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Among the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction. The friend of popular governments never finds himself so much alarmed for their character and fate as when he contemplates their propensity to this dangerous vice.

James Madison
The Federalist, No. 10

I. INTRODUCTION

Since 1975 the dramatic upsurge of interest in historic preservation has continued apace. The causes are many, but powerful incentives for preservation certainly stem from the celebration of the Bicentennial in 1976 as well as from the escalating transportation and building costs, fueled primarily by inflationary domestic monetary policy. As is usually the case, over time both common law and legislation come to reflect the values and interests of society, albeit in dramatically different ways. So it is with historic preservation law. Reflecting mainly the legislative dynamics of political economy, preservation law now covers a wide spectrum of interests and exerts a significant influence over the allocation of property rights in many jurisdictions.

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1. For a discussion of state preservation law as of 1975, see Beckwith, Developments in the Law of Historic Preservation and a Reflection on Liberty, 12 Wake Forest L. Rev. 93 (1976).
3. For a summary of the more intrusive state statutes, see J. Beckwith, Significant State Historic Preservation Statutes (1979).
Although local, state, and federal preservation law has grown rapidly during the past four years,\(^4\) the single most important event was, of course, the Supreme Court's holding in *Penn Central Transportation Co. v. City of New York*\(^5\) that a New York City landmark ordinance\(^6\) enacted pursuant to a state statute\(^7\) did not amount to a taking of property for which compensation must be paid. Decided during a time of expanded private-law preservation accomplishments,\(^8\) of a general recognition of the inefficiency and incompetence of governmental regulation,\(^9\) and of the influence and attitudes of the new class, *Penn Central* is not without its ironies. Indeed, the Supreme Court's sanction of the expanded politicization of property rights typifies preservation law during the period and graphically illustrates a fundamental choice facing the preservation movement, indeed all of American society. Simply put, the choice is between the open society and faction, between spontaneity and politicization. On the one hand is the Madisonian model of civility, restraint, and the private law; on the other is the grim reality of coercion, incivility, and the unprincipled redistribution of wealth so characteristic of present-day governance. Many preservationists and their associates in various environmental coalitions exhibit all of the unhappy characteristics of Madisonian faction and the new class, advocating as they do the supplanting of private agreement by the public law. Ironically, all of this is done in the name of preserving reminders of a past whose moral and economic foundations in our own time are so badly eroded.

In light of these developments, this article has a dual purpose. First, the article discusses the evolution of state and local preservation law since 1975. The coverage is comprehensive and includes an appendix that is an updated revision of my compilation of legislation first published in 1976 by the National Trust for Historic Preservation in *A Guide to State Programs*.

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4. For discussions of preservation law prior to 1976, see symposia at 12 *Wake Forest L. Rev.* 1 (1976); 8 *Conn. L. Rev.* 201 (1976); 36 *Law & Contemp. Prob.* 309 (1971).


The article has, however, a second and more compelling purpose. As a matter of social policy, the historic preservation movement is deeply in error regarding legal methodology and first principles. Most preservationists, especially those who are beneficiaries of public monies, advocate statist solutions to private problems. They prefer zoning, with its public intrusion into matters of aesthetics, over private agreement. They advocate increased public funding. Why do preservationists prefer public solutions? Do many preservationists, especially the intellectuals, advance their own self interest in governmental solutions as members of the new class? Does the historic preservation movement, with its roots in the humanities, share a historic bias against free-market capitalism and a free society? One must ask whether the state has any role to play in historic preservation beyond the enforcement of contracts and the protection of private property. If not, how can the influence of statist preservationists be overcome and the role of the state in preservation matters be reduced to its proper minimal level? In short, what is the preservation policy of a free society?

II. Public Law: Historic Preservation and the Police Power

If recent developments are any indication, then for the foreseeable future the greatest changes in preservation law will occur within the ambit of the police power to create historic districts and to designate historic landmarks. Because most of the new preservation law is statutory, it exhibits quite naturally the familiar characteristics of legislation as opposed to other forms of law, such as common law and private contracts. Briefly stated, legislation is inextricably wedded to the political process and generally reflects no presumption save that of the efficacy of whatever constituency secured its passage. The recent dramatic increase in public interest in preservation and in the scope and quantity of preservation law is consistent with this model.

A. Historic District and Landmark Legislation

At present at least forty jurisdictions authorize some form of historic district zoning, the most frequently used public-law regulation technique. Unlike landmark designation of a single building, the focus of a historic district designation is on preserving the cumulative historical or architectural quality of an interrelated group of buildings. Like zoning controls, whose geographic and regulatory features may differ greatly in complexity from place to place, historic district statutes also vary

11. See statutory appendix infra.
widely. Since 1975 Alaska, the District of Columbia, Indiana, Iowa, Mississippi, and Nebraska passed new historic district statutes; Alabama authorized "preservation districts" in Mobile; North Carolina extensively revised its statute; and Rhode Island expanded existing provisions to include East Greenwich, Coventry, and Woonsocket.

The Alaska, Mississippi, and Nebraska statutes are relatively modest, and simply authorize the creation of historic districts without specifying in detail the procedures to be followed. The Alaska statute, however, does give some guidance as to historic criteria that would justify creating a district, and the Mississippi statute requires notice of a public hearing before a district is created. Both the Mississippi and Nebraska statutes stipulate the membership and terms of members of a local historic district commission, and whether or not the power of eminent domain may be used. Furthermore, in both Alaska and Mississippi, the local commission is required to consult with a state agency prior to creating the district.

By contrast, the District of Columbia, Indiana, and Iowa statutes are far more elaborate, containing provisions typical of their type. The historic districts may be created by local governing bodies although Iowa authorizes their creation by majority vote in a referendum following a petition of ten percent of the residents. As is customary in his-

12. For a discussion of historic district legislation as of 1975, see Beckwith, supra note 1, at 95-98.
13. ALASKA STAT. § 29.33.090 (1972 & Supp. 1979); Id. §§ 29.48.108-.110 (Supp. 1979); Id. § 41.35.180(5) (1977); Id. §§ 45.98.010-.070 (Supp. 1979).
15. IND. CODE ANN. §§ 18-4-22-1 to -12, -7-22-1 (Burns Supp. 1978).
23. ALASKA STAT. § 29.48.110(b) (Supp. 1979).
toric districts,31 these new statutes authorize aesthetic regulation by means of a certificate of appropriateness issued by the local historic district commission.32 Denials of applications must be justified,33 and provision is made for showings of economic hardship.34

Two subsections of the District of Columbia and Indiana statutes depart from prior practice. From the standpoint of remedies, the D.C. statute is unique in that any party that demolishes a property in violation of the ordinance may be required to rebuild the property as it existed prior to the demolition.35 This provision is apparently the first of its kind in the country. The Indiana statute contains an innovative recitation of design considerations to guide development in the historic districts.36

In contrast to state statutes authorizing historic districts are those that authorize the local designation of individual landmarks. At least twenty states37 have enacted such laws either as separate legislation or as part of a law authorizing local historic districts. Landmark designation employs the police power in the same way historic district designation does, and state landmark statutes are as diverse as those authorizing historic districts.

Prior to the Penn Central case isolated historic landmarks, especially those in urban areas, posed more troublesome legal questions than the larger historic districts. Since 1975 at least two jurisdictions, the District of Columbia and Mississippi, have authorized the designation of historic landmarks.38 In light of the Penn Central decision, it is reasonable to anticipate further landmarks designation.

One state, North Carolina, experienced a total revision of existing legislation. In 1979, the North Carolina General Assembly rewrote the historic district and landmarks statutes, the revisions of which are discussed at length elsewhere.39

34. District of Columbia, Historic Landmark and Historic District Protection Act of 1978, §§ 5(e)-(g), 6(e)-(g), 7(e)-(f) (Nov. 28, 1978); Ind. Code Ann. § 18-7-22-11 (Burns Supp. 1978); Iowa Code Ann. § 303.30 (West Supp. 1979).
37. See statutory appendix infra.
B. Constitutional Issues: Procedural Due Process and Economic Hardship

Constitutional questions centering on historic district zoning and landmark designation have evolved significantly since 1975, with new questions arising as old ones seem settled. For example, although the propriety of using the police power for preservation purposes now seems assured, this very success has given rise to problems of procedural due process in the management of historic district and landmarks commissions.40

By 1975 the propriety of the police power for preservation purposes was largely settled. Historic preservation was accepted as part of the "general welfare" embraced by the police power.41 While aesthetics was important, the courts tended to stress the importance of economics and commercial benefits, especially from the tourist industry.42

Since 1975 state courts have continued to uphold the constitutionality of historic district legislation.43 Interestingly, in A-S-P Associates v. City of Raleigh,44 the North Carolina Supreme Court upheld the use of the police power45 in a historic district that was not a tourist attraction.46 Furthermore, the case illustrates, in a manner reminiscent of Euclid v. Amber Realty Co.,47 the curious dispensation given the police power in land-use cases by courts that are prone to invoke the doctrine of substantive due process to invalidate economic regulation.

By upholding the Oakwood ordinance, the North Carolina Supreme Court went beyond the older cases. Oakwood, a late nineteenth-century neighborhood east of the state capitol,48 was not a tourist attraction like Boston's Beacon Hill, New Orleans's Vieux Carré or Santa Fe's adobe district. Nonetheless, the court recognized that preservation was permissibly within the police power because it promoted cultural values, urban revitalization, and architectural creativity. This construction of the general welfare will become more apposite because most historic districts now being created are not tourist attractions but are, rather, part of the fabric of typical living communities, perhaps cherished by their residents but not cultivated by outside visitors. Thus, the

41. Beckwith, supra note 1, at 101.
42. Id.
44. 298 N.C. 207, 258 S.E.2d 444 (1979).
45. Id. at 216, 258 S.E.2d at 450.
46. Id. at 210, 258 S.E.2d at 446-67.
47. 272 U.S. 365 (1926).
A-S-P case will strengthen the use of the police power for preservation purposes to the extent that it dispenses with the "tourist rationale."

