2019

Architectural Heritage, Sites, & Landscapes Seized by Urban Law - Report for the United States

Sara C Bronin

AIDRU SYMPOSIUM
ARCHITECTURAL HERITAGE, SITES AND LANDSCAPES SEIZED BY URBAN LAW
SPRING 2017

REPORT FOR THE UNITED STATES

SARA C. BRONIN
THOMAS F. GALLIVAN CHAIR OF REAL PROPERTY LAW &
DIRECTOR, CENTER FOR ENERGY & ENVIRONMENTAL LAW
UNIVERSITY OF CONNECTICUT SCHOOL OF LAW

This national report dealing with United States historic preservation law covers the following topics:

(1) What Is Protected

(2) Who Protects

(3) Primary Instruments for Protection

(4) Instruments for Implementation and Enhancement

(5) Funding and Taxation Issues

(6) Representative Legal Cases

Note that much of the explanation is drawn from and reproduces in part the author's previously co-authored works, *Historic Preservation Law* (with Professor J. Peter Byrne) and *Historic Preservation Law in a Nutshell* (with Professor Ryan M. Rowberry).

(1) What Is Protected

Historic preservation law in the United States occurs at three primary levels: federal (applying nationwide), state (of which there are 50), and local (e.g., city, county). At each level, historic preservation law applies to resources that are "designated" historic and resources that are eligible for such designation.

Designation is a formal, technical process during which a nominated resource is evaluated to determine whether it meets legal requirements regarding its *significance* and its *integrity*. The designation process is largely conducted by non-lawyers who use their backgrounds (often

in architecture, archaeology, or history) to evaluate resources within a legal framework. When a federal, state, or local official decides a resource meets the applicable designation criteria, it will be listed on the applicable government-administered register of historic places. Both public and private resources may be listed on registers of historic places. At the federal level, the register is called the National Register of Historic Places, and it was created pursuant to the National Historic Preservation Act, 54 U.S.C. § 300101 et seq., adopted by Congress in 1966. In addition to the National Register of Historic Places, hundreds of state and local registers of historic places identify historic places and trigger legal protection, which varies depending on the jurisdiction.

In general, American laws do not distinguish between man-made and natural *historic* resources. For example, at the federal level, 5 types of historic resources – buildings, districts, sites, structures, and objects – can all be listed on the National Register of Historic Places. However, to be considered a historic landscape site protectable by historic preservation law, the landscape must have ties to human activity – such as an archaeological site or a battlefield. Landscapes that are scenic but not historic are protected under a variety of other environmental laws. (For example, local, state, and federal government may designate a scenic landscape a publicly-owned park; may be a party to a covenant that requires a third party property owner of the landscape to protect the landscape; may be the beneficiary of an easement on behalf of the public to access the property; or may be under special obligations to protect the landscape during governmental activities.) In this report, I will focus on historic landscapes, not merely scenic landscapes. There are some exceptions to the general rule that the law does not distinguish between man-made and natural historic resources. The biggest exception is that federal rehabilitation tax credits apply only to designated historic *buildings*, and not any other type of resource. The tax credit law offers property owners up to 20% of the value of qualified expenditures for rehabilitating a building and putting it back in service. See 26 U.S.C. § 47. The tax credit does not apply to improvements on natural historic resources.

So let's return now to the designation process. "Significance" and "integrity" are terms of art that are defined by the jurisdiction doing the designation.

Significance usually refers to the association that a resource has with important persons or historical events; the architectural or technical merit of the resource; or the ability of the resource to provide information about history or prehistory. Certainly, U.S. law protects old, famous buildings and structures, such as Philadelphia's Independence Hall (where the Declaration of Independence was signed) and the Brooklyn Bridge. But historic resources need not be famous to be legally protected. Many resources now protected, particularly under local historic ordinances, are vernacular structures used by ordinary people. Nor is old age a necessity when the resource has exceptional significance. For example, some especially significant buildings may be designated by federal officials as historic even before they are fifty years old. As another example, in New York City, the local historic preservation ordinance uses thirty years as the benchmark age.

