Preservation as the Movement of Yes
How Preservation Law Lays the Groundwork for a “Movement of Yes”

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As an attorney in the Law Division of the National Trust for Historic Preservation for the past five years, I have had the privilege of working with a team of colleagues who have dedicated their careers to protecting historic places across the United States. Our projects reflect the diversity of the country’s history and geography, and the fragile landscapes deeply connected to both. As advocates, we develop and respond to an array of legal claims that arise from historic preservation statutes, regulations, court decisions, state laws and local ordinances. This work ranges from fighting the unregulated cruise ship tourism that is overwhelming the National Historic Landmark District in Charleston, South Carolina, to opposing the threat of uranium mining in the scenic and sacred landscapes of Mount Taylor, New Mexico. We supported a coalition that took on and won a legal battle that stopped an office tower from spoiling the pristine views of the Hudson River Palisades in Englewood Cliffs, New Jersey. We are working to save the James River and its landscapes in Virginia from the visual threat of giant power lines and are still fighting to block commercial development near the South Rim of the Grand Canyon in Arizona. We continue to oppose a planned wind farm that would mar historic views of Nantucket Sound and are fighting “takings” challenges in urban areas like New York City. My experience has shown me that, notwithstanding their significance, historic places continue to confront increasing risk of loss. To make our work even more challenging, the laws designed to protect these places from harm attract a level of criticism that other areas of land use or environmental regulation manage to escape.

Despite the commonly touted benefits of preservation—opportunities for place-based learning, tourism, community revitalization, local job creation and property value enhancement—some
critics like to refer to any whiff of historic preservation as the “Movement of No.” Although there is some modicum of truth to that perception, the basic supposition is wrong. Historic preservation is not a “Movement of No.” Historic preservation is a movement designed to protect places that are valued by communities and that preserve our sense of place as individuals and as a nation. This movement is supported by protective laws on which these places depend for their survival so that current and later generations can appreciate and enjoy them into the future—much like other environmental laws designed to protect the public’s welfare.

In his essay series, “Why Do Old Places Matter?,” Rome Prize recipient and National Trust attorney Tom Mayes identified myriad reasons in addition to those already listed here, which include but are not limited to history, memory, beauty, economics, architecture, learning, continuity, creativity, sustainability, identity and spirituality. All of these reasons inform the purpose and policy of historic preservation. But as those who advocate for these values know, preserving historic places depends on more than just the good intentions of property owners, the eager efforts of advocates or the persuasiveness of social media campaigns. The ability to say “no” under certain circumstances is critical—because saying “no” to inappropriate property use and development is saying “yes” to the...
survival of meaningful historic and cultural places and the values they embody. Without the ability to say “no,” places like the iconic Beaux Arts Grand Central Terminal in New York City or vernacular shotgun houses in the Campground Historic District of Mobile, Alabama, would probably no longer stand.³

This article examines how the laws that underpin America’s historic preservation movement are designed to promote flexibility and collaboration and lead to outcomes for the public good. It questions why perceptions about preservation law are sometimes negative and considers how we as preservation supporters can counter such perceptions through our messages and actions to help preservation reposition itself as a positive movement.

WHY WE NEED TO BE ABLE TO SAY “NO”

Sometimes getting to the outcomes with the greatest long-term public benefits requires saying “no.”

In his famous article, “The Tragedy of the Commons,” American ecologist and philosopher Garrett Hardin illustrates why regulation of property rights is necessary.⁴ To do so, Hardin uses the example of a colonial commons or community pasture for grazing cattle, which no one owns but everyone can use. In other words, he describes a world with an absence of property rights or any land use control. In the commons—where no one owns or has the ability to control anything—rational humans, operating according to each individual’s self-interest, race to use as much of the commons as
possible even though the commons is limited. They do so even though this behavior harms the group as a whole. As a result, the commons is ultimately overconsumed and destroyed. In academic and conservation circles, this idea of a commons is applied to oceans and the problem of overfishing, forests and too much logging, subsurface mining rights and mountaintop removal, the atmosphere and industrial pollution, and wildlife and the extinction of species that results from overhunting. These examples help demonstrate how our rush to consume finite resources before others do leads to their overconsumption and to the destruction that Hardin predicted.