In *Euclid*, the United States Supreme Court upheld the general zoning power. In both *Euclid* and A-S-P, land use regulation was upheld by a court sympathetic to substantive due process. *Euclid* was decided in 1926 at the height of the 1904-1933 substantive due process era; yet Justice Sutherland, after expounding on the increasing complexity of urban life, found the question to be fairly debatable and deferred to the legislature. Sutherland's basic assumption was wrong, of course, because complexity is hardly a compelling basis for the assertion of the police power. His was the common rationalistic fallacy of believing that something must be done consciously and by design to insure an orderly society. On the contrary, given the inherent limitations of the human mind, spontaneous decentralized institutions such as the free market are essential to the creation of an orderly society that is the result of human action but not of human design. The coordination problem of atomistic knowledge makes central planning impossible, and the history of the administration of zoning laws largely bears this out.

The A-S-P case follows *Euclid*'s relaxed standard of judicial review. It has long been observed that state courts continue to apply the doctrine of substantive due process long after its rejection by the United States Supreme Court. The Supreme Court of North Carolina has been pre-eminent in its adherence to the doctrine, as most recently shown in *In Re Aston Park Hospital, Inc.* Yet this same court in A-S-P had no difficulty in holding that historic preservation was a permissible use of the police power. Indeed, the court specifically declined to review the substantive wisdom of the historic district ordinance. Thus the same double standard found in *Euclid* during the *Lochner* era was reasserted in North Carolina in A-S-P during the *Aston Park* era.

Historic preservation as a permissible objective for the use of the police power seems assured, but this very success will likely raise future problems of procedural due process. For example, while the standard...
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of judicial review of decisions by preservation commissions apparently is not rigorous, it is not without limits. As the standard of review articulated by Justice Braucher in *Gumley v. Board of Selectmen* makes clear, a complete and comprehensive record is essential to any preservation commission decision. Given the lay membership of most preservation commissions, casual concern for legal formalities may be expected.

In addition to the expected state court focus on procedural due process, the *Penn Central* case insures future litigation of the issue of economic hardship. The older state court police-power cases, as well as the more recent gloss added by such cases as *A-S-P*, did not address the constitutional status of historic preservation laws under the fifth amendment of the federal Constitution. Apparently, this question has been given a definitive answer in *Penn Central*. In brief, the Court upheld the New York City Landmark Preservation Commission’s refusal to allow the construction of a tall office building on the site of Grand Central Station, a designated New York City landmark. By a six to three vote, the Court held that the restrictions of the city ordinance, enacted pursuant to the state statute, did not constitute a “taking” of property for which compensation must be paid. The Court’s approval of landmark regulation will certainly have a great impact on the willingness of local governments to enact such laws. In presenting their arguments in support of landmark designation, preservation interests will find their legal position enhanced. Thus, historic preservation will become an even more influential consideration in controlling the use of land.

To be sure, preservation will be a more influential consideration, but not one without limits. The ordinance upheld in *Penn Central* provided that certificates of appropriateness should be granted if the applicant can show that landmark designation would result in undue economic hardship, a burden not carried by the Penn Central Transportation Company. The Court held that there was no taking because the railroad had failed to show that it had been denied a reasonable economic return in light of its transferable development rights. Some state statutes and local ordinances already provide for a relaxation of

57. *Id.* at 724, 358 N.E.2d at 1015.
58. Indeed, as Russell Brenneman points out, the *Figarsky* case was won because of the completeness of the record made at the commission hearing. *See R. Brenneman, The Development and Significance of Figarsky v. Norwich Historic District Commission* (1976).
59. Such as in the preservation ordinances in the District of Columbia and in Louisville, Kentucky, which were strengthened in keeping with the *Penn Central* decision. *National Trust for Historic Preservation, 5 Landmark and Historic District Commissions No. 1* (Feb. 1979).
requirements in cases of hardship and, given the sanction by the Supreme Court, will increasingly do so in the future. The Court, however, left unanswered the requirements for a showing of economic hardship and left the door open for future litigation to flesh out the meaning of the term.

Although procedural due process and economic hardship will likely loom large in future preservation litigation, presumably it is clear that the police power may be used with relative confidence in the preservation of historic districts and landmarks. But if preservationists have won a major victory, it must still be asked: to be sure, the police power may be used, but at what cost and to whom? The great benefits of historic preservation are familiar enough: enhanced property values, stabilized tax bases, and the ambiance of history and tradition. But what certainty do we have that the benefits of an essentially political methodology for allocating property rights will exceed the costs? Restrictions on historic landmarks and districts usually prevent the best economic use of the property. Isolated landmarks present the most acute problems of efficient use of land, quite graphically illustrated by Grand Central Station which more than likely will never provide any services other than as a Beaux Arts structure. In a city already devastated by the politics of rent control, any further limitations on the market mechanism must be greeted with mixed feelings at best. To this observer, the holding of the Penn Central case is regrettable and will accelerate the politicization of economic decisions with its attendant inefficiencies and attenuation of individual autonomy.

C. Public Preservation Agencies

The passage of the National Historic Preservation Act of 1966 and the growth of the environmental protection movement have encouraged most states to establish some form of state preservation agency. All of them have appointed a state historic preservation officer (hereinafter referred to as SHPO) to implement state responsibilities under the 1966 Act. Most of the preservation agencies are public

60. Typical is a Virginia statute, VA. CODE ANN. § 15.1-503.2 (Supp. 1979), which allows the owner of a designated historic landmark to demolish it if he has applied to the governing body for demolition permission and, following a denial, has given the governing body a right of first refusal to buy the landmark for the required length of time, but with no executed contract of sale resulting.

61. The Illinois landmark statute was recently amended to explicitly incorporate the Penn Central holding so that the denial of a demolition permit for a landmark building "shall not constitute a taking . . . unless . . . [it] deprives the owner of all reasonable beneficial use or return." P.A. 81-560, 1979 Ill. Legis. Serv. 1273 (West).


63. For references to the relevant state statutes as of 1975, see Beckwith, supra note 1, at 182-87.
bodies funded through state tax revenues, but some are quasi-public organizations chartered and perhaps subsidized by the states.

The public agencies in the various states generally have similar functions: acquiring and preserving historic sites and archaeological remains, accepting gifts and encouraging interest in historic preservation, conducting research and surveying historic resources, and erecting historical markers. Most states authorize the maintenance of a state register of historic places, and the head of the agency often acts as the SHPO.

Some state agencies are authorized specifically to cooperate in implementing either or both federal and local preservation laws. The relatively new statutes of a number of states, such as Alaska, Indiana, Kentucky, and Utah explicitly provide for state participation in implementing the 1966 Act, including nominations to the National Register of Historic Places. Some states, such as Alaska and Connecticut, specifically authorize the state agency to consult with localities about creating historic districts, reviewing the adverse impact of proposed actions on local historic resources, and granting financial assistance in the form of loans or grants in aid.

While the state agencies basically have similar functions, they also carry out work unique to their states. For example, some states, especially in the West, link preservation activities to the state park system. To illustrate, Arizona's State Parks Board maintains the state register of historic places. In other states, such as Nebraska, North Carolina, and South Carolina, the agencies function as the state archives, one of the more traditional state undertakings antedating the advent of the police power.

Since 1975 there has been an increase in the number of state public agencies that deal exclusively with preservation matters. At least twelve states and one territory (Arkansas, Guam, Hawaii, Idaho, 64

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64. See generally statutory appendix infra.
65. ALASKA STAT. § 41.35.180 (1977).
66. IND. CODE ANN. § 14-3-3-3-3(a) (Burns Supp. 1979).
70. CONN. GEN. STAT. ANN. § 7-147b(a) (1972).
75. ARK. STAT. ANN. §§ 8-904 to -913 (Supp. 1979).
Illinois,\textsuperscript{79} Indiana,\textsuperscript{80} Kansas,\textsuperscript{81} Montana,\textsuperscript{82} Nevada,\textsuperscript{83} New Hampshire,\textsuperscript{84} Utah,\textsuperscript{85} Vermont,\textsuperscript{86} and Washington\textsuperscript{87} have created state preservation agencies. These separate agencies carry on some responsibilities (especially regarding archaeological and historic sites) formerly vested in agencies less specifically organized for preservation purposes. These agencies are increasingly assuming new responsibilities that reflect recent initiatives in preservation law, such as implementing preservation incentives of the Tax Reform Act of 1976,\textsuperscript{88} assisting local governments in the creation of historic districts, and carrying out new and expanded state responsibilities for the preservation of historic resources. In some states, for example, the regulatory power of the agencies can be invoked to require review of public, publicly funded, or licensed projects affecting properties given special legal status by listing in the state register or by location in a state historic district.

As state preservation law becomes more complex, the tasks of state agencies become more specialized. In response to this trend, some of the more recent statutes create state preservation agencies with specialized subdivisions.\textsuperscript{89} Growth of state preservation agencies should not be unexpected. This growth is consistent with the diffuse costs and concentrated benefits characteristic of governmental regulation generally.\textsuperscript{90}

With a growing constituency within the agencies and among owners of historic property, the preservation bureaucracy approximates the traditional model of a bureaucracy run primarily for the benefit of its members and their stronger client groups—in this case, the preservationists. As in many instances of governmental regulation, their interests are congruent. Furthermore, growth of the preservation bureaucracy will likely continue as state and local preservation initiatives accelerate in response to the sanction given by the Supreme Court in \textit{Penn Central}. 

\begin{itemize}
\item \textsuperscript{79} ILL. ANN. STAT. ch. 127, §§ 133d1-d14 (Smith-Hurd Supp. 1979).
\item \textsuperscript{80} IND. CODE ANN. §§ 14-3-3.1 to -14 (Burns Supp. 1979).
\item \textsuperscript{81} KAN. STAT. §§ 75-2715 to -2725 (1977 & Supp. 1979).
\item \textsuperscript{82} MONT. CODE ANN. §§ 22-3-422 to -442 (1979).
\item \textsuperscript{83} NEV. REV. STAT. §§ 383.011-.021(1977), as amended, ch.102, § 1, 1979 NEV. STATS. 159; ch. 179, § 1, 1979 NEV. STATS. 269.
\item \textsuperscript{84} N.H. REV. STAT. ANN. §§ 227-C:1-9 (1978).
\item \textsuperscript{87} WASH. REV. CODE §§ 43.51A.00-.140 (Supp. 1979).
\item \textsuperscript{89} \textit{E.g.}, the Indiana Division of Historic Preservation includes four subdivisions dealing respectively with archaeology, registration and survey, museums, and historic sites and structures. Similarly, the Iowa State Historical Department is segmented into the divisions of historical museums and archives, state historical society, and historic preservation.
\item \textsuperscript{90} \textit{See text accompanying notes 202-06 infra}.
\end{itemize}
D. Governmental Review of Public and Private Action