Integrity refers to the ability of a resource to communicate its significant elements. A stone fence that was once a technical masterpiece of local craftsmanship, but that was disassembled and strewn about a field would lack the integrity required to be designated historic. A log cabin that was mostly burned in a fire would also be deemed to lack the ability to communicate its significance. On the other hand, structures that have significantly deteriorated may still be deemed to have integrity, especially if designation will lead to rehabilitation.

With criteria as broad as "significance" and "integrity," the designation process combines both subjective and objective evaluations of nominated resources. Usually, nominations may come from any source; sometimes, the property owner must consent before the resource is designated under the applicable law. Nominators rely on oral histories, local archives, newspaper clippings, drawings, surveys, and other primary sources to document the significance of a resource. Up until the 1980s or so, nomination forms were often submitted by interested

amateurs. These days, private firms, mostly regional in scope, provide consulting services to survey, document, and prepare nominations for historic resources.

Different resources require different legal treatments. Archaeological resources, for example, may require regulations about how resources may be transported—something that is irrelevant to most buildings and structures. Projects that may disturb tribal resources may require consultation between government officials, private parties, and tribes before the potentially harmful action is taken. Buildings and structures may be subject to more specific guidelines depending on their architectural style. Historic roads and bridges may raise special issues relating to their functionality—how to preserve their historic features while still allowing vehicular movement. The preservation of landscapes may require consideration of animal habitat, public access, vegetation, and historically appropriate fencing. Various instruments of protection are covered in part (3) below.

(2) Who Protects

Key players in historic preservation law fall into one of four categories: (a) public entities and officials, (b) property owners, (c) nonprofit advocacy organizations, and (d) preservation professionals. These players operate at the local, state, and national levels; there is very little international involvement in U.S. historic preservation law. In describing the role of these players, I will touch upon the law's four primary methods of addressing historic properties: regulating; providing incentives; allowing conservation and preservation restrictions; and gathering and disseminating information. But note that these four primary methods are further described in part (3) below.

(a) Public Entities & Officials

Public entities and officials—associated with federal, state, or local government—play a major role in historic preservation. Congress and state legislatures pass laws binding public or

private actors to behave in certain ways. The U.S. presidents, state governors, and local mayors can direct agencies to act or issue executive orders relating to preservation. The legislative branches of government at the federal and state levels have also created advisory groups, such as the federal Advisory Council on Historic Preservation, which advises the U.S. president, and the various state historic preservation councils, which advise state governors and their staff.

At the federal level, the Secretary of the U.S. Department of the Interior, through the subagency known as the National Park Service, develops historic preservation regulations and policy, advises other federal agencies, and consults with state and local groups in accordance with the framework created by the National Historic Preservation Act, 54 U.S.C. § 300101 et seq. Within the National Park Service, the Keeper of the National Register of Historic Places manages the designation process, described in part (1), for the federal government.

All 50 states have State Historic Preservation Officers, who nominate resources for the National Register of Historic Places, maintain state registers of historic places, advise other state agencies, and liaise with the National Park Service on specific matters. State Historic Preservation Officers also have a national organization that helps coordinate and convey their concerns to the U.S. Congress.

At the local level, legislative bodies (such as city councils or boards of selectmen) may pass historic preservation ordinances, which create commissions that make decisions in accordance with the requirements of the local law. This group may be called the historic preservation commission, historic properties commission, historic district commission, or landmarks commission. The makeup of such commissions depends on the jurisdiction, which may impose rules such as preservation expertise or residency within a historic district on commissioners. In addition to its powers to make decisions pursuant to the historic preservation ordinance, the commission may also have advisory responsibilities in other matters affecting historic properties, including the process of designating properties as historic, planning and zoning applications, and local legislative body actions.

Virtually all major U.S. cities have local historic preservation commissions, including New York City, Philadelphia, Washington, D.C., Los Angeles, Chicago, Dallas, Houston, and San Francisco. In total, there are about 2,300 local preservation commissions in the United States, which is just a fraction of the number of general-purpose local governments (nearly 40,000). Cities and towns first established in the twentieth century are less likely than older cities to have historic preservation ordinances.

