Small Business Lease Program*, N.Y. CITY COUNCIL, <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3458244&GUID=D10860C6-E6C7-416E-8F05-563B4551EDB7&Options=ID|Text|Other|&Search=small+business+jobs+survival+act> (considered by the same Mar. 22, 2018).

<sup>25</sup> Some local businesses are turning to websites such as GoFundMe in order to sustain their businesses in the face of rising operational costs. See Katie King, *Cash-Strapped Small Businesses Turn to GoFundMe*, WALL ST. J. (Nov. 9, 2019, 8:00 AM), <https://www.wsj.com/articles/cash-strapped-small-businesses-turn-to-gofundme-11573304401>.

<sup>26</sup> The announced closure of an Upper West Side bookstore, Westsider Books, led local patrons of the store to create a GoFundMe account, with a goal of raising \$50,000 for the store to remain open. In five days, the campaign exceeded its goal and raised over \$54,000, with help from a \$10,000 donation that provided momentum for the campaign. Though a feel-good story, it seems unlikely such a campaign could be duplicated in poorer communities which are less likely to have patrons capable of offering such substantial financial support. See Tom Huddleston Jr., *Neighbors Raised \$50,000 on GoFundMe to Save This Local Bookstore—Now It's Thriving*, CNBC (May 10, 2019, 12:31 PM), <https://www.cnn.com/2019/05/10/neighbors-raised-thousands-on-gofundme-to-save-a-local-bookstore.html>.

<sup>27</sup> A recent example of a perhaps short-lived victory to preserve a neighborhood's character through activism is demonstrated by recent occurrences in Coney Island. After a drawn-out battle over a potential rezoning of the amusement district in Brooklyn, the city purchased seven acres of property from a developer as a result of pressure from local businesses who were concerned that they would be left out of the prior developer's plans. Today, the land purchased by the city has been contracted out to an Italian theme park operator who is threatening the local businesses of the district with a five hundred percent rent hike. Rich Calder, *Boardwalk Shop Owner in New Fight to 'Save Coney Island's*



Ultimately, this state of affairs has led to a renewed push for legal protection for commercial tenants in general<sup>28</sup> or, at least, particularly noteworthy businesses.<sup>29</sup> Perhaps unbeknownst to many within the movement, they are engaged in a battle that has been waged, if quietly, for decades.<sup>30</sup> The victory of those fighting to preserve New York's character and culture<sup>31</sup> is essential to saving the city as we know it today and the one we imagine it to become. Failure, at least in the short term, is likely to finalize New York's transformation from a city defined by its uniqueness to one that is increasingly reminiscent of a sterile shopping mall<sup>32</sup>—full of chains from everywhere rather than places that remind you that you are *somewhere*.<sup>33</sup>

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*Soul*, N.Y. POST (Nov. 24, 2019, 8:33 PM), <https://nypost.com/2019/11/24/boardwalk-shop-owner-in-new-fight-to-save-coney-islands-soul/>.

<sup>28</sup> Elizabeth Kim, *Facing Retail Vacancy Crisis, City Council to Consider Plan for Commercial Rent Stabilization*, GOTHAMIST (Nov. 6, 2019, 5:33 PM), <https://gothamist.com/news/facing-a-retail-vacancy-crisis-is-nyc-ready-to-take-on-rent-control-for-small-businesses>.

<sup>29</sup> *Letters, Week of Jan. 15, 2015*, THE VILLAGER (Jan. 15, 2015), <https://www.thevillager.com/2015/01/letters-week-of-jan-15-2015/> (quoting a letter to the editor) (“It is shameful that there is still no law protecting such businesses and preventing the further destruction of the character of our neighborhoods, and the fabric that keeps our communities vital.”).

<sup>30</sup> David B. Saxe & Brett Dockwell, *Commercial Rent Control in New York: Back Again?*, L.J. NEWSL. (Feb. 2019), <http://www.lawjournalnewsletters.com/2019/02/01/commercial-rent-control-in-new-york-back-again/?slreturn=20191008151432> (discussing the history of rent regulation in New York City and the recent proposals to reinstitute it).

<sup>31</sup> Providing a clear and concise definition of what constitutes a given city's culture seems difficult (if not ill-advised) in most places and especially so in a city as diverse as New York. Therefore, the use of the term “culture” and “character” in reference to New York is, perhaps, best understood in contrast to things which are, by nature, not unique or organic to the city or its neighborhoods.

<sup>32</sup> See JERILOU HAMMETT & KINGSLEY HAMMETT, *SUBURBANIZATION OF NEW YORK* 113 (2007) (discussing the influx of corporate chain stores into the city).

<sup>33</sup> Although the concept of “somewhere” versus “anywhere” has increasingly acquired a politicized edge, it is useful as a framework for understanding the discontent that comes from communities that feel as though they have no ability to dictate their future. Because the rise of “somewhere vs. anywhere” has been fueled by the work of a British author, much of its discussion revolves around

This Note will argue that New York City should reimagine landmark preservation as not just a tool for preserving the city's heritage through the protection of physical structures and districts, but also as a mechanism for identifying and protecting certain businesses which also add an irreplaceable element to the city's culture. Part I of this Note will explain the challenges facing New York City's communities and why it is so vital that the City Council provide legal mechanisms to protect and promote culturally significant local businesses and community institutions. Part II will compare the challenges facing today's business preservationists to those which faced earlier preservation efforts to protect the city's architectural heritage through the creation of the city's Landmarks Law. Part III will argue that today's Landmarks Law, while increasingly seen as a tool for preserving the character of a neighborhood, is, in its current form, incapable of truly preserving less tangible elements of a community. The inadequacy of today's regime will be analyzed by observing efforts to preserve the Stonewall Inn and Greenwich Village. Part IV will propose to include a "Living Landmark" classification for culturally significant businesses and institutions. Finally, Part V will provide an overview of the Living Landmark proposal and examine the city's authority to implement the proposal.

#### I. LOCAL BUSINESSES AND THEIR IMPORTANCE IN SUSTAINING COMMUNITIES

Those who lament the closing of neighborhood establishments are sometimes dismissed as reactionary nostalgics, longing for a time and place that no longer exists.<sup>34</sup> To be sure, the reaction that

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British politics and, more specifically, the "Brexit" debate. Even so, the underlying premise of the debate seems to principally concern agency and the ability of communities to dictate the terms of their future. For a less politically charged discussion of this concept, see *People from Somewhere vs People from Anywhere*, MIKE FROST (June 29, 2017), <https://mikefrost.net/people-somewhere-vs-people-anywhere/>.

<sup>34</sup> Steve Cuozzo, *When It Comes to Gentrification New Yorkers Are Total Hypocrites*, N.Y. POST (Nov. 16, 2019, 1:17 PM), <https://nypost.com/2019/11/16/when-it-comes-to-gentrification-new-yorkers-are-total-hypocrites/> (discussing neighborhood change and nostalgia, in general).

has accompanied the closing of businesses that have been rendered obsolete by technological and societal change seems to suggest that a certain amount of sentimentality is likely to exist under the surface of any discussion involving change, especially in a neighborhood.<sup>35</sup> Even still, the closing of some local and long-term commercial establishments can have a tangible and detrimental impact on a neighborhood and the communities that comprise it, and their loss should concern us all.

Increasingly, social scientists are coming to appreciate the importance of small businesses in creating and maintaining a distinct sense of place and belonging within a community.<sup>36</sup> More than just places to shop, local businesses often play many important roles within a neighborhood, including fostering entrepreneurship, providing employment opportunities for locals—particularly in immigrant communities<sup>37</sup>—and helping to define a neighborhood’s sense of place.<sup>38</sup> The loss of local small businesses, particularly those which play an important role in bringing people together—whether physically or emotionally—can have a detrimental impact on the neighborhood at large, and, in particular, on marginalized communities within the neighborhood.<sup>39</sup>

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<sup>35</sup> See Natalie Degraffinried, *This Year’s Hottest Cultural Trend Is Blockbuster Nostalgia*, THE OUTLINE (Sept. 18, 2018, 4:18 PM), <https://theoutline.com/post/6258/blockbuster-video-trend-2018?zd=2&zi=dvaqzplm> (discussing the uptick in nostalgia for a now-defunct video rental chain).

<sup>36</sup> Felder & Pignolo, *supra* note 18, at 97–100 (discussing the importance of small businesses in creating a sense of place in a community).

<sup>37</sup> See Ginia Bellafante, *The Empty Storefront Crisis and the End of the American Dream*, N.Y. TIMES (June 14, 2019), <https://www.nytimes.com/2019/06/14/nyregion/nyc-immigrant-small-business.html>.

<sup>38</sup> Felder & Pignolo, *supra* note 18, at 97–100.

<sup>39</sup> Local businesses play a number of important roles in developing a sense of community within a given area. On a macro level, they provide a place for “random encounters” and can serve as a community’s focal point, while on a personal level scholars have suggested that frequenting a local business can provide a sense of “belonging” and “moral ownership” in one’s community. *Id.*; see also Zukin, *supra* note 4, at 57–58 (discussing how long-term residents of a community are impacted when the ownership and character of local stores change).

A. *Diners and the Demise of Third Places in New York Culture*

Like bistros in France<sup>40</sup> or pubs in England,<sup>41</sup> diners and other inclusive local establishments<sup>42</sup> play an important role as “informal public gathering places” in New York City’s neighborhoods.<sup>43</sup> The importance of such places to a given community is evident by the outpourings of grief that take place after the announcement of their

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<sup>40</sup> See RAY OLDENBURG, *THE GREAT GOOD PLACE* 145 (1989) (discussing the importance of bistros and cafés in providing the French public with places to come together). A recent decline in the number of bistros in France has propelled a movement to push the United Nations Educational, Scientific and Cultural Organization (“UNESCO”) to recognize French bistros in its recently created “Intangible Cultural Heritage” category. Claire Mufson, *Paris Bistros Became Symbols of Resilience. But Are They UNESCO Worthy?*, N.Y. TIMES (June 16, 2018), <https://www.nytimes.com/2018/06/16/world/europe/paris-bistro-cafe-unesco.html>.