Many kinds of actions may have an impact on historic resources. Just as governments may encounter historic property as a result of public projects, such as road construction, so too private actions may have an adverse affect. In recent years, states have been more directly involved in regulating governmental projects and, in some cases, private actions that may endanger historic structures and sites. At least twenty states now have statutes authorizing or requiring review of proposed projects that may have an impact on archaeological and historic resources.91

The earliest laws of this kind scrutinized the adverse effects of governmental projects, particularly road construction, on archaeological sites. The simplest of these statutes92 are permissive, and authorize cooperation among governmental agencies to minimize the adverse impact of state projects on archaeological remains. Salvage by the state archaeologist is often authorized. Some states, however, have moved beyond authorizing salvage work to requiring it. Alaska, for example, requires that if a public construction project is proposed on any historic, prehistoric, or archaeological site, the project may not commence until salvage work is completed.93 If the site is discovered during construction, the state's Department of Natural Resources must be notified and its concurrence obtained for continuing the project.94 If the required concurrence is not obtained within ninety days, the agency or person performing the construction may appeal to the governor for a final decision.95

The National Historic Preservation Act of 1966,96 the National Environmental Policy Act of 1969,97 and the Department of Transportation Act of 196698 each set up a mechanism for reviewing the impact of federally related projects on historic structures and sites. Recent state statutes modeled after these federal laws have added a new dimension to the review of proposed public and private actions. Some states, such as Kansas99 and Hawaii,100 amended their salvage statutes to require added protective scrutiny for historic properties listed on the state or

91. See statutory appendix infra.
93. ALASKA STAT. § 41.35.070(c) (1977).
94. Id. § 41.35.070(d) (1977).
95. Id. § 41.35.070(e) (1977).
100. HAWAII REV. STAT. §§ 6E-8 to -10 (1976).
National Registers. The procedure in Kansas is modeled on Section 4(f) of the Department of Transportation Act. State or local governmental work in Kansas affecting a historic site may not proceed until the governor or local governing body finds that there is no feasible and prudent alternative to the project, and that it includes all possible planning to minimize harm to the site.\textsuperscript{101} Appeal in either case may then be had to the district court having jurisdiction in the county in which the historic site is located.\textsuperscript{102} Hawaii models its regulation on Section 106 of the National Historic Preservation Act, but also extends the scope of regulation to include private action affecting any historic property in the Hawaii Register of Historic Places.\textsuperscript{103} To allow time for review, a landowner must notify Hawaii's Department of Land and Natural Resources of any proposed construction.\textsuperscript{104} The construction may not commence or, in the event that it has already begun, continue until the department has given its concurrence or ninety days have elapsed, whichever occurs sooner.\textsuperscript{105} Within the ninety days the state must either begin condemnation proceedings for the purchase of the property, permit the project to begin, or undertake salvage operations on the site.\textsuperscript{106}

Perhaps the 1976 Illinois statute is the state law most explicitly patterned after the National Historic Preservation Act of 1966.\textsuperscript{107} It establishes the Illinois Register of Historic Places\textsuperscript{108} and the Illinois Historic Sites Advisory Council,\textsuperscript{109} modeled respectively after the National Register and federal Advisory Council on Historic Preservation that were created in the 1966 Act. The Illinois state historic preservation officer, who is also director of the state Department of Conservation, designates places on the state register from nominations submitted by the council.\textsuperscript{110} Designation as a Registered Illinois Historic Place includes an enumeration of the site's "Critical Historic Features," which thereafter may not be substantially altered or demolished without a Certificate of Compliance from the SHPO.\textsuperscript{111} A person who wants to demolish a critical historic feature must give notice of intent to the Department of Conservation and must post notice at the site.\textsuperscript{112} Within

\textsuperscript{101} KAN. STAT. § 75-2724 (1977).
\textsuperscript{102} Id.
\textsuperscript{103} HAWAII REV. STAT. §§ 6E-8 to -10 (1976).
\textsuperscript{104} Id. § 6E-8(a) (1976).
\textsuperscript{105} Id.
\textsuperscript{106} Id.
\textsuperscript{108} ILL. ANN. STAT. ch. 127, § 133d6 (Smith-Hurd Supp. 1979).
\textsuperscript{109} Id. § 133d3.
\textsuperscript{110} Id.
\textsuperscript{111} Id. § 133d7.
\textsuperscript{112} Id. § 133d8(a).
thirty days of receipt of this notice, the SHPO or any individual may request a meeting to discuss the proposed action.\textsuperscript{113} The meeting must be held within sixty days of request, and the topics to be discussed shall include avoidance and minimization of adverse effects, methods of preserving the structure or place, and possible alternatives to the proposed action.\textsuperscript{114} The SHPO must help interested parties explore every possible means for substantial preservation of the registered historic place.\textsuperscript{115} Within thirty days of the meeting, the SHPO must issue a certificate of compliance allowing the project to proceed if it is determined (1) that the person filing notice of the proposed act has negotiated in good faith and further negotiations would not be productive, (2) that the proposed action would not have an impact significant enough to warrant further delay, or (3) that the person filing notice agrees to modifications of the proposed action specified by the SHPO.\textsuperscript{116} The SHPO, however, may delay issuance of a certificate for another ninety days if he finds that none of the preceding grounds for issuance have been met.\textsuperscript{117} During this additional delay period, the SHPO may require negotiations to continue, and photographs and measured drawings may be made as a lasting record of the site.\textsuperscript{118} After the ninety days have elapsed without a certificate being issued, the SHPO must issue a certificate at the applicant's request.\textsuperscript{119}

Projects financed wholly or in part by state funds are subject to a stricter test under the Illinois law. Those projects that will have an adverse economic or environmental impact on registered historic places are not permitted at all unless the SHPO finds that (1) the project is necessary for the public benefit, (2) the project cannot be carried out practically so as to avoid the adverse effect, and (3) the adverse effect is minimized to the maximum extent feasible.\textsuperscript{120}

The growing number of state environmental laws patterned after the National Environmental Policy Act offer another kind of regulatory protection for historic properties.\textsuperscript{121} These state laws afford protection of resources to the extent that these resources are viewed as part of the environmental values governed by the statute. The purposes, stated in the preambles of such statutes or in the definitions sections, often explicitly include the protection of historic sites and values.\textsuperscript{122}

\textsuperscript{113} Id. § 133d8(b).
\textsuperscript{114} Id. § 133d8(c).
\textsuperscript{115} Id. § 133d8(d).
\textsuperscript{116} Id. § 133d8(d)(1).
\textsuperscript{117} Id. § 133d8(d)(3).
\textsuperscript{118} Id.
\textsuperscript{119} Id. § 133d8(f).
\textsuperscript{120} Id. § 133d9.
\textsuperscript{121} See statutory appendix infra.
\textsuperscript{122} A California court recently held that an environmental statute that defined "environ-
Most of the twenty states with such laws require environmental impact assessments prior to the issuance of permits when state action is involved. A few states, such as Minnesota, also scrutinize private actions that may have an adverse environmental impact and grant standing to individuals and groups seeking to enforce the laws. Colorado authorizes designation of “areas of state interest,” defined to include areas “containing, or having a significant impact upon, historical, natural, or archaeological resources of statewide importance.” These resources include properties listed in the National Register, designated by state statute, or included in a list of historically and architecturally significant places compiled by the state historical society. Once the areas of state interest are designated, permits for development are required from the local government in whose jurisdiction the development is to take place.

E. State Financial Assistance

Public funding for preservation purposes varies among the states, reflecting the political influence of preservationists and the climates of public choice prevailing in the various legislatures. Until recently most state financial assistance for historic preservation took the form of authorizations for city and county governments to appropriate funds for historical purposes, often pursuant to specific tax levies. Since 1975, however, some states, notably Alaska, Colorado, and South Dakota, have authorized state-funded loans for preservation purposes, while Maine has authorized savings banks to invest up to five percent of their deposits in preservation-related investments in real property. The South Dakota historic preservation loan fund provides loans to purchase, restore, or develop historic South Dakota structures for residential or commercial use. The Alaska historic district revolving loan fund is authorized to make loans for the restoration, improvement, rehabilitation, or maintenance of eligible structures. The South Dakota statute is more restrictive than that of Alaska in eligibility require-

123. MINN. STAT. § 116B.03 (1977).
124. COLO. REV. STAT. § 24-65.1-201(c) (Supp. 1979).
125. Id. § 24-65.1-105(b).
126. Id. § 24-65.1-501.
127. ALASKA STAT. §§ 45.98.010-.070 (Supp. 1979).
132. ALASKA STAT. § 45.98.020 (Supp. 1979).
ments and the amount of assistance available for one property. Only actual or potentially eligible National Register properties may receive loans in South Dakota, while in Alaska loans may be made to properties (1) within a historic district established pursuant to the state enabling statute, (2) deemed "important" in state or national history, and (3) within a historic district and suitable for modification to conform to the style of the surrounding buildings in the district.

In South Dakota a maximum of $25,000 may be loaned at an annual interest rate of one-fourth the prime rate for up to ninety percent of the cost of purchase, restoration, and development of a structure. A property receiving a loan under this statute must be encumbered with a covenant running with the land to protect its restored features. In Alaska the loans must be secured by collateral and may not exceed eighty-five percent of the appraised value of the collateral. No one historic district may receive more than $1,500,000 in loans and no one property more than $100,000. The interest rate may not exceed seven and one-half percent, and the state retains a lien on the property as collateral. The state's lien is superior to the lien of the participating financial institution, and both of these liens are superior to all other liens except those for taxes and special assessments. If the maintenance or rehabilitation of the historic property fails to conform to the requirements of the loan, the interest rate is increased to the maximum legal rate available under state law, and a penalty is assessed equal to two percent of the balance of the loan.

