THE IMPACT OF LAW ON PRESERVATION ACTIVITIES IN THE UNITED STATES

Assessing the role of law in the continuing American effort to protect the architectural, historical and archaeological elements of its heritage is a difficult task. Thus it may be helpful to define what is meant by the term "law" in the context of this essay.

We are concerned here with preservation law principally in terms of the ultimate purpose of any law: a formalized mechanism of society that has as its principal purpose the orderly resolution of conflict—whether that conflict arises between private individuals, individuals and their governments or governmental units themselves. However, to evaluate the strengths and weaknesses of preservation law, it is also necessary to place this body of law in both its political and governmental contexts, and to look at the traditional legal constraints that a federal system with written constitutions has imposed on it.

It is important to emphasize that, except for "legislative law" aimed at specific preservation problems and the court decisions interpreting the law, there is no such thing as "preservation law" per se. The preservationist working within the American legal system must be familiar with such subjects as contracts, taxation, constitutional law, real property, future interests, conveyancing, torts, administrative law and a wide variety of other traditional legal subjects.

THE SOURCES OF PRESERVATION LAW

In addition to encompassing many discrete legal subjects, the American law of historic preservation comes from many diverse, often uncoordinated and unrelated sources. Under our federal system of government, national laws relating to cultural preservation are passed by the U.S. Congress which affect equally all of the 50 states and six territories. Still more federally based law comes in the form of executive orders issued by the President and from the guidelines and regulations of federal departments and agencies involved directly or indirectly with historic preservation: the Department of the Interior, the Advisory Council on Historic Preservation, the Department of Housing and Urban Development, the Department of Transportation, the Council on Environmental Quality, the General Services Administration and others.

By the same token, each session of the 50 state legislatures may produce additional legislation in support of a particular preservation activity. This includes laws that appropriate funds to identify and evaluate cultural resources in a given state, levy general or special taxes to raise revenue for specific conservation and preservation programs, or provide tax preferences of one kind or another. In addition, the states, in much the same fashion as the federal government, contribute to the body of preservation law through executive orders issued by governors, statutes passed by legislatures, and the regulation of such state agencies as archives, history, natural resources and parks and highways. Environmental regulations in particular have increased during the last eight years. These regulations, which are principally motivated by a concern for more effective land use planning and the protection of open space, shorelines, estuarine areas and agricultural or forest land, and so on, increasingly embrace cultural resources as an environmental value to be protected.

Most importantly, the states contribute to our body of preservation law by adopting enabling legislation for their subunits of government, such as cities, townships, counties and occasionally regions. In effect, enabling legislation delegates to these local units regulatory powers without which local preservation efforts would be impossible. As in most western nations, local governments in the United States have no inherent powers of their own; their powers are granted by the state. There is considerable disagreement about the appropriateness and effectiveness of much local regulation, but there is little room for argument that, within the public sector, local government units now shoulder what is perhaps the prime responsibility for architectural preservation. There is even less debate that in terms of sheer volume, most preservation law is to be found at the local level. It is axiomatic that in the United States, "the federal government has the money, the states have the power, and the local governments have the problems." This is no less true in the historic preservation field than in many other areas.

PRESERVATION LAW AS A REFLECTION OF A LARGER SYSTEM

Another major factor to consider in evaluating the impact of law on cultural preservation activities is that law does not operate in a vacuum. It is part of, and at the same time a reflection of the larger political, economic and social system that produces legislation. There is, therefore, often a vast gulf between what is called the "law in books" (statutes, ordinances, administrative regulations, executive orders and court decisions, to name a few) and the "law in action." In historic preservation, as in many other areas, there is much law on

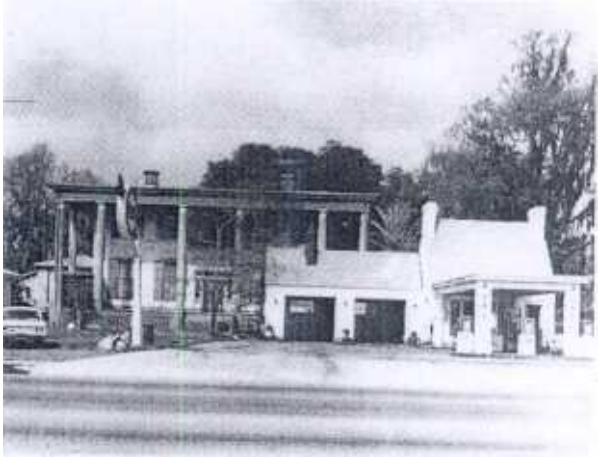
the books that is not effectively enforced, much that is politically unacceptable to use to the fullest extent, and much that in the absence of specific judicial sanction in each state and in the federal courts is constitutionally unsettled.

To take one example, perhaps a decade ago fewer than 100 municipalities in the United States took advantage of their state-delegated powers to control the aesthetics of new buildings in historic districts by requiring certificates of appropriateness as a condition precedent to issuing building permits. A recent estimate would place the number of cities now using such procedures at approximately 450. Yet there are fewer than two dozen cases squarely upholding the constitutionality of such controls, and most of these cases are found in approximately 12 jurisdictions.

It is also important to remember that in the broader context of the American political system, preserving our architectural, archaeological and historical heritage is not regarded by many citizens as a high-priority public goal. Local, state and federal appropriations of public monies for preservation are typically on the order of less than one one-hundredth of 1 percent of the total governmental budget; and in the sphere of public regulation, which encompasses an owner's right to alter or demolish a listed landmark building, there is a distinct disinclination to enforce such laws unless the building is of superlative architectural quality or historically associative value, and the economic deprivation to be encountered by the owner is relatively minor. In terms of public acquisition of cultural property, many laws authorize state and sometimes local governments to acquire property compulsorily or by "eminent domain,"[1] but these laws are rarely utilized. In short, there remains a strong and vocal division of opinion among Americans as to how far government at any level should be permitted to go in regulating the use of private property. What has been described as a "frontier mentality" that regards land and buildings, whether of cultural importance or not, as commodities to be freely traded to produce income or capital gains for the current owner—rather than as scarce resources to be treated with respect and consideration—is still a disappointingly widespread phenomenom among the vast majority of American citizens and, hence, their governments. Preservation law is directly and obviously affected by such attitudes. In addition to the fate of private buildings, the widespread destruction of distinctive *public* buildings by state and local governments themselves, protective laws to the

The growth of historic preservation laws in the United States is well illustrated by the large increase in historic district ordinances over the past decade. Prince Street, in the Alexandria Historic District, Virginia, is one of the earlier beneficiaries of this kind of regulation. (Virginia Historic Landmarks Commission)

De développement de lois de conservation historique aux Etats-Unis est très bien illustré depuis ces dix dernières années par l'accroissement d'arrêtés municipaux en faveur des quartiers historiques. Prince Street, dans le Quartier Historique d'Alexandria, en Virginie, a été l'une des premières bénéficiaires de cette sorte de réglementation.