<sup>41</sup> See OLDENBURG, *supra* note 40, at 123 (discussing the unique role of English pubs as “third places” in English culture). In the United Kingdom, a steep decline in the number of pubs has prompted local communities to attempt to purchase the pubs and operate them on a community level. See also Frank Langfitt, *It Takes a Village to Save a British Pub*, NPR (Mar. 10, 2019, 9:01 AM), <https://www.npr.org/2019/03/10/700835354/it-takes-a-village-to-save-a-british-pub> (describing the impact of a pub’s closure, a local entrepreneur said, “You deplete a small community of a place like this, which is the only communal hub, and you just take its heart away.”).

<sup>42</sup> Labels like “diner” are less important than the atmosphere provided by the establishment. In fact, there is a wide variety of venues that could qualify as socially important establishments within a given community, even, in some instances, corporate chains. See Diana Budds, *It’s Time to Take Back Third Places*, CURBED (May 31, 2018, 5:21 PM), <https://www.curbed.com/2018/5/31/17414768/starbucks-third-place-bathroom-public>.

<sup>43</sup> The coffee shop orients us here, in this city and not another . . . . If we are regulars, we become known, connected, to a network of people who remain over the span of years, even decades. In the anonymous city, these ties can be lifesavers, especially for the elderly, the poor, the marginal, but also for all of us. Without them, the city becomes evermore fragmented, disorienting and unrecognizable.

George Blecher, *More Than Coffee: New York’s Vanishing Diner Culture*, N.Y. TIMES (Nov. 23, 2016), <https://www.nytimes.com/2016/11/23/nyregion/diners-new-york-city.html> (quoting Jeremiah Moss).

closure,<sup>44</sup> in addition to the sense of loss that lingers long after their removal from the neighborhood.<sup>45</sup> Moreover, the loss of each such business also represents the loss of a place where the long-term residents<sup>46</sup> of a community can meet in an environment that is both comfortable and reflective of the norms of their community.<sup>47</sup>

As social isolation has increased across American culture,<sup>48</sup> a newfound appreciation has come about for places that provide a place for community life within society.<sup>49</sup> Known by scholars as “Third Places,”<sup>50</sup> these are the places “in which people feel

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<sup>44</sup> The sale of Kane’s Diner, a Flushing, Queens restaurant of more than fifty years, caused hundreds of former patrons to visit the diner one last time. Bagcal, *supra* note 1. The closure of Hank’s Saloon, a long-time dive bar in the Boreum Hill section of Brooklyn, closed in 2018 after the building in which the bar was located was slated to be demolished and turned into condos. Reflecting on Hank’s Saloon’s closure, the bar’s owner lamented the disappearance of dive bars and described them as places that are “extremely special to New York and add genuine heart and soul to the community.” *Hank’s Saloon Will Close at the End of 2018*, BROOKLYN VEGAN (Nov. 15, 2017, 6:21 PM), <http://www.brooklynvegan.com/hanks-saloon-will-close-at-the-end-of-2018/?trackback=tsmclip>.

<sup>45</sup> See Adam Platt, *What’ll It Be for the New York Diner?*, N.Y. GRUB ST. (June 26, 2017), <http://www.grubstreet.com/2017/06/watching-and-lamenting-the-death-of-the-new-york-diner.html>.

<sup>46</sup> Because of New York City’s relatively strong residential rent regulations and large public housing system, communities with large percentages of rent-regulated or public housing are likely to still maintain a large number of long-term residents, even while the surrounding community has changed. See NYC DEP’T OF HOUS. PRES. & DEV., *SOCIODEMOGRAPHICS OF RENT STABILIZED TENANTS 3–4* (2017).

<sup>47</sup> See Felder & Pignolo, *supra* note 18, at 107–08 (discussing the differing perceptions of commercial spaces based on the cultural backgrounds of patrons).

<sup>48</sup> Dhruv Khullar, *How Social Isolation Is Killing Us*, N.Y. TIMES (Dec. 22, 2016), <https://www.nytimes.com/2016/12/22/upshot/how-social-isolation-is-killing-us.html>.

<sup>49</sup> Tony Matthews & Joanne Dolley, *‘Third Places’ Where Urban Loneliness Doesn’t Dwell*, NEWCASTLE HERALD (Apr. 13, 2018, 12:07 PM), <https://www.newcastleherald.com.au/story/5340934/third-places-where-urban-loneliness-doesnt-dwell/> (discussing common examples of places that encourage community in addition to their impact on combatting isolation and loneliness).

<sup>50</sup> “Third Place” is a term popularized by sociologist Ray Oldenburg as a publicly accessible place that is neither work nor home but is accessible to all people and is viewed by members of the community as “their own.” Ramon

comfortable and to which they return time and again to socialize, to relax, and to enjoy the company of those around them . . . inexpensive places where people come together and life happens. In other words, they're a community's living room."<sup>51</sup>

*B. Commercial Displacement and Its Impact on  
Community Life*

New York City is defined by its neighborhoods.<sup>52</sup> Described by former Mayor David Dinkins as a “gorgeous mosaic,”<sup>53</sup> New York is a patchwork of neighborhoods with distinct characters and identities.<sup>54</sup> These neighborhood distinctions, however, are in a constant state of flux as enormous demographic changes have transformed many of the city's neighborhoods.<sup>55</sup> In some neighborhoods, these demographic changes—and the economic ramifications that coincide with them—have put severe pressure on the local businesses that existed before these neighborhoods' newfound popularity.<sup>56</sup>

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Oldenburg, *The Third Place*, 5 QUALITATIVE SOC., 265, 268–69 [hereinafter Oldenburg, *The Third Place*]. For an in-depth overview of third places, see generally OLDENBURG, *supra* note 40.

<sup>51</sup> Budds, *supra* note 42.

<sup>52</sup> See Rachelle Eason, *A Guide to New York City Neighborhoods*, CULTURE TRIP (June 28, 2019), <https://theculturetrip.com/north-america/usa/new-york/articles/10-new-york-city-neighborhood-stereotypes/>.

<sup>53</sup> Editorial Board, *The Mosaic Thing*, N.Y. TIMES (Jan. 3, 1990), <https://www.nytimes.com/1990/01/03/opinion/the-mosaic-thing.html>.

<sup>54</sup> For an overview of the general characteristics of New York's neighborhoods, see Pauline Frommer, *Neighborhoods in Brief in New York City*, FROMMERS, <https://www.frommers.com/destinations/new-york-city/planning-a-trip/neighborhoods-in-brief> (last visited Mar. 23, 2020).

<sup>55</sup> Andrew Small, *Mapping the Modern Transformation of New York City*, CITY LAB (May 7, 2017), <https://www.citylab.com/life/2017/05/mapping-the-transformation-of-new-york-city/525330/> (describing the impact of gentrification on New York City over the last fifteen years).

<sup>56</sup> See Soni Sangha, *Gentrification in Washington Heights Forcing Out Longtime Mom and Pop Shops*, FOX NEWS (Jan. 29, 2015), <https://www.foxnews.com/world/gentrification-in-washington-heights-forcing-out-longtime-mom-and-pop-shops> (discussing general commercial displacement

As neighborhoods gentrify, economic and social inequalities within the community may create an environment in which the commercial spaces of the neighborhood increasingly reflect the perceived tastes of the wealthier incoming group.<sup>57</sup> This transformation can come at the expense of the preexisting community as local businesses play an important role in maintaining the vitality of a given community within a neighborhood.<sup>58</sup> Moreover, commercial spaces can also be seen as reflecting which community maintains “symbolic ownership” of a given area.<sup>59</sup> On a practical level, this means that an area that once provided valuable goods and services for the preexisting community can be transformed into a district that is no longer welcoming to certain portions of the community, regardless of how deep their roots are in the neighborhood.<sup>60</sup>

Importantly, businesses can also play an important role in providing a common space for different groups to meet.<sup>61</sup> While

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in the Washington Heights section of New York City in addition to a specific incident in which an entire block of Latino-owned storefronts was evicted).

<sup>57</sup> Rachel Meltzer, *Gentrification and Small Business: Threat or Opportunity?*, 18 CITYSCAPE: J. POL’Y DEV. & RES. 57, 58–59 (2016).

<sup>58</sup> Local businesses are especially important in poor and immigrant communities as avenues for jobs and entrepreneurship. *Id.*; see also Bellafante, *supra* note 37 (discussing the role small businesses have played in both shaping neighborhoods and empowering immigrant communities and why today’s retail crisis jeopardizes the social mobility that small businesses give to their owners, employees, and other beneficiaries within the community).

<sup>59</sup> “Symbolic ownership” is a term used to describe the ways in which a social space, such as a neighborhood commercial district, can be controlled outside of the regulatory process. An example of this phenomenon is when the composition of a neighborhood district changes to the point where it tends to only attract those who are capable of affording upscale prices while deterring those who are unable to afford them. This transformation has the effect of potentially creating a sense of division in the community and may signify that a given area is “owned” by a given group. Andrew Deener, *Commerce as the Structure and Symbol of Neighborhood Life: Reshaping the Meaning of Community in Venice, California*, 6 CITY & COMMUNITY 291, 311(2007).

<sup>60</sup> For an account of how the transformation of a neighborhood’s commercial district impacts residents of neighborhoods going through gentrification, see *id.* at 296.