Our shared historic and cultural heritage is a commons too and likewise in need of legal protection. But because most of us who enjoy it are “free riders” who receive the benefits of historic preservation without having to share in its burdens or costs, it is easy to take for granted the need to protect the historic commons. As a result, we do not often realize the special duties and obligations that preservation law confers, or how it operates. Preservation law, however, is essential if society wants to protect historic resources. Without it, the unfettered consumption described by Hardin would bring about adverse effects, such as those of massive cruise tourism on the Charleston National Historic Landmark District or at the Port of New Orleans. As Harvard professor Jerold S. Kayden has explained, without the power to say “no,” “thousands of historic buildings that stamp a place as special would be gone.”

But preservation law should never be used to avoid all change. Hardin’s critics point out that too much regulation of the commons can lead to such unwanted outcomes as resource underuse or economic stagnation. To avoid such problems, preservation must strike the right balance between past, present and future use so that the property, site or place that embodies our shared history can continue to remain productive and not languish. Preservation law in all its forms reflects this tension. Change is a constant and important part of our work.

A VERY BRIEF HISTORY OF PRESERVATION LAW
Preservation law as we know it today developed gradually.
From historic preservation’s early beginnings—with Ann Pamela Cunningham’s efforts to preserve George Washington’s Mount Vernon in the 19th century, the passage of the federal Antiquities Act in 1906, and the nation’s first local preservation laws in Charleston and New Orleans in the 1930s—preservation regulation has expanded steadily over time because of public support. By 1965, 51 communities across the country had preservation ordinances, a number that has grown to more than 2,300 communities in the United States today. This same support led to Congress’s adoption of a comprehensive federal program, including the National Historic Preservation Act (NHPA) and Section 4(f) of the Department of Transportation Act, both enacted in 1966, and the National Environmental Policy Act (NEPA), enacted in 1969. Taken together, preservation law is composed of statutes, regulations, financial incentives, policies and case precedent decided by courts.

From the beginning, of course, the motives of historic preservation have been questioned. Critics have claimed that preservation is merely an elitist preoccupation that harms ordinary folks by violating their property rights and holding back progress. But such arguments lack merit. In fact, the Supreme Court of the United States determined in 1978 that historic preservation serves a valid public purpose, including because it can generate powerful economic benefits for communities.9

In light of historic preservation’s strong public, political and legal support, it is confusing that preservation law should ever be considered “negative.” The history of preservation law shows the opposite. For example, since the passage of the NHPA, federal agencies have had a duty to “take into account” the effects of their undertakings and to “consider” ways to avoid, minimize or mitigate harm to historic properties in consultation with stakeholders.10 The NEPA, a related information-gathering law, requires public disclosure of significant effects on the human environment, including historic and cultural resources, and consideration of project alterations to avoid or prevent such effects.11 In both federal laws, however, the legal protections provided are procedural in nature as well as collaborative and cannot dictate outcomes. One narrow exception
Ever since Charleston, South Carolina, became a home port for Carnival Cruise Lines, the number of cruise ships and passengers has become a threat to the fragile infrastructure and historic character of the National Historic Landmark District. The National Trust placed Charleston on “watch status” in 2011.

In federal law to the usual “stop, look and listen” approach is found in Section 4(f) of the Department of Transportation Act, which prohibits the use of historic properties unless all possible planning has taken place to minimize harm and there is no other “feasible and prudent” alternative to the proposed project. In practice, however, this prohibition is rarely exercised because of the elastic nature of the exception. Permits requiring application of these laws for new roads, bridges, mining permits, cell phone towers, urban infill projects, wind and solar farms, elevated rail projects, and many other undertakings are approved by the government almost every day. Preservation law, then, cannot legitimately be considered an impediment to change or progress.