Traditional concepts of private property shape the course of American preservation law. Absence of land-use regulation frequently results in intrusions on the historic scene, such as this meshing of a gasoline station with the Wardlaw-Smith house, Madison, Florida. (Advisory Council on Historic Preservation)

Les concepts traditionnaux de la propriété privée déterminent la direction que prend la législation américaine pour la conservation. L'absence d'une réglementation sur l'utilisation des terres aboutit fréquemment à des intrusions sur le site historique, comme ici l'engrenage d'une station-service dans la maison Wardlaw-Smith à Madison en Floride.

contrary notwithstanding, is indicative of the "progress" mentality that still afflicts the nation.

PRESERVATION AND THE POLICE POWER

The American legal system generally accepts the principle that within certain limits a development control or "zoning" ordinance may permit or proscribe the uses of land and buildings, according to regulations that differ from area to area within a city or county. These limits are proscribed by the constitutional precepts of "due process" and "equal protection," as mandated by the Fifth and Fourteenth Amendments to the U.S. Constitution, and by equivalent provisions in all state constitutions. This approach to development control is not unlike similar procedures in other countries, though in practice the American rules are perhaps less strictly limiting on the individual property owner. However, in terms of cultural preservation, or using such regulations to protect the visual environment of a historic district or quarter, there is still an unsettled legal and political question as to whether zoning regulations should go "the next step." Should an elected or appointed board of local officials be empowered to exercise control through regulation to achieve a period setting, to prescribe an architectural style or detail, to limit the color of a building, or to control the cutting of trees or other landscape features on private property? Such issues are generally regarded by state courts in the United States as matters of "taste," and it is fair to say that most state supreme courts (each of which interprets state law according to its own constitution and legal tradition) would prefer to avoid such issues altogether or would follow a historical tendency to invalidate such aesthetic regulations when confronted with them.

While it may be postulated from a relatively small number of decided cases that the states have shown some softness with respect to questions of aesthetic regulation or elevational control as an exercise of the police power of a state where historical, architectural or cultural values are involved, it should be acknowledged that most courts are still hesitant to confront the issue of uncompensated regulation in a positive manner unless the district in question may be regarded as a "period piece" carrying with it highly visible and generally unquestioned attributes of high architectural or historic merit.

Other western nations tend to uphold aesthetic controls more readily, and they usually administer these controls in a much more tightly prescribed planning context (and perhaps with greater public appreciation of cultural values). By contrast, American courts tend to view the question of architectural control in historic districts as an extension of the doctrine that regulations over the visual environment may be tolerated only at the extreme ends of the scale of visual pollution—usually where billboards, junkyards and the like are involved. It is true that no state court has invalidated the use of aesthetic controls on constitutional grounds in a historic district. Nevertheless, the judicial sample of opinion among the states is small, and large areas of uncertainty remain as to how far such regulations may go.

ACQUISITION OF HISTORIC PROPERTIES

Under the American legal system, a distinction can be drawn between those situations where owners are or are not compensated for rights surrendered to the state or one of its subdivisions. For example, our system readily accepts the idea that the site of a historic battle in the Civil War (1861-65) may be compulsorily acquired through the power of eminent domain for the purpose of maintaining a historical park for the education and enjoyment of the public. Similarly, the American legal system would operate with little difficulty to vest in the general public a "right" to have the view of an intrinsically important architectural facade or scenic view unchanged where the owner was compensated or paid for his inherent right to alter it as he liked, or to ruin or demolish it altogether. Where such rights to destroy are voluntarily relinquished, either by way of donation to a governmental unit or a recognized charity or tax-exempt organization for the owner's tax advantage, or by purchase following negotiations to a governmental unit acting on behalf of the public, few hard legal questions would be encountered.

The basic problem, perhaps more political than legal in nature, is to determine the point beyond which a given cultural resource is of such importance to the public that government should have the right to take it from an unwilling owner by compulsory purchase or eminent domain, even when fair compensation is paid. Apart from policy questions (What objects should be acquired? To which unit should the power be delegated? What procedures should be followed?), such action may involve a variety of subtle legal issues: Is the contemplated action—for example, the retention of an important scenic view in a rural area of historical importance—a "public purpose" in an accepted constitutional sense, so that public funds may be spent to acquire it? Does the action involve a constitutionally acceptable "public use" sufficient to sustain its acquisition by eminent domain? The latter question may be especially difficult in a state whose traditional rules or constitutional precepts require some actual physical invasion of the interest acquired, or some entry by the public onto the property. In a narrow sense (which is the way lawyers and judges must necessarily look at such issues), the question is whether the mere act of looking at a scenic view or the preserved facade of a historic building from a public street satisfies this test of entry or invasion. Only a few states have yet had occasion to address this particular question, and while it has been answered affirmatively in at least one, the outcome would remain uncertain in each of the other states in which the courts have not had to face the specific issue. If such an issue were not presented as a constitutional question, it might arise as a matter of statutory construction or interpretation.

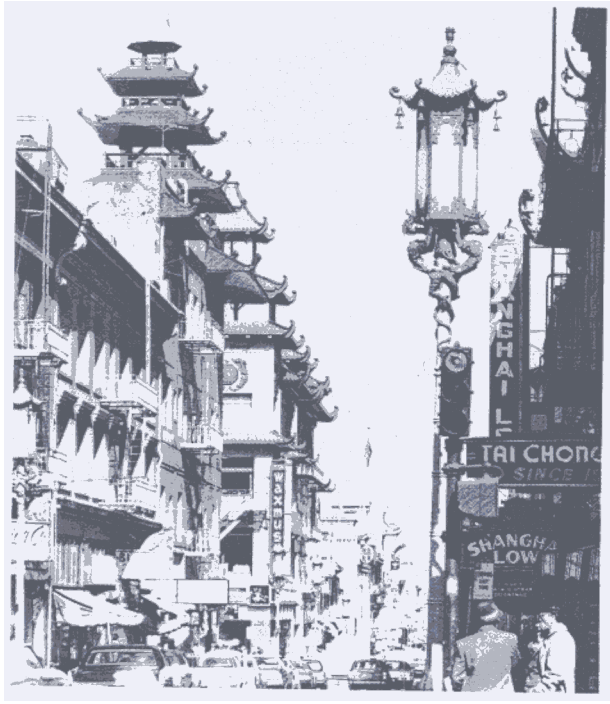
A CASE-BY-CASE APPROACH

Perhaps the principal point to be made here is that our legal system presents these and similar issues in such a fashion that they can be answered only on a case-by-

case basis, with each state free to examine each question independently, limited only by its own constitutional traditions, the literal wording of the statute involved and by the policy considerations that necessarily affect its interpretation of that statute. In other words, preservation law whether viewed as a mechanism for resolving conflict, or as a codification of cultural values currently prevalent in the larger social and economic system, leaves much to be desired in terms of uniformity and consistency.