<sup>61</sup> Jim Dwyer, *Coogan’s, an Uptown Stalwart, Makes Its Last Stand*, N.Y. TIMES (Jan. 9, 2018), <https://www.nytimes.com/2018/01/09/nyregion/coogans>

certain businesses (such as diners, bars, and barbershops)<sup>62</sup> may be especially capable of attracting patrons from diverse walks of life, there are also unique neighborhood institutions which help bridge the gap between the longstanding community and new arrivals.<sup>63</sup> In the Prospect Lefferts Gardens section of Brooklyn—an area undergoing rapid gentrification<sup>64</sup>—longstanding vegan ice cream parlor Scoops has been credited with creating cohesion in an increasingly diverse community by bringing together the neighborhood’s longstanding Caribbean population and those new to the area.<sup>65</sup>

A similar dynamic exists on Brooklyn’s Atlantic Avenue where a longstanding Middle Eastern commercial district has continued to thrive<sup>66</sup> in spite of decades of gentrification occurring within the surrounding community.<sup>67</sup> The continued presence of the largely Middle Eastern-owned commercial district is not only credited with providing the surrounding neighbors with a chance to try new

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-washington-heights-closing.html (discussing how local bar Coogan’s provided a gathering space for the neighborhood’s diverse population).

<sup>62</sup> See Oldenburg, *The Third Place*, *supra* note 50, at 268–69.

<sup>63</sup> Kadia Goba, *Flatbush Neighbors Rally to Save Scoops*, BKLYNER (May 21, 2019), <https://bklyner.com/flatbush-neighbors-rally-to-save-scoops/> (discussing the role of a local ice cream parlor in creating “cohesion” in an increasingly diverse community).

<sup>64</sup> Shaye Weaver, *Prospect Lefferts Gardens: What to Do in the Rapidly Changing Parkside Neighborhood*, AM N.Y. (July 30, 2018), <https://www.amny.com/things-to-do/prospect-lefferts-gardens-guide-1-20215090/>.

<sup>65</sup> Goba, *supra* note 63.

<sup>66</sup> One of the Middle Eastern shops, Sahadi’s, has proven so popular that it has opened up an additional location in the Sunset Park neighborhood of Brooklyn. Its Atlantic Avenue location has been a mainstay of the Brooklyn Heights and Carrol Gardens community since the 1940s. Carla Vianna, *Award-Winning Middle Eastern Grocer Sahadi’s Opens a Sit-Down Restaurant in Industry City*, EATER: N.Y. (Aug. 28, 2019, 2:07 PM), <https://ny.eater.com/2019/8/28/20836646/sahadis-open-menu-industry-city-sunset-park-brooklyn-nyc>.

<sup>67</sup> As with Scoops, which likely benefitted from the increasing popularity of veganism, the longevity of Atlantic Avenue’s commercial district may, in part, be attributable to the rise in health-conscious eating that took place as the surrounding community gentrified in the 1970s and 1980s. See Angelica Frey, *How Brooklyn’s Middle East Survives Against the Odds*, THE BRIDGE (Mar. 26, 2017), <https://thebridgebk.com/how-brooklyns-middle-east-survives/>.



cuisines, but it is also recognized as a place for cultural exchange and understanding<sup>68</sup> in an era fraught with opportunity for tension and misunderstanding between the two communities.<sup>69</sup>

As gentrification continues its march through the city, the future of places like Scoops<sup>70</sup> and Atlantic Avenue's Middle Eastern commercial district remains uncertain.<sup>71</sup> When such places are lost, what truly remains of a city?

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<sup>68</sup> For an in-depth look of the role that Atlantic Avenue has played in fostering a sense of community for Arab Americans, in addition to providing an opportunity for cultural exchange and integration, see Jane Peterson, *Brooklyn's Atlantic Avenue*, ARAMCO WORLD (Mar. 1988), <https://archive.aramcoworld.com/issue/198802/brooklyn.s.atlantic.avenue.htm>.

<sup>69</sup> After the events of September 11, neighbors of the Muslim shopkeepers on Atlantic Avenue demonstrated their support for the Muslim community by continuing to frequent the community's shops and vocalizing their solidarity with the community. Gady A. Epstein, *N.Y. Neighbors Rally Around Arabs, Muslims*, BALTIMORE SUN (Sept. 14, 2001), <https://www.baltimoresun.com/news/bs-xpm-2001-09-14-0109140289-story.html>. More recently, Atlantic Avenue was home to an outpouring of community support for the local Yemeni and Syrian eateries after the Trump administration's travel ban targeted the respective countries. Anthony Izaguirre & Rich Schapiro, *Owner of Yemeni Eatery Grateful for Support as He Serves Group Aiming to Feast on Fare from Countries on Trump's Travel Ban List*, N.Y. DAILY NEWS (Feb. 04, 2017, 6:00 PM), <https://www.nydailynews.com/new-york/yemeni-eater-owner-serves-tour-group-fighting-trump-palates-article-1.2964361>.

<sup>70</sup> Scoops, for example, is currently operating without a lease. To date, over 22,250 signatures have been collected on an online petition demonstrating support for the ice cream parlor's continued presence in the community. *Save Scoops!*, CARE2, <https://www.thepetitionsite.com/845/888/347/save-scoops/?fbclid=IwAR0f6mtbhVIGAH3JlfnM0ASddI8tpPZjKHPV0sjwz2w9yh-LEAbukN0HUbw> (last visited Mar. 23, 2020).

<sup>71</sup> Unlike many small businesses, some of the Middle Eastern businesses on Atlantic Avenue, such as Sahadi's, own the buildings they are located in. This has likely played a key role in maintaining the commercial district's Middle Eastern character as building ownership allows a business to avoid steep rent increases. This seems especially relevant to a business like Sahadi's which operates out of a space that is the equivalent of three storefronts. See *Sahadi's History*, SAHADI FINE FOODS, <https://www.sahadifinefoods.com/history/> (last visited Mar. 23, 2020). See also Frey, *supra* note 67 (discussing how building ownership has helped Tripoli Restaurant remain on Atlantic Avenue).

## II. ORIGINS AND HISTORY OF PRESERVATION IN NEW YORK CITY

In many respects, the crisis facing the city's local businesses reflect an earlier era in New York's history in which immense economic, political, and social pressures<sup>72</sup> threatened—and, in some cases, demolished—some of the city's most admired architecture and pummeled through entire neighborhoods.<sup>73</sup> This destruction contributed to the growth of a preservation movement which, ultimately, resulted in the passage of the city's Landmarks Law in 1965.<sup>74</sup> This legislation has allowed New Yorkers, through the Landmarks Preservation Commission (the "LPC" or the "Commission"), the agency responsible for fulfilling the law's mandate, to have a greater say in directing the future of their respective neighborhoods.<sup>75</sup> Understanding the history and movement which led to the Landmarks Law is vital for today's preservationists seeking to duplicate an earlier generation's success against new challenges.

*A. Pre-Landmarks Law New York City and Early Preservation Efforts*

Surprisingly enough, one could make a strong case that the origin of today's Landmarks Law can be found in a proliferation of billboards that swept across the city in the early 1900s.<sup>76</sup> Influenced by European ideals and the burgeoning "City Beautiful

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<sup>72</sup> ANTHONY C. WOOD, *PRESERVING NEW YORK: WINNING THE RIGHT TO PROTECT A CITY'S LANDMARKS* 83 (2007).

<sup>73</sup> *Id.*

<sup>74</sup> *See id.* at 359.

<sup>75</sup> PLACEECONOMICS, *HISTORIC PRES. AT THE CORE OF A DYNAMIC NEW YORK CITY* 9–10 (2016), [https://www.placeeconomics.com/wp-content/uploads/2016/08/final\\_report\\_040816\\_pagessmall.pdf](https://www.placeeconomics.com/wp-content/uploads/2016/08/final_report_040816_pagessmall.pdf) (discussing how communities are increasingly looking toward historic district designation as a means for shaping the future of their neighborhoods).

<sup>76</sup> *See* WOOD, *supra* note 72, at 26–27 (discussing the proliferation of billboards across the city and the subsequent reaction that it provoked by those put off by the ubiquity of billboards—including on residential property—which eventually inspired a movement to seek the state's intervention in the regulation of private property on aesthetic grounds).

Movement,”<sup>77</sup> a small but dedicated group of reformers sought to reign in the billboard frenzy, which was blanketing the city in advertising, through government regulation.<sup>78</sup> Although not directly related to regulating buildings or other structures, the anti-billboard reform effort represented a significant departure from the prevailing wisdom of the time regarding the government’s role in regulating private property.<sup>79</sup> This rethinking of the government’s role in regulating private property soon led to additional reform movements that eventually focused in on the historic preservation of individual buildings and historic districts through government regulation on aesthetic grounds.<sup>80</sup>

Early efforts to preserve buildings in New York were largely focused on protecting buildings and sites with historical significance, such as those which housed important historical figures or were closely tied to significant moments in the city’s history.<sup>81</sup> Notably, these early preservation efforts existed almost entirely outside of the framework of government regulation and were, instead, largely piecemeal operations led by various interest groups who would purchase the property as a means of preservation.<sup>82</sup> This fragmented approach to preservation was disrupted by the immense economic, social, and political developments that took place after World War II.<sup>83</sup> These

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<sup>77</sup> *Id.* at 17.

<sup>78</sup> The extent of the billboard craze is demonstrated by the wall of billboards aligning the property of Andrew Carnegie on Manhattan’s Fifth Avenue, across from Central Park. *See id.* at 26–28.

<sup>79</sup> *See id.* at 27–28.

<sup>80</sup> *Id.* at 28–29.

<sup>81</sup> MARJORIE PEARSON, NEW YORK CITY LANDMARKS PRESERVATION COMMISSION (1962–1999): PARADIGM FOR CHANGING ATTITUDES TOWARDS HISTORIC PRESERVATION 6–8 (2010).

<sup>82</sup> *Id.* at 6–9.