Although the Colorado statute is not explicitly for historic preservation purposes, it may be of interest to preservationists. The purpose of the statute is to stimulate the flow of private investment capital into the financing of older housing. It authorizes creation of the Colorado Older Housing Preservation Corporation, which may make mortgage loans and insurance available for the purchase, repair, or rehabilitation of an owner-occupied structure that is thirty years old or older, is used primarily as a residence, and is located in a recorded subdivision plat in which at least fifty percent of the residential housing structures are

134. ALASKA STAT. § 45.98.020 (Supp. 1979).
136. Id. § 1-19A-21.
137. ALASKA STAT. § 45.98.040(3) (Supp. 1979).
138. Id. § 45.98.040(1)-2).
139. Id. § 45.98.040(4).
140. Id. § 45.98.040(6).
141. Id.
142. Id.
143. Id. § 45.98.060.
144. Id.
Although the mortgage program apparently has not been implemented, the prospect of being forced to extend financing for it caused Denver banks to form their own risk pool. As of March 1979, the pool had made 407 high-risk loans with no defaults. These loans, along with the work of historic district and landmark commissions, are having a significant impact on older Denver neighborhoods.

These subsidy programs are typical governmental responses to intense producer coalitions—in this case, the preservationists. Instead of preservationists bearing the full costs of indulging their tastes, preservation projects are publicly financed from general tax revenues. This transfer of wealth is consistent with a generalized view of economic regulations suggesting that, as a result of its diffuse costs and concentrated benefits, intense producer coalitions may impose the costs of their preferences on society as a whole. Because the cost to any one person of financing the transfer payments to the preservationists is so small, it is irrational for any single taxpayer to oppose the transfer. On the other hand, the preservationists have every incentive to lobby for the subsidy because the concentrated benefits to them exceed the costs of lobbying. Subsidies to preservationists represent yet another example of the trend toward the growth of government and its attendant wealth transfers.

F. Local Building Codes

By their very nature historic structures exhibit the building techniques of particular periods in the past. The older a structure is, the more likely it is that its preservation or rehabilitation will conflict with local building codes, whose requirements for construction and maintenance are typically stringent. For example, building codes prevent preservation and rehabilitation efforts by requiring building materials or archaic construction techniques that are unsuitable for older historic structures and greatly increase rehabilitation costs.

Since 1975 Connecticut and Hawaii have joined California, Idaho, Massachusetts, and South Dakota in adopting statutes to reconcile preservation and building codes. Using identical language, Idaho and South Dakota authorize the governing body of any city or county to exempt historic property from applicable health or building codes to the extent that enforcement would prevent or seriously hinder its pres-

146. Id. § 7-49-102(2).
148. See text accompanying notes 190-206 infra.
PRESERVATION LAW

In 1976 Hawaii authorized the governing body of any political subdivision to modify local building code provisions for the protection, enhancement, preservation, and use of historic properties. In 1977 Connecticut authorized revisions to the state building code to allow exemptions for historic structures as defined under state law and listed in the state register of historic places. Under Massachusetts law, the requirements of any historic district statute, ordinance, or bylaw prevails over the state building code. It should be noted that some local historic preservation ordinances in Massachusetts provide a similar exemption. California undertakes the most ambitious approach with a separate state historical building code. The statute authorizes the adoption of alternative rules, regulations, and standards by state agencies and local building authorities applicable to qualified historical structures as defined under state law.

Not only do local building codes discourage rehabilitation of old buildings, they also inflate housing costs generally, frustrate design innovation, and foster corruption among local building inspectors. Because building codes, particularly in urban areas, often are passed at the behest of construction unions in order to prevent innovation and the use of labor-saving building techniques (thus maximizing the demand for labor), the need to relax building codes for preservation purposes appears even stronger.

The statutory relaxation of building codes for preservation purposes clearly creates a desirable flexibility to encourage rehabilitation. It is equally clear, however, that these enabling statutes do not go far enough. Outright abolition of governmental building codes and private enforcement of voluntary market-oriented building codes would greatly encourage the preservation of historic buildings, yet guarantee an adequate concern for safety. The promulgators of the private codes would have every incentive to insure aesthetically sound, safe, and cost-minimizing rehabilitations in keeping with the risk preferences of preservationists. As employees of private firms, inspectors would exhibit a concern for the purchaser of services—in this case, the preservationists—rather than the corruption so typical of the urban inspectors.

151. CONN. GEN. STAT. ANN. §§ 19-395q, -403c, g (West Supp. 1979).
152. MASS. GEN. LAWS ANN. ch. 143, § 3A (West Supp. 1979).
155. Id. § 18959.5.
156. Id. § 18955.
157. NATIONAL COMMISSION ON NEIGHBORHOODS WHITE HOUSE REPORT (1979).
158. R. CRASWELL, THE FAILURE OF FEDERAL HOUSING 20 (1977); R. POSNER, supra note 2, at 245.
employed by the local governmental monopoly. Innovation in code services would flourish among the competing firms, leading to lower costs for adaptive re-use of historic buildings.

III. PRIVATE PRESERVATION LAW AND VOLUNTARY AGREEMENT

Private agreements among individuals is the alternative to the police power in the allocation of property rights. Although real property law sanctions a wide variety of techniques for private planning, these devices share one important characteristic: they are the non-coercive result of private agreement and are not a result of the sovereign power of the state except in so far as remedies for breach are available in the courts. As previously discussed, however, the greatest growth in preservation law has been in the public sector and, in light of Penn Central, this growth will likely continue for the foreseeable future.

The private law may be employed in various ways for the preservation of historic properties. Among them are powers of termination for breach of condition, 159 possibilities of reverter, 160 easements, 161 real covenants, 162 and equitable servitudes. 163 These private-law devices have particular requirements for their creation and enforcement, 164 some of which impede their effectiveness as preservation devices. Particularly vulnerable are in-gross interests, such as negative facade easements and equitable servitudes.

This is not to say that the private law is irrelevant. Indeed, its under-utilization is a source of concern to many. Nevertheless, even with this growth of the public law, since 1975 the private law has been significantly strengthened in six states.

To alleviate doubts about preservation easements and covenants, at least nine states, 165 including four since 1975, 166 have enacted statutes

159. Beckwith, supra note 1, at 127-29.
160. Id. at 129-30.
161. Id. at 130-33.
162. Id. at 135-38.
163. Id. at 138-40.
164. No attempt is made here to explain the traditional doctrines of future interests, easements, real covenants, or equitable servitudes. These traditional devices, with their advantages and drawbacks, are usually available to preservationists and their lawyers, although with wide variation among the jurisdictions. Instead, the focus of this section is quite narrow, and emphasizes only those statutes making specific changes in these private-law devices for preservation or conservation purposes. Throughout this discussion, it should be kept in mind that the traditional property law devices are still available.
166. Georgia, Illinois, Louisiana, and North Carolina.
establishing the validity of "preservation restrictions." The principle virtues of preservation restrictions are its ease of creation and enforceability.\(^{167}\)

The four most recent statutes are typical of the type although they differ significantly. First, the statutes differ as to terminology, authorizing the creation of facade and conservation "easements,"\(^{168}\) "conservation rights"\(^{169}\) in real property, "real rights,"\(^{170}\) and conservation and preservation "agreements."\(^{171}\) This variety of terminology illustrates the conceptual difficulties of eliminating the traditional distinctions between the various older real property devices.\(^{172}\) The terminology differs, but their purpose is the same: to facilitate the private encumbrance of historic property, primarily by making in-gross property rights enforceable without regard to privity or appurtenancy.\(^{173}\)

Although their purposes are similar, the statutes differ as to who may use these simplified conveyancing rules. Typically,\(^{174}\) all four states authorize charitable organizations and governmental bodies to convey and enforce these interests.\(^{175}\)

North Carolina, however, goes further and authorizes any corporation or business entity to enforce preservation agreements.\(^{176}\) This innovation is enormously important because it authorizes a for-profit firm to enforce preservation agreements, a service that could be offered to consumers for a fee. If preservationists were willing to pay for services of such a firm, then entrepreneurs might provide a private corporate alternative to a local political body. The firm would act on behalf of its customers, many of whom might not own any property appurtenant to the restricted parcels, but who, nonetheless, would favor preservation. Like any business firm,\(^{177}\) the preservation firm would reduce the transaction costs of private planning, costs that might be high in older neighborhoods where there was no initial subdividing from a large tract of land.\(^{178}\) As is often the case with municipal services,\(^{179}\) a

\(^{167}\) Beckwith, supra note 1, at 141.


\(^{171}\) N.C. GEN. STAT. § 121-35 (Supp. 1979).

\(^{172}\) See Beckwith, supra note 1, at 127-40.


\(^{174}\) Beckwith, supra note 1, at 142-43.


\(^{176}\) N.C. GEN. STAT. § 121-35(2) (Supp. 1979).

\(^{177}\) R. POSNER, supra note 2, at 289-90.

\(^{178}\) Id. at 50.
private firm might be able to enforce these preservation restrictions at less cost than traditional political controls.

In the Georgia, Illinois, and North Carolina statutes, historic preservation is linked with a concern for environmental quality. These statutes authorize the creation of conservation "easements," "rights," and "agreements" in order to preserve natural, scenic, and open-space areas. Thus private planning is simplified for preservationists and conservationists alike. In 1976 Florida enacted a similar statute solely for conservation purposes.

It should be noted that preservation restrictions have their own tax consequences. On the federal level, donation in perpetuity of preservation restrictions on historic property to charitable organizations entitles the donor to a charitable deduction for federal income tax purposes. Encumbering historic property with a preservation restriction also affects its valuation for property tax purposes. The Georgia and North Carolina statutes are typical of the states that, in passing laws recognizing preservation restrictions, have also required that property tax assessors at least consider the effect of the restrictions.

In considering the choice of methodology for achieving goals of historic preservation, it is vitally important to notice that the simplification of conveyancing of property rights discussed in this section has occurred simultaneously with the expansion of zoning controls under the police power sanctioned by the Penn Central case. This concurrent growth of private and public methodologies graphically illustrates the contrast between decentralized private action and centralized governmental action and the economic and political consequences of the choice to be made. At this point, then, it is appropriate to consider the greater implications of the choice of legal methodology in historic preservation and of the role of preservationists in American society.

IV. Faction, Property Rights, and Ideology

As noted, since 1975 state and local preservation law has grown considerably, with the greatest growth by far occurring through the exercise of the police power within the public law. The creation of historic dis-

tricts, and designation of historic landmarks, and the public funding of preservation projects and revolving funds typify the morphology of growth of public preservation law. At first glance, those who cherish American traditions might rejoice at such a concentrated and successful effort to preserve the American past. Upon reflection, however, it becomes clear that the growth of public preservation law, far from being an example of stewardship of the past, is actually symptomatic of an ominous transformation of the law and the politicization of economic choice.