Historic district regulation has been employed to protect areas of varying character and significance: San Francisco's Chinatown; Nantucket, Massachusetts; Baltimore's Federal Hill; and the Palace of the Governors, Santa Fe, New Mexico. (San Francisco Convention & Visitor's Bureau; Jack E. Boucher for HABS; the Society for the Preservation of Federal Hill and Fells Point; Charles Snell for U.S. Department of the Interior, National Park Service)

La réglementation des quartiers historiques a été utilisée pour protéger des localités de cachet et d'importance divers: la ville chinoise à San Francisco, Nantucket au Massachusetts, Federal Hill à Baltimore et le Palais des Gouverneurs à Santa Fé, au Nouveau Mexique.



Given, in our system, like most European ones, that the principal legal tools for governmental action for cultural preservation at the state and local level involve either uncompensable regulation *via* the police power of the state or the outright acquisition of cultural property—whether we are speaking of buildings, entire districts, archaeological sites, battlefields, historical documents of superlative importance, museum artifacts or other like physical reminders of a heritage—the legal tools vary to such an extreme in both a procedural and a substantive sense that it is often difficult to predict the outcome of a specific controversy. What is quite permissible by way of landmark regulation in California may be totally unacceptable in South Carolina. Regulatory powers that can be imposed upon the owners of property in a historic zoning district in Illinois, New Mexico, Massachusetts or Louisiana may go far beyond permissible limits in Utah, North Carolina or Georgia. In many cases, the limits of public authority may simply be unknown and unknowable until the supreme court of a given state has addressed a specific issue. Nevertheless, since most preservation battles are won or lost at the local level, it may be argued that in a nation as large and diverse as the United States, the option for each state to solve its own problems in its own way is much to be preferred.

HISTORIC DISTRICTS AND LANDMARKS

Before leaving the state and local scene to consider the role of national or federal preservation law, it is well to reiterate that the political and institutional setting in which preservation laws are administered by state and local governments is as important as the letter of the law itself. Historic district and landmark protection ordinances will serve as examples.

Historic district regulations have been in use in the United States since the 1930s, and the number of such ordinances in force has increased quite rapidly in recent years. Among other advantages, historic district regulations can be an important factor in promoting awareness and appreciation of the architectural and historic significance of a given locale. In most cases, these regulations have a demonstrably positive economic effect by stabilizing or increasing property values, and this in turn is usually a powerful psychological factor in encouraging additional capital investment and maintenance expenditures within a neighborhood. Additionally, again from a non-legal standpoint, they are often highly instrumental in developing or reinforcing positive attitudes toward an area or neighborhood on the part of residents, strengthening the sense of historic continuity and assisting increasingly mobile and transient populations to "put down roots." Historic district regulations can be a strong factor in challenging the popular notion of "progress," and to that extent they help reverse the almost inevitable tendency toward blight and decay that comes with age.

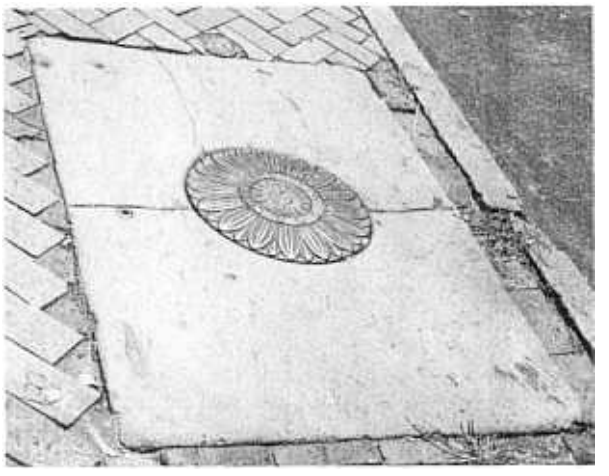
However, regulations are only one of the many forces affecting the overall character of a historic neighborhood or district, and measuring the impact or effectiveness of such rules is an elusive task. There are both practical and legal limitations to what such regulations can accomplish. For example, historic district regulations can only respond or react to the ad hoc private initiatives of individual property owners within a district. Mere designation of an area as historic does not necessarily activate development by private individuals or absentee landlords, whose investment decisions may be governed more by economic realities and prevailing social values. Nor does such designation automatically provide needed appropriations by city councils to support capital expenditures for public facilities, maintenance or other amenities and services needed within the district. Historic district regulations usually do not afford protection against the vandalizing of important interior architectural features not viewable from a public right-of-way, and variances from the design standards of many such ordinances are notoriously easy to obtain from both historic district commissions and boards of appeal. Adequate staff support and even-handed enforcement are difficult to achieve in many cities, and there is a widespread tendency to treat historic districts as special "overlay" zones, with the consequence that aesthetic conformity or period restoration often becomes the principal objective of the ordinance—often mitigating against even the best of compatible modern designs. Landscape and townscape features of historic districts, which are as important to preserve as the architecture itself, are not subject to regulation under many state enabling acts in any event.

The many advantages of historic district regulations notwithstanding, this prevailing and somewhat "separatist" approach tends to focus principally on matters of style and aesthetics, and to leave to other administrators officials and processes the equally compelling issues of land use, density, access, housing quality, urban design and other problems. This in turn tends to mask or divert attention from the major problem, which is essentially one of approach or administration—how to use a variety of legal tools and fiscal techniques in a coordinated way as an integral part of local planning operations.

The legal rationale for aesthetic regulation as an exercise of a state's "police power" is based essentially on the theory that maintaining the visual character of a distinctive historic area stabilizes or increases the value of property within the district, promotes the flow of tourist dollars in the community and has educational value—thus promoting the general welfare.

Based on existing precedent, many state courts that have not yet had to pass upon the validity of historic district regulations will doubtless accept this rationale as sufficient with respect to areas generally recognized as historic. However, the argument becomes somewhat tenuous when applied to listed or scheduled buildings located outside historic districts subject to regulations known in the American system as "landmark protection ordinances."

These ordinances typically deal with the protection of isolated landmarks located outside the confines of a historic district and provide essentially for a stay of demolition for periods varying from 90 days to one year. Many of the arguments regarding the beneficial aspects of historic district regulations also apply to the regula-



tion of individual landmarks, in or out of historic districts. A major advantage of these ordinances is that they buy time for a threatened building and afford local governments and private groups an opportunity to marshall support and money for the preservation of the landmark building. Clearly, however, the economic impact of such an ordinance upon an individual owner may be severe, since during the delay period the owner can often make no use of the property but must continue to pay taxes on it. For this reason, and to minimize the possibility that a court would find that the application of the regulation to a particular property constituted a "taking" of property rights without fair compensation, landmark ordinances usually provide a measure of relief by reducing the waiting period in so-called "hardship" cases, authorizing the reduction or remission of property taxes, or some other means. From a legal standpoint, the major difficulty with such ordinances when applied to landmark buildings not in a historic district is the problem of making a satisfactory showing to a court that the presence of one isolated landmark increases the flow of tourist dollars or tends to sustain or increase property values in the neighborhood. The judicial response to such ordinances to date has been mixed.