<sup>83</sup> After World War II, public consciousness for preservation began to shift away from isolated sites associated with the country’s and city’s historic past. . . . Widespread redevelopment, aided in part by such federal programs as the Highway Act of 1956 and Urban Renewal Act of 1962, began to change the face of urban America through the construction

developments, under the umbrella of the economic upswing that occurred after the War, led to a construction boom in the city which resulted in the wholesale change of the physical dimensions and character of some of its neighborhoods,<sup>84</sup> putting residents of other neighborhoods at perpetual unease that theirs could be next.<sup>85</sup> Eventually, the unease felt in certain quarters of the city,<sup>86</sup> in addition to the demolition of several more significant buildings<sup>87</sup> and the threat to many others,<sup>88</sup> created the political climate for the New York State legislature to pass the enabling statute, providing local governments the authority to enact laws to regulate private property with “special character or special historical or aesthetic interest or value.”<sup>89</sup>

### III. NEW YORK’S LANDMARKS LAW’S SUCCESSES AND SHORTCOMINGS

In 1965, New York City finally created the legal authority to protect its architectural heritage.<sup>90</sup> Although representing only a small portion of the city’s buildings,<sup>91</sup> the Landmarks Law’s impact on the lives of New Yorkers is hard to overstate.<sup>92</sup> The success of

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of highways, the expansion of the suburbs, and the rebuilding of central city areas.

*Id.* at 9 (quoting the author).

<sup>84</sup> *Id.*

<sup>85</sup> See WOOD, *supra* note 72, at 168.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 251–52 (discussing significant buildings—including Carnegie Hall, Grand Central, and Penn Station—that faced risk of demolition).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 141.

<sup>90</sup> N.Y.C. ADMIN. CODE § 25-301(b) (2020).

<sup>91</sup> Less than five percent of the city’s lot area falls under regulation by the Landmark Preservation Commission (“LPC”). PLACEECONOMICS, *supra* note 75, at 1.

<sup>92</sup> Maybe the clearest example of the impact of New York’s Landmarks Law is demonstrated by contrasting the city’s two main train stations, Grand Central Terminal and Pennsylvania Station. Once considered an architectural wonder, the old Pennsylvania Station was demolished and replaced by a sports arena, Madison Square Garden, before the city’s Landmarks Law was enacted. Its destruction is

the law in protecting New York's architectural heritage is evident throughout the city.<sup>93</sup> Indeed, it is nearly impossible to imagine what the city's streetscape would look like had it not been passed. How many of the city's most cherished buildings<sup>94</sup> would have been destroyed in the name of development, only to later realize the cost of this destruction?<sup>95</sup> Without the Landmarks Law, would the intersection of Broadway and Fifth Avenue still feature the iconic Flatiron building, or would it have been replaced by a generic, but more profitable glass tower?<sup>96</sup> Thankfully, we will never know.

Today, however, the challenge facing New York is not in protecting its buildings, but instead, protecting what is inside of them. The continued push of gentrification into the neighborhoods

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often viewed as a catalyst for the city's enactment of its Landmarks Law. Today, Penn Station provides its commuters with a constant source of delays and has been described as a "subterranean rat maze." In contrast, Grand Central stands as one of the city's most admired public places and stands as a testament to the importance of the Landmarks Law in preserving the city's heritage. Moreover, Grand Central is also closely connected with the city's Landmarks Law as its designation led to the seminal *Penn Central v. New York City* case which verified the city's right to regulate landmarked properties. See Anthony Flint, *The Price of Saving Grand Central Terminal*, CITYLAB (Oct. 17, 2018), <https://www.citylab.com/design/2018/10/saving-grand-central-40-years-later-cautionary-tale/573208/>; see also Michael Kimmelman, *When the Old Penn Station Was Demolished, New York Lost Its Faith*, N.Y. TIMES (Apr. 24, 2019), <https://www.nytimes.com/2019/04/24/nyregion/old-penn-station-pictures-new-york.html> (discussing the continued impact of the destruction of the original Penn Station on the lives of New Yorkers).

<sup>93</sup> *The New York City Landmark Law Over the Years*, N.Y. TIMES (Apr. 17, 2015), [https://www.nytimes.com/interactive/2015/04/18/opinion/editorial-landmarks-law-timeline.html#time369\\_10876](https://www.nytimes.com/interactive/2015/04/18/opinion/editorial-landmarks-law-timeline.html#time369_10876).

<sup>94</sup> See *id.*

<sup>95</sup> See Kim Slowey, *Construction Begins on New \$600M Main Entrance at NYC's Penn Station*, CONSTRUCTION DIVE (June 18, 2019), <https://www.constructiondive.com/news/construction-begins-on-new-600m-main-entrance-at-nycs-penn-station/557072/>; Kimmelman, *supra* note 92.

<sup>96</sup> See *50th Anniversary of Flatiron Building Landmarking*, FLATIRON DISTRICT (Sept. 21, 2016), <https://www.flatirondistrict.nyc/discover-flatiron/flatiron-history/september-20-2016-50th-anniversary-of-flatiron-building-landmarking>.

of the city's outer boroughs<sup>97</sup> has led some community groups to pursue historic district designation as a tool for preserving their neighborhoods in the face of economic upheaval.<sup>98</sup> Although criticized by some as a catalyst for gentrification and an inhibitor to the construction of affordable housing,<sup>99</sup> historic district designation has proven useful both as a tool for maintaining affordable housing and, in some circumstances, as a means for preserving small mom-and-pop retail stores.<sup>100</sup> Nevertheless, to the extent that historic designation is useful as a tool for communities, its effect is limited to providing a broad protection against new development and, currently, lacks the focus to protect individual businesses.

#### A. Individual Landmarking and Historic Preservation

Although the building housing the Stonewall Inn, the site of the 1969 riots which launched the American gay rights movement,<sup>101</sup>

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<sup>97</sup> The outer boroughs refer to the New York City boroughs of Brooklyn, the Bronx, Queens, and Staten Island and do not include Manhattan.

<sup>98</sup> GREGORY DIETRICH, A PROVEN SUCCESS: HOW THE NEW YORK CITY LANDMARKS LAW AND PROCESS BENEFIT THE CITY 42 (2014), <http://www.nypap.org/wp-content/uploads/2016/05/A-Proven-Success.pdf> (discussing how community groups in Bedford-Stuyvesant, Bay Ridge, Ridgewood, Richmond Hill, and the South Bronx, among other neighborhoods, are pursuing historic district designation to preserve their communities).

<sup>99</sup> Jack Denton, *Is Landmarking a Tool of Gentrification or a Bulwark Against It?*, PAC. STAN. (July 3, 2019), <https://psmag.com/economics/is-landmarking-a-tool-of-gentrification-or-a-bulwark-against-it> (“[Groups oppose] preservation out of fears that it may ‘accelerate gentrification by making housing more expensive, and perhaps also increasing the social status of a neighborhood by signaling the presence of amenities that higher income or more educated households value.’” (quoting Ingrid Gould Ellen)).

<sup>100</sup> DIETRICH, *supra* note 98 (“Without landmark protections, these buildings are rarely if ever demolished to make way for more affordable housing or cheaper retail space. Instead, they are almost always lost to new luxury housing, usually with retail space for chain or big box stores, not small mom-and-pop shops.” (quoting Andrew Berman)).

<sup>101</sup> See Sarah Pruitt, *What Happened at the Stonewall Riots? A Timeline of the 1969 Uprising*, HISTORY (June 28, 2019), <https://www.history.com/news/stonewall-riots-timeline>.

was recently designated a New York City Landmark,<sup>102</sup> that distinction by itself does not actually protect the Stonewall as an operating entity. This is because landmark designation only protects buildings, not businesses within them.<sup>103</sup> In other words, while the building that leases space to the Stonewall is protected against demolition, current landmark legislation does not prevent the building's owner from replacing the Stonewall itself with a bank, drug store, or corporate chain.<sup>104</sup>

Though it's heartening to know that the building which played host to such an important moment in American history will be preserved, the fact that the Stonewall itself is unprotected by any law speaks to the precariousness of the current environment and the need to extend preservation efforts beyond mere physical structures. Applying this thought to a different context reveals the inadequacy of the current preservation scheme. For example, who would find it acceptable to merely preserve the exterior of St. Peter's Basilica in the Vatican City while allowing the interior to turn into a casino or shopping mall? Why then should such an important place in America's history be left to chance?

### *B. Historic Districts and Neighborhood Preservation*

In addition to its authority to identify and designate individual buildings as landmarks, the LPC is also empowered to protect certain areas of the city that possess a "distinct sense of place" on the basis of the areas' architectural and historical significances.<sup>105</sup>

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<sup>102</sup> Geoffrey Montes, *The Stonewall Inn Is Granted Landmark Status*, ARCHITECTURAL DIGEST (Oct. 2, 2015), <https://www.architecturaldigest.com/story/stonewall-inn-landmark-status>.

<sup>103</sup> See Lindsay Rittenhouse, *Are New York Diners a Dying Breed?*, OBSERVER (Mar. 5, 2015, 9:30 AM), <https://observer.com/2015/03/are-new-york-diners-a-dying-breed/> (When asked why Café Edison couldn't be saved through landmarking, a spokesperson for the LPC stated, "We can't landmark a diner because it's a diner, we can only landmark a building, but we can't regulate the use (of the building).").

<sup>104</sup> See *id.*

<sup>105</sup> *Types and Criteria*, N.Y.C. LANDMARK PRESERVATION COMMISSION, <https://www1.nyc.gov/site/lpc/designations/landmark-types-criteria.page>.

Ranging from single blocks<sup>106</sup> to entire neighborhoods,<sup>107</sup> historic district designation remains a crucial tool for communities seeking to preserve the physical characteristics of their neighborhoods. Increasingly, the power of historic district designation is being recognized by communities as a tool for combatting the effects of gentrification.<sup>108</sup> Although useful as a means for preserving a neighborhood's physical appearance, the effectiveness of historic district designation is limited for those who view it as less about preserving buildings than about preserving neighborhoods.<sup>109</sup> Manhattan's Greenwich Village offers a cautionary tale for those relying on today's inadequate preservation measures as a means for shaping their neighborhoods' futures.