(b) Owners

Owners of historic properties have great power, because they often have significant freedom to enhance, neglect, or even destroy their properties. This is because the vast majority of historic resources are protected only in limited ways—if legal protection exists at all.

In jurisdictions and circumstances where the law regulates what owners can do with their historic resources, owners are more constrained. For example, in a city with a local historic preservation ordinance, owners will often have to submit an application to a local building department showing how their demolition, alteration, or new construction is "appropriate" for the historic resource. If so, the local government will issue certificates of appropriateness. If not, the owner cannot proceed with her proposal. As another example, if the federal government owns a designated historic resource and wants to do something that will affect it, government officials will have consider the consequences of their actions on the resource (pursuant to Section 106 of the National Historic Preservation Act, 54 U.S.C. § 306108), and in some circumstances may have to actually mitigate the negative consequences on the resource (for federal transportation programs and projects, pursuant to Section 4(f) of the Department of Transportation Act). Note that the same provisions apply to private historic resources affected by a federal activity.

Owners can also take advantage of incentives for preservation of historic properties. At the federal level, for example, property owners can get a 20% tax credit if they rehabilitate a

property on the National Register of Historic Places. They can also get a tax deduction if they donate a preservation easement to a nonprofit preservation organization or to a unit of government. State governments may have similar provisions.

Owners can also protect their own properties from future development by imposing conservation or preservation restrictions (in the form of covenants or easements) on their properties, which can constrain future owners from making undesirable alterations or destroying historic properties.

(c) Nonprofit Organizations

Nonprofit organizations have also been instrumental in facilitating pro-preservation policies. The key national nonprofit organization is the National Trust for Historic Preservation, chartered by Congress in 1949. It has an expansive mission that includes legal assistance, regional initiatives, historic site ownership, investment in specific towns and projects, and publicizing preservation-related news. Preservation Action, another national nonprofit, advocates that Congress pass laws promoting preservation. State historic trusts for preservation and state advocacy groups fulfill similar roles. The U.S. also has a tradition of local historical societies and other interest groups who advocate and engage on the local level.

(d) Preservation Professionals

Finally, there are those professionals who work "in the trenches" to turn preservation projects into reality. Over the last fifty years, historic preservation has become increasingly professionalized. Training programs in anthropology, archaeology, architecture, and history boast educational tracks devoted to historic preservation. Graduates of these programs (and others with preservation experience) survey historic resources, prepare nominations for registers of historic places, fill out grant, tax, and other incentive applications, engage in historic architectural

design, conserve fragile archaeological resources, figure out complex financing schemes for preservation projects, or assist public or private entities with long-term resource management.

(3) Primary Instruments for Protection

In the United States, historic preservation law has evolved at the local, state, and federal levels to protect a wide range of physical resources. Four primary types of laws are implicated: (a) regulation; (b) provision of incentives; (c) authorization of private restrictions; and (d) information gathering.

Note that each of these categories of law is generally considered well within the constitutional and/or statutory authority of the relevant level of government. Preservation laws have for the most part survived challenges based on state and constitutional law, including challenges relating to substantive due process, vagueness, free speech or religious liberty rights, and takings provisions. The only constitutional issue considered in detail in this report is takings, in part (5).

(a) Regulation

Regulation, the most important category of preservation law, refers simply to the imposition of rules on activities affecting historic properties. Regulation is a "permission tool," in that the actor must seek permission pursuant to, or otherwise establish compliance with, the applicable regulation before affecting a historic resource.

Federal, state, and local authorities may all impose rules on both public and private preservation activity. Federal rules are applied primarily to designated resources on the National Register of Historic Places (or, sometimes, those that are eligible for listing but not yet listed). Local governments may protect properties designated as historic on federal and state registers of historic places, not just the local register. Usually, local regulation affects only buildings and districts, not landscaped sites. Federal and state regulation usually applies to all types of historic

resources, including landscapes. Except in extremely rare situations, protection is limited to historic resources, and not the environment or "protection zone" around the historic resources. (The one state-level exception that comes to mind is the Kansas Historic Preservation Act, Kan. Stat. Ann. § 75– 2715 et seq., which requires state and local governments to minimize harmful effects on historic properties and their environs.)