PLANNING AND PRESERVATION: NEW TECHNIQUES

As the preservation ethic in America turns increasingly to one favoring conservation and rehabilitation of older structures over preservation and period restoration, and as preservationists address their interests more consistently to matters of housing, schools, social and protective services, and the maintenance of ethnic stability as well as to matters of aesthetics and townscapes, there is increasing recognition that legal approaches to preservation must become an integral part of normal land use planning and control procedures and programs. Increasingly it is believed that while historic district zoning and landmark protection ordinances do play an important part in preservation, taken alone they are mere stopgap measures.

A coal chute and fire department call box in Georgetown, Washington, D.C., and telephone wires in Santa Fe, New Mexico, are examples of townscape features that may have a positive or negative impact on the visual character of a historic district but are rarely regulated; most historic ordinances deal only with the features of the particular buildings in their districts. (Boucher for HABS, John P. Conron)

Une cabine téléphonique pour les Sapeurs-Pompiers et un manche à charbon à Georgetown, Washington D. C., des cables téléphoniques à Santa Fé sont les exemples, dans un cadre citadin, d'éléments qui peuvent avoir une influence négative ou positive sur l'aspect visuel d'un quartier historique, mais qui ne sont que très rarement réglementés: la plupart des décrets municipaux concernant les quartiers historiques ne s'occupent que des aspects particuliers des bâtiments d'un quartier donné.

In their place, since the late 1960s more comprehensively based and planning-oriented legal tactics have been used for maintaining and enhancing older urban neighborhoods. The New York City special purpose districts are an outstanding example of such an innovative approach, dealing broadly with specially planned communities, areas of special ethnic character, scenic views, natural areas, distinctive commercial and residential districts and others. Under the New York City regulations, new development in each special purpose district must be reviewed by the city's planning commission and found to be consistent with the purposes of the district classification—including the preservation of architecturally important buildings, open space, townscape and overall environmental character.

Similarly, American preservation law has tended recently to come more directly to grips with the economics of preservation, particularly in situations where strong real estate market conditions have resulted in severe pressures on the owners of important buildings to demolish and replace them with a more profitable use.[2] An example is the development rights transfer technique, which recognizes that individual historic landmarks are often much smaller than the maximum development allowed under the current zoning "envelope" and permits the landmark owner to sell the unused portion of his development rights within the zoning envelope to the owner of an adjacent or nearby site. The nearby site may then exceed the limits of its envelope by the amount of development rights purchased by the landmark owner. Thus, the landmark building owner is compensated directly for his "loss" as well as through reduced taxes on his property (valued after the transaction at present-use value), and the city recovers some of the lost taxes on the landmark site through increased revenue on the enlarged building project nearby. New York City, San Francisco and Washington, D.C., have adopted such schemes, and others are pending. A brilliant extension of this basic concept is the creation of development rights transfer districts, proposed for the city of Chicago by Professor John J. Costonis, unfortunately, yet to be adopted there.[3]

A number of states (e.g., Oregon, California, New Mexico and the District of Columbia) are also attempting to address the economic problems of preservation through various laws reducing, abating or deferring property taxes on historic properties of acknowledged merit.

PRIVATE LAW APPROACHES

Partly because private law may often afford a greater degree of protection for cultural resources than public regulation alone (both substantively and in terms of duration), increasing use has been made in recent years of what are now referred to as "preservation restrictions." These are nothing more or less than modern versions of ancient common-law conveyancing techniques involving easements, restrictive convenants, deed restrictions, defeasible estates, leasing and similar devices.

Through the use of these "less-than-fee" private law approaches, a preservation organization or amenity society may be able to exercise continuing control over the architectural character of a property or protect its surroundings without the necessity of purchasing the full bundle of ownership rights. For example, the owner of a historic property subject to such restrictions may be prevented from changing the exterior, demolishing the building, cutting trees, permitting unsightly advertising, destroying interiors, making inappropriate additions, and so on, without the permission of the organization or individual holding the restriction. Variations of this technique have been used with notable success to protect individual buildings, entire districts, open space and scenic views in Green Springs and Waterford, Virginia; Annapolis, Maryland; Savannah, Georgia; Cambridge, Massachusetts, and elsewhere. These private law techniques have also been used by the National Park Service, a number of state highway departments and most recently by the National Trust for Historic Preservation. Stemming from widespread successful use by conservation organizations concerned primarily with the protection of open space, shorelines and ecologically fragile areas, the use of these approaches is now an established component of American preservation law. It is also noteworthy that these new techniques have been used on occasion by public agencies, such as the Sacramento Redevelopment Agency in California, to effectuate a combined preservation-urban redevelopment purpose. Recent scholarly journal articles have made the plea that private, rather than public, approaches to preservation endeavors represent the most effective and philosophically consistent direction for preservation in the United States.[4]

As noted earlier, the states and their political subdivisions have long been the dominant legal forum for resolving most of the conflicts stemming from attempts to achieve historic preservation objectives through public regulation of private property—in matters of uncompensated elevational control in historic districts; prohibitions against the demolition, alteration or destruction of individual landmarks; or the use of a much broader spectrum of planning and development controls. In this respect, even though the basic substantive and procedural precepts of constitutional due process and equal protection are similar from state to state, America operates in fact as 50 separate nations. Again, the power to regulate the use of property is in essence a state power. It will doubtless remain so except in the most unusual circumstances, given the traditional and long-standing reluctance of the U.S. Supreme Court to enter the states' arena of land-use regulation.[5]

FEDERAL APPROACHES TO PRESERVATION

At the federal or national level, the protection of historic properties has traditionally been accomplished through outright ownership of a relatively small number of nationally significant properties, by controlling public and private activities that might affect these properties adversely. More recently, the federal government has attempted to protect historic properties through elabo-

rate processes of environmental review. This right of review arises as a condition precedent to the availability of literally hundreds of federal grants-in-aid, licensing and other programs of assistance to states, local governments and private interests. As discussed previously, except with respect to properties in actual federal ownership, there is no inherent federal regulatory power.

Notwithstanding these limitations, protection of cultural resources has been a matter of long-standing federal policy, reaching back to such laws as the Antiquities Act of 1906, which established a system for protecting nationally significant prehistoric sites on federal land; the National Parks Act of 1916, creating the National Park Service charged to protect historic as well as natural parks, and the Historic Sites Act of 1935, authorizing the Secretary of the U.S. Department of the Interior to initiate a variety of cultural preservation programs, and extending the authority of the National Park Service beyond the care and interpretation of federally owned properties. The 1935 Act also authorized the acquisition of historic properties as such by the federal government (including, for the first time, such less-than-fee interests as easements) and may be said to have marked the real beginning of today's federal-state preservation partnership.