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<sup>106</sup> Doctor's Row in Bay Ridge, Brooklyn is the neighborhood's first historic district and is less than a block long. Craig Hubert, *Landmarks Preservation Commission Designates Bay Ridge's First Historic District*, BROWNSTONER (June 25, 2019, 12:34 PM), <https://www.brownstoner.com/architecture/landmarks-brooklyn-bay-ridge-doctors-row-historic-district-lpc-designation/>; see also Deidre Drewes, *The History of Streets: Stone Street*, UNTAPPED N.Y. (Nov. 28, 2012), <https://untappedcities.com/2012/11/28/the-history-of-streets-stone-street-nyc/> (discussing Stone Street's unique history and sense of place within Lower Manhattan).

<sup>107</sup> Lauren Cook, *NYC Historic Neighborhoods: Why Greenwich Village, Park Slope, More Districts Are So Special*, AM N.Y. (Sept. 12, 2016), <https://www.amny.com/real-estate/nyc-historic-neighborhoods-why-greenwich-village-park-slope-more-districts-are-so-special-1-12305601/> (discussing how some historic districts encompass entire neighborhoods).

<sup>108</sup> Discussing claims that landmark and historic designation "exacerbate issues of rapid gentrification," a report on the impact of New York's Landmarks Law suggests that, in fact, community groups within neighborhoods such as Bedford-Stuyvesant, Bay Ridge, Ridgewood, and the South Bronx have been pursuing historic district designation in order to preserve their neighborhoods from development forces. See DIETRICH, *supra* note 98.

<sup>109</sup> Increasingly, community groups are viewing historic district designation as something that transcends the mere preservation of buildings. Interestingly, this recognition is coming from within some of the city's most historically marginalized neighborhoods, such as Crown Heights and Bedford-Stuyvesant. When discussing the neighborhoods' pursuance of historic district designation, a community activist remarked that "designation is more about preserving neighborhoods than about the buildings." WOOD, *supra* note 72, at 9–10.



Long romanticized as an urban bohemia,<sup>110</sup> Greenwich Village has played a prominent role in the city's cultural history<sup>111</sup> and as a hotbed for neighborhood preservation activism.<sup>112</sup> After playing a leading role in the preservation movement's earlier struggle for landmark legislation, Greenwich Village is now protected as one of the city's largest historic districts.<sup>113</sup> The success of the Greenwich Village Historic District in preserving the area's architectural heritage is plainly visible for anyone who walks through the neighborhood, as the Village's brownstone-lined blocks are renowned for their charm and beauty. Equally visible, however, is the erosion of the Village's culture and sense of place from the continued shuttering of some of the neighborhood's most defining commercial establishments.<sup>114</sup> Within the last few years, the Village has witnessed the theft of a 183-year-old pharmacy,<sup>115</sup> a neighboring Italian restaurant that had been serving the community for forty

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<sup>110</sup> MOSS, *supra* note 15, at 139–42; NORVAL WHITE ET AL., *AIA GUIDE TO NEW YORK CITY* 126–30 (5th ed. 2010).

<sup>111</sup> Some of the country's most prominent literary and artistic figures either called the Village home or frequently visited, including James Baldwin, Bob Dylan, and Mark Twain. Daniel Lanciana, *New York Icons: Greenwich Village*, MEDIUM (Mar. 24, 2018), [https://medium.com/@daniel\\_lanciana/new-york-icons-greenwich-village-44fc20a5ef5c](https://medium.com/@daniel_lanciana/new-york-icons-greenwich-village-44fc20a5ef5c).

<sup>112</sup> Greenwich Village has stood at the forefront of the city's preservation efforts because of its attraction to developers and its being home to New York University which, over the decades, has demonstrated an inexhaustible desire to continue its expanse into the surrounding neighborhood. These challenges have tested the neighborhood's resolve and fortified the role of preservation in the community's psyche. *See* WOOD, *supra* note 72, at 170–73.

<sup>113</sup> Valeria Ricciulli, *See Greenwich Village's Historic Buildings in One Handy Map*, CURBED N.Y. (Apr. 29, 2019, 2:38 PM), <https://ny.curbed.com/2019/4/29/18522689/greenwich-village-historic-district-gvshp-map-tour> (describing the one-hundred-block Greenwich Village Historic District as the city's largest historic district).

<sup>114</sup> WHITE ET AL., *supra* note 110, at 141 (discussing the disappearance of cafés and coffeeshops in the neighborhood).

<sup>115</sup> Once the oldest apothecary in the United States, Avignone Chemist was forced to close in 2015 after its building's new owner, a hedge fund, tripled the rent to \$60,000 per month. Today, Avignone's former location is occupied by a fast-casual chain eatery that operates across the United States. Jeremiah Moss, *Avignone to Sweetgreen*, JEREMIAH'S VANISHING N.Y. (Apr. 26, 2016), <http://vanishingnewyork.blogspot.com/2016/04/avignone-to-sweetgreen.html>.

years,<sup>116</sup> and the Cornelia Street Café, an iconic space in the city’s literary, music, and art world<sup>117</sup> and a “pillar of Greenwich Village.”<sup>118</sup> With such establishments often substituted for vacant storefronts<sup>119</sup> or commercial chains,<sup>120</sup> the Village is currently in the midst of a transformation that risks disrupting the “sense of place” that historic districts seek to protect. Reflecting on this transformation, one commentator noted:

[T]he last decade has given rise to a ritual that’s become depressing in its familiarity. A local eating establishment—a diner, a trattoria—that’s been there

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<sup>116</sup> Trattoria Spaghetto, an Italian restaurant that served the Village for over thirty years, was forced to close after its builder’s new hedge fund ownership replaced the neighborhood establishment with a chain eatery that has twenty-five locations in New York City alone. Anthony Noto, *Mom-and-Pop Italian Restaurant to Become a ‘Dig Inn’*, N.Y. BUS. J. (Apr. 22, 2019, 10:02 AM), <https://www.bizjournals.com/newyork/news/2019/04/22/mom-and-pop-italian-restaurant-to-become-a-dig-inn.html>.

<sup>117</sup> See, e.g., Alex Brook Lynn, *And Then They Came for Cornelia*, TABLET (Dec. 18, 2018, 8:00 AM), <https://www.tabletmag.com/scroll/277102/cornelia-street-cafe-closes-and-another-bit-of-old-new-york-bites-the-dust>; Giovanni Russonello, *Cornelia Street Café, a Pillar of Greenwich Village Experimentation, Closes Its Doors*, N.Y. TIMES (Jan. 4, 2019), <https://www.nytimes.com/2019/01/04/arts/music/cornelia-street-cafe-closes.html>.

<sup>118</sup> Russonello, *supra* note 117. Ironically, Cornelia Street Café was honored on its tenth anniversary by the Koch administration as a “landmark cultural institution.” Unfortunately, this distinction did not carry any legal protection with it. Lynn, *supra* note 117.

<sup>119</sup> The commercial vacancy crisis that is occurring throughout the city is especially visible on Bleeker Street, a thoroughway which crosses through Manhattan’s Greenwich Village. Having transformed into what was described as a “fashion theme park . . . that once hosted no fewer than six Marc Jacobs boutiques on a four block stretch,” Bleeker Street is now a poster child for the phenomenon known as “high-rent blight.” Steven Kurutz, *Bleeker Street’s Swerve from Luxe Shops to Vacant Stores*, N.Y. TIMES (May 31, 2017), <https://www.nytimes.com/2017/05/31/fashion/bleecker-street-shopping-empty-storefronts.html>. The crisis on Bleeker Street has become so evident that a New York State Senator issued a report on the occurrence. The report found, among other things, that since 2001, approximately forty-four local small businesses have vanished and been replaced with upscale chains. BRAD HOYLMAN, BLEAKER ON BLEEKER 2 (2017), [https://www.nysenate.gov/sites/default/files/press-release/attachment/bleaker\\_on\\_bleeker\\_0.pdf](https://www.nysenate.gov/sites/default/files/press-release/attachment/bleaker_on_bleeker_0.pdf).

<sup>120</sup> HOYLMAN, *supra* note 119.

for years, and that you prize in every way (the food, the atmosphere, the people who work there), seems to be thriving. Then you're meeting someone there for dinner, and . . . poof! It's gone. Shuttered. Maybe it moved to a different part of town, but in most cases it's gone forever. Why? Even beloved restaurants have to play by the rules of capitalism, but these places have done that; they were popular and profitable. Until, that is, the rent the proprietors were paying is suddenly jacked up by fifty percent. Overnight, the place becomes unsustainable, and it closes. Then it sits as an empty storefront, essentially abandoned, for months or even years, until the space is taken over by a bank, a chain drugstore, a Starbucks, or maybe a new restaurant, with high-end backing, that no one ends up loving, and a year later that closes down, too. This syndrome, repeated countless times (with restaurants, music stores, and other cherished haunts), has neutered the once resonant and idiosyncratic culture of Greenwich Village. "It's been like watching an eroding beach—you can't see it happening, but one day you come upon that diminished sand dune, and the erosion is all too visible."<sup>121</sup>

#### IV. REIMAGINING LANDMARK DESIGNATION

What accounts for the distinction between how culturally significant buildings are treated relative to culturally significant businesses? Plainly answered, it exists because the city's Landmarks Law was not designed to regulate a building's *use*, per se, but instead was focused on protecting the physical characteristics of a building or, in the case of historic districts, a given area.<sup>122</sup> However, since

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<sup>121</sup> Gleiberman, *supra* note 21.