At the federal level, there are rules relating to a federal agency's obligation to consider or curb its harmful effects on historic resources. Two important statutes, the National Historic Preservation Act, 54 U.S.C. § 300101 et seq., and the National Environmental Policy Act, 42 U.S.C. § 4321 et seq., establish procedures that agencies must follow before they can undertake a large-scale activity. To comply with these statutes, the federal agency engaging in the activity that might affect a historic resource usually engages private preservation professionals to conduct research about the resource, the project site, and the possible effects of the activity on the resource. This research is then written up and called an "environmental assessment" or "environmental impact statement." Once the study has been done and all parties have been duly consulted, the agency may proceed with the activity – even if it affects the historic resource. For this reason, these two federal statutes are seen as fairly week, requiring agencies to "stop, look, and listen" but not requiring any substantive result.

Other federal statutory provisions, such as Section 4(f) of the Transportation Act, 23 U.S.C. § 138, impose substantive requirements on agencies to minimize all harm to protected properties. It applies only to federal transportation programs or projects and holds that such programs or projects may adversely affect a significant historic site only if two criteria are met. First, there must be no prudent and feasible alternative to using the site. Second, the program or project must include all possible planning to minimize harm to the protected site. The statute thus prevents federal transportation officials from harming historic resources without considering every reasonable alternative, and choosing the one that does the least harm. Section 4(f) applies not just to historic resources but also to parks and to wildlife and waterfowl refuges.

There are also federal rules for private actors, including extensive guidance on how archaeological and tribal resources should be treated. In modern times, destruction, alteration, and removal have become the biggest threats to archaeologically significant sites and artifacts because these resources may be in fragile condition, may lose their value if altered, and may be moved without detection. Beginning in the early twentieth century, Congress and state legislatures passed archaeological protection statutes to control access to these resources and prohibit their destruction or significant alteration. Whether at the state or federal level, such statutes usually address both known and unknown resources, and they usually limit their scope to those resources on public or tribal land.

State legislatures often pass counterparts to the federal preservation statutes. In addition, a small handful of state legislatures require local governments to consider historic properties during the planning process.

Local governments also regulate activities that affect historic resources. Localities derive their authority to draft historic preservation ordinances and empower local commissions from state enabling statutes. This means that practices vary from state to state, though some legal issues and practices are common. Local historic preservation ordinances focus on historic buildings and districts of historic buildings—rarely do they impact structures, objects or sites. Local ordinances may exempt public institutions from compliance. These ordinances are administered by commissions, as described in part (2) above.

Most commonly, local governments adopt stand-alone historic preservation ordinances that restrict three types of activities: demolition, alteration, and new construction. Local ordinances may limit or delay the ability of private property owners to demolish all or part of their historic (or older) properties. There are three different types of ordinances that limit demolition: ordinances restricting demolition by affirmative act, ordinances requiring delays before demolition by affirmative act occurs, and ordinances restricting "demolition by neglect" (essentially, letting a historic resource deteriorate).

Many localities restrict the way property owners can alter the visible features of their historic buildings. These restrictions typically take the form of a review by the local historic commission, which is triggered when the owner of a historic property (or a nonhistoric property located within a historic district) applies for a building permit to change some aspect of her building. The property owner must convince the commission that the alterations are appropriately compatible with the historic aspects of the property and its setting. If the commission agrees with the property owner, it will issue a "certificate of appropriateness," which allows the building permit to be issued and the alterations to proceed.

New construction on vacant lots within historic districts presents special problems. On the one hand, it seems odd, or even anti-creative, to constrain construction that does not demolish or alter extant historic fabric. On the other hand, one can see how incompatible new construction within a historic district could negatively affect the ensemble effect of a district. Jurisdictions vary as to how they treat new construction within historic districts. Some jurisdictions will hold new construction to the same standards as alterations, described in the preceding paragraph. Other jurisdictions will not evaluate the appropriateness of new construction.