The principal offshoots of the 1935 Act have been the National Survey of Historic Sites and Buildings, initiated in 1937; the Registry of National Historic Landmarks, created in 1960; the Historic American Buildings Survey; the Historic American Engineering Record; and other programs aimed mainly at locating, identifying and evaluating cultural and archaeological resources. It should be noted here that these programs emphasized identification pertaining to properties of *national* significance that were potentially worthy of the federal government's concern and support. Thus, it may be said that until 1966, federal preservation law centered less on resolving conflict than on identifying historical, architectural and archaeological resources that might later become the objects of conflict.

Indeed, with the exception of a small number of specialized national preservation activities, federal preservation policies overall during the last three decades are best described as contradictory. For example, national housing policy, beginning with the Housing Act of 1949, provided both the impetus and the wherewithal for the wholesale destruction of historic urban centers and their concentrations of architecturally important properties through a housing program that for many years emphasized wholesale clearance and redevelopment of substandard areas.[6] The surviving remnants of these programs still remain (under such new names as Demonstration Cities, Model Cities, etc.) to plague today's urban preservation efforts.

These postwar programs were in turn the almost inevitable product of earlier federal housing programs and goals dating back to the 1930s which tended to favor new construction in suburbia at the expense of inner-city areas. Ironically, federal law during much of the 1950s and 1960s reposed the power in one agency, the U.S. Department of Housing and Urban Development (HUD), to undertake the wholesale destruction of then unidentified central city historic properties and districts, while simultaneously providing through several categorical grant-in-aid programs the financial aid for acquisition and restoration by state and local governments.

Unfortunately, the momentum for preservation provided by HUD programs from 1954 through 1972, token though it was in terms of the agency's total housing effort, has been lost with the advent of revenue-sharing and community development block grants. These programs, authorized by the Housing and Community Development Act of 1974, have returned to local decision-makers the actual determination of spending priorities. While HUD grants for the 1976 federal fiscal year still provide more money for preservation than the National Park Service matching grant-in-aid program, local governments with few notable exceptions have expressed a clear preference for water and sewer projects, recreation, street improvements and housing rehabilitation, rather than historic preservation programs.

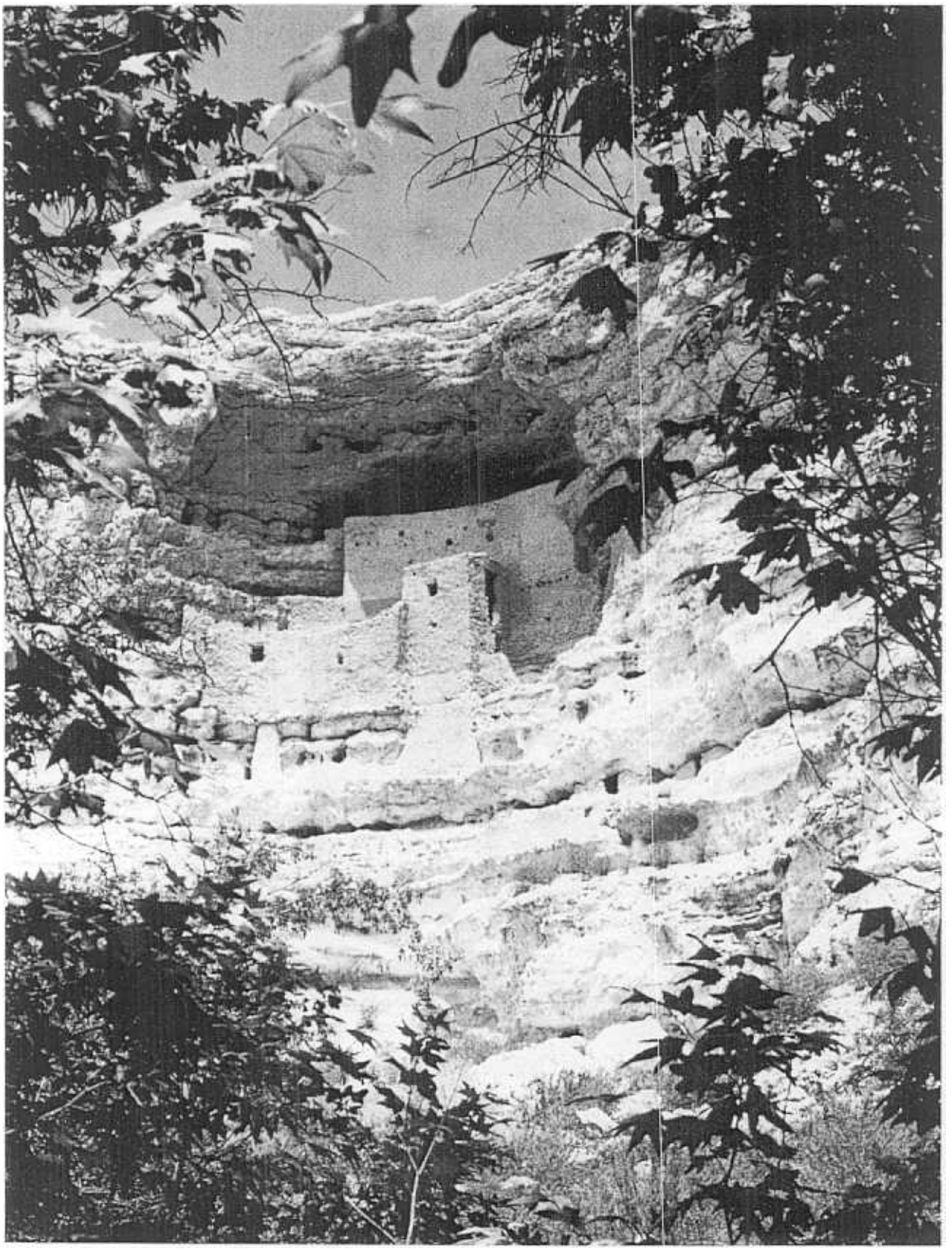
National housing policies during this period were not the only ones to work against preservation. Other federal programs, especially those of the Department of Transportation, which have provided massive funding for urban expressways, airports and other transportation facilities, have been sometimes equally at cross-purposes with preservation. Federal programs funding the construction of dams and reservoirs, navigation improvements, prisons and other large-scale public works fall into the same category.

FEDERAL PROGRAMS: THE LAST DECADE

The benchmark year in terms of federal preservation law was 1966, which saw the passage of the National Historic Preservation Act by what came to be called "The Preservation Congress."[7] The 1966 Act expanded the national preservation program by funding, through comprehensive plans prepared and administered by the states according to federal guidelines, an accelerated survey of historic buildings, sites, districts and objects of not only national but state and local significance as well. The law also provided matching funds for acquiring and preserving properties listed or scheduled in the Interior Department's National Register of Historic Places.

"Preservation restrictions" have found increasing favor in recent years as an alternative or supplement to public regulation for preservation objectives. Middleton's Tavern, Annapolis, Maryland, "before" and "after" the use of facade easements exemplifies the active and effective private law approach to preservation in Annapolis. (Boucher for HABS)

"Les restrictions pour la conservation" se sont vues favorablement acceptées ces dernières anées en tant qu'alternative ou supplément á la réglementation des projets de conservation. La Taverne de Middletown à Annapolis, dans le Maryland, avant et après l'allégement de la surface, illustre l'attitude dynamique et efficace de la loi privée envers la conservation à Annapolis.



Chronically underfunded in terms of state and local public and private matching-fund capability, which has been growing at an almost exponential rate since 1967, and currently facing the prospect of a substantial cut in federal funds, it is a matter of speculation whether the national survey—now numbering about 12,000 individual entries (estimated to be about 20 percent of the total number eligible)—will be completed any time in the near future. These grim facts reinforce an earlier point: While law may set forth governmental policy and spell out procedure, funding levels are perhaps a better indicator of actual intentions and priorities.

Indeed, it has been said that the ultimate test of government priorities may be seen in its tax policies. The relatively low priority accorded historic preservation at the federal level may to some extent be measured by Congress' failure during its three most recent sessions to pass various bills encouraging preservation through changes in tax depreciation rules to permit accelerated writeoffs of the costs of rehabilitating historic buildings, to deny deductions for the cost of demolishing historic buildings and to authorize other reforms. Whether such bills fail by inadvertence, indifference or conscious design, the result is the same. As noted earlier, the greater interest in the use of tax incentives for preservation has been expressed in a small number of states. In fairness, however, it should be noted that changes in tax policy at any level of government come slowly, and both political and administrative problems have been encountered by those state and local governments attempting to address the preservation problem through tax relief.

THE 1966 ACT: FEDERAL PROTECTIVE REVIEW PROCEDURES

The National Historic Preservation Act of 1966 also brought about the first attempts to establish a workable protective review process for cultural resources through the creation of the Advisory Council on Historic Preservation, an independent agency of the executive branch of the national government. The Advisory Council consists of 10 cabinet-level representatives of those federal agencies whose programs relate most directly to historic preservation and an equal number of citizen members appointed by the President, plus representatives of the National Trust for Historic Preservation and the Smithsonian Institution. Under the 1966 Act, the Advisory Council must have the opportunity to review and comment on the effect of any federally funded, licensed or approved project affecting any district or property in the National Register of Historic Places before the project may proceed.[8]

The Advisory Council's role in the federal protective review process was enlarged by presidential Executive Order 11593 of May 1971, directing all federal agency heads to cooperate with the Council in formulating plans to protect properties listed or potentially eligible for listing in the National Register and in nominating properties under their jurisdiction to it. In recent years, various legislative and executive directives requiring Advisory Council review and comment have been merged into one procedure that presently brings to the Council and its staff approximately 1,500 cases for review each year.

Despite its small staff, the Advisory Council has had truly remarkable success in almost all the cases that have come before it in the last nine years. In cooperation with the states, it has devised acceptable compromise solutions in many cases involving potential threats to National Register properties, and in others it has succeeded in completely halting federal projects. Urban highways that would have destroyed the visual and historic character of the Vieux Carré in New Orleans and the Ansonborough historic district of Charleston, South Carolina, were effectively blocked as a result of the sensitive use of the Council's mediation and advisory procedures. The Federal Mint in San Francisco was also saved in the same way.

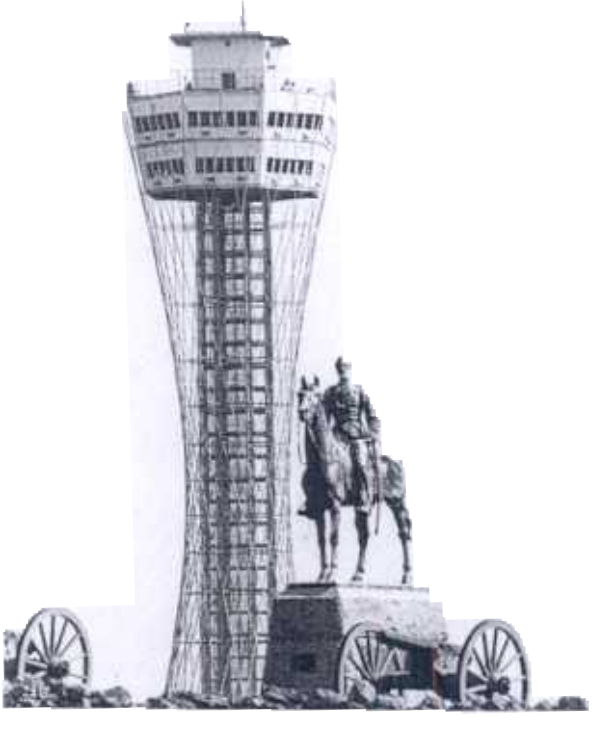
The Advisory Council, it should be noted, has no actual veto over federally funded projects. This is true even when all the parties involved (the Advisory Council on Historic Preservation, the state historic preservation officer and the federal agency administering the project) determine that the project's effects will be adverse to a historic property or its surroundings. Nor does the statute give the Council jurisdiction over National Register properties in private ownership, whose temporary custodians are free to demolish or alter them at will, in the absence of other state or local constraints which may or may not be available to protect the property.[9]

Despite these limitations, many federal agencies subject to the 1971 Executive Order have accepted and are complying with Council procedures, though with varying degrees of enthusiasm and depending on the agencies' differing resources and types of programs. This acceptance demonstrates again that preservation success often is achieved by means other than acquisition or the imposition of regulations. The Council is thus an excellent example of the creative use of legal procedures and techniques to resolve conflict situations through education, persuasion and mediation.

Indeed, despite the lack of a veto over federal projects or jurisdiction over destructive acts by the owners of privately owned National Register properties, the new protective environmental review process has been highly

Early federal preservation laws focused on public ownership and protection of threatened historic sites of national importance, often sites that predated the colonization of America, such as Montezuma Castle in Arizona. (M. Woodbridge Williams for U.S. Department of the Interior, National Park Service)

Les premières lois fédérales de conservation ont visé la propriété publique et la protection de sites historiques d'importance nationale, sites menacés qui souvent antidataient la colonisation des Etats-Unis, comme le chateau de Montézuma en Arizona.



The "comment" procedure of the Advisory Council on Historic Preservation has resulted in saving numerous historic properties, such as the San Francisco Mint, from impairment by federal projects. However, the advisory nature of the process has its limitations; a modern observation tower adjacent to the Gettysburg battlefield in Pennsylvania was constructed in spite of the vigorous protest of the council. (Donald Jones for the U.S. Mint; Richard Frear for NPS)

Le procédé de "commentaire" du Conseil sur la Conservation Historique a réussi à sauvegarder de nombreuses propriétés historiques comme l'Hôtel de la Monnaie à San Francisco, des dommages de certains projets fédéraux. Cependant le côté conseil du procédé connaît des limites: une tour de guet moderne adjacente au champ de bataille de Gettysburg en Pennsylvanie a été construite malgré les protestations énergiques du Conseil.

successful. By now the process is so well recognized and respected that some see the potential for its own eventual self-destruction. For example, local and state officials complain that the process is occasionally lengthy, complicated and in practice subject to outright political interference and manipulation, especially at the state and local level. There have in fact been local and state attempts to misuse the National Register listing process as a weapon in crisis situations, and the identification of archaeological resources has been especially troublesome. At least one state has used the test of National Register eligibility as a "trigger" for police-power regulations under the state land-use, coastal area management and local landmark control programs described earlier. In effect, strength is given at the state or local level to a federal program initially devised principally for the purpose of identifying and documenting historic resources of national, state and local significance. In similar fashion, several states have tied National Register listing to state or local tax incentive programs for preserving historic properties.

With the best of intentions, this has had the practical effect of changing the program to a quasi-regulatory one, and has associated the National Register program with the charge of opening up tax "loopholes" at a time when tax preferences of most kinds are extremely unpopular with the vast majority of citizens. These local and state programs have also added considerably to the workload of state historic preservation officers, whose positions as state-appointed mediators of federal-state conflicts are extremely sensitive from a political standpoint. As a result, there have been threats by individual states to withdraw from the program entirely, in spite of the loss of federal funds that would be incurred by that state.

It should be emphasized that these objections or problems in no way detract from the validity or usefulness of the federal protective review process. Rather, the problems attest to the ingenuity and success of the National Park Service in devising what is perhaps the first rationally defensible test of what is historic and what is not. Success inevitably exacts a price, however, and we see once again that laws cannot be looked at separately from their effect in practice. For example, one state, knowing that National Register listing would subject its plans to the review process, recently considered legislation making it a criminal offense for any official of that state to recommend any historic property for inclusion in the National Register without first completing many cumbersome and potentially self-defeating procedural steps. At the local level, a city in North Carolina officially voted to revoke the designation of its National Register historic district, in spite of the fact that it had no legal authority to do so.[10] Other municipalities are beginning actively to block efforts by local preservation interests for National Register designation, for fear of limiting their administrative freedom to deal with cultural resources as local whim, politics and the working of real estate markets may determine.

AN ASSESSMENT

The problems just discussed must eventually be solved by legislative action or changes in administrative policy or regulation—in other words, new "law." At present, the federal government has only relatively weak incentives to bring state and local governments into line on preservation issues. These are limited to a deplorably underfunded grant-in-aid program and limited powers to "review and comment" on the effects of proposed federal projects. Nevertheless, the federal protective review process is, on balance, working well, and to a large extent the problems presently encountered are no more or less than those reasonably to be anticipated as any new program gets underway. The review process is by now well established as a legal forum for sorting out preservation issues; beyond this, it shows real promise of rapidly becoming an effective planning tool for federal agencies. In any event, the earlier recitation of current problems should not obscure the fact that by comparison with 1966, the intervening 10 years have been a decade of very significant preservation progress at the federal level.[11]

It is becoming increasingly apparent that the central problem in achieving a balanced and effective historic preservation program under the American federal system is not merely one of better intra-agency or inter-agency coordination at federal or state levels, or even one of attaining ever higher federal and state funding levels. It is primarily a matter of determining in a more fundamental sense which levels of government should have what powers to preserve; how those powers should be exercised and shared; and at what level of government the ultimate decision should be made with respect to buildings, sites, districts and objects having different levels of architectural or historic significance. These issues will not be resolved easily or in the near future.

This essay began with the supposition that a critical evaluation of historic preservation law in the United States might most profitably look at that body of law as a means of resolving conflict. To a large extent, all law seeks to accomplish that objective—that is, to provide an orderly process for discovering mutually agreeable balancing points in the clash between public interests and private property rights. Despite continuing uncertainty about the permissible outer limits of the police power or the ability of government to achieve preservation ends through uncompensated regulation in most states, and despite the momentarily controversial nature of the more recent attempts to utilize protective review processes as a means of balancing public environmental interests at the federal level, it may be said that law can work for preservation. But the results are mixed and competing philosophies are coming more sharply into focus. A growing number of observers believe that state and local governments in the United States have more raw legal powers to bring to bear on preservation problems than they are politically willing or intelligently capable of using, and that preservation goals can ultimately be realized more effectively in the private marketplace using, for example, preservation agreements such as

those effected by Great Britain's National Trust for Places of Historic Interest or Natural Beauty. Perhaps the greatest strength of the American legal system is its suppleness in meeting a wide variety of problems in an almost countless number of ways. Presently, however, it is important to distinguish carefully between what law can do and what it should accomplish. One is "law," the other "policy."

While law in one sense is a means of resolving conflict in an orderly manner, it is in another sense a revealing codification of societal values and priorities. In the latter sense, laws that appropriate funds, restrict property owners or achieve some other preservation goal can tell us how much has been accomplished. On the other hand, those laws that fail to pass and those whose practical application does not work out quite as intended, remind us that there is yet a long way to go.

The United States, among all nations, is a young country, just beginning to develop a widespread historic preservation consciousness. Americans do not accept regulation kindly, and much of our lawmaking and administration is done openly and publicly, allowing, by comparison with other nations, little room for arbitrary preservation judgments by professional administrators at any level of government.

In preserving buildings and areas, both in terms of public acceptance and in a planning sense, Americans are just now arriving at the point where Britain found itself prior to the passage of the Town and Country Planning Acts of 1945 and 1946. This is especially true insofar as regulatory processes are concerned. We must also remember that the United States is a vast country geographically, and both the preservation "climate" and the state of preservation law will vary widely from one coast to another, and sometimes even within the same state.

Although it is axiomatic in American society that this is a country governed by laws and not by men, it must be remembered that men administer law, and that "law" cannot be divorced from the institutions, traditions, cultural values and politics of the people who pass laws and who administer, enforce and interpret them. While the law itself may work for preservation, it is a means to an end and not an end in itself. Viewed from this perspective, it is not our laws that need sorting out, but our preservation goals. Our preservation objectives are often fuzzy. Our preservation philosophy has many facets and it changes rapidly, just as do our individual and collective preferences for fashion in architecture, neighborhoods and lifestyles. Witness, for example, the current dialogue among preservationists whether more emphasis should be placed on ethnic and aesthetic values in judging the preservation-worthiness of neighborhoods and less emphasis on the traditional associative values of history and architecture. Witness, too, the current arguments whether "historic preservation" and "neighborhood conservation" are one and the same thing.

Our body of preservation law—legislative, administrative, executive and judicial—has developed in much the same fashion as the nation has grown: in unplanned, principally responsive, ad hoc ways. As preservation goals become more clear, and as preservation itself achieves a higher place in the sum total of public values, the law will inevitably follow.

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RÉSUMÉ

Aux Etats-Unis, il n'existe pas de "loi pour la conservation" en tant que telle, puisque les lois de conservation renferment une grande variété de sujets légaux traditionnels, y compris contrats, imposition, propriété immobilière et lois constitutionnelle et administrative. Cependant, on peut dire que la loi orientée vers la conservation, comme toutes les autres sortes de législation américaine, est en essence une codification de plus vastes traditions politiques et culturelles qui fonctionnent á l'intérieur du cadre d'un marché relativement libre.

Bien que les lois fédérales, les lois d'état et les lois locales régissent la protection des sites historiques des Etats-Unis, la responsibilité première de la conservation repose dans les mains des gouvernements locaux. Cette situation conduit à un problème majeur, du fait que chaque unité de gouvernement local est plus ou moins libre de poursuivre indépendamment un programme de conservation, si elle le désire et quand elle le désire, et d'employer pour ce faire tout moyen légal de son choix. Les conservateurs se voient confrontés à un autre problème qui est celui de la "mentalité du progrès" dans ce pays, qui considère les terres et les bâtiments, qu'ils aient une importance culturelle ou non, en tant que simples marchandises de libre échange, sources de revenus ou de profit pour leur propriétaire. Même lorsqu'il est décidé de sauvegarder une ressource culturelle, le droit du propriétaire de trouver compensation, dans de nombreux cas, aux pertes économiques résultant de la conservation est un facteur critique dans l'issue finale.

C'est peut-être à cause de cette mentalité du progrès que les Américains ne considèrent pas traditionnellement le projet de protéger notre héritage architectural, archéologique et historique comme une réalisation prioritaire. Le fait que les fonds publics pour la conservation montent, de manière caractéristique, á moins d'un centième d'un pour cent du budget gouvernemental total reflète ce manque d'intérêt. Cependant l'appui que le public offre à la conservation a récemment augmenté, en partie sous la conduite fédérale.

Les moyens légaux existants pour encourager le conservation comprennent à la fois la régulation gouvernementale et l'acquisition publique des propriétés. Malgré leur soutien juridique, les lois existantes ne sont pas employées au maximum. Une stratégie plus récente consiste à se

servir de la loi privée (contrats restrictifs, provisions de location à bail, restrictions d'actes) comme supplément à la régulation et à l'acquisition.

Malgré la prédominance de l'action locale dans le domaine de la conservation, les activités fédérales ont joué un grand rôle en créant une atmosphère récente de soutien pour la sauvegarde de nos ressources et de nos bien culturels. A ce propos, sont plus particulièrement dignes d'attention l'enquête nationale sur les bâtiments, les sites, les districts et les objets historiques et les procédés protectifs de la révision de l'environnement établis par l'Acte de Conservation Historique Nationale de 1966.

L'Acte de 1966 a créé le Conseil sur la Conservation Historique, bureau fédéral indépendant. Ses activités prouvent que le succés de tout effort de conservation peut être obtenu par des moyens autres que ceux de la réglementation et de l'acquisition gouvernementales. Ce Conseil est un excellent exemple de l'emploi créateur de procédés et de moyens légaux pour résoudre les situations de conflit.

Le dernière décennie a été témoin d'un progrès significatif dans la législation américaine pour la conservation, mais il subsiste encore des problèmes sérieux en ce qui concerne la division des responsibilités entre le gouvernement national, les gouvernements des états et les gouvernements locaux. De plus il faudrait que les méthodes légales d'approche à la conservation deviennent parties intégrantes de la plannification ordinaire de l'emploi des terres et des programmes de contrôle. Les districts de New York "à fin particulière" sont des exemples remarquables de cette sorte d'attitude innovatrice.

D'autres questions à l'ordre du jour en ce qui concerne les efforts fournis pour la conservation comprennent entre autres le tri des objectifs qui sont pour l'instant souvent vagues. Des exemples de cette philosophie irrésolue sont (1) le débat à savoir s'il faut mettre l'accent sur les valeurs ethniques et esthétiques ou sur les valeurs traditionnelles combinées de l'Histoire et de l'architecture et (2) les querelles actuelles à savoir si la conservation historique et la conservation "de quartier" sont la seule et même chose.

En conclusion, les lois pour la conservation—soit législative, soit administrative, soit exécutive ou juridique, se sont développées en grande partie de la même manière que la nation: de façon incontrolée. Cependant, au fur et à mesure que les buts s'affirmeront davantage et que la conservation s'imposera comme une plus grande priorité dans l'esprit du peuple américain, la législation ne pourra que suivre.

FOOTNOTES

1. "Eminent domain" is the authority of government to take property from a private owner for public use and enjoyment upon payment of fair compensation, as determined by a court in special proceedings.
2. Such pressures are often created or sustained by the negative effect of federal or state tax laws that give a special advantage to new construction by permitting the rapid depreciation of the new building. At the same time the laws deny rapid depreciation for older buildings that are rehabilitated.
3. Costonis, John J. *Space Adrift: Landmark Preservation and the Marketplace.* Chicago: University of Illinois Press, 1974.
4. Beckwith, James P., Jr. "Developments in the Law of Historic Preservation and a Reflection on Liberty." Wake Forest *Law Review*, Vol. XII, No. 1, Spring, 1976, pp. 93-159.
5. Under the American federal system of government, the so-called "police power" has never been ceded to the federal government. The states, as holders of "reserved" sovereign powers under the 10th Amendment to the U.S. Constitution, and as the grantors of such powers to local governments, have retained such regulartory authority. This is why it is generally agreed, for example, that the federal government could not adopt or enforce local zoning ordinances. Whether the federal government could force states or local governments to adopt such regulations involuntarily under other provisions of the Constitution is an unsettled question.
6. Perhaps a part of the explanation for this is the earlier preoccupation of the federal government with properties of *national* significance. How many of the historic properties in these now-departed urban centers might have met this more stringent test is a matter for speculation.
7. So named because of a number of other preservation programs and incentives, not described in this article, adopted by the 89th Congress.
8. Similar but not identical protective review processes were also established under Section 4 (f) of the Department of Transportation Act of 1966 and by the National Environmental Policy Act of 1969. Although addressing themselves directly to preservation concerns, the processes established by these acts do not directly involve the Advisory Council on Historic Preservation.
9. This is not to imply that public projects *affecting* privately owned properties on the National Register are not subject to the Council's review and procedures.
10. Legally, the ultimate power to list a property in the National Register is vested in the Secretary of the Interior. As a practical matter, the decision to list is made by the state historic preservation officer in most cases, with the advice of a state professional review committee and subject to confirmation by the Keeper of the National Register, a federal official. Thus, while the criteria are nationally uniform, most decisions concerning the application of those criteria to individual properties are made at the state level.
11. Judicial scrutiny of the federal protective review process has on the whole tended to be more concerned with the technicalities as to which individuals or groups have standing to sue, to enforce or insure an adequate review process, and with definitional problems of applicability in specific situations. In other words, the courts have been more concerned with form and procedure than with substance or basic constitutionality.