<sup>122</sup> Michelle Cohen, *Historic Districts and Landmarking: What They Mean and How They Could Affect You*, 6SQFT (Dec. 13, 2016), <https://www.6sqft.com/historic-districts-and-landmarking-what-they-mean-and-how-they-could-affect-you/> (discussing historic districts).

as early as 1989, members of the preservation community have recognized the need to expand landmark protection to cover businesses, as well as buildings.<sup>123</sup>

Celebrating the twenty-fifth anniversary of the Landmarks Law in 1989, a prescient thought was given by then-Chairman William J. Conklin, who suggested the creation of a special classification of landmark designation, “Living Legends,” for certain places that “promote neighborhood stability and have attained special significance in the life of the city.”<sup>124</sup> How many irreplaceable establishments have been lost over the thirty years since this thought was expressed? More importantly, how much more of New York’s cultural and social heritage must be sacrificed until the city provides protection for its “Living Legends?”<sup>125</sup>

In order to address today’s preservation challenges, New York City must reimagine the purpose of preservation beyond merely protecting the physical appearances of structures or select districts. While landmark preservation has been largely successful in maintaining the aesthetic beauty of the city,<sup>126</sup> such a narrow approach to preservation does little to safeguard the soul and character of New York’s various neighborhoods. Therefore, a new approach is needed—one that embraces the underlying rationale behind today’s Landmarks Law<sup>127</sup> while expanding the LPC’s mandate and authority to preserve and protect culturally and socially significant businesses and establishments.

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<sup>123</sup> William J. Conklin, *preface to* HISTORIC CITY COMM., NEW YORK CITY LANDMARKS PRES. COMM’N, NEW YORK: THE HISTORIC CITY 1–2 (1989) <http://www.nypap.org/wp-content/uploads/2017/02/New-York-The-Historic-City.pdf>.

<sup>124</sup> *Id.*

<sup>125</sup> It should be noted that “Living Landmarks” has been used by New York’s preservation community to honor those who have contributed greatly to the city’s preservation movement. *2019 Living Landmarks Celebration*, N.Y. LANDMARKS CONSERVANCY, <https://nylandmarks.org/event/2019-living-landmarks-celebration/> (last visited Mar. 23, 2020).

<sup>126</sup> WOOD, *supra* note 72, at 373–77.

<sup>127</sup> Conklin, *supra* note 123, at 5.

*A. Purpose of the Landmarks Law*

The drafters of the New York City Landmarks Law provided that the legislation's purpose was to:

(a) effect and accomplish the protection, enhancement and perpetuation of such improvements and landscape features and of districts which represent or reflect elements of the city's cultural, social, economic, political and architectural history; (b) safeguard the city's historic, aesthetic and cultural heritage, as embodied and reflected in such improvements, landscape features and districts; (c) stabilize and improve property values in such districts; (d) foster civic pride in the beauty and noble accomplishments of the past; (e) protect and enhance the city's attractions to tourists and visitors and the support and stimulus to business and industry thereby provided; (f) strengthen the economy of the city; and (g) promote the use of historic districts, landmarks, interior landmarks and scenic landmarks for the education, pleasure and welfare of the people of the city.<sup>128</sup>

While it is certainly the case that the Landmarks Law was primarily designed with architectural and aesthetic features in mind,<sup>129</sup> its language suggests that its purpose stretches beyond a mere desire to preserve buildings purely for their architectural qualities. Indeed, the law speaks to the protection of the city's "social" and "cultural" heritage in addition to "enhanc[ing] the city's attractions to tourists and visitors."<sup>130</sup> Moreover, although the LPC has reiterated its understanding that it is not authorized to protect businesses<sup>131</sup> or other activity on a given property, the Commission has, at times,

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<sup>128</sup> N.Y.C. ADMIN. CODE § 25-301(b) (2020).

<sup>129</sup> Conklin, *supra* note 123, at 5.

<sup>130</sup> § 25-301(b). At a certain point, New York's attractiveness to tourists could suffer should the city continue to experience an erosion of its local culture, as expressed through its storefronts and shops, and replacement by chain stores that can be found on nearly any corner in the United States.

<sup>131</sup> Rittenhouse, *supra* note 103.

acted in a manner that could be seen as providing protection for a given property based not on the building's aesthetic qualities, but, instead, based on a building's use.<sup>132</sup> This suggests that the LPC has, under certain circumstances, read its mandate beyond protecting buildings as also protecting important elements of life in New York City within them.<sup>133</sup> New York City should acknowledge this reality and provide more formal and transparent tools for the LPC to carry out a more holistic preservation mandate.

### *B. Landmark Preservation Law and Commercial Preservation*

As currently written,<sup>134</sup> the New York City Landmarks Law does not provide the LPC with the authority to give explicit legal protection to local businesses or other less tangible entities.<sup>135</sup> Instead, the law provides the LPC with the power to designate individual buildings, interiors, scenic landmarks,<sup>136</sup> and historic districts.<sup>137</sup> Essentially, the current law amounts to an authorization to regulate the physical features of a given property without a corresponding ability to regulate the building's use.<sup>138</sup> Indeed, the

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<sup>132</sup> The LPC's role in saving a number of architecturally unremarkable Broadway theaters from demolition during the Koch administration in the 1980s serves as an example of something akin to use protection. This is because the LPC's protection of the theaters was less about their architectural qualities, but more so about their status as theaters. *See* PEARSON, *supra* note 81, at 81–82.

<sup>133</sup> *See id.*

<sup>134</sup> § 25-301.

<sup>135</sup> *See id.*; *see also* Rittenhouse, *supra* note 103 (quoting the LPC's director of communications, saying, "We can't landmark a diner because it's a diner, we can only landmark a building, but we can't regulate the use (of the building).").

<sup>136</sup> Scenic landmarks provide protection for some outdoor public spaces such as parks—and even two trees—from development or unapproved alterations. *See* Dana Schulz, *Looking at NYC's 10 Scenic Landmarks and What Sets Them Apart from Other Public Parks*, 6SQFT (June 24, 2015), <https://www.6sqft.com/looking-at-nycs-10-scenic-landmarks-and-what-sets-them-apart-from-other-public-parks/>.

<sup>137</sup> § 25-301.

<sup>138</sup> *See generally id.* (Unlike the more broadly worded Bard Act, New York City's Landmarks Law is more narrowly worded to effectively limit its current application solely to the preservation of the physical features of a given

LPC's inability to regulate use was recently echoed by the Commission when activists called upon the LPC to intervene to prevent the continued shuttering of diners within the city.<sup>139</sup>

In practice, however, the LPC has occasionally acted in a manner that effectively circumvents the restriction against use regulation by providing what amounts to *de facto* protection for a given structure's use. The most prominent example of such *de facto* use protection is found by reviewing the LPC's role in preserving Broadway's Theater District.<sup>140</sup> Facing pressure from the City Planning Department's proposed rezoning of Manhattan's Midtown West neighborhood, and the Koch administration's desire to reinvigorate nearby Times Square, many theaters appeared to be under threat.<sup>141</sup> This threat was especially real for theaters that were often free-standing buildings, which provided developers with valuable air space into which to build.<sup>142</sup> Lacking the architectural prestige of nearby theaters like Radio City Music Hall, the Commission struggled with how to "identify and protect a building that was notable for something besides obvious architectural

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structure.); *see also Bard Act*, N.Y. PRESERVATION ARCHIVE PROJECT, <http://www.nypap.org/preservation-history/bard-act/> (describing the origins of the enabling act that permitted the enactment of the city's Landmarks Law).

<sup>139</sup> Discussing the limitations of the LPC's ability to landmark diners simply because of their status as diners, the LPC's director of communications said, "We can't landmark a diner because it's a diner, we can only landmark a building, but we can't regulate the use (of the building)." This restriction of use regulation was further demonstrated by suggesting that even if the building that housed the diner were landmarked, this alone would not prevent the building's owner from using the space for something other than a diner. Rittenhouse, *supra* note 103.

<sup>140</sup> PEARSON, *supra* note 81, at 81–82.

<sup>141</sup> *Id.*

<sup>142</sup> Paul Goldberger, *Architecture View; Theaters and Churches Are the City's New Battleground*, N.Y. TIMES (May 30, 1982), <https://www.nytimes.com/1982/05/30/theater/architecture-view-theaters-and-churches-are-the-city-s-new-battleground.html>. The mere fact that the LPC even attempted to identify a rationale for saving buildings that the Commission itself found to be architecturally unnoteworthy seems to suggest that the Commission was, ultimately, seeking to use its limited mandate to protect certain structures not for their own sake, but because of what took place within them. This, in a sense, seems to suggest that, at times, the LPC can be viewed as using physical features of a structure as pretext for achieving an ultimate goal of preserving a given activity within that structure.

qualities.”<sup>143</sup> The extent of the LPC’s commitment to theater preservation was demonstrated by the Commission’s placing nearly every midtown theater on its calendar for a public hearing,<sup>144</sup> also seeming to suggest that more than architectural distinction was being utilized as criteria.

Less explicit examples of such *de facto* use regulation are demonstrated by the LPC’s landmarking of the Cyclone roller coaster and Wonder Wheel in Coney Island, Brooklyn.<sup>145</sup> While these designations alone do not ensure the continued operation of either structure as a business,<sup>146</sup> they do, in a sense, demonstrate the ability of the LPC to restrict the use of a given structure.<sup>147</sup>

While useful in limited circumstances,<sup>148</sup> *de facto* use regulation is not a viable vehicle for today’s preservation movement because its effectiveness is too reliant on the unique features of a particular

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<sup>143</sup> PEARSON, *supra* note 81, at 82.

<sup>144</sup> Goldberger, *supra* note 142.

<sup>145</sup> LANDMARK PRES. COMM’N, DESIGNATION LIST 206, LP-1636 (1988); LANDMARK PRES. COMM’N, DESIGNATION LIST 215, LP-1708 (1989).

<sup>146</sup> Just down the Coney Island Boardwalk, the Parachute Drop stands as an example of a landmarked amusement ride which, while protected from demolition, is no longer in operation. However, unlike the Cyclone and Wonder Wheel, it received landmark status after it was no longer in operation. LANDMARK PRES. COMM’N, DESIGNATION LIST 215, *supra* note 145.