For any of these three proposed activities – demolition, alteration, or new construction – the commission's approval may be conditioned to ensure that the project satisfies the applicable standard. For example, a commission may require an applicant to take a photographic record and measured drawings of the historic resource before it is demolished. As another example, a commission might require the property owner or developer to plant trees to screen an unsightly addition, change proposed materials or fenestration, or re-situate a proposed accessory structure. The commission may also deny an application, as long as it states its reasons for doing so in the record.

Less commonly, a local government may regulate historic preservation through special provisions of the planning or zoning codes, such as requiring that new construction in historic

districts be built to certain architectural standards. Note that in the United States, planning and zoning functions take place at the local level, not the state or federal level, with only a few rare exceptions. (For example, the U.S. Congress passed the Religious Land Use & Institutionalized Persons Act, 42 U.S.C. § 2000cc et seq., which prevents local governments from imposing substantial burdens on religious institutions through their zoning and historic preservation laws.)

(b) Incentives

Preservation law has institutionalized incentives for private parties to engage or invest in historic preservation projects. These incentives come in three forms: direct subsidies, tax relief, and procedural relief.

Direct subsidies include grants or loan programs. The federal government provides grants to state historic preservation offices for specific projects, such as the preservation of historic cemeteries. Several states give grants to municipalities and nonprofit institutions to study the feasibility of preserving designated historic structures or to create affordable housing in historic structures. Some states also have revolving loan funds that offer low interest rate loans for qualifying private projects.

Tax relief comes in a variety of forms, as discussed in greater detail in part (5) below.

Incentives might also include procedural relief, such as exemptions from zoning ordinances, relaxation of building codes, or waivers of building permit or occupancy permit fees.

(c) Authorization of Restrictions

The third category of historic preservation law—conservation and preservation restrictions—allow private property owners to protect their historic properties for any length of time, including forever, by placing restrictions on development or other activities that might negatively affect the historic features of their properties. These property owners grant the restriction to a nonprofit organization or government (depending on state law), which holds the

restriction and enforces its terms during the restriction period. Conservation restrictions usually protect landscapes (which may be either historic landscapes or scenic landscapes), while preservation restrictions usually protect buildings. Sometimes, these restrictions are called covenants or easements. Obligations are passed on to subsequent owners and may be enforced by the holder of the restriction (usually a government or nonprofit organization), or by the general public. As a form of private law, these restrictions can be highly effective in protecting historic properties.

(d) Information

The collection and dissemination of information has also been an important function of the law. Registers of historic places are an obvious example of public institutions serving an important information-gathering role. These registers tell people about historic resources in their communities and provide a catalogue (albeit never comprehensive) of places worthy of attention. Building surveys, such as the Historic American Buildings Survey and the Historic American Engineering Record, serve as extremely valuable repositories of information.

Beyond registers and surveys are public notice statutes for federal and state agencies. These require agencies to create a record, analyze, and notify the public about threats to historic resources—a critical source of information to those who know where to look.

Finally, localities' historic preservation personnel (usually housed in the planning and zoning office) can be a valuable resource for property owners seeking information on local history and pending projects.

(4) Instruments for Implementation and Enhancement

U.S. law offers strategies for enhancement and promotion primarily through the guidance set forth in the Secretary of the U.S. Department of the Interior Standards for the Treatment of Historic Properties (the "Standards"). See 36 C.F.R. Part 68. The Standards are

intended to apply broadly to many types of protected properties, including to buildings, sites (including historic landscapes), structures, objects, and districts. These Standards have been integrated in all federal laws and policies implicating historic preservation. For example, a rehabilitation project involving a historic resource is not eligible for a federal tax credit unless the proposed treatment of it complies with the Standards. In addition, the Standards are often incorporated by reference or adapted into relevant state and local laws. For example, a local law may say that a historic district commission may only issue a certificate of appropriateness if the proposed project complies with the Standards.