The first task then is to characterize the problem. What has happened to the law in our time? More particularly, what does preservation law purport to do and how? For whom does it purport to act and at what cost? Secondly, consider the preservationists. Who are they, and what values do they espouse? Are they the practitioners of private initiative and the common law at its best, or do many of them have a vested interest in governmental solutions? Why do so many preservationists favor statist solutions?

A. The Rise of Entrepreneurial Coalitions and the Enthronement of Politics

To put the contemporary preservation movement in perspective, it is instructive to consider two aspects of American life and governance first and most admirably discussed in the eighteenth century. I refer, of course, to American constitutionalism and the uniquely American affinity for local action by small groups. These characteristics, so admirable and promising in their time, have given rise in our own time to the very worst and the very best in the preservation movement.

American constitutionalism was concerned primarily with protecting the freedom of the individual and encouraging economic growth. A free society is not without its perils, however, and James Madison, in his magnificent discussion in The Federalist, No. 10, cogently described the dangers resulting from special interests. He was particularly apprehensive about the influence of factions. For Madison, factionalism was the worst possible ill that could afflict a free and democratic society. While it was (and is) inescapable that various factions would have

187. See text accompanying notes 11-36 supra.
188. See text accompanying notes 37-38 supra.
189. See text accompanying notes 127-47 supra.
191. Madison defined faction as "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens or to the permanent and aggregate interests of the community." Madison, The Federalist No. 10, in THE FEDERALIST PAPERS 42 (W. Brock ed. 1971).
different views, Madison sought to devise a political system that would control the effects of faction.\textsuperscript{192} To this end, Madison advocated a federal government and the separation of powers. Through these vertical and horizontal restraints, he sought to prevent the monopolization of the coercive power of the state and, by increasing the costs of political entrepreneurship, to make it unprofitable for groups in society to redistribute wealth through politics.\textsuperscript{193} For over a century these impediments worked well enough\textsuperscript{194} in America and inhibited the redistributive possibilities that are inherent in any democratic society.

In addition to constitutionalism, the American propensity for local action deserves comment. The astute Frenchman, Alexis de Tocqueville, in his classic, Democracy in America, noted that “[i]n no country in the world has the principle of association been more successfully used or applied to a greater multitude of objects than in America. . . . [and] a vast number . . . are formed and maintained by the agency of private individuals.”\textsuperscript{195} De Tocqueville described an individualistic people for whom self-reliance was a paramount virtue,\textsuperscript{196} and where one “looks upon the social authority with an eye of mistrust and anxiety”\textsuperscript{197} and “claims its assistance only when he is unable to do without it.”\textsuperscript{198}

It is not surprising, then, that in this environment restraining faction and encouraging individual initiative, the latter half of the nineteenth century in the United States\textsuperscript{199} and in England\textsuperscript{200} was a period of unparalleled growth and of minimal governmental regulation. Life expectancies increased, sanitation improved, and for the first time, the majority of people had a life relieved of medieval poverty, disease, and unending toil.

Unfortunately, our present century has brought a great transformation of interest-group politics—a transformation that has given rise to the very factionalism Madison so feared. Economic controls reminis-
cent of earlier mercantilism have returned, and individual initiative has declined as the local associations, described by de Tocqueville, have been increasingly supplanted by the state.

Today, the political process is used robustly to redistribute wealth. Largely a result of the concentrated benefits and diffuse costs of governmental regulation, individual producer coalitions, exhibiting no restraint, go to the legislature for specific things. Rational vote-maximizing politicians respond by giving them exactly what they want in return for electoral support. Thus government grows inexorably in response to the perverse incentives of political logic. Presumably there is no end to the process, until perhaps the level of inflation or of aggregate taxation required to finance governmental expansion reaches such a level that the chronic free-rider problems of public choice are overcome and the voters demand a reduction in expenditures.

One must, of course, move from generalizations to specifics. Having described generally the decline of constitutional restraints and of individual initiative and the rise of political entrepreneurship, one must scrutinize the preservation movement.

It is all too apparent that many preservationists have succumbed to the vice of faction and are deeply in error regarding legal methodology. They resort to the public law in order to politicize economic choice while alleging their service of the "public interest." To be sure, preservation law produces benefits, but these benefits are far from randomly distributed. Furthermore, preservation law has become an instrument of coercion rather than a basis of private agreement. Financed on the federal level by expansionary monetary policy, subsidies to preservationists contribute (as do all transfer payments) to an inflated currency and a debilitating national defense. Regulatory costs drive up the cost of housing and displace the poor.

In their zeal to preserve, preservationists contribute to the rationalistic fallacy that through planning, government should "do something."

203. The concentrated benefits of regulation make it natural for producers, unlike consumers, to intervene in the political process because the costs of intervention exceed the benefits obtained. It is irrational for consumers to lobby against the subsidy because the cost of doing so exceeds the tiny benefits to each consumer, and chronic free-rider problems encourage inaction. As a result, the amorphous consumer interest is systematically underrepresented.
In this way, they perpetuate the widespread misconception that social orders must be the conscious result of human design (often through law) rather than the unintended, but orderly, results of spontaneous human action.

Why do preservationists believe these things about the law? Do they have a vested interest in governmental, as opposed to private, solutions? At this point, a discussion of the recent emergence of the so-called "new class" is warranted.

B. Historic Preservation and the New Class

The new class is the governmental-intellectual class, the tradesmen in the commerce in ideas, whose influence has grown enormously since World War II. Adept at manipulating ideas and symbols, the new class has seen its influence enormously expanded through the national communications media. The new class is affluent, well-educated, and professional, and usually locates its center of power in the state. Dependent on central government spending for its livelihood and its aspirations toward power and prestige, much of the new class is statist, and is distinguished by its "hidden agenda of self-aggrandizement, its adversarial posture against the central conceptions of our political, economic, and cultural systems, and its attempts to shortcircuit the will of the majority..." By no means are all members of the new class statist, however.

How many preservationists are statist members of the new class? To answer this question, one must look at the various constituencies within the preservation movement.

Those with the greatest stake in the expansion of the state are those already either directly or indirectly employed in its service. Preservation professionals are employed in preservation agencies in all levels of government. Secondly, other preservation professionals, such as carpenters and design consultants, market restoration services to pri-

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207. Although the term had its origin in the work of Milovan Djilas and has been popularized most effectively by Irving Kristol, I would refer the reader to the recent writings of Michael Novak. See, e.g., M. NOVAK, THE AMERICAN VISION (1978).

208. Commentators such as Michael Novak and Malcolm Muggeridge have noted the influence of media figures and their consensus of secular, statist values. M. NOVAK, supra note 207, at 29. The exaggerated influence of the media is in part attributable to rational voter ignorance. The rationally ignorant voter has little incentive to incur information costs because his single vote is not likely to influence the outcome of an election. Therefore he relies on information provided at no cost by the media. J. Gwartney, Microeconomics 64 (1977).


211. On the federal level, one finds the Heritage Conservation and Recreation Service created in 1978 as the umbrella organization of the Department of Interior. The National Trust for Historic Preservation also receives federal funding under the National Historic Preservation Act of
vate parties and governmental projects. Architects are participating in the spread of adaptive re-use of older buildings. Lawyers are discovering the existence of preservation law as part of a traditional real property and tax practice.\(^{212}\)

A third statist constituency are the citizen-preservationists, ostensibly private individuals who, like other regulated industries,\(^{213}\) may be subsidized by public enforcement and various governmental programs. While some preservationists undoubtedly have lobbied for income-transfer programs, other may simply be responding to the incentives created by enacted law, such as the grant-in-aid program under the Historic Preservation Act of 1966.\(^{214}\)

The preservationist intellectuals (both academic and journalistic) form a fourth constituency of the preservation movement that supports governmental expansion. Intellectuals are attracted to socialism for many reasons,\(^{215}\) and there is no reason to suppose that preservationist intellectuals are any different. Ambitious but risk-averse, the intellectual tends to be a visionary who criticizes the existing (usually capitalist) order by recourse to an aspiration toward a vague (usually socialistic) ideal. Many preservationist intellectuals seek a new society of architectural permanence where spontaneous forces, especially the market, are restrained, usually by force.

Envious of the material rewards of the business world but loathe or unable to participate in its markets, which do not generally recognize or reward alleged moral superiority, the intellectual sees governmental expansion as the avenue to wealth, power, and prestige. Many preservationist intellectuals resent the free market and the rewards earned by the developer. With a heavy investment in human capital, however, they must market their services as administrators or consultants to that firm that will buy them. This firm is usually the state.

Academic commentators often prefer public-law solutions as a

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1966. 16 U.S.C. § 470(a)(3). All of the states and territories have preservation agencies. See statutory appendix infra. Many municipalities also have preservation professionals on their staffs.

212. The Practicing Law Institute has just issued its first volume on historic preservation law, and several law schools were offering seminars in preservation law in the spring of 1980.

213. See R. Posner, supra note 2, at 239-70.


means of career advancement in a highly politicized society.\textsuperscript{216} One can profitably ask whether this is true in historic preservation. In any event, as verbalists trading in the commerce in ideas, the commentators on historic preservation (who, no doubt, would object strenuously to the issuance of certificates of appropriateness for the publication of their articles) generally endorse stringent assertions of the police power over property rights in historic areas.

Among many preservationists hostility toward the free market is in part attributable to the ties of the preservation movement with the humanities. Humanists have disliked the discipline of the marketplace ever since the advent of the Industrial Revolution brought about the rise of bourgeois capitalism. Resenting the downward mobility that resulted from the loss of their feudal patrons, the humanist intellectuals repudiated the market order and embraced socialism as a means of restoring aristocratic values and their own influence and prestige. To this day, humanists often espouse aristocratic values while denouncing capitalism’s alleged detraction from this lofty aspiration.\textsuperscript{217}

Preservationist intellectuals are no exception. With their roots in the aesthetic branch of humanism, they tend to deprecate commerce and its response to the subjective preferences of mass taste.\textsuperscript{218} A concrete example might prove helpful.