<sup>147</sup> The idea that the landmarking of the Cyclone and Wonder Wheel represent *de facto* use regulation is based largely on their unique status as amusement rides. While other landmarked structures can essentially alter their structures’ uses within the limits of local zoning laws, it seems unlikely that either the Cyclone or Wonder Wheel could be anything other than an amusement park ride.

<sup>148</sup> There are a few remaining standalone diners in Manhattan—such as the Pearl Diner, Square Diner, and Empire Diner—which could be seen as candidates for “*de facto*” preservation if the LPC were to adopt an attitude similar to that which it displayed when seeking to protect Broadway theaters. While not ensuring the continued occupancy of a diner (for example, the Empire Diner has transformed into something of an upscale restaurant), such protection would, at least, prevent demolition of the structures. Moreover, the physical layout of these diners may provide additional obstacles for their use as anything other than restaurants. To view some of New York’s remaining stand-alone diners, see *The Last Five Stand-Alone Diners in Manhattan*, SCOUTING N.Y. (Feb. 10, 2014), <http://www.scoutingny.com/the-last-stand-alone-diners-in-manhattan/>.



structure limiting its future usage.<sup>149</sup> In other words, while landmarking a theater or thrill ride is likely to narrow the structure's use based on the limited options for other activity in such spaces, such an approach is likely to be futile when other commercial uses are available.<sup>150</sup>

## V. SOLUTION

The last few years have seen a renewed interest in reinstating commercial rent regulation within New York City.<sup>151</sup> Currently, the two most prominent proposals are the Small Business Jobs Survival Act ("SBJSA")<sup>152</sup> and a proposal to reinstate a form of commercial rent regulation<sup>153</sup> which is similar in nature to the city's method of

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<sup>149</sup> See LANDMARK PRES. COMM'N, DESIGNATION LIST 206, *supra* note 145; LANDMARK PRES. COMM'N, DESIGNATION LIST 215, *supra* note 145.

<sup>150</sup> Stated differently, although landmarking a theater or amusement park ride may severely limit the extent of commerce that can take place on the structure, a typical building, even if landmarked, is likely able to switch out commercial tenants without any difficulty and, in many cases, simply leave the commercial unit vacant while awaiting a higher-paying tenant. This is evident throughout the West Village, for example. See Corey Kilgannon, *The Empty Storefronts of New York: A Panoramic View*, N.Y. TIMES (Sept. 6, 2018), <https://www.nytimes.com/interactive/2018/09/06/nyregion/nyc-storefront-vacancy.html?mtrref=www.google.com&gwh=6F3A0F2B6E1B8FE4EA9C6C7F02143133&gwt=pay&assetType=REGIWALL>.

<sup>151</sup> Spivack, *supra* note 3.

<sup>152</sup> See *Creating a Small Business Lease Program*, N.Y. CITY COUNCIL, <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3458244&GUID=D0860C6-E6C7-416E-8F05-563B4551EDB7&Options=ID|Text|Other|&Search=small+business+jobs+survival+act> (last visited Mar. 23, 2020).

<sup>153</sup> The Small Business Jobs Survival Act ("SBJSA") aims to provide commercial tenants with greater stability by providing them with a guaranteed ten-year lease renewal and the option for arbitration if a landlord and tenant cannot agree on new terms. This proposal received a hearing before the New York City Council in October 2018 but has yet to be voted on. Sadeef Ali Kully, *Council Bill on Commercial Leases in Limbo as Evidence of Vacancy Problem Grows*, CITY LIMITS (Oct. 11, 2019), <https://citylimits.org/2019/10/11/council-bill-on-commercial-leases-in-limbo-as-evidence-of-vacancy-problem-grows/>. A more ambitious proposal has recently been introduced by City Councilmember Stephen Levy which proposes to institute regulations similar to the city's residential regulation program. Elizabeth Kim, *Real Estate Industry, De Blasio Align Against*

regulating certain residential apartments.<sup>154</sup> These proposals, while likely necessary for the long-term cultural survival of the city's neighborhoods,<sup>155</sup> have faced—and will likely continue to face—enormous opposition from New York's powerful real estate lobby.<sup>156</sup> This is not to suggest that efforts for more comprehensive regulation should be abandoned, but instead to acknowledge the possibility that such reform could take time and therefore permit the continued pilfering of the city's neighborhoods through the eviction of irreplaceable local businesses. Realizing this, a parallel reform effort should be undertaken to identify and protect the city's culturally and communally significant commercial establishments. This effort can be thought of as a complement to the broader push for commercial rent regulation and as a mechanism for providing a more politically expedient solution to a problem that is highly time

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*Commercial Rent Control Proposal*, GOTHAMIST (Nov. 15, 2019), <https://gothamist.com/news/real-estate-industry-de-blasio-align-against-commercial-rent-control-proposal>.

<sup>154</sup> Unlike commercial tenants, New York City provides an extensive array of protections to residential tenants who rent apartments in buildings that fall under the city's rent stabilization or rent control schemes. These regulations, among other things, provide tenants with the right to a lease renewal and regulate annual rent increases based on the decision of a board charged with determining yearly rent increases for all regulated apartments. In June 2019, these regulations were strengthened by the passage of the Housing Stability and Tenant Protection Act. See Vivian Wang, *New Rent Laws Pass in N.Y.: 'The Pendulum Is Swinging' Against Landlords*, N.Y. TIMES (June 14, 2019), <https://www.nytimes.com/2019/06/14/nyregion/rent-laws-ny-deal.html>.

<sup>155</sup> As Greenwich Village demonstrates, a neighborhood's cultural identity can be quickly washed away even while maintaining a similar exterior. This phenomenon is not only embodied by physical landmarking, which does not protect businesses within the landmarked buildings, but is also demonstrated by the upscaling of former neighborhood restaurants into expensive and exclusive entities that no longer reflect the spirit of their former selves. See MOSS, *supra* note 15, at 142–47.

<sup>156</sup> Since 2000, New York's real estate industry has contributed over one hundred million dollars into New York State political campaigns. John Leland, *Real Estate Thought It Was Invincible in New York. It Wasn't.*, N.Y. TIMES (Nov. 29, 2019), <https://www.nytimes.com/2019/11/29/nyregion/real-estate-industry-nyc.html> (quoting Liz Krueger, stating, "Real estate on many levels has been more powerful than local government or state government.").

sensitive.<sup>157</sup> Although this proposal, too, will almost certainly elicit political opposition from real estate interests, it may also be seen by its opponents as an acceptable compromise when compared to the SBJSA or commercial rent stabilization.<sup>158</sup> Additionally, with a narrow focus centered on only select small businesses, this proposal addresses concerns raised by New York City Council Speaker Corey Johnson that broader commercial regulation is not sufficiently tailored toward small businesses.<sup>159</sup>

### A. Living Landmarks

As the fight for comprehensive commercial rent regulation moves forward, the city must establish a legal mechanism for identifying and evaluating culturally or communally significant local establishments that are of such value to the surrounding community that they should be provided a legal right to an affordable lease renewal.

Unlike physical structures, businesses do not lend themselves to easily definable criteria for evaluating their landmark worthiness.<sup>160</sup> The less tangible qualities of businesses relative to buildings and other physical structures present a challenge to preservationists

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<sup>157</sup> *Endangered Spaces: Your Favorite New York Spots Are Vanishing*, N.Y. TIMES (Apr. 14, 2019), <https://www.nytimes.com/interactive/2019/nyregion/endangered-spaces-nyc.html> (discussing the precarious nature of a number of prominent local businesses in New York).

<sup>158</sup> The passage of the Housing Stability and Tenant Protection Act of 2019 appears to have shaken the confidence of New York's real estate community. With comprehensive commercial rent control measures before the City Council, it seems reasonable to suggest that the industry may view measures to protect a relatively small number of businesses as a sensible compromise given the alternatives. See Leland, *supra* note 156.

<sup>159</sup> As currently written, the SBJSA would extend that same lease renewal and arbitration rights to all commercial tenants. Therefore, a large corporate box store would be afforded the same protection as a local "mom-and-pop" corner store. Kully, *supra* note 153.

<sup>160</sup> Under current LPC guidelines, in order for a structure to be designated an individual landmark, it must be at least thirty years old and possess "a special character or special historical or aesthetic interest or value as part of the development, heritage, or cultural characteristics of the City, state, or nation." *Types and Criteria*, *supra* note 105.

seeking to create a set of criteria that provides necessary leeway to protect a variety of establishments while also furnishing standards that must be met before a business can be designated.<sup>161</sup> Nevertheless, a few guiding principles should be considered—ones which seem capable of providing evaluators<sup>162</sup> with the ability to identify truly noteworthy businesses. Examples of considerations that should be used include: (a) the extent to which the business contributes to a community's sense of place;<sup>163</sup> (b) the extent to which the business embodies or has contributed to a significant moment or movement in the history of the city or surrounding neighborhood;<sup>164</sup> (c) the longevity of the business's operation within the neighborhood;<sup>165</sup> and (d) the extent to which a business has a

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<sup>161</sup> It should be noted that the individual landmark designation also involves a seemingly arbitrary assessment of what constitutes a building or structure that is worthy of landmark designation. Indeed, some even argue that buildings which are considered “unattractive” should be preserved based on their unique contribution to a city's architectural heritage. See Llewellyn Hinkes-Jones, *The Case for Saving Ugly Buildings*, CITYLAB (Jan. 10, 2012), <https://www.citylab.com/design/2012/01/case-saving-ugly-buildings/913/>. This is all to say that assessing physical buildings also involves a great deal of discretion.

<sup>162</sup> Ideally, a separate entity should be set up to work with local community organizations to identify businesses that fulfill one or more aspects of the criteria listed above.