Substantively, the Standards include suggestions for four different treatments of historic properties, which from greatest to least amount of fidelity to existing conditions are: preservation (one type of enhancement, in the terms of the questionnaire), rehabilitation (promotion, in the terms of the questionnaire), restoration (another type of enhancement), and reconstruction. Preservation and rehabilitation are both used when a structure retains its historic use, or is converted to a use that maximizes the retention of historic features. The difference is that preservation treatments are appropriate for those situations where the preservation of the building (and later-added changes with their own historic significance) is paramount, while rehabilitations can also include adaptive reuses, additions, and new construction. The restoration treatment is used to take a building back to a particular historical time (the "restoration period"), and any part of the building that did not exist at that time is removed. Finally, reconstruction treatments involve the rebuilding of a new landscape, building, structure, or object to duplicate key historic features.

The Standards require different techniques for each of the four types of treatments, but they are not prescriptive with respect to the types of techniques. Rather, the Standards apply performance standards that the techniques must generally meet. For example, there are several Standards common to the preservation, rehabilitation, and restoration treatments, namely: that archaeological resources must be protected and preserved in place; that if a historic feature must

be replaced, the new feature will match the old in "design, color, texture and, where possible, materials"; and that chemical or physical treatments must be undertaken using the gentlest means possible. The Standards do not include such requirements when it comes to the reconstruction treatment, because it is assumed that reconstructions depicts historic resources no longer in existence, and thus there are no historic resources or materials to be concerned with.

There are, of course, also differences among the Standards' applicability to the four types of treatments. When it comes to preservation, the Standards require that the historic character of a property – including distinctive materials, features, finishes, and craftsmanship – be retained and preserved, and that historic fabric not be altered or replaced. For rehabilitation, the Standards require that the historic character be maintained but are more flexible in anticipating new additions and exterior alterations which are required to be differentiated from the old and compatible with historic materials, features, scale, and massing. The Standards also require that new construction must be undertaken in a way that if they are removed in the future, the form and integrity of the historic property would not be impaired. When it comes to restoration, the Standards require that the property be given either its historical use or a new use (such as a museum) that interprets the property and its restoration period. Later additions and materials out of the restoration period will be removed, and replacement of missing features must be substantiated by documentary and physical evidence. Finally, reconstructions will duplicate historic features and elements that are clearly documented, and will be identified as a contemporary re-creation.

Additional guidelines are provided in 36 C.F.R. § 68.4. Each of these four treatments requires different methods and produces different outcomes. To choose which treatment to use, property owners must should consider the building's significance and relevant importance, physical condition, proposed use, relevant code requirements, availability of documentation, and economic and technical feasibility. For example, a property which is the last surviving example of a particular style of architecture in a city might be a candidate for preservation, which involves

careful fidelity to the property's existing physical features. A project involving a change of use—say, the conversion of a historic neighborhood school into luxury condominiums—might benefit from the more flexible standards of rehabilitation. An example of a reconstruction is the slave home at Mount Vernon, rebuilt next to Washington's home and clearly identified as a reconstruction, decades after all slave homes on the property were torn down. Because of the temporal materials and poor quality of such homes, none survived to the present day, yet a facsimile, clearly labeled as such, could help visitors better understand the history of the estate.

Moving away from the Standards, I now consider the question of whether public authorities appropriate heritage to ensure its enhancement of promotion. In the United States, where historic resources are both publicly and privately owned, governments do not typically appropriate (condemn) property, in part because it is no longer believed that government will necessarily be the best or only steward of historic properties. That said, some famous examples of appropriation do exist, such as Congress's use of eminent domain to own parts of a famous American Civil War battlefield. See United States v. Gettysburg Electric Railway Company, 160 U.S. 668 (1896) (in which the U.S. Supreme Court sanctioned this exercise of eminent domain as a "public use").

Similarly, private management of public historic properties is not necessarily the preferred alternative. The entire National Park system (with some historic resources) is managed by the federal government, as are sites such as the Statue of Liberty on Ellis Island and homestead sites of U.S. presidents. However, all levels of government may contract with private parties to manage historic sites, and may or may not be required to make a profit. In the United States, the role of tourism promotion is played only to a limited extent by government agencies. More commonly, private business associations or public-private partnerships lead tourism efforts.

(5) Funding and Taxation Issues

There are three primary tax mechanisms relevant to the protection of historic and natural properties in the United States: federal and state tax credits, federal tax deductions, and state or local property tax reductions. The tax credit program applies to architectural heritage, while the tax deduction and property tax reductions may apply to both architectural and natural heritage.