Moreover, in addition to funding voluntary grant programs that provide financial support for repairs, research or technical assistance, federal law (along with some state laws) provides attractive financial incentives for historic rehabilitation tax credit projects and preservation easement deductions. The benefits of tax credits have been highlighted in a series of reports released by the National Trust Community Investment Corporation and the National Park Service. These reports show that the Federal Historic Rehabilitation Tax Incentives Program successfully brings together property owners and investors to revitalize historic buildings in need of repair. Nearly $100 billion in private investment has been realized in communities all over the country during the 37-year life of the federal program. Some states, such as New York, North Carolina and Virginia, have state credit programs too. At the federal level alone, historic rehabilitation tax credits have generated millions of
jobs, raised new tax revenue for all levels of government, and increased payrolls and production in nearly every sector of the economy. Although it is certainly possible that a state historic preservation officer and the National Park Service could refuse to approve a developer’s inappropriate plans, in most cases they are able to collaborate in rehabilitation projects using flexible guidelines, the Secretary of the Interior’s Standards. After tax credit projects are completed, present and future generations are able to use and enjoy historic buildings once again, thereby multiplying their economic benefits. Historic tax credits provide further evidence that historic preservation law is not a “Movement of No.”

Furthermore, preservation easements are another type of voluntary tool encouraged by tax deductions. As with conservation easements that are used to protect open land in perpetuity, preservation easements are agreements between a property owner and an easement holding organization to protect an owner’s intent to control the future use of his or her historic property. Because preservation easements are negotiated agreements, parties have flexibility in their drafting to address the specific characteristics of a historic property, the property owner’s interests and the goals of a preservation easement-holding organization—sometimes even allowing for limited future development. And to the extent that preservation easements protect historic properties that are not subject to local historic preservation laws—as well as properties subject to laws that might in the future be exempted or revoked—an easement may be the only protection against demolition or inappropriate alteration. Although a court may be asked at some point in a future enforcement lawsuit to say “no” to someone who has violated an easement’s terms, the decision to place an easement on a historic property is a voluntary one.

FACTORS CONTRIBUTING TO A “NEGATIVE” PERCEPTION
For the most part, historic preservation is a voluntary activity. Millions of people maintain, reuse and enjoy landmarked historic structures by choice every day. And much more unsung preservation activity takes place without any landmark regulation or legal
compulsion. Nevertheless, why does a negative perception about preservation law persist?

**Local Laws with Veto Power**

It is often said that most people experience preservation law at the local level, an old adage that is probably true. And it is at the local level that most people encounter “no,” even though the vast majority of proposed changes to historic buildings are ultimately approved. Because of the way the preservation system is structured within our federal system of government under the NHPA, more than 2,300 local historic preservation commissions across the country have been empowered by state enabling laws to make decisions regarding whether to allow changes to historic properties that have been landmarked under local law.18 This means that the bulk of preservation law decisions take place locally and that the administration of preservation law across cities and towns is decentralized.

For this reason, outcomes involving local law tend to vary, even though those differences are rarely discussed, explained or understood. This is why a local preservation commission in an architecturally progressive place like Miami might allow a contemporary addition to a historic building but a commission in a more architecturally conservative city like Philadelphia might reject it. And when decisions like these are compared or referenced in the popular press, headlines tend to emphasize the fact that a commission said “no” without giving any factual or legal context.19 In fact (although this is backed up by anecdotal evidence rather than statistics), most projects that historic preservation commissions review are not rejected. In cities like Washington, DC, for example, it is usually only the largest and clearly incompatible projects that go before the Historic Preservation Review Board. And even then, most of those are ultimately approved.20 Even for those projects that are rejected outright, there is usually some portion of the work or some revision involved that makes the application acceptable in the end.21 This is the case in many other cities and towns.

Further complicating the perception problem is the fact that sometimes preservation commissions are not even the ones saying “no.” Sometimes after a historic preservation officer has already
approved a project or, in other cases, even before the matter has come up before a preservation commission, it may be rejected by a local design review board or planning or zoning commission. A recent illustration involves the construction of a modest contemporary house in Raleigh, North Carolina, which a local preservation commission approved as being consistent with existing adjacent historic properties in the Oakwood Historic District. The article’s headline, however, attributed a lawsuit filed to require demolition of the newly constructed house to a preservation decision, even though the suit was filed by a disgruntled neighbor. Myrick Howard, president of Preservation North Carolina, encouraged residents to reject a narrow focus and embrace contemporary design to ensure that the area did not get “stuck” in one style.

Regardless of how local preservation laws are worded, they all reflect the voluntary political choices made by elected officials in cities and towns and, by extension, their constituents. Some laws, like those that apply to the Historic Beacon Hill neighborhood in Boston, Massachusetts, require an owner to obtain permission from a historic preservation commission for any exterior change that he or she might propose. Camden, South Carolina, is much less restrictive but requires owner consent prior to any landmark designation. The City of Los Angeles allows for the designation of landscape features and “natural phenomena.” Detroit’s local law can extend to open space but does not have strong maintenance requirements. Savannah, Georgia, applies its preservation law only to building facades that are visible from a public right of way. Washington, DC’s ordinance includes a “special merit exception” for changes that provide an important public benefit. And the local preservation law of New York City—one of the strongest in the nation—incorporates a transfer of development rights program for certain parts of the city, designed to offset loss of development opportunities that occur following the designation of a historic landmark.

Even though no two local preservation ordinances are alike, one common thread—in addition to the power to designate landmarks—is that they allow a historic preservation commission to say “no” when a property owner proposes a change that would either
harm the historic integrity of an individual building or jeopardize adjacent historic property owners. Indeed, many people who make the choice to live in a historic district do so precisely because of the certainty that preservation commission review control provides. Certainty like this is needed to assure property owners that the historic context will be protected and inappropriate property changes won’t be allowed in the neighborhoods in which they invest.

In some cases, communities have adopted local preservation laws in order to obtain Certified Local Government status, which is conferred by a voluntary National Park Service program that provides grant funding and technical assistance for historic preservation projects. Another common thread is that local laws all allow exemptions under appropriate circumstances, such as when a proposed change is not visible from a public right of way (Savannah and Charleston), might result in a legitimate financial hardship (Philadelphia and Portland, Maine), or frustrate a project of “special merit” (San Antonio and Washington, DC). A final common thread is this: legal attacks on the constitutionality of local ordinances—such as in Chicago—have generally not been successful.26

**Enforcement and Interpretation Issues**

One of the most common ways to weaken support for preservation law—and which contributes to a negative reputation—is through poor or arbitrary enforcement. Enforcement problems can take many forms. First, preservation law of any kind suffers when it lacks enforcement power, whether because a government agency has no enforcement scheme, has weak penalties, or does not have sufficient staff or financial resources to challenge violators. In systems such as these, those who desire legal protection from preservation law, as well as those who wish to skirt it, discount the law’s clout.

Second, even when governments enforce preservation law, arbitrary or inconsistent decisions—or a failure to follow consistent procedures—weaken community confidence in it. Allowing one property owner to change a historic house facade while denying another with a similar house the opportunity to make a similar change inevitably leads to negative perceptions. At the federal level,
examples of enforcement problems could include a federal agency issuing a finding of “no effect” on a permit application for destructive uranium mining on a sacred Native American site when the adverse effects are patently obvious. Regardless of the reason, practices like these undermine preservation law and cause the public to lose respect for its legitimacy. Preservation law is likewise weakened by government agencies or commissions that fail to explain why “no” is necessary. For this reason, written decisions should always be supported by facts and law.

Moreover, divisive and expensive litigation often arises when federal or state agencies and local governments fail to comply with the statutes, ordinances and regulations that they are required by law to enforce. In carrying out its mission, the National Trust has participated as a party or amicus curiae in more than 200 cases in federal and state courts since 1970. These cases have helped secure the standing of preservation groups to sue to protect the rights of owners of historic properties, as well as community members, and helped make sure that preservation law is applied by government agencies and commissions according to its letter and spirit. In many of these cases, however, litigation could have been avoided had government agencies simply followed the law, instead of actively trying to sidestep it.

Complexity

Preservation law is also misunderstood because of its complexity. Unlike a speed limit sign or a dock permit application, preservation law is not easy to explain or to reduce to catchy sound bites; it
comprises constitutional protections, statutes, regulations, executive orders, local ordinances, architectural guidelines and local commission decisions—along with hundreds of decisions by federal and state courts involving the application of these laws.

Legal complexity poses an ongoing challenge that can and probably does deter potential support. The layers of rules range widely, addressing local historic districts, tax credits, easements, archaeology, National Register nominations, maintenance protocols, Section 106 review, affordable housing and more. And the resources these rules target are varied as well. In the case of Native American resources, some laws apply to historic structures only, while others protect against the destruction or removal of artifacts (such as pottery, basketry, tools and rock paintings) that may be found on federally owned or tribal lands and, in some cases, on privately owned land. There are also laws that provide a process for review of governmental actions that may adversely affect a wide variety of traditional cultural resources.

Deciphering the laws that offer protection for historic and cultural resources and sacred sites is not an easy task, even for seasoned lawyers and judges. One of the best descriptions of the complexities of historic preservation law comes from the U.S. Committee of the International Council on Monuments and Sites (US/ICOMOS):

> The conservation of the built heritage in the United States is a complicated and multifaceted field that reflects our history, our specific type of federated government as established by our Constitution, the size of our country and our cultural diversity. The rise of public interest in the conservation of heritage sites, plus a somewhat natural propensity towards understanding the weight of our history has meant that the preservation movement and the preservation ethic permeate all levels of our society and government. Our success in the field is hard to measure and even harder to describe.27

Legal complexity does not arise out of a desire to make compliance tough but rather reflects the inherent difficulty of regulating historic and cultural resources, which often requires subjective
assessments of aesthetic merit; value judgments over issues such as historic “significance” and “integrity”; or legitimate disagreements over how best to avoid, minimize or mitigate adverse effects. Preservation law, however, is no more complicated than many environmental regulations, healthcare laws, or antitrust or securities laws. Although lawyers and advocates need to do what they can to explain preservation law and make it more accessible to the broader public, regulating historic and cultural heritage will always be complex. Any law that attempts to protect this heritage will reflect this complexity and must require the ability to say “no” under appropriate circumstances. But the suggestion that preservation law is wholly negative because it is complex or misunderstood is simply untrue.

COUNTERING NEGATIVE PERCEPTIONS

No easy answers exist as to why preservation is sometimes considered a “Movement of No.” This article explores some of the reasons related to preservation law. The next articles in this issue look at why this negative perception gets attached to other aspects and activities of the preservation movement. On balance, the perception is not an accurate one. When faced with the question, “Why is preservation a ‘Movement of No?,’” the best defense is four-fold. First, reject the proposition. Embrace historic preservation by name. As Tom Mayes has explained in his essays, there is nothing negative about historic preservation’s purpose. Second, recognize that saying “no” is absolutely necessary if communities want to protect historic resources and that there is inherent complexity in regulating issues related to heritage. A “one size fits all” approach is naive. Third, do a better job of educating the public and enforcement officials about how preservation law is intended to operate and how to apply it consistently and fairly. Moreover, preservation commissions and other government agencies should always explain the basis for their decisions and assist the public with compliance. Economic consultant Donovan Rypkema has said that “if your historic preservation commission does not have written, illustrated guidelines, available online and understandable not just
by architects but by actual human beings, you’re part of the problem with preservation, not part of the solution.”\(^{28}\) Fourth, urge communities to create or enhance voluntary preservation incentives. Taken together, these recommendations may not altogether turn preservation law into a “Movement of Yes,” but they can help preservation law “grow toward a new maturity.”\(^{29}\)

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2  Section 1 of the National Historic Preservation Act, Pub. L. No. 89-665, as amended by Pub. L. No. 96-515.

3  New York City’s lack of a local preservation ordinance in 1963—and concomitant lack of ability to say “no” to proposed demolitions for historic preservation reasons—is why the internationally acclaimed historic Penn Station was demolished starting that year. As reported in the editorial pages at the time (Editorial, “Farewell to Penn Station,” New York Times, October 30, 1963), “Any city gets what it admires, will pay for, and ultimately deserves. Even when we had Penn Station, we couldn’t afford to keep it clean. We want and serve tin-can architecture in a tinhorn culture. And we will probably be judged not by the monuments we build but by those we have destroyed.” For images depicting the loss of Penn Central, see New York Architecture (blog), available at http://www.nyc-architecture.com/GOn/GOn004.htm. The loss of Penn Station led to the passage of the New York City Landmarks Law in 1965.


5  In colonial America, perceived endless amounts of land resulted in few land use controls. However, as populations started to shift from rural to urban areas, the need to regulate land increased. This was especially true in urban areas, where cities tried to control the location of industry, commerce and housing. The first zoning ordinance was passed in New York City in 1916 in response to the large height and scale of the Equitable Building at 120 Broadway. Chicago passed its first comprehensive zoning law in 1923, although it first started regulating the built environmental in 1837 and passed a height ordinance in 1893. By the 1930s, encouraged by the U.S. Department of Commerce’s 1924 Standard State Zoning Enabling Act, most states had adopted zoning laws. In the 1960s, concerns about the environment and historic preservation led to further regulation.


7  Even though it is a fallacy, a common argument by opponents of historic preservation is that preservationists want to stop any change from occurring. For example, see “Supreme Court told Group Favors ‘Pristine State’ for Grand Central,” New York Times, April 18, 1978.


13  Some states have adopted similar legislation based on these federal laws.

14  For example, according to government statistics on its website, the U.S. Army Corps of Engineers issues more than 40,000 permits a year through its nationwide permitting program.

Ibid.


For perspective, according to the most recent U.S. Census data, the United States has 19,354 cities and towns with 3,144 counties or county equivalents. Thus, only slightly more than 10 percent of local governments have historic preservation laws. Within those communities, 5 percent is the average amount of historic fabric protected by local designation.

Robin Pogrebin, “Landmarks Commission Rejects Plan to Change Interior of the Four Seasons,” New York Times, May 19, 2015. (Pogrebin reports a controversial decision, but does not explain that the local preservation law specifically grants the authority to review proposed changes to landmarked interiors.)

Information provided by the DC Office of Planning/Historic Preservation Office on January 12, 2016 (on file with author).

For fiscal year 2015, DC’s Historic Preservation Office approved at least 4,924 permit applications. Ibid.

For example, see “Contemporary Glass Structure Rejected by Covington Board,” River City News, July 21, 2015 (describing how an urban design review board rejected a contemporary building and noting the historic preservation arguments that were made), and Chris Korman and Steve Kilar, “Design Review Panel Rejects Casino, But Likes Light Rail Entrances,” Baltimore Sun, September 13, 2012 (discussing urban design review panel’s decision to reject proposed architectural plans).


J. Peter Byrne, “Historic Preservation and Its Cultural Despisers: Reflections on the Contemporary Role of Preservation Law in Urban Development,” George Mason Legal Review 665 (2012). As Professor Byrne has noted, “Legal research into [preservation law’s] assumptions, methods, and goals should be a growing field.” Ibid.