<sup>163</sup> This consideration is designed to cover establishments which are viewed by local residents as an integral component of the community to the point where the establishment's absence could result in a segment of the community feeling alienated from the greater neighborhood. Although the forces precipitating change in a given community are likely to differ based on local conditions, the idea behind this consideration is to protect viable establishments which are particularly important in a given population but are under threat from economic or demographic changes in the area.

<sup>164</sup> This consideration is designed to cover establishments such as the Stonewall Inn and other businesses which have made significant cultural contributions. An example of a lost business that likely would have qualified under this consideration is the former music venue CBGB, which some label as the birthplace of punk rock but which was forced to close in 2006 over a rent dispute. Jon Pareles, *Fans of a Groundbreaking Club Mourn and Then Move On*, N.Y. TIMES (Oct. 17, 2006), <https://www.nytimes.com/2006/10/17/arts/music/17cbgb.html>.

<sup>165</sup> Currently, the LPC requires physical structures to be thirty years or older before qualifying for landmark designation. While a set age requirement may be

demonstrated capacity to bridge cultural or socio-economic divides within the neighborhood.<sup>166</sup>

Businesses which fulfill one or more of the above criteria would then go through a process similar to that which buildings and historic districts go through when they are candidates for landmark protection.<sup>167</sup> Should an individual business be approved, the body responsible for implementing the Living Legends component of landmark designation would be charged with setting an appropriate rent to ensure a business's continued ability to remain in the community while providing the owner of the landmarked commercial property a corresponding tax credit. Additionally, the city's Commercial Rent Tax—an effective 3.9% tax on the base rent of businesses south of Ninety-Sixth Street in Manhattan<sup>168</sup>—could also be waived for businesses based on their financial situation. Finally, a landmarked business would be reviewed upon its next lease renewal to ensure the continued viability of the business and to confirm that the considerations that supported the business's landmark designation still pertain. Ultimately, the cumulative impact of these regulations would result in a landmarked business obtaining lease terms that effectively ensure that such businesses are able to remain in operation for as long as they are viable and valued by their local community.

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appropriate for buildings, it may, in the context of business landmarking, create the incentive for a landlord to refuse to renew a lease with a business in order to avoid potential landmark designation. Therefore, while certainly useful in considering the appropriateness of a given business's potential landmark designation, no set age requirement should be adopted.

<sup>166</sup> This consideration is designed to capture businesses, like the beforementioned Scoops and Middle Eastern retailers on Atlantic Avenue, which connect diverse populations within a community.

<sup>167</sup> For an overview of the LPC's designation process, see *Designations*, LANDMARKS PRESERVATION COMMISSION, <https://www1.nyc.gov/site/lpc/designations/designations.page> (last visited Mar. 23, 2020).

<sup>168</sup> *Commercial Rent Tax*, N.Y.C. DEP'T. FINANCE, <https://www1.nyc.gov/site/finance/taxes/business-commercial-rent-tax-crt.page>.

*B. New York City's Authority to Landmark Businesses*

Because cities and local municipalities in New York State lack inherent sovereign power,<sup>169</sup> any action taken by a local legislature must be supported either by the New York State Constitution, the Municipal Home Rule Law, or an enabling statute.<sup>170</sup> As the city's authority to enact commercial rent regulation absent explicit authorization from the state legislature is highly contested,<sup>171</sup> it seems the legislation that enabled the city's Landmarks Law may offer a viable and less contentious alternative.<sup>172</sup>

Although nearly a decade passed before the City Council took advantage of the power it was bestowed, the 1956 passage of what has become known as the Bard Act (the "Act")<sup>173</sup> was a watershed moment in the city's preservation movement because it provided

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<sup>169</sup> REPORT ON LEGISLATION BY THE COMM. ON REAL PROPERTY LAW, N.Y. CITY BAR 6 (2018), <https://www2.nycbar.org/pdf/report/uploads/20072983-CommercialTenantHarassmentRealPropertyCoopCondoReportFINAL11.19.15.pdf>.

<sup>170</sup> *Id.*

<sup>171</sup> The city's newfound interest in enacting some form of commercial rent regulation has attracted a great deal of scholarship. So far, it appears that the general consensus in the academic community is that local governments in New York State are not authorized to implement commercial rent regulation without authorization from a state enabling statute. Those who support this opinion have pointed to the fact that the city's former commercial regulatory scheme was supported and authorized by a state enabling statute that has since expired. *Id.* For an analysis of the legal challenges facing commercial rent regulation and the SBJSA more specifically, see generally Henry R. Topper, Note, *Regulatory Takings and the Constitutionality of Commercial Rent Regulation in New York City*, 104 CORNELL L. REV. 530 (2019).

<sup>172</sup> The idea that commercial landmarking would be less contentious is based on the simple fact that it would inevitably cover only a very limited number of commercial establishments while commercial rent control and the SBJSA would cover a far greater number of establishments.

<sup>173</sup> The Bard Act derived its name from a leading force in the preservation movement, Albert Bard, whose relentless effort to obtain an enabling statute for local municipalities in New York State was finally realized in 1956. WOOD, *supra* note 72, at 140–42.

local governments in New York State the authority to enact their own landmark protection schemes.<sup>174</sup> The Act provides that: the governing board or local legislative body of any county, city, town or village is empowered to provide by regulations, special conditions and restrictions for the protection, enhancement, perpetuation and use of places, districts, sites, buildings, structures, works of art, and other objects having a special character or special historical or aesthetic interest or value.<sup>175</sup>

While enacted largely in response to the destruction of so many noteworthy buildings across the city,<sup>176</sup> the language of the Bard Act is broad. Instead of explicitly limiting its scope to buildings or physical structures, the Act speaks of “places”<sup>177</sup> as a category separate and apart from the later mentioned “districts, sites, buildings, structures, works of art, and other objects.”<sup>178</sup>

Moreover, the Act empowers local legislatures to enact “regulations, special conditions, and restrictions for the protection . . . [and] perpetuation and use of places.”<sup>179</sup> These mentions, taken together, indicate that the Act arguably provides New York City with the legal authority to amend the city’s Landmarks Law to provide the LPC with explicit authorization to enact measures to protect certain culturally or communally significant small businesses because such sites plausibly constitute “places” that can be seen as separate and apart from the other categories of protectable entities provided for in the statute.

### C. Statutory Interpretation in New York State

The New York State Court of Appeals has held that the primary rule of statutory construction is “to interpret a statute to effectuate the intent of the Legislature, and when the statutory language is clear and unambiguous, it should be construed so as to give effect to the

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<sup>174</sup> *Id.*

<sup>175</sup> N.Y. GEN. MUN. LAW § 96-a (2020).

<sup>176</sup> *Bard Act*, *supra* note 138.

<sup>177</sup> § 96-a.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

plain meaning of the words used.”<sup>180</sup> Moreover, New York courts have also held that “all parts of a statute are intended to be given effect and that a statutory construction which renders one part meaningless should be avoided.”<sup>181</sup>

Again, while it is likely the case that the driving force behind the passage of the Bard Act was largely focused on providing local governments with a legal mechanism to combat the physical destruction of notable structures,<sup>182</sup> it is also true that the preservation movement which ultimately led to the Act’s passage was concerned, in some circumstances, with building use as well. Carnegie Hall, for example, was understood by the preservation community to be an otherwise unnoteworthy structure but nevertheless the focal point of preservation concern, almost exclusively because of the building’s role in the city’s arts community.<sup>183</sup> Therefore, if we are to follow the court’s demand to “give effect” to each part of the statute, the notable absence of any limitation in scope on protection of buildings’ physical features seems all the more significant when considered in light of the preservation community’s concerns at the time of the Act’s enactment.

Here, in addition to enabling local governments to protect physical entities, such as buildings, structures, and works of art, the Bard Act explicitly confers upon municipalities the authority to regulate the “perpetuation and *use* of places.”<sup>184</sup> If “places” is to be given effect, then it must signify something distinct from “districts, sites, buildings, structures, works of art, and other objects.”<sup>185</sup> Based on the Act’s language, it is not clear why “places” could not be understood to include commercial establishments. Finally, while the

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<sup>180</sup> *Matter of Avella v. City of N.Y.*, 13 N.Y.S.3d 358, 363 (N.Y. App. Div. 2015) (quoting *People v. Finnegan*, 647 N.E.2d 758, 760 (N.Y. 1995)).

<sup>181</sup> *Id.* at 363–64.

<sup>182</sup> Although conceptualized decades before its eventual passage in 1956, “[t]he threat to Grand Central Terminal beginning in 1954 undoubtedly created a feeling of urgency that contributed to the adoption of the Bard Act.” *Bard Act*, *supra* note 138.

<sup>183</sup> See WOOD, *supra* note 72, at 252.

<sup>184</sup> § 96-a (emphasis added).

<sup>185</sup> *Id.*; see *Matter of Avella*, 13 N.Y.S.3d at 363–64.



Act does not provide any explicit language with regard to regulating rents, this absence could reflect the likelihood that such an addition would be viewed by legislators at the time as redundant, given that New York State had already enabled commercial rent control for at least ten years before the Act's passage.<sup>186</sup>

Together, this suggests that local governments in New York State are authorized to enact legislation that would provide legal protection to ensure the continued use of spaces that host commercial or community-based institutions of special character.

#### CONCLUSION

Preservation is a perpetual struggle that presents each generation with distinct challenges—challenges which inevitably confront the conventional wisdom of the day. Today, a retail crisis is wreaking havoc across our communities in a manner reminiscent of the destruction that once afflicted the city's architectural heritage. While New Yorkers and visitors to the city are fortunate to have benefitted from the wisdom of past preservation movements that have done so much to preserve the physical beauty of the city, aesthetic preservation alone will not be enough to fully preserve what is loved by so many about New York. Therefore, the city must reimagine preservation and provide the Landmarks Preservation Commission with the legal tools necessary to fully protect our neighborhoods from the constant cultural erosion that accompanies the loss of culturally significant businesses.

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<sup>186</sup> Saxe & Dockwell, *supra* note 30.