Tax credits are the single most effective public program supporting private development of historic buildings. They provide an incentive for property owners and developers to rehabilitate historic buildings in the form of a "refund" equal to a percentage of project costs. Tax credits are attractive because they reduce a taxpayer's tax liability on a dollar-for-dollar basis—unlike, say, tax deductions, whose value is reduced according to the marginal income rate paid by the taxpayer.

The federal rehabilitation tax credit program—the most significant direct federal financial aid to private historic preservation development projects—was created in 1978. At this time, cities around the country were experiencing high rates of vacant and neglected structures in urban neighborhoods with historic buildings. To spur economic development in these neighborhoods, Congress passed the Revenue Act of 1978. Several Congressional acts later, the federal program currently offers a 20 percent credit for certain rehabilitations of buildings listed on the National Register of Historic Places and a 10 percent credit for certain rehabilitations of non-historic buildings constructed before 1936. Since the program's inception in 1978, the credits have leveraged over $106 billion in private investment to preserve nearly 40,000 historic properties.

Thirty-one state legislatures—many inspired by the success of the federal rehabilitation tax credit—have passed laws authorizing state rehabilitation tax credits. Some of these credits may be combined with the federal credits. Other credits are offered for owner-occupied residences or other projects that are ineligible for the federal credit. Eligibility for state tax credit programs varies but often requires that a property be listed on the National Register of Historic Places or a state equivalent.

Tax deductions are also popular. They reduce a taxpayer's income subject to tax, which means that their value is relative to the rate the taxpayer pays. Taxpayers who donate a preservation or conservation restriction to a qualifying nonprofit are eligible for a federal tax deduction. As noted above, such restrictions typically constrain the development or alteration of historic buildings or structures, as well as natural landscapes. Taxpayers who rehabilitate single-purpose agricultural structures may also be eligible for a federal tax deduction.

At the state or local level, property taxes may be frozen for, or phased in over, a period following the rehabilitation of the property. This benefits owners of historic properties because they do not have to immediately absorb the presumably higher post-rehabilitation appraised value of their properties. Property tax rates may also be reduced for rehabilitating certain types of projects into a new use.

There is also the question of compensation when government infringes on property ownership through regulation of historic properties. This question is taken up in part (6) below, which discusses two takings law cases.

(6) Representative Legal Cases

Having co-authored two books on the voluminous number of judicial decisions dealing with preservation, it is hard to pick just one or two. But I will focus on two cases that deal with federal constitutional constraints on governmental appropriations of private property—more commonly known as "takings." The Fifth Amendment to the U.S. Constitution states that in no case "shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The constraints of the takings clause apply not only to the federal government but also to the actions of the states, and by extension localities. If government is found to have taken property, just compensation must be provided to aggrieved property owners. Just compensation typically takes the form of fair market value, calculated through a comparable sales approach,

income approach (particularly for commercial properties), or cost approach. Some jurisdictions require extra compensation for the taking of homes.

Takings clause caselaw has evolved, and courts now recognize that government may take private property either by physically appropriating it (usually by a pro-active exercise of government condemnation of private property, known as eminent domain); or by regulating it in certain problematic ways.

The key legal issue in the eminent domain cases reviewed by federal courts is whether there is a "public use" justifying the condemnation. Early on, courts interpreted the public use requirement narrowly, requiring public ownership of, or public access to, the condemned property. Valid public uses under this narrow view included public buildings, roads, bridges, and parks. But what about other activities which are not so obviously public uses? Federal courts have evolved to adopt a broader view of the public use requirement, allowing exercises of eminent domain that achieve a public benefit, without necessarily granting public use or access. This evolution is illustrated by a few key cases.