Previously, it was suggested that Sir Kenneth Clark’s film series and book \textit{Civilisation} was an instructive example of the frequency with which a preference for aesthetics and preservation is closely correlated with an antipathy toward the market system.\textsuperscript{219} This observation received striking confirmation in Lord Clark’s recent autobiography\textsuperscript{220} in which he discusses his views on economics. As an undergraduate at Oxford, Lord Clark’s thinking was profoundly influenced by John Ruskin, the well-known Fabian Socialist author and critic. It was Ruskin’s \textit{Unto This Last}, which attacked not only capitalism as an economic system but also modern art as a reflection of the ugliness of industrial society, which proved to be a “revelation” in Clark. It was this “beautifully simple and candid examination of the basic truths of economics”\textsuperscript{221} that brought about a “complete revolution”\textsuperscript{222} in Clark’s mind.

\textsuperscript{216} Beckwith: Preservation Law 1979-1980: Faction, Property Rights, and Ideolog

\textsuperscript{217} M. \textsc{Friedman}, \textsc{Capitalism and Freedom} 8 (1962).


\textsuperscript{219} Beckwith, supra note 1, at 149, n. 323.

\textsuperscript{220} K. \textsc{Clark}, \textit{Another Part of the Wood: A Self-Portrait} (1975). For a discussion of this characteristic in John Ruskin see Beckwith, supra note 1, at 148-50.

\textsuperscript{221} \textit{Id.} at 112.

\textsuperscript{222} \textit{Id.}

Published by History and Scholarship Digital Archives, 1980
The author of *Civilisation* closes with the following summary of the influence the Fabian intellectuals had over him:

I have retained from those years of reading a hatred of exploitation that has grown through the years. The sight of a lot of people dining in the Savoy makes me feel sick. This is an emotional, almost physical, response. . . . But somewhere in the back of my mind is a genuine hatred of Power, Display, Big Business and all that goes with it.223

While criticism of the Fabians is widespread,224 it suffices for our purposes to say that Lord Clark's animus toward capitalism, particularly his debilitating sense of guilt over the greater consumption made possible by an increased marginal productivity of labor,225 accounts in large measure for *Civilisation*'s negative image of capitalism and the resulting erroneous conclusion that it is inimical to our artistic and architectural heritage.

C. Historic Preservation and the Market Process

As previously discussed, many preservationists have a vested interest in governmental regulation and exhibit a morbid view of the market process. Because of the endemic self-interest of such views, a realistic appraisal of the compatibility of the preservation movement and the market is essential.226

The preservation movement must recognize that its continued existence, as well as that of most things worth preserving in American society, depend ultimately upon the survival of democratic capitalism. Indeed, most of what preservationists revere was created as a result of the free accumulation of capital in the past. Through the coordination function of the price system,227 the market fostered the creative powers of architects and builders in the erection of countless structures. This process, however, must not be halted simply because of the fixed preferences of one time and place. If there is to be anything worth preserving in the future, today's society must be free to create those yet unbuilt structures that will be tomorrow's landmarks. This can occur only in a capitalist democracy.

Preservationists often perceive the market as a threat to historic buildings. This perception stems from a definition of landmarks that is static and unchanging and that ignores the creation of new structures. To be sure, the market is a dynamic process that rewards change and

223. Id.


226. For an earlier discussion see Beckwith, *supra* note 1, at 101-02.

innovation. The history of the growth of cities shows a constant evolution of land uses often resulting in the loss of historic structures. 228 At the same time, however, new structures were often built that in their time became historic. History is always evolving and cumulative and cannot be segmented.

Not all preservationists misunderstand the market process, however. The views of the commercial preservationists provide a startling contrast to the anti-market preservation mainstream. The commercial preservationists seek to preserve artifacts of a commercial and industrial society, such as service stations, diners, neon signs, and the like. 229 It is intriguing to note that the mainstream preservationists who dislike the free market inevitably espouse fixed, aristocratic values, while the commercial preservationists who understand the evolving market process do not. As one commercial preservationist put it, "[t]he preservationist’s instinct is to go out and freeze-dry it . . . but the commercial environment isn’t fixed in time." 230 These preferences echo the attraction of socialism for those who prefer a fixed, status society as opposed to the fluid mobility of capitalist societies.

Of course, while anti-capitalism is often linked with aristocratic values, an aversion to mass taste is not necessarily a bad thing. Indeed, a reverence for antiquity is an instructive and civilizing influence. On the other hand, a socialized economy for the imposition of aristocratic values by force is abundantly a bad thing. The central problem is how the tangible fabric of the past can be preserved to instruct the future without repudiating the free economy essential to the creation of a future society worth preserving. 231 This problem will be addressed at the conclusion of the article, but not before one proposed future course for the preservation movement is examined and rejected.

D. The Proposed Environmentalist-Preservationist Alliance

There are those who would have the historic preservation movement ally itself with natural environmental groups, such as the Sierra Club. They argue that it is a natural alliance between those who would preserve the built environment and those who would preserve its natural counterpart. Before any such alliance takes place, preservationists

228. E. BANFIELD, supra note 9, at 25-51.
229. To Preserve or Not? That is the Question for a Neo-Neon Age, Wall St. J., Mar. 28, 1980 at 1, col. 4.
230. Id. at 28, col. 1.
231. The ultimate irony would arise if, as a result of over-regulation supported by preservationists, capitalist enterprises were bankrupted, only then to be preserved as monuments by the same preservationists. Although the reasons for its closing may not necessarily have been governmental regulation, The Sloss Furnace in Birmingham, Alabama, a 118-year-old iron processing furnace, is now being converted into a museum. The Chapel Hill Newspaper, June 1, 1979 at 3A, col. 1; Kulik, Birmingham, Am. Preservation, Feb.-Mar. 1978, at 20.
should be aware of some of the characteristics of the environmental lobby and how notoriously inadequate government has been in managing public lands.

First, consider the environmentalists as a group. They are hardly representative of American society as a whole, being drawn primarily from a strata of leisured, educated affluence. Many environmentalists are members of the new class who, having no need for upward mobility, can afford to support policies that stifle economic growth. Many environmentalists are hostile toward the free market. Adept at manipulating the political process, the environmental lobby enjoys an influence far out of proportion to its numbers, and is able to impose heavy regulatory costs on society as a whole. As major consumers of recreation, the environmentalists advance their own self-interest by preserving wilderness and park areas, which they preponderantly enjoy. The poor, for example, rarely visit the more remote parks, and increasing transportation costs have reduced their accessibility to the middle class.

Secondly, one must consider government’s competence in environmental management. In its husbandry of natural areas, government has proved itself adept at only two things: subsidizing political powerful groups and degrading and overusing the public lands committed to its charge.

Consider, for example, governmental management of our national parks, forests, and public grazing lands. In all of these areas access is rationed at below-market prices. Subsidies are thereby conferred on park visitors, timber harvesters, and livestock ranchers. Furthermore, because the lands are publicly owned, no one has any incentive to carefully husband the land. As a result of the lack of private property rights, the parks are overcrowded, timber is overcut, and


234. See generally, B. Frieden, supra note 232; R. Smith, supra note 232.


237. Baden & Stroup, supra note 236 at 238-40;


239. Baden & Stroup, supra note 236; Stroup & Baden, supra note 236.
lands are overgrazed.240

Should the preservation movement ally itself with advocates of governmental incompetence and narrow self-interest? Should it ally itself with a lobby that is hostile toward a growing, free-enterprise economy, and that has a vested interest in governmental regulation and a zero growth rate? Should it ally itself with a statist lobby that imposes enormous regulatory costs on society as a whole? Should it ally itself with a lobby that holds itself out as advancing the public interest while steadfastly advancing no interest but its own?

The answer is obviously no. If the preservation movement is ever to build itself upon sound principles of political economy, it must eschew an alliance with the environmental extremists. Where then should the future lead?

V. HISTORIC PRESERVATION, PUBLIC CHOICE, AND THE FUTURE

Scholarly articles usually conclude with a prescription of what the law ought to be. Although this article is no exception, one must be realistic in assessing the likelihood of meaningful change in light of the realities of public choice. Given the incentive structure of present-day preservation law and politics, one cannot be overly sanguine about the effect that ideas will have on those who benefit from the concentrated benefits of preservation regulation and subsidies. The beneficiaries of political entrepreneurship are loath to surrender their subsidies even if, in the aggregate, an end to transfer legislation would be beneficial to all. It may be, as Armen Alchian suggests, that education does not make much difference in the trend toward socialism so long as the incentives for transfer legislation remain intact.241 On the other hand, such a view may be overly pessimistic, and a strategy along the lines suggested by Michael Novak242 might well herald a reversal of the drift toward the omnipotent state.

At present, the preservation movement is disinclined to repudiate the state. In spite of the newly operative private revolving funds and the new preservation restriction statutes, most indications point toward a preponderant politicization. A recent front-page, new-class manifesto of political entrepreneurship for preservationists243 reveals a new, aggressive interest in the transfer of wealth so typical of the new class and political coalitions. This lack of restraint is the central political prob-
lem of our time that has so degraded public discourse and the very nature of law itself. It is tragic that the transfer mentality has spread to the preservationists who make so much of their lofty ideals of preserving what is best in American society.

Given this misdirection of the preservation movement, prescriptions for beneficial change come easily. As to methodology, the preservation movement must repudiate the state and embrace the private law as the means to achieving its goals. It must eschew the use of politics and must pay the full cost of its preferences without any subsidies. Self-restraint must be the norm, and the rewards for political entrepreneurship must be ended. In short, there must be a complete and total reversal of the direction of the preservation movement.

The preservation movement must reaffirm its commitment to the survival of democratic capitalism and must recognize the endemic self-interest and statist influence of its new-class members. It must also preserve more than just the built environment. The freedom of the individual must be preserved along with Paca House and Pulaski Square. The market system and the common law at its best must be preserved along with the Battery and Beacon Hill. Only when these commitments are met will the preservation movement be worthy of its name.
Appendix of State and Territorial Historic Preservation
Statutes and Session Laws*

Alabama

Archaeology: ALA. CODE tit. 41, §§ 41-3-1 to -6 (1975).


Attorney-General Opinions: Since 1964 there have been approximately thirty opinions generally discussing the day-to-day activities of preservation agencies. Two opinions concern tax consequences of gifts for preservation purposes. 129 Op. Att’y Gen. 51 (1967); 138 Op. Att’y Gen. 7 (1970).


Historic Preservation: ALA. CODE tit. 41, §§ 41-10-135 to -151 (Supp. 1979). See also Archives and Historical Commissions.


State Parks and Historic Sites: ALA. CODE tit. 9, §§ 9-14-1 to -6 (1975).

Taxation: ALA. CODE tit. 41, § 41-10-147 (Supp. 1979); ALA. CONST. art. XI, § 217 (as amended by Amendment No. 373, declared ratified Nov. 20, 1978).


* The format of this appendix is similar to one I used in A Guide to State Programs published in 1976 by the Preservation Press of the National Trust for Historic Preservation. This appendix, however, does not summarize legislation as does the 1976 Guide.

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Alaska

Archaeology: **Alaska Stat. § 44.37.040 (1976).**
Archives and Historical Commissions: **Alaska Stat. §§ 44.19.461-.496 (1976).**
Historic Districts: **Alaska Stat. § 29.33.090 (1972 & Supp. 1979); id. §§ 29.48.108-.110 (Supp. 1979); id. § 41.35.180(5) (1977); id. §§ 45.98.010-.070 (Supp. 1979).**
Historic Preservation: **Alaska Stat. §§ 41.35.010-.240 (1977).**
Historic Trails: *See* State Parks and Historic Sites.
Principal State Agency: **Alaska Stat. §§ 41.35.110-.190 (1977).**
Public Financial Assistance: **Alaska Stat. § 41.22.010 (1977); id. § 41.35.040; id. §§ 45.98.010-.070 (Supp. 1979).**
Review of Projects: **Alaska Stat. § 41.35.070 (1977).**
State Parks and Historic Sites: **Alaska Const. art. VIII, § 7; Alaska Stat. §§ 41.20.010-.345 (1977); id. §§ 41.22.010-.030.**
Taxation: **Alaska Stat. § 29.53.025(b)(2)(C), (e) (Supp. 1979).**

American Samoa

Archaeology: *See* Archives and Historical Commissions.
Archives and Historical Commissions: **A.S. Code tit. 3, §§ 401-407 (1973); id. tit. 25, §§ 1-406 (1973).**
Crimes: **A.S. Code tit. 15, § 1081 (1973).**
Environmental Quality: **A.S. Code tit. 29, §§ 1217-1218 (1973).**
State Parks and Historic Sites: **A.S. Code tit. 32, §§ 1-202 (1973).**

Arizona


Arkansas


Historic Trails: See State Parks and Historic Sites.


California


Preservation Law

See also State Park and Historic Sites.

Colorado

See also Archaeology and Historic Districts.

Connecticut

Archives and Historical Commissions: See Principal State Agency.
Building Codes: CONN. GEN. STAT. ANN. §§ 19-395t, -403(c), (g) (West Supp. 1980).
Crimes: See Historic Districts.
Taxation: CONN. GEN. STAT. ANN. § 12-81(7) (West Supp. 1980); id. §§ 12-127a, -347 (West 1972); id. § 7-131b.
Tort Liability: CONN. GEN. STAT. ANN. §§ 52-557f to -557i (West Supp. 1980). See also Historic Trails.

Delaware

Civil Liability: See Archaeology and State Parks and Historic Sites.
Crimes: See Archaeology and State Parks and Historic Sites.
State Parks and Historic Sites: See Principal State Agency.

**District of Columbia**


**Florida**

Crimes: See Archaeology.
Historic Districts: Fla. Stat. Ann. §§ 266.01-.07 (West 1975) (St. Augustine); id. §§ 266.101-.108 (Pensacola); id. §§ 266.110-.117 (Tallahassee); id. §§ 266.201-.208 (West 1975 & Supp. 1979) (Key West); id. §§ 266.301-.308 (Boca Raton); id. §§ 266.401-.410 (West Supp. 1979) (Tampa); id. §§ 267.0615-.0616; Ch. 73-408, § 1, 1973 Fla. Laws 46 (Bradford County).


\textit{Georgia}


Attorney-General Opinions: Op. Att'y Gen. 71-139 tax exemption of preservation organization; 76-50 not essential that land subject to conservation easement be within historic district; 79-14 expenses authorized for members and employees of Historic Chattahoochee Commission.


State Parks and Historic Sites: \textit{See} Historic Preservation.


\textit{Guam}

Archaeology: \textit{Guam Gov't Code} §§ 13985.11, .15-.28, .29-.35 (Supp. 1974).

Archives and Historical Commissions: \textit{Guam Gov't Code} §§ 13985.36-.40 (Supp. 1974).

History Preservation: See Principal State Agency.

Hawaii

Attorney General Opinions: Op. Att’y Gen. (Oct. 26, 1979). Properties placed on Hawaii Register of Historic Places without notification to property owner have not been validly registered and should be removed prior to possible resubmission of application that meets due process requirements.

Idaho


Historic Trails: *See* State Parks and Historic Sites.


State Parks and Historic Sites: **IDAHO CODE §§ 67-4113 to -4118 (1973 & Supp. 1979); id. §§ 67-4201 to -4236, -4301 to -4312.**

Tort Liability: **IDAHO CODE § 36-1604 (1977).**

**Illinois**


Archives and Historical Commissions: **ILL. ANN. STAT. ch. 24 §§ 11-47-1 to -2, -48-1 to -3** (Smith-Hurd 1962); *id.* ch. 34, § 412 (Smith-Hurd 1960); *id.* § 2481 (Smith-Hurd Supp. 1979); *id.* ch. 81, §§ 70-71 (Smith-Hurd 1966); *id.* ch. 116, §§ 43.4-47.1 (Smith-Hurd Supp. 1979); *id.* ch. 128, §§ 13-17 (Smith-Hurd 1953 & Supp. 1979); *id.* §§ 18-20 (Smith-Hurd Supp. 1979).


Crimes: *See* Archaeology.


**Indiana**

Archaeology: IND. CODE ANN. §§ 14-3-3.3-4 to -5 (Burns Supp. 1979).
Archives and Historical Commissions: IND. CODE ANN. §§ 17-3-86-1 to -11 (Burns 1974).
Historic Districts: IND. CODE ANN. §§ 18-4-22-1 to -12 (Burns Supp. 1979); id. §§ -24-1 to -25 (Burns 1974); id. §§ -7-22-1 to -11 (Burns Supp. 1979).
Historic Preservation: IND. CODE ANN. §§ 14-3-3.3-1 to -14 (Burns Supp. 1979); id. § 17-1-14-11(1)(B).
Principal State Agency: *See* Historic Preservation.
State Parks and Historic Sites: IND. CODE ANN. §§ 14-6-1-1 to -28-4 (Burns 1973 & Supp. 1979); id. §§ 17-2-55-1 to -3 (Burns 1974); id. §§ 18-5-15-1, -7-5-99.
State Register of Historic Places: IND. CODE ANN. §§ 14-3-3.3-6(b), -10 (Burns Supp. 1979).
Tort Liability: IND. CODE ANN. § 14-2-6-3 (Burns 1973).

**Iowa**

Archives and Historical Commissions: IOWA CODE ANN. §§ 303.1-.15 (West Supp. 1979-1980); id. §§ 304.1-.17; id. § 358B.17 (West 1977).
Environmental Quality: IOWA CODE ANN. §§ 27A.1-.6 (West 1978); id. §§ 108A.1-.7 (West Supp. 1979-1980); id. §§ 111A.1-.10; id. §§ 111B.1-.13; id. §§ 111D.1-.5.

Kansas

Attorney-General Opinions: VI Op. Att’y Gen. 692 (Apr. 16, 1969) exemption from taxation of building used for historical purposes; Op Att’y Gen. (Dec. 11, 1979) enactment of, or amendment to, a municipal zoning ordinance is not a “project” within the meaning of KAN. STAT. ANN. § 75-2724 requiring opportunity for historic preservation officer to comment.
Crimes: See Archaeology.

Kentucky

Archaeology: KY. REV. STAT. §§ 164.705-.735 (1980).
Archives and Historical Commissions: KY. REV. STAT. §§ 171.311-.340, .385-.395, .410-.990 (1980). See also Principal State Agency.
Crimes: See Archaeology.

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Historic Districts: KY. REV. STAT. § 100.127(3), .203(1)(e) (Supp. 1978); id. § 100.201 (1971).
Historic Trails: See State Parks and Historic Sites.

Louisiana

Archives and Historical Commissions: LA. CONST. art. IV § 7; LA. REV. STAT. ANN. §§ 17:1541 to :1543 (West 1963); id. §§ 44:404 to :430 (West Supp. 1980).
Crimes: See Archaeology and Historic Districts.
Principal State Agency: See Historic Preservation.

Maine

shipwrecks within three-mile territorial limit; (Jan. 11, 1971) jurisdiction of state park agency in preservation matters.

Crimes: See Archives and Historical Commissions; State Parks and Historic Sites.


Historic Preservation: See Principal State Agency.

Historic Trails: See State Parks and Historic Sites.


Maryland


Attorney-General Opinions: Op. ATT’Y GEN. (Jan. 18, 1973) local preservation law not binding on state agencies; (Mar. 3, 1975) state enabling law for historic zoning not applicable to chartered counties; (June 20, 1975) funding of utility lines in historic districts; (Sept. 6, 1977) standards for deletion of property from historic district; (Oct. 28, 1977) constitutionality of state funding for historic religious properties.


Historic Districts: MD. ANN. CODE art. 25A, § 5(BB) (Supp. 1979); id. art. 66B, §§ 2.12, 8.01-.15 (1978); id. art. 66D, § 8-101(c).


Massachusetts

Archaeology: MASS. GEN. LAWS ANN. ch. 6, §§ 179-180 (West 1976).
Historic Preservation: MASS. CONST. arts. XLIX, LI.
Tort Liability: MASS. GEN. LAWS ANN. ch. 21, § 17C (West 1973).

**Michigan**

Archaeology: MICH. COMP. LAWS ANN. §§ 299.51-.55 (1967).
Attorney-General Opinions: OP. ATT'Y GEN. (Mar. 6, 1975).
Crimes: See Archaeology and State Parks and Historic Sites.
Environmental Quality: MICH. COMP. LAWS ANN. §§ 281.761-.776 (1979); id. §§ 554.701-.719 (Supp. 1979).
Historic Trials: See State Parks and Historic Sites.
Tort Liability: MICH. COMP. LAWS ANN. § 300.201 (Supp. 1979).

**Minnesota**

Archaeology: MINN. STAT. ANN. §§ 138.31-.42 (West 1979).
Archives and Historical Commissions: MINN. STAT. ANN. §§ 138.161-.25 (West 1979); id. §§ 190.095, 416.05 (West Supp. 1980); id. § 471.93 (West 1977).
Crimes: See Archaeology.
Historic Districts: MINN. STAT. ANN. §§ 138.71-.75 (West 1979).
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Historic Trails: Minn. Stat. Ann. §§ 84.029(2) (West 1977); id. §§ 85.015 -.017 (West 1977 & Supp. 1980); id. § 85.021, 86A.05(4), 93.45 (West 1977); id. § 160.06 (West 1960).

**Mississippi**


**Missouri**

Archaeology: See Environmental Quality.
Montana

Archaeology: MONT. REV. CODES ANN. § 22-3-432 (1979).
Archives and Historical Commissions: MONT. REV. CODES ANN. §§ 22-3-101 to -221 (1979).

Nebraska


Nevada

Archives and Historical Commissions: NEV. REV. STAT. §§ 86.010-.080 (1973); id. §§ 225.065-.070, 239.010-.330, 382.010-.090 (1977).
Principal State Agency: NEV. REV. STAT. §§ 383.011-.121 (1977), as
amended, Ch. 102, § 1, 1979 Nev. Stats. 159; Ch. 179, § 1, 1979 Nev. Stats. 269.


New Hampshire


New Jersey

Archaeology: See Archives and Historical Commissions.


New Mexico


Archives and Historical Commissions: N.M. STAT. ANN. §§ 18-3-1 to -8 (1978 & Supp. 1979); id. §§ 18-4-1 to -6 (1978).


Historic District Act empowers any county or municipality otherwise empowered to adopt and enforce zoning ordinances to create zoning districts designated as historic areas.

Crimes: See Historic Trails and Principal State Agency.


Historic Trails: N.M. STAT. ANN. §§ 16-3-1 to -9 (1978).


New York


Environmental Quality: N.Y. ENVIRONMENTAL CONSERVATION LAW § 3-0301(1)(p) (McKinney 1973); id. §§ 15-2701 to -2723 (McKin-


Historic Landmarks: N.Y. GEN. MUNIC. LAW § 96-a (McKinney 1977); N.Y. TOWN LAW § 64(17-a) (McKinney Supp. 1979); N.Y. VILLAGE LAW § 7-700 (McKinney 1973).

Historic Trails: N.Y. PARKS & REC. LAW § 3.09(7-a) (McKinney Pamph. 1979).

Principal State Agency: N.Y. PARKS & REC. LAW §§ 11.01-.09, 19.01-.13 (McKinney Pamph. 1979).


State Parks and Historic Sites: N.Y. PARKS & REC. LAW §§ 3.01-.21, 5.09-.09, 7.01-.11, 9.01-.09, 11.01-.09, 13.01-.27, 15.01-17.11, 19.01-.13, 20.01-.03 (McKinney Pamph. 1979); N.Y. TRANS. LAW § 14-a (McKinney 1975).


North Carolina


Crimes: See Archaeology.


Tort Liability: N.C. GEN. STAT. §§ 113-120.5-.6 (Supp. 1979).

North Dakota


State Parks and Historic Sites: N.D. CENT. CODE §§ 48-10-01 to -02 (1978 & Supp. 1979); id. §§ 55-04-01 to -03, -05-01 to -03, -06-01 to -02 (1972); id. §§ 55-08-01 to -14, -10-01 to -13 (1972 & Supp. 1979).
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Taxation: See Archives and Historical Commissions.

Ohio

Archives and Historical Commissions: OHIO REV. CODE ANN. § 111.08 (Anderson 1978); id. §§ 149.01-.99 (Anderson 1978 & Supp. 1979); id. §§ 307.23-.25, 345.17 (Anderson 1979).
Attorney-General Opinions: Op. Att’y Gen. 2516 (1953). County historical society may use funds received under OHIO REV. CODE ANN. § 307.23 to preserve historic house and may use the house to display its collection of relics.
Civil Liability: See Crimes.
Environmental Quality: OHIO REV. CODE ANN. §§ 1501.16-.19, 1517.01-.99 (Anderson 1978).
Historic Landmarks: OHIO REV. CODE ANN. § 713.02 (Anderson 1976).
State Parks and Historic Sites: OHIO REV. CODE ANN. §§ 155.21-.27 (Anderson 1978); id. § 713.02 (Anderson 1976); id. §§ 1541.01-.10, 1743.06-.07 (Anderson 1978); id. § 5511.05 (Anderson Supp. 1979).

Oklahoma

Crimes: See Archaeology; Archives and Historical Commissions; State Parks and Historic Sites.

Oregon

State Parks and Historic Sites: OR. CONST. art. IX, § 3; OR. REV. STAT. §§ 226.110-.400 (1971); id. §§ 266.010-.590 (1975); id. §§ 276.001-.108, 377.505-.545, 390.010-.290 (1977).

Pennsylvania

PRESERVATION LAW


Historic Preservation: PA. CONST. art. 1, § 27; id. art. 8, § 15.


Puerto Rico


Historic Preservation: P.R. CONST. art. VI, § 19.


Rhode Island


State Parks and Historic Sites: R.I. GEN. LAWS §§ 30-28-1 to -9 (1968); id. §§ 32-1-2 to -18, -2-1 to -14 (1968 & Supp. 1979); id. §§ 32-3-1 to -12, -4-1 to -15 (1968).


Tort Liability: R.I. GEN. LAWS §§ 32-6-1 to -7 (Supp. 1979).

South Carolina


Archives and Historical Commissions: S.C. CODE §§ 51-13-510 to -540, -610 to -620 (1976); id. §§ -910 to -960, -19-10 to -20 (Supp. 1979); id. §§ 60-11-10 to -80, -13-10 to -50 (1976). Many local commissions are established by session law.

Historical commissions (by county):


Lee: No. 237, 1949 S.C. Acts 381.


Historical Commissions (by site):


Museum Commissions (by county):


Environmental Quality: S.C. CODE §§ 51-5-10 to -170 (1976); id. §§ -7-10 to -140 (Supp. 1979).


Historic Preservation Commissions (by county):


Lancaster County: No. 754, 1940 S.C. Acts 1612.

South Dakota
Crimes: See Archaeology.

Tennessee
Archives and Historical Commissions: Tenn. Code Ann. §§ 4-11-101
to -110, -12-101 to -111 (1979); id. § 5-901(21) (Supp. 1979); id. § 5-1801 (1971); id. §§ 10-1-101 to -204 (1980); id. § 18-113 (1955).


Texas

Archaeology: TEX. NAT. RES. CODE ANN. §§ 191.001-.174 (Vernon 1978); id. §§ 201.001-.043 (Vernon Supp. 1979); TEX. REV. CIV. STAT. ANN. art. 6145-6 (Vernon 1970).

Archives and Historical Commissions: TEX. NAT. RES. CODE §§ 181.011-.103 (Vernon 1978 & Supp. 1979); id. §§ 182.001-.045 (Vernon 1978); TEX. REV. CIV. STAT. ANN. arts. 250-260 (Vernon 1973); id. art. 678m, §§ 15-16 (Vernon 1964); id. arts. 5434, 5439, 5441, 5443, 5445-5446(a) (Vernon 1958 & Supp. 1979); id. art. 6145 (Vernon 1970 & Supp. 1979); id. art. 6145.1 (Vernon Supp. 1979).


**Trust Territory of the Pacific Islands**

Archaeology: See Historic Districts; State Parks and Historic Sites.

Archives and Historical Commissions: See State Parks and Historic Sites.


**Utah**


Preservation Law


Vermont


Virgin Islands


https://archives.law.nccu.edu/ncclr/vol11/iss2/12

Virginia

Taxation: VA. CONST. art. X, §§ 6(a)(6),(h); VA. CODE §§ 10-139 to -140, -145.10, -155 (1978); id. §§ 58-12(7)-(8), (12)-(13), (15), -12.4, .12, .29, .32, .37, .77, .90-.92, -760.2 to .3, -769.4 to .16 (1974 & Supp. 1979).
Tort Liability: VA. CODE § 10-150.18 (Supp. 1979); id. § 29-130.2 (1979).

Washington

Archaeology: WASH. REV. CODE ANN. §§ 27.44.010-.020 (1970 & Supp. 1980); id. §§ 27.53.010-.900 (Supp. 1980).
Crimes: WASH. REV. CODE ANN. § 9.68.015 (1977); id. § 27.44.010 (1970); id. § 27.53.090 (Supp. 1980); id. §§ 40.16.010-.030 (1972).
Environmental Quality: WASH. REV. CODE ANN. §§ 43.51.900-.930 (1970); id. §§ 43.97.010-.050, 47.39.010-.910 (1970 & Supp. 1980); id. §§ 79.70.010-.900 (Supp. 1980).
Historic Trails: WASH. REV. CODE ANN. §§ 67.32.010-.140 (Supp. 1980).
Preservation Law

Preservation Restrictions: WASH. REV. CODE ANN. §§ 84.34.010-.921 (Supp. 1980).
Principal State Agency: WASH. REV. CODE ANN. §§ 43.51A.010-.140 (Supp. 1980).

West Virginia

Archaeology: W. VA. CODE §§ 20-7A-1 to -6 (1978); id. § 29-1-7 (1980).
Archives and Historical Commissions: W. VA. CODE §§ 5-8-1 to -20, 5A-4A-1 to -3 (1979); id. §§ 8-26A-1 to -6 (1976 & Supp. 1979); id. § 57-1-7c (Supp. 1979).
Environmental Quality: W. VA. CODE § 20-5B-1 to -17 (1978).
Tort Liability: W. VA. CODE §§ 19-25-1 to -6 (1977); id. § 20-7A-6 (1978).

Wisconsin

Archives and Historical Commissions: WIS. STAT. ANN. § 16.61 (West 1972 & Supp. 1979); id. § 19.21(5) (West 1972); id. § 19.23 (West 1972 & Supp. 1979); id. §§ 44.01-.21 (West 1979 & Supp. 1979); id. § 59.07(31)-(32) (West 1957 & Supp. 1979); id. § 86.19(4) (West Supp. 1979).

Wyoming