Discussion of an 1896 Supreme Court case regarding Congress's exercise of eminent domain over a portion of Gettysburg Battlefield is essential: not only does it reveal a modest departure from the requirement of public use or access, but its central substantive issue is historic preservation. *See* United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668 (1896). Because of *Kohl*, decided in 1875, Congress's authority to exercise eminent domain was not in question by the time the Supreme Court was hearing *Gettysburg Railway*. Instead, the issue in this case was whether historic preservation constituted a public purpose justifying the use of eminent domain pursuant to the Condemnation Act, codified at 40 U.S.C. § 3113, or the Fifth Amendment of the U.S. Constitution. Congress had authorized $75,000 to be spent "[f]or the purpose of preserving the lines of battle at Gettysburg, Pa." and for the installation of tablets, improvement of battlefield avenues, and study of the battlefield site. 160 U.S. at 668. The Secretary of War appointed a commission to carry out these tasks, and the commission condemned property,

including property of the plaintiff, Gettysburg Electric Railway Company. Note that at the time of the condemnation in 1893, there were no legal assurances that the site would be open to the public. (Two years later, however, Congress passed legislation to designate the site as a national battlefield park. *See* Ch. 80, 53d Cong., Sess. III, 28 Stat. 651 (Feb. 11, 1895).)

The Supreme Court identified the "really important question" in this case to be whether the preservation of Gettysburg constituted a public use. *Id.* at 679. The Supreme Court held that historic preservation was indeed a public use under both the Condemnation Act and the U.S. Constitution. It further explained:

> The battle of Gettysburg was one of the great battles of the world. The numbers contained in the opposing armies were great; the sacrifice of life was dreadful; while the bravery, and, indeed, heroism, displayed by both the contending forces, rank with the highest exhibition of those qualities ever made by man. The importance of the issue involved in the contest of which this great battle was a part cannot be overestimated. The existence of the government itself, and the perpetuity of our institutions, depended upon the result. Valuable lessons in the art of war can now be learned from an examination of this great battlefield, in connection with the history of the events which there took place. … Such a use seems necessarily not only a public use, but one so closely connected with the welfare of the republic itself as to be within the powers granted congress by the constitution for the purpose of protecting and preserving the whole country. … [T]he sacrifices are rendered more obvious and more easily appreciated when such a battlefield is preserved by the government at the public expense.

Id. at 681-83. In *Gettysburg Railway*, the preservation purpose was enough to sustain the finding of public use. Of course, the Court may have assumed some future physical use/occupation by the public: what significance are monuments, unless they can be viewed by the public? But the essence of the lofty language used by the Court—reflecting the patriotic rationale for preservation—was that the preservation aim could itself sustain the exercise of eminent domain.

The most important case in regulatory takings jurisprudence, *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), happens to focus on historic preservation. The owner of a landmarked building—Grand Central Terminal in Manhattan—hoped to construct a 55-story office tower atop the Terminal. The local historic preservation commission determined that the tower, as designed, was incompatible with the historic features of the Terminal and thus

could not be built. The property owner challenged this determination as an unconstitutional regulatory taking.

The Supreme Court identified three relevant factors, weighing them to determine that no taking had occurred. The factors are: (1) the character of the government action; (2) the economic impact of the regulation on the claimant; and (3) "the extent to which the regulation has interfered with distinct investment-backed expectations," *id.* at 124. Importantly, the Court found that the local preservation ordinance did not unfairly burden the Terminal's owner. Moreover, because the owners could still use the property as a railroad terminal—its primary use for the preceding sixty-five years—the character of the government action was not so invasive, nor did it so severely diminish the reasonable investment backed expectations of the claimant, that a taking had occurred.

The facts, holding, and impact of *Penn Central* are more involved and far-reaching than this brief description suggests. No court has declared that a designation of a historic resource constitutes a taking, and only two decisions (one state, one federal—both in Maryland) have found that a preservation restriction is a taking. *See* Keeler v. Mayor of Cumberland, 940 F. Supp. 879 (D. Md. 1996); Broadview Apartments Co. v. Comm'n for Historical & Architectural Pres., 433 A.2d 1214 (Md. Ct. Spec. App. 1981).

This discussion does not consider state constitutional equivalents to the federal takings clause, but many state constitutions provide similar protection from government takings, which are often analyzed using legal principles similar to the ones discussed below. It also obviously does not include the myriad other judicial decisions involving preservation law, which will be left